**BEFORE THE HON'BLE NATIONAL GREEEN TRIBUNAL**
**PRINCIPAL BENCH AT NEW DELHI**
**IN O.A. NO. 44 OF 2024**

**IN THE MATTER OF:**

JOT SINGH BIST .....APPLICANT

Versus

STATE OF UTTRAKHAND AND ORS. ..RESPONDENTS

**COMPILATION OF JUDGEMENTS**



THROUGH

ALPHA LEGAL ADVOCATES
C-53, BLOCK C, JANGPURA EXTENSION,
NEW DELHI – 110014

2022 SCC OnLine SC 1469

In the Supreme Court of India

(BEFORE B.R. GAVAI AND B.V. NAGARATHNA, JJ.)

Civil Appeal Nos. 2407-2412 of 2021

State of Uttar Pradesh and Others ... Appellant(s);

*Versus*

Uday Education and Welfare Trust and Others ... Respondent(s).

With

Civil Appeal Nos. 3144-3146 of 2022
Civil Appeal Nos. 3132-3134 of 2022
Civil Appeal Nos. 3135-3137 of 2022
Civil Appeal No. 3138 of 2022
Civil Appeal Nos. 4061-4062 of 2022
Civil Appeal No. 3141 of 2022
Civil Appeal Nos. 2547-2548 of 2020
Civil Appeal Nos. 3142-3143 of 2022
Civil Appeal Nos. 3147-3149 of 2022

Civil Appeal Nos. 2407-2412 of 2021, Civil Appeal Nos. 3144-3146 of 2022, Civil Appeal Nos. 3132-3134 of 2022, Civil Appeal Nos. 3135-3137 of 2022, Civil Appeal No. 3138 of 2022, Civil Appeal Nos. 4061-4062 of 2022, Civil Appeal No. 3141 of 2022, Civil Appeal Nos. 2547-2548 of 2020, Civil Appeal Nos. 3142-3143 of 2022 and Civil Appeal Nos. 3147-3149 of 2022

Decided on October 21, 2022

The Judgment of the Court was delivered by

B.R. GAVAI, J.:— A For the reasons stated in the applications for impleadment/intervention, the same are allowed.

2. This bunch of appeals challenges the order dated 18th February 2020, passed by the learned National Green Tribunal, Principal Bench, New Delhi (hereinafter referred to as "the learned NGT") in Original Application Nos. 313, 335 and 396 of 2019, thereby quashing and setting aside the notice dated 1st March 2019 issued by the State of Uttar Pradesh for establishing new wood based industries (hereinafter referred to as "WBIs") and also setting aside all the provisional licenses given in pursuance thereof.

3. The appeals also challenge the orders dated 18th March 2020, 2nd December 2020, and 21st December 2020 vide which the review applications filed by the State of Uttar Pradesh and the provisional license holders have been rejected.

4. Civil Appeal Nos. 2407-2412 of 2021 are filed by the State of Uttar Pradesh. The rest of the Civil Appeals are filed by the provisional license holders, who were granted licenses in pursuance of the notice dated 1st March 2019, issued by the State of Uttar Pradesh.

FACTUAL BACKGROUND

5. For the sake of convenience, we will refer to the facts as found in Civil Appeal Nos. 2407-2412 of 2021 filed by the State of Uttar Pradesh.

6. There are series of orders passed by this Court and the Central Empowered Committee (hereinafter referred to as "CEC") appointed by this Court, issuing various

directions for prohibiting/regulating the felling of trees as well as the establishment of WBIs. We will refer to them extensively in the subsequent paragraphs.

7. In pursuance of the order passed by this Court dated 5th October 2015 in Writ Petition (Civil) No. 202 of 1995 (*T.N. Godavarman Thirumalpad* v. *Union of India*), the Ministry of Environment and Forest and Climate Change ("MOEFCC" for short) issued Wood Based Industries (Establishment and Regulation) Guidelines 2016 (hereinafter referred to as "2016 Guidelines") vide Notification No. S.O. 3456 (E) dated 11th November 2016.

8. Subsequent to the 2016 Guidelines, timber assessment for Trees Outside Forest ("TOF" for short) in the State of Uttar Pradesh for WBIs was done for the period between February 2017 and December 2017 by the Forest Survey of India ("FSI" for short). The FSI thereafter submitted its report, which contains district wise, species wise and diameter class wise number of stems (trees), volume and annual potential production of timber from TOF in rural areas of all the districts of the State.

9. In pursuance of the 2016 Guidelines, the matter was placed before the State Level Committee ("SLC" for short) for grant of licenses to various WBIs. The SLC in its meeting held on 4th May 2018, considered the matter about the grant of licenses to various WBIs after taking into consideration the availability of wood in the State of Uttar Pradesh for determining the amount of timber available for new WBIs. In the said meeting, it was also decided that, in order to determine the correct number of new licenses to be issued to WBIs under different categories against the timber available in the State, a reassessment may be done by the Indian Plywood Industries Research and Training Institute ("IPIRTI" for short).

10. In the meeting of the SLC, held on 7th September 2018, since it was found that the capacity of plywood units is taken as fixed by the 2016 Guidelines, which, in turn, was based on the assessment of IPIRTI, a decision was taken that there was no need for the fresh assessment of the capacity by IPIRTI.

11. In pursuance of the aforesaid decision, E-lottery was held on 12th December 2018 for grant of licenses to various WBIs for the establishment of WBIs in 8 categories. Between 12th December 2018 and 31st December 2018, online letters of offer were issued to 1348 successful applicants. Subsequently, in the months of February and March 2019, provisional licenses were issued to 1215 successful applicants in the 8 categories to set up their WBIs. Subsequent thereto, on 1st March 2019, a notice was issued by the Government of Uttar Pradesh communicating the grant of provisional licenses to the newly selected WBIs.

12. Being aggrieved thereby, Original Application No. 313 of 2019 came to be filed by Uday Education and Welfare Trust before the learned NGT in March 2019. Vide order dated 28th March 2019, the learned NGT directed the State Government to submit a report from the Joint Committee comprising of the representative of Principal Secretary (Forest), U.P. and the Principal Chief Conservator of Forest, U.P. to examine the issues.

13. Being aggrieved by the notice dated 1st March 2019 issued by the State Government, Original Application Nos. 335 and 396 of 2019 also came to be filed by Samvit Foundation and U.P. Timber Association respectively before the learned NGT.

14. In pursuance of the directions issued by the learned NGT, the Joint Committee Report came to be submitted on 3rd August 2019. Vide order dated 6th August 2019 passed in Original Application nos. 313, 335 and 396 of 2019, the learned NGT directed the State Government to review the notice dated 1st March 2019 with regard to the establishment of new WBIs by 1350 units strictly in terms of the judgment of this Court in the case of *T.N. Godavarman* v. *Union of India*. Vide order dated 1st

October 2019, the learned NGT directed the status quo to be maintained.

15. The State of Uttar Pradesh filed an Interlocutory Application No. 732 of 2019 in O.A. Nos. 313, 335 and 396 of 2019, seeking modification of the order dated 6th August 2019 and the order dated 1st October 2019. Vide order dated 18th December 2019, the learned NGT issued directions to the State Government to provide certain data. Subsequently, vide the impugned order dated 18th February 2020, the learned NGT allowed the said Original Applications and quashed and set aside the notice dated 1st March 2019 issued by the State Government for establishing new WBIs and all the provisional licenses given.

16. Being aggrieved thereby, Civil Appeal (Diary) No. 12004 of 2020 was filed before this Court. Vide order dated 26th October 2020, this Court dismissed the said appeals as withdrawn with a liberty to file review application before the learned NGT. Vide orders dated 18th March 2020, 2nd December 2020, and 21st December 2020, the learned NGT rejected the Review Applications.

17. The appellants, therefore, approached this Court being aggrieved by the orders passed by the learned NGT in the Original Applications as well as in the Review Petitions.

SUBMISSIONS

18. We have heard Shri Vikas Singh, Shri P.S. Patwalia and Mr. Rana Mukherjee, learned Senior Counsel appearing on behalf of the State of Uttar Pradesh, Shri V. Giri, Shri Syed Waseem Qadri, Shri V.K. Uniyal, Shri Vinay Navare, Shri V.K. Shukla, learned Senior Counsels, Ms. Prerna Singh, and Mr. Rudraksh Gupta, learned counsels appearing on behalf of the appellants, who were granted provisional licenses. We have also heard Shri Dhruv Mehta and Shri Brijender Chahar, learned Senior Counsels appearing on behalf of the respondent No. 1.

19. Shri Vikas Singh, learned Senior Counsel, submitted that the decision of the State Government to establish WBIs is in accordance with the 2016 Guidelines issued by the MOEFCC. He submits that the timber requirement by 1215 new WBIs, which were issued provisional licenses is only 12.35 lakh cubic meters per year, whereas the total timber available in the State is 80.30 lakh cubic meters per year. It is, therefore, submitted that, as such, the requirement is not even 20% of the total availability of timber. Learned Senior Counsel submitted that the only authorized agency in the country to conduct a survey of the forest as well as TOF is FSI. It is submitted that the object of IPIRTI is not to conduct a survey of either forest or TOF. It is submitted that, as a matter of fact, the learned NGT itself has directed such a study to be conducted by FSI, who has already undertaken similar studies for many States like Punjab, Maharashtra and others. It is submitted that when the survey with regard to availability of timber in the State of Uttar Pradesh was done by the very same agency, the learned NGT fell in gross error in again directing the State Government to conduct such a survey through the FSI.

20. It is submitted that even the MOEFCC had supported the stand taken by the State of Uttar Pradesh and, therefore, the learned NGT ought not to have interfered with the decision of the State Government.

21. Shri P.S. Patwalia, learned Senior Counsel also submitted that the decision of the State Government was in tune with the decision of this Court dated 18th May 2007 and 5th October 2015 passed in Writ Petition (Civil) No. 202 of 1995 (*T.N. Godavarman Thirumulpad* v. *Union of India*). It is submitted that when an expert body like the FSI had done an elaborate study, there was no reason for the learned NGT to have sat in appeal over the same. He further submits that though a detailed affidavit has been filed on behalf of the State of Uttar Pradesh in compliance with the order of the learned

NGT dated 18th December 2019, regarding the availability of timber, the learned NGT has totally ignored the same.

22. Shri V. Giri, learned Senior Counsel, submits that the learned NGT erred in passing orders which have vitally affected the rights of the citizens who were granted provisional licenses. He submits that the order impugned is totally in breach of the principles of natural justice. It is submitted that, from the perusal of the record, it is clear that the State of Haryana while calculating its requirement for wood also takes into consideration the import from the State of Uttar Pradesh. It is submitted that when there is excess wood available in the State of Uttar Pradesh, there is no reason why the same should be permitted to be exported to the State of Haryana at the cost of entrepreneurs in the State of Uttar Pradesh.

23. Shri Vinay Navare, learned Senior Counsel, submitted that the timber used in the WBIs is from the trees which are agro-based. He submits that though the State of Uttar Pradesh had adopted an elaborate procedure right from June 2018 till the grant of licenses, the applicants before the learned NGT had taken no steps. Shri Navare submits that only after the provisional licenses were issued and 632 out of 1215 WBIs provisional license holders had already been established and commenced operations, the applications were entertained and the orders were passed to the prejudice of the WBIs. It is submitted that Section 19(1) of the National Green Tribunal Act, 2010 (hereinafter referred to as "the NGT Act") mandates following of the principles of natural justice. It is submitted that though the applications for impleadment were made by the WBIs, the applicants were not granted an opportunity of being heard.

24. Shri V.K. Uniyal, learned Senior Counsel submitted that the learned NGT had erred in using the word "allotted". It is submitted that there is no question of allotment of timber to the WBIs and they are required to purchase the same from the open market.

25. Shri V.K. Shukla, learned Senior Counsel submitted that the State Government decided to grant provisional licenses for 8 different categories of WBIs. The requirement of raw material for different categories of WBIs is different. It is submitted that the learned NGT has grossly erred in considering all categories of WBIs together and setting aside the licenses granted to all of them. It is submitted that the said industries are established in pursuance of the National Agro Forestry Policy of 2014 and as such the learned NGT ought not to have interfered.

26. Ms. Prerna Singh, learned counsel appears for the appellants, who have been granted provisional licenses for plywood (press only) category. She submits that for plywood (press only) industries, there is no requirement of consumption of timber directly. It is submitted that initially veneer is manufactured out of round/fresh timber. Veneer then so manufactured is glued and pressed together to manufacture plywood. It is submitted that the learned NGT has considered the requirement of timber as twice the actual requirement. She submits that in the State of Uttar Pradesh, veneer is manufactured in surplus, which is exported to the State of Haryana.

27. Shri Rudraksh Gupta, learned counsel, submits that the learned NGT has failed to take into consideration the report of the National Poplar Commission of India.

28. All the learned counsel appearing on behalf of the appellants, in unison, submit that the original applicants before the Court were not *bonafide* litigants. It is submitted that there are reasons to believe that the proceedings were initiated at the instance of either the existing WBIs in the State of Uttar Pradesh to prevent competition or they were filed at the instance of the WBIs in the State of Haryana who were importing timber from the State of Uttar Pradesh at cheaper rates.

29. Shri Dhruv Mehta, learned Senior Counsel appearing on behalf of the respondent No. 1, on the contrary, submits that this Court has repeatedly held that the principles of sustainable development, the precautionary principle and the polluter

pays principle are to be followed consistently. He raised a preliminary objection on the ground that in view of Section 22 of the NGT Act, the scope of an appeal before this Court could be limited to that of Section 100 of the Civil Procedure Code, 1908. It is, therefore, submitted that unless a substantial question of law is raised, the appeal could not be tenable.

30. Shri Dhruv Mehta submits that this Court vide order dated 12th December 1996 has specifically prohibited the felling of trees in any forest, public or private. He further relies on the report of CEC dated 15th March 2005 to buttress his submission that WBIs can be permitted only if they exclusively use timber derived from poplar and eucalyptus species or agriculture waste products. It is submitted that the said guidelines also specifically provided that if the unit is found to have used any timber other than poplar and eucalyptus whether from a legal source or otherwise, the license granted to the unit shall be liable to be cancelled. He further relies on the report of CEC dated 12th October 2006. He submits that an assessment has to be done on the basis of the district-wise survey about timber availability from the TOF category. He submits that the said report of CEC itself would reveal that the assessment of the State is much less than what was initially projected by the State Government. He submits that unless the timber availability for the new WBIs is assessed and the SLC examines and recommends its approval, it is not permissible to establish new WBIs.

31. Shri Mehta further submits that the report of CEC dated 18th April 2007, accepted by this Court vide its order dated 18th May 2007, would show that the availability of timber for WBIs in the State of Uttar Pradesh is only 45.70 lakh cubic meters per year. Learned Senior Counsel submits that taking into consideration the fact that presently many imported machines from China are being used, the capacity of the existing units has gone much higher and, therefore, the timber which is available in the State of Uttar Pradesh would not be sufficient to meet the demand of the existing industries.

32. Shri Mehta submits that when SLC in its meeting dated 4th May 2018 had decided to get a report from IPIRTI, there was no occasion for it to review its decision in its subsequent meeting dated 7th September 2018. He submits that the Senior Officer of the Forest Department of the rank of Chief Conservator of Forest, Kanpur Division, Kanpur recommended that the report from IPIRTI should be obtained before deciding to issue the new licenses. It is submitted that the letters of the said officer dated 11th September 2019 and 20th April 2018 have been ignored by the SLC.

33. Shri Dhruv Mehta further submits that Annexure-I to the 2016 Guidelines is in contravention of the recommendations of CEC, which takes the requirement of timber for plywood unit as “NIL”.

