

**BEFORE THE NATIONAL GREEN TRIBUNAL,  
(SOUTHERN ZONE), SITTING AT CHENNAI  
Appeal No. 14 of 2020**

IN THE MATTER OF:

Yelahanka Puttenahalli Lake and  
Bird Conservation Trust (Regd.)

....APPELLANT

VERSUS

Ministry of Environment, Forests and  
Climate Change, Union of India & Ors.

...RESPONDENTS

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**WRITTEN SUBMISSIONS ON BEHALF OF THE APPELLANT**

The Advocate for the Appellant submits as under:-

**A. The Environment Clearance dated 01.09.2015 was the subject matter of challenged before the Hon'ble High Court and Hon'ble Supreme Court of India:-**

1. The Appellant had filed W.P. No. 25189/2018 before the Hon'ble High Court of Karnataka at Bangalore and in the Memorandum of Writ Petition, the EC dated 01.09.2015 has been categorically challenged. The relevant paragraph 19 of the Memorandum of Writ Petition is as follows:-

*"19. However, since the project was illegally cleared by the SEIAA who did not have jurisdiction to even deal with the proposal under the EIA Notification, 2006 these issues have not been disclosed or noticed, much less studied or appraised. It is therefore, submitted that the clearance dated 01.09.2015 is void ab initio and is a nullity, with no validity in law. The project proponent has no right to continue construction under the aegis of this void clearance and the continuance of activity at the site is illegal."*

**(see page 229 @ 236 of the Appeal paper-book)**

2. Further, the prayers made in the W.P. No. 25189/2018 before the Hon'ble High Court are as follows:-

*"1. Direct the 1<sup>st</sup> Respondent to consider the representation submitted by the Petitioner and initiate necessary action against the 4<sup>th</sup> Respondent towards the cancellation of the illegal and void environment clearance dated 01.09.2015 issued by the 2<sup>nd</sup> Respondent herein (placed herewith as Annexure-J)*

*2. Direct the 3<sup>rd</sup> Respondent to ensure that all steps are taken and necessary financial allocations are made towards preservation of the Puttenahlli Bird Reserve.*

*3. pass any other orders in the interest of justice and equity."*

**(see page 229 @ 245 of the Appeal paper-book)**

3. The Hon'ble High Court in its order dated 08.03.2019 had ruled as under:-

*"5. On hearing the learned counsels, we do not find any merit in this petition. Primarily as could be seen from the representation made by the petitioner, the same is a relief sought for to set aside the Environmental Clearance granted to respondent No. 4. The said order is appealable to the National Greens Tribunal. Therefore, it is not appropriate to entertain this petition. Even otherwise, on considering the material on record, we do not find that there is any violation of law in granting the environmental clearance. The environmental clearance is granted in a manner known to law, after following the procedure involved therein."*

**(see page 264 @ 268 of Appeal paper-book)**

4. The Appellant herein filed a Special Leave Petition before the Hon'ble Supreme Court of India in SLP(C) No. 10555/2019. The Special leave

petition, *inter alia*, questioned the grant of EC dated 01.09.2015. The relevant paragraph is as follows:-

*“I. It is submitted that the M/s. Karnataka Power Corporation Ltd. Instead of approaching the Ministry of Environment, Forest and Climate Change (MoEFCC) to seek environmental clearance under the EIA Notification, 2006; has erroneously approached the Karnataka State Environmental Impact Assessment Authority (hereinafter referred to as the SEIAA) seeking for environmental clearance in respect of the said “Gas based Combined Cycle Power Plant”. The SEIAA, without taking into consideration that it did not have the jurisdiction to consider the said application, and without any application of mind, issued environmental clearance dated 01.09.2015. This calls for the interference of this Hon’ble Court.”*

**(see page 269 @ 286 of Appeal paper-book)**

5. The Hon’ble Supreme Court by its Order dated 08.05.2019 issued notice in the special leave petition (see page 302 of Appeal paper-book). The Karnataka Power Corporation Ltd., (KPCL), filed its counter-affidavit opposing the special leave petition. Therein, *inter alia*, the KPCL, took a stand that there is alternate remedy available to the Appellant and thereby acknowledging that the EC can be challenged before the Hon’ble NGT. The relevant paragraph of Counter-affidavit filed in SLP(C) No. 10555/2019, is as follows:-

*“2. S. 14, 15 and 16(h) of the National Green Tribunal Act, 2010 provides that the Tribunal has the jurisdiction inter alia, to adjudicate matters relating to disputes regarding environmental clearances granted and matters relating to protection of the*



*environment. Therefore, the Petitioner is required to approach the Tribunal for the adjudication of any claims it has regarding the same.” (see page 303 @ 306 of Appeal paper-book)*

6. The Hon’ble Supreme Court in SLP(C) No. 10555/2019 granted leave in the matter and thereby by its Order dated 10.06.2020 disposed of the matter as follows:-

*“Leave granted.*

*The petitioners filed a writ petition No. 25189 of 2018 before the High Court of Karnataka at Bangalore challenging the Order granting environmental clearance dated 1.9.2015 by State Level Environmental Impact Assessment Authority in favour of respondent No.4. The High Court has rightly held that the said order is appealable to the National Green Tribunal. While holding so, the Division Bench has observed that there is no violation of any law in granting environmental clearance, without considering the rival contentions of the parties.*

*Having heard learned counsel for the parties, we are of the view that it is just and proper for the parties to approach the National Green Tribunal for appropriate relief. The observation of the High Court on merits of the case is hereby set aside.*

*If the proceedings are initiated before the National Green Tribunal within a period of four weeks from today, the National Green Tribunal is requested to dispose of the same on merits.*

*The Appeal is disposed of accordingly.*

*Pending application(s), if any, shall stand(s) disposed of.”*

**(see page 388 of Appeal paper-book)**

7. The KPCL had sought the clarification of the above order dated 10.06.2020, by filing a miscellaneous application in M.A. No. 1527/2020,

before the Hon'ble Supreme Court, wherein the Respondent No. 4 stated as follows:-

*"5. The necessity for this application for clarification arises due to the material suppression of facts by the Petitioner from this Court and from the Respondent No.4, which has resulted in the liberty being granted in terms of the order dated 10.06.2020. First aspect for clarification is that the order of this Hon'ble Court records that the Petitioner was challenging the EC before this Hon'ble Court and the Hon'ble High Court. The Petitioner has never questioned the EC at any point in time."*

**(Copy of M.A. No. 1527/2020 is filed along with the memo by the KPCL)**

8. The Hon'ble Supreme Court in M.A. No. 1527/2020 by its Order dated 09.09.2020 was pleased to pass the following order:-

*"Heard learned counsel for the parties.*

*In our view, Order passed by this Court on 10.06.2020 requires no clarification. Application for Clarification stands disposed of accordingly.*

*However, all the contentions of the parties are left open to be considered by the National Green Tribunal."*

Hence, in the light of the above, it is submitted that the contention of the Respondents, to the effect that the EC dated 01.09.2015 is not challenged before the Hon'ble High Court and the Hon'ble Supreme Court, deserves to be rejected and the issue regarding the grant of EC dated 01.09.2015 needs to be considered on merits by this Hon'ble Tribunal, in the interest of justice.



**B. Arguments on challenge to the EC dated 01.09.2015:-**

9. It is humbly submitted that the Puttenahalli Lake is located in Bengaluru North Taluk, Yelahanka Hobli. It is a part of Yelamallappa Chetty series of lakes in Bengaluru. This series of lakes flow eastward and joins Dakshina Pinakini River, which ultimately joins the Cauvery River. Yelahanka-Puttenahalli Lake is spread in an area of about 13.77 hectares and is world renowned for being home to over 120 species of birds including migratory and endangered species viz., Northern Pintail (*Anas Acuta*), White Stork (*Ciconia Ciconia*), Northern Shoveler (*AnasClypeata*), Garganey (*Anas Querquedula*) and Glossy Ibis (*Plegadis Falcinellus*) etc. The said lakes are an abode for resident, colonial nesting water Birds, migratory Birds, Butterflies and moths. Its avi-fauna includes endangered and migratory birds from the Northern Himalayas, Siberia, countries from Europe, Africa etc. Birds which are listed under threatened categories of International Union for Conservation of Nature (IUCN) and find it as a favourite abode during breeding season. Around 120 species of Birds spotted therein are Darters, varieties of Ducks such as Northern pintail, Garganey, Painted storks, varieties of Herons, Varieties of Egrets, Glossy Ibis etc. are spotted. Some of these birds fall under Schedule I or Schedule IV of the Wildlife (Protection) Act, 1972. The number of birds during season goes beyond 7000. Hence, the lakes have found place as worth mentioning even in several concerned foreign journals. That the "Proposal for Declaration of Puttenahalli Tank Area as Bird Conservation Reserve as per Section 36A of Wildlife Protection act, 1972" submitted by Deputy Conservator of Forests, Bangalore Urban Division, Bangalore highlights the importance of the Puttenahalli Lake. It states that the area is presently under the ownership and possession with the Forest Department of the State Government of Karnataka. The site is maintained as part of



nursery by the Karnataka State Forest Department and is a veritable bird paradise, the like of which has not been recorded during nearly 200 year ornithological history of Bangalore.

10. It is submitted that the protected area is located in the vicinity of a project site and would attract the General Conditions of the EIA Notification, 2006. Thus, it is clear that though a project may be categorized as 'Category B Project' under the EIA Notification, 2006, if it falls within 10 kms radius from a 'protected area' under the Wildlife (Protection) Act, 1972, then it has to be appraised at the Central Level by the MoEF as though it is a 'Category A Project'. It is submitted that the Puttenahalli lake is declared as a "Bird Conservation Reserve" under Section 36-A of the Wildlife (Protection) Act, 1972 by the Government of Karnataka on 29.04.2015 Thus, the present environmental clearance granted by SEIAA is bad in law.
11. That the Government of India, Ministry of Environment, Forest and Climate Change issued the Office Memorandum F.No.J-11013/41/2006-IA-II(part) dated 20.08.2014, inter alia, states as follows:-

*"This Ministry vide Circular No.L-11011/7/2004-IA.II(I) (Part) dated 27.02.2007 and Office Memorandum (OM) No. J-11013/41/2006-IA.II(I) dated 02.12.2009 clarified procedure for consideration of developmental projects located within 10 km of 'Protected Areas' (PAs), i.e., National Parks and Wild-life Sanctuaries and also involving wild-life habitat, for grant of environmental clearance (EC) under EIA Notification, 2006. The aforesaid Circular/ OM were inter alia issued pursuant to Supreme Court Order dated 04.12.2006 in W.P.(C) No. 460 of 2004....."*

**(See Annexure A-5 at pages 158-159 of Appeal paper-book)**

12. It is submitted that the Environmental Impact Assessment Notification, 2006 ("EIA, 2006) issued by the Respondent No. 1, places the "Gas based Combined Cycle Power Plant" under the category 1(d) and is less than 500 MW, it is classified as a "Category B" Project, and the said project would *prima facie* falls within the jurisdiction of State-level Environment Impact Assessment Authority (SEIAA) for the purpose of granting clearances. However, in respect of the instant "Gas based Combined Cycle Power Plant" with the configuration of 350 (+/- 20) MW, is situated at a distance of just around 500 metres from the Puttenahalli Bird Conservation Reserve. Further that the Power Plant is surrounded by the Yelahanka Puttenahalli Lake which is a declared and notified "Bird Conservation Reserve" under the provisions of Section 36-A of the Wildlife (Protection) Amendment Act, 2006. Thus, due to this extra-ordinary situation of the region being eco-sensitive, the conditions mentioned in the 'General Conditions' of the EIA Notification, 2006 are attracted and as such, the SEIAA loses its jurisdiction to deal with the Environmental Clearance and the grant of EC can only be dealt with and cleared at the Central Level by the Ministry of Environment, Forest and Climate Change (MoEFCC)/ Respondent No. 1 herein and not otherwise. **(EIA Notification is annexed as Annexure A-6 at page 160 of Appeal paper-book)**
13. It is clear from a reading of the EIA Notification, 2006 that though a project may be categorized as 'Category B' project under the EIA Notification, 2006, if it falls within 10 kms distance from a protected area, so declared, under the Wildlife (Protection) Act, 1972, then it has to be appraised at the Central Level by the MoEF as though it is a 'Category A' project. Hence, it is apparent that the Environmental Clearance issued by the SEIAA has been issued without jurisdiction and is *non-est* in the eyes of law.

14. It is submitted that the said "Gas based Combined Cycle Power Plant" is located within 500 meters from the Yelahanka-Puttenahalli Lake. Further, it is submitted that instead of approaching the Ministry of Environment, Forests and Climate Change (MoEFCC), the Respondent No. 4/ KPCL has approached the Karnataka State Environmental Impact Assessment Authority (SEIAA) for the grant of environmental clearance. The SEIAA, without taking into consideration that it does not have the jurisdiction to consider the said application, and without any application of mind, issued environmental clearance on 01.09.2015. Thus, the grant of environmental clearance to the Gas Based Power Plant Project by the SEIAA is illegal, as per the guideline mentioned in EIA Notification, 2006. It is therefore submitted that the clearance dated 01.09.2015 is void *ab initio* and is a nullity, with no validity in law. Therefore, the Respondent No. 4 has no right to continue with the construction of the Gas Based Combined Cycle Power Plant.
15. It is submitted that the public grievance was raised by the people around by writing a letter to the MoEF. The MoEF *vide* its Letter dated 30.07.2018 directed the Ministry of Environment, Forest and Climate Change, Regional Office (Southern Zone), Bangalore to submit a factual report on the issues of environmental destruction around Yelahanka Puttenahalli Lake Birds refuge and pollution caused in the vicinity due to the establishment of a 350 MW Gas based Combined Cycle Power Plant by M/s. Karnataka Power Corporation Ltd. Accordingly, a team of Officials visited the spot and submitted a detailed Report on 03.10.2018 to the MOEFCC. The said Report under the heading "*2.4 Consideration of impacts of the project on adjacent residential area and the Yelahanka Lake Wetland*" has categorically stated that the primary storm water drain (*rajkulawas*) are blocked and concretised, which is affecting the water



supply to sustain the wetland ecosystem and further that as far as buffer zone is concerned the KPCL is in violation of the directives passed by this Hon'ble Tribunal. It is submitted that heat, air, noise and light pollution from the subject "Gas based Combined Cycle Power Plant" will have a direct bearing on the birds in the 'protected area'. In fact, changes in air temperature due to stack emissions results in affecting the migratory pattern of birds itself and the deposition of pollutants on the waterbody etc., are issues that require specific consideration. However, the EIA report is silent on these issues and despite being a prohibited activity, the construction of the "Gas based Combined Cycle Power Plant" is going.

**C. Arguments on prior knowledge of Karnataka Power Corporation Ltd. regarding the Declaration of "The Bird Conservation Reserve":**

16. It is submitted that the Puttenahalli Lake is declared as the "Bird Conservation Reserve" *vide* Gazette Notification dated 29.04.2015 by the Government of Karnataka in exercise of its powers under Section 36-A of the Wildlife (Protection) Act, 1972 (see **Annexure A-3 at page 148 of Appeal paper-book**). The same was brought into force on 10.09.2015. The said declaration of 29.04.2015 was to the knowledge of the Respondent No. 4 (KPCL) and the latter is headed by Chief Minister of Karnataka, who officiate as its Chairman. Thus, it is submitted that the KPCL had the prior knowledge about declaring the Puttenahalli Lake as 'Bird Conservation Reserve'. Thus, the Respondent No. 4, the project proponent was duty bound to disclose the fact of proposed 'Bird



Conservation Reserve' in its project proposal submitted to the SEIAA for grant of Environmental Clearance. It may be noted that any area or lake to become a habitat for flora and fauna would take years. And only when the area/lake become an established habitat for flora and fauna, then attempts are made to conserve the same by declaring it as a protected area or sanctuary or national parks and not vice versa. It is submitted that in light of the above, the establishment of the "Gas based Power Plant" within the close vicinity of the Puttenahalli Lake and the same would result in the destruction of the lake eco-system. Further the environmental clearance dated 01.09.2015 is void ab initio and is a nullity since it has been issued without taking into consideration the fact of the 'protect area'. And moreover, that the Respondent No. 4 has concealed the prior knowledge it had about the intention of the Government of Karnataka in declaring the area/lake as 'Bird Conservation Reserve'. Further the establishment of the said "Gas based Combined Cycle Power Plant" would cause grave and irreparable damage to the environment and the lives of the people residing in its vicinity.

17. Herein, it is submitted that the Respondent No. 4 has admitted, in its Counter-Statement, that it had the knowledge about the decision of the Government of Karnataka regarding the Gazette Notification dated 29.04.2015 declaring the Puttenahalli Lake as "Bird Conservation



Reserve”, though the decision was to come into effect later. The admission of the Respondent No. 4, to this effect is as follows:-

*“52. ....It is submitted that the Government of Karnataka had decided to declare the Puttenahalli Lake as a Bird Conservation Reserve on 29/04/2015 and the same was notified in the Official Gazette on 10/09/2015.....”*

**(See Counter Statement of Respondent No. 4 at page 22)**

From the above it is submitted that the Respondent No. 4 has deliberately not disclosed and intentionally not brought to the notice of the Respondent No. 2 (SEIAA), that the Power Plant of the Respondent No. 4, falls within 10 kms radius of the protected area “Puttenahalli Bird Conservation Reserve”. Thus, only on this count alone the impugned EC dated 01.09.2015 deserves to be quashed and set aside, in the interest of justice.

**D. Environment clearance obtained on false/misleading statements made by the KPCL (Respondent no. 4):**

18. It is submitted that the Respondent No. 4 (KPCL) has deliberately concealed and/or submitted a false and misleading information to the State Level Environment Impact Assessment Authority- Karnataka (SEIAA) and thereby illegally obtained the present Environmental Clearance dated



01.09.2015. It is stated that an Application for Environmental Clearances in prescribed Form No. 1 is submitted by the Respondent No. 4/ Karnataka Power Corporation Ltd. to the Karnataka State Environment Impact Assessment Authority on 20.12.2014. Therein, the Respondent No. 4 deliberately gives misleading information, they are as follows (**only relevant Serial Nos. are mentioned hereunder**):-

**Form-1**

**I) Basic Information:**

<b><u>S. No.</u></b>	<b><u>Item</u></b>	<b><u>Details</u></b>
xx	xx	xx
6.	Category of Project i.e., 'A' or 'B'	"B" (Gas based power plant of less than 500 MW capacity)
7.	Does it attract the general condition? If yes, please specify.	No
8.	Does it attract the specific condition? If yes, please specify	No
xxx	xxxxx	xxxx
21.	Whether the proposal involves approval/ clearance under: a) The Forest(Conservation) Act, 1980. b) The Wildlife (Protection) Act, 1972 c) The CRZ Notification, 1991	No
xxxx	xxxxx	xxxx
23.	Forest Land involved (hectares)	Establishment of the plant and facilities does not involve forest

		land. However, KPCL, has sought transfer of approx. 6 hectares of forest land, located adjacent to the site, for plantation purpose.
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xxxxxxx

III) Environmental Sensitivity:

<u>S. No.</u>	<u>Areas</u>	<u>Name/ Identity</u>	<u>Aerial distance (within 15 kms) from proposed project location boundary</u>
1.	xx	xx	xx
2.	Areas which are important or sensitive for ecological reasons: wetlands, watercourses or other water bodies, coastal zones, biosphere, mountains, forests	None	Not Applicable
3.	Areas used by protected, important or sensitive species of flora or fauna for breeding,	None	Not Applicable

	nesting, foraging, resting over wintering, migration.		
XX	XXX	XXX	XXX

(see page 391 to 407 of Appeal paper-book)

19. The State Level Expert Appraisal Committee (SEAC), Karnataka addresses a Letter dated 19.01.2015 to Chief Engineer, Karnataka Power Corporation Ltd., whereby the former prescribes the Terms of Reference (ToRs) for preparing draft EIA Report for the said Gas based Combined Cycle Power Plant. The relevant Terms of Reference are as follows:-

*“4. The study should cover an area of 10 kms radius around the proposed plant site.”*

*xxxxxx*

*“28. If ecologically sensitive attributes fall within a 10 km radius of the project boundary, proponent shall describe the sensitivity (distance, area and significance) and propose the additional points based on significance for review and acceptance by the State Appraisal Committee (SEAC). A map marking the location of such areas (existing or proposed) duly authenticated by the Chief Wildlife Warden. Ecological sensitive attributes include:*

- *National Parks.*
- *Wildlife Sanctuaries Game Reserve.*
- *Tiger Reserve/ Elephant Reserve.*
- *Breeding Grounds.*
- *Habitat for migratory birds.*

- *Area with threatened (rare, vulnerable, endangered) flora/ fauna.*
- *Wetlands.*
- *Zoological Gardens.*
- *Reserved forests/ Protected Forests.*
- *Any other closed/ protected area under the Wildlife (Protection) Act, 1972, any other locally applicable.”*

**(Terms of Reference- see Annexure A-23 at pages 408 to 413 of Appeal paper-book)**

20. It is submitted that the Respondent No. 4 prepared the EIA Report in contravention of the Terms of Reference and as well deliberately provided misleading and false information. The Respondent No. 4/ KPCL, in the Environmental Impact Assessment Report, makes the following false/ misleading statement:

*“4.8.4. Flora of the Project Area:*

*The field survey to conduct studies for baseline data were made using standard methods for which the sampling sites were selected based on topography and floristic composition within the study area. Plants of ornamental, fodder, timber species and medicinal use were listed. Sanctuaries, National park, Biosphere reserve and Migratory routes have not occurred in the study area.” (see p. 424)*

The above statement can be contradicted to a statement made in another paragraph of the same EIA Report submitted by the Respondent no. 4/ KPCL. The said paragraph is as follows:-



*“5.6.3. Impact on Yelahanka and Puttenahalli Lakes:*

*Puttenahalli Lake is a 10-hectare water body which is to the Western side of the proposed plant and Yelahanka lake is about 120 Hectares and is to the Eastern side of the plant near Yelahanka, 14 km north of Bangalore. These lakes were once outside the Bangalore city and were breeding centers for darters, painted storks, black-crowned night herons, purple herons, pond herons egrets, Asian open bill stork, Eurasian spoonbills, spot-billed pelicans, little grebes, little cormorants, spot-billed ducks, purple moorhens and common sandpipers.” (see p. 426)*

**(EIA Report- Annexure A-24- see pages 414 to 427 of the Appeal paper-book)**

21. It is further submitted that the data and information given in the Questionnaire for Environmental Appraisal dated 23.07.2015 by the KPCL, regarding the existence of the National Parks/ Wildlife Sanctuaries is false and misleading. The relevant portion of the Questionnaire for Environmental Appraisal appended to the EIA Report submitted by the Respondent No. 4/ KPCL is as follows:-

*“VI. Whether any of the following exist within 7 km. of the periphery of the project site. If so, please indicate aerial distance and the name of the eco-system as given under the Table.*



<i>S. No.</i>		<i>Name</i>	<i>Area falling within 7 km periphery of project (ha.)</i>	<i>Aerial Distance km.</i>
<i>1.</i>	<i>National Park/ Wildlife Sanctuary</i>	<i>None</i>		
<i>xxx</i>	<i>xxxx</i>	<i>xxxx</i>	<i>xxxx</i>	<i>xxx</i>

(see pages 428 to 442 of the Appeal paper-book)

**E. Mandatory Public hearing not conducted:**

22. It is submitted that the Public hearing has not been conducted as required by the EIA Notification 2006. Hence, the Environment Clearance dated 01.09.2015 has been granted in violation of the EIA Notification 2006. The MoEFCC *vide* its Office Memorandum dated 04.04.2016 has clarified as follows:-

“6. ....So a Thermal Power Plant, Cement Plant or Integrated Steel Plant even if located in notified Industrial Regions/ Zones cannot be granted exemption from the public consultation, as that is not the intent of the EIA Notification, 2006.

