



LL.B. VI TERM

LB-603 Environmental Law

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**FACULTY OF LAW
UNIVERSITY OF DELHI, DELHI- 110007
January, 2023**

TABLE OF CONTENTS

UNIT 1: INTERNATIONAL ENVIRONMENTAL LAW [5 LECTURES] 5

Development of international environmental law; nature and scope of key international environmental law principles and rights (substantive and procedural) *U.N. Conference on Human Environment, 1972 – Stockholm Principles, Establishment of Environmental Institutions like UNEP; World Charter for Nature, 1982; Ozone Protection – Montreal Protocol for the Protection of Ozone Layer, 1987 as amended; Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989; Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, 1999; Stockholm Convention on Persistent Organic Pollutants, 2001; U.N. Conference on Environment and Development, 1992 - Rio Principles; Convention on Biological Diversity, 1992; Cartagena Protocol on Biosafety, 2000; U.N. Convention on Climate Change 1992, Kyoto Protocol, 1997; Forest Principles; Agenda 21; Human Right to Healthy Environment; Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 1998 (Aarhus Convention); Johannesburg Conference, 2002; Rio+20-United Nations Conference on Sustainable Development; Paris Agreement, 2015; Sustainable Development Goals.*

Trail Smelter Arbitration (US/Canada), 3 U.N. Rep. Int'l Arb. Awards 1905 (1941) 7
Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), International Court of Justice, 25 September 1997 (separate opinion of Justice Weeramantry) 13
Case Concerning Pulp Mills on River Uruguay (Argentina/Uruguay), ICJ, 2010 26
Case Concerning Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) Compensation owed by the Republic of Nicaragua to the Republic of Costa Rica, ICJ, 2 February 2018.

UNIT 2: FUNDAMENTAL PRINCIPLES OF ENVIRONMENTAL PROTECTION [5 LECTURES] 34

Development v. Environment; Sustainable Development–Inter-generational and Intra-generational Equity; Precautionary Principle; Polluter Pays Principle; Public Trust Doctrine; Community rights

Indian Council for Enviro-Legal Action v. Union of India, AIR 1996 SC 1446 34
Indian Council for Enviro-Legal Action v. Union of India, (2011) 12 SCC 768 48
Vellore Citizens Welfare Forum v. Union of India, AIR 1996 SC 2715 51
Narmada Bachao Andolan v. Union of India, AIR 2000 SC 3751 59
Intellectuals Forum, Tirupathi v. State of A.P., AIR 2006 SC 1350 80
Jitendra Singh v. Ministry of Environment & Ors., Supreme Court, Civil Appeal No. 5109/2019, decided on 25 November 2019 91
Hanuman Laxman Aroskar v. Union of India, (2019) 15 SCC 401

UNIT 3: CONSTITUTIONAL PERSPECTIVE [5 LECTURES]..... 96

Fundamental Rights - Article 14 (Right to equality, non-arbitrary and non-discriminatory treatment), Article 19(1)(g) (Freedom to carry on trade or business), Article 21 (Right to life, livelihood and wholesome environment) and Article 32 (Right to Constitutional remedies); Directive Principles of State Policy – Article 47, 48-A; Fundamental Duty – Article 51-A(g); Article 226 (Powers of High Courts); Public Interest Litigation - Nature – Non-Adversarial, Collaborative, Co-operative and Investigative; Locus Standi - Pro Bono Publico; Representative Standing; Citizens' Standing

<i>Subhash Kumar v. State of Bihar</i> , AIR 1991 SC 420.....	96
<i>Rural Litigation and Entitlement Kendra v. State of U.P.</i> , (1985) 2 SCC 431.....	99
<i>M.C. Mehta v. Union of India</i> , AIR 1997 SC 734.....	104
<i>M.C. Mehta v. Kamal Nath</i> , (1997) 1 SCC 388.....	117
<i>M.C. Mehta v. Kamal Nath</i> , AIR 2000 SC 1997.....	128
<i>M.C. Mehta v. Kamal Nath</i> , 2002 (2) SCALE 654.....	131
<i>Sachidanand Pandey v. State of West Bengal</i> , AIR 1987 SC 1109.....	135

UNIT 4: PREVENTION AND CONTROL OF WATER POLLUTION [5 LECTURES]..... 149

The Water (Prevention and Control of Pollution) Act, 1974 – Water Pollution – Meaning; Central and State Pollution Control Boards – Constitution, Powers and Functions; Water Pollution Control Areas; Samples of Effluents – Procedure; Consent Requirement – Procedure, Grant/Refusal, Withdrawal, Review, Appeals, Revision; Restraint Order; Citizen Suit Provision; Offences and Penalties; The Water Cess (Prevention and Control of Pollution) Act, 1977

The Air (Prevention and Control of Pollution) Act, 1981- Air Pollution – Meaning, Causes and Effects; Central and State Pollution Control Boards - Functions; Air Pollution Control Area; Consent Requirement - Procedure, Grant/Refusal, Withdrawal; Restraint Orders; Citizen Suits; Noise Pollution (Regulation and Control) Rules, 2000; Offences/Penalties; Vehicular pollution

<i>M.C. Mehta v. Union of India</i> , AIR 1988 SC 1037.....	149
<i>M.C. Mehta v. Union of India</i> , AIR 1988 SC 1115.....	158
<i>M/s Delhi Bottling Co. Pvt. Ltd. v. Central Board for the Prevention and Control of Water Pollution</i> , AIR 1986 Del. 152.....	165
<i>Municipal Council, Ratlam v. Vardichand</i> , (1980) 4 SCC 162.....	168
<i>State of M.P. v. Kedia Leather & Liquor Ltd.</i> , AIR 2003 SC 3236.....	176
<i>Forum Prevention of Env'n. & Sound Pollution v. Union of India</i> , AIR 2005 SC 3136.....	180
<i>Church of God (Full Gospel) in India v. KKR Majestic Welfare Colony Welfare Association</i> , AIR 2000 SC 2773.....	193
<i>Varun Seth v. Police Commissioner, Delhi Police, NGT, Principal Bench</i> , 05 Oct 2017	

UNIT 5: ENVIRONMENTAL PROTECTION [5 LECTURES] 198

The Environment (Protection) Act, 1986 – Aims and Objects; Meaning of “Environment” and “Environmental Pollutant”; Powers and Functions of the Central Government; Environment Authority - Constitution; Delegation of Powers; Offences/Penalties; Effectiveness of the Act; Environmental Impact Assessment, 2006; Environmental Audit; law relating to hazardous substance and activities —issues of liability; Need for effective climate change law and energy law.

<i>S. Jagannath v. Union of India, AIR 1997 SC 811</i>	198
HAZARDOUS SUBSTANCES AND ACTIVITIES	206
<i>MC Mehta v Union of India, 1987 AIR 1086 (Oleum Gas Leak case)</i>	206
<i>Union Carbide Corporation v Union of India, AIR 1992 SC 248</i>	212

UNIT 6: NATIONAL GREEN TRIBUNAL [3 LECTURES] 232

Law Commission 186th Report on Proposal to Constitute Environment Courts (2003); The National Green Tribunal Act, 2010; Powers and functions of the National Green Tribunal; jurisdiction; locus standi, remedies.

<i>Techi Tagi Tara v. Rajendra Singh Bhandari & Ors, Supreme Court, Civil Appeal No. 1359/017, Judgement of 22 September 2017</i>	232
<i>Save Mon Region Federation v. Union Of India, NGT, Principal Bench, 07 April, 2016</i>	
<i>University of Delhi v. Ministry of Environment Forest and Climate Change & Ors. NGT Principal Bench, Appeal No. 112/2018, MANU/GT/0014/2021</i>	235
<i>Municipal Corporation of Greater Mumbai v. Ankita Sinha, Supreme Court, 7 Oct. 2021</i>	
<i>Pahwa Plastics Pvt Ltd. vs Dastak Ngo and others, Supreme Court, 25 March, 2022</i>	

UNIT 7: PROTECTION AND CONSERVATION OF FORESTS, BIODIVERSITY AND WILDLIFE [5 LECTURES] 248

The Indian Forest Act, 1927; The Forest (Conservation) Act, 1980; Kinds of Forest Land - Private, Reserved, Village, Protected; Use of Forest Land for Non-Forest purposes; Rights of Tribals and Forest Dwellers—The Scheduled Tribes and Other Traditional Dwellers (Recognition of Forest Rights) Act, 2006; The Biological Diversity Act, 2002—access to biological resources and benefit sharing; Regulation of genetically modified organisms; The Manufacture, Use, Import, Export and Storage of Hazardous Micro-Organisms Genetically Engineered Organisms or Cells Rules, 1989. Protection of Wildlife - the Wildlife (Protection) Act, 1972; Sanctuaries and National Parks; Licensing of Zoos and Parks.

<i>Orissa Mining Corporation v Ministry of Environment and Forest, (2013)6 SCC476</i> ..	248
<i>Sansar Chand v State of Rajasthan, 2010 (10) SCC 604</i>	275
<i>Centre For Environment Law, WWF-I v. Union of India & Others, Supreme Court, I.A. No. 100 in Writ Petition (Civil) No. 337 of 1995, decided on 15 April 2013</i>	280
<i>Divya Pharmacy v Union of India, High Court of Uttarakhand, WP 3437/2016, Decided on 21 December 2018</i>	297
<i>TN Godavarman Thirumulpad v Union of India—Shomona Khanna, ‘Boundaries of Forest Land: The Godavarman case and Beyond’, in Sharachchandra Lele & Ajit Menon eds., Democratizing Forest Governance in India 225 (Oxford University Press, 2014).</i>	

Prescribed Legislations

1. The Water (Prevention and Control of Pollution) Act, 1974
2. The Air (Prevention and Control of Pollution) Act, 1981
3. The Environment (Protection) Act, 1986
4. The Public Liability Insurance Act, 1991
5. The National Green Tribunal Act, 2010
6. The Biological Diversity Act, 2002
7. The Wildlife (Protection) Act, 1972
8. The Indian Forest Act, 1927
9. The Forest (Conservation) Act, 1980
10. The Scheduled Tribes and Other Traditional Dwellers (Recognition of Forest Rights) Act, 2006.

Policies and reports

1. The National Environment Policy, 2006
2. The National Forest Policy, 1988
3. The National Water Policy, 2012
4. The Wildlife Conservation Strategy, 2002
5. Report of the World Commission on Environment and Development, Our Common Future, 1987

Prescribed Books

1. Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (4th ed., 2018).
2. Ved P. Nanda and Rock Pring, *International Environmental Law and Policy for the 21st Century*, (2nd ed., 2012).
3. Shibani Ghosh (ed), *Indian Environmental Law: Key Concepts and Principles* (2019).
4. Geetanjoy Sahu, *Environmental Jurisprudence and the Supreme Court: Litigation, Interpretation, Implementation* (2014).
5. Shyam Diwan and Armin Rosencranz, *Environmental Law and Policy in India– Cases, Materials and Statutes* (2nd ed., 2001).
6. Gurdip Singh, *Environmental Law in India* (2nd ed 2016).
7. Usha Tandon et al (ed), *Biodiversity: Law, Policy and Governance* (2018).
8. Usha Tandon (ed), *Energy Law and Policy* (2018).
9. Manju Arora Relan, *Forest and Wildlife Law & Rights of Indigenous People*, (1999).
10. P. Leelakrishnan, *Environmental Law in India* (5th ed., 2019).

11. Rubric for Theory Exam Papers:

'All the theory papers, except for CLE subjects*, for LL.B. semester exams carry 100 marks each, for which the University of Delhi conducts an end semester descriptive exam of 3 hours duration. A typical theory question paper contains 8 questions printed both in English and Hindi languages. The student is required to answer 5 out of 8 questions. Each question carries equal marks, that is 20 marks each. Hence the maximum marks for each paper is 100. A student has to secure a minimum of 45 marks out of 100 to pass a paper.

Answers may be written either in English or in Hindi but the same medium should be used throughout the paper.'

UNIT 1: INTERNATIONAL ENVIRONMENTAL LAW

Trail Smelter Arbitration (United State/Canada), 3 U.N. Rep. Int'l Arb. Awards 1905 (1941)

This Tribunal is constituted under, and its powers are derived from and limited by, the Convention between the United States of America and the Dominion of Canada signed at Ottawa, April 15, 1935, duly ratified by the two parties, and ratifications exchanged at Ottawa, August 3, 1935 (hereinafter termed "the Convention").

The duty imposed upon the Tribunal by the Convention was to "finally decide" the following questions:

- 1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor?
- 2) In the event of the answer to the first part of the preceding question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?
- 3) In the light of the answer to the preceding question, what measures or régime, if any, should be adopted or maintained by the Trail Smelter?
- 4) What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding questions?

In 1896 a smelter was started under American auspices near the locality known as Trail. In 1906, the Consolidated Mining and Smelting Company of Canada, Limited, obtained a charter of incorporation from the Canadian authorities, and that company acquired the smelter plant at Trail as it then existed. Since that time, the Canadian Company, without interruption, has operated the Smelter, and from time to time has greatly added to the plant until it has become one of the best and largest equipped smelting plants on this continent. In 1925 and 1927, two stacks of the plant were erected to 409 feet in height and the Smelter greatly increased its daily smelting of zinc and lead ores. This increased product resulted in more Sulphur dioxide fumes and higher concentrations being emitted into the air; and it is claimed by one Government (though denied by the other) that the added height of the stacks increased the area of damage in the United States. In 1916, about 5,000 tons of sulphur per month were emitted; in 1924, about 4,700 tons; in 1926, about 9,000 tons—an amount which rose near to 10,000 tons per month in 1903. In other words, about 300-350 tons of Sulphur

were being emitted daily in 1930. (It is to be noted that one ton of Sulphur is substantially the equivalent of two tons of sulphur dioxide or SO₂.)

From 1925, at least, to the end of 1931, damage occurred in the State of Washington, resulting from the sulphur dioxide emitted from the Trail Smelter.

Part II

The first question under Article III of the Convention which the Tribunal is required to decide is as follows: (1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor.

The Tribunal has first considered the items of indemnity claimed by the United States in its Statement (p. 52) "on account of damage occurring since January 1, 1932, covering: (a) Damages in respect of cleared land and improvements thereon; (b) Damages in respect of uncleared land and improvements thereon; (c) Damages in respect of livestock; (d) Damages in respect of property in the town of Northport; (g) Damages in respect of business enterprises".

On the basis of the evidence, the United States contended that damage had been caused by the emission of sulphur dioxide fumes at the Trail Smelter in British Columbia, which fumes, proceeding down the valley of the Columbia River and otherwise, entered the United States. The Dominion of Canada contended that even if such fumes had entered the United States, they had caused no damage after January 1, 1932. The witnesses for both Governments appeared to be definitely of the opinion that the gas was carried from the Smelter by means of surface winds, and they based their views on this theory of the mechanism of gas distribution. The Tribunal finds itself unable to accept this theory. It has, therefore, looked for a more probable theory, and has adopted the following as permitting a more adequate correlation and interpretation of the facts which have been placed before it.

A careful study of the time, duration, and intensity of the fumigations recorded at the various stations down the valley reveals a number of striking and significant facts. The first of these is the coincidence in point of time of the fumigations. The most frequent fumigations in the late spring, summer, and early autumn are diurnal, and occur during the early morning hours. These usually are of short duration. A characteristic curve expressing graphically this type of fumigation, rises rapidly to a maximum and then falls less rapidly but fairly sharply to a concentration below the sensitivity of the recorder. The dominant influence here is evidently the heating action of the rising sun on the atmosphere at the surface of the earth. This gives rise to temperature differences which may and often do lead to a mixing of the gas-carrying atmosphere with that near the surface. When this occurs with sufficient intensity, a fumigation is recorded at all stations at which the sulphur dioxide reaches, a

concentration that is not too low to be determined by the recorder. Obviously this effect of the rising sun may be different on the east and the west side of the valley, but the possible bearing of this upon fumigations in the valley must await further study.

Another type of fumigation occurs with especial frequency during the winter months. These fumigations are not so definitely diurnal in character and are usually of longer duration. The Tribunal is of the opinion that these are due to the existence for a considerable period of a sufficient velocity of the gas-carrying air current to cause a mixing of this with the surface atmosphere. Whether or not this mixing is of sufficient extent to produce a fumigation will depend upon the rate at which the surface air is diluted by surface winds which serve to bring in air from outside the contaminated area. The fact that fumigations of this type are more common during the night, when the surface winds often subside completely, bears out this opinion. A fumigation with a lower velocity of the gas-carrying air current would then be possible.

The conclusions above together with a detailed study of the intensity of the fumigations at the various stations from Columbia Gardens down the valley, have led to deductions in regard to the rate of attenuation of concentration of sulphur dioxide with increasing distance from the Smelter which seem to be in accord both with the known facts and the present theory. The conclusion of the Tribunal on this phase of the question is that the concentration of sulphur dioxide falls off very rapidly from Trail to a point about 16 miles downstream from the Smelter, or 6 miles from the boundary line, measured by the general course of the river; and that at distances beyond this point, the concentration of sulphur dioxide is lower and falls off more gradually and less rapidly.

The Tribunal will now proceed to consider the different classes of damage cleared and to uncleared land.

(1) With regard to cleared land used for crops, the Tribunal has found that damage through reduction in crop yield due to fumigation has occurred in varying degrees during each of the years, 1932 to 1936; and it has found no proof of damage in the year 1937.

(2) With respect to damage to cleared land not used for crops and to all uncleared (other than uncleared land used for timber), the Tribunal has adopted as the measure of indemnity, the measure of damages applied by American courts, viz-, the amount of reduction in the value of the use or rental value of the land. The Tribunal is of opinion that the basis of estimate of damages contended for by the United States, viz-, applying to the value of uncleared land a ratio of loss measured by the reduced crop yield on cleared land, has no sanction in any decisions of American courts.

(3) With regard to "damages in respect of livestock", claimed by the United States, the Tribunal is of opinion that the United States has failed to prove that the presence of

fumes from the Trail Smelter has injured either the livestock or the milk or wool productivity of livestock since January 1, 1932, through impaired quality of crop or grazing. So far as the injury to livestock is due to reduced yield of crop or grazing, the injury to livestock is due to reduced yield of crop or grazing, the injury is compensated for in the indemnity which is awarded herein for such reduction of yield.

(4) With regard to "damages in respect of property in the town of Northport", the same principles of law apply to assessment of indemnity to owners of urban land as apply to owners of farm and other cleared land, namely, that the measure of damage is the reduction in the value of the use or rental value of the property, due to fumigations. The Tribunal is of opinion that there is no proof of damage to such urban property; that even if there were such damage, there is no proof of facts sufficient to enable the Tribunal to estimate the reduction in the value of the use or rental value of such property; and that it cannot adopt the method contended for by the United States of calculating damages to urban property.

(5) With regard to "damages in respect of business enterprises", the counsel for the United States in his Answer and Argument (p. 412) stated: "The business men unquestionably have suffered loss of business and impairment of the value of good will because of the reduced economic status of the residents of the damaged area." The Tribunal is of opinion that damage of this nature "due to reduced economic status" of residents in the area is too indirect, remote, and uncertain to be appraised and not such for which an indemnity can be awarded...

(6) The United States in its Statement (pp. 49-50) alleges the discharge by the Trail Smelter, not only of "smoke, sulphurous fumes, gases", but also of "waste materials", and says that "the Trail Smelter disposes of slag in such a manner that it reaches the Columbia River and enters the United States in that stream", with the result that the "waters of the Columbia River in Stevens County are injuriously affected", thereby. No evidence was produced on which the Tribunal could base any findings as regards damage, if any, of this nature...

In conclusion, the Tribunal answers Question 1 in Article III, as follows: Damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and up to October 1, 1937, and the indemnity to be paid therefor is seventy-eight thousand dollars (\$78,000), and is to be complete and final indemnity and compensation for all damage which occurred between such dates. Interest at the rate of six per centum per year will be allowed on the above sum of seventy-eight thousand dollars (\$78,000) from the date of the filing of this report and decision until date of payment. This decision is not subject to alteration or modification by the Tribunal hereafter.

As Professor Eagleton puts in (*Responsibility of States in International Law*, 1928, p. 80) : "A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction." A great number of such general pronouncements by leading authorities concerning the duty of a State to respect other States and their territory have been presented to the Tribunal. These and many others have been carefully examined. International decisions, in various matters, from the Alabama case onward, and also earlier ones, are based on the same general principle, and, indeed, this principle, as such, has not been questioned by Canada. But the real difficulty often arises rather when it comes to determine what, *pro subjecta materie*, is deemed to constitute an injurious act.

No case of air pollution dealt with by an international tribunal has been brought to the attention of the Tribunal nor does the Tribunal know of any such case. The nearest analogy is that of water pollution. But, here also, no decision of an international tribunal has been cited or has been found.

There are, however, as regards both air pollution and water pollution, certain decisions of the Supreme Court of the United States which may legitimately be taken as a guide in this field of international law. For it is reasonable to follow by analogy, in international cases, precedents established by that court in dealing with controversies between States of the Union or with other controversies concerning the quasi-sovereign rights of such States, where no contrary rule prevails in international law and no reason for rejecting such precedents can be adduced from the limitations of sovereignty inherent in the Constitution of the United States.

In the suit of the State of *Missouri v. the State of Illinois* (200 U.S. 496, 521) concerning the pollution, within the boundaries of Illinois, of the Illinois River, an affluent of the Mississippi flowing into the latter where it forms the boundary between that State and Missouri, an injunction was refused. "Before this court ought to intervene", said the court, "the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side. (See *Kansas v. Colorado*, 185 U.S. 125.)" The court found that the practice complained of was general along the shores of the Mississippi River at that time, that it was followed by Missouri itself and that thus a standard was set up by the defendant which the claimant was entitled to invoke.

In the more recent suit of the State of New York against the State of New Jersey (256 U.S. 296, 309), concerning the pollution of New York Bay, the injunction was also refused for lack of proof, some experts believing that the plans which were in dispute would result in the presence of "offensive odors and unsightly deposits", other equally reliable experts testifying that they were confidently of the opinion that the waters

would be sufficiently purified. The court, referring to Missouri v. Illinois, said: "... . the burden upon the State of New York of sustaining the allegations of its bill is much greater than that imposed upon a complainant in an ordinary suit between private parties. Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence."

What the Supreme Court says there of its power under the Constitution equally applies to the extraordinary power granted this Tribunal under the Convention. What is true between States of the Union is, at least, equally true concerning the relations between the United States and the Dominion of Canada.

The Tribunal, therefore, finds that the above decisions, taken as a whole, constitute an adequate basis for its conclusions, namely, that, under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence. Considering the circumstances of the case, the Tribunal holds that the Dominion of Canada is responsible in international law for the conduct of the Trail Smelter. Apart from the undertakings in the Convention, it is, therefore, the duty of the Government of the Dominion of Canada to see to it that this conduct should be in conformity with the obligation of the Dominion under international law as herein determined.

***Case Concerning the Gabčíkovo-Nagymaros Project
(Hungary/Slovakia), International Court of Justice, Judgment of 25
September 1997 (separate opinion of Vice-President Weeramantry)¹***

This case raises a rich array of environmentally related legal issues. A discussion of some of them is essential to explain my reasons for voting as I have in this very difficult decision. Three issues on which I wish to make some observations, supplementary to those of the Court, are the role played by the principle of sustainable development in balancing the competing demands of development and environmental protection; the protection given to Hungary by what I would describe as the principle of continuing environmental impact assessment; and the appropriateness of the use of inter partes legal principles, such as estoppel, for the resolution of problems with an erga omnes connotation such as environmental damage.

THE CONCEPT OF SUSTAINABLE DEVELOPMENT

Since sustainable development is a principle fundamental to the determination of the competing considerations in this case, and since, although it has attracted attention only recently in the literature of international law, it is likely to play a major role in determining important environmental disputes of the future, it calls for consideration in some detail. Moreover, this is the first occasion on which it has received attention in the jurisprudence of this Court.

When a major scheme, such as that under consideration in the present case, is planned and implemented, there is always the need to weigh considerations of development against environmental considerations, as their underlying juristic bases - the right to development and the right to environmental protection - are important principles of current international law.

In the present case we have, on the one hand, a scheme which, even in the attenuated form in which it now remains, is important to the welfare of Slovakia and its people, who have already strained their own resources and those of their predecessor State to the extent of over two billion dollars to achieve these benefits. Slovakia, in fact, argues that the environment would be improved through the operation of the Project as it would help to stop erosion of the river bed, and that the scheme would be an effective protection against floods. Further, Slovakia has traditionally been short of electricity, and the power generated would be important to its economic development. Moreover, if the Project is halted in its tracks, vast structural works constructed at great expense, even prior to the repudiation of the Treaty, would be idle and

¹ Only relevant footnotes are included in this excerpt.

unproductive, and would pose an economic and environmental problem in themselves.

On the other hand, Hungary alleges that the Project produces, or is likely to produce, ecological damage of many varieties, including harm to river bank fauna and flora, damage to fish breeding, damage to surface water quality, eutrophication, damage to the groundwater régime, agriculture, forestry and soil, deterioration of the quality of drinking water reserves, and sedimentation. Hungary alleges that many of these dangers have already occurred and more will manifest themselves, if the scheme continues in operation. In the material placed before the Court, each of these dangers is examined and explained in considerable detail.

How does one handle these considerations? Does one abandon the Project altogether for fear that the latter consequences might emerge? Does one proceed with the scheme because of the national benefits it brings, regardless of the suggested environmental damage? Or does one steer a course between, with due regard to both considerations, but ensuring always a continuing vigilance in respect of environmental harm? It is clear that a principle must be followed which pays due regard to both considerations. Is there such a principle, and does it command recognition in international law? I believe the answer to both questions is in the affirmative. The principle is the principle of sustainable development and, in my view, it is an integral part of modern international law. It is clearly of the utmost importance, both in this case and more generally.

To hold that no such principle exists in the law is to hold that current law recognizes the juxtaposition of two principles which could operate in collision with each other, without providing the necessary basis of principle for their reconciliation. The untenability of the supposition that the law sanctions such a state of normative anarchy suffices to condemn a hypothesis that leads to so unsatisfactory a result. Each principle cannot be given free rein, regardless of the other. The law necessarily contains within itself the principle of reconciliation. That principle is the principle of sustainable development. This case offers a unique opportunity for the application of that principle, for it arises from a Treaty which had development as its objective, and has been brought to a standstill over arguments concerning environmental considerations.

(a) Development as a Principle of International Law

Article 1 of the Declaration on the Right to Development, 1986, asserted that "The right to development is an inalienable human right." This Declaration had the overwhelming support of the international community and has been gathering strength since then. Principle 3 of the Rio Declaration, 1992, reaffirmed the need for the right to development to be fulfilled.

"Development" means, of course, development not merely for the sake of development and the economic gain it produces, but for its value in increasing the sum total of human happiness and welfare. That could perhaps be called the first principle of the law relating to development.

To the end of improving the sum total of human happiness and welfare, it is important and inevitable that development projects of various descriptions, both minor and major, will be launched from time to time in all parts of the world.

(b) Environmental Protection as a Principle of International Law

The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.

While, therefore, all peoples have the right to initiate development projects and enjoy their benefits, there is likewise a duty to ensure that those projects do not significantly damage the environment.

(c) Sustainable Development as a Principle of International Law

After the early formulations of the concept of development, it has been recognized that development cannot be pursued to such a point as to result in substantial damage to the environment within which it is to occur. Therefore, development can only be prosecuted in harmony with the reasonable demands of environmental protection. Whether development is sustainable by reason of its impact on the environment will, of course, be a question to be answered in the context of the particular situation involved.

It is thus the correct formulation of the right to development that that right does not exist in the absolute sense, but is relative always to its tolerance by the environment. The right to development as thus refined is clearly part of modern international law. It is compendiously referred to as sustainable development.

The concept of sustainable development can be traced back, beyond the Stockholm Conference of 1972, to such events as the Founex meeting of experts in Switzerland in June 1971; the conference on environment and development in Canberra in 1971; and United Nations General Assembly resolution 2849 (XXVI). It received a powerful impetus from the Stockholm Declaration which, by Principle 11, stressed the essentiality of development as well as the essentiality of bearing environmental considerations in mind in the developmental process. Moreover, many other Principles of that Declaration provided a setting for the development of the concept of sustainable development and more than onethird of the Stockholm Declaration related

to the harmonization of environment and development'. The Stockholm Conference also produced an Action Plan for the Human Environment.

Whether in the field of multilateral treaties², international declarations³; the foundation documents of international organizations⁴; the practices of international financial institutions⁵; regional declarations and planning document⁶; or State practice⁷, there is a wide and general recognition of the concept.

The principle of sustainable development is thus a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community.

² For example, the United Nations Convention to Combat Desertification (The United Nations Convention to Combat Desertification in those Countries Experiencing Serious Droughts and/or Desertification, Particularly in Africa). 1994, Preamble, Art. 9 (1); the United Nations Framework Convention on Climate Change, 1992 (ILM, 1992, Vol. XXXI, p. 849. Arts. 2 and 3); and the Convention on Biological Diversity (ILM, 1992. Vol. XXXI, p. 818, Preamble, Arts. I and 10 - "sustainable use of biodiversity").

³ For example, the Rio Declaration on Environment and Development, 1992, emphasizes sustainable development in several of its Principles (e.g., Principles 4, 5, 7, 8, 9, 20, 21, 22. 24 and 27 refer expressly to "sustainable development" which can be described as the central concept of the entire document); and the Copenhagen Declaration, 1995 (paras. 6 and 8). following on the Copenhagen World Summit for Social Development, 1995.

⁴ For example, the North American Free Trade Agreement (Canada, Mexico, United States) (NAFTA, Preamble, ILM, 1993. Vol. XXXII, p. 289); the World Trade Organization (WTO) (paragraph 1 of the Preamble of the Marrakesh Agreement of 15 April 1994, establishing the World Trade Organization, speaks of the "optimal use of the world's resources in accordance with the objective of sustainable development" - ILM, 1994. Vol. XXXIII. pp. 1143-1 144); and the European Union (Art. 2 of the ECT).

⁵ For example, the World Bank Group, the Asian Development Bank, the African Development Bank, the Inter-American Development Bank, and the European Bank for Reconstruction and Development all subscribe to the principle of sustainable development. Indeed, since 1993, the World Bank has convened an annual conference related to advancing environmentally and socially sustainable development (ESSD).

⁶ For example, the Langkawi Declaration on the Environment, 1989, adopted by the "Heads of Government of the Commonwealth representing a quarter of the world's population" which adopted "sustainable development" as its central theme; Ministerial Declaration on Environmentally Sound and Sustainable Development in Asia and the Pacific, Bangkok, 1990 (doc. 38a. p. 567); and Action Plan for the Protection and Management of the Marine and Coastal Environment of the South Asian Seas Region. 1983 (para. 10: "sustainable, environmentally sound development").

⁷ For example, in 1990. the Dublin Declaration by the European Council on the Environmental Imperative stated that there must be an acceleration of effort to ensure that economic development in the Community is "sustainable and environmentally sound" (Bulletin of the European Communities, 6, 1990, Ann. II. p. 18). It urged the Community and Member States to play a major role to assist developing countries in their efforts to achieve "long-term sustainable development" (ibid., p. 19). It said, in regard to countries of Central and Eastern Europe, that remedial measures must be taken "to ensure that their future economic development is sustainable" (ibid.).

The concept has a significant role to play in the resolution of environmentally related disputes. The components of the principle come from well-established areas of international law - human rights, State responsibility, environmental law, economic and industrial law, equity, territorial sovereignty, abuse of rights, good neighbourliness - to mention a few. It has also been expressly incorporated into a number of binding and far-reaching international agreements, thus giving it binding force in the context of those agreements. It offers an important principle for the resolution of tensions between two established rights. It reaffirms in the arena of international law that there must be both development and environmental protection, and that neither of these rights can be neglected.

The general support of the international community does not of course mean that each and every member of the community of nations has given its express and specific support to the principle - nor is this a requirement for the establishment of a principle of customary international law.

As Brierly observes:

"It would hardly ever be practicable, and all but the strictest of positivists admit that it is not necessary, to show that every state has recognized a certain practice, just as in English law the existence of a valid local custom or custom of trade can be established without proof that every individual in the locality, or engaged in the trade, has practised the custom. This test of general recognition is necessarily a vague one; but it is of the nature of customary law, whether national or international . . ."⁸

Evidence appearing in international instruments and State practice (as in development assistance and the practice of international financial institutions) likewise amply supports a contemporary general acceptance of the concept.

Recognition of the concept could thus, fairly, be said to be worldwide.

(d) The Need for International Law to Draw upon the World's Diversity of Cultures in Harmonizing Development and Environmental Protection

In drawing into international law the benefits of the insights available from other cultures, and in looking to the past for inspiration, international environmental law would not be departing from the traditional methods of international law, but would, in fact, be following in the path charted out by Grotius. Rather than laying down a set of principles *a priori* for the new discipline of international law, he sought them also *a posteriori* from the experience of the past, searching through the whole range of cultures available to him for this purpose. From them, he drew the durable principles which had weathered the ages, on which to build the new international order of the future. Environmental law is now in a formative stage, not unlike international law in

⁸ J. Brierly, *The Law of Nations*, 6th ed., 1963. p. 61

its early stages. A wealth of past experience from a variety of cultures is available to it. It would be pity indeed if it were left untapped merely because of attitudes of formalism which see such approaches as not being entirely *de rigueur*.

I cite in this connection an observation of Sir Robert Jennings that, in taking note of different legal traditions and cultures, the International Court (as it did in the Western Sahara case):

"was asserting, not negating, the Grotian subjection of the totality of international relations to international law. It seems to the writer, indeed, that at the present juncture in the development of the international legal system it may be more important to stress the imperative need to develop international law to comprehend within itself the rich diversity of cultures, civilizations and legal traditions . . ." ⁹ law, it needs to be multi-disciplinary, drawing from other disciplines such as history, sociology, anthropology, and psychology such wisdom as may be relevant for its purpose.

It is in this spirit that I approach a principle which, for the first time in its jurisprudence, the Court is called upon to apply - a principle which will assist in the delicate task of balancing two considerations of enormous importance to the contemporary international scene and, potentially, of even greater importance to the future.

(e) Some Wisdom from the Past Relating to Sustainable Development

There are some principles of traditional legal systems that can be woven into the fabric of modern environmental law. They are specially pertinent to the concept of sustainable development which was well recognized in those systems. Moreover, several of these systems have particular relevance to this case, in that they relate to the harnessing of streams and rivers and show a concern that these acts of human interference with the course of nature should always be conducted with due regard to the protection of the environment. In the context of environmental wisdom generally, there is much to be derived from ancient civilizations and traditional legal systems in Asia, the Middle East, Africa, Europe, the Americas, the Pacific, and Australia - in fact, the whole world. This is a rich source which modern environmental law has left largely untapped.

I shall start with a system with which I am specially familiar, which also happens to have specifically articulated these two needs – development and environmental protection - in its ancient literature. I refer to the ancient irrigation-based civilization

⁹ Sir Robert Y. Jennings, "Universal International Law in a Multicultural World", in *International Law and the Grotian Heritage: A Commemorative Colloquium on the Occasion of the Fourth Centenary of the Birth of Hugo Grotius*. edited and published by the T.M.C. Asser Institute, The Hague, 1985, p. 195

of Sri Lanka. It is a system which, while recognizing the need for development and vigorously implementing schemes to this end, at the same time specifically articulated the need for environmental protection and ensured that the technology it employed paid due regard to environmental considerations. This concern for the environment was reflected not only in its literature and its technology, but also in its legal system, for the felling of certain forests was prohibited, game sanctuaries were established, and royal edicts decreed that the natural resource of water was to be used to the last drop without any wastage.

Another such environmentally related measure consisted of the "forest tanks" which were built in the jungle above the village, not for the purpose of irrigating land, but to provide water to wild animals.

This system of tanks and channels, some of them two thousand years old, constitute in their totality several multiples of the irrigation works involved in the present scheme. They constituted development as it was understood at the time, for they achieved in Toynbee's words, "the arduous feat of conquering the parched plains of Ceylon for agriculture. Yet they were executed with meticulous regard for environmental concerns, and showed that the concept of sustainable development was consciously practised over two millennia ago with much success.

The philosophy underlying this gigantic system which for upwards of two thousand years served the needs of man and nature alike, was articulated in a famous principle laid down by an outstanding monarch that "not even a little water that comes from the rain is to flow into the ocean without being made useful to man". According to the ancient chronicles, these works were undertaken "for the benefit of the country", and "out of compassion for all living creatures". This complex of irrigation works was aimed at making the entire country a granary. They embodied the concept of development *par excellence*.

Just as development was the aim of this system, it was accompanied by a systematic philosophy of conservation dating back to at least the third century BC. The ancient chronicles record that when the King (Devanampiya Tissa, 247-207 BC) was on a hunting trip (around 223 BC), the Arahata Mahinda, son of the Emperor Asoka of India, preached to him a sermon on Buddhism which converted the king. Here are excerpts from that sermon:

"O great King, the birds of the air and the beasts have as equal a right to live and move about in any part of the land as thou. The land belongs to the people and all living beings; thou art only the guardian of it."

This sermon, which indeed contained the first principle of modern environmental law - the principle of trusteeship of earth resources - caused the king to start sanctuaries for wild animals - a concept which continued to be respected for over twenty

centuries. The traditional legal system's protection of Sauna and flora, based on this Buddhist teaching, extended well into the eighteenth century.

The sermon also pointed out that even birds and beasts have a right to freedom from fear.

The notion of not causing harm to others and hence *sic utere tuo ut alienum non laedas* was a central notion of Buddhism. It translated well into environmental attitudes. "*Alienum*" in this context would be extended by Buddhism to future generations as well, and to other component elements of the natural order beyond man himself, for the Buddhist concept of duty had an enormously long reach.

This marked concern with environmental needs was reflected also in royal edicts, dating back to the third century BC, which ordained that certain primeval forests should on no account be felled. This was because adequate forest cover in the highlands was known to be crucial to the irrigation system as the mountain jungles intercepted and stored the monsoon rains. They attracted the rain which fed the river and irrigation systems of the country, and were therefore considered vital.

The task of the law is to convert such wisdom into practical terms and the law has often lagged behind other disciplines in so doing. Happily, for international law, there are plentiful indications, as recited earlier in this opinion, of that degree of "general recognition among States of a certain practice as obligatory"¹⁰ to give the principle of sustainable development the nature of customary law.

The foregoing is but one illustrative example of the concern felt by prior legal systems for the preservation and protection of the environment. There are other examples of complex irrigation systems that have sustained themselves for centuries, if not millennia. My next illustration comes from two ancient cultures of sub-Saharan Africa - those of the Sonjo and the Chagga, both Tanzanian tribe...

In relation to concern for the environment generally, examples may be cited from nearly every traditional system, ranging from Australasia and the Pacific Islands, through Amerindian and African cultures to those of ancient Europe. When Native American wisdom, with its deep love of nature, ordained that no activity affecting the land should be undertaken without giving thought to its impact on the land for seven generations to when African tradition viewed the human community as threefold - past, present and future - and refused to adopt a one-eyed vision of concentration on the present ; when Pacific tradition despised the view of land as merchandise that could be bought and sold like a common article of commerce, and viewed land as a living entity which lived and grew with the people and upon whose sickness and death the people likewise sickened and died; when Chinese and Japanese culture stressed

¹⁰ J. Brierly, *The Law of Nations*, p. 61.

the need for harmony with nature; and when Aboriginal custom, while maximizing the use of all species of plant and animal life, yet decreed that no land should be used by man to the point where it could not replenish itself, varied cultures were reflecting the ancient wisdom of the human family which the legal systems of the time and the tribe absorbed, reflected and turned into principles whose legal validity cannot be denied. Ancient Indian teaching so respected the environment that it was illegal to cause wanton damage, even to an enemy's territory in the course of military conflict.¹¹

This survey would not be complete without a reference also to the principles of Islamic law that inasmuch as all land belongs to God, land is never the subject of human ownership, but is only held in trust, with all the connotations that follow of due care, wise management, and custody for future generations. The first principle of modern environmental law - the principle of trusteeship of earth resources - is thus categorically formulated in this system.

The formalism of modern legal systems may cause us to lose sight of such principles, but the time has come when they must once more be integrated into the corpus of the living law...

By virtue of its representation of the main forms of civilization, this Court constitutes a unique forum for the reflection and the revitalization of those global legal traditions. There were principles ingrained in these civilizations as well as embodied in their legal systems, for legal systems include not merely written legal systems but traditional legal systems as well, which modern researchers have shown to be no less legal systems than their written cousins, and in some respects even more sophisticated and finely tuned than the latter.

Living law which is daily observed by members of the community, and compliance with which is so axiomatic that it is taken for granted, is not deprived of the character of law by the extraneous test and standard of reduction to writing. Writing is of course useful for establishing certainty, but when a duty such as the duty to protect the environment is so well accepted that all citizens act upon it, that duty is part of the legal system in question.

(f) Traditional Principles that can assist in the Development of Modern Environmental Law

As modern environmental law develops, it can, with profit to itself, take account of the perspectives and principles of traditional systems, not merely in a general way, but with reference to specific principles, concepts, and aspirational standards.

¹¹ Nagendra Singh, *Human Rights and the Future of Mankind*, 1981, p. 93.

Among those which may be extracted from the systems already referred to are such far-reaching principles as the principle of trusteeship of earth resources, the principle of intergenerational rights, and the principle that development and environmental conservation must go hand in hand. Land is to be respected as having a vitality of its own and being integrally linked to the welfare of the community. When it is used by humans, every opportunity should be afforded to it to replenish itself. Since flora and fauna have a niche in the ecological system, they must be expressly protected.

There is a duty lying upon all members of the community to preserve the integrity and purity of the environment.

Natural resources are not individually, but collectively, owned, and a principle of their use is that they should be used for the maximum service of people. There should be no waste, and there should be a maximization of the use of plant and animal species, while preserving their regenerative powers. The purpose of development is the betterment of the condition of the people.

Most of them have relevance to the present case, and all of them can greatly enhance the ability of international environmental law to cope with problems such as these if and when they arise in the future. There are many routes of entry by which they can be assimilated into the international legal system, and modern international law would only diminish itself were it to lose sight of them - embodying as they do the wisdom which enabled the works of man to function for centuries and millennia in a stable relationship with the principles of the environment. This approach assumes increasing importance at a time when such a harmony between humanity and its planetary inheritance is a prerequisite for human survival.

Sustainable development is thus not merely a principle of modern international law. It is one of the most ancient of ideas in the human heritage. Fortified by the rich insights that can be gained from millennia of human experience, it has an important part to play in the service of international law.

B. THE PRINCIPLE OF CONTINUING ENVIRONMENTAL IMPACT ASSESSMENT

(a) The Principle of Continuing Environmental Impact Assessment

Environmental Impact Assessment (EIA) has assumed an important role in this case.

In a previous opinion¹² I have had occasion to observe that this principle was gathering strength and international acceptance, and had reached the level of general recognition at which this Court should take notice of it.¹³

¹² *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*. I.C.J. Reports

I wish in this opinion to clarify further the scope and extent of the environmental impact principle in the sense that environmental impact assessment means not merely an assessment prior to the commencement of the project, but a continuing assessment and evaluation as long as the project is in operation. This follows from the fact that EIA is a dynamic principle and is not confined to a pre-project evaluation of possible environmental consequences. As long as a project of some magnitude is in operation, EIA must continue, for every such project can have unexpected consequences; and considerations of prudence would point to the need for continuous monitoring.

The greater the size and scope of the project, the greater is the need for a continuous monitoring of its effects, for EIA before the scheme can never be expected, in a matter so complex as the environment, to anticipate every possible environmental danger.

In the present case, the incorporation of environmental considerations into the Treaty by Articles 15 and 19 meant that the principle of EIA was also built into the Treaty. These provisions were clearly not restricted to EIA before the project commenced, but also included the concept of monitoring during the continuance of the project...

Environmental law in its current state of development would read into treaties which may reasonably be considered to have a significant impact upon the environment, a duty of environmental impact assessment and this means also, whether the treaty expressly so provides or not, a duty of monitoring the environmental impacts of any substantial project during the operation of the scheme.

EIA, being a specific application of the larger general principle of caution, embodies the obligation of continuing watchfulness and anticipation.

(b) The Principle of Contemporaneity in the Application of Environmental Norms

This case concerns a treaty that was entered into in 1977. Environmental standards and the relevant scientific knowledge of 1997 are far in advance of those of 1977. As

1995. p. 344. See, also, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, 1. C. J. Reports 1996, p. 140.

¹³ Major international documents recognizing this principle (first established in domestic law under the 1972 National Environmental Protection Act of the United States) are the 1992 Rio Declaration (Principle 17); United Nations General Assembly resolution 2995 (XXVII), 1972; the 1978 UNEP Draft Principles of Conduct (Principle 5); Agenda 21 (paras. 7.41 (h) and 8.4); the 1974 Nordic Environmental Protection Convention (Art. 6); the 1985 EC Environmental Assessment Directive (Art. 3); and the 1991 Espoo Convention. The status of the principle in actual practice is indicated also by the fact that multilateral development banks have adopted it as an essential precaution (World Bank Operational Directive 4.00).

the Court has observed, new scientific insights and a growing awareness of the risks for mankind have led to the development of new norms and standards:

"Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past." (Para. 140.)

If the Treaty was to operate for decades into the future, it could not operate on the environmental norms as though they were frozen in time when the Treaty was entered into. This inter-temporal aspect of the present case is of importance to all treaties dealing with projects impacting on the environment. Unfortunately, the Vienna Convention offers very little guidance regarding this matter which is of such importance in the environmental field. The provision in Article 3 1, paragraph 3 (c) , providing that "any relevant rules of international law applicable in the relations between the parties" shall be taken into account, scarcely covers this aspect with the degree of clarity requisite to so important a matter.

Environmental concerns are live and continuing concerns whenever the project under which they arise may have been inaugurated. It matters little that an undertaking has been commenced under a treaty of 1950, if in fact that undertaking continues in operation in the year 2000. The relevant environmental standards that will be applicable will be those of the year 2000.

As this Court observed in the *Namibia* case, "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 31, para. 53*), and these principles are "not limited to the rules of international law applicable at the time the treaty was concluded"¹⁴.

Environmental rights are human rights. Treaties that affect human rights cannot be applied in such a manner as to constitute a denial of human rights as understood at the time of their application. A Court cannot endorse actions which are a violation of human rights by the standards of their time merely because they are taken under a treaty which dates back to a period when such action was not a violation of human rights.

Support for this proposition can be sought from the opinion of Judge Tanaka in *South West Africa*, when he observed that a new customary law could be applied to the interpretation of an instrument entered into more than 40 years previously (*I.C.J. Reports 1966, pp. 293-294*). The ethical and human rights related aspects of

¹⁴ *Oppenheim's International Law*, R. Y. Jennings and A. Watts (eds.), 1992, p. 1275.

environmental law bring it within the category of law so essential to human welfare that we cannot apply to today's problems in this field the standards of yesterday. Judge Tanaka reasoned that a party to a humanitarian instrument has no right to act in a manner which is today considered inhuman, even though the action be taken under an instrument of 40 years ago. Likewise, no action should be permissible which is today considered environmentally unsound, even though it is taken under an instrument of more than 20 years ago.

(c) Is it Appropriate to Use the Rules of *Inter Partes* Litigation to Determine *Erga Omnes* Obligations?

An important conceptual problem arises when, in such a dispute *inter partes*, an issue arises regarding an alleged violation of rights or duties in relation to the rest of the world. The Court, in the discharge of its traditional duty of deciding between the parties, makes the decision which is in accordance with justice and fairness between the parties. The procedure it follows is largely adversarial. Yet this scarcely does justice to rights and obligations of an *erga omnes* character - least of all in cases involving environmental damage of a far-reaching and irreversible nature. I draw attention to this problem as it will present itself sooner or later in the field of environmental law, and because (though not essential to the decision actually reached) the facts of this case draw attention to it in a particularly pointed form.

...*Inter partes* adversarial procedures, eminently fair and reasonable in a purely *inter partes* issue, may need reconsideration in the future, if ever a case should arise of the imminence of serious or catastrophic environmental danger, especially to parties other than the immediate litigants.

We have entered an era of international law in which international law subserves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare. In addressing such problems, which transcend the individual rights and obligations of the litigating States, international law will need to look beyond procedural rules fashioned for purely *inter partes* litigation.

When we enter the arena of obligations which operate *erga omnes* rather than *inter partes*, rules based on individual fairness and procedural compliance may be inadequate. The great ecological questions now surfacing will call for thought upon this matter. International environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole.

***Case Concerning Pulp Mills on the River Uruguay
(Argentina/Uruguay), International Court of Justice, Judgment of 20
April 2010***

25. The dispute before the Court has arisen in connection with the planned construction authorized by Uruguay of one pulp mill and the construction and commissioning of another, also authorized by Uruguay, on the River Uruguay.

23. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Argentina,

“For all the reasons described in this Memorial, the Argentine Republic requests the International Court of Justice:

- 1) to find that by unilaterally authorizing the construction of the CMB and Orion pulp mills and the facilities associated with the latter on the left bank of the River Uruguay, in breach of the obligations resulting from the Statute of 26 February 1975, the Eastern Republic of Uruguay has committed the internationally wrongful acts set out in Chapters IV and V of this Memorial, which entail its international responsibility;
- 2) to adjudge and declare that, as a result, the Eastern Republic of Uruguay must:
 - i. cease immediately the internationally wrongful acts referred to above;
 - ii. resume strict compliance with its obligations under the Statute of the River Uruguay of 1975
 - iii. re-establish on the ground and in legal terms the situation that existed before the internationally wrongful acts referred to above were committed;
 - iv. pay compensation to the Argentine Republic for the damage caused by these internationally wrongful acts that would not be remedied by that situation being restored, of an amount to be determined by the Court at a subsequent stage of these proceedings;
 - v. provide adequate guarantees that it will refrain in future from preventing the Statute of the River Uruguay of 1975 from being applied, in particular the consultation procedure established by Chapter II of that Treaty.

On behalf of the Government of Uruguay,

“On the basis of the facts and arguments set out above, and reserving its right to supplement or amend these Submissions, Uruguay requests that the Court adjudge and declare that the claims of Argentina are rejected.”

“Based on all the above, it can be concluded that:

- 1) Argentina has not demonstrated any harm, or risk of harm, to the river or its ecosystem resulting from Uruguay’s alleged violations of its substantive obligations under the 1975 Statute that would be sufficient to warrant the dismantling of the Botnia plant;
- 2) the harm to the Uruguayan economy in terms of lost jobs and revenue would be substantial;
- 3) in light of points (a) and (b), the remedy of tearing the plant down would therefore be disproportionately onerous, and should not be granted;
- 4) if the Court finds, notwithstanding all the evidence to the contrary, that Uruguay has violated its procedural obligations to Argentina, it can issue a declaratory judgment to that effect, which would constitute an adequate form of satisfaction;
- 5) if the Court finds, notwithstanding all the evidence to the contrary, that the plant is not in complete compliance with Uruguay’s obligation to protect the river or its aquatic environment, the Court can order Uruguay to take whatever additional protective measures are necessary to ensure that the plant conforms to the Statute’s substantive requirements;
- 6) if the Court finds, notwithstanding all the evidence to the contrary, that Uruguay has actually caused damage to the river or to Argentina, it can order Uruguay to pay Argentina monetary compensation under Articles 42 and 43 of the Statute; and
- 7) the Court should issue a declaration making clear the Parties are obligated to ensure full respect for all the rights in dispute in this case, including Uruguay’s right to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute.

26. The boundary between Argentina and Uruguay in the River Uruguay is defined by the bilateral Treaty entered into for that purpose at Montevideo on 7 April 1961 (UNTS, Vol. 635, No. 9074, p. 98). Articles 1 to 4 of the Treaty delimit the boundary between the Contracting States in the river and attribute certain islands and islets in it to them. Articles 5 and 6 concern the régime for navigation on the river. Article 7 provides for the establishment by the parties of a “régime for the use of the river” covering various subjects, including the conservation of living resources and the

prevention of water pollution of the river. Articles 8 to 10 lay down certain obligations concerning the islands and islets and their inhabitants.

27. The “régime for the use of the river” contemplated in Article 7 of the 1961 Treaty was established through the 1975 Statute (see paragraph 1 above). Article 1 of the 1975 Statute states that the parties adopted it “in order to establish the joint machinery necessary for the optimum and rational utilization of the River Uruguay, in strict observance of the rights and obligations arising from treaties and other international agreements in force for each of the parties”. After having thus defined its purpose (Article 1) and having also made clear the meaning of certain terms used therein (Article 2), the 1975 Statute lays down rules governing navigation and works on the river (Chapter II, Articles 3 to 13), pilotage (Chapter III, Articles 14 to 16), port facilities, unloading and additional loading (Chapter IV, Articles 17 to 18), the safeguarding of human life (Chapter V, Articles 19 to 23) and the salvaging of property (Chapter VI, Articles 24 to 26), use of the waters of the river (Chapter VII, Articles 27 to 29), resources of the bed and subsoil (Chapter VIII, Articles 30 to 34), the conservation, utilization and development of other natural resources (Chapter IX, Articles 35 to 39), pollution (Chapter X, Articles 40 to 43), scientific research (Chapter XI, Articles 44 to 45), and various powers of the parties over the river and vessels sailing on it (Chapter XII, Articles 46 to 48). The 1975 Statute sets up the Administrative Commission of the River Uruguay (hereinafter “CARU”, from the Spanish acronym for “Comisión Administradora del Río Uruguay”) (Chapter XIII, Articles 49 to 57), and then establishes procedures for conciliation (Chapter XIV, Articles 58 to 59) and judicial settlement of disputes (Chapter XV, Article 60). Lastly, the 1975 Statute contains transitional (Chapter XVI, Articles 61 to 62) and final (Chapter XVII, Article 63) provisions

28. The first pulp mill at the root of the dispute was planned by “Celulosas de M’Bopicuá S.A.” (hereinafter “CMB”), a company formed by the Spanish company ENCE (from the Spanish acronym for “Empresa Nacional de Celulosas de España”, hereinafter “ENCE”). This mill, hereinafter referred to as the “CMB (ENCE)” mill, was to have been built on the left bank of the River Uruguay in the Uruguayan department of Río Negro opposite the Argentine region of Gualeguaychú, more specifically to the east of the city of Fray Bentos, near the “General San Martín” international bridge.

37. The second industrial project at the root of the dispute before the Court was undertaken by “Botnia S.A.” and “Botnia Fray Bentos S.A.” (hereinafter “Botnia”), companies formed under Uruguayan law in 2003 specially for the purpose by Oy Metsä-Botnia AB, a Finnish company. This second pulp mill, called “Orion” (hereinafter the “Orion (Botnia)” mill), has been built on the left bank of the River Uruguay, a few kilometres downstream of the site planned for the CMB (ENCE)

mill, and also near the city of Fray Bentos. It has been operational and functioning since 9 November 2007.

46. The dispute submitted to the Court concerns the interpretation and application of the 1975 Statute, namely, on the one hand whether Uruguay complied with its procedural obligations under the 1975 Statute in issuing authorizations for the construction of the CMB (ENCE) mill as well as for the construction and the commissioning of the Orion (Botnia) mill and its adjacent port; and on the other hand whether Uruguay has complied with its substantive obligations under the 1975 Statute since the commissioning of the Orion (Botnia) mill in November 2007

53. Characterizing the provisions of Articles 1 and 41 of the 1975 Statute as “referral clauses”, Argentina ascribes to them the effect of incorporating into the Statute the obligations of the Parties under general international law and a number of multilateral conventions pertaining to the protection of the environment. Consequently, in the view of Argentina, the Court has jurisdiction to determine whether Uruguay has complied with its obligations under certain international conventions.

54. The Court now therefore turns its attention to the issue whether its jurisdiction under Article 60 of the 1975 Statute also encompasses obligations of the Parties under international agreements and general international law invoked by Argentina and to the role of such agreements and general international law in the context of the present case.

55. Argentina asserts that the 1975 Statute constitutes the law applicable to the dispute before the Court, as supplemented so far as its application and interpretation are concerned, by various customary principles and treaties in force between the Parties and referred to in the Statute. Relying on the rule of treaty interpretation set out in Article 31, paragraph 3 (c) of the Vienna Convention on the Law of Treaties, Argentina contends notably that the 1975 Statute must be interpreted in the light of principles governing the law of international watercourses and principles of international law ensuring protection of the environment. It asserts that the 1975 Statute must be interpreted so as to take account of all “relevant rules” of international law applicable in the relations between the Parties, so that the Statute’s interpretation remains current and evolves in accordance with changes in environmental standards. In this connection, Argentina refers to the principles of equitable, reasonable and non-injurious use of international watercourses, the principles of sustainable development, prevention, precaution and the need to carry out an environmental impact assessment. It contends that these rules and principles are applicable in giving the 1975 Statute a dynamic interpretation, although they neither replace it nor restrict its scope.

56. Argentina further considers that the Court must require compliance with the Parties’ treaty obligations referred to in Articles 1 and 41 (a) of the 1975 Statute.

Argentina maintains that the “referral clauses” contained in these articles make it possible to incorporate and apply obligations arising from other treaties and international agreements binding on the Parties. To this end, Argentina refers to the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (hereinafter the “CITES Convention”), the 1971 Ramsar Convention on Wetlands of International Importance (hereinafter the “Ramsar Convention”), the 1992 United Nations Convention on Biological Diversity (hereinafter the “Biodiversity Convention”), and the 2001 Stockholm Convention on Persistent Organic Pollutants (hereinafter the “POPs Convention”). It asserts that these conventional obligations are in addition to the obligations arising under the 1975 Statute, and observance of them should be ensured when application of the Statute is being considered. Argentina maintains that it is only where “more specific rules of the [1975] Statute (*lex specialis*)” derogate from them that the instruments to which the Statute refers should not be applied

The Parties nevertheless are in agreement that the 1975 Statute is to be interpreted in accordance with rules of customary international law on treaty interpretation, as codified in Article 31 of the Vienna Convention on the Law of Treaties.

75. The Court notes that the object and purpose of the 1975 Statute, set forth in Article 1, is for the Parties to achieve “the optimum and rational utilization of the River Uruguay” by means of the “joint machinery” for co-operation, which consists of both CARU and the procedural provisions contained in Articles 7 to 12 of the Statute. The Court has observed in this respect, in its Order of 13 July 2006, that such use should allow for sustainable development which takes account of “the need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian States” (*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006, p. 133, para. 80)

76. In the *Gabcíkovo-Nagymaros* case, the Court, after recalling that “[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development”, added that “[i]t is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty” (*Gabcíkovo- Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 78, paras. 140-141).

77. The Court observes that it is by co-operating that the States concerned can jointly manage the risks of damage to the environment that might be created by the plans initiated by one or other of them, so as to prevent the damage in question, through the performance of both the procedural and the substantive obligations laid down by the 1975 Statute. However, whereas the substantive obligations are frequently worded in

broad terms, the procedural obligations are narrower and more specific, so as to facilitate the implementation of the 1975 Statute through a process of continuous consultation between the parties concerned. The Court has described the régime put in place by the 1975 Statute as a “comprehensive and progressive régime” (Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006, p. 133, para. 81), since the two categories of obligations mentioned above complement one another perfectly, enabling the parties to achieve the object of the Statute which they set themselves in Article 1.

81. The Court notes that, just as the original Spanish text, the French translation of this Article (see paragraph 80 above) distinguishes between the obligation to inform (“comunicar”) CARU of any plan falling within its purview (first paragraph) and the obligation to notify (“notificar”) the other party (second paragraph). By contrast, the English translation uses the same verb “notify” in respect of both obligations. In order to conform to the original Spanish text, the Court will use in both linguistic versions of this Judgment the verb “inform” for the obligation set out in the first paragraph of Article 7 and the verb “notify” for the obligation set out in the second and third paragraphs.

The Court considers that the procedural obligations of informing, notifying and negotiating constitute an appropriate means, accepted by the Parties, of achieving the objective which they set themselves in Article 1 of the 1975 Statute. These obligations are all the more vital when a shared resource is at issue, as in the case of the River Uruguay, which can only be protected through close and continuous co-operation between the riparian States.

94. The Court notes that the obligation of the State initiating the planned activity to inform CARU constitutes the first stage in the procedural mechanism as a whole which allows the two parties to achieve the object of the 1975 Statute, namely, the optimum and rational utilization of the River Uruguay”. This stage, provided for in Article 7, first paragraph, involves the State which is initiating the planned activity informing CARU thereof, so that the latter can determine “on a preliminary basis” and within a maximum period of 30 days whether the plan might cause significant damage to the other party.

95. To enable the remainder of the procedure to take its course, the parties have included alternative conditions in the 1975 Statute: either that the activity planned by one party should be liable, in CARU’s opinion, to cause significant damage to the other, creating an obligation of prevention for the first party to eliminate or minimize the risk, in consultation with the other party ; or that CARU, having been duly informed, should not have reached a decision in that regard within the prescribed period.

101. The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States” (Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949, p. 22). A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. This Court has established that this obligation “is now part of the corpus of international law relating to the environment” (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), p. 242, para. 29).

102. In the view of the Court, the obligation to inform CARU allows for the initiation of co-operation between the Parties which is necessary in order to fulfil the obligation of prevention. This first procedural stage results in the 1975 Statute not being applied to activities which would appear to cause damage only to the State in whose territory they are carried out.

117. Uruguay maintains that it was not required to transmit the environmental impact assessments to Argentina before issuing the initial environmental authorizations to the companies, these authorizations having been adopted on the basis of its legislation on the subject.

118. Argentina, for its part, first points out that the environmental impact assessments transmitted to it by Uruguay were incomplete, particularly in that they made no provision for alternative sites for the mills and failed to include any consultation of the affected populations. The Court will return later in the Judgment to the substantive conditions which must be met by environmental impact assessments (see paragraphs 203 to 219).

Furthermore, in procedural terms, Argentina considers that the initial environmental authorizations should not have been granted to the companies before it had received the complete environmental impact assessments, and that it was unable to exercise its rights in this context under Articles 7 to 11 of the 1975 Statute.

119. The Court notes that the environmental impact assessments which are necessary to reach a decision on any plan that is liable to cause significant transboundary harm to another State must be notified by the party concerned to the other party, through CARU, pursuant to Article 7, second and third paragraphs, of the 1975 Statute. This notification is intended to enable the notified party to participate in the process of ensuring that the assessment is complete, so that it can then consider the plan and its effects with a full knowledge of the facts (Article 8 of the 1975 Statute).

120. The Court observes that this notification must take place before the State concerned decides on the environmental viability of the plan, taking due account of the environmental impact assessment submitted to it.

122. The Court concludes from the above that Uruguay failed to comply with its obligation to notify the plans to Argentina through CARU under Article 7, second and third paragraphs, of the 1975 Statute.

UNIT 2: FUNDAMENTAL PRINCIPLES OF ENVIRONMENTAL PROTECTION

Indian Council for Enviro-Legal Action v. Union of India, AIR 1996 SC 1446

B.P. JEEVAN REDDY, J. - This writ petition filed by an environmentalist organization brings to light the woes of people living in the vicinity of chemical industrial plants in India. It highlights the disregard, nay, contempt for law and lawful authorities on the part of some among the emerging breed of entrepreneurs, taking advantage, as they do, of the country's need for industrialization and export earnings. Pursuit of profit has absolutely drained them of any feeling for fellow human beings - for that matter, for anything else. And the law seems to have been helpless. Systemic defects? It is such instances which have led many people in this country to believe that disregard of law pays and that the consequences of such disregard will never be visited upon them - particularly, if they are men with means. Strong words indeed - but nothing less would reflect the deep sense of hurt, the hearing of this case has instilled in us. The facts of the case will bear out these opening remarks.

2. Bichhri is a small village in Udaipur District of Rajasthan. To its north is a major industrial establishment, Hindustan Zinc Limited, a public-sector concern. That did not affect Bichhri. Its woes began somewhere in 1987 when the fourth respondent herein, Hindustan Agro Chemicals Limited started producing certain chemicals like Oleum (said to be the concentrated form of sulphuric acid) and Single Super Phosphate. The real calamity occurred when a sister concern, Silver Chemicals (Respondent 5), commenced production of 'H' acid in a plant located within the same complex. 'H' acid was meant for export exclusively. Its manufacture gives rise to enormous quantities of highly toxic effluents — in particular, iron-based and gypsum-based sludge - which if not properly treated, pose grave threat to Mother Earth. It poisons the earth, the water and everything that comes in contact with it. Jyoti Chemicals (Respondent 8) is another unit established to produce 'H' acid, besides some other chemicals. Respondents 6 and 7 were established to produce fertilizers and a few other products.

3. All the units/factories of Respondents 4 to 8 are situated in the same complex and are controlled by the same group of individuals. All the units are what may be called "chemical industries". The complex is located within the limits of Bichhri village.

4. Because of the pernicious wastes emerging from the production of 'H' acid, its manufacture is stated to have been banned in the western countries. But the need of 'H' acid continues in the West. That need is catered to by the industries like the Silver Chemicals and Jyoti Chemicals in this part of the world. (A few other units producing 'H' acid have been established in Gujarat, as would be evident from the decision of the Gujarat High Court in *Pravinbhai Jashbhai Patel v. State of Gujarat* [(1995) 2 Guj LR 1210], a decision rendered by one of us, B.N. Kirpal, J. as the Chief Justice of that Court.) Silver Chemicals is stated to have produced 375 MT of 'H' acid. The quantity of 'H' acid produced by Jyoti Chemicals is not known. It says that it produced only 20 MT, as trial production, and no more. Whatever

quantity these two units may have produced, it has given birth to about 2400-2500 MT of highly toxic sludge (iron-based sludge and gypsum-based sludge) besides other pollutants. Since the toxic untreated waste waters were allowed to flow out freely and because the untreated toxic sludge was thrown in the open in and around the complex, the toxic substances have percolated deep into the bowels of the earth polluting the aquifers and the subterranean supply of water. The water in the wells and the streams has turned dark and dirty rendering it unfit for human consumption. It has become unfit for cattle to drink and for irrigating the land. The soil has become polluted rendering it unfit for cultivation, the mainstay of the villagers. The resulting misery to the villagers needs no emphasis. It spread disease, death and disaster in the village and the surrounding areas. This sudden degradation of earth and water had an echo in Parliament too. A Hon'ble Minister said, action was being taken, but nothing meaningful was done on the spot. The villagers then rose in virtual revolt leading to the imposition of Section 144 CrPC by the District Magistrate in the area and the closure of Silver Chemicals in January 1989. It is averred by the respondents that both the units, Silver Chemicals and Jyoti Chemicals have stopped manufacturing 'H' acid since January 1989 and are closed. We may assume it to be so. Yet the consequences of their action remain - the sludge, the long-lasting damage to earth, to underground water, to human beings, to cattle and the village economy. It is with these consequences that we are to contend with in this writ petition.

5. The present social action litigation was initiated in August 1989 complaining precisely of the above situation and requesting for appropriate remedial action. To the writ petition, the petitioner enclosed a number of photographs illustrating the enormous damage done to water, cattle, plants and to the area in general. A good amount of technical data and other material was also produced supporting the averments in the writ petition.

8. The Govt. of Rajasthan filed its counter-affidavit on 20-1-1990. It made a curious statement in para 3 to the following effect:

(T)hat the State Government is *now* aware of the pollution of underground water being caused by liquid effluents from the firms arrayed as Respondents 4 to 8 in the writ petition. Therefore, the State Government has initiated action through the Pollution Control Board to check further spread of pollution.

The State Government stated that the water in certain wells in Bichhri village and some other surrounding villages has become unfit for drinking by human beings and cattle, though in some other wells, the water remains unaffected.

16. The first considered order made, after hearing the parties, by this Court is of 11-12-1989. Under this order, the court requested the National Environmental Engineering Research Institute (NEERI) to study the situation in and around Bichhri village and submit their report "as to the choice and scale of the available remedial alternatives". NEERI was requested to suggest both short-term and long-term measures required to combat the hazard already caused. Directions were also made for supply of drinking water to affected villages by the State of Rajasthan. The RPCB was directed to make available to the court the Report it had prepared concerning the situation in Bichhri village.

Relevant statutory provisions

49. Article 48-A is one of the Directive Principles of State Policy. It says that the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country. Article 51-A sets out the fundamental duties of citizens. One of them is “(g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.....”

50. The problem of increasing pollution of rivers and streams in the country - says the Statement of Objects and Reasons appended to the Bill which became the Water (Prevention and Control of Pollution) Act, 1974 - attracted the attention of the State legislatures and Parliament. They realised the urgency of ensuring that domestic and industrial effluents are not allowed to be discharged into water courses without adequate treatment and that pollution of rivers and streams was causing damage to the country's economy. A committee was set up in 1962 to draw a draft enactment for prevention of water pollution. The issue was also considered by the Central Council of Local Self-Government in September 1963. The Council suggested the desirability of having a single enactment for the purpose. A Draft Bill was prepared and sent to various States. Several expert committees also made their recommendations meanwhile. Since an enactment on the subject was relatable to Entry 17 read with Entry 6 of List II in the Seventh Schedule to the Constitution - and, therefore, within the exclusive domain of the States - the State Legislatures of Gujarat, Kerala, Haryana and Mysore passed resolutions as contemplated by Article 252 of the Constitution enabling Parliament to make a law on the subject. On that basis, Parliament enacted the Water (Prevention and Control of Pollution) Act, 1974. (The State of Rajasthan too passed the requisite resolution.) Section 24(1) of the Water Act provides that:

24. (1) Subject to the provisions of this section,-

(a) no person shall knowingly cause or permit any poisonous, noxious or polluting matter determined in accordance with such standards as may be laid down by the State Board to enter (whether directly or indirectly) into any stream or well....

Section 25(1), before it was amended by Act 53 of 1988, provided that:

25. (1) Subject to the provisions of this section, no person shall, without the previous consent of the State Board, bring into use any new or altered outlet for the discharge of sewage or trade effluent into a stream or well or begin to make any new discharge of sewage or trade effluent into a stream or well.

As amended by Act 53 of 1988, Section 25 now reads:

25. (1) Subject to the provisions of this section, no person shall, without the previous consent of the State Board, -

(a) establish or take any steps to establish any industry, operation or process, or any treatment and disposal system or an extension or addition thereto, which is likely to discharge sewage or trade effluent into a stream or well or sewer or on land (such discharge being hereafter in this section referred to as ‘discharge of sewage’); or

(b) bring into use any new or altered outlets for the discharge of sewage; or

(c) begin to make any new discharge of sewage....

It is stated that the Rajasthan Assembly passed resolution under Article 252 of the Constitution adopting the said Amendment Act vide Gazette Notification dated 9-5-1990. Section 33 empowers the Pollution Control Board to apply to the court, not inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the First Class, to restrain any person causing pollution if the said pollution is likely to prejudicially affect water in a stream or a well. Section 33-A, which has been introduced by Amendment Act 53 of 1988, empowers the Board to order the closure of any industry and to stop the electricity, water and any other service to such industry if it finds such a direction necessary for effective implementation of the provisions of the Act. Prior to the said Amendment Act, the Pollution Control Board had no such power and the course open to it was to make a recommendation to the Government to pass appropriate orders including closure.

51. The Air (Prevention and Control of Pollution) Act, 1981 contains similar provisions.

52. In the year 1986, Parliament enacted a comprehensive legislation, Environment (Protection) Act. The Act *defines 'environment'* to include “water, air and land and the interrelationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property”. The preamble to the Act recites that the said Act was made pursuant to the decisions taken at the United Nations Conference on Human Environment held at Stockholm in June 1972 in which India also participated. Section 3 empowers the Central Government “*to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution*”. Sub-section (2) elucidates the several powers inhering in the Central Government in the matter of protection and promotion of environment. Section 5 empowers the Central Government to issue appropriate directions to any person, officer or authority to further the objects of the enactment. Section 6 confers rule-making power upon the Central Government in respect of matters referred to in Section 3. Section 7 says that “no person carrying on any industry, operation or process shall discharge or emit or permit to be discharged or emitted any environmental pollutant in excess of such standards as may be prescribed”.

53. The Central Government has made the Hazardous Wastes (Management and Handling) Rules, 1989 in exercise of the power conferred upon it by Section 6 of the Environment (Protection) Act prescribing the manner in which the hazardous wastes shall be collected, treated, stored and disposed of.

Consideration of the submissions

54. Taking up the objections urged by Shri Bhat first, we find it difficult to agree with them. This writ petition is not really for issuance of appropriate writ, order or directions against the respondents but is directed against the Union of India, Government of Rajasthan and RPCB to compel them to perform their statutory duties enjoined by the Acts aforementioned on the ground that their failure to carry out their statutory duties is seriously undermining the right to life (of the residents of Bichhri and the affected area) guaranteed by Article 21 of the Constitution. If this Court finds that the said authorities have not taken the action required of them by law and that their inaction is jeopardising the right to life of the citizens of this country or of any section thereof, it is the duty of this Court to intervene. If it

is found that the respondents are flouting the provisions of law and the directions and orders issued by the lawful authorities, this Court can certainly make appropriate directions to ensure compliance with law and lawful directions made thereunder. This is a social action litigation on behalf of the villagers of Bichhri whose right to life, as elucidated by this Court in several decisions, is invaded and seriously infringed by the respondents as is established by the various reports of the experts called for, and filed before, this Court. If an industry is established without obtaining the requisite permission and clearances and if the industry is continued to be run in blatant disregard of law to the detriment of life and liberty of the citizens living in the vicinity, can it be suggested with any modicum of reasonableness that this Court has no power to intervene and protect the fundamental right to life and liberty of the citizens of this country. The answer, in our opinion, is self-evident. We are also not convinced of the plea of Shri Bhat that RPCB has been adopting a hostile attitude towards his clients throughout and, therefore, its contentions or the reports prepared by its officers should not be relied upon. If the respondents establish and operate their plants contrary to law, flouting all safety norms provided by law, the RPCB was bound to act. On that account, it cannot be said to be acting out of animus or adopting a hostile attitude. Repeated and persistent violations call for repeated orders. That is no proof of hostility. Moreover, the reports of RPCB officials are fully corroborated and affirmed by the reports of the Central team of experts and of NEERI. We are also not prepared to agree with Shri Bhat that since the report of NEERI was prepared at the instance of RPCB, it is suspect. This criticism is not only unfair but is also uncharitable to the officials of NEERI who have no reason to be inimical to the respondents. If, however, the actions of the respondents invite the concern of the experts and if they depict the correct situation in their reports, they cannot be accused of any bias. Indeed, it is this Court that asked NEERI to suggest remedial measures and it is in compliance with those orders that NEERI submitted its interim report and also the final report. Similarly, the objection of Shri Bhat that the reports submitted by the NEERI, by the Central team (experts from the Ministry of Environment and Forests, Government of India) and RPCB cannot be acted upon is equally unacceptable. These reports were called by this Court and several orders passed on the basis of those reports. It was never suggested on behalf of Respondents 4 to 8 that unless they are permitted to cross-examine the experts or the persons who made those reports, their reports cannot be acted upon. This objection, urged at this late stage of proceedings - after a lapse of several years - is wholly unacceptable. The persons who made the said reports are all experts in their field and under no obligation either to the RPCB or for that matter to any other person or industry. It is in view of their independence and competence that their reports were relied upon and made the basis of passing orders by this Court from time to time.

57. So far as the responsibility of the respondents for causing the pollution in the wells, soil and the aquifers is concerned, it is clearly established by the analysis report referred to in the report of the Central experts' team dated 1-11-1993 (p. 1026 of Vol. II). Indeed, number of orders passed by this Court, referred to hereinbefore, are premised upon the finding that the respondents are responsible for the said pollution. It is only because of the said reason that they were asked to defray the cost of removal and storage of sludge. It is precisely for this reason that, at one stage, the respondents had also undertaken the de-watering of polluted wells. Disclaiming the responsibility for the pollution in and around Bichhri village, at this

stage of proceedings, is clearly an afterthought. We accordingly hold and affirm that the respondents alone are responsible for all the damage to the soil, to the underground water and to Village Bichhri in general, damage which is eloquently portrayed in the several reports of the experts mentioned hereinabove. NEERI has worked out the cost for repairing the damage at more than Rupees forty crores. Now, the question is whether and to what extent can the respondents be made responsible for defraying the cost of remedial measures in these proceedings under Article 32. Before we advert to this question, it may perhaps be appropriate to clarify that so far as removal of remaining sludge and/or the stoppage of discharge of further toxic wastes are concerned, it is the absolute responsibility of the respondents to store the sludge in a proper manner (in the same manner in which 720 MT of sludge has already been stored) and to stop the discharge of any other or further toxic wastes from its plants including Sulphuric Acid Plant and to ensure that the wastes discharged do not flow into or through the sludge. Now, turning to the question of liability, it would be appropriate to refer to a few decisions on the subject.

58. In *Oleum Gas Leak* case [AIR 1987 SC 1086], a Constitution Bench discussed this question at length and held thus:

We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of substance or any other related element that caused the harm the enterprise must be held strictly liable for causing such harm as a part of the social cost of carrying on the hazardous or inherently dangerous activity. If the enterprise is permitted to carry on an hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such hazardous or inherently dangerous activity as an appropriate item of its overheads. Such hazardous or inherently dangerous activity for private profit can be tolerated only on condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not. ...We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the

tortious principle of strict liability under the rule in *Rylands v. Fletcher* [(1868) LR 3 HL 330].

We would also like to point out that the measure of compensation in the kind of cases referred to in the preceding paragraph must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise.

59. Shri Bhat, however, points out that in the said decision, the question whether the industry concerned therein was a 'State' within the meaning of Article 12 and, therefore, subject to the discipline of Part III of the Constitution including Article 21 was left open and that no compensation as such was awarded by this Court to the affected persons. He relies upon the observations in the concurring opinion of Ranganath Misra, C.J., in *Union Carbide Corpn.* [AIR 1992 SC 248]. The learned Chief Justice referred in the first instance, to the propositions enunciated in *Oleum Gas Leak* case, and then made the following observations in paras 14 and 15:

14. In *M.C. Mehta* case, no compensation was awarded as this Court could not reach the conclusion that Shriram (the delinquent company) came within the meaning of 'State' in Article 12 so as to be liable to the discipline of Article 21 and to be subjected to a proceeding under Article 32 of the Constitution. Thus what was said was essentially obiter.

15. The extracted part of the observations from *M.C. Mehta* case perhaps is a good guideline for working out compensation in the cases to which the ratio is intended to apply. The statement of the law ex facie makes a departure from the accepted legal position in *Rylands v. Fletcher*. We have not been shown any binding precedent from the American Supreme Court where the ratio of *M.C. Mehta* decision, has in terms been applied. In fact Bhagwati, C.J. clearly indicates in the judgment that his view is a departure from the law applicable to western countries.

60. The majority judgment delivered by M.N. Venkatachaliah, J. (on behalf of himself and two other learned Judges) has not expressed any opinion on this issue. We on our part find it difficult to say, with great respect to the learned Chief Justice, that the law declared in *Oleum Gas Leak* case, is obiter. It does not appear to be unnecessary for the purposes of that case. Having declared the law, the Constitution Bench directed the parties and other organisations to institute actions on the basis of the law so declared. Be that as it may, we are of the considered opinion that even if it is assumed (for the sake of argument) that this Court cannot award damages against the respondents in these proceedings that does not mean that the Court cannot direct the Central Government to determine and recover the cost of remedial measures from the respondents. Section 3 of the Environment (Protection) Act, 1986 expressly empowers the Central Government (or its delegate, as the case may be) to "take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of environment...". Section 5 clothes the Central Government (or its delegate) with the power to issue directions for achieving the objects of the Act. Read with

the wide definition of ‘environment’ in Section 2(a), Sections 3 and 5 clothe the Central Government with all such powers as are “necessary or expedient for the purpose of protecting and improving the quality of the environment”. The Central Government is empowered to take all measures and issue all such directions as are called for the above purpose. In the present case, the said powers will include giving directions for the removal of sludge, for undertaking remedial measures and also the power to impose the cost of remedial measures on the offending industry and utilise the amount so recovered for carrying out remedial measures. This Court can certainly give directions to the Central Government/its delegate to take all such measures, if in a given case this Court finds that such directions are warranted. We find that similar directions have been made in a recent decision of this Court in *Indian Council for Enviro-Legal Action* [1995 (5) SCALE 578]. That was also a writ petition filed under Article 32 of the Constitution. Following is the direction:

It appears that the Pollution Control Board had identified as many as 22 industries responsible for the pollution caused by discharge of their effluents into Nakkavagu. They were responsible to compensate to farmers. It was the duty of the State Government to ensure that this amount was recovered from the industries and paid to the farmers.

It is, therefore, idle to contend that this Court cannot make appropriate directions for the purpose of ensuring remedial action. It is more a matter of form.

61. Shri K.N. Bhat submitted that the rule of absolute liability is not accepted in England or other Commonwealth countries and that the rule evolved by the House of Lords in *Rylands v. Fletcher*, is the correct rule to be applied in such matters. Firstly, in view of the binding decision of this Court in *Oleum Gas Leak* case, this contention is untenable, for the said decision expressly refers to the rule in *Rylands* but refuses to apply it saying that it is not suited to the conditions in India. Even so, for the sake of completeness, we may discuss the rule in *Rylands* and indicate why that rule is inappropriate and unacceptable in this country. The rule was first stated by Blackburn, J. (Court of Exchequer Chamber) in the following words:

We think that the true rule of law is that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff’s default, or perhaps, that the escape was the consequence of vis major, or the act of God; ... and it seems but reasonable and just that the neighbour who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour’s, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property.

62. The House of Lords, however, added a rider to the above statement, viz., that the user by the defendant should be a “non-natural” user to attract the rule. In other words, if the user by the defendant is a natural user of the land, he would not be liable for damages. Thus, the

twin tests - apart from the proof of damage to the plaintiff by the act/negligence of the defendants - which must be satisfied to attract this rule are 'foreseeability' and 'non-natural' user of the land.

63. The rule in *Rylands* has been approved by the House of Lords in the recent decision in *Cambridge Water Co. Ltd. v. Eastern Counties Leather, plc*, [(1994) (2) W.L.R. 53]. The plaintiff, Cambridge Water Company, was a statutory corporation engaged in providing public water supply within a certain area including the city of Cambridge. It was lifting water from a bore well situated at some distance from Sawstyn. The defendant-Company Eastern Leather, was having a tannery in Sawstyn. Tanning necessarily involves degreasing of pelts. For that purpose, the defendant was using an organo chlorine called PCE. PCE was stored in a tank in the premises of the defendant. The plaintiff's case was that on account of the PCE percolating into the ground, the water in its well became contaminated and unfit for human consumption and that on that account it was obliged to find an alternative source at a substantial cost. It sued the defendant for the resulting damages. The plaintiff based his claim on three alternative grounds, viz., negligence, nuisance and the rule in *Rylands*. The trial Judge (High Court) dismissed the action in negligence and nuisance holding that the defendant could not have reasonably foreseen that such damage could occur to the plaintiff. So far as the rule in *Rylands* was concerned, the trial Judge held that the user by the defendant was not a non-natural user and hence, it was not liable for damages. On appeal, the Court of Appeal declined to decide the matter on the basis of the rule in *Rylands*. It relied strongly upon the ratio in *Ballard v. Tomlinson* [(1885) 29 Ch. D. 1115], holding that no person having a right to use a common source is entitled to contaminate that source so as to prevent his neighbour from having a full value of his right of appropriation. The Court of Appeal also opined that the defendant's use of the land was not a natural use. On appeal by the defendant, the House of Lords allowed the appeal holding that *foreseeability* of the harm of the relevant type by the defendant was a pre-requisite to the right to recover damages both under the heads of *nuisance* and also under the rule in *Rylands* and since that was not established by the plaintiff, it has to fail. The House of Lords, no doubt, held that the defendant's use of the land was a non-natural use *but dismissed the suit*, as stated above, *on the ground that the plaintiff has failed to establish that pollution of their water supply by the solvent used by the defendant in his premises was in the circumstances of the case foreseeable by the defendant*.

64. The Australian High Court has, however, expressed its disinclination to treat the rule in *Rylands* as an independent head for claiming damages or as a rule rooted in the law governing the law of nuisance in *Burnie Port Authority v. General Jones Pty Ltd.* [(1994) 68 Aus. L J 331], The respondent, General Jones Limited, had stored frozen vegetables in three cold storage rooms in the building owned by the appellant, Burnie Port Authority (Authority). The remaining building remained under the occupation of the Authority. The Authority wanted to extend the building. The extension work was partly done by the Authority itself and partly by an independent contractor (Wildridge and Sinclair Pty. Ltd.). For doing its work, the contractor used a certain insulating material called EPS, a highly inflammable substance. On account of negligent handling of EPS, there was a fire which inter alia damaged the rooms in which General Jones had stored its vegetables. On an action by General Jones, the Australian High Court held by a majority that the rule in *Rylands* having attracted many difficulties,

uncertainties, qualifications and exceptions, should now be seen, for the purposes of Australian Common Law, as absorbed by the principles of ordinary *negligence*. The Court held further that under the rules governing negligence, if a person in control of a premises, introduces a dangerous substance to carry on a dangerous activity, or allows another to do one of those things, owes a duty of reasonable care to avoid a reasonably foreseeable risk of injury or damage to the person or property of another. In a case where a person or the property of that other is lawfully in a place outside the premises, the duty of care varies in degree according to the magnitude of the risk involved and extends to ensuring that such care is taken. Applying the said principle, the court held that the authority allowed the independent contractor to introduce or retain a dangerous substance or to engage in a dangerous activity in its premises which substance and activity caused a fire that destroyed the goods of General Jones. The evidence, the court held, established that the independent contractor's work was a dangerous activity in that it involved real and foreseeable risk of a serious conflagration unless special precautions were taken. In the circumstances, it was held that *the authority owed a non-delegable duty of care to General Jones to ensure that its contractor took reasonable steps to prevent the occurrence of a fire and the breach of that duty attracted liability pursuant to the ordinary principles of negligence for the damage sustained by the respondent.*

65. On a consideration of the two lines of thought (one adopted by the English courts and the other by the Australian High Court), we are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country. We are convinced that the law stated by this Court in *Oleum Gas Leak* case, is by far the more appropriate one - apart from the fact that it is binding upon us. (We have disagreed with the view that the law stated in the said decision is *obiter*.) According to this rule, once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity *irrespective* of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on. In the words of the Constitution Bench, such an activity:

(C)an be tolerated only on condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not.

The Constitution Bench has also assigned the reason for stating the law in the said terms. It is that the enterprise (carrying on the hazardous or inherently dangerous activity) alone has the resource to discover and guard against hazards or dangers - and not the person affected *and* the practical difficulty (on the part of the affected person) in establishing the absence of reasonable care or that the damage to him was foreseeable by the enterprise.