34. The learned Senior Counsel submits that vide Notification dated 20th July 2012, the State of Uttar Pradesh had notified 7 species of trees in the prohibited category. However, vide another Notification dated 31st October 2017, the said trees were taken out of the prohibited category. The learned NGT had set aside the said Notification of 2017 by order dated 11th September 2018. It is submitted that the said order of the learned NGT has been accepted by the State of Uttar Pradesh and a fresh notification has been issued on 7th January 2020, again bringing the said trees in the prohibited category. The learned Senior Counsel submits that while assessing the availability of timber, the trees under the said prohibited category have also been taken into consideration. He submits that if 20.75 lakh cubic meters is deducted from the availability of the timber, then the timber available in the State would be much less.

35. The learned Senior Counsel further submits that the survey has not been conducted for all the districts and has been conducted only for 30 districts and,

therefore, the survey itself is erroneous.

36. The learned Senior Counsel further submits that FSI, while conducting the survey, has not taken into consideration the rotation period and, therefore, the survey is erroneous on the said count also. Learned Senior Counsel, in support of his submissions, relies on the judgment of this Court in the cases of *Common Cause* v. *Union of India*[1], *Mantri Techzone Private Limited* v. *Forword Foundation*[2], *Municipal Corporation of Greater Mumbai* v. *Ankita Sinha*[3] and *Pragnesh Shah* v. *Dr. Arun Kumar Sharma*[4].

37. Shri Dhruv Mehta, relying on the judgment of this Court in the case of *Ankita Sinha* (supra), submits that this Court itself has considered the learned NGT to be a special Tribunal and held that it will even have jurisdiction to take suo motu cognizance of the environmental issues. He, therefore, submits that the arguments made on behalf of the appellants with regard to locus are without substance.

38. Shri Vikas Singh, learned Senior Counsel, in rejoinder, submits that the only distinction between the prohibited trees and non-prohibited trees is that the non-prohibited trees can be felled without permission, whereas prohibited trees can be felled only in certain circumstances and only after the requisite permission is granted. He submits that the perusal of the FSI survey would reveal that even after the timber requirement for 1215 new units is taken into count, the State, still, will have 26.36 lakh cubic meters in reserve. He submits that if the new WBIs are permitted, it would result in more farmers going in for agro forestry in the State, which, in turn, will increase the forest cover. It is submitted that said 1215 units are likely to give employment to around 80000 people. Learned Senior Counsel, therefore, submits that the impugned orders deserve to be quashed and set aside.

EARLIER ORDERS OF THIS COURT

39. For appreciating the rival submissions, it will be apposite to refer to certain orders passed by this Court.

40. This Court in the case of *T.N. Godavarman* (supra) passed an order on 12th December 1996. The relevant part thereof is as under:

> "6. Each State Government should within two months, file a report regarding -
>
> (i) the number of saw mills, veneer and plywood mills actually operating within the State, with particulars of their real ownership;
>
> (ii) the licenced and actual capacity of these mills for stock and sawing;
>
> (iii) their proximity to the nearest forest;
>
> (iv) their source of timber.
>
> 7. Each State Government should constitute within one month, an Expert Committee to assess:
>
> (i) the sustainable capacity of the forests of the State qua saw mills and timber based industry;
>
> (ii) The number of existing saw mills which can safely be sustained in the State;
>
> (iii) The optimum distance from the forest, qua that State, at which the saw mill should be located."

41. Vide subsequent order dated 4th March 1997[5], this Court directed thus:

> "6. All unlicensed saw mills, veneer and plywood industries in the State of Maharashtra and the State of Uttar Pradesh are to be closed forthwith and the State Government would not remove or relax the condition for grant of permission/licence for the opening of any such saw mill, veneer and plywood industry and it shall also not grant any fresh permission/licence for this purpose. The Chief Secretary of the State will ensure strict compliance of this direction and file a compliance report within two weeks."

42. Vide order dated 9th May 2002, this Court constituted CEC for monitoring of the implementation of the orders passed by this Court and for placing non-compliances of the cases before it.

43. Vide order dated 29th October 2002[6], this Court further directed thus:

> "44. No State or Union Territory shall permit any unlicensed sawmills, veneer, plywood industry to operate and they are directed to close all such unlicensed unit forthwith. No State Government or Union Territory will permit the opening of any sawmills, veneer or plywood industry without prior permission of the Central Empowered Committee. The Chief Secretary of each State will ensure strict compliance with this direction. There shall also be no relaxation of rules with regard to the grant of licence without previous concurrence of the Central Empowered Committee.
>
> 45. It shall be open to apply to this Court for relaxation and or appropriate modification or orders qua plantations or grant of licences."

44. Vide order dated 1st September 2006, this Court allowed licenses to be issued to the closed sawmills, Veneer and Plywood units as per availability of timber and eligibility and seniority as per CEC recommendation.

45. In pursuance of the orders passed by this Court, SLC was constituted by the State of Uttar Pradesh for verification and compilation of information about closed WBIs.

46. The FSI conducted its assessment and assessed the annual availability of wood from TOF in the State of Uttar Pradesh at 55.61 lakh cubic meters vide report dated 3rd April 2007.

47. On the basis of the report of the FSI, the SLC assessed the annual availability of timber for WBIs from TOF at 53.01 lakh cubic meters. CEC further reduced the same to 43.70 lakh cubic meters. However, it added 2.00 lakh cubic meters per year as timber available from government forests, and, therefore, assessed the annual availability of timber at 45.70 lakh cubic meters.

48. It is to be seen that in its report itself, the CEC included 17.77 lakh cubic meters of timber from the prohibited species. This Court considered the report of CEC and passed the following order on 18th May 2007:

> "The matters relate to Saw Mills, Plywood and Veneer Units.
>
> The CEC has considered the availability of wood for the industries, which was assessed as 43.70 lakh cu. mt from trees outside forests and 02.00 lakh cu. mt from Government Forests.
>
> It has also assessed the units into four categories.
>
> We accept the CEC's recommendations. The Saw Mills, Plywood and Veneer Units may be permitted, on the basis of the recommendations made by the CEC. Licences may be given by the State Level Committees.
>
> If there are any objections regarding grant of licences, the parties would be at liberty to submit their applications before the CEC for consideration."

49. It could thus be seen that in 2007 itself, this Court had accepted the recommendations of the CEC wherein the CEC had computed the total availability of timber and had also taken into consideration the availability of timber from the prohibited category.

50. Vide order dated 29th February 2008, this court considered the issue regarding the manufacturing of Medium Density Fiber board (MDF) and Particle board in the States of Punjab, Uttarakhand and Karnataka. While considering the same, this Court passed the following order:

> "The matter relates to the manufacturing of Medium Density Fiber board (MDF)

and Particle Board in the States of Punjab, Uttarakhand and Karnataka. CEC has filed its report and stated that there is a growing trend to use more and more MDF/Particle Board in place of industrial timber. The MDF/Particle Board help in reducing the pressure on natural forests. The lops and tops and small wood available from the plantations of eucalyptus, poplar, etc. raised on the non-forest can be used by MDF/Particle Board plants."

51. In view of the permissions granted by this Court, the licenses were granted to the unlicensed sawmills which were closed on account of the orders passed by this Court taking into consideration the availability of timber between 2007 and 2010. However, it is to be noted that the said licenses were granted only to the units which were closed and not to the new units.

52. The matter again came up for consideration before this Court on 30th April 2010, when this Court passed the following order:

"(II) after meeting the requirement of the licensed wood based industry, the units permitted by this Hon'ble Court and the units whose category is yet to be finalised, the plywood/veneer units falling in category IV may be considered for grant of license to the extent of timber availability and strictly in the order of seniority, subject to the one-time payment of Rs. 9 lakhs per press in respect of the veneer units and compliance of the other conditions that have been stipulated. The one-time payment of penalty will be in addition to the normal licence fee and the other charges, if any, payable to the U.P. Forest Department. As decided earlier, the above said amount should be kept in a designated interest bearing bank account and should be utilized only after the scheme in this regard is approved by this Hon'ble Court;"

53. It could thus be seen that this Court permitted granting of additional licenses if additional timber was found to be available.

54. The CEC in its meeting held on 26th May 2010 with the SLC and representatives of WBIs Associations in the State of Uttar Pradesh, after taking into consideration the capacity of timber for Vertical Band Saw (VBS) sawmill, modified/reduced the value of capacity of timber for VBS sawmills upto 10 Horse Power from 540 to 270 cubic meters per year for the State of Uttar Pradesh in line with other States. As such, additional 9,58,230 cubic meters of timber became available for licenses from 3,549 such VBS units. In view of this position between 2010 and 2015, licenses came to be issued by the State of Uttar Pradesh to unlicensed WBIs, which were closed earlier by the order of this Court, as per the criteria recommended by the CEC and accepted by this Court.

55. The matter again came up for consideration before this Court on 5th October 2015 with regard to WBIs, when this Court passed the following order:

"CATEGORY I - MATTERS RELATING TO WOOD BASED INDUSTRIES:

We have heard Shri Harish Salve, learned *amicus curiae,* Shri Ranjit Kumar, learned Solicitor General of India, Shri K.K. Venugopal, learned senior counsel and other learned senior counsel/counsels. Accordingly, we pass the following orders:

(i) The State Level Committees for Wood-Based Industries ("SLCs") are, subject to the compliance of the prescribed guidelines and procedure, authorized to take decisions regarding the grant of license/permission to the wood-based industries;

(ii) In each State/UT for which the SLC has so far not been constituted, the SLC under the Chairmanship of the Principal Chief Conservator of Forests with a representative of the Ministry of Environment and Forest and Climate Change ("MoEFCC") and an officer of the State Forest Department/Industries

Department not below the rank of the Chief Conservator of Forests/equivalent rank will immediately be constituted;

(iii) The MoEF is authorized to issue appropriate guidelines in conformation with the orders and directions issued by this Court and also the existing guidelines to the SLCs relating to assessment of timber availability for wood-based industries and grant of license/permission to the wood-based industries including addition of new machineries and also utilization of amounts recovered from the wood-based industries and connected matters;

(iv) Any person aggrieved by the decision taken by the SLC may file an appeal before the MoEFCC seeking appropriate relief within 60 days' time. If, for any reason, any person is aggrieved by the orders so passed in the appeal, he may prefer an appropriate petition/application/appeal before the appropriate forum/Court for grant of appropriate relief(s).

We also permit the MoEFCC to condone the delay, if any, in filing an appeal, if sufficient cause is made out by the applicant(s)/appellant(s)"

56. It is thus seen that vide the said order, SLCs were authorized to take decisions regarding the grant of license/permission to the WBIs. Vide the said order, it was also directed to constitute SLC under the Chairmanship of the Principal Chief Conservator of Forest with a representative of MOEFCC and an officer of the State Forest Department/Industries Department not below the rank of the Chief Conservator of Forests/equivalent rank. This Court further directed the SLCs to be constituted in each State/Union Territory for which the SLC was not yet constituted. The MOEF was also authorized to issue appropriate guidelines in conformity with the orders and directions issued by this Court and also the existing guidelines to the SLCs relating to the assessment of timber availability for WBIs. Appeals could be filed before MOEFCC against the decision of the SLC.

MOEFCC GUIDELINES

57. In accordance with the directions issued by this Court vide order dated 5th October 2015, the MOEFCC issued 2016 Guidelines on 11th November 2016. The 2016 Guidelines provided for the constitution of the SLC as well as the powers and functions of SLC. Under clause 4 of the 2016 Guidelines, the SLC was authorised to assess the availability of timber for wood based industrial units in the State/UT every five years. The SLC was also authorised to approve appropriate locations for setting up of wood based industrial units. It was also authorized to approve the name of wood based industrial units which may be considered for grant of fresh license or enhancement of the existing licensed capacity.

58. Clause 5 of the 2016 Guidelines provides for the assessment of the availability of timber for wood based industrial units. It requires that the quantity of timber would be assessed by commissioning the study, preferably in collaboration with institutes/universities of repute, once in five years. Under clause 6 of the 2016 Guidelines, the timber requirement for various units as assessed by IPIRTI was given in Annexure I. The said Annexure I reads thus:

"The Indian Plywood Industry Research and Training Institute (IPlRTI), Bangalore an autonomous body under the Ministry of Environment, Forest and Climate Change has assessed the timber requirement per unit for peeling length of 4 feet and 8 feet size in the plywood/veneer units as 5 cu.mt and 11 cu.mt. respectively per day on an average of 8 working hours per day. By assuming that the peeling units work for 8 hours per day on an average for 300 days in a year the normal timber requirement of the peeling length of 4 feet size in veneer units is 1500 cu.mt. The total timber requirement for the stand alone veneer units may be assessed by calculating the equivalent number of 4 feet length machines and by taking its normal installed capacity as 1500 cu.mt. per annum.

> The timber requirement of a plywood unit may be taken as 'nil' on the ground that the round timber is used as timber in the veneer units only and that the plywood units are the secondary users which use the veneer as the raw material produced by the veneer units. The plywood units use presses of various sizes such as 8 × 4 × 6, 8 × 4 × 12, 8 × 4 × 15, 4 × 4 × 7, 4 × 4 × 10. A 8 × 4 × 10 capacity press can produce upto 10 plywood pieces of 8′ × 4′ size per hour whereas a 8 × 4 × 15 capacity press can produce upto 15 plywood pieces of 8′ × 4′ size per hour and so on. The normative installed capacity of the plywood units will accordingly depend upon the number and the type of presses. This number and type of presses installed in each of the plywood unit may be assessed and thereafter equivalent number or presses of 8 × 4 × 10 capacity may be calculated. The normative annual timber requirement for a integrated plywood unit having a 8 × 4 × 10 capacity press may be taken as 2000 cu.mt. per annum, and accordingly the total requirement of timber for the plywood units should be calculated."

59. It could thus be seen that even as per the assessment of the IPIRTI, the timber requirement of a plywood unit is required to be taken as 'NIL' on the ground that the round timber is used as timber in the veneer units only and that the plywood units are the secondary users which use the veneer as raw material. It could thus be seen that the plywood units use presses of various sizes.

60. In pursuance of the 2016 Guidelines, the SLC was reconstituted in the State of Uttar Pradesh under the Chairmanship of Principal Chief Conservator of Forest/Head of Forest Department on 17th May 2017. Vide Notification dated 11th September 2017, the MOEFCC amended the 2016 Guidelines.

61. Subsequently, in accordance with the 2016 Guidelines, the SLC assessed the availability of timber for WBIs in the State of Uttar Pradesh, through the FSI. For assessing the availability of timber, the FSI conducted a survey and arrived at the annual potential production of timber from TOF in rural areas of all the districts of the State. FSI assessed the annual potential production from TOF at 77.74 lakh cubic meters. Subsequent to the survey and assessment, the SLC in its meeting dated 4th May 2018 considered the matter for grant of license to various WBIs. The SLC decided to get the reassessment done by IPIRTI to determine the correct number of new licenses to be issued to WBIs under different categories against the available timber. However, subsequently, the SLC, in its meeting dated 7th September 2018, found that IPIRTI had not done any new study/assessment of the consumption of timber by various WBIs in any State/Union Territory. It was also found that the State of Haryana had adopted the timber consumption figures based on the CEC figures of 2007. It was therefore unanimously resolved by the SLC that there was no need for any fresh study/assessment for the consumption of timber by WBIs to be conducted by IPIRTI and to adopt the figures for WBIs as were referred to in the 2016 Guidelines. It further found that the CEC in its meeting dated 26th May 2010 had reduced the annual consumption of timber of sawmills upto 10 Horse Power or less HP to 270 cubic meters from 540 cubic meters.