7. It is accordingly clarified that the category of projects and activities mentioned in the Annexure of this O.M. will require Public consultation in the process of Environment Impact Assessment and

*environmental clearance irrespective of its location in or outside a notified industrial area/ estate/ region.”*

**(see page 213 of the Appeal paper-book)**

23. That the Respondent No. 4 in para 65 of the counter-statement has stated that the said Office Memorandum dated 04.04.2016 is in the nature of amendment to the EIA Notification of 2006. The relevant portion of para 65 of counter statement are as follows:

*“65. .... It is submitted that the Office Memorandum dated 04/04/2016 was issued the year after the EC was obtained and the EC was published by the Respondent No. 4 in the local newspapers. It is further submitted that a bare reading of the EIA notification along with Office Memorandum clearly shows that the Office Memorandum issued is in the nature of an amendment to the EIA Notification, 2006 making an exception previously available to certain industries unavailable thereon and is clearly in the nature of an amendment to the same. Therefore, the Office Memorandum would only apply prospectively and not retrospectively to projects which have already received Environmental Clearances pursuant to the exemption under the EIA Notification, 2006.....”*

**(see p. 29 of Counter-Statement)**



24. Herein, a reference may be made to the said Office Memorandum dated 04.04.2016 which is a clarification and hence the same has retrospective effect. The relevant para 7 is as follows:-

*“7. It is accordingly clarified that the category of projects and activities mentioned in the Annexure of this OM will require Public consultation in the process of Environmental Impact Assessment and environment clearance irrespective of its location in or outside a notified industrial area/estate/region.” (see Annexure A-9 p. 213)*

- It is submitted that the impugned EC, though granted on 01.09.2015, has not attained finality and the same is challenged before this Hon'ble Tribunal. Therefore, the said OM dated 04.04.2016 would be directly applicable to the present EC dated 01.09.2016 and thus no exemption would be available to the Respondent No. 4, notwithstanding the exemption erroneously granted by the SEIAA/SEAC. Thus, only on this count alone the present impugned EC dated 01.09.2015 deserves to be quashed in the interest of justice.
25. It is submitted that the law in respect of a clarification would have a retrospective effect, is no longer *res integra*. That the Hon'ble Supreme Court in *S.B. Bhattacharjee vs. S.D. Majumdar and Ors.* [ (2007) 10 SCC 513] has laid down the law as follows:-



*“The clarification being explanatory and/or clarificatory, in our opinion, will have a retrospective effect.”*

26. Further, the Hon’ble Supreme Court in ***S.S. Grewal v. State of Punjab and Ors.*** [1993 Supp( 3 )SCC 234], has laid down the law as follows:-

*“...In this context it may be stated that according to the principles of statutory construction a statute which is explanatory or clarificatory of the earlier enactment is usually held to be retrospective. (See: Craies on Statute Law, 7th Edn., p. 58).....”*

27. Yet again in ***Commissioner of Income-Tax, Bombay and Ors. v. Podar Cement Pvt. Ltd. and Ors.*** [( 1997 ) 5 SCC 482], the Hon’ble Supreme Court, after referring to a large number of authorities including that of G.P. Singh's Principles of Statutory Interpretation', has held as follows:-

*“...An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law when the Constitution came into force, the amending Act also will be part of the existing law.”*

Thus, in the light of the above facts and circumstances, it is humbly submitted that the non-conducting of the mandatory Public hearing prior to the grant of EC dated 01.09.2015 is in violation of the Rules contained

in EIA Notification, 2006 and therefore, the impugned EC dated 01.09.2015 is bad in law and deserves to be quashed, in the interest of justice.

**F. Power Plant is a polluting activity and cannot be set-up in eco-sensitive zone:-**

28. That the "Gas based Combined Cycle Power Plant" is a declared polluting activity, since it has been classified as RED category industry (industries with pollution score of over 60) even according to the 2016 reclassification of industries by the CPCB. All power generating units except wind, solar and mini-hydel projects have been classified as RED category industries as seen from serial number 9 of the list of Red Category Industries. It is submitted that the establishment of such a plant would effectively destroy the lake eco-system completely. It is therefore clear that the present project proponent cannot be allowed to establish the "Gas based Combined Cycle Power Plant" in this protected area of Yellahanka-Puttenahalli Lake. (see Annexure A-26 at page 443 of Appeal paper-book)
29. It is submitted that the MoEFCC has issued guidelines dated 09.02.2011 which states that the necessity for eco-sensitive zones, which are to act as shock absorbers and transitional zones for the protected areas, which otherwise would be forced to grapple with the environmental pollution and stress caused by establishments in its vicinity. The Guidelines provides a list of prohibited, regulated and permissible activity and the subject "Gas based Combined Cycle Power Plant", which is a Red Category Industry and an activity of great environmental footprint covered under the EIA Notification, 2006 is prohibited from being set up in the vicinity of the



protected area. Serial No. 4 of Annexure 1 to the guidelines prohibits the establishment of polluting industries and Serial No. 23 prohibits the release of effluents into water bodies. Thus, the present project would come within the teeth of the said Guidelines dated 09.02.2011 and hence, is prima facie illegal.

30. It is submitted that the Power Plant is being established between two lakes, viz., the Puttenahalli Lake and Yelahanka Lake, without considering the hydrology of the region. It affects the *rajakaluve* connecting the two lakes and wetlands. It is submitted that the watershed area of the water-bodies in question are being affected prejudicially and this also has not attracted the attention of the statutory authorities. Further, the village map clearly shows the connecting water body between the two lakes as water body and this also has been ignored. In fact, the concrete canal constructed by the project proponent has already destroyed the wetland and has to be restored. It is contrary to the established law in regard to permissible constructions in the vicinity of water bodies and *rajakaluves*.
31. It is submitted that the power plant is being established in an area where no pollution control measures are possible. In fact because of paucity of land, immediately adjacent to lakes and residential areas, green belt cannot be created all around. Discharge of treated water into Yelahanka lake will destroy water quality and affect users. It is submitted that relevant conditions are not considered. Secondary pollution control measures not envisaged to handle any emergency situations and risk factors are high. It is submitted that the EIA report has been prepared without any application of mind and the same deserves to be rejected. However, the clearance has been issued based on this inchoate report that fails to even identify and



perform the basic features of an EIA study by an authority without jurisdiction to grant the clearance itself.

32. It is submitted that it is clear that the said "Gas based Combined Cycle Power Plant" cannot be permitted in the present location, *i.e* in the immediate vicinity of the protected area under the Wildlife (Protection) Act, 1972 and in its eco-sensitive zone. It is submitted that even for projects that are permitted in the eco-sensitive zones, the law has mandated that permission has to be obtained from the National Board for Wildlife (NBWL), so that issues relating to wildlife and habitat conservation can be properly examined and impact of the activity on the protected area can be assessed. This has been mandated by the Hon'ble Supreme Court by its order dated 04.12.2006 passed in W.P.(C) No. 460 of 2004 that held that all proposals within 10 KM of a 'protected area' be referred to the NBWL. The MoEFCC to prevent assessment of such projects at the state level, has issued OM dated 20.08.2014 clearly stating this requirement. However, in the instant case, the SEIAA has not even referred the proposal to the NBWL and has illegally granted the subject clearance to the project proponent and no permission has been obtained from the National Board for Wildlife as mandated by law, despite which, the project proponent is continuing with construction activity at a brisk pace.
33. It is submitted that heat, air, noise and light pollution from the subject "Gas based Combined Cycle Power Plant" will have a direct bearing on the birds in the 'protected area'. In fact, changes in air temperature due to stack emissions, results in affecting the migratory pattern of birds itself and the deposition of pollutants on the waterbody etc., are issues that require specific consideration. However, the EIA report is silent on these issues and despite being a prohibited activity, the project proponent is proceeding



with the establishment of the said "Gas based Combined Cycle Power Plant" with total disregard to the environmental laws.

34. It is submitted that the present Power Plant emits enormous volumes of noise, which is in violation of permissible limits. The Plant will generate sound levels of around 85 dB(A), whereas the permissible noise levels are less than 55dB(A) for residential areas and 45dB(A) during night times. It is submitted that for last few days, a loud unbearable noise is being heard in the vicinity of the Yelahanka-Puttenahalli Lake. It is believed that it is because of unscheduled trials being conducted at the under-construction power plant of Karnataka Power Corporation Limited (Respondent No. 4). It is further submitted that the residents have complained about the blasting sounds. The sound so created is beyond permissible limits and the same is recorded using Mobile Device. This unabated noise along with continuous vibrations have started to affect the birds/animals as well as people residing in the vicinity. This is a potential health hazard and will adversely affect the health and well-being of Birds and Animals as well as general public including old persons and young children staying in the vicinity. Further, a resident in the vicinity has complained stating that on the morning of 21 May, 2020, she heard a disturbingly loud noise that lasted for more than 15 mins. The children in the park and others around all looked around curiously while trying to cover their ears to shut the noise as much as they could. That the said noise has originated from the said power plant. Hence, the Petitioner/Appellant including various resident nearby have made a formal representation/complaint to the concerned Authorities viz., Karnataka State Pollution Control Board, Bengaluru and Commissioner, Bangalore Bruhat Mahanagar Palika. The said Authorities, till date, have not taken any action to curb the activities of the Respondent No. 4 (KPCL) and hence, the clearing and cutting of trees and destruction of forest around



the lake including the pollution of the lake water by discharge hot water from the power plant is ever-since continued. This would spell a death knell to the birds and animals and consequently annihilation of the Bird Conservation Reserve; and further would pose serious health hazard to the people living in and around the power plant and thereby upset the ecological balance in the surrounding environment. (see page 444 to 454 of Appeal paper-book)

35. It is further submitted that the Respondent No. 4 (KPCL) has claimed that the Gas (LNG) required for the proposed power plant would be supplied by M/s. GAIL (India) Ltd. from Dabhol, Maharashtra. The Respondent No. 4 has been negotiating with GAIL for supply of natural gas to the proposed Power Plant. GAIL has to put up a pipeline covering a distance of more than 10 kms from the existing pipeline located on the Outer Ring Road near Hebbal, upto the Power Plant site at Yelahanka. The environmental impact of putting up a pipeline from the outer ring road till the proposed plant site has not been evaluated so far. The Appellant submits that as per clause 6(a) of the Schedule to SO 1533 issued by the MoEF relating to "LIST OF PROJECTS OR ACTIVITIES REQUIRING PRIOR ENVIRONMENTAL CLEARANCE" would be applicable to such a pipeline project. It is humbly submitted that there are numerous lakes located between the Power Plant and the outer ring road, viz., Hebbal Lake, Singapura Lake, Attur Lake, Puttenahalli Lake etc., and in addition to these lakes, there are numerous natural drains (*rajakaluves*). Besides these, the area is thickly populated and almost 50% of the Bangalore North population resides in the areas located alongside the propose pipeline between outer ring road and the plant site. In addition to this, the proposed pipeline has pass through the Indian Airforce Station at Jalahalli.



36. That this Hon'ble Tribunal and the Hon'ble Supreme Court has consistently held that lakes and such other eco-sensitive zones must be protected for the benefit of current and future generations, and to build water security for all and also in supporting traditional livelihoods and the conservation of biodiversity. That the draining of effluents is prohibited under the Wetland (Conservation and Management) Rules, 2010 enacted by the Ministry of Environment and Forests under the Environment Protection Act, 1986. The action of the Respondent is in blatant violation of the principles of Intergenerational Equity which this Hon'ble Court has incorporated into the India legal jurisprudence in the case of A. P. Pollution Control Board vs. Prof. M. V. Nayudu and Ors., [1999 (2) SCC 718]. Further, by virtue of the Public Trust Doctrine and the Principle of Intergenerational Equity, the Respondents are duty bound to conserve and protect the Yellahanka-Puttenahalli Lake and all other lakes. Thus, it is submitted that the mandatory public hearing to be held, in order to give an opportunity to all affected persons to voice their concerns which are to be addressed by the project proponents, has not been complied with in terms of EIA Notification, 2006 and the principles of natural justice.
37. It is submitted that the Government of Karnataka, through the Department of Urban Development, passed an Order bearing No. 39 of 2019, Bengaluru, dated 11.12.2019, whereby has sought to transfer the Puttenahalli Birds Conservation Reserve to Bengaluru Bruhut Mahanagar Palike for maintenance etc. from the Forest Department. and the latter issued a Short Term Tender Notification bearing No. EE-4 (Lakes)/TN-01/2020-21 dated 17.04.2020 for the said purpose. The Appellant has challenged the above Orders/Notifications of the Government of Karnataka before the High Court of Karnataka by filing a writ petition in W.P. No. 7319/2020. The High Court of Karnataka by its Order dated 01.06.2020



has taken cognizance of the matter and has issued notice to the concerned parties. The said matter is still pending consideration before the High Court of Karnataka.

38. That this Hon'ble Tribunal and the Hon'ble Supreme Court has consistently held that lakes and such other eco-sensitive zones must be protected for the benefit of current and future generations, and to build water security for all and also in supporting traditional livelihoods and the conservation of biodiversity. That the draining of effluents is prohibited under the Wetland (Conservation and Management) Rules, 2010 enacted by the Ministry of Environment and Forests under the Environment Protection Act, 1986. The action of the Respondent is in blatant violation of the principles of Intergenerational Equity which this Hon'ble Court has incorporated into the India legal jurisprudence in the case of *A. P. Pollution Control Board vs. Prof. M. V. Nayudu and Ors.*, [1999 (2) SCC 718]. Further, by virtue of the Public Trust Doctrine and the Principle of Intergenerational Equity, the Respondents are duty bound to conserve and protect the Yellahanka-Puttenahalli Lake and all other lakes. Thus, it is submitted that the mandatory public hearing to be held, in order to give an opportunity to all affected persons to voice their concerns which are to be addressed by the project proponents, has not been complied with in terms of EIA Notification, 2006 and the principles of natural justice. That despite having repeatedly approached the Respondents in respect of the illegal and void environmental clearance granted to the Respondent No. 4, and the grave harms and dangers of the thermal power project, the Ministry of Environment, Forests and Climate Change has failed to even consider the representation submitted by the Appellant/Trust. This calls for the interference by this Hon'ble Court with the impugned order passed by the SEIAA in the interest of justice, equity and good conscience.



39. That the Hon'ble High Court of Bombay in the case of ***Gram Panchayat Navlakh Umbre v/s. Union of India and Ors.*** [PIL No. 115/2010 etc **Judgement dated 28.06.2012**], has held as follows:-

*“24. ....The scheme of the notification dated 14 September 2006 contemplates an application by the project proponent, the finalization of comprehensive terms of reference by the SEAC and the conduct of EIA studies by the project proponent on the basis of the terms of reference approved by the SEAC. Thereupon a draft EIA report has to be prepared on the basis of the EIA studies. A public consultation is to take place on the basis of the draft EIA report. The final EIA report is prepared on the basis of a compliance of the grievances that are raised during the course of the public consultation. Thereupon a final EIA report has to be submitted to the SEAC. The SEAC in turn conducts a detailed scrutiny of the final EIA report, the report of the public consultation and the application and has to address environmental and other concerns.....The SEAC is primarily a body consisting of experts. The importance which the notification attributes to the SEAC is evident from the fact that under clause 4(iii), the SEIAA is required to base its decision on the recommendations of the SEAC. Moreover, under Clause 8(ii) the SEIAA is to normally accept the recommendations of the SEAC and where it differs from those recommendations to furnish reasons for the disagreement, while requesting reconsideration by the SEAC. The process of screening, scoping and appraisal by the SEAC is of utmost importance and is a vital element in the ultimate process of decision making leading upto the grant or rejection of an environmental clearance. The notification indicates time lines for the performance of various tasks which are assigned to the SEAC. Initially when it screens a proposal, the SEAC has to determine whether or not the project or activity requires further environmental studies for the preparation of an EIA report. In the stage of scoping the SEAC, before it formulates comprehensive terms of reference has to address all relevant environmental concerns for the*



*preparation of an EIA report in respect of the project or activity for which clearance is sought. The notification envisages that, where it considers necessary, the SEAC can even conduct a site visit. Once the terms of reference are formulated and finalized by the SEAC, the next stage involves the conducting of EIA studies. The Terms of Reference provide the analytical framework on the basis of which EIA studies are conducted. The preparation of the Terms of Reference is not a meaningless formality. They contain a framework of identifying environmental concerns with reference to which EIA studies are conducted. The notification requires public consultation not only with locally affected persons but all other persons having even a plausible stake in the environmental aspects of the project. Finally, when it comes to the stage of appraisal, the SEAC has to conduct the process in a transparent manner on the basis of the application and other documents such as the final EIA report, the report of public consultation and other relevant material.*

*25. In the present case, it is evident that the SEAC has acted in a casual manner without understanding either the vital implications of the function which is assigned to it under the notification or the consequences of its decision making process. The Court in the exercise of its power of judicial review is cognizant of the fact that the SEAC is drawn from experts in the field. Even so, it is necessary that the SEAC discharges its duties with a high degree of accountability and responsiveness having regard to the fact that it is an institution which is created with a view to facilitate environmental governance. Environmental governance requires decision makers to bear in mind the principles of sustainable development. The principles of sustainable development require a balance to be drawn between the need for development on the one hand and the protection of the environment on the other. In taking into account the principles of sustainable development, an authority such as the SEAC must bring its attention to bear on relevant factors such as the need to preserve the natural resources for the benefit of future generations, the sustainable prudent or rationale use of natural resources, the equitable engagement of natural resources and the need to ensure that environmental considerations are*



*integrated into economic and development plans, programmes and processes. Among the fundamental principles of environmental governance are principles that foster access to information; access to justice to the community which is liable to be affected and governance based on rule of law. Access to information, particularly to impoverished and marginalised communities, which populate our rural land scape is of vital importance. Communities must have access to all information in order to be satisfied that a proposed project meets standards of safety; that the site upon which the project is to be located is environmentally conducive and that the project will not result in a destruction of the natural habitat. Denial of information is the surest way to deprive rural communities of human rights and leads to a sense of alienation. Access to information is a source empowerment. Participatory decision making must hence be an ingredient of environmental governance in a true sense of the term. Merely observing the forms of participation without the substance is to negate fundamental human rights. When expert bodies are conferred with statutory duties which are envisaged in the public interest, particularly having regard to the need to protect sensitive interests such as those of the environment, it is necessary that those duties must be performed scrupulously keeping in mind the safeguards which are provided by enacting legal provisions.....”*

**(see Annexure A-37 at pages 79 to 119 of Rejoinder of Appellant)**

40. WHEREFORE, in the light of the above facts and circumstances and the caselaws relied upon by the Appellant and the as per the law laid down by the Hon’ble Supreme Court of India, it is most humbly prayed that the Hon’ble Tribunal may be pleased to allow the present appeal and thereby:-

1. Declare the Environmental Clearance *vide* SEIAA 20 IND 2014 dated 01.09.2015 granted by the Karnataka State Environment Impact Assessment Authority (Respondent No. 2) to the Karnataka Power Corporation Ltd. (Respondent No. 4 herein) as null and void

as being contrary to the provisions of Environmental Impact Assessment Notification of 2006, and hence cancel the same, and

2. Direct the Karnataka Power Corporation Ltd. (Respondent No. 4 herein) not to put up the Gas-based Combined Cycle Power Plant at the present site in the vicinity of the Puttenahalli Bird Conservation Reserve and thereby restore the damage done the Puttenahalli-Yelahanaka Lakes by illegal encroachments on the lake areas, and
3. Issue an order directing the Respondent No. 4 for restitution of environment and to ensure protection of bio-diversity of the Puttenahalli and Yelahanaka Lakes and to ensure protection of aquatic life, flora and fauna.

  
APPELLANT  
Yelahanaka Conservation  
Lake & Bird Conservation Trust (Regd)

Drawn and filed by,



Abdul Azeem Kalebudde  
Advocate for the Appellant

Date: 06.10.2021  
Place: Chennai

MANU/SC/7658/2007

**Equivalent Citation:** AIR2007SC2102, JT2007(7)SC381, 2007(7)SCALE190, (2007)10SCC513, (2008)1SCC(LS)21, [2007]6SCR743, 2007(4)SCT153(SC), 2008(1)SLJ139(SC), 2007(4)SLR619(SC)

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 2527 of 2007 (Arising out of S.L.P. (Civil) No. 3413 of 2006) and Civil Appeal Nos. 2528-29 2007 (Arising out of S.L.P. (Civil) Nos. 12650-12651 of 2006)

Decided On: 15.05.2007

Appellants: **S.B. Bhattacharjee**

**Vs.**

Respondent: **S.D. Majumdar and Ors.**

**Hon'ble Judges/Coram:**

*S.B. Sinha and C.K. Thakker, JJ.*

**Counsels:**

*For Appellant/Petitioner/Plaintiff: Sunil Gupta, Sr. Adv., C. Mukund, Ashok Jain, Pankaj Jain, Bijoy Kumar Jain, K.N. Madhusoodhanan, R. Sathish and Kailash Chand, Advs*

*For Respondents/Defendant: Manoj Goel, Shoundeep Raj, Shrigopal and Brij Bhushan, Advs.*

**Case Category:**

SERVICE MATTERS - PROMOTION

**JUDGMENT****S.B. Sinha, J.**

**1.** Leave granted.

**2.** Interpretation of an Office Memorandum dated 10.10.2002 providing for the mode and manner for considering the suitability of candidates for promotion from one post to the other, falls for consideration in these appeals which arise out of a common judgment and order dated 27.01.2006 passed by a Division Bench of the Gauhati High Court in Writ Appeal No. 5 of 2004 whereby and whereunder the appeal preferred by Respondent No. 1 from a judgment and order 29.11.2004 passed by a learned Single Judge of the said High Court in Writ Petition (Civil) No. 44 of 2004, was allowed.

**3.** A post of Executive Engineer was created on 01.02.2004. For the purpose of filling up the said post, the Departmental Promotion Committee (for short, 'the DPC) held a meeting on 16.03.2004. The DPC indisputably was, inter alia, to consider the Annual Confidential Reports (for short, 'ACRs') of the candidates concerned. Both the appellant and the first respondent along with two others were eligible therefore. Promotion to the said post is governed by the Mizoram Engineering Service Rules, 2001 (for short, 'the Rules). Rule 20 of the said Rules, inter alia, provides for general procedure for promotion, relevant clauses whereof are as under:

**20.** (1) Whether any vacancy or vacancies arise(s) to be filled up by

promotion, the Controlling Authority shall furnish to the Commission, the following documents and information:

(d) Annual Confidential Reports of eligible candidates of preceding years as may be required, length of service, duly reviewed and accepted by the authorities concerned.

(e) Details about reservation for member of the service in respect of graduate in Engineering and holders of under graduate diploma in Engineering as provided under Sub-rules (3) and (4) of Rule 19.

(f) Clearance from Vigilance Department separately in respect of each, and

(g) Any other documents and information as may be considered necessary by the Commission.