66. Once the law in *Oleum Gas Leak* case, is held to be the law applicable, it follows, in the light of our findings recorded hereinbefore, that Respondents 4 to 8 are absolutely liable to compensate for the harm caused by them to the villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove the sludge and other pollutants lying in the affected area (by affected area, we mean the area

of about 350 ha indicated in the sketch at p. 178 of NEERI report) and also to defray the cost of the remedial measures required to restore the soil and the underground water sources. Sections 3 and 4 of Environment (Protection) Act confers upon the Central Government the power to give directions of the above nature and to the above effect. Levy of costs required for carrying out remedial measures is implicit in Sections 3 and 4 which are couched in very wide and expansive language. Appropriate directions can be given by this Court to the Central Government to invoke and exercise those powers with such modulations as are called for in the facts and circumstances of this case.

67. The question of liability of the respondents to defray the costs of remedial measures can also be looked into from another angle, which has now come to be accepted universally as a sound principle, viz., the “Polluter Pays” principle.

The Polluter Pays principle demands that the financial costs of preventing or remedying damage caused by pollution should lie with the undertakings which cause the pollution, or produce the goods which cause the pollution. Under the principle it is not the role of Government to meet the costs involved in either prevention of such damage, or in carrying out remedial action, because the effect of this would be to shift the financial burden of the pollution incident to the taxpayer. The ‘Polluter Pays’ principle was promoted by the Organisation for Economic Cooperation and Development (OECD) during the 1970s when there was great public interest in environmental issues. During this time there were demands on Government and other institutions to introduce policies and mechanisms for the protection of the environment and the public from the threats posed by pollution in a modern industrialised society. Since then there has been considerable discussion of the nature of the Polluter Pays principle, but the precise scope of the principle and its implications for those involved in past, or potentially polluting activities have never been satisfactorily agreed.

Despite the difficulties inherent in defining the principle, the European Community accepted it as a fundamental part of its strategy on environmental matters, and it has been one of the underlying principles of the four Community Action Programmes on the Environment. The current Fourth Action Programme [(1987) OJ C 328/1] makes it clear that ‘the cost of preventing and eliminating nuisances must in principle be borne by the polluter’, and the Polluter Pays principle has now been incorporated into the European Community Treaty as part of the new articles on the environment which were introduced by the Single European Act of 1986. Article 130-R(2) of the Treaty states that environmental considerations are to play a part in all the policies of the community, and that action is to be based on three principles: the need for preventive action; the need for environmental damage to be rectified at source; and that the polluter should pay.

Thus, according to this principle, the responsibility for repairing the damage is that of the offending industry. Sections 3 and 5 empower the Central Government to give directions and take measures for giving effect to this principle. In all the circumstances of the case, we think it appropriate that the task of determining the amount required for carrying out the remedial measures, its recovery/realisation and the task of undertaking the remedial measures is placed upon the Central Government in the light of the provisions of the Environment (Protection) Act, 1986. It is, of course, open to the Central Government to take the help and assistance of State Government, RPCB or such other agency or authority, as they think fit.

Directions

70. Accordingly, the following directions are made:

1. The Central Government shall determine the amount required for carrying out the remedial measures including the removal of sludge lying in and around the complex of Respondents 4 to 8, in the area affected in Village Bichhri and other adjacent villages, on account of the production of 'H' acid and the discharges from the Sulphuric Acid Plant of Respondents 4 to 8. Chapters VI and VII in NEERI report (submitted in 1994) shall be deemed to be the show-cause notice issued by the Central Government proposing the determination of the said amount. Within six weeks from this day, Respondents 4 to 8 shall submit their explanation, along with such material as they think appropriate in support of their case, to the Secretary, Ministry of Environment and Forests, Government of India, (MEF). The Secretary shall thereupon determine the amount in consultation with the experts of his Ministry within six weeks of the submission of the explanation by the said respondents. The orders passed by the Secretary, (MEF) shall be communicated to Respondents 4 to 8 - and all concerned - and shall also be placed before this Court. Subject to the orders, if any, passed by this Court, the said amount shall represent the amount which Respondents 4 to 8 are liable to pay to improve and restore the environment in the area. For the purpose of these proceedings, the Secretary, (MEF) and Respondents 4 to 8 shall proceed on the assumption that the affected area is 350 ha, as indicated in the sketch at p. 178 of NEERI report. In case of failure of the said respondents to pay the said amount, the same shall be recovered by the Central Government in accordance with law. The factories, plant, machinery and all other immovable assets of Respondents 4 to 8 are attached herewith. The amount so determined and recovered shall be utilised by the MEF for carrying out all necessary remedial measures to restore the soil, water sources and the environment in general of the affected area to its former state.

2. On account of their continuous, persistent and insolent violations of law, their attempts to conceal the sludge, their discharge of toxic effluents from the Sulphuric Acid Plant which was allowed to flow through the sludge, and their non-implementation of the orders of this Court - all of which are fully borne out by the Expert Committee's reports and the findings recorded hereinabove - Respondents 4 to 8 have earned the dubious distinction of being characterised as "rogue industries". They have inflicted untold misery upon the poor, unsuspecting villagers, de-spoiling their land, their water sources and their entire environment - all in pursuance of their private profit. They have forfeited all claims for any consideration by this Court. Accordingly, we herewith order the closure of all the plants and factories of Respondents 4 to 8 located in Bichhri village. The RPCB is directed to seal all the factories/units/plants of the said respondents forthwith. So far as the Sulphuric Acid Plant is concerned, it will be closed at the end of one week from today, within which period Respondent 4 shall wind down its operations so as to avoid risk of any untoward consequences, as asserted by Respondent 4 in Writ Petition (C) No. 76 of 1994. It is the responsibility of Respondent 4 to take necessary steps in this behalf.

The RPCB shall seal this unit too at the end of one week from today. The reopening of these plants shall depend upon their compliance with the directions made and obtaining of *all* requisite permissions and consents from the relevant authorities. Respondents 4 to 8 can apply for directions in this behalf after such compliance.

3. So far as the claim for damages for the loss suffered by the villagers in the affected area is concerned, it is open to them or any organisation on their behalf to institute suits in the appropriate civil court. If they file the suit or suits in *forma pauperis*, the State of Rajasthan shall not oppose their applications for leave to sue in *forma pauperis*.

4. The Central Government shall consider whether it would not be appropriate, in the light of the experience gained, that chemical industries are treated as a category apart. Since the chemical industries are the main culprits in the matter of polluting the environment, there is every need for scrutinising their establishment and functioning more rigorously. No distinction should be made in this behalf as between a large-scale industry and a small-scale industry or for that matter between a large-scale industry and a medium-scale industry. All chemical industries, whether big or small, should be allowed to be established only after taking into consideration all the environmental aspects and their functioning should be monitored closely to ensure that they do not pollute the environment around them. It appears that most of these industries are water-intensive industries. If so, the advisability of allowing the establishment of these industries in arid areas may also require examination. Even the existing chemical industries may be subjected to such a study and if it is found on such scrutiny that it is necessary to take any steps in the interests of environment, appropriate directions in that behalf may be issued under Sections 3 and 5 of the Environment Act. The Central Government shall ensure that the directions given by it are implemented forthwith.

5. The Central Government and the RPCB shall file quarterly reports before this Court with respect to the progress in the implementation of Directions 1 to 4 aforesaid.

6. The suggestion for establishment of environment courts is a commendable one. The experience shows that the prosecutions launched in ordinary criminal courts under the provisions of the Water Act, Air Act and Environment Act never reach their conclusion either because of the workload in those courts or because there is no proper appreciation of the significance of the environment matters on the part of those in charge of conducting of those cases. Moreover, any orders passed by the authorities under Water and Air Acts and the Environment Act are immediately questioned by the industries in courts. Those proceedings take years and years to reach conclusion. Very often, interim orders are granted meanwhile which effectively disable the authorities from ensuring the implementation of their orders. All this points to the need for creating environment courts which alone should be empowered to deal with all matters, civil and criminal, relating to environment. These courts should be manned by legally trained persons/judicial officers and

should be allowed to adopt summary procedures. This issue, no doubt, requires to be studied and examined in depth from all angles before taking any action.

7. The Central Government may also consider the advisability of strengthening the environment protection machinery both at the Centre and the States and provide them more teeth. The heads of several units and agencies should be made personally accountable for any lapses and/or negligence on the part of their units and agencies. The idea of an environmental audit by specialist bodies created on a permanent basis with power to inspect, check and take necessary action not only against erring industries but also against erring officers may be considered. The idea of an environmental audit conducted periodically and certified annually, by specialists in the field, duly recognised, can also be considered. The ultimate idea is to integrate and balance the concern for environment with the need for industrialisation and technological progress.

71. Respondents 4 to 8 shall pay a sum of Rupees fifty thousand by way of costs to the petitioner which had to fight this litigation over a period of over six years with its own means. Voluntary bodies, like the petitioner, deserve encouragement wherever their actions are found to be in furtherance of public interest. The said sum shall be deposited in this Court within two weeks from today. It shall be paid over to the petitioner.

***Indian Council for Enviro-Legal Action v. Union of India, (2011) 12
SCC 768***

DALVEER BHANDARI, J. 1. This is a very unusual and extraordinary litigation where even after fifteen years of the final judgment of this court (date of judgment 13th February, 1996) the litigation has been deliberately kept alive by filing one interlocutory application or the other in order to avoid compliance of the judgment. The said judgment of this Court has not been permitted to acquire finality till date. This is a classic example how by abuse of the process of law even the final judgment of the apex court can be circumvented for more than a decade and a half. This is indeed a very serious matter concerning the sanctity and credibility of the judicial system in general and of the apex court in particular.

3. The basic facts of this case are taken from the judgment delivered in the Writ Petition No.967 of 1989. In the beginning of the judgment of this court delivered on February 13, 1996, it is observed as under:

It highlights the disregard, nay, contempt for law and lawful authorities on the part of some among the emerging breed of entrepreneurs, taking advantage, as they do, of the country's need for industrialisation and export earnings. Pursuit of profit has absolutely drained them of any feeling for fellow human beings - for that matter, for anything else. And the law seems to have been helpless. Systemic defects? It is such instances which have led many people in this country to believe that disregard of law pays and that the consequences of such disregard will never be visited upon them - particularly, if they are men with means. Strong words indeed - but nothing less would reflect the deep sense of hurt, the hearing of this case has instilled in us.

4. It seems that the court was prophetic when it made observation that at times men with means are successful in avoiding compliance of the orders of this court. This case is a classic illustration where even after decade and a half of the pronouncement of the judgment by this court based on the principle of 'polluter pays', till date the polluters (concerned industries in this case) have taken no steps to ecologically restore the entire village and its surrounding areas or complied with the directions of this court at all. The orders of this court were not implemented by keeping the litigation alive by filing interlocutory and interim applications even after dismissal of the writ petition, the review petition and the curative petition by this court.

223. The other aspect which has been dealt with in great details is to neutralize any unjust enrichment and undeserved gain made by the litigants. While adjudicating, the courts must keep the following principles in view.

1. It is the bounden duty and obligation of the court to neutralize any unjust enrichment and undeserved gain made by any party by invoking the jurisdiction of the court.

2. When a party applies and gets a stay or injunction from the court, it is always at the risk and responsibility of the party applying. An order of stay cannot be presumed to be conferment of additional right upon the litigating party.

3. Unscrupulous litigants be prevented from taking undue advantage by invoking jurisdiction of the Court.

4. A person in wrongful possession should not only be removed from that place as early as possible but be compelled to pay for wrongful use of that premises fine, penalty and costs. Any leniency would seriously affect the credibility of the judicial system.

5. No litigant can derive benefit from the mere pendency of a case in a court of law.

6. A party cannot be allowed to take any benefit of his own wrongs.

7. Litigation should not be permitted to turn into a fruitful industry so that the unscrupulous litigants are encouraged to invoke the jurisdiction of the court.

8. The institution of litigation cannot be permitted to confer any advantage on a party by delayed action of courts.

224. It may be pertinent to mention that even after dismissal of review petition and of the curative petition on 18.7.2002, the applicants (respondent Nos. 4 to 8) have been repeatedly filing one petition or the other in order to keep the litigation alive. It is indeed astonishing that the orders of this court have not been implemented till date. The applicants have made all possible efforts to avoid compliance of the judgment of this Court. This is a clear case of abuse of process of the court.

225. The Court in its order dated 04.11.1997 while accepting the report of the MOEF directed the applicant - M/s Hindustan Agro Chemical Ltd. to pay a sum of Rs.37.385 crores towards the costs of remediation. The amount which ought to have been deposited way back in 1997 has yet not been deposited by keeping the litigation alive.

226. We have carefully considered the facts and circumstances of this case. We have also considered the law declared by this Court and by other countries in a number of cases. We are clearly of the opinion that the concerned applicant-industry must deposit the amount as directed by this Court vide order dated 4.11.1997 with compound interest. The applicant-industry has deliberately not complied with the orders of this court since 4.11.1997. Thousands of villagers have been adversely affected because no effective remedial steps have been taken so far. The applicant- industry has succeeded in their design in not complying with the court's order by keeping the litigation alive.

227. Both these interlocutory applications being totally devoid of any merit are accordingly dismissed with costs.

Consequently, the applicant-industry is directed to pay Rs.37.385 crores along with compound interest @ 12% per annum from 4.11.1997 till the amount is paid or recovered.

228. The applicant-industry is also directed to pay costs of litigation. Even after final judgment of this Court, the litigation has been kept alive for almost 15 years. The respondents have been compelled to defend this litigation for all these years. Enormous court's time has been wasted for all these years.

229. On consideration of the totality of the facts and circumstances of this case, we direct the applicant-industry to pay costs of Rs.10 lakhs in both the Interlocutory Applications. The amount of costs would also be utilized for carrying out remedial measure in village Bichhri and surrounding areas in Udaipur District of Rajasthan on the direction of the concerned authorities.

230. In case the amount as directed by this Court and costs imposed by this Court are not paid within two months, the same would be recovered as arrears of the land revenue.

231. Both these interlocutory applications are accordingly disposed of.

Vellore Citizens Welfare Forum v. Union of India, AIR 1996 SC 2715

KULDIP SINGH, J. - This petition - public interest - under Article 32 of the Constitution of India has been filed by Vellore Citizens' Welfare Forum and is directed against the pollution which is being caused by enormous discharge of untreated effluent by the tanneries and other industries in the State of Tamil Nadu. It is stated that the tanneries are discharging untreated effluent into agricultural fields, roadsides, waterways and open lands. The untreated effluent is finally discharged in River Palar which is the main source of water supply to the residents of the area. According to the petitioner the entire surface and subsoil water of River Palar has been polluted resulting in non-availability of potable water to the residents of the area. It is stated that the tanneries in the State of Tamil Nadu have caused environmental degradation in the area. According to the preliminary survey made by the Tamil Nadu Agricultural University Research Centre, Vellore nearly 35,000 hectares of agricultural land in the tanneries belt has become either partially or totally unfit for cultivation. It has been further stated in the petition that the tanneries use about 170 types of chemicals in the chrome tanning processes. The said chemicals include sodium chloride, lime, sodium sulphate, chlorium (*sic*) sulphate, fat, liquor, ammonia and sulphuric acid besides dyes which are used in large quantities. Nearly 35 litres of water is used for processing one kilogram of finished leather, resulting in dangerously enormous quantities of toxic effluents being let out in the open by the tanning industry. These effluents have spoiled the physico-chemical properties of the soil and have contaminated groundwater by percolation. According to the petitioner an independent survey conducted by Peace Members, a non-governmental organisation, covering 13 villages of Dindigul and Peddiar Chatram Anchayat Unions, reveals that 350 wells out of total of 467 used for drinking and irrigation purposes have been polluted. Women and children have to walk miles to get drinking water.

9. It is no doubt correct that the leather industry in India has become a major foreign exchange earner and at present Tamil Nadu is the leading exporter of finished leather accounting for approximately 80 per cent of the country's export. Though the leather industry is of vital importance to the country as it generates foreign exchange and provides employment avenues it has no right to destroy the ecology, degrade the environment and pose as a health-hazard. It cannot be permitted to expand or even to continue with the present production unless it tackles by itself the problem of pollution created by the said industry.

10. The traditional concept that development and ecology are opposed to each other is no longer acceptable. "Sustainable Development" is the answer. In the international sphere, "Sustainable Development" as a concept came to be known for the first time in the Stockholm Declaration of 1972. Thereafter, in 1987 the concept was given a definite shape by the World Commission on Environment and Development in its report called "***Our Common Future***". The Commission was chaired by the then Prime Minister of Norway, Ms G.H. Brundtland and as such the report is popularly known as "***Brundtland Report***". In 1991 the World Conservation Union, United Nations Environment Programme and Worldwide Fund for Nature, jointly came out with a document called "Caring for the Earth" which is a strategy for sustainable living. Finally, came the Earth Summit held in June 1992 at Rio which saw the largest gathering of world leaders ever in the history — deliberating and chalking out a blueprint for the survival of the planet. Among the tangible achievements of the Rio

Conference was the signing of two conventions, one on biological diversity and another on climate change. These conventions were signed by 153 nations. The delegates also approved by consensus three non-binding documents namely, a Statement on Forestry Principles, a declaration of principles on environmental policy and development initiatives and Agenda 21, a programme of action into the next century in areas like poverty, population and pollution. During the two decades from Stockholm to Rio “Sustainable Development” has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting ecosystems. “Sustainable Development” as defined by the Brundtland Report means “Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs”. We have no hesitation in holding that “Sustainable Development” as a balancing concept between ecology and development has been accepted as a part of the customary international law though its salient features have yet to be finalised by the international law jurists.

11. Some of the salient principles of “Sustainable Development”, as culled out from Brundtland Report and other international documents, are Inter-Generational Equity, Use and Conservation of Natural Resources, Environmental Protection, the Precautionary Principle, Polluter Pays Principle, Obligation to Assist and Cooperate, Eradication of Poverty and Financial Assistance to the developing countries. We are, however, of the view that “The Precautionary Principle” and “The Polluter Pays Principle” are essential features of “Sustainable Development”. The “Precautionary Principle” - in the context of the municipal law - means:

(i) Environmental measures - by the State Government and the statutory authorities - must anticipate, prevent and attack the causes of environmental degradation.

(ii) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

(iii) The “onus of proof” is on the actor or the developer/industrialist to show that his action is environmentally benign.

12. “The Polluter Pays Principle” has been held to be a sound principle by this Court in *Indian Council for Enviro-Legal Action v. Union of India* [(1996 AIR SCW 1069)]. The Court observed:

(W)e are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country.

The Court ruled that:

(O)nce the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity *irrespective* of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on.

Consequently the polluting industries are “absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove sludge and other pollutants

lying in the affected areas”. The “Polluter Pays Principle” as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of “Sustainable Development” and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.

13. The Precautionary Principle and the Polluter Pays Principle have been accepted as part of the law of the land. Article 21 of the Constitution of India guarantees protection of life and personal liberty. [*Articles 47, 48-A and 51-A(g) of the Constitution were quoted*]

Apart from the constitutional mandate to protect and improve the environment there are plenty of post-independence legislations on the subject but more relevant enactments for our purpose are: the Water (Prevention and Control of Pollution) Act, 1974 (the Water Act), the Air (Prevention and Control of Pollution) Act, 1981 (the Air Act) and the Environment (Protection) Act, 1986 (the Environment Act). The Water Act provides for the constitution of the Central Pollution Control Board by the Central Government and the constitution of the State Pollution Control Boards by various State Governments in the country. The Boards function under the control of the Governments concerned. The Water Act prohibits the use of streams and wells for disposal of polluting matters. It also provides for restrictions on outlets and discharge of effluents without obtaining consent from the Board. Prosecution and penalties have been provided which include sentence of imprisonment. The Air Act provides that the Central Pollution Control Board and the State Pollution Control Boards constituted under the Water Act shall also perform the powers and functions under the Air Act. The main function of the Boards, under the Air Act, is to improve the quality of the air and to prevent, control and abate air pollution in the country. We shall deal with the Environment Act in the latter part of this judgment.

14. In view of the above-mentioned constitutional and statutory provisions we have no hesitation in holding that the Precautionary Principle and the Polluter Pays Principle are part of the environmental law of the country.

15. Even otherwise once these principles are accepted as part of the Customary International Law there would be no difficulty in accepting them as part of the domestic law. It is almost an accepted proposition of law that the rules of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the courts of law.

16. The constitutional and statutory provisions protect a person’s right to fresh air, clean water and pollution-free environment, but the source of the right is the inalienable common law right of clean environment. It would be useful to quote a paragraph from Blackstone’s commentaries on the Laws of England [*Commentaries on the Laws of England of Sir William Blackstone*, Vol. III, fourth edition published in 1876]. Chapter XIII, “Of Nuisance” depicts the law on the subject in the following words:

Also, if a person keeps his hogs, or other noisome animals, or allows filth to accumulate on his premises, so near the house of another, that the stench incommodes him and makes the air unwholesome, this is an injurious nuisance, as it tends to deprive him of the use and

benefit of his house. A like injury is, if one's neighbour sets up and exercises any offensive trade; as a tanner's, a tallow-chandler's, or the like; for though these are lawful and necessary trades, yet they should be exercised in remote places; for the rule is, 'sic utere tuo, ut alienum non leadas'; this therefore is an actionable nuisance. And on a similar principle a constant ringing of bells in one's immediate neighbourhood may be a nuisance.

With regard to other corporeal hereditaments; it is a nuisance to stop or divert water that used to run to another's meadow or mill; to corrupt or poison a watercourse, by erecting a dye-house or a lime-pit, for the use of trade, in the upper part of the stream; to pollute a pond, from which another is entitled to water his cattle; to obstruct a drain; or in short to do any act in common property, that in its consequences must necessarily tend to the prejudice of one's neighbour. So closely does the law of England enforce that excellent rule of gospel-morality, of 'doing to others, as we would they should do unto ourselves'.

18. The Statement of Objects and Reasons to the Environment Act, *inter alia*, states as under:

The decline in environmental quality has been evidenced by increasing pollution, loss of vegetal cover and biological diversity, excessive concentrations of harmful chemicals in the ambient atmosphere and in food-chains, growing risks of environmental accidents and threats to life-support systems. The world community's resolve to protect and enhance the environmental quality found expression in the decisions taken at the United Nations Conference on the Human Environment held in Stockholm in June 1972. The Government of India participated in the Conference and strongly voiced the environmental concerns. While several measures have been taken for environmental protection both before and after the Conference, the need for a general legislation further to implement the decisions of the Conference has become increasingly evident.

Existing laws generally focus on specific types of pollution or on specific categories of hazardous substances. Some major areas of environmental hazards are not covered. There also exist uncovered gaps in areas of major environmental hazards. There are inadequate linkages in handling matters of industrial and environmental safety. Control mechanisms to guard against slow, insidious build-up of hazardous substances especially new chemicals in the environment, are weak. Because of a multiplicity of regulatory agencies, there is need for an authority which can assume the lead role for studying, planning and implementing long-term requirements of environmental safety and to give direction to, and coordinate a system of speedy and adequate response to emergency situations threatening the environment.

In view of what has been stated above, there is urgent need for the enactment of a general legislation on environmental protection which *inter alia*, should enable coordination of activities of the various regulatory agencies, creation of an authority or authorities with adequate powers for environmental protection, regulation of discharge of environmental pollutants and handling of hazardous substances, speedy response in the event of accidents threatening the environment and deterrent punishment to those who endanger human environment, safety and health.

[Sections 3, 4, 5, 7 and 8 of the Environment Act and Rules 3(1), 3(2) and 5(1) of the Environment (Protection) Rules, 1986 were quoted by the court.]

20. It is thus obvious that the Environment Act contains useful provisions for controlling pollution. The main purpose of the Act is to create an authority or authorities under Section 3(3) of the Act with adequate powers to control pollution and protect the environment. It is a pity that till date no authority has been constituted by the Central Government. The work which is required to be done by an authority in terms of Section 3(3) read with other provisions of the Act is being done by this Court and the other courts in the country. It is high time that the Central Government realises its responsibility and statutory duty to protect the degrading environment in the country. If the conditions in the five districts of Tamil Nadu, where tanneries are operating, are permitted to continue then in the near future all rivers/canals shall be polluted, underground waters contaminated, agricultural lands turned barren and the residents of the area exposed to serious diseases. It is, therefore, necessary for this Court to direct the Central Government to take immediate action under the provisions of the Environment Act.

21. There are more than 900 tanneries operating in the five districts of Tamil Nadu. Some of them may, by now, have installed the necessary pollution control measures; they have been polluting the environment for over a decade and in some cases even for a longer period. This Court has in various orders indicated that these tanneries are liable to pay pollution fine. The polluters must compensate the affected persons and also pay the cost of restoring the damaged ecology.

22. Mr. M.C. Mehta, the learned counsel for the petitioner has invited our attention to the notification GOMs No. 213 dated 30-3-1989 which reads as under:

1. In the government order first read above, the Government have ordered, among other things, that no industry causing serious water pollution should be permitted within one kilometre from the embankments of rivers, streams, dams, etc. and that the Tamil Nadu Pollution Control Board should furnish a list of such industries to all local bodies. It has been suggested that it is necessary to have a sharper definition for water sources so that ephemeral water collections like rainwater ponds, drains, sewerages (bio-degradable) etc. may be excluded from the purview of the above order. The Chairman, Tamil Nadu Pollution Control Board has stated that the scope of the government order may be restricted to reservoirs, rivers and public drinking-water sources. He has also stated that there should be a complete ban on location of highly polluting industries within 1 kilometre of certain water sources.

2. The Government has carefully examined the above suggestions. The Government impose a total ban on the setting up of the highly polluting industries mentioned in Annexure I to this order within one kilometre from the embankments of the water sources mentioned in Annexure II to this order.

3. The Government also direct that under any circumstances if any highly polluting industry is proposed to be set up within one kilometre from the embankments of the water sources other than those mentioned in Annexure II to this order, the Tamil Nadu Pollution Control Board should examine the case and obtain the approval of the Government for it.

Annexure I to the notification includes distilleries, tanneries, fertilizer, steel plants and foundries as the highly polluting industries. We have our doubts whether the above-quoted government order is being enforced by the Tamil Nadu Government. The order has been issued to control pollution and protect the environment. We are of the view that the order should be strictly enforced and no industry listed in Annexure I to the order should be permitted to be set up in the prohibited area.

24. The Board has the power under the Environment Act and the Rules to lay down standards for emissions or discharge of environmental pollutants. Rule 3(2) of the Rules even permits the Board to specify more stringent standards from those provided under the Rules. The NEERI having justified the standards stipulated by the Board, we direct that these standards are to be maintained by the tanneries and other industries in the State of Tamil Nadu.

25. Keeping in view the scenario discussed by us in this judgment, we order and direct as under:

1. The Central Government shall constitute an authority under Section 3(3) of the Environment (Protection) Act, 1986 and shall confer on the said authority all the powers necessary to deal with the situation created by the tanneries and other polluting industries in the State of Tamil Nadu. The authority shall be headed by a retired Judge of the High Court and it may have other members - preferably with expertise in the field of pollution control and environment protection - to be appointed by the Central Government. The Central Government shall confer on the said authority the powers to issue directions under Section 5 of the Environment Act and for taking measures with respect to the matters referred to in clauses (v), (vi), (vii), (viii), (ix), (x) and (xii) of sub-section (2) of Section 3. The Central Government shall constitute the authority before September 30, 1996.

2. The authority so constituted by the Central Government shall implement the "Precautionary Principle" and the "Polluter Pays Principle". The authority shall, with the help of expert opinion and after giving opportunity to the polluters concerned assess the loss to the ecology/environment in the affected areas and shall also identify the individuals/families who have suffered because of the pollution and shall assess the compensation to be paid to the said individuals/families. The authority shall further determine the compensation to be recovered from the polluters as cost of reversing the damaged environment. The authority shall lay down just and fair procedure for completing the exercise.

3. The authority shall compute the compensation under two heads namely, for reversing the ecology and for payment to individuals. A statement showing the total amount to be recovered, the names of the polluters from whom the amount is to be recovered, the amount to be recovered from each polluter, the persons to whom the compensation is to be paid and the amount payable to each of them shall be forwarded to the Collectors/District Magistrates of the area concerned. The Collector/District Magistrate shall recover the amount from the polluters, if necessary, as arrears of land

revenue. He shall disburse the compensation awarded by the authority to the affected persons/families.

4. The authority shall direct the closure of the industry owned/managed by a polluter in case he evades or refuses to pay the compensation awarded against him. This shall be in addition to the recovery from him as arrears of land revenue.

5. An industry may have set up the necessary pollution control device at present but it shall be liable to pay for the past pollution generated by the said industry which has resulted in the environmental degradation and suffering to the residents of the area.

6. We impose pollution fine of Rs 10,000 each on all the tanneries in the districts of North Arcot Ambedkar, Erode Periyar, Dindigul Anna, Trichi and Chengai M.G.R. The fine shall be paid before October 31, 1996 in the office of the Collector/District Magistrate concerned. We direct the Collectors/District Magistrates of these districts to recover the fines from the tanneries. The money shall be deposited, along with the compensation amount recovered from the polluters, under a separate head called "Environment Protection Fund" and shall be utilised for compensating the affected persons as identified by the authorities and also for restoring the damaged environment. The pollution fine is liable to be recovered as arrears of land revenue. The tanneries which fail to deposit the amount by October 31, 1996 shall be closed forthwith and shall also be liable under the Contempt of Courts Act, 1971.

7. The authority, in consultation with expert bodies like NEERI, Central Board, Board shall frame scheme/schemes for reversing the damage caused to the ecology and environment by pollution in the State of Tamil Nadu. The scheme/schemes so framed shall be executed by the State Government under the supervision of the Central Government. The expenditure shall be met from the "Environment Protection Fund" and from other sources provided by the State Government and the Central Government.

8. We suspend the closure orders in respect of all the tanneries in the five districts of North Arcot Ambedkar, Erode Periyar, Dindigul Anna, Trichi and Chengai M.G.R. We direct all the tanneries in the above five districts to set up CETPs or Individual Pollution Control Devices on or before November 30, 1996. Those connected with CETPs shall have to install in addition the primary devices in the tanneries. All the tanneries in the above five districts shall obtain the consent of the Board to function and operate with effect from December 15, 1996. The tanneries who are refused consent or who fail to obtain the consent of the Board by December 15, 1996 shall be closed forthwith.

9. We direct the Superintendent of Police and the Collector/District Magistrate/Deputy Commissioner of the district concerned to close all those tanneries with immediate effect who fail to obtain the consent from the Board by the said date. Such tanneries shall not be reopened unless the authority permits them to do so. It would be open to the authority to close such tanneries permanently or to direct their relocation.

10. Government Order No. 213 dated March 30, 1989 shall be enforced forthwith. No new industry listed in Annexure I to the notification shall be permitted to be set up within the prohibited area. The authority shall review the cases of all the industries which are

already operating in the prohibited area and it would be open to the authority to direct the relocation of any of such industries.

11. The standards stipulated by the Board regarding total dissolved solids (TDS) and approved by the NEERI shall be operative. All the tanneries and other industries in the State of Tamil Nadu shall comply with the said standards. The quality of ambient waters has to be maintained through the standards stipulated by the Board.

26. We have issued comprehensive directions for achieving the end result in this case. It is not necessary for this Court to monitor these matters any further. We are of the view that the Madras High Court would be in a better position to monitor these matters hereinafter. We, therefore, request the Chief Justice of the Madras High Court to constitute a Special Bench "Green Bench" to deal with this case and other environmental matters. We make it clear that it would be open to the Bench to pass any appropriate order/orders keeping in view the directions issued by us. We may mention that "Green Benches" are already functioning in Calcutta, Madhya Pradesh and some other High Courts. We direct the Registry of this Court to send the records to the Registry of the Madras High Court within one week. The High Court shall treat this matter as a petition under Article 226 of the Constitution of India and deal with it in accordance with law and also in terms of the directions issued by us.

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Narmada Bachao Andolan v. Union of India, AIR 2000 SC 3751

B.N. KIRPAL, J. (*For Dr. Anand, C.J. and himself*) (*Majority View*) - 5. The Central Water and Power Commission carried out a study of the hydroelectric potential of the Narmada basin in the year 1955. After the investigations were carried out by the Central Water and Power Commission, the Navagam site was finally decided upon in consultation with the erstwhile Government of Bombay for the construction of the dam. The Central Water and Power Commission forwarded its recommendations to the then Government of Bombay. At that time the implementation was contemplated in two stages. In Stage I, full reservoir level ("FRL") was restricted to 160 ft with provision for wider foundations to enable raising of the dam to FRL 300 ft in Stage II. A high-level canal was envisaged in Stage II. The erstwhile Bombay Government suggested two modifications, first FRL of the dam be raised from 300 to 320 ft in Stage II and second the provision of a powerhouse in the riverbed and a powerhouse at the head of the low-level canal be also made. This project was then reviewed by a panel of consultants appointed by the Ministry of Irrigation and Power who in a report in 1960 suggested that the two stages of the Navagam Dam as proposed should be combined into one and the dam be constructed to its final FRL 320 ft in one stage only. The consultants also stated that there was scope for extending irrigation from the high-level canal towards the Rann of Kutch.

8. In November 1963 the Union Minister of Irrigation and Power held a meeting with the Chief Ministers of Gujarat and Madhya Pradesh at Bhopal. As a result of the discussions and exchange of views, an agreement (Bhopal Agreement) was arrived at. The salient features of the said agreement were:

(a) That the Navagam Dam should be built to FRL 425 by the Government of Gujarat and its entire benefits were to be enjoyed by the State of Gujarat.

(b) Punasa Dam (Madhya Pradesh) should be built to FRL 850. The costs and power benefits of Punasa Power Project shall be shared in the ratio 1:2 between the Governments of Gujarat and Madhya Pradesh. Out of the power available to Madhya Pradesh half of the quantum was to be given to the State of Maharashtra for a period of 25 years for which the State of Maharashtra was to provide a loan to the extent of one-third the cost of Punasa Dam. The loan to be given by the State of Maharashtra was to be returned within a period of 25 years.

(c) Bargi Project was to be implemented by the State of Madhya Pradesh. Bargi Dam was to be built to FRL 1365 in Stage I and FRL 1390 in Stage II and the Governments of Gujarat and Maharashtra were to give a total loan assistance of Rs 10 crores for the same.

15. On 16-10-1969 the Government of India made another reference of certain issues raised by the State of Rajasthan to the said Tribunal.

16. The State of Madhya Pradesh filed a Demurrer before the Tribunal stating that the constitution of the Tribunal and reference to it were ultra vires of the Act. The Tribunal framed 24 issues which included the issues relating to Gujarat having a right to construct a high dam with FRL 530 feet and a canal with FSL 300 feet or thereabouts. Issues 1(a), 1(b),

1(A), 2, 3 and 19 were tried as preliminary issues of law and by its decision dated 23-2-1972 the said issues were decided against the respondents herein. It was held that the notification of the Central Government dated 16-10-1969 referring the matters raised by the State of Rajasthan by its complaint was ultra vires of the Act but constitution of the Tribunal and making a reference of the water dispute regarding inter-State River Narmada was not ultra vires of the Act and the Tribunal had jurisdiction to decide the dispute referred to it at the instance of the State of Gujarat. 17. Against the aforesaid judgment of the Tribunal on the preliminary issues, the States of Madhya Pradesh and Rajasthan filed appeals by special leave to this Court and obtained a stay of the proceedings before the Tribunal to a limited extent. This Court directed that the proceedings before the Tribunal should be stayed but discovery, inspection and other miscellaneous proceedings before the Tribunal may go on. The State of Rajasthan was directed to participate in these interlocutory proceedings.

20. On 16-8-1978, the Tribunal declared its award under Section 5(2) read with Section 5(4) of the Inter-State Water Disputes Act, 1956. Thereafter, References Nos. 1, 2, 3, 4 and 5 of 1978 were filed by the Union of India and the States of Gujarat, Madhya Pradesh, Maharashtra and Rajasthan respectively under Section 5(3) of the Inter-State Water Disputes Act, 1956. These references were heard by the Tribunal, which on 7-12-1979 gave its final order. The same was published in the Extraordinary Gazette by the Government of India on 12-12-1979. In arriving at its final decision, the issues regarding allocation, height of dam, hydrology and other related issues came to be subjected to comprehensive and thorough examination by the Tribunal. Extensive studies were done by the Irrigation Commission and Drought Research Unit of India, Meteorological Department in matters of catchment area of Narmada basin, major tributaries of Narmada basin, drainage area of Narmada basin, climate, rainfall, variability of rainfall, arid and semi-arid zones and scarcity area of Gujarat. The perusal of the report shows that the Tribunal also took into consideration various technical literature before giving its award.

22. The Tribunal in its award directed for the constitution of an inter-State administrative authority i.e. Narmada Control Authority for the purpose of securing compliance with and implementation of the decision and directions of the Tribunal. The Tribunal also directed for constitution of a Review Committee consisting of the Union Minister for Irrigation (now substituted by Union Minister for Water Resources) as its Chairperson and the Chief Ministers of Madhya Pradesh, Maharashtra, Gujarat and Rajasthan as its members. The Review Committee might review the decisions of the Narmada Control Authority and the Sardar Sarovar Construction Advisory Committee. The Sardar Sarovar Construction Advisory Committee headed by the Secretary, Ministry of Water Resources as its Chairperson was directed to be constituted for ensuring efficient, economical and early execution of the project.

23. The Narmada Control Authority is a high-powered committee having the Secretary, Ministry of Water Resources, Government of India as its Chairperson, Secretaries in the Ministry of Power, Ministry of Environment and Forests, Ministry of Welfare, Chief Secretaries of the four States concerned as members. In addition thereto, there are a number of technical persons like Chief Engineers as the members.

35. The Narmada Bachao Andolan, the petitioner herein, had been in the forefront of agitation against the construction of the Sardar Sarovar Dam. Apparently because of this, the Government of India, Ministry of Water Resources vide office memorandum dated 3-8-1993 constituted a Five- Member Group to be headed by Dr Jayant Patil, Member, Planning Commission and Dr Vasant Gowariker, Mr Ramaswamy R. Iyer, Mr L.C. Jain and Dr V.C. Kulandaiswamy as its members to continue discussions with the Narmada Bachao Andolan on issues relating to the Sardar Sarovar Project. Three months' time was given to this Group to submit its report.

36. During this time, the construction of the dam continued and on 22-2-1994 the Ministry of Water Resources conveyed its decision regarding closure of the construction sluices. This decision was given effect to and on 23-2-1994 closure of ten construction sluices was effected.

37. In April 1994 the petitioner filed the present writ petition *inter alia* praying that the Union of India and other respondents should be restrained from proceeding with the construction of the dam and they should be ordered to open the aforesaid sluices. It appears that the Gujarat High Court had passed an order staying the publication of the report of the Five-Member Group established by the Ministry of Water Resources. On 15-11-1994 this Court called for the report of the Five-Member Group and the Government of India was also directed to give its response to the said report.

38. By order dated 13-12-1994, this Court directed, that the report of the Five-Member Group be made public and responses to the same were required to be filed by the States and the report was to be considered by the Narmada Control Authority. This report was discussed by the Narmada Control Authority on 2-1-1995 wherein disagreement was expressed by the State of Madhya Pradesh on the issues of height and hydrology. Separate responses were filed in this Court to the said Five-Member Group report by the Government of India and the Governments of Gujarat and Madhya Pradesh.

Rival contentions

43. While strongly championing the cause of environment and of the tribals who are to be ousted as a result of the submergence, it was submitted that the environmental clearance which was granted in 1987 was without any or proper application of mind as complete studies in that behalf were not available and till this is done the project should not be allowed to proceed further. With regard to relief and rehabilitation a number of contentions were raised with a view to persuade this Court that further submergence should not take place and the height of the dam, if at all it is to be allowed to be constructed, should be considerably reduced as it is not possible to have satisfactory relief and rehabilitation of the oustees as per the Tribunal's award as a result of which their fundamental rights under Article 21 would be violated.

General issues relating to displacement of tribals and alleged violation of the rights under Article 21 of the Constitution

53. The submission of Shri Shanti Bhushan, learned Senior Counsel for the petitioners was that the forcible displacement of tribals and other marginal farmers from their land and other sources of livelihood for a project which was not in the national or public interest was a

violation of their fundamental rights under Article 21 of the Constitution of India read with ILO Convention No. 107 to which India is a signatory. Elaborating this contention, it was submitted that this Court had held in a large number of cases that international treaties and covenants could be read into the domestic law of the country and could be used by the courts to elucidate the interpretation of fundamental rights guaranteed by the Constitution. In this connection, our attention was drawn to ILO Convention No. 107 which stipulated that tribal populations shall not be removed from their lands without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security or in the interest of national economic development. It was further stated that the said Convention provided that in such cases where removal of this population is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to that of lands previously occupied by them, suitable to provide for their present needs and future development. Shri Shanti Bhushan further contended that while Sardar Sarovar Project will displace and have an impact on thousands of tribal families, it had not been proven that this displacement was required as an exceptional measure. He further submitted that given the seriously flawed assumptions of the project and the serious problems with the rehabilitation and environmental mitigation, it could not be said that the project was in the best national interest. It was also submitted that the question arose whether the Sardar Sarovar Project could be said to be in the national and public interest in view of its current best estimates of cost, benefits and evaluation of alternatives and specially in view of the large displacement of tribals and other marginal farmers involved in the project. Elaborating this contention, it was contended that serious doubts had been raised about the benefits of the project - the very rationale which was sought to justify the huge displacement and the massive environmental impacts etc. It was contended on behalf of the petitioners that a project which was sought to be justified on the grounds of providing a permanent solution to water problems of the drought-prone areas of Gujarat would touch only the fringes of these areas, namely, Saurashtra and Kutch and even this water, which was allocated on paper, would not really accrue due to a host of reasons.

54. Refuting the aforesaid arguments, it has been submitted on behalf of the Union of India and the State of Gujarat that the petitioners have given a highly exaggerated picture of the submergence and other impacts of this project. It was also submitted that the petitioner's assertion that there was large-scale relocation and uprooting of tribals was not factually correct. According to the respondents, the project would affect only 245 villages in Gujarat, Maharashtra and Madhya Pradesh due to pondage and backwater effect corresponding to 1 in 100-year flood. The State-wise break-up of affected villages and the number of project-affected families (PAFs) shows that only four villages would be fully affected (three in Gujarat and one in Madhya Pradesh) and 241 would be partially affected (16 in Gujarat, 33 in Maharashtra and 192 in Madhya Pradesh). The total project-affected families who would be affected were 40,827.

Environmental issues

63. The four issues raised under this head by Shri Shanti Bhushan are as under:

I. Whether the execution of a large project, having diverse and far-reaching environmental impact, without the proper study and understanding of its environmental

impact and without proper planning of mitigative measures is a violation of fundamental rights of the affected people guaranteed under Article 21 of the Constitution of India?

II. Whether the diverse environmental impacts of the Sardar Sarovar Project have been properly studied and understood?

III. Whether any independent authority has examined the environmental costs and mitigative measures to be undertaken in order to decide whether the environmental costs are acceptable and mitigative measures practical?

IV. Whether the environmental conditions imposed by the Ministry of Environment have been violated and if so, what is the legal effect of the violations?

64. According to Shri Shanti Bhushan, when the environmental clearance was given in 1987, proper study and analysis of the environmental impacts and mitigative measures which were required to be taken, were not available and, therefore, this clearance was not valid. The decision to construct the dam was stated to be a political one and was not a considered decision after taking into account the environmental impacts of the project. The execution of SSP without a comprehensive assessment and evaluation of its environmental impacts and a decision regarding its acceptability was alleged to be a violation of the rights of the affected people under Article 21 of the Constitution of India. It was further submitted that no independent authority has examined vehemently the environmental costs and mitigative measures to be undertaken in order to decide whether the environmental costs are acceptable and mitigative measures practical. With regard to the environmental clearance given in June 1987, the submission of Shri Shanti Bhushan was that this was the conditional clearance and the conditions imposed by the Ministry of Environment and Forests had been violated. The letter granting clearance, it was submitted, disclosed that even the basic minimum studies and plans required for the environmental impact assessment had not been done. Furthermore it was contended that in the year 1990, as the deadline for completion of the studies was not met, the Ministry of Environment and Forests had declared that the clearance had lapsed. The Secretary of the said Ministry had requested the Ministry of Water Resources to seek extension of the clearance but ultimately no extension was sought or given and the studies and action plans continued to lag to the extent that there was no comprehensive environmental impact assessment of the project, proper mitigation plans were absent and the costs of the environmental measures were neither fully assessed nor included in the project costs. In support of his contentions, Shri Shanti Bhushan relied upon the report of a commission called the Independent Review or the Morse Commission. The said Commission had been set up by World Bank and it submitted its report in June 1992. In its report, the Commission had adversely commented on practically all aspects of the project.

65. Shri Shanti Bhushan submitted that it had become necessary for some independent judicial authority to review the entire project, examine the current-best estimates of all costs (social, environmental, financial), benefits and alternatives in order to determine whether the project is required in its present form in the national interest, or whether it needs to be restructured/modified.

66. Shri Shanti Bhushan further submitted that environmental impacts of the projects were going to be massive and full assessment of these impacts had not been done. According

to him the latest available studies show that studies and action plans had not been completed and even now they were lagging behind *pari passu*. It was also contended that mere listing of the studies does not imply that everything is taken care of. Some of the studies were of poor quality and based on improper data and no independent body had subjected these to critical evaluation.

Re: environmental clearance

67. As considerable stress was laid by Shri Shanti Bhushan challenging the validity of the environmental clearance granted in 1987 *inter alia* on the ground that it was not preceded by adequate studies and it was not a considered opinion and there was non-application of mind while clearing the project, we first propose to deal with the contention.

68. The events after the award and up to the environmental clearance granted by the Government *vide* its letter dated 24-6-1987 would clearly show that some studies, though incomplete, had been made with regard to different aspects of the environment. Learned counsel for the respondents stated that in fact on the examination of the situation, the claim made with regard to the satisfactory progress was not correct. In order to carry out the directions in the award about the setting up of an authority, the Inter-State Water Disputes Act, 1956 was amended and Section 6-A was inserted to set out how a statutory body could be constituted under the Act. On 10-9-1980 in exercise of the powers conferred by Section 6-A of the Act the Central Government framed a scheme, constituted Narmada Control Authority to give effect to the decision of the award.

103. The clearance of June 1987 required the work to be done *pari passu* with the construction of the dams and the filling of the reservoir. The area wherein the rainfall water is collected and drained into the river or reservoir is called catchment area and the catchment area treatment was essentially aimed at checking of soil erosion and minimising the silting in the reservoir within the immediate vicinity of the reservoir in the catchment area. The respondents had proceeded on the basis that the requirement in the letter of June 1987 that catchment area treatment programme and rehabilitation plans be drawn up and completed ahead of reservoir filling would imply that the work was to be done *pari passu*, as far as catchment area treatment programme is concerned, with the filling of reservoir. Even though the filling of the reservoir started in 1994, the impoundment award was much less than the catchment area treatment which had been affected. The status of compliance with respect to *pari passu* conditions indicated that in the year 1999, the reservoir level was 88.0 metres, the impoundment area was 6881 hectares (19%) and the area where catchment treatment had been carried out was 1,28,230 hectares being 71.56% of the total work required to be done. The minutes of the Environmental Subgroup as on 28-9-1999 stated that catchment area treatment works were nearing completion in the States of Gujarat and Maharashtra. Though, there was some slippage in Madhya Pradesh, however, overall works by and large were on schedule. This clearly showed that the monitoring of the catchment treatment plan was being done by the Environmental Subgroup quite effectively.

105. While granting approval in 1987 to the submergence of forest land and/or diversion thereof for SSP, the Ministry of Environment and Forests had laid down a condition that for every hectare of forest land submerged or diverted for construction of the project, there

should be compensatory afforestation on one hectare of non-forest land plus reforestation on two hectares of degraded forest. According to the State of Gujarat, it had fully complied with the condition by raising afforestation in 4650 hectares of non-forest areas and 9300 hectares in degraded forest areas before 1995-96 against the impoundment area of 19%. The *pari passu* achievement of afforestation in Gujarat was stated to be 99.62%.

106. If afforestation was taking place on wasteland or lesser quality land, it did not necessarily follow, as was contended by the petitioners, that the forests would be of lesser quality or quantity.

121. In ***A.P. Pollution Control Board*** case, this Court was dealing with the case where an application was submitted by a company to the Pollution Control Board for permission to set up an industry for the production of “BSS castor oil derivatives”. Though later on a letter of intent had been received by the said Company, the Pollution Control Board did not give its no-objection certificate to the location of the industry at the site proposed by it. The Pollution Control Board, while rejecting the application for consent, *inter alia*, stated that the unit was a polluting industry which fell under the red category of polluting industry and it would not be desirable to locate such an industry in the catchment area of Himayat Sagar, a lake in Andhra Pradesh. The appeal filed by the Company against the decision of the Pollution Control Board was accepted by the appellate authority. A writ petition was filed in the nature of public interest litigation and also by the Gram Panchayat challenging the order of the Appellate Authority but the same was dismissed by the High Court. On the other hand, the writ petition filed by the Company was allowed and the High Court directed the Pollution Control Board to grant consent subject to such conditions as may be imposed by it.

122. It is this decision which was the subject-matter of challenge in this Court. After referring to the different concepts in relation to environmental cases like the “precautionary principle” and the “polluter-pays principle”, this Court relied upon the earlier decision of this Court in ***Vellore Citizens’ Welfare Forum v. Union of India*** [AIR 1996 SC 2715] and observed that there was a new concept which places the burden of proof on the developer or industrialist who is proposing to alter the status quo and has become part of our environmental law. It was noticed that inadequacies of science had led to the precautionary principle and the said “precautionary principle” in its turn had led to the special principle of burden of proof in environmental cases where burden as to the absence of injurious effect of the actions proposed is placed on those who want to change the *status quo*. At p. 735, this Court, while relying upon a report of the International Law Commission, observed as follows:

38. The precautionary principle suggests that where there is an identifiable risk of serious or irreversible harm, including, for example, extinction of species, widespread toxic pollution in major threats to essential ecological processes, it may be appropriate to place the burden of proof on the person or entity proposing the activity that is potentially harmful to the environment.

123. It appears to us that the “precautionary principle” and the corresponding burden of proof on the person who wants to change the status quo will ordinarily apply in a case of polluting or other project or industry where the extent of damage likely to be inflicted is not known. When there is a state of uncertainty due to lack of data or material about the extent of

damage or pollution likely to be caused then, in order to maintain the ecology balance, the burden of proof that the said balance will be maintained must necessarily be on the industry or the unit which is likely to cause pollution. On the other hand where the effect on ecology or environment of setting up of an industry is known, what has to be seen is that if the environment is likely to suffer, then what mitigative steps can be taken to offset the same. Merely because there will be a change is no reason to presume that there will be an ecological disaster. It is when the effect of the project is known that the principle of sustainable development would come into play which will ensure that mitigative steps are and can be taken to preserve the ecological balance. Sustainable development means what type or extent of development can take place which can be sustained by nature/ecology with or without mitigation.

124. In the present case we are not concerned with the polluting industry which is being established. What is being constructed is a large dam. The dam is neither a nuclear establishment nor a polluting industry. The construction of a dam undoubtedly would result in the change of environment but it will not be correct to presume that the construction of a large dam like the Sardar Sarovar will result in an ecological disaster. India has an experience of over 40 years in the construction of dams. The experience does not show that construction of a large dam is not cost-effective or leads to ecological or environmental degradation. On the contrary there has been ecological upgradation with the construction of large dams. What is the impact on environment with the construction of a dam is well known in India and, therefore, the decision in *A.P. Pollution Control Board* case [AIR 1999 SC 812] will have no application in the present case.

125. Reference was made by Shri Shanti Bhushan to the decision of the United States District Court in the case of *Sierra Club etc. v. Robert F. Froehlke* [(1973) 350bF. Supp.1280]. In that case work had begun on Wallisville Project which, *inter alia*, consisted of construction of a low dam. It was the case of the plaintiff that the construction of the project would destroy hundreds of thousands of trees and enormous grain, fish and other wildlife will lose their habitat and perish. It was contended that the defendants were proceeding in violation of law by not complying with the requirements of the National Environmental Policy Act, 1969 (NEPA). The plaintiff, *inter alia*, sought an injunction for restraining the undertaking of the project in violation of the said Act. The District Court held that notwithstanding that a substantial amount of work had already been done in connection with the project but due to the failure to satisfy full disclosure requirement of NEPA, injunction would be issued to halt any further construction until requirements of NEPA had been complied with, that even though there was no Act like NEPA in India at the time when environmental clearance was granted in 1987, nevertheless by virtue of Stockholm Convention and Article 21 of the Constitution the principles of *Sierra Club decision* should be applied.

126. In India notification had been issued under Section 3 of the Environmental Act regarding prior environmental clearance in the case of undertaking of projects and setting up of industries including the inter-State river project. This notification has been made effective from 1994. There was, at the time when the environmental clearance was granted in 1987, no obligation to obtain any statutory clearance. The environmental clearance which was granted

in 1987 was essentially administrative in nature, having regard and concern for the environment in the region. Change in the environment does not *per se* violate any right under Article 21 of the Constitution of India especially when ameliorative steps are taken not only to preserve but to improve the ecology and environment and in case of displacement, prior relief and rehabilitation measures take place *pari passu* with the construction of the dam.

Conclusion

223. Water is one element without which life cannot sustain. Therefore, it is to be regarded as one of the primary duties of the Government to ensure availability of water to the people.

224. There are only three sources of water. They are rainfall, groundwater or from the river. A river itself gets water either by the melting of snow or from the rainfall while the groundwater is again dependent on the rainfall or from the river. In most parts of India, rainfall takes place during a period of about 3 to 4 months known as the monsoon season. Even at the time when the monsoon is regarded as normal, the amount of rainfall varies from region to region. For example, North-Eastern States of India receive much more rainfall than some of the other States like Punjab, Haryana or Rajasthan. Dams are constructed not only to provide water whenever required but they also help in flood control by storing extra water. Excess of rainfall causes floods while deficiency thereof results in drought. Studies show that 75% of the monsoon water drains into the sea after flooding a large land area due to absence of the storage capacity. According to a study conducted by the Central Water Commission in 1998, surface water resources were estimated at 1869 cu km and rechargeable groundwater resources at 432 cu km. It is believed that only 690 cu km of surface water resources (out of 1869 cu km) can be utilised by storage. At present the storage capacity of all dams in India is 174 cu km which is incidentally less than the capacity of Kariba Dam in Zambia/Zimbabwe (180.6 cu km) and only 12 cu km more than Aswan High Dam of Egypt.

225. While the reservoir of a dam stores water and is usually situated at a place where it can receive a lot of rainfall, the canals take water from this reservoir to distant places where water is a scarce commodity. It was, of course, contended on behalf of the petitioner that if the practice of water harvesting is resorted to and some check dams are constructed, there would really be no need for a high dam like Sardar Sarovar. The answer to this given by the respondent is that water harvesting serves a useful purpose but it cannot ensure adequate supply to meet all the requirements of the people. Water harvesting means to collect, preserve and use the rain water. The problem of the area in question is that there is deficient rainfall and small-scale water-harvesting projects may not be adequate. During the non-rainy days, one of the essential ingredients of water harvesting is the storing of water. It will not be wrong to say that the biggest dams to the smallest percolating tanks meant to tap the rain water are nothing but water-harvesting structures to function by receiving water from the common rainfall.

226. Dam serves a number of purposes. It stores water, generates electricity and releases water throughout the year and at times of scarcity. Its storage capacity is meant to control floods and the canal system which emanates therefrom is meant to *convey* and provide water

for drinking, agriculture and industry. In addition thereto, it can also be a source of generating hydropower. Dam has, therefore, necessarily to be regarded as an infrastructural project.

227. There are three stages with regard to the undertaking of an infrastructural project. One is conception or planning, second is decision to undertake the project and the third is the execution of the project. The conception and the decision to undertake a project is to be regarded as a policy decision. While there is always a need for such projects not being unduly delayed, it is at the same time expected that a thorough possible study will be undertaken before a decision is taken to start a project. Once such a considered decision is taken, the proper execution of the same should be undertaken expeditiously. It is for the Government to decide how to do its job. When it has put a system in place for the execution of a project and such a system cannot be said to be arbitrary, then the only role which a court may have to play is to see that the system works in the manner it was envisaged.

228. A project may be executed departmentally or by an outside agency. The choice has to be of the Government. When it undertakes the execution itself, with or without the help of another organisation, it will be expected to undertake the exercise according to some procedure or set manner. NCA was constituted to give effect to the award, various subgroups have been established under NCA and to look after the grievances of the resettled oustees, each State has set up a grievance redressal machinery. Over and above NCA is the Review Committee. There is no reason now to assume that these authorities will not function properly. In our opinion the Court should have no role to play.

229. It is now well settled that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy-making process and the courts are ill-equipped to adjudicate on a policy decision so undertaken. The court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution. Even then any challenge to such a policy decision must be before the execution of the project is undertaken. Any delay in the execution of the project means overrun in costs and the decision to undertake a project, if challenged after its execution has commenced, should be thrown out at the very threshold on the ground of laches if the petitioner had the knowledge of such a decision and could have approached the court at that time. Just because a petition is termed as a PIL does not mean that ordinary principles applicable to litigation will not apply. Laches is one of them.

230. Public interest litigation (PIL) was an innovation essentially to safeguard and protect the human rights of those people who were unable to protect themselves. With the passage of time PIL jurisdiction has been ballooning so as to encompass within its ambit subjects such as probity in public life, granting of largess in the form of licences, protecting environment and the like. But the balloon should not be inflated so much that it bursts. Public interest litigation should not be allowed to degenerate to becoming publicity interest litigation or private inquisitiveness litigation.

231. While exercising jurisdiction in PIL cases the court has not forsaken its duty and role as a court of law dispensing justice in accordance with law. It is only where there has been a

failure on the part of any authority in acting according to law or in non-action or acting in violation of the law that the court has stepped in. No directions are issued which are in conflict with any legal provisions. Directions have, in appropriate cases, been given where the law is silent and inaction would result in violation of the fundamental rights or other legal provisions.

232. While protecting the rights of the people from being violated in any manner, utmost care has to be taken that the court does not transgress its jurisdiction. There is, in our constitutional framework a fairly clear demarcation of powers. The court has come down heavily whenever the executive has sought to impinge upon the court's jurisdiction.

233. At the same time, in exercise of its enormous power the court should not be called upon to or undertake governmental duties or functions. The courts cannot run the Government nor can the administration indulge in abuse or non-use of power and get away with it. The essence of judicial review is a constitutional fundamental. The role of the higher judiciary under the Constitution casts on it a great obligation as the sentinel to defend the values of the Constitution and the rights of Indians. The courts must, therefore, act within their judicially permissible limitations to uphold the rule of law and harness their power in public interest. It is precisely for this reason that it has been consistently held by this Court that in matters of policy the court will not interfere. When there is a valid law requiring the Government to act in a particular manner the court ought not to, without striking down the law, give any direction which is not in accordance with law. In other words the court itself is not above the law.

234. In respect of public projects and policies which are initiated by the Government the courts should not become an approval authority. Normally such decisions are taken by the Government after due care and consideration. In a democracy, welfare of the people at large, and not merely of a small section of the society, has to be the concern of a responsible Government. If a considered policy decision has been taken, which is not in conflict with any law or is not mala fide, it will not be in public interest to require the court to go into and investigate those areas which are the function of the executive. For any project which is approved after due deliberation the court should refrain from being asked to review the decision just because a petitioner in filing a PIL alleges that such a decision should not have been taken because an opposite view against the undertaking of the project, which view may have been considered by the Government, is possible. When two or more options or views are possible and after considering them the Government takes a policy decision it is then not the function of the court to go into the matter afresh and, in a way, sit in appeal over such a policy decision.

235. What the petitioner wants the Court to do in this case is precisely that. The facts enumerated hereinabove clearly indicate that the Central Government had taken a decision to construct the dam as that was the only solution available to it for providing water to the water-scarce areas. It was known at that time that people will be displaced and will have to be rehabilitated. There is no material to enable this Court to come to the conclusion that the decision was *mala fide*. A hard decision need not necessarily be a bad decision.

236. Furthermore, environmental concern has not only to be of the area which is going to be submerged but also its surrounding area. The impact on environment should be seen in relation to the project as a whole. While an area of land will submerge but the construction of the dam will result in multifold improvement in the environment of the areas where the canal waters will reach. Apart from bringing drinking water within easy reach the supply of water to Rajasthan will also help in checking the advancement of the Thar Desert. Human habitation will increase there which, in turn, will help in protecting the so far porous border with Pakistan.

237. While considering Gujarat's demand for water, the Government had reports that with the construction of a high dam on River Narmada, water could not only be taken to the scarcity areas of northern Gujarat, Saurashtra and parts of Kutch but some water could also be supplied to Rajasthan.

238. Conflicting rights had to be considered. If for one set of people namely those of Gujarat, there was only one solution, namely, construction of a dam, the same would have an adverse effect on another set of people whose houses and agricultural land would be submerged in water. It is because of this conflicting interest that considerable time was taken before the project was finally cleared in 1987. Perhaps the need for giving the green signal was that while for the people of Gujarat, there was no other solution but to provide them with water from the Narmada, the hardships of the oustees from Madhya Pradesh could be mitigated by providing them with alternative lands, sites and compensation. In governance of the State, such decisions have to be taken where there are conflicting interests. When a decision is taken by the Government after due consideration and full application of mind, the court is not to sit in appeal over such decision.

239. Since long the people of India have been deriving the benefits of the river valley projects. At the time of independence, foodgrain was being imported into India but with the passage of time and the construction of more dams, the position has been reversed. The large-scale river valley projects *per se* all over the country have made India more than self-sufficient in food. Famines which used to occur have now become a thing of the past. Considering the benefits which have been reaped by the people all over India with the construction of the dams, the Government cannot be faulted with deciding to construct the high dam on River Narmada with a view to provide water not only to the scarcity areas of Gujarat but also to the small areas of the State of Rajasthan where shortage of water has been there since time immemorial.

240. In the case of projects of national importance where the Union of India and/or more than one State(s) are involved and the project would benefit a large section of the society and there is evidence to show that the said project had been contemplated and considered over a period of time at the highest level of the States and the Union of India and more so when the project is evaluated and approval granted by the Planning Commission, then there should be no occasion for any court carrying out any review of the same or directing its review by any outside or "independent" agency or body. In a democratic set-up, it is for the elected Government to decide what project should be undertaken for the benefit of the people. Once such a decision had been taken then unless and until it can be proved or shown that there is a

blatant illegality in the undertaking of the project or in its execution, the court ought not to interfere with the execution of the project.

241. Displacement of people living on the proposed project sites and the areas to be submerged is an important issue. Most of the hydrology projects are located in remote and inaccessible areas, where local population is, like in the present case, either illiterate or having marginal means of employment and the per capita income of the families is low. It is a fact that people are displaced by projects from their ancestral homes. Displacement of these people would undoubtedly disconnect them from their past, culture, custom and traditions, but then it becomes necessary to harvest a river for the larger good. A natural river is not only meant for the people close by but it should be for the benefit of those who can make use of it, being away from it or nearby. Realising the fact that displacement of these people would disconnect them from their past, culture, custom and traditions, the moment any village is earmarked for takeover for dam or any other developmental activity, the project-implementing authorities have to implement R&R programmes. The R&R plans are required to be specially drafted and implemented to mitigate problems whatsoever relating to all, whether rich or poor, landowner or encroacher, farmer or tenant, employee or employer, tribal or non-tribal. A properly drafted R&R plan would improve the living standards of displaced persons after displacement. For example residents of villages around Bhakra Nangal Dam, Nagarjuna Sagar Dam, Tehri, Bhilai Steel Plant, Bokaro and Bala Iron and Steel Plant and numerous other developmental sites are better off than people living in villages in whose vicinity no development project came in. It is not fair that tribals and the people in undeveloped villages should continue in the same condition without ever enjoying the fruits of science and technology for better health and have a higher quality of lifestyle. Should they not be encouraged to seek greener pastures elsewhere, if they can have access to it, either through their own efforts due to information exchange or due to outside compulsions. It is with this object in view that the R&R plans which are developed are meant to ensure that those who move must be better off in the new locations at government cost. In the present case, the R&R packages of the States, specially of Gujarat, are such that the living conditions of the oustees will be much better than what they had in their tribal hamlets.

242. The loss of forest because of any activity is undoubtedly harmful. Without going into the question as to whether the loss of forest due to river valley project because of submergence is negligible, compared to deforestation due to other reasons like cutting of trees for fuel, it is true that large dams cause submergence leading to loss of forest areas. But it cannot be ignored and it is important to note that these large dams also cause conversion of wasteland into agricultural land and make the area greener. Large dams can also become instruments in improving the environment, as has been the case in western Rajasthan, which transformed into a green area because of Indira Gandhi Canal which draws water from Bhakra Nangal Dam. This project not only allows the farmers to grow crops in deserts but also checks the spread of Thar Desert in the adjoining areas of Punjab and Haryana.

243. The environmental and ecological consideration must, of course, be given due consideration but with proper channelisation of developmental activities ecology and environment can be enhanced. For example, Periyar Dam Reservoir has become an elephant sanctuary with thick green forests all around while at the same time it wiped out famines that

used to haunt the district of Madurai in Tamil Nadu before its construction. Similarly Krishnaraja Sagar Dam which has turned Mandya District which was once covered with shrub forests with wild beasts into a prosperous one with green paddy and sugarcane fields all around.

244. So far a number of such river valley projects have been undertaken in all parts of India. The petitioner has not been able to point out a single instance where the construction of a dam has, on the whole, had an adverse environmental impact. On the contrary the environment has improved. That being so, there is no reason to suspect, with all the experience gained so far, that the position here will be any different and there will not be overall improvement and prosperity. It should not be forgotten that poverty is regarded as one of the causes of degradation of environment. With improved irrigation system the people will prosper. The construction of Bhakra Dam is a shining example for all to see how the backward area of erstwhile undivided Punjab has now become the granary of India with improved environment than what was there before the completion of the Bhakra Nangal Project.

245. The award of the Tribunal is binding on the States concerned. The said award also envisages the relief and rehabilitation measures which are to be undertaken. If for any reason, any of the State Governments involved lag behind in providing adequate relief and rehabilitation then the proper course, for a court to take, would be to direct the award's implementation and not to stop the execution of the project. This Court, as a Federal Court of the country specially in a case of inter-State river dispute where an award had been made has to ensure that the binding award is implemented. In this regard, the Court would have the jurisdiction to issue necessary directions to the State which, though bound, chooses not to carry out its obligations under the award. Just as an ordinary litigant is bound by the decree, similarly a State is bound by the award. Just as the execution of a decree can be ordered, similarly, the implementation of the award can be directed. If there is a shortfall in carrying out the R&R measures, a time-bound direction can and should be given in order to ensure the implementation of the award. Putting the project on hold is no solution. It only encourages the recalcitrant State to flout and not implement the award with impunity. This certainly cannot be permitted. Nor is it desirable in the national interest that where fundamental right to life of the people who continue to suffer due to shortage of water to such an extent that even the drinking water becomes scarce, non-cooperation of a State results in the stagnation of the project.

246. The clamour for the early completion of the project and for the water to flow in the canal is not only by Gujarat but is also raised by Rajasthan.

247. As per clause 3 of the final decision of the Tribunal published in the Gazette notification of India dated 12-12-1979 the State of Rajasthan has been allocated 0.5 MAF of Narmada water in national interest from Sardar Sarovar Dam. This was allocated to the State of Rajasthan to utilise the same for irrigation and drinking purposes in the arid and drought-prone areas of Jalore and Barmer Districts of Rajasthan situated on the international border with Pakistan, which have no other available source of water.

248. Water is the basic need for the survival of human beings and is part of the right to life and human rights as enshrined in Article 21 of the Constitution of India and can be served only by providing source of water where there is none. The resolution of UNO in 1977 to which India is a signatory, during the United Nations Water Conference resolved unanimously *inter alia* as under:

All people, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantum and of a quality equal to their basic needs.

249. Water is being made available by the State of Rajasthan through tankers to the civilians of these areas once in four days during summer season in a quantity, which is just sufficient for their survival. The districts of Barmer and Jalore are part of “Thar Desert” and on account of scarcity of water the desert area is increasing every year. It is a matter of great concern that even after half a century of freedom, water is not available to all citizens even for their basic drinking necessity, violating the human rights resolution of UNO and Article 21 of the Constitution of India. Water in the rivers of India has great potentiality to change the miserable condition of the arid, drought-prone and border areas of India.

250. The availability of drinking water will benefit about 1.91 lakh people residing in 124 villages in arid and drought-prone border areas of Jalore and Barmer Districts of Rajasthan who have no other source of water and are suffering grave hardship.

251. As already seen, the State of Madhya Pradesh is keen for the reduction of the dam's height to 436 ft. Apart from Gujarat and Rajasthan the State of Maharashtra also is not agreeable to this. The only benefit from the project which Maharashtra[†] would get is its share of hydel power from the project. The lowering of the height from 455 ft to 436 ft will take away this benefit even though 9399 hectares of its land will be submerged. With the reduction of height to 436 ft not only will there be loss of power generation but it would also render the generation of power seasonal and not throughout the year.

252. One of the indicators of the living standard of people is the per capita consumption of electricity. There is, however, perennial shortage of power in India and, therefore, it is necessary that the generation increases. The world over countries having rich water and river systems have effectively exploited these for hydel-power generation. In India, the share of hydel power in the total power generated was as high as 50% in the year 1962-63 but the share of hydel power started declining rapidly after 1980. There is more reliance now on thermal-power projects. But these thermal-power projects use fossil fuels, which are not only depleting fast but also contribute towards environmental pollution. Global warming due to the greenhouse effect has become a major cause of concern. One of the various factors responsible for this is the burning of fossil fuel in thermal-power plants. There is, therefore, international concern for reduction of greenhouse gases which is shared by World Bank resulting in the restriction of sanction of funds for thermal-power projects. On the other hand, the hydel power's contribution to the greenhouse effect is negligible and it can be termed ecology-friendly. Not only this but the cost of generation of electricity in hydel projects is significantly less. The award of the Tribunal has taken all these factors into consideration while determining the height of the dam at 455 ft. Giving the option of generating eco-

friendly electricity and substituting it by thermal power may not, therefore, be the best option. Perhaps the setting up of a thermal plant may not displace as many families as a hydel project may but at the same time the pollution caused by the thermal plant and the adverse effect on the neighbourhood could be far greater than the inconvenience caused in shifting and rehabilitating the oustees of a reservoir.

253. There is and has been in the recent past protests and agitations not only against hydel projects but also against the setting up of nuclear or thermal-power plants. In each case reasons are put forth against the execution of the proposed project either as being dangerous (in case of nuclear) or causing pollution and ecological degradation (in the case of thermal) or rendering people homeless and posing adverse environment impacts as has been argued in the present case. But then electricity has to be generated and one or more of these options exercised. What option to exercise, in our constitutional framework, is for the Government to decide keeping various factors in mind. In the present case, a considered decision has been taken and an award made, whereby a high dam having an FRL of 455 ft with capability of developing hydel power is to be constructed. In the facts and circumstances enumerated hereinabove, even if this Court could go into the question, the decision so taken cannot be faulted.

Directions

254. While issuing directions and disposing of this case, two conditions have to be kept in mind, (i) the completion of the project at the earliest, and (ii) ensuring compliance with the conditions on which clearance of the project was given including completion of relief and rehabilitation work and taking of ameliorative and compensatory measures for environmental protection in compliance with the scheme framed by the Government thereby protecting the rights under Article 21 of the Constitution. Keeping these principles in view, we issue the following directions:

(1) Construction of the dam will continue as per the award of the Tribunal.

(2) As the Relief and Rehabilitation Subgroup has cleared the construction up to 90 metres, the same can be undertaken immediately. Further raising of the height will be only *pari passu* with the implementation of the relief and rehabilitation measures and on the clearance by the Relief and Rehabilitation Subgroup. The Relief and Rehabilitation Subgroup will give clearance for further construction after consulting the three Grievance Redressal Authorities.

(3) The Environment Subgroup under the Secretary, Ministry of Environment and Forests, Government of India will consider and give, at each stage of the construction of the dam, environment clearance before further construction beyond 90 metres can be undertaken.

(4) The permission to raise the dam height beyond 90 metres will be given by the Narmada Control Authority, from time to time, after it obtains the above-mentioned clearances from the Relief and Rehabilitation Subgroup and the Environment Subgroup.

(5) The reports of the Grievance Redressal Authorities, and of Madhya Pradesh in particular, show that there is a considerable slackness in the work of identification of

land, acquisition of suitable land and the consequent steps necessary to be taken to rehabilitate the project oustees. We direct the States of Madhya Pradesh, Maharashtra and Gujarat to implement the award and give relief and rehabilitation to the oustees in terms of the packages offered by them and these States shall comply with any direction in this regard which is given either by NCA or the Review Committee or the Grievance Redressal Authorities.

(6) Even though there has been substantial compliance with the conditions imposed under the environment clearance, NCA and the Environment Subgroup will continue to monitor and ensure that all steps are taken not only to protect but to restore and improve the environment.

(7) NCA will within four weeks from today draw up an action plan in relation to further construction and the relief and rehabilitation work to be undertaken. Such an action plan will fix a time-frame so as to ensure relief and rehabilitation *pari passu* with the increase in the height of the dam. Each State shall abide by the terms of the action plan so prepared by NCA and in the event of any dispute or difficulty arising, representation may be made to the Review Committee. However, each State shall be bound to comply with the directions of NCA with regard to the acquisition of land for the purpose of relief and rehabilitation to the extent and within the period specified by NCA.

(8) The Review Committee shall meet whenever required to do so in the event of there being any unresolved dispute on an issue which is before NCA. In any event, the Review Committee shall meet at least once in three months so as to oversee the progress of construction of the dam and implementation of the R&R programmes.

If for any reason serious differences in implementation of the award arise and the same cannot be resolved in the Review Committee, the Committee may refer the same to the Prime Minister whose decision, in respect thereof, shall be final and binding on all concerned.

(9) The Grievance Redressal Authorities will be at liberty, in case the need arises, to issue appropriate directions to the respective States for due implementation of the R&R programmes and in case of non-implementation of its directions, GRAs will be at liberty to approach the Review Committee for appropriate orders.

(10) Every endeavour shall be made to see that the project is completed as expeditiously as possible.

This and connected petitions are disposed of in the aforesaid terms.

BHARUCHA, J. (*dissenting*) - I have read the judgment proposed to be delivered by my learned brother, the Hon'ble Mr Justice B.N. Kirpal. Respectfully, I regret my inability to agree therewith.

257. I take the view that the Sardar Sarovar Project does not require to be re-examined, having regard to its cost-effectiveness or otherwise, and that the seismicity aspect of the project has been sufficiently examined and no further consideration thereof is called for. I do not accept the submission on behalf of the petitioner that those ousted by reason of the canals

emanating from the reservoir in the project must have the same relief and rehabilitation benefits as those ousted on account of the reservoir itself; this is for the reason that the two fall in different classes.

258. Having said this, I turn to the aspect of the environmental clearance of the project. The Planning Commission accorded provisional sanction to the project subject to the environment clearance thereof being obtained. At the relevant time, the responsibility for giving environmental clearance lay with the Department of Environment in the Ministry of Environment and Forests of the Union Government. The Department had in January 1985 issued Guidelines for Environmental Impact Assessment of River Valley Projects. The preface thereof stated that environmental appraisal was an important responsibility assigned to the Department. It involved the evaluation of the environmental implications of, and the incorporation of necessary safeguards in the activities having a bearing on environmental quality. While river valley projects were a basic necessity to a country whose economy was largely based on agriculture, over the years the realisation had dawned that river valley projects had their due quota of positive and adverse impacts which had to be carefully assessed and balanced for achieving sustained benefits. Therefore, it had been decided in the late 70s that all river valley projects should be subjected to a rigorous assessment of their environmental impact so that necessary mitigative measures could be duly incorporated therein at the inception stage. The Guidelines set out the procedure to be adopted for carrying out environmental impact assessments. In the chapter headed Relevance of Environmental Aspects for River Valley Development Projects, the Guidelines stated concern for environmental pollution is rather a recent phenomenon which has been triggered mainly by the backlash effect of accelerated industrial growth in the developed countries. The two major criteria - the project should maximise economic returns and it should be technically feasible, are no longer considered adequate to decide the desirability or even the viability of the project. It is now widely recognised that the development effort may frequently produce not only sought-for benefits, but other, often unanticipated, undesirable consequences as well which may nullify the socio-economic benefits for which the project is designed.

After reference to the strong feelings that were often expressed in favour of measures that would provide the provision of adequate food and shelter to the millions, the Guidelines stated:

Such strong feelings are easy to understand in the context of the prevailing economic stagnation. It does not, however, follow that the arguments advanced are valid. The basic flaw in these arguments is that they presume incompatibility between environmental conservation and the development effort.

Apart from some selected cases where the uniqueness of the natural resources, like wildlife, flora and genetic pool, which demanded exclusive earmarking of a given region for their specific use, the majority of cases did not call for a choice between development projects and preservation of the natural environment; but in all cases there was great need to consider the environmental aspects along with the other feasibility considerations. It was imperative to analyse whether the adoption of environmental measures was going to result in any short- or long-term social or economic benefits. A careful study of the direct costs involved, which would be caused by the absence of environmental mitigative measures on river valley

projects, was an eye-opener. These included effects on health, plant genetic resources, aquatic resources, waterlogging and salinity of irrigated soils, deforestation and soil conservation. During the planning and feasibility assessment stages, several factors had to be taken into account, including short- and long-term impact on population and human settlements in the inundated and watershed areas, impact on flora and fauna (wildlife) in the vicinity, impact on wildlife, including birds, impact on national parks and sanctuaries, on sites and monuments of historical, cultural and religious significance and on forests, agriculture, fisheries and recreation and tourism. Requisite data for impact assessment was not readily available, this being relatively a new discipline, and it had to be generated through such field surveys as:

(P)re-impoundment census of flora and fauna, particularly the rare and endangered species, in submergence areas;
census of animal population and available grazing areas;
land-use pattern in the area with details of extent and type of forest;
pre-impoundment survey of fish habitat and nutrient levels;
groundwater level, its quality, and existing water-use pattern;
mineral resources, including injurious minerals, in the impoundment; and
living conditions of affected tribals/aboriginals etc.”

The cost of proposed remedial and mitigative measures to protect the environment had to be included in the project cost. Mitigative measures included, among other things, compensatory afforestation. Only when the incorporation of environmental aspects in the project planning was made a part and parcel of all river valley projects would there be hope to protect and preserve our natural environment and fulfil objective of rapid economic development on the sustained basis while safeguarding the natural resources including the air, water, land, flora and fauna for the benefit of present and future generations.

The necessary data that was required to be collected for impact assessment was set out in the Guidelines. A chart of the impact assessment procedure was also contained in the Guidelines.

259. It appears that, though it ought rightly to have been taken by the Ministry of Environment and Forests, the decision whether or not to accord the environmental clearance to the project was left to the Prime Minister.

273. The fact that the environmental clearance was given by the Prime Minister and not by the Ministry of Environment and Forests, as it would ordinarily have been done, makes no difference at all. Under its own policy, as indicated by the Guidelines, the Union of India was bound to give environmental clearance only after (a) all the necessary data in respect of the environmental impact of the project had been collected and assessed; (b) the assessment showed that the project could proceed; and (c) the environmental safeguard measures, and their cost, had been worked out.

274. An adverse impact on the environment can have disastrous consequences for this generation and generations to come. This Court has in its judgments on Article 21 of the Constitution recognised this. This Court cannot place its seal of approval on so vast an undertaking as the project without first ensuring that those best fitted to do so have had the opportunity of gathering all necessary data on the environmental impact of the project and of

assessing it. They must then decide if environmental clearance to the project can be given, and, if it can, what environmental safeguard measures have to be adopted, and their cost. While surveys and studies on the environmental aspects of the project have been carried out subsequent to the environmental clearance, they are not, due to what are euphemistically called “slippages”, complete. Those who now examine whether environmental clearance to the project should be given must be free to commission or carry out such surveys and studies and the like as they deem necessary. They must also, of course, consider such surveys and studies as have already been carried out. Given that the construction of the dam and other work on the project has already commenced, this factor must play a part in their deciding whether or not environmental clearance should be accorded. Until environmental clearance to the project is accorded by them, further construction work on the dam shall cease.

275. The Union of India has issued a notification on 27-1-1994 called the “Environmental Impact Assessment Notification, 1994” (and amended it on 4-5-1994). Its terms are not applicable to the present proceedings, but its provisions are helpful insofar as they prescribe who is to assess the environmental impact assessment reports and environment management plans that are submitted by applicants for new projects, including hydroelectric projects. The Notification says:

The reports submitted with the application shall be evaluated and assessed by the Impact Assessment Agency, and if deemed necessary it may consult a Committee of Experts, having a composition as specified in Schedule III of this Notification. The Impact Assessment Agency (IAA) would be the Union Ministry of Environment and Forests. The Committee of Experts mentioned above shall be constituted by IAA or such other body under the Central Government authorised by IAA in this regard.

The Environmental Impact Agency of the Union Ministry of Environment and Forests shall now appoint a Committee of Experts composed of experts in the fields mentioned in Schedule III of the Notification and that Committee of Experts shall assess the environmental impact of the project as stated above.

281. When the writ petition was filed the process of relief and rehabilitation, such as it was, was going on. The writ petitioners were not guilty of any laches in that regard. In the writ petition they raised other issues, one among them being related to the environmental clearance of the project. Given what has been held in respect of the environmental clearance, when the public interest is so demonstrably involved, it would be against public interest to decline relief only on the ground that the Court was approached belatedly.

282. I should not be deemed to have agreed to anything stated in brother Kirpal’s judgment for the reason that I have not traversed it in the course of what I have stated.

283. In the premises,

(1) The Environmental Impact Agency of the Ministry of Environment and Forests of the Union of India shall forthwith appoint a Committee of Experts in the fields mentioned in Schedule III of the Notification dated 27-1-1994, called the Environmental Impact Assessment Notification, 1994.

(2) The Committee of Experts shall gather all necessary data on the environmental impact of the project. They shall be free to commission or carry out such surveys and studies and the like as they deem necessary. They shall also consider such surveys and studies as have already been carried out.

(3) Upon such data, the Committee of Experts shall assess the environmental impact of the project and decide if the environmental clearance to the project can be given and, if it can, what environmental safeguard measures must be adopted, and their cost.

(4) In so doing, the Committee of Experts shall take into consideration the fact that the construction of the dam and other work on the project has already commenced.

(5) Until environmental clearance to the project is accorded by the Committee of Experts as aforesaid, further construction work on the dam shall cease.

(6) The Grievance Redressal Authorities of the States of Gujarat, Madhya Pradesh and Maharashtra shall ensure that those ousted by reason of the project are given relief and rehabilitation in due measure.

(7) When the project obtains environmental clearance, assuming that it does, each of the Grievance Redressal Authorities of the States of Gujarat, Madhya Pradesh and Maharashtra shall, after inspection, certify, before work on the further construction of the dam can begin, that all those ousted by reason of the increase in the height of the dam by 5 metres from its present level have already been satisfactorily rehabilitated and also that suitable vacant land for rehabilitating all those who will be ousted by the increase in the height of the dam by another 5 metres is already in the possession of the respective States.

(8) This process shall be repeated for every successive proposed 5 metre increase in the dam height.

(9) If for any reason the work on the project, now or at any time in the future, cannot proceed and the project is not completed, all oustees who have been rehabilitated shall have the option to continue to reside where they have been rehabilitated or to return to where they were ousted from, provided such place remains habitable, and they shall not be made at all liable in monetary or other terms on this account.

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***Intellectuals Forum, Tirupathi v. State of A.P., AIR 2006
SC 1350***

DR. AR. LAKSHMANAN, J. - The present matter raises two kinds of questions. Firstly, at a jurisprudential level, it falls on this Court to lay down the law regarding the use of public lands or natural resources, which have a direct link to the environment of a particular area, by the Government. Secondly, this Court should decide, on the facts of the present case, the order to be passed with respect to two tanks in the Tirupathi area - Peruru and Avilala.

2. The above two appeals were filed by a registered society called the Intellectuals Forum against the respondents herein. The contesting parties are State of Andhra Pradesh represented by its Chief Secretary, Tirupathi Urban Development Authority represented by its Vice-Chairman and the A.P. Housing Board represented by its Vice-Chairman and Housing Commissioner.

3. The present case relates to the preservation of and restoration of *status quo ante* of two tanks, historical in nature, being in existence since the time of Srikrishnadevaraya, 1500 A.D.

4. The tanks are called "Avilala tank" and "Peruru tank" which are situated in the suburbs of Tirupathi town which is a world renowned popular pilgrim centre having everyday inflow of tourists between one lakh to two lakhs.

5. Systematic destruction of percolation, irrigation and drinking water tanks in Tirupathi town, namely, Avilala and Peruru tanks and alienation of the Avilala tank bed land to the Tirupathi Urban Development Authority (in short TUDA) and the A.P. Housing Board under GOMs No. 84 Rev. dated 28.01.1994 and Peruru tank bed land to Tirumala Tirupathi Dvasthanam (in short TTD) for housing purposes under GOMs NO. 181 Rev. dated 15.03.1991, which are impugned in Writ Petitions Nos. 8650 and 7955 of 1994 respectively.