62. On the basis of the decision of the SLC, e-lottery was held. After following the procedure, provisional licenses were issued to 1215 successful applicants in 8 categories of WBIs in February and March 2019. After the issuance of provisional licenses, on 1st March 2019, the State Government issued a Notice with regard to grant of provisional licenses to the newly selected WBIs which came to be challenged before the learned NGT by way of filing the aforesaid Original Applications by the respondents. The learned NGT after passing various interlocutory directions finally passed the impugned order and quashed and set aside the notice dated 1st March 2019 issued by the State Government and provisional licenses given in pursuance

thereof. As such we are required to examine the correctness of the decision of the learned NGT.

CONSIDERATIONS

63. The learned NGT while passing the impugned order has set aside the notice of the State of Uttar Pradesh on the following grounds:

(1) that the WBIs can be allowed to operate only after ensuring timber and raw material availability to sustain such industries and this has to be determined in actual terms and not on mere assumptions;

(2) that it is difficult to accept the stand of the State of Uttar Pradesh that there was availability of timber/raw material to sustain the new WBIs;

(3) that it is the stand of the State of Uttar Pradesh that the total potential availability of timber per year in the State of Uttar Pradesh is 80.30 lakh cubic meters, which includes 2.56 lakh cubic meters from the Government forests and 77.74 lakh cubic meters from TOF. Out of 80.30 lakh cubic meters, 71.8 lakh cubic meters were stated to be available from 22 species and 8.50 lakh cubic meters from the other species. Out of 22 species, there are 10 species that are prohibited from felling and as such, 20.75 lakh cubic meters from these 10 species are liable to be excluded;

(4) that the major contribution is from Eucalyptus (28 lakh cubic meters) and Poplar species (15 lakh cubic meters), a total of which is 43 lakh cubic meters. Thus, the figure is not actual but presumptive;

(5) that the standard error percentage adopted by the FSI is not correct and is much higher;

(6) that the total availability of timber for consumption including that from the government forests would not be more than 40-45 lakh cubic meters per year;

(7) that the potential availability of 77.74 lakh cubic meters from TOF as given in the affidavit has been overestimated.

64. It is to be noted that after this Court allowed the licenses to be issued to the closed sawmills vide order dated 1st September 2006, the SLCs were constituted. The permissions were to be granted on the recommendations of the CEC. Vide order dated 18th May 2007, this Court had also accepted the recommendation of the CEC. Vide another order dated 30th April 2010, this Court permitted additional licenses to be granted if additional timber was available. Accordingly, licenses were granted between 2010 and 2015. Vide subsequent order dated 5th October 2015, this Court allowed the grant of license/permission to unlicensed WBIs in the country. This Court had directed the reconstitution of the SLCs for WBIs. In pursuance of the directions issued by this Court, the 2016 Guidelines were issued by the MOEFCC. As per the 2016 Guidelines, the SLC was reconstituted in the State of Uttar Pradesh on 17th May 2017.

65. One of the duties which was cast upon the SLC was to assess the availability of timber for wood based industrial units in the State. The SLC was to assess the availability of timber by commissioning studies, preferably in collaboration with institutes/universities of repute, once in five years. In accordance with the 2016 Guidelines, the FSI conducted the survey and submitted its report in March 2018. It will be relevant to refer to the relevant part of the Foreword of the said report of the FSI.

> "In the recent past, a number of requests were received for establishment of wood based industries in the state for which the raw material would come from outside the forest areas. Since accurate assessment of TOF is needed for effective planning & management, Uttar Pradesh Forest Department requested FSI to make Agro-Climatic zone wise assessment on the basis of inventory already done during its regular course of inventory conducted in the State. As per the final report, the

total stems as estimated from the study is 299.43 million with a volume of 79.40 m. cum. The total yield in the Uttar Pradesh is estimated 7.8 million cum.

The report gives an assessment of the growing stock existing outside state forest reserves. The report has also indicated district-wise, species-wise and girth class-wise number of stems and volume in each Agro-Climatic Zone wise of inventoried districts. I am confident that this report would provide useful data for arriving at informed policy and programme interventions to give a fillip to forestry sector in the state besides providing benchmark data for tree crop in non-forest area."

66. After conducting the survey, the FSI has come to a finding that the State of Uttar Pradesh had an annual potential production of 77,74,521 cubic meters of timber. For conducting the survey, the FSI acquired satellite data for the inventoried districts of Uttar Pradesh State from National Remote Sensing Centre, Hyderabad. The entire gambit of scientific methodology was applied. The data processing was carried out independently for all the inventoried districts of Uttar Pradesh. It will be relevant to refer to the following part of the report of the FSI:

"The data processing was carried out independently for all the inventoried districts of Uttar Pradesh. Estimates of stems per ha and volume per ha were generated according to species and diameter class for block, linear and scattered stratum under each district. Estimated stems and their volumes were generated according to species and diameter class by aggregating stem per hectare and volume per hectare over the entire Rural CNF Area of each stratum for each district by combining the estimated stems and volumes under block, linear and scattered stratum. By aggregating the estimates of stems and volume of all the three strata, the estimates of stems and volumes according to species and diameter class has been prepared for Rural area separately."

67. The FSI had also divided the State of Uttar Pradesh into 9 Agro-climatic zones to generate the estimate of growing stock and annual potential production. District-wise production was estimated before concluding that 77,74,521 cubic meters of timber was the annual potential production. The contention of the respondents that the rotation method was not applied is totally incorrect. It will be relevant to refer to paragraph 5.4 of the said report, which reads thus:

"5.4 Estimates of Annual Potential Production of Wood from TOF (Rural)

Yield of a forest depends on several factors such as its structure, growth, density, productive capacity of site etc. The estimate of yield been generated for rural area using growing stock estimates. The Uttar Pradesh Forest Department was supplied the complete list of tree species which were found in the survey. The Uttar Pradesh Forest Department was asked to indicate tree species being used as 'timber' and 'non timber' and rotation period of specified timber species. *The Uttar Pradesh Forest Department informed that they do not have rotation period of all species and requested Forest Survey of India to use their rotation period used for estimation of annual potential production of wood.* The species are arranged into two groups; one containing the species having timber values and another containing rest by agro-climatic zone wise. The yield has been calculated using Von Mentel formula as given below:

Yield= 2GS/R

Where GS : Growing Stock

R : rotation period

Using the information of timber value, growing stock and rotation period in the above mentioned formulae species wise yield were calculated. The Agro-Climatic Zone wise yield has been given in Annexure-11."

[emphasis supplied]

68. The standard error was also determined by applying the appropriate scientific method.

69. The FSI, hence, considered various aspects before concluding and submitting its 101 page report.

70. It could thus be seen that the estimation as arrived at by the FSI was by applying a proper and adequate scientific method.

71. However, it is surprising that the learned NGT has brushed aside such a scientific exercise by merely observing that the figures arrived at were by estimation and not realistic.

72. The FSI has published a paper on "Trees Outside Forest Resources in India". The contributors to the said paper are (1) Dr. Subhash Ashutosh, DG, FSI; (2) Prakash Lakhchaura, DDG, FI, (3) Kamal Pandey, DD, FI; (4) Dr. Sourav Ghose, Proj. Scientist D; (5) Sushila Tripathi; and (6) H.K. Tripathi. The paper shows that the timber and panel products of TOF origin have emerged as the major alternative to timber from forests and thus TOF have significantly obviated pressure from forests. The report shows that, the extent of TOF in the country has been assessed at 29.38 m hectare, which is around 8.94% of the total geographical area of the country. The report further shows that based on the recommendations of the National Commission on Agriculture (NCA, 1976), the Government of India launched a social forestry program in the late seventies on a large scale. The paper further shows that, these days satellite data in a wide range of spectral, spatial, radiometric and temporal resolutions are available from various Remote Sensing Agencies of several countries. It further shows that there has been a rapid advancement in the development of digital image processing software. It, therefore, observes that the desired mapping of natural resources with reasonable accuracy is possible. The report refers to the methodology of assessment of TOF in different countries of the world and refers to various authorities. It refers to different types of methodologies used for different periods; the first one being from 1991 to 2001; the second period being from 2001 to 2016; and the third period being from 2016 onwards. The report shows that the State of Maharashtra has the highest potential annual yield of timber in India followed by the States of Uttar Pradesh and Karnataka.

73. It will be relevant to refer to the conclusion of the said paper, which is as follows:

> "5. Conclusion
>
> TOF play a significant role in the socioeconomic lives of people both in rural and urban areas of the country by enriching the people and society at large economically as well as ecologically. The management of TOF assumes high significance in the country for realizing much higher potential which it offers in generating wood based economy and ecosystem services including carbon sequestration. Periodic assessment of TOF resources including its spatial distribution is prerequisite for its scientific management in the country. FSI is mandated with this task however there is need for continuous improvement in the methodology and inclusion of more number of variables in the assessment. The organization will have to be further strengthened particularly in terms of man power, to address the emerging information needs on TOF. There has been regular refinement in methodologies in the last three decades to quantify TOF resources using various statistical designs and estimates with better precision. The advancement of technologies in the field of remote sensing, satellite image processing and availability of high resolution satellite data made the methodology much precise and easier. The progression of science may further refine the existing method of TOF assessment in near future.
>
> TOF also act as an important source for timber and fuel wood to meet the

demands of fast growing population of the country. There is a need to put focus on increasing the growing stock per hectare or yield of TOF by better management and planning. There is also a need for a separate policy on TOF to ensure its expansion and sustainable management for multiple ecological benefits, timber production, carbon sequestration and for obviating pressure from the natural forests.

Occupying nearly 9% of the geographical area of the country, TOF are significant natural, renewable resource which make vital contribution to the agro-ecology, socio -economy of the rural areas, environmental amelioration in the urban areas and feed wood based industries with the raw material and thus generate significant employment. TOF form a nearly 38% of the carbon sink in forest & tree cover of the country. TOF offers the path for achieving the national policy goal of 33% of forest & tree cover in the country. Through expansion of TOF, particularly in agro-forestry and on culturable waste lands, India can substantially increase its carbon sink to achieve its international commitments of NDC and LDN by 2030."

74. It could thus be seen that the FSI has also emphasized the need of promoting TOF. It has been observed that TOF are significant natural, renewable resources which make vital contributions to the agro-ecology, socio-economy of the rural area, and environmental amelioration in the urban area and feed WBIs with raw material and thus generate significant employment.

75. It is our considered view that, when the estimation was done by the FSI by applying the scientific method and had arrived at the conclusion based on satellite data, such a report could not have been brushed aside by the learned NGT lightly.

76. Insofar as the finding of the learned NGT that the survey also takes into consideration the prohibited trees, the felling of which is not permissible, it will be relevant to note that the Notification dated 7th January 2020 issued by the Government of Uttar Pradesh provides that the prohibited trees shall not be felled till 31st December 2025 except under unavoidable circumstances, such as when a tree is dead or dying or it constitutes a danger to persons or property, or its felling is necessary for executing development work approved by the Government, or if the fruit bearing capacity of such tree has declined substantially. Such trees cannot be felled unless permission to fell such tree has been obtained in writing from the competent authority. The tree owners are also required to maintain 10 trees in place of each tree felled. It is thus clear that there is no absolute prohibition for felling the trees which are in the prohibited category. However, the same can be done only in exceptional circumstances.

77. It is to be noted that the prohibited trees also include trees like Mango, Jamun, etc. which are fruit bearing trees. After a particular number of years, the fruit bearing capacity of such trees drastically reduces and as such, the farmers normally fell such trees and go in for replantation of the orchard. Apart from that, it is to be noted that the CEC itself approved the availability of timber for the State of Uttar Pradesh in its report dated 19th April 2007, which included 17.77 lakh cubic meters of prohibited trees. The said report of the CEC was approved by this Court vide its order dated 18th May 2007.

78. It is further to be noted that in pursuance of the order of the learned NGT dated 28th March 2019, a Committee of Experts [Joint Committee comprising of representative of Principal Secretary (Forest), U.P. and Principal Chief Conservator of Forest, U.P.] had submitted its report on 3rd August 2019. Not only this, but in pursuance of the directions issued by the learned NGT on 18th December 2019, another detailed affidavit was filed on behalf of the State Government on 21st January 2020, giving therein the details about the availability of timber. It was specifically stated in the said affidavit that eucalyptus and poplar are the main species of TOF and

80% of the wood is derived therefrom. It was further pointed out that the farmers in the State of Uttar Pradesh were not getting remunerative prices and are forced to sell their produce at a very cheap rate mainly to middlemen. It was also pointed out that there would be an expected investment of about Rs. 3000 crore in the State with the establishment of new WBIs. The same would employ more than 80000 people, mostly in the rural areas of the State. However, all these factors have been ignored by the learned NGT.

79. As such, the learned NGT has grossly erred in deducting the availability of timber from the prohibited trees. By now, it is more than settled that the Courts should not enter into an area that is the domain of the experts. FSI, which is undisputedly an expert body, had arrived at its estimation based on the scientific method. The learned NGT could not have sat in appeal over the opinion of the expert.

80. It is relevant to note that MOEFCC, in pursuance of the directions issued by the learned NGT had filed its opinion on 18th December 2019. It will be relevant to refer to paragraph 8 of the said opinion.

> "8. That based on the examination of available documents in light of the provisions of the Wood Based Industries (Establishment and Regulation) Rules, 2016, MoEFCC is of the opinion that the State of U.P. has followed the Wood Based Industries (Establishment and Regulation) Guidelines, 2016 (as amended in 2017) issued by MoEFCC. The availability of wood in the State has also been assessed by the SLC through FSI. The Ministry is, therefore, of the view that the SLC may approve setting up of new industries in the State if it is satisfied that sufficient timber is available legally to run the new wood based industries."

81. The learned NGT has failed to take into consideration the stand of the MOEFCC, which also supported the stand of the State that sufficient timber was available legally to run the new WBIs.

82. Insofar as the contention of the learned counsel for the respondents that, though in the meeting of the SLC dated 4th May 2018, it was decided to get the assessment done by IPIRTI, the SLC in its meeting dated 7th September 2018 did a volte-face and decided not to get the assessment done from IPIRTI, the perusal of the minutes of the meeting of the SLC dated 7th September 2018 would reveal that it was found that the IPIRTI had not done any new study/assessment of the consumption of timber by various WBIs in any State/Union Territory. It was noticed that, as per the report of the FSI, the TOF available was 77,74,522 cubic meters. Adding the timber available in the forest area of 2,57,273 cubic meters, the total quantity of availability of timber was 80,31,795 cubic meters. It is to be noted that the SLC had taken note of the letter dated 29th August 2018 issued by the Director, IPIRTI, where he had communicated that no assessment pertaining to the annual consumption of timber by Veneer and Plywood Industries was undertaken by the IPIRTI during the last two years in any State of the country. It was found that the 2016 Guidelines itself provided for annual consumption of timber based on the report of IPIRTI. In this premise, it was found that there was no need to conduct a fresh study/assessment for the consumption of timber by WBIs by IPIRTI. It was decided to accept the figures as provided in the 2016 Guidelines.

83. It can thus be seen that the decision of the SLC for not getting the assessment done by the IPIRTI is based on sound reasons. When the 2016 Guidelines itself provided for the consumption of timber by WBIs based on the report of the IPIRTI, there was no purpose to again get the assessment done by IPIRTI. The scope of judicial review has been succinctly explained by this court in the case of *Tata Cellular* v. *Union of India*[7], which has been consistently followed in a catena of cases. This Court, in the said case, observed thus:

"77. The duty of the court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers?
2. Committed an error of law,
3. committed a breach of the rules of natural justice,
4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(*i*) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(*ii*) Irrationality, namely, Wednesbury unreasonableness.