**4 .** State of Mizoram, however, issued an Office Memorandum dated 10.10.2002 laying down the procedures to be observed by the DPC, relevant clauses whereof are as under:

**3.2** While merit has to be recognised and rewarded, advancement in the officer's career should not be regarded as a matter of course but should be earned by dint of hard work, good conduct and result oriented performance as reflected in the annual confidential reports and based on strict and rigorous selection process.

**3.4** Confidential Rolls are the basic inputs on the basis of which assessment is to be made by each DPC. The evaluation of CRs should be fair, just and nondiscriminatory. Hence,

(a) The DPC should consider CRs for equal number of years in respect of all Officers considered for promotion subject to (c) below.

(b) The DPC should assess the suitability of the candidates for promotion on the basis of the their service records and with particular reference to the CR for five preceding years, irrespective of the qualifying service prescribed in the Service Rules/Recruitment Rules. (If more than one CR has been written in a particular year all the CRs for the relevant years shall be considered together as the CR for one year).

(c) When ACR has not been written by the reporting Officer despite submission of the self-appraisal to the Reporting Officer by the Officers reported upon during the relevant period, the DPC should consider the CR of one preceding year beyond the relevant period.

X X X

(e) The DPC should not be guided merely by the overall grading, if any, that may be recorded in the CRs, but should make its own assessment on the basis of the entries in the CRs, because it has been noticed that, some time, the overall grading in a CR may be inconsistent with the grading under various parameters or attributes.

(f) If the Reviewing Authority or the Accepting Authority, as the case

may be, has overruled the Reporting Officer, or the Reviewing Authority, as the case may be, the remarks of the latter authority should be taken as the final remarks for the purpose of assessment, provided it is apparent from the relevant entries that the higher authority has come to a different assessment consciously after due application of mind. If the assessment of the Reporting Officer, Reviewing Authority and Accepting Authority are complimentary to each other and one does not have the effect of overruling the other, then the remarks should be read together and the final assessment made by the DPC.

(g) ACRs of Officers which became available during the year immediately preceding the vacancy/panel year should be considered by the DPCs even if DPCs are held later than the year of vacancy. In other words, for the vacancy/panel year, 2001-2002, ACRs upto the year ending 31st March, 2000 are required to be considered irrespective of the date of convening of DPC. However, ACRs upto the year ending 31st March, 2001 will be considered by the DPC if it sits after September of that year even if the vacancy falls within 2001 -2002.

X X X

**3.5(ii)** In respect of all posts which are in the scale of pay of Rs. 12000-16500/- and above, the bench-mark shall be "VERY GOOD" and for all the posts which are in the scale of pay of Rs. 8000-13 500/- and above but less than Rs. 12000-16500/- the bench-mark shall be 'GOOD'.

Further, overall grading of officers shall be made in the following manner:

<u>Outstanding</u>	An Officer, who gets at least 3 (three) outstanding reports out of 5 (five), provided that the remaining 2 (two) reports should not be less than 'Very Good', will be categorised as 'Outstanding'.
<u>Very Good</u>	An Officer, who gets at least 3 (three) 'Very Good' reports out of 5 (five), provided that the remaining 2 (two) reports should not be less than 'Good' will be categorised as 'Very Good'.
<u>Good</u>	An Officer, who gets at least 3 (three) 'Good' reports out of 5 (five), will be categorised as 'Average'.
<u>Average</u>	An Officer, who gets at least 3 (three) 'Good' reports out of 5 (five), will be categorised as 'Average'.

An Officer who gets an overall grading of Outstanding will en bloc supersede Officer who gets an overall grading of 'Very Good' regardless of seniority. An Officer who gets an overall grading of 'Very Good' will en bloc supersede Officer who gets an overall grading of 'Good' regardless of seniority.

X X X

**3.8** For the purpose of evaluating the merit of the Officers while preparing year-wise panels, scrutiny of the record of service of the Officers should be limited to the records that would have been available had the DPC met at the appropriate time. For instance, for preparing a panel relating to the vacancies

of 2001-2002 the latest available records of service of the Officers up-to the period ending March, 2000 as the case may be should be taken into account and not the subsequent one. However, if on the date of the meeting of the DPC, Departmental Proceedings are in progress and under the existing instructions sealed cover procedure is to be followed, such procedure should be observed even if Departmental Proceeding were not in existence in the year to which the vacancy related. The Officer's name should be kept in the sealed cover till the proceedings are finalized.

**5.** Before we embark upon the rival contentions of the parties, we may notice the assessment of ACRs of the appellant and respondent No. 1 respectively from 1997-98, which is as under:

Sl. No.	Name of Officer	1997-98	98-99	99-00	00-01	01-02	02-03	Overall
1.	S.D. Majumdar	VG	VG	VG	VG	VG	VG	Very Good
2.	...	...	...	...	...	...	...	...
3.	...	...	...	...	...	...	...	...
4.	S.B. Bhattacharjee	VG	Os	VG	VG	Os	Os	Outstanding

**6.** Indisputably, if the ACR for the year 1997-98 is taken into consideration for the purpose of judging the suitability of the appellant and respondent No. 1 and that of the year 2002-03 is excluded, Respondent No. 1 being senior, would be promoted to the post of Executive Engineer; whereas in the event the ACR for the period 1997-98 is excluded and that of the year 2002-03 is taken into consideration, as the appellant herein would be given overall grading 'outstanding', the case of Respondent No. 1 would not be considered at all.

**7.** The fact that respondent No. 1 is senior to the appellant is not in dispute. As the DPC recommended the candidature of the appellant alone in terms of the extant rules, Respondent No. 1 herein filed a writ petition before the Gauhati High Court on 04.06.2004. During the pendency of the said Writ Petition, the Government of Mizoram itself issued a clarification on or about 13.09.2004, which reads as under:

In inviting a reference to this Department 's O.M. No. A.32012/1/81-APT(r)/Loose dated 10.10.2002 on the above subject, this is to clarify para 3.4 (g) of the said O.M. that if the DPC sits after September of the year 2002, ACRs upto the year ending 31.3.2001 would be taken into consideration by the DPC while consideration the vacancies that arose for the vacancy year 2001-2002.

**8.** By a judgment and order dated 29.11.2004, a learned Single Judge of the Gauhati High Court dismissed the said writ petition of Respondent No. 1, inter alia, opining that Clause (g) of Paragraph 3.4 of the said Office Memorandum must not only be applied having regard to the other provisions thereof, but also the latest ACR i.e. the ACR for the year ending 31.03.2003 should not be excluded from consideration. The clarificatory Office Memorandum dated 10.10.2002, the learned Single Judge opined, should receive such interpretation at the hands of the court which would advance the cause of public service. It was observed:

6. Before parting with the record, this Court must deal with the reliance placed on behalf of the petitioner on an office Memorandum dated 13.9.2004 which office Memorandum has been placed before the court at the hearing. The clarification issued in the office Memorandum dated 30.9.2004 can only

be logically and reasonably understood if the year 2002 as recorded therein is understood as the year 2001. In any case as this Court has already interpreted and laid down the true meaning of Clause (g) of paragraph 3.4 of the office Memorandum dated 10.10.2002, the clarification contained in the office Memorandum dated 13.9.2004 would have little sequence in altering the conclusion already reached.

**9.** An intra-court appeal having been preferred there against, a Division Bench of the said High Court reversed the said finding of the learned Single Judge, holding that the ACR for the year ending 31.03.2003 could not have been taken into consideration on a plain reading of Clause (g) of paragraph 3.4. Sustenance to the said finding was sought to be obtained from the Office Memorandum dated 16.06.2000 issued by the Government of India, the relevant portion whereof reads as under:

G.I. Dept. of Per. & Trg. O.M. No. 22011/9/98-Estt. (D) dated the 16th June, 2000

Relevant year upto which ACRs are to be considered.

**1.** ...

**2.** In regard to operation of the Model Calendar for DPCs, a doubt has been raised by certain quarters as the question of the relevant year upto which ACRs are required to be considered by the DPCs. In this connection, it is once again clarified that only such ACRs should be considered which became available during the year immediately preceding the vacancy /panel years even if DPC are held later than the Schedule prescribed in the Model Calendar. In other words, for the vacancy/panel year 2000-2001, ACRs upto the year 1998-99 are required to be considered irrespective of the date of convening DPC.

**10.** Although the clarificatory Office Memorandum has been issued by the State of Mizoram itself, apart from the candidate concerned, viz. Shri S.B. Bhattacharjee, the State of Mizoram as also the Mizoram Public Service Commission are before us.

**11.** Mr. Sunil Gupta, learned Senior Counsel appearing on behalf of the State of Mizoram, Mr. Ranjit Kumar, learned Senior Counsel appearing on behalf of the Mizoram Public Service Commission and Mr. Bijoy Kumar Jain, learned Counsel appearing on behalf of the private appellants in support of the appeals, inter alia, submitted:

(i) The Division Bench of the High Court committed a manifest error in passing the impugned judgment insofar as it failed to take into consideration the fact that the Office Memorandum dated 10.10.2002, if read in its entirety, would lead to only one conclusion that the merit and merit alone should be taken into consideration for promotion to the post of Executive Engineer.

(ii) The words 'preceding five years' in Clause (b) of paragraph 3.4 of the office memorandum dated 10.10.2002 would mean preceding five years before the meeting takes place.

(iii) Illustration appended to Clause (g) of paragraph 3.4 would clearly suggest that in the event the meeting of the DPC is held after September, it is incumbent upon it to take into consideration the ACRs upto 31.03.2003.

(iv) The expression 'immediately preceding' occurring in Clause (g) of paragraph 3.4 must be given its due meaning, which would bring within its purview the ACRs upto 31.03.2003.

(v) The clarificatory Office Memorandum having been issued while the writ petition was pending, the same being not available to the Public Service Commission, it could not have been taken the same into consideration and in that view of the matter, it cannot be given a retrospective effect and retroactive operation.

(vi) As the clarification lacks precision in regard to the interpretation of the term 'immediately preceding', the same cannot be held to have overridden the first part of Clause (g) of paragraph 3.4.

(vii) Illustration, it is trite, shall not give way to the main provision itself.

(viii) Whereas the learned Single Judge has considered the purport of entire rule, the Division Bench failed to do so and, thus, its judgment cannot be sustained.

(ix) The Office Memorandum issued by the Central Government was not relevant. Suitability of a candidate being the sole criteria, it was incumbent upon the DPC to consider the latest ACR so as to arrive at its own satisfaction and particularly when the chance of there being a negative report and/or down gradation of the officer concerned cannot be ruled out.

**12.** Mr. Manoj Goel and Mr. Shuvodeep Roy, learned Counsel appearing on behalf of Respondent, on the other hand, urged:

(i) The term 'immediately preceding' must be read with the words accompanying the same, namely, 'became available during the preceding the vacancy/panel year'.

(ii) An ACR becomes available for consideration not only when it is written but also when a representation is made in that behalf and reviewed by the Reviewing Authority.

(iii) As the clarificatory office memorandum dated 13.09.2004 is binding on the State, the same would be retrospective in nature.

(iv) Illustration being in nature of the proviso, the effect thereof cannot be ignored.

(v) The learned Single Judge committed a manifest error in substituting one year for consideration of another year and, thus, the judgment of the Division Bench of the High Court cannot be faulted with.

(vi) The Rule itself takes care of a contingency if any departmental proceeding or any criminal proceeding is initiated against the recommendee, in which event, the State would not be powerless to pass appropriate orders, as would appear from Rule 17 of the Rules.

**13.** Although a person has no fundamental right of promotion in terms of Article 16 of the Constitution of India, he has a fundamental right to be considered therefore. An effective and meaningful consideration is postulated thereby. The terms and

conditions of service of an employee including his right to be considered for promotion indisputably are governed by the rules framed under the proviso appended to Article 309 of the Constitution of India.

**14.** Rule 20, as noticed hereinbefore, provides that if any vacancy or vacancies arise(s) to be filled up by promotion, the Controlling Authority would furnish to the Commission the documents enumerated therein including ACRs of eligible candidates of preceding years, as may be required, length of service, duly reviewed and accepted by the authorities concerned.

**15.** It has not been denied or disputed before us that in a given case ACRs of an eligible candidate may not be written and, thus, may not be available. If the same is available, a notice in that behalf must be given, in the event, any exigency arises therefore to the affected officer and only upon consideration of the representation made by him, if any, the decision taken in that behalf by the Reviewing Authority shall be final. The ACR by immediate superior, thus, is not final or determinative, as the same would be subject to the decision of the Reviewing Authority.

**16.** The validity or otherwise of the said Office Memorandum dated 10.10.2002 is not in question. With a view to give effect to the statutory rules governing the field, the State of Mizoram has issued the said Office Memorandum directing that the procedure laid down therein shall be observed by the DPC. Indisputably, merit and suitability of the candidates concerned are the primary consideration for promotion to a selection post, where for the necessary ingredients as envisaged in Clause 3.4 of the said Office Memorandum would fall for consideration of the DPC, but it must be borne in mind that Clause 3.4 provides for the mode and manner in which the DPC shall consider the same.

**17.** DPC is required to consider the service records, with particular reference to the ACRs for five preceding years. The ACRs for 'five preceding years' must, therefore, be held to mean 'five preceding years' of ACRs which have attained finality. It, however, does not define how the said 'five preceding years' is to be calculated. Calculation and/or reckoning of 'five preceding years' is provided for in Clause (g) of paragraph 3.4.

**18.** Before, however, we embark upon the construction of Clause (g) of paragraph 3.4 of the said Office Memorandum, we may notice that in terms of Clause (e) thereof, a minute grading of the ACRs and not overall grading alone would be subject-matter of consideration of the DPC; as it has been stated therein, 'it had been noticed that some time the overall grading in ACR may be inconsistent with the grading under various parameters or attributes'. Each of the parameters or attributes on the basis whereof the ACRs are written and gradation is given would, thus, have to be considered.

**19.** The Rules indisputably envisage that a person having an overall grading of 'outstanding' shall alone be considered vis-a-vis who do not come within the purview of the gradation of outstanding despite the fact that their service career they might have received overall grading of 'Very Good'.

**20.** We at this stage may also notice paragraph 3.8 of the said Office Memorandum, which proceeds on the basis that for the purpose of evaluating the merit of the officers, scrutiny of the records of the officers should be limited to the records that would have been available, had the DPC met at the appropriate time. Even in relation thereto, an illustration had been given stating that if a vacancy arises in 2001-02,

only the latest records of service of the Officers upto the period ending March 2000, namely, 1999-2000 shall be taken into consideration.

It categorically uses both positive language as also a negative language stating that what would be taken into consideration is only the records ending upto March 2000 and not the subsequent ones.

**21.** In the aforementioned backdrop of events, interpretation of Clause (g) of paragraph 3.4 should be resorted to. The words 'immediately preceding', as noticed hereinbefore, are preceded by the words 'ACRs of the officers which became available during the year'. This constitutes the first part. The words 'vacancy/panel year' following the words 'the year immediately preceding' must also be duly taken into consideration.

A DPC may be held during the year in which the vacancy arises or later than the year of the vacancy. The Rules intentionally provided for one year gap.

It is only in a case where a controversy may arise in regard to the number of ACRs which would be available, the illustration and/or proviso has been appended to Clause 3.4.

**22.** The Office Memorandum, if read in the context of the rules, takes into consideration the necessity of considering the case of the eligible candidates during the year where vacancy arose. The DPC is expected to meet each year. Only when it is not possible to hold a meeting of the DPC within that year, the illustration would be applicable.

A vacancy must arise in a particular year. If it arose as in the present case in 2003-04 following the illustration contained in Clause (g) of paragraph 3.4, ACRs upto the year 31.03.2002 i.e. vacancy year/panel year 2001-02 are required to be taken into consideration irrespective of the date of convening of the DPC. Only when ACRs upto 31.03.2003 were required to be taken into consideration if it sits after September of that year even if the vacancy arose within the year 2001-02.

**23.** If the opinion of the learned Single Judge is given effect to, then 31.03.2003 becomes 31.03.2004. Indisputably, necessity was felt for a further clarification. It was in the aforementioned premise that a further clarification was issued by the State so as to direct that if the DPC sits after September of the year concerned (in this case 2004), the ACRs upto the year ending 31.03.2003 could be taken into consideration while considering the vacancies which arose in 2003-04. The Division Bench of the High Court, in our opinion, cannot, thus, be held to have committed any error in this behalf.

**24.** It may be that in a given case, the court can with a view to give effect to the intention of the legislature, may read the statute in a manner compatible therewith, and which would not be reduced to a nullity by the draftsman's unskillfulness or ignorance of law. But, however, it is also necessary for us to bear in mind the illustration given by the executive while construing an executive direction and office memorandum by way of executive construction cannot be lost sight of. It is in that sense the doctrine of *contemporanea expositio* may have to be taken recourse to in appropriate cases, although the same may not be relevant for construction of a model statute passed by a legislature.

In G.P. Singh's 'Principles of Statutory Interpretation, 10th Edn. at p. 319, it is

stated:

But a uniform and consistent departmental practice arising out of construction placed upon an ambiguous statute by the highest executive officers at or near the time of its enactment and continuing for a long period of time is an admissible aid to the proper construction of the statute by the Court and would not be disregarded except for cogent reasons. The controlling effect of this aid which is known as 'executive construction' would depend upon various factors such as the length of time for which it is followed, the nature of rights and property affected by it, the injustice result from its departure and the approval that it has received in judicial decisions or in legislation.

Relying upon this principle, the Supreme Court in *Ajay Gandhi v. B. Singh* having regard to the fact that the President of the Income Tax Appellate Tribunal had been from its inception in 1941 exercising the power of transfer of the members of the Tribunal to the places where Benches of the Tribunal were functioning, held construing Sections 251(1) and 255(5) of the Income Tax Act that the President under these provisions has the requisite power of transfer and posting of its members. The court observed:

For construction of a statute, it is trite, the actual practice may be taken into consideration.

Contemporary official statements throwing light on the construction of a statute and statutory instruments made under it have been used as *contemporanea expositio* to interpret not only ancient but even recent statute both in England and India.

**25.** Clarification was issued by the State of Mizoram not only in the light of the express provisions contained in paragraph 3.8 of the Office Memorandum but also in the light of a similar clarification issued by the Central Government. The Division Bench of the High Court has noticed that the clarificatory memorandum was issued considering the Central Government clarificatory Office Memorandum as a model.

Reliance placed by Mr. Ranjit Kumar, learned Senior Counsel appearing on behalf of the appellant on a decision of this Court in *Shambhu Nath Mehra v. The State of Ajmer* MANU/SC/0023/1956 : 1956CriLJ794 , in our opinion, is not apposite. This Court therein was considering interpretation of the word 'especially' contained in Section 106 of the Indian Evidence Act, 1872, which was an exception to Section 101 thereof, vis-a-vis Sections 112 and 113 of the Railways Act. It is in that context this Court observed:

**13.** We recognise that an illustration does not exhaust the full content of the section which it illustrates but equally it can neither curtail nor expand its ambit; and if knowledge of certain facts is as much available to the prosecution, should it choose to exercise due diligence, as to the accused, the facts cannot be said to be "especially" within the knowledge of the accused.

If the first part of the statement of law in *Shambhu Nath*. (supra), in our opinion, is applicable, the illustration in question does not curtail nor extend the ambit. It merely clarifies what otherwise might have been obvious. It introduces the rule by abundant caution although it might not have been necessary keeping in view the purport and

object which Rule 20 and paragraph 3.8 seeks to achieve.

**26.** The clarification issued by the State is not in the teeth of the illustration given in Clause (g) of paragraph 3.4 of the Office Memorandum.

The clarification having been issued, the same should be taken into consideration by this Court irrespective of the fact as to whether it was available to the Public Service Commission on 16.03.2004 when the DPC held its meeting which, in our opinion, was not of much significance.

The clarification being explanatory and/or clarificatory, in our opinion, will have a retrospective effect.

**27.** In S.S. Grewal v. State of Punjab and Ors. MANU/SC/0272/1994 : (1994)ILLJ339SC , this Court stated the law thus:

...In this context it may be stated that according to the principles of statutory construction a statute which is explanatory or clarificatory of the earlier enactment is usually held to be retrospective. (See: Craies on Statute Law, 7th Edn., p. 58) It must, therefore, be held that all appointments against vacancies reserved for Scheduled Castes made after May 5, 1975 (after May 14, 1977 insofar as the Service is concerned), have to be made in accordance with the instructions as contained in the letter dated May 5, 1975 as clarified by letter dated April 8, 1980....

**28.** Yet again in Commissioner of Income-Tax, Bombay and Ors. v. Podar Cement Pvt. Ltd. and Ors. MANU/SC/0649/1997 : [1997]226ITR625(SC) , this Court referring to a large number of authorities including that of G.P. Singh's Principles of Statutory Interpretation', observed:

...An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law when the Constitution came into force, the amending Act also will be part of the existing law.

**29.** This Court in Allied Motors (P) Ltd. v. Commissioner of Income Tax, Delhi MANU/SC/0317/1997 : [1997]224ITR677(SC) , observed:

**13.** Therefore, in the well-known words of Judge Learned Hand, one cannot make a fortress out of the dictionary; and should remember that statutes have some purpose and object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning. In the case of R.B. Jodha Mal Kuthiala v. CIT MANU/SC/0389/1971 : [1971]82ITR570(SC) , this Court said that one should apply the rule of reasonable interpretation. A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole.

[See also Zile Singh v. State of Haryana and Ors. MANU/SC/0876/2004 : AIR2004SC5100

**30.** We should not, however, fail to notice that in S. Sundaram Pillai and Ors. etc. v. V.R. Pattabiraman and Ors. etc. MANU/SC/0387/1985 : [1985]2SCR643 , this Court held:

**53.** Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is--

- (a) to explain the meaning and intendment of the Act itself,
- (b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,
- (c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,
- (d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and (e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same.

[See also S.P.S. Balasubramanyam v. Suruttayan alias Andali Padayachi and Ors. MANU/SC/0147/1992 : AIR1992SC756 and Hardev Motor Transport v. State of M.P. and Ors. MANU/SC/8596/2006 : AIR2007SC839 ]

In a given case, and in absence of rule, the court might have been justified to hold that the DPC must take into consideration the merit and merit only. However, in a case of this nature, where the State lays down the procedures as to how and in what manner the merit and suitability is to be judged, it was obligatory on the part of the commission to follow the same in its letter and spirit. The case at hands shows that it can in a situation of this nature prove to be disastrous to an employee, if any other construction is given.

**31.** Respondent No. 1 is senior to the appellant by 16 years. A post was created. It for one reason or the other was sought to be filled up immediately. If the interpretation as accepted by the learned Single Judge is to be given effect to, the case of Respondent No. 1 was not to be considered at all by the DPC. The Division Bench of the High Court, therefore, in our opinion, cannot be said to have committed any error warranting interference by this Court. The appeals are, therefore, dismissed with costs Counsel's fee is quantified at Rs. 10,000/-.

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MANU/SC/0272/1994

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**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 241 of 1993

Decided On: 07.05.1993

Appellants:**S.S. Grewal**  
**Vs.**Respondent:**State of Punjab and Ors.****Hon'ble Judges/Coram:***P.B. Sawant and S.C. Agrawal, JJ.***ORDER****S.C. Agrawal, J.**

**1.** This appeal relates to the inter se seniority of the appellant and respondent No. 3 in the Punjab Superior Judicial Service (hereinafter referred to as 'The Service'). The appellant and respondent No. 3 were both appointed to the Service on May 26, 1986 on the basis of selection by direct recruitment. The appellant belongs to the general category whereas respondent No. 3 is a Mazhabi Sikh, which is a Scheduled Caste in Punjab.