6. Accordingly to the appellant, the cry of socially spirited citizens calling for judicial remedy was not considered in the right perspective by the Division Bench of the High Court of Andhra Pradesh despite there being overwhelming evidence of the tanks being in existence and were being put to use not only for irrigation purpose but also as lakes which were furthering percolation to improve the groundwater table, thus serving the needs of the people in and around these tanks. It was submitted that the High Court has given precedence to the economic growth by completely ignoring the importance and primacy attached to the protection of environment and protection of valuable and most cherished freshwater resources. The Government without considering the well-planned development of Tirupathi town alienated the tank bed lands in favour of some governmental agencies for valuable consideration. It was further submitted since Tirupathi is in the draught prone region called Rayala Seema, there is always shortage of water and the district machinery is constantly put on alert for devising schemes for the purpose of improving the existing water resources. An engineering team which was assigned such a task had visited in and around the foothills of Tirupathi and Tirumala for the purpose of identifying sources of freshwater and suggestions to be given for their improvement. Apart from suggestions, the team of engineers, in the minutes of the meeting held on 26.05.1990, suggested that improvement of feeder channels

(Vagus) for Peruru tank and Avilala tank would improve the percolation of all the surrounding areas and that there is enough potential for the tanks to get enough water if the feeder channels are improved. It was also submitted by representation that the Commissioner of Land Revenue to retain Peruru tank and Avilala tank, since retention of water in the said tanks would improve the water table which is already very low in the surrounding wells and also to the east of the tanks before the gradients. In the meantime, the Government passed GOMs NO. 181 Revenue dated 15.03.1991 alienating an extent of 150 acres of land which belongs to the tank bed area of Peruru tank to Tirumala Tirupathi Devasthanam (in short TTD). The members of the appellant's forums as also the various other socially spirited citizens have written letters to various authorities of the Government requesting the said authorities including the Chief Minister not to alienate the tank bed areas of both the tanks for housing or for any other activity except for the purpose for which they are meant. However, the Government issued GOMs NO. 84 Revenue dated 28.01.1994 authorizing the District Collector, Chittoor to alienate 90 acres of land belonging to Avilala tank bed area to the A.P. Housing Board. This government order further directed that TUDA should provide a master plan for the entire area of 170 acres so as to ensure integrated development of Avilala tank area.

7. Since there was no response to the representation made, the appellant filed two writ petitions in the High Court challenging the government orders passed by the Government of Andhra Pradesh by which the District Collector, Chittoor was directed to hand over the tank bed areas of Avilala tank and Peruru tank to the A.P. Housing Board and to TTD respectively.

8. Writ Petition No. 7955 of 1994 was filed assailing GOMs NO. 181 dated 15.03.1991, in respect of alienation of Peruru tank bed land to TTD and Writ Petition No. 8650 of 1994 was filed assailing GOMs No. 84 dated 28.01.1994 alienating Avilala tank bed area to the A.P. Housing Board. The respondents filed their counter-affidavits opposing the writ-petitions. The Indian Medical Association also made a similar plea that the Government should immediately withdraw its GOs alienating Avilala tank and Peruru tank and restore them urgently as percolation tanks, to improve the groundwater table. This prayer was made by the Indian Medical Association due to alarming increase of toxic contents like fluorides and other salts in the underground water due to steep fall in the underground water table level. A feasibility report on Peruru tank was prepared by Sri Venkateswara Tirupathi. Several other individuals filed affidavits supporting the cause of the appellant.

9. A counter-affidavit was filed by the Government, Revenue Department in Writ Petition NO. 8650 of 1994 whereby the said respondent justified the issuance of GOMs NO. 84 Revenue Department dated 28.01.1994 stating that the same was in public interest. A counter-affidavit was also filed by Respondent 3, the Law Officer of the Housing Board stating that the Housing Board has invested Rs. 88.43 lakhs towards development of land and thus the Board has invested in all a sum of Rs. 1,78,43,000 and prayed for dismissal of the writ petition. An additional counter-affidavit was also filed by Respondent 3 stating that the area is fully developed. Likewise, Shri P. Kirshnaiah, the Executive Officer of TTD filed affidavit stating that a number of dwellings have come up in the entire area and the prayer in the writ petition could not be granted and prayed for dismissal of the writ petition.

10. By the impugned and common judgment dated 28.09.2000, the Division Bench of the High Court finding no illegality or irregularity in the action of the respondents dismissed both the writ petitions. Aggrieved by the dismissal of the writ petitions, the appellant has filed these appeals by way of special leave petitions.

35. On 5-12-2003, this Court passed the following order :

The Secretary, Ministry of Water Resources, Government of India is directed to constitute a committee of experts for the purpose of submitting a report on the question whether the two tanks, namely, the Peruru and Avilala or either of them can be utilized for water harvesting. The report shall be submitted to this Court within a period of six weeks from the date of the communication of this order. The Registry is directed to forward a set of documents, which have been filed before this Court to the Secretary for being placed before and considered by such Committee. The Committee will hold local inspection. Before it does so it shall give notice to the Advocate-on-Record concerned. The respondent State will provide such documents as may be required by the Committee for the purpose of submitting the report. List the matter thereafter.

36. The Government of India constituted a committee for the purpose of submitting its report to this Court.

37. The term of reference of the Committee was to submit a report on the question whether the two tanks, namely, the Peruru and Avilala or either of them can be utilized for water harvesting. Pursuant to this, the Committee visited Tirupathi on 19.01.2004 and 20.01.2004 for local inspection and necessary investigations. During the visit, a detailed discussion was held with the representatives of TUDA, TTD and members of the Intellectuals Forum.

38. The Committee submitted its detailed inspection report on 21.01.2004.

40. In the above background, the following questions of law arise for consideration by this Court:

1. Whether the urban development could be given priority over and above the need to protect the environment and valuable fresh water resources?
2. Whether the action of A.P. State in issuing the impugned GOs could be permitted in derogation of Articles 14 and 21 of the Constitution as also the directive principles of State policy and fundamental duties enshrined in the Constitution?
3. Whether the need for sustainable development can be ignored, done away with and cause harm to the environment in the name of urban development?
4. Whether there are any competing public interests and if so how the conflict is to be adjudicated/reconciled?

45. The inspection report of the Committee constituted under the directions of this Court considered various issues. It is stated in the report as follows:

1. There is no tank existing in the area at present. Remains of the original demolished bund were seen. The area upstream was plain with no indications of any water storage.

2. Reported feeder channels to the tank are in fact localized drainage lines which do not have any direct source of surface water from the nearby Tirumala hills. The tank might have received water as overflow from Peruru tank located on the west of Avilala tank.

62. The Expert Committee in its report has suggested some additional measures for rainwater harvesting by providing for a percolation tank in an area of 50 acres instead of 20 acres already earmarked for the said purpose by the Revenue Authorities with rooftop rainwater harvesting and artificial recharge for increasing the groundwater level.

63. The Expert Committee has gone into various technical and cost aspects about the feasibility of reviving the Peruru tank. Only after the Committee found that the tank could not be revived in its original form, it suggested in its report for construction of percolation tank and rooftop rainwater harvesting and artificial recharge for increasing the groundwater level.

64. A careful perusal of the report would clearly reveal that the Committee has given its suggestions only after taking into account various possibilities in recharging the groundwater level. It is not proper in doubting the correctness of the Committee's report as contended by the appellants. The Committee, in our view, has gone into the details about the revival of the feeder channel to the Peruru tank from Swarnamukhi river and having regard to the impracticability of restoring the same as feeder channel, had suggested an alternative which, in their view, is feasible and beneficial.

65. It is evident from the report of the Expert Committee that the members of the Expert Committee have taken technical aspects as contained therein and the objections of the appellant in this regard are untenable. The Government of Andhra Pradesh has also taken various steps pursuant to the directions given by this Court which could be seen from the additional affidavit dated 25.03.2005 filed by the State of Andhra Pradesh.

66. We have given our thoughtful and careful consideration to the sensitive issues raised in the appeals by the appellant and countered by the respective respondents with reference to the pleadings, the documents, annexures filed and judgment of the High Court. We have also carefully perused the report submitted by the Expert Committee and also considered the rival submissions made by the respective counsel. In our opinion, the nature of the question in this case is twofold. Firstly, the jurisprudential issues. In the event of conflict between the competing interests of protecting the environment and social development, this Court in *M.C. Mehta v. Kamal Nath* [(1997) 1 SCC 388] held as under:

[T]he issues presented in this case illustrate the classic struggle between those members of the public who would preserve our rivers, forests, parks and open lands in their pristine purity and those charged with administrative responsibilities who, under the pressures of the changing needs of an increasingly complex society, find it necessary to encroach to some extent upon open lands heretofore considered inviolate to change. The resolution of this conflict in any given case is for the legislature and not the courts. If there is a law made by Parliament or the State Legislatures the courts can serve as an instrument of determining Legislative intent in the exercise of their powers of judicial review under the Constitution. But in the absence of any legislation, the executive acting under the doctrine of public trust cannot abdicate the

natural resources and convert them into private ownership, or for commercial use. The aesthetic use and the pristine glory of the natural resources, the environment and the ecosystems of our country cannot be permitted to be eroded for private, commercial or any other use unless the courts find it necessary, in good faith, for the public good and in public interest to encroach upon the said resources.

67. The responsibility of the State to protect the environment is now a well-accepted notion in all countries. It is this notion that, in international law, gave rise to the principle of “State responsibility” for pollution emanating within one’s own territories [*Corfu Channel* case, ICJ Rep (1949) 4]. This responsibility is clearly enunciated in the United Nations Conference on the Human Environment, Stockholm 1972 (Stockholm Convention), to which India was a party. The relevant clause of this declaration in the present context is para 2, which states:

The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.

Thus, there is no doubt about the fact that there is a responsibility bestowed upon the Government to protect and preserve the tanks, which are an important part of the environment of area.

Sustainable Development

68. The respondents, however, have taken the plea that the actions taken by the Government were in pursuance of urgent needs of development. The debate between the developmental and economic needs and that of the environment is an enduring one, since if the environment is destroyed for any purpose without a compelling developmental cause, it will most probably run foul of the executive and judicial safeguards. However, this Court has often faced situations where the needs of environmental protection have been pitched against the demands of economic development. In response to this difficulty, policy-makers and judicial bodies across the world have produced the concept of “sustainable development”. The concept, as defined in the 1987 report of the World Commission on Environment and Development (Brundtland Report) defines it as “Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs.” Returning to the Stockholm Convention, a support of such a notion can be found in para 13, which states:

In order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and coordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve environment for the benefit of their population.

69. Subsequently the Rio Declaration on Environment and Development, passed during the Earth Summit in 1992, to which also India is a party, adopted the notion of sustainable development. Principle 4 of the declaration states:

In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

70. This Court in *Essar Oil Ltd. v. Halar Utkarsh Samiti* [(2004) 2 SCC 392] was pleased to expound on this. Their Lordships held:

27. This, therefore, is the [sole] aim, namely, to balance economic and social needs on the one hand with environmental considerations on the other. But in a sense all development is an environmental threat. Indeed, the very existence of humanity and the rapid increase in the population together with consequential demands to sustain the population has resulted in the concreting of open lands, cutting down of forests, the filling up of lakes and pollution of water resources and the very air which we breathe. However, there need not necessarily be a deadlock between development on the one hand and the environment on the other. The objective of all laws on environment should be to create harmony between the two since neither one can be sacrificed at the altar of the other.

71. A similar view was taken by this Court in *Indian Council for Enviro-Legal Action v. Union of India* [(1996) 5 SCC 281].

73. In the light of the above discussions, it seems fit to hold that merely asserting an intention for development will not be enough to sanction the destruction of local ecological resources. What this Court should follow is the principle of sustainable development and find a balance between the developmental needs which the respondents assert, and the environmental degradation, that the appellant alleges.

Public trust doctrine

74. Another legal doctrine that is relevant to this matter is the Doctrine of Public Trust. This doctrine, though in existence from Roman times, was enunciated in its modern form by the US Supreme Court in *Illinois Central Railroad Co. v. People of the State of Illinois*, [146 US 37 : 36 L Ed 1018 (1892)] where the Court held:

The bed or soil of navigable waters is held by the people of the State in their character as sovereign in trust for public uses for which they are adapted. (L Ed p. 1018)....

The State holds title to the bed of navigable waters upon a public trust, and no alienation or disposition of such property by the State which does not recognize and is not in execution of this trust, is permissible. (L Ed p. 1033)

What this doctrine says therefore is that natural resources, which include lakes, are held by the State as a “trustee” of the public, and can be disposed of only in a manner that is consistent with the nature of such a trust. Though this doctrine existed in the Roman and English law, it related to specific types of resources. The US courts have expanded and given the doctrine its contemporary shape whereby it encompasses the entire spectrum of the environment.

75. The doctrine, in its present form, was incorporated as a part of Indian law by this Court in *M.C. Mehta v. Kamal Nath* and also in *M.I. Builders (P) Ltd. v. Radhey Shyam Sahu* [(1999) 6 SCC 464]. In *M.C. Mehta*, Kuldip Singh, J., writing for the majority held:

34. Our legal system ... includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment ... The State as a trustee is under a legal duty to protect the natural resources.

76. The Supreme Court of California, in *National Audubon Society v. Superior Court of Alpine Country*, [33 Cali 419] also known as Mono Lake case summed up the substance of the doctrine. The Court said:

Thus the public trust is more than an affirmation of State power to use public property for public purposes. It is an affirmation of the duty of the State to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering the right only in those rare cases when the abandonment of the right is consistent with the purposes of the trust.

This is an articulation of the doctrine from the angle of the affirmative duties of the State with regard to public trust. Formulated from a nugatory angle, the doctrine does not exactly *prohibit* the alienation of the property held as a public trust. However, when the State holds a resource that is freely available for the use of the public, it provides for high degree of judicial scrutiny on any action of the Government, no matter how consistent with the existing legislations, that attempts to restrict such free use. To properly scrutinize such actions of the Government, the courts must make a distinction between the Government's general obligation to act for the public benefit, and the special, more demanding obligation which it may have as a trustee of certain public resources [Joseph L. Sax "The Public Trust Doctrine in Natural Resource Law : Effective Judicial Intervention", *Michigan Law Review*, Vol. 68, No. 3 (Jan. 1970) pp. 471-566]. According to Prof. Sax, whose article on this subject is considered to be an authority, three types of restrictions on governmental authority are often thought to be imposed by the public trust doctrine [ibid]:

1. the property subject to the trust must not only be used for a public purpose, but it must be held available for us by the general public;
2. the property may not be sold, even for fair cash equivalent;
3. the property must be maintained for particular types of use (i) either traditional uses, or (ii) some uses particular to that form of resources.

77. In the instant case, it seems, that the government orders, as they stand now, are violative of Principles 1 and 3, even if we overlook Principle 2 on the basis of the fact that the Government is itself developing it rather than transferring it to a third party for value.

78. Therefore, our order should try to rectify these defects along with following the principle of sustainable development as discussed above.

79. Further the principle of “Inter-Generational Equity” has also been adopted while determining cases involving environmental issues. This Court in *A.P. Pollution Control Board v. Prof. M.V. Nayudu* [(1999) 2 SCC 718] held as under:

53. The principle of inter-generational equity is of recent origin. The 1972 Stockholm Declaration refers to it in Principles 1 and 2. In this context, the environment is viewed more as a resource basis for the survival of the present and future generations.

‘Principle 1.- Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for the present and future generations.....

Principle 2.- The natural resources of the earth, including the air, water, lands, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of the present and future generations through careful planning or management, as appropriate.’ (emphasis in original)

80. Several international conventions and treaties have recognized the above principles and, in fact, several imaginative proposals have been submitted including the locus standi of individuals or groups to take out actions as representatives of future generations, or appointing an ombudsman to take care of the rights of the future against the present (proposals of Sands and Brown Weiss referred to by Dr. Sreenivas Rao Permmaraju, Special Rapporteur, paras 97 and 98 of this report).

81. The principles mentioned above wholly apply for adjudicating matters concerning environment and ecology. These principles must, therefore, be applied in full force for protecting the natural resources of this country.

82. Article 48-A of the Constitution mandates that the State shall endeavour to protect and improve the environment to safeguard the forests and wildlife of the country. Article 51-A of the Constitution enjoins that it shall be the duty of every citizen of India, inter alia, to protect and improve the national environment including forests, lakes, rivers, wildlife and to have compassion for living creatures. These two articles are not only fundamental in the governance of the country but also it shall be the duty of the State to apply these principles in making laws and further these two articles are to be kept in mind in understanding the scope and purport of the fundamental rights guaranteed by the Constitution including Articles, 14, 19 and 21 of the Constitution and also the various laws enacted by Parliament and the State Legislatures.

83. On the other hand, we cannot also shut our eyes that shelter is one of the basic human needs just next to food and clothing. Need for a national housing and habitat policy emerges from the growing requirements of shelter and related infrastructure. These requirements are growing in the context of rapid pace of urbanization, increasing migration from rural to urban centres in search of livelihood, mismatch between demand and supply of sites and services at affordable cost and inability of most new and poorer urban settlers to access formal land markets in urban areas due to high costs and their own lower incomes, leading to a non-sustainable situation. This policy intends to promote sustainable development of habitat in the

country, with a view to ensure equitable supply of land, shelter and services at affordable prices.

84. The world has reached a level of growth in the 21st century as never before envisaged. While the crisis of economic growth is still on, the key question which often arises and the courts are asked to adjudicate upon is whether economic growth can supersede the concern for environmental protection and whether sustainable development which can be achieved only by way of protecting the environment and conserving the natural resources for the benefit of humanity and future generations could be ignored in the garb of economic growth or compelling human necessity. The growth and development process are terms without any content, without an inkling as to the substance of their end results. This inevitably leads us to the conception of growth and development which sustains from one generation to the next in order to secure "our common future". In pursuit of development, focus has to be on sustainability of development and policies towards that end have to be earnestly formulated and sincerely observed. As Prof. Weiss puts it, "conservation, however, always takes a back seat in times of economic stress". It is now an accepted social principle that all human beings have fundamental right to a healthy environment, commensurate with their well being, coupled with a corresponding duty of ensuring that resources are conserved and preserved in such a way that present as well as the future generations are aware of them equally.

85. Parliament has considerably responded to the call of the nations for conservation of environment and natural resources and enacted suitable laws.

86. The judicial wing of the country, more particularly this Court, has laid down a plethora of decisions asserting the need for environmental protection and conservation of natural resources. The environmental protection and conservation and natural resources has been given a status of a fundamental right and brought under Article 21 of the Constitution. This apart, the directive principles of State policy as also the fundamental duties enshrined in Part IV and Part IV-A of the Constitution respectively also stress the need to protect and improve the natural environment including the forests, lakes, rivers and wildlife and to have compassion for living creatures.

87. This Court in *Dahanu Taluka Environment Protection Group v. Bombay Suburban Electricity Supply Co. Ltd.* [(1991) 2 SCC 539] held that the Government concerned should consider the importance of public projects for the betterment of the conditions of living of the people on the one hand and the necessity for preservation of social and ecological balances, avoidance of deforestation and maintenance of purity of the atmosphere and water free from pollution on the other in the light of various factual, technical and other aspects that may be brought to its notice by various bodies of laymen.

88. No doubt, the wishful thinking and the desire of the appellant Forum, that the tanks should be there, and the old glory of the tanks should be continued, is laudable. But the ground realities are otherwise. We have already noticed the ground realities as pointed out by the Government of Andhra Pradesh, TUDA and TTD in their reply to the civil appeals by furnishing details, datas and particulars. Nowadays because of poverty and lack of employment avenues, migration of people from rural areas to urban areas is a common phenomenon. Because of the limited infrastructure of the towns, the towns are becoming

slums. We, therefore, cannot countenance the submissions made by the appellant in regard to the complete restoration and revival of two tanks in the peculiar facts and circumstances of this case. We cannot, at the same time, prevent the Government from proceeding with the proper development of Tirupathi town. The two government orders which are impugned have been issued long before and pursuant to the issuance of the government orders, several other developments have taken place. Constructions and improvements have been made in a vast measure. Because of spending crores and crores of rupees by various authorities, the only option now left to the appellant and the respondents is to see that the report submitted by the Expert Committee is implemented in its letter and spirit and all the respondents shall cooperate in giving effect to the Committee's report.

89. It is true that the tank is a communal property and the State authorities are trustees to hold and manage such properties for the benefits of the community and they cannot be allowed to commit any act or omission which will infringe the right of the Community and alienate the property to any other person or body.

90. Taking into account all these principles of law, and after considering the competing claims of environment and the needs for housing, this Court holds the following as per the facts of this case:

The respondents have claimed that the valuable right to shelter will be violated if the impugned government orders are revoked. On the facts of the present case, it seems that the respondents intend to build residential blocks of flats for high and middle income families, institutions as well as infrastructure for TTD. If the proposed constructions are not carried on, it seems unlikely that anyone will be left homeless or without their basic need for shelter. Therefore, one feels that the right to shelter does not seem to be so pressing under the present circumstances so as to outweigh all environmental considerations.

91. Another plea repeatedly taken by the respondents corresponds to the money already spent on developing the land. However, the decision of this case cannot be based solely upon the investments committed by any party. Since, otherwise, it would seem that once any party makes certain investment in a project, it would be a fait accompli and this Court will not have any option but to deem it legal.

92. Therefore, under the present circumstances, the Court should do the most it can, to safeguard the two tanks in question. However, due to the persistent developmental activities over a long time, much of the natural resources of the lakes have been lost, and considered irreparable. This, though regrettable, is beyond the power of this Court to rectify.

93. One particular feature of this case was the competing nature of claims by both the parties on the present state of the two tanks and the feasibility of their revival. We thought that it would be best, therefore, if we place reliance on the findings of the Expert Committee appointed by us which has considered the factual situation and the feasibility of revival of the two tanks. Thus in pursuance of study of that Committee, this Court passes the following orders.

94. The appeals are disposed of with the following directions:

With regard to Peruru tank

- (i) No further constructions to be made.
- (ii) The supply channel of Bodeddulu venka needs to be cleared and revitalized. A small check dam at Malapalli to be removed to ensure the free flow and supply to the tank.
- (iii) Percolation tank to be constructed and artificial recharge to be done to ensure the revival of the tank, keeping in mind its advantage at being situated at the foothills.
- (iv) The area allotted by the Mandal Revenue Office for construction of the tank to be increased to a minimum of 50 acres. Percolation tank with sufficient number of recharge shafts to be developed to recharge the unsaturated horizons up to 20 m. The design of the shafts, etc. to be prepared in consultation with CGWB. The proposed percolation tank to be suitably located along the bund keeping in view the inlets, irrigation sluices and surplus water.
- (v) Feasibility and cost estimation for the revival of the old feeder channel for Swarnamukhi river should be carried and a report to be submitted to the Court.
- (vi) Each house already constructed by TTD must provide for rooftop rainwater harvesting. Abstraction from groundwater to be completely banned. No borewell/tubewell for any purpose to be allowed in the area.
- (vii) Piezometers to be set up at selected locations, in consultation with CGWB to observe the impact of rainwater harvesting in the area on groundwater regime.

With regard to Avilala tank

- (i) No further construction to be allowed in the area.
- (ii) Each house already constructed by A.P. HB/TUDA must provide structure for rooftop rainwater harvesting. All the storm water in the already built colonies to be recharged to groundwater. Structures for such purposes to be designed in consultation with CGWB.
- (iii) No borewell/tubewell for any purpose to be allowed in the area.
- (iv) An area of 40 acres presently reserved for the government should not any way that may lead to concretization of the ground surface. Recharge structures to be constructed for rainwater harvesting.
- (v) Piezometers to be set up at selected locations, in consultation with CGWB to observe the impact of rainwater harvesting in the area on groundwater regime.

95. We place on record our deep appreciation for the valuable assistance rendered by all the counsel appearing in this case which made our job easier.

***Jitendra Singh v. Ministry of Environment & Ors., Supreme Court,
Civil Appeal No. 5109/2019, decided on 25 November 2019***

Surya Kant J.:

1. The instant statutory appeal has been preferred under Section 22 of the National Green Tribunal Act, 2010 (hereinafter “NGT Act”) against the order dated 06.03.2019 of the Principal Bench of the National Green Tribunal (“NGT”), whereby appellant’s grievance against allotment of local ponds to private industrialists has been dismissed summarily without any adjudication of the lis or merits, but merely on the basis of an affidavit filed by Respondent No. 5 (Greater Noida Industrial Development Authority – hereinafter “GNIDA”) claiming that it was developing bigger alternative waterbodies.

2. The appellant is a permanent resident of village Saini, tehsil Dadri, of district Gautam Budh Nagar, which falls in the National Capital Region. He claims to be a socially active lawyer dedicated to bettering the lives of his covillagers and alleges that the Original Application before the NGT was triggered when around 18.01.2017 the agents of a private entity (Respondent No. 6 M/s Sharp Enterprises Pvt. Ltd. Hereinafter “Sharp”) using excavators and other heavy machinery attempted to forcibly takeover possession of a ‘commonpond’, which had been in use by local villagers for a century. This was objected to by the villagers, and the appellant subsequently made a complaint on 25.01.2017 to various authorities including the District Collector. Pointing out revenue records which elucidate the common status of the ponds, he sought directions to restrain Sharp and its agents. However, there was no action on his representation for more than 10 days, leading to another attempt by Sharp at dispossession, compelling the appellant to seek police help. A few days later, he submitted another representation to the Collector, but to no avail. Aggrieved, he was left with no recourse but to approach the NGT by way of an Original Application under Section 14 (read with Sections 15 and 18) of the NGT Act for adjudication of these environmental issues.

3. Before the Tribunal, appellant contended that large tracts of his village (but not the impugned waterbodies) had been acquired under the Land Acquisition Act, 1894 ostensibly for industrial development by GNIDA. Subsequently, these acquired lands (including some local ponds) had been leased to private industrialists, including Sharp in 2012. Using revenue records obtained under the UP Consolidation of Holdings Act, appellant showed that Khasra Nos. 552 (1140 sq meters) and 490 (8470 sq meters) were ‘pokhar’ (pond) and Khasra Nos. 522 (1620 sq meters) and 676 (9804 sq metres) were ‘rajwaha’ (canal). Highlighting that the water bodies were vested in the Gram Sabhas per Section 117 of the UP Zamindari Abolition and Land Reforms Act, 1950,

he contended that such land had neither been acquired, nor resumed and hence there was no power with GNIDA to transfer the same to Sharp. He further claimed to have discovered other similar illegal allotments of water bodies by GNIDA to other thirdparties.

4. The appellant urged that neither the mandatory environmental clearances under the Environmental (Protection) Act, 1984 had been obtained by the industrialists nor the statutory authorities applied their mind that the project would negatively impact the environment and human health. Laying support on the Ramsar Convention and Rule 4 of the Wetland (Conservation and Management) Rules, 2010 which prohibited reclamation of wetlands, setting up or expansion of industries, permanent construction or any other activity with potentially adverse effects on ecosystem, he sought cancellation of such illegal allotments and protection of waterbodies.

12. At the outset, we must note, that the respondents have been unable to demonstrate how the 2016 Government Order can be made applicable retrospectively, the possession having been given to Sharp in 2012. Notwithstanding this, no case of the present instance being an extraordinary circumstance (hence permitting recourse to the exceptional provisions of the Government Order) has been made before us either. Further, argument that Khasra No. 552 is a 'slightly sloped seasonal rainfall catchment area' and not a 'pond', is creative but without merit. Photographs have been placed on record by the appellant showing that there is substantial water in the pond, which has not been controverted. Further, revenue records maintained by the Revenue Department themselves show that the land was 'pokhar'. It is hence not open for the authorities to contradict and plead against the record without any scientific or empirical support, for such categorisation had been made by them in the past. Further, it was conceded by respondent authorities during arguments that Khasra No. 490 was also recorded as 'pokhar' in revenue records and that it too had been integrated in the industrial development project.

13. Additionally, it is clear that repeal of the UP Zamindari Abolition and Land Reforms Act, 1950 and vesting of such ponds and local areas in the State by Section 57 of the UP Revenue Code, 2006 would not by itself either change the nature of land contrary to revenue record nor will defeat the long established rights of the local people on commons. Such a proposition had unequivocally been laid down in *Chigurupati Venkata Subbaya v. Palaguda Anjaya* (1972) 1 SCC 521, where this Court negated a contention that communal rights in the suit land stood abolished per Section 3 of the Estates Abolition Act, 1948 for it provided that estates, including communal lands, would stand transferred to the Government free from any encumbrance. Further, it was held that even explicit destruction of all rights and interests created by the principal or landholders, would not apply to community rights as such rights originated elsewhere.

14. Given that Section 22 of the NGT Act, 2010 specifies that the nature of the appeal shall be akin to a second appeal as specified under Section 100 of the Code of Civil Procedure, 1908, we would restrict our deliberation to a singular substantive question of law. That is, whether it is permissible for the State to alienate common water bodies for industrial activities, under the guise of providing alternatives?

15. In *Hinch Lal Tiwari v. Kamala Devi* [(2001) 6 SCC 496], this Court settled that ‘ponds’ were a public utility meant for common use and held that they could not be allotted or commercialised. It had refused to give any weight to similar arguments of the pond having become levelled, with merely some portion getting covered during rainy season by water. Importantly, it emphasised that:

“13. It is important to notice that the material resources of the community like forests, tanks, ponds, hillock, mountain etc. are nature's bounty. They maintain delicate ecological balance. They need to be protected for a proper and healthy environment which enables people to enjoy a quality life which is the essence of the guaranteed right under Article 21 of the Constitution. The Government, including the Revenue Authorities i.e. Respondents 11 to 13, having noticed that a pond is falling in disuse, should have bestowed their attention to develop the same which would, on one hand, have prevented ecological disaster and on the other provided better environment for the benefit of the public at large. Such vigil is the best protection against knavish attempts to seek allotment in nonabadi sites.”

16. This Court reiterated in *Jagpal Singh v. State of Punjab* [(2011) 11 SCC 396] and noted that since time immemorial, certain common lands had vested in village communities for collective benefit. Except in exceptional circumstances when used exclusively for the downtrodden, these lands were inalienable. It was observed that such protections, however, remained on paper, and since Independence powerful people and a corrupt system had appropriated these lands for personal aggrandisement. Pointing out the harms in allowing such misappropriation, the Court noted an urgent public interest in stopping such misdeeds. Further, various directions were issued for eviction of illegal occupants and restoration of the common land to villagers. It was explicitly specified that “long duration of such illegal occupation or huge expenditure in making constructions thereon” cannot be a “justification for condoning this illegal act or for regularising the illegal possession”.

17. It is uncontroverted, in the present case, that the Government Order dated 03.06.2016 was a consequence of the aforesaid judgment in *Jagpal Singh*. Curiously, however, Clause 5 of the Government Order carves an exception of “huge projects/works” (albeit in extraordinary circumstances) to *Jagpal Singh*’s strict principle of nonalienation of common waterbodies. It is clear that such ground of

exception doesn't fall under the limited class of grants to "landless labourers or members of the Scheduled Castes/Scheduled Tribes, or where there is already a school, dispensary or other public utility on the land". Such industrial activities without any rationale classification, unlike the narrow class exempted, do not serve a social public purpose or benefit the local people, and thus will be hit by the

inalienability bar.

20. Protection of such village commons is essential to safeguard the fundamental right guaranteed by Article 21 of our Constitution. These common areas are the lifeline of village communities, and often sustain various chores and provide resources necessary for life. Waterbodies, specifically, are an important source of fishery and much needed potable water. Many areas of this country perennially face a water crisis and access to drinking water is woefully inadequate for most Indians. Allowing such invaluable community resources to be taken over by a few is hence grossly illegal. 21. The respondents' scheme of allowing destruction of existing water bodies and providing for replacements, exhibits a mechanical application of environmental protection. Although it might be possible to superficially replicate a waterbody elsewhere, however, there is no guarantee that the adverse effect of destroying the earlier one would be offset. Destroying the lake at Khasra Nos. 552 and 490, for example, would kill the vegetation around it and would prevent seepage of groundwater which would affect the already low watertable in the area. The people living around the lake would be compelled to travel all the way to the alternative site, in this case allegedly almost 3 kms away. Many animals and marine organisms present in the earlier site would perish, and wouldn't resuscitate by merely filling a hole with water elsewhere. Further, the soil quality and other factors at the alternate site might not be conducive to growth of the same flora, and the local environment would be altered permanently. The respondents' reduction of the complex and cascading effects of extinguishing natural waterbodies into mere numbers and their attempt to justify the same through replacement by geographically larger artificial waterbodies, fails to capture the spirit of the Constitutional scheme and is, therefore, impermissible.

22. Hence, it is clear that schemes which extinguish local waterbodies albeit with alternatives, as provided in the 2016 Government Order by the State of UP, are violative of Constitutional principles and are liable to be struck down.

23. For the reasons stated above, we allow the appeal and set aside the impugned order passed by the NGT. The allotment of all water bodies (both ponds and canals), including Khasra Nos. 552 and 490 to Respondent No. 6, or any other similar third party in village Saini, tehsil Dadari, district Gautam Budh Nagar is held to be illegal and the same is hereby quashed. Since this Court has on 15.07.2019 already directed

the parties to maintain status quo, Respondent Nos. 1 to 5 shall restore, maintain and protect the subjectwater bodies in village Saini. Respondents are further directed to remove all obstructions from the catchment area through which natural water accumulates in the village ponds, all within a period of three months.

UNIT 3: CONSTITUTIONAL PERSPECTIVE

Subhash Kumar v. State of Bihar, AIR 1991 SC 420

K.N. SINGH, J. – 2. This petition is under Art. 32 of the Constitution by Subhash Kumar for the issue of a writ or direction directing the Director of Collieries, West Bokaro Collieries at Ghatotand, District Hazaribagh in the State of Bihar and the Tata Iron & Steel Co. Ltd. to stop forthwith discharge of slurry/sludge from its washeries at Ghatotand in the District of Hazaribagh into Bokaro river. This petition is by way of public interest litigation for preventing the pollution of the Bokaro river water from the sludge/slurry discharged from the washeries of the Tata Iron & Steel Co. Ltd.... The petitioner has asserted that Tata Iron and Steel Co., respondent No. 5 carries on mining operation in coal mines/washerries in the town of Jamshedpur.

3. The petitioner has alleged that the surplus waste in the form of sludge/slurry is discharged as an effluent from the washeries into the Bokaro river which gets deposited in the bed of the river and it also gets settled on land including the petitioner's land bearing Plot No. 170.... The continuous discharge of slurry in heavy quantity by the Tata Iron & Steel Co. from its washeries posing risks to the health of people living in the surrounding areas and as a result of such discharge the problem of pure drinking water has become acute. The petitioner has asserted that in spite of several representations, the State of Bihar and State Pollution Control Board have failed to take any action against the Company, instead they have permitted the pollution of the river water. He has further averred that the State of Bihar instead of taking any action against the Company has been granting leases on payment of royalty to various persons for the collection of slurry. He has, accordingly, claimed relief for issue of direction directing the respondents which include the State of Bihar, the Bihar Pollution Control Board, Union of India and Tata Iron & Steel Co., to take immediate steps prohibiting the pollution of the Bokaro river water from the discharge of slurry into the Bokaro river and to take further action under provisions of the Act against the Tata Iron & Steel Co.

4. In the counter-affidavits filed on behalf of the respondents, the petitioner's main allegation that the sludge/slurry is being discharged into the river Bokaro causing pollution to the water and the land and that the Bihar State Pollution Board has not taken steps to prevent the same is denied. In the counter-affidavit filed on behalf of the Bihar State Pollution Board it is asserted that the Tata Iron & Steel Co. operates open case and underground mining. The Company in accordance to Ss. 25 and 26 of the Water (Prevention and Control of Pollution) Act, 1974 applied for sanction from the Board to discharge their effluent from their outlets. The Board before granting sanction analysed their effluent which was being watched constantly and monitored to see that the discharge does not affect the water quality of the Bokaro river adversely. In order to prevent the pollution, the Board issued direction to the Director of Collieries to take effective steps for improving the quality of the effluent going into the Bokaro river. The State Pollution Board imposed conditions requiring the Company to construct two settling tanks for settlement of solids and rewashing the same. The Board directed for the regular samples being taken and tested for suspended solids and for the

communication of the results of the tests to the Board each month. The State Board has asserted that the Company has constructed four ponds ensuring more strong capacity of treating effluent. The Pollution Board has been monitoring the effluent. It is further stated that on the receipt of the notice of the instant writ petition the Board carried out an inspection of the settling tanks regarding the treatment of the effluent from the washeries on 20th June, 1988. On inspection it was found that all the four settling tanks had already been completed and work for further strengthening of the embankment of the tanks was in progress and there was no discharge of effluent from the washeries into the river Bokaro except that there was negligible seepage from the embankment. It is further stated that the Board considered all the aspects and for further improvement it directed the management of the collieries for removal of the settled slurry from the tanks. The Board has directed that the washeries shall perform dislodging of the settling tanks at regular intervals to achieve the proper required retention time for the separation of solids and to achieve discharge of effluents within the standards prescribed by the Board. It is further asserted that at present there is no discharge from any of the tanks to the Bokaro river and there is no question of pollution of the river water or affecting the fertility of land. In their affidavits filed on behalf of the respondent Nos. 4 and 5, they have also denied the allegations made in the petition. They have asserted that the effective steps have been taken to prevent the flow of the water discharge from the washeries into the river Bokaro. It is stated that in fact river Bokaro remains dry during 9 months in a year and the question of pollution of water by discharge of slurry into the water does not arise. However, the management of the washeries have constructed four different ponds to store the slurry. The slurry which settles in the ponds is collected for sale. The slurry contains highly carboniferous materials and it is considered very valuable for the purpose of fuel as the ash contents are almost nil in the coal particles found in the slurry. Since, it has high market value, the Company would not like it to go in the river water. The Company has taken effective steps to ascertain that no slurry escapes from its ponds as the slurry is highly valuable. The Company has been following the directions issued by the State Pollution Control Board constituted under the 1974 Act.

6. On a perusal of the counter-affidavit filed on behalf of the respondents Nos. 4 and 5 it appears that the petitioner has been purchasing slurry from the respondents Nos. 4 and 5 for the last several years. With the passage of time he wanted more and more slurry, but the respondent-company refused to accept his request. The petitioner is an influential businessman, he had obtained a licence for coal trading, he tried to put pressure through various sources on the respondent-company for supplying him more quantity of slurry but when the Company refused to succumb to the pressure, he started harassing the Company. He removed the Company's slurry in an unauthorised manner for which a Criminal Case No. 178 of 1987 under Sections 379 and 411 of the Indian Penal Code read with Section 7 of the Essential Commodities Act was registered against the petitioner and Pradip Kumar his brother at Police Station Mandu, which is pending before the Sub-Judge, Hazaribagh. One Shri Jugal Kishore Jayaswal also filed a criminal complaint under Sections 379 and 411 of I.P.C. against the petitioner and his brother Pradip Kumar in the Court of Judicial Magistrate, First Class, Hazaribagh, which is also pending before the Court of Judicial Magistrate, 2nd Class Hazaribagh. The petitioner initiated several proceedings before the High Court of Patna under Article 226 of the Constitution for permitting him to collect slurry from the raiyati land.

These petitions were dismissed on the ground of existence of dispute relating to the title of the land. The petitioner filed a Writ Petition C.W.J.C. No. 887 of 1990 in the High Court of Patna for taking action against the Deputy Commissioner, Hazaribagh for implementing the Full Bench judgment of the Patna High Court in *Kundori Labours Co-operative Society Ltd. v. State of Bihar* [AIR 1986 Pat. 242], wherein it was held that the slurry was neither coal nor mineral instead it was an industrial waste of coal mine, not subject to the provisions of the Mines and Mineral (Regulation and Development) Act, 1957. Consequently the collection of slurry which escaped from the washeries could be settled by the State Government with any person without obtaining the sanction of the Central Government. The petitioner has been contending before the High Court that the slurry which was discharged from washeries did not belong to the Company and he was entitled to collect the same. Since the respondent-company prevented the petitioner from collecting slurry from its land and as it further refused to sell any additional quantity of slurry to him, he entertained grudge against the respondent-company. In order to feed fat his personal grudge he has taken several proceedings against the respondent-company including the present proceedings. These facts are quite apparent from the pleadings of the parties and the documents placed before the Court. In fact, there is intrinsic evidence in the petition itself that the primary purpose of filing this petition is not to serve any public interest instead it is in self interest as would be clear from the prayer made by the petitioner in the interim stay application. The petitioner claimed interim stay application.

7. Article 32 is designed for the enforcement of Fundamental Rights of a citizen by the Apex Court. It provides for an extraordinary procedure to safeguard the Fundamental rights of a citizen. Right to life is a fundamental right under Art. 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Art. 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life. A petition under Art. 32 for the prevention of pollution is maintainable at the instance of affected persons or even by a group of social workers or journalists. But recourse to proceeding under Art. 32 of the Constitution should be taken by a person genuinely interested in the protection of society on behalf of the community. Public interest litigation cannot be invoked by a person or body of persons to satisfy his or its personal grudge and enmity. If such petitions under Art. 32 are entertained, it would amount to abuse of process of the Court, preventing speedy remedy to other genuine petitioners from this Court. Personal interest cannot be enforced through the process of this Court under Art. 32 of the Constitution in the garb of a public interest litigation. Public interest litigation contemplates legal proceeding for vindication or enforcement of fundamental rights of a group of persons or community who are not able to enforce their fundamental rights on account of their incapacity, poverty or ignorance of law. A person invoking the jurisdiction of this Court under Act 32 must approach this Court for the vindication of the fundamental rights of affected persons and not for the purpose of vindication of his personal grudge or enmity. It is duty of this Court to discourage such petitions and to ensure that the course of justice is not obstructed or polluted by unscrupulous litigants by invoking the extraordinary jurisdiction of this Court for personal matters under the garb of the public interest litigation.

8. In view of the above discussion, we are of the opinion that this petition has been filed not in any public interest but for the petitioner's personal interest and for these reasons we dismiss the same and direct that the petitioner shall pay Rs. 5,000/- as costs.

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Rural Litigation and Entitlement Kendra v. State of U.P.,
(1985) 2 SCC 431

P.N. BHAGWATI, AMARENDRA NATH SEN & RANGANATH MISRA, JJ. –

1. This case has been argued at great length before us not only because a large number of lessees of lime stone quarries are involved and each of them has painstakingly and exhaustively canvassed his factual as well as legal points of view but also because this is the first case of its kind in the country involving issues relating to environment and ecological balance and the questions arising for consideration are of grave moment and of significance not only to the people residing in the Mussoorie Hill range forming part of the Himalayas but also in their implications to the welfare of the generality of people living in the country. It brings into sharp focus the conflict between development and conservation and serves to emphasise the need for reconciling the two in the larger interest of the country. But since having regard to the voluminous material placed before us and the momentous issues raised for decision, it is not possible for us to prepare a full and detailed judgment immediately and at the same time, on account of interim order made by us, mining operations carried out through blasting have been stopped and the ends of justice require that the lessees of lime stone quarries should know, without any unnecessary delay, as to where they stand in regard to their lime stone quarries we propose to pass our order on the writ petitions. The reasons for the order will be set out in the judgment to follow later.

2. We had by an Order dated August 11, 1983 appointed a Committee consisting of Shri D.N. Bhargav, Controller General, Indian Bureau of Mines, Nagpur, Shri M.S. Kahlon, Director General of Mines Safety and Col. P. Mishra, Head of the Indian Photo Interpretation Institute (National Remote Sensing Agency) for the purpose of inspecting the lime stone quarries mentioned in the writ petition as also in the list submitted by the Government of Uttar Pradesh. This Committee which we shall hereinafter for the sake of convenience refer to as the Bhargav Committee, submitted three reports after inspecting most of the lime stone quarries and it divided the lime stone quarries into three groups. The lime stone quarries comprised in category A were those where in the opinion of the Bhargav Committee the adverse impact of the mining operations was relatively less pronounced; category B comprised those lime stone quarries where in the opinion of the Bhargav Committee the adverse impact of mining operations was relatively more pronounced and category C covered those lime stone quarries which had been directed to be closed down by the Bhargav Committee under the orders made by us on account of deficiencies regarding safety and hazards of more serious nature.

3. It seems that the Government of India also appointed a Working Group on Mining of Lime Stone Quarries in Dehradun-Mussoorie area, some time in 1983. The Working Group was also headed by the same Shri D.N. Bhargav who was a member of the Bhargav Committee appointed by us. There were five other members of the Working Group along with Shri D.N. Bhargav and one of them was Dr. S. Mudgal who was at the relevant time Director in the Department of Environment, Government of India and who placed the Report of the Working Group before the Court along with his affidavit. The Working Group in its Report submitted in September 1983 made a review of lime stone quarry leases for continuance or

discontinuance of mining operations and after a detailed consideration of various aspects recommended that the lime stone quarries should be divided into two categories, namely category 1 and category 2; category 1 comprising lime stone quarries considered suitable for continuance of mining operations and category 2 comprising lime stone quarries which were considered unsuitable for further mining.

4. It is interesting to note that the lime stone quarries comprised in category A of the Bhargav Committee Report were the same lime stone quarries which were classified in category 1 by the Working Group and the lime stone quarries in categories B and C of the Bhargav Committee Report were classified in category 2 of the Report of the Working Group. It will thus be seen that both the Bhargav Committee and the Working Group were unanimous in their view that the lime stone quarries classified in category A by the Bhargav Committee Report and category 1 by the Working Group were suitable for continuance of mining operations. So far as the lime stone quarries in category C of the Bhargav Committee Report are concerned, they were regarded by both the Bhargav Committee and the Working Group as unsuitable for continuance of mining operations and both were of the view that they should be closed down. The only difference between the Bhargav Committee and the Working Group was in regard to lime stone quarries classified in category B. The Bhargav Committee Report took the view that these lime stone quarries need not be closed down, but it did observe that the adverse impact of mining operations in these lime stone quarries was more pronounced, while the Working Group definitely took the view that these lime stone quarries were not suitable for further mining.

6. We shall also examine in detail the question as to whether lime stone deposits act as aquifers or not. But there can be no gainsaying that lime stone quarrying and excavation of the lime stone deposits do seem to affect the perennial water springs. This environmental disturbance has however to be weighed in the balance against the need of lime stone quarrying for industrial purposes in the country and we have taken this aspect into account while making this order.

7. We are clearly of the view that so far as the lime stone quarries classified in category C in the Bhargav Committee Report are concerned which have already been closed down under the directions of the Bhargav Committee, should not be allowed to be operated. If the lessees of these lime stone quarries have obtained any stay order from any court permitting them to continue the mining operations, such stay order will stand dissolved and if there are any subsisting leases in respect of any of these lime stone quarries they shall stand terminated without any liability against the State of Uttar Pradesh. If there are any suits or writ petitions for continuance of expired or unexpired leases in respect of any of these lime stone quarries pending, they will stand dismissed.

8. We would also give the same direction in regard to the lime stone quarries in the Sahasradhara Block even though they are placed in category B by the Bhargav Committee. So far as these lime stone quarries in Sahasradhara Block are concerned, we agree with the Report made by the Working Group and we direct that these lime stone quarries should not be allowed to be operated and should be closed down forthwith. We would also direct, agreeing with the Report made by the Working Group that the lime stone quarries placed in category 2 by the Working Group other than those which are placed in categories B and C by the

Bhargav Committee should also not be allowed to be operated and should be closed down save and except for the lime stone quarries covered by mining leases Nos. 31, 36 and 37 for which we would give the same direction as we are giving in the succeeding paragraphs in regard to the lime stone quarries classified as category B in the Bhargav Committee Report.

9. So far as the lime stone quarries classified as category A in the Bhargav Committee Report and/or category 1 in the Working Group Report are concerned, we would divide them into two classes, one class consisting of those lime stone quarries which are within the city limits of Mussoorie and the other consisting of those which are outside the city limits. We take the view that the lime stone quarries falling within category A of the Bhargav Committee Report and/or category 1 of the Working Group Report and falling outside the city limits of Mussoorie, should be allowed to be operated subject of course to the observance of the requirements of the Mines Act, 1952, the Metalliferous Mines Regulations, 1961 and other relevant statutes, rules and regulations. Of course when we say this, we must make it clear that we are not holding that if the leases in respect of these lime stone quarries have expired and suits or writ petitions for renewal of the leases are pending in the courts, such leases should be automatically renewed. It will be for the appropriate courts to decide whether such leases should be renewed or not having regard to the law and facts of each case. So far as the lime stone quarries classified in category A in the Bhargav Committee Report and category 1 in the Working Group Report and falling within the city limits of Mussoorie are concerned, we would give the same direction which we are giving in the next succeeding paragraph in regard to the lime stone quarries classified as category B in the Bhargav Committee Report.

12. The consequence of this Order made by us would be that the lessees of lime stone quarries which have been directed to be closed down permanently under this Order or which may be directed to be closed down permanently after consideration of the Report of the Bandyopadhyay Committee, would be thrown out of business in which they have invested large sums of money and expended considerable time and effort. This would undoubtedly cause hardship to them, but it is a price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment with minimal disturbance of ecological balance and without avoidable hazard to them and to their cattle, homes and agricultural land and undue affectation of air, water and environment. However, in order to mitigate their hardship, we would direct the Government of India and the State of Uttar Pradesh that whenever any other area in the State of Uttar Pradesh is thrown open for grant of lime stone or dolomite quarrying, the lessees who are displaced as a result of this order shall be afforded priority in grant of lease of such area and intimation that such area is available for grant of lease shall be given to the lessees who are displaced so that they can apply for grant of lease of such area and on the basis of such application, priority may be given to them subject, of course, to their otherwise being found fit and eligible. We have no doubt that while throwing open new areas for grant of lease for lime stone or dolomite quarrying, the Government of India and the State of Uttar Pradesh will take into account the considerations to which we have adverted in this order.

13. We are conscious that as a result of this Order made by us, the workmen employed in the lime stone quarries which have been directed to be closed down permanently under this Order or which may be directed to be closed down permanently after consideration of the

Report of the Bandyopadhyay Committee, will be thrown out of employment. But the lime stone quarries which have been or which may be directed to be closed down permanently will have to be reclaimed and afforestation and soil conservation programme will have to be taken up in respect of such lime stone quarries and we would therefore direct that immediate steps shall be taken for reclamation of the areas forming part of such lime stone quarries with the help of the already available Eco-Task Force of the Department of Environment, Government of India and the workmen who are thrown out of employment in consequence of this Order shall, as far as practicable and in the shortest possible time, be provided employment in the afforestation and soil conservation programme to be taken up in this area.

14. There are several applications before us for removal of lime stone, dolomite and marble chips mined from the quarries and lying at the site and these applications also are being disposed of by this Order. So far as lime stone quarries classified as category A in the Bhargav Committee Report and/or category 1 in the Working Group Report and falling outside the city limits of Mussoorie are concerned, we have permitted the lessees of these lime stone quarries to carry on mining operations and hence they must be allowed to remove whatever minerals are lying at the site of these lime stone quarries without any restriction whatsoever, save and except those prescribed by any statutes, rules or regulations and subject to payment of royalty. We do not, however, propose to go into the question as to what was the precise quantity of minerals mined by the lessees of these lime stone quarries and lying at the site at the time when these lime stone quarries were closed down under the directions of the Bhargav Committee. We would permit the lessees of these lime stone quarries to remove whatever minerals are found lying at the site or its vicinity, provided of course such minerals are covered by their respective leases and/or quarry permits.

15. Such removal will be carried out and completed by the lessees within four weeks from the date of this Order and it shall be done in the presence of an officer not below the rank of Deputy Collector to be nominated by the District Magistrate, Dehradun, a gazetted officer from the Mines Department nominated by the Director of Mines and a public spirited individual in Dehradun,

* * * * *

M.C. Mehta v. Union of India, AIR 1997 SC 734

KULDIP SINGH, J. – 4. The Taj has been included in the list of 100 most endangered sites by the “Wprld Monuments Fund” by stating as under:

“The Taj Mahal – The Taj is the “King Emperor” amongst the World Wonders. The Taj is the final achievement and acme of the Moghul Art. It represents the most refined aesthetic values. It is a fantasy like grandeur. It is the perfect culmination and artistic interplay of the architects’ skill and the jeweler’s inspiration. The marble-in-lay walls of the Taj are amongst the most outstanding examples of decorative workmanship. The elegant symmetry of its exterior and the aerial grace of its domes and minarets impress the beholder in a manner never to be forgotten. It stands out as one of the most priceless national monument, of surpassing beauty and worth, a glorious tribute to man’s achievement in Architecture and Engineering.

According to the petitioner, the foundries, chemical/hazardous industries and the refinery at Mathura are the major sources of damage to The Taj. The sulphur dioxide emitted by the Mathura Refinery and the industries when combined with Oxygen - with the aid of moisture - in the atmosphere forms sulphuric acid called “Acid rain” which has a corroding effect on the gleaming white marble. Industrial/Refinery emissions, brick-kilns, vehicular traffic and generator-sets are primarily responsible for polluting the ambient air around Taj Trapezium (TTZ). The petition states that the white marble has yellowed and blackened in places. It is inside The Taj that the decay is more apparent. Yellow pallor pervades the entire monument. In places the yellow hue is magnified by ugly brown and black spots. Fungal deterioration is worst in the inner chamber where the original graves of Shah-Jahan and Mumtaz Mahal lie. According to the petitioner The Taj a monument of international repute – is on its way to degradation due to atmospheric pollution and it is imperative that preventive steps are taken and soon. The petitioner has finally sought appropriate directions to the authorities concerned to take immediate steps to stop air pollution in the TTZ and save The Taj.

5. The Report of the Expert Committee called “***Report on Environmental Impact of Mathura Refinery***” (Varadharajan Committee) published by the Government of India in 1978 has been annexed along with the writ petition.

Varadharajan Committee made, among others, the following recommendations:

“Steps may be taken to ensure that no new industry including small industries or other units which can cause pollution are located north west of the Taj Mahal ... Efforts may be made to relocate the existing small industries particularly the foundries, in an area south east of Agra beyond the Taj Mahal so that emissions from these industries will not be in the direction of the monuments ... Similar considerations may apply to large industries such as Fertiliser & Petrochemicals. Such industries which are likely to cause environmental pollution may not be located in the neighbourhood of the refinery. The Committee further recommends that no large industry in the Agra region and its neighbourhood be established without

conducting appropriate detailed studies to assess the environmental effect of such industries on the monuments. Location should be so chosen as to exclude any increase in environmental pollution in the area ... The Committee wishes to record its deep concern regarding the existing level of pollution in Agra. It recommends that an appropriate authority be created which could monitor emissions by industries as well as the air quality at Agra on a continuous basis. This authority should be vested with powers to direct industries causing pollution to limit the level of emission and specify such measures as are necessary to reduce the emission whenever the pollutant level at the monuments exceeds acceptable limits. The Committee particularly desires that recommendations made in regard to reduction of existing pollution levels at Agra should be converted to a time-bound programme and should be implemented with utmost speed. The Committee also recommends that studies should be undertaken by competent agencies to explore the possibility of protecting the monuments by measures such as provision of a green belt around Agra in the region between Mathura and Agra.... Even though assurances have been obtained from IOC that adequate precautions would be taken to contain the pollution on account of using coal in the power plant, the Committee is of the opinion that till such time this problem is studied in depth and suitable technologies have been found to be satisfactorily in use elsewhere, the use of coal in the refinery power plant should be deferred.”

The Central Board for the Prevention and Control of Water Pollution, New Delhi, published a report (Control of Urban Pollution Series CUPS/7/1981-82) under the title “Inventory and Assessment of Pollution Emissions in and Around Agra-Mathura Region (Abridged).” The relevant findings are as under :

“Industrial activities which are in operation in Agra city and its outskirts could be categorized as (i) Ferrous Metal Casting using Cupolas (Foundry); (ii) Ferror-alloy and Non-Ferrous Castings using Crucibles, Rotary Furnances etc., (iii) Rubber Processing; (iv) Lime Oxidation and Pulversing; (v) Engineering; (vi) Chemical; and (vii) Brick and Refractory Kilns (Table 4-1). The contribution of sulphur dioxide through emission primarily from the combustion from the fuels comprising hard coke, steam coal, wood and fuel oil is estimated at 3.64 tonnes per day from industrial activities in the Agra City and its outskirts (Table 5-3). The vehicular contribution as estimated from traffic census in 6 road crossings is only 65 kg a day or 0.065 tonnes a day and should be considered negligible for the present (Para 7-4)... The Contribution of sulphur dioxide from the 5 recognised distinct discrete sources in tonnes per day are 2.28, 2.28, 1.36, 1.21 and 0.65 from (i) two thermal power stations, (ii) foundries, (iii) other industries in Agra, (iv) two railway marshalling yards, and (v) vehicular traffic respectively. Omitting contribution from vehicular traffic as because it is considered negligible, the relative contributions from the other 4 distinct sources are 32, 32, 19 and 16.9 per cent. With the elimination of the first and the fourth sources – by closing down the two thermal power stations and replacing coal fired steam engines by diesel engines in the two railway marshalling yards – about 50 per cent (48.9 to be exact) cut down of sulphur dioxide emission is expected.”

The National Environmental Engineering Research Institute (NEERI) gave “Over-view report” regarding status of air pollution around The Taj in 1990. This Court on January 8, 1993 passed the following order:

“We have heard Mr. M.C. Mehta, the petitioner in person. According to him, the sources of pollution in Agra region as per the report of Central Pollution Control Board are Iron foundries. Ferro-alloyed industries, rubber processing, lime processing; engineering, chemical industry, brick refractory and vehicles. He further states that distant sources of pollution are the Mathura Refinery and Ferozabad Glass Industry. It is necessary to have a detailed survey done of the area to find out the actual industries and foundries which are working in the region. We direct the U.P. Pollution Control Board to get a survey done in the area and prepare a list of all the industries and foundries which are the sources of pollution in the area. The Pollution Board after having the survey done shall issue notices to all the foundries and industries in that region to satisfy the Board that necessary anti-pollution measures have been undertaken by the said industries/ foundries. The Pollution Board after doing this exercise shall submit a report to this Court on or before May 5, 1993. A copy of this order be sent to the Chairman and Secretary, U.P. Pollution Control Board for compliance and report as directed.”

7. Meanwhile, NEERI submitted its report dated October 16/18, 1993 regarding sulphur dioxide emission control measures at Mathura Refinery. Since the Mathura Refinery matter is being dealt with separately it is not necessary to go into the details of the report. Suffice it to say that apart from short term strategy, the NEERI recommended the use of natural gas, setting up of Hydro cracking unit, improved sulphur Recovery Unit, Chemobiochemical Sulphur Recovery and the setting up of green belt around the refinery. The NEERI report examined in detail the decay mechanism and status of The Taj marble. How the deterioration of marble occurs, is stated by NEERI as under:

“The deterioration of marble occurs in two modes. In the first mode, weathering takes place if the marble is sheltered under domes and cornices, and protected from direct impact of rain. Here a crust is formed, which after some period, exfoliates due to mechanical stresses. In case of marble exposed to rain, gradual reduction of material occurs, as the reaction products are washed away by rainfall and fresh marble is exposed. The crusts are formed due to Sulphur Dioxide, but the cumulative effects of all pollutants are more damaging. It is also observed that trace metals present in fly ash and suspended particulate matter, e.g. Manganese, Iron and Vanadium act as catalysts for oxidation of Sulphur Dioxide, and in turn enhance degradation of marble calcite to gypsum.”

8. This court by an order dated February 11, 1994 asked the NEERI to examine the possibility of using propane or any other safe fuel instead of coal/coke by the industries in the TTZ. The operative part of the order is as under:

“We requested Mr. V.R. Reddy, learned Additional Solicitor General on January 14, 1994 to have discussion with the concerned authorities and assist us in probing the possibility of providing some safe fuel to the foundries and other industries

situated in the Taj trapezium. We are thankful to Mr. Reddy for doing good job and placing before us various suggestions in that direction. Mr. Reddy has suggested that NEERI be asked to examine the possible effects of the use of Propane as a safe fuel from the point of view of atmospheric pollution. We accept the suggestion and request Dr. P. Khanna to examine the feasibility of Propane as a possible alternative to the present fuel which is being used by the foundries and other industries in the Taj trapezium. This may be done within 2 weeks from today. Copy of this order be sent to the Director, NEERI within 2 days from today. Government of India, Ministry of Environment shall pay the charges of NEERI in this respect.

We further direct the U.P. State Industrial Development Corporation through its Managing Director to locate sufficient landed area possibly outside the Taj trapezium where the foundries and other industries located within the Taj trapezium can be ultimately shifted. The Corporation shall also indicate the various incentives which the Government/U.P.S.I.D.C. might offer to the shifting industries. The Managing Director of the U.P.S.I.D.C. shall file an affidavit before this Court on or before March 4, 1994 indicating the steps taken by the Corporation in this respect. We also direct the Gas Authority of India to indicate the price of Propane which they might have to ultimately supply to the industries within the Taj trapezium or the industries which are to be shifted from within the Taj trapezium. This may be done within 4 weeks from today. We place the statement of the outcome of discussion held by Mr. Reddy with the concerned authorities on record.”

This Court on February 25, 1994 examined the issue relating to supply of natural gas to the Mathura Refinery and the industries in the TTZ and passed the following order:

“With a view to save time and red tape we are of the view that it would be useful to have direct talk with the highest authorities who can take instant decision in the matter. We, therefore, request the Chairman of the Oil and Natural Gas Commission, the Chairman of the Indian Oil Corporation and the Chairman of the Gas Authority of India to be personally present in this Court on 8.3.1994 at 2.00 p.m.

We further direct the Secretary, Ministry of Petroleum, to depute a responsible officer to be present in the Court on 8.3.1994 at 2.00 p.m.”

The Corporation filed affidavit dated March 3, 1994 indicating the location/area of various industrial estates which were available for relocation of the industries from TTZ. After examining the contents of the affidavit, this Court on March 4, 1994 passed the following order:

“Mr. K.K. Venugopal, learned senior advocate appears for the U.P. State Industrial Corporation Limited. The Corporation has filed an affidavit wherein it is stated that the Corporation has 220 acres of developed land in industrial area, Kosi (Kotwa) where 151 plots are available for immediate allotment. It is further stated that undeveloped land measuring 330 acres is available in Salimpur in Aligarh District. Both these places are about 60/65 kms. away from Agra and are outside the Taj environment Trapezium. It is also stated that 85 acres of undeveloped land is also available at Etah, which is about 80 kms. away from Agra.

Before we issue any directions regarding the development of area or allotment of land to various industries, it is necessary to know the exact number of air polluting industries which are operating within the Taj Trapezium which are to be shifted outside the trapezium. Mr. Pradeep Misra, learned counsel for the U.P. State Pollution Control Board fairly states that he would direct the Board Secretariat to prepare a list on the basis of their record and survey, and submit the same in this Court within a week from today.”

9. This Court on April 11, 1994 after hearing learned counsel for the parties, passed the order indicating that as a first phase the industries situated in Agra be relocated out of TTZ. While the industries were being heard on the issue of relocation, this Court on April 29, 1994 passed the following order:

“Efforts are being made to free the prestigious Taj from pollution, if there is any, because of the industries located in and around Agra. It is further clear from our order that the basis of the action initiated by this Court is the NEERI’s report which was submitted to the Government of India in July, 1993.

We are of the view that it would be in the interest of justice to have another investigation/report from a reputed technical/Engineering authority. Ministry of Environment and Forests, Government of India may examine this aspect and appoint an expert authority (from India or abroad) to undertake the survey of the Taj Trapezium Environmental Area and make a report regarding the source of pollution in the Trapezium and the measures to be adopted to control the same. The authority can also identify the polluting industries in the Taj Trapezium. We, therefore, request Mr. Kamal Nath, Minister Incharge, Department of Environment and Forests, to personally look into this matter and identify the authority who is to be entrusted with this job. This must be done within three weeks from the receipt of this order. A responsible Officer of the Ministry shall file an affidavit in this Court within two weeks indicating the progress made by the Ministry in this respect. Registry to send copy of the above quoted order to the Secretary, Ministry of Environment and Forests and also to Mr. Kamal Nath, personally, within three days from today.”

Pursuant to above quoted order, the Government of India, Ministry of Environment and Forests, by the order dated May 18, 1994 appointed an expert committee under the chairmanship of Dr. S. Varadharajan.

10. Meanwhile the Indian Oil Corporation placed on record its report on the feasibility study regarding the use of safe alternate fuel by the Mathura Refinery. The report suggested the use of natural gas as the most optimum fuel. Once the natural gas is brought to Mathura there would be no difficulty in providing the same to the other industries in TTZ and outside TTZ.

13. This Court on March 14, 1996 directed the GAIL, Indian Oil Corporation and the UP State Industrial Development Corporation to indicate the industrial areas outside the TTZ which would be connected with the gas supply network. The order passed was as under:

“Mr. Reddy, the learned Additional Solicitor General after consulting Mr. C.P. Jain, the Chief Environmental Manager, New Delhi has stated that mechanical

process for bringing gas near Mathura Refinery shall be completed by December, 1996. He further stated that the commissioning would be done by January, 1997. We have on record the undertaking of the Gas Authority of India that while the pipe line is being constructed the branch pipe line for supplying gas to Mathura Refinery and to the industries shall also be completed side by side. We direct the Gas Authority of India, Indian Oil Corporation and U.P. State Industrial Development Corporation to file an affidavit in this Court within two weeks of the receipt of this order indicating as to which of the industrial areas outside the Taj Trapezium would be connected with the gas supply network. We may mention that the PSCDC has already filed affidavit in this Court indicating various industrial Estates which can be developed outside the Taj Trapezium.”

We have already heard arguments regarding relocation of industries from Taj Trapezium. Some of the industries which are not in a position to get gas connections or which are otherwise polluting may have to be relocated outside Taj Trapezium. The GAIL may also examine whether in the event of availability of more quantity of gas, the same can be supplied to the industries outside the Taj Trapezium which are located in the vicinity from where the gas pipe is passing.

This Court on September 12, 1996 passed the following order regarding the safety measures to be taken during the construction and operation of the gas network in the Taj Trapezium. The Court also recorded the undertaking by learned counsel for the industries that the industries in TTZ are taking steps to approach the Gas Authority of India for gas connections:

“Pursuant to this Court’s order dated April 10, 1996 and subsequent order dated May 10, 1996, Mr. P.C. Gupta, General Manager, Gas Authority of India has filed an affidavit. It is stated in the affidavit that necessary directions in the pipeline design corrosion protection, protection during construction and during operations have been taken by the Gas Authority of India. It is for the Central Pollution Control Board or the State Pollution Control Board concerned to examine the legal position and do the needful, if anything is to be done under law.”

14. The NEERI submitted a Technical Report dated 7-3-1994 pertaining to “Issues Associated with Fuel Supply Alternatives for Industries in Agra-Mathura Region”. Paras 2.4.1 and para 3 of the Report are as under:

“2.4 Safety Requirements

2.4.1 NG: The use of NG involves the defining of No Gas Zone for safe distribution. The new sites in Agra and Ferozabad industries being identified by the Government of Uttar Pradesh shall minimise this hazard as the industrial estates shall be suitably designed for NG distribution.

The new industrial sites should preferably be out of the Taj Trapezium. The incentives for industries to shift to new industrial estates need to be established to ensure speedy implementation.

3.0 Summary

The various issues raised in this report pertaining to the fuel supply alternatives to the industries in Agra-Ferozabad region and the Mathura Refinery, can be summarized as:

- Need for relocation of industries;
- Availability of cleaner fuel (present and future);
- Environmental benefits from alternate fuels;
- Safety considerations;

The recommendations are summarized hereunder:

- Shifting of small-scale polluting industries outside the Taj Trapezium on industrial estate sites to be identified by the Government of Uttar Pradesh;
- Provision of natural gas to the industries in Agra-Mathura region and Mathura Refinery.”

Mr M.C. Mehta, Mr Kapil Sibal and other learned counsel representing the Agra industries took us through the April 1995 Varadharajan Committee Report. Relevant paragraphs of the Report are reproduced hereunder:

“4. The Expert Committee’s recommendation that steps may be taken to ensure that no new industry, including small industries or other units, which can cause pollution are located north-west of the Taj Mahal, has been enforced. However, efforts to relocate existing small industries, particularly the foundries, in an area south-east of Agra beyond the Taj Mahal, have not been successful.”

16. The Report clearly shows that the level of Suspended Particulate Matter (SPM) in the Taj Mahal area is high. The relevant part of the Report in this respect is as under:

SPM (Period 1981-1993)

(i) The level of SPM at Taj Mahal is generally quite high, the monthly mean values being above 200 micrograms/cubic metre for all the months during 1981-1985 except for the monsoon months.

(ii) There is an increasing trend in the monthly mean SPM concentrations from about 380 micrograms/cubic metre to 620 micrograms/cubic metre during the period 1987-1991, and the trend reverses thereafter till 1993. There is a decrease in monthly mean SPM levels from 620 micrograms/cubic metre in 1991 to about 425 micrograms/cubic metre in 1993.”

17. Para 71 of the Report deals with the consumption of coal in the Agra areas. The relevant part is as under:

“... These do cause pollution of the atmosphere. Industries in Agra are situated north-west, north and north-east of the Taj Mahal, several of them being located across the river. These are the major sources of concern as they are not far away, and much of the time winds blow from their location towards Taj Mahal.”

18. Para 78 relating to the use of Natural Gas is as under:

“... Natural Gas distribution to industries in existing locations in Agra would need installation of pipelines and meters. This may be expensive and in addition not ensure safety, as accidental leakage in pipeline network may lead to explosions and fires. It may however be possible to use LPG or HSD with suitable precautions, after careful review.”

19. Relevant part of para 79 is as under:

“... NEERI Report dated 7-3-1994 on Fuel Supply alternatives (Annexure) suggests Natural Gas can be considered for use only in new industrial sites.”

20. The industries in Agra have been dealt in paras 92, 93, 95 and 96 which are as under:

“92. Industries in Agra and Ferozabad have been asked to instal APCD to reduce essentially SPM level in air emissions. The UPPCB has the authority to monitor their performance to meet standards outlined for different industries by CPCB noting their capacities. These regulations should be fully enforced. NEERI has suggested suitable sites in Agra and Ferozabad which could be identified and developed as industrial estates with facilities, separated from residential area. If such sites are developed, Natural Gas supply in the industrial estate would be possible with safety, and the industrial units could be shifted.

93. There is need for a single authority in such estate to coordinate all maintenance and repair work on electrical supply, telecommunications, water, sewage, drains, roads and construction. Any industrial estate in Agra with Natural Gas will have to be located at a substantial distance from monuments to ensure full safety. * * *

95. When industrial units are relocated, it would be appropriate to modernise technology equipment and buildings. Most of the units will need very substantial financial assistance. The value of the present sites and their future use have to be determined. It would not be desirable to promote residential colonies and commercial establishments in such vacated areas as they may in turn add to the problems of water supply and atmospheric quality by excessive use of energy. Major changes of this nature would need a clear development planning strategy and resources, and will also take several years for implementation.

96. There is urgent need for quicker measures which could lead to better environment, especially in the Taj Mahal. For this purpose, it is necessary to effect overall reduction in coal/coke consumption by industries and others in Agra and in Taj Trapezium Zone generally. The present level of consumption of 129 metric tonnes per day by industry can be substantially reduced by new technology and by use of LPG and HSD of low sulphur. Stricter standards for emissions may be evolved when such technological and fuel changes are effected. Support for development of modifications in design and operation and demonstration should be provided. Some assistance to industries for adoption of these may be considered after careful examination of the costs and benefits to the industry and to society. All those industries not responding for action for feasible changes and contributing disproportionately to atmospheric pollution have to face action.”

22. After careful examination of the two Varadharajan Reports (1978 and 1995) and the various NEERI reports placed on record, we are of the view that there is no contradiction between the two sets of reports. In the 1978 Report, Varadharajan found substantial level of air pollution because of sulphur dioxide and SPM in the Agra region. The source, according to the report, was the coal-users including approximately 250 small industries mainly foundries. The excess of SPM was because of the use of coal. The Report specifically recommended in para 5.4 for the relocation of the existing small industries particularly the foundries. The 1995 Varadharajan Report clearly shows that the standard of atmospheric pollution is much higher than the 1981-85 period which according to the Report is also because of heavy traffic and operation of generating sets. NEERI reports have clearly recommended the relocation of the industries from the TTZ.

23. This Court on April 11, 1994 passed the following order:

“We are of the view that the shifting of the industries from the Taj Trapezium has to be made in a phased manner. NEERI’s report indicates that the maximum pollution to the ambient air around Taj Mahal is caused by the industries located in Agra. We, therefore, as a first phase, take up the industries situated in Agra for the purposes of the proposed shifting outside Taj Trapezium.....:

We, therefore, direct the U.P. State Pollution Control Board to issue Public Notices in the two national English Daily newspapers and also two vernacular newspapers for three consecutive days indicating that the Supreme Court of India is processing the proposal for shifting of the air polluting industries such as Foundries, Pit Furnaces, Rubber Sole, Chemical, Refractory Brick, Engineering and Lime Processing from Agra to outside Taj Trapezium at a suitable place to be selected after hearing the parties including the industry owners.”

25. The Taj, apart from being cultural heritage, is an industry by itself. More than two million tourists visit the Taj every year. It is a source of revenue for the country. This Court has monitored this petition for over three years with the sole object of preserving and protecting The Taj from deterioration and damage due to atmospheric and environmental pollution. It cannot be disputed that the use of coke/coal by the industries emit pollution in the ambient air. The objective behind this litigation is to stop the pollution while encouraging development of industry. The old concept that development and ecology cannot go together is no longer acceptable. Sustainable development is the answer. The development of industry is essential for the economy of the country, but at the same time the environment and the eco-systems have to be protected. The pollution created as a consequence of development must be commensurate with the carrying capacity of our eco-systems.

26. Various orders passed by this Court from time to time (quoted above) clearly indicate that the relocation of the industries from TTZ is to be resorted to only if the natural gas which has been brought at the doorstep of TTZ is not acceptable/available by/to the industries as a substitute for coke/coal. The GAIL has already invited the industries in TTZ to apply for gas connections. Before us, Mr. Kapil Sibal and Mr. Sanjay Parikh, learned counsel for the industries have clearly stated that all the industries would accept gas as an industrial fuel. The industries operating in TTZ which are given gas connections to run the industries need not relocate. The whole purpose is to stop air pollution by banishing coke/coal from TTZ.

This Court in *Vellore Citizens Welfare Forum v. Union of India* [(1996) 7 JT 375] has defined “the precautionary principle” and the “Polluter Pays principles”.

27. Based on the reports of various technical authorities mentioned in this judgment, we have already reached the finding that the emissions generated by the coke/coal consuming industries are air-pollutants and have damaging effect on the Taj and the people living in the TTZ. The atmospheric pollution in TTZ has to be eliminated at any cost. Not even one per cent chance can be taken when - human life apart - the preservation of a prestigious monument like The Taj is involved. In any case, in view of the precautionary principle as defined by this Court, the environmental measures must anticipate, prevent and attack the causes of environmental degradation. The ‘onus of proof’ is on an industry to show that its operation with the aid of coke/coal is environmentally benign. It is, rather, proved beyond doubt that the emissions generated by the use of coke/coal by the industries in TTZ are the main polluters of the ambient air.

28. We, therefore, hold that the above-mentioned 292 industries shall as per the schedule indicated hereunder change-over to the natural gas as an industrial fuel. The industries which are not in a position to obtain gas connections – for any reason – shall stop functioning with the aid of coke/coal in the TTZ and may relocate themselves as per the directions given by us hereunder.

29. We order and direct as under:

(1) The industries (292 listed above) shall approach/apply to the GAIL before February 15, 1997 for grant of industrial gas-connection.

(2) The industries which are not in a position to obtain gas connections and also the industries which do not wish to obtain gas connections may approach/apply to the Corporation (UPSIDC)/Government before February 28, 1997 for allotment of alternative plots in the industrial estates outside TTZ.

(3) The GAIL shall take final decision in respect of all the applications for grant of gas connections by March 31, 1997 and communicate the allotment letters to the individual industries.

(4) Those industries which neither apply for gas connection nor for alternative industrial plot shall stop functioning with the aid of coke/coal in the TTZ with effect from April 30, 1997. Supply of coke/coal to these industries shall be stopped forthwith. The District Magistrate and the Superintendent of Police shall have this order complied with.

(5) The GAIL shall commence supply of gas to the industries by June 30, 1997. As soon as the gas supply to an industry commences, the supply of coke/coal to the said industry shall be stopped with immediate effect.

(6) The Corporation/Government shall finally decide and allot alternative plots, before March 31, 1997, to the industries which are seeking relocation.

(7) The relocating industries shall set up their respective units in the new industrial estates outside TTZ. The relocating industries shall not function and operate in TTZ beyond December 31, 1997. The closure by December 31, 1997 is

unconditional and irrespective of the fact whether the new unit outside TTZ is completely set up or not.

(8) The Deputy Commissioner, Agra and the Superintendent (Police), Agra shall effect the closure of all the industries on December 31, 1997 which are to be relocated by the date as directed by us.

(9) The U.P. State Government/Corporation shall render all assistance to the industries in the process of relocation. The allotment of plots, construction of factory building, etc., and issuance of any licence/permissions, etc. shall be expedited and granted on priority basis.

(10) In order to facilitate shifting of industries from TTZ, the State Government and all other authorities shall set up unified single agency consisting of all the departments concerned to act as a nodal agency to sort out all the problems of such industries. The single window facility shall be set up by the U.P. State Government within one month from today. The Registry shall communicate this direction separately to the Chief Secretary, Secretary (Industries) and Chairman/Managing Director, UPSIDC along with a copy of this judgment. We make it clear that no further time shall be allowed to set up the single window facility.

(11) The State Government shall frame a scheme for the use of the land which would become available on account of shifting/relocation of the industries before June 30, 1997. The State Government may seek guidance in this respect from the order of this Court dated May 10, 1996 in I.A. No. 22 in Writ Petition (Civil) No. 4677 of 1985.

(12) The shifting industries on the relocation in the new industrial estates shall be given incentives in terms of provisions of the Agra Master Plan and also the incentives which are normally extended to new industries in new industrial estates.

(13) The workmen employed in the above-mentioned 292 industries shall be entitled to the rights and benefits as indicated hereunder :

(a) The workmen shall have continuity of employment at the new town and place where the industry is shifted. The terms and conditions of their employment shall not be altered to their detriment.

(b) The period between the closure of the industry in Agra and its restart at the place of relocation shall be treated as active employment and the workmen shall be paid their full wages with continuity of service.

(c) All those workmen who agree to shift with the industry shall be given one year's wages as 'shifting bonus' to help them settle at the new location. The said bonus shall be paid before January 31, 1998.

(d) The workmen employed in the industries who do not intend to relocate/obtain natural gas and opt for closure, shall be deemed to have been retrenched by May 31, 1997, provided they have been in continuous service (as defined in Section 25-B of the Industrial Disputes Act, 1947) for not less than one year in the industries concerned before the said date.

They shall be paid compensation in terms of Section 25-F(b) of the Industrial Disputes Act. These workmen shall also be paid, in addition, six years' wages as additional compensation.

(e) The compensation payable to the workmen in terms of this judgment shall be paid by the management within two months of the retrenchment.

(f) The gratuity amount payable to any workmen shall be paid in addition.

30. Before parting with this judgment, we may indicate that the industries in the TTZ other than 292 industries shall be dealt with separately. We direct the Board to issue individual notices and also public notice to the remaining industries in the TTZ to apply for gas connection/relocation within one month of the notice by the Board. The Board shall issue notice within one month from today. The matter is to come up for further monitoring in this respect before this Court on April 4, 1997.

31. We may also indicate that this Court by order dated May 10, 1996 has stopped the operation of all the brick kilns in the TTZ with effect from August 15, 1996. This Court by order dated September 4, 1996 has directed that the fly-ash produced in the process of the functioning of thermal plants may be supplied to the brick kilns for the construction of bricks. This would be a useful step to eliminate the pollution caused by fly-ash.

32. This Court is separately monitoring the following issues for controlling air pollution in TTZ:

(a) The setting up of hydrocracker unit and various other devices by the Mathura Refinery.

(b) The setting up of 50 bed hospital and two mobile dispensaries by the Mathura Refinery to provide medical aid to the people living in the surrounding areas (Court order dated August 7, 1996).

(c) Construction of Agra bypass to divert all the traffic which passes through the city. Under directions of this Court, 24 kms. stretch of the by-pass shall be completed by the end of December 1996 (Court order dated April 10, 1996).

(d) Additional amount of Rs. 99.54 crores sanctioned by the Planning Commission to be utilised by the State Government for the construction of electricity supply projects to ensure 100 per cent uninterrupted electricity to the TTZ. This is necessary to stop the operation of generating sets which are major source of air pollution in the TTZ (Court orders dated April 10, 1996, May 10, 1996, August 30, 1996, September 4, 1996 and September 10, 1996).

(e) The construction of Gokul Barrage, water supply work of Gokul Barrage, roads around Gokul Barrage, Agra Barrage and water supply of Agra Barrage, have also been undertaken on a time schedule basis to supply drinking water to the residents of Agra and to bring life into river Yamuna which is next to the Taj (Court order dated May 10, 1996 and August 30, 1996).

(f) Green belt as recommended by NEERI has been set up around Taj. Pursuant to continuous monitoring of this Court, the Green Belt has become a reality.

(g) This Court suggested to the Planning Commission by order dated September 4, 1996 to consider sanctioning separate allocation for the city of Agra and the creation of separate cell under the control of Central Government to safeguard and preserve the Taj, the city of Agra and other national heritage monuments in the TT.

(h) All emporia and shops functioning within the Taj premises have been directed to be closed.

(i) Directions have been issued to the Government of India to decide the issue pertaining to declaration of Agra as heritage city, within two months.

* * * * *

M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388

KULDIP SINGH, J. – This Court took notice of the news item appearing in the *Indian Express* dated 25.2.1996 under the caption - “Kamal Nath dares the mighty Beas to keep his dreams afloat.” The relevant part of the news item is as under:

Kamal Nath’s family has direct links with a private company, Span Motels Private Limited, which owns a resort - Span Resorts - for tourists in Kullu-Manali Valley. The problem is with another ambitious venture floated by the same company – Span Club.

The club represents Kamal Nath’s dream of having a house on the bank of the Beas in the shadow of the snow-capped Zanskar Range. The club was built after encroaching upon 27.12 bighas of land, including substantial forest land, in 1990. The land was later regularised and leased out to the company on 11.4.1994. The regularisation was done when Mr. Kamal Nath was Minister of Environment and Forests... The swollen Beas changed its course and engulfed the Span Club and the adjoining lawns, washing it away.

For almost five months now, the Span Resorts management has been moving bulldozers and earth-movers to turn the course of the Beas for a second time.

The heavy earth-mover has been used to block the flow of the river just 500 metres upstream. The bulldozers are creating a new channel to divert the river to at least one kilometre downstream. The tractor-trolleys move earth and boulders to shore up the embankment surrounding Span Resorts for laying a lawn. According to the Span Resorts management, the entire reclaiming operation should be over by March 31 and is likely to cost over a crore of rupees.

Three private companies - one each from Chandigarh, Mandi and Kullu – have moved in one heavy earth-mover (hired at the rate of Rs. 2000 per hour), four earth-movers and four bulldozers (rates varying from Rs. 650 to Rs. 850 each per hour) and 35 tractor-trolleys. A security ring has been thrown all around... Another worrying thought is that of the river eating into the mountains, leading to landslides which are an occasional occurrence in this area. Last September, these caused floods in the Beas and property estimated to be worth Rs. 105 crores was destroyed... Once they succeed in diverting the river, the Span management plans to go in for landscaping the reclaimed land. But as of today, they are not so sure. Even they confess the river may just return.

13. This Court took notice of the news item - quoted above - because the facts disclosed therein, if true, would be a serious act of environmental degradation on the part of the Motel. It is not disputed that in September, 1995, the swollen Beas engulfed some part of the land in possession of the Motel. The news item stated that the Motel used earth-movers and bulldozers to turn the course of the river. The effort on the part of the Motel was to create a new channel by diverting the river-flow. According to the news item three private companies were engaged to reclaim huge tracts of land around the Motel. The main allegation in the

news item was that the course of the river was being diverted to save the Motel from future floods. In the counter-affidavit filed by the Motel, the allegations in the news item have been dealt with in the following manner:

“(l) If the works were not conducted by the Company, it would in future eventually cause damage to both banks of the river, under natural flow conditions.

(m) By dredging the river, depth has been provided to the river channel thus enhancing its capacity to cope with large volume of water.

(n) The wire crates have been put on both banks of the river. This has been done to strengthen and protect the banks from erosion and not any form of river diversion. It is not necessary to divert the river because simply providing greater depth and removing debris deposits enhances the capacity of the river to accommodate greater water flow.

(o) I further state that the nearly 200 metres of wire crates which have been put on the left bank of the river (the river bank on the opposite side of SPAN) is in the interest of the community and nearby residents/villages. This left bank crating protects the hillside where RANGRI, CHAKKI and NAGGAR are located.

(s) After the floods, it was observed, that the boulders and rubble deposits were obstructing and hindering the flow of the river and thus, it was the common concern of the Company as well as of the Panchayat of Village BARAGRAN BIHAL to carry out dredging measures to provide free flow of the river water.

(t) Accordingly, alleviation measures conducted by the Company and the villagers of BARAGRAN BIHAL were as under --

(i) *Dredging of debris deposit:* Debris deposits in river basin which had collected due to the floods were removed by dredging. This deepens the channel and thus allows larger flow of water.

(ii) *Strengthening of both banks with wire crates:* Wire crates are the common method of protection of bank erosion. Accordingly wire crates were put along the opposite side (left bank) to protect the landslide of the hillside wire on which Village RANGRI is perched, Wire crating was also put on the Resort side of the river (right bank) to strengthen and protect the bank against erosion. All the wire crating runs along the river flow and not as an obstruction or for any diversion.

16. This Court by the order dated 6.5.1996 directed the Central Pollution Control Board (the Board) through its Member Secretary to inspect the environment around the area in possession of the Motel and file a report. This Court further ordered as under :

“Meanwhile we direct that no construction of any type or no interference in any manner with the flow of the river or with the embankment of the river shall be made by the Span Management.”

17. Pursuant to this Court’s order dated 6.5.1996 the Board filed its report along with the affidavit of Dr. S.P. Chakrabarti, Member Secretary of the Board. It is stated in the affidavit that a team comprising Dr. Bharat Singh, Former Vice-Chancellor and Professor Emeritus,

University of Roorkee, Dr. S.K. Ghosh, Senior Scientist and former Head, Division of Plant Pathology (NF), Kerala Forest Research Institute, Peechi, Trichur and Dr. S.P. Chakrabarti, Member Secretary, Board was constituted. The team inspected the area and prepared the report. Para 4.2 of the report gives details of the construction done by the Motel prior to 1995 floods. The relevant part of the paragraph is as under:

“To protect the newly-acquired land, SMPL took a number of measures which include construction of the following as shown in Fig. 2 --

(a) 8 nos. studs of concrete blocks 8 m long and 20 m apart on the eastern face of the club island on the upstream side,

(b) 150 m long stepped wall also on the eastern face of club island on the downstream side,

(c) A 2 m high bar of concrete blocks at the entry at the spill channel, and

(d) Additional 8 nos. studs also 8 m long and 20m apart on the right bank of River Beas in front of the restaurant of the SMPL.

While (a) & (b) were aimed at protecting the club island from the main current, (c) was to discourage larger inflow into the spill channel. Item (d) was meant to protect the main resort land of SMPL if heavy flow comes into the spill channel.