(*iii*) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in *R.* v. *Secretary of State for the Home Department, ex Brind* [[1991] 1 A.C. 696], Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention"."

84. Applying the aforesaid principle to the present case, it cannot be said that the decision-making process has been vitiated either on account of illegality, irrationality or procedural impropriety.

85. With regard to the contention of Shri Dhruv Mehta, learned Senior Counsel, that Annexure I to the 2016 Guidelines providing the timber requirement of a plywood unit to be taken as "NIL" is contrary to the CEC recommendations is concerned, we do not find any substance in the said submission. Firstly, 2016 Guidelines have been issued by the MOEFCC in pursuance of the directions issued by this Court dated 5th October 2015. In any case, the raw material for plywood industries is 'Veneer' and the raw material for veneer is 'timber'. We find substance in the contention of the appellants that, if timber is to be considered again as a raw material for plywood, then it will amount to showing the consumption of the same timber more than once, which is, in fact, not consumed. It is not in dispute that veneer is a raw material for plywood, which is derived from timber. The same timber is used for deriving veneer and such veneer, which is used for manufacturing plywood, cannot be counted twice. In any case, as long as the 2016 Guidelines which are issued in pursuance of the directions issued by this Court are not set aside, the contention in that regard is without substance.

86. That leads us to consider the contention of the respondents that this Court has repeatedly emphasized the principles of sustainable development, the precautionary principle and the polluter pays principle. No doubt that the protection of the environment is of utmost importance. It is the duty of this generation to protect the environment for future generations.

CONCLUSION

87. It cannot be disputed that Section 20 of the NGT Act itself directs the learned Tribunal to apply the principles of sustainable development, the precautionary principle and the polluter pays principle. Undisputedly, it is the duty of the State as

well as its citizens to safeguard the forest of the country. The resources of the present are to be preserved for the future generations. However, one principle cannot be applied in isolation of the other.

88. It is necessary that, while protecting the environment, the need for sustainable development has also to be taken into consideration and a proper balance between the two has to be struck.

89. A body having expertise in the field, i.e. the FSI, upon a scientific study, has concluded that there is sufficient timber available in the State of Uttar Pradesh. Not only that, but the respondents themselves have placed on record a project report on "Study to know the percentage and value of the raw material sourced through U.P. Forests by Plywood and Khair (Kattha) Industries in U.P.". The said report is prepared by RAK Management Consultants on the instructions of the Department of Planning, Economic and Statistics Division, Government of Uttar Pradesh. The said report itself shows that the consultants, during the field survey, observed resentment among the plywood manufacturers against the process of issuing new licenses to the WBIs by the State Government.

90. The report further goes on to show that on average 1500-1700 trucks/tractor trollies of the eucalyptus and popular wood from all over Haryana, Punjab, Himachal Pradesh and Uttar Pradesh go to Yamuna Nagar, Haryana daily. Out of the said trucks/trollies, approximately 300-350 tractor trollies and some other small vehicles per day come from Uttar Pradesh. The report shows that approximately 5 to 6 lakh metric tons of timber per year is exported to Yamuna Nagar. The said material belongs to the western districts of Uttar Pradesh, i.e. Muzaffarnagar, Saharanpur, Shamli, Baghpat and Meerut. It is stated that there is no sufficient market for this produce in the said area. The report further finds that the western districts of Uttar Pradesh, i.e. Meerut, Muzaffarnagar, Saharanpur, Baghpat and Shamli, etc. do not have sufficient number of plywood and veneer units and as such, they are not sufficient for the entire farmers' produce available in the said area. The report itself shows that the western districts need around 80-85 plywood and veneer units. The report goes on further to show that there is dissatisfaction among the already existing industrialists about the assessment made by the FSI.

91. It is further to be noted that the State has specifically pointed out before the learned NGT that on the establishment of WBIs, an investment of about Rs. 3000 crore was likely to be attracted in the State; employment opportunities to over 80000 people will be available and the farmers of the State would get a more remunerative price. This would result in more impetus for large-scale plantation and agro-forestry. The State also emphasized that this will reduce dependence on traditional/cash crops and also reduce migration of people to urban areas. It is also emphasized that if the new WBIs are permitted, it will reduce the import of WBIs produce. However, all these aspects have not been taken into consideration by the learned NGT.

92. It will be relevant to note that the Forest Research Institute, Dehradun, Uttarakhand has published 'Country Report of Poplars and Willows Period : 2012-2015'. The report states that the timber from poplar and willow is the backbone of vibrant plywood, board, match, paper and sports goods industries. The report further states that in tune with Indian Agroforestry Policy 2014, the plantation of poplar has been promoted. It further states that the Planning Commission of India has given special grants to certain States for the diversification of agriculture where farmers are advised to move away from paddy cultivation to sustain agricultural production. Poplar and eucalyptus are among the few trees promoted under this diversification plan. The report states that Poplar plays a significant role in rural development by generating employment for many categories of skilled, semi-skilled and unskilled workers.

93. The paper on "Trees Outside Forest Resources in India" published by the FSI,

cited supra, also emphasizes that TOF are significant natural, renewable resources which make vital contributions to the agro-ecology, socio-economic improvement of the rural areas, environmental amelioration in the urban areas and feed WBIs with raw material and thus generate significant employment. TOF form nearly 38% of the carbon sink in the forest and tree cover of the country. It states that TOF offers the path for achieving the national policy goal of 33% of forest and tree cover in the country. It states that through the expansion of TOF, particularly in agro-forestry and on culturable waste lands, India can substantially increase its carbon sink to achieve its international commitments of NDC and LDN by 2030.

94. As already discussed herein above, the majority of TOF is from two species, i.e. Poplar and Eucalyptus. These trees are fast growing. If a market is available for the said trees, there will be impetus to the farmers for large scale plantations. The rotation in these species is quite fast. This will, in turn, increase the green coverage. We are of the considered view that the learned NGT has taken a lopsided view. It has failed to take into consideration the concerns expressed by the State. The learned NGT has committed patent error in ignoring the expert's report and sitting in appeal over the same. The learned NGT has also failed to take into consideration the stand taken by the MOEFCC, which supported the stand of the State. As already discussed herein above, the State had emphasized many advantages of granting new licenses to WBIs. It was also emphasized that the timber from the State of Uttar Pradesh was being exported to the State of Haryana. However, none of these aspects have been considered by the learned NGT. We are, therefore, of the considered view that the impugned orders of the learned NGT are not sustainable in law.

95. There is another reason, in our view, why the order of the learned NGT would not be sustainable. Though, on the date on which the review applications were rejected, 1215 provisional licenses were already granted and 633 units had already been established and commenced production, the learned NGT has passed the impugned order which adversely affects their interest. Either some of such industries ought to have been impleaded in their representative capacity or a public notice should have been given so that such license holders could have represented their case. However, the said contention is lightly brushed aside by the learned NGT by holding that, since the issue is related to the general decision of the State which is applicable uniformly to all the proposed provisional licensees, it is not necessary to consider the issue raised in the impleadment applications. It is more than a settled law that the principles of natural justice are required to be followed even in administrative actions when such actions adversely affect the rights of the citizens. When the learned NGT exercised its judicial powers, it could not have ignored the principles of natural justice, which, even under Section 19(1) of the NGT Act, it is bound to follow.

96. Another aspect that needs consideration is that a serious issue was raised before the learned NGT by the appellants herein with regard to the credentials and *bonafides* of the original applicants.

97. When the matter was heard by us, we too made pertinent queries to Shri Mehta and Shri Chahar with regard to the credentials of the applicants before the learned NGT. One applicant is Uday Education and Welfare Trust; the second applicant is Samvit Foundation and the third applicant is U.P. Timber Association. Undisputedly, the U.P. Timber Association was a litigant interested in the litigation. However, insofar as the other original applicants, i.e. Uday Education and Welfare Trust and Samvit Foundation, for whom Shri Dhruv Mehta and Shri Brijender Chahar, learned Senior Counsel are appearing, specific queries with regard to the activities undertaken by the said original applicants were made as to whether they were involved in any activity with regard to the protection of the environment; had they at least been engaged in promoting plantation; what were the aims and objectives of the said original applicants; and what are the sources of funding, etc. Shri Mehta and Shri Chahar,

learned Senior counsel, fairly submitted that apart from the fact that they (original applicants) had previously filed some public interest litigations wherein orders were passed in their favour, they had no other information.

98. Shri Dhruv Mehta, learned Senior Counsel has rightly relied on the judgment of this Court in the case of *Ankita Sinha* (supra) to submit that the learned NGT is empowered to take suo motu cognizance. This Court has held that, taking into consideration the nature of functions of the learned NGT, it cannot be equated with other Tribunals and in environmental matters, it will also have a power to take *suo motu* cognizance. However, when the credentials and *bonafides* of a litigant approaching the learned NGT are seriously raised, the same cannot be ignored.

99. We find that before a litigant is permitted to knock the doors of justice and seek orders which have far reaching effects of affecting the employment of thousands of persons, stopping investment in the State, prejudicing the interests of the farmers; the credentials and *bonafides* of the applicants must be tested. In the present case, there is scope to infer that the litigation could be at the behest of the existing WBIs who wanted to avoid competition and continue to get raw material at a cheaper rate. There is also scope to infer that it could be at the behest of the WBIs in the adjoining Yamuna Nagar district of Haryana where lakhs of tons of timber is exported from the State of Uttar Pradesh. There is scope to infer that it could be in the interest of middlemen who are engaged in exporting timber from Uttar Pradesh to Haryana. We would, therefore, only request the learned NGT that, when credentials and *bonafides* of such litigants are seriously raised and when entertaining the grievance of such litigants, which is likely to adversely affect the rights of many, it should ensure the *bonafides* and credentials of such litigants.

100. Though we are allowing the appeals, setting aside the orders of the learned NGT, and upholding the action of the State Government in granting licenses, we would like to remind the State and its authorities that it is their duty to protect the environment. The State and its authorities should ensure that necessary steps are taken for arresting the problem of declining forest and tree cover. The State and its authorities should make meaningful and concerted efforts to ensure that the green cover in the State of Uttar Pradesh is not reduced and to ensure that it increases.

101. The conservation of forest plays a vital role in maintaining the ecology. It acts as processors of the water cycle and soil and also as providers of livelihoods. As such, preservation and sustainable management of forests deserve to be given due importance in formulation of policies by the State. In this regard, it will be apposite to refer to certain earlier pronouncements of this Court.

(a) In the case of *Samatha* v. *State of A.P.*[8], a three-Judge Bench of this Court after referring to the earlier judgment in the case of *State of H.P.* v. *Ganesh Wood Products*[9] observed that, even while considering the grant of renewal of mining leases, the provisions of the Forest (Conservation) Act, 1980 and the Environment (Protection) Act, 1986 would apply. This Court held that the MOEF and all the States have a duty to prevent mining operations affecting forests. It further observed that, whether mining operations are carried on within the reserved forest or other forest area, it is their duty to ensure that the industry or enterprise does not denude the forest to become a menace to human existence nor a source to destroy flora and fauna and biodiversity. It has further been held that if it becomes inevitable to disturb the existence of forests, there is a concomitant duty upon the State to reforest and restore the green cover and to ensure adequate measures to promote, protect and improve both man-made and natural environment, flora and fauna as well as biodiversity. It further held that there can be no distinction between government forests and private forests in the matter of forest wealth of the nation and in the matter of environment and

ecology.

(b) In the case of *Essar Oil Ltd.* v. *Halar Utkarsh Samiti*[10], this Court discussed the need for a balance between the economic and social needs and development on the one hand and environment considerations on the other. It was observed that laws on environment should be to create harmony between the two since neither one can be sacrificed at the altar of the other. In this regard, the observations of this Court in the case of *Indian Council for Enviro-Legal Action* v. *Union of India*[11] were quoted as under:

> "While economic development should not be allowed to take place at the cost of ecology or by causing widespread environment destruction and violation; at the same time, the necessity to preserve ecology and environment should not hamper economic and other developments. Both development and environment must go hand in hand, in other words, there should not be development at the cost of environment."

(c) In the case of *Maharashtra Land Development Corporation* v. *State of Maharashtra*[12] reference was made to *Glanrock Estate Private Limited* v. *State of Tamil Nadu*[13] wherein it was observed as under:

> "*27.* …. Forests in India are an important part of the environment. They constitute [a] national asset. In various judgments of this Court delivered by the Forest Bench of this Court in *T.N. Godavarman Thirumulpad* v. *Union of India* (Writ Petition No. 202 of 1995), it has been held that 'intergenerational equity' is part of Article 21 of the Constitution.
>
> *28.* What is intergenerational equity? The present generation is answerable to the next generation by giving to the next generation a good environment. We are answerable to the next generation and if deforestation takes place rampantly then intergenerational equity would stand violated.
>
> *29.* The doctrine of sustainable development also forms part of Article 21 of the Constitution. The 'precautionary principle' and the 'polluter pays principle' flow from the core value in Article 21.
>
> *30.* The important point to be noted is that in this case we are concerned with vesting of forests in the State. When we talk about intergenerational equity and sustainable development, we are elevating an ordinary principle of equality to the level of overarching principle."

(d) Of course, one cannot ignore one of the several dicta of this Court in *T.N. Godavarman Thirumulkpad* v. *Union of India*[14] wherein this Court enunciated the definition of "forest" in the following words:

> "4. The Forest Conservation Act, 1980 was enacted with a view to check further deforestation which ultimately results in ecological imbalance; and therefore, the provisions made therein for the conservation of forests and for matters connected therewith, must apply to all forests irrespective of the nature of ownership or classification thereof. The word "forest" must be understood according to its dictionary meaning. This description covers all statutorily recognised forests, whether designated as reserved, protected or otherwise for the purpose of Section 2(*i*) of the Forest Conservation Act. The term "forest land", occurring in Section 2, will not only include "forest" as understood in the dictionary sense, but also any area recorded as forest in the Government record irrespective of the ownership. This is how it has to be understood for the purpose of Section 2 of the Act. The provisions enacted in the Forest Conservation Act, 1980 for the conservation of forests and the matters connected therewith must apply clearly to all forests so understood irrespective of the ownership or classification thereof…"

102. Though we find that for the sustainable development of the State and on account of the availability of the timber, sanction of granting licenses can be permitted to continue, however, as a responsible State, it needs to ensure that environmental concerns are duly attended to. We, therefore, direct the State Government to ensure that while granting permission for felling trees of the prohibited species, it should strictly ensure that the permission is granted only when the conditions specified in the Notification dated 7th January 2020 are satisfied. The State Government shall also ensure that when such permissions are granted to the applicants, the applicants scrupulously follow the mandate in the said notification of planting 10 trees against 1 and maintaining them for five years.

103. In the result, the appeals are allowed. The impugned orders passed by the learned National Green Tribunal, Principal Bench, New Delhi in Original Application Nos. 313, 335 and 396 of 2019 as well as in the Review Applications are quashed and set aside.

104. Pending applications, if any, shall stand disposed of. No costs.

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[1] (2017) 9 SCC 499

[2] (2019) 18 SCC 494

[3] 2021 SCC OnLine SC 897

[4] 2022 SCC OnLine SC 79

[5] (1997) 3 SCC 312

[6] (2008) 16 SCC 337

[7] (1994) 6 SCC 651

[8] AIR 1997 SC 3297 : (1997) 8 SCC 191

[9] (1995) 6 SCC 363

[10] (2004) 2 SCC 392

[11] (1996) 5 SCC 281

[12] (2011) 15 SCC 616

[13] (2010) 10 SCC 96

[14] (1997) 2 SCC 267 : AIR 1997 SC 1228

ENVIRONMENTAL (PROTECTION) ACT, 1986, RAILWAYS ACT, 1989, SECTION 11 AND CONSTITUTION OF INDIA, ARTICLE 226

*(M. L. Pendse and G. D. Kamat, JJ.)*

GOA FOUNDATION and another *Petitioners.*

vs.