**2.** The recruitment to the Service is governed by Punjab Superior Judicial Service Rules, 1963 (hereinafter referred to as 'The Rules'). By Rule 8-A, which was inserted in the rules by notification dated June 14, 1977, the instructions issued by the State Government from time to time in relation to reservation of appointments or posts for Scheduled Castes and Backward Classes were made applicable for the purpose of making appointments to the posts in the Service. The orders of the State Government relating to persons belonging to Schedule Castes in this regard which have a bearing in this appeal are as follows:

(1) Letter dated June 6, 1974 from the Secretary to the Government of Punjab, Welfare of Scheduled Castes and Backward Classes Department to all Heads of Department etc. It was communicated that it had been decided to increase the percentage of reservation in direct recruitment in all services from 20% to 25% in the case of members of Scheduled Castes and from 2% to 5% in the case of members belonging to Backward Classes. In the said letter, it was also indicated that the vacancies to be reserved for the members of Scheduled Castes in a lot of 100 vacancies would be at the points specified below:

1, 5, 9, 13, 17, 21, 25, 29, 33, 37, 41, 45, 49, 53, 57, 61, 65, 69, 73, 77, 81, 85, 89, 93 and 97 and so on.

It was also directed that the Roster already existing would not be abandoned, but would now be maintained in continuation from the vacancy in the existing Roster last filled up according to the new pattern of reservation that has been prescribed in the earlier paragraphs in the said letter.

(2) Circular dated November 19, 1974 relates to carrying forward of reservation for members of Scheduled Castes/Backward Classes. It was directed that "the reservation should be carried forward from vacancy to vacancy in the same block until a Scheduled Caste or a Backward Class person, as the case may be, is appointed or promoted in the same block. It was further directed that if all the vacancies in any block determined on the basis of prescribed Roster are filled up by other category-person due to non-availability of Scheduled Castes or Backward Classes persons, the reservation should be 'carried forward to the subsequent blocks. The said letter required that the reservation should be carried forward from vacancy to vacancy in each block and from block to block until the carried forward vacancies are filled up by the members of the Scheduled Castes or Backward Classes. It was also provided that only one reserved vacancy out of the carried forward vacancies should be filled in a block of appropriate Roster in addition to the normal reserved point of the block.

(3) Letter dated May 5, 1975, from the Secretary to the Government, Punjab, Welfare of Scheduled Castes & Backward Classes Department addressed to all Heads of Departments etc. It was communicated that the Government have decided that henceforth, 50% vacancies of the quota reserved for Scheduled Castes should be offered to Balmikis and Mazhabi Sikhs, if available, as a first preference from amongst the Scheduled Castes candidates.

(4) Letter dated April 8, 1980 addressed by the Under Secretary to the Government of Punjab, Welfare Department Reservation Cell, to all Heads of Departments etc. The position with regard to the implementation of instructions regarding reservation for Mazhabi Sikhs and Balmikis under the letter dated May 5, 1975 was clarified as follows:

"i) Combined merit list can be disturbed while giving appointment to the candidate belonging to Balmikis and Mazhabi Sikhs.

ii) On the basis of 50% reservation the first reserved vacancy can be offered to Balmikis and Mazhabi Sikhs although his name may be below in the merit list.

iii) On the basis of 50% reservation, Balmikis and Mazhabi Sikhs 1, 3,5 and so on reserved vacancies shall go to the candidates of these castes if available and 2,4,6 and so on reserved vacancies shall go to other Scheduled Castes candidates.

It is clarified here that these instructions are to be implemented when the names of the candidates of Balmikis and Mazhabi Sikhs are included in the merit list after selection. If no candidate belonging to these communities has been selected or less candidate selected then the reserved vacancy should be filled up from amongst the other Scheduled Castes candidates meaning thereby no reserve vacancy reserved for Balmikis and Mazhabi Sikhs should be carried forward.

**3.** After the introduction of Rule 8-A in the Rules, four persons were appointed by way of direct recruitment to the Service in the year 1979. One out of them, Shri Balwant Rai, belonged to a Scheduled Caste (other than Balmikis or Mazhabi Sikhs). Thereafter, in 1981, one post fell vacant but no person belonging to a Scheduled Caste could be selected and the candidate belonging to general category was

appointed against the said post. In the year 1982, selection was made for two posts but only one person could be selected and he also belonged to the general category and no person belonging to a Scheduled Caste was available for appointment. In 1986, six persons including the appellant and respondent No. 3 were appointed on the basis of direct recruitment. Out of those six persons, four belonged to the general category and two belonged to Scheduled Caste. One of the two persons was Shri G.S. Samra who belonged to a Scheduled Caste other than Balmikis or Mazhabi Sikhs, and the other was respondent No. 3 who is a Mazhabi Sikh. In the merit list for the said selection the appellant was placed at No. 1, Shri G.S. Samra was at No. 2 and respondent Rs. 3 was at No. 5. As per the Roster, Shri G.S. Samra was placed at Point No. 7, the appellant at Point No. 8 and respondent Rs. 3 at Point Rs. 9. After joining the Service, Shri G.S. Samra resigned from the same and had ceased to be a member of the Service prior to April 1, 1988.

**4.** In the tentative seniority list of the members of the Service as on April 1, 1988, the appellant was placed at Serial No. 52 and respondent No. 3 was placed at Serial No. 53. Respondent No. 3 submitted a representation against his placement in the seniority list and claimed that he should be placed against the post reserved for Scheduled Caste at Serial No. 5 in the Roster and on that basis he should be given the seniority of the year of 1981. He also submitted that since he is a Mazhabi Sikh, he is entitled to preference over Shri G.S. Samra who belonged to a Scheduled Caste other than balmikis and Mazhabi Sikhs, and he claimed that he should have been placed at Point No. 7 in the Roster and Shri G.S. Samra should have been placed at Point No. 9 and on that basis also respondent Rs. 3 is senior to the appellant. Representation was also invited from the appellant in this regard. After considering the said representations the High Court, on its administrative side, decided that the respondent No. 3 was entitled to be placed above Shri G.S. Samra in view of the Circular Letter dated May 5, 1975 and that he should have been placed against Point No. 7 in the roster and Shri G.S. Sarma should have been placed against Point No. 9 in the Roster. On that basis the seniority list was revised and respondent No. 3 was placed at Serial No. 52 while the appellant were placed at Serial No. 53. Feeling aggrieved by the revision in the seniority, the appellant filed a writ petition in the High Court which was dismissed by the High Court by judgment and order dated October 9, 1991. This appeal is directed against the said judgment of the High Court.

**5.** There is no dispute that appellant has been rightly assigned Point No. 8. If Respondent Rs. 3 has to be assigned Point No. 7, as found by the High Court, then he would be senior to the appellant but if Respondent No. 3 is assigned Point Rs. 9 then appellant would be senior to Respondent Rs. 3. It is, therefore, necessary to determine whether respondent No. 3 is entitled to be placed at Point Rs. 7 in the Roster in place of Shri G.S. Samra who should be placed at Point No. 9, or that the respondent Rs. 3 should be assigned Point No. 9 of the Roster. The said question requires consideration of the various orders relating to reservation for Scheduled Castes to which reference has been made earlier. As indicated earlier by letter dated June 6, 1974 points 1, 5, 9, 13, 17, 21, 25, 29, 33, 37, 41, 45, 49, 53, 57, 61, 65, 69, 73, 77, 81, 85, 89, 93 and 97 in the Roster are reserved for members of Scheduled Castes. By letter dated May 5, 1975, 50% of the vacancies of the quota reserved for Scheduled Castes are required to be offered to Balmikis and Mazhabi Sikhs, if available, as a first preference from amongst the Scheduled Castes candidates. In view of the clarifications contained in the letter dated April 8, 1980 on the basis of 50% reservation the first reserved vacancy can be offered to Balmikis and Mazhabi Sikhs although his name may be below in the merit list and on the basis of 50% reservation, amongst the vacancies reserved for Scheduled Caste, vacancies

1,3,5 and so on would go to Balmikis and Mazhabi Sikhs, if available, and reserved vacancies 2,4,6, and so on would go to other Scheduled Castes candidate. It has also been clarified that if no candidate belonging to the communities of Balmikis and Mazhabi Sikhs was selected or less number of candidates were selected then the reserved vacancies should be filled up amongst the other Scheduled Castes candidates and that no vacancy reserved for Balmikis and Mazhabi Sikhs should be carried forward. In view of the aforesaid clarifications out of the posts reserved for Scheduled Castes in the Roster, there was reservation for Balmikis and Mazhabi Sikhs on the posts against the following points in the Roster: 1, 9, 17, 25, 33, 41, 49, 57, 65, 73, 81, 89 and 97.

**6.** There was reservation for members of Scheduled Castes other than Balmikis and Mazhabi Sikhs on the posts against the following points in the Roster: 5, 13, 21, 29, 37, 45, 53, 61, 69, 77, 85 and 93.

**7.** The learned Counsel for the appellant has urged that since these orders relating to reservation for Scheduled Castes became applicable to the Service with effect from June 14, 1977, when Rule 8-A was inserted, all appointments to the Service after June 14, 1977 have to be made in accordance with these orders. The submission is that the first appointment, by direct recruitment, of a person belonging to the Scheduled Castes was of Shri Balwant Rai made in 1979. That was at point No. 1 in the Roster. That should have gone to a Balmiki or a Mazhabi Sikh but since no person belonging to those communities was available, Shri Balwant Rai, who belongs to a Scheduled Caste other than Balmikis and Mazhabi Sikhs, was appointed. It has been further urged that in view of the clarification contained in the letter dated April 8, 1980, a vacancy reserved for Balmikis and Mazhabi Sikhs is not required to be carried forward and the Balmikis and Mazhabi Sikhs cannot claim reservation in respect of the next vacancy at Point No. 5 which was reserved for Scheduled Castes other than Balmikis and Mazhabi Sikhs and they can only claim the vacancy that was reserved for Balmikis or Mazhabi Sikhs at point No. 9. It was submitted that Shri G.S. Samra who belonged to a Scheduled Caste other than Balmikis and Mazhabi Sikhs was entitled to be appointed against the reserved vacancy at Point No. 5 reserved for a candidate belonging to a Scheduled caste other than Balmikis and Mazhabi Sikhs but since at the time of selections that were made in the years 1981 and 1982, no person belonging to a Scheduled Caste was available. The vacancy at Point No. 5 reserved for Scheduled Castes was carried forward to point No. 7 and Shri G.S. Samra had to be adjusted at point No. 7 in the Roster. The submission is that respondent No. 3, being a Mazhabi Sikh, could not claim to be placed at point No. 7 in the Roster against a vacancy which was reserved for a candidate belonging to a Scheduled Castes other than Balmikis and Mazhabi Sikhs and he could be only placed against the vacancy at point No. 9 in the Roster.

**8.** The learned Counsel for the respondent No. 3 on the other hand has urged that in view of the order dated May 5, 1975, 50% vacancies of the quota reserved for Scheduled Castes have to be offered to Balmikis and Mazhabi Sikhs and since Shri Balwant Rai belonging to a Scheduled Caste other than Balmikis and Mazhabi Sikhs had been appointed in 1979, the next post should go to Balmikis and Mazhabi Sikhs, and on that basis, respondent No. 3 was entitled to be appointed against the second post at point No. 7 of the Roster and Shri G.S. Samra could only be appointed against third post at point No. 9 in the roster. In the alternative, it was urged that the order dated April 8, 1980 could only have prospective operation with effect from the date of issue of the said order and the sub-roster indicated by the said order could be given effect to only from that date and on that basis the first post reserved for

Scheduled Castes should go to Balmik is or Mazhabi Sikhs and on that basis also respondent No. 3 was entitled to be placed against point No. 7 in the 100 - point roster and Shri G.S. Samra against point No. 9 in the said roster.

**9.** From a perusal of the letter dated April 8, 1980, we find that it gives clarifications on certain doubts that had been created by some Departments in the matter of implementation of the instructions contained in the earlier letter dated May 5, 1975. Since the said letter dated April 8, 1980 is only clarificatory in nature, there is no question of its having an operation independent of the instructions contained in the letter dated May 5, 1975 and the clarifications contained in the letter dated April 8, 1980 have to be read as a part of the instructions contained in the earlier letter dated May 5, 1975. In this context it may be stated that according to the principles of statutory construction a statute which is explanatory or clarificatory of the earlier enactment is usually held to be retrospective. (See: Craies on Statute Law, 7th Ed., p.58). It must, therefore, be held that all appointments against vacancies reserved for Scheduled Castes made after May 5, 1975 (after May 14, 1977 in so far as the Service is concerned), have to be made in accordance with the instructions as contained in the letter dated May 5, 1975 as clarified by letter dated April 8, 1980. On that view, the appointment of Shri Bal want Rai in 1979 has to be treated to be an appointment made under the said instructions and operation of these instructions cannot be postponed till April 8, 1980. If the matter is considered in this light then the sub-roster as indicated in the letter dated April 8, 1980 would have to be applied in respect of the post on which Shri Bal want Rai was appointed in 1979 and the said appointment has to be regarded as having been made against the vacancy at point No. 1 in the roster which was reserved for Balmikis or Mazhabi Sikhs but since no Balmiki or Mazhabi Sikh was selected for that post, the said vacancy was assigned to Shri Bal want Rai who belonged to a Scheduled Caste other than a Balmiki or Mazhabi Sikh. The said vacancy which was reserved for Balmik is or Mazhabi Sikhs could not be carried forward in view of the directions contained in the letter dated April 8, 1980. The next post reserved for Scheduled Castes at point No. 5 in the roster was meant for a person belonging to a Scheduled Caste other than Balmik is and Mazhabi Sikhs. In the selections that were made in 1981 and 1982 no person belonging to a Scheduled Caste was selected and, therefore, posts at Points Nos. 5 and 6 in the Roster became available to candidates in the general category and the vacancy at Point Rs. 5 reserved for Scheduled Castes was carried forward to point No. 7. In 1986, two persons belonging to Scheduled Castes, namely Shri G.S. Samra and respondent No. 3 were selected. Shri G.S. Samra belonged to a Scheduled Caste other than Balmiki and Mazhabi Sikh whereas respondent No. 3 was a Mazhabi Sikh. Since the post at point No. 5 which had been carried forward to point No. 7 was reserved for a candidate belonging to a Scheduled Caste other than Balmiki or Mazhabi Sikh it had to be assigned to Shri G.S. Samra falling in that category and respondent No. 3 who was a Mazhabi Sikh could only be appointed against the reserved vacancy at point No. 9 in the Roster. Respondent No. 3 can not claim that the vacancy at Point No. 7 should be assigned to him. If respondent No. 3 is adjusted against the vacancy at point No. 9 in the Roster, he has to be placed in seniority below the appellant who was appointed against point No. 8 in the Roster.

**10.** In the judgment under appeal, the High Court has placed reliance on the instructions dated March 6, 1961 and the decision of this Court in Jagjit Singh v. State of Punjab MANU/SC/0351/1978 : (1978)IILLJ30SC . The instructions dated March 6, 1961 deal with a situation where the services of a Government Servant belonging to Scheduled Castes/Tribes and Backward Classes are terminated and a resultant vacancy occurred. It has been directed as under: -

With a view to safeguard the interests of the members of the Scheduled Castes/Tribes and Backward Classes, it has been decided that if the services of a Government Servant belonging to Scheduled Castes/Tribes or Backward Classes are terminated, the resultant vacancy should not be included in the normal pool of vacancies to be filled in accordance with the Block System but should be filled up on ad hoc basis from the candidates belonging to these castes and classes. In other words the intention is that the posts vacated by members of Scheduled Castes/Tribes and Backward Classes should remain earmarked and be filled up by members belonging to these Classes.

**11.** In Jagjit Singh's case, this Court was dealing with appointments to the Punjab Civil Service (Executive Branch). The selection was made for appointment against 12 vacancies in the said Service and other vacancies in the Allied Services. Two of the vacancies in the Punjab Civil Service were reserved for Scheduled Castes candidates. Three persons were selected from among the members of Scheduled Castes. The appellant in the said appeal was at third place in the merit list of the Scheduled Castes candidates. The first two candidates on the merit list were appointed and the appellant was appointed on the post of "A" Class Tehsildar in one of the Allied Services. Subsequently, one of the two candidates who had been appointed to the Punjab Civil Service resigned his office and a question arose as to whether the appellant was entitled to be appointed to the Punjab Civil Service against the vacancy arising on account of resignation of the Scheduled Castes candidate who had been appointed earlier. The appellant laid his claim for such appointment on the basis of the instructions contained in the circular of March 6, 1961. The said claim of the appellant was upheld by this Court and it was held that the resultant vacancy caused by resignation of one of the Scheduled Castes candidate should have gone to the appellant. The Circular dated March 6, 1961 and the decision in Jagjit Singh v. State of Punjab (supra) MANU/SC/0351/1978 do not have a bearing on the question in controversy in the instant case because here there is no dispute that the respondent No. 3 has been appointed against the post reserved for members of Scheduled Castes and the question is about the inter se placement of two persons appointed against vacancies reserved for Scheduled Caste candidates. The Circular dated March 6, 1961 does not deal with the said question and it has to be dealt with on the basis of the instructions contained in the orders dated May 5, 1975 and April 8, 1980.

**12.** For the reasons aforementioned the appeal is allowed, the judgment and the order of the High Court dated October 9, 1991 is set aside. The Civil Writ Petition filed by the appellant in the High Court is allowed and it is declared that respondent No. 3 can only be treated to have been appointed against the vacancy at Point no. in the Roster and on that basis he must be placed below the appellant in the seniority list. Respondent No. 2 is directed to revise the seniority list of the members of the Service accordingly. The appellant would be entitled to consequential benefits, if any, accruing to him as a result of such revision in the seniority. The parties are left to bear their own costs.

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MANU/SC/0649/1997

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**IN THE SUPREME COURT OF INDIA**

Tax Reference Case Nos. 9-10 of 1986

Assessment Year: 1975-1976;1976-1977

Decided On: 27.05.1997

Appellants: **Commissioner of Income Tax, Bombay and Ors.****Vs.**Respondent: **Podar Cement Pvt. Ltd. and Ors.****Hon'ble Judges/Coram:***K.S. Paripoornan, K. Venkataswami and B.N. Kirpal, JJ.***Counsels:***For Appellant/Petitioner/Plaintiff: K.N. Shukla, R. Sathish, K.N. Nagpal and B. Krishna Prasad, Advs**For Respondents/Defendant: Harish Salve, G.C. Sharma, Sanjeev Puri, N. Ganapathy and Vinay Vaish, Advs.***ORDER****K. Venkataswami, J.**

**1.** In all these cases the scope of Section 22 of the Income Tax Act, 1961 (hereinafter called the 'Act') arises for consideration.

**2 .** Brief facts are necessary to appreciate the question that arises for our consideration.

**3.** The respondent in Tax Reference Case Nos. 9-10/86 is a company and an assessee under the Act (hereinafter called the 'assessee'). It owns four flats bearing Nos. 231, 232, 241 and 242 in a building call as "Silver Arch" on Nepeansea Road, Bombay. The builders of the said building are M/s. Malabar Industries Pvt. Ltd. Out of the four aforesaid flats, two were directly purchased by the respondent-company from the builders and the other two were purchased by its sister concern and subsequently by the assessee. The possession of the flats was taken after payment of consideration in full some time in August, 1973. It is common ground that all these flats have been let out to various persons. The rental income from these flats was included in the Return for the assessment years in question, namely, 1975-76 and 1976-77. It was the case of the assessee that the rental income from the flats was assessable as 'income from other sources' under Section 56 of the Act inasmuch as the assessee-company was not the 'legal owner' of the property in the flats. Such a claim was put forward before the Assessing Officer mainly on the ground that the title to the property (four flats) had not been conveyed to the Co-operative society which was formed by the purchasers of the flats and that so long as the ownership was not transferred in the name of the assessee the rental income from the flats could not be assessed as 'income from house property' (under Section 22 of the Act).

**4.** One other subsidiary question was also raised by the assessee that the rental income should be calculated on the bonafide annual value and not the actual rent received. As a matter of fact, the assessee has shown Rs. 49,800 as chargeable rent. The Income Tax Officer, however, has taken the annual letting value of those flats at Rs. 1,31,268 on the basis of rent receivable in respect of flats from an adjoining building. The Income Tax Officer also rejected the claim of the assessee that the income from the flats should be assessed under Section 56 of the Act.

**5.** Aggrieved by the orders of the Income Tax Officer, the assessee preferred appeals to the Commissioner of Income Tax (Appeals), who by an order dated 9.4.81 upheld in toto the views as stated above by the Income Tax Officer. After receiving the orders from the appellate authority, the assessee filed Miscellaneous Applications dated 14.9.81 before the appellate authority purporting to be under Section 154 of the Act. It was contended before the appellate authority that in view of the decision of this Court in *Diwan Daulat Rai Kapur v. New Delhi Municipal Committee* MANU/SC/0393/1979 : [1980]122ITR700(SC) , the authorities were bound to take the annual letting value of those flats on the basis of standard rent chargeable and in any case not on the basis of the actual rent receivable with regard to some other flats. The appellate authority accepted the assessee's Miscellaneous Applications by Order dated 17.3.82 and rectified its earlier order dated 9.4.81. Still not satisfied with the appellate order, the assessee preferred two appeals against the order of the appellate authority contending that the income from the four flats should have been assessed under Section 56 of the Act and not under Section 22. The Revenue preferred two appeals against the rectification order dated 17.3.82.

**6.** Those four appeals were considered by the Income Tax Appellate Tribunal, (Bombay Bench "A"), Bombay, and the Tribunal by a common order dated 8.5.86 purporting to follow several decisions of the Bombay High Court accepted the case of the assessee and held that the income from the flats could not be taxed as 'income from house property' under Section 22, but should be taxed as 'income from other sources' under Section 56 of the Act. The Tribunal, however, did not decide the other question, namely, whether the actual rental income should be taken into account for the computation or the chargeable rental value. We are not concerned with the latter question here.

**7.** The Tribunal when moved by the Revenue under Section 256(1) of the Act referred the case straight away to this Court under Section 257 of the Act in view of conflicting decisions between the High Courts.

**8.** The question referred to reads as follows :-

Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the income derived by the assessee-company from flats from the building known as "Silver Arch" of Bombay is taxable under the head 'income from other sources' under Section 56 of the Income Tax Act and not income from "house property" under Section 22 of the Income Tax Act, 1961?

Civil Appeal No. 4165/94 :

**9.** In this case the respondent-assessee, an individual, returned for the assessment year 1983-84 the rental income from two flats bearing Nos. 406 and 407 at Kailash Building, Curzon Road, New Delhi, and also parking space and claimed that the said income must be assessed as 'income from house property'. However, the Income Tax

Officer took the view that the assessee only had tenancy rights and, therefore, the income could be assessed under the head "income from other sources namely, under Section 56 of the Act.

**10.** Aggrieved by the order of the Assessing Officer, an appeal was preferred to the Commissioner of Income Tax (Appeal), New Delhi, who has accepted the case of the assessee and directed the assessment under Section 22 of the Act.

**11.** The Revenue aggrieved by the appellate order preferred an appeal to the Tribunal. The Tribunal held that the appellate authority was right in holding that the income from the flats should be assessed as income from house property and not as income from other sources. For coming to this conclusion, the Tribunal, as a matter of fact, found that the assessee is the owner of the flats as well as the parking space in question. The Tribunal rejected an application for reference under Section 256(1) and the High Court also rejected the reference under Section 256(2). Hence, the present appeal by special leave by the Revenue.