The works executed in 1993 were bank protection works, and were not of a nature so as to change the regime or the course of river. A medium flood again occurred in 1994. Partly due to the protection works, no appreciable damage occurred during this flood. The main current still continues on the left bank.”

21. Mr. Harish Salve vehemently contended that whatever construction activity was done by the Motel on the land under its possession and on the area around, if any, was done with a view to protect the leasehold land from floods. According to him the Divisional Forest Officer by the letter dated 12.1.1993 – quoted above – permitted the Motel to carry out the necessary works subject to the conditions that the department would not be liable to pay any amount incurred for the said purpose by the Motel. We do not agree. It is obvious from the correspondence between the Motel and the Government, referred to by us, that much before the letter of the Divisional Forest Officer, dated 12.1.1993, the Motel had made various constructions on the surrounding area and on the banks of the river. In the letter dated 30.8.1989 addressed to the Divisional Forest Officer, Kullu – quoted above – the Motel management admitted that “over the years, and especially after the severe flood erosion last year, we have built extensive stone, cemented and wire-mesh-crated embankments all along the river banks at considerable expense and cost. We have also gradually and painstakingly developed this entire waste and banjar area.” The “Banjar area” referred to in the letter was the adjoining area admeasuring 22.2 bighas which was not on lease with the Motel at that time. The admissions by the Motel management in various letters written to the Government, the counter-affidavits filed by the various government officers and the report placed on record by the Board clearly show that the Motel management has by their illegal constructions and callous interference with the natural flow of River Beas has degraded the environment. We

have no hesitation in holding that the Motel interfered with the natural flow of the river by trying to block the natural relief/spill channel of the river.

22. The forest lands which have been given on lease to the Motel by the State Government are situated at the bank of River Beas. Beas is a young and dynamic river. It runs through Kullu Valley between the mountain ranges of the Dhauladhar in the right bank and the Chandrakheni in the left. The river is fast-flowing, carrying large boulders, at the times of flood. When water velocity is not sufficient to carry the boulders, those are deposited in the channel often blocking the flow of water. Under such circumstances the river stream changes its course, remaining within the valley but swinging from one bank to the other. The right bank of River Beas where the Motel is located mostly comes under forest, the left bank consists of plateaus, having steep bank facing the river, where fruit orchards and cereal cultivation are predominant. The area being ecologically fragile and full of scenic beauty should not have been permitted to be converted into private ownership and for commercial gains.

23. The notion that the public has a right to expect certain lands and natural areas to retain their natural characteristic is finding its way into the law of the land. The need to protect the environment and ecology has been summed up by David B. Hunter (University of Michigan) in an article titled "An Ecological perspective on property: A call for judicial protection of the public's interest in environmentally critical resources" published in 12 *Harv. Envtl. L. Rev.* 311 (1988) is in the following words:

Another major ecological tenet is that the world is finite. The earth can support only so many people and only so much human activity before limits are reached. This lesson was driven home by the oil crisis of the 1970s as well as by the pesticide scare of the 1960s. The current deterioration of the ozone layer is another vivid example of the complex, unpredictable and potentially catastrophic effects posed by our disregard of the environmental limits to economic growth. The absolute finiteness of the environment, when coupled with human dependency on the environment, leads to the unquestionable result that human activities will at some point be constrained.

'[H]uman activity finds in the natural world its external limits. In short, the environment imposes constraints on our freedom; these constraints are not the product of value choices but of the scientific imperative of the environment's limitations. Reliance on improving technology can delay temporarily, but not forever, the inevitable constraints. There is a limit to the capacity of the environment to service... growth, both in providing raw materials and in assimilating by-product wastes due to consumption. The largesse of technology can only postpone or disguise the inevitable.'

Historically, we have changed the environment to fit our conceptions of property. We have fenced, plowed and paved. The environment has proven malleable and to a large extent still is. But there is a limit to this malleability, and certain types of ecologically important resources – for example, wetlands and riparian forests – can no longer be destroyed without enormous long-term effects on environmental and therefore social stability. To ecologists, the need for preserving sensitive resources

does not reflect value choices but rather is the necessary result of objective observations of the laws of nature.

In sum, ecologists view the environmental sciences as providing us with certain laws of nature. These laws, just like our own laws, restrict our freedom of conduct and choice. Unlike our laws, the laws of nature cannot be changed by legislative fiat; they are imposed on us by the natural world. An understanding of the laws of nature must therefore inform all of our social institutions.

24. The ancient Roman Empire developed a legal theory known as the “Doctrine of the Public Trust.” It was founded on the ideas that certain common properties such as rivers, seashore, forests and the air were held by Government in trusteeship for the free and unimpeded use of the general public. Our contemporary concern about “the environment” bear a very close conceptual relationship to this legal doctrine. Under the Roman law these resources were either owned by no one (*res nullius*) or by every one in common (*res communis*). Under the English common law, however, the Sovereign could own these resources but the ownership was limited in nature, the Crown could not grant these properties to private owners if the effect was to interfere with the public interests in navigation or fishing. Resources that were suitable for these uses were deemed to be held in trust by the Crown for the benefit of the public. Joseph L. Sax, Professor of Law, University of Michigan – proponent of the Modern Public Trust Doctrine - in an erudite article “Public Trust Doctrine in Natural Resource Law : Effective Judicial Intervention,” 68 *Mich. L. Rev.* 473, has given the historical background of the Public Trust Doctrine as under :

The source of modern public trust law is found in a concept that received much attention in Roman and English law - the nature of property rights in rivers, the sea, and the seashore. That history has been given considerable attention in the legal literature, need not be repeated in detail here. But two points should be emphasized. First, certain interests, such as navigation and fishing, were sought to be preserved for the benefit of the public; accordingly, property used for those purposes was distinguished from general public property which the sovereign could routinely grant to private owners. Second, while it was understood that in certain common properties - such as the seashore, highways, and running water – ‘perpetual use was dedicated to the public,’ it has never been clear whether the public had an enforceable right to prevent infringement of those interests. Although the State apparently did protect public uses, no evidence is available that public rights could be legally asserted against a recalcitrant government.

25. The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. According to Professor Sax the Public Trust Doctrine imposes the following restrictions on governmental authority :

Three types of restrictions on governmental authority are often thought to be imposed by the public trust; first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third the property must be maintained for particular types of uses.

26. The American law on the subject is primarily based on the decision of the United States Supreme Court in *Illinois Central Railroad Co. v. People of the State of Illinois* [146 US 387 (1892)]. In the year 1869 the Illinois Legislature made a substantial grant of submerged lands - a mile strip along the shores of Lake Michigan extending one mile out from the shoreline - to the Illinois Central Railroad. In 1873, the Legislature changed its mind and repealed the 1869 grant. The State of Illinois sued to quiet title. The Court while accepting the stand of the State of Illinois held that the title of the State in the land in dispute was a title different in character from that which the State held in lands intended for sale. It was different from the title which the United States held in public lands which were open to pre-emption and sale. It was a title held in trust – for the people of the State that they may enjoy the navigation of the water, carry on commerce over them and have liberty of fishing therein free from obstruction or interference of private parties. The abdication of the general control of the State over lands in dispute was not consistent with the exercise of the trust which required the Government of the State to preserve such waters for the use of the public. According to Professor Sax the Court in *Illinois Central* [146 US 387 (1892)] “articulated a principle that has become the central substantive thought in public trust litigation. When a State holds a resource which is available for the free use of the general public, a court will look with considerable scepticism upon any governmental conduct which is calculated either to relocate that resource to more restricted uses or to subject public uses to the self-interest of private parties.”

27. In *Gould v. Greylock Reservation Commission* [350 Mass 410 (1966)], the Supreme Judicial Court of Massachusetts took the first major step in developing the doctrine applicable to changes in the use of lands dedicated to the public interest. In 1886, a group of citizens interested in preserving Mount Greylock as an unspoiled natural forest, promoted the creation of an association for the purpose of laying out a public park on it. The State ultimately acquired about 9000 acres, and the legislature enacted a statute creating the Greylock Reservation Commission. In the year 1953, the legislature enacted a statute creating an Authority to construct and operate on Mount Greylock an Aerial Tramway and certain other facilities and it authorised the Commission to lease to the Authority any portion of the Mount Greylock Reservation. Before the project commenced, five citizens brought an action against both the Greylock Reservation Commission and the Tramway Authority. The plaintiffs brought the suit as beneficiaries of the public trust. The Court held both the lease and the management agreement invalid on the ground that they were in excess of the statutory grant of the authority. The crucial passage in the judgment of the Court is as under:

The profit-sharing feature and some aspects of the project itself strongly suggest a commercial enterprise. In addition to the absence of any clear or express statutory authorization of as broad a delegation of responsibility by the Authority as is given by the management agreement, we find no express grant to the Authority or power to

permit use of public lands and of the Authority's borrowed funds for what seems, in part at least, a commercial venture for private profit.

Professor Sax's comments on the above-quoted paragraph from *Gould* decision are as under:

It hardly seems surprising, then, that the court questioned why a State should subordinate a public park, serving a useful purpose as relatively undeveloped land, to the demands of private investors for building such a commercial facility. The court, faced with such a situation, could hardly have been expected to have treated the case as if it involved nothing but formal legal issues concerning the State's authority to change the use of a certain tract of land.... *Gould*, like *Illinois Central*, was concerned with the most overt sort of imposition on the public interest : commercial interests had obtained advantages which infringed directly on public uses and promoted private profits. But the Massachusetts court has also confronted a more pervasive, if more subtle, problem – that concerning projects which clearly have some public justification. Such cases arise when, for example, a highway department seeks to take a piece of parkland or to fill a wetland.

28. In *Sacco v. Development of Public Works* [532 Mass 670], the Massachusetts Court restrained the Department of Public Works from filing a great pond as part of its plan to relocate part of State Highway. The Department purported to act under the legislative authority. The court found the statutory power inadequate and held as under:

The improvement of public lands contemplated by this section does not include the widening of a State highway. It seems rather that the improvements of public lands which the legislature provided for ... is to preserve such lands so that they may be enjoyed by the people for recreational purposes.

29. In *Robbins v. Deptt. of Public Works* [244 NE 2d 577], the Supreme Judicial Court of Massachusetts restrained the Public Works Department from acquiring Fowl Meadows, "wetlands of considerable natural beauty... often used for nature study and recreation" for highway use.

30. Professor Sax ... opines that "the Supreme Court of Wisconsin has probably made a more conscientious effort to rise above rhetoric and to work out a reasonable meaning for the public trust doctrine than have the courts of any other State."

31. Professor Sax stated the scope of the public trust doctrine in the following words:

If any of the analysis of this Article makes sense, it is clear that the judicial techniques developed in public trust cases need not be limited either to these few conventional interests or to questions of disposition of public properties. Public trust problems are found whenever governmental regulation comes into question, and they occur in a wide range of situations in which diffused public interests need protection against tightly organized groups with clear and immediate goals. Thus, it seems that the delicate mixture of procedural and substantive protections which the courts have applied in conventional public trust cases would be equally applicable and equally appropriate in controversies involving air pollution, the dissemination of pesticides,

the location of rights of way for utilities, and strip mining of wetland filling on private lands in a State where governmental permits are required.

32. We may at this stage refer to the judgment of the Supreme Court of California in *National Audubon Society v. Superior Court of Alpine Country* [33 Cal 3d 419]. The case is popularly known as the *Mono Lake* case. Mono Lake is the second largest lake in California. The lake is saline. It contains no fish but supports a large population of brine shrimp which feed vast numbers of nesting and migrating birds. Islands in the lake protect a large breeding colony of California gulls, and the lake itself serves as a haven on the migration route for thousands of birds. Towers and spires of tufa (*sic*) on the north and south shores are matters of geological interest and a tourist attraction. In 1940, the Division of Water Resources granted the Department of Water and Power of the City of Los Angeles a permit to appropriate virtually the entire flow of 4 of the 5 streams flowing into the lake. As a result of these diversions, the level of the lake dropped, the surface area diminished, the gulls were abandoning the lake and the scenic beauty and the ecological values of Mono Lake were imperilled. The plaintiffs environmentalist - using the public trust doctrine - filed a law suit against Los Angeles Water Diversions. The case eventually came to the California Supreme Court, on a Federal Trial Judge's request for clarification of the State's public trust doctrine. The Court explained the concept of public trust doctrine in the following words:

By the law of nature these things are common to mankind - the air, running water, the sea and consequently the shores of the sea (Institutes of Justinian 2.1.1). From this origin in Roman law, the English common law evolved the concept of the public trust, under which the sovereign owns 'all of its navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people.

The Court explained the purpose of the public trust as under:

The objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways. As we observed in *Marks v. Whitney* [6 Cal 3d 251], [p]ublic trust easements (were) traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the State, and to use the bottom of the navigable waters for anchoring, standing, or other purposes. We went on, however, to hold that the traditional triad of uses - navigation, commerce and fishing - did not limit the public interest in the trust res. In language of special importance to the present setting, we stated that '[t]he public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the State is not burdened with an outmoded classification favouring one mode of utilization over another. There is a growing public recognition that one of the important public uses of the tidelands - a use encompassed within the tidelands trust - is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study as open space, and as environments which provide food and habitat for birds and marine life, and which favourably affect the scenery and climate of the area.'

Mono Lake is a navigable waterway. It supports a small local industry which harvests brine shrimp for sale as fish food, which endeavour probably qualifies the lake as a 'fishery' under the traditional public trust cases. The principal values plaintiffs seek to protect, however, are the recreational and ecological – the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds. Under *Marks v. Whitney* [6 Cal 3d 251], it is clear that protection of these values is among the purposes of the public trust.

The Court summed up the powers of the State as trustee in the following words:

Thus, the public trust is more than an affirmation of State power to use public property for public purposes. It is an affirmation of the duty of the State to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust

The Supreme Court of California, inter alia, reached the following conclusion :

The State has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. Just as the history of this State shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests. As a matter of practical necessity the State may have to improve appropriations despite foreseeable harm to public trust uses. In so doing, however, the State must bear in mind its duty as trustee to consider the effect of the taking on the public trust and to preserve, so far as consistent with the public interest, the uses protected by the trust.

The Court finally came to the conclusion that the plaintiffs could rely on the public trust doctrine in seeking reconsideration of the allocation of the waters of the Mono basin.

33. It is no doubt correct that the public trust doctrine under the English common law extended only to certain traditional uses such as navigation, commerce and fishing. But the American Courts in recent cases have expanded the concept of the public trust doctrine. The observations of the Supreme Court of California in *Mono Lake* case [33 Cal 3d 419] clearly show the judicial concern in protecting all ecologically important lands, for example fresh water, wetlands or riparian forests. The observations of the Court in *Mono Lake* case to the effect that the protection of ecological values is among the purposes of public trust, may give rise to an argument that the ecology and the environment protection is a relevant factor to determine which lands, waters or airs are protected by the public trust doctrine. The Courts in United States are finally beginning to adopt this reasoning and are expanding the public trust to encompass new types of lands and waters. In *Phillips Petroleum Co. v. Mississippi* [108 SCt 791 (1988)], the United States Supreme Court upheld Mississippi's extension of public trust doctrine to lands underlying non-navigable tidal areas. The majority judgment adopted ecological concepts to determine which lands can be considered tide lands. *Phillips Petroleum* case assumes importance because the Supreme Court expanded the public trust

doctrine to identify the tide lands not on commercial considerations but on ecological concepts. We see no reason why the public trust doctrine should not be expanded to include all ecosystems operating in our natural resources.

34. Our legal system - based on English common law - includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership.

35. We are fully aware that the issues presented in this case illustrate the classic struggle between those members of the public who would preserve our rivers, forests, parks and open lands in their pristine purity and those charged with administrative responsibilities who, under the pressures of the changing needs of an increasingly complex society, find it necessary to encroach to some extent upon open lands heretofore considered inviolate to change. The resolution of this conflict in any given case is for the legislature and not the courts. If there is a law made by Parliament or the State Legislatures the courts can serve as an instrument of determining legislative intent in the exercise of its powers of judicial review under the Constitution. But in the absence of any legislation, the executive acting under the doctrine of public trust cannot abdicate the natural resources and convert them into private ownership, or for commercial use. The aesthetic use and the pristine glory of the natural resources, the environment and the ecosystems of our country cannot be permitted to be eroded for private, commercial or any other use unless the courts find it necessary, in good faith, for the public good and in public interest to encroach upon the said resources.

36. Coming to the facts of the present case, large area of the bank of River Beas which is part of protected forest has been given on a lease purely for commercial purposes to the Motels. We have no hesitation in holding that the Himachal Pradesh Government committed patent breach of public trust by leasing the ecologically fragile land to the Motel management. Both the lease transactions are in patent breach of the trust held by the State Government. The second lease granted in the year 1994 was virtually of the land which is a part of the riverbed. Even the Board in its report has recommended de-leasing of the said area.

37. This Court in *Vellore Citizens' Welfare Forum v. Union of India* [(1996) 5 SCC 647] explained the "Precautionary Principle" and "Polluter Pays Principle". The Polluter Pays Principle' has been held to be a sound principle by this Court in *Indian Council for Enviro-Legal Action v. Union of India* [(1996) 3 SCC 212].

38. It is thus settled by this Court that one who pollutes the environment must pay to reverse the damage caused by his acts.

39. We, therefore, order and direct as under:

1. The public trust doctrine, as discussed by us in this judgment is a part of the law of the land.

2. The prior approval granted by the Government of India, Ministry of Environment and Forest by the letter dated 24.11.1993 and the lease deed dated 11.4.1994 in favour of

the Motel are quashed. The lease granted to the Motel by the said lease deed in respect of 27 bighas and 12 biswas of area, is cancelled and set aside. The Himachal Pradesh Government shall take over the area and restore it to its original-natural conditions.

3. The Motel shall pay compensation by way of cost for the restitution of the environment and ecology of the area. The pollution caused by various constructions made by the Motel in the riverbed and the banks of River Beas has to be removed and reversed. We direct NEERI through its Director to inspect the area, if necessary, and give an assessment of the cost which is likely to be incurred for reversing the damage caused by the Motel to the environment and ecology of the area. NEERI may take into consideration the report by the Board in this respect.

4. The Motel through its management shall show cause why pollution fine in addition be not imposed on the Motel.

5. The Motel shall construct a boundary wall at a distance of not more than 4 metres from the cluster of rooms (main building of the Motel) towards the river basin. The boundary wall shall be on the area of the Motel which is covered by the lease dated 29.9.1981. The Motel shall not encroach/cover/utilise any part of the river basin. The boundary wall shall separate the Motel building from the river basin. The river bank and the river basin shall be left open for the public use.

6. The Motel shall not discharge untreated effluents into the river. We direct the Himachal Pradesh Pollution Control Board to inspect the pollution control devices/treatment plants set up by the Motel. If the effluent/waste discharged by the Motel is not conforming to the prescribed standards, action in accordance with law be taken against the Motel.

7. The Himachal Pradesh Pollution Control Board shall not permit the discharge of untreated effluent into River Beas. The Board shall inspect all the hotels/institutions/factories in Kullu-Manali area and in case any of them are discharging untreated effluent/waste into the river, the Board shall take action in accordance with law.

8. The Motel shall show cause on 18.12.1996 why pollution fine and damages be not imposed as directed by us. NEERI shall send its report by 17.12.1996. To be listed on 18.12.1996.

40. The writ petition is disposed of except for limited purpose indicated above.

* * * * *

M.C. Mehta v. Kamal Nath, AIR 2000 SC 1997

S. SAGHIR AHMAD, J. – This case, which was finally decided by this Court by its judgment dated December 13, 1996 has been placed before us for determination of the quantum of pollution fine. It may be stated that the main case was disposed of with the following directions (see above).

2. Pursuant to the above Order, notice was issued requiring the Motel to show cause on two points: (I) why the Motel be not asked to pay compensation to reverse the degraded environment, and (ii) why pollution fine, in addition, be not imposed.

3. Mr. G.L. Sanghi, learned Senior Counsel, appearing for M/s. Span Motel Private Ltd. has contended that though it is open to the Court, in proceedings under Article 32 of the Constitution to grant compensation to the victims whose Fundamental Rights might have been violated or who are the victims of an arbitrary executive action or victims of atrocious behaviour of public authorities in violation of public duties cast upon them, it cannot impose any fine on those who are guilty of the action. He contended that the fine is a component of Criminal Jurisprudence and cannot be utilised in civil proceedings specially under Article 32 or 226 of the Constitution either by this Court or the High Court as imposition of fine would be contrary to the provisions contained in Articles 20 and 21 of the Constitution. It is contended that fine can be imposed upon a person only if it is provided by a statute and gives jurisdiction to the Court to inflict or impose that fine after giving a fair trial to that person but in the absence of any statutory provision, a person cannot be penalised and no fine can be imposed upon him.

Mr. M.C. Mehta, who has been pursuing this case with the usual vigour and vehemence, has contended that if a person disturbs the ecological balance and tinkers with the natural conditions of rivers, forests, air and water, which are the gifts of nature, he would be guilty of violating not only the Fundamental Rights, guaranteed under Article 21 of the Constitution, but also be violating the fundamental duties to protect environment under Article 51-A(g) which provides that it shall be the duty of every citizen to protect and improve the natural environment including forests, lakes, rivers and wildlife and to show compassion for living creatures.

Any disturbance of the basic environment elements, namely air, water and soil which are necessary for “life” would be hazardous to “life” within the meaning of Article 21 of the Constitution.

10. In the matter of enforcement of Fundamental Rights under Article 21 under Public Law domain, the Court, in exercise of its powers under Article 32 of the Constitution has awarded damages against those who have been responsible for disturbing the ecological balance either by running the industries or any other activity which has the effect of causing pollution in the environment. The Court while awarding damages also enforces the “POLLUTER PAYS PRINCIPLE” which is widely accepted as a means of paying for the cost of pollution and control. To put in other words, the wrongdoer, the polluter, is under an obligation to make good the damage caused to the environment.

11. The recognition of the vice of pollution and its impact on future resources was realised during the early part of 1970. The United Nations Economic Commission for Europe, during a panel discussion in 1971, concluded that the total environmental expenditure required for improvement of the environment was overestimated but could be reduced by increased environmental awareness and control. In 1972, the Organisation for Economic Co-operation and Development adopted the “POLLUTER PAYS PRINCIPLE” as a recommendable method for pollution cost allocation. This principle was also discussed during the 1972 Paris Summit. In 1974, the European Community recommended the application of the principle by its member States so that the costs associated with environmental protection against pollution may be allocated according to uniform principles throughout the Community. In 1989, the Organisation for Economic Co-operation and Development reaffirmed its use and extended its application to include costs of accidental pollution. In 1987, the principle was acknowledged as a binding principle of law as it was incorporated in European Community Law through the enactment of the Single European Act, 1987. Article 130 R.2 of the 1992 Maastricht Treaty provides that Community Environment Policy “shall be based on the principle that the polluter should pay.

12. “POLLUTER PAYS PRINCIPLE” has also been applied by this Court in various decisions. In *Indian Council for Enviro-Legal Action v. Union of India*, [AIR 1996 SC 1446], it was held that once the activity carried on was hazardous or inherently dangerous, the person carrying on that activity was liable to make good the loss caused to any other person by that activity. This principle was also followed in *Vellore Citizens Welfare Forum v. Union of India* [AIR 1996 SC 2715] which has also been discussed in the present case in the main judgment. It was for this reason that the Motel was directed to pay compensation by way of cost for the restitution of the environmental ecology of the area. But it is the further direction why pollution fine, in addition, be not imposed which is the subject matter of the present discussion.

18. In the instant case, a finding has been recorded that M/s. Span Motel had interfered with the natural flow of river and thus disturbed the environment and ecology of the area. It has been held liable to pay damages. The quantum of damages is under the process of being determined. The Court directed a notice to be issued to show cause why pollution fine be not imposed. In view of the above, it is difficult for us to hold that the pollution fine can be imposed upon M/s. Span Motel without there being any trial and without there being any finding that M/s. Span Motel was guilty of the offence under the Act and are, therefore, liable to be punished with imprisonment or with FINE. This notice has been issued without reference to any provision of the Act.

19. The contention that the notice should be treated to have been issued in exercise of power under Article 142 of the Constitution cannot be accepted as this Article cannot be pressed into aid in a situation where action under that Article would amount to contravention of the specific provisions of the Act itself. A fine is to be imposed upon the person who is found guilty of having contravened any of the provisions of the Act. He has to be tried for the specific offence and then on being found guilty, he may be punished either by sentencing him to undergo imprisonment for the period contemplated by the Act or with fine or with both. But recourse cannot be taken to Article 142 to inflict upon him this punishment.

20. The scope of Article 142 was considered in several decisions and recently in *Supreme Court Bar Association v. Union of India* [AIR 1998 SC 1895] by which the decision of this Court in *V.C. Mishra, Re* [(1995) 2 SCC 584] was partly overruled, it was held that the plenary power of this Court under Article 142 of the Constitution are inherent in the Court and are “COMPLEMENTARY” to those powers which are specifically conferred on the Court by various statutes. This power exists as a separate and independent basis of jurisdiction apart from the statutes. The Court further observed that though the powers conferred on the court by Article 142 are curative in nature, they cannot be construed as powers which authorise the court to ignore the substantive rights of a litigant. The Court further observed that this power cannot be used to “supplant” substantive law applicable to the case or cause under consideration of the court. Article 142 even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby achieve something indirectly which cannot be achieved directly.

22. Thus, in addition to the damages which have to be paid by M/s. Span Motel, as directed in the main judgment, it cannot be punished with fine unless the entire procedure prescribed under the Act is followed and M/s. Span Motel are tried for any of the offences contemplated by the Act and is found guilty.

23. The notice issued to M/s. Span Motel why pollution fine be not imposed upon them is, therefore, withdrawn. But the matter does not end here.

24. Pollution is a civil wrong. By its very nature, it is a tort committed against the community as a whole. A person, therefore, who is guilty of causing pollution has to pay damages (compensation) for restoration of the environment and ecology. He has also to pay damages to those who have suffered loss on account of the act of the offender. The powers of this Court under Article 32 are not restricted and it can award damages in a PIL or a Writ Petition as has been held in a series of decisions. In addition to damages aforesaid, the person guilty of causing pollution can also be held liable to pay exemplary damages so that it may act as a deterrent for others not to cause pollution in any manner. Unfortunately, notice for exemplary damages was not issued to M/s. Span Motel although it ought to have been issued. The considerations for which “fine” can be imposed upon a person guilty of committing an offence are different from those on the basis of which exemplary damages can be awarded. While withdrawing the notice for payment of pollution fine, we direct a fresh notice to be issued to M/s. Span Motel to show cause why in addition to damages, exemplary damage be not awarded for having committed the acts set out and detailed in the main judgment. This notice shall be returnable within six weeks. This question shall be heard at the time of quantification of damages under the main judgment.

* * * * *

M.C. Mehta v. Kamal Nath, 2002 (2) SCALE 654

DORAISWAMY RAJU, J. – The above matter has been set down for hearing before us pursuant to the orders passed by this Court (Justice S. Saghir Ahmad and Justice Doraiswamy Raju) on May 12, 2000 and the consequent Notice issued to the Executive Director, M/s. Span Motels Pvt. Ltd. at Manali, and the Executive Director, Span Motels Pvt. Ltd., Operations Headquarters at New Delhi, calling upon them to show cause as to why in addition to damages, exemplary damages be not awarded for having committed the various acts set out and enumerated in detail in the main Judgment reported in ***M.C. Mehta v. Kamal Nath*** [(1997) 1 SCC 388] (see above).

2. On being served with a notice dated 14.12.1996, the matter was heard on 19.12.1996 when this Court (Justice Kuldip Singh and Justice S. Saghir Ahmad) passed the following order:

Pursuant to the above quoted direction NEERI has filed its report. A copy of the report was given to the learned counsel for the Motel yesterday. Show cause notice to the Motel has been given on 2 counts – (i) why the Motel be not asked to pay compensation to reverse the degraded environment, and (ii) why pollution fine, in addition, be not imposed. Mr. H.N. Salve, learned counsel appearing for the Motel states that he intends to file counter to the report filed by the NEERI. He has asked for short adjournment. We are of the view that prayer for adjournment is justified.

We, however, make it clear that this Court in the judgment dated December 13, 1996 has found as a fact that the Motel by constructing walls and bunds on the river Banks and in the river Bed, as detailed in the judgment, has interfered with the flow of the river. The said finding is final and no argument can be permitted to be addressed in that respect. The only question before this Court is the determination of quantum of compensation and further whether the fine in addition be imposed, if so, the quantum of fine. [Emphasis supplied]

When the matter came up for hearing on 4.8.98, the State of Himachal Pradesh was directed to examine the Report submitted by NEERI and also submit its own Plan of Action, too. Since, it was felt that the various owners of properties along the river banks would be benefited by the plan that is prepared, they should also be heard before any action is taken on the basis of such plan. The suggested plan and list of owners of properties were directed to be filed and thereupon Notices were also issued to them, in due course. On 16.3.99. Notice was issued to the Ministry of Environment, Government of India, to indicate their response to the Action Plan submitted by the Government of Himachal Pradesh on 21.12.98, wherein it was also stated that they are not possessed of sufficient financial means to implement their own action plan unless the Government of India provides them necessary finances. On 3.8.99, it was ordered that the larger issue regarding Action Plan will be considered later and the matter will be taken to decide the question relating to pollution fine, if any, to be imposed on the 1st respondent. On 28.9.99, the statement of Mr. Salve, learned counsel on behalf of the respondent, that M/s. Span Motels (P) Ltd. was prepared to bear their fair share of the project cost of ecological restoration was recorded, and directed the same to be submitted in writing.

On 19.01.2999, it was also ordered that the question of apportionment of cost of restoration of ecology as also the question of pollution fine will be considered by the Court on the next date of hearing. At the hearing on 29.2.2000, Shri G.L. Sanghi, Senior Advocate, appearing for M/s. Span Motels (P) Ltd., challenged the legality of the proposed levy of fine, otherwise than through the manner envisaged under the relevant pollution laws by resorting to prosecution before criminal court and after a fair trial therefore. Mr. M.C. Mehta, apart from making submissions, was permitted to submit a note in response to the submissions of Shri G.L. Sanghi.

4. On a consideration of the respective stand on behalf of the parties on either side, by a judgment dated 12.5.2000, reported in 2000 (6) SCC 213, after adverting to the various laws relating to the prevention and control of pollution and for protection of environment, it was held as follows:

Thus, in addition to the damages which have to be paid by M/s. Span Motels, as directed in the main judgment, it cannot be punished with fine unless the entire procedure prescribed under the Act is followed and M/s. Span Motel are tried for any of the offences contemplated by the Act and is found guilty.

The notice issued to M/s. Span Motel why pollution fine be not imposed upon them is, therefore, withdrawn. But the matter does not end here. Pollution is a civil wrong. By its very nature, it is a Tort committed against the community as a whole. A person, therefore, who is guilty of causing pollution has to pay damages (compensation) for restoration of the environment and ecology. He has also to pay damages to those who have suffered loss on account of the act of the offender. The powers of this Court under Article 32 are not restricted and it can award damages in a PIL or a Writ Petition as has been held in a series of decisions. In addition to damages aforesaid, the person guilty of causing pollution can also be held liable to pay exemplary damages so that it may act as a deterrent for others not to cause pollution in any manner. Unfortunately, notice for exemplary damages was not issued to M/s. Span Motel although it ought to have been issued. The considerations for which "fine" can be imposed upon a person guilty of committing an offence are different from those on the basis of which exemplary damages can be awarded. While withdrawing the notice for payment of pollution fine, we direct a fresh notice be issued to M/s. Span Motel to show cause why in addition to damages, exemplary damages be not awarded for having committed the acts set out and detailed in the main judgment. This notice shall be returnable within six weeks. This question shall be heard at the time of quantification of damages under the main judgment.

6. We have carefully considered the submissions made by them in the light of the materials on record. The sum and substance of the stand taken for M/s. Span Motels (P) Ltd., is that the action taken and construction works executed by them at heavy cost was meant to protect not only their property but the property of the State and the same was also in the interests of those on the basin and banks of both sides of the river Beas and a perusal of the remedial measures suggested in the technical reports noticed above would go to show that they have only executed such nature and type of works which now are suggested for execution in those reports as protective measures, and, therefore, they cannot be held guilty of having committed any illegalities and interfered with or endangering the environment or ecology in the place to warrant the levy of exemplary damages against them. In pursuing

such a stand the repeated endeavour was to reiterate that M/s. Span Motels (P) Ltd. could not be said to have committed any illegal acts, when they really approached all the authorities concerned for effective action and even obtained necessary permissions for executing those necessary protective measures and works, at a stage when the authorities who are obliged themselves to undertake such works were feeling helpless for want of funds to undertake them. Finally, it was contended that they have already spent considerable sum of their own money for the protective and relief measures undertaken by them and it will be unjust and harsh to impose upon them any further liability in the shape of exemplary damages, when they have already undertaken responsibility to bear a fair share of the project cost of ecological restoration. Shri G.L. Sanghi also reiterated and reinforced the said undertaking by stating that his clients still stand by the same and there is no justification whatsoever to levy any exemplary damages against them.

7. This Court, on the earlier occasions, after adverting to the pleadings, relevant documents and the technical report of the Central Pollution Control Board, enumerated the various activities of the Span Motels considered to be illegal and constituted “callous interference with the natural flow of river Beas” resulting in the degradation of the environment and for that purpose indicated them with having “interfered with the natural flow of the river by trying to block the natural relief/spill channel of the river”. We do not want to burden this judgment once again by repeating them *in extenso*. Equally, the Himachal Pradesh Government also was held to have committed patent breach of public trust by leasing the ecologically fragile land to the Motel. It is only on such findings, the “polluter pays” principle as interpreted by this Court with liability for harm to compensate not only the victims but also the cost of restoring the environmental degradation and reversing the damaged ecology was held applicable to this case. Those findings rendered earlier were held to be “final and no argument can be permitted to be addressed in that respect” and the only question that remained left is the “determination of quantum of compensation and further whether the fine in addition be imposed, if so, the quantum of fine.” Therefore, not only it is impermissible for the counsel for the Motel or anyone else to claim for a reversal of those findings or any reconsideration of the nature, character and legality or propriety of those activities of SMPL but we feel bound by them and not persuaded to proceed on a clean slate, by-passing the exercise earlier undertaken and the conclusions firmly recorded in this regard. After the submission of the technical report by NEERI also, it was held that the “question of apportionment of cost of restoration of ecology as also the question of pollution fine will be considered by the Court” on the next and further hearings. The NEERI report also does not appear to either give a clean chit or completely exonerate the Span Motel Pvt. Ltd. for their activities, which were earlier considered to constitute an onslaught on the fragile environment and ecology of the area.

8. Even in the judgment of this Court, since reported in (2000) 6 SCC 213 while accepting the claim of the Motels that the *sine qua non* for punishment of imprisonment and fine is a fair trial in a competent court and that such punishment of imprisonment or fine can be imposed only after the person is found guilty by the competent Court, a general and passing reference has also been made to the earlier findings and as a consequence of which only it has been again held that though no fine as such can be imposed and the notice issued

by this Court earlier be withdrawn, a fresh notice was directed to be issued to Span Motels Pvt. Ltd. as to why in addition to damages, as directed in the main judgment, exemplary damages cannot be awarded against them “for having committed the acts set out and detailed in the main judgment.” Equally, the object and purpose of such levy of exemplary damages was also indicated as to serve “a deterrent for others not to cause pollution in any manner.” Having regard to what has been stated supra, the question as to the imposition of exemplary damages and the liability of Span Motels Pvt. Ltd. in this regard has to necessarily depend upon the earlier findings of this Court that the Motel by constructing walls and bunds on the river banks and in the river bed as detailed in the judgment has interfered with the flow of the river and their liability to pay the damages on the principle of “Polluter pays” and also as an inevitable consequence thereof. The specification in the NEERI report regarding details of the activities of Span Motels Pvt. Ltd. and the nature of constructions made in 1993 in figure No. 2 that (a) “in 1993, to protect the newly acquired land as also the main resort land, the SMPL constructed concrete studs stepped wall and concrete bars as depicted in Fig. 2;” (b) “blocked the mouth of the natural relief/spill channel by dumping of boulders” resulting in the leveling of the leased area, and (c) “at the downstream of M/s. SMPL, a private property owner has blocked the relief/spill channel by constructing a stonewall across the channel (E & F)” also confirms and only reinforce the need for justification for the indictment already made. The basis for their liability to be saddled with the exemplary costs has been firmly and irreversibly already laid down in the main judgment itself and there is no escape for the Span Motels Pvt. Ltd. in this regard. We have to necessarily proceed further only on those basis of facts and position of law, found and declared.

The question remaining for further consideration relating to the award of exemplary damages is only as to the quantum. The various laws in force to prevent, control pollution and protect environment and ecology provide for different categories of punishment in the nature of imposition of fine as well as or imprisonment or either of them, depending upon the nature and extent of violation. The fine that may be imposed alone may extend even to one lakh of rupees. Keeping in view all these and the very object underlying the imposition of imprisonment and fine under the relevant laws to be not only to punish the individual concerned but also to serve as a deterrent to others to desist from indulging in such wrongs which we consider to be almost similar to the purpose and aim of awarding exemplary damages, it would be both in public interest as well as in the interests of justice to fix the quantum of exemplary damages payable by Span Motels Pvt. Ltd. at Rupees Ten lakhs only. This amount we are fixing keeping in view the undertaking given by them to bear a fair share of the project cost of ecological restoration which would be quite separate and apart from their liability for the exemplary damages. The question relating to the said quantum of liability for damages on the principle of “polluter pays”, as held by this Court against the Span Motels Pvt. Ltd. and undertaken by them, will be determined separately and left open for the time being. The amount, of special damages of Ten lakhs of rupees, shall be remitted to the State Government in the Department of Irrigation and Public Health to the Commissioner/Secretary for being utilized only for the flood protection works in the area of Beas river affected by the action of Span Motels Pvt. Ltd.

Sachidanand Pandey v. State of West Bengal, AIR 1987 SC 1109

CHINNAPPA REDDY, J. - 4. In India, as elsewhere in the world, uncontrolled growth and the consequent environmental deterioration are fast assuming menacing proportions and all Indian cities are afflicted with this problem. The once imperial city of Calcutta is no exception. The question raised in the present case is whether the Government of West Bengal has shown such lack of awareness of the problem of environment in making an allotment of land for the construction of a five star hotel at the expense of the zoological garden that it warrants interference by this Court? Obviously, if the government is alive to the various considerations requiring thought and deliberation and has arrived at a conscious decision after taking them into account, it may not be for this Court to interfere in the absence of mala fides. On the other hand, if relevant considerations are not borne in mind and irrelevant considerations influence the decision, the court may interfere in order to prevent a likelihood of prejudice to the public. *Whenever a problem of ecology is brought before the court, the court is bound to bear in mind Article 48-A of the Constitution, the Directive Principle which enjoins that "the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country", and Article 51-A(g) which proclaims it to be the fundamental duty of every citizen of India "to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures". When the court is called upon to give effect to the Directive Principle and the fundamental duty, the court is not to shrug its shoulders and say that priorities are a matter of policy and so it is a matter for the policy-making authority. The least that the court may do is to examine whether appropriate considerations are borne in mind and irrelevancies excluded. In appropriate cases, the court may go further, but how much further must depend on the circumstances of the case. The court may always give necessary directions. However the court will not attempt to nicely balance relevant considerations. When the question involves the nice balancing of relevant considerations, the court may feel justified in resigning itself to acceptance of the decision of the concerned authority.* We may now proceed to examine the facts of the present case. *(Emphasis added)*

5. There is in Calcutta a zoological garden located in Alipore, now almost the heart of Calcutta, on either side of Belvedere Road, one of Calcutta's main arterial roads, forty-nine acres on one side and eight acres on the other. The main zoo is in the forty-nine acres block of land. There are some old buildings and vacant land in the eight acre plot of land. This eight acre plot of land is known as the Begumbari land. It is out of these eight acres that the land of the extent of four acres has been carved out and given to the Taj Group of Hotels for the construction of a Five Star Hotel. It is this giving away of land, that was challenged before the High Court and is now challenged in this Court in this appeal by two citizens of Calcutta, one of them the Secretary of the union of workmen of the zoological garden and the other a life member of the zoo, both of whom claim to be lovers of wild life and well-wishers of the zoo.

6. In January 1979, the Director General of Tourism, Government of India, addressed a letter to the Chief Secretary, Government of West Bengal conveying the resolution of the

Tourism Conference which was presided over by the Union Minister of Tourism and attended by several State Ministers and requesting that land in good locations may be made available for construction of hotels in a drive to encourage tourism. In May 1980 the Taj Group of Hotels came forward with a suggestion that they would be able to construct a Five Star Hotel if any of three properties on Chowringhee, specified by them, was made available to them. The Government found that there was some litigation connected with the Chowringhee properties and, therefore, it would not be possible to convey the Chowringhee properties to the Taj Group of Hotels. On September 29, 1980 and November 29, 1980, there were two notes by the Secretary of the Metropolitan Development Department to the effect that the ITDC was interested in a property known as the Hastings House property and that the Taj Group of Hotels who considered the Hastings House property unsuitable may be offered four acres out of the eight acres of Begumbari land. On the same day the Taj Group of Hotels wrote to the Government of West Bengal stating that the proposed land could be seriously considered for construction of a hotel. Thereafter the Chief Minister along with the Minister of Tourism and the Minister for Metropolitan Development visited the site accompanied by the Director of the zoo who apparently knew about the proposal right from the start. A note was then prepared by the Secretary, Metropolitan Development Department and put up to the Chief Minister for his approval. The note suggested that the Hastings House property may be offered to the ITDC and the Begumbari property may be offered to the Taj Group and that at a later stage a suitable committee might be appointed to negotiate with the two groups of hotels. The Chief Minister approved the proposal and required it be placed before the Cabinet. On January 7, 1981 a memorandum was prepared for the consideration of the Cabinet explaining the need for more Five Star Hotels in Calcutta and the benefits flowing out of the construction and establishment of such five star hotels. It was suggested that the Hastings House property may be leased to the ITDC Group and the Begumbari property to the Taj Group of Hotels. In regard to the Begumbari property, it was stated: "From the property of the Zoological Gardens on the Belvedere Road it is possible to carve out about four acres of land currently used for dumping garbage and also for growing grass for the elephants. It will be necessary and in any case advisable to shift the dumping ground, while adequate space can be made available for growing grass elsewhere in the same area." It was stated that the Finance and Tourism Departments had agreed to the proposal to lease the properties to the ITDC and the Taj Group respectively. It was stated that though the Forest Department had suggested that Salt Lake was a better place for establishing a Five Star Hotel, there was no demand for a Five Star Hotel in that area and the request for a hotel in Salt Lake was confined to a Three Star Hotel. Cabinet approval was sought for the offers to be made to the ITDC and to the Taj Group and for the constitution of a suitable committee to undertake negotiations with the two groups

7. On February 12, 1981, the Cabinet took a decision approving the proposal contained in the last paragraph of the Cabinet Memorandum, thus clearing the way for negotiations with the Taj Group.

8. Meanwhile, it appeared that the Public Undertakings Committee appointed by the West Bengal Legislative Assembly submitted a report on February 14, 1981 about the zoo in which they stated:

Originally this zoo was on the outskirts of the city but the city has grown in such a fashion that the zoo has virtually become the city centre and there is hardly any scope for its expansion. The zoo is situated on the left bank of the Tolly's Nalla divided with two parts on either side of the Alipore Road. The zoo proper is about 40 acres on the western side, while the eastern part comprises the zoo hospital, audio-visual centre, aquarium, zoo store and staff quarters. The Committee was informed that nowadays migratory birds were coming less in number though previously more foreign birds used to come here and in the opinion of the Managing Committee, the main reason for this was due to air and sound pollution. Breeding potentialities of animals and birds have been retarded due to constant stress and strain on the animals and also due to atmospheric reasons The Committee came to learn that a big hotel was proposed to be constructed on the plot of land where fodder for elephant are being grown to meet at least a portion of the elephants' food. Moreover, the staff quarters, hospitals for animals and the morgue are also situated near the said plot of land. If the proposed hotel is set up, all the existing buildings, viz. hospital, morgue etc. would have to be shifted to the main gardens resulting in unhealthy atmosphere for the zoo animals and also hampering the beauty of the Zoo Gardens. This would also create problems to the staff quarters and aquarium.

The Committee also referred to a proposal to establish a 'subsidiary zoo' some slight distance from Calcutta city and the request said to have been made for the allotment of 200 acres of land for that purpose. It was suggested that the Government may consider abandoning the proposal to set up a hotel on the eastern side of the zoo.

9. The Chief Town Planner also visited the site at the request of the Secretary, Metropolitan Development Department. The inspection was made in the presence of the Director of the zoo. The Chief Town Planner thought that 2 to 2 1/2 acres of land only might be made available for the hotel. He expressed the apprehension that if four acres of land were to be given for construction of a hotel, then the entire hospital and the dumping ground would have to be removed and the southern boundary of the hotel would come very close to the residential block.

10. On March 19, the Taj Group submitted a proposal to the Government containing fairly detailed information about the tourism industry and its needs, the situation in Calcutta, the realities of hotel construction, the facts relating to what had been done in other cities, the benefits flowing out of the construction of hotels and their own proposals for constructing a hotel in the four acres of land in Belvedere Road. Two alternative financial arrangements were suggested. The first alternative was the payment of annual rent on the basis of the valuation of the land, the second alternative was based on the concept of net sales, net sales being defined as sales after deducting all taxes and levies and service charges. The Metropolitan Development Department expressed a preference for the second alternative and suggested the constitution of a committee. The Finance Department also approved. The Taj Group was invited to send the financial projection on the basis of the second alternative. Correspondence went on. On June 5, 1981, a Committee of Secretaries was formally constituted.

11. In the meanwhile, WEBCON, a West Bengal Government Consultancy Undertaking, was asked to examine the proposals and to advise the Government. The WEBCON submitted its report on July 14, 1981 and on the request of the Committee of Secretaries a further report was submitted on July 22, 1981. The report of WEBCON is a comprehensive report on various topics connected with the establishment of a Five Star Hotel in Calcutta. Among other things the report also suggested various financial alternatives and recommended the second alternative based on net sales as the best. It is to be mentioned here that even by February 21, 1981 the proposal to lease out the Begumbari land to the Taj Group of Hotels had become public knowledge and newspapers carried reports on the same.

12. On June 9, 1981, the Secretary of the Animal Husbandry and Veterinary Services Department complained to the Secretary of the Metropolitan Development Department that they were not aware of the decision to lease the Begumbari land. The Secretary, Metropolitan Development Department made an endorsement on the letter to the effect that the Minister for Animal Husbandry and Veterinary Services had himself visited the site. In fact, as we have seen, the matter had been considered and approved by the Cabinet itself and all departments must necessarily have been appraised of the proposal.

13. While so, the Managing Committee of the Zoo, on June 11, 1981, passed a resolution expressing itself against the proposal to construct a hotel on land belonging to the zoo. The resolution said:

The proposal for soil testing of zoo land in the Begumbari Compound for the purpose of construction of Five Star Hotel was discussed in the meeting. The Committee resolved that construction of a multi-storied building in the near vicinity of the zoo will be highly detrimental to the animals of the zoo, its ecological balance and adversely affect the bird migration which is one of the greatest attractions of the zoo. The area proposed to be taken for hotel construction is already used by the zoo for fodder cultivation, burial ground for dead animals, animal hospital, operation theatre, quarantine area, segregation wards, post-mortem room and nursery both for zoo animals and horticultural section. These essential services cannot be accommodated within the campus of the main zoo for risk of spreading of infection to other animals of the zoo. Procurement of green fodder for the large number of herbivorous animals of the zoo is already a serious problem for the zoo and any disturbance to fodder cultivation will aggravate the situation. The Calcutta zoo has the smallest area in comparison to other reputed zoo. The Committee is of a opinion that no portion of zoo land can be parted with for any other purpose. This being the position soil testing will hardly be of any avail as the zoo cannot spare the land. Shri Ashoka Basu, MLA, Shri K.P. Banerjee and Shri A.K. Das abstained from participation in the proceedings.

The Minister for Metropolitan Development submitted a note to the Chief Minister on the resolution of the Managing Committee of the zoo. He pointed out that even if four acres out of the eight acres of Begumbari land was given to the Taj Group, there would still remain sufficient land for accommodation of the facilities. He added that the Managing Committee's resolution was not binding on the Government and suggested that the Director of the zoo

might be asked to allow the Taj Group to undertake soil testing etc. so that work may proceed according to the time schedule. The Chief Minister endorsed the following:

I agree. It is unfortunate that we have not been able to accept the contentions of the Managing Committee. If further facilities are necessary for the Zoo, the government will provide them.

On June 25, 1981, the Managing Committee of the zoo met again and passed another resolution by which they withdrew their earlier objections. The resolution stated:

In view of the letter issued to the Zoological Gardens, Alipore and the Cabinet decision regarding the land of Begumbari Compound and in consideration of the assurance conveyed through Shri Ashoka Bose, Chief Whip and Member that the State Government will give to the Garden adjacent lands and matching grants for the purposes of shifting of the departments of the zoo within the aid compound, the Members do not press their objections as contained in the resolution of the Managing Committee held on June 11, 1981.

This was passed by the majority of the Members present, the President Justice Shri R.K. Banerjee dissenting.

15. Presumably as a consequence of the letter from the Director of the zoo there was a note by the Secretary, Animal Husbandry and Veterinary Services Department suggesting the postponement of the implementation of the Cabinet decision till the necessary facilities then available at Begumbari land were shifted to other land of the same extent within a reasonable distance from the Zoological Garden, as those facilities were originally linked with the zoo. He pointed out that the Metropolitan Development Department had not consulted the Animal Husbandry Department before the Cabinet note was prepared and circulated. So the practical problems of the zoo did not receive detailed consideration earlier. The note also pointed out that immediate transfer of the four acre plot of land would mean discontinuance of existing hospital facilities, research laboratory, operation theatre, segregation wards, quarantine facilities etc. A reference was also made to the report of Public Undertakings Committee.

16. Meanwhile negotiations with Taj Group proceeded apace. The WEBCON submitted further reports. Taj Group suggested further modifications. On September 9, 1981 a detailed memorandum was prepared for Cabinet discussion. Two alternative financial proposals were set out. A reference was made to the Committee of Secretaries who negotiated with the Taj Group of Hotels. Note was taken of the suggestion of the Negotiation Committee that the overall development plan for the environmental beautification, widening of approach roads, landscaping of Tolly's Nullah were responsibilities of the State Government and estimated to cost Rs 2 crores but that it was expected to be of considerable public benefit. Stress was laid on the direct and indirect economic activities which would be generated by the establishment of a Five Star Hotel. Reference was also made to the report of WEBCON and it was noted that the projected profitability of the venture to the Government was expected to be high. It was also mentioned that the Ministers in charge of Tourism, Animal Husbandry, Land Revenue and Finance had seen the note and had agreed to it. On September 10, 1981 the Cabinet took the final decision to grant a ninety-nine years lease of the four acres of Begumbari land to the Taj Group of Hotels. On September 28, 1981 the Government of West

Bengal officially conveyed its acceptance of the proposal of the Taj Group of Hotels for the construction of a Five Star Hotel. The terms and conditions of the lease were set out. On January 7, 1982, there was a joint meeting of the Establishment and Finance sub-committees of the Zoo and it was decided to recommend to the Committee of management that the demarcated area of four acres may be relinquished in favour of Animal Husbandry and Veterinary Services Department subject to the requirement that the zoo will continue to get the services and facilities in the existing structures until they were reconstructed on the adjacent land. On January 11, 1982 the Managing Committee endorsed the view of the sub-committees and this was communicated to the Government. On January 15, 1982, the Government of West Bengal wrote to the Land Acquisition Officer, with copies to the Taj Group of Hotels, directing the Land Acquisition Officer to give possession of the land to the Taj Group of Hotels subject to their later executing a proper long-term lease. It was mentioned in the letter that the construction of the hotel should not be started till the lease deed was executed and registered. It was further expressly stipulated as follows:

The Alipore Zoological Garden will continue to get the services and facilities from the existing essential structures which fall within the demarcated area in the annexed sketch map till such time when these essential structures i.e. hospital and operation theatre are reconstructed on the adjacent land occupied by the Zoological Garden. A copy of the sketch map is enclosed for ready reference. The Indian Hotels Co. Ltd. will find out in consultation with and with the concurrence of the Animal Husbandry and Veterinary Services Department of this Government and the authorities of the Alipore Zoological Garden the period of time required for reconstruction of the essential structures standing on the land proposed to be leased out to the said Company. It will also let this Department have in consultation with and with the concurrence of the Animal Husbandry and Veterinary Services Department of this Government and the Alipore Zoological Garden a plan and estimate for reconstruction of the aforesaid essential structures on the land adjacent to the land proposed to be leased out, so that all these points are incorporated in the deed of lease between the said Company and the State Government in this department for the said land measuring four acres.

As agreed by the said Company during the various meetings its representatives had with various departments of this government, the company will either place the necessary fund in the hands of Animal Husbandry and Veterinary Services Department or the Zoo Garden authorities, as the case may be, for reconstruction of the aforesaid essential structures or reconstruct the aforesaid essential structures under its own supervision to the satisfaction of the Zoo Garden authorities or Animal Husbandry and Veterinary Services Department as the case may be; such funds will in either case be advanced or deemed to be advanced by the Company without interest to be adjusted against dues of the State Government in accordance with the terms and conditions of the lease.

17. It is to be noted here that though the stipulation was that the cost of new construction was to be initially met by Taj Group of Hotels and later to be adjusted against the rent payable by Taj Group, the Taj Group later agreed to waive such reimbursement. We are told that a

total sum of Rs 30 lakhs has now been spent by Taj Group of Hotels in connection with the reconstruction. We are also told that an extent of 288 square meters out of the plot given to the Taj Group was carved out and given back for accommodating part of the reconstructed structures. Pursuant to the letter dated January 15, 1982 possession was given to Taj Group on January 16, 1982. Thereafter an Expert Committee was constituted to supervise the construction of alternative facilities. At that stage the writ petition out of which the present appeal arises was filed on February 26, 1982. Initially the relief sought was primarily to restrain the zoo authorities from giving effect to the two resolutions dated January 7, 1982 and January 11, 1982 to hand over the four acres to the Animal Husbandry Department of the Government. Subsequent to the filing of the writ petition, a lease deed was executed by the Taj Group of Hotels in favour of the Government. The writ petition was therefore, amended and a prayer for cancellation of the lease deed was added. First a learned Single Judge dismissed the writ petition. On appeal, a Division Bench of the High Court confirmed the judgment of the learned Single Judge. The original petitioners are now before us having obtained special leave under Article 136 of the Constitution.

18. Before adverting to the submission of the learned counsel, it is necessary, at this juncture, to refer to certain correspondence. On April 23, 1982, Late Smt. Indira Gandhi, Prime Minister of India wrote to Shri Jyoti Basu, Chief Minister of West Bengal expressing the hope that he would not allow the Calcutta Zoo to suffer in any manner and would leave it intact. She drew the Chief Minister's attention to the fact that "apart from reduction in the already inadequate space for the Zoological Garden construction of a Five Star multi-storeyed building would disturb the inmates and adversely affect bird migration which was a great attraction". She also mentioned that the Expert Committee of the Indian Board for Wild Life also unanimously disapproved the idea. She queried whether the hotel could not be located elsewhere. For one reason or the other the Prime Minister's letter did not reach the Chief Minister for a considerable time. On August 21, 1982 the Chief Minister sent his reply pointing out that the four acres of land were agreed to be relinquished by the Committee of Management of the Zoological Garden on condition that alternate arrangements were made for shifting the existing structures which were necessary for the zoo from the plot in question to the adjacent plot. The Chief Minister also mentioned that there appeared to be some misconception that the plot in question was a part of the Zoo Garden. It was not so. It was outside the Zoological Garden and separated from it by a 80-100 feet road. The Chief Minister assured the Prime Minister that the existing structures would be relocated on the adjacent land and until that was done the zoo would continue to get their services and facilities from the existing structures. The Chief Minister further drew the attention of the Prime Minister to the fact that the hotel was likely to be a six storeyed one and would not be the only tall building near the zoo. There were already a large number of highrise residential buildings around the zoo. No one had raised any objection when those buildings were constituted. Another multi-storeyed building which was going to be the largest in the locality was under construction near the zoo for the Post and Telegraph Department. There was no report that the existing multi-storeyed buildings had any adverse effect on the migratory birds or the animals. The Chief Minister also pointed out that the lessee and their experts on wild life had assured them that in any case adequate precaution would be taken in regard to illumination of the hotel and the lay out of the surroundings so that no disturbance would be

caused to the flight path of the birds or animals. On August 30, 1982, Shri J.R.D. Tata wrote to the Prime Minister pointing out that their hotel management had discussed the matter at length with representatives of the Wild Life Fund who were satisfied that the proposed hotel would cause no disturbance to the birds. He had again gone thoroughly into the project with special reference to its possible impact on the birds or environment and had also visited Calcutta in that connection. He was satisfied that the project could not possibly disturb birds using the lake or interfere with their free movement. He gave his reasons as follows:

The four acre plot assigned to the Hotel Company by the State Government is not within the boundaries of the area belonging to the Zoological Gardens but on the other side of Belvedere Road, an important thoroughfare parallel to the main boundary of the zoo and some 700 feet from the main part of the lake. It forms part of an area belonging to the State Government which the zoo authorities have up to now been allowed to use to look after sick animals of the zoo and as labour quarters. It contains five small structures including a cage and a small veterinary laboratory or dispensary. The whole area is in shockingly unkept condition, most of it covered by a single or spear grass and other wild growth.

The hotel is planned to be built away from the frontage of that plot of Belvedere Road and to be low rise structure, the highest point of which will not exceed 75 feet.

Dr B. Biswas, a renowned ornithologist, who recently retired as Professor Emeritus of the Zoological Survey of India, whom the Taj Management consulted, confirmed that a 75 feet high building on the location would not worry birds landing on the lake or climbing out of it. In fact, as the grounds of the zoo between the lake and Belvedere Road are covered with high trees, the climbing or descent angle which the birds have to negotiate to get over the trees is already steeper than it will be between the lake and the proposed hotel.

As regards the objection that arise from the hotel itself from vehicular traffic to and from the hotel would disturb the birds, the hotel will be totally airconditioned so that no noise will emanate from it, while noise from the heavy traffic on Belvedere Road does not seem it have bothered the birds up to now. The occasional additional cars plying into and out of the hotel could therefore hardly trouble birds resting on the lake some 250 yards away.

Regarding the fear that lights emanating from the hotel or illuminated signs of the hotel would disorient the birds and possibly cause them to hit the building the management of the Hotel Company has taken a firm decision that there will be no bright lights or neon signs emanating from the hotel.

Shri Tata further suggested that if necessary the Prime Minister could appoint a small advisory committee consisting of Shri Pushpa Kumar, Director of the Hyderabad Zoo considered to be the finest zoo in India and one of the best in Asia, Dr Biswas, Mrs Anne Wright and the Chairman of the Managing Committee of the Zoological Garden to advise on the subject. On September 1, 1982, Smt Indira Gandhi wrote to Mr Tata expressing her happiness that the hotel was not going to upset the zoo animals and welcoming his offer to help the State Government to improve the zoo's facilities.

21. We are unable to agree with the submission of Dr Singhvi, learned counsel for the appellants, that the Government of West Bengal decided to grant the lease of the Begumbari land to the Taj Group of Hotels without applying their mind to very important relevant considerations. Much of the argument on this question was based on the assumption that the decision to lease the Begumbari land to the Taj Group of Hotels was taken on February 12, 1981. The decision taken by the Cabinet on February 12, 1981 was merely to enter into negotiations with the ITDC and the Taj Group of Hotels in regard to leasing the Hastings House property and the Begumbari land. Negotiations with the ITDC did not fructify while negotiations with the Taj Group of Hotels fruited. It was on September 10, 1981 that the Cabinet finally took the decision to lease the Begumbari land to the Taj Group. If there was any decision on February 12, 1981 in regard to leasing the Begumbari land it could at best be characterised as purely tentative and it could not by any stretch of imagination be called an irrevocable or irreversible decision in the sense that the Government was powerless to revoke it or that it had created any rights in anyone so as to entitle that person to question any reversal of the tentative decision. It was not a decision, if it was one, on which any right could be hung. At that stage, the Government of West Bengal appeared to have been on the search for two suitable plots of land which could be offered, one to the ITDC and the other to the Taj Group of Hotels for the construction of Five Star Hotels. The record shows that these two chain hoteliers were the only hoteliers - and, they certainly were leading hoteliers of the country - who had come forward to negotiate with the West Bengal Government regarding the construction of Five Star Hotels. The city of Calcutta was noticeably lacking in the "Five Star Hotel amenity" to attract tourists, local and foreign, and the Government of West Bengal was anxious to do its best to promote the tourist industry which it was hoped, would provide direct and indirect employment, earn foreign exchange and confer other economic benefits to the people of the State. It is immaterial whether the move came first from the Government or from the Taj Group. The Government was anxious that more Five Star Hotels should be established at Calcutta and the Taj Group was willing to establish one. They wanted a suitable plot for its construction. It was the suggestion of the All India Tourism Conference presided over by the Union Minister for Tourism that State Governments should make plots in good locations available at concessional rates for construction of hotels in order to promote the tourist industry. It was in pursuance of this general all-India policy and, in particular, to fulfil the felt needs of Calcutta that the Government of West Bengal was looking out for a suitable plot in a good location. They were clearly not doing so at the behest of the Taj Group of Hotels. It does not require much imagination to say that location is among the most important factors to be considered when constructing a Five Star Hotel, particularly if it is to promote tourism. Obviously, one place is not as good as another and the place has to be carefully chosen. After excluding Salt Lake and after considering some properties in Chowringhee, the Government felt that two properties, the Hastings House property and the Begumbari property could be thought of as meeting the requirements. Since the Hastings House property was not found acceptable by the Taj Group, it was decided to negotiate with them in regard to construction of a Five Star Hotel on the Begumbari land. We find it difficult to treat this decision to negotiate with the Taj Group in regard to construction of a Five Star Hotel on the Begumbari land as a final decision to part with the land. The prominent use to which the land was evidently put at that time was as a dumping ground for refuse and rubbish and for

growing fodder for elephants. This was noticed and mentioned in the note prepared for the consideration of the Cabinet and it was suggested that separate provision would have to be made for them. Therefore, it is clear that it was not forgotten that if the land was to be allotted to the Taj Group, separate provision would have to be made for whatever use the land was being put to them. The Government was not unmindful of the interests and requirements of the Zoological Garden though at that stage no detailed investigations had apparently been made. The decision of the Government was not one of those mysterious decisions taken in the shrouded secrecy of Ministerial Chambers. It appears to have been taken openly with no attempt at secrecy. The decision, perhaps proposal would be a more appropriate word, was known to the Public Undertakings Committee in less than two days. They expressly refer to it in their report dated February 14, 1981 made two days after the Cabinet decision. By twenty-first February it was public knowledge and news of the proposal was published in the daily newspapers. We have no evidence of any immediate or subsequent public protest but there were certain objections from some circles. Earlier we have extracted the report of Public Undertakings Committee. The substance of the objection of the Public Undertakings Committee was that the facilities available in the Begumbari land would be left unprovided for if the land was given to the proposed hotel. The available facilities were mentioned as staff quarters, hospital for animals, burial ground for animals, fodder for elephants etc. It was also said that if the hospital and the burial ground were to be shifted to the main garden it would result in an unhealthy atmosphere for the animals and the zoo and would detract from the beauty of the Zoo Garden. The assumption of the Public Undertakings Committee that the hospital and the burial ground were to be shifted to the main garden was baseless, since there was never any such proposal. A modern zoo hospital for animals has been constructed in the remaining extent of Begumbari land replacing the old hospital which was housed in a semi-dilapidated building. Surely, there should be no complaint about it. It has also been proposed to shift the burial ground elsewhere. That would be most desirable from any point of view. Fodder for elephants should not again be considered to be a problem. It would be stretching credibility to suggest that it is necessary to grow fodder in the Begumbari land to feed the elephants in the zoo. Fodder may be bought and brought from elsewhere. The Chief Town Planner who was deputed to visit the site at the request of the Secretary, Metropolitan Development Department and who visited the zoo accompanied by the Director of the zoo reported that 2 to 2 1/2 acres of land might be made available for the hotel. If four acres of land were given, he expressed the apprehension that the hospital and the dumping ground would have to be moved elsewhere. The hospital as we have already mentioned has since been conveniently and comfortably accommodated in a new building and the proposal is to move the dumping ground elsewhere. The Managing Committee of the zoo also initially expressed its opposition to the proposal to construe a hotel on land belonging to the zoo. The Committee's objections were twofold: (1) A multi-storied building in the vicinity of the zoo will disturb the animals and the ecological balance and will affect the bird migration (2) the land was already used for various purposes, that is, fodder cultivation, burial ground for animals, hospital, operation theatre, quarantine area, post-mortem room and nursery. It would be impossible, according to the Committee to accommodate these essential services within the campus of the main zoo. The objections of the Managing Committee were first brought to the notice of the Minister for Metropolitan Development who submitted a note to the Chief

Minister pointing out that even if four acres of land out of the eight acres of Begumbari land was given to the Taj Group, there would still remain sufficient land for accommodating the existing facilities. The Chief Minister considered the objections and noted that if further facilities were necessary for the zoo, Government would provide them. Thereafter the Managing Committee reversed its earlier stand and agreed to the proposal on the assurance that adjacent land and matching grants would be given to the zoo. We have earlier referred to the letter of the Director of the Zoo dated June 29, 1981 addressed to the Secretary, Animal Husbandry Department where he expressed his opposition to the proposal on the ground that the zoo could not be run for a single day without the essential services which were being provided in the four acres of land proposed to be given for the hotel. This again, we notice, is based on the assumption that there was going to be no provision for those facilities once the hotel was constructed. We have already pointed out that this assumption is wholly incorrect. The letter of the Director of the zoo was followed by a note by the Secretary of the Animal Husbandry Department suggesting that the practical problems of the zoo should receive detailed consideration and that the immediate transfer of the land to the hotel would mean discontinuance of the existing facilities. In the face of all this material, we do not see how it can be seriously contended that the interests and the requirements of the zoo were totally ignored and not kept in mind when the decision was taken to lease the land to the Taj Group of Hotels. The Chief Minister's attention was expressly drawn to the Managing Committee's first resolution expressing its opposition to the proposal to give the land for the construction of a hotel and detailing the objections and the Chief Minister had expressly noted that all facilities necessary for the zoo would be provided by the Government. The assurance was also conveyed to the Managing Committee through the emissaries of the Chief Minister. There were inter-departmental notings which we presume must also have been brought to the notice of the Chief Minister. We find it impossible to agree with the stricture that the Chief Minister turned a blind eye and a deaf ear to the interests and the requirements of the zoo and went about the question of allotment of land to the Taj Group of Hotels determined to give the land to them and with a mind closed to everything else. We cannot do so in the face of the assurance of the Chief Minister that facilities would be provided for the zoo and if, as the saying goes, the proof of the pudding is in the eating, the Chief Minister's assurances are found reflected in the lease executed by the Taj Group of Hotels in favour of the Government of West Bengal.

In clause 25 of the lease deed, it is expressly stipulated that the lessee shall reconstruct the structures now existing on the demised land (as found in the sketch accompanying the deed) on the adjacent plot of land and that the plan, design, lay out, estimates, etc. of the proposed new structures should be supplied by the Alipur Zoological Garden to the lessee. The reconstructed structures were required to be equal to the existing ones in floor area, but it was open to them to increase the floor area by agreement. The amount expended by the lessee towards the reconstruction of the structures was to be adjusted without interest against the dues of the lessee to the Government. The Alipore Zoological Garden authorities were required to vacate the existing structure within a period of six months which was also the period stipulated for raising the new constructions. We may add here that the Taj Group of Hotels have spent a sum of Rs 30 lakhs towards the cost of the new constructions, but that they have waived their right to claim reimbursement from the government. An affidavit to

that effect was also filed before the trial court. Thus we see that the contention of the appellants that the Government of West Bengal had no thought to spare for the facilities which were till then being provided in the Begumbari land is unsustainable. The learned counsel for the appellants urged that the second cabinet memorandum dated September 9, 1981 on which date the Government took the final decision to grant the lease made no mention of the needs and interests of the zoo or the facilities provided in the Begumbari land for the zoo. It is true that there is no reference to these matters in the second cabinet memorandum. But that is for the obvious reason that the matter had already been the subject-matter of inter-departmental discussion and communication. The Managing Committee of the zoo which had initially opposed the proposal had also come round and had agreed to the proposal. It was, therefore, thought that there was no need to mention the needs and interests of the zoo which were already well known and had also received consideration.

22. It was suggested that the zoo itself required to be expanded and there was, therefore, no land which could be spared. The land allotted to the hotel was, as we have seen, not used for the main purpose of the zoo and was not in fact part of the main Zoological Garden. The Government had already in mind a proposal to start a subsidiary zoo in an extent of about 200 acres of land in the outskirts of Calcutta. This has been mentioned in the various notings made from time to time. We have no doubt that the Government was quite alive to the need for expansion of the zoo when they decided to grant four acres of the Begumbari land which was not used for the main purpose of the zoo for the construction of a Five Star Hotel.

23. The next question is whether the Government was alive to the ecological considerations, particularly to the question of the migratory birds when they took the decision to lease the land to the Taj Group of Hotels. Again sustenance to the argument of the learned counsel for the appellants is sought to be drawn from the circumstance that neither of the two Cabinet Memoranda dated January 7, 1981 and September 9, 1981 referred to the migratory birds. It is wrong to think that everything that is not mentioned in the cabinet memoranda did not receive consideration by the government. We must remember that the process of choosing and allotting the land to the Taj Group of Hotels took nearly two years, during the course of which objections of various kinds were raised from time to time. It was not necessary that every one of these objections should have been mentioned and considered in each of the cabinet memoranda. The question of the migratory birds was first raised in the resolution of the Managing Committee dated June 11, 1981. This resolution was forwarded to the Chief Minister and considered by him as evident from the note of the Chief Minister and the subsequent reversal of the Managing Committee's resolution at the instance of the Chief Minister and on his assurances. The Chief Minister was certainly aware of the question of the migratory birds before it was finally decided to allot the Begumbari land to the Taj Group of Hotels. That the Government was aware of the dissension based on the alleged obstruction likely to be caused by a multi-storeyed building to the flight of the migratory birds appears from the letter of the Chief Minister to the Prime Minister. In this letter, the Chief Minister pointed out that there were already in existence a number of multi-storeyed buildings all around the Zoological Garden, but there was no report that they had any adverse effect on the migratory birds or the animals. He also pointed out that all precautions would be taken in the matter of illumination of the hotel and lay out of the surroundings so that no disturbance

would be caused to the flight path of the birds or animals. Shri J.R.D. Tata, on behalf of the Taj Group of Hotels, also wrote to the late Prime Minister assuring her that the hotel management had discussed the matter at length with a representative of the Wild Life Fund who, after discussion, had been satisfied that the proposed hotel would cause no disturbance to the birds. He further assured her that he had himself gone thoroughly into the project with special reference to the possible impact on the birds and the environment and had satisfied himself that the project would not cause any disturbance to the birds or their free movement. The reasons given by him have already been extracted earlier by us from his letter. He pointed out that the four acre plot was not within the main Zoological Garden, but was separated from it by the Belvedere Road which was an important thoroughfare in the city. It was about 700 feet from the main part of the lake. The hotel was proposed to be built away from the frontage of the plot in Belvedere Road and was to be a low rise structure, the highest point of which would not exceed 75 feet. This was mentioned apparently to indicate that the building would not come within the trajectory of the birds. He mentioned that Dr Biswas, a renowned ornithologist had also been consulted by the Taj Management and he had also confirmed that a 75 feet building would not interfere with the landing or climbing out of the birds from the lake. He further mentioned that the grounds of the zoo between the lake and the Belvedere Road were covered with tall trees and that the birds negotiating the trees would have to fly at a steeper angle than it would be necessary to negotiate the proposed hotel. The vehicular traffic on Belvedere Road which was also heavy did not bother the birds and the slight increase of the vehicular traffic consequent on the construction of the hotel was also not likely to bother them either. It was also pointed out that particular care would be taken in the matter of illumination of the hotel so that bright lights or neon signs emanating from the hotel would not disturb the birds and animals.

24. We are satisfied that the question of obstruction which may be caused to migratory birds did not go unnoticed by the government before the decision to lease the land was taken and we are also satisfied that the building of the proposed hotel is not likely to cause any obstruction to the flight path of the migratory birds.

26. Bearing in mind the proper approach that we have to make when questions of ecology and environment are raised, an approach which we have mentioned at the outset, we are satisfied that the facts and circumstances brought out by the appellants do not justify an inference that the construction of the proposed hotel in the Begumbari land would interfere in any manner with the animals in the zoo and the birds arriving at the zoo or otherwise disturb the ecology: The proposed hotel is a garden hotel and there is perhaps every chance of the ecology and environment improving as a result of planting numerous trees all around the proposed hotel and the removal of the burial ground and dumping ground for rubbish.

40. On a consideration of the relevant cases cited at the Bar the following propositions may be taken as well established: State-owned or public-owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest, when it is considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating

departure from the rule but then the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism.

41. Applying these tests, we find it is impossible to hold that the Government of West Bengal did not act with probity in not inviting tenders or in not holding a public auction but negotiating straightway at arm's length with the Taj Group of Hotels.

42. The last and final submission of the learned counsel for the appellants relates to the commercial and financial aspects of the lease. According to the learned counsel, the "net sales" method of calculating the compensation payable to the Government for the lease of the land has totally sacrificed the State's interests. He submits that if the market value of the land had been fairly determined and the rent had been stipulated at a percentage of that value, the return to the Government would have been much higher. We do not think that there is any basis for any genuine criticism. The "net sales" method appears to be a fairly well known method adopted in similar situations. This was what was recommended by WEBCON, the consulting agency of the West Bengal Government who submitted a detailed report on the subject. This was also the recommendation of the Committee of Secretaries who went into the matter in depth. Even to lay persons like us who are no financial experts, it appears that the "net sales" method does and the rent-based-on-market-value method does not take into account the appreciating value of land, the inflationary tendency of prices and the profit orientation. Even on a prima facie view, there appears to be nothing wrong or objectionable in the "net sales" method. It is profit-oriented and appears to be in the best interests of the Government of West Bengal.

43. On a consideration of all the facts and circumstances of the case, we are satisfied that the Government of West Bengal acted perfectly bona fide in granting the lease of Begumbari land to the Taj Group of Hotels for the construction of a Five Star hotel in Calcutta. The Government of West Bengal did not fail to take into account any relevant consideration. Its action was not against the interests of the Zoological Garden or not in the best interests of the animal inmates of the zoo or migrant birds visiting the zoo. The financial interests of the State were in no way sacrificed either by not inviting tenders or holding a public auction or by adopting the "net sales" method. In the result, the judgments of the learned Single Judge and the Division Bench of the Calcutta High Court are affirmed and the appeal is dismissed.

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UNIT 4: PREVENTION AND CONTROL OF WATER POLLUTION

M.C. Mehta v. Union of India, AIR 1988 SC 1037

E.S. VENKATARAMIAH, J. – This is a public interest litigation. The petitioner who is an active social worker has filed this petition *inter alia* for the issue of a writ/order/direction in the nature of mandamus to the respondents other than Respondents 1 and 7 to 9 restraining them from letting out the trade effluents into the river Ganga till such time they put up necessary treatment plants for treating the trade effluents in order to arrest the pollution of water in the said river. Respondent 1 is the Union of India, Respondent 7 is the Chairman of the Central Board for Prevention and Control of Pollution, Respondent 8 is the Chairman, Uttar Pradesh Pollution Control Board and Respondent 9 is the Indian Standards Institute.

2. Water is the most important of the elements of nature. River valleys are the cradles of civilization from the beginning of the world. Aryan civilization grew around the towns and villages on the banks of the river Ganga. Varanasi which is one of the cities on the banks of the river Ganga is considered to be one of the oldest human settlements in the world. It is the popular belief that the river Ganga is the purifier of all but we are now led to the situation that action has to be taken to prevent the pollution of the water of the river Ganga since we have reached a stage that any further pollution of the river water is likely to lead to a catastrophe. There are today large towns inhabited by millions of people on the banks of the river Ganga. There are also large industries on its banks. Sewage of the towns and cities on the banks of the river and the trade effluents of the factories and other industries are continuously being discharged into the river. It is the complaint of the petitioner that neither the Government nor the people are giving adequate attention to stop the pollution of the river Ganga. Steps have, therefore, to be taken for the purpose of protecting the cleanliness of the stream in the river Ganga, which is in fact the life sustainer of a large part of the northern India.

3. When this petition came up for preliminary hearing, the Court directed the issue of notice under O. 1, R. 8 of the Code of Civil Procedure treating this case as a representative action by publishing the gist of the petition in the newspapers in circulation in northern India and calling upon all the industrialists and the municipal corporations and the town municipal councils having jurisdiction over the areas through which the river Ganga flows to appear before the Court and to show cause as to why directions should not be issued to them as prayed by the petitioner asking them not to allow the trade effluents and the sewage into the river Ganga without appropriately treating them before discharging them into the river. Pursuant to the said notice a large number of industrialists and local bodies have entered appearance before the Court. Some of them have filed counter-affidavits explaining the steps taken by them for treating the trade effluents before discharging them into the river.

4. Before proceeding to consider the facts of this case it is necessary to state a few words about the importance of and need for protecting our environment. Article 48-A of the Constitution provides that the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country. Article 51-A of the Constitution imposes as one of the fundamental duties on every citizen the duty to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures. The proclamation adopted by the United Nations Conference on the Human Environment which took place at Stockholm from 5th to 16th of June, 1972 and in which the Indian delegation led by the Prime Minister of India took a leading role runs thus:

1. Man is both creature and moulder of his environment which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when through the rapid acceleration of science and technology, man has acquired the power, to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and the man made, are essential to his well being and to the enjoyment of basic human rights - Even the right to life itself.

2. The protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world, it is the urgent desire of the peoples of the whole world and the duty of all Governments.

3. Man has constantly to sum up experience and go on discovering, inventing, creating and advancing. In our time man's capability to transform his surroundings, if used wisely, can bring to all peoples the benefits of development and the opportunity to enhance the quality of life. Wrongly or heedlessly applied, the same power can do incalculable harm to human beings and the human environment. We see around us growing evidence of man-made harm in many regions of the earth; dangerous levels of pollution in water, air, earth and living beings; major and undesirable disturbances to the ecological balance of the biosphere; destruction and depletion of irreplaceable resources; and gross deficiencies harmful to the physical, mental and social health of man, in the man-made environment; particularly in the living and working environment.

A point has been reached in history when we must shape our actions throughout the world with a more prudent care for their environmental consequences. Through ignorance or indifference we can do massive and irreversible harm to the earthly environment on which our life and well-being depend. Conversely, through fuller knowledge and wiser action, we can achieve for ourselves and our posterity a better life in an environment more in keeping with human needs and hopes. There are broad vistas for the enhancement of environmental quality and the creation of a good life. What is needed is an enthusiastic but calm state of mind and intense but orderly work. For the purpose of attaining freedom in the world of nature man must use knowledge to build in collaboration with nature a better environment. To defend and improve the human environment for present and future generations has become an

imperative goal for mankind, a goal to be pursued together with, and in harmony with, the established and fundamental goals of peace and of world-wide economic and social development.

To achieve this environmental goal will demand the acceptance of responsibility by citizens and communities and by enterprises and institutions at every level, all sharing equitably in common efforts. Individuals in all walks of life as well as organizations in many fields, by their values and the sum of their actions, will shape the world environment of the future. Local and National Governments will bear the greatest burden for large-scale environmental policy and action within their jurisdictions. International co-operation is also needed in order to raise resources to support the developing countries carrying out their responsibilities in this field. A growing class of environmental problems, because they are regional or global in extent or because they affect the common international realm, will require extensive co-operation among nations and action by international organizations in the common interest. The Conference calls upon the Governments and peoples to exert common efforts for the preservation and improvement of the human environment, for the benefit of all the people and for their posterity.

The proclamation also contained certain common convictions of the participant nations and made certain recommendations on development and environment. The common convictions stated include the conviction that the discharge of toxic substances or of other substances and the release of heat in such quantities or concentrations as to exceed the capacity of environment to render them harmless must be halted in order to ensure that serious or irreversible damage is not inflicted upon eco systems, that States shall take all possible steps to prevent pollution of the seas so that hazards to human health, harm to living resources and marine life, damage to the amenities or interference with other legitimate uses of seas is avoided, that the environmental policies would enhance and not adversely affect the present and future development potential of developing countries, that science and technology as part of their contributions to economic and social development must be applied with identification, avoidance and control of environmental risks and the solution of environmental problems and for the common good of mankind, that States have the responsibility to ensure that activities of exploitation of their own resources within their jurisdiction are controlled and do not cause damage to the environment of other States or areas beyond the limit of national jurisdiction, that it will be essential in all cases to consider the system of values prevailing in each country and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost and that man and his environment must be spared the effects of nuclear weapons and all other means of mass destruction. These are only some of the statements of principles proclaimed by the Stockholm Conference.

5. Realising the importance of the prevention and control of pollution of water for human existence Parliament has passed the Water (Prevention and Control of Pollution) Act, 1974 ('the Act') to provide for the prevention and control of water pollution and the maintaining or restoring of wholesomeness of water, for the establishment, with a view to carrying out the purposes aforesaid, of Boards for the prevention and control of water pollution for conferring

on and assigning to such Boards powers and functions relating thereto and for matters concerned therewith. The Act was passed pursuant to resolutions passed by all the Houses of Legislatures of the States of Assam, Bihar, Gujarat, Haryana, Himachal Pradesh, Jammu and Kashmir, Karnataka, Kerala, Madhya Pradesh, Rajasthan, Tripura and West Bengal under Cl. (1) of Art. 252 of the Constitution to the effect that the prevention and control of water pollution should be regulated in those States by Parliamentary legislation. The Act has been since adopted by the State of Uttar Pradesh also by resolutions passed in that behalf by the Houses of Legislature of the said State in the year 1975 (vide notification No. 897/IX-3-100-74 dated 3-2-1975). Section 24 of the Act prohibits the use of any stream or well for disposal of polluting matter etc. It provides that subject to the provisions of the said poisonous, noxious or polluting matter determined in accordance with such standards as may be laid down by the State Board to enter whether directly or indirectly into any stream or well or no person shall knowingly cause or permit to enter into any stream any other matter which may tend either directly or in combination with similar matters to impede the proper flow of the water of the stream in a manner leading or likely to lead to a substantial aggravation of pollution due to other causes or of its own consequences. The expression stream is defined by S. 2(j) of the Act as including river, water course whether flowing or for the time being dry, inland water whether natural or artificial, sub-terranean waters, sea or tidal waters to such extent or as the case may be to such point as the State Government may by notification in the Official Gazette, specify in that behalf. Under the Act it is permissible to establish a Central Board and the State Boards. The functions of the Central Board and the State Boards are described in Ss.16 and 17 respectively. One of the functions of the State Board is to inspect sewage or trade effluents, works and plants for the treatment of sewage and trade effluents and to review plans, specifications or other data relating to plants set up for the treatment of water, works for the purification and the system for the disposal of sewage or trade effluents. 'Trade effluent' includes any liquid, gaseous or solid substance which is discharged from any premises used for carrying on any trade or industry, other than domestic sewage. The State Board is also entrusted with the work of laying down standards of treatment of sewage and trade effluents to be discharged into any particular stream taking into account the minimum fair weather dilution available in that stream and the tolerance limits of pollution permissible in the water of the stream, after the discharge of such effluents. The State Board is also entrusted with the power of making application to courts for restraining apprehended pollution of water in streams or well. Notwithstanding the comprehensive provisions contained in the Act no effective steps appear to have been taken by the State Board so far to prevent the discharge of effluents of the Jajmau near Kanpur to the river Ganga. The fact that such effluents are being first discharged into the municipal sewerage does not absolve the tanneries from being proceeded against under the provisions of the law in force since ultimately the effluents reach the river Ganga from the sewerage system of the municipality.

6. In addition to the above Act, Parliament has also passed the Environment (Protection) Act, 1986 which has been brought into force throughout India with effect from November 19, 1986. Section 3 of this Act confers power on the Central Government to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution. 'Environment' includes water, air and land and the inter-relationship which exists among and

between water, air and land and human beings, other living creatures, plants, micro-organisms and property. (S. 2(a) of the Environment (Protection) Act, 1986). Under S. 3(2)(iv) of the said Act the Central Government may lay down standards for emission or discharge of environmental pollutants from various sources whatsoever. Notwithstanding anything contained in any other law but subject to the provisions of the Environment (Protection) Act, 1986, the Central Government may under S. 5 of the Act, in the exercise of its powers and performance of its functions under that Act issue directions in writing to any person, officer or authority and such authority is bound to comply with such directions. The power to issue directions under the said section includes the power to direct the closure, prohibition or regulation of any industry, operation or process or stoppage or regulation of the supply of electricity or water or any other service. Section 9 of the said Act imposes a duty on every person to take steps to prevent or mitigate the environmental pollution. Section 15 of the said Act contains provisions relating to penalties that may be imposed for the contravention of any of the provisions of the said Act or directions issued thereunder. It is to be noticed that not much has been done even under this Act by the Central Government to stop the grave public nuisance caused by the tanneries at Jajmau, Kanpur.

7. All the tanneries at Jajmau, Kanpur which were represented by counsel, except respondents Nos. 87 and 89 have relied upon a common counter-affidavit filed by them and their case is argued by Shri S.K. Dholakia and Shri Mukul Mudgal. Respondent No. 87 is represented by Shri R.P. Gupta and respondent No. 89 is represented by Shri P. Narasimhan. There is not much dispute on the question that the discharge of the trade effluents from these tanneries into the river Ganga has been causing considerable damage to the life of the people who use the water of the river Ganga and also to the aquatic life in the river. The tanneries at Jajmau in Kanpur have themselves formed an association called Jajmau Tanners Pollution Control Association with the objects among others:

- (1) To establish, equip and maintain laboratories, workshop, institutes, organisations and factories for conducting and carrying on experiments and to provide funds for the main objects of the Company.
- (2) To procure and import wherever necessary the chemicals etc. for the purpose of pollution control in tanning industries.
- (3) To set up and maintain common effluent treatment plant for member tanners in and around Jajmau.
- (4) To make periodical charges on members for the effluent treatment based on the benefit he/it derives from time to time to meet the common expenses for maintenance, replacement incurred towards effluent treatment.