KONKAN RAILWAY CORPORATION and others *Respondents.*

**(a) Environment (Protection) Act (29 of 1986), S. 3(2)(v), Railways Act (24 of 1989), S. 11 and Constitution of India, Arts. 226 and 21** — *Project to set up railway line from Bombay to Mangalore through State of Goa — Petitioner filing Writ Petition praying that work should be stalled till environment clearance is procured, as project would adversely affect ecology and environment in Goa — High Court declining to exercise writ jurisdiction as it is meant to advance cause of justice and not to defeat exercises undertaken by Government for public benefit.*

The Central Government decided to provide a broad gauge railway line from Bombay to Mangalore running through the State of Goa and therefore the Konkan Railway Corporation Ltd., was set up. The project was approved after detailed and long drawn survey and the Government of Goa approved the alignment passing through the State of Goa. The petitioner society claiming to protect and improve natural environment filed a writ petition with a prayer that the Corporation should be compelled to procure environment clearance for the alignment passing through State of Goa from Ministry of Environment and Forests and until such clearance was secured all work in respect of providing railway line should be withheld. The petitioner claimed that the proposed alignment was wholly destructive of the environment and eco-system and violated the citizen's rights under Article 21. The petitioner claimed that under the provisions of section 3(2)(v) of Environment (Protection) Act the Ministry of Environment had issued a notification dated 19-2-1991 prescribing restrictions on setting up or extension of industries and operations in Coastal Regulation Zone and the Corporation cannot ignore the activities prohibited by the notification. The Corporation pointed out that the entire route was surveyed and about 80% of the required land was acquired by applying urgency clause under the Land Acquisition Act. The Corporation had awarded several contracts for construction and an amount of Rs. 330 crores was invested. The project team commissioned by the Corporation had reported that there would be no air pollution and the green forest as well as the marine/fish life would not be affected. It was pointed out on behalf of the Conservator of Forests, Government of Goa that there was no breach whatsoever of any of the provisions of Forests Act or Goa Preservation of Trees Act. The Corporation pointed out that the cost of the project escalated from day to day and the extent of interest and cost which would be suffered by the Corporation every day by stalling the project would be to the tune of .45 lakhs. It was submitted by the Corporation that the assumption that Khazan lands would be adversely

W. P. No. 170 of 1992 decided on 29-4-1992. (Panaji-Goa)

affected was also without any basis. The Government of Goa and Conservator of Forests supported the claim of the Corporation while the Ministry of Environment made it clear that it was fully conscious of the mitigative steps taken by the Corporation and necessary precaution would be taken to ensure that the ecology and the environment of the places from where the alignment passes would not be disturbed.

*Held*, that the High Court would decline to exercise its writ jurisdiction to frustrate the project of such magnitude on alleged damage to ecology and environment. The claim of the petitioners that the alignment would have devastating and irreversible impact upon the Khazan lands was witthout any foundation, and even otherwise, the extent of damage was extremely negligible and a public project of such a magnitude which was undertaken for meeting the aspirations of the people on the west coast cannot be defeated on such considerations. It is not open to frustrate the project of public importance to safeguard the interest of few persons. The Courts are bound to take into consideration the comparative hardship which the people in the region will suffer by stalling the project of great public utility. The Notification dated 19-2-1991 on which reliance was placed by the petitioner had no application whatsoever to the work undertaken by the Corporation. Moreover, the wide ambit of the provisions of the Environment Act do not bind the construction or maintenance of a railway line. The Railways Act, 1989 is a legislation enacted subsequent to the Environment Act and the Corporation was right in claiming that for the purpose of providing railway line, clearance is not required even though the line passes over the railways, rivers, creeks, etc. in view of the specific provisions of section 11 of the Railways Act. (Paras 6 to 9).

**(b) Environment (Protection) Act (29 of 1986), S. 3(2)(v) and Notification dated 19th February, 1991 issued by the Ministry of Environment** — *Expression "industries, operations or processes etc. in the notification" — Activities of providing rail line not covered — The reference to the bunding in the Notification must be read in the context of setting up industries or any operations or processes in respect of such industries — Providing railway line is not an industry.* (Para 8)

**(c) Environment (Protection) Act (29 of 1986), S. 3(2)(v) and Notification dated 19th February 1991** — *The activities in respect of which clearance is required are those where permanent buildings or workshops or harbours or thermal power plants are erected and not for the purpose of providing a rail line.* (Para 8)

**(d) Environment (Protection) Act (29 of 1986), S. 1 and Railways Act (24 of 1989), S. 11** — *The provisions of the Environment Act have no application in respect of work undertaken in exercise of powers conferred under section 11 of the Railways Act, 1989 — For the purpose of providing railway line, clearance is not required even though the line passes over the railways, rivers, creeks, etc. in view of the specific provisions of section 11 of the Railways Act.* (Para 8).

**(e) Forests (Conservation) Act, S. 2** — *Project of providing broad gauge railway line from Bombay to Mangalore approved by Central Government — Rail line passing through forest land — The project approved by the Central*

*Government and the Railway Ministry which was carrying out the exercise is a part of the Central Government — Objection on the ground of prior approval of Centre not tenable.* (Para 7).

For petitioners : *A. Grover* and *Mrs. Norma Alvares.*

For respondent No. 1 : *S. K. Kakodkar, Senior Advocate* with *E. Afonso.*

For respondents Nos. 2 and 4 : *J. Dias, Advocate General* with *Mrs. S. Albuquerque, Additional Government Advocate.*

For respondent No. 3 : *R. M. S. Khandeparkar, Standing Counsel.*

**JUDGMENT**

**M. L. PENDSE, J. :—** Rule returnable forthwith. Mr. Kakodkar waives service on behalf of respondent No. 1. Mr. Dias, Advocate General, on behalf of respondents Nos. 2 and 4 and Mr. Khandeparkar on behalf of respondent No. 3. Heard counsel.

Very few people are fortunate to see their dreams fulfilled and people residing on the west coast saw fulfilment of their dream when the Central Government decided to provide a broad gauge railway line from Bombay to Mangalore and thereafter to extend to the State of Kerala. It was a long-standing demand of the people in the region for a cheap and fast transport to improve the economic conditions and to make accessible the hinterlands in the State of Maharashtra, State of Goa and State of Karnataka. The Central Government was considering providing a railway line for a considerable length of time but the project was postponed from time to time due to lack of requisite funds. Ultimately the Central Government took a decision to provide the line and to achieve that purpose The Konkan Railway Corporation Ltd., a public limited Company, was set up. The length of the line from Bombay to Mangalore along the west coast is to be 760 Kilometres and out of that 106 Kilometres line runs through the State of Goa. The cost of the project was envisaged at Rs. 1391 crores in the year 1991-92. The Central Government set up a Corporation as the total allocation of the Planning Commission was only to the order of Rs. 300 crores and, therefore, it was incumbent for the Corporation to raise the funds for seeking equity contribution from the Ministry of Railways and the beneficiary States of Maharashtra, Goa, Karnataka and Kerala. The Corporation was also conferred with powers to raise money with issuance of 9% tax-free bonds from financial institutions and public borrowings. The Konkan Railway alignment passes through different terrain in different States and the Corporation is required to construct large number of tunnels and projects over rivers. The Railway line will have 136 major bridges and 1670 minor bridges and there will be 71 tunnels with a total length of 75 Kms. The Konkan Railway is the biggest railway project undertaken in the Indian sub-continent in the present century. The project was approved after detailed and long-drawn survey of various aspects of the matter and the Corporation was constituted in July, 1990 to undertake the exercise which is of an extensive magnitude. The project commenced on October 15, 1990 and the Government

of Goa approved the alignment passing through the State of Goa on December 17, 1990.

2. The petitioner No. 1 is a Society registered under the Societies Registration Act and claims to protect and improve the natural environment including forests, lakes, river and wild life and to have compassion for living creatures. The petitioners approached this Court by filing the present petition under Article 226 of the Constitution with the prayer that the Corporation should be compelled to procure environment clearance for the alignment passing through the State of Goa from the Ministry of Environment and Forests, Government of India, and until such clearance is secured all the work in respect of providing railway line should be withheld. The grievance of the petitioners is that the proposed alignment has been planned and undertaken without an adequate Environment Impact Assessment (E.I.A.) and an Environment Management Plan (E.M.P.). The petitioners claim that the proposed alignment is wholly destructive of the environment and the eco-system and violates the citizens' rights under Article 21 of the Constitution. The petitioners also claim that even though the ecological damage will not be felt immediately, such damage will be gradual and will lead to the deterioration of the land quality and will affect large number of people. The petitioners further claim that as the proposed alignment passes across the rivers, creeks, basins and backwaters, the Corporation cannot proceed to carry out the work without obtaining the statutory clearance required under the provisions of the Environment (Protection) Act, 1986. The petitioners claim that under the provisions of section 3(2)(v) the Ministry of Environment has issued Notification dated February 19, 1991 and restrictions on the setting up or extension of industries, operations or processes in the Coastal Regulation Zone (C.R.Z.) are prescribed. The petitioners claim that the Corporation cannot ignore the activities prohibited or regulated under the Notification and in the absence of clear sanction or approval from the Ministry of Environment it is not permissible to proceed with the project undertaken within the State of Goa. The petitioners further claim that certain correspondence which has transpired between Inter-Ministerial Departments reflects that the Environment Ministry is not inclined to permit the Corporation to undertake the project without examining the objections raised by various Organizations to the proposed alignment.

3. The Corporation has filed Return sworn by Mr. B. Rajaram, Chief Engineer of Konkan Railway Corporation for Goa Sector and it is pointed out that after the Corporation was constituted the entire route was surveyed and the line required for the project had been demarcated and the land acquisition process has already commenced. The Corporation has already secured possession of 80% of the required land by applying urgency clause under section 17 of the Land Acquisition Act. The Corporation has also awarded several contracts for construction of bridges, tunnels and work has commenced all along the line. Several engineers have been posted on the field and the physical progress achieved is about 20% of the total length of line. The Corporation had chalked out the programme to complete the line by October,

1994. The Corporation points out that an amount of Rs. 330 crores has been invested and the projected investment for the current year is Rs. 400 crores. The Corporation points out that the maximum length from north to south of State of Goa is 105 Kms. and the terrain is intersected by hilly spurs running down from the Western Ghats and a number of streams which together form an important network of waterways for inland navigation. The Corporation further points out that the alignment for Goa Sector was finalised in December, 1990 and when a few Goans raised objection to the proposed alignment, the Railway Ministry appointed Mr. M. Menezes, an eminent Goan Engineer and retired Chairman of the Railway Board to consider the objections and submit an investigation report. The report was submitted on November 16, 1991 and Mr. Menezes recommended a few alterations with a view to avoid the alignment passing through the crowded villages. There recommendations made by Mr. Menezes were accepted by the Railway Ministry and the Corporation has accordingly altered the initial alignment. The Corporation further points out that to ascertain whether there would be an adverse effect on the environment and ecology and, if so, to suggest mitigative steps, the Corporation commissioned services of a Government Enterprise known as Rail India Technical and Economical Services (RITES). The services commissioned by the Corporation are of an internationally recognised Consultancy Organization and is manned by eminent persons expert in the field of ecology, environment and allied subjects. The Project Team reported that there will be no air pollution, no significant noise produced by the Railways and not even the green forest will be disturbed or the marine/fish life would be affected. The Project Team considered alternative alignments suggested and came to the conclusion that the proposed alignment by the Corporation and which is approved by the Government of Goa and Central Government is preferable to all other suggestions. The Corporation then points out that an area of 216 hectares of land have already been taken possession of by the Corporation in the State of Goa and contracts for construction of major and minor bridges to the tune of Rs. 137 crores over rivers Zuari and Mandovi have already been awarded and work has commenced at ten locations. The total expenditure incurred in Goa Sector is to the order of Rs. 22 crores and that is about 10% of the entire project cost in Goa. The Corporation then points out that the claim of the petitioners that the alignment would adversely affect the environment and ecology of the State of Goa is nothing but a figment of imagination and objections are raised with ulterior motives. The Corporation points out that the provisions of the Environment Act and Notifications issued thereunder are not binding upon the Railway Administration and Corporation, apart from the fact that all requisite steps for ensuring that the environment will not be adversely affected are already undertaken. The Corporation further points out that the alleged breach or violation of the provisions of Forests (Conservation) Act and the Regulation about cutting of trees under the Trees Act is without any merit.

The Government of Goa and the Conservator of Forests supported the claim of the Corporation while the Ministry of Environment through their counsel made it clear that the Ministry is fully conscious of the mitigative

steps taken by the Corporation and necessary precaution will be taken to ensure that the ecology and the environment of the places from where the alignment passes is not disturbed.

4. Mr. Grover, learned counsel appearing on behalf of the petitioners, submitted that though the petitioners are not opposing the project undertaken by the Corporation, their challenge is only to the proposed Railway alignment as it violates the provisions of the Environment (Protection) Act and Regulations and Notifications thereunder. Mr. Grover submitted that the proposed alignment would destroy the natural environment in many areas and undermine the ingenious centuries old man-made environment of the Khazan lands. The learned counsel urged that the geology of Goa consists esentially of reddish iron and manganese bearing rocky strata which gets softened in the process of monsoon lateritization. It is contended that the softer rocks of Goa have been eroded over the ages to a base level of erosion much below the sea level and due to this geological reason, Zuari, Mandovi and Chapora are the three rivers on the west coast in which the ocean tides sweep inland for several kilometres. Mr. Grover submitted that the agriculturists in this region have erected timber sluice gates which operate under tidal power to control the inflow of tides. The low-lying khazan paddy fields which lie below the sea level in the estuaries of the three rivers have created a unique natural biological eco-system of mangrove and fish life. The khazan lands, claims the counsel, have richest and most fertile nurseries of fish life and fish breeding grounds and any embankment which the Corporation is bound to construct through the khazan land will destabilise the drainage of the tidal basin which will cause devastating and irreversible damage to the area. We inquired from the learned counsel as to what is the extent of the khazan land existing in Goa and the answer was the approximate area is about 227 hectares and the proposed alignment would affect the land admeasuring only 30 hectares.

5. Mr. Kakodkar, learned counsel for the Corporation, submitted that the assumption that the khazan lands would be adversely affected is without any basis. The learned counsel pointed out that the Corporation has taken adequate precaution to ensure that the biological eco-system is not disturbed. Mr. Kakodkar pointed out that there will not be any interference with the natural tides and adequate drainage works are provided to avoid any stagnation of tidal flow. The entire water management through the utilisation of sluice gates and bunds system remains unaffected.

6. In our judgment, the claim of the petitioners that the alignment would have devastating and irreversible impact upon the khazan lands is without any foundation, and even otherwise, the extent of damage is extremely negligible and a public project of such a magnitude which is undertaken for meeting the aspirations of the people on the west coast cannot be defeated on such considerations. It is not open to frustrate the project of public importance to safeguard the interest of few persons. It cannot be overlooked that while examining the grievance about adverse impact upon a small area of 30 hectares of Khazan lands, the benefit which will be derived by large number of people by construction of rail line cannot be brushed aside. The Courts are bound

to take into consideration the comparative hardship which the people in the region will suffer by stalling the project of great public utility. The cost of the project escalates from day to day and, as pointed out by the Corporation, the extent of the interest and cost which will be suffered by the Corporation every day is to the tune of Rs. 45 lakhs. No development is possible without some adverse effect on the ecology and environment but the projects of public utility cannot be abandoned and it is necessary to adjust the interest of the people as well as the necessity to maintain the environment. The balance has to be struck between the two interests and this exercise must be left to the persons who are familiar and specialized in the field. The Corporation has set up not only a specialized Committee but has also engaged the service of a renowned engineer from Goa and who is practical not only in experience of the surroundings in Goa and when both of them have given green signal to the project, we decline to exercise our writ jurisdiction to frustrate the project of such magnitude on the alleged damage to the ecology and environment of khazan lands.