Civil Appeal No. 4549/95

**12.** The appellant in this case is an individual and the relevant assessment year is 1970-71. The appellant is the owner of three flats in a multi-storeyed building known as 'Akash Deep'. This multi-storeyed building has been constructed on a piece of land at Barakhamba Road which belongs to Government but has been given under perpetual lease. The name of the original lessee was not known. However, the company known as Ansal and Sehgal Pvt. Ltd. entered into an agreement with the lessee and constructed a multi-storeyed building on the said piece of land. The assessee claimed and it was not disputed that he has paid the entire price thereof and got possession of the three flats. It is also the claim of the appellant that he had absolute rights of disposal over them and that he had let out these flats to different tenants and he was deriving the income from the flats and was paying the municipal taxes in respect thereof. In the Income Tax Return for the assessment year in question the appellant has shown a net income of Rs. 18,403 from these flats by way of rent. The said net income was arrived at after deducting municipal taxes as well as the statutory deduction of one-sixth of the annual value on account of repairs as provided in Section 24 of the Act. The Income Tax Officer while accepting the Return denied the deduction for repairs claimed by the assessee on the ground that the income must be assessable under the head 'income from other sources' under Section 56 of the Act.

**13.** Aggrieved by that, the appellant preferred an appeal to the Appellate Assistant Commissioner who was convinced by the claim of the appellant directed the ITO to assess the income under the head 'income from house property' and to allow statutory relief on account of repairs.

**14.** The Revenue preferred an appeal before the Tribunal. The Tribunal found as a fact that there was no sale deed as such in respect of flats in favour of the assessee. There was only an agreement to sell coupled with the payment of the purchase price and the handing over of occupation or possession. The Tribunal further found that the super-structure of the multi-storeyed building including the flats vested originally with the company which had constructed the same and the assessee had only entered into an agreement to purchase the flats, though actually the assessee had paid all the installments of purchase price. The Tribunal was of the view that till regular sale deeds were executed in favour of the assessee the title in the flats remained vested in

the company and, therefore, the assessee could not in law claim as legal owner of those flats. The Tribunal applying a decision of the Delhi High Court upset the view taken by the Appellate Assistant Commissioner and restored the order of the Income Tax Officer. The appellant was successful in getting a reference under Section 256(1) of the Act and the High Court in detail considered the matter. However, the High Court in view of its earlier decisions confirmed the view taken by the Tribunal and held that the income in question was assessable under Section 56 of the Act as income from other sources. Aggrieved by that, the present appeal is by the appellant by special leave.

**15.** It will be seen from the narration of facts in all these cases, a common question of law arises as regards the scope of Section 22 of the Act vis-a-vis Section 56 of the Act.

**16.** Mr. K.N. Shukla, the learned senior counsel appearing for the Revenue, has advanced the arguments in general, in view of the fact that the Revenue had not taken an uniform stand in assessing the owners of flats as seen from the facts given above. He submitted that the owners of flats as well as promoters are liable to be taxed under Sections 56 and 22 respectively of the Income Tax Act. In other words, the promoters are the legal owners and income from house property will have to be taxed at the hands of the promoters under Section 22 of the Act and the owners of the flats being in beneficial enjoyment of the respective properties will have to pay tax under Section 56 as 'income from other sources'. He invited our attention to a decision of this Court in *R.B. Jodha Mal Kuthiala v. Commissioner of Income Tax, Punjab, J & K and Himachal Pradesh* MANU/SC/0389/1971 : [1971]82ITR570(SC) rendered under the Income Tax Act and also a recent judgment reported in *Mohd. Noor and Ors., Etc. v. Mohd. Ibrahim and Ors., Etc.* MANU/SC/0084/1995 : AIR1995SC398, rendered under the Rajasthan Tenancy Act, 1955. He also invited our attention to a judgment of the Bombay High Court in *C.I.T. Bombay City-III v. Zoroastrian Building Society Ltd.* MANU/MH/0054/1975 : [1976]102ITR499(Bom). In general, he left to the ultimate decision of the Court on the issue in question without finally expressing his point of view in view of the conflicting stand taken by the Revenue while making the assessments under challenge.

**17.** Mr. Sharma, the learned senior counsel, advanced the leading arguments and according to him, Section 22 of the Act charges the income arising from the house property and not the ownership of the house property. Such income from the house property can be real or notional. He also argued that income under the head 'house property' real or notional cannot escape taxation whoever may be regarded as the owner but certainly it cannot have two owners at the same time. According to the learned counsel, the owner is the person who in his own right can use the house property or derive income from it. Only such owner has to be taxed under the head 'income from house property'. He alone has to be taxed under this head. If he cannot be taxed under this head, he cannot be taxed at all. In other words, he cannot be taxed under the head 'income from other sources' under Section 56 of the Act. He also contended that income from house property cannot be taxed doubly once in the hands of the legal owner under Section 22 and again in the hands of actual user and recipient of income under Section 56 of the Act. Permitting such assessment would be opposed to equity and justice which is not normally allowed by the Courts. As a corollary from the last contention he submitted that it is well settled that the interpretation, which would avoid hardship and double taxation, should be preferred rather to the interpretation which would result in hardship and double taxation. Lastly, it was contended by Mr. Sharma that the Parliament wherever found necessary

had provided for avoidance of double taxation expressly like Sections 64(2), 69D, 93(2) and 94(4) but no such express provision was considered necessary as regards Sections 22 - 27 as they thought in their wisdom that no authority of Income Tax would assess the same income twice, once in the hands of the legal owner on notional basis and again in the hands of buyer on actual receipt of rent.

**18.** Mr. Sharma, learned senior counsel, in support of these arguments while placing heavy reliance on the judgment of this Court in Jodha Mal's case (supra) also cited numerous judgments of the High Court which have applied the principles enunciated in the judgment of this Court in Jodha Mai's case. The judgments on which reliance was placed are the following:

- 1.** Addl. C.I.T. v. U.P. State Agro Indl. Corporation MANU/UP/0300/1980 : [1981]127ITR97(All) (Allahabad).
- 2.** Smt. Kala Rani v. C.I.T. Patiala-I MANU/PH/0240/1981 (Punjab & Haryana).
- 3.** Addl. C.I. T., Bihar v. Sahay Properties & Investment Co. (P) Ltd. MANU/BH/0071/1982 : [1983]144ITR357(Patna) .
- 4.** Saiffuddin v. C.I.T. MANU/RH/0134/1985.
- 5.** Madgul Udyog v. C.I.T. MANU/WB/0178/1989 : [1990]184ITR484(Cal) .
- 6.** Maharani Yogeshwari Kumari v. C.I.T. MANU/RH/0104/1994 .
- 7.** C.I.T. v. General Mktg. & Mfg. Co. Ltd. MANU/WB/0063/1995 : [1996]222ITR574(Cal) .
- 8.** C.I.T. v. Krishna Lal Ajmani MANU/BH/0081/1996 : [1996]222ITR653(Patna) .

**19.** Mr. H.N. Salve, learned senior counsel appearing for the respondent-assessee in Tax Reference Case Nos. 9-10/86, took a different stand from that of Mr. Sharma and contended that the word 'owner' in Section 22 of the Income Tax Act should be understood in its general sense and not in the sense in which it was understood by this Court in Jodha Mal's case (supra). According to learned counsel, the word 'owner' can only refer to the legal owner and none else, as concept of dual ownership is unknown in Indian Jurisprudence. He invited our attention to the language of Section 9(1) of the Old Income Tax Act which corresponds to Section 22 of the present Act and contended that the assessment does not depend on actual receipt of income from house property. He also submitted that the view taken by some of the High Courts that the owners of the flats even in the absence of any registered document of sale in their favour can be treated as owners in view of Section 53A of the Transfer of Property Act is wholly wrong and unsustainable. That view, according to him, is contrary to the well settled position in law as laid down in several judgments of this Court. The learned senior counsel submitted that the ownership is paramount title and it cannot be otherwise interpreted. Mr. Salve submitted that even if the interpretation suggested by him to Section 22 results in double taxation even then that has to be accepted as that being the correct position in law. There is no equity in Taxation law. In support of his arguments he placed reliance on the following judgments of this Court :

**1 .** Balkrishna Gupta and Ors. v. Swadeshi Polytex Ltd. and Anr. MANU/SC/0024/1985 : [1985]2SCR854 .

**2 .** Narandas Karsondas v. S.A. Kamtam and Anr. MANU/SC/0363/1976 : [1977]2SCR341 .

**3 .** Bai Dosabai v. Mathurdas Govinddas and Ors. MANU/SC/0344/1980 : [1980]3SCR762 .

**4.** Rani Chhatra Kumari v. Mohan Bikram (1931) 58 I.A. 279.

**20.** We are given to understand that an identical issue is pending before a Full Bench of the Delhi High Court and Mr. Syali, learned counsel appearing in that case sought our permission to place his arguments. The question being of some importance, we permitted him to submit his arguments.

**21.** Mr. Syali, learned counsel, submitted that the Income Tax Act is a self-contained code, exhaustive of all matters dealt with therein and its provisions show an intention to depart from the common rule. In support of that, he placed reliance on a judgment of this Court in R.B.R. Subba Rao and Ors. v. CIT MANU/SC/0042/1956 : [1956]30ITR163(SC) . According to the learned counsel, the meaning of the word 'owner' occurring in Section 22 has to be understood contextually, purposively and only within the four corners of the Income Tax Act. Adopting a wider meaning, according to him, will not and cannot lead to rewriting the Civil Law. In a way, he supported the stand taken by Mr. Sharma, learned senior counsel, and he also placed heavy reliance on the judgment of Jodha Mal's case. In addition to the cases cited by Mr. Sharma, learned counsel Mr. Syali invited our attention to a case reported in (Late) Nawab Sir Mir Osman All Khan v. Commissioner of Wealth Tax, Hyderabad MANU/SC/0276/1986 : [1986]162ITR888(SC) . He also invited our attention to a recent judgment of this Court reported in State v. S.J. Chaudhary , to support his contention the words occurring in a statute should be so construed as to continuously update the wordings in accordance with the changes in social conditions.

**22.** To appreciate the submissions made at the bar, it is necessary to set out the relevant sections from the Act. We set out hereunder Section 9(i) of the old Act, Sections 22, 27 and 56 of new Act.

9(1) The tax shall be payable by an assessee under the head 'Income from property' in respect of the *bona fide* annual value of property consisting of any building or lands appurtenant thereto of which he is the owner, other than such portions of such property as he may occupy for the purposes of any business, profession or vocation carried on by him the profits of which are assessable to tax.

**22. Income from house property.**- The annual value of property consisting of any building or lands appurtenant thereto of which the assessee is the owner, other than such portions of such property as he may occupy for the purposes of any business or profession carried on by him the profits of which are chargeable to income-tax, shall be chargeable to income-tax under the head "Income from house property.

**27.** "Owner of house property", "annual charge", etc., defined - For the purposes of Sections 22 - 26 -

(i)x x x

(ii)x x x

(iii) a member of a cooperative society to whom a building or part thereof is allotted or leased under a house building scheme of the society shall be deemed to be the owner of that building or part thereof.

[before amendment]

(iii) a member of a co-operative society, company or other association of persons to whom a building or part thereof is allotted or leased under a house building scheme of the society, company or . association, as the case may be, shall be deemed to be the owner of that building or part thereof;

(iiia) a person who is allowed to take or retain possession of any building or part thereof in part performance of a contract of the nature referred to in Section 53A of the Transfer of Property Act, 1882 (4 of 1882), shall be deemed to be the owner of that building or part thereof;

(iiib) a person who acquires any rights (excluding any rights by way of a lease from month to month or for a period not exceeding one year) in or with respect to any building or part thereof, by virtue of any such transaction as is referred to in clause (f) of Section 269UA, shall be deemed to be the owner of that building or part thereof;

(iv)x x x

(v)x x x

(vi)x x x

**56.** Income from other sources - (1) Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income-tax under the head "Income from other sources", if it is not chargeable to income-tax under any of the heads specified in Section 14, items A to E.

(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following income shall be chargeable to income-tax under the head "Income from other sources", namely -

(i)x x x

(ia)x x x

(ib)x x x

(ic)x x x

(i)x x x

(ii)x x x

(iii) where an assessee lets on hire machinery, plant or furniture belonging to him and also buildings, and the letting of the buildings is inseparable from

the letting of the said machinery, plant or furniture, the income from such letting, if it is not chargeable to income-tax under the head "Profits and gains of business or profession.

**23.** From the narration of the facts and the rival submissions it will be seen that the controversy revolves around the meaning to be given to the word 'of which the assessee is the owner' occurring in Section 22 of the Act. We may point out that Section 9(i) of the old Act was substantially the same as Section 22 of the new Act. We may also state that the whole of Section 9 of the old Act has been split up and redrafted into several separate Sections, namely, Sections 22 - 27 under the new Act.

**24.** We have noticed the reliance placed by the bar on the decision of this Court in *Jodha Mal's* case which was concerned with the old Section 9(i) of the Act. In that case, this Court had occasioned to consider the meaning to be given to the words 'of which he is the owner'. Of course, on facts the Court was called upon to decide whether the erstwhile admitted owner of the property is liable to pay income-tax on the house property under Section 9 even after the said property has been vested in the Custodian of Evacuee Property by virtue of Section 6(1) of the Pakistan (Administration of Evacuee Property) Ordinance, 1949. The contention of the Revenue in that was that notwithstanding the vesting of the house property in the Custodian the legal ownership remained with the assessee therein and, therefore, Section 9(1) of the old Act was attracted. This contention was repelled by this Court. Hegde, J. speaking for the Bench observed at page 575 :

The question is who is the "owner" referred to in this Section? Is it the person in whom the property vests or is it he who is entitled to some beneficial interest in the property? It must be remembered that Section 9 brings to tax the income from property and not the interest of a person in the property. A property cannot be owned by two persons, each one having independent and exclusive right over it. Hence, for the purpose of Section 9, the owner must be that person who can exercise the rights of the owner, not on behalf of the owner but in his own right.

**25.** The learned Judge observed that "it is true that equitable considerations are irrelevant in interpreting tax laws. But, those laws, like all other laws, have to be interpreted reasonably and in consonance with justice". Again at page 577, it was held that "for determining the person liable to pay tax, the test laid down by the Court was to find out the person entitled to that income". Again at page 578 it was observed : "No one denies that an evacuee from Pakistan has a residual right in the property that he left in Pakistan. But the real question is, can that right be considered as ownership within the meaning of Section 9 of the Act. As mentioned earlier that Section seeks to bring to tax income of the property in the hands of the owner. Hence, the focus of that Section is on the receipt of the income. The meaning that we give to the word "owner" in Section 9 must not be such as to make that provision capable of being made an instrument of oppression. It must be in consonance with the principles underlying the Act."

**26.** In our opinion, the above observations of this Court clearly fixes the liability on a person who receives - or is entitled to receive the income from the property in his own right. In spite of this, the assessing officers of various circles instead of uniformly following the ratio laid down in this case have taken different diametrically opposite views depending upon the pronouncements of the concerned High Courts in the circles on the scope of Section 22 of the Act. The High Courts of Allahabad.

Punjab and Haryana, Rajasthan, Calcutta and Patna have taken the view by correctly understanding the ratio laid down in Jodha Mal's case and the High Courts of Bombay, Delhi and Andhra Pradesh have taken a different view wrongly distinguishing on facts in Jodha Mai's case.

**27.** In the Kala Rani's case (supra), the Punjab and Haryana High Court after referring to the judgment of this Court in Jodha Mai's case observed as follows:

Thus, it cannot be accepted that before a person can be assessed under Section 22 of the Act, he must be the owner by virtue of a sale deed in his favour. As a matter of fact, what is being taxed under Section 22 of the Act is the income from house property or the annual value of the property of which the assessee is the owner.

**28.** The High Court rejected the contention that the mere possession of the property in pursuance of an agreement to sell was not sufficient to burden the assessee with tax on any income under Section 22 of the Act.

**29.** The High Court of Patna in Sahay Properties' case (supra) has elaborately dealt with this case. As a matter of fact, civil appeals were preferred by Special Leave against the judgment of the Patna High Court in Civil Appeal Nos. 5874-76 of 1983. However, those appeals were dismissed as withdrawn on 20.3.1996 without deciding the issue.

**30.** Brief facts in that case were, the assessee company acquired certain immovable property in February 1962. The assessee paid the entire consideration and was in actual physical possession of the entire properties contracted to be sold. The assessee was empowered by the vendor to use the properties in whatsoever manner the assessee liked and to receive and enjoy the entire usufructs thereof, with the only reservation that a formal deed of conveyance with registration in conformity with the Indian Registration Act would follow at the request of the assessee and once that request was made, it was incumbent upon the transferor to execute such a deed of conveyance and to get it registered. The assessee was assessed under Section 22 in respect of the income from the property but the Tribunal held that the assessee was not the owner of the property and was not liable to be assessed as such.

**31.** The Patna High Court has cited this Court's judgment in Jodha Mal's case and also number of other judgments of the different High Courts. The High Court had also gone into the concept of "ownership" and referred to passages from G.W. Paton on Jurisprudence, Dias on Jurisprudence, Stroud's Judicial Dictionary and Pollock on Jurisprudence. We may usefully extract certain passages from the judgment of the Patna High Court.

**32.** The learned Judges observed at page 361 :

The emphasis, therefore, in this statutory provision is that the tax under the Section is in respect of ownership. But this matter is not as simple as it looks. This leaves us to a more vexed question as to what is ownership. Should the assessment be made at the hands of the person who has the bare husk of the legal title or at the hands of the person who has the rights of an owner of a property in a practical sense? Enjoyment as an owner only in a practical sense can be attributed to the term "owner" in the context of this Section - a person who can exercise the rights of the owner and is entitled to the income from the property for his own benefit. It is well-settled, and

learned counsel for either side were not at loggerheads, that the section cannot be so construed as to make it an instrument of oppression, to use the language of Hegde, J., in the case of Jodha Mal MANU/SC/0389/1971 : [1971]82ITR570(SC)

We are very much alive to the legal position that it is true that there is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in-nothing is to be implied. We can look only fairly at the language used. Nonetheless, the tax laws have to be interpreted reasonably and in consonance with justice. This is well-settled by numerous decisions of the Supreme Court itself.

We have, therefore, to judge and interpret the language of Section 22 of the Act in the context of that particular Section, and that context we shall come back to hereinafter at a more appropriate place.

**33.** In the meantime, it would not be irrelevant to go into the concept of "ownership". What is ownership after all? Read from the Roman Law upto the English Law at the present stage, medieval stage having been interspersed with different formulae, the position that now juristically emerges is this. The full rights of an owner as now recognised are :

- (a) The power of enjoyment (e.g., the determination of the use to which the res is to be put, the power to deal with produce as he pleases, the power to destroy);
- (b) Possession which includes the right to exclude others;
- (c) Power to alienate inter vivos, or to charge as security;
- (d) Power to leave the res by will.

**34.** One of the most important of these powers is the right to exclude others. The property right is essentially a guarantee of the exclusion of other persons from the use of handling of the thing.... But every owner does not possess all the rights set out above? - a particular owner's powers may be restricted by law or by an agreement he has made with another." (refer to G.W. Paton on Jurisprudence, 4th Edn., pp.517-18).

**35.** While dealing with the concept of possession and enumerating the illustrative cases and rules in this respect, Paton says at p.577 in Clause (x):

To acquire possession of a thing it is necessary to exercise such physical control over the thing as the thing is capable of, and to evince an intention to exclude others:....

Reference in this connection has been made to the case of Tubantia: Young v. Hichens and of Pierson v. Post [1805] 3 Caines 175 (Supreme Court of New York)....

**36.** It would thus be seen that where the possession of a property is acquired, with a right to exercise such necessary control over the property acquired which it is capable of, it is the intention to exclude others which evinces an element of ownership.

**37.** To the same effect and with a more vigorous impact is the subject dealt with by

Dias on Jurisprudence, (4th Edn., at p.400):

The position, therefore, seems to be that the idea of ownership of land is essentially one of the 'better right' to be in possession and to obtain it, whereas with chattels the concept is a more absolute one. Actual possession implies a right to retain it until the contrary is proved, and to that extent a possessor is presumed to be owner.

Again, at p.404, the learned author says:

Special attention should also be drawn to the distinction between 'legal' ownership recognised at common law and 'equitable' ownership recognised at equity. This occurs principally when there is a trust, which is purely the result of the peculiar historical development of English Law. A trust implies the existence of two kinds of concurrent ownerships, that of the trustee at law and that of the beneficiary at equity.

**38.** We are not concerned in this case with any case of trust either under the equitable principles or under the law as engrafted in the Indian Trusts Act. Because, the "beneficiary might himself be a trustee of his interest for a third person, in which case his equitable ownership is as devoid of advantage to him as the legal ownership is to the trustee. So, when described in terms of ownership, the distinction between legal and equitable ownership lies in the historical factors that govern their creation and function; in terms of advantage, the distinction is between the bare right, whether legal or equitable, and the beneficial right" (vide pp.404-405 of Dias on Jurisprudence, 4th Edn.).

**39.** We, therefore, need not go into the questions involving trusts where a person holds the property and receives the income in trust for others who are the legal beneficiaries. The crux of the matter is as to whether, as already stated above, the actual possession in a given particular case gives a right to retain such a possession until the contrary is proved and so long as that is not done, to that extent a possessor is presumed to be the owner.

**40.** Incidentally, although the Supreme Court in the case of *Jodha Mal MANU/SC/0389/1971* : [1971]82ITR570(SC) merely mentioned that Stroud's Judicial Dictionary had given several definitions and illustrations of ownership, it refrained from going into the details on account of the practical approach that was made in that case, to which we shall hereinafter refer and dilate upon. We think it worthwhile, the matter having been canvassed at length at the Bar, to give a full illustration of the definitions of "ownership" as Stroud puts it. One such definition is that the "owner" or "proprietor" of a property is the person in whom (with his or her assent) it is for the time being beneficially vested, and who has the occupation, or control, or usufruct, of it, e.g., a lessee is, during the term, the owner of the property demised. Yet another definition that has been given by Stroud is that :

'Owner' applies to every person in possession or receipt either of the whole, or of any part, of the rents or profits of any land or tenement; or in the occupation of such land or tenement, other than as a tenant from year to year or for any less term or as a tenant at will". (Stroud's Judicial Dictionary, 3rd Edn., Vol. 3, p.2060).