11. There is a reference to the Jajmau tanneries in 'an Action Plan for Prevention of Pollution of the Ganga' prepared by the Department of Environment, Government of India in the year 1985, which is as under: -

1.1 The Ganga drains eight States: Himachal Pradesh, Punjab, Haryana, Uttar Pradesh, Rajasthan, Madhya Pradesh, Bihar, West Bengal and the Union Territory of Delhi. It is also the most important river of India and has served as the cradle of Indian Civilization. Several major pilgrim centres have existed on its banks for centuries and millions of people come to bathe in the river during religious festivals,

especially the Kumbhas of Haridwar and Allahabad. Many towns on the Ganga, e.g. Kanpur, Allahabad, Patna and Calcutta have very large populations and the river also serves as the source of water supply for these towns. The Ganga is, however, being grossly polluted especially near the towns situated on its banks. Urgent steps need to be taken to prevent the pollution and restore the purity of river water.

2.0 Sources of Pollution

2.1 The main sources of pollution of the Ganga are the following:-

Urban liquid waste (Sewage, storm drainage mixed with sewage, human, cattle and kitchen wastes carried by drains etc.)

Industrial liquid waste

Surface run-off of cultivated land where cultivators use chemical fertilisers, pesticides, insecticides and such manures the mixing of which may make the river water unsafe for drinking and bathing.

Surface run-off from areas on which urban solid wastes are dumped.

Surface run-off from areas on which industrial solid wastes are dumped.

4.4.12 Effluent from industries:

Under the laws of the land the responsibility for treatment of the industrial effluents is that of the industry. While the concept of 'Strict Liability' should be adhered to in some cases, circumstances may require that plans for sewerage and treatment systems should consider industrial effluents as well. Clusters of small industries located in a contiguous area near the river bank and causing direct pollution to the river such as the tanneries in Jajmau in Kanpur is a case in point. In some cases, waste waters from some industrial units may have already been connected to the city sewer and, therefore, merit treatment along with the sewage in the sewage treatment plant. It may also be necessary in some crowded areas to accept waste waters of industries in a city sewer to be fed to the treatment plant, provided the industrial waste is free from heavy metals, toxic chemicals and is not abnormally acidic or alkaline.

In such circumstances, scheme proposals have to carefully examine the case of integrating or segregating industrial wastes for purposes of conveyance and treatment as also the possibilities for appointment of capital and operating costs between the city authorities and the industries concerned." (Emphasis added)

12. Appearing on behalf of the Department of Environment, Government of India, Shri B. Dutta the learned First Additional Solicitor General of India placed before us a memorandum explaining the existing situation at Jajmau area of Kanpur. It read thus:

"Status regarding construction of treatment facilities for treatment of wastes from Tanneries in Jajmau area of Kanpur:

1. About 70 small, medium and large tanneries are located in Jajmau area of Kanpur. On an average they generate 4.5 MLD of waste water.

2. Under the existing laws; tanneries like other industries are expected to provide treatment of their effluents to different standards depending on whether these are discharged into stream or land. It is the responsibility of the industry concerned to ensure that the quality of the waste water conforms to the standards laid down.

3. From time to time, tanneries of Kanpur have represented that due to lack of physical facilities, technical knowhow and funds, it has not been possible to install adequate treatment facilities.

4. Jajmau is an environmentally degraded area of Kanpur. The location of numerous tanneries in the area is a major cause of the degradation. Civic facilities for water supply, sanitation, solid waste removal etc. are also highly inadequate. Because the area abuts the Ganga river, its pollution affects the river quality as well. Accordingly, under the Ganga Action Plan an integrated sanitation project is being taken up for the Jajmau area. Some aspects of the Plan relate to tannery wastes as follows:

(i) The medium and large units will have to up up pretreatment facilities to ensure that the standard of sewage discharged into the municipal sewer also conform to the standards laid down. Scientific institutions such as Central Leather Research Institute are looking into the possibilities of pretreatment including recovery of materials such as chromium. The setting up of pre-treatment facility in the respective units will be the responsibility of the individual units concerned. The Ganga Project Directorate as part of the Ganga Action Plan, will play a facilitative role to demonstrate application of modern technologies for cost effective pre-treatment which the small tanners can afford.

(ii) Since the wastes will be ultimately discharged into the river, the waste will have to further conform to the standards laid down for discharge into the stream. For this purpose, it will be necessary to treat the waste further and as part of the Ganga Action Plan a treatment plant will be constructed for this purpose utilising some advanced processes. It is also proposed to combine the domestic waste with the industrial waste conveyed through the industrial sewer which will then be treated in a treatment plant.

(iii) It is estimated that cost of this proposed sewage treatment facility which will treat the waste from the domestic sources and the pretreated wastes from tanneries will be about Rs.2.5 crores. It will have a capacity of 25 MLD and the first demonstration module of about 5 MLD is expected to be installed in early 1988-89. Necessary work for designing of the plant has already been initiated and the infrastructure facilities such as availability of land, soil testing etc. have also been ensured. Tender specifications are being provided and it is expected that the tenders will be floated sometime in October 87. It is expected that in the combined treatment facility of 25 MLD, about 20 MLD will be from the domestic sources and 5 MLD will be from the tanneries after pretreatment in the region.”

13. In the counter-affidavit filed on behalf of the Hindustan Chambers of Commerce, of which 43 respondents are members it is admitted that the tanneries discharge their trade effluents into the sewage nullah which leads to the municipal sewage plant before they are thrown into the river Ganga. It is not disputed by any of the respondents that the water in the river Ganga is being polluted grossly by the effluent discharged by the tanneries. We are informed that six of the tanneries have already set up the primary treatment plants for carrying out the pretreatment of the effluent before it is discharged into the municipal sewerage which ultimately leads to the river Ganga. About 14 of the tanneries are stated to be engaged in the construction of the primary treatment plants. It is pleaded on behalf of the rest of the Tanneries who are the members of the Hindustan Chambers of Commerce and three other tanneries represented by Shri Mukul Mudgal that if some time is given to them to establish the pre-treatment plants they would do so. It is, however, submitted by all of them that it would not be possible for them to have the secondary system for treating waste water as that would involve enormous expenditure which the tanneries themselves would not be able to meet. It is true that it may not be possible for the tanneries to establish immediately the secondary system plant in view of the large expenditure involved but having regard to the adverse effect the effluents are having on the river water, the tanneries at Jajmau, Kanpur should, at least set up of the primary treatment plants and that is the minimum which the tanneries should do in the circumstances of the case. In the counter-affidavit filed on behalf of the Hindustan Chamber of Commerce it is seen that the cost of pretreatment plant for 'A' class tannery is Rs. 3,68,000/-, the cost of the plant for a 'B' class tannery is Rs. 2,30,000/- and the cost of the plant for 'C' class tannery is Rs. 50,000/-. This cost does not appear to be excessive. The financial capacity of the tanneries should be considered as irrelevant while requiring them to establish primary treatment plants. Just like an industry which cannot pay minimum wages to its workers cannot be allowed to exist a tannery which cannot set up a primary treatment plant cannot be permitted to continue to be in existence for the adverse effect on the public at large which is likely to ensue by the discharging of the trade effluents from the tannery to the river Ganga would be immense and it will outweigh any inconvenience that may be caused to the management and the labour employed by it on account of its closure. Moreover, the tanneries involved in these cases are not taken by surprise. For several years they are being asked to take necessary steps to prevent the flow of untreated waste water from their factories into the river. Some of them have already complied with the demand. It should be remembered that the effluent discharged from a tannery is ten times noxious when compared with the domestic sewage water which flows into the river from any urban area on its banks. We feel that the tanneries at Jajmau, Kanpur cannot be allowed to continue to carry on the industrial activity unless they take steps to establish primary treatment plants. In cases of this nature this Court act affecting or likely to affect the public is being committed and the statutory authorities who are charged with the duty to prevent it are not taking adequate steps to rectify the grievance. For every breach of a right there should be a remedy. It is unfortunate that a number of tanneries at Jajmau even though they are aware of these proceedings have not cared even to enter appearance in this Court to express their willingness to take appropriate steps to establish the pretreatment plants. So far as they are concerned an order directing them to stop working their tanneries should be passed. Those tanneries who have already put up the primary treatment plants may continue to

carry on production in their factories subject to the condition that they should continue to keep the primary treatment plants established by them in sound working order.

15. Shri S.K. Dholakia, learned counsel for the other tanneries who are members of the Hindustan Chambers of Commerce and the other tanneries who have entered appearance through Shri Mukul Mudgal submits that they will establish primary treatment plants within six months and he further submits that in the event of their not completing the construction of the primary treatment plants as approved by the State Board (respondent 8) and bringing them into operation within the period of six months the said tanneries will stop carrying on their business. We record the statement made by the learned counsel and grant them time till 31-3-1988 to set up the primary treatment plants. If any of these tanneries does not set up a primary treatment plant within 31.3.1988 it is directed to stop its business with effect from 1.4.1988.

16. We issue a direction to the Central Government, the Uttar Pradesh Board, established under the provisions of the Water (Prevention and Control of Pollution) Act, 1974 and the District Magistrate, Kanpur to enforce our order faithfully. Copies of this order shall be sent to them for information.

17. The case is adjourned to 27th October, 1987 to consider the case against the municipal bodies in the State of Uttar Pradesh having jurisdiction over the areas through which the river Ganga is passing.

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M.C. Mehta v. Union of India, AIR 1988 SC 1115

E.S. VENKATARAMIAH, J. – By our judgment dated September 22, 1987 in *M.C. Mehta v. Union of India* [AIR 1988 SC 1037] we issued certain directions with regard to the industries in which the business of tanning was being carried on at Jajmau near Kanpur on the banks of the river Ganga. On that occasion we directed that the case in respect of the municipal bodies and the industries which were responsible for the pollution of the water in the river Ganga would be taken up for consideration on the next date of hearing. Accordingly, we took up for consideration first the case against the municipal bodies. Since it was found that Kanpur was one of the biggest cities on the banks of the river Ganga, we took up for consideration the case in respect of the Kanpur Nagar Mahapalika.

We have in the judgment delivered by us on September 22, 1987 [reported in AIR 1988 SC 1037], briefly referred to the Water (Prevention and Control of Pollution) Act, 1974 (the Water Act') in which provisions have been made for the establishment of the Boards for the prevention and control of water pollution for conferring on and assigning to such Boards powers and functions relating thereto and for matters connected therewith.

Sections 3 and 4 of the Water Act provide for the constitution of the Central Board and State Boards respectively. A State Board has been constituted under section 4 of the Water Act in the State of Uttar Pradesh. Section 16 of the Water Act sets out the functions of the Central Board and section 17 of the Water Act lays down the functions of the State Board. The functions of the Central Board are primarily advisory and supervisory in character. The Central Board is also required to advise the Central Government on any matter concerning the prevention and control of water pollution and to co-ordinate the activities of the State Boards. The Central Board is also required to provide technical assistance and guidance to the State Boards, carry out and sponsor investigations and research relating to problems of water pollution and prevention, control or abatement of water pollution. The functions of the State Board are more comprehensive. In addition to advising the State Government on any matter concerning the prevention, control or abatement of water pollution, the State Board is required among other things (i) to plan a comprehensive programme for the prevention, control or abatement of pollution of streams and wells in the State and to secure the execution thereof, (ii) to collect and disseminate information relating to water pollution and prevention, control or abatement thereof; (iii) to encourage, conduct and participate in investigations and research relating to problems of water pollution and prevention, control or abatement of water pollution; (iv) to inspect sewage or trade effluents, works and plants for the treatment of sewage and trade effluents; (v) to review plans, specifications or other data relating to plants set up for the treatment of water, works for the purification thereof and the system for the disposal of sewage or trade effluents or in connection with the grant of any consent as required by the Water Act; (vi) to evolve economical and reliable methods of treatment of sewage and trade effluents, having regard to the peculiar conditions of soil, climate and water resources of different regions and more especially the prevailing flow characteristics of water

in streams and wells which render it impossible to attain even the minimum degree of dilution, and (vii) to lay down standards of treatment of sewage and trade effluents to be discharged into any particular stream taking into account the minimum fair weather dilution available in that stream and the tolerance limits of pollution permissible in the water of the stream, after the discharge of such effluents. The State Board has been given certain executive powers to implement the provisions of the Water Act. Sections 20, 21 and 23 of the Water Act confer power on the State Board to obtain information necessary for the implementation of the provisions of the Water Act, to take samples of effluents and to analyse them and to follow the procedure prescribed in connection therewith and the power of entry and inspection for the purpose of enforcing the provisions of the Water Act. Section 24 of the Water Act prohibits the use of stream or well for disposal of polluting matters etc. contrary to the provisions incorporated in that section. Section 32 of the Water Act confers the power on the State Board to take certain emergency measures in case of pollution of stream or well. Where it is apprehended by a Board that the water in any stream or well is likely to be polluted by reason of the disposal of any matter therein, or of any likely disposal of any matter therein, or otherwise, the Board may under Section 33 of the Water Act make an application to a court not inferior to that of a Presidency Magistrate or a Magistrate of the first class, for restraining the person who is likely to cause such pollution from so causing.

The Environment (Protection) Act, 1986, which has also been referred to in our earlier judgment, also contains certain provisions relating to the control, prevention and abatement of pollution of water and one significant provision in that Act is what is contained in Section 17 thereof, which provides that where an offence under that Act is committed by any Department of Government, the Head of that Department shall be deemed to be guilty of the offence and is liable to be punished.

7. It is unfortunate that although Parliament and the State Legislature have enacted the aforesaid laws imposing duties on the Central and State Boards and the municipalities for prevention and control of pollution of water, many of those provisions have just remained on paper without any adequate action being taken pursuant thereto. After the above petition was filed and notice was sent to the Uttar Pradesh State Board constituted under the Water Act, an affidavit has been filed before this Court by Dr. G.N. Misra, Scientific Officer of the U.P. Pollution Control Board setting out the information which the Board was able to collect regarding the measures taken by the several local bodies and also by the U.P. Pollution Control Board in order to prevent the pollution of the water flowing in the river Ganga. A copy of the report relating to the inspection made at Kanpur on 23-11-87/24-11-87 by Shri Tanzar Ullah Khan, Assistant Environmental Engineer and Shri A.K. Tiwari, Junior Engineer enclosed to the counter-affidavit as Exhibit K-5.

It is thus seen that 274.50 million litres a day of sewage water is being discharged into the river Ganga from the city of Kanpur, which is the highest in the State of Uttar Pradesh and next only to the city of Calcutta which discharges 580.17 million litres a day of sewage water into the river Ganga. Para 4 of the affidavit filed by Shri Jai Shanker Tewari, Executive Engineer of Kanpur Nagar Mahapalika reads thus:

4. That the pollution in river Ganga from Kanpur is occurring because of following reasons:

(i) About 16 nalas collecting sullage water, sewage, textile waste, power plant waste and tannery effluents used to be discharged without any treatment into the river. However, some Nalas have been trapped now.

(ii) The dairies located in the city have a cattle population of about 80,000. The dung, fodder waste and other refuse from this cattle population is quantitatively more than the sullage from the city of human population of over 20 lakhs. All this finds its way into the sewerage system and the nalas in the rainy season. It has also totally choked many branches of sewers and trunk sewers resulting in the overflow of the system.

(iii) The night soil is collected from the unsewered areas of the city and thrown into the nalas.

(iv) There are more than 80 tanneries in Jajmau whose effluent used to be directly discharged into the river.

(v) The total water supply in Kanpur is about 55 million gallons per day. After use major part of it goes down the drains, nalas and sewers, sewage is taken to Jajmau sewage pumping station and a part of it is being supplied to sewage farms after diluting it with raw Ganges water and the remaining part is discharged into the river.

(vi) Dhobi Ghats.

(vii) Defecation by economically weaker sections.

10. The affidavit further states that the U.P. Jal Nigam, the U.P. Water Pollution Control Board, the National Environmental Engineering Research Institute, the Central Leather Research Institute, the Kanpur Nagar Mahapalika, the Kanpur Development Authority and the Kanpur Jal Sansthan have started taking action to minimise the pollution of the river Ganga. It is also stated therein that the financial assistance is being provided by the Central Ganga Authority through Ganga Project Directorate, State Government, the World Bank, the Dutch Government etc. for implementing the said measures. The said affidavit gives information about the several works undertaken at Kanpur for minimising the pollution of the river Ganga. It also states that Rs. 493.63 lacs had been spent on those works between the years 1985 and 1987 and that the total allocation of funds by the Central Ganga Authority for Kanpur is Rs. 3694.94 lacs and that up to the end of the current financial year it is proposed to spend Rs. 785.58 lacs (1985 to 1987-88) towards various schemes to be completed under Ganga Action Plan. The affidavit points out that in Kanpur City sewer cleaning has never been done systematically and in a planned way except that some sewers were cleaned by the U.P. Jal Nigam around 1970. The main reasons for mal-functioning and choking of the city sewerage, according to the affidavit, are (i) throwing or discharging of solids, clothes, plastics, metals etc. into the sewerage system; (ii) throwing of cow dung from dairies which are located in every part of the city which consists of about 80,000 cattle; (iii) laying of under-sized sewers specially in labour colonies; (iv) throwing of solid wastes and malba from construction of buildings into sewers through manholes; (v) non-availability of mechanical equipment for sewer cleaning works; and (vi) shortage of funds for proper maintenance. It is asserted that the discharge of untreated effluents into the river Ganga will be stopped up to 80% by March, 1988.

NATURE OF THE PROBLEM

The introduction of modern water carriage systems transferred the sewage disposal from the streets and the surroundings of townships to neighbouring streams and rivers. This was the beginning of the problem of water pollution. It is ironic that man, from the earliest times, has tended to dispose of his wastes in the very streams and rivers from which most of his drinking water is drawn. Until quite recently this was not much of a problem, but with rapid urbanisation and industrialization, the problem of the pollution of natural waters is reaching alarming proportions.

The most disturbing feature of this mode of disposal is that those who cause water pollution are seldom the people who suffer from it. Cities and industries discharge their untreated or only partially treated sewage and industrial waste waters into neighbouring streams and thereby remove waste matter from their own neighbourhood. But in doing so, they create intense pollution in streams and rivers and expose the downstream riparian population to dangerously unhygienic conditions. In addition to the withdrawal of water for downstream towns and cities, in many developing countries, numerous villages and riparian agricultural population generally rely on streams and rivers for drinking water for themselves and their cattle, for cooking, bathing, washing and numerous other uses. It is thus riparian population that specially needs protection from the growing menace of water pollution (pages 1 and 2).

BENEFITS OF CONTROL

The benefits which result from the prevention of water pollution include a general improvement in the standard of health of the population, the possibility of restoring stream waters to their original beneficial state and rendering them fit as sources of water supply, and the maintenance of clean and healthy surroundings which would then offer attractive recreational facilities. Such measures would also restore fish and other aquatic life.

Apart from its menace to health, polluted water considerably reduces the water resources of a nation. Since the total amount of a country's utilisable water remains essentially the same and the demand for water is always increasing, schemes for the prevention of water pollution should, wherever possible, make the best use of treated waste waters either in industry or agriculture. Very often such processes may also result in other benefits in addition to mere reuse. The application of effluents on agricultural land supplies not only much needed water to growing crops but also manurial ingredients; the recovery of commercially valuable ingredients during the treatment of industrial waste waters often yields by products which may to some extent offset the cost of treatment.

If appropriate financial credits could be calculated in respect of these and other incidental benefits, it would be apparent that measures for the prevention of pollution are not unduly costly and are within the reach of all nations, advanced or developing. It is fortunate that people are becoming more receptive to the idea of sharing the financial burden for lessening pollution. It is now recognised in most countries that it is the responsibility of industries to treat their trade wastes in such a way that they do not deteriorate the quality of the receiving waters, which otherwise would make the utilisation of such polluted waters very difficult or costly for downstream settlers.

URGENCY OF THE PROBLEM

The crucial question is not whether developing countries can afford such measures for the control of water pollution but it is whether they can afford to neglect them. The importance of the latter is emphasised by the fact that in the absence of adequate measures for the prevention or control of water pollution, a nation would eventually be confronted with far more onerous burdens to secure wholesome and adequate supplies of water for different purposes. If developing countries embark on suitable pollution prevention policies during the initial stages of their industrialisation, they can avoid the costly mistakes committed in the past by many developed countries. It is, however, unfortunate that the importance of controlling pollution is generally not realised until considerable damage has already been done.”

16. In common law the Municipal Corporation can be restrained by an injunction in an action brought by a riparian owner who has suffered on account of the pollution of water in a river caused by the Corporation by discharging into the river insufficiently treated sewage from discharging such sewage into the river. In *Pride of Derby and Derbyshire Angling Association v. British Celanese Ltd.* [(1953) Ch 149], the second defendant, the Derby Corporation admitted that it had polluted the plaintiff's fishery in the River Derwent by discharging into it insufficiently treated sewage, but claimed that by the Derby Corporation Act, 1901, it was under a duty to provide a sewerage system and that the system which had accordingly been provided had become inadequate solely from the increase in the population of Derby. The Court of Appeal held that it was not inevitable that the work constructed under the Act of 1901 should cause a nuisance, and that in any case the Act on its true construction did not authorise the commission of a nuisance. The petitioner in the case before us is no doubt a riparian owner. He is a person interested in protecting the lives of the people who make use of the water flowing in the river Ganga and his right to maintain the petition cannot be disputed. The nuisance caused by the pollution of the river Ganga is a public nuisance, which is wide spread in range and indiscriminate in its effect and it would not be reasonable to expect any particular person to take proceedings to stop it as distinct from the community at large. The petition has been entertained as a Public Interest Litigation. On the facts and in the circumstances of the case we are of the view that the petitioner is entitled to move this Court in order to enforce the statutory provisions which impose duties on the municipal authorities and the Boards constituted under the Water Act. We have already set out the relevant provisions of the statute which impose those duties on the authorities concerned. On account of their failure to obey the statutory duties for several years the water in the river Ganga at Kanpur has become so much polluted that it can no longer be used by the people either for drinking or for bathing. The Nagar Mahapalika of Kanpur has to bear the major responsibility for the pollution of the river near Kanpur City.

17. It is no doubt true that the construction of certain works has been undertaken under the Ganga Action Plan at Kanpur in order to improve the sewerage system and to prevent pollution of the water in the river Ganga. But as we see from the affidavit filed on behalf of the authorities concerned in this case the works are going on at a snail's pace. We find from the affidavits filed on behalf of the Kanpur Nagar Mahapalika that certain target dates have been fixed for the completion of the works already undertaken. We expect the authorities concerned to complete those works within the target dates mentioned in the counter-affidavit

and not to delay the completion of the works beyond those dates. It is, however, noticed that the Kanpur Nagar Mahapalika has not yet submitted its proposals for sewage treatment works to the State Board constituted under the Water Act. The Kanpur Nagar Mahapalika should submit its proposals to the State Board within six months from today.

18. It is seen that there is a large number of dairies in Kanpur in which there are about 80,000 cattle. The Kanpur Nagar Mahapalika should take action under the provisions of the Adhiniyam or the relevant bye-laws made thereunder to prevent the pollution of the water in the river Ganga on account of the waste accumulated at the dairies. The Kanpur Nagar Mahapalika may either direct the dairies to be shifted to a place outside the city so that the waste accumulated at the dairies does not ultimately reach the river Ganga or in the alternative it may arrange for the removal of such waste by employing motor vehicles to transport such waste from the existing dairies in which event the owners of the dairies cannot claim any compensation. The Kanpur Nagar Mahapalika should immediately take action to prevent the collection of manure at private manure pits inside the city.

19. The Kanpur Nagar Mahapalika should take immediate steps to increase the size of the sewers in the labour colonies so that the sewage may be carried smoothly through the sewerage system. Wherever sewerage line is not yet constructed steps should be taken to lay it.

20. Immediate action should also be taken by the Kanpur Nagar Mahapalika to construct sufficient number of public latrines and urinals for the use of the poor people in order to prevent defecation by them on open land. The proposal to levy any charge for making use of such latrine and urinals shall be dropped as that would be a reason for the poor people not using the public latrines and urinals. The cost of maintenance of cleanliness of those latrines and urinals has to be borne by the Kanpur Nagar Mahapalika.

21. It is submitted before us that whenever the Board constituted under the Water Act initiates any proceedings to prosecute industrialists or other persons who pollute the water in the river Ganga, the persons accused of the offences immediately institute petitions under section 482 of the Code of Criminal Procedure, 1973 in the High Court and obtain stay orders thus frustrating the attempt of the Board to enforce the provisions of the Water Act. They have not placed before us the facts of any particular case. We are, however, of the view that since the problem of pollution of the water in the river Ganga has become very acute the High Courts should not ordinarily grant orders of stay of criminal proceedings in such cases and even if such an order of stay is made in any extraordinary case the High Courts should dispose of the case within a short period, say about two months, from the date of the institution of such case. We request the High Courts to take up for hearing all the cases where such orders have been issued under sections 482 of the Code of Criminal Procedure, 1973 staying prosecutions under the Water Act within two months. The counsel for the Board constituted under the Water Act shall furnish a list of such cases to the Registrar of the concerned High Courts for appropriate action being taken thereon.

22. One other aspect to which our attention has been drawn is the practice of throwing corpses and semi-burnt corpses into the river Ganga. This practice should be immediately brought to an end. The cooperation of the people and police should be sought in enforcing this restriction. Steps shall be taken by the Kanpur Nagar Mahapalika and the Police authorities to ensure that dead bodies or half burnt bodies are not thrown into the river Ganga.

23. Whenever applications for licences to establish new industries are made in future, such applications shall be refused unless adequate provision has been made for the treatment of trade effluents flowing out of the factories. Immediate action should be taken against the existing industries if they are found responsible for pollution of water.

24. Having regard to the grave consequences of the pollution of water and air and the need for protecting and improving the natural environment which is considered to be one of the fundamental duties under the Constitution [vide Clause (g) of Article 51A of the Constitution] we are of the view that it is the duty of the Central Government to direct all the educational institutions throughout India to teach at least for one hour in a week lessons relating to the protection and the improvement of the natural environment including forests, lakes, rivers and wild life in the first ten classes. The Central Government shall get text books written for the said purpose and distribute them to the educational institutions free of cost. Children should be taught about the need for maintaining cleanliness commencing with the cleanliness of the house both inside and outside, and of the streets in which they live. Clean surroundings lead to healthy body and healthy mind. Training of teachers who teach this subject by the introduction of short term courses for such training shall also be considered. This should be done throughout India.

25. In order to rouse amongst the people the consciousness of cleanliness of environment the Government of India and the Governments of States and of the Union Territories may consider the desirability of organising "Keep the city clean" week (Nagar Nirmalakarana Saptaha), 'keep the town clean' week (Pura Nirmalakarana Saptaha) and 'Keep the village clean' week (Grama Nirmalakarana Saptaha) in every city, town and village throughout India at least once a year. During that week the entire city, town or village should be kept as far as possible clear, tidy and free from pollution of land, water and air. The organisation of the week should be entrusted to the Nagar Mahapalikas, Municipal Corporations, Town Municipalities, Village Panchayats or such other local authorities having jurisdiction over the area in question. If the authorities decide to organise such a week throughout India but may be staggered depending upon the convenience of the particular city, town or village. During that week all the citizens including the members of the executive, members of Parliament and the State Legislatures, members of the judiciary may be requested to cooperate with the local authorities and to take part in the celebrations by rendering free personal service. This would surely create a national awareness of the problems faced by the people by the appalling all-round deterioration of the environment which we are witnessing today. We request the Ministry of Environment of the Government of India to give a serious consideration to the above suggestion.

26. What we have stated above applies mutatis mutandis to all other Mahapalikas and Municipalities which have jurisdiction over the areas through which the river Ganga flows. Copies of this judgment shall be sent to all such Nagar Mahapalikas and Municipalities. The case against the Nagar Mahapalikas and Municipalities in the State of Uttar Pradesh shall stand adjourned by six months. Within that time all the Nagar Mahapalikas and Municipalities in the State of Uttar Pradesh through whose areas the river Ganga flows shall file affidavits in this Court explaining the various steps they have taken for the prevention of pollution of the water in the river Ganga in the light of the above judgment.

M/s Delhi Bottling Co. Pvt. Ltd. v. Central Board for the Prevention and Control of Water Pollution, AIR 1986 Del. 152

H.C. GOEL, J. – M/s. Delhi Bottling Co. Pvt. Ltd. (for short ‘the Company’), petitioner No. 1, has been carrying on the business of preparation of soft drinks under the trade names of Gold Spot, Limca, Thums Up, Rimzim and Soda Water etc. at their factory premises No. 60, Shivaji Marg, New Delhi. They are discharging trade effluents which ultimately fall in the stream i.e. river Yamuna. Shri S.K. Arya, petitioner No. 2 is the Plant Manager of the Company. The Company duly obtained consent order under the provisions of Ss. 25 and 26 of the Water (Prevention and Control of Pollution) Act, 1974 (for short ‘the Act’). A complaint under S. 33(1) of the Act was filed by the Central Board for the Prevention and Control of Water Pollution, respondents, against the petitioners. It was alleged that the Company has neither put up the treatment plant nor has started any preliminary step in that regard. It was further alleged that a sample of the trade effluents of the Company was lifted by the officials of the Board on May 16 1984 in the presence of Mr. D.L. Khosla, a representative of the Company and the sample on analysis has been found as not conforming to the parameters of the consent order of the Company. It was prayed that the Company be restrained from causing pollution by discharge of trade effluents till the company sets up the required treatment plant and conforms to the quality of trade effluents according to the parameters as provided in the consent order. Shri Naipal Singh, Metropolitan Magistrate, Delhi, after obtaining the reply of the petitioners to the complaint of the respondents and after hearing the parties, passed the impugned order dated August 8, 1984 accepting the application of the respondents and restraining the petitioners from causing pollution of the stream by discharging the trade effluents till the required treatment plant is set up and conforming the quality of trade effluents according to the standards prescribed by the Board in its consent order as renewed on November 26, 1981. Feeling aggrieved by this order of the learned Metropolitan Magistrate, the petitioners have filed this petition under S. 482, Cr.P.C.

2. Mr. R. Mohan, learned counsel for the respondents, submitted that for passing an order under S. 33 of the Act there is no need that the samples of the effluents must be lifted from the factory premises and got analysed as per the provisions of S. 21 of the Act. As such, it was not necessary for the officials of the Board to divide the sample lifted into two parts and to get the same analysed from the laboratory established by the Delhi Administration as per the provisions of S. 21(4) of the Act. The learned Magistrate has not dealt with this aspect of the matter in his impugned order. However, I think that it is necessary to go into this question for a proper decision of the case. Mr. Mohan submitted that as per S. 33 of the Act the Board has the power to lift a sample on a ground other than the one that the water in the stream is polluted by reason of disposal of any matter therein or of any likely disposal of any other matter therein. It is submitted that that being so and S. 21 being confined to the lifting of samples only when the stream is likely to be polluted by reason of disposal of any matter therein or of any likely disposal of any matter therein, provisions of S. 21 do not come into operation for lifting of a sample for the purposes of getting an order under S. 33 of the Act. I do not find any force in this submission. The Scheme of the Act shows that S. 21 is a

provision of general application governing the matter of lifting of samples in all cases including the cases for the purpose of obtaining an order under S. 33 of the Act. The heading of S. 21 is "Powers to take samples of effluents and procedure to be followed in connection therewith." S. 21(1) incorporates the powers of the State Board or of the officers of the State Board with regard to the lifting of samples of water from any stream or well or samples of any sewage or trade effluent which is passing from any plant or vessel or from or over any place into any such stream or well. Sub-s. (2) of S. 21 states that the result of any analysis of a sample of any sewage or trade effluent taken under sub-s. (1) shall not be admissible in evidence in any legal proceedings unless the provisions of sub-ss. (3), (4) and (5) are complied with. The proceedings under S. 33 of the Act are obviously legal proceedings under the Act. It is thus clear that the sample must be lifted in accordance with the provisions of S. 21 of the Act when only its analysis could be admissible in evidence in the proceedings under S. 33 of the Act. Further Ss. 32 and 33 are the only two provisions of the Act where under samples may be lifted by the Board. Whereas S. 32 provides for emergent cases, S. 33 is the normal provision empowering the Board to make applications to courts for restraining apprehended pollution of water in streams or wells. So to say that for taking action under S. 33 which is a normal provision in which the lifting of samples is involved that the provisions of S. 21 are not operative is wholly fallacious.

3. We have now to see as to how far the learned Magistrate was right in coming to the conclusion that though the provisions of S. 21 were applicable to the case, yet the sample was not required to be divided into two parts and got analysed as per the provisions of sub-s. (5) of S. 21 because in his view no appearance was put in on behalf of the Company before the officials of the Board at the time of the taking of the sample by them. I may say at the very outset that this conclusion of the learned Magistrate is wholly erroneous. The petitioners in para 2 of the preliminary objections and para 17 of their reply to the complaint clearly stated that the sample was not divided by the officials of the Board into two parts and no part thereof was given to the Company's representative in spite of his request in that behalf. The Respondent-Board filed a rejoinder to this reply of the petitioners. They, however, did not controvert these allegations of the petitioners therein. The Board in fact in their rejoinder did not reply to the allegations of the petitioners in their reply parawise and the Board nowhere controverted the said allegations of the petitioners. No affidavit was filed by either side before the learned Magistrate in support of their respective claims. In such a situation the aforesaid allegations of the petitioners had to be taken as not controverted and thus admitted. The learned Magistrate came to the conclusion that the copy of the notice for the inspection by the officials of the Board was duly served on Shri S.K. Arya, petitioner No. 2. He, however, took the view that no appearance was put in on behalf of the petitioners before the officials of the Board at the time when they lifted the sample. This observation of the learned Magistrate is wholly against the true facts. The petitioners filed a photo copy of form No. 12 which was available on the record of the learned Magistrate. At the foot of this document there is nothing "Received Form 12" and which purports to be signed by one D.L. Khosla on the same date, i.e. May 6, 1984, the date on which the samples were lifted. This receipt was given by Shri Khosla in token of the Board's having delivered a copy of Form 12 to him who was the agent of the petitioners present before the officials. The learned Magistrate did not deal with the matter on the basis of the aforesaid allegations which are in the nature of the

pleadings of the parties. The learned Magistrate observed that as no presence was put in on behalf of the Company, so the question of there being any request by the Company for dividing the samples into two parts did not arise. This conclusion of the learned Magistrate is not sustainable in view of my above finding that Shri Khosla was duly present at the time when the sample was lifted. Further in view of the said pleadings of the parties it has to be taken that a demand was also made by the said representative to the officials of the Board to divide the sample into two parts and to get the same analysed in accordance with S. 21(5) of the Act, but that request was not acceded to. I accordingly hold that the officials of the Board were not justified in getting the sample analysed from a laboratory only recognised by the Board instead of getting the same analysed from the laboratory of the Delhi Administration and without complying with the requirements of sub-s. (5) of S. 21 of the Act. That being so, the conclusion that the petitioners were discharging effluents in the stream which were likely to cause pollution is not sustainable. Consequently the impugned order is bad and is liable to be set aside.

4. The learned Magistrate also took note of the fact that the petitioners had not erected any treatment plant as per Cl. 5 of the consent order. Mr. Sarin, learned Counsel for the petitioners, submitted that there was no absolute obligation on the part of the petitioners to erect a separate treatment plant so long as they were not discharging the effluents contrary to the parameters as provided in the consent order. Be that as it may, the true interpretation of the impugned order is that a restraint order has been passed against the petitioners restraining them from discharging their effluents in the stream which do not conform to the quality as per the standards prescribed by the Board in its consent order and thereby causing pollution of the stream. We cannot read in between the order that a direction has been given to the petitioners to erect a treatment plant. Such a direction is also perhaps not envisaged by the provisions of S. 33(1) of the Act. S. 33(1) only provides for the passing of a restraint order by the court against the Company for ensuring the stoppage of apprehended pollution of water in the stream in which the trade effluents of the Company are discharged. I, therefore, need not go into the question as to whether the petitioners' non-erection of a treatment plant was such an act on which the impugned restraint order was justified. The restraint order is also not based on that footing. For the non-erection of the treatment plant the Board has the power to launch prosecution against the defaulting Company under the provisions of S. 41 of the Act.

5. In conclusion I accept the petition and set aside the impugned order of the learned Magistrate.

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Municipal Council, Ratlam v. Vardichand, (1980) 4 SCC 162

V.R. KRISHNA IYER, J. - 'It is procedural rules', as this appeal proves, 'which infuse life into substantive rights, which activate them to make them effective'. Here, before us, is what looks like a pedestrian quasi-criminal litigation under Section 133 CrPC, where the Ratlam Municipality - the appellant - challenges the sense and soundness of the High Court's affirmation of the trial Court's order directing the construction of drainage facilities and the like, which has spiralled up to this Court. The truth is that a few profound issues of processual jurisprudence of great strategic significance to our legal system face us and we must zero in on them as they involve problems of access to justice for the people beyond the blinkered rules of 'standing' of British-Indian vintage. If the centre of gravity of justice is to shift, as the Preamble to the Constitution mandates, from the traditional individualism of locus standi to the community orientation of public interest litigation, these issues must be considered. In that sense, the case before us between the Ratlam Municipality and the citizens of a ward, is a pathfinder in the field of people's involvement in the justicing process, sans which as Prof. Sikes points out, the system may 'crumble under the burden of its own insensitivity'. The key question we have to answer is whether by affirmative action a court can compel a statutory body to carry out its duty to the community by constructing sanitation facilities at great cost and on a time-bound basis. At issue is the coming of age of that branch of public law bearing on community actions and the court's power to force public bodies under public duties to implement specific plans in response to public grievances.

2. The circumstances of the case are typical and overflow the particular municipality and the solutions to the key questions emerging from the matrix of facts are capable of universal application, especially in the Third World humanscape of silent subjection of groups of people to squalor and of callous public bodies habituated to deleterious inaction. The Ratlam municipal town, like many Indian urban centres, is populous with human and subhuman species, is punctuated with affluence and indigence in contrasting coexistence, and keeps public sanitation a low priority item, what with cesspools and filth menacing public health. Ward No. 12, New Road, Ratlam town is an area where prosperity and poverty live as strange bedfellows. The rich have bungalows and toilets, the poor live on pavements and litter the streets with human excreta because they use roadsides as latrines in the absence of public facilities. And the city fathers being too busy with other issues to bother about the human condition, cesspools and stinks, dirtied the place beyond endurance which made the well-to-do citizens protest, but the crying demand for basic sanitation and public drains fell on deaf ears. Another contributory cause to the insufferable situation was the discharge from the Alcohol Plant of malodorous fluids into the public street. In this lawless locale, mosquitoes found a stagnant stream of stench so hospitable to breeding and flourishing, with no municipal agent disturbing their stinging music at human expense. The local denizens, driven by desperation, at long last, decided to use the law and call the bluff of the municipal body's bovine indifference to its basic obligations under Section 123 of the M.P. Municipalities Act, 1961 (the Act, for short). That provision casts a mandate:

123. Duties of Council. - (1) In addition to the duties imposed upon it by or under this Act or any other enactment for the time being in force, it shall be the duty

of a Council to undertake and make reasonable and adequate provision for the following matters within the limits of the municipality, namely -

(b) cleansing public streets, places and sewers, and all places, not being private property, which are open to the enjoyment of the public whether such places are vested in the Council or not; removing noxious vegetation, and abating all public nuisances;

(c) disposing of night-soil and rubbish and preparation of compost manure from night-soil and rubbish.

And yet the municipality was oblivious to this obligation towards human well-being and was directly guilty of breach of duty and public nuisance and active neglect. The sub-Divisional Magistrate, Ratlam, was moved to take action under Section 133 Cr PC to abate the nuisance by ordering the municipality to construct drain pipes with flow of water to wash the filth and stop the stench. The magistrate found the facts proved, made the direction sought and scared by the prospect of prosecution under Section 188 IPC, for violation of the order under Section 133 Cr PC, the municipality rushed from court to court till, at last, years after, it reached this Court as the last refuge of lost causes. Had the municipal council and its executive officers spent half of this litigative zeal on cleaning up the street and constructing the drains by rousing the people's *sramdan* resources and laying out the city's limited financial resources, the people's needs might have been largely met long ago. But litigation with other's funds is an intoxicant, while public service for common benefit is an inspiration; and, in a competition between the two, the former overpowers the latter. Not where a militant people's will takes over people's welfare institutions, energises the common human numbers, canalises their community consciousness, forbids the offending factories from polluting the environment, forces the affluent to contribute wealth and the indigent their work and thus transforms the area into a healthy locality vibrant with popular participation and vigilance, not neglected ghettos noisy with squabbles among the slimy slum-dwellers nor with electoral 'sound and fury signifying nothing'.

3. The Magistrate, whose activist application of Section 133 Cr PC, for the larger purpose of making the Ratlam municipal body do its duty and abate the nuisance by affirmative action, has our appreciation. He has summed up the concrete facts which may be usefully quoted in portions:

New Road, Ratlam, is a very important road and so many prosperous and educated persons are living on this road. On the southern side of this road some houses are situated and behind these houses and attached to the college boundary, the municipality has constructed a road and this new road touches the Government College and its boundary. Just in between the said area a dirty *nallah* is flowing which is just in the middle of the main road i.e. New Road. In this stream (*nallah*) many a time dirty and filthy water of Alcohol Plant having chemical and obnoxious smell, is also released for which the people of that locality and general public have to face most obnoxious smell. This *nallah* also produces filth which causes a bulk of mosquitoes breeding. On this very southern side of the said road a few days back municipality has also constructed a drain but it has not constructed it completely but left the construction in between and in some of the parts the drain has not at all been

constructed and because of this the dirty water of half constructed drain and septic tank is flowing on the open land of applicants, where due to insanitation and due to non-removing the obstructed earth the water is accumulated in the pits and it also creates dirt and bad smell and produces mosquitoes in large quantities. This water also goes to nearby houses and causes harm to them. For this very reason the applicants and the other people of that locality are unable to live and take rest in their respective houses. This is also injurious to health.

7. Now that we have a hang of the case we may discuss the merits, legal and factual. If the factual findings are good - and we do not re-evaluate them in the Supreme Court except in exceptional cases - one wonders whether our municipal bodies are functional irrelevances, banes rather than boons and 'lawless' by long neglect, not leaders of the people in local self-government. It may be a cynical obiter of pervasive veracity that municipal bodies minus the people and plus the bureaucrats are the bathetic vogue - no better than when the British were here!

8. We proceed on the footing, as we indicated even when leave to appeal was sought, that the malignant facts of municipal callousness to public health and sanitation, held proved by the magistrate, are true. What are the legal pleas to absolve the municipality from the court's directive under Section 133 Cr PC? That provision reads:

Section 133. (1) Whenever a District Magistrate or a Sub-Divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers -

(a) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public;

such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order -

(i) to remove such obstruction or nuisance; or

(ii) to prevent or stop the construction of such building, or to alter the disposal of such substance;

or if he objects so to do, to appear before himself or some other Executive Magistrate subordinate to him at a time and place to be fixed by the order, and show cause, in the manner hereinafter provided, why the order should not be made absolute.

9. So the guns of Section 133 go into action wherever there is public nuisance. The public power of the magistrate under the Code is a public duty to the members of the public who are victims of the nuisance, and so he *shall* exercise it when the jurisdictional facts are present as here. "All power is a trust - that we are accountable for its exercise - that, from the people,

and for the people, all springs, and all must exist.” Discretion becomes a duty when the beneficiary brings home the circumstances for its benign exercise.

10. If the order is defied or ignored Section 188 IPC comes into penal play:

Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to obtain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

11. There is no difficulty in locating who has the obligation to abate the public nuisance caused by absence of primary sanitary facilities. Section 123, which is mandatory.

12. The statutory setting being thus plain, the municipality cannot extricate itself from its responsibility. Its plea is not that the facts are wrong but that the law is not right because the municipal funds being insufficient it cannot carry out the duties under Section 123 of the Act. This *alibi* made us issue notice to the State which is now represented by counsel, Shri Gambhir, before us. The plea of the municipality that notwithstanding the public nuisance financial inability validly exonerates it from statutory liability has no juridical basis. The criminal procedure code operates against statutory bodies and others regardless of the cash in their coffers, even as human rights under Part III of the Constitution have to be respected by the State regardless of budgetary provision. Likewise, Section 123 of the Act has no saving clause when the municipal council is penniless. Otherwise, a profligate statutory body or pachydermic governmental agency may legally defy duties under the law by urging in self-defence a self-created bankruptcy or perverted expenditure budget. That cannot be.

13. Section 133 Cr PC is categorical, although reads discretionary. Judicial discretion when facts for its exercise are present, has a mandatory import. Therefore, when the sub-Divisional Magistrate, Ratlam, has, before him, information and evidence, which disclose the existence of a public nuisance and, on the materials placed, he considers that such unlawful obstruction or nuisance should be removed from any public place which may be lawfully used by the public, he shall act. Thus, his judicial power shall, passing through the procedural barrel, fire upon the obstruction or nuisance, triggered by the jurisdictional facts. The magistrate’s responsibility under Section 133 Cr PC is to order removal of such nuisance *within a time to be fixed in the order*. This is a public duty implicit in the public power to be exercised on behalf of the public and pursuant to a public proceeding. Failure to comply with the direction will be visited with a punishment contemplated by Section 188 IPC. Therefore, the Municipal Commissioner or other executive authority bound by the order under Section 133 Cr PC shall obey the direction because disobedience, if it causes obstruction or annoyance or injury to any persons lawfully, pursuing their employment, shall be punished with simple imprisonment or fine as prescribed in the section. The offence is aggravated if the disobedience tends to cause danger to human health or safety. The imperative tone of Section 133 Cr PC read with the punitive temper of Section 188 IPC make the prohibitory act a mandatory duty.

14. Although these two Codes are of ancient vintage, the new social justice orientation imparted to them by the Constitution of India makes it a remedial weapon of versatile use. Social justice is due to the people and, therefore, the people must be able to trigger off the jurisdiction vested for their benefit in any public functionary like a magistrate under Section 133 Cr PC. In the exercise of such power, the judiciary must be informed by the broader principle of access to justice necessitated by the conditions of developing countries and obligated by Article 38 of the Constitution. This brings Indian public law, in its processual branch, in line with the statement of Prof. Kojima: "The urgent need is to focus on the ordinary man - ne might say the little man..." *Access to justice* by Cappelletti and B. Garth summarises the new change thus:

The recognition of this urgent need reflects a fundamental change in the concept of "procedural justice"... The new attitude to procedural justice reflects what Professor Adolf Homburger has called "a radical change in the hierarchy of values served by civil procedure", the paramount concern is increasingly with "social justice", i.e., with finding procedures which are conducive to the pursuit and protection of the rights of ordinary people. While the implications of this change are dramatic - or instance, insofar as the role of the adjudicator is concerned - it is worth emphasizing at the outset that the core values of the more traditional procedural justice must be retained. "Access to justice" must encompass both forms of procedural justice.

15. Public nuisance, because of pollutants being discharged by big factories to the detriment of the poorer sections, is a challenge to the social justice component of the rule of law. Likewise, the grievous failure of local authorities to provide the basic amenity of public conveniences drives the miserable slum-dwellers to ease in the streets, on the sly for a time, and openly thereafter, because under Nature's pressure bashfulness becomes a luxury and dignity a difficult art. A responsible municipal council constituted for the precise purpose of preserving public health and providing better finances cannot run away from its principal duty by pleading financial inability. Decency and dignity are non-negotiable facets of human rights and are a first charge on local self-governing bodies. Similarly, providing drainage systems - not pompous and attractive, but in working condition and sufficient to meet the needs of the people - cannot be evaded if the municipality is to justify its existence. A bare study of the statutory provisions make this position clear.

16. In this view, the magistrate's approach appears to be impeccable although in places he seems to have been influenced by the fact that "cultured and educated people" live in this area and "New Road, Ratlam is a very important road and so many prosperous and educated persons are living on this road". In India 'one man, one value' is the democracy of remedies and rich or poor the law will call to order where people's rights are violated. What should also have been emphasised was the neglect of the Malaria Department of the State of Madhya Pradesh to eliminate mosquitoes, especially with open drains, heaps of dirt, public excretion by humans for want of lavatories and slums nearby, had created an intolerable situation for habitation. An order to abate the nuisance by taking affirmative action on a time-bound basis is justified in the circumstances. The nature of the judicial process is not purely adjudicatory nor is it functionally that of an umpire only. Affirmative action to make the remedy effective is of the essence of the right which otherwise becomes sterile. Therefore, the court, armed

with the provisions of the two Codes and justified by the obligation under Section 123 of the Act, must adventure into positive directions as it has done in the present case. Section 133 CrPC authorise the prescription of a time-limit for carrying out the order. The same provision spells out the power to give specific directives. We see no reason to disagree with the order of the magistrate.

17. The High Court has taken a correct view and followed the observations of this Court in *Govind Singh v. Shanti Sarup* where it has been observed:

We are of the opinion that in a matter of this nature where what is involved is not merely the right of a private individual but the health, safety and convenience of the public at large, the safer course would be to accept the view of the learned Magistrate, who saw for himself the hazard resulting from the working of the bakery.

18. We agree with the High Court in rejecting the plea that the time specified in the order is unworkable. The learned Judges have rightly said:

It is unfortunate that such contentions are raised in 1979 when these proceedings have been pending since 1972. If in seven years' time the Municipal Council intended to remedy such a small matter, there would have been no difficulty at all. Apart from it, so far as the directions are concerned, the learned Magistrate, it appears, was reasonable. So far as direction No. 1 is concerned, the learned Magistrate only expected the Municipal Council and the Town Improvement Trust to evolve a plan and to start planning about it within six months; the learned Magistrate has rightly not fixed the time-limit within which that plan will be completed. Nothing more reasonable could be said about direction No.1.

20. Before us the major endeavour of the Municipal Council was to persuade us to be pragmatic and not to force impracticable orders on it since it had no wherewithal to execute the order. Of course, we agree that law is realistic and not idealistic and what cannot be performed under given circumstances cannot be prescribed as a norm to be carried out. From that angle it may well be that while upholding the order of the magistrate, we may be inclined to tailor the direction to make it workable. But first things first and we cannot consent to a value judgment where people's health is a low priority. Nevertheless, we are willing to revise the order into a workable formula the implementation of which would be watch-dogged by the court.

23. We make the further supplementary directions which we specifically enjoin upon the municipal authority and the State Government to carry out.

1. We direct the Ratlam Municipal Council to take immediate action, within its statutory powers, to stop the effluents from the Alcohol Plant flowing into the street. The State Government also shall take action to stop the pollution. The sub-Divisional Magistrate will also use his power under Section 133 CrPC, to abate the nuisance so caused. Industries cannot make profit at the expense of public health. Why has the magistrate not pursued this aspect?

2. The Municipal Council shall, within six months from today, construct a sufficient number of public latrines for use by men and women separately, provide water supply and scavenging service morning and evening so as to ensure sanitation.

The Health Officer of the Municipality will furnish a report, at the end of the six-monthly term, that the work has been completed. We need hardly say that the local people will be trained in using and keeping these toilets in clean condition. Conscious cooperation of the consumers is too important to be neglected by representative bodies.

3. The State Government will give special instructions to the Malaria Eradication Wing to stop mosquito breeding in Ward 12. The sub-Divisional Magistrate will issue directions to the officer concerned to file a report before him to the effect that the work has been done in reasonable time.

4. The municipality will not merely construct the drains but also fill up cesspools and other pits of filth and use its sanitary staff to keep the place free from accumulations of filth. After all, what it lays out on prophylactic sanitation is a gain on its hospital budget.

5. We have no hesitation in holding that if these directions are not complied with the sub-Divisional Magistrate will prosecute the officers responsible. Indeed, this Court will also consider action to punish for contempt in case of report by the sub-Divisional Magistrate of wilful breach by any officer.

24. We are sure that the State Government will make available by way of loans or grants sufficient financial aid to the Ratlam Municipality to enable it to fulfil its obligations under this Order. The State will realise that Article 47 makes it a paramount principle of governance that steps are taken 'for the improvement of public health *'as amongst its primary duties'* The Municipality also will slim its budget on low priority items and elitist projects to use the savings on sanitation and public health. It is not our intention that the ward which has woken up to its rights alone need be afforded these elementary facilities. We expect all the wards to be benefited without litigation. The pressure of the judicial process, expensive and dilatory, is neither necessary nor desirable if responsible bodies are responsive to duties. Cappelletti holds good for India when he observes:

Our judicial system has been aptly described as follows:

Admirable though it may be, (it) is at once slow and costly. It is a finished product of great beauty, but entails an immense sacrifice of time, money and talent.

This "beautiful" system is frequently a luxury, it tends to give a high quality of justice only when, for one reason or another, parties can surmount the substantial barriers which it erects to most people and to many types of claims.

Why drive common people to public interest action? Where directive principles have found statutory expression in Do's and Dont's the court will not sit idly by and allow municipal government to become a statutory mockery. The law will relentlessly be enforced and the plea of poor finance will be poor alibi when people in misery cry for justice. The dynamics of the judicial process has a new 'enforcement' dimension not merely through some of the provisions of the criminal procedure code (as here), but also through activated tort consciousness. The officers in charge and even the elected representatives will have to face the penalty of the law if what the Constitution and follow up legislation direct them to do are

defied or denied wrongfully. The wages of violation is punishment, corporate and personal. We dismiss this petition subject to the earlier mentioned modifications.

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State of M.P. v. Kedia Leather & Liquor Ltd., AIR 2003 SC 3236

ARIJIT PASAYAT, J. - View expressed by High Court of Madhya Pradesh, Jabalpur Bench at Indore holding that after introduction of Water (Prevention and Control of Pollution) Act, 1974 (the 'Water Act') and the Air (Prevention and Control of Pollution) Act, 1981 (the 'Air Act'), there was implied repeal of Section 133 of the Code of Criminal Procedure, 1973 (the 'Code'), is questioned in these appeals.

2. Factual background needs to be noted in brief as legal issues of pristine nature are involved. The Sub-Divisional Magistrate (hereinafter referred to as the 'SDM') of the area concerned served orders in terms of Section 133 of the Code directing the respondents who owned industrial units to close their industries on the allegation that serious pollution was created by discharge of effluent from their respective factories and thereby a public nuisance was caused. The preliminary issues and the proceedings initiated by the SDM were questioned by the respondents herein before the High Court under Section 397 of the Code.

3. The main plank of their arguments before the High Court was that by enactment of Water Act and the Air Act there was implied repeal of Section 133 of the Code. The plea was contested by the SDM on the ground that the provisions of Water Act and the Air Act operate in different fields, and, therefore, the question of Section 133 of the Code getting eclipsed did not arise.

5. The High Court referred to various provisions of the Water Act and Air Act and compared their scope of operation with Section 133 of the Code. The High Court was of the view that the provisions of the Water and the Air Acts are in essence elaboration and enlargement of the powers conferred under Section 133 of the Code. Water and Air pollution were held to be species of nuisance or of the conduct of trades or occupation injurious to the health or physical comfort of the community. As they deal with special types of nuisance, they ruled out operation of Section 133 of the Code. It was concluded that existence and working of the two parallel provisions would result not only in inconvenience but also absurd results. In the ultimate, it was held that the provisions of the Water and Air Acts impliedly repealed the provisions of Section 133 of the Code, so far as allegations of public nuisance by air and water pollution by industries or persons covered by the two Acts are concerned. As a consequence, it was held that the SDM had no jurisdiction to act under Section 133 of the Code. Learned counsel for the appellant-State submitted that the view expressed by the High Court is not legally tenable. The three statutes operate in different fields and even though there may be some amount of over-lapping, they can co-exist. A statutory provision cannot be held to have been repealed impliedly by the Court. Learned counsel for the respondents-units submitted that this Court had occasion to pass interim orders on 2.1.2001. Exception was taken to the manner of functioning of the Madhya Pradesh Pollution Control Board (the 'Board') and directions were given to take necessary action against the delinquent officials. Proceedings were initiated and on the basis of the reports filed by the functionaries of the reconstituted Board, functioning of the factories had been discontinued. The legality of the proceedings and the orders passed therein have been questioned and the Board has been moved for grant of necessary permission for making the factories functional. In this

background it is submitted that the issues raised have really become academic. Though, learned counsel for the appellant-State and the Board accepted the position to be factually true, it is submitted that considering the impact of the decision which would have far reaching consequences, the legal issues may be decided and appropriate directions should be given so far as the functioning or closure of the factories aspect is concerned.

8. Section 133 of the Code appears in Chapter X of the Code which deals with maintenance of public order and tranquility. It is a part of the heading 'public nuisance'. The term 'nuisance' as used in law is not a term capable of exact definition and it has been pointed out in Halsbury's Laws of England that "even at the present day there is not entire agreement as to whether certain acts or omissions shall be classed as nuisances or whether they do not rather fall under other divisions of the law of tort". In *Vasant Manga Nikumba v. Baburao Bhikanna Naidu (deceased) by Lrs.* [1995 Supp.(4) SCC 54] it was observed that nuisance is an inconvenience which materially interferes with the ordinary physical comfort of human existence. It is not capable of precise definition. To bring in application of Section 133 of the Code, there must be imminent danger to the property and consequential nuisance to the public. The nuisance is the concomitant act resulting in danger to the life or property due to likely collapse etc. The object and purpose behind Section 133 of the Code is essentially to prevent public nuisance and involves a sense of urgency in the sense that if the Magistrate fails to take recourse immediately irreparable damage would be done to the public. It applies to a condition of the nuisance at the time when the order is passed and it is not intended to apply to future likelihood or what may happen at some later point of time. It does not deal with all potential nuisance, and on the other hand applies when the nuisance is in existence. It has to be noted that some times there is a confusion between Section 133 and Section 144 of the Code. While the latter is more general provision the former is more specific. While the order under the former is conditional, the order under the latter is absolute. The proceedings are more in the nature of civil proceedings than criminal proceedings.

9. One significant factor to be noticed is that person against whom action is taken is not an accused within the meaning of Section 133 of the Code. He can give evidence on his own behalf and may be examined on oath. Proceedings are not the proceedings in respect of offences. The Water Act and the Air Act are characteristically special statutes.

10. The two statutes relate to prevention and control of pollution and also provides for penal consequences in case of breach of statutory provisions. Environmental, ecological air and water pollution amount to violation of right to life assured by Article 21 of the Constitution of India, 1950. Hygienic environment is an integral facet of healthy life. Right to live with human dignity becomes illusory in the absence of humane and healthy environment.

11. Chapter V of the Water Act deals with prevention and control of water pollution. Similarly, Chapter IV of the Air Act deals with prevention and control of air pollution. Sections 30, 32 and 33 of the Water Act deal with power of the State Board to carry out certain works, emergency measures in certain cases and power of Board to make application to the Courts for restraining apprehended pollution respectively. Under Sections 18, 20 and 22-A of the Air Act deal with power to give directions, power to give instructions for

ensuring standards and power of Board to make application to Court for restraining persons from causing air pollution respectively.

12. The provisions of Section 133 of the Code can be culled in aid to remove public nuisance caused by effluent of the discharge and air discharge causing hardship to the general public. To that extent, learned counsel for the appellant is correct in his submission.

13. There is presumption against a repeal by implication; and the reason of this rule is based on the theory that the Legislature while enacting a law has a complete knowledge of the existing laws on the same subject matter, and therefore, when it does not provide a repealing provision, the intention is clearly not to repeal the existing legislation. When the new Act contains a repealing section mentioning the Acts which it expressly repeals, the presumption against implied repeal of other laws is further strengthened on the principle *expressio unius (persone vel rei) est exclusio alterius*. (The express intention of one person or thing is the exclusion of another), as illuminatingly stated in *Garnett v. Bradley* [1878] 3 AC 944 (HL)] The continuance of existing legislation, in the absence of an express provision of repeal by implication lies on the party asserting the same. The presumption is, however, rebutted and a repeal is inferred by necessary implication when the provisions of the later Act are so inconsistent with or repugnant to the provisions of the earlier Act and that the two cannot stand together. But, if the two can be read together and some application can be made of the words in the earlier Act, a repeal will not be inferred.

14. The necessary questions to be asked are:

- (1) Whether there is direct conflict between the two provisions.
- (2) Whether the Legislature intended to lay down an exhaustive Code in respect of the subject-matter replacing the earlier law;
- (3) Whether the two laws occupy the same field.

15. The doctrine of implied repeal is based on the theory that the Legislature, which is presumed to know the existing law, did not intend to create any confusion by retaining conflicting provisions and, therefore, when the court applies the doctrine, it does nothing more than giving effect to the intention of the Legislature by examining the scope and the object of the two enactments and by a comparison of their provisions. The matter in each case is one of the construction and comparison of the two statutes. The Court leans against implying a repeal, “unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied, or that there is a necessary inconsistency in the two Acts standing together.” To determine whether a later statute repeals by implication an earlier, it is necessary to scrutinize the terms and consider the true meaning and effect of the earlier Act. Until this is done, it is impossible to ascertain whether any inconsistency exists between the two enactments. The area of operation in the Code and the pollution laws in question are different with wholly different aims and objects; and though they alleviate nuisance, that is not of identical nature. They operate in their respective fields and there is no impediment for their existence side by side.

16. While as noted above the provisions of Section 133 of the Code are in the nature of preventive measures, the provisions contained in the two Acts are not only curative but also preventive and penal. The provisions appear to be mutually exclusive and the question of one

replacing the other does not arise. Above being the position, the High Court was not justified in holding that there was any implied repeal of Section 133 of the Code. The appeals deserve to be allowed to the extent indicated above, which we direct. However, if applications are pending before the Board, it would be appropriate for the Board to take necessary steps for their disposal. The question whether there was no infraction under Section 133 of the Code or the two Acts is a matter which shall be dealt with by the appropriate forum, and we do not express any opinion in that regard.

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PREVENTION AND CONTROL OF AIR POLLUTION

Forum Prevention of Env'n. & Sound Pollution v. Union of India, AIR 2005 SC 3136

R.C. LAHOTI, CJI: These two matters before us raise certain issues of far-reaching implications in day-to-day life of the people in India relating to noise pollution vis-a-vis right to life enshrined in Article 21 of the Constitution as interpreted in its wide sweep by the Constitutional courts of the country. Though a limited grievance was raised to begin with but several intervenors and interlocutory applications enhanced the scope of hearing and the cases were heard in a very wide perspective centering around Article 21 of the Constitution. Several associated and incidental issues have also been gone into. Facts in W.P. No.72/98

2. *CWP No. 72/98* is filed by Shri Anil K. Mittal, an engineer by profession moving the Court pro bono publico. The immediate provocation for filing the petition was that a 13 year old girl was a victim of rape (as reported in newspapers of January 3, 1998). Her cries for help sunk and went unheard due to blaring noise of music over loudspeaker in the neighbourhood. The victim girl, later in the evening, set herself ablaze and died of 100% burn injuries. The petition complains of noise created by the use of the loudspeakers being used in religious performances or singing bhajans and the like in busy commercial localities on the days of weekly offs. Best quality hi-fi audio systems are used. Open space, meant for use by the schools in the locality, is let out for use in marriage functions and parties wherein merry making goes on with hi-fi amplifiers and loudspeakers without any regard to timings. Modern residents of the locality organize terrace parties for socializing and use high capacity stereo systems in abundance. These are a few instances of noise pollution generated much to the chagrin of students taking examinations who find it utterly difficult to concentrate on studies before and during examinations. The noise polluters have no regard for the inconvenience and discomfort of the people in the vicinity. Noise pollution has had its victims in the past and continues to have victims today as well. The petitioner seeks to invoke the writ jurisdiction of this Court so that there may not be victims of noise pollution in future. The principal prayer is that the existing laws for restricting the use of loudspeakers and other high volume noise producing audio-video systems, be directed to be rigorously enforced.

4. The Government of India framed and published Noise Pollution Control and Regulation Rules, 1999. On 11.10.2002 the Government of India brought in an amendment in the Rules. The amendment empowered the State Government to permit use of loudspeaker or public address system during night hours (between 10 pm and 12 pm mid-night) on or during the cultural or religious occasions for a limited period not exceeding 15 days. Vires of this amendment were put in issue by the appellant submitting that the provision is not accompanied by any guidelines and is capable of being misused to such an extent that the whole purpose behind enacting the Rules itself may be defeated. The High Court of Kerala found the petition devoid of any merit and directed the petition to be dismissed. Feeling aggrieved, this petition has been filed by special leave.

5. The special leave petition and, in particular, the writ petition raise issues of wide ranging dimensions relating to noise pollution and the implications thereof. Taking cognizance of the matters as public interest litigation, the Court vide its order dated 6.4.98, directed the cause title of the petition filed by Shri Anil Kumar Mittal to be amended as “In re. Noise Pollution Implementation of the Laws for Restricting Voice of Loudspeakers and High Volume Producing Sound System”.

6. The Union of India and the Central Pollution Control Board have not opposed the prayer made in the writ petition and the appeal and have rather supported the writ petitioner. Valuable inputs have been provided by the Central Pollution Control Board in the form of pleadings, authentic publications, research documents and other papers. The Union of India, while not opposing the relief sought for by the petitioner, has pointed out several practical difficulties in completely regulating and where necessary, eliminating noise pollution.

7. Though the sweep of hearing in these matters has been very wide, the principal thrust of the writ petitioner and the learned Amicus has been directed towards noise created by firecrackers, loudspeakers used by political parties, at religious places and on religious and social occasions or festivals. Hindu Bokta Jana Sabai, Tamil Nadu Fireworks and Amorges Manufacturers Association, Universal Society Performance, All India Federation of Fireworks Association, Indian Fireworks Manufacturers Association and some individuals have sought for interventions. It is not necessary to notice the contents of the intervention applications in detail. Suffice it to say that the reliefs sought for in the applications are conflicting. Some of the intervenors have sought for:-

(i) noise created by horns of engines, pressure horns in automobiles, loudspeakers, denting, painting of cars, particularly, in residential areas and from unauthorized premises being prohibited;

(ii) use of loudspeakers in religious places such as temples, mosque, churches, gurudwaras and other places being discontinued or at least regulated;

(iii) firecrackers burst during Diwali festival and on other occasions for fun or merry making being prohibited completely, if the noise created exceeds certain decibels and being so regulated as to prevent bursting during night hours.

Other set of intervenors seeks such like reliefs:-

(i) granting exemption in favour of bursting of firecrackers on or during festivals without regard to the limit of time as such bursting of firecrackers is associated with the performance of ceremonies relating to religion or social occasions;

(ii) laying down mechanism for regulating the very manufacturing of firecrackers so that such firecrackers as unreasonably enhance noise pollution may be kept away from entering the markets and playing into the hands of the people.

9. Article 21 of the Constitution guarantees life and personal liberty to all persons. It is well settled by repeated pronouncements of this Court as also the High Courts that right to life enshrined in Article 21 is not of mere survival or existence. It guarantees a right of persons to life with human dignity. Therein are included, all the aspects of life which go to make a person's life meaningful, complete and worth living. The human life has its charm and there

is no reason why the life should not be enjoyed along with all permissible pleasures. Anyone who wishes to live in peace, comfort and quiet within his house has a right to prevent the noise as pollutant reaching him. No one can claim a right to create noise even in his own premises which would travel beyond his precincts and cause nuisance to neighbours or others. Any noise which has the effect of materially interfering with the ordinary comforts of life judged by the standard of a reasonable man is nuisance. How and when a nuisance created by noise becomes actionable has to be answered by reference to its degree and the surrounding circumstances, the place and the time.

10. Those who make noise often take shelter behind Article 19(1)A pleading freedom of speech and right to expression. Undoubtedly, the freedom of speech and right to expression are fundamental rights but the rights are not absolute. Nobody can claim a fundamental right to create noise by amplifying the sound of his speech with the help of loudspeakers. While one has a right to speech, others have a right to listen or decline to listen. Nobody can be compelled to listen and nobody can claim that he has a right to make his voice trespass into the ears or mind of others. Nobody can indulge into aural aggression. If anyone increases his volume of speech and that too with the assistance of artificial devices so as to compulsorily expose unwilling persons to hear a noise raised to unpleasant or obnoxious levels then the person speaking is violating the right of others to a peaceful, comfortable and pollution-free life guaranteed by Article 21. Article 19(1)a cannot be pressed into service for defeating the fundamental right guaranteed by Article 21. We need not further dwell on this aspect. Two decisions in this regard delivered by High Courts have been brought to our notice wherein the right to live in an atmosphere free from noise pollution has been upheld as the one guaranteed by Article 21 of the Constitution. These decisions are *Free Legal Aid Cell Shri Sugan Chand Aggarwal alias Bhagatji v. Govt. of NCT of Delhi* [AIR (2001) Del. 455 (DB)] and *P.A. Jacob v. Superintendent of Police, Kottayam* [AIR (1993) Ker 1]. We have carefully gone through the reasoning adopted in the two decisions and the principle of law laid down therein, in particular, the exposition of Article 21 of the Constitution. We find ourselves in entire agreement therewith.

11. The present cases provide an opportunity for examining several questions, such as what is noise? What are its adverse effects? Whether noise pollution runs in conflict with the fundamental rights of the people? And what relief can be allowed by way of directions issued in public interest?

STATUTORY LAWS IN INDIA

89. Not that the Legislature and the Executive in India are completely unmindful of the menace of noise pollution. Laws have been enacted and the Rules have been framed by the Executive for carrying on the purposes of the legislation. The real issue is with the implementation of the laws. What is needed is the will to implement the laws. It would be useful to have a brief resume of some of the laws which are already available on the Statute Book. Treatment of the problem of noise pollution can be dealt under the Law of Crimes and Civil Law. Civil law can be divided under two heads (i) The Law of Torts (ii) The General Civil Law. The cases regarding noise have not come before the law courts in large quantity. The reason behind this is that many people in India did not consider noise as a sort of pollution and they are not very much conscious about the evil consequences of noise

pollution. The level of noise pollution is relative and depends upon a person and a particular place. The law will not take care of a super sensitive person but the standard is of an average and rational human being in the society.

The Noise Pollution (Regulation and Control) Rules, 2000

90. In order to curb the growing problem of noise pollution, the Government of India has enacted the Noise Pollution (Regulation and Control) Rules, 2000. Prior to the enactment of these rules noise pollution was not being dealt specifically by a particular Act.

“Whereas the increasing ambient noise levels in public places from various sources, inter-alia, industrial activity, construction activity, generator sets, loudspeakers, public address systems, music systems, vehicular horns and other mechanical devices, have deleterious effects on human health and the psychological well being of the people; it is considered necessary to regulate and control noise producing and generating sources with the objective of maintaining the ambient air quality standard in respect of noise;”

91. The main provisions of the noise rules are as under:

1. The State Government may categorize the areas into industrial, commercial, residential or silence areas/zones for the purpose of implementation of noise standards for different areas.
2. The ambient air quality standards in respect of noise for different areas/zones has been specified for in the Schedule annexed to the Rules.
3. The State Government shall take measures for abatement of noise including noise emanating from vehicular movements and ensure that the existing noise levels do not exceed the ambient air quality standards specified under these rules.
4. An area comprising not less than 100 meters around hospitals, educational institutions and courts may be declared as silence area/zone for the purpose of these rules.
5. A loudspeaker or a public address system shall not be used except after obtaining written permission from the authority and the same shall not be used at night i.e. between 10.00p.m. and 6.00 a.m.
6. A person found violating the provisions as to the maximum noise permissible in any particular area shall be liable to be punished for it as per the provisions of these rules and any other law in force.

Indian Penal Code

92-93. Noise pollution can be dealt under Sections 268, 290 and 291 of the Indian Penal Code, as a public nuisance. Under Section 268 of this Code, it is mentioned that ‘A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. A common nuisance is not excused on the ground that it causes some convenience or advantage.’ Sections 290 and 291 of the Indian Penal Code deal with the punishment for public nuisance.

Criminal Procedure Code

95. Under Section 133 of the Code of Criminal Procedure, 1973 the magistrate has the power to make conditional order requiring The Factories Act, 1948.

The Factories Act

96. The Factories Act does not contain any specific provision for noise control. However, under the Third Schedule Sections 89 and 90 of the Act, 'noise induced hearing loss', is mentioned as a notifiable disease. Under section 89 of the Act, any medical practitioner who detects any notifiable disease, including noise-induced hearing loss, in a worker, has to report the case to the Chief Inspector of Factories, along with all other relevant information. Failure to do so is a punishable offence.

97. Similarly, under the Model Rules, limits for noise exposure for work zone area has been prescribed.

Motor Vehicles Act, 1988 and rules framed thereunder

98. Rules 119 and 120 of the Central Motor Vehicles Rules, 1989, deal with reduction of noise.

Rule 119. Horns

(1) On and after expiry of one year from the date of commencement of the Central Motor Vehicles (Amendment) Rules, 1999, every motor vehicle including construction equipment vehicle and agricultural tractor manufactured shall be fitted with an electric horn or other devices conforming to the requirements of IS: 1884:1992, specified by the Bureau of Indian Standards for use by the driver of the vehicle and capable of giving audible and sufficient warning of the approach or position of the vehicle: Provided that on and from 1st January, 2003, the horn installation shall be as per AIS-014 specifications, as may be amended from time to time, till such time as corresponding Bureau of Indian Standards specifications are notified.

(2) *Noise standards* - No motor vehicle shall be fitted with any multi-toned horn giving a succession of different notes or with any other sound-producing device giving an unduly harsh, shrill, loud or alarming noise.

Rule 120. Silencers

(1) Every motor vehicle including agricultural tractor shall be fitted with a device (hereinafter referred to as a silencer) which by means of an expansion chamber or otherwise reduces as far as practicable, the noise that would otherwise be made by the escape of exhaust gases from the engine.

(2) *Noise standards*. Every motor vehicle shall be constructed and maintained so as to conform to noise standards specified in Part E of the Schedule VI to the Environment (Protection) Rules, 1986, when tested as per IS: 3028-1998, as amended from time to time.

Law of Torts

99. Quietness and freedom from noise are indispensable to the full and free enjoyment of a dwelling-house. No proprietor has an absolute right to create noises upon his own

land, because any right which the law gives is qualified by the condition that it must not be exercised to the nuisance of his neighbours or of the public. Noise will create an actionable nuisance only if it materially interferes with the ordinary comfort of life, judged by ordinary, plain and simple notions, and having regard to the locality; the question being one of degree in each case.

The Air (Prevention and Control of Pollution) Act, 1981

100. Noise was included in the definition of air pollutant in Air (Prevention and Control of Pollution) Act in 1981. Thus, the provisions of the Air Act, became applicable in respect of noise pollution, also.

The Environment (Protection) Act, 1986

101. In the Environment (Protection) Act, 1986, although there is no specific provision to deal with noise pollution, the Act confers powers on Government of India to take measures to deal with various types of pollution including noise pollution.

Fireworks

The Explosives Act, 1884 regulates manufacture, possession, use, sale, transport, import & export of explosives. Firecrackers are governed by this Statute. Rule 87 of the Explosives Rule, 1983 prohibits manufacture of any explosive at any place, except in factory or premises licensed under the Rules. In India there is no separate Act that regulates the manufacture, possession, use, sale, manufacture and transactions in firecrackers. All this is regulated by The Explosives Act, 1884. The Noise that is produced by these fireworks is regulated by the Environmental Protection Act, 1986 and The Noise Pollution (Regulation and Control) Rules, 2000.

JUDICIAL OPINION IN INDIA

104. In *Kirori Mal Bishambar Dayal v. The State*, [AIR 1958 Punj 11], accused/petitioner was convicted and sentenced under Section 290 of Indian Penal Code 1860 and was fined Rs. 50 for causing noise and emitting smoke and vibrations by operating of heavy machinery in the residential area. The orders of the trial court was upheld by the District Magistrate in appeal. The High Court of Punjab & Haryana also upheld the decision of the courts below and dismissed the revision petition. In the case of *Bhuban Ram v. Bibhuti Bhushan Biswas* [AIR 1919 Calcutta 539], it was held that working of a paddy husking machine at night causes nuisance by noise and the occupier was held liable to be punished under Section 290 IPC. In *Ivour Heyden v. State of Andhra Pradesh*, [1984 Cri LJ (NOC) 16], the High Court of Andhra Pradesh excused the act of playing radio loudly on the ground that it was a trivial act. Careful reading of Section 95 of IPC shows that only that harm is excused which is not expected to be complained by the person of ordinary temper and sense.

105. In *Rabin Mukherjee v. State of West Bengal*, [AIR 1985 Cal. 222] the use of air horns was prohibited by the court to prevent noise pollution. The Court observed:

It is found that the atmosphere and the environment is very much polluted from indiscriminating noise emitted from different quarters and on research it was found that persons who are staying near the Airport, are becoming victim of various

ailments. Such persons even become victim of mental disease. On such research it was also found that workers in various factories even become deaf and hard of hearing. It was further found on such research that as a result of this excessive noise pollution, people suffer from loss of appetite, depression, mental restlessness and insomnia. People also suffer from excessive blood pressure and heart trouble. It is not necessary to go into the question about direct effect of such noise pollution because of indiscriminate and illegal use of such electric and air horn as it is an admitted position that the same is injurious to health and amongst different causes of environmental pollution, sound pollution is one which is of grave concern.”

106. In the case of *People United for better Living in Calcutta v. State of West Bengal* [AIR 1993 Cal. 215] the Calcutta High Court observed:

In a developing country there shall have to be developments, but that development shall have to be in closest possible harmony with the environment, as otherwise there would be development but no environment, which would result in total devastation, though, however, may not be felt in present but at some future point of time, but then it would be too late in the day, however, to control and improve the environment. In fact, there should be a proper balance between the protection of environment and the development process. The society shall have to prosper, but not at the cost of the environment and in similar vein, the environment shall have to be protected but not at the cost of the development of the society and as such a balance has to be found out and administrative actions ought to proceed accordingly.

107. In *Burrabazar Fireworks Dealers Association v. Commissioner of police, Calcutta* [AIR 1998 Cal. 121] it has been held

Art. 19(1)(g) of the Constitution of India does not guarantee the fundamental right to carry on trade or business which creates pollution or which takes away that community's safety, health and peace. A citizen or people cannot be made a captive listener to hear the tremendous sounds caused by bursting out from noisy fireworks. It may give pleasure to one or two persons who burst it but others have to be a captive listener whose fundamental rights guaranteed under Article 19(1)(a) and other provisions of the Constitution are taken away, suspended and made meaningless. Under Art. 19(1)(a), read with Art. 21 of the Constitution of India, the citizens have a right of decent environment and they have a right to live peacefully, right to sleep at night and to have a right to leisure which are all necessary under Art. 21 of the Constitution.”(Headnote)

111. The Supreme Court in *Church of God (Full Gospel) in India v. K.K.R. Majestic Colony Welfare Assn.* [(2000) 7 SCC 282] held that the Court may issue directions in respect of controlling noise pollution even if such noise was a direct result of and was connected with religious activities. It was further held:-

Undisputedly, no religion prescribes that prayers should be performed by disturbing the peace of others nor does it preach that they should be through voice amplifiers or beating of drums. In our view, in a civilized society in the name of religion, activities which disturb old or infirm persons, students or children having

their sleep in the early hours or during daytime or other persons carrying on other activities cannot be permitted. It should not be forgotten that young babies in the neighbourhood are also entitled to enjoy their natural right of sleeping in a peaceful atmosphere. A student preparing for his examination is entitled to concentrate on his studies without there being any unnecessary disturbance by the neighbours. Similarly, the old and the infirm are entitled to enjoy reasonable quietness during their leisure hours without there being any nuisance of noise pollution. Aged, sick, people afflicted with psychic disturbances as well as children up to 6 years of age are considered to be very sensible (sic sensitive) to noise. Their rights are also required to be honoured.

Under the Environment (Protection) Act, 1986, rules for noise-pollution level are framed which prescribe permissible limits of noise in residential, commercial, industrial areas or silence zone. The question is whether the appellant can be permitted to violate the said provisions and add to the noise pollution. In our view, to claim such a right in itself would be unjustifiable. In these days, the problem of noise pollution has become more serious with the increasing trend towards industrialisation, urbanization and modernisation and is having many evil effects including danger to health. It may cause interruption of sleep, affect communication, loss of efficiency, hearing loss or deafness, high blood pressure, depression, irritability, fatigue, gastrointestinal problems, allergy, distraction, mental stress and annoyance etc. This also affects animals alike. The extent of damage depends upon the duration and the intensity of noise. Sometimes it leads to serious law and order problem. Further, in an organized society, rights are related with duties towards others including neighbours.....because of urbanization or industrialization the noise pollution may in some area of a city/town might be exceeding permissible limits prescribed under the Rules, but that would not be a ground for permitting others to increase the same by beating of drums or by use of voice amplifiers, loudspeakers or by such other musical instruments and, therefore, rules prescribing reasonable restrictions including the Rules for the use of loudspeakers and voice amplifiers framed under the Madras Town Nuisances Act, 1889 and also the Noise Pollution (Regulation and Control) Rules, 2000 are required to be enforced.

114. We have referred to a few, not all available judgments. Suffice is to observe that Indian Judicial opinion has been uniform in recognizing right to live in freedom from noise pollution as a fundamental right protected by Article 21 of the Constitution and noise pollution beyond permissible limits as an in-road on that right. We agree with and record our approval of the view taken and the opinion expressed by the several High Courts in the decisions referred to hereinabove.

INTERIM ORDERS

115. During the course of the hearing of this case the Court had passed several interim orders keeping in mind the importance of the issue.

116. The interim order dated 27/09/2001 deserves to be mentioned in particular, which directed as under:

(1) The Union Government, the Union Territories as well as all the State Governments shall take steps to strictly comply with Notification No. G.S.R. 682(E) dated October 05, 1999 whereby the Environment (Protection) Rules, 1986 framed under the Environment (Protection) Act, 1986 were amended. They shall in particular comply with amended Rule 89 of the said Rules, which reads as follows:

“89. Noise standards for fire-crackers A.

(i) The manufacture, sale or use of firecrackers generating noise level exceeding 125 dB(AI) or 145 dB(C)pk at 4 meters distance from the point of bursting shall be prohibited.

(ii) For individual fire-cracker constituting the series (joined fire-crackers), the above mentioned limit be reduced by 5 log 10(N) dB, where N = number of crackers joined together.

(2) The use of fireworks or fire-crackers shall not be permitted except between 6.00 a.m. and 10.00p.m. No firework or firecracker shall be allowed between 10.00 p.m. and 6.00 a.m.

(3) Firecrackers shall not be used at any time in silence zones, as defined in S.O. 1046(E) issued on 22.11.2000 by the Ministry of Environment and Forests. In the said Notification Silence Zone has been defined as:

“Silence Zone is an area comprising not less than 100 meters around hospitals, educational institutions, courts, religious places or any other area which is declared as such by the competent authority.”

(4) The State Education Resource Centres in all the States and the Union Territories as well as the management/principals of schools in all the States and Union Territories shall take appropriate steps to educate students about the ill effects of air and noise pollution and appraise them of directions (1) to (3) above.

These interim directions were also directed to be given wide publicity both by electronic and print media. It was said that Doordarshan and other television channels shall give publicity to these directions, at least once every day during prime time, during the fortnight before Dussehra and Diwali. The Ministry of Information and Broadcasting was asked to bring these directions to the notice of the general public through appropriate advertisements, issued in the newspapers. The All India Radio was asked to broadcast these directions on prime time on FM and other frequencies for information of the general public.

117. Due to the imposition of the restrictions on the bursting of firecrackers, several Interim Applications came to be filed before the Court. The Court vide its interim order dated 10.9.2003 stated:

Through the I.A.s filed in this Court the following two suggestions deserve notice.

Firstly, it is submitted that certain local festivals and celebrations are accompanied customarily by bursting of firecrackers which is at times at such hours as is not permissible under the order of this Court dated 27.9.2001. Secondly, it is

pointed out that the industry of fireworks may face serious difficulty, even partial closure, on account of the directions made by this Court.

We have grave doubts if the above said considerations can come in the way of the enforcement of fundamental rights guaranteed by the Constitution for the citizens and people of India to live in peace and comfort, in an atmosphere free from pollution of any kind, such as one caused by noise and foul/poisonous gases. However still, without expressing any final opinion on the pleas advanced, we allow the parties adversely affected the liberty to make representation to their respective State Governments and the State Governments may, in their turn, if satisfied of the genuineness of the representation made, invite the attention of the Govt. of India, to the suggestions made.

118. We are happy to note that the initial reluctance to abide by the interim directions made by this Court as displayed by the subsequent interlocutory applications soon gave way to compliance. By and large the interim directions made by the Court were observed in compliance. Police and civil administration remained alert during Diwali Festival to see that the directions made by the Court were complied with. Resident Welfare Associations and school children gave a very encouraging response who voluntarily desisted from bursting firecrackers in prohibited hours of night and also bursting such firecrackers as produce high level noise.

**DIFFICULTY IN IMPLEMENTATION OF NOISE POLLUTION CONTROL
METHODOLOGY IN INDIA**

119. India has passed through the stage of being characterised as a developing country and is ready to enter and stand in the line of developed countries. Yet, the issue of noise pollution in India has not been taken so far with that seriousness as it ought to have been. Firstly, as we have stated earlier, there is a lack of will on the part of the Executive to implement the laws. This has contributed to lack of infrastructure essential for attaining the enforcement of laws. Secondly, there is lack of requisite awareness on the part of the citizens. The deleterious effects of noise pollution are not well known to the people and are not immediately perceptible. People generally accept noise pollution as a part of life, a necessary consequence of progress and prosperity.

120. The problems that are being faced in controlling noise pollution are:-

1. The Statutes and the Rules framed thereunder are not comprehensive enough so as to deal with all the problems and issues related to noise pollution. This impression of ours stands reaffirmed on a comparative reading of legislation in India with these in other countries of the world to which we have referred to briefly earlier in this judgment.

2. The authorities responsible for implementing the laws are not yet fully identified. Those which have been designated, do not seem to be specialised in the task of regulating noise pollution. There is dearth of necessary personnel technically qualified to act effectively. What is needed is a combination of technically qualified and administratively competent personnel with the requisite desire and dedication for implementation of the laws.

3. There is lack of proper gadgets and equipments and other infrastructure such as labs for measuring the noise levels. Due to the shortage of the instruments needed for the purpose of measuring sound, the policemen who are on the job usually end up measuring sound with their ears itself and not with the use of technical instruments.

DIRECTIONS

168. It is hereby directed as under:

I. Firecrackers

1. On a comparison of the two systems, i.e. the present system of evaluating firecrackers on the basis of noise levels, and the other where the firecrackers shall be evaluated on the basis of chemical composition, we feel that the latter method is more practical and workable in Indian circumstances. It shall be followed unless and until replaced by a better system.