7. Mr. Grover then submitted that under section 2 of the Forests (Conservation) Act, no authority can use forest land or any portion thereof for any non-forest purpose except with the prior approval of the Central Government. The grievance is that the alignment passes through the forest land and the Corporation has not secured prior approval for the use of the land for non-forest purpose. There is no merit in the submission because the project has been approved by the Central Government and the Railway Ministry which is carrying out the exercise is a part of the Central Government. The use of the forest land for providing railway line is not going to affect or damage the existence of forests and the complaint of the petitioners on this count is devoid of any merit. Mr. Grover also submitted that the alignment required cutting of several trees inside as well as outside the forests and such destruction of existing trees is not permissible in view of the provisions of the Trees Act. The submission is misconceived because the trees are cut for a public purpose to provide a rail line. Apart from this consideration, the Corporation points out that a project has been undertaken to plant double the number of trees which will be required to cut down for providing the rail line. Again, the project of such magnitude of providing the rail line passing through more than three States cannot be held back by catering to the alleged grievance of the petitioners that the trees are indiscriminately cut. It would not be out of place to mention that the averment on this count made in the petition is extremely vague. Mr. Dias, Advocate General appearing on behalf of the Conservator of Forests, Government of Goa, pointed out that there is no breach whatsoever of any of the provisions of the Forests Act or the Goa Preservation of Trees Act, 1984. Mr. Grover also submitted that the alignment will extinguish ecologically sensitive areas like Carambolim wetlands where the migratory birds visit during the course of year. Mr. Grover sounded an apprehension that a small lake at Carambolim will be filled up by the Corporation and that would prevent the migratory birds from reaching the State of Goa. Mr. Kakodkar submitted that the apprehension sounded is entirely imaginary and that the alignment is not going to affect the wetlands. We are unable to find any merit in the

objections raised to the proposed alignment in the State of Goa by the Corporation. The challenge to the continuation of the project on the ground that the alignment is likely to affect the environment and disturb the ecological balance is without any substance and is, therefore, required to be turned down.

8. Mr. Grover then submitted that whatever may be the apprehensions of the petitioners and even if the Court comes to the conclusion that the apprehensions sounded by the petitioners are without any substance, still it is not permissible for the Corporation to continue with the exercise undertaken without prior clearance from the Environment Ministry of the Central Government. The learned counsel submitted that the work cannot proceed in view of the provisions of the Environment (Protection) Act, 1986. It was also submitted that the Corporation is guilty of statutory violation in ignoring the specific directions given by the Ministry in exercise of powers under the Act and, therefore, the Corporation should be restrained from carrying out any work until the clearance is secured from the Ministry. The Environment Act was enacted to provide for the protection and improvement of the environment and for the matters connected therewith. Section 3 of the Act, *inter alia,* confers power on the Central Government to take all measures for the purpose of protecting and improving the quality of the environment and preventing environmental pollution. Sub-section (2) prescribes that such measures may include steps for restriction of areas in which any industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards. In exercise of powers under section 3(2)(v) of the Act the Ministry of Environment issued Notification dated February 19, 1991. The Notification declares the coastal stretches of seas, bays, estuaries, creeks, rivers and backwaters which are influenced by tidal action upto 500 metres from the High Tide Line and the land between the Low Tide Line and the High Tide Line as Coastal Regulation Zone. The Notification prescribes that there will be restrictions on the setting up and expansion of industries, operations or processes in the said Coastal Regulation Zone. The Notification then provides that land reclamation, bunding or disturbing the natural course of water will be prohibited activities. The Notification further provides that it may be permissible to carry out the operations beyond 100 metres and upto 500 metres provided clearance for such activities is obtained. Relying on the Notification it was contended on behalf of the petitioners that the activity of bunding undertaken by the Corporation for the alignment is a prohibited activity. In the alternative, it was contended that even if the activity is permissible such permission has not been sought. In our judgment, both the submissions are misconceived and are required to be turned down for more than one reason. In the first instance, the assumption of the petitioners that the exercise undertaken by the Corporation for providing a rail line is an industry is entirely unjustified. The expression "industries, operations or processes etc." cannot bring within its sweep the activities of providing a rail line. The contention that the activities of bunding undertaken by the Corporation are prohibited activities is fallacious. The reference to the bunding in the Notification must be read in the context of setting up industries or any operations or processes in respect of such industries. Once it is found that providing rail line is not

an industry, then it is not possible to jump to the conclusion that the work of bunding is a prohibited activity and, therefore, the Corporation should be prevented from proceeding with the work. The alternate submission that even if the activity is permitted within the stipulated limit beyond 100 metres from the High Tide Line but within the distance of 500 metres, the clearance is required from the Ministry, is without any substance. Apart from the fact that the Notification has no application to the work undertaken by the Corporation, the activities in respect of which clearance is required are those where permanent buildings or workshops or harbours or thermal power plants are erected and not for the purpose of providing a rail line. The rail line or a public road is provided for access to the public to the seas, bays, estuaries, creeks and backwaters and either a public road or a rail line is not a construction which demands clearance. It is beyond our comprehension to appreciate as to how a rail line can be or a road can be constructed without travelling over the bridges constructed over the rivers, creeks or seas. The Notification on which reliance is placed has no application whatsoever to the work undertaken by the Corporation.

The Corporation is also right in the contention that the provisions of the Environment Act have no application in respect of work undertaken in exercise of powers conferred under section 11 of the Railways Act, 1989. Section 11, *inter alia,* provides that notwithstanding anything contained in any other law, the Railway Administration may, for the purposes of constructing or maintaining a railway, make or construct in or upon, across, under or over any lands, or any streets, hills, valleys, roads, streams, or other waters, rivers as it thinks proper. The wide ambit of the provisions of section 11, and the non-obstante Clause makes it extremely clear that the provisions of the Environment Act do not bind the construction or maintenance of a railway line. The Railways Act is a legislation enacted subsequent to the Environment Act and the Corporation is right in claiming that for the purpose of providing railway line, clearance is not required even though the line passes over the railways, rivers, creeks, etc. in view of the specific provisions of section 11 of the Railways Act.

A faint attempt was made by Mr. Grover to suggest that the Ministry of Environment has issued a draft Notification inviting objections and the draft Notification intends to prescribe that environment clearance from the Central Government is required for providing railway lines. It is not possible to take any notice of such draft Notification because it has no legal existence till the objections are examined and final Notification is issued. Mr. Kakodkar pointed out that the Railways have raised serious objections to the proposed Notification apart from the fact that even the draft Notification requires clearance from the Central Government and which has already been given long before.

9. Though Mr. Grover did not advance submission during arguments, it is necessary to make reference to one of the complaints made in the petition. The petitioners claim that the alignment is going to adversely affect the Churches and Temples in the State of Goa and which were in existence over centuries and are of great religious interest to the citizens. We are afraid that the complaint made in the petition is only with a view to appeal to the religious sentiments

of the people and create misplaced sympathy for the obstruction raised to the proposed project. We hope and trust that the projects undertaken for the benefit of a large number of people are not defeated or stalled by appealing to the religious sentiments of a few or by indulging in street agitations. Such attempts may temporarily help a particular group but would permanently cause damage to the interest of the common citizen. In this context reference must be made to the inter-Ministerial correspondence to which our attention was invited by Mr. Grover. It appears that persons holding high offices in Central Government are addressing letters and making representations to the Ministry of Environment suggesting that the grievances of a group or an organization should be accepted and the proposed alignment should be given up or shifted eastwards. It seems that representations are forwarded to appease the feelings of a section of people who desired to raise obstruction to the proposed alignment of rail line through the State of Goa. As expected the correspondence passed between the two Ministries, Railway and Environment, indicates that without taking any decision, efforts are made not to displease anyone and by recommending that a small group or committee should be constituted to examine the representation. In our judgment, such exercise should not have been undertaken because it results into postponing the much-needed and long-awaited railway line and would lead to escalation of cost and put pressure on the public exchequer. We hope and trust that everyone will realise that providing a rail line is neither a political nor a religious issue but is undertaken for providing basic necessity of cheap and quick mode of transport. It hardly requires to be stated that the cheap and fast mode of transport would lead to speedy development of backward areas in four States and which has immense potential in terms of human and material resources. The rail line running through the four States would confer immense benefit upon the citizens in carrying passengers and goods from the backward areas. The State of Goa has abundant natural resources and the railway line would assist in setting up mangrove and mineral base and sea food leading to the prosperity of the common man. The existing transport facilities by road are entirely inadequate to cater to the needs of the people in transporting their goods to the large towns. We hope and trust that unnecessary obstructions are not raised to the project of such huge public utility and which will herald the prosperity for the poor people on the western coast. It should be remembered that the project of such gigantic magnitude has become available after the people fought for over a century and the petty interest of a local area should not defeat the project in respect of which the Central Government has already spent a huge amount.

We decline to exercise our writ jurisdiction in such cases because the writ jurisdiction is meant to advance the cause of justice and not to defeat exercises undertaken by the Government for the public benefit. The machinery of the Court should not be used for subserving the private interest or the interest of a local area to the detriment of the public at large. For these reasons we refuse to grant any relief to the petitioners.

10. Accordingly, the petition fails and Rule is discharged with costs.

*Petition dismissed.*

W.A. Nos. 327, 232 and 284 of 2015

Geologist v. Sunil Kumar

2015 SCC OnLine Ker 13635

In the High Court of Kerala

(BEFORE ASHOK BHUSHAN, C.J. AND A.M. SHAFFIQUE, J.)

1. The Geologist District Geologist Office Mining and Geology Department, Civil Station Cherthala, Alappuzha District.
2. The Principal Secretary Industrial Department, Government Secretariat Thiruvananthapuram ..... Appellant(s)/Addl. R3

By Sr. Government Pleader Sri. C.R. Syamkumar

*Versus*

1. Sunil Kumar S/o Late Bhaskaran, Government Contractor Peratheril House, Mavelikkara-690101.
2. The Executive Engineer Office of the Executive Engineer (Doubling) Southern Railway, Kayamkulam ..... Respondent (s)/Petitioner

R1 by Adv. Sri. K.R. Sunil

R2 by Sri. C.S. Dias, SC, Railways

W.A. Nos. 327, 232 and 284 of 2015

Against the Order/Judgment in WP (C) 29439/2014 of High Court of Kerala Dated 02-12-2014

Decided on April 10, 2015

Infrastructure Laws — Railways Act, 1989 — S. 11 — Extraction of sand from the survey numbers owned by private individuals — Requirement of environmental clearance under the notification issued under the Environment (Protection) Act, 1986 — Petitioners are claiming right to mine/extract red earth from the survey numbers owned by private persons — No work as enumerated in S. 11 is being done in the re-survey numbers involved in the Writ Petition — S. 11 of the Act, 1989 held inapplicable — Construction of a road as contemplated under S. 11(a) is carrying out any work by the Railway administration on lines of railway — Held, learned Single Judge committed error in directing for grant of short term permit/renewal of permit — For extraction of sand without environmental clearance — Environment (Protection) Act, 1986, S. 3

(Paras 14, 19, 22 and 24)

*Goa Foundation* v. *Konkan Railway Corporation*, AIR 1992 Bom 471, *distinguished*

JUDGMENT

Ashok Bhushan, C.J.

These three Writ Appeals raise common questions of law and facts, hence, they have been heard together and are being disposed of by this common judgment.

2. Brief facts giving rise to the Writ Appeals are:

W.A. No. 327 of 2015 arises from the judgment dated 12.12.2014 in W.P(C). No. 30330 of 2014. The parties shall be referred to as referred in the Writ Petition. The petitioner, a sub-contractor, employed by a firm, “K.K. Builders” for the purpose of supply of ordinary earth for the construction of a new railway track from Karyamcode Bridge to Pallikkara Railway Gate of the Southern Railway, filed W.P(C). No. 30330 of 2014 seeking a writ of mandamus directing the District Collector to issue No-Objection

Certificate to the petitioner for removing red earth from properties comprised in R.S. No. 628/2 of the Cheruvathoor Village. Further direction has been sought for issuing mining permit on the basis of the No-Objection Certificate granted by the District Collector for the removal of red earth from the land comprised in R.S. No. 628/2 of the Cheruvathoor Village. The petitioner's case in the Writ Petition was that he was given sub-contract for removal of earth from R.S. No. 628/2 belonging to one Aravindakshan, who made a statement that he has no objection for removal of red earth. The petitioner made an application before the District Collector for giving No-Objection Certificate. By Exhibit P3, the Tahsildar submitted a report dated 16.9.2014 on the application recommending issuance of No-Objection Certificate in order to obtain environmental clearace. The petitioner's case further was that he was informed that environmental clearance from the State Leval Environment Impact Assessment Authority is required for getting NOC. In the above background, the Writ Petition was filed.

3. W.A. No. 232 of 2015 arises out of the judgment dated 2.12.2014 in W.P(C). No. 29439 of 2014. The petitioner's case in the Writ Petition was that he, being a contractor, has been authorised by M/s. United Construction Company Engineering Contractors, who is a railway contractor, to supply red earth for the purpose of doubling the railway track between Chengannoor-Chingavanam. The petitioner's case further was that he was also granted mining permit dated 18.8.2014 for extraction of red earth, which permit was valid upto 1.11.2014. The petitioner, before expiry of the permit, had made an application dated 31.10.2014 for renewal of permit. An order was passed by the learned Single Judge directing the Government to consider the representation submitted by the petitioner. The Government on 1.12.2014 rejected the application of the petitioner seeking renewal of permit. The Government in its order dated 1.12.2014 took a view that the railway track doubling work was awarded to another company and the petitioner is not being granted any contract by the Railway and further it was held that environmental clearance is necessary for excavation of red earth. Reference has been made to the Government order dated 21.2.2014 and memorandum dated 24.12.2013 of the Ministry of Environment and Forests.

4. A counter affidavit was filed by the District Geologist in the Writ Petition, where it was pleaded that environmental clearance is necessary for removal of red earth. The petitioner, in the above background, filed the Writ Petition seeking a writ of mandamus to renew the mining permit of the petitioner.

5. W.A. No. 284 of 2015 has been filed against the judgment dated 18.12.2014 in W.P(C). No. 34254 of 2014. The petitioner claimed to be owner of properties comprised in Re.Sy. Nos. 394/5, 6, 8, 7, 3, 9, 12, 10, 02, 11, 14, 4, 13, 1, 5, 379/1 and 398/5, 9 in Block No. 2 of Kidanganoor Village at Pathanamthitta District. The petitioner submitted an application before the District Collector for getting No-Objection Certificate. The petitioner claimed to have entered into an agreement, under which the petitioner had to supply red earth. The petitioner refers to the permit granted for extraction of red earth upto 30.6.2014. The petitioner's case was that he made an application for extension of permit, on which a report was submitted by the Village Officer. The petitioner also placed reliance on the judgment dated 2.12.2014 in W.P(C). No. 29439 of 2014. The petitioner on the above background filed the Writ Petition with the following reliefs:

“i. Issue a writ of certiorari or any other appropriate writ order or direction, commanding the 2nd respondent to issue NOC to the petitioenr for removing red earth from the petitioner'sproperty in Re.Sy. Nos. 394/5, 6, 8, 7, 3, 9, 12, 10, 02, 11, 14, 4, 13, 1, 5, 379/1, 398/5, 9 in Block No. 2 of Kidanganoor Village at Pathanamthitta District, under the provisions of the Kerala Minor Mineral Concession Rule.

ii) Issue a writ of mandamus or any other appropriate writ order or direction, commanding the 9th respondent to issue a mining permit to the petitioner on the basis of NOC from the 2nd respondent for removing the red earth from the petitioner's property in Re.Sy. Nos. 394/5, 6, 8, 7, 3, 9, 12, 10, 02, 11, 14, 4, 13, 1, 5, 379/1, 398/5, 9 in Block No. 2 of Kidanganoor Village at Pathanamthitta District, under the provisions of the Kerala Minor Mineral Concession Rule."