Thus the juristic principle from the view point of each one is to determine the

true connotation of the term "owner" within the meaning of Section 22 of the Act in its practical sense, leaving the husk of the legal title beyond the domain of ownership for the purpose of this statutory provision. The reason is obvious. After all, who is to be taxed or assessed to be taxed more accurately - a person in receipt of money having actual control over the property with no person having better right to defeat his claim of possession or a person in legal parlance who may remain a remainder man, say, at the end or extinction of the period of occupation after, again say, a thousand years? The answer to this question in favour of the assessee would not merely be doing palpable injustice but would cause absurd inconvenience and would make the Legislature to be dubbed as being a party to a nonsensical legislation. One cannot reasonably and logically visualise as to when a person in actual physical control of the property realising the entire income and usufructs of the property for his own use and not for the use of any other person, having the absolute power of disposal of the income so received, should be held not liable to tax merely because a vestige of legal ownership or a husk of title in the long run may yet clothe another person with the power of a residual ownership when such contingency arises which is not a case even here. A plain reading of Clause 4 of the agreement, as extracted above, clearly goes to show that the physical possession of the properties has passed on or is deemed to have passed on to the assessee to have and to hold for ever and absolutely with the power to use the same in whatsoever manner it thinks best and the assessee shall derive all income and benefits together with full power of disposal of the properties as well as the income thereof. Can it then be said that the recipient of the income being the assessee only having an absolute and exclusive control over the property without any let or hindrance on the part of the so-called vendor which, indeed, under law it was not entitled to do, as we shall presently show, shall be immune from the taxing provision in Section 22 of the Act? The answer in our view is clearly in the negative. The reason is simple. The consideration money has been paid in full. The assessee has been put in exclusive and absolute possession of the property. It has been empowered to deal with the income as it likes. It has been empowered to dispose of and even to alienate the property. Reference to Section 54 or, for that matter, Section 55 of the Transfer of Property Act by the Tribunal merely emphasises the fact that the legal title does not pass unless there is a deed of conveyance duly registered. The agreement is in writing and the value of the property is admittedly worth more than hundred rupees. Section 54 of the Transfer of Property Act would, therefore, exclude the conferment of absolute title by transfer to the assessee. That, however, would not take away the right of the assessee to remain in possession of the property, to realise and receive the rents and profits therefrom and to appropriate the entire income for its own use. The so-called vendor is not permitted in law to dispossess or to question the title of the assessee (the so-called vendee). It was for this very practical purpose that the doctrine of the equity of part performance was introduced in the Transfer of Property Act, 1882, by inserting S.53A therein. The Section specifically allows the doctrine of part performance to be applied to the agreements which, though required to be registered, are not registered and to transfers not completed in the manner prescribed therefore by any law. The section is, therefore, applicable to cases where the transfer is not completed in a manner required by law unless such a non-compliance with the procedure results in the transfer being void. There is, however, a

distinction between an agreement void as such and an agreement void in the absence of something which the vendor could do and had expressly or impliedly contracted to do, and where a vendor agrees to sell his share of property, including sir land, there is an implied term in the contract that he will apply for sanction to the revenue authorities necessary for such transfers and the Court will direct him to do so. It cannot be said that such an agreement is void because no sanction has been obtained. In the instant case, having reference to Clause 5 of the agreement it would be seen that the option was given to the assessee to demand at its pleasure a conveyance duly registered being executed in its favour by the Sahay family (the vendor) and to get its name mutated in the official records. The assessee has not exercised its option for reasons best known to it - presumably to have double weapon in its hands to be used as and when circumstances so demanded. Can it yet be said that for the default on the part of the assessee itself it would be entitled to say that it is not the owner of the property for all practical purposes, receiving the rent all the time, appropriating the usufructs for its own purposes all the time and having no interference at the instance of the vendor? Can that be a practical and logical approach to the true construction and purport of the substance and spirit of Section 22 of the Act? The answer, in our view, is clearly in the negative and against the assessee. Having taken all the advantages and still taking all the advantages under the contract without any hindrance or obstruction on the part of anyone including the vendor which the vendor could not do in view of S.53A of the Transfer of Property Act, the assessee cannot now turn back and say that because of its default in having a deed registered at its sweet will it was not an owner within the meaning of Section 22 of the Act. It may bear repetition to say that it was on account of these facts that juristic principles have now emerged saying that one of the most important of the powers of ownership is the right to exclude others from possession and the property right is essentially a guarantee of the exclusion of other persons from the use or handling of the thing. In that sense, therefore, the assessee itself became the owner of the property in question. In our view, any decision to the contrary would not be in consonance with the juristic principle either at common law or in equity. In either case, it would not be subservient to the intent and purpose of Section 22 of the Act, with regard to which, as we have already stated, we can fairly look at the language used and the tax laws have to be interpreted reasonably and in consonance with justice. So far we have dealt with the case in this respect on juristic principles as if it were a matter of first impression. We have, therefore, now to refer to the case law on the subject.

**41.** Ultimately, the learned Judges held that the assessee in that case will fall under the true meaning of the term "owner" as used in Section 22 of the Act and, therefore, liable to tax from income out of the house property as owner thereof. This Judgment of the Patna High Court was followed by the same High Court in the Judgment reported in Krishna Lal Ajmani's case (supra).

**42.** The Rajasthan High Court in Maharani Yogeshwari Kumari's case again considered the same question and after referring to various judgments held as follows :

Section 22 of the Income Tax Act has created a charge on the income in respect of annual value of the property consisting of any buildings or lands

appurtenant thereto of which the assessee is the owner, other than such portions of such property as he may occupy for the purposes of any business or profession carried on by him the profits of which are chargeable to income tax under the head "income from house property". The question, therefore, arises as to whether the words "of which the assessee is the owner" can be applicable only to a registered owner or also to such person in whose favour the registered sale-deed has not been executed but a sale agreement has been executed, possession of the property has been given and consideration for sale has been paid. Section 53A of the Transfer of Property Act contemplates that when any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that the contract, though required to be registered, has not been registered, or where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract. The proviso to the aforesaid section contemplates that nothing in that section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof. If the view that without there being conveyance, the transferor continues to be the owner is taken, still a question arises that the income has not been received by the owner and, therefore, whether the assessment of the transferee could be made by considering that there was diversion of income or the transferor has ceased to have any right in respect of the income received? This Section debars the transferor from enforcing his right to the property. In the case of *Hamda Ammal v. Avadiappa Pathar* MANU/SC/0521/1991 : (1991)1SCC715 , it was held by the apex court that the document after its registration relates back to the date of execution of the sale deed. Though under the income tax law, the benefit of ownership is unknown, but still if the income is assessed in the hands of the transferor who has not received the income from the property whether such a transferor can be made liable to make the payment of tax. Various decisions given by the different High Courts have taken different views. The view of the Calcutta, Bombay, Delhi and Allahabad High Courts as mentioned above is on one hand, whereas the view of the Andhra Pradesh Court in the case of *CIT v. Nawab Mir Barkat Ali Khan*, (1974) Tax LR 90 and the Karnataka High Court in the case of *Ram-Kumar Mills P. Ltd. v. CIT* MANU/KA/0066/1989 : [1989]180ITR464(KAR) is different. So far as the view taken by the apex court in the case of *Osman Ali Khan* MANU/SC/0276/1986 : [1986]162ITR888(SC) is concerned that was in the context of the Wealth Tax Act where the language of the section was different. Section 53A debars a transferor from exercising the rights of an owner after he has received full consideration and handed over possession under the contract. The transferor in a case where he has executed the document and received consideration

and even handed over possession of the property, cannot exercise any right of an owner. This Court in the case of *Rajputana Hotels Pvt. Ltd. v. State of Rajasthan*, (D.B. Civil Writ Petition No. 511 of 1989 decided on May 27, 1992), while interpreting the provisions of Rajasthan Land and Building Tax Act, 1964, has held that the person who is entitled to receive the rent is assessable in respect of a property even if it is not registered in his name.

The matter can be considered from another angle. Under the Income Tax Act, the assessing authority has power to assess the income in the hands of the real owner. If 'A' purchases the property in the name of 'X', simply because the property is registered in the name of 'X', 'A' cannot escape his liability. Secondly, there can be a partnership where the partners have contributed the property and the property has become the partnership property, then no registration is required, the income in such a case has to be assessed in the hands of the partnership-firm and not the individuals who have contributed the property. Thirdly, the transferee who has received the income has already been assessed in respect of income derived from such property as income from the property, whether Section 22 can again be invoked against the transferor in respect of such income, fourthly, in respect of a co-operative society the members thereof are given the property on the basis of allotment letters which may or may not be registered. The members thereafter transfer the property from one hand to another and if it is considered that it is only the registered owner or the society who can be assessed to tax, then the person who has enjoyed the income would escape liability of tax. Fifthly, if it is considered that the registered owner alone is liable to pay tax while the income is received by the transferee, the transferee would enjoy the income but the tax will be levied from the registered owner who may or may not be in a position to make the payment of tax. Sixthly, there could be diversion of income by overriding title as was considered in the case of *Savita Mohan MANU/RH/0074/1984*, seventhly, if the property is in the name of a trust and the beneficiary is entitled to a specific share of the income, whether the other provisions of the Act can be said to be inoperative and , eighthly, there may be some similar other instances.

**43.** We do not think that it is necessary to set out extracts from the judgments of other High Courts taking similar view.

**44.** The contrary view taken by the other High Courts was mainly based on the facts that unless there is a registered deed conveying the property, the person in possession/enjoyment of the property cannot be considered as legal owner and, therefore, he cannot be called upon to pay the tax under Section 22 of the Act.

**45.** The law laid down by this Court in *Jodha Mai's* case according to us, has been rightly understood by the High Courts of Punjab and Haryana, Patna, Rajasthan, etc. The requirement of registration of the sale-deed in the context of the Section 22 is not warranted.

**46.** At this juncture, we can also refer to the judgment cited by Mr. Syali regarding updating construction of the words used in the statute. In *State (Through CBI/New Delhi) v. S.J. Choudhary* , this Court has quoted the following passage with approval in support of updating construction.

Statutory Interpretation by Francis Bennion, 2nd Edn., Section 288 with the

heading "Presumption that updating construction to be given" states one of the rules thus : (p.617)

x x x

(2) It is presumed that Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed (an updating construction). While it remains law, it is to be treated as always speaking. This means that in its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law.

x x x

In the comments that follow it is pointed out that an ongoing Act is taken to be always speaking. It is also, further, stated thus : (pp. 618-19)

In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the true original intention. Accordingly the interpreter is to make allowances for any relevant changes that have occurred, since the Act's passing, in law, social conditions, technology, the meaning of words, and other matters. Just as the US Constitution is regarded as 'a living Constitution', so an ongoing British Act is regarded as 'a living Act'. That today's construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate temporal development. The drafter will try to foresee the future, and allow for it in the wording.

x x x

An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation, year in the year out. It also comprises processing by executive officials.

**47.** Applying the above principle also, the view taken by the High Courts of Patna, Punjab and Haryana, etc. can be supported.

**48.** Assuming that there are two possible interpretations on Section 22 of the Act, which is akin to a charging Section, it is well settled, that the one which is favourable to the assessee has to be preferred. Even on that principle the view taken by the High Courts of Patna, Punjab and Haryana, etc. has to be preferred rather than the contrary view taken by the High Courts of Delhi and Andhra Pradesh.

**49.** Accordingly, we hold that the views taken by the High Courts of Allahabad, Patna, Rajasthan, Punjab and Haryana are the correct views. The contrary view taken by the Delhi High Court is not correct.

**50.** It may not be out of place to extract a passage from the judgment of the Delhi

High Court under Appeal (C.A. No. 4549/95). The High Court in a way conceded the correctness of the Patna view by observing as follows :

It can be contended, in view of the agreements of sale and the handing over of the possession to various persons who are, in fact entitled to enjoy these flats and the income therefrom in any manner they like and against whom the company has lost all rights of recourse because of the provisions of Section 53A of the Transfer of Property Act, that the company is the owner of nothing but the husk of title over the property and should not be assessed on the principle of the decision of the Supreme Court and this contention may perhaps have to be accepted.

**51.** In spite of the above observation, the Delhi High Court took a contrary view mainly on the ground that the earlier decisions of that Court has consistently taken such a contrary view which has to be followed.

**52.** The view expressed supra by us is strengthened/supported by a subsequent amendment to Section 27 of the Act. The said amendment was introduced to Section 27 of the Act by the Finance Act, 1987 by substituting Clauses (iii), (iiia) and (iiib) in the place of old clause (iii) w.e.f. 1.4.88.

**53.** In our view, the circumstances under which the amendment was brought into existence and the consequences of the amendments will have a greater bearing in deciding the issue placed before us. In other words, if after discussion we come to a conclusion that the amendment was clarificatory/declaratory in nature and, therefore, it will have retrospective effect then it will set at rest the controversy finally.

**54.** We have seen that the High Courts are sharply divided on this issue, one set of High Courts taking the view that the promoters/contractors after parting with possession on receipt of full consideration thereby enabling the 'purchasers' to enjoy the fruits of the property, even though no registered document as required under Section 54 of the Transfer of Property Act was executed, can be 'owners' for the purpose of Section 22 of the Act. The other set of the High Courts had taken a contrary view holding unless a registered sale document transferring the ownership as required under the Transfer of Property Act the so-called purchasers cannot become owners for the purpose of Section 22 of the Act. As a matter of fact, the judgment of the Delhi High Court in I.T.R. No. 84/77 reported in Sushil Ansal v. CIT, Delhi-III MANU/DE/0288/1986 : [1986]160ITR308(Delhi) , the appeal against which is C.A. No. 4549/95 (supra) the learned Judge has made the following observation:

Before we conclude, we may mention that, during the course of the hearing, we suggested to the standing counsel for the Department that the Central Board should consider various practical aspects of this problem and formulate guidelines which would be equitable to the various classes of persons concerned. Perhaps, as suggested by this Court in CIT v. Hans Raj Gupta (1981) 137 ITR 195, the time has even come for legislative amendment, if necessary, possibly with retrospective effect. Serious consideration at the highest administrative level was warranted in view of the recurrent nature of the problem, its magnitude and the conflict of judicial decisions. However, after taking sufficiently long adjournments, counsel informed us that no decision could be taken by the Board and requested that we should decide the reference. We have, therefore, proceeded to do so.

**55.** May be this is one of the reasons for the Parliament to bring in the amendment

referred to above to Section 27 of the Act. At any rate the admitted position when the amendment was brought in, was that there was divergence of opinion between the High Courts on the issue at hand.

**56.** In the Memorandum explaining provisions in Finance Bill 1987 concerning Section 27 reads as follows :

#### SIMPLIFICATION AND RATIONALISATION OF PROVISIONS

##### Enlarging the meaning of "owner of house property"

**27.** Under the existing provisions of Section 22 of the Income Tax Act, any income from house property is chargeable to tax only in the hands of the legal owner. As per Section 27 of the Income Tax Act, certain persons who are not otherwise legal owners are deemed to be the owners for the purposes of these provisions.

Under the Transfer of Property Act, the transfer of ownership can be effected only by means of a registered instrument. However, in the recent times various other devices are sought to be employed for transferring one's ownership in property. As a result, there are situations in which the actual owner, say, of an apartment in a multi-storeyed building, or a holder of a power of attorney is not the legal owner of a property. In some cases, pending resolution of disputes, the legal as well as the beneficial owners are assessed to tax in respect of the same income.

As a measure of rationalisation, the Bill seeks to enlarge further the meaning of the expression "owner of house property", given in clause (iii) of Section 27 by providing that a person who comes to have control over the property by virtue of such transactions as are referred to in clause (f) of Section 269 UA will also be deemed to be the owner of the property. The amendment also seeks to enlarge the applicability of this clause to a member of company or other association of persons.

Corresponding amendments have also been proposed in regard to the definition of "transfer" in Section 2(47) of the Income Tax Act, Section 2(m) of the Wealth Tax Act defining "net wealth" and Section 2(xii) of the Gift Tax Act defining "gift".

These amendments will take effect from 1st April, 1988, and will, accordingly, apply in relation to the assessment year 1988-89 and subsequent years.

**57.** If this much is clear, the next thing to be considered is what is the effect of the amendment.

**58.** In Crawford's Statutory Construction, at page 107 paragraph 74 reads as follows :

*74. Declaratory Statutes.*-Generally speaking, declaratory statutes can be divided into two clauses : (1) those declaratory of the common law, and (2) *Those declaring the meaning of an existing statute.* Obviously, those declaratory of the common law should be construed according to the common law. *Those of the second class are to be construed as intended to*

*lay down a rule for future cases, and to act retrospectively. They closely resemble interpretation clauses, and their paramount purpose is to remove doubt as to the meaning of existing law, or to correct a construction considered erroneous by the legislature.*

(Emphasis supplied)

**59.** In Francis Bennion Statutory Interpretation, (second edition) 1992, page 105, the learned author says "Declaratory Acts - A declaratory Act or enactment declares what the law is on a particular point, often 'for the avoidance of doubt'."

**60.** In Justice G.P. Singh's (Sixth Edition 1996) 'Principles of Statutory Interpretation' under the heading "declaratory statutes", the learned author has summed up as follows :

#### Declaratory statutes

The presumption against retrospective operation is not applicable to declaratory statutes. As stated in CRAIES and approved by the Supreme Court : "For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a preamble, and also the word 'declared' as well as the word 'enacted'". But the use of the words 'it is declared' is not conclusive that the Act is declaratory for these words may, at times, be used to introduce new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language 'shall be deemed always to have meant' is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law when the Constitution came into force, the amending Act also will be part of the existing law.

**61.** The above summing up is factually based on the judgments of this Court as well as English decisions.

**62.** A Constitution Bench of this Court in Keshavlal Jethalal Shah v. Mohanlal Bhagwandas and Anr. MANU/SC/0164/1968 : [1968]3SCR623 , while considering the nature of amendment to Section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act as amended by Gujarat Act 18 of 1965, observed as follows :

The amending clause does not seek to explain any pre-existing legislation which was ambiguous or defective. The power of the High Court to entertain a petition for exercising revisional jurisdiction was before the amendment derived from Section 115, CPC, and the legislature has by the amending Act attempted to explain the meaning of that provision. *An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act.*

(Emphasis supplied)

**63.** From the circumstances narrated above and from the Memorandum explaining the Finance Bill, 1987 (supra), it is crystal clear that the amendment was intended to supply an obvious omission or to clear up doubts as to the meaning of the word "owner" in Section 22 of the Act. We do not think that in the light of the clear exposition of the position of a declaratory/clarificatory Act it is necessary to multiply the authorities on this point. We have, therefore, no hesitation to hold that the amendment introduced by the Finance Bill, 1988 was declaratory/clarificatory in nature so far as it relates to Section 27(iii), (iiia) and (iiib). Consequently, these provisions are retrospective in operation. If so, the view taken by the High Courts of Patna, Rajasthan, and Calcutta, as noticed above, gets added support and consequently the contrary view taken by the Delhi, Bombay and Andhra Pradesh High Courts is not good law.

**64.** We are conscious of the settled position that under the common law owner means a person who has not valid title legally conveyed to him after complying with the requirements of law such as Transfer of Property Act, Registration Act etc. But in the context of Section 22 of the Income-tax Act having regard to the ground realities and further having regard to the object of the Income-tax Act, namely, 'to tax the income', we are of the view, owner' is a person who is entitled to receive income from the property in his own right.

**65.** In the light of the above narration and discussion, we do not think it necessary to discuss any more separately the submissions advanced across the bar.

**66.** In-time, we answer the question referred to this court in T.R.C. Nos. 9-10/88 in the negative and in favour of the Revenue. The Civil Appeal No. 4165/94 filed by the Revenue stands dismissed and Civil Appeal No. 4549/95 by an assessee stands allowed. However, there will be no order as to costs.

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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CIVIL APPELLATE JURISDICTION**

**PUBLIC INTEREST LITIGATION NO.115 OF 2010**

**WITH**

**CIVIL APPLICATION NO.143 OF 2010**

**AND**

**CIVIL APPLICATION NO.87 OF 2012**

Gram Panchayat Navlakh Umbre  
Through Navlakh Umbre Parisar Paryavaran  
Vikas Sangh

..Petitioner.

versus

Union of India and others

..Respondents.

.....

Mr. K. Sultan Singh with Mr. V. Hari Pillai, Mr. K. Himmat Singh, Ms. Susha Unni and Mr. Samar Vijay Singh i/b Ms. Sartaj Shaikh and Sushila K. Chaurasia for the Petitioner.

Mr. Ajay Basutkar for Respondent No.1.

Mr. S.R. Nargolkar, Addl. GP. for Respondent No.2.

Smt. Sharmila U. Deshmukh for Respondent No.5.

Mr. Navroz Seervai, Senior Advocate with Mr. Milind Sathe, Senior Advocate, Mr. K.A. Setalvad, Senior Advocate, Mrs. R.H. Khan, Mr. Abhishek Sing and Mr. S.D. Bavalekar i/b Mulla & Mulla & Craigie Blunt & Caroe for Respondent No.6.

.....

**CORAM : DR.D.Y.CHANDRACHUD, and  
R.D.DHANUKA, JJ.**

**28 June 2012.**

**ORAL JUDGMENT (PER DR.D.Y.CHANDRACHUD, J.) :**

Rule. The Learned Counsel for the Respondents waive service. By consent, the Petition is taken up for hearing and final disposal.

2. The gram panchayat of the village Navlakh Umbre has moved these proceedings under Article 226 of the Constitution through an association by the name of Navlakh Umbre Parisar Paryavaran Vikas Sangh. The Petition challenges the environmental clearances granted to the Sixth Respondent for

setting up a 355 MWs combined cycle power project. The project is to come up in or around the villages of Navlakh Umbre and Badhalwadi, about 35 kms north west of Pune in the Maval Taluka. The Petition, which is in the nature of a public interest litigation, has been placed before the Division Bench in pursuance of administrative directions of Hon'ble the Chief Justice in view of an order of the Supreme Court dated 2 May 2012 directing the disposal of the Petition by 30 June 2012. Accordingly the Petition has been heard for final disposal with the consent of all the parties.

3. On 14 September 2006 the Ministry Of Environment and Forests of the Union Government (**MOEF**) issued a notification in exercise of powers inter alia conferred by Section 3 of the Environment (Protection) Act 1986 stipulating a requirement of a prior environmental clearance for setting up new projects or activities and for the expansion or modernization of existing projects or activities falling within the purview of the notification. The power project which is sought to be set up by the Sixth Respondent falls in category B-1 of the Schedule to the notification.

4. Between January and March 2008 agreements to sell were executed between agriculturists and a company by the name of Helios Constructions Private Limited in respect of the land on which the power project is to be set up. It is common ground that initially clearance for setting up a Special Economic Zone was obtained from the Director of Industries. The company which purchased the land was subsequently amalgamated with the Sixth Respondent, Hindustan Electricity Generation Company Private Limited. Baseline studies for

setting up the power project were conducted between March and May 2008. On 24 March 2009 and 30 June 2009 the **MOEF** had issued circulars mandating a prior environmental clearance for the setting up of power projects.

5. On 30 September 2009 the Sixth Respondent filed an application before the State Expert Appraisal Committee (SEAC) for setting up a power project of 355 MWs +/- 10%. Form 1 in which the application was submitted envisaged three phases of which Phase - I would consist of 355 MWs. On 29 October 2009, at the 18<sup>th</sup> meeting of the SEAC draft terms of reference as submitted by the Sixth Respondent were approved and it was envisaged that on the completion of the Environmental Impact Assessment (EIA) and a public hearing, the Sixth Respondent would approach the SEAC. The Terms of Reference contained a disclosure that the study period on the basis of which the proposal was mooted was between March and May 2008, the area for the study being 10 kms around the site. The first phase envisaged the acquisition of 195 acres of land, while the second phase involved an acquisition of 172 acres of land. Following the approval of the terms of reference a public notice was issued on 9 January 2010 in the newspapers for a public hearing as contemplated by the notification dated 14 September 2006. On 26 January 2010 the Gramsabha of several villages passed a resolution opposing the project on account of environmental concerns. On 11 February 2010 the Maharashtra Pollution Control Board (MPCB) conducted a public hearing.

6. On 13 January 2010 / 15 March 2010 the Sixth Respondent submitted an application to the Union Ministry of Environment and Forests for the expansion of

its power project from 355 MWs to 2500 MWs. On 22 March 2010 a circular was issued by the MOEF inter alia highlighting that in several cases proposals for expansion have been received though environmental clearance had not been granted or had only recently been issued. The circular inter alia clarified that in case environmental clearance for the earlier proposal was still to be accorded, the project proponent shall apply afresh and submit a comprehensive proposal for the entire project, clubbing all the phases, in order that the environmental issues could be addressed holistically.