2. The Department of Explosives (DOE) shall undertake necessary research activity for the purpose and come out with the chemical formulae for each type or category or class of firecrackers. The DOE shall specify the proportion/composition as well as the maximum permissible weight of every chemical used in manufacturing firecrackers.

3. The Department of Explosives may divide the firecrackers into two categories- (i) Sound emitting firecrackers, and (ii) Colour/light emitting firecrackers.

4. There shall be a complete ban on bursting sound emitting firecrackers between 10 pm and 6 am. It is not necessary to impose restrictions as to time on bursting of colour/light emitting firecrackers.

5. Every manufacturer shall on the box of each firecracker mention details of its chemical contents and that it satisfies the requirement as laid down by DOE. In case of a failure on the part of the manufacturer to mention the details or in cases where the contents of the box do not match the chemical formulae as stated on the box, the manufacturer may be held liable.

6. Firecrackers for the purpose of export may be manufactured bearing higher noise levels subject to the following conditions: (i) The manufacturer should be permitted to do so only when he has an export order with him and not otherwise; (ii) The noise levels for these firecrackers should conform to the noise standards prescribed in the country to which they are intended to be exported as per the export order; (iii) These firecrackers should have a different colour packing, from those intended to be sold in India; (iv) They must carry a declaration printed thereon something like 'not for sale in India' or 'only for export to country AB' and so on.

II. Loudspeakers

1. The noise level at the boundary of the public place, where loudspeaker or public address system or any other noise source is being used shall not exceed 10 dB(A) above the ambient noise standards for the area or 75 dB(A) whichever is lower.

2. No one shall beat a drum or tom-tom or blow a trumpet or beat or sound any instrument or use any sound amplifier at night (between 10. 00 p.m. and 6.a.m.) except in public emergencies.

3. The peripheral noise level of privately owned sound system shall not exceed by more than 5 dB(A) than the ambient air quality standard specified for the area in which it is used, at the boundary of the private place.

III. Vehicular Noise

No horn should be allowed to be used at night (between 10 p.m. and 6 a.m.) in residential area except in exceptional circumstances.

IV. Awareness

1. There is a need for creating general awareness towards the hazardous effects of noise pollution. Suitable chapters may be added in the text-books which teach civic sense to the children and youth at the initial/early level of education. Special talks and lectures be organised in the schools to highlight the menace of noise pollution and the role of the children and younger generation in preventing it. Police and civil administration should be trained to understand the various methods to curb the problem and also the laws on the subject.

2. The State must play an active role in this process. Resident Welfare Associations, service Clubs and Societies engaged in preventing noise pollution as a part of their projects need to be encouraged and actively involved by the local administration.

3. Special public awareness campaigns in anticipation of festivals, events and ceremonial occasions whereat firecrackers are likely to be used, need to be carried out.

169. The above said guidelines are issued in exercise of power conferred on this Court under Articles 141 and 142 of the Constitution of India. These would remain in force until modified by this Court or superseded by an appropriate legislation.

V. Generally

1. The States shall make provision for seizure and confiscation of loudspeakers, amplifiers and such other equipments as are found to be creating noise beyond the permissible limits.

2. Rule 3 of the Noise Pollution (Regulation and Control) Rules, 2000 makes provision for specifying ambient air quality standards in respect of noise for different areas/zones, categorization of the areas for the purpose of implementation of noise standards, authorizing the authorities for enforcement and achievement of laid down standards. The Central Government/State Governments shall take steps for laying down such standards and notifying the authorities where it has not already been done.

170. Though, the matters are closed consistently with the directions as above issued in public interest, there will be liberty of seeking further directions as and when required and in particular in the event of any difficulty arising in implementing the directions. Before parting, we would like to place on record our deep appreciation of valuable assistance rendered by Shri Jitendra Sharma, Senior Advocate assisted by Shri Sandeep Narain, Advocate (and

earlier by late Shri Pankaj Kalra, Advocate) who highlighted several relevant aspects of the issues before us and also helped in formulating the guidelines issued as above.

* * * * *

***Church of God (Full Gospel) in India v. KKR Majestic Welfare Colony
Welfare Association, AIR 2000 SC 2773***

Shah, J.: The questions involved in this appeal are that in a country having multiple religions and numerous communities or sects, whether a particular community or sect of that community can claim right to add to noise pollution on the ground of religion? Whether beating of drums or reciting of prayers by use of microphones and loudspeakers so as to disturb the peace or tranquility of neighbourhood should be permitted? Undisputedly no religion prescribes that prayers should be performed by disturbing the peace of others nor does it preach that they should be through voice-amplifiers or beating of drums. In our view, in a civilized society in the name of religion, activities which disturb old or infirm persons, students or children having their sleep in the early hours or during day-time or other persons carrying on other activities cannot be permitted. It should not be forgotten that young babies in the neighbourhood are also entitled to enjoy their natural right of sleeping in a peaceful atmosphere. A student preparing for his examination is entitled to concentrate on his studies without their being any unnecessary disturbance by the neighbours. Similarly, old and infirm are entitled to enjoy reasonable quietness during their leisure hours without there being any nuisance of noise pollution. Aged, sick, people afflicted with psychic disturbances as well as children up to 6 years of age are considered to be very sensible to noise. Their rights are also required to be honoured.

Under the Environment (Protection) Act, 1986, rules for noise pollution level are framed which prescribe permissible limits of noise in residential, commercial, industrial areas or silence zone. The question is whether the appellant can be permitted to violate the said provisions and add to the noise pollution? In our view, to claim such a right itself would be unjustifiable. In these days, the problem of noise pollution has become more serious with the increasing trend towards industrialization, urbanization and modernization and is having many evil effects including danger to the health. It may cause interruption of sleep, affect communication, loss of efficiency, hearing loss or deafness, high blood pressure, depression, irritability, fatigue, gastro-intestinal problems, allergy, distraction, mental stress and annoyance etc. This also affects animals alike. The extent of damage depends upon the duration and the intensity of noise. Sometimes it leads to serious law and order problem. Further, in an organized society, rights are related with duties towards others including neighbours.

Keeping this background in mind, we would narrate the facts in brief for resolving the controversy involved in the present case. This appeal by special leave is filed against the judgment and order dated 19.4.1999 passed by the High Court of Judicature at Madras in Criminal O.P. No. 61 of 1998. The appellant is the Church of God (Full Gospel) (Church for short) located at K.K.R. Nagar, Madhavaram High Road,

Chennai. It has a prayer hall for the Pentecostal Christians and is provided with musical instruments such as drum set, triple gango, guitar etc. Respondent No.1-KKR Majestic Colony Welfare Association (Welfare Association for short) made a complaint on 15.5.1996 to the Tamilnadu Pollution Control Board (hereinafter referred to as the Board) stating therein that prayers in the Church were recited by using loudspeakers, drums and other sound producing instruments which caused noise pollution thereby disturbing and causing nuisance to the normal day life of the residents of the said colony. Complaints were also made to the Superintendent of Police and the Inspector of Police--respondents Nos 5 and 6 respectively. The Joint Chief Environmental Engineer of the Board respondent No.4 herein on 23.5.1996 addressed a letter to respondent No.5, the Superintendent of Police, Chengai MGR District (East), Chennai, to take action on the complaint. On 12.6.1996, respondent No.4 again addressed a letter to respondent No.5 enclosing therewith the analysis report of the Ambient noise level survey conducted in the vicinity of the appellants church hall which disclosed that noise pollution was due to plying of vehicles on the Madhavaram High Road. Respondent No.1 gave representations to various officials in this regard. Thereafter respondent No.1 Welfare Association filed Criminal O.P. No.61 of 1998 before the High Court of Madras for a direction to respondent Nos. 5 and 6 to take action on the basis of the letter issued by respondent No.4. In the High Court, it was contended by learned counsel for the Church that the petition was filed with an oblique motive in order to prevent a religious minority institution from pursuing its religious activities and the Court cannot issue any direction to prevent the Church from practicing its religious beliefs. It was also submitted that the noise pollution was due to plying of vehicles and not due to use of loudspeakers etc.

The learned Judge referred to the decision of the High Court in Appa Rao, M.S. v. Government of Tamil Nadu & Another (1995-1 L.W. (Vol.115) 319) where certain guidelines have been laid down for controlling the noise pollution. In Appa Raos case, the Division Bench of the Madras High Court after considering the contentions raised by the parties and decisions cited therein and also to the provisions of Section 41 and 71(a) of the Madras City Police Act, 1888 and Section 10 of the Madras Town Nuisance Act, 1989 has issued directions to the Government for controlling the noise pollution and for the use of amplifiers and loudspeakers. In the said case, the Court has observed that the grievances of the petitioners, who have complained with regard to the noise pollution were fully justified and the authorities concerned were turning or made to turn by the higher powers a Nelsons eye to the violation of rules and regulations in these matters. The Court also considered copy of an article which appeared in the August, 1982 Issue of Science Today and a copy of the ICMR Bulletin of July, 1979 containing a Study on Noise Pollution in South India wherein it is pointed out that noise pollution will lead to serious nervous disorders, emotional tension leading to high blood-pressure, cardiovascular diseases, increase in

cholesterol level resulting in heart attacks and strokes and even damage to foetus. The learned Single Judge also referred to other decisions and directed respondent Nos.5 and 6 to follow the guidelines issued in Appa Raos case (Supra) and to take necessary steps to bring down the noise level to the permitted extent by taking action against the vehicles which make noise and also by making the Church to keep their speakers at a lower level. He further held that the Survey report submitted by the Board would go to show that the Church was not the sole contributor of the noise and it appeared that the interference of noise was also due to plying of vehicles. The learned Judge pointed out that there was nothing of malice and malicious wish to cause any hindrance to the free practice of religious faith of the Church and if the noise created by the Church exceeds the permissible decibels then it has to be abated. Aggrieved by the said order, this appeal is filed by the Church.

Mr. G. Krishnan, learned senior counsel appearing on behalf of appellant contended that the High Court has failed to note that the two survey reports of the Pollution Control Board clearly attributed the noise pollution in the area in question to the vehicular traffic and not to any of the activities of the appellant-Church and, therefore, direction issued in respect of controlling the noise ought not to have been extended in respect of the appellant-Church; that the High Court has overlooked that the right to profess and practice Christianity is protected under Articles 25 and 26 of the Constitution of India which cannot be dislodged by directing the authorities to have a check on the appellant-Church; and that the judgment relied upon by the High Court in Appa Raos case (Supra) did not empower the authorities to interfere with the religious practices of any community.

The learned counsel appearing on behalf of the respondents contended that the appellant-Church has deliberately tried to give religious colour to this cause of action as respondent no.1 - Welfare Association is consisting of members belonging to all religions as found by the High Court. It is contended that even if the contention of the appellant-Church that the noise created by it is within the prescribed limits taken as it is, the order passed by the High Court will not in any way prejudice the right of religious practice of appellant because the order of the High Court is only with regard to reducing the noise pollution in that area. It is further contended that the High Court can pass orders to protect and preserve a very fundamental right of citizen under Article 19(1)(a) of the Constitution of India. He relied upon the judgment of Calcutta High Court in *Om Birangana Religious Society v. The State and others* [CWN 1995-96 (Vol.100) 617] wherein the Court dealt with a similar matter. The questions posed by the Court for consideration were whether the public are captive audience or listener when permission is given for using loud-speakers in public and the person who is otherwise unwilling to bear the sound and/or the music or the communication made by the loud-speakers, but he is compelled to tolerate all these things against his will

and health? Does it concern simply a law and order situation? Does it not generate sound pollution? Does it not affect the other known rights of a citizen? Even if a citizen is ill and even if such a sound may create adverse effect on his physical and mental condition, yet he is made a captive audience to listen. The High Court held that:

It cannot be said that the religious teachers or the spiritual leaders who had laid down these tenets, had any way desired the use of microphones as a means of performance of religion. Undoubtedly, one can practice, profess and propagate religion, as guaranteed under Article 25(1) of the Constitution but that is not an absolute right. The provision of Article 25 is subject to the provisions of Article 19(1)(a) of the Constitution. On true and proper construction of the provision of Article 25(1), read with Article 19(1)(a) of the Constitution, it cannot be said that a citizen should be coerced to hear any thing which he does not like or which he does not require.

Thereafter, the High Court laid down certain guidelines for the Pollution Control Board for grant of permission to use loudspeakers and to maintain noise level in West Bengal. In our view, the contentions raised by the learned counsel for the appellant deserves to be rejected because the direction given by the learned Judge to the authorities is only to follow the guidelines laid down in Appa Raos case decided by the Division Bench of the same High Court on the basis of the Madras City Police Act, 1888 and the Madras Towns Nuisance Act, 1889. It is also in conformity with the Noise Pollution (Regulation and Control) Rules, 2000 framed by the Central Government under the provisions of the Environment (Protection) Act, 1986 read with rule 5 of the Environment (Protection) Rules, 1986.

In the present case, the contention with regard to the rights under Article 25 or Article 26 of the Constitution which are subject to public order, morality and health are not required to be dealt with in detail mainly because as stated earlier no religion prescribes or preaches that prayers are required to be performed through voice amplifiers or by beating of drums. In any case, if there is such practice, it should not adversely affect the rights of others including that of being not disturbed in their activities. We would only refer to some observations made by the Constitution Bench of this Court qua rights under Articles 25 and 26 of the Constitution in *Acharya Maharajshri Narendra Prasadji Anand Prasadji Maharaj and Others v. The State of Gujarat & Others* [(1975) 1 SCC 11]. After considering the various contentions, the Court observed that no rights in an organized society can be absolute. Enjoyment of one's rights must be consistent with the enjoyment of rights also by others. Where in a free play of social forces it is not possible to bring about a voluntary harmony, the State has to step in to set right the imbalance between competing interests. The Court also observed that a particular fundamental right cannot exist in isolation in a water-tight compartment. One Fundamental Right of a person may have to co-exist in

harmony with the exercise of another Fundamental Right by others also with reasonable and valid exercise of power by the State in the light of the Directive Principles in the interests of social welfare as a whole. Further, it is to be stated that because of urbanization or industrialization the noise pollution may in some area of a city/town might be exceeding permissible limits prescribed under the rules, but that would not be a ground for permitting others to increase the same by beating of drums or by use of voice amplifiers, loudspeakers or by such other musical instruments and, therefore, rules prescribing reasonable restrictions including the rules for the use of loudspeakers and voice amplifiers framed under the Madras Town Nuisance Act, 1889 and also the Noise Pollution (Regulation and Control) Rules, 2000 are required to be enforced . We would mention that even though the Rules are unambiguous, there is lack of awareness among the citizens as well as the Implementation Authorities about the Rules or its duty to implement the same. Noise polluting activities which are rampant and yet for one reason or the other, the aforesaid Rules or the rules framed under various State Police Acts are not enforced. Hence, the High Court has rightly directed implementation of the same. In the result, the appeal is dismissed.

UNIT 5: ENVIRONMENTAL PROTECTION

S. Jagannath v. Union of India

AIR 1997 SC 811

KULDIP SINGH, J. - Shrimp (Prawn) Culture Industry is taking roots in India. Since long the fishermen in India have been following the traditional rice/shrimp rotating aquaculture system. Rice is grown during part of the year and shrimp and other fish species are cultured during the rest of the year. However, during the last decade the traditional system which, apart from producing rice, produced 140 kgs of shrimp per hectare of land began to give way to more intensive methods of shrimp culture which could produce thousands of kilograms per hectare. A large number of private companies and multinational corporations have started investing in shrimp farms. In the last few years more than eighty thousand hectares of land have been converted to shrimp farming. India's marine export weighed in at 70,000 tonnes in 1993 and these exports are projected to reach 200 thousand tonnes by the year 2000. The shrimp farming advocates regard aquaculture as potential saviour of developing countries because it is a short-duration crop that provides a high investment return and enjoys an expanding market. The said expectation is sought to be achieved by replacing the environmentally benign traditional mode of culture by semi-intensive and intensive methods. More and more areas are being brought under semi-intensive and intensive modes of shrimp farming. The environmental impact of shrimp culture essentially depends on the mode of culture adopted in the shrimp farming. Indeed, the new trend of more intensified shrimp farming in certain parts of the country - without much control of feeds, seeds and other inputs and water management practices - has brought to the fore a serious threat to the environment and ecology which has been highlighted before us.

2. This petition under Article 32 of the Constitution of India - in public interest - has been filed by S. Jagannathan, Chairman, Gram Swaraj Movement, a voluntary organisation working for the upliftment of the weaker sections of society. The petitioner has sought the enforcement of Coastal Zone Regulation Notification dated 19-2-1991 issued by the Government of India, stoppage of intensive and semi-intensive type of prawn farming in the ecologically fragile coastal areas, prohibition from using the wastelands/wetlands for prawn farming and the constitution of a National Coastal Management Authority to safeguard the marine life and coastal areas. Various other prayers have been made in the writ petition. This Court issued notice by the order dated 3-10-1994. On 12-12-1994, this Court passed the following order:

Ministry of Environment and Forests, Government of India issued a Notification dated 19-2-1991, under clause (d) of sub-rule (3) of Rule 5 of the Environment (Protection) Rules, 1986 wherein it was declared that the coastal stretches of seas, bays, estuaries, creeks, rivers and backwater which are influenced by the tidal action (in the landward side) up to 500 metres from the High Tide Line (HTL) and the land between the Low Tide Line (LTL) and the HTL are Coastal Regulation Zone. The Central Government has imposed various restrictions in the said notification. Mr Mehta, learned advocate appearing for the petitioner, states that despite the issue of the notification, unauthorised industries and other construction

is being permitted by various States within the area which has been declared as Coastal Regulation Zone. ... Meanwhile we direct all the respondent-States not to permit the setting up of any industry or the construction of any type on the area at least up to 500 metres from the sea water at the maximum High Tide. The abovesaid area i.e. from the High Tide Level up to 500 metres shall be kept free from all construction of any type.

3. The Union of India and States/Union Territories of Gujarat, Maharashtra, Orissa, Kerala, Tamil Nadu, West Bengal, Goa, Pondicherry, Daman/Diu, Andaman/Nicobar and Lakshadweep have filed replies to the writ petitions. This Court on 27-3-1995 passed the following order:

This public interest petition is directed against the setting up of prawn farms on the coastal areas of Andhra Pradesh, Tamil Nadu and other coastal States. It is alleged that the coastal States are allowing big business houses to develop prawn farms on a large scale in the ecologically fragile coastal areas of the States concerned in violation of the Environment Protection Act, 1986 and the rules framed thereunder and various other provisions of law. It is also alleged that establishment of prawn farms on rural cultivable lands is creating serious environmental, social and economic problems for the rural people living along the coastal bed specially in the east coast. ... Meanwhile, we direct NEERI, Nagpur through its Director to appoint an investigating team to visit the coastal areas of the States of Andhra Pradesh and Tamil Nadu and give its report to this Court regarding the various farms which are being set up in the said area.

In case the investigating team finds that the ecologically fragile area is being environmentally degraded then it shall suggest the remedial measures in that respect. The NEERI team shall keep in view the Notification dated 19-2-1991 of the Ministry of Environment and Forests, Government of India, issued under the Environment Protection Act, 1986 and also the provisions of the Tamil Nadu Agriculture (Regulation) Act, 1995. The NEERI shall submit its report before 30-4-1995.

4. Pursuant to the above-quoted order, the National Environmental Engineering Research Institute, Nagpur (NEERI) submitted its report dated 25-4-1995 before this Court. This Court further directed NEERI to send an expert team to the coastal areas in other States and file its report within two months. The report was filed in this Court within the specified time. This Court on 9-5-1995 passed the following order:

This matter be listed for final hearing on 4-8-1995. Meanwhile we direct that no part of agricultural lands and salt farms be converted into commercial aquaculture farms hereinafter. We further direct that no groundwater withdrawal, be allowed for aquaculture purposes to any of the industries whether already existing or in the process of being set up. No further shrimp farms or any aquaculture farms be permitted to be set up in the areas in dispute hereinafter.

We direct the respective State Governments (the Collector concerned or any other officer appointed by the Government) to provide free access through aquaculture units to the sea coast to the fishermen/tourists after hearing the parties concerned.

Mr Mehta has contended that due to these farms occupying most of the coastal areas it has become difficult for the villagers to search for fresh water. The State Government may examine this aspect and provide water by way of tankers wherever it is necessary.

So far as the farmers in the State of Tamil Nadu are concerned they are all represented through Mr Kapil Sibal and his team, we direct the State of A.P. to send a copy of the order of this Court to all the aquaculture farms in the State of A.P. informing them that the matter shall be taken up by this Court for final hearing on 4-8-1995. This may be done by the State of A.P. by the end of June 1995.

We direct the Pondicherry Administration to send a copy of the order of this Court to all the aquaculture farms in Pondicherry informing them that the matter shall be taken up by this Court for final hearing on 4-8-1995. This may be done by the Pondicherry Administration by the end of June 1995.

We further direct the Superintendent of Police and the Collector of the areas concerned to see that the order of this Court specially the directions given are meticulously complied with by all the farms.

Before finally hearing this matter, this Court passed the following order on 24-8-1995:

We are of the view that it would be in the interest of justice to have full representation before us so far as individual aquafarms in various States/Union Territories are concerned. We, therefore, adjourn the hearing to 17-10-1995. Meanwhile, we direct the coastal States/Union Territory Governments through their learned counsel who are present in the Court, to issue individual notices to all the aquafarms which are located in their respective territories. It may be stated in the notices that the same are being issued under the direction of this Court. It should also be specifically mentioned that if they want to be heard in these matters by this Court, they be present through their counsel/representatives in the Court, on the next date of hearing, which is 17-10-1995. We also direct the Marine Products Export Development Authority (MPEDA), through its counsel, Mr Harish N. Salve, to do the same exercise at its level also. Apart from that, we further direct all the State Governments/Union Territories to issue public notices in this respect in daily newspapers which have circulation in the coastal areas, informing the aquafarms regarding the hearing of these matters in this Court on 17-10-1995. This may be done on two consecutive days.

Notices and publication be completed within 3 weeks from today. Meanwhile, we direct all the State Governments/Union Territories not to give fresh licences/permission for setting up/establishment of any aquafarm in their respective territories till further orders.

21. Mr M.C. Mehta, learned counsel for the petitioner, has taken us through the NEERI Reports and other voluminous material on the record. He has vehemently contended that the modern - other than traditional - techniques of shrimp farming are highly polluting and are detrimental to the coastal environment and marine ecology. According to him only the traditional and improved traditional systems of shrimp farming which are environmentally friendly should be permitted. Mr Mehta has taken us through the Notification dated 19-2-1991 issued by the Government of India under Section 3 of the Environment (Protection) Act, 1986 (the Act) (CRZ Notification) and has vehemently contended that setting up of shrimp farms on the coastal stretches of seas, bays, estuaries, creeks, rivers and backwaters up to 500 metres from the High Tide Line (HTL) and the line between the Low Tide Line (LTL) and the HTL is totally prohibited under para 2 of the said notification. The relevant part of the Notification No. S.O. 114(E) dated 19-2-1991 is as under:

“2. **Prohibited Activities.**—The following activities are declared as prohibited within the Coastal Regulations Zone, namely:

(i) setting up of new industries and expansion of existing industries, except those directly related to waterfront or directly needing foreshore facilities;

(ii) manufacture or handling or storage or disposal of hazardous substances as specified in the Notifications of the Government of India in the Ministry of Environment and Forests No. S.O. 594(E) dated 28-7-1989, S.O. 966(E) dated 27-11-1989 and G.S.R. 1037(E) dated 5-12-1989;

(iii) setting up and expansion of fish-processing units including warehousing (excluding hatchery and natural fish drying in permitted areas);

(v) discharge of untreated wastes and effluent from industries, cities, or towns and other human settlements. Schemes shall be implemented by the concerned authorities for phasing out the existing practices, if any, within a reasonable time period not exceeding three years from the date of this notification.

(viii) land reclamation, bunding or disturbing the natural course of sea water with similar obstructions, except those required for control of coastal erosion and maintenance or clearing of waterways, channels and ports and for prevention of sandbars and also except for tidal regulators, storm water drains and structures for prevention of salinity ingress and for sweet water recharge.

(x) harvesting or drawal of groundwater and construction of mechanisms therefor with 200 m of HTL; in the 200 m to 500 m zone it shall be permitted only when done manually through ordinary wells for drinking, horticulture, agriculture and fisheries....

22. According to Mr Mehta the shrimp culture industry is neither “directly related to waterfront” nor “directly needing foreshore facility” and as such is a prohibited activity under para 2(i) of the CRZ Notification. Mr Kapil Sibal on the other hand has argued that a shrimp farm is an industry which is directly related to waterfront and cannot exist without foreshore facilities. Relying upon *Oxford English Dictionary* Mr Sibal contended that “waterfront” means land abutting on the sea, that part of a town which fronts on a body of water. According to him “foreshore” in terms of the said dictionary means the part of the shore that lies between the High Tide and the Low Tide. According to *Webster’s Comprehensive Dictionary*, International Edn., the expression “foreshore” means “that part of a shore uncovered at low tide”.

23. It is, thus, clear that the part of the shore which remains covered with water at the High Tide and gets uncovered and becomes visible at the Low Tide is called “foreshore”. It is not possible to set up a shrimp culture farm in the said area because it would completely submerge in water at the High Tide. It is, therefore, obvious that foreshore facilities are neither directly nor indirectly needed in the setting up of a shrimp farm. So far as “waterfront” is concerned it is no doubt correct that a shrimp farm may have some relation to the waterfront in the sense that the farm is dependent on brackish water which can be drawn from the sea. But on a close scrutiny, we are of the view that shrimp culture farming has no relation or connection with the “waterfront” though it has relation with brackish water which is available from various water bodies including sea. What is required is the “brackish water”

and not the “waterfront”. The material on record shows that the shrimp ponds constructed by the farms draw water from the sea by pipes, jetties etc. It is not the “waterfront” which is needed by the industry. What is required is brackish water which can be drawn from any source including sea and carried to any distance by pipes etc. The purpose of CRZ Notification is to protect the ecologically fragile coastal areas and to safeguard the aesthetic qualities and uses of the sea coast. The setting up of modern shrimp aquaculture farms right on the sea coast and construction of ponds and other infrastructure thereon is per se hazardous and is bound to degrade the marine ecology, coastal environment and the aesthetic uses of the sea coast. We have, therefore, no hesitation in holding that the shrimp culture industry is neither “directly related to waterfront” nor “directly needing foreshore facilities”. The setting up of shrimp culture farms within the prohibited areas under the CRZ Notification cannot be permitted.

24. Para 2(viii) of the CRZ Notification quoted above, prohibits the bunding or disturbing the natural course of sea water with similar obstructions. A bund is an embankment or dyke. Alagarwami Report in para 4.3.2 (quoted above) has specifically mentioned that huge cyclone protection dykes and peripheral dykes are constructed by the shrimp farmers. The report further states that due to physical obstruction caused by the dykes the natural drain is blocked and flood water accumulated in the hinterland villages. The report notices that the shrimp ponds are constructed right on the bank of the creeks without leaving any area for draining of flood waters. A shrimp farm on the coastal area by itself operates as a dyke or a bund as it leaves no area for draining of the flood waters. The construction of the shrimp farms, therefore, violates clause (viii) of para 2 of the CRZ Notification. In view of the findings by the Alagarwami Report it may be useful to hold an inquiry/investigation to find out the extent of loss occurred, if any, to the villages during the recent cyclone in the State of Andhra Pradesh because of the dykes constructed by the shrimp farmers.

25. Annexure 1 to the CRZ Notification contains regulations regarding Coastal Area Classification and Development. The coastal stretches within 500 m of HTL of the landward side are classified into four categories, namely, CRZ-I, CRZ-II, CRZ-III and CRZ-IV. Para 6(2) of the CRZ Notification lays down the norms for the development or construction activities in different categories of CRZ areas. In CRZ-III Zone agriculture, horticulture, gardens, pastures, parks, playfields, forestry, and salt manufacture from sea level may be permitted up to 200 m from the high tide line. The aquaculture or shrimp farming has not been included as a permissible use and as such is prohibited even in this zone. A relevant point arises at this stage. Salt manufacturing process like the shrimp culture industry depends on sea water. Salt manufacturers can also raise the argument that since they are wholly dependent on sea water theirs is an industry “directly related to waterfront” or “directly needing foreshore facilities”. The argument stands negated by inclusion of the salt manufacturing industry in CRZ-III Zone under para 6(2) of the CRZ Notification otherwise it was not necessary to include the industry therein because it could be set up anywhere in the coastal regulation zone in terms of para 2(1) of the CRZ Notification. It is thus obvious that an industry dependent on sea water cannot by itself be an industry “directly related to waterfront” or “directly needing foreshore facilities”. The shrimp culture industry, therefore,

cannot be permitted to be set up anywhere in the coastal regulation zone under the CRZ Notification.

50. We are of the view that before any shrimp industry or shrimp pond is permitted to be installed in the ecology fragile coastal area it must pass through a strict environmental test. There has to be a high-powered “Authority” under the Act to scrutinise each and every case from the environmental point of view. There must be an environmental impact assessment before permission is granted to install commercial shrimp farms. The conceptual framework of the assessment must be broad based primarily concerning environmental degradation linked with shrimp farming. The assessment must also include the social impact on different population strata in the area. The quality of the assessment must be analytically based on superior technology. It must take into consideration the inter-generational equity and the compensation for those who are affected and prejudiced.

52. We, therefore, order and direct as under:

1. The Central Government shall constitute an authority under Section 8(3) of the Environment (Protection) Act, 1986 and shall confer on the said authority all the powers necessary to protect the ecologically fragile coastal areas, seashore, waterfront and other coastal areas and specially to deal with the situation created by the shrimp culture industry in the coastal States/Union Territories. The authority shall be headed by a retired Judge of a High Court. Other members preferably with expertise in the field of aquaculture, pollution control and environment protection shall be appointed by the Central Government. The Central Government shall confer on the said authority the powers to issue directions under Section 5 of the Act and for taking measures with respect to the matters referred to in clauses (v), (vi), (vii), (viii), (ix), (x) and (xii) of sub-section (2) of Section 3. The Central Government shall constitute the authority before 15-1-1997.

2. The authority so constituted by the Central Government shall implement “the Precautionary Principle” and “the Polluter Pays Principle”.

3. The shrimp culture industry/the shrimp ponds are covered by the prohibition contained in para 2(i) of the CRZ Notification. No shrimp culture pond can be constructed or set up within the coastal regulation zone as defined in the CRZ notification. This shall be applicable to all seas, bays, estuaries, creeks, rivers and backwaters. This direction shall not apply to traditional and improved traditional types of technologies (as defined in Alagarswami Report) which are practised in the coastal low-lying areas.

4. All aquaculture industries/shrimp culture industries/shrimp culture ponds operating/set up in the coastal regulation zone as defined under the CRZ Notification shall be demolished and removed from the said area before 31-3-1997. We direct the Superintendent of Police/ Deputy Commissioner of Police and the District Magistrate/Collector of the area to enforce this direction and close/demolish all aquaculture industries/shrimp culture industries, shrimp culture ponds on or before 31-3-1997. A compliance report in this respect shall be filed in this Court by these authorities before 15-4-1997.

5. The farmers who are operating traditional and improved traditional systems of aquaculture may adopt improved technology for increased production, productivity and return with prior approval of the “authority” constituted by this order.

6. The agricultural lands, salt pan lands, mangroves, wetlands, forest lands, land for village common purpose and the land meant for public purposes shall not be used/converted for construction of shrimp culture ponds.

7. No aquaculture industry/shrimp culture industry/shrimp culture ponds shall be constructed/set up within 1000 mts of Chilka Lake and Pulicat Lake (including Bird Sanctuaries namely Yadurapattu and Nelapattu).

8. Aquaculture industry/shrimp culture industry/shrimp culture ponds already operating and functioning in the said area of 1000 mts shall be closed and demolished before 31-3-1997. We direct the Superintendent of Police/Deputy Commissioner of Police and the District Magistrate/Collector of the area to enforce this direction and close/demolish all aquaculture industries/shrimp culture industries, shrimp culture ponds on or before 31-3-1997. A compliance report in this respect shall be filed in this Court by these authorities before 15-4-1997.

9. Aquaculture industry/shrimp culture industry/shrimp culture ponds other than traditional and improved traditional may be set up/ constructed outside the coastal regulation zone as defined by the CRZ Notification and outside 1000 mts of Chilka and Pulicat Lakes with the prior approval of the “Authority” as constituted by this Court. Such industries which are already operating in the said areas shall obtain authorisation from the “Authority” before 30-4-1997 failing which the industry concerned shall stop functioning with effect from the said date. We further direct that any aquaculture activity including intensive and semi-intensive which has the effect of causing salinity of soil, or the drinking water or wells and/or by the use of chemical feeds increases shrimp or prawn production with consequent increase in sedimentation which, on putrefaction is a potential health hazard, apart from causing siltation, turbidity of water courses and estuaries with detrimental implication on local fauna and flora shall not be allowed by the aforesaid Authority.

10. Aquaculture industry/shrimp culture industry/shrimp culture ponds which have been functioning/operating within the coastal regulation zone as defined by the CRZ Notification and within 1000 mts from Chilka and Pulicat Lakes shall be liable to compensate the affected persons on the basis of the “Polluter Pays” principle.

11. The Authority shall, with the help of expert opinion and after giving opportunity to the polluters concerned assess the loss to the ecology/environment in the affected areas and shall also identify the individuals/families who have suffered because of the pollution and shall assess the compensation to be paid to the said individuals/families. The Authority shall further determine the compensation to be recovered from the polluters as cost of reversing the damaged environment. The authority shall lay down just and fair procedure for completing the exercise.

12. The Authority shall compute the compensation under two heads namely, for reversing the ecology and for payment to individuals. A statement showing the total

amount to be recovered, the names of the polluters from whom the amount is to be recovered, the amount to be recovered from each polluter, the persons to whom the compensation is to be paid and the amount payable to each of them shall be forwarded to the Collector/District Magistrate of the area concerned. The Collector/District Magistrate shall recover the amount from the polluters, if necessary, as arrears of land revenue. He shall disburse the compensation awarded by the authority to the affected persons/families.

13. We further direct that any violation or non-compliance of the directions of this Court shall attract the provisions of the Contempt of Courts Act in addition.

14. The compensation amount recovered from the polluters shall be deposited under a separate head called "Environment Protection Fund" and shall be utilised for compensating the affected persons as identified by the Authority and also for restoring the damaged environment.

15. The authority, in consultation with expert bodies like NEERI, Central Pollution Control Board, respective State Pollution Control Boards shall frame scheme/schemes for reversing the damage caused to the ecology and environment by pollution in the coastal States/Union Territories. The scheme/schemes so framed shall be executed by the respective State Governments/Union Territory Governments under the supervision of the Central Government. The expenditure shall be met from the "Environment Protection Fund" and from other sources provided by the respective State Governments/Union Territory Governments and the Central Government.

16. The workmen employed in the shrimp culture industries which are to be closed in terms of this order, shall be deemed to have been retrenched with effect from 30-4-1997 provided they have been in continuous service (as defined in Section 25-B of the Industrial Disputes Act, 1947) for not less than one year in the industry concerned before the said date. They shall be paid compensation in terms of Section 25-F(b) of the Industrial Disputes Act, 1947. These workmen shall also be paid, in addition, six years' wages as additional compensation. The compensation shall be paid to the workmen before 31-5-1997. The gratuity amount payable to the workmen shall be paid in addition.

53. The writ petition is allowed with costs. We quantify the costs as Rs 1,40,000 (Rupees one lakh forty thousand) to be paid by the States of Gujarat, Maharashtra, Orissa, Kerala, Tamil Nadu, Andhra Pradesh and West Bengal in equal shares of Rs 20,000 each. The amount of Rs 1,40,000 realised from the seven coastal States shall be paid to Mr M.C. Mehta, Advocate who has assisted us in this case throughout. We place on record our appreciation for the assistance rendered by Mr Mehta.

HAZARDOUS SUBSTANCES AND ACTIVITIES

MC Mehta v Union of India, 1987 AIR 1086 (Oleum Gas Leak case)

BHAGWATI, CJ: This writ petition under Article 32 of the Constitution has come before us on a reference made by a Bench of three Judges. The reference was made because certain questions of seminal importance and high constitutional significance were raised in the course of arguments when the writ petition was originally heard. The facts giving rise to the writ petition and the subsequent events have been set out in some detail in the Judgment given by the Bench of three Judges on 17th February 1986, and it is therefore not necessary to reiterate the same. Suffice it to state that the Bench of three Judges permitted Shriram Foods and Fertiliser Industries (hereinafter referred to as Shriram) to restart its power plant as also plants for manufacture of caustic chlorine including its by-products and recovery plants like soap, glycerine and technical hard oil, subject to the conditions set out in the Judgment. That would have ordinarily put an end to the main controversy raised in the writ petition which was filed in order to obtain a direction for closure of the various units of Shriram on the ground that they were hazardous to the community and the only point in dispute which would have survived would have been whether the units of Shriram should be directed to be removed from the place where they are presently situated and relocated in another place where there would not be much human habitation so that there would not be any real danger to the health and safety of the people. But while the writ petition was pending there was escape of oleum gas from one of the units of Shriram on 4th and 6th December, 1985 and applications were filed by the Delhi Legal Aid & Advice Board and the Delhi Bar Association for award of compensation to the persons who had suffered harm on account of escape of oleum gas. These applications for compensation raised a number of issues of great constitutional importance and the Bench of three Judges therefore formulated the issues and asked the petitioner and those supporting him as also Shriram to file their respective written submissions so that the Court could take up the hearing of these applications for compensation. When these applications for compensation came up for hearing it was felt that since the issues raised involved substantial questions of law relating to the interpretation of Articles 21 and 32 of the Constitution, the case should be referred to a larger Bench of five Judges and this is how the case has now come before us.

Mr. Diwan, learned counsel appearing on behalf of Shriram raised a preliminary objection that the Court should not proceed to decide these constitutional issues since there was no claim for compensation originally made in the writ petition and these issues could not be said to arise on the writ petition. Mr. Diwan conceded that the

escape of oleum gas took place subsequent to the filing of the writ petition but his argument was that the petitioner could have applied for amendment of the writ petition so as to include a claim for compensation for the victims of oleum gas but no such application for amendment was made and hence on the writ petition as it stood, these constitutional issues did not arise for consideration. We do not think this preliminary objection raised by Mr. Diwan is sustainable. It is undoubtedly true that the petitioner could have applied for amendment of the writ petition so as to include a claim for compensation but merely because he did not do so, the applications for compensation made by the Delhi Legal Aid & Advice Board and the Delhi Bar Association cannot be thrown out. These applications for compensation are for enforcement of the fundamental right to life enshrined in Article 21 of the Constitution and while dealing with such applications, we cannot adopt a hypertechnical approach which would defeat the ends of justice. This Court has on numerous occasions pointed out that where there is a violation of a fundamental or other legal right of a person or class of persons who by reason of poverty or disability or socially or economically disadvantaged position cannot approach a Court of law for justice, it would be open to any public spirited individual or social action group to bring an action for vindication of the fundamental or other legal right of such individual or class of individuals and this can be done not only by filing a regular writ petition but also by addressing a letter to the Court. If this Court is prepared to accept a letter complaining of violation of the fundamental right of an individual or a class of individuals who cannot approach the Court for justice, there is no reason why these applications for compensation which have been made for enforcement of the fundamental right of the persons affected by the oleum gas leak under Article 21 should not be entertained. The Court while dealing with an application for enforcement of a fundamental right must look at the substance and not the form. We cannot therefore sustain the preliminary objection raised by Mr. Diwan. The first question which requires to be considered is as to what is the scope and ambit of the jurisdiction of this Court under Article 32 since the applications for compensation made by the Delhi Legal Aid and Advice Board and the Delhi Bar Association are applications sought to be maintained under that Article. We have already had occasion to consider the ambit and coverage of Article 32 in the *Bandhua Mukti Morcha v. Union of India & Ors.*, [1984] 2 SCR 67 and we wholly endorse what has been stated by one of us namely, Bhagwati, J. as he then was in his judgment in that case in regard to the true scope and ambit of that Article. It may now be taken as well settled that Article 32 does not merely confer power on this Court to issue a direction, order or writ for enforcement of the fundamental rights but it also lays a constitutional obligation on this Court to protect the fundamental rights of the people and for that purpose this Court has all incidental and ancillary powers including the power to forge new remedies and fashion new strategies designed to enforce the fundamental

rights. It is in realization of this constitutional obligation that this Court has in the past innovated new methods and strategies for the purpose of securing enforcement of the fundamental rights, particularly in the case of the poor and the disadvantaged who are denied their basic human rights and to whom freedom and liberty have no meaning.

We are also of the view that this Court under Article 32(1) is free to devise any procedure appropriate for the particular purpose of the proceeding, namely, enforcement of a fundamental right and under Article 32(2) the Court has the implicit power to issue whatever direction, order or writ is necessary in a given case, including all incidental or ancillary power necessary to secure enforcement of the fundamental right. The power of the Court is not only injunctive in ambit, that is, preventing the infringement of a fundamental right, but it is also remedial in scope and provides relief against a breach of the fundamental right already committed vide *Bandhua Mukti Morcha's case* (supra). If the Court were powerless to issue any direction, order or writ in cases where a fundamental right has already been violated, Article 32 would be robbed of all its efficacy, because then the situation would be that if a fundamental right is threatened to be violated, the Court can injunct such violation but if the violator is quick enough to take action infringing the fundamental right, he would escape from the net of Article 32. That would, to a large extent, emasculate the fundamental right guaranteed under Article 32 and render it impotent and futile. We must, therefore, hold that Article 32 is not powerless to assist a person when he finds that his fundamental right has been violated. He can in that event seek remedial assistance under Article 32. The power of the Court to grant such remedial relief may include the power to award compensation in appropriate cases. We are deliberately using the words "in appropriate cases" because we must make it clear that it is not in every case where there is a breach of a fundamental right committed by the violator that compensation would be awarded by the Court in a petition under Article 32. The infringement of the fundamental right must be gross and patent, that is, incontrovertible and ex facie glaring and either such infringement should be on a large scale affecting the fundamental rights of a large number of persons, or it should appear unjust or unduly harsh or oppressive on account of theft poverty or disability or socially or economically, disadvantaged position to require the person or persons affected by such infringement to initiate and pursue action in the civil courts. Ordinarily, of course, a petition under Article 32 should not be used as a substitute for enforcement of the right to claim compensation for infringement of a fundamental right through the ordinary process of civil court. It is only in exceptional cases of the nature indicated by us above, that compensation may be awarded in a petition under Article 32...

We must also deal with one other question which was seriously debated before us and that question is as to what is the measure of liability of an enterprise which is engaged in an hazardous or inherently dangerous industry, if by reason of an accident occurring in such industry, persons die or are injured. Does the rule in *Rylands v. Fletcher* apply or is there any other principle on which the liability can be determined? The rule in *Rylands v. Fletcher* was evolved in the year 1866 and it provides that a person who for his own purposes being on to his land and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril and, if he fails to do so, is *prima facie* liable for the damage which is the natural consequence of its escape. The liability under this rule is strict and it is no defence that the thing escaped without that person's wilful act, default or neglect or even that he had no knowledge of its existence. This rule laid down a principle of liability that if a person who brings on to his land and collects and keeps there anything likely to do harm and such thing escapes and does damage to another, he is liable to compensate for the damage caused. Of course, this rule applies only to non-natural user of the land and it does not apply to things naturally on the land or where the escape is due to an act of God and an act of a stranger or the default of the person injured or where the thing which escapes is present by the consent of the person injured or in certain cases where there is statutory authority. Vide *Halsbury Laws of England*, Vol. 45 para 1305. Considerable case law has developed in England as to what is natural and what is non-natural use of land and what are precisely the circumstances in which this rule may be displaced. But it is not necessary for us to consider these decisions laying down the parameters of this rule because in a modern industrial society with highly developed scientific knowledge and technology where hazardous or inherently dangerous industries are necessary to carry out part of the developmental programme. This rule evolved in the 19th Century at a time when all these developments of science and technology had not taken place cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present-day economy and social structure. We need not feel inhibited by this rule which was evolved in this context of a totally different kind of economy. Law has to grow in order to satisfy the needs of the fast-changing society and keep abreast with the economic developments taking place in the country. As new situations arise the law has to be evolved in order to meet the challenge of such new situations. Law cannot afford to remain static. We have to evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialised economy. We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that in any other foreign country. We no longer need the crutches of a foreign legal order. We are certainly prepared to receive light from whatever source it comes but we have to build up our own jurisprudence and we cannot countenance an argument that

merely because the new law does not recognise the rule of strict and absolute liability in cases of hazardous or dangerous liability or the rule as laid down in *Rylands v. Fletcher* as is developed in England recognises certain limitations and responsibilities. We in India cannot hold our hands back and I venture to evolve a new principle of liability which English courts have not done. We have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy, there is no reason why we should hesitate to evolve such principle of liability merely because it has not been so done in England. We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and nondelegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of substance or any other related element that caused the harm must be held strictly liable for causing such harm as a part of the social cost for carrying on the hazardous or inherently dangerous activity. If the enterprise is permitted to carry on a hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such hazardous or inherently dangerous activity as an appropriate item of its overheads. Such hazardous or inherently dangerous activity for private profit can be tolerated only on condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not. This principle is also sustainable on the ground that the enterprise alone has the resource to discover and guard against hazards or dangers and to provide warning against potential hazards. We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to

compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in *Rylands v. Fletcher* (supra). We would also like to point out that the measure of compensation in the kind of cases referred to in the preceding paragraph must be co-related to the magnitude and capacity of the enterprise because such compensation must have a deferent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise.

Union Carbide Corporation v Union of India, AIR 1992 SC 248

Ranganath Misra, CJ: 1. I entirely agree with my noble and learned Brother Venkatachaliah and hope and trust that the judgment he has produced is the epitaph on the litigation. I usually avoid multiple judgments but this seems to be a matter where something more than what is said in the main judgment perhaps should be said.

4. Several suits were filed in the United States of America for damages by the local representatives of the deceased and by many of the affected persons. The Union of India under the Bhopal Gas Leak Disaster (Processing of Claims) Act of 1985 took upon itself the right to sue for compensation on behalf of the affected parties and filed a suit for realisation of compensation. The suits were consolidated and Judge Keenan by his order dated 12th May, 1988, dismissed them on the ground of forum non conveniens, subject, inter alia, to the following conditions:

- 1) Union Carbide shall consent to submit to the jurisdiction of the Courts of India and shall continue to waive defences based on the statute of limitations, and
- 2) Union Carbide shall agree to satisfy any judgment rendered against it in an Indian Court, and if appealable, upheld by any appellate court in that country, whether such judgment and affirmance comport with the minimal requirements of due process.

5. The United States Court of Appeals for the Second Circuit by its decision of January 14, 1987, upheld the first condition and in respect of the second one stated:

In requiring that UCC consent to enforceability of an Indian judgment against it, the district court proceeded at least in part on the erroneous assumption that, absent such a requirement, the plaintiff's, if they should succeed in obtaining an Indian judgment against UCC, might not be able to enforce it against UCC in the United States. The law, however, is to the contrary. Under New York law, which governs actions brought in New York to enforce foreign judgments...foreign-country judgment that is final, conclusive and enforceable where rendered must be recognised and will be enforced as "conclusive between the parties to the extent that it grants or denies recovery of a sum of money" except that it is not deemed to be conclusive if:

- 1) The judgment was rendered under a system which does not provide impartial tribunals or procedures, compatible with the requirements of due process of law;
- 2) The foreign court did not have personal jurisdiction over the defendant.

6. After Judge Keenan made the order of 12th of May, 1986, in September of that year Union of India in exercise of its power under the Act filed a suit in the District

Court at Bhopal. In the plaint it was stated that death toll upto then was 2,660 and serious injuries had been suffered by several thousand persons and in all more than 5 lakh persons had sought damages upto then. But the extent and nature of the injuries or the aftereffect thereof suffered by victims of the disaster had not yet been fully ascertained though survey and scientific and medical studies had already been undertaken. The suit asked for a decree for damages for such amount as may be appropriate under the facts and the law and as may be determined by the Court so as to fully, fairly and finally compensate all persons and authorities who had suffered as a result of the disaster and were having claims against the UCC. It also asked for a decree for effective damages in an amount sufficient to deter the defendant and other multi-national corporations involved in business activities from committing wilful and malicious and wanton disregard of the rights and safety of the citizens of India. While the litigations were pending in the US Courts an offer of 350 million dollars had been made for settlement of the claim. When the dispute arising out of interim compensation ordered by the District Court of Bhopal came before the High Court, efforts for settlement were continued. When the High Court reduced the quantum of interim compensation from Rs. 350 crores to a sum of Rs. 250 crores, both UCC and Union of India challenged the decision of the High Court by filing special leave petitions. It is in these cases that the matter was settled by two orders dated 14th and 15th of February, 1989. On May 4, 1989, the Constitution Bench which had recorded the settlement proceeded to set out brief reasons on three aspects:

- (a) How did this Court arrive at the sum of 470 million US dollars for an overall settlement?
- (b) Why did the Court consider this sum of 470 million US dollars as 'just, equitable and reasonable'?
- (c) Why did the Court not pronounce on certain important legal questions of far-reaching importance said to arise in the appeals as to the principles of liability of monolithics, economically entrenched multi-national companies operating with inherently dangerous technologies in the developing countries of the third world - questions said to be of great contemporary relevance to the democracies of the third-world?

10. It is interesting to note that there has been no final adjudication in a mass tort action anywhere. The several instances which counsel for the parties placed before us were cases where compensation had been paid by consent or where settlement was reached either directly or through a circuitous process. Such an alternate procedure has been adopted over the years on account of the fact that trial in a case of this type would be protracted and may not yield any social benefit. Assessment of compensation in cases of this type has generally been by a rough and ready process.

In fact, every assessment of compensation to some extent is by such process and the concept of just compensation is an attempt to approximate compensation to the loss suffered. We have pointed out in our order of May 4, 1989, that 'the estimate in the very nature of things cannot share the accuracy of an adjudication'. I would humbly add that even an adjudication would only be an attempt at approximation.

13. The main foundation of the challenge was two-fold:

- (i) The criminal cases could not have been compounded or quashed and immunity against criminal action could not be granted; and
- (ii) the quantum of compensation settled was grossly low.

So far as the first aspect is concerned, the main judgment squarely deals with it and nothing more need be said. As far as the second aspect goes, the argument has been that the principle enunciated by this Court in *M.C. Mehta v. Union of India*, MANU/SC/0092/1986 : [1987]1SCR819 should have been adopted. The rule in *Rylands v. Fletcher* [1868] 3 HL 330 has been the universally accepted authority in the matter of determining compensation in tort cases of this type.

14. In *M.C. Mehta's* case no compensation was awarded as this Court could not reach the conclusion that *Shriram* (the delinquent company) came within the meaning of "State" in Article 12 so as to be liable to the discipline of Article 21 and to be subjected to a proceeding under Article 32 of the Constitution. Thus what was said essentially obiter.

15. The extracted part of the conservation from *M.C. Mehta's* case perhaps is a good guideline for working out compensation in the cases to which the ratio is intended to apply. The statement of the law *ex-fade* makes a departure from the accepted legal position in *Rylands v. Fletcher*. We have not been shown any binding precedent from the American Supreme Court where the ratio of *M.C. Mehta's* decision has in terms been applied. In fact *Bhagwati*, CJ clearly indicates in the judgment that his view is a departure from the law applicable to the western countries. guideline for working out compensation in the cases to which the ratio is intended to apply. The statement of the law *ex-fade* makes a departure from the accepted legal position in *Rylands v. Fletcher*. We have not been shown any binding precedent from the American Supreme Court where the ratio of *M.C. Mehta's* decision has in terms been applied. In fact *Bhagwati*, CJ clearly indicates in the judgment that his view is a departure from the law applicable to the western countries.

16. We are not concerned in the present case as to whether the ratio of *M.C. Mehta* should be applied to cases of the type referred to in it in India. We have to remain cognizant of the fact that the Indian assets of UCC through UCIL are around Rs. 100 crores or so. For any decree in excess of that amount, execution has to be taken in the

United States and one has to remember the observation of the U.S. Court of Appeals that the defence of due process would be available to be raised in the execution proceedings. The decree to be obtained in the Bhopal suit would have been a money decree and it would have been subject to the law referred to in the judgment of the U.S. Court of Appeals. If the compensation is determined on the basis of strict liability-a foundation different from the accepted basis in the United States-the decree would be open to attack and may not be executable.

17. If the litigation was to go on merits in the Bhopal Court it would have perhaps taken at least 8 to 10 years; an appeal to the High Court and a further appeal to this Court would have taken in all around another spell of 10 years with steps for expedition taken. We can, therefore, fairly assume that litigation in India would have taken around 20 years to reach finality. From 1986, the year when the suit was instituted, that would have taken us to the beginning of the next century and then steps would have been made for its execution in the United States. On the basis that it was a foreign judgment, the law applicable to the New York Court should have been applicable and the 'due process' clause would have become relevant. That litigation in the minimum would have taken some 8-10 years to be finalised. Thus, relief would have been available to the victims at the earliest around 2010. In the event the U.S. Courts would have been of the view that strict liability was foreign to the American jurisprudence and contrary to U.S. public policy, the decree would not have been executed in the United States and apart from the Indian assets of UCIL, there would have been no scope for satisfaction of the decree.

18. When dealing with this case this Court has always taken a pragmatic approach. The oft-quoted saying of the great American Judge that 'life is not logic but experience' has been remembered. Judges of this Court are men and their hearts also bleed when calamities like the Bhopal gas leak incident occur. Under the constitutional discipline determination of disputes has been left to the hierarchical system of Courts and this Court at its apex has the highest concern to ensure that Rule of Law works effectively and the cause of justice in no way suffers. To have a decree after struggling for a quarter of a century with the apprehension that the decree may be ultimately found not to be executable would certainly not have been a situation which this Court could countenance.

19. In the order of May 4, 1989, this Court had clearly indicated that it is our obligation to uphold the rights of the citizens and to bring to them a judicial fitment as available in accordance with the laws. There have been several instances where this Court has gone out of its way to evolve principles and make directions which would meet the demands of justice in a given situation. This, however, is not an occasion when such an experiment could have been undertaken to formulate the Mehta principle of strict liability at the eventual risk of ultimately losing the legal battle.

20. Those who have clamoured for a judgment on merit were perhaps not alive to this aspect of the matter. If they were and yet so clamoured, they are not true representatives of the cause of the victims, and if they are not, they were certainly misleading the poor victims. It may be right that some people challenging the settlement who have come before the Court are the real victims. I assume that they are innocent and unaware of the rigmarole of the legal process. They have been led into a situation without appreciating their own interest. This would not be the first instance where people with nothing as stake have traded in the misery of others.

24 . In the facts and circumstances indicated and for the reasons adopted by my noble brother in the judgment. I am of the view that the decree obtained on consent terms for compensation does not call for review.

25. I agree with the majority view.

M.N. Venkatachaliah, J.: On 14th February, 1989 this Court recorded an over-all settlement of the claims in the suit for 470 million U.S. Dollars and the consequential termination of all civil and criminal proceedings. The relevant portions of the order of this Court dated 14th February, 1989 provide:

- 1) The Union Carbide Corporation shall pay a sum of U.S. Dollars 470 millions (Four hundred and seventy Millions) to the Union of India in full settlement of all claims, rights and liabilities related to and arising out of the Bhopal Gas disaster.
- 2) The aforesaid sum shall be paid by the Union Carbide Corporation to the Union of India on or before 31st March, 1989.
- 3) To enable the effectuation of the settlement, all civil proceedings related to and arising out of the Bhopal Gas disaster shall hereby stand transferred to this Court and shall stand concluded in terms of the settlement, and all criminal proceedings related to and arising out of the disaster shall stand quashed wherever these may be pending.

A memorandum of settlement shall be filed before us tomorrow setting forth all the details of the settlement to enable consequential directions, if any, to issue.

30. The settlement is assailed in these Review Petitions and Writ Petitions on various grounds. The arguments of the petitioners in the case have covered a wide range and have invoked every persuasion-jurisdictional, legal, humanitarian and those based on considerations of public-policy. It is urged that the Union of India had surrendered the interests of the victims before the might of multinational cartels and that what are in issue in the case are matters of great moment to developing countries in general.

31 . Before we examine the grounds of challenge to the settlement we might, perhaps, refer to three events. The first is that the Central Bureau of Investigation, Government of India, brought criminal charges under Sections 304, 324, 326, 429 read with Section 35 of the Indian Penal Code against Mr. Warren Anderson, the then Chairman of the UCC and several other persons including some of the officers incharge of the affairs of the UCIL. On 7th December, 1984 Mr. Warren Anderson came to India to see for himself the situation at Bhopal. He was arrested and later released on bail. One of the points seriously urged in these petitions is the validity of the effect of the order of this Court which terminated those criminal proceedings.

The second event is that on 17th of November, 1986 the District Court at Bhopal, on the motion of the plaintiff- Union of India, made an order restraining the UCC by an interlocutory injunction, from selling its assets, paying dividends, buying back debts, etc. during the pendency of the suit. On 30th of November, 1986 the District Court vacated that injunction on the written assurance and undertaking dated 27th November 1986 filed by the UCC to maintain unencumbered assets of three billion U.S. Dollars. One of the points argued in the course of the hearing of these petitions is whether, in the event the order recording the settlement is reviewed and the settlement set aside, the UCC and UCIL would become entitled to the restitution of the funds that they deposited in Court pursuant to and in performance of their obligations under the settlement. The UCC deposited 420 million U.S. Dollars and the UCIL the rupee equivalent of 45 million U.S. Dollars. 5 million U.S. Dollars directed by Judge Keenan to be paid to the International Red Cross was given credit to. The petitioners urge that even after setting aside of the settlement, there is no compulsion or obligation to restore to the UCC the amounts brought into Court by it as such a step would prejudicially affect the interests of the victims. The other cognate question is whether, if UCC is held entitled to such restitution, should it not, as a pre-condition, be held to be under a corresponding obligation to restore and effectuate its prior undertaking dated 27th November 1987 to maintain unencumbered assets of three billion U.S. Dollars, accepting which the order dated 30th November, 1987 of the District Court Bhopal came to be made.

The third event is that subsequent to the recording of the settlement a Constitution Bench of this Court dealt with and disposed of writ-petitions challenging the constitutionality of the 'Act' on various grounds in what is known as Charanlal Sahu's case and connected matters. The Constitution Bench upheld its constitutionality and in the course of the Court's opinion Chief Justice Mukharji made certain observations as to the validity of the settlement and the effect of the denial of a right of being heard to the victims before the settlement, a right held to be implicit in Section 4 of the Act. Both sides have heavily relied on certain observations in that pronouncement in support of the rival submissions.

33. The contentions urged at the hearing in support of these petitions admit of the following formulations:

Contention (A): The proceedings before this Court were merely in the nature of appeals against an interlocutory order pertaining to the interim compensation. Consistent with the limited scope and subject-matter of the appeals, the main suits themselves could not be finally disposed of by the settlement. The Jurisdiction of this Court to withdraw or transfer a suit or proceeding to itself is exhausted by Article 139A of the Constitution. Such transfer implicit in the final disposal of the suits having been impermissible suits were not before the Court so as to be amenable to final disposal by recording a settlement. The settlement is, therefore, without jurisdiction.

Contention (B): Likewise the pending criminal prosecution was a separate and distinct proceeding unconnected with the suit from the interlocutory order in which the appeals before this Court arose. The criminal proceedings were not under or relatable to the 'Act'. The Court had no power to withdraw to itself those criminal proceedings and quash them. The orders of the Court dated 14th and 15th of February 1989, in so far as they pertain to the quashing of criminal proceedings are without jurisdiction.

Contention (C): The 'Court-assisted-settlement' was as between, and confined to, the Union of India on the one hand and UCC & UCIL on the other. The Original Suit No. 1113 of 1986 was really and in substance a representative suit for purposes and within the meaning of Order XXIII Rule 3B C.P.C. inasmuch as any order made therein would affect persons not economic parties to the suit. Any settlement reached without notice to the persons so affected without complying with the procedural drill of Order XXIII Rule 3B is a nullity. That the present suit is such a representative suit; that the order under review did affect the interests of third parties and that the legal effects and consequences of non-compliance with Rule 3B are attracted to case are concluded by the pronouncement of the Constitution Bench in Charanlal Sahu's case.

Contention (D): The termination of the pending criminal proceedings brought about by the orders dated 14th and 15th of February, 1989 is bad in law and would require to be reviewed and set aside on grounds that (i) if the orders are construed as permitting a compounding of offences, they run in the teeth of the statutory prohibition contained in Section 320(9) of the CrPC; (ii) if the orders are construed as permitting a withdrawal of the prosecution under Section 321 Cr. P.C. they would, again, be bad as violative of settled principles guiding withdrawal of prosecutions; and (iii) if the orders amounted to a quashing of the proceedings under Section 482 of the CrPC, grounds for such quashing did not obtain in the case.

Contention (E): The effect of the orders under review interdicting and prohibiting future criminal proceedings against any person or persons whatsoever in relation to or

arising out of the Bhopal Gas Leak Disaster, in effect and substance, amounts to conferment of an immunity from criminal proceedings. Grant of immunity is essentially a legislative function and cannot be made by a judicial act. At all events, grant of such immunity is opposed to public policy and prevents the investigation of serious offences in relation to this horrendous industrial disaster where UCC had inter-alia alleged sabotage as cause of the disaster. Criminal investigation was necessary in public interest not only to punish the guilty but to prevent any recurrence of such calamitous events in future.

Contention (F): The memorandum of settlement and the orders of the Court thereon, properly construed, make the inference inescapable that a part of the consideration for the payment of 470 million U.S. Dollars was the stifling of the criminal prosecutions which is opposed to public-policy. This vitiates the agreement on which the settlement is based for unlawfulness of the consideration. The consent order has no higher sanctity than the legality and validity of the agreement on which it rests.

Contention (G): The process of settlement of a mass tort action has its own complexities and that a "Fairness-Hearing" must precede the approval of any settlement by the court as fair, reasonable and adequate. In concluding that the settlement was just and reasonable the Court omitted to take into account and provide for certain important heads of compensation such as the need for and the costs of medical surveillance of a large section of population, which though symptomatic for the present was likely to become symptomatic later having regard to the character and the potentiality of the risks of exposure and the likely future damages resulting from long-term effects and to build-in a 'reopener' clause. The settlement is bad for not affording a fairness-hearing and for not incorporating a "re-opener" clause. The settlement is bad for not indicating appropriate break-down of the amount amongst the various classes of victim-groups. There were no criteria to go by at all to decide the fairness and adequacy of the settlement.

Contention (H): Even if the settlement is reviewed and set aside there is no compulsion or obligation to refund and restore to the UCC the funds brought in by it, as such restitution is discretionary and in exercising this discretion the interests of the victims be kept in mind and restitution denied. At all events, if restitution is to be allowed, whether UCC would not be required to act upon and effectuate its undertaking dated 27th November, 1986 on the basis of which order dated 30th November, 1986 of the Bhopal District Court Vacating the injunction against it was made.

Contention (I): Notice to the affected-person implicit in Section 4 of the Act was imperative before reaching a settlement and that as admittedly no such opportunity was given to the affected-person either by the Union of India before entering into the

settlement or by the Court before approving it, the settlement is void as violative of natural justice. Sufficiency of natural justice at any later stage cannot cure the effects of earlier insufficiency and does not bring life back to a purported settlement which was in its inception void. The observations of the Constitution Bench in Charanlal Sahu's case suggesting that a hearing was available at the review stage and should be sufficient compliance with natural justice, are mere obiter-dicta and do not alter the true legal position.

Point (j): Does the settlement require to be set aside and the Original Suit No. 1113 of 1986 directed to be proceeded with on the merits? If not, what other reliefs require to be granted and what other directions require to be issued?

Re: Contentions (A) and (B)

34. The contention articulated with strong emphasis is that the court had no jurisdiction to withdraw and dispose of the main suits and the criminal proceedings in the course of hearing of appeals arising out of an interlocutory order in the suits. The disposal of the suits would require and imply their transfer and withdrawal to this Court for which, it is contended, the Court had no power under law. It is urged that there is no power to withdraw the suits or proceedings de hors. Article 139A and the conditions enabling the application of Article 139A do not, admittedly, exist. It is, therefore, contended that the withdrawal of the suits, implicit in the order of their final disposal pursuant to the settlement, is a nullity. It is urged that Article 139A is exhaustive of the powers of the Court to withdraw suits or other proceedings to itself.

It is not disputed that Article 139A in terms does not apply in the facts of the case. The appeals were by special leave under Article 136 of the Constitution against an interlocutory order. If Article 139A exhausts the power of transfer or withdrawal of proceedings, then the contention has substance. But is that so?

This Court had occasion to point out that Article 136 is worded in the widest terms possible. It vests in the Supreme Court a plenary jurisdiction in the matter of

entertaining and hearing of appeals by granting special leave against any kind of judgment or order made by a Court or Tribunal in any cause or matter and the powers can be exercised in spite of the limitations under the specific provisions for appeal contained in the Constitution or other laws. The powers given by Article 136 are, however, in the nature of special or residuary powers which are exercisable outside the purview of the ordinary laws in cases where the needs of justice demand interference by the Supreme Court.

Any limited interpretation of the expression "cause or matter" having regard to the wide and sweeping powers under Article 136 which Article 142(1) seeks to effectuate, limiting it only to the short compass of the actual dispute before the Court

and not to what might necessarily and reasonably be connected with or related to such matter in such a way that their withdrawal to the Apex Court would enable the court to do "complete justice", would stultify the very wide constitutional powers. Take, for instance, a case where an interlocutory order in a matrimonial cause pending in the trial court comes up before the apex court. The parties agree to have the main matter itself either decided on the merits or disposed of by a compromise. If the argument is correct this Court would be powerless to withdraw the main matter and dispose it of finally even if it be on consent of both sides. Take also a similar situation where some criminal proceedings are also pending between the litigating spouses. If all disputes are settled, can the court not call up to itself the connected criminal litigation for a final disposal? If matters are disposed of by consent of the parties, can any one of them later turn around and say that the apex court's order was a nullity as one without jurisdiction and that the consent does not confer jurisdiction? This is not the way in which jurisdiction with such wide constitutional powers is to be construed. While it is neither possible nor advisable to enumerate exhaustively the multitudinous ways in which such situations may present themselves before the court where the court with the aid of the powers under Article 142(1) could bring about a finality to the matters, it is common experience that day-in-and-day- out such matters are taken up and decided in this Court. It is true that mere practice, however long, will not legitimize issues of jurisdiction. But the argument, pushed to its logical conclusions, would mean that when an interlocutory appeal comes up before this Court by special leave, even with the consent of the parties, the main matter cannot be finally disposed of by this Court as such a step would imply an impermissible transfer of the main matter. Such technicalities do not belong to the content and interpretation of constitutional powers.

To the extent power of withdrawal and transfer of cases to the apex court is, in the opinion of the Court, necessary for the purpose of effectuating the high purpose of Articles 136 and 142(1), the power under Article 139A, must be held not to exhaust

The power of withdrawal and transfer.

Article 139A it is relevant to mention here, was introduced as part of the scheme of the 42nd Constitutional Amendment. That amendment proposed to invest the Supreme Court with exclusive jurisdiction to determine the constitutional validity of central laws by inserting Articles 131A, 139A and 144A. But Articles 131A, and 144A were omitted by the 43rd Amendment Act 1977, leaving Article 139A intact. That article enables the litigants to approach the Apex-Court for transfer of proceedings if the conditions envisaged in that Article are satisfied. Article 139A was not intended, nor does it operate, to whittle down the existing wide powers under Article 136 and 142 of the Constitution.

We find absolutely no merit in this hypertechnical submission of the petitioners' learned Counsel. We reject the argument as unsound.

A similar ground is urged in support of contention [B] in relation to such withdrawal implicit in the quashing of the criminal proceedings. On the merits of the contention whether such quashing of the proceedings was, in the circumstances of the case, justified or not we have reached a decision on Contentions [D] and [E]. But on the power of the court to withdraw the proceedings, the contention must fail.

We, accordingly, reject both Contentions [A] and [B].

Re: Contention (D)

38. This concerns the validity of that part of the orders of the 14th and 15th of February, 1989 quashing and terminating the criminal proceedings. In the order dated 14th February 1989 Clause (3) of the order provides:

...and all criminal proceedings related to and arising out of the disaster shall stand quashed wherever these may be pending.

Para 3 of the order dated 15th February, 1989 reads:

Upon full payment of the sum referred to in paragraph 2 above:

(a) The Union of India and the State of Madhya Pradesh shall take all steps which may in future become necessary in order to implement and give effect to this order including but not limited to ensuring that any suits, claims or civil or criminal complaints which may be filed in future against any Corporation, Company or person referred to in this settlement are defended by them and disposed of in terms of this order.

(b) Any such suits, claims or civil or criminal proceedings filed or to be filed before any court or authority are hereby enjoined and shall not be proceeded with before such court or authority except for dismissal or quashing in terms of this order.

39. The two contentions of the petitioners, first, in regard to the legality and validity of the termination of the criminal proceedings and secondly, the validity of the protection or immunity from future proceedings, are distinct. They are dealt with also separately. The first - which is considered here - is in relation to the termination of pending criminal proceedings.

40. Petitioners' learned Counsel strenuously contend that the orders of 14th and 15th of February, 1989, quashing the pending criminal proceedings which were serious non-compoundable offences under Sections 304, 324, 326 etc. of the Indian Penal Code are not supportable either as amounting to withdrawal of the prosecution under Section 321 CrPC, the legal tests of permissibility of which are well settled or as

amounting to a compounding of the offences under Section 320 Criminal Procedure Code as, indeed, Sub-section (9) of Section 320 Cr. P.C. imposes a prohibition on such compounding. It is also urged that the inherent powers of the Court preserved under Section 482 Cr. P.C. could not be pressed into service as the principles guiding the administration of the inherent power could, by no stretch of imagination, be said to accommodate the present case. So far as Article 142(1) of the Constitution is concerned, it is urged, that the power to do "complete justice" does not enable any order "inconsistent with the express statutory provisions of substantive law, much less, inconsistent with any constitutional provisions" as observed by this Court in *Prem Chand Garg v. Excise Commissioner, U.P., Allahabad* MANU/SC/0082/1962 : [1963] 1 SCR 885.

41. Shri Nariman, however, sought to point out that in *Prem Chand Garg's* case the words of limitation of the power under Article 142(1) with reference to the "express statutory provisions of substantive law" were a mere obiter and were not necessary for the decision of that case. Shri Nariman contended that neither in *Garg's* case nor in the subsequent decision in *A.R. Antulay v. R.S. Nayak and Anr.* MANU/SC/0002/1988: 1988CriLJ1661 where the above observations in *Garg's* case were approved, any question of inconsistency with the express statutory provisions of substantive law arose and in both the cases the challenge had been on the ground of violation of fundamental rights. Shri Nariman said that the powers under Articles 136 and 142(1) are overriding constitutional powers and that while it is quite understandable that the exercise of these powers, however wide, should not violate any other constitutional provision, it would, however, be denying the wide sweep of these constitutional powers if their legitimate plenitude is whittled down by statutory provisions. Shri Nariman said that the very constitutional purpose of Article 142 is to empower the Apex Court to do complete justice and that if in that process the compelling needs of justice in a particular case and provisions of some law are not on speaking terms, it was the constitutional intentment that the needs of justice should prevail over a provision of law. Shri Nariman submitted that if the statement in *Garg's* case to the contrary passes into law it would wrongly alter the constitutional scheme. Shri Nariman referred to a number of decisions of this Court to indicate that in all of them the operative result would not strictly square with the provisions of some law or the other. Shri Nariman referred to the decisions of this Court where even non-compoundable offences were permitted to be compounded in the interests of complete justice; where even after conviction under Section 302 sentence was reduced to one which was less than that statutorily prescribed; where even after declaring certain taxation laws unconstitutional for lack of legislative competence this Court directed that the tax already collected under the void law need not be refunded etc. Shri Nariman also referred to the *Sanchaita* case. where this Court, having regard to the large issues of public interest involved in the matter, conferred the power of

adjudication of claims exclusively on one forum irrespective of jurisdictional prescriptions.

42. Learned Attorney General submitted that the matter had been placed beyond doubt in Antulay's case where the court had invoked and applied the dictum in Garg's case to a situation where the invalidity of a judicial-direction which, "was contrary to the statutory provision, namely Section 7(2) of the Criminal Law (Amendment) Act, 1952 and as such violative of Article 21 of the Constitution" was raised and the court held that such a direction was invalid. Learned Attorney General said that the power under Article 142(1) could not be exercised if it was against an express substantive statutory provision containing a prohibition against such exercise. This, he said, is as it should be because justice dispensed by the Apex Court also should be according to law.

The order terminating the pending criminal proceedings is not supportable on the strict terms of Sections 320 or 321 or 482 Cr. P.C. Conscious of this, Shri Nariman submitted that if the Union of India as the Dominus litis through its Attorney-General invited the court to quash the criminal proceedings and the court accepting the request quashed them, the power to do so was clearly referable to Article 142(1) read with the principle of Section 321 Cr. P.C. which enables the Government through its public-prosecutor to withdraw a prosecution. Shri Nariman suggested that what this Court did on the invitation of the Union of India as Dominus Litis was a mere procedural departure adopting the expedient of "quashing" as an alternative to or substitute for "withdrawal". There were only procedural and terminological departures and the Union of India as a party inviting the order could not, according to Shri Nariman, challenge the jurisdiction to make it, Shri Nariman submitted that the State as the Dominus Litis may seek leave to withdraw as long as such a course was not an attempt to interfere with the normal course of justice for illegal reasons.

43. It is necessary to set at rest certain misconceptions in the arguments touching the scope of the powers of this Court under Article 142(1) of the Constitution. These issues are matters of serious public importance. The proposition that a provision in any ordinary law irrespective of the importance of the public policy on which it is founded, operates to limit the powers of the Apex Court under Article 142(1) is unsound and erroneous. In both Garg's as well as Antulay's case the point was one of violation of constitutional provisions and constitutional rights. The observations as to the effect of inconsistency with statutory provisions were really unnecessary in those cases as the decisions in the ultimate analysis turned on the breach of constitutional rights. We agree with Shri Nariman that the power of the Court under Article 142 in so far as quashing of criminal proceedings are concerned is not exhausted by Sections 320 or 321 or 482 Cr. P.C. or all of them put together. The power under Article 142 is at an entirely different level and of a different quality.

Prohibitions or limitations or provisions contained in ordinary laws cannot, ipso facto, act as prohibitions or limitations on the constitutional powers under Article 142. Such prohibitions or limitations in the statutes might embody and reflect the scheme of a particular law, taking into account the nature and status of the authority or the court on which conferment of powers - limited in some appropriate way – is contemplated. The limitations may not necessarily reflect or be based on any fundamental considerations of public policy. Sri Sorabjee, learned Attorney-General, referring to Garg's case, said that limitation on the powers under Article 142 arising from "inconsistency with express statutory provisions of substantive law" must really mean and be understood as some express prohibition contained in any substantive statutory law. He suggested that if the expression 'prohibition' is read in place of 'provision' that would perhaps convey the appropriate idea. But we think that such prohibition should also be shown to be based on some underlying fundamental and general issues of public-policy and not merely incidental to a particular statutory scheme or pattern. It will again be wholly incorrect to say that powers under Article 142 are subject to such express statutory prohibitions. That would convey the idea that statutory provisions override a constitutional provision. Perhaps, the proper way of expressing the idea is that in exercising powers under Article 142 and in assessing the needs of "complete justice" of a cause or matter, the apex court will take note of the express prohibitions in any substantive statutory provision based on some fundamental principles of public-policy and regulate the exercise of its power and discretion accordingly. The proposition does not relate to the powers of the court under Article 142, but only to what is or is not 'complete justice' of a cause or matter and in the ultimate analysis of the propriety of the exercise of the power. No question of lack of jurisdiction or of nullity can arise.

Learned Attorney General said that Section 320 Criminal Procedure Code is "exhaustive of the circumstances and conditions under which composition can be effected." [See Sankar Rangayya v. Sankar Ramayya MANU/TN/0508/1915 : AIR 1916 Mad. 463 at 485 and that "the courts cannot go beyond a test laid down by the

Legislature for determining the class of offences that are compoundable and substitute one of their own." Learned Attorney General also referred to the following passage in Biswabahan v. Gopen Chandra MANU/SC/0096/1966 : 1967CriLJ828 :

If a person is charged with an offence, then unless there is some provision for composition of it the law must take its course and the charge enquired into resulting either in conviction or acquittal.

He said that "if a criminal case is declared to be non-compoundable, then it is against public policy to compound it, and any agreement to that end is wholly void in law." (See ILR 40 Cal. 113; and submitted that court "cannot make that legal which the law condemns". Learned Attorney-General stressed that the criminal case was an

independent matter and of great public concern and could not be the subject matter of any compromise or settlement. There is some justification to say that statutory prohibition against compounding of certain class of serious offences, in which larger social interests and social security are involved, is based on broader and fundamental considerations of public policy. But all statutory prohibitions need not necessarily partake of this quality. The attack on the power of the apex court to quash the crucial proceedings under Article 142(1) is ill-conceived. But the justification for its exercise is another matter.

44. The proposition that State is the dominus Litis in criminal cases, is not an absolute one. The society for its orderly and peaceful development is interested in the punishment of the offender. [See A.R. Antulay v. R.S. Nayak and Anr. MANU/SC/0082/1984 : 1984CriLJ647 , 509 and "If the offence for which a prosecution is being launched is an offence against the society and not merely an individual wrong, any member of the society must have locus to initiate a prosecution as also to resist withdrawal of such prosecution, if initiated." [See Sheonandan Paswan v. State of Bihar and Ors. [1987] 1 SCC 289.

But Shri Nariman put it effectively when he said that if the position in relation to the criminal cases was that the court was invited by the Union of India to permit the termination of the prosecution and the court consented to it and quashed the criminal cases, it could not be said that there was some prohibition in some law for such powers being exercised under Article 142. The mere fact that the word 'quashing' was used did not matter. Essentially, it was a matter of mere form and procedure and not of substance. The power under Article 142 is exercised with the aid of the principles of Section 321 Cr. P.C. which enables withdrawal of prosecutions. We cannot accept the position urged by the learned Attorney-General and learned Counsel for the petitioners that court had no power or jurisdiction to make that order. We do not appreciate Union of India which filed the memorandum of 15th February, 1989 raising the plea of want of jurisdiction.

But whether on the merits there were justifiable grounds to quash is a different matter. There must be grounds to permit a withdrawal of the Prosecution. It is really not so much a question of the existence of the power as one of justification for its exercise. A prosecution is not quashed for no other reason than that the Court has the power to do so. The withdrawal must be justified on grounds and principles recognised as proper and relevant. There is no indication as to the grounds and criteria justifying the withdrawal of the prosecution. The considerations that guide the exercise of power of withdrawal by Government could be and are many and varied. Government must indicate what those considerations are. This Court in State of Punjab v. Union of India MANU/SC/0218/1986 : 1987CriLJ151 said that in the matter of power to withdraw

prosecution the "broad ends of public justice may well include appropriate social, economic and political purposes". In the present case, no such endeavour was made. Indeed, the stand of the UCC in these review petitions is not specific as to the court to permit a withdrawal. Even the stand of the Union of India has not been consistent. On the question whether Union of India itself invited the order quashing the criminal cases, its subsequent stand in the course of the arguments in Sahu case as noticed by the court appears to have been this:

... The Government as such had nothing to do with the quashing of the criminal proceedings and it was not representing the victims in respect of the criminal liability of the UCC or UCIL to the victims. He further submitted that quashing of criminal proceedings was done by the Court in exercise of plenary powers under Articles 136 and 142 of the Constitution...

The guiding principle in according permission for withdrawal of a prosecution were stated by this Court in *M.N. Sankarayanan Nair v. P.V. Balakrishnan and Ors.* [1972] 2 SCC 599:

...Nevertheless it is the duty of the Court also to see in furtherance of justice that the permission is not sought on grounds extraneous to the interest of justice or that offences which are offences against the State go unpunished merely because the Government as a matter of general policy or expediency unconnected with its duty to prosecute offenders under the law, directs the public prosecutor to withdraw from the prosecution and the Public Prosecutor merely does so at the behest.

Learned Counsel for the petitioners submitted that the case involved the allegation of commission of serious offences in the investigation of which the society was vitally interested and that considerations of public interest, instead of supporting a withdrawal, indicate the very opposite.

The offences relate to and arise out of a terrible and ghastly tragedy. Nearly 4,000 lives were lost and tens of thousands of citizens have suffered injuries in various degrees of severity. Indeed at one point of time UCC itself recognized the possibility of the accident having been the result of acts of sabotage. It is a matter of importance that offences alleged in the context of a disaster of such gravity and magnitude should not remain uninvestigated. The shifting stand of the Union of India on the point should not by itself lead to any miscarriage of justice.

We hold that no specific ground or grounds for withdrawal of the prosecutions having been set out at that stage the quashing of the prosecutions requires to be set aside.

45. There is, however, one aspect on which we should pronounce. Learned Attorney-General showed us some correspondence pertaining to a letter Rogatory in the criminal investigation for discovery and inspection of the UCC's plant in the United States for purposes of comparison of the safety standards. The inspection was to be conducted during the middle of February, 1989. The settlement, which took place on the 14th of February, 1989, it is alleged, was intended to circumvent that inspection

we have gone through the correspondence on the point. The documents relied upon do not support such an allegation. That apart, we must confess our inability to appreciate this suggestion coming as it does from the Government of India which was a party to the settlement.

46. However, on Contention (D) we hold that the quashing and termination of the criminal proceedings brought about by the orders dated 14th and 15th February, 1989 require to be, and are, hereby reviewed and set aside.

Re: Contention (E)

47. The written memorandum setting out the terms of the settlement filed by the Union of India and the U.C.C. contains certain terms which are susceptible of being construed as conferring a general future immunity from prosecution. The order dated 15th February, 1989 provides in Clause 3[a] and 3[b]:

...that any suits, claims or civil or criminal complaints which may be filed in future against any Corporation, Company or person referred to in this settlement are defended by them and disposed of in terms of this order".

Any such suits, claims or civil or criminal proceedings filed or to be filed before any court or authority or hereby enjoined and shall not be proceeded with before such court or Authority except for dismissed or quashing in terms of this order.

These provisions, learned Attorney General contends, amount to conferment of immunity from the operation of the criminal law in the future respecting matters not already the subject matter of pending cases and therefore, partake of the character of a blanket criminal immunity which is essentially a legislative function. There is no power or jurisdiction in the courts, says learned Attorney-General, to confer immunity for criminal prosecution and punishment. Learned Attorney General also contends that grant of immunity to a particular person or persons may amount to a preferential treatment violative of the equality clause.

This position seems to be correct...

49. However, in view of our finding on contention (D) that the quashing of criminal proceedings was not justified and that the orders dated 14th and 15th of February, 1989 in that behalf require to be reviewed and set-aside, the present contention does not survive because as a logical corollary and consequence of such further directions as to future prosecutions earlier require to be deleted. We, therefore, direct that all portions in the orders of this Court which relate to the incompetence of any future prosecutions be deleted.

50. The effect of our order on Contentions [D] and [E] is that all portions of orders dated 14th and 15th February, 1989, touching the quashing of the pending prosecution as well as impermissibility of future criminal liability are set-aside. However, in so far

as the dropping of the proceedings in contempt envisaged by Clause (b) of para 4 of the order dated 15th February, 1989 is concerned, the same is left undisturbed.

Contention (E) is answered accordingly.

107. We might now sum up the conclusions reached, the findings recorded and directions issued on the various contentions:

- 1) The contention that the Apex Court had no jurisdiction to withdraw to itself the original suits pending in the District Court at Bhopal and dispose of the same in terms of the settlement and the further contention that, similarly, the Court had no jurisdiction to withdraw the criminal proceedings are rejected. It is held that under Article 142(1) of the Constitution, the Court had the necessary jurisdiction and power to do so. Accordingly, contentions (A) and (B) are held and answered against the petitioners.
- 2) The contention that the settlement is void for non-compliance with the requirements of Order XXIII Rule 3B, CPC is rejected. Contention (C) is held and answered against the petitioners.
- 3) The contention that the Court had no jurisdiction to quash the criminal proceedings in exercise of power under Article 142(1) is rejected. But, in the particular facts and circumstances, it is held that the quashing of the criminal proceedings was not justified. The criminal proceedings are, accordingly, directed to be proceeded with. Contention (D) is answered accordingly.
- 4) The orders dated 14th /15th of February, 1989 in so far as they seek to prohibit future criminal proceedings are held not to amount to a conferment of criminal immunity; but are held to be merely consequential to the quashing of the criminal proceedings. Now that the quashing is reviewed, this part of the order is also set aside. Contention (E) is answered accordingly.
- 5) The contention (F) that the settlement, and the orders of the Court thereon, are void as opposed to public policy and as amounting to a stifling of criminal proceedings is rejected.
- 6) Having regard to the scheme of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985, the incidents and imperatives of the American Procedure of 'Fairness Hearing' is not strictly attracted to the Court's sanctioning of a settlement. Likewise, the absence of a "Re-opener" clause does not, ipso facto, vitiate the settlement. Contention (G) is rejected.
- 7) It is held, per invitum, that if the settlement is set aside the UCC shall be entitled to the restitution of the US 420 million dollars brought in by it pursuant to the orders of this Court. But, such restitution shall be subject to the

compliance with and proof of satisfaction of the terms of the order dated 30th November 1986, made by the Bhopal District Court. Contention (H) is rejected subject to the condition aforesaid.

- 8) The settlement is not vitiated for not affording the victims and victim groups an opportunity of being heard. However, if the settlement-fund is found to be insufficient, the deficiency is to be made good by the Union of India as indicated in paragraph 72. Contention (I) is disposed of accordingly.
- 9) On point (J), the following findings are recorded and directions issued:
 - a) For an expeditious disposal of the claims a time-bound consideration and determination of the claims are necessary. Directions are issued as indicated in paragraph 77.
 - b) In the matter of administration and disbursement of the compensation amounts determined, the guide-lines contained in the judgment of the Gujarat High Court in *Muljibhai v. United India Insurance Co.*, are required to be taken into account and, wherever apposite, applied. Union of India is also directed to examine whether an appropriate scheme under the Unit Trust of India Act could be evolved for the benefit of the Bhopal victims.
 - c) For a period of 8 years facilities for medical surveillance of the population of the Bhopal exposed to MIC should be provided by periodical medical check-up. For this purpose a hospital with at least 500 beds strength, with the best of equipment and facilities should be established. The facilities shall be provided free of cost to the victims at least for a period of 8 years from now. The state Government shall provide suitable land free of cost.
 - d) In respect of the population of the affected wards, [excluding those who have filed claims], Government of India shall take out an appropriate medical group insurance cover from the Life Insurance Corporation of India or the General Insurance Corporation of India for compensation to those who, though presently symptomatic and filed no claims for compensation, might become symptomatic in future and to those later-born children who might manifest congenital or prenatal MIC related afflictions. There shall be no upper individual monetary limit for the insurance liability. The period of insurance shall be for a period of eight years in future. The number of persons to be covered by this group shall be about one lakh persons. The premia shall be paid out of the settlement fund.