6. The learned Single Judge, vide judgment dated 2.12.2014 in two Writ Petitions which gave rise to the first two Writ Appeals and vide judgment dated 18.12.2014 in the Writ Petition which gave rise to the third Writ Appeal directed to grant short term permit without insisting for environmental clearance to remove the quantity of red earth recommended by the Tahsildar and also to transport the same to the railway site. In the Writ Petitions giving rise to second and third Writ Appeals the learned Single Judge issued a direction for renewal of the permit without obtaining environmental clearance.

7. The State Government as well as the State authorities, aggrieved by the abovementioned directions, have come up with the Writ Appeals challenging the aforesaid judgments of the learned Single Judge.

8. We have heard Sri. C.R. Syamkumar, learned Senior Government Pleader appearing for the appellants, Sri. C.S. Dias, learned Standing Counsel for the Railways, Sri. Subhash Chand and Sri. Babu S. Nair, learned counsel for the respondents.

9. It is submitted by the learned Special Government Pleader that extraction of red earth is not permissible without obtaining environmental clearance. It is submitted that the Government order dated 21.1.2014 clearly contemplated obtaining environmental clearance before extraction of red earth. It is submitted that the writ petitioners have not been asked by the Railway administration to carry on any work. It is submitted that Section 11 of the Railways Act, 1989, which has been relied on by the petitioners, is not applicable, since the said Section is applicable with regard to carrying out work by the Railway administration. It is further submitted that for carrying out the work by the Railway administration in the property belonging to the Railway, no environmental clearance may be required, but in so far as private land on which permission is sought for, for extraction of red earth, environmental clearance is clearly required. It is submitted that the learned Single Judge committed error in directing for grant of mining permit without obtaining environmental clearance. It is submitted that the Writ Appeals be allowed setting aside the directions of the learned Single Judge with liberty to the petitioners to obtain environmental clearance and thereafter make request for grant of short term permit.

10. Learned counsel for the petitioners, refuting the submission made by the learned Government Pleader, contended that the red earth is required for the purpose of Railway work, i.e., doubling of Railway track, for which work no environmental clearance is necessary by virtue of Section 11 of the Railways Act, 1989. It is submitted that the petitioners have been duly authorised by the Railway contractor/Railway to supply red earth of a specified quantity, hence the work is Railway work, which has to be carried on in public interest. It is submitted that for the work of the Railway, which is a work in public interest, no environmental clearance is necessary. It is submitted that the judgments of the learned Single Judge is perfectly correct and the appeals deserve to be dismissed. Learned counsel for the petitioners have also placed heavy reliance on a Division Bench judgment of the Bombay High Court reported in *Goa Foundation* v. *Konkan Railway Corporation* (AIR 1992 BOMBAY 471).

11. We have considered the submissions of learned counsel for the parties and have perused the records.

12. There are two main issues, which arose for consideration in these Writ Appeals,

i.e.:

I. Whether Section 11 of the Railways Act, 1989 shall override the requirement of obtaining environmental clearance under the Environment (Protection) Act, 1986 and the notifications issued thereunder in respect to the lands which are involved in the present Writ Appeals?

II. Whether for extraction of sand by the petitioners from the survey numbers involved in the Writ Petitions, which are owned by private individuals, no environmental clearance is required under the notification issued under the Environment (Protection) Act, 1986 and the extraction is permissible by means of a short term mining permit looking to the nature of purpose for which land is sought to be extracted?

13. Both the issues being inter connected are being taken together. The learned Single Judge in its judgments has relied on Section 11 of the Act, 1989 as well as the judgment in *Goa Foundation's* case (supra) for directing the Geologist to grant short term permit or renew the permit without insisting environmental clearance. Section 11 of the Act, 1989 is a part of Chapter IV of the Act, 1989, which is to the following effect:

"11. Power of railway administrations to execute all necessary works.- Notwithstanding anything contained in any other law for the time being in force, but subject to the provisions of this act and the provisions of any law for the acquisition of land for a public purpose or for companies, and subject also, in the case of a non-Government Railway, to the provisions of any contract between the non-Government railway and the Central Government, a railway administration may, for the purposes of constructing or maintaining a railway-

(a) make or construct in or upon, across, under or over any lands, or any streets, hills, valleys, roads, railway, tramways, or any rivers, canals, brooks, streams or other waters, or any drains, water-pipes, gas-pipes, oil-pipes, severs, electric supply lines, or telegraph lines, such temporary or permanent inclined-planes, bridges, tunnels, culverts, embankments, acquaducts, roads, lines of railway, s passages, conduits, drains, piers, cuttings and fences, in-take wells, tube wells, dams, river training and protection works as it thinks proper;

(b) alter the course of any rivers, brooks, streams or other water courses, for the purpose of constructing and maintaining tunnels, bridges, passages or other works over or under them and divert or alter either temporarily or permanently, the course of any rivers, brooks, streams or other water courses or any roads, streets or ways, or raise or sink the level thereof, in order to carry them more conveniently over or under or by the side of the railway;

(c) make drains or conduits into, through or under any lands adjoining the railway for the purpose of conveying water from or to the railway;

(d) erect and construct such houses, warehouses, offices and other buildings, and such yards, stations, wharves, engines, machinery apparatus and other works and conveniences as the railway administration thinks proper;

(da) developing any railway land for commercial use;

(e) alter, repair or discontinue such buildings, works and conveniences as aforesaid or any of them and substitute others in their stead;

(f) erect, operate, maintain or repair any telegraph and telephone lines in connection with the working of the railway;

(g) erect, operate, maintain or repair any electric traction equipment, power supply and distribution installation in connection with the working of the railway; and

(h) do all other acts necessary for making, maintaining altering or repairing and using the railway."

14. Section 11 of the Act, 1989 enumerates the power of Railway administrations to execute all necessary works. From the facts as noted above, all the petitioners, who have filed the Writ Petitions claimed to be sub-contractors from a Railway contractor, who has been granted contract to supply red earth for Railway line/doubling of Railway line. The work of construction of Railway line/doubling of Railway line is admittedly not being done on the survey numbers in which the petitioners are claiming right of extraction of red earth. Section 11 empowers the Railway administrations to carry out any work as enumerated in Section 11. The present is a case where the petitioners are claiming right to mine/extract red earth from the survey numbers owned by private persons. No work as enumerated in Section 11 is being done in the re-survey numbers involved in the Writ Petition. Section 11 of the Act, 1989 is wholly inapplicable. Sub-clause (a) of Section 11 empowers the Railway administrations for the purpose of constructing or maintaining a railway in or upon, across, under or over any lands……. Sub-clause (b) of Section 11 empowers the Railway administrations for the purposes of constructing or maintaining a railway to alter the course of any rivers, brooks, streams or other water courses…. Sub-clause (c) of Section 11 empowers the Railway administrations for the purposes of constructing or maintaining a railway to make drains or conduits into, through or under any lands…… Similarly, Sub-clause (d) of Section 11 empowers the Railway administrations to erect and construct such houses, warehouses, offices and other buildings…. Sub-clauses (e), (f) and (g) are not attracted in the present case. Sub-clause (h) of Section 11 empowers the Railway administrations to do all other acts necessary for making, maintaining altering or repairing and using the railway. The key words under Section 11(a) are “make or construct in or upon, across, under or over any lands, or any streets,…… Section 11, as noted above, empowers the Railway administrations for the purpose of constructing or maintaining a railway, notwithstanding anything contained in any other law for the time being in force to do various acts “for the purpose of constructing or maintaining a railway”. In the present case we are concerned with the activity of excavation of red earth from the land in different survey/re-survey numbers as mentioned above. The act, which is empowered by the above provision is to make or construct in or upon, under or over any lands. Thus, the act, which is envisaged under Section 11(a) must be comprised in the words “make or construct”. The word ‘make’ has been defined in P. Ramanatha Aiyar's Law Lexicon 3rd Edition in the following words:

“TO MAKE”. In itself involves a conscious act on the part of the maker.” (per COLLINS, J., *Dickins* v. *Gill*, (1896) 2 QB 310)

“To make”, in the mechanical sense, does not signify to create out of nothing, for that surpasses all human power. It does not often mean the production of a new article out of materials entirely raw, but generally consists in giving new shapes, new qualities, or new combinations to matter which has already gone through some other artificial process.

The word “make” includes also the power to amend, alter or rescind. *V.V. Riva* v. *S. Dalenia*, AIR 1968 Bom 347, 358. [Securities Contracts (Regulation) Act (42 of 1956), S.10(1)]” The plain meaning of the word ‘make’ does not include a mining activity, i.e., the activity of excavation of red earth. The second word used in Section 11(a) is ‘construct’. The word ‘construct’ has been defined in P. Ramanatha Aiyar's Law Lexicon 3rd Edition as follows:

“‘Construct’, with its grammatical variations, in relation to a building, means to construct, recontruct, erect, re-erect, extend or alter structurally a building. [Control of National Highways (Land and Traffic) Act, 2002 (13 of 2003), S.2(c)]”

‘Construction’ includes construction of building as well as alteration or repairs. Construction of a road as contemplated under Section 11(a) has to be understood as carrying out any work by the Railway administration on lines of railways. Obviously,

the activity, which is being claimed by the petitioners on the land of extraction of red earth cannot be said to be covered by Section 11(a). A plain reading of Section 11 of the Act, 1989 clearly indicates that no work is being carried out in the survey numbers owned by private persons or by the Railways, nor in any of the contracts. Hence, Section 11 on its plain reading is not attracted in the present case.

15. The judgment, which has been relied on by learned counsel for the petitioners, i.e., *Goa Foundation's* case (supra), was a case where the Central Government decided to provide a broad gauge railway line from Bombay to Mangalore and thereafter to extend to the State of Kerala and for that purpose the Konkan Railway Corporation Ltd. was set up. A public interest litigation was filed alleging that drawing of Railway line shall affect the environment and no clearance has been obtained under the Environment Protection (Amendment) Act, 1986 and the notification dated 19.2.1991 was issued by which restrictions on the setting up or extension of industries, operations or processes in the coastal regulation zone has been prescribed. In the above context, the Division Bench referred to Section 11 and held that there was no necessity to obtain environmental clearance by virtue of Section 11 of the Act, 1989. It is relevant to note that in the above case the Corporation has acquired the land on which the Corporation intended to proceed to lay down the Railway line. The said fact has been clearly noted in paragraph 3 of the judgment in the following words:

"3. The Corporation has filed Return sworn by Mr. B. Rajaram, Chief Engineer of Konkan Railway Corporation for Goa Sector and it is pointed out that after the Corporation was constituted the entire route was surveyed and the line required for the project had been demarcated and the land acquisition process has already commenced. The Corporation has already secured possession of 80% of the required land by applying urgency clause under Section 17 of the Land Acquisition Act. The Corporation has also awarded several contracts for construction of bridges, tunnels and work has commenced all along the line. Several engineers have been posted on the field and the physical progress achieved is about 20% of the total length of line. The Corporation had chalked out the programme to complete the line by October, 1994. The Corporation points out that an amount of Rs. 330 crores has been invested and the projected investment for the current year is Rs. 400 crores. The Corporation points out that the maximum length from north to south of State of Goa is 105 Kms. and the terrain is intersected by hilly spurs running down from the Western ghats and a number of streams which together form an important network of waterways for inland navigation. The Corporation further points out that the alignment for Goa Sector was finalised in December 1990 and when a few Goans raised objection to the proposed alignment, the Railway Ministry appointed Mr. M. Menezes, an eminent Goan Engineer and retired Chairman of the Railway Board to consider the objections and submit an investigation report. The report was submitted on November 16, 1991 and Mr. Menezes recommended a few alterations with a view to avoid the alignment passing through the crowded villages the commendations made by Mr. Menezes were accepted by the Railway Ministry and the Corporation has accordingly altered the initial alignment. the Corporation further points out that to ascertain whether there would be an adverse effect on the environment and ecology and, if so, to suggest mitigative steps, the Corporation commissioned services of a Government Enterprise known as Rail India Technical and Economical Services (RITES). The services commissioned by the Corporation are of an internationally recognised Consultancy Organization and is manned by eminent persons expert in the filed of ecology, environment and allied subjects. The Project Team reported that there will be no air pollution, no significant noise produced' by the Railways and not even the green forest will be disturbed or the marine/fish life would be affected. The Project Team considered alternative alignments suggested and came to the conclusion that the proposed alignment by the Corporation and which is approved by the Government of Goa and Central Government is

preferable to all other suggestions. The Corporation then points out that an area of 216 hectares of land have already been taken possession of by the Corporation in the State of Goa and' contracts for construction of major and minor bridges to the tune of Rs. 137 crores over rivers Zuari and Mandovi have already been awarded and work has commenced at ten locations. The total expenditure incurred in Goa Sector is to the order of Rs. 22 crores and that is about 10% of the entire project cost in Goa. The Corporation then points out that the claim of the petitioners that the alignment would adverse by affect the environment and ecology of the State of Goa is nothing but a figment of imagination and objections are raised with ulterior motives. The Corporation points out that the provisions of the Environment Act and Notifications issued thereunder are not binding upon the Railway Administration and Corporation, apart from the fact that all requisite steps for ensuring that the environment will not be adversely affected are already undertaken. The Corporation further points out that the alleged breach or violation of the provisions of Forests (Conservation) Act and the Regulation about cutting of trees under the Trees Act is without any merit.

The Government of Goa and the Conservator of Forests supported the claim of the Corporation while the Ministry of Environment through their counsel made it clear that the Ministry is fully conscious of the mitigative steps taken by the Corporation and necessary precaution will be taken to ensure that the ecology and the environment of the places from where the alignment passes is not disturbed."

16. In the above context, the Division Bench in paragraph 8 of the judgment has made the following observations:

"8. ….The Corporation is also right in the contention that the provisions of the Environment Act have no application in respect of work undertaken in exercise of powers conferred under Section 11 of the Railways Act, 1989. Section 11, inter alia, provides that notwithstanding anything contained in any other law, the Railway Administration may, for the purposes of constructing or maintaining a railway, make or construct in or upon, across, under or over any lands, or any streets, hills, valleys, roads, streams, or other waters, rivers as it thinks proper. The wide ambit of the provisions of Section 11 and the non-obstante Clause makes it extremely clear that the provisions of the Environment Act do not bind the construction or maintenance of a railway line. The Railways Act is a legislation enacted subsequent to the Environment Act and the Corporation is right in claiming that for the purpose of providing railway line, clearance is not required even though the line passes over the railways, rivers, creeks, etc. in view of the specific provisions of Section 11 of the Railways Act…."

17. Thus, in the above case, the Railway administrations was proceeding to carry out the work on the land, which was acquired by the Railway. The said case was not a case of carrying out any work in any private land, nor the said was a case of carrying out any mining operation in a private land for extraction of sand. The said case is clearly distinguishable and does not help the appellants.