7. On 15 April 2010 a “rapid” Environmental Impact Assessment (EIA) was submitted by the Sixth Respondent to the SEAC. Hearings of the 26th meeting of the SEAC commenced on 15 April 2010. On 16 April 2010 the SEAC recorded that the Sixth Respondent had completed the required EIA and had completed a public hearing. The SEAC formulated its decision to recommend the proposal for the grant of a prior environmental clearance to the State Environment Impact Assessment Authority (SEIAA) subject to compliance with certain conditions. Between November 2009 and April 2010 a further baseline monitoring study was conducted on behalf of the Sixth Respondent at the project site which found no significant changes in the results or parameters of the data collected between March and May 2008.

8. On 19 May 2010 a representation was filed by the Petitioners before the SEAC setting out what they regarded to be legal infirmities and social and environmental concerns arising from the project. On 14 June 2010 the present proceedings came to be instituted. On 17 June 2010, a Division Bench of this

Court, while issuing notice, recorded the statement of Senior Counsel appearing on behalf of the Sixth Respondent “that the project is at initial stage and awaiting necessary permissions and approvals”. A statement was made on instructions that the Sixth Respondent “ will not fell any more trees without obtaining prior approval from the relevant authorities”. The recommendations made by the SEAC came up initially before the SEIAA on 9 July 2010 when the authority noted that the issue of granting environmental clearance would be considered after the submission of documents set out in the minutes. On 19 July 2010 a notice to show cause was issued by the MPCB to the Sixth Respondent alleging that the Sixth Respondent had carried out work at the site even before obtaining prior environmental clearance in breach of the provisions of the notification dated 14 September 2006. In its reply dated 20 July 2010 the Sixth Respondent asserted that it had a deemed clearance with effect from 10 June 2010 in terms of the notification dated 14 September 2006. According to the Sixth Respondent in August 2010 a study was commissioned by I.I.T. Chennai on air pollution. The report dealt with the dispersion of ground level concentration of NO<sub>2</sub> emitted from the stack of the power project which showed that the predicted minimum 24 hours' average level concentration was less than the prescribed limit for residential, rural and other areas.

9. On 20 October 2010 a notice was issued by the Petitioners under Section 19(b) of the Environment (Protection) Act 1986. Following this a criminal complaint was filed on 13 January 2011 against the directors and officers of the Sixth Respondent and against the members of the SEAC and SEIAA by the Petitioners. The complaint proceeded on the basis that SEIAA and SEAC did

not have jurisdiction to grant a prior environmental clearance to the power project once the Sixth Respondent had moved the MOEF with a proposal for expansion. On 17 January 2011 and 5 February 2011 respectively the Judicial Magistrate, First Class issued process against accused Nos.1 to 7 who were officials of the Sixth Respondent and subsequently against accused Nos.8 to 18 comprising of members of the SEAC and SEIAA on the basis that prima facie there was a violation of the provisions of Sections 15 and 17 of the Environment (Protection) Act 1986. On 28 February 2011 an order was passed by the J.M.F.C. allowing the bail applications of some of the accused inter alia subject to the condition that no work shall be carried out at the project site till the decision of the complaint. The State of Maharashtra filed a writ petition before this Court seeking to quash and set aside the criminal proceedings which had been adopted against the members of the SEAC and SEIAA.

10. On 24 March 2011 the Sixth Respondent addressed a letter to the MOEF stating that from 7 July 2010 it had pursued the environmental clearance only for a proposed power project comprising of 355 MWs + or – 10% and not for the proposed expansion to 2500 MWs. At the hearing before the SEIAA on 28 March 2011 the authority decided to refer the matter to the MOEF for a clarification with reference to the circular dated 22 March 2010. By a communication dated 26 April 2011 the MOEF confirmed the request of the Sixth Respondent for the withdrawal of the proposal for expansion to 2500 MWs. On 28 April 2011 the Sixth Respondent addressed a communication to the State of Maharashtra confirming the withdrawal of its application before the MOEF for expansion of its power project. Following this, the MOEF by a communication

dated 3 August 2011 confirmed that the proposal for expansion had been withdrawn and that the project being a category B project would have to be appraised by the SEAC / SEIAA. As regards the allegation of environmental violations, the MOEF directed that its circular dated 16 November 2010 should be followed.

11. Apart from the petition filed by the State for quashing the criminal proceedings against the officials of the SEAC and SEIAA (Writ Petition 833 of 2011), a petition was filed before this Court by the Sixth Respondent (Writ Petition 8581 of 2011) seeking the issuance of a prior environmental clearance certificate. By a judgment dated 18 October 2011 a Division Bench of this Court quashed and set aside the issuance of process against the members of the SEIAA and SEAC. On 15 November 2011 a Division Bench of this Court disposed of Writ Petition 8581 of 2011 by directing the SEIAA to consider the application of the Sixth Respondent for environmental clearance to the project in the light of a decision taken at a meeting held on 28 March 2011, but without insisting on the requirement that the Sixth Respondent produces a copy of the order given for the installation of the machinery on the site and that the Sixth Respondent will not pursue expansion prior to the installation and commissioning of the project. The Division Bench was of the view that before the SEIAA issued an environmental clearance, the Sixth Respondent could not be expected to place an order for the installation of machinery. The Court also recorded the statement of the Sixth Respondent that it had already withdrawn the proposal for expansion as noted in the letter dated 3 August 2011 of the Central Government and hence “there is no question of the Petitioner going for expansion”.

12. On 4 January 2012 the State Government addressed a communication to the Sixth Respondent adverting to the fact that on a site visit conducted by the Regional Officer of the MPCB, a report had been presented to the Department of Environment from which it was noted that the Sixth Respondent had carried out tree cutting leveling and filling work at the site and that the approximate quantity of soil involved in the filling was about 1 lac cubic meters. The communication of the State Government referred to a memorandum of the MOEF dated 19 August 2010 according to which no activity relating to any project shall be undertaken without obtaining a prior environmental clearance except for fencing of the site and the construction of temporary sheds for security guards. The communication of the State Government called upon the Sixth Respondent to furnish a written communication in the form of a resolution of its Board of Directors stating that the violations of the Environment (Protection) Act 1986 would not be repeated. The communication was again challenged before a Division Bench of this Court. By an order dated 15 February 2012 the Division Bench directed the Sixth Respondent to submit a resolution to the Environment Department of the State Government to the effect that neither the Sixth Respondent nor its directors had committed any violations of the Environment (Protection) Act 1986 or the rules and, without prejudice to this contention, to furnish a commitment that no breaches would be committed thereafter. The Division Bench directed that upon the submission of such an undertaking, the Environment Department of the State Government “shall issue the requisite permission” within two weeks from the date of receipt of the resolution”. Following the order of the Division Bench, the SEIAA granted its approval to the

project at its meeting held on 8/9 December 2011. A formal permission was communicated thereafter on 22 February 2012. On 5 March 2012 the writ petition was disposed of by the Division Bench. The Division Bench clarified that the Court had not expressed any opinion on any of the contentions raised in the petition or on the communication of the State Government dated 4 January 2012 about the Sixth Respondent or its directors having committed a violation of the Environment (Protection) Act 1986 or in regard to the contention of the Sixth Respondent relating to a deemed prior environmental clearance.

13. In proceedings under Article 136 of the Constitution, the Supreme Court by an order dated 1 March 2012 directed that the permission granted to the Sixth Respondent by the letter dated 22 February 2012 shall remain in abeyance. By a subsequent order dated 2 May 2012, the Supreme Court directed that it would be open to the Sixth Respondent to (i) place its orders for purchase of machineries; (ii) construct a boundary wall around the premises where the power plant is proposed to be set up; (iii) plant trees; (iv) furnish notice to proceed to the contractors and (v) take steps to tie up finances including equity participation, if any, at its own risk and subject to the final result of the present proceedings and the Special Leave Petition.

14. In the petition as it has been originally filed, the Petitioners have sought to challenge, *inter alia* the orders dated 29 October 2009 and 16 April 2010 passed by the SEAC and sought a direction to the effect that the proposed project should be shifted to an alternate industrial site and ought not be established at the proposed site at village Navlakh Umbre. Consequential reliefs have been

sought, *inter alia* for conducting a comprehensive study, a fresh public hearing and a restraint on undertaking any activity pertaining to the project. In Civil Application 143 of 2010 the Petitioner sought a direction restraining the Sixth Respondent from proceeding further with all work and activity and a direction to the MPCB and SEIAA to file reports. In Civil Application 87 of 2012 the Petitioner has sought to place certain additional documents on the record and to challenge the environmental clearance granted by the SEIAA on 26 August 2010. Learned Senior Counsel appearing on behalf of the Sixth Respondent has not opposed the Civil Application in so far as it seeks to challenge the subsequent permissions and to place additional documentary material on the record before the Court so as to enable the Court to render a complete adjudication of all the issues that arise in these proceedings.

15. Counsel appearing on behalf of the Petitioners submitted that –

- i) The Terms of Reference which form the basis of Environmental Impact Assessment (EIA) studies were approved by the SEAC without any application of mind. Neither was any site visit conducted by the SEAC nor was any environmental issue considered or discussed before the Terms of Reference were approved;
- ii) The final EIA report purportedly furnished by the project proponent was not analyzed or scrutinized by the SEAC and the recommendation accorded to the project was without application of mind. The procedure which has been prescribed in the notification dated 14 September 2006 was evidently not followed. The final EIA

report was filed before the SEAC on 15 April 2010. The notification dated 14 September 2006 provides for the procedure to be followed in the SEAC on receipt of the final EIA. The final EIA has to be scrutinized and objections have to be formulated. The SEAC, however, issued its recommendations on the very next day without having regard to the circumstances to which a reference is required by the terms of the notification;

- iii) The recommendation issued by the SEAC on 16 April 2010 suffered from a lack of jurisdiction. The Sixth Respondent had moved an application before the Central Government on 15 March 2010 for expansion of the project. On 16 April 2010 when a recommendation was issued by the SEAC, the proposal for expansion was pending before the Union Government. In terms of the circular issued by the MOEF on 22 March 2010, once a proposal for expansion was moved before the Central Government and prior environmental clearance has not been granted by the SEAC, a fresh proposal for the entire project was required to be submitted to the Central Government and the jurisdiction to decide upon it vested exclusively with the MOEF. The withdrawal of the application for expansion before the Central Government took place much later. The Sixth Respondent in its letter dated 24 March 2011 also clarified that it was with effect from 7 July 2010 that the Sixth Respondent ceased to press the application for expansion. Consequently on the date on which the SEAC granted its recommendation, it had no jurisdiction to do so;
- iv) In the present case the EIA studies and environmental data preceded

the formulation of the terms of reference, whereas the clear intendment of the notification dated 14 September 2006 is that such studies must be undertaken after the terms of reference are formulated;

- v) The villagers on whose behalf these proceedings have been instituted had addressed repeated representations to all statutory authorities concerned including the SEAC and SEIAA drawing attention to the violations on the part of the developer in commencing work in the absence of an environmental clearance. No just and fair opportunity of being heard was afforded to them. Despite the undertaking furnished to this Court on 17 June 2010, the Sixth Respondent continued to carry out work without prior environmental clearance and in breach of the clear mandate of the notification. The MPCB having found justification in the grievance of the Petitioners in regard to the carrying on of work illegally, also issued a notice dated 19 July 2010. SEIAA has proceeded to grant its clearance without any adjudication of the notice;
- vi) The plea of the Sixth Respondent of a deemed environmental clearance with effect from 3 June 2010 is based on the foundation that the SEIAA had not acted upon the recommendation of the SEAC within the prescribed period of 45 days. This claim is unsustainable because – (1) The recommendation of the SEAC dated 16 July 2010 is invalid both for want of jurisdiction and on the grounds set out earlier; (2) Even before this Court on 17 June 2010 the Sixth Respondent stated that it had yet not secured environmental

clearance; (3) The Sixth Respondent participated before the SEIAA without raising the claim that it had secured a deemed environmental clearance; and (4) Until date no court or authority has adjudicated upon the claim of the Sixth Respondent to a deemed environmental clearance.

16. The learned AGP appearing on behalf of the State Government, as well as the SEAC and SEIAA submitted that –

- i) The SEAC and SEIAA were justified in ruling upon the application filed by the Sixth Respondent. On 16 April 2010 the SEAC was not informed of the fact that the Sixth Respondent had moved the MOEF with a proposal for expansion. In any event, the circular dated 22 March 2010 postulates the filing of a fresh proposal before the MOEF. In view of the mandate of the circular dated 22 March 2010, the earlier proposal filed by the Sixth Respondent before the MOEF on 15 March 2010 would cease to have any validity. In the absence of a fresh proposal by the Sixth Respondent before the MOEF comprehensively dealing with all phases of the project, the SEAC was within jurisdiction in entertaining the application for the grant of a clearance for the project to the extent of 355 MWs;
- ii) On the withdrawal of the application filed by the Sixth Respondent before the MOEF for expansion, the SEAC would in any event have jurisdiction to consider the original proposal for a project of 355 MWs. In that view of the matter and since as a result of the subsequent developments, the Union Government clarified that the proposal for

expansion has been withdrawn and the file has been closed, there is no reason for this Court in the exercise of its jurisdiction in a public interest petition to interfere with the grant of environmental clearance by the SEAC / SEIAA;

- iii) The issue as to whether the SEAC did have jurisdiction is covered by the judgments of the Division Bench of this Court dated 18 October 2011 and 15 November 2011;
- iv) The SEAC is composed of experts drawn from diverse fields. The SEAC in the present case considered relevant material and its recommendations were based on facts on the record;
- v) The SEIAA is guided by the recommendations of the SEAC since the latter is a committee of experts drawn from diverse fields. Yet the SEIAA must apply its mind to the recommendations, which it has done before proceeding to grant an environmental clearance.

17. Learned Senior Counsel appearing on behalf of the Sixth Respondent submitted that :-

- i) The terms of reference constitute the basis and foundation of the consideration of the project which takes places, once the final EIA has been formulated, before the SEAC. Merely because the decision of the SEAC is brief and was taken in a day does not show that there was no application of mind;
- ii) The concept of a deeming provision is an integral part of the notification dated 14 September 2006, The notification prescribes time limits which are mandatorily required to be observed. The SEAC at its

meeting held on 16 April 2010 recommended the grant of an environmental clearance to the SEIAA. Thereafter the SEIAA having failed to notify its decision within a period of 45 days, the Sixth Respondent must be deemed to have obtained permission to proceed with the work with effect from 3 June 2010. The petition before this Court was filed on the basis that the Sixth Respondent would assert a claim to a deemed permission. After the Division Bench passed its first order in the proceedings on 17 June 2010 the Sixth Respondent filed an affidavit in reply on 28 July 2010 asserting that it had deemed permission. On 9 August 2010 the Petitioners, in the Civil Application, sought an injunction against the Sixth Respondent from carrying out work. Thereafter there was no ad interim order on the Civil Application for interim relief for a period of nearly two years. There was consequently in law no prohibition on the Sixth Respondent proceeding ahead with the work of the project;

- iii) The use of the expression “jurisdiction” in the context of the exercise of the power by the SEAC to make its recommendation is erroneous. The power of the SEAC to make its recommendation does not raise an issue of jurisdiction as commonly understood in law. In any event, the order of this Court dated 18 October 2011 specifically dealt with the issue as to whether the SEAC had the jurisdiction to entertain the application of the Sixth Respondent and the issue was answered in favour of the Sixth Respondent. This has also been clarified in the subsequent order of the Division Bench dated 15 November 2011;
- iv) A fresh study was carried out between November 2009 and April

2010, which confirmed the findings of the earlier study based on data gathered between March and May 2008. Even if a study could have been done in a better fashion, that would not invalidate the existing study, based on administrative law standards. The final EIA permission dated 22 February 2010 contains detailed specifications to be observed by the Sixth Respondent which shows an adequate and careful application of mind;

- v) The proceedings before the SEIAA of 8/9 December 2011 would indicate that the authority had determined at the meeting that the environmental clearance should be granted. The order passed by the Division Bench thereafter, only directed the enforcement of the permission which was already decided upon at the meeting that was held on 8/9 December 2011.

18. The rival submissions now fall for consideration.

19. On 14 September 2006 the Union Government in the Ministry of Environment and Forests directed that thenceforth the setting up of new projects or activities as well as the expansion or modernization of existing projects and activities listed out in the Schedule to the notification shall be undertaken only after prior environmental clearance from the Central Government, or as the case may be, by the State Level Environment Impact Assessment Authority constituted under Section 3(3) of the Environment (Protection) Act 1986. Clause 2 of the notification specifies inter alia that while projects falling under Category A of the Schedule are required to be referred to the Central Government in the

MOEF, projects falling under Category B would fall within the purview of the SEIAA. Thermal Power Plants are specified at Entry 1(d) of the Schedule. Plants involving a capacity of less than 500 MWs fall in Category B. Such projects require the prior environmental clearance of the SEIAA. Clause 4(iii) of the notification emphasizes that the SEIAA shall base its decision on the recommendations of the State Expert Appraisal Committee (SEAC) as constituted under the notification. The SEAC at the level of the State Government and the EAC at the Central Government are required to screen, scope and appraise projects falling under Category B and Category A respectively. Clause 5(d) empowers the members of the SEAC, or as the case may be, EAC to inspect any site connected with the project or activity in respect of which prior environmental clearance is sought. Under clause 6 an application for prior environmental clearance is required to be submitted in Form I, after the identification of the prospective site and before commencing any construction activity or preparation of land at site.

20. Clause 7 of the notification specifies the stages involved in the grant of an environmental clearance. For new projects the process of granting an environmental clearance comprehends four stages, these being – (i) Screening, which is required for Category B projects; (ii) Scoping; (iii) Public consultation; and (iv) Appraisal. The first stage involving screening of a project requires the SEAC to determine whether or not the project or activity requires further environmental studies for the preparation of an Environmental Impact Assessment (EIA) for its appraisal prior to the grant of an environmental clearance. Projects requiring an EIA report are termed as Category B-1 projects.

The SEAC, in the preliminary process of screening is therefore required to determine at the outset whether or not the project requires further environmental studies in order to facilitate the preparation of an EIA. This is the first aspect to which attention is required to be devoted by the SEAC. The next stage involves scoping, under which the SEAC in the case of a Category B-1 project has to determine detailed and comprehensive terms of reference addressing all relevant environmental concerns for the preparation of an Environmental Impact Assessment report. The SEAC has to determine the terms of reference on the basis of the information furnished in the prescribed application form including the terms of reference as proposed, a site visit by a sub-group of the committee if it considers that to be necessary and other information that may be available with the committee. The obligation to determine the Terms of Reference is of the SEAC. Those which are suggested by the proponent of the project are at best, a guide. The SEAC is not confined to them nor is it constrained by what the project proponent suggests. The SEAC may bring to bear on its task any information that may be available with it. The Terms of Reference are required to be finalized by the SEAC within sixty days of the receipt of Form I. If the SEAC fails to do so, the terms of reference suggested by the applicant are to be deemed as final terms of reference approved for EIA studies. An application for a prior environmental clearance can be rejected at this stage itself by the regulatory authority on the recommendation of the EAC or the SEAC.

21. The third stage involves public consultation, a process by which the concerns of locally affected persons and others who have a plausible stake in the environmental impacts of the project or activity are ascertained with a view to

taking into account all material concerns arising from the project or activity or design. The process of public consultation is conducted by the State Pollution Control Board and has two components : (i) a public hearing in close proximity to the site to be carried out for ascertaining the views of locally affected persons and (ii) obtaining responses from other persons with a plausible stake in the environmental aspects of the project or activity. After the completion of the public consultation, the applicant is required to address all the material environmental concerns expressed during this process and to make appropriate changes in the draft EIA. The final EIA report is then to be submitted to the concerned regulatory authority for appraisal.

22. The fourth stage is that of appraisal in the course of which a detailed scrutiny is made by the SEAC of the application and all the other documents such as the final EIA report and the outcome of public consultation. The notification mandates that the process of appraisal must be carried out in a transparent manner in a proceeding to which the applicant is invited for furnishing clarifications. On the conclusion of the proceedings, the SEAC has to make recommendations to the regulatory authority either for the grant of a prior environmental clearance on stipulated terms or the rejection of the application for environmental clearance. The appraisal of an application has to be completed by the SEAC within sixty days of the receipt of the final EIA.

23. Upon the submission of the recommendations of the SEAC, the regulatory authority is to consider the recommendations of the SEAC and to convey its decision to the applicant within 45 days of the receipt of the recommendations.

The importance which the notification ascribes to the recommendations of the SEAC is evident from the fact that the notification stipulates that the regulatory authority shall normally accept the recommendations of the SEAC. In cases where the SEIAA disagrees with the recommendations, it shall request reconsideration by the SEAC within a stipulated time frame indicating the reasons for its disagreement. Clause 8(iii) of the notification provides that in the event that the decision of the regulatory authority is not communicated to the applicant within the period specified, the applicant may proceed as if the environment clearance sought for has been granted, or as the case may be, denied in terms of the final recommendations of the SEAC. Appendix V to the notification specifies in detail the procedure for appraisal by the SEAC. Appendix V provides that the final EIA report and other relevant documents submitted by the applicant shall be scrutinized in the office within thirty days from receipt by the regulatory authority strictly with reference to the terms of reference and inadequacies noted must be communicated to the members of the SEAC. The composition of the SEAC is laid down in Appendix VI. The SEACs are to consist *inter alia* of experts drawn from diverse disciplines of environmental science.

24. Now it is in the background of the mandate of the notification dated 14 September 2006 that it would be necessary to consider the procedure that was followed in the present case. At the outset, it must be noted that the environmental studies which form the basis of the original proposal of the Sixth Respondent were conducted between March and May 2008. The Sixth Respondent submitted an application before the SEAC on 30 September 2009.

On 29 October 2009, the SEAC approved the draft terms of reference as submitted by the Sixth Respondent. The scheme of the notification dated 14 September 2006 contemplates an application by the project proponent, the finalization of comprehensive terms of reference by the SEAC and the conduct of EIA studies by the project proponent on the basis of the terms of reference approved by the SEAC. Thereupon a draft EIA report has to be prepared on the basis of the EIA studies. A public consultation is to take place on the basis of the draft EIA report. The final EIA report is prepared on the basis of a compliance of the grievances that are raised during the course of the public consultation. Thereupon a final EIA report has to be submitted to the SEAC. The SEAC in turn conducts a detailed scrutiny of the final EIA report, the report of the public consultation and the application and has to address environmental and other concerns. In the present case, it is evident that the SEAC initially dealt with the application submitted by the Sixth Respondent on 29 October 2009 when the draft terms of reference were approved. A public consultation took place thereafter on the basis of the draft EIA report. Upon the final EIA report being submitted to the SEAC on 15 April 2010, the SEAC took up the matter on the very next day. As a matter of fact, the record before the Court would indicate that the SEAC had already commenced its 26<sup>th</sup> meeting on 15 April 2010. The mandatory procedure which was required to be followed under the terms of the notification envisages that upon the submission of the final EIA report, the report is required to be scrutinized within thirty days of its receipt by the regulatory authority concerned strictly with reference to the terms of reference and the inadequacies, if any, are required to be noted and to be communicated to the members of the SEAC. Evidently, there was no such scrutiny of the final

EIA report before it was taken up for consideration by the members of the SEAC within a day of its submission on 15 April 2010. The SEAC is primarily a body consisting of experts. The importance which the notification attributes to the SEAC is evident from the fact that under clause 4(iii), the SEIAA is required to base its decision on the recommendations of the SEAC. Moreover, under Clause 8(ii) the SEIAA is to normally accept the recommendations of the SEAC and where it differs from those recommendations to furnish reasons for the disagreement, while requesting reconsideration by the SEAC. The process of screening, scoping and appraisal by the SEAC is of utmost importance and is a vital element in the ultimate process of decision making leading upto the grant or rejection of an environmental clearance. The notification indicates time lines for the performance of various tasks which are assigned to the SEAC. Initially when it screens a proposal, the SEAC has to determine whether or not the project or activity requires further environmental studies for the preparation of an EIA report. In the stage of scoping the SEAC, before it formulates comprehensive terms of reference has to address all relevant environmental concerns for the preparation of an EIA report in respect of the project or activity for which clearance is sought. The notification envisages that, where it considers necessary, the SEAC can even conduct a site visit. Once the terms of reference are formulated and finalized by the SEAC, the next stage involves the conducting of EIA studies. The Terms of Reference provide the analytical framework on the basis of which EIA studies are conducted. The preparation of the Terms of Reference is not a meaningless formality. They contain a framework of identifying environmental concerns with reference to which EIA studies are conducted. The notification requires public consultation not only

with locally affected persons but all other persons having even a plausible stake in the environmental aspects of the project. Finally, when it comes to the stage of appraisal, the SEAC has to conduct the process in a transparent manner on the basis of the application and other documents such as the final EIA report, the report of public consultation and other relevant material.