- e) On humanitarian consideration and in fulfilment of the offer made earlier, the UCC and UCIL should agree to bear the financial burden for the establishment and equipment of a hospital, and its operational expenses for a period of eight years.

UNIT 6: NATIONAL GREEN TRIBUNAL

Techi Tagi Tara v. Rajendra Singh Bhandari & Ors, Supreme Court, Civil Appeal No. 1359/017, Judgement of 22 September 2017.

Madan B. Lokur J.: 1. This batch of appeals is directed against the judgment and order dated 24th August, 2016 passed by the National Green Tribunal, Principal Bench, New Delhi (for short ‘the NGT’) in Original Application No. 318 of 2013.1 On a reading of the judgment and order passed by the NGT, it is quite clear that the Tribunal was perturbed and anguished that some persons appointed to the State Pollution Control Boards (for short ‘SPCBs’) did not have, according to the NGT, the necessary expertise or qualifications to be members or chairpersons of such high powered and specialized statutory bodies and therefore did not deserve their appointment or nomination. While we fully commiserate with the NGT and share the pain and anguish, we are of the view that the Tribunal has, at law, exceeded its jurisdiction in directing the State Governments to reconsider the appointments and in laying down guidelines for appointment to the SPCBs, however well-meaning they might be. Therefore, we set aside the decision of the NGT, but note that a large number of disconcerting facts have been brought out in the judgment which need serious consideration by those in authority, particularly the State Governments that make appointments or nominations to the SPCBs. Such appointments should not be made casually or without due application of mind considering the duties, functions and responsibilities of the SPCBs.

13. Keeping all these facts and the recalcitrance of the State Governments in mind, the NGT examined the expertise and qualifications of members of the SPCB of almost all States and prima facie found that about ten States and one Union Territory had members in the SPCB who lacked the qualifications suggested by the Central Government.

14. At this stage, it must be mentioned that apart from the Central Government, there are several authorities that have applied their mind to the issue of appointment of members of the SPCBs. These include Expert Committees such as the Bhattacharya Committee of 1984, the Belliappa Committee of 1990, the Administrative Staff College of India Study of 1994 and a Committee chaired by Prof. M.G.K. Menon. Notwithstanding this, the response of the State Governments in appointing professionals and experts to the SPCBs has been remarkably casual. It is this chalta hai attitude that led the NGT to direct the State Governments to consider examining

the appointment of the Chairperson and members in the SPCBs and determining whether their appointment deserves continuation or cancellation. Thereafter the NGT gave several guidelines that ought to be followed in making appointments to the SPCBs.

15. The objection of the appellants is to: (i) the exercise of jurisdiction by the NGT in directing the State Governments to reconsider the appointment of the Chairperson and members of the SPCBs; and (ii) laying down guidelines for appointment of the Chairperson and members of the SPCBs.

16. As regard the first grievance, it is contended that the appointment or removal of members of the SPCBs does not lie within the statutory jurisdiction of the NGT. Our attention has been drawn to some provisions of the National Green Tribunal Act, 2010 (for short 'the Act')...This provision cannot be read in isolation but must be read in conjunction with Section 15 of the Act which relates to relief, compensation and restitution as being broadly the directions that can be issued by the NGT... Finally, it is important to refer to Section 2(m) of the Act...

17. On a combined reading of all these provisions, it is clear to us that there must be a substantial question relating to the environment and that question must arise in a dispute – it should not be an academic question. There must also be a claimant raising that dispute which dispute is capable of settlement by the NGT by the grant of some relief which could be in the nature of compensation or restitution of property damaged or restitution of the environment and any other incidental or ancillary relief connected therewith.

18. The appointment of the Chairperson and members of the SPCBs cannot be classified in any circumstance as a substantial question relating to the environment. At best it could be a substantial question relating to their appointment. Moreover, their appointment is not a dispute as one would normally understand it. In *Prabhakar v. Joint Director, Sericulture Department*⁸ the following 'definition' of dispute was noted in paragraphs 34 and 35 of the Report:

“34. To understand the meaning of the word “dispute”, it would be appropriate to start with the grammatical or dictionary meaning of the term:

“‘Dispute’.—to argue about, to contend for, to oppose by argument, to call in question — to argue or debate (with, about or over) — a contest with words; an argument; a debate; a quarrel;”

35. Black's Law Dictionary, 5th Edn., p. 424 defines “dispute” as under:

“Dispute.—A conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other. The subject of litigation; the matter for which a suit is brought and upon which issue is joined, and in relation to which jurors are called and witnesses examined.”

19. As far as we are concerned, in the context of the Act, a dispute would be the assertion of a right or an interest or a claim met by contrary claims on the other side. In other words, the dispute must be one of substance and not of form and it appears to us that the appointments that we are concerned with are not 'disputes' as such or even disputes for the purposes of the Act – they could be disputes for a constitutional court to resolve through a writ of quo warranto, but certainly not for the NGT to venture into. The failure of the State Government to appoint professional and experienced persons to key positions in the SPCBs or the failure to appoint any person at all might incidentally result in an ineffective implementation of the Water Act and the Air Act, but this cannot be classified as a primary dispute over which the NGT would have jurisdiction. Such a failure might be of a statutory obligation over which, in the present context and not universally, only a constitutional court would have jurisdiction and not a statutory body like the NGT. While we appreciate the anxiety of the NGT to preserve and protect the environment as a part of its statutory functions, we cannot extend these concepts to the extent of enabling the NGT to consider who should be appointed as a Chairperson or a member of any SPCB or who should not be so appointed.

20. Additionally, no relief as postulated by Section 15 of the Act could be granted to a claimant, assuming that a substantial question relating to the environment does arise and that a dispute does exist.

21. It appears to us that the NGT realized its limitations in this regard and therefore issued a direction to the State Governments to reconsider the appointments already been made, but the seminal issue is really whether the NGT could at all have entertained a claim of the nature that was raised. For reasons given above, the answer must be in the negative and it would have been more appropriate for the NGT to have required the claimant to approach a constitutional court for the relief prayed for in the original application. To this extent therefore, the direction given by the NGT must be set aside as being without jurisdiction. However, we have been told that some States have implemented the order of the NGT and removed some members while others have approached this Court and obtained an interim stay order. Those officials who were removed pursuant to the order of the NGT (including the appellant Techhi Tagi Tara) have an independent cause of action and we leave it open to them to challenge their removal in appropriate and independent proceedings. This is an issue between the removed official and the State Government - the removal is not a public interest issue and we cannot reverse the situation.

22. On the second grievance relating to the issue of guidelines by the NGT, the meat of the matter concerns the appointment of officials who are experts in their field and

are otherwise professional. This is for each State Government to consider and decide what is the right thing to do under the circumstances – should an unqualified or inexperienced person be appointed or should the SPCB be a representative but expert body? The Water Act and the Air Act as well as the Constitution give ample guidance in this regard. We have already adverted to the provisions of the Constitution including Article 48A, Article 51A(g) and Article 21 of the Constitution. So, the entire scheme of the various provisions of the

Constitution adverted to above, including the principles that have been accepted and adopted internationally as well as by this Court such as the principles of sustainable development, public trust and intergenerational equity are a clear indication that in matters relating to the protection and preservation of the environment (through the appointment of officials to the SPCBs) the Central Government as well as the State Governments have to walk the extra mile. Unfortunately, many of the State Governments have not even taken the first step in that direction – hence the present problem.

23. While it is beyond the jurisdiction of the NGT and also beyond our jurisdiction to lay down specific rules and guidelines for recruitment of the Chairperson and members of the SPCBs, we are of opinion that there should be considerable deliberation before an appointment is made and only the best should be appointed to the SPCB. It is necessary in this regard for the Executive to consider and frame appropriate rules for the appointment of such persons who would add lustre and value to the SPCB...

33. Keeping the above in mind, we are of the view that it would be appropriate, while setting aside the judgment and order of the NGT, to direct the Executive in all the States to frame appropriate guidelines or recruitment rules within six months, considering the institutional requirements of the SPCBs and the law laid down by statute, by this Court and as per the reports of various committees and authorities and ensure that suitable professionals and experts are appointed to the SPCBs. Any damage to the environment could be permanent and irreversible or at least long-lasting. Unless corrective measures are taken at the earliest, the State Governments should not be surprised if petitions are filed against the State for the issuance of a writ of quo warranto in respect of the appointment of the Chairperson and members of the SPCBs. We make it clear that it is left open to public spirited individuals to move the appropriate High Court for the issuance of a writ of quo warranto if any person who does not meet the statutory or constitutional requirements is appointed as a Chairperson or a member of any SPCB or is presently continuing as such.

***University of Delhi v. Ministry of Environment Forest and Climate
Change & Ors.***

***NGT Principal Bench, Appeal No. 112/2018
MANU/GT/0014/2021***

*[Coram: Adarsh Kumar Goel, J. (Chairperson),
Sheo Kumar Singh, J. (Member (J)) and Dr. Nagin Nanda, Member (E)]*

Background

[On 24.03.2000 the Ministry of Defence (MoD) upon the request of the Delhi Metro Rail Corporation (DMRC) considered to give NOC for acquisition of Defence lands in respect of four bungalows in Mall Road, Cavellary Lane and Chhatra Marg. Accordingly, by a Notification dated 2.05.2002 the MoD issued the NOC. The GNCTD by Notifications dated 15.12.2000 and 14.02.2001 issued under Section 4 and 6 of the Land Acquisition Act, 1894 notified that Bungalow No.1, 3 and 4 measuring a total area about 30512.16 Sq.m was acquired at the public expenses for a public purpose namely for Mass Rapid Transport System(MRTS). In 2003, the DDA vide its Resolution No. 19/2003 dated 28.03.2003 permitted DMRC to develop properties of area up to 3 ha., other than the recreational area, on the basis of 25% ground coverage and 100 FAR, without processing the change of land use. On 13.08.2008 DMRC gave two hectares of the land to M/s Young Builders Private Limited for a Group Housing Residential Project and accordingly a Lease Agreement for 90 years was executed between them for an amount of Rs. 218 Cr. Upon the representation of the University of Delhi, the Engineer Member Committee of the DDA constituted by Lt. Governor of Delhi on 27.04.2010 reported that construction of a high rise building of 8 storeys will amount to grave intervention on the ambience of the University and will add to a considerable traffic load on the two lane road of the University. Despite representations by the University of Delhi, the DDA on 12.05.2011 permitted the M/s Young Builders Private Limited to carry out construction as per the norms available to a group housing society under the MPD- 2021 without any height restriction and the 2 ha. plot leased out to the said builder be considered as a separate entity. On 23.03.2018 the State Environmental Impact Assessment Authority (SEIAA)-Delhi granted Environmental Clearance (EC) to the said Builders for construction of a group housing society of 4 towers/blocks consisting of 410 dwellings units with a total height of 139.6 meters S+G+37 floors. It was this EC which the University of Delhi Challenged before the Hon'ble NGT in 2018. The Hon'ble NGT was pleased to pass an interim order on 08.01.2020 directing to maintain status quo as on

the date and no further construction activity may be undertaken. Emphasizing on the Precautionary Principle, the Hon'ble NGT in said interim order held that "Applying the 'Precautionary Principle' of environmental law, we consider it necessary to require an evaluation of relevant data and not the old database by a joint Committee comprising representatives of the CPCB, MoEF&CC and IIT Delhi" (para No.4 of the said interim order). The Builders challenged the said interim order of the NGT before the Hon'ble Supreme Court in Civil Appeal No.341 of 2020. The Hon'ble Supreme Court was pleased to set aside the said interim order of the NGT on the ground that "the correctness of the environmental clearance dated 23.03.2018 the material relied upon will have to be taken note at the outset by the NGT even before requiring any other report....the counter affidavit along with the documents were available on record a detailed consideration was necessary and only thereafter if any further report was required by constituting a committee the same would have arisen" (para no.7 of Supreme Court Order dated 28.01.2020). The Hon'ble Supreme Court thus directed "The NGT shall take note of the counter affidavit and the documents of the appellant and consider the matter on its merits and pass orders in accordance with law" (para No.8 of the said Order). The Hon'ble NGT in compliance of the order of the Hon'ble Supreme Court listed the matter and passed an order on 03.02.2020, "Accordingly, while accepting prayer for adjournment, we direct that the project proponent may not proceed with any further activity till further consideration of the matter by this Tribunal." This Order of NGT was further challenged by the Builders before the Hon'ble Supreme Court in a Civil Appeal. The Hon'ble Supreme Court was pleased to direct amongst others "to examine various aspects including the viability of the Project without being influenced by any of the opinions expressed by the National Green Tribunal in the impugned order." (Order dated 10.06.2020, in Civil Appeal No.2485/2020, M/s Young Builders Private Ltd. v. University of Delhi & Ors.). It is in light of this background the present Order was pronounced by the Hon'ble NGT on 20.01.2021.]

1. This appeal has been preferred against the order of the State Environment Impact Assessment Authority (SEIAA), Delhi dated 23.03.2018, granting Environmental Clearance (EC) for "Group Housing Complex located at 1 and 3 Cavalry Lane and 4 Chhatra Marg at Civil Lines Delhi" by Young Builders (P) Ltd. The project is proposed on an area of 20,000 sq. m. with built up area of 1,17,733.81 sq. m. with four towers of 139.6m. height having 410 dwelling units. The total floors

proposed are S+G+37 with 31,740.26 sq. m. of basement area. The EC was earlier granted in 13.08.2012. An application was submitted for amendment of the EC on 12.02.2018. According to the appellant, as per requirement of notification dated 14.09.2006, prior to its amendment on 22.12.2014, the project was to be treated as Category A to be dealt with by MoEF&CC. To avoid such procedure, the project proponent prayed for treating the application as a new project after 20.12.2014. The SEIAA declared the earlier EC to be null and void and treated the application for amendment as a fresh application.

3. Vide interim order dated 8.01.2020, the Tribunal directed maintenance of status quo, pending further consideration and appointed a joint Committee to undertake carrying capacity study of the environment to determine viability of the project, having regard to the relevant data. In Civil Appeal No. 341/2020, filed against the said order, the Hon'ble Supreme Court, vide order dated 28.01.2020, set aside the order dated 08.01.2020 and remanded the matter to this Tribunal to first consider the merits of the case in the light of the material already on record and pass a fresh order. All contentions of the parties were left open.

4. Accordingly, after consideration of the material on record and the rival contentions, vide order dated 27.02.2020, the Tribunal held that *prima facie* the project did not appear to be viable. The Tribunal noted that the project was the tallest high rise building in the city with more than 37 floors, having 410 dwelling units, in the vicinity of educational institutions, hospital, Metro Station, the Northern Ridge and other heritage buildings. There was no due disclosure by the project proponent in Form-1 and Form-1A. There was also no application of mind by the State Expert Appraisal Committee (SEAC) and State Environment Impact Assessment Authority (SEIAA) while granting EC. The project was earlier wrongly treated as category B ignoring the 'general condition' appended to the EIA notification dated 14.9.2006. Evaluation of the category B-1 project, on fresh application, was without appraisal of the requisite carrying capacity in terms of air quality, noise level, traffic congestion and other environmental considerations. The building was located close to the Northern Ridge and the data of the air quality was not duly examined to assess the assimilative capacity with reference to Particulate Matter (PM) load and other data. The site in question was earlier a parking site for the Metro Station and once the group housing complex is set up, the parking will be on the public roads, adversely affecting the environment. There are other detailed reasons to which reference is not considered necessary for purposes of this order. Based on its conclusion, the Tribunal directed that the EC be suspended pending further consideration. A Committee was constituted to make an assessment as to the viability of the project.

5. In appeal against the above order, the Hon'ble Supreme Court dealt with the matter vide order dated 10.06.2020, in Civil Appeal No. 2485/2020, *M/s Young Builders Private Ltd. v. University of Delhi & Ors.* It was observed:

“(6) We direct the Committee to examine various aspects including the viability of the Project without being influenced by any of the opinions expressed by the National Green Tribunal in the impugned order. The appellant, University of Delhi and Delhi Metro Rail Corporation are at liberty to file their respective representation along with requisite documents before the Committee within the period of two weeks. The Committee before it starts its first deliberation shall afford an opportunity of preliminary hearing to the appellant, University of Delhi and Delhi Metro Rail Corporation. Likewise, the Committee shall also afford a further opportunity of hearing to the appellant, University of Delhi and Delhi Metro Rail Corporation before it submits its final report before the Tribunal.

(7) The Committee shall complete the deliberation and submit its final report within two months from the date of the representation being filed by the appellant and University of Delhi and Delhi Metro Rail Corporation. The Member Secretary, Central Pollution Control Board, shall coordinate and take necessary steps for convening the meeting of the Committee. The meeting of the Committee shall be conducted by virtual hearing, or video conferencing, and afford an opportunity of hearing to the representatives of the parties, mentioned above.

(8) After submission of the final report by the said Committee, the appellant, University of Delhi and Delhi Metro Rail Corporation are at liberty to raise all the contentions/points before the National Green Tribunal.

(9) Since we have directed the Committee to examine the issue without being influenced by any of the opinions expressed by the National Green Tribunal, it is not necessary to pass any further direction. The civil appeal is accordingly disposed of with the above direction and observation.”

6. The Committee, appointed in terms of order of this Tribunal dated 27.2.2020 and above order of the Hon'ble Supreme Court, has given its report dated 10.12.2020. Concluding part in the report is as follows:

“SUMMARY OBSERVATIONS ON VIABILITY OF THE PROJECT

The Hon'ble Supreme Court of India, vide its order dated June 10, 2020 directed the Committee to examine various aspects, including viability of the project. Accordingly, the proposed project was examined for compliance/approval status for statutory

requirements and an independent assessment of environmental and other impacts during the construction and occupancy phase was undertaken. Specifically, all environmental and other components, water, air, solid waste, traffic congestion, population density (representing impact on services), load on urban infrastructure, structural design adequacy have been examined.

It is observed that project proponents have obtained necessary approvals/clearances such as electric sub-station, water supply, sewerage scheme, storm water drainage scheme, Delhi fire services, Delhi urban arts commission, layout plan, tree removal/transport permission, etc. (Annexure IV).

To assess the impact on the environment, the incremental impact of the project was examined. It was then inferred if the impact was insignificant or otherwise in comparison to baseline status. The impact was examined in a grid of 2 km x 2 km (project site at the grid centre) as the maximum impact will be caused in the close vicinity of the project.

Air Pollution: An increase in emission was estimated as: 0.25% in CO, 0.09% in HC, and 0.1% in NO_x and insignificant in PM (particulate matter) during the construction and occupancy phase. The estimated incremental increase is insignificant to the baseline emissions.

Water Demand and Solid waste: An increase of 0.003% (of water demand in the grid) in the freshwater requirement, 0.002% in discharge of treated sewage into the municipal sewer, an increase of 1.27% in solid waste generation from the current generation in the grid was considered nominal.

Noise Pollution: No significant impact of noise on the environment is foreseen except during intermittent operation of the DG sets; however, the DG set will be compliant to CPCB noise norms for DG sets.

Traffic Congestion: An on-field traffic count, vehicle speed, volume and capacity of main roads was undertaken. Traffic volume to capacity ratio (V/C) and vehicle speed are two main parameters to assess the Level of Service (LoS) provided by the road. There was a marginal increase in volume to capacity ratio (ranging from 0.04 to 0.16), suggesting that the LoS was acceptable to even during peak traffic hours.

Population density: Timarpur ward is the largest ward in the grid and an incremental increase in the population was estimated in this ward. The estimated increase in the population density in the Timarpur ward will be 6777 persons per sq. km. The

percentage increment in the ward will be 14%. This increase is significant; however, tall residential buildings do give higher population density. This increase in density is not likely to impact the urban infrastructure/ services, as noted above.

Structural and Earthquake Resistance Design: (i) FORM 07 (Structural Stability Certificate) dated 04.07.2017 was submitted to North DMC along with building plan approval application by the proponent, (ii) STR certificate dated 10.01.2018 having the detailed structural stability certificate issued by the structural engineer, and (iii) A detailed foundation recommendation report of Prof. VS Raju, Ex. Director, IIT, Delhi dated 17.04.2018, were considered as views of experts for structural safety concerning earthquake.

The Committee members have suggested the following measures for implementation:

- *The project proponent must ensure that all necessary approvals have been obtained and are valid.*
- *It is noted that the project proponent has calculated the proposed STP capacity as 200 KLD based on the assumption of @ 4 persons per household. However, based on Census data, 2011, Delhi's average population density is @ 4.75 persons per household (range 4.6 – 4.9). Thus, the corresponding sewage generation of 225 KLD during the occupancy phase will exceed the*
- *proposed STP capacity. Therefore, the project proponent is advised to upgrade STP capacity to 225 KLD or restrict water supply so that peak sewage generation must not exceed 200 KLD.*
- *Considering that the project area is part of groundwater discharge zone, it is advised to restrict construction to only one underground basement and one stilt parking, instead of the proposed two. The parking plan may accordingly be revised and necessary approvals obtained.*
- *An undertaking may be submitted that no groundwater will be extracted during the construction phase.*
- *NOC may be obtained from the District Advisory Committee on Ground Water of Govt. of NCT Delhi before dewatering during construction.*
- *An inlet digital flow meter shall be installed at DJB freshwater supply line*
- *All environmental norms should be strictly adhered to during construction and occupancy phase of the project.*

In view of the impact analysis, the project seems viable as environmental impacts, including impact on traffic congestion and urban infrastructure/services, are minimal/nominal.

The viability of the project is contingent upon adequacy of the environment management plan submitted and adherence to the commitments made by project proponent and follow best practices. All EC conditions must be complied with at all times.”

7. The appellant has assailed the report by filing written submissions/objections to the report on 15.01.2021. Headings of the objections are:

- “1. Composition of Committee- Presence of Member who was party to granting of Impugned Prior Environmental Clearance is improper and is violative of the principle “nemo judex in causa sua”:*
- 2. Meeting not conducted in a transparent manner:*
- 3. Appellant was not informed of the field visit of the site made by the Committee:*
- 4. Credentials of the Site Visit team of the Committee is questionable:*
- 5. Non-compliance of the order dated 10.06.2020 of Hon’ble Supreme Court:*
- 6. Assessment done contrary to decision taken in the meeting held on 05.08.2020:*
- 7. Impact on population density is more significant than what is reported:*
- 8. Assumptions made for calculating vehicular pollution has no basis:*
- 9. Vehicles plying are considered to be petrol or CNG and not diesel for evaluating vehicular pollution without any basis.*
- 10. Inference with regards to Air Pollution is fictitious.*
- 11. Ambient PM Level of the area is already alarming.*
- 12. Traffic analysis based on wrong data*
- 13. Width of the roads not considered.*
- 14. No suggestions on Solid Waste Management including C&D waste as well as Hazardous Waste Management.*
- 15. Incomplete noise impact analysis.*
- 16. Location of the project viz-a-viz its surroundings have not been considered properly.*
- 17. No findings provided on the adverse effects of DG sets being Used.*
- 18. Change in layout and modification on basement and parking suggested due to impact on groundwater discharge zone - Consequential impact of suggestions not studied and moreover fresh EC would be required.*
- 19. Analysis of seismic stability has various shortcomings and Irregularities.*

20. *No clarity towards Ground Water Usage.*
21. *Colourable violation of Precautionary Principle.*
22. *No analysis of impact on the Ridge.*
23. *No analysis on critically polluted areas.*
24. *Contrary information submitted with regards to Najafgarh Drain.*
25. *Incorrectly notes distance with interstate border.*
26. *Factual Inaccuracies.*
27. *No consideration of the detailed written representation of Appellant sent to the Committee.*

8. Further, the appellant has submitted that following points raised by the Appellant before the Committee have not been considered:

“a. Objection towards the composition of the Committee comprising of Ms. Meenakshi Dhote on the grounds that she was already a member of the decision-making process of the impugned EC

b. Affidavit of Ministry of Defence dated 01.02.2019 filed before this Hon’ble Tribunal shows that the land where the project is proposed was illegally transferred by NCT Delhi to M/s Young Builders after changing the land use arbitrarily from ‘Public and Semi- Public’ purpose to ‘Residential’ purpose.

c. Letter dated 25.10.1943 of Joint Secretary states that no unseemly buildings shall be erected in the neighbourhood of Delhi University and that regulatory bodies should consult University of Delhi before building plans are approved.

d. Master Plan of Delhi 2021 under Clause 11.3 imposes restriction on tall buildings in North Delhi Campus area and Zonal Development Plan for Zone C under Clause 1.4.4 mandating preservation and the character and heritage of the campus.

e. Report dated 27.04.2010 of a Committee constituted by Lt. Governor of Delhi states that any intervention at the doorstep of Delhi University constructing high rise building of 8 stories or so will amount to grave intervention on ambience of the University and will add to traffic load of two lanes which will further affect the ambience of the campus.

f. Sub-Committee was constituted by SEAC vide letter dated 13.12.2011. One of the members expressed the view that project being adjacent to the University Campus will adversely affect the environment.

g. No study of AAQ status of the project and carrying capacity of the area in term of air quality has been considered. Form IA of Respondent No. 4 is ambiguous on these aspects.

h. Sample test report of M/s Young Builders shows AAQ to be beyond permissible limits

i. Increase in dust pollution during construction will be detrimental to hospitals such as VP Chest Institute.

j. Traffic in the two adjacent lanes is already high due to large movement of public including students from metro to respective institutions and residential and commercial areas.

k. As per DMRC website, ridership/footfall at the Vishwavidyalaya Metro is around 25,000 person and this increases during the time of admission.

l. The traffic Analysis report of 2011 cannot be relied upon for granting EC as it does not reflect the updated status.

m. Traffic load increase will create an unbearable burden on the Cavalry Lane and Chhatra Marg which are narrow lanes of 8.5 m and 10.8m respectively. Chhatra Marg is accident prone area and will increase hardship of differently able community as provided under the Report titled "The accessibility issues concerning persons with disabilities near the Vishwa Vidyalaya Metro Area.

n. Traffic analysis Report of 2018 cannot be relied upon due to few anomalies submitted such as it wrong estimates of road width of Cavalry lane and Chhatra Marg considered, Average Daily Traffic (ADT) is shown to be higher than shown in 2011 report however number of cars mentioned in 2011 report is more than 2018 which is not possible, among others.

o. Proposed project falls under silence zone and due to the sensitive location of the proposed project, which is of 140 meters height, adverse impact on noise will be very high. Faculty of Education, University of Delhi which is adjacent to the proposed site offers various courses and there are also student hostels and schools and a throwaway distance. Even according to the test report of Respondent No. 4 ambient noise levels are high

p. DJB's appraisal of waste requirement for the project is undervalued. Water requirement of University of Delhi is itself not fulfilled. This will exacerbate pressure on Groundwater.

q. Clearance by DJB given for 2,57,029 litres per day for 1,785 person which is 144 litres per person per day. This is far less than estimates contained in Delhi's Water

Policy 2016 which estimates that the same to be 160-225 litres. This is corroborated by Respondent No. 4 – M/s Young Builders in its own water balance study stating requirement to be 332 KLD. Further the water balance sheet represents demand of more quantity of water than what has been granted under the clearance by DJB. Therefore, the water pressure will shift to groundwater.

r. Groundwater of the project area is overexploited and is in semi-critical state, where no Groundwater can be drawn unless permission of CGWA is acquired.

s. Non-compliance of OM dated 10.11.2015 and 25.10.2017 in letter and spirit relating to various aspects such as socioeconomic impacts, energy requirement to minimize power and promote renewable energy, groundwater potential, alteration in natural slope, water balance chart, recommendation of CAG among others. For instance, only 1% of electrical load is submitted to be fulfilled from solar energy.

t. The dissent of two members for SEAC against the project has not been recorded.

u. Various shortcomings towards waste management such as on permission from SPCB under Solid Waste Management Rules 2016, no plan or details of STP, location of plant area required among others.

*v. Non consideration of lack of fire equipment with Delhi Fire Services for fighting high-rise buildings to deal with fire incidents and carrying out firefighting in congested, narrow arteries as noted by Hon'ble High Court in *Vikas Singh v. Lt. Governor and Others. Compliance with Guidelines for High-Rise Buildings dated 6 June 2013 is highly questionable. Clearance dated 08.09.2017 of Delhi Fires service not reliable as width of the road considered wrongly.**

*w. The Hon'ble High Court of Delhi has observed in *Arpit Bhargava & Anr. v. North Delhi Municipal Corporation & Ors.* that Delhi is not in state of readiness in terms of seismic structural stability of buildings.*

x. Geo-Technical Investigation Report of 2011 soil investigation report of 2011 cannot be relied upon for processing of EC.

y. There is no proof that the Soil investigation report of 2018 was presented to SEIAA. Further, the Foundation Report states that final excavation depth would be around 12m below existing ground level shows and would necessitate lowering of the ground water table. This shows that project is subject to liquefaction.

z. Letter dated 11.01.2020 of Civitech approving the Soil Investigation done on the site on 27.05.2009 issued to Respondent No. 4 which was filed before the Hon'ble Supreme Court has been suppressed before Hon'ble NGT.

aa. A total of 156 trees removed against the salient feature of Request of Proposal of DMRC. Out of agreed sampling plantation of 1560 plants only 780 have been reported to be planted and no information for the rest of them has been provided. Respondent No. 4 sought compensatory afforestation in his own private land which is not in norm under compensatory afforestation

bb. Proposed Construction will open a gateway or many more project in the vicinity.

cc. Project will hamper the privacy of women employees and women residing in women hostels adjacent to the proposed site.

dd. Concealment of facts by the project proponent under its Form I– Delhi University and Viceroy Buildings being adjacent to the proposed project, Najafgarh Drain being close distance to the proposed project.

ee. No analysis of carrying capacity of the area.”

9. The appellant has also filed objections to the affidavit filed by the project proponent on 08.01.2021 as follows:

“1. False statement regarding no impact on groundwater: In Para 'b' on Page 1599 of the affidavit, Respondent No. 4 has stated that the depth of the foundation would be 10.05m and there would be no adverse impact on the groundwater. This is contrary to the own report of Respondent No. 4 which states that the foundation level will actually be 13.05m and the Groundwater level will have to be lowered for any construction.

2. Application to District Advisory Committee on Ground Water not mutually exclusive to single basement: In its affidavit (Para iv at Page 1601), Respondent No. 4 contends that since it has filed an application for extraction of groundwater with the District Advisory Committee, the suggestion of the Committee on single basement should be ignored. If the District Advisory Committee gives its clearance, then there would not be any obstruction of the groundwater and hence two basements can be constructed. This is contrary to the suggestions of the Committee. The Committee has suggested that there should be a single basement and there should be an application to the District Advisory Committee. The said two tasks are not mutually exclusive. In any event, the application is contrary to the recommendation given by Prof Raju Consultants. The application is for lowering the water table level to 12.45m, whereas the report of Prof Raju Consultants recommends lowering it to 13.05m. Prof Raju Consultants Report notes the significant issues in dewatering and hence the Committee recommended a single basement.”

10. We further note that I.A. No. 14/2021 has been filed by the appellant to bring on record certain additional documents as follows:

- “3. xxx xxx xxx
*a. Notification dated 03.04.2008 of Government of NCT Delhi establishing that area falling within 100 meters of an educational institute among others will considered as a silence zone. annexed as **Annexure C.***
*b. Relevant pages of Zonal Development Plan for Zone – “C” - Civil Lines Zone approved by the Ministry of Urban Development (Delhi Division) vide letter dated 08.03.2010 annexed as **Annexure D.***
*c. Office Memorandum dated 06.06.2013 of MoEF&CC issuing Guidelines for High Rise Building annexed as **Annexure E.**”*

11. As against the above, the project proponent has also filed written submissions on 18.01.2021 responding to the written submissions of the appellant and supporting the report. We do not consider it necessary to reproduce the same in view of stand of the project proponent during the hearing noted in next para.

12. When we took up the matter for final consideration, learned Senior Counsel for the project proponent made a statement that as per his instructions, the project proponent has to apply for fresh EC to the MoEF&CC and the impugned EC will not be acted upon. Learned Counsel for the appellant states that if the impugned EC is not to be acted upon and the matter is to be considered afresh by the MoEF&CC on merits the appeal may be disposed of as infructuous, without prejudice to the rights to challenge the fresh EC which may be granted.

13. In view of above stand of the parties, it is no longer necessary for this Tribunal to go into the merits and express any final view about viability of the project or otherwise.

14. Accordingly, the appeal is disposed of as infructuous, without prejudice to the rights and remedies of the parties in accordance with law.

In view of order in the main appeal, all pending I.A.s will stand disposed of.

** A fresh EC was granted to the M/s Young Builders Private Limited on 21.05.2021 by the Ministry of Environment and Forest and Climate Change (MoEF & CC) which has been appealed/challenged by the University of Delhi before the Hon'ble National Green Tribunal in Appeal No. 17 of 2021. The hearing is concluded and order reserved.*

UNIT 7: PROTECTION AND CONSERVATION OF FORESTS, BIODIVERSITY AND WILDLIFE

Orissa Mining Corporation v Ministry of Environment and Forest, (2013)6 SCC 476

K.S. Panicker Radhakrishnan, J.:

3. M/s. Sterlite (parent company of Vedanta) filed an application on 19.3.2003 before MOEF for environmental clearance for the purpose of starting an Alumina Refinery Project (ARP) in Lanjigarh Tehsil of District Kalahandi, stating that no forest land was involved within an area of 10 kms. The 4th Respondent - Vedanta, in the meanwhile, had also filed an application on 6.3.2004 before this Court seeking clearance for the proposal for use of 723.343 ha of land (including 58.943 ha of reserve forest land) in Lanjigarh Tehsil of District Kalahandi for setting up an Alumina Refinery. Noticing that forest land was involved, the State of Orissa submitted a proposal dated 16.08.2004 to the MoEF for diversion of 58.90 hectare of forest land which included 26.1234 hectare of forest land for the said ARP and the rest for the conveyor belt and a road to the mining site. The State of Orissa, later, withdrew that proposal. The MoEF, as per the application submitted by M/s. Sterlite, granted environmental clearance on 22.9.2004 to ARP on 1 million tonne per annum capacity of refinery along with 75 MW coal based CPP at Lanjigarh on 720 hectare land, by delinking it with the mining project. Later, on 24.11.2004, the State of Orissa informed MOEF about the involvement of 58.943 ha of forest land in the project as against "NIL" mentioned in the environmental clearance and that the Forest Department of Orissa had, on 5.8.2004, issued a show-cause-notice to 4th Respondent for encroachment of 10.41 acres of forest land (out of 58.943 ha for which FC clearance proposal was sent) by way of land breaking and leveling.

10. MOEF, later, considered the request of the State of Orissa dated 28.2.2005 seeking prior approval of MOEF for diversion of 660.749 ha of forest land for mining of bauxite ore in Lanjigarh Bauxite Mines in favour of OMC, in accordance with Section 2 of the Forest (Conservation) Act, 1980. MOEF, after considering the proposal of the State Government and referring to the recommendations of FAC dated 27.10.2006, agreed in principle for diversion of the above-mentioned forest land...

11. MoEF then granted environmental clearance to OMC vide its proceedings dated 28.04.2009 subject to various conditions including the following conditions:

(iii) Environmental clearance is subject to grant of forestry clearance. Necessary forestry clearance under the Forest (Conservation) Act, 1980 for diversion of 672.018 ha forest land involved in the project shall be obtained before starting mining operation in that area. No mining shall be undertaken in the forest area without obtaining requisite prior forestry clearance.

15. The recommendations of the FAC dated 23.8.2010 and Saxena Committee report were considered by MOEF and the request for Stage-II Clearance was rejected on 24.8.2010, stating as follows:

VIII. Factors Dictating Decision on Stage-II Clearance

I have considered three broad factors while arriving at my decision.

1. The Violation of the Rights of the Tribal Groups including the Primitive Tribal Groups and the Dalit Population.

The blatant disregard displayed by the project proponents with regard to rights of the tribals and primitive tribal groups dependant on the area for their livelihood, as they have proceeded to seek clearance is shocking. Primitive Tribal Groups have specifically been provided for in the Forest Rights Act, 2006 and this case should leave no one in doubt that they will enjoy full protection of their rights under the law. The narrow definition of the Project Affected People by the State Government runs contrary to the letter and spirit of the Forest Rights Act, 2006. Simply because they did not live on the hills does not mean that they have no rights there. The Forest Rights Act, 2006 specifically provides for such rights but these were not recognized and were sought to be denied.

Moreover, the fate of the Primitive Tribal Groups need some emphasis, as very few communities in India in general and Orissa in particular come under the ambit of such a category. Their dependence on the forest being almost complete, the violation of the specific protections extended to their "habitat and habitations" by the Forest Rights Act, 2006 are simply unacceptable.

This ground by itself has to be foremost in terms of consideration when it comes to the grant of forest or environmental clearance. The four-member committee has highlighted repeated instances of violations.

One also cannot ignore the Dalits living in the area. While they may technically be ineligible to receive benefits under the FRA 2006, they are such an inextricable part of the society that exists that it would be impossible to disentitle them as they have been present for over five decades. The Committee has also said on p.40 of their

report that "even if the Dalits have no claims under the FRA the truth of their de facto dependence on the Niyamgiri forests for the past several decades can be ignored by the central and state governments only at the cost of betrayal of the promise of inclusive growth and justice and dignity for all Indians". This observation rings true with the MoE&F and underscores the MoE&F's attempt to ensure that any decision taken is not just true to the law in letter but also in spirit.

2. Violations of the Environmental Protection Act 1986:

(i) Observations of the Saxena Committee and MoE&F Records:

In addition to its findings regarding the settlement of rights under the FRA 2006, the four-member Committee has also observed, with reference to the environmental clearance granted for the aluminum refinery, on p.7 of its Report dated 16th August 2010 that:

The company/s Vedanta Alumina Limited has already proceeded with construction activity for its enormous expansion project that would increase its capacity six fold from 1 Mtpa to 6 Mtpa without obtaining environmental clearance as per the provisions of EIA Notification, 2006 under the EPA. This amounts to a serious violation of the provisions of the Environment (Protection) Act. This expansion, its extensive scale and advanced nature, is in complete violation of the EPA and is an expression of the contempt with which this company treats the laws of the land.

I have reviewed the records of the MoE&F and have found no documentation which establishes such activity to have been granted clearance. Nor is there any evidence to suggest that such requirement was waived by the Ministry. The TORs for the expansion of the project from 1 million tones to 6 million tones were approved in March 2008. No further right has been granted in any form by the Ministry to the project proponents to proceed with the expansion. While any expansion without prior EC is a violation of the EIA Notification/EPA 1986 this, itself, is not a minor expansion and is therefore a most serious transgression of the EPA 1986.

There also appear to have been other acts of violation that emerge from a careful perusal of the evidence at hand. This is not the first act of violation. On March 19th, 2003 M/s. Sterlite filed an application for environmental clearance from the MoE&F for the refinery. In the application it was stated that no forest land is involved in the project and that there was no reserve forest within a radius of 10 kms of the project site.

Thereafter on September 22nd, 2004, environment clearance was granted by the MoE&F for the refinery project. While granting the environmental clearance, the MoE&F was unaware of the fact that the application for forest clearance was also

pending since the environmental clearance letter clearly stated that no forest land was involved in the project. In March 2005, in proceedings before itself, the Central Empowered Committee (CEC) too questioned the validity of the environmental clearance granted by the MoE&F and requested the Ministry to withhold the forest clearance on the project till the issue is examined by the CEC and report is submitted to the Hon'ble Supreme Court.

(ii) Case before the MEAA by the Dongaria Kondhs:

After the grant of Environment Clearance, the local tribals and other concerned persons including the Dongaria Kondhs challenged the project before the National Environment Appellate Authority (NEAA). [Kumati Majhi and Ors. v. Ministry of Environment and Forest, Srabhu Sikka and Ors. v. Ministry of Environment and Forests, R. Sreedhar v. Ministry of Environment and Forest, Prafulla Samantara v. Ministry of Environment and Forests and Ors. Appeal No. 18, 19, 20 and 21 of 2009].

It is brought to my attention that this is the first time that the Dongaria Kondha have directly challenged the project in any Court of law. The Appeals highlighted the several violations in the Environmental Clearance process. Some of the key charges raised were that the full Environmental Impact Assessment Report was not made available to the Public before the public hearing, different EIA reports made available to the public and submitted to the Ministry of Environment and Forests, the EIA conducted was a rapid EIA undertaken during the monsoon months. The matter is reserved for judgment before the NEAA.

(iii) Monitoring Report of the Eastern Regional Office dated 25th May, 2010:

On 25th May 2010, Dr. VP Upadhyay (Director 'S') of the Eastern Regional Office of the Ministry of Environment and Forests submitted his report to the MoE&F which listed various violations in para 2 of the monitoring report. They observed:

- a) M/s. Vedanta Alumina Limited has already proceeded with construction activity for expansion project without obtaining environmental clearance as per provisions of EIA Notification 2006 that amounts to violation of the provisions of the Environment (Protection) Act.
- b) The project has not established piezometers for monitoring of ground water quality around red mud and ash disposal ponds; thus, the condition No. 5 of Specific Condition of the clearance letter is being violated.
- c) The condition No. ii of General Condition of environmental clearance has been violated by starting expansion activities without prior approval from the Ministry. Furthermore all bauxite for the refinery was to be sourced from mines which have already obtained environmental clearance. The Report listed 14 mines from which Bauxite was being sourced by the project proponents.

However out of these 11 had not been granted a mining license while 2 had only received TORs and only 1 had received clearance.

3. Violations under the Forest Conservation Act:

The Saxena Committee has gone into great detail highlighting the various instances of violations under the Forest (Conservation) Act 1980. All these violations coupled with the resultant impact on the ecology and biodiversity of the surrounding area further condemn the actions of the project proponent. Not only are these violations of a repeating nature but they are instances of willful concealment of information by the project proponent.

IX. The Decision on Stage-II Clearance

The Saxena Committee's evidence as reviewed by the FAC and read by me as well is compelling. The violations of the various legislations, especially the Forest (Conservation) Act, 1980, the Environment (Protection) Act, 1986, and the Scheduled Tribes and Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, appear to be too egregious to be glossed over. Furthermore, a mass of new and incriminating evidence has come to light since the Apex Court delivered its judgment on August 8th, 2008. Therefore, after careful consideration of the facts at hand, due deliberation over all the reports submitted and while upholding the recommendation of the FAC, I have come to the following conclusions:

- 1) The Stage II forest clearance for the OMC and Sterlite bauxite mining project on the Niyamgiri Hills in Lanjigarh, Kalahandi and Rayagada districts of Orissa cannot be granted. Stage-II Forest Clearance therefore stands rejected.
- 2) Since forest clearance is being rejected, the environmental clearance for this mine is inoperable.
- 3) It appears that the project proponent is sourcing bauxite from a large number of mines in Jharkhand for the one million tonne alumina refinery and are not in possession of valid environmental clearance. This matter is being examined separately.
- 4) Further, a show-cause notice is being issued by the MOE&F to the project proponent as to why the environmental clearance for the one million tonnes per annum alumina refinery should not be cancelled.
- 5) A show-cause notice is also being issued to the project proponent as to why the terms of reference (TOR) for the EIA report for the expansion from one million tones to six million tones should not be withdrawn. Meanwhile, the TOR and the appraisal process for the expansion stands suspended.

Separately the MoE&F is in the process of examining what penal action should be initiated against the project proponents for the violations of various laws as documented exhaustively by the Saxena Committee.

On the issues raised by the Orissa State Government, I must point out that while customary rights of the Primitive Tribal Groups are not recognized in the National Forest Policy, 1988 they are an integral part of the Forest Rights Act, 2006. An Act passed by Parliament has greater sanctity than a Policy Statement. This is apart from the fact that the Forest Rights Act came into force eighteen years after the National Forest Policy. On the other points raised by the State Government officials, on the procedural aspects of the Forest Rights Act, 2006, I expect that the joint Committee set up by the MoE&F and the Ministry of Tribal Affairs would give them due consideration. The State Government officials were upset with the observations made by the Saxena Committee on their role in implementing the Forest Rights Act, 2006. Whether State Government officials have connived with the violations is a separate issue and is not relevant to my decision. I am prepared to believe that the State Government officials were attempting to discharge their obligations to the best of their abilities and with the best of intentions. The State Government could well contest many of the observations made by the Saxena Committee. But this will not fundamentally alter the fact that serious violations of various laws have indeed taken place.

The primary responsibility of any Ministry is to enforce the laws that have been passed by Parliament. For the MoE&F, this means enforcing the Forest (Conservation) Act, 1980, the Environmental (Protection) Act, 1986, the Scheduled Tribes and Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and other laws. It is in this spirit that this decision has been taken.

The order dated 24.8.2010 was communicated by MOEF to the State of Orissa vide its letter dated 30.8.2010, the legality of those orders are the subject matter of this writ petition.

16. Shri K.K. Venugopal, learned senior counsel appearing for OMC, referred to the earlier judgments of this Court in Vedanta as well as Sterlite and submitted that those judgments are binding on the parties with regard to the various questions raised and decided and also to the questions which ought to have been raised and decided. Learned senior counsel also pointed out that MOEF itself, after the above mentioned two judgments, had accorded Stage-I clearance vide its proceeding dated 11.12.2008 and that the State of Orissa vide its letter dated 10.8.2009 had informed MOEF of the compliance of the various conditions stipulated in the Stage-I clearance dated 11.12.2008. Consequently, there is no impediment in the MOEF granting Stage- II clearance for the project. Learned senior counsel also submitted that the reasons stated

by the FAC as well as the Saxena Committee are all untenable and have nothing to do with Bauxite Mining Project (BMP) undertaken by OMC. Learned senior counsel also submitted that the constitution of, initially, a 3-Member Committee and, later, a 4-Member Committee, was intended only to cancel the Stage-I clearance granted to the BMP in compliance with the judgment of this Court. Learned Counsel also pointed out that the claim under the Forest Rights Act was also raised by Sidharth Nayak through a review petition, which was also rejected by this Court on 7.5.2008. Consequently, it would not be open to the parties to again raise the issues which fall under the Forest Rights Act.

17. Shri C.A. Sundaram, learned senior counsel appearing for the State of Orissa, submitted that various reasons stated by the MOEF for rejecting the Stage-II clearance are unsustainable in law as well as on facts. Learned senior counsel pointed out that reasons stated by the Saxena Committee as well as MOEF alleging violation of the Environmental Protection Act, 1986, are totally unrelated to the BMP. Learned senior counsel pointed out that Alumina Refinery is an independent project and the violation, if any, in respect of the same ought not to have been relevant criteria for the consideration of the grant of Stage-II clearance to the BMP, being granted to OMC. Referring to the Monitoring Report of Eastern Regional Office dated 25.5.2010, learned senior counsel pointed out that the findings recorded in that report are referable to 4th Respondent and not to the mining project granted to OMC. Learned senior counsel also submitted that Saxena Committee as well as MOEF has committed a factual error in taking into account the alleged legal occupation of 26.123 ha of village forest lands enclosed within the factory premises which has no connection with regard to the mining project, a totally independent project. Learned senior counsel also submitted that in the proposed mining area, there is no human habitation and that the individual habitation rights as well as the Community Forest Resource Rights for all villages located on the hill slope of the proposed mining lease area, have already been settled. Learned senior counsel also pointed out that the Gram Sabha has received several individual and community claims from Rayagada and Kalahandi Districts and they have settled by giving alternate lands.

18. Shri Sundaram also submitted that the Forest Rights Act deals with individual and community rights of the Tribals which does not, in any manner, expressly or impliedly, make any reference to the religious or spiritual rights protected under Articles 25 and 26 of the Constitution of India and does not extend to the property rights. Learned senior counsel also submitted that the State Government continues to maintain and have ownership over the minerals and deposits beneath the forests and such rights have not been taken away by the Forest Rights Act and neither the Gram Sabha nor the Tribals can raise any ownership rights on minerals or deposits beneath the forest land.

19. Shri C.U. Singh, learned senior counsel appearing for the 3rd Respondent - Sterlite, submitted that various grounds stated in Saxena report as well as in the order of MOEF dated 24.8.2010, were urged before this Court when Vedanda and Sterlite cases were decided and, it was following those judgments, that MOEF granted Stage-I approval on 11.12.2008 on the basis of the recommendation of FAC. In compliance of the Stage-I clearance accorded by MOEF, SPV (OMC and Sterlite) undertook various works and completed, the details of the same have been furnished along with the written submissions filed on 21.1.2013. Learned senior counsel submitted that the attempt of the MOEF is to confuse the issue mixing up the Alumina Refinery Project with that of the Bauxite Mining Project undertaken by Sterlite and OMC through a SPV. The issues relating to expansion of refinery and alleged violation of the Environmental Protection Act, 1986, the Forest Conservation Act, 1980 etc. have nothing to do with the mining project undertaken by OMC and Sterlite. Learned senior counsel, therefore, submitted that the rejection of the Stage-II clearance by MOEF is arbitrary and illegal.

20. Shri Mohan Parasaran, Solicitor General of India, at the outset, referred to the judgment of this Court in Sterlite and placed considerable reliance on para 13 of the judgment and submitted that while granting clearance by this Court for the diversion of 660.749 ha of forest land to undertake bauxite mining in Niyamgiri hills, left it to the MOEF to grant its approval in accordance with law. Shri Parasaran submitted that it is in accordance with law that the MOEF had constituted two Committees and the reports of the Committees were placed before the FAC, which is a statutory body constituted under Section 3 of the Forest Conservation Act. It was submitted that it was on the recommendation of the statutory body that MOEF had passed the impugned order dated 24.8.2010. Further, it was pointed out that, though MOEF had granted the Stage-I clearance on 11.12.2008, it can still examine as to whether the conditions stipulated for the grant of Stage-I clearance had been complied with or not. For the said purpose, two Committees were constituted and the Saxena Committee in its report has noticed the violation of various conditions stipulated in the Stage-I clearance granted by MOEF on 11.12.2008. Shri Parasaran also submitted that the Petitioner as well as 3rd Respondent have also violated the provisions of the Forest Rights Act, the violation of which had been specifically noted by the Saxena Committee and accepted by MOEF. Referring to various provisions of the Forest Rights Act under Section 3.1(i), 3.1(e) and Section 5 of the Act, it was submitted that concerned forest dwellers be treated not merely as right holders as statutory empowered with the authority to protect the Niyamgiri hills. Shri Parasaran also pointed out that Section 3.1(e) recognizes the right to community tenures of habitat and habitation for "primitive tribal groups" and that Dongaria Kondh have the right to grazing and the collection of mineral forest of the hills and that they have the

customary right to worship the mountains in exercise of their traditional rights, which would be robbed of if mining is permitted in Niyamgiri hills.

21. Shri Raj Panjwani, learned senior counsel appearing for the applicants in I.A. Nos. 4 and 6 of 2012, challenged the environmental clearance granted to OMC on 28.4.2009 by MOEF before the National Environment Appellate Authority (NEAA) under Section 4(1) of the NEAA Act, 1997, by filing Appeal Nos. 20 of 2009 and 21 of 2009 before NEAA. NEAA vide its order dated 15.5.2010 allowed the appeals and remitted the matter to MOEF to revisit the grant of environmental clearance to OMC on 28.4.2009. Later, MOEF by its order dated 11.7.2011 has withdrawn the environmental clearance dated 28.4.2009 granted in favour of OMC and that OMC, without availing of the statutory remedy of the appeal, filed I.A. No. 2 of 2011 in the present writ petition.

22. Shri Sanjay Parekh, learned Counsel appearing for the applicants in I.A. Nos. 5 and 6 of 2011, referred to the various provisions of the Forest Rights Act and the Rules and submitted that the determination of rights of scheduled tribes (STs)/other traditional forest dwellers (TFDs) have to be done by the Gram Sabha in accordance with the machinery provided under Section 6 of the Act. Learned Counsel also submitted that the forest wealth vests in the STs and other TFDs and can be diverted only for the purpose mentioned in Section 3(3). learned Counsel also referred to the Saxena Committee report and submitted that the report clearly reveals the community rights as well as the various rights and claims of the primitive traditional forest dwellers. Learned Counsel also submitted that if the mining is undertaken in Niyamgiri hills, it would destroy more than 7 sq. Km. of undisturbed forest land on the top of the mountain which is the abode of the Dongaria Kondh and their identity depends on the existence of Niyamgiri hills.

Judicial Evaluation

23. We may, at the outset, point out that there cannot be any doubt that this Court in Vedanta case had given liberty to Sterlite to move this Court if they were agreeable to the "suggested rehabilitation package" in the order of this Court, in the event of which it was ordered that this Court might consider granting clearance to the project, but not to Vedanta. This Court in Vedanta case had opined that this Court was not against the project in principle, but only sought safeguards by which the Court would be able to protect the nature and sub-serve development.

24. The Sterlite, State of Orissa and OMC then unconditionally accepted the terms and conditions and modalities suggested by this Court in Vedanta under the caption "Rehabilitation Package" and they moved this Court by filing I.A. No. 2134 of 2007 and this Court accepted the affidavits filed by them and granted clearance to the

diversion of 660.749 ha of forest land to undertake the bauxite mining in Niyamgiri Hills and ordered that MOEF would grant its approval in accordance with law.

25. MOEF, then considered the proposal of the State Government made under Section 2 of the Forest (Conservation) Act, 1980 and also the recommendations of the FAC and agreed in principle for the diversion of 660.749 ha of forest land for mining of bauxite ore in Lanjigarh Bauxite Mines in favour of OMC, subject to 21 conditions vide its order 11.12.2008. One of the conditions was with regard to implementation of the Wildlife Management Plan (WMP) suggested by WII and another was with regard to the implementation of all other provisions of different Acts, including environmental clearance, before the transfer of the forest land. Further, it was also ordered that after receipt of the compliance report on fulfilment of the 21 conditions from the State of Orissa, formal approval would be issued under Section 2 of the Forest (Conservation) Act, 1980.

26. MOEF examined the application of the OMC for environmental clearance under Section 12 of the EIA Notification, 2006 read with para 2.1.1(i) of Circular dated 13.10.2006 and accorded environmental clearance for the "Lanjigarh Bauxite Mining Project" to OMC for an annual production capacity of 3 million tonnes of bauxite by opencast mechanized method involving total mining lease area of 721.323 ha, subject to the conditions and environmental safeguards, vide its letter dated 28.4.2009. 32 special conditions and 16 general conditions were incorporated in that letter. It was ordered that failure to comply with any of the conditions might result in withdrawal of the clearance and attract action under the provisions of the Environment Protection Act, 1986. It was specifically stated that the environmental clearance would be subject to grant of forestry clearance and that necessary clearance for diversion of 672.018 ha. of forest land involved in the project be obtained before starting operation in that area and that no mining be undertaken in the forest area without obtaining prior forestry clearance. Condition No. XXX also stipulated that the project proponent shall take all precautionary measures during mining operation for conservation and protection of flora and fauna spotted in the study area and all safeguards measures brought out by the WMP prepared specific to the project site and considered by WII shall be effectively implemented. Further, it was also ordered that all the recommendations made by WII for Wildlife Management be effectively implemented and that the project proponent would also comply with the standards prescribed by the State and Central Pollution Control Boards. Later, a corrigendum dated 14.7.2009 was also issued by MOEF adding two other conditions - one special condition and another general condition.

27. State of Orissa vide its letter dated 10.8.2009 informed MOEF that the user agency had complied with the stipulations of Stage-I approval. Specific reference was made point by point to all the conditions stipulated in the letters of MOEF dated

11.12.2008 and 30.12.2008 and, in conclusion, the State Government has stated in their letter as follows:

In view of the above position of compliance by the User Agency to the direction of Hon'ble Supreme Court of India dated 8.8.2008 and stipulations of the Government of India, MOEF vide their Stage-I approval order dated 30.12.2008, the compliance is forwarded to the Government of India, MOEF to kindly examine the same and take further necessary steps in matters of according final approval for diversion of 660.749 ha of forest land for the project under Section 2 of the Forest Conservation Act, 1980.

MOEF, it is seen, then placed the letter of the State Government dated 10.8.2008 before the FAC and FAC on 4.11.2009 recommended that the final clearance be considered only after ascertaining the community rights of forest land and after the process for establishing such rights under the Forest Rights Act is completed. Dr. Usha Ramanathan Committee report was placed before the FAC on 16.4.2010 and FAC recommended that a Special Committee under the Ministry of Tribal Affairs be constituted to look into the issue relating to violation of tribal rights and the settlement of various rights under the Forest Rights Act, which led, as already indicated, to the constitution of the Saxena Committee report, based on which the MOEF passed the impugned order dated 24.8.2010.

28. FAC, in its meeting, opined that the final clearance under the Forest (Conservation) Act would be given, only after ascertaining the "Community Rights" on forest land and after the process of establishing such rights under the Forest Rights Act. After perusing the Usha Ramanathan report, FAC on 16.4.2010 recommended that a Special Committee be constituted to look into the issues relating to the alleged violation of rights under the Forest Rights Act. MOEF, then on 29.6.2010 constituted the Saxena Committee and the Committee after conducting an enquiry submitted its report which was placed before the FAC on 20.8.2010 and FAC noticed prima facie violation of the Forest Rights Act and the Forest (Conservation) Act.

29. Petitioner has assailed the order of MoEF dated 24.08.2010 as an attempt to reopen matters that had obtained finality. Further, it is also submitted that the order wrongly cites the violation of certain conditions of environmental clearance by "Alumina Refinery Project" as grounds for denial of Stage II clearance to OMC for its "Bauxite Mining Project". The contention is based on the premise that the two Projects are totally separate and independent of each other and the violation of any statutory provision or a condition of environmental clearance by one cannot be a relevant consideration for grant of Stage II clearance to the other.

30. Petitioner's assertion that the Alumina Refinery Project and the Bauxite Mining Project are two separate and independent projects, cannot be accepted as such, since

there are sufficient materials on record to show that the two projects make an integrated unit. In the two earlier orders of this Court (in the Vedanta case and the Sterlite case) also the two Projects are seen as comprising a single unit. Quite contrary to the case of the Petitioner, it can be strongly argued that the Alumina Refinery Project and Bauxite Mining Project are interdependent and inseparably linked together and, hence, any wrong doing by Alumina Refinery Project may cast a reflection on the Bauxite Mining Project and may be a relevant consideration for denial of Stage II clearance to the Bauxite Mining Project.

In this Judgment, however, we do not propose to make any final pronouncement on that issue but we would keep the focus mainly on the rights of the Scheduled Tribes and the "Traditional Forest Dwellers" under the Forest Rights Act.

STs and TFDs:

31. Scheduled Tribe, as such, is not defined in the Forest Rights Act, but the word "Traditional Forest Dweller" has been defined under Section 2(o) as any member or community who has at least three generations prior to the 13th day of December, 2005 primarily resided in and who depend on the forest or forests land for bona fide livelihood needs. Article 366(25) of the Constitution states that STs means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are defined under Article 342 to be the Scheduled Tribes. The President of India, in exercise of the powers conferred by Clause (1) of Article 342 of the Constitution, has made the Constitution (Schedule Tribes) Order, 1950. Part XII of the Order refers to the State of Orissa. Serial No. 31 refers to Dongaria Kondh, Kutia Kandha etc.

32. Before we examine the scope of the Forest Rights Act, let us examine, how the rights of indigenous people are generally viewed under our Constitution and the various International Conventions.

Constitutional Rights and Conventions:

33. Article 244 (1) of the Constitution of India which appears in Part X provides that the administration of the Scheduled Areas and Scheduled Tribes in States (other than Assam, Meghalaya and Tripura) shall be according to the provisions of the Fifth Schedule and Clause (2) states that Sixth Schedule applies to the tribal areas in Assam, Meghalaya, Tripura and Mizoram. Evidently, the object of the Fifth Schedule and the Regulations made thereunder is to preserve tribal autonomy, their cultures and economic empowerment to ensure social, economic and political justice for the preservation of peace and good Governance in the Scheduled Area. This Court in *Samatha v. Arunachal Pradesh* MANU/SC/1325/1997 : (1997) 8 SCC 191 ruled that all relevant clauses in the Schedule and the Regulations should be harmoniously and widely be read as to elongate the Constitutional objectives and dignity of person to the Scheduled Tribes and ensuring distributive justice as an integral scheme thereof. The

Court noticed that agriculture is the only source of livelihood for the Scheduled Tribes apart from collection and sale of minor forest produce to supplement their income. Land is their most important natural and valuable asset and imperishable endowment from which the tribal derive their sustenance, social status, economic and social equality, permanent place of abode, work and living. Consequently, tribes have great emotional attachments to their lands.

34. Part B of the Fifth Schedule [Article 244(1)] speaks of the administration and control of Schedules Areas and Scheduled Tribes. Para 4 thereof speaks of Tribes Advisory Council. Tribes Advisory Council used to exercise the powers for those Scheduled Areas where Panchayat Raj system had not been extended. By way of the Constitution (73rd Amendment) Act, 1992, Part IX was inserted in the Constitution of India. Article 243-B of Part IX of the Constitution mandated that there shall be panchayats at village, intermediate and district levels in accordance with the provisions of that Part. Article 243-C of Chapter IX refers to the composition of Panchayats. Article 243-M (4)(b) states that Parliament may, by law, extend the provisions of Part IX to the Scheduled Areas and the Tribal areas and to work out the modalities for the same. The Central Government appointed Bhuria Committee to undertake a detailed study and make recommendations as to whether the Panchayat Raj system could be extended to Scheduled Areas. The Committee submitted its report on 17.01.1995 and favoured democratic, decentralization in Scheduled Areas. Based on the recommendations, the Panchayat (Extension to Scheduled Areas) Act, 1996 (for short 'PESA Act') was enacted by the Parliament in the year 1996, extending the provisions of Part IX of the Constitution relating to Panchayats to the Scheduled Areas. The Statement of Objects and Reasons of the Act reads as follows:

There have been persistent demands from prominent leaders of the Scheduled Areas for extending the provisions of Part IX of the Constitution to these Areas so that Panchayati Raj Institutions may be established there. Accordingly, it is proposed to introduce a Bill to provide for the extension of the provisions of Part IX of the Constitution to the Scheduled Areas with certain modifications providing that, among other things, the State legislations that may be made shall be in consonance with the customary law, social and religious practices and traditional management practices of community resources;... The offices of the Chairpersons in the panchayats at all levels shall be reserved for the Scheduled Tribes; the reservations of seats at every panchayat for the Scheduled Tribes shall not be less than onethird of the total number of seats.

35. This Court had occasion to consider the scope of PESA Act when the constitutional validity of the proviso to Section 4(g) of the PESA Act and few sections of the Jharkhand Panchayat Raj Act, 2001 were challenged in *Union of India v.*

Rakesh Kumar MANU/SC/0021/2010 : (2010) 4 SCC 50 and this Court upheld the Constitutional validity.

36. Section 4 of the PESA Act stipulates that the State legislation on Panchayats shall be made in consonance with the customary law, social and religious practices and traditional management practices of community resources. Clause (d) of Section states that every Gram Sabha shall be competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution. Further it also states in Clause (i) of Section 4 that the Gram Sabha or the Panchayats at the appropriate level shall be consulted before making the acquisition of land in the Scheduled Areas for development projects and before re-settling or rehabilitating persons affected by such projects in the Scheduled Areas and that the actual planning and implementation of the projects in the Scheduled Areas, shall be coordinated at the State level. Subclause (k) of Section 4 states that the recommendations of the Gram Sabha or the Panchayats at the appropriate level shall be made mandatory prior to grant of prospective licence or mining lease for minor minerals in the Scheduled Areas. Panchayat has also endowed with the powers and authority necessary to function as institutions of Self-Government.

37. The customary and cultural rights of indigenous people have also been the subject matter of various international conventions. International Labour Organization (ILO) Convention on Indigenous and Tribal Populations Convention, 1957 (No. 107) was the first comprehensive international instrument setting forth the rights of indigenous and tribal populations which emphasized the necessity for the protection of social, political and cultural rights of indigenous people. Following that there were two other conventions ILO Convention (No. 169) and Indigenous and Tribal Peoples Convention, 1989 and United Nations Declaration on the rights of Indigenous Peoples (UNDRIP), 2007, India is a signatory only to the ILO Convention (No. 107).

38. Apart from giving legitimacy to the cultural rights by 1957 Convention, the Convention on the Biological Diversity (CBA) adopted at the Earth Summit (1992) highlighted necessity to preserve and maintain knowledge, innovation and practices of the local communities relevant for conservation and sustainable use of biodiversity, India is a signatory to CBA. Rio Declaration on Environment and Development Agenda 21 and Forestry principle also encourage the promotion of customary practices conducive to conservation. The necessity to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources have also been recognized by United Nations in the United Nations Declaration on Rights of Indigenous Peoples. STs and other TFDs residing in the Scheduled Areas have a right

to maintain their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands.

39. Many of the STs and other TFDs are totally unaware of their rights. They also experience lot of difficulties in obtaining effective access to justice because of their distinct culture and limited contact with mainstream society. Many a times, they do not have the financial resources to engage in any legal actions against development projects undertaken in their abode or the forest in which they stay. They have a vital role to play in the environmental management and development because of their knowledge and traditional practices. State has got a duty to recognize and duly support their identity, culture and interest so that they can effectively participate in achieving sustainable development.

40. We notice, bearing in mind the above objects, the Forest Rights Act has been enacted conferring powers on the Gram Sabha constituted under the Act to protect the community resources, individual rights, cultural and religious rights.

The Forest Rights Act

41. The Forest Rights Act was enacted by the Parliament to recognize and vest the forest rights and occupation in forest land in forest dwelling STs and other TFDs who have been residing in such forests for generations but whose rights could not be recorded and to provide for a framework for recording the forest rights so vested and the nature of evidence required for such recognition and vesting in respect of forest land. The Act also states that the recognized rights of the forest dwelling STs and other TFDs include the responsibilities and authority for sustainable use, conservation of bio-diversity and maintenance of ecological balance and thereby strengthening the conservation regime of the forests while ensuring livelihood and food security of the forest dwelling STs and other TFDs. The Act also noticed that the forest rights on ancestral lands and their habitat were not adequately recognized in the consolidation of State forests during the colonial period as well as in independent India resulting in historical injustice to them, who are integral to the very survival and sustainability of the forest ecosystem.

42. The Statement of Objects and Reasons of the Act states that forest dwelling tribal people and forests are inseparable and that the simplicity of tribals and their general ignorance of modern regulatory framework precluded them from asserting their genuine claims to resources in areas where they belong and depended upon and that only recently that forest management regimes have initiated action to recognize the occupation and other right of the forest dwellers. of late, we have realized that forests have the best chance to survive if communities participate in their conservation and regeneration measures. The Legislature also has addressed the long standing and genuine felt need of granting a secure and inalienable right to those communities

whose right to life depends on right to forests and thereby strengthening the entire conservation regime by giving a permanent stake to the STs dwelling in the forests for generations in symbiotic relationship with the entire ecosystem.

43. We, have to bear in mind the above objects and reasons, while interpreting various provisions of the Forest Rights Act, which is a social welfare or remedial statute. The Act protects a wide range of rights of forest dwellers and STs including the customary rights to use forest land as a community forest resource and not restricted merely to property rights or to areas of habitation.

44. Forest rights of forest dwelling STs and other TFDs are dealt with in Chapter II of the Act. Section 3 of that chapter lists out what are the forest rights for the purpose of the Act...

46. Chapter III of the Act deals with recognition, restoration and vesting of forest rights and related matters. Section 4 of that chapter deals with recognition of, and vesting of, forest rights in forest dwelling STs and other TFDs. Section 5 lists out duties in whom the forest rights vests and also the holders of forest rights empowers them to carry out duties. Those duties include preservation of habitat from any form of destructive practices affecting their cultural and natural heritage.

47. The definition clauses read with the above-mentioned provisions give emphasis to customary rights, rights to collect, use and dispose of minor forest produce, community rights like grazing cattle, community tenure of habitat and habitation for primitive tribal groups, traditional rights customarily enjoyed etc. Legislative intention is, therefore, clear that the Act intends to protect custom, usage, forms, practices and ceremonies which are appropriate to the traditional practices of forest dwellers.

49. Ministry of Tribal Affairs has noticed several problems which are impeding the implementation of the Act in its letter and spirit. For proper and effective implementation of the Act, the Ministry has issued certain guidelines and communicated to all the States and UTs vide their letter dated 12.7.2012. The operative portion of the same reads as follows:

GUIDELINES:

i) Process of Recognition of Rights:

- a) The State Governments should ensure that on receipt of intimation from the Forest Rights Committee, the officials of the Forest and Revenue Departments remain present during the verification of the claims and the evidence on the site.

- b) In the event of modification or rejection of a claim by the Gram Sabha or by the Sub-Divisional Level Committee or the District Level Committee, the decision on the claim should be communicated to the claimant to enable the aggrieved person to prefer a petition to the Sub Divisional Level Committee or the District Level Committee, as the case may be, within the sixty days period prescribed under the Act and no such petition should be disposed of against the aggrieved person, unless he has been given a reasonable opportunity to present his case.
- c) The Sub-Divisional Level Committee or the District Level Committee should, if deemed necessary, remand the claim to the Gram Sabha for reconsideration instead of rejecting or modifying the same, in case the resolution or the recommendation of the Gram Sabha is found to be incomplete or prima-facie requires additional examination.
- d) In cases where the resolution passed by the Gram Sabha, recommending a claim, is upheld by Sub-Divisional Level committee, but the same is not approved by the District Level Committee, the District Level Committee should record the reasons for not accepting the recommendations of the Gram Sabha and the Sub-Divisional Level Committee, in writing, and a copy of the order should be supplied to the claimant.
- e) On completion of the process of settlement of rights and issue of titles as specified in Annexures II, III & IV of the Rules, the Revenue / Forest Departments shall prepare a final map of the forest land so vested and the concerned authorities shall incorporate the forest rights so vested in the revenue and forest records, as the case may be, within the prescribed cycle of record updation.
- f) All decisions of the Sub-Divisional Level Committee and District Level Committee that involve modification or rejection of a Gram Sabha resolution/ recommendation should be in the form of speaking orders.
- g) The Sub-Divisional Level Committee or the District Level committee should not reject any claim accompanied by any two forms of evidences, specified in Rule 13, and recommended by the Gram Sabha, without giving reasons in writing and should not insist upon any particular form of evidence for consideration of a claim. Fine receipts, encroacher lists, primary offence reports, forest settlement reports, and similar documentation rooted in prior official exercises, or the lack thereof, would not be the sole basis for rejection of any claim.
- h) Use of any technology, such as, satellite imagery, should be used to supplement evidences tendered by a claimant for consideration of the claim

and not to replace other evidences submitted by him in support of his claim as the only form of evidence.

- i) The status of all the claims, namely, the total number of claims filed, the number of claims approved by the District Level Committee for title, the number of titles actually distributed, the number of claims rejected, etc. should be made available at the village and panchayat levels through appropriate forms of communications, including conventional methods, such as, display of notices, beat of drum etc.
- j) A question has been raised whether the four hectare limit specified in Section 4(6) of the Act, which provides for recognition of forest rights in respect of the land mentioned in Clause (a) of Sub-section (1) of Section 3 of the Act, applies to other forest rights mentioned in Section 3(1) of the Act. It is clarified that the four hectare limit specified in Section 4(6) applies to rights under Section 3(1)(a) of the Act only and not to any other right under Section 3(1), such as conversion of pattas or leases, conversion of forest villages into revenue villages etc.

ii) Minor Forest Produce:

- a) The State Government should ensure that the forest rights relating to MFPs under Section 3(1)(c) of the Act are recognized in respect of all MFPs, as defined under Section 2(i) of the Act, in all forest areas, and state policies are brought in alignment with the provisions of the Act. Section 2(i) of the Act defines the term "minor forest produce" to include "all non-timber produce of plant origin, including bamboo, brush wood, stumps, cane, tussar, cocoons, honey, wax, lac, tendu or kendu leaves, medicinal plants and herbs, roots, tubers, and the like".
- b) The monopoly of the Forest Corporations in the trade of MFP in many States, especially in case of high value MFP, such as, tendu patta, is against the spirit of the Act and should henceforth be done away with.
- c) The forest right holders or their cooperatives/ federations should be allowed full freedom to sell such MFPs to anyone or to undertake individual or collective processing, value addition, marketing, for livelihood within and outside forest area by using locally appropriate means of transport.
- d) The State Governments should exempt movement of all MFPs from the purview of the transit rules of the State Government and, for this purpose, the transit rules be amended suitably. Even a transit permit from Gram Sabha should not be required. Imposition of any fee/charges/royalties on the

processing, value addition, marketing of MFP collected individually or collectively by the cooperatives/ federations of the rights holders would also be ultra vires of the Act.

- e) The State Governments need to play the facilitating role in not only transferring unhindered absolute rights over MFP to forest dwelling Scheduled Tribes and other traditional forest dwellers but also in getting them remunerative prices for the MFP, collected and processed by them.

iii) Community Rights:

- a) The District Level Committee should ensure that the records of prior recorded nistari or other traditional community rights (such as Khatian part II in Jharkhand, and traditional forest produce rights in Himachal and Uttarakhand) are provided to Gram Sabhas, and if claims are filed for recognition of such age-old usufructory rights, such claims are not rejected except for valid reasons, to be recorded in writing, for denial of such recorded rights;
- b) The District Level Committee should also facilitate the filing of claims by pastoralists before the concerned Gram Sabha (s) since they would be a floating population for the Gram Sabha(s) of the area used traditionally.
- c) In view of the differential vulnerability of Particularly Vulnerable Tribal Groups (PTGs) amongst the forest dwellers, District Level Committee should play a pro-active role in ensuring that all PTGs receive habitat rights in consultation with the concerned PTGs' traditional institutions and their claims for habitat rights are filed before the concerned Gram Sabhas.
- d) The forest villages are very old entities, at times of preindependent era, duly existing in the forest records. The establishment of these villages was in fact encouraged by the forest authorities in the pre-independent era for availability of labour within the forest areas. The well defined record of each forest village, including the area, number of inhabitants, etc. exists with the State Forest Departments. There are also unrecorded settlements and old habitations that are not in any Government record. Section 3(1)(h) of the Act recognizes the right of forest dwelling Scheduled Tribes and other traditional forest dwellers relating to settlement and conversion on forest villages, old habitation, un-surveyed villages and other villages and forests, whether recorded, notified or not into revenue villages. The conversion of all forest villages into revenue villages and recognition of the forest rights of the inhabitants thereof should actually have been completed immediately on enactment of the Act. The State Governments may, therefore, convert all such erstwhile forest villages, unrecorded settlements and old habitations into revenue villages with a sense of urgency in a time bound manner. The

conversion would include the actual land-use of the village in its entirety, including lands required for current or future community uses, like, schools, health facilities, public spaces etc. Records of the forest villages maintained by the Forest Department may thereafter be suitably updated on recognition of this right.

iv) Community Forest Resource Rights:

- a) The State Government should ensure that the forest rights under Section 3(1)(i) of the Act relating to protection, regeneration or conservation or management of any community forest resource, which forest dwellers might have traditionally been protecting and conserving for sustainable use, are recognized in all villages and the titles are issued as soon as the prescribed Forms for claiming Rights to Community Forest Resource and the Form of Title for Community Forest Resources are incorporated in the Rules. Any restriction, such as, time limit, on use of community forest resources other than what is traditionally imposed would be against the spirit of the Act;
- b) In case no community forest resource rights are recognized in a village, the reasons for the same should be recorded. Reference can be made to existing records of community and joint forest management, van panchayats, etc. for this purpose.
- c) The Gram Sabha would initially demarcate the boundaries of the community forest resource as defined in Section 2(a) of the Act for the purposes of filing claims for recognition of forest right under Section 3(1)(i) of the Act.
- d) The Committees constituted under Rule 4(e) of the Forest Rights Rules, 2008 would work under the control of Gram Sabha. The State Agencies should facilitate this process.
- e) Consequent upon the recognition of forest right in Section 3(i) of the Act to protect, regenerate or conserve or manage any community forest resource, the powers of the Gram Sabha would be in consonance with the duties as defined in Section 5(d), wherein the Gram Sabha is empowered to regulate access to community forest resources and stop any activity which adversely affects the wild animals, forest and the bio-diversity. Any activity that prejudicially affects the wild-life, forest and bio-diversity in forest area would be dealt with under the provisions of the relevant Acts.

v) Protection Against Eviction, Diversion of Forest Lands and Forced Relocation:

- a) Section 4(5) of the Act is very specific and provides that no member of a forest dwelling Scheduled Tribe or other traditional forest dwellers shall be

evicted or removed from the forest land under his occupation till the recognition and verification procedure is complete. This clause is of an absolute nature and excludes all possibilities of eviction of forest dwelling Scheduled Tribes or other traditional forest dwellers without settlement of their forest rights as this Section opens with the words "Save as otherwise provided". The rationale behind this protective clause against eviction is to ensure that in no case a forest dweller should be evicted without recognition of his rights as the same entitles him to a due compensation in case of eventuality of displacement in cases, where even after recognition of rights, a forest area is to be declared as inviolate for wildlife conservation or diverted for any other purpose. In any case, Section 4(1) has the effect of recognizing and vesting forest rights in eligible forest dwellers. Therefore, no eviction should take place till the process of recognition and vesting of forest rights under the Act is complete.

- b) The Ministry of Environment & Forests, vide their letter No. 11-9/1998-FC(pt.) dated 30.07.2009, as modified by their subsequent letter of the same number dated 03.08.2009, has issued directions, requiring the State/ UT Governments to enclose certain evidences relating to completion of the process of settlement of rights under the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, while formulating unconditional proposals for diversion of forest land for nonforest purposes under the Forest (Conservation) Act, 1980. The State Government should ensure that all diversions of forest land for non-forest purposes under the Forest (Conservation) Act, 1980 take place in compliance with the instructions contained in the Ministry of Environment & Forest's letter dated 30.07.2009, as modified on 03.08.2009.
- c) There may be some cases of major diversions of forest land for non-forest purposes under the Forest (Conservation) Act, 1980 after the enactment of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 but before the issue of Ministry of Environment & Forests' letter dated 30.07.2009, referred to above. In case, any evictions of forest dwelling Scheduled Tribes and other traditional forestdwellers have taken place without settlement of their rights due to such major diversions of forest land under the Forest (Conservation) Act, 1980, the District Level Committees may be advised to bring such cases of evictions, if any, to the notice of the State Level Monitoring Committee for appropriate action against violation of the provisions contained in Section 4(5) of the Act.
- d) The Act envisages the recognition and vesting of forest rights in forest dwelling Scheduled Tribes and other traditional forest dwellers over all forest

lands, including National Parks and Sanctuaries. Under Section 2(b) of the Act, the Ministry of Environment & Forests is responsible for determination and notification of critical wildlife habitats in the National Parks and Sanctuaries for the purpose of creating inviolate areas for wildlife conservation, as per the procedure laid down. In fact, the rights of the forest dwellers residing in the National Parks and Sanctuaries are required to be recognized without waiting of notification of critical wildlife habitats in these areas. Further, Section 4(2) of the Act provides for certain safeguards for protection of the forest rights of the forest rights holders recognized under the Act in the critical wildlife habitats of National Parks and Sanctuaries, when their rights are either to be modified or resettled for the purposes of creating inviolate areas for wildlife conservation. No exercise for modification of the rights of the forest dwellers or their resettlement from the National Parks and Sanctuaries can be undertaken, unless their rights have been recognized and vested under the Act. In view of the provisions of Section 4(5) of the Act, no eviction and resettlement is permissible from the National Parks and sanctuaries till all the formalities relating to recognition and verification of their claims are completed. The State/ UT Governments may, therefore, ensure that the rights of the forest dwelling Scheduled Tribes and other traditional forest dwellers, residing in National Parks and Sanctuaries are recognized first before any exercise for modification of their rights or their resettlement, if necessary, is undertaken and no member of the forest dwelling Scheduled Tribe or other traditional forest dweller is evicted from such areas without the settlement of their rights and completion of all other actions required under Section 4(2) of the Act.

- e) The State Level Monitoring Committee should monitor compliance of the provisions of Section 3(1)(m) of the Act, which recognizes the right to in situ rehabilitation including alternative land in cases where the forest dwelling Scheduled Tribes and other traditional forest dwellers have been illegally evicted or displaced from forest land without receiving their legal entitlement to rehabilitation, and also of the provisions of Section 4(8) of the Act, which recognizes their right to land when they are displaced from their dwelling and cultivation without land compensation due to State development interventions.

vi) Awareness-Raising, Monitoring and Grievance Redressal:

- a) Each State should prepare suitable communication and training material in local language for effective implementation of the Act.
- b) The State Nodal Agency should ensure that the Sub Divisional Level Committee and the District Level Committee make district-wise plans for

trainings of revenue, forest and tribal welfare departments' field staff, officials, Forest Rights Committees and Panchayat representatives. Public meetings for awareness generation in those villages where process of recognition is not complete need to be held.

- c) In order to generate awareness about the various provisions of the Act and the Rules, especially the process of filing petitions, the State Government should organize public hearings on local bazaar days or at other appropriate locations on a quarterly basis till the process of recognition is complete. It will be helpful if some members of Sub Divisional Level Committee are present in the public hearings. The Gram Sabhas also need to be actively involved in the task of awareness raising.
- d) If any forest dwelling Scheduled Tribe in case of a dispute relating to a resolution of a Gram Sabha or Gram Sabha through a resolution against any higher authority or Committee or officer or member of such authority or Committee gives a notice as per Section 8 of the Act regarding contravention of any provision of the Act or any rule made thereunder concerning recognition of forest rights to the State Level Monitoring Committees, the State Level Monitoring Committee should hold an inquiry on the basis of the said notice within sixty days from the receipt of the notice and take action, if any, that is required. The complainant and the Gram Sabha should be informed about the outcome of the inquiry.

Forest Rights Act and MMRD Act:

50. State of Orissa has maintained the stand that the State has the ownership over the mines and minerals deposits beneath the forest land and that the STs and other TFDs cannot raise any claim or rights over them, nor the Gram Sabha has any right to adjudicate such claims. This Court in *Amritlal Athubhai Shah and Ors. v. Union Government of India and Anr.* MANU/SC/0037/1976 : (1976) 4 SCC 108, while dealing with the scope of Mines and Minerals (Regulation and Development) Act, 1957 held as follows:

3. ...the State Government is the "owner of minerals" within its territory, and the minerals "vest" in it. There is nothing in the Act or the Rules to detract from this basic fact. That was why the Central Government stated further in its revisional orders that the State Government had the "inherent right to reserve any particular area for exploitation in the public sector". It is therefore quite clear that, in the absence of any law or contract etc to the contrary, bauxite, as a mineral, and the mines thereof, vest in the State of Gujarat and no person has any right to exploit it otherwise than in accordance with the provisions of the Act and the Rules....

The Forest Rights Act, neither expressly nor impliedly, has taken away or interfered with the right of the State over mines or minerals lying underneath the forest land, which stand vested in the State. State holds the natural resources as a trustee for the people. Section 3 of the Forest Rights Act does not vest such rights on the STs or other TFDs. PESA Act speaks only of minor minerals, which says that the recommendation of Gram Sabha shall be made mandatory prior to grant of prospecting licence or mining lease for minor minerals in the Scheduled Areas. Therefore, as held by this Court in *Amritlal (supra)*, the State Government has the power to reserve any particular area for Bauxite mining for a Public Sector Corporation.

Gram Sabha and other Authorities:

51. Under Section 6 of the Act, Gram Sabha shall be the authority to initiate the process for determining the nature and extent of individual or community forest rights or both and that may be given to the forest dwelling STs and other TFDs within the local limits of the jurisdiction. For the said purpose it receive claims, and after consolidating and verifying them it has to prepare a plan delineating the area of each recommended claim in such manner as may be prescribed for exercise of such rights. The Gram Sabha shall, then, pass a resolution to that effect and thereafter forward a copy of the same to the Sub-Divisional Level Committee. Any aggrieved person may move a petition before the Sub-Divisional Level Committee against the resolution of the Gram Sabha. Sub-section (4) of Section 6 confers a right on the aggrieved person to prefer a petition to the District Level Committee against the decision of the Sub-Divisional Level Committee. Sub-section (7) of Section 6 enables the State Government to constitute a State Level Monitoring Committee to monitor the process of recognition and vesting of forest rights and to submit to the nodal agency. Such returns and reports shall be called for by that agency.

52. Functions of the Gram Sabha, Sub-Divisional Level Committee, District Level Committee, State Level Monitoring Committee and procedure to be followed and the process of verification of claims etc. have been elaborately dealt with in 2007 Rules read with 2012 Amendment Rules. Elaborate procedures have therefore been laid down by Forest Rights Act read with 2007 and 2012 Amendment Rules with regard to the manner in which the nature and extent of individual or customary forest rights or both have to be decided. Reference has already been made to the details of forest rights which have been conferred on the forest dwelling STs as well as TFDs in the earlier part of the Judgment. Individual/Community Rights

53. Forest Rights Act prescribed various rights to tribals/forest dwellers as per Section 3 of the Act. As per Section 6 of the Act, power is conferred on the Gram Sabha to process for determining the nature and the extent of individual or community forests

read with or both that may be given to forest dwelling STs and other TFDs, by receiving claims, consolidate it, and verifying them and preparing a map, delineating area of each recommended claim in such a manner as may be prescribed. The Gram Sabha has received a large number of individual claims and community claims from the Rayagada District as well as the Kalahandi District. From Rayagada District Gram Sabha received 185 individual claims, of -which 145 claims have been considered and settled by granting alternate rights over 263.5 acres of land. 40 Individual claims pending before the Gram Sabha pertain to areas which falls outside the mining lease area. In respect of Kalahandi District 31 individual claims have been considered and settled by granting alternate rights over an area of 61 acres.

54. Gram Sabha has not received any community claim from the District of Rayagada. However, in respect of Kalahandi District 6 community claims had been received by the Gram Sabha of which 3 had been considered and settled by granting an alternate area of 160.55 acres. The balance 3 claims are pending consideration. Customary and Religious Rights (Sacred Rights)

55. Religious freedom guaranteed to STs and the TFDs under Articles 25 and 26 of the Constitution is intended to be a guide to a community of life and social demands. The above-mentioned Articles guarantee them the right to practice and propagate not only matters of faith or belief, but all those rituals and observations which are regarded as integral part of their religion. Their right to worship the deity Niyam-Raja has, therefore, to be protected and preserved.