18. One of the submissions made by learned counsel for the petitioners is with regard to Kochi Metro Rail. The Government of Kerala has already granted exemption from obtaining permit for removal of minor minerals. He submits that same analogy should be applied with regard to the work of the Railway in which the petitioners are excavating red earth for the purpose of Railway.

19. The Kerala Minor Mineral Concession Rules, 1967 have been amended by the Kerala Minor Mineral Concession Amendment Rules, 2014 published in the Kerala Gazette on 26.2.2014. In Rule 57, after clause (ba) of sub-rule (2), a new clause, clause (bb) has been added to the following effect:

"(bb) Notwithstanding anything contained in these rules, a contractor in the employ of the Delhi Metro Rail Corporation quarrying minor minerals from the land acquired for Kochi Metro Rail Project including purambokes, for bonafide purposes, coming under

the works of the Kochi Metro Rail Project, shall be exempted from obtaining a quarrying permit or quarrying lease and payment of royalty for removing minor minerals."

20. The newly inserted clause (bb) of sub-rule (2) of Rule 57 grants exemption from obtaining quarrying permit or quarrying lease and payment of royalty for removing minor minerals. One important provision in the Rule, which is relevant for the present case is that the said exemption is for "quarrying minor minerals from the land acquired for the Kochi Metro Rail Project, including puramboke. ….. Thus, the above exemption granted to the Kochi Metro Rail Corporation is with respect to particular project and further with regard to land which has been acquired for the Kochi Metro Rail Project. Even the analogy drawn by the petitoner from the above provision cannot be held to be attracted, since the present is not a case where the survey/re-survey numbers in which right of excavation of earth is claimed has been acquired by the Railways. Thus, no benefit can be taken by the petitioners from the aforesaid clause (bb) of sub-rule (2) of Rule 57 added as per the Kerala Minor Mineral Concession (Amendment) Rules, 2014.

21. In this context, Section 14 of the Railways Act, 1989 is also relevant. Section 14 gives right to the Railway for temporary entry upon land to remove obstruction, to repair or to prevent accident. That too, on a land adjoining the Railway. Section 14 intended that the Railway can carry out any portion in any land belonging to any private land or construct any work. The said intendment would have been clear from the enactment. For argument sake, even if it is accepted that under Section 11 of the Act, 1989, the Railway administrations is intended to carry out any work in any land, the Railway itself is not carrying out any work in the survey numbers, as noted above, Section 11 is clearly inapplicable.

22. The provisions of Section 11 of the Railways Act, 1989 indicate that even for owners and occupiers of land adjoining the Railway "accommodation works" is contemplated by railway under Section 16, which are affected by any railway work. Section 16(1) of the Railways Act, 1989 is as follows:

"16. Accommodation works.- (1) A railway administration shall make and maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway, namely:-

(a) such crossings, bridges, culverts and passages over, under or by the sides of, or leading to or from, the railway as may, in the opinion of the State Government, be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway is made; and

(b) all necessary bridges, tunnels, culverts, drains, water sources or other passages, over, under or by the sides of the railway, of such dimensions as will, in the opinion of the State Government, be sufficient at all times to convey water as freely from or to the lands lying near or affected by the railway as it was before the making of the railway or as nearly as possible."

From the above scheme of the Act it is clear that any act cannot contemplate carrying out any work in the land of any private owners without any compensation or accommodation work. There being no such contemplation of carrying out any work in the survey/re-survey numbers in which the petitioners are claiming right of excavation of land, it is clear that the provisions of Section 11 or any other provisions of the Railways Act, 1989 are not attracted in the present case.

23. So far as requirement of obtaining short term permit for excavation of earth, the issue has already been decided by a Division Bench of this Court in W.P. (C). No. 31148 of 2014 and connected cases. It is useful to extract paragraph 82 of the said judgment, which has clearly laid down that no mining can be done without obtaining environmental clearance. Paragraph 82 of the judgment in W.P. (C) No. 31148 of 2014

and connected cases is as follows:

82. In view of the foregoing discussion, we come to the following conclusions.

(i) In case where quarrying/mining/lease which were existing on the date of issuance of Notification dated 14.09.2006 or on the date of issue of the order dated 18.05.2012 by the Government of India, Ministry of Environment and Forests with regard to area less than 5 hectares no environmental clearance with regard to extraction of minor mineral is required. Notification dated 14.09.2006 contemplated obtaining environmental clearance only with regard to new projects/new activities.

(ii) Government Order dated 10.01.2014 cannot be relied on by the parties in view of the restraint order issued by the National Green Tribunal dated 27.09.2013 till such time the restraint order continues.

(iii) By amendment of Section 14 by Act.

37. of 1986 making Section 4 applicable to minor minerals also the provision contained in Section 4 shall be applicable to mining operations by a person holding mining lease or any other kind of mineral concession. It cannot be accepted that mining operation with effect from 10.02.1987 cannot be continued by a person holding any other mineral concession apart from mining lease.

(iv) Judgment of the Apex Court in *Deepak Kumar's* case (supra) did not contemplate environmental clearance for an area less than 5 hectares with regard to existing mining lease/mining permits on the date of judgment. Paragraph 29 of the judgment clearly directed that leases of minor minerals including their renewal for an area of less than five hectares be granted by the State/Union Territories only after getting environmental clearance.

(v) Environmental clearance as contemplated by Notification dated 14.09.2006 required environmental clearance for new projects/new activities.

(vi) The Notification dated 14.09.2006 having been applied vide order dated 18.05.2012 of the Government of India, Ministry of Environment and Forests all mining operations for new project and new activities for an area less than 5 hectares after 18.05.2012 required environmental clearance carried through either a mining lease or mining permit.

(vii) Interim order passed by the Apex Court on 27.01.2012 was intended by the Supreme Court to operate till the Rules have been framed by the States taking into consideration the guidelines and recommendations of the Ministry of Environment and Forests.

(viii) As per Rule 68 no mining/quarrying operations can be permitted without there being an approved mining plan. But such rule is subject to exception as engrafted in Rule 66, i.e., for existing lease holders, time has been allowed to submit mining plan."

24. In view of the foregoing discussions, we are of the view that the learned Single Judge committed error in directing for grant of short term permit/renewal of permit for extraction of sand without environmental clearance. The judgments impugned in these Writ Appeals are unsustainable and are set aside. We, however, leave it open to the petitioners to move appropriate application in accordance with the Kerala Minor Mineral Concession Rules, 2015 for obtaining mining permit for extraction of sand in accordance with the provisions of the Kerala Minor Mineral Concession Rules, 2015.

25. When the matter was heard on 9.4.2015 at the request of the writ petitioners, learned counsel for the petitioners made available before the Court a copy of the minutes of the meeting held on 23.3.2015 under the Chairmanship of the Chief Minister. It is submitted that a decision has been taken that quarrying of earth for Railway doubling works has to be permitted without environmental clearance by the Geology and Mining Department. The subject of the meeting was various issues related to land acquisition for doubling of Railway Tracks in Kottayam, Alappuzha,

Pathanamthitta and Ernakulam Districts. The minutes record that after detailed discussion, one of the decisions taken in the meeting is as follows:

"5. Quarrying of earth for Railway doubling works has to be permitted without environmental clearance by the Geology and Mining Department. Government Order in this regard should be issued from Industries Department soon based on the decision in the meeting. (Action - Industries Department)."

26. The minutes of the meeting was regarding the issue relating to land acquisition for doubling of Railway Tracks in Kottayam, Alappuzha, Pathanamthitta and Ernakulam Districts. The proceedings also note that the doubling work is not possible unless acquisition of land for the projects is completed without any delay. It is not clear whether decision No. 5 was with regard to the land which was proposed to be acquired and for that land environmental clearance was not required or whether it relates to land from where red earth can be excavated by a contractor or sub-contractors of the Railway.

27. Be that as it may, the issue as to whether environmental clearance is required for sub-contractors for excavation of earth on the basis of any Government order issued in pursuance of the meeting held on 23.3.2015 shall arise only when any such Government orders are issued and such orders are looked into. It is not necessary for this Court to consider any such issue at this stage. Thus, on the basis of the minutes of the aforesaid meeting, the petitioners cannot claim that they have right to excavate earth without obtaining environmental clearance.

In the result, the Writ Appeals are allowed, judgments of the learned Single Judge are set aside and the Writ Petitions are dismissed, subject to the liberty as mentioned in paragraph 24 above.

The parties shall bear their own costs.

2022 SCC OnLine Bom 7184 : (2023) 4 Bom CR 174

In the High Court of Bombay at Goa

(BEFORE DIPANKAR DATTA, C.J. AND M.S. SONAK, J.)

Ganv Bhavancho Ekvott A Society Registered under the Societies Registration Act, through its President, Muiguel Francisco Felix Furtado and Others ... Petitioners;

*Versus*

South Western Railways, through its General Manager and Others ... Respondents.

Public Interest Litigation Writ Petition No. 15 of 2021

Decided on August 3, 2022

Advocates who appeared in this case :

Ms. Maria Caroline Collasso, Advocate for the Petitioners.

Mr. P.P. Singh with Mr. D. Bhardwaj, Advocates for the Respondent No. 1.

Mr. Devidas J. Pangam, Advocate General with Mr. Deep D. Shirodkar, Additional Government Advocate for the Respondents No. 3 to 7.

Mr. Iftikar Agha with Ms. Valencia Fernandes, Advocates for the Respondent No. 8.

The Judgment of the Court was delivered by

DIPANKAR DATTA, C.J.:— We heard this public interest litigation (hereafter 'PIL', for short) for a little while on Monday and the major part of yesterday. We have heard the parties for quite some time today. Had a particular submission, which was made by Mr. Agha, learned advocate for the respondent no. 8, i.e., General Manager, Railway Vikas Nigam Limited (hereafter 'GM, RVNL', for short), been heard by us yesterday, we could have disposed of the writ petition relying upon the law laid down in paragraph 7 of the decision of the Supreme Court in *Beg Raj Singh* v. *State of Uttar Pradesh*, (2003) 1 SCC 726. It has been held there, *inter alia*, as follows:—

> "7. *** The ordinary rule of litigation is that the rights of the parties stand crystallized on the date of commencement of litigation and the right to relief should be decided by reference to the date on which the petitioner entered the portals of the court. A petitioner, though entitled to relief in law, may yet be denied relief in equity because of subsequent or intervening events i.e. the events between the commencement of litigation and the date of decision. The relief

to which the petitioner is held entitled may have been rendered redundant by lapse of time or may have been rendered incapable of being granted by change in law. There may be other circumstances which render it inequitable to grant the petitioner any relief over the respondents because of the balance tilting against the petitioner on weighing inequities pitted against equities on the date of judgment. Third-party interests may have been created or allowing relief to the claimant may result in unjust enrichment on account of events happening in-between. Else the relief may not be denied solely on account of time lost in prosecuting proceedings in judicial or quasi-judicial forum and for no fault of the petitioner. ***"

(emphasis ours)

2. However, since we have heard the parties on the merits of the contentions and an important question of law emerges for our consideration, we feel disinclined to dispose of the PIL by merely holding that by lapse of time and the intervening events between the date of commencement of this PIL and the date of this judgment, the relief claimed by the petitioners cannot and should not be granted.

3. This PIL is at the instance of a society registered under the Societies Registration Act, 1860 and three residents of Guirdolim, Chandor and Cavorim villages of Salcete taluka. The petitioners are aggrieved because the respondent no. 1, i.e., South Western Railways (hereafter 'SWR', for short) and RVNL have been making large scale construction for doubling of the railway track in the Vasco-Da-Gama - Kulem section of Tinaighat - Vasco-da-Gama area of the State of Goa without obtaining requisite permissions under the Goa Panchayat Raj Act, 1994 (hereafter 'Panchayat Act', for short), the Goa Town And Country Planning Act (hereafter 'T&CP Act', for short), the Goa Irrigation Act, 1973 (hereafter 'Irrigation Act', for short), the Goa, Daman & Diu Land Revenue Code, 1968 (hereafter 'Land Revenue Code, for short) and the Coastal Regulation Zone Notification, 2011 (hereafter '2011 CRZ Notification', for short) issued by the Department of Environment, Forest And Wild Life, Ministry of Environment And Forests, Government of India in exercise of powers conferred by sub-section (1) and clause (v) of sub-section 2 of section 3 of the Environment Protection Act, 1986 (hereafter 'EP Act', for short).

4. The pleaded case in the writ petition, giving rise to this PIL, reveals that at the beginning of 2019, the villages of Guirdolim, Chandor and Cavorim for the first time came to know of a proposal to carry out double tracking of railway lines and development of Chandor railway station. The respondent no. 2, i.e., Village Panchayat of Guirdolim, called upon SWR and the GM of RVNL vide letter dated 14th March, 2019 to provide details and to inform the Panchayat and the Gram Sabha regarding any proposal for double tracking of railway

tracks and development of Chandor railway station. This was followed by another letter dated 8th August, 2019 of the Village Panchayat of Guirdolim whereby a request was made to the GM of RVNL to depute a person to explain the plan for double tracking of railway tracks and the development of Chandor railway station. These letters did not elicit any response either from SWR or the GM, RVNL, although construction work commenced in October 2020 notwithstanding the stiff opposition from the villagers of Guirdolim and other neighbouring villages. Towards the end of October 2020, large scale filling of low-lying, water-logged, prime agricultural lands was started including the filling of a major rivulet running parallel to and to the north of the existing track. Despite complaints lodged by the villagers, all attempts proved abortive resulting in the Village Panchayat of Guirdolim writing to the Director, RVNL as well as the GM, RVNL on 17th December, 2020 demanding a halt of the construction of double tracking of railway line. Even then, the officers of RVNL chose not to halt the construction work. The petitioners have alleged that in the process of construction, SWR and RVNL were found to have trespassed into a church property. On protests being raised by the villagers, better sense prevailed and work was stopped by the representatives of SWR. The writ petition, thereafter, reveals several attempts made by the petitioners seeking intervention of the respondent no. 4, i.e., the Principal Secretary, Goa Coastal Zone Management Authority (hereafter 'GCZMA'), the respondent no. 5, i.e., the Collector, South Goa District and the respondent no. 3, i.e., the Town and Country Planning Department, Government of Goa. Not only did the said respondents not take any steps against SWR and RVNL by issuing stop work orders to ensure that all mandatory permissions are first obtained and submitted to the Village Panchayat of Guirdolim for review, there was no response and on the contrary SWR and RVNL repeatedly encroached or trespassed into private properties of the residents without any permissions or consent of the owners. The police were duly approached but the same also did not yield any result, resulting in institution of this PIL on 1st April 2021 wherein the petitioners have prayed the following substantial relief:

> *"(i) That this Hon'ble Court be pleased to issue a writ of mandamus, or a writ in the nature of mandamus, or a prohibitory writ, or writ in the nature of certiorari, or an order or direction to direct Respondents No. 1 and Respondent No. 8 to obtain prior permissions under the Goa Panchayat Raj Act, 1994, the Goa Town & Country Planning Act, 1974, the Coastal Regulation Zone Notification, 2011, the Goa, Daman & Diu Land Revenue Code, 1968 and the Goa Irrigation Act, 1973.*

*(ii) That this Hon'ble Court be pleased to issue a writ of mandamus, or a writ in the nature of mandamus, or a prohibitory writ, or writ in the nature of certiorari, or an order or direction to direct Respondents No. 1 and Respondent No. 8 to stop all the ongoing works until all necessary permissions are obtained from Respondents No. 2 to 6.*

*(iii) That this Hon'ble Court be pleased to issue a writ of mandamus, or a writ in the nature of mandamus, or a prohibitory writ, or writ in the nature of certiorari