25. In the present case, it is evident that the SEAC has acted in a casual manner without understanding either the vital implications of the function which is assigned to it under the notification or the consequences of its decision making process. The Court in the exercise of its power of judicial review is cognizant of the fact that the SEAC is drawn from experts in the field. Even so, it is necessary that the SEAC discharges its duties with a high degree of accountability and responsiveness having regard to the fact that it is an institution which is created with a view to facilitate environmental governance. Environmental governance requires decision makers to bear in mind the principles of sustainable development. The principles of sustainable development require a balance to be drawn between the need for development on the one hand and the protection of the environment on the other. In taking into account the principles of sustainable development, an authority such as the SEAC must bring its attention to bear on relevant factors such as the need to preserve the natural resources for the benefit of future generations, the sustainable prudent or rationale use of natural resources, the equitable engagement of natural resources and the need to ensure that environmental considerations are integrated into economic and development plans, programmes and processes. Among the fundamental principles of

environmental governance are principles that foster access to information; access to justice to the community which is liable to be affected and governance based on rule of law. Access to information, particularly to impoverished and marginalised communities, which populate our rural land scape is of vital importance. Communities must have access to all information in order to be satisfied that a proposed project meets standards of safety; that the site upon which the project is to be located is environmentally conducive and that the project will not result in a destruction of the natural habitat. Denial of information is the surest way to deprive rural communities of human rights and leads to a sense of alienation. Access to information is a source empowerment. Participatory decision making must hence be an ingredient of environmental governance in a true sense of the term. Merely observing the forms of participation without the substance is to negate fundamental human rights. When expert bodies are conferred with statutory duties which are envisaged in the public interest, particularly having regard to the need to protect sensitive interests such as those of the environment, it is necessary that those duties must be performed scrupulously keeping in mind the safeguards which are provided by enacting legal provisions. In the present case, the SEAC evidently completed its task within a day of the presentation of the final EIA report. In doing so the SEAC evidently failed to take into consideration the mandate of the notification dated 14 September 2006 and the considerations which are regarded by the notification as relevant and germane to the discharge of its duties. The final resolution of the SEAC, recommending the grant of approval on 16 April 2010 was to the following effect –

“Decision : The project proponent has got the EIA completed and conducted public hearing. Copies of the EIA and public hearing have

been submitted. The main findings of the EIA were explained. It was pointed out that the concerns expressed at the time of the public hearing are being complied with. The project proponent explained that they eventually propose to put up thermal plants for a total capacity of around 2500 MW. They stated that they are adopting the latest and clean technology. They explained the various steps which will be taken up to ensure all environmental safeguards.

It was decided to recommend the proposal for grant of prior environment clearance subject to the project proponent complying with the following:

- (i) The projected level of NO<sub>x</sub> and the simulation model to work out the pollution level after commencement of the plant should be cross checked from a reputed organization like NEERI or IIT and their report submitted. If their reports indicate the need for any mitigating steps, the same should be worked out, and indicated.
- (ii) The EIA carried out is rapid for a short period, since the project is proposed to be expanded to a large magnitude, a comprehensive study should be initiated to avoid delay in future.”

26. The first part of the decision of the SEAC contains merely a record of the fact that the EIA was completed and that a public hearing was conducted. The SEAC notes that the main findings of the EIA were explained. The SEAC records the submission of the project proponent that (i) the concerns that were expressed at the time of the public hearing were complied with; (ii) the project proponent would be adopting the latest and clean technology; and (iii) steps that would be taken to ensure environmental safeguards were explained. There is no analysis by the SEAC of the environmental concerns; no analysis of the impact of the project on the environment and no analysis of the steps that would be taken to address environmental effects or damage. None of the reasons would indicate an independent applicant of mind. The SEAC recommended the grant of an environmental clearance subject to the Sixth Respondent getting the

project level of NO<sub>x</sub> crosschecked from a reputed organization and if mitigating steps were required, to adopt those steps. The SEAC also took note of the fact that the EIA which had been carried out was “rapid”; and “for a short period”. In that context, the SEAC noted that since the project was proposed to be expanded, a comprehensive study should be initiated to avoid delay in the future. The concern of the SEAC appears to have been more to avoid a delay in the project than that of a need to protect and preserve the environment. When the notification requires a screening, scoping and appraisal of the project, by an expert body such as the SEAC, the record must indicate a due and proper application of mind by the SEAC to all aspects of environmental concern. This would include – (i) Environmental studies carried out to assess the nature of the existing environment and the impact of the proposed project on the environment; (ii) The consequences of the project on issues such as water and air pollution; (iii) The impact of the project on the existing natural resources and the extent of the use and depletion of natural resources; (iv) Whether an ecological sensitive area would be affected and if so, the nature and effect thereof; (v) The impact of the project on concerns such as biodiversity; (vi) The nature of the technology that is sought to be put in place; and (vii) The safeguards that must be introduced in order to ensure that the adverse impacts of the project are contained within prescribed statutory requirements. This list of factors, we wish to clarify, is not exhaustive. But the important point to be noted is that the SEAC and the SEIAA are important instruments of ensuring regulatory compliance and environmental governance in accordance with law. The decision making process of those authorities besides being transparent must result in a reasoned conclusion which is reflective of a due application of mind to the diverse

concerns arising from a project such as the present. The mere fact that a body is comprised of experts is not sufficient a safeguard to ensure that the conclusion of its deliberations is just and proper. That safeguard, particularly for the wider community, must be reflected in the manner in which the authority conducts its process and in the outcome of its process. In matters of environmental governance the only available safeguard for the community at large is that the process which the authority follows must adhere to fair and transparent principles established by law and that the reasons which emanate from the public body must be suggestive of the decision maker having taken into consideration all relevant aspects and having borne in mind the need to preserve and protect the environment. The balance which is drawn by the authority between the need for development on the one hand and the protection of the environment on the other, must be reflected in its formulation. In the present case, the entirety of the appraisal of the SEAC is contained in the extract which we have set out above. That in our view, does not satisfy the requirements of a transparent, accountable and responsive decision making process. These three elements, in our view, are key requirements of a process which is fair and in accordance with Article 14 of the Constitution.

27. Environmental protection is often pitched against the demands of economic development. While dealing with those conflicts, policy makers and judicial bodies across the world have applied the concept of sustainable development. The 1987 Report of the World Commission on Environment and Development (Brundtland Report) defined Sustainable Development as "Development that meets the needs of the present without compromising the

ability of the future generations to meet their own needs". This responsibility was enunciated in 1972 by the Stockholm Convention to which India was a party. In 1992 the Rio Declaration on Environment and Development, to which also India is a party, adopted the notion of sustainable development.

28. Courts in India have accorded a constitutional position to sustainable development, sourcing the doctrine from Articles 21, 48, 48A and 51A of the Constitution. Directions have been issued from time to time to foster an effective administrative set up for preventing environmental degradation resulting from developmental activities (*M. C. Mehta v. Union of India and Ors.*<sup>1</sup>). In matters involving environment and ecology, the doctrine of Public Trust enjoins the Government to protect resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. The heart of the public trust doctrine is that it imposes limits and obligations upon government agencies and their administrators on behalf of all the people and especially future generations. Professor Joseph L. Sax in his classic article, "The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention"<sup>2</sup>, indicates that the public trust doctrine, of all concepts known to law, constitutes the best practical and philosophical premise and legal tool for protecting public rights and for protecting and managing resources, ecological values or objects held in trust. The doctrine, in its present form, was incorporated as a part of Indian law by the Supreme Court in *M. C. Mehta v. Kamal Nath*<sup>3</sup> and also in *M.I. Builders v. Radhey Shyam Sahu*<sup>4</sup>.

1 (2009) 6 SCC 142.

2 Michigan Law Review, Vol.68 No.3 (Jan.1970) PP 471- 566

3 (1997) 1 SCC 388

4 [1999] 3 SCR 1066

29. The precautionary principle and the polluter-pays principle were also recognized in **M. C. Mehta** where the Court held that the principle of sustainable development involves the anticipation of environmental harm and taking measures to avoid it or to choose the least environmentally harmful activity. The Supreme Court held that the State government committed a patent breach of public trust by leasing ecologically fragile land for a Motel, and ordered compensation by way of costs for the restitution of the environment and ecology of the area. In **Vellore Citizens Welfare Forum v. UOI**<sup>5</sup> the Supreme Court ordered the closure of all the tanneries in certain districts which did not invest in effluent treatment plants and held that "Environmental measures by the central government and the statutory authorities must anticipate prevent and attack the causes of environmental degradation and 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.

30. In **Intellectuals Forum, Tirupathi v. State of A.P. & Ors.**<sup>6</sup>, the Supreme Court held that the government was bound to protect historical tanks in view of the concept of 'sustainable development' and the 'public trust doctrine'. The principle of 'Inter-Generational Equity' was also given legal status, which was then reiterated in several cases including **A.P. Pollution Control Board v. Prof. M.V. Nayudu and Ors.**<sup>7</sup> where it was held that the State cannot be allowed to commit an act or omission which will infringe the right of the community and to alienate property to any other person or body. The fact that a party has spent

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51996) 5 SCC 647  
6AIR 2006 SC 1352  
71999] 1 SCR 235

money on developing land was held to be immaterial.

31. In **T. N. Godavaram Thirumulpad v. Union of India (UOI) and Ors.**<sup>8</sup>, the Supreme Court held that adherence to the principle of Sustainable Development is a constitutional requirement, and that it is the duty of the State to devise and implement a coherent and co-ordinated programme to meet its obligation of sustainable development based on inter-generational equity.

32. In **Bombay Dyeing & Mfg. Co. Ltd. v. Bombay Environmental Action Group and Ors.**<sup>9</sup>, the Supreme Court held that while the need to protect the environment is a priority, a balance has to be drawn with the need to promote development:

*“...The harmonization of the two needs has led to the concept of sustainable development, so much so that it has become the most significant and focal point of environmental legislation and judicial decisions relating to the same. Sustainable development, simply put, is a process in which development can be sustained over generations. Making the concept of sustainable development operational for public policies raises important challenges that involve complex synergies and trade-offs.”*

33. An intention to develop is not sufficient to sanction the destruction of local ecological resources. In applying the principle of sustainable development, there must be a balance between developmental needs which project proponents assert, and environmental damage and degradation, that communities seriously apprehend.

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82008) 2 SCC 222  
9AIR 2006 SC 1489

34. During the course of the hearing of these proceedings, the AGP appearing on behalf of the SEIAA and SEAC stated before the Court that the SEAC, was not informed, when it took its decision on 16 April 2010 of the pendency of the application by the Sixth Respondent before the MOEF for the expansion of its project. On the issue of whether the SEAC had jurisdiction to entertain the application, we must at the outset indicate that a Division Bench of this Court presided over by the Learned Chief Justice has come to the conclusion in its judgment dated 18 October 2011 that the SEAC did have jurisdiction to entertain the application. Having regard to that finding, which is contained in the judgment of the Division Bench dated 18 October 2011, and which has been reiterated subsequently by the same Bench in its order dated 15 November 2011, it would not be consistent with judicial discipline for this Court to re-examine the same issue afresh. The judgment of the Division Bench dated 18 October 2011 arose out of an order of the Judicial Magistrate, First Class issuing process in a criminal complaint instituted by the petitioner alleging a violation of the provisions of Sections 15 and 17 of the Environment (Protection) Act 1986. The complaint proceeded on the basis that the SEAC had no jurisdiction to entertain the application for environmental clearance, once the Sixth Respondent had moved the MOEF with a proposal for expansion. The J.M.F.C. issued process and the order issuing process against the officials of the State Government was challenged by the State in writ proceedings before this Court. The Division Bench, in its judgment dated 18 October 2011 came to the conclusion that Section 17 of the Environment (Protection) Act 1986 could have no application to the members of the SEAC or the SEIAA, when they acted as authorities under the notification dated 14 September 2006. Apart from this, the

Division Bench took note of the fact that the Central Government had closed the file regarding the proposal of the Sixth Respondent for the expansion of its project. In that view of the matter, the Division Bench quashed and set aside the order of the Magistrate issuing process. This order was construed subsequently by the Division Bench in a further order dated 15 November 2011 in which the Court held that the challenge to jurisdiction of the SEAC and SEIAA had already been negated in the judgment dated 18 October 2011. These orders of the Division Bench are the subject matter of a challenge before the Supreme Court where Special Leave Petitions are pending. As another Division Bench of the same Court, discipline requires us not to take any view at variance with the judgment of the Division Bench, so long as it continues to hold the field.

35. In our view, the issue must be looked at from a slightly different perspective, quite apart from the issue of jurisdiction. As the record before the Court would indicate, the Sixth Respondent moved the Union Government with an application for expansion of its project capacity to the extent of 2150 MWs on 13 January 2010 / 15 March 2010. The AGP stated before us that on 16 April 2010 when the SEAC made its recommendations for the grant of an environmental clearance, it was not in knowledge of the fact that the MOEF had already been moved by the Sixth Respondent for the grant of clearance for an expanded capacity. The minutes of the decision of the SEAC record that the project proponent explained that it eventually proposes to put up a thermal plant for a total capacity of around 2500 MWs. In response to this the SEAC stated that since the EIA which had been carried out was 'rapid' and 'for a short period' and since the project was proposed to be expanded to a large magnitude, a

comprehensive study should be initiated, “to avoid delay in future”. In our view, the SEAC ought to have been informed by the Sixth Respondent, when it proceeded to take its decision on 16 April 2010, of the fact that at that time an application which had been filed by the Sixth Respondent for a further expansion of its capacity to the extent of 2150 MWs was pending before the MOEF. The circular which was issued by the MOEF on 22 March 2010 took note of the fact that where a proposal for expansion was submitted without a prior environmental clearance having been granted for the original project, a fresh proposal should be submitted so as to enable a holistic appraisal of the entire project from the environmental perspective. The rationale for the circular is that different authorities should not consider piecemeal, requests for environmental clearance but an overall assessment should be made by MOEF of all the ramifications. If the SEAC were to be informed of the pendency of an application before the Central Government at that stage, that in our view, was a material circumstance which would have had some bearing on the outcome of the proceedings before the SEAC. We clarify once again at the cost of repetition that this is not an issue which pertains to the jurisdiction of the SEAC (which as noted above is concluded by the judgment of the Division Bench), but about the conduct and fairness of the approach of the project proponent in the present case. The MOEF, by its letter dated 24 March 2011 clarified that the project proponent had with effect from 7 July 2010 ceased to pursue its proposal for expansion. The clear intendment of that communication is that on the date on which the SEAC took its decision on 16 April 2010, there was a live proposal before the Union Government which was pending consideration. The failure to inform the SEAC of the existence of such a proposal is a matter which reflects on the candor with

which the proceeding was conducted before the SEAC and is, in our view, indicative of a circumstance which vitiates the decision making process.

36. Clause 8(vi) of MOEF notification, dated 14<sup>th</sup> September 2006 provides thus :

“Deliberate Concealment and/or submission of false or misleading information or data which is material to screening or scoping or appraisal or decision on the application shall make the application liable for rejection, and cancellation of prior environmental clearance granted on that basis. Rejection of an application or cancellation of a prior environmental clearance already granted, on such ground, shall be decided by the regulatory authority, after giving a personal hearing to the applicant, and following the principles of natural justice.”

In **this case**, the Sixth Respondent failed to disclose to the SEAC the application made to the MOEF for an additional 2150MW. Concealment of such information, material to appraisal and to a decision on the application would have the effect of rendering the application liable for rejection.

37. Insofar as the SEIAA is concerned, it is evident from the notification that the recommendations of the SEAC constitute the basis and foundation of the proceedings before the SEIAA. Now at this stage, it will be necessary for the Court to advert to the record of the decision making process before the SEIAA. The proceedings before the SEIAA took place initially on 9 July 2010 when the authority decided to consider the proposal after the submission of certain documents, among them being compliance of the recommendations submitted by the SEAC. Thereafter on 7 August 2010, the Sixth Respondent submitted details of an air pollution study carried out by I.I.T. Chennai as recommended by

the SEAC. On 26 August 2010 the SEIAA noted that the Sixth Respondent had simultaneously approached the MOEF for getting environmental clearance for its expansion which had not been initiated. After considering the report of I.I.T. Chennai, the authority decided to accord environmental clearance subject to various conditions, among them being a requirement that a copy of the order for the installation of machinery at site shall be furnished. On 28 March 2011 the SEIAA decided to refer the case to the MOEF for a clarification with regard to its circular dated 22 March 2010. On 4/5 August 2011, the SEIAA was of the view that since proceedings were pending before the Court, no question arose on issuing a clearance at that stage. On 23/24 November 2011 the SEIAA was informed of the decision of this Court in Writ Petition 8581 of 2011. The authority recorded that it needed time to scrutinize the documents submitted by the project proponent including comments in respect of the objections which were raised against the project. The proceedings were then adjourned to 8/9 December 2011. The notice of the hearing on 8/9 December 2011 was furnished to the petitioner at 9.00 p.m. on 8 December 2011. The petitioner submitted a reply to the SEIAA on 9 December 2011 seeking an adjournment of the proceedings. The reply was communicated through an email at 10.45 a.m. on 9 December 2011. The SEIAA, however, proceeded with the hearing on 9 December 2011 in the absence of the Petitioner. The decision of the SEIAA records that taking into account the directions of this Court, the submission of information by the project proponent, the contents of the EIA report, a public hearing report and a deed of commitment filed by the project proponent, the authority had decided to accord approval for the grant of an environment clearance. Evidently, the final decision was arrived at in the absence of the petitioner who had submitted a detailed note

of objections on 28 November 2011. We find that the decision which has been arrived at by the SEIAA is unsustainable for several reasons. Firstly, the recommendation of the SEAC was to form the basis and foundation of the ultimate grant of approval by the SEIAA. Once the underlying decision of the SEAC is found to be flawed, the decision of the SEIAA must stand vitiated. Secondly, the order of the SEIAA does not reflect an application of mind to the environmental issues and concerns emanating from the project. Thirdly, even at its meeting on 23/24 November 2011 the SEIAA had considered it appropriate to defer a final decision since it required time to scrutinize relevant documents including comments in respect of various objections raised against the project. For this purpose a meeting was convened on 8/9 December 2011. The record does not indicate whether those concerns were duly allayed. In any event, a decision was taken in the absence of the petitioner who had communicated that the notice of the hearing was received only the previous night and that it was not possible for the petitioner to attend the hearing the next morning due to a court proceeding.

38. The foundation of the submission of the Sixth Respondent that it has received deemed permission for the project with effect from 3 June 2010, is on the basis of the recommendations that were issued by the SEAC on 16 April 2010. The recommendations of the SEAC have been held to be invalid and contrary to law. The basis on which the submission of deemed permission has been urged would have no foundation whatsoever. The Court must also express its concern about the manner in which both the SEAC and SEIAA have proceeded to grant clearances without application of mind to the question as to

whether, in breach of the specific conditions of the notification dated 14 September 2006, the Sixth Respondent had carried out development work at site without a prior environmental clearance. As we have noted earlier, a notice to show cause has already been issued to the Sixth Respondent, which has yet to be adjudicated upon. The Petitioners have repeatedly drawn attention to their grievance that even without an environmental clearance, the Sixth Respondent has proceeded with work at the site in breach of the notification dated 14 September 2006. The issue as to whether an applicant for environmental clearance has acted in breach of the condition which prohibits work prior to the receipt of environmental clearance is a material consideration in determining whether environmental clearance should be granted. A project proponent who seeks an environmental clearance under the law must demonstrably act in accordance with law. There is a serious allegation of a breach by the Sixth Respondent which resulted in the issuance of a notice to show cause by MPCB. That issue cannot be disassociated from the grant of an environmental clearance and a clearance could not have been granted without a definitive conclusion, arrived at in accordance with the principles of natural justice, on the issue of breach.

39. In the circumstances, we are of the view that the orders of the SEAC dated 29 October 2009 and 16 April 2010 and the order of the SEIAA dated 22 February 2012 would have to be quashed and set aside. We order accordingly. We remand the proceedings in consequence back to the SEAC for a fresh decision on the application submitted by the Sixth Respondent in accordance with law. We also clarify that we have not entered a finding of fact on the

allegation that the Sixth Respondent has committed a violation of the notification dated 14 September 2006 by proceeding ahead with the work of development even before the receipt of environmental clearance. We leave that aspect open to be adjudicated upon by the competent authority after furnishing to the Sixth Respondent and to the Petitioner an opportunity of being heard.

We direct that the SEAC shall conclude the exercise expeditiously.

Rule is made absolute in the aforesaid terms.

There shall be no order as to costs.

In view of the disposal of the petition, Civil Applications 143 of 2010 and 87 of 2012 are disposed of.

**(Dr. D.Y. Chandrachud, J.)**

**(R.D.Dhanuka, J.)**

**PROOF OF SERVICE**

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**NGT Chennai- Appeal No. 14/2020- Written Submissions**

1 message

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6 October 2021 at 18:38

To: krishnan-mrgk@krslegal.in, darpan.advocate@gmail.com, tvsekar12@rediffmail.com, sns2358@yahoo.co.in, vasanthhk72@gmail.com, Ajay Nandalike &lt;ajay@pragatilaw.in&gt;, Tanya John &lt;tanya@pragatilaw.in&gt;

Respected Sir/Madam,

**Sub: Yelahanka Puttenahalli Lake and Bird Conservation Trust (R) v/s. Ministry of Environment and Forest and Climate Change and Ors.**

**Appeal No. 14/2020****Before the Hon'ble National Green Tribunal, (SZ) Chennai**

Kindly find attached herewith the complete set of the Written Submissions in the above mentioned Appeal and the same is being filed as per the Order dated 29.09.2021 passed by the Hon'ble Tribunal.

Kindly acknowledge the receipt of the same.

Thanking you,  
Yours Sincerely,

Abdul Azeem Kalebudde

Advocate-on-Record

Supreme Court of India

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**NGT Yelahanka Matter- Written Submissions FINAL.pdf**  
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