56. Gram Sabha has a role to play in safeguarding the customary and religious rights of the STs and other TFDs under the Forest Rights Act. Section 6 of the Act confers powers on the Gram Sabha to determine the nature and extent of "individual" or "community rights". In this connection, reference may also be made to Section 13 of the Act coupled with the provisions of PESA Act, which deal with the powers of Gram Sabha. Section 13 of the Forest Rights Act reads as under:

13. Act not in derogation of any other law.- Save as otherwise provided in this Act and the provisions of the Panchayats (Extension of the Scheduled Areas) Act, 1996 (40 of 1996), the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.

57. PESA Act has been enacted, as already stated, to provide for the extension of the provisions of Part IX of the Constitution relating to Panchayats to the Scheduled Areas. Section 4(d) of the Act says that every Gram Sabha shall be competent to safeguard and preserve the traditions, customs of the people, their cultural identity, community resources and community mode of dispute resolution. Therefore, Grama Sabha functioning under the Forest Rights Act read with Section 4(d) of PESA Act has an obligation to safeguard and preserve the traditions and customs of the STs and

other forest dwellers, their cultural identity, community resources etc., which they have to discharge following the guidelines issued by the Ministry of Tribal Affairs vide its letter dated 12.7.2012.

58. We are, therefore, of the view that the question whether STs and other TFDs, like Dongaria Kondh, Kutia Kandha and Ors. have got any religious rights i.e. rights of worship over the Niyamgiri hills, known as Nimagiri, near Hundaljali, which is the hill top known as Niyam-Raja, have to be considered by the Gram Sabha. Gram Sabha can also examine whether the proposed mining area Niyama Danger, 10 km away from the peak, would in any way affect the abode of Niyam-Raja. Needless to say, if the BMP, in any way, affects their religious rights, especially their right to worship their deity, known as Niyam Raja, in the hills top of the Niyamgiri range of hills, that right has to be preserved and protected. We find that this aspect of the matter has not been placed before the Gram Sabha for their active consideration, but only the individual claims and community claims received from Rayagada and Kalahandi Districts, most of which the Gram Sabha has dealt with and settled.

59. The Gram Sabha is also free to consider all the community, individual as well as cultural and religious claims, over and above the claims which have already been received from Rayagada and Kalahandi Districts. Any such fresh claims be filed before the Gram Sabha within six weeks from the date of this Judgment. State Government as well as the Ministry of Tribal Affairs, Government of India, would assist the Gram Sabha for settling of individual as well as community claims.

60. We are, therefore, inclined to give a direction to the State of Orissa to place these issues before the Gram Sabha with notice to the Ministry of Tribal Affairs, Government of India and the Gram Sabha would take a decision on them within three months and communicate the same to the MOEF, through the State Government. On the conclusion of the proceeding before the Gram Sabha determining the claims submitted before it, the MoEF shall take a final decision on the grant of Stage II clearance for the Bauxite Mining Project in the light of the decisions of the Gram Sabha within two months thereafter.

61. The Alumina Refinery Project is well advised to take steps to correct and rectify the alleged violations by it of the terms of the environmental clearance granted by MoEF. Needless to say that while taking the final decision, the MoEF shall take into consideration any corrective measures that might have been taken by the Alumina Refinery Project for rectifying the alleged violations of the terms of the environmental clearance granted in its favour by the MoEF.

62. The proceedings of the Gram Sabha shall be attended as an observer by a judicial officer of the rank of the District Judge, nominated by the Chief Justice of the High Court of Orissa who shall sign the minutes of the proceedings, certifying that the

proceedings of the Gram Sabha took place independently and completely uninfluenced either by the Project proponents or the Central Government or the State Government.

63. The Writ Petition is disposed of with the above directions. Communicate this order to the Ministry of Tribal Affairs, Gram Sabhas of Kalahandi and Rayagada Districts of Orissa and the Chief Justice of High Court of Orissa, for further follow up action.

Sansar Chand v State of Rajasthan, 2010 (10) SCC 604

Markandey Katju, J.:

5. Before dealing with the facts of this case, we would like to comment upon the background. India, at one time, had one of the richest and most varied fauna in the world. However, over the last several decades there has been rapid decline of India's wild animals and birds which is a cause of grave concern. Some wild animals and birds have already become extinct e.g. the cheetah and others are on the brink of extinction. Areas which were once teeming with wild life have become devoid of it, and many sanctuaries and parks are empty or almost empty of animals & birds. Thus, the Sariska Tiger Reserve in Rajasthan and the Panna Tiger Reserve in Madhya Pradesh today have no tigers.

6. One of the main causes for this depredation of the wild life is organized poaching which yields enormous profits by exports to China and other countries.

7. Article 48A of the Constitution states as follows: "48A. Protection and improvement of environment and safeguarding of forest and wild life. -- The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country".

8. Article 51A (g) of the Constitution states that it is the duty of every citizen of India to protect and improve the natural environment including the wild life.

9. The Wildlife (Protection) Act, 1972 was enacted for this constitutional purpose. Chapter III of the said Act prohibits hunting of wild animals except in certain limited circumstances. Chapter IV enables the State Government to declare any area as a sanctuary or national park, and destruction or removal of animals from those areas is prohibited except under very limited circumstances. Chapter V & VA prohibits trade or commerce of wild animals, animal articles or trophies. Chapter VI makes violation of the provisions of the Act a criminal offence. By the Wildlife Protection (Amendment) Act, 2002 the punishment has been increased vide Section 51 as amended, and the property derived from illegal hunting and trade is liable to forfeiture vide Chapter VIA.

13. As already stated above, the wild life in India has already been considerably destroyed. At one time there were hundreds of thousands of tigers, leopards and other wild animals, but today there are only about 1400 tigers left, according to the Wildlife Institute.

14. Until recently habitat loss was thought to be the largest threat to the future of tigers, leopards etc. However, it has now been established that illegal trade and commerce in skins and other body parts of tigers, leopards etc. has done even much

greater decimation. Poaching of tigers for traditional Chinese medicine industry has been going on in India for several decades. Tigers and leopards are poached for their skins, bones and other constituent parts as these fetch high prices in countries such as China, where they are valued as symbols of power (aphrodisiacs) and ingredients of dubious traditional medicines. This illegal trade is organized and widespread and is in the hands of ruthless sophisticated operators, some of whom have top level patronage. The actual poachers are paid only a pittance, while huge profits are made by the leaders of the organized gangs who have international connection in foreign countries. Poaching of wild life is an organized international illegal activity which generates massive amount of money for the criminals.

15. Interpol says that trade in illegal wild life products is worth about US\$ 20 billion a year, and India is now a major source market for this trade. Most of the demand for wildlife products comes from outside the country. While at one time there were hundreds of thousands of tigers in India, today according to the survey made by the Wildlife Institute of India (an autonomous body under the Ministry of Environment and Forests), there were only 1411 tigers left in India in 2008. There are no reliable estimates of leopards as no proper census has been carried out, but the rough estimates show that the leopard too is a critically endangered species.

16. There is virtually no market for the skins or bones of tigers and leopards within India. The evidence available points out that tigers and leopards, poached in the Indian wilderness, are then smuggled across the border to meet the demand for their products in neighbouring countries such as China. When dealing with tiger and leopard poachers and traders, it is therefore important to bear in mind that one is dealing with trans-national organized crime. The accused in these cases represents a link in a larger criminal network that stretches across borders. This network starts with a poacher who in most cases is a poor tribal and a skilled hunter. Poachers kill tigers and leopards so as to supply the orders placed by a trader in a larger city centre such as Delhi. These traders are very wealthy and influential men. Once the goods reach the trader, he then arranges for them to be smuggled across the border to his counterpart in another country and so on till it reaches the end consumer. It is impossible for such a network to sustain itself without large profits and intelligent management.

17. Under the Wildlife (Protection) Act, 1972, trading in tiger, leopard and other animal skins and parts is a serious offence. Apart from that, India is a signatory to both the UN Convention on International Trade in Endangered Species (CITES) and the UN Convention against Transnational Organized Crime (CTOC). However, despite these National and International laws many species of wildlife e.g. tigers, leopards, bison etc. are under threat of extinction, mainly due to the poaching organized by international criminal traders and destruction of the habitats.

18. Sansar Chand, the appellant before us has a long history of such criminal activities, starting with a 1974 arrest for 680 skins including tigers, leopards and others. In the subsequent years the appellant and his gang has established a complex, interlinking smuggling network to satisfy the demand for tiger and leopard parts and skins outside India's borders, particularly to China. It is alleged that the appellant and his gang are accused in 57 wildlife cases between 1974 and 2005.

20. The present case is only one of the cases in which the appellant has been accused. The facts of the case have been set out in detail in the judgment of the High Court and hence we are not repeating the same here. Briefly stated, on January 5, 2003 the police arrested one Balwan who was traveling in a train with a carton containing leopard's skin. During investigation, the said Balwan on January 7, 2003 made a disclosure statement to the SHO, GRP Bhilwara that the two leopard skins were to be handed over to Sansar Chand at Sadar Bazar, Delhi. The appellant was charge sheeted and after trial he was convicted by the Additional Chief Judicial Magistrate (Railways), Ajmer, Rajasthan by his judgment dated 29.4.2004. The appellant filed an appeal which was dismissed by the Special Judge, SC/ST (Prevention of Atrocities) Cases, Ajmer vide his judgment dated 19.8.2006. Thereafter the appellant filed a Revision Petition, which was dismissed by the Rajasthan High Court by the impugned judgment dated 10.12.2008. Hence, this appeal.

21. Thus, all the courts below have found the appellant guilty of the offences charged.

22. Learned counsel for the appellant submitted that the prosecution case is solely based on the extra judicial confession made by co-accused Balwan vide Ex.P-33. We do not agree. Apart from the extra judicial confession of Balwan there is a lot of other corroborative material on record which establishes the appellant's guilt.

23. It must be mentioned that persons like the appellant are the head of a gang of criminals who do illegal trade in wildlife. They themselves do not do poaching, but they hire persons to do the actual work of poaching. Thus a person like the appellant herein remains behind the scene, and for this reasons it is not always possible to get direct evidence against him.

25. Ex.P-33 which contains the confession of the appellant, was written by PW-11 Arvind Kumar on the instructions given by the accused Balwan while in custody. Prior to Ex.P-33, Balwan has also disclosed the name of the appellant vide Ex.P-6 on January 6, 2003.

26. In our opinion, Ex.P-33 supported by the evidence of Arvind PW 11 and Ex.P-6 cannot be treated to be concocted documents which cannot be relied upon. As per the disclosure statement of Balwan the other co-accused persons were also arrested and articles used for killing and removing skins from the bodies of leopards were also recovered.

27. The accused Balwan was released on bail on 18.01.2003, and thereafter he sent the written confession Exh.P-33 on 23.01.2003 during judicial custody at Central Jail, Ajmer. In our opinion it cannot be held that the accused Balwan was under any pressure of the police. The said letter Ex.P-33 dictated by Balwan to Arvind Kumar was directly sent from the Central Jail, Ajmer to the Chief Judicial Magistrate's Court, Ajmer. We are of the opinion that the letter P-33 was not fabricated or procured by pressure. The accused Balwan has clearly stated in Exh.P-33 that he was paid Rs. 5000/- and Rs. 10000/- by the appellant. The appellant has several houses in Delhi, purchased in his name and in the name of his wife. It appears that these houses were purchased with the help of gains made out of his illegal activities stated above.

28. Pw-11 Arvind Kumar has stated in his deposition before the Court that he wrote the letter Ex.P-33 at the instance of the accused Balwan. The thumb impression of the accused Balwan is on that letter.

29. At the instance of the appellant one Bhua Gameti was questioned who stated that the panther's skin had been taken by various persons e.g. Khima, Nawa, Kheta Ram, Mohan and Chuna, who were also arrested. At their pointing out the equipment used for hunting the leopard and poaching it were seized. Panther's nails were also recovered from accused Bhura and the guns, cartridges, and knives for removing the skins of panthers were recovered from the accused.

30. There is a large amount of oral and documentary evidence on record which has been discussed in great detail by the learned Magistrate and the learned Special Judge and hence we are not repeating the same here. Thus the appellant has rightly been held guilty beyond reasonable doubt.

31. As already stated above, in such cases it is not easy to get direct evidence, particularly against the leader of the gang (like the appellant herein).

33. There is no absolute rule that an extra judicial confession can never be the basis of a conviction, although ordinarily an extra judicial confession should be corroborated by some other material vide *Thimma v. The State of Mysore - AIR 1971 SC 1871* , *Mulk Raj v. The State of U.P. - AIR 1959 SC 902* , *Sivakumar v. State by Inspector of Police - AIR 206 SC 563 (para 41 & 42)*, *Shiva Karam Payaswami Tewar vs. State of Maharashtra - AIR 2009 SC 1692* , *Mohd. Azad vs. State of West Bengal - AIR 2009 SC 1307* . In the present case, the extra judicial confession by Balwan has been referred to in the judgments of the learned Magistrate and the Special Judge, and it has been corroborated by the other material on record. We are satisfied that the confession was voluntary and was not the result of inducement, threat or promise as contemplated by Section 24 of the Evidence Act.

34. The learned Magistrate and the Special Judge have discussed in great detail the prosecution evidence, oral as well as documentary and have found the appellant

guilty. The High Court has affirmed that verdict and we see no reason to take a different view. The appeal, therefore, stands dismissed.

35. Before we part with this case, we would like to request the Central and State Governments and their agencies to make all efforts to preserve the wild life of the country and take stringent actions against those who are violating the provisions of the Wildlife (Protection) Act, as this is necessary for maintaining the ecological balance in our country.

***Centre For Environment Law, WWF-I v. Union of India & Others,
Supreme Court, I.A. No. 100 in Writ Petition (Civil) No. 337 of 1995,
decided on 15 April 2013***

K.S. Radhakrishnan, J.:

2. The Wildlife Institute of India (for short 'WII'), an autonomous institution under the Ministry of Environment and Forests (for short 'MoEF'), Government of India, through its wildlife Biologists had done considerable research at the Gir Forest in the State of Gujarat since 1986. All those studies were geared to provide data which would help for the better management of the Gir forest and enhance the prospects for the long term conservation of lions at Gir, a single habitat of Asiatic lion in the world. The data collected by the Wildlife Biologists highlighted the necessity of a second natural habitat for its long term conservation. Few of the scientists had identified the Asiatic lions as a prime candidate for a re-introduction project to ensure its long term survival. In October 1993, a Population and Habitat Analysis Workshop was held at Baroda, Gujarat. Various issues came for consideration in that meeting and the necessity of a second home for Asiatic lions was one of the issues deliberated upon in that meeting. Three alternative sites for re-introduction of Asiatic lions were suggested for an intensive survey, the details of which are given below: (1) Darrah-Jawaharsagar Wildlife Sanctuary (Rajasthan); (2) Sitamata Wildlife Sanctuary (Rajasthan); (3) Kuno Wildlife Sanctuary (Madhya Pradesh).

3. The Research Advisory Committee of WII recognized the need for a prior survey to assess the potential of those sites. Accordingly, a field survey was conducted. Surveys of the three sites were made during winter as well as summer, to assess water availability during the summer and also to ascertain the changes in human impact on the habitat during the seasons. The surveyors concentrated on ascertaining the extent of forest area in and adjoining the chosen protected areas with the aim of establishing the contiguity of the forested habitat. Attempts were also made to establish the relative abundance of wild ungulate prey in the three sites based on direct sightings as well as on indirect evidence. An assessment of the impact on the people and their livestock on habitat quality in all three sites was also made. Of the three sites surveyed, Kuno Wildlife Sanctuary (for short 'Kuno') was found to be the most suitable site for re-introduction in establishing a free ranging population of Asiatic lions. A draft report to that effect was prepared by eminent Scientists like Ravi Chellam, Justus Joshwa, Christy A. Williams and A.J.T. Johnsingh on behalf of WII. The report revealed that the Kuno was a historical distribution range of Asiatic lions. Report also highlighted the necessity of a long term commitment of resources, personnel, the necessity of a comprehensive rehabilitation package, adequate staff and facilities. Committee did not consider the presence of tigers in Kuno to be a major limiting factor, especially since the tigers occur in such low numbers and density.

Since lions live in stable social units, report highlighted that it is important to take lions for the translocation also from a single pride. Further, it was also pointed out that genetic consideration would not be a major factor, provided fresh male lions are moved from Gir to Kuno every three to five years and the resident males in Kuno selectively captured for Zoos.

4. State of Madhya Pradesh then undertook a massive rehabilitation package for the villagers settled in and near Kuno so as to push forward the scheme of relocation of Asiatic lions in Kuno. It was noticed that about 1545 families of 24 revenue villages were living inside Kuno and they had to be rehabilitated outside the sanctuary. Since suitable and sufficient revenue land was not available in adjoining areas, it was decided to relocate those villages on degraded protected forests. Since proposed site of resettlement fell in various blocks of protected forest, the use as a rehabilitation purpose involved a legal obligation to obtain prior sanction from MoEF under Section 2 of the Forest (Conservation) Act, 1980.

5. The Secretary (Forests), Government of Madhya Pradesh, therefore, sent a letter dated 24.7.1996 to MoEF seeking final approval of the Central Government in accordance with the Forest (Conservation) Act, 1980. MoEF, after examining the request of the State of Madhya Pradesh, conveyed its approval under Section 2 of the Forest (Conservation) Act, 1980 for diversion of 3720.9 hectare of forest land for rehabilitation of 18 villages located inside the Kuno, subject to fulfillment of certain conditions. Out of 3720.9 hectare of the 13-forest compartments, 3395.9 hectare forest area of 12 compartments was finally approved by the Government of India for de-notification. Compartment No. P-442 of Umarikaia forest block was left out from the original proposal by Government of India letter dated 1.2.2000 and hence, the released area in first phase had been de-notified after due permission from the Government of India. Forest area of 1263.9 hectare released in the second phase could not be de-notified for want of permission from the Government of India. The Government of India constituted a Monitoring Committee for the effective implementation of the Asiatic Lion Reintroduction Project at Kuno which met on 10.3.2004. The Survey report of WII was discussed in the meeting and it was noticed that Kuno Paipur Sanctuary of M.P. was identified as the project site/and a 20 year project was conceived in three phases as below: (a) Phase I (1995-2000 A.D.) Village relocation and habitat development; (b) Phase II (2000-2005) Fencing at the side, translocation, research and monitoring; (c) Phase III (2005-2015) Eco-development.

It was pointed out in the meeting that, currently, the project was in Phase II and 18 villages had been rehabilitated from Kuno. Further, in the meeting, the Chief Wildlife Warden of Gujarat had, however, opined that there was no commitment on the part of the State of Gujarat for providing lions and the State Government had not agreed for the same. Based on the discussion, the Chairman summed up the consensus which

emerged out of the deliberations as follows: (1) A letter from MOS, MoEF should be sent to the Chief Minister of Gujarat, highlighting the project justification with a request to provide lions for translocation to Kuno Palpur Sanctuary; (2) State of Gujarat should be provided with a set of project documents; (3) The Chief Wildlife Warden, MP should prepare a road map with a final detail for translocation of lions from Gir to Kuno; (4) An assessment of prey base in Kuno should be done by WII; and (5) No further expenditure should be incurred with a focus on lion; however, funding support for habitat improvement/welfare initiatives for other wild animals can continue.

6. The scheme for rehabilitation of villagers was prepared by the centrally sponsored "Beneficiary-oriented Scheme for Tribal Development". It was stated in the scheme that a total of more than Rs. 1545 lacs would be required for the satisfactory re-location of 1545 families of 24 villages out of the limit of Kuno. Out of 1545 lacs, 1061 lacs had been spent on relocation process. Balance 484 lacs were required to be released for the remaining rehabilitation works. The Chief Wildlife Warden, M.P. had certified the said expenditure.

7. WII, in the meantime, had made a detailed assessment of prey population for lion re-location in Kuno. It was noticed that since re- location of villages from Kuno was complete, Government of M.P. was keen to assess the prey base in the sanctuary so as to plan obtaining lions from Gujarat for re-introduction as early as possible. For the said purpose, the task of evaluating for wild prey base was entrusted to WII. Consequently, the faculty from WII, with the help of 34 forest staff, had undertaken the study of ungulates in Kuno under the guidance of Dr. Raghu Chundawat and carried out the prey assessment exercise from 2.1.2005 to 8.1.2005 and 8.2.2005 to 13.2.2005. A report was filed in June 2006 (July 2006). The Minister of MoEF sent a letter dated 20.7.2006 to the Chief Minister of Gujarat for translocation of two numbers of lions to Kuno. The Chief Minister of Gujarat vide his letter dated 30.4.2006 replied stating that the matter had been placed before the concerned department for further views. But nothing had been transpired in spite of the fact that crores and crores of rupees were spent by the Government of India for re- location of villages, de-notifying the reserve forest and so on which led to the filing of this public interest litigation seeking a direction to the respondents to implement the re-location programme as recommended by WII, and approved by the Government of India.

18. We heard Shri Raj Panjwani, learned senior counsel appearing for the applicant, who submitted that this 20-year project is hanging on fire due to the indifferent attitude of the Gujarat Government. Learned senior counsel submitted that the necessity of re-introduction of Asiatic lion at Kuno has been keenly felt and the scientific world has unanimously advocated for translocation of this endangered species to Kuno for its long term survival and preservation. Learned senior counsel

pointed out that NBWL, the expert technical body at more than one occasions has approved and granted technical sanction to go ahead with the project, but could not pick up expected momentum due to the indifferent and defiant attitude of the State of Gujarat.

19. Ms. Vibha Datta Makhija, learned counsel appearing for the State of Madhya Pradesh, highlighted the steps taken by the State of Madhya Pradesh for pushing the project forward. Learned counsel referred to the various counter affidavits filed by the State of Madhya Pradesh for completing the first phase of the project. Necessary sanction has already been obtained to declare Kuno as Sanctuary under the Wildlife Protection Act. MoEF has already granted its approval under Section 2 of the Forest (Conservation) Act for diversion of 3395.9 hectare of forest land for the rehabilitation of eighteen villages located inside Kuno, subject to fulfillment of certain conditions. The area at Kuno was increased to 1268.861 Sq. Km in April 2002 by creating a separate Kuno Wildlife Division. For the above purpose, a total amount of Rs. 1545 lakh had been granted by the Government of India and utilized by the State Government. Learned counsel also pointed out that altogether 24 villages and 1543 families were relocated outside Kuno by the year 2002-2003 and the lands abandoned by them have been developed into grass lands.

20. Learned counsel also pointed out that prey density at Kuno has far exceeded the prey density at Gir. Reference was made to the Prey Density Survey conducted during 2004-2005 by Mr. Fiaz A. Khudsar and Mr. Raman in the year 2008. Firstly, it was pointed out that WII had also conducted an independent study in the year 2012, which also supported the stand taken by the State of Madhya Pradesh that there is sufficient prey base to receive sufficient numbers of lions. Over and above, adequate training has also been given to the forest staff, guards etc. for receiving the lions and for their upkeep and monitoring.

21. Shri P.K. Malhotra, learned Additional Solicitor General, submitted that the population of Asiatic lion is increasing at Gir, but there are conceivable threats to their survival; man-made, natural calamity as well as outbreak of epidemic, which may wipe out the entire population, due to their small population base and limited geographical area of spread. It is under such circumstances, the need for a second home for lions was felt, for which Kuno was found to be the most suitable habitat. However, it was pointed out that the lions could be translocated only if sufficient number of ungulates is available and after taking effective measures, such as, control of poaching, grassland management, water management, building rubble wall around the division etc. Learned senior counsel made reference to the study conducted by the experts of WII and Wildlife Trust of India of the programme of re-introduction of Cheetah in Kuno, on import from Namibia. Referring to the correspondence between the Ministry of State (External Affairs) and Chief Minister of Madhya Pradesh, it was

pointed out that subsequent re-introduction of lions is in no way expected to affect the cheetah population, which would have established in the area, by that time.

22. Shri P.S. Narasimha, learned senior counsel and learned Amicus Curiae apprised the court of the extreme urgency for the protection of the Asiatic lion which has been included in the Red List published by the International Union for Conservation of Natgure (IUCN) as critically endangered species, endorsed by NBWL in various meetings. NBWL, being the highest scientific statutory body, it commands respect and its opinion is worthy of acceptance by the MoEF and all the State Governments. Learned senior counsel also referred to Article 48 and Article 51-A of the Constitution of India and submitted that the State has a duty to protect and improve environment and safeguard the forests and wildlife in the country, a duty cast upon all the States in the Union of India. Reference was also made to the conservatism in Bio-Diversity and the Eco-centric principle, which have been universally accepted. Learned senior counsel also referred to the National Wildlife Action Plan 2002-2016, and submitted that translocation of Asiatic lions has been treated as a priority project after having found that an alternative home for Asiatic lion is vital for its survival. Learned senior counsel also submitted that the National Forest Policy and the Scheme of 2009 and NWAP (2002-2016) and the plans have legislative force as decided in Lafarge Umiam Mining Private Limited, T.N. Godavarman Thirumulpad v. Union of India and others (2011) 7 SCC 338 case and can be enforced through Courts.

23. Shri Shyam Divan, learned senior counsel appearing for the State of Gujarat, refuted all those contentions and reiterated that there is no necessity of finding out a second home for Asiatic lions, since the population of Asiatic lion has been properly protected in Greater Gir forest and also in few other sanctuaries near Gir Forest. Shri Divan submitted that the population of Asiatic lion has gone up reasonably since broader conservation methods have been adopted by the State of Gujarat and that at present, there is no immediate threat to the Asiatic lions calling for emergency measures, like translocation or reintroduction. Learned senior counsel further pointed out that past experience shows that such translocation of lions ended in failure and possibility of such recurrence cannot be ruled out, since Kuno is not well set to accept or preserve an endangered species like Asiatic lion; which is a success story at Gir.

24. Shri Divan also submitted that, so far, no acceptable translocation plan has been prepared or implemented for a successful translocation of an endangered species like Asiatic lion and the same has been taken note of and commented upon the State Wildlife Board, Gujarat in its meeting held on 16.3.2012. Shri Divan also submitted that the prey-base studies are totally inadequate and not a single study has been conducted or report placed before this Court to show that the benchmark of 480,000 kgs. of wild ungulates biomass has been attained at Kuno. Shri Divan also referred to the note dated 8.7.2012 submitted by Dr. Ravi Chellam and contended that no reliable

information was furnished to support the view regarding adequacy of prey base at Kuno. Shri Divan also referred to Section 12 of the Wild Life (Protection) Act and submitted that the translocation should be to 'an alternative suitable habitat'. Kuno, according to the learned senior counsel, is not a 'suitable habitat', not only due to inadequacy of prey- base, but also due to factors like presence of tigers, large scale poaching, unfavourable climate condition, lack of expertise, human-animal conflict etc.

25. Learned senior counsel also referred to the issues raised by the petitioner through this PIL and contended that it would not stand the tests laid in Lafarge case (supra), especially when the State Board of Wild Life has stated cogent reasons why translocation of lions to Kuno, at present, is not advisable, which is fully justified by the objections and independent scientific material. Such decision, according to the learned senior counsel, is not amenable to judicial review and, even otherwise, no grounds are made out for issuing a Writ of Mandamus directing translocation of Asiatic lion from Gir to Kuno.

LEGAL FRAMEWORK

26. We will first deal with the constitutional and the legal framework on which we have to examine the various issues which have come up for consideration in this case. The subject "Protection of wild animals and birds" falls under List III, Entry 17B of Seventh Schedule. The Parliament passed The Wild Life (Protection) Act 53 of 1972 to provide for the protection of wild animals and birds with a view to ensuring the ecological and environmental security of the country. The Parliament vide Constitution (42nd Amendment) Act, 1976 inserted Article 48A w.e.f. 03.01.1977 in Part IV of the Constitution placing responsibility on the State "to endeavour to protect and improve the environment and to safeguard the forests and wild life of the country." Article 51A was also introduced in Part IVA by the above-mentioned amendment stating that "it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures".

27. By Act 23 of 1982, Section 12(bb) was inserted in the Wild Life (Protection) Act w.e.f. 21.05.1982 which authorised the Chief Wild Life Warden to grant a special permit for the purpose of scientific management which would include translocation of any wild animal to an alternative suitable habitat or population management of wild life without killing or poisoning or destroying any wild animals.

28. The Parliament later vide Act 16 of 2003 inserted Section 5A w.e.f. 22.09.2003 authorizing the Central Government to constitute the National Board for Wild Life (in short 'NBWL'). By the same Amendment Act, Section 5C was also introduced eliciting functions of the National Board. Section 5B was also introduced by the

aforesaid amendment authorizing the National Board to constitute a Standing Committee for the purpose of exercising such powers and performing such duties as may be delegated to the Committee by the National Board. NBWL is, therefore, the top most scientific body established to frame policies and advise the Central and State Governments on the ways and means of promoting wild life conservation and to review the progress in the field of wild life conservation in the country and suggesting measures for improvement thereto. The Central and the State Governments cannot brush aside its opinion without any cogent or acceptable reasons. Legislation in its wisdom has conferred a duty on NBWL to provide conservation and development of wild life and forests.

30. The Parliament enacted the Biological Diversity Act in the year 2002 followed by the National Biodiversity Rules in the year 2004. The main objective of the Act is the conservation of biological diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the utilization of genetic resources. Bio-diversity and biological diversity includes all the organisms found on our planet i.e. plants, animals and micro-organisms, the genes they contain and the different ecosystems of which they form a part. The rapid deterioration of the ecology due to human interference is aiding the rapid disappearance of several wild animal species. Poaching and the wildlife trade, habitat loss, human-animal conflict, epidemic etc. are also some of the reasons which threaten and endanger some of the species.

31. India is known for its rich heritage of biological diversity and has so far documented over 91,200 species of animals. In India's bio-graphic regions, 45,500 species of plants are documented as per IUCN Red List 2008. India has many critically threatened animal species. IUCN has noticed today the only living representative of lions once found throughout much of south-west Asia occurred in India's Gir forest which has been noticed as a critically endangered species in IUCN Red List. The IUCN adopted a resolution of 1963 by which a multi-lateral treaty was drafted as the Washington Convention also known as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 1973. CITES entered into force on 1st July, 1975, which aims to ensure that international trade in specimens of wild animals and plants does not threaten the survival of the species in the wild, and it accords varying degrees of protection to more than 33,000 species of animals and plants. Appendix 1 of CITES refers to 1200 species which are threatened with extinction. Asiatic lion is listed in Appendix 1 recognizing that species is threatened with extinction.

32. We notice for achieving the objectives of various conventions including Convention on Biological Diversity (CBD) and also for proper implementation of IUCN, CITES etc., and the provisions of the Wild Life (Protection) Act, Bio-diversity Act, Forest Conservation Act etc. in the light of Articles 48A and 51A(g), the

Government of India has laid down various policies and action plans such as the National Forest Policy (NFP) 1988, National Environment Policy (NEP) 2006, National Bio-diversity Action Plan (NBAP) 2008, National Action Plan on Climate Change (NAPCC) 2008 and the Integrated development of wild life habitats and centrally sponsored scheme framed in the year 2009 and integrated development of National Wild- life Action Plan (NWAP) 2002-2016. In Lafarge case (*supra*) this Court held that National Forest Policy 1988 be read together with the Forest (Conservation) Act, 1980. In our view, the integrated Development of Wile Life habitat under the Centrally Sponsored Scheme of 2009 and the NWAP (2002-2016) have to be read along with the provisions of the Wile Life (Conservation) Act.

33. The Prime Minister of India on 1.1.2002, in the XXI Meeting of the Indian Board for Wildlife, released the 'National Wildlife Action Plan (2002-2016)' (in short NWAP 2002-2016). NWAP has highlighted that the wildlife encompasses all uncultivated flora and undomesticated fauna and every species has the right to live and every threatened species must be protected to prevent its extinction. It was noticed with the mounting agricultural, industrial and demographic pressures, wilderness areas, which are the richest repositories of wildlife and biodiversity have either shrunk or disappeared and their continued existence is crucial for the long term survival of the biodiversity and the ecosystems supporting them. NWAP, *inter alia*, highlighted the necessity to protect the long term ecological security of India and to identify and protect natural ecosystems from over-exploitation, contamination and degradation. NWAP has also urged the necessity to give primacy to in situ conservation which is a sheet anchor of wildlife conservation. Ex situ measures in zoological parks and gene banks may supplement this objective, without depleting scarce wild resources. NWAP also highlighted the ecological requirements for the survival of threatened, rare and endangered species together with their community associations of flora and fauna. It also highlighted the imperative necessity to have alternative homes for highly endangered species like the Great Indian Bustard, Bengal Florican, Asiatic Lion, Wild Buffalo, Dugong, the Manipur Brow Antlered Deer and the like. It was also noticed that where in situ conservation efforts are unlikely to succeed, ex situ captive breeding and rehabilitation measures may be necessary, in tandem with the preparation of their wild habitats to receive back captive populations, especially in respect of lesser-known species where status and distribution of wild animals are not fully known...

35. MoEF noticed that the fragmented nature of wildlife rich areas, increased human pressure, habitat degradation, proliferation of invasive species, man-animal conflicts, poaching, impacts of changing climate etc. are some of the challenges that has to be addressed at a war footing. The necessity for ensuring better protection of wildlife outside the protected areas and initiating recovery programmes for saving critically

endangered species and habitats has also been high-lighted. Keeping that in view, a comprehensive Centrally Sponsored Scheme titled 'Integrated Development of Wildlife Habitats' has been made operational on 30.7.2009 which was in addition to the erstwhile Centrally Sponsored Scheme -- 'Assistance for the Development of National Parks and Sanctuaries'. The scheme incorporated additional components and activities for implementing the provisions of the Wildlife (Protection) Act, 1972, the National Wildlife Action Plan (2002-2016), recommendations of the Tiger Task Force, 2005 and the National Forest Commission, 2006 and the necessities felt from time to time for the conservation of wildlife and biodiversity in the country. The scheme was formulated during the 11th year plan.

36. India has a network of 99 national parks, 515 wildlife sanctuaries, 43 conservation reserves and 4 community reserves in different bio- geographic zones. Many important habitats, still exists outside those areas, which requires special attention from the point of view of conservation. The Centrally Sponsored Scheme also specifically refers to the recovery programmes for saving critically endangered species and habitats. Due to variety of reasons, several species and their habitats have become critically endangered. Snow leopard, Great Indian Bustard, Kashmir Stag, Gangetic Dolphin, Nilgiri Tahr, Malabar Civet, marine turtles, etc are few examples.

37. The scope of the Centrally Sponsored scheme was examined in T.N. Godavarman Thirumulpad v. Union of India and others (2012) 3 SCC 277 (Wilde Buffalo case) and this Court directed implementation of that scheme in the State of Chhattisgarh. The centrally sponsored scheme, as already indicated, specifically refers to the Asiatic lions as a critically endangered species and highlighted the necessity for a recovery programme to ensure the long term conservation of lions. NWAP 2002-2016 and the Centrally Sponsored Scheme 2009 relating to integrated development of wildlife habitats are schemes which have statutory status and as held in Lafarge case (supra) and have to be implemented in their letter and spirit. While giving effect to the various provisions of the Wildlife Protection Act, the Centrally Sponsored Scheme 2009, the NWAP 2002-2016 our approach should be eco-centric and not anthropocentric.

ANTHROPOCENTRIC VS. ECO-CENTRIC

39. Sustainable development, it has been argued by various eminent environmentalists, clearly postulates an anthropocentric bias, least concerned with the rights of other species which live on this earth. Anthropocentrism is always human interest focussed thinking that non-human has only instrumental value to humans, in other words, humans take precedence and human responsibilities to non-human are based benefits to humans. Eco-centrism is nature-centred, where humans are part of nature and non-humans have intrinsic value. In other words, human interest does not

take automatic precedence and humans have obligations to non-humans independently of human interest. Eco-centrism is, therefore, life-centred, nature-centred where nature includes both humans and non-humans.

40. We re-iterate that while examining the necessity of a second home for the Asiatic lions, our approach should be eco-centric and not anthropocentric and we must apply the “species best interest standard”, that is the best interest of the Asiatic lions. We must focus our attention to safeguard the interest of species, as species has equal rights to exist on this earth. Asiatic Lion has become critically endangered because of human intervention. The specie originally existed in North Africa and South-West Asia formerly stretched across the coastal forests of northern Africa and from northern Greece across south-west Asia to eastern India. Today the only living representatives of the lions once found throughout much of South-West Asia occur in India's Gir Forest. Asiatic lion currently exists as a single sub-population and is thus vulnerable to extinction from unpredictable events, such as an epidemic or large forest fire etc. and we are committed to safeguard this endangered species because this species has a right to live on this earth, just like human beings.

41. Article 21 of the Constitution of India protects not only the human rights but also casts an obligation on human beings to protect and preserve a specie becoming extinct, conservation and protection of environment is an inseparable part of right to life. In *M.C. Mehta v. Kamal Nath and Others* (1997) 1 SCC 388 , this Court enunciated the doctrine of “public trust”, the thrust of that theory is that certain common properties such as rivers, seashores, forests and the air are held by the Government in trusteeship for the free and unimpeded use of the general public. The resources like air, sea, waters and the forests have such a great importance to the people as a whole, that it would be totally unjustified to make them a subject of private ownership. The State, as a custodian of the natural resources, has a duty to maintain them not merely for the benefit of the public, but for the best interest of flora and fauna, wildlife and so on. The doctrine of ‘public trust’ has to be addressed in that perspective.

42. We, as human beings, have a duty to prevent the species from going extinct and have to advocate for an effective species protection regimes. NWAP 2002-2016 and the Centrally Sponsored Scheme 2009 indicate that there are many animal species which are close enough to extinction and some of the other species have already disappeared from this earth. No species can survive on the brink of extinction indefinitely and that the continued existence of any species depends upon various factors like human-animal conflict, epidemics, forest fire and other natural calamities etc.

43. The Wildlife Biologists of WII, after conducting a research on Gir Forests, noticed the necessity for long term conservation of Asiatic lion in Gir and also highlighted the necessity of a second natural habitat for its long term conservation. Population and Habitat Analysis Workshop held at Baroda in October, 1993 also highlighted that fact. NBWL, as already indicted, has taken a consistent view in all its meetings about the necessity of a second habitat for Asiatic lion, an endangered species. Asiatic lion, it has been noticed, has been restricted to only one single habitat, i.e. the Gir National Forest and its surrounding areas and an outbreak of possible epidemic or natural calamity might wipe off the entire species. A smaller population with limited genetic strength are more vulnerable to diseases and other catastrophes in comparison to large and widespread population. Threat, therefore, is real and has proved by the outbreak of canine distemper in the lions of Serengeti NP, Tanzania in 1994. 85% of the Serengeti lion population, it was noticed, had Canine Distemper Virus antibodies and at least 30% of the Serengeti and Mara lions died due to the infection. Compared with Gir, the lion population in the 40,000 sq. km. Serengeti-Mara ecosystem is large with about 2500 lions. It was felt that if an epidemic of this scale were to affect the lions in Gir, it would be very difficult to save them from extinction, given the much smaller area of the Gir forests and the smaller lion population. The possibility of the disease spreading to the pockets of habitat such as Girnar, Mityala, Rajula, Kodinar and the surrounding areas, cannot be ruled out.

44. We have already indicated that there is uniformity in the views expressed by the Bio-Scientists of WII, NBWL, MoEF and other experts that to have a second home for the endangered species like Asiatic lion is of vital importance. A detailed study has been conducted to find out the most suitable habitat for its re-introduction and Kuno Wildlife Sanctuary (for short 'Kuno') in Madhya Pradaesh, as already indicted, has been found to be the most ideal habitat.

OWNERSHIP AND POSSESSION OF WILD ANIMALS

45. No state, organisation or person can claim ownership or possession over wild animals in the forest. Wild Animal is defined under the Wild Life (Protection) Act, 1972 under Section 2(36) to mean any animal specified in schedules I to IV and found wild in nature. 'Wild Life' has been defined under Section 2(37) to include any animal, bees, butterflies, crustacean, fish and moths, and or land vegetation which forms part of any habitat. Section 9 prohibits hunting of wild animals, specified in Schedule I, II, III and IV except as provided under Section 11 and Section 12. Section 40 of the Act obliges a person to make a declaration and Section 41 enables the Chief Wild Life Warden to make an enquiry and preparation of inventories and Section 42 deals with the issue of certificates and confers, no ownership of the wild animals to a particular state or others. Animals in the wild are properties of the nation for which no

state can claim ownership and the state's duty is to protect the wild life and conserve it, for ensuring the ecological and environmental security of the country.

46. Several migratory birds, mammals, and animals in wild cross national and international borders created by man and every nation have a duty and obligation to ensure their protection. No nation or organisation can claim ownership or possession over them, the Convention on the conservation of migratory species of wild animals held at Bonn, 1979, supports this principle and the convention recognises that wild animals in their innumerable forms are irreplaceable part of the earth; natural system and must be conserved for the good of the mankind. It has recognised that the states are and must be the protectors of the migratory species of wild animals that live within or pass through their national jurisdictional boundaries. Convention highlights that conservation and effective management of migratory species of wild animals require the concerted action of all states within the national jurisdictional boundaries of which such species spend any part of their life cycle. India is also a signatory to that convention.

47. State of Gujarat has taken up the stand that it has got its own conservation programme in respect of Asiatic lion. Due the effective conservation programme carried out by the State of Gujarat at Gir, it was pointed out, that the number of Asiatic lions in the wildlife has increased, the range of these lions has increased, the statutorily protected habitat has increased, so also the area occupied by these lions has increased. The State has maintained the stand that there is no present or immediate danger to the Asiatic lions warranting any emergency measures.

48. State Board for Wildlife, Gujarat (SBWL, Gujarat), which has been constituted by the State Government under Section 6 of the Wildlife Protection Act, 1972, convened a meeting on 16.3.2012 to discuss the issue relating to translocation of Asiatic lion from Gujarat to Madhya Pradesh. SBWL, Gujarat and took the view that that the issue of giving or not giving lions to Kuno is not an issue of conflict between States, but it is a collective Indian cultural approach in the interest of long term conservation of lions as part of our family. SBWL further maintained the stand that Asiatic Lion being a "family member" is beyond and higher than the "scientific reasoning". SBWL, therefore, did not agree with the proposal for translocation of lion from Gujarat to Kuno, a stand endorsed by the State of Gujarat.

49. Approach made by SWBL and the State of Gujarat is an anthropocentric approach, not eco-centric though the State of Gujarat can be justifiably proud of the fact that it has preserved an endangered specie becoming extinct. We are, however, concerned with a fundamental issue whether the Asiatic lions should have a second home. The cardinal issue is not whether the Asiatic lion is a "family member" or is part of the "Indian culture and civilization", or the pride of a State but the preservation

of an endangered species for which we have to apply the “species best interest standard”. Our approach should not be human-centric or family-centric but eco-centric. “Scientific reasoning” for its re-location has to supersede the family bond or pride of the people and we have to look at the species best interest especially in a situation where the specie is found to be a critically endangered one and the necessity of a second home has been keenly felt. We, therefore, find it difficult to agree with the reasoning of SBWL, Gujarat and the State of Gujarat that the Asiatic lion is a family member and hence be not parted with.

50. The views of NBWL constituted by the Central Government in exercise of its powers conferred under Section 5A of the Wildlife Protection Act, have to prevail over the views expressed by SBWL. The duties conferred on the National Board under Section 5C of the Act and on the State Board under Section 8 of the Act are entirely different. NBWL has a duty to promote conservation and development of wildlife and frame policies and advise the Central Government and the State Governments on the ways and importance of promoting wildlife conservation. It has to carry out/make assessment of various projects and activities on wildlife or its habitat. NBWL has also to review from time to time the progress in the field of wildlife conservation in the country and suggest measures for improving thereto. Those functions have not been conferred on the State Board. The State Board has been conferred with a duty to advise the State Government the selection and management of areas to be declared as protected areas and advise the State Government in formation of their policies for protection and conservation of the wildlife and specify plans etc. Statutorily, therefore, it is the duty of NBWL to promote conservation and development of wildlife with a view to ensuring ecological and environmental security in the country. We are, therefore, of the view that the various decisions taken by NBWL that Asiatic lion should have a second home to save it from extinction, due to catastrophes like epidemic, large forest fire etc, which could result in extinction, is justified. This Court, sitting in the jurisdiction, is not justified in taking a contrary view from that of NBWL.

HISTORICAL HABITAT – RE-INTRODUCTION

51. No specie can survive on the brink of extinction indefinitely and the probabilities associated with a critically endangered specie make their extinction a matter of time. Convention biology is the science that studies bio-diversity and the dynamics of extinction. Eco-system approach to protecting endangered species emphasises on recovery, and complement and support eco-system based conservation approach. Reintroduction of an animal or plant into the habitat from where it has become extinct is also known as ex-situ conservation. India has successfully achieved certain re-introduction programmes, for example, the Rhino from Kaziranga, re- introduction of Gangetic gharial in the rivers of Uttar Pradesh, Rajasthan etc. Re-introduction of an

organism is the intentional movement of an organism into a part of its native range from which it has disappeared or become extirpated in historic times as a result of human activities or natural catastrophe.

52. Kuno, as already stated, was proved to be a historical habitat of Asiatic Lions. After survey of the potential status for re-introduction of Asiatic lion, a final report has been submitted by WII, which was published on 31.1.1995 Kuno Wildlife Sanctuary (Madhya Pradesh) emerged as the most suitable habitat for re-introduction of the Asiatic lion. The Council of Ministers approved the project on 28.2.1996. Between 1996 and 2001, 24 villages with about 1547 families had been translocated from the sanctuary by the Madhya Pradesh Forest Department. Government of Madhya Pradesh had also demarcated 1280 sq. kms. Kuno Wildlife Division, encompassing the Sironi, Agra and Morawan forest ranges around the sanctuary. Government of India vide its order dated 21.1.1997 ordered diversion of 3720.9 hectares of forest land, including 18 villages were protected under Section 2 of the Forest Conservation Act. A 20-years Project envisaged by the Government of India was also approved by NBWL in its meeting held on 10.3.2004. The Government of Madhya Pradesh took up a massive re-location of villages and giving them alternative sites. A male over 18 years of age was considered to be a family and each family was given 2 hectares of cultivate land, in addition to 500 sq. mtrs. Land was also given for house construction. Financial assistance to the tune of Rs. 1,00,000/- in the form of housing material was also given. Government of India has spent a sum of Rs. 15 crores for the said purpose.

53. We also notice that all possible steps have been taken by the State of Madhya Pradesh, MoEF and the Union of India making Kuno Wildlife Sanctuary fit for re-introduction of Asiatic lion, with the approval of NWLB.

PREY DENSITY

54. WII was requested to assess the availability of prey density in the year 2005. With the assistance of various staff, 17 transects totalling 461 km were surveyed over an area of 280 sq. kms. The density of catchable wild prey (chital, sambar, nilgai, wild pig) by lions was 13 animals/sq. km. There were about 2500 cattle, left behind by the translocated people which were considered to be the buffer prey for lions to tide over the likely problem of drought periodically killing wild ungulates. WII noticed that with the implementation of the recommendations such as the control of poaching, grassland management, building rubble wall around the Division and water augmentation, a substantial rise (ca. 20 animals/Sq. km) in the wild prey base for lions by the end of 2007. A detailed report on the assessment of prey population was submitted by WII in July 2006.

55. State of Gujarat had raised serious objection with regard to prey density at Kuno. Various studies have been conducted with regard to prey density. Reports and studies conducted by the Government of Madhya Pradesh revealed that the prey density at Kuno has far exceeded the estimated prey density as recommended by Prof. Chellam in his 1993 report...State of Madhya Pradesh has also taken up the stand that the prey base in Kuno is more than the existing prey base in Gir...

56. State of Gujarat filed an application on 2.7.2012 on the basis of the above estimation of prey base and sought a direction to the parties to take a fresh survey on prey base. Shri Ravi Chellam in his written note on 8.7.2012 made some remarks on prey-base stating that prey density estimation seems to be inadequate in terms of design, data-collection, protocols, and analytical methods, when compared with the internationally accepted standards. Shri Chellam suggested that prey studies have to be conducted at least twelve months covering all seasons and habitat.

57. State of Gujarat has also raised various other objections stating that the past track record would indicate that State of Madhya Pradesh is not taking any effective steps to control poaching which is also a threat if lions are translocated to Kuno. To meet that contention, the State of Madhya Pradesh stated that the Tiger Authority of India in its report – Tiger Meets, July 2011 – has assessed the performance of the State of Madhya Pradesh as outstanding, which would indicate that they had taken effective steps against poaching of animals at Kuno. We notice that poaching of wild animals is of great concern which calls for attention by all State Governments, so as to protect the endangered species from extinction. It is a matter which has to be dealt with effectively and poaches, if caught, should be brought to justice.

CHEETAH TO KUNO

58. We notice that while the matter was being heard, a decision has been made by MoEF to import African Cheetahs from Namibia to India and to introduce the same at Kuno. Amicus Curiae filed I.A. No. 3452 of 2012. This Court granted a stay on 8.5.2012 of the decision of MoEF to import the Cheetahs from Namibia to India for introducing them to Kuno. Serious objections have been raised by the Amicus Curiae Shri P.S. Narasimha against the introduction of foreign species at Kuno. Learned Amicus Curiae pointed out that the decision to introduce African Cheetahs into the same proposed habitat chosen for re-introduction of Asiatic lion has not been either placed before the Standing Committee of NBWL, nor has there been a consistent decision. Learned Amicus Curiae pointed out that IUCN Guidelines on translocation clearly differentiated between introduction and re-introduction. The guidelines critically warned against the introduction of African or imported species which never existed in India. It is not a case of international movement of organism into a part of its native range. Learned Amicus Curiae pointed that NWAP 2002-2016, which is a

National Policy document, does not envisage re-introduction of a foreign species to India. The Policy only mentioned re-introduction or finding an alternative home for species like Asiatic lion.

59. MoEF, in our view, has not conducted any detailed study before passing the order of introducing foreign cheetah to Kuno. Kuno is not a historical habitat for African cheetahs, no materials have been placed before us to establish that fact. A detailed scientific study has to be done before introducing a foreign species to India, which has not been done in the instant case. NBWL, which is Statutory Board established for the purpose under the Wildlife Protection Act was also not consulted.

60. We may indicate that our top priority is to protect Asiatic lions, an endangered species and to provide a second home. Various steps have been taken for the last few decades, but nothing transpired so far. Crores of rupees have been spent by the Government of India and the State of Madhya Pradesh for re-introduction of Asiatic lion to Kuno. At this stage, in our view, the decision taken by MoEF for introduction of African cheetahs first to Kuno and then Asiatic lion, is arbitrary an illegal and clear violation of the statutory requirements provided under the Wildlife Protection Act. The order of MoEF to introduce African Cheetahs into Kuno cannot stand in the eye of Law and the same is quashed.

61. MoEF's decision for re-introduction of Asiatic lion from Gir to Kuno is that of utmost importance so as to preserve the Asiatic lion, an endangered species which cannot be delayed. Re-introduction of Asiatic lion, needless to say, should be in accordance with the guidelines issued by IUCN and with the active participation of experts in the field of re-introduction of endangered species. MoEF is therefore directed to take urgent steps for re-introduction of Asiatic lion from Gir forests to Kuno. MoEF has to constitute an Expert Committee consisting of senior officials of MoEF, Chief Wildlife Wardens of the States of Madhya Pradesh and Gujarat. Technical experts should also be the members of the Committee, which will include the Secretary General and Chief Executive Officer of WWF. Dr. Y.S. Jhala, senior scientist with Wildlife Institute of India, Dr. Ravi Chellam, senior scientist, Dr. A.J.T. Johnsingh, since all of them had done lot of research in that area and have national and international exposure. Any other expert can also be co-opted as the members of the Committee. Needless to say, the number of lions to be re-introduced would depend upon the density of prey base and other related factors, which the Committee will assess.

62. I.A. is allowed as mentioned above...

63. We are also inclined to highlight the necessity of an exclusive parliamentary legislation for the preservation and protection of endangered species so as to carry out

the recovery programmes before many of the species become extinct and to give the following directions:

(a) NWAP (2002-2016) has already identified species like the Great Indian Bustard, Bengal Florican, Dugong, the Manipur Brow Antlered Deer, over and above Asiatic Lion and Wild Buffalo as endangered species and hence we are, therefore, inclined to give a direction to the Government of India and the MoEF to take urgent steps for the preservation of those endangered species as well as to initiate recovery programmes.

(b) The Government of India and the MoEF are directed to identify, as already highlighted by NWAP, all endangered species of flora and fauna, study their needs and survey their environs and habitats to establish the current level of security and the nature of threats. They should also conduct periodic reviews of flora and fauna species status, and correlate the same with the IUCN Red Data List every three years.

(c) Courts and environmentalists should pay more attention for implementing the recovery programmes and the same be carried out with imagination and commitment.

***Divya Pharmacy v Union of India, High Court of Uttarakhand, WP
3437/2016, Decided on 21 December 2018.***

Sudhanshu Dhulia, J.: "Divya Yog Mandir", is a Trust, registered under the Registration Act, 1908, and "Divya Pharmacy", which is the sole petitioner before this Court is a business undertaking of this Trust. The Pharmacy manufactures Ayurvedic medicines and Nutraceutical products, at its manufacturing unit at Haridwar, Uttarakhand.

2. It is an admitted fact that "Biological Resources" constitute the main ingredient and raw materials in the manufacture of Ayurvedic and Nutraceutical products. Petitioner is aggrieved by the demand raised by Uttarakhand Biodiversity Board (from hereinafter referred to as UBB), under the head "Fair and Equitable Benefit Sharing" (FEBS), as provided under the Biological Diversity Act, 2002 (from hereinafter referred to as the Act), and the 2014 Regulations framed therein.

3. Petitioner's case is simple. UBB cannot raise a demand, under the Head of "Fair and Equitable Benefit Sharing" (FEBS), as the Board neither has the powers nor the jurisdiction to do that and, secondly, the petitioner in any case is not liable to pay any amount or make any kind of contribution under the head of "FEBS". This argument of the petitioner is based on the interpretations of "certain provisions" of the statute, which we may now refer.

4. The Biological Diversity Act, 2002 is a 2002 Act of the Parliament, with three basic objectives: (A) Conservation of Biological Diversity. (B) Sustainable use of its components. (C) Fair and equitable sharing of the benefits arising out of the use of biological resources.

5. In this writ petition, we are presently only concerned with the third objective which is fair and equitable benefit sharing (from hereinafter referred to as FEBS).

7. Under the Act, certain class of persons, cannot undertake an activity, related to biodiversity in India, in any manner, without a "prior approval" of the National Biodiversity Authority (from hereinafter referred to as NBA). The persons who require prior approval from NBA are the persons defined in Section 3 of the Biological Diversity Act, 2002 (from hereinafter referred to as the 'Act')...

8. A bare reading of the above provision makes it clear that prior approval of NBA is mandatory for persons or entities who have some kind of a "foreign element" attached to them. Either they are foreigners or even if they are citizens, they are non-residents, and in case of a body corporate again a "non-Indian" element is

attached to it. Persons having a foreign element have therefore been kept in a distinct category.

11. Fair and equitable benefit sharing (FEBS) thus has not been precisely defined. Its definition is based on reference to other provisions of the statute, where again it is given by way of illustration in sub-section (2) of Section 21, where "payment of monetary compensation" is one of the means of grant of this benefit.

12. Before NBA grants approval under Section 19 or under Section 20 of the Act, it has to ensure that the terms and conditions for granting the approval are such which secure equitable sharing of benefits arising out of the use of "Biological Resources". In other words, FEBS would only arise if an approval is being taken under Section 19 and 20 of the Act, and in no other contingency. All the same, both Sections 19 & 21, are the sections meant for only "foreign entities", who require approval from NBA in one form or the other. These provisions do not apply in case of the petitioner which is purely an Indian Company.

13. Under Section 19 and 20 of the Act, a prior approval is required from NBA, only by persons who have been defined under Section 3(2) of the Act. Such persons are the ones who are not citizens of India, or though a citizen of India are still non-resident Indian, and if it is a body corporate, association or organization, it is not incorporated or registered in India, or if incorporated or registered in India under any law for the time being in force, it has a non-Indian participation in its share capital or management. To put it simply prior approval for NBA is only required when there is a "foreign element" involved.

14. For an Indian entity such as the petitioner, the provision is given in Section 7 of the Act, which speaks of "prior intimation" to be given, that too not to NBA but to the State Biodiversity Board (SBB)...

15. As the petitioner does not fall in any of the categories as defined under sub-section (2) of Section 3, there is no question of a prior approval from NBA by the petitioner, and logically therefore there is no question of any contribution under FEBS, as a contribution under FEBS only comes from those who require a prior approval from NBA.

16. The petitioner would also argue that the State Biodiversity Board (SBB) has no power to impose FBES in respect of persons referred in Section 7 of the Act of 2002, i.e. in respect of "Indian entities". Even NBA does not have the powers under the Act, to delegate these powers to SBB, as the NBA itself is not authorised to impose FEBS on an "Indian entity". In short the petitioner would argue that there is no provision in the Act where a contribution in the form of "fee"/monetary

compensation, or a contribution in any manner is required to be given by an Indian entity. FEBS is only for foreigners! The statute is clear about it. Sri Parthasarthy would finally submit that the elementary principle of statutory interpretation is to give plain meaning to the words used. Reliance is placed on a decision of the Hon'ble Apex Court in the case of State of Jharkhand and another v. Govind Singh reported in (2005) 10 SCC 437. Para 17 of the said judgment reads as under:

"17. Where, therefore, the "language" is clear, the intention of the legislature is to be gathered from the language used. What is to be borne in mind is as to what has been said in the statute as also what has not been said. A construction which requires, for its support, addition or substitution of words or which results in rejection of words, has to be avoided, unless it is covered by the rule of exception, including that of necessity, which is not the case here."

17. To the contrary, the learned counsel for the SBB Sri Ritwik Dutt would submit that FEBS is one of the three major objectives sought to be achieved by the Act of 2002, and this has always to be seen as a continuation of the long history of international conventions and treaties, which preceded the parliamentary legislation. The Act and the Regulations framed therein are a result of our international commitments. Reference here is to the Rio de Janeiro Convention and Johannesburg Declaration, and most importantly Nagoya Protocol. The learned counsel for the SBB would argue that there is no distinction between a "foreign entity" and an "Indian entity", as far as FEBS is concerned, and if a distinction is made between a foreign entity and Indian entity in this respect, it would defeat the very purpose of the Act, and would also be against the international treaties and conventions to which India is a signatory. The learned counsel would submit that whereas a foreign entity under Section 3 has to take prior approval of NBA before venturing into this area, an Indian entity has to give "prior intimation" to SBB before venturing into this area, under Section 7 of the Act. The regulation and control, as far as Indian entity is concerned, is given to SBB under the Act, and therefore it is the SBB which is the regulatory authority in case of an Indian entity, such as the petitioner, and FEBS is being imposed by SBB as one of its regulatory functions.

18. The functions of SBB are defined under Section 23 of the Act of 2002...

19. The powers of SBB are given under Section 24 of the Act of 2002...

20. Learned counsel would argue that under sub-section (a) of Section 23 of the Act of 2002, powers are given to the SBB to advise the State Government in this area of biodiversity, whereas in sub-section (b) of Section 23, the SBB has got

powers to regulate the grant of approvals or otherwise to request for commercial utilization or bio-survey and bio-utilisation of any biological resource by Indians. The powers given under Sub-section (c) of Section 23 of the Act of 2002 are general powers given to SBB to carry out the provisions of the Act or as may be prescribed by the State Government.

21. Sub-section (b) of Section 23 has to be read with Section 7 of the Act of 2002 and reading of the two provisions together would mean that although an Indian entity has only to give "prior information" (as against "prior approval" to NBA, in case of a foreign entity), it does not mean that SBB has no control over an Indian entity. Section 23 stipulates that SBB has powers to "regulate by granting of approvals or otherwise requests for commercial utilization or bio-survey and bio-utilisation of any biological resource by Indians". Regulation by imposition of fee is an accepted form of regulatory mechanism, the learned counsel for SBB would argue. This has again to be seen with sub-section (2) of Section 24, where the SBB, in consultation with the local bodies and after making such enquiries can prohibit or restrict any such activity, if it is of opinion that such activity is detrimental or contrary to the objectives of conservation and sustainable use of biodiversity or equitable sharing of benefits arising out of such activity.

22. Learned counsel would then rely on Section 52A of the Act of 2002, which is a provision for appeal before the National Green Tribunal, inter alia, against any order passed by NBA or SBB regarding determination of benefit sharing. Learned counsel would therefore emphasise that the very fact that an Appellate Authority has been provided, inter alia, against any order which has been passed by the SBB regarding FEBS, would imply that SBB has powers to impose FEBS.

23. Reliance has also been placed on Section 32 of the Act, which provides for constitution of State Biodiversity Fund, where, inter alia, all sums received by the State Biodiversity Board or such other sources have to be kept, hence a holistic reading of the entire provisions of the Act, would show that SBB has got an important role to play, particularly in the field of FEBS, the learned counsel for the SBB would submit.

24. The Act ensures that funds are available with the SBB for protection and regeneration of biological diversity, so that long term sustainability is ensured and the indigenous and local communities get incentives for benefit of conservation and use of biological resources.

25. The importance of FEBS has then been emphasised by the learned counsel for SBB relying upon the preamble of the Act of 2002, (which refers to the Rio de

Janeiro Convention of 1992), where "Fair and Equitable Benefit Sharing" is one of the three important posts of the entire movement of conservation of biodiversity, and one of the main purposes of the statute.

26. The learned counsel for the SBB would then argue that in the present context, a simple and plain reading of the statutory provisions may not be correct. The definition clause of the Act of 2002 starts with the words "In this Act, unless the context otherwise requires". The learned counsel would hence argue that the definitions of different words and phrases given in Section 2 of the Act of 2002, are the ones which have to be applied under normal circumstances, but when the application of the definition loses its purpose, the context requires a different examination.

27. Thereafter the learned counsel for the SBB emphasised the importance of International Conventions in construing domestic legislations, apart from the Rio de Janeiro Convention and Johannesburg Declaration, and particular emphasis was given to Nagoya Protocol of 2010 for the reason that in the Nagoya Protocol, the entire emphasis was on "fair and equitable benefit sharing" and the importance of indigenous and local communities in this regard.

28. In short, in the concept of FEBS, no distinction is made between a foreign entity and an the Indian entity, and the only distinction which the Act makes within Indian entities is in proviso to Section 7 of the Act of 2002 where an exception has been created for local people and communities in that area, including growers and cultivators of biodiversity, and vaidas and hakims, who have been practicing indigenous medicine.

29. The above stand taken by the SBB is adopted by the remaining respondents such as Union of India and the State of Uttarakhand.

30. Having heard the rival submissions, it is clear that at the heart of the dispute here is the interpretation of what constitutes "fair and equitable benefit sharing", and whether this liability can be fastened on an Indian, or an Indian company.

31. The petitioner is an Indian company, without any element of foreign participation, either in its share capital or management, and therefore has challenged the imposition of an amount by the SBB, under the head of "fair and equitable benefit sharing", precisely on the ground that an Indian entity cannot be subjected to this burden. The entire argument of the petitioner rests on a textual and legalistic interpretation, particularly of the term "Fair and Equitable Benefit Sharing".

32. In the first blush it seems only obvious that the law here does not subject an Indian entity to FEBS. But what seems obvious, may not always be correct.

The definition of FEBS in the statute and its implementation

33. The entire case of the petitioner, as placed by its learned counsel Sri Parthasarthy, moves on the definition clause of "Fair and Equitable Benefit Sharing" and based on that he would argue that "Fair and Equitable Benefit Sharing" would not involve an Indian entity.

34. The question is whether the context here requires a plain and textual interpretation. It is true that in normal circumstances, a definition has to be interpreted as it is given in the definition clause, but Section 2 of the Act, which defines various expressions in the Act opens with some important words, which are, "unless the context otherwise requires". Meaning thereby that it is not mandatory that one should always mechanically attribute an expression as assigned in the definition clause. Yes, ordinarily this must be done, but when such an interpretation results in an absurdity, or where it defeats the very purpose of the Act, then it becomes the duty of the Court to assign a "proper meaning" to the words or the phrase, as the case might be. It is for the reason that the Legislature, for abundant precaution, by and large in all statutes, start the definition clause with the words "unless the context otherwise requires", or such similar expressions.

35. G.P. Singh in his Classic, Principles of Statutory Interpretations* explains this aspect as follows:

"...where the context makes the definition given in the interpretation clause inapplicable, a defined work when used in the body of the statute may have to be given a meaning different from that contained in the interpretation clause; all definitions given in an interpretation clause are therefore normally enacted subject to the qualification - 'unless there is anything repugnant in the subject or context, or 'unless the context otherwise requires'."

36. But then before a different meaning is given to a definition, reason must be given as to why it is being done. It is also true that in a case where the application of a definition as given in the definition clause makes the provision unworkable or otiose, it must be so stated, that the definition is not applicable because of the contrary context.** * 12th Edition, page 191 ** Justice G.P. Singh: Principles of Statutory Interpretation, 12th Edition, page 192

37. The frequently cited case in this regard is Venguard Fire and General Insurance Co. Ltd., Madras v. Fraser & Ross, AIR 1960 SC 971. In the said case, the Hon'ble Apex Court, explained this position as under:

"It is well settled that all statutory definitions or abbreviations must be read subject to the qualification variously expressed in the definition clauses which created them and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, It is possible for the word to have a somewhat different meaning in different sections of the Act depending upon the subject or context. That is why all definitions in statutes generally begin with the qualifying words, similar to the words used in the present case, namely, 'unless there is anything repugnant in the subject or context'. Therefore, in finding out of the meaning of the word, "Insurer" in various sections of the Act (Insurance Act, 1938) the meaning to be ordinarily given to it is that given in the definition clause. But this is not inflexible and there may be sections in the Act where the meaning may have to be departed from on account of the subject or context in which the word had been used and that will be giving effect to the opening sentence in the definition section, namely 'unless there is anything repugnant in the subject or context'. In view of this qualification, the Court has not only to look at the words but also to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words under the circumstances."

What is fair and equitable benefit sharing and the importance of international treaties?

43. Indigenous and local communities, who either grow "biological resources", or have a traditional knowledge of these resources, are the beneficiaries under the Act. In return for their parting with this traditional knowledge, certain benefits accrue to them as FEBS, and this is what FEBS is actually all about.

44. This benefit the "indigenous and local communities", get under the law is over and above the market price of their "biological resources".

45. But to fully appreciate the concept of FEBS, we may have to go back to the legislative history behind the enactment and the long struggle, by and on behalf of the local and indigenous communities.

46. At this juncture, it may also be worthwhile to mention that India is a country which is extremely rich in biodiversity. It is one of the top 17 megadiverse countries of the world.¹ Megadiverse, as the word suggests, would mean "having great diversity", and a megadiverse country must have at least 5000 species of endemic plants and must border marine ecosystem². Significantly, apart from USA, Australia and China, which are in the list of 17 top megadiverse countries of the world, due to their size alone, the remaining countries in this pool, are the

developing countries, such as India, Colombia, Ecuador, etc. It is the developing world which has raised a long struggle in conserving its biological resources, and to save it from exploitation and extinction.

47. The effort of the world community for a sustainable biodiversity system goes back to the United Nations conference on human environment, which is better known as Stockholm conference of 1972. It was the first United Nations conference, which focused on international environment issues. The Stockholm manifesto recognised that earth's resources are finite and there is an urgent need to safeguard these resources.

48. Twenty years later in 1992 due to the combined efforts of the developing nations, United Nation Convention of Rio de Janeiro was signed, of which India is a signatory. The preamble of the convention recognised and declared the importance of biological diversity for evolution and the need for its conversation. It also raised concern and cautioned the world, that biological diversity is being reduced significantly by unchecked human activities. The Preamble also recognises "the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components."

49. The first Article of the Rio de Janeiro Convention declares its objectives as follows: "The objectives of this Convention, to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate finding."

50. Ten years later, in 2002, the world community again took stock of the movement, this time at Johannesburg, South Africa. The conference resulted in an important declaration known as "Johannesburg Declaration on Sustainable Development, 2002". The Johannesburg Declaration reasserts the challenges it faces in the world regarding conservation of biodiversity.

What is important for us is that at Johannesburg the vital role of indigenous people in the field of sustainable development was reasserted. It also recognized that sustainable development requires a long-term perspective and broad-based participation in policy formulation, decision-making and implementation at all

levels. Though technically Johannesburg declaration may not be a treaty, yet it is an important milestone in this movement.

51. The same year i.e. in 2002 our Parliament, in recognition of its international commitments, enacted the Biological Diversity Act, 2002, which was published in the Gazette of India on 01.10.2003. The Preamble of the Act shows the purpose of bringing the legislation in India...

52. At this juncture, we must emphasize the importance of international treaties and conventions on municipal laws. The Constitution of India emphasizes this aspect. Article 51 (c) of the Constitution states as under:-

"51. Promotion of international peace and security:- The State shall endeavour to (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another;"

53. The Hon'ble Apex Court in the case of T.N. Godavarman v. Union of India (2002) 10 SCC 606 has emphasised the importance of international conventions and treaties as under:

"Duty is cast upon the Government under Article 21 of the Constitution of India to protect the environment and the two salutary principles which govern the law of environment are : (i) the principles of sustainable development, and (ii) the precautionary principle. It needs to be highlighted that the Convention on Biological Diversity has been acceded to by our country and, therefore, it has to implement the same. As was observed by this Court in Vishaka v. State of Rajasthan in the absence of any inconsistency between the domestic law and the international conventions, the rule of judicial construction is that regard must be had to international conventions and norms even in construing the domestic law."

56. In a recent judgment in the case of Commr. Of Customs v. G.M. Exports reported in (2016) 1 SCC 91, the Hon'ble Apex Court sums up this aspect in para 23 of its judgment, which reads as under:-

"23. A conspectus of the aforesaid authorities would lead to the following conclusions:

(1) Article 51(c) of the Constitution of India is a Directive Principle of State Policy which states that the State shall endeavour to foster respect for international law and treaty obligations. As a result, rules of international law which are not contrary to domestic law are followed by the courts in this country. This is a situation in which there is an international treaty to which India is not a signatory or general rules of international law are made applicable. It is in this situation that

if there happens to be a conflict between domestic law and international law, domestic law will prevail.

(2) In a situation where India is a signatory nation to an international treaty, and a statute is passed pursuant to the said treaty, it is a legitimate aid to the construction of the provisions of such statute that are vague or ambiguous to have recourse to the terms of the treaty to resolve such ambiguity in favour of a meaning that is consistent with the provisions of the treaty.

(3) In a situation where India is a signatory nation to an international treaty, and a statute is made in furtherance of such treaty, a purposive rather than a narrow literal construction of such statute is preferred. The interpretation of such a statute should be construed on broad principles of general acceptance rather than earlier domestic precedents, being intended to carry out treaty obligations, and not to be inconsistent with them.

(4) In a situation in which India is a signatory nation to an international treaty, and a statute is made to enforce a treaty obligation, and if there be any difference between the language of such statute and a corresponding provision of the treaty, the statutory language should be construed in the same sense as that of the treaty. This is for the reason that in such cases what is sought to be achieved by the international treaty is a uniform international code of law which is to be applied by the courts of all the signatory nations in a manner that leads to the same result in all the signatory nations.

It is in the light of these principles that we must now examine the statute in question."

57. In the light of the above, we have to understand the importance of the 2002 Act as it is a result of our international commitments.

58. India is a party to the United Nations Convention on Biological Diversity signed at Rio on 5th of June 1992. Being a signatory to the International treaty, India was under an obligation to give effect to the provisions of the treaty. Article 8 of the Rio Convention is regarding IN-SITU Conservation. Article 8 (j) and (k) are relevant for our purposes here. It reads as follows:

"Article 8. IN-SITU CONSERVATION Each Contracting Party shall, as far as possible and as appropriate: (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and

practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

(k) Develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations."

59. Further Article 15 of the Rio Convention relates to - Access to Genetic Resources. Clause (1) & (7) of the above Article, read as under:- "Article 15. Access to Genetic Resources

1. Recognizing the sovereign rights of the States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.

7. Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, and in accordance with Articles 16 and 19 and, where necessary, through the financial mechanism established by Articles 20 and 21 with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms."

60. Being a signatory to the Rio Convention, India was committed to bring appropriate legislation in the country in order to give effect to the provisions of the treaty. It was in this background and on these international commitments that the Parliament enacted the Biological Diversity Act in 2002.

61. Another important international convention must be referred here, which is Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention on Biological Diversity. The Nagoya Protocol of 2010 is a supplementary agreement to the 1992 Rio de Janeiro Convention on Biological Diversity.

62. It must be stated, even at the cost of repetition, that the conservation of biological diversity has three main pillars or objectives. The first is the conservation of biological diversity, the second is sustainable use of its components and the third is fair and equitable sharing of the benefits arising out of utilisation of genetic resources. Nagoya Protocol of 2010 focuses on the third component (with which we are presently concerned), which is fair and equitable sharing of genetic material, including the traditional knowledge associated with the genetic resources and the benefits arising out from their use.

63. The preamble of Nagoya Protocol, inter alia, recognised the "importance of promoting equity and fairness in negotiations and mutually agreed terms between

providers and users of genetic resources". It also recognised "the vital role that women play in access and benefit-sharing and affirming the need for the full participation of women at all levels of policy-making and implementation for biodiversity conservation." Article 5 of the Nagoya Protocol describes "fair and equitable benefit-sharing"...

64. Who are to be the beneficiaries of this FEBS? The protocol here speaks of the "local and indigenous communities". They are the ones that need this protection and they are the ones who were at the centre of concern at Nagoya.

65. Article 7 of the Nagoya Convention reads as under...

66. Article 12 of the Nagoya Protocol reads as under...

67. Article 15 of the Nagoya Protocol reads as under...

68. Article 16 of the Convention reads as under...

71. In the above background of our international commitments, we find that as the Biological Diversity Act, 2002 is a follow up to the Rio Convention of 1992, similarly, the Regulations of 2014, is a consequence of the Nagoya Protocol. By the Regulations, the commitments at Nagoya are being enforced. In fact the Preamble of the 2014 Regulations* mentions that the Regulations are in pursuance of the Nagoya Protocol.

72. The concept of FEBS, as we have seen, is focused on the benefits for the "local and indigenous communities", and the Nagoya Protocol makes no distinction between a foreign entity and an Indian entity, as regards their obligation towards local and indigenous communities in this regard. Consequently the "ambiguities" in the national statute have to be seen in the light of the International treaties i.e. Rio and Nagoya and a purposive rather than a narrow or literal interpretation has to be made, if we have to arrive at the true meaning of FEBS. In our case the Biological Diversity Act, 2002 has been enacted not merely in furtherance of an International treaty but it is rather to enforce a treaty obligation and therefore in case there is any difference between the language of a municipal * Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations, 2014.

Law and corresponding provision of the treaty, "the statutory language should be construed in the same sense as that of the treaty". This is what has been held by the Hon'ble Apex Court in *Commr. Of Customs v. G.M. Exports*.¹

73. After going through the entire history of this movement, which is a movement towards the conservation of biological diversity, one gets a sense that the main

force behind this movement which resulted in the international conventions and finally the municipal legislations, is the protection which the developing countries required from the advanced countries in this particular field. All the same, the rights of "indigenous and local communities" were extremely important and emphatically declared in the Nagoya Protocol. These rights have to be protected, equally from outside as well as from within.

74. The focus of the Nagoya Protocol is on FEBS, and protection of indigenous and local communities, and the effort is that the indigenous and local communities must get their fair and equitable share of parting with their traditional knowledge and resources. India being a signatory to the Rio and the Nagoya Protocol, is bound to fulfill its international commitments and make implementation of FEBS effective and strong.

75. Having said this, however if we make a plain reading of the provisions, and take a very conservative and textual approach to the interpretation of the relevant statutory provisions, we would find that the Act does make a distinction between a "foreign entity" and a "domestic entity", as far as FEBS is concerned, particularly when we read the definition of FEBS. But will that be the correct approach!

76. A simple textual interpretation as submitted by the petitioner would indeed show that the petitioner which is not a foreign entity is not liable to contribute to FEBS and the powers to impose FEBS lie only with the NBA.

77. But then a plain and textual interpretation here defeats the very purpose, for which the law was enacted! The Purposive Interpretation

78. The entire controversy before this Court, ultimately revolves around the interpretation of certain provisions of Biological Diversity Act, 2002, such as what constitutes "Fair and Equitable Benefit Sharing", and whether such a demand can be made by the State Biodiversity Board, or such powers can be delegated by the National Biodiversity Authority. Over the years, the Courts have been relying on a theory of "interpretation", which is now well known as the "purposive interpretation of law". The Hon'ble Apex Court has applied the theory of the "purposive interpretation" not only in its interpretation of the Constitution, but also in its interpretation of ordinary statutes.

83. It is true that in the above case, the principle of purposive interpretation of law were applied while interpreting constitutional provisions, but it must be stated that the principle of purposive interpretation are equally applicable while interpreting ordinary statutes. In fact, principle of purposive interpretation is applicable not

only in interpreting the Constitution and the statutes, but also in the interpretation of a will or a contract.

92. It would be important to note that the purposive interpretation of law becomes particularly relevant when the legislation, which requires interpretation, is a socially or economically beneficial legislation. Here in the case at hand, it is clear that behind the very concept of FEBS lies the concern of the legislatures for the "local and indigenous communities". FEBS in the form of a "fee" or by any other means is a benefit given to the indigenous and local communities by the Act, and the Regulations, which again have to be examined in the light of the international treaties where the importance of FEBS has been explained.

93. The imposition of FEBS for the local and indigenous communities can also be appreciated by way of an illustration. In Uttarakhand, in fact in the entire Central Himalayan region, there is a "herb" or "biological resource", found in the high mountains, called "Yarsagumba". Its local name is "Keera Jadi", which is said to be an effective remedy for various ailments. It is also known as the "Himalayan Viagra".

94. The local and the indigenous communities in Uttarakhand, who reside in the high Himalayas and are mainly tribals, are the traditional "pickers" of this biological resource. Through ages, this knowledge is preserved and passed on to the next generation. The knowledge as to when, and in which season to find the herb, its character, the distinct qualities, the smell, the colour, are all part of this traditional knowledge. This knowledge, may not strictly qualify as an intellectual property right of these communities, but nevertheless is a "property right", now recognised for the first time by the 2002 Act, as FEBS. Can it be said that the Parliament on the one hand recognised this valuable right of the local communities, but will still fail to protect it from an "Indian entity". Could this ever be the purpose of the legislature? "Biological resources" are definitely the property of a nation where they are geographically located, but these are also the property, in a manner of speaking, of the indigenous and local communities who have conserved it through centuries.

95. In the light of what we have discussed above, we shall now examine and finally determine whether in view of the above provisions of law, the State Biodiversity Board (i.e. SBB) has got power to impose "Fair and Equitable Benefit Sharing (FEBS)" in respect of persons who have got no foreign element attached to them, such as the petitioner, and whether the National Biodiversity Authority (i.e. NBA) has got powers to delegate to SBB power to impose FEBS to persons who are covered by Section 7 of the Act.

96. As the power to impose FEBS has been given to the SBB by the Regulations framed by the NBA i.e. 2014 Regulations, which is presently under challenge, let us refer to the relevant provisions of the Act and the Regulations.

97. The NBA has got powers to frame Regulations under Section 64 of the Act of 2002. Section 64 of the Act of 2002 reads as under:

"64. Power to make regulations. - The National Biodiversity Authority shall, with the previous approval of the Central Government by notification in the Official Gazette, are regulations for carrying out the purposes of this Act."

98. This provision is again to be read along with sub-section (1) of Section 18, which is reproduced below:

"18. Functions and powers of National Biodiversity Authority. - (1) It shall be the duty of the National Biodiversity Authority to regulate activities referred to in sections 3, 4 and 6 and by regulations issue guidelines for access to biological resources and for fair and equitable benefit sharing."

99. Under sub-section (2) of Section 21, the benefit sharing can be given effect to in all or any of the manner provided therein, such as, grant of joint ownership of intellectual property rights, "transfer of technology", etc. where "payment of monetary compensation and other non-monetary benefits of the benefit claimers as the National Biodiversity Authority may deem fit" is one of the manners in which benefit sharing can be determined. Further for this, under sub-section (4), the NBA has power to make regulation...

100. Primarily what has been challenged is Regulation 2, 3 & 4 of the 2014 Regulations, which read as under:

"2.Procedure for access to biological resources, for commercial utilization or for bio-survey and bio-utilization for commercial utilization. - (1) Any person who intends to have access to biological resources including access to biological resources harvested by Joint Forest Management Committee (JFMC)/Forest dweller/ Tribal cultivator/ Gram Sabha, shall apply to the NBA in Form-I of the Biological Diversity Rules, 2004 or to the State Biodiversity Board (SBB), in such form as may be prescribed by the SBB, as the case may be, along with Form 'A' annexed to these regulations.

(2) The NBA or the SBB, as the case may be, shall, on being satisfied with the application under sub-regulation (1), enter into a benefit sharing agreement with the applicant which shall be deemed as grant of approval for access to biological

resources, for commercial utilization or for bio-survey and bio-utilization for commercial utilization referred to in that sub-regulation

3. Mode of benefit sharing for access to biological resources, for commercial utilization or for bio-survey and bio-

utilization for commercial utilization.-- (1) Where the applicant/ trader/ manufacturer has not entered into any prior benefit sharing negotiation with persons such as the Joint Forest Management Committee (JFMC)/ Forest dweller/ Tribal cultivator/ Gram Sabha, and purchases any biological resources directly from these persons, the benefit sharing obligations on the trader shall be in the range of 1.0 to 3.0% of the purchase price of the biological resources and the benefit sharing obligations on the manufacturer shall be in the range of 3.0 to 5.0% of the purchase price of the biological resources:

Provided that where the trader sells the biological resource purchased by him to another trader or manufacturer, the benefit sharing obligation on the buyer, if he is a trader, shall range between 1.0 to 3.0% of the purchase price and between 3.0 to 5.0%, if he is a manufacturer: Provided further that where a buyer submits proof of benefit sharing by the immediate seller in the supply chain, the benefit sharing obligation on the buyer shall be applicable only on that portion of the purchase price for which the benefit has not been shared in the supply chain.

(2) Where the applicant/ trader/ manufacturer has entered into any prior benefit sharing negotiation with persons such as the Joint Forest Management Committee (JFMC)/ Forest dweller/ Tribal cultivator/ Gram Sabha, and purchases any biological resources directly from these persons, the benefit sharing obligations on the applicant shall be not less than 3.0% of the purchase price of the biological resources in case the buyer is a trader and not less than 5.0% in case the buyer is a manufacturer:

(3) In cases of biological resources having high economic value such as sandalwood, red sanders, etc. and their derivatives, the benefit sharing may include an upfront payment of not less than 5.0%, on the proceeds of the auction or sale amount, as decided by the NBA or SBB, as the case may be, and the successful bidder or the purchaser shall pay the amount to the designated fund, before accessing the biological resource."

4. Option of benefit sharing on sale price of the biological resources accessed for commercial utilization under regulation

2.-- When the biological resources are accessed for commercial utilization or the bio- survey and bio-utilization leads to commercial utilization, the applicant shall

have the option to pay the benefit sharing ranging from 0.1 to 0.5 % at the following graded percentages of the annual gross ex-factory sale of the product which shall be worked out based on the annual gross ex-factory sale minus government taxes as given below:-

Annual Gross ex-factory sale of product		Benefit Sharing Component
Up to Rupees	1,00,00,000	0.1%
Rupees	1,00,00,001 up to 3,00,00,000	0.2%
Above Rupees	3,00,00,000	0.5%

101. The above provisions in the Regulations, provide for a benefit sharing obligation, for any person, who wants to have access to "biological resources", which is a certain percentage of the purchase price. The petitioner which is an Indian entity is also obliged to pay an amount as FEBS to the SBB. Therefore the challenge to Regulations 3, 4 & 5.

102. As per Section 7 of the Act of 2002, no person, who is a citizen of India or a body corporate, association or organization which is registered in India, can obtain any biological resources for commercial utilization, etc. without giving a prior intimation to the SBB concerned. Only local communities, vairs and hakims are exempted from this provision.

103. Thereafter sub-section (b) of Section 23 of the 2002 Act is relevant for our purposes, which reads as under:

"23. Functions of State Biodiversity Board. - The functions of the State Biodiversity Board shall be to -

(a)....

(b) regulate by granting of approvals or otherwise requests for commercial utilization or bio-survey and bio-utilisation of any biological resource by Indians."

104. At this juncture, it must be stated that regulating an activity in form of demand of a fee is an accepted practice recognised in law. Therefore, in case the

SBB as a regulator, demands a fee in the form of FEBS from the petitioner when the petitioner is admittedly using the biological resources for commercial purposes, it cannot be said that it has no powers to do so. As far as vesting of this power through a Regulation by NBA is concerned, we must take resort to Section 21(2) (f) and sub-section (4) of Section 21, already referred above. Under sub-section (2) of Section 21, NBA, has powers, subject to any regulation, to "determine the benefit sharing".

105. What is Fair and Equitable Benefit Sharing cannot be looked through the narrow confines of the definition clause alone. The concept of FEBS has to be appreciated from the broad parameters of the scheme of the Act and the long history of the movement for conservation, together with our international commitments in the form of international treaties to which India is a signatory. Once we do that, we find that Under Section 2(f) and sub-section (4) of Section 21, the NBA has got powers to frame regulations in order to give payment of monetary compensation and other non- monetary benefits to the benefit claimers as the National Biodiversity Authority may deem fit, in form of Regulations and the State Biodiversity Board in turn has powers and duties to collect FEBS under the regulatory power it has under Section 7 read with Section 23 (b) of the Act.

106. In view of the above, this Court is of the opinion that SBB has got powers to demand Fair and Equitable Benefit Sharing from the petitioner, in view of its statutory function given under Section 7 read with Section 23 of the Act and the NBA has got powers to frame necessary regulations in view of Section 21 of the Act. The challenge of the petitioner to the validity of the Regulations fails. This Court holds that the Regulations 2, 3 and 4 of the Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations, 2014 only clarifies and follows what is there in the Act and it is intra vires the Act.

107. It is made clear that this Court has given no findings on the retrospective operation of the above provision, since there is no such demand by SBB as of now. This aspect is left open.

108. The writ petition fails and is hereby dismissed.

109. No order as to costs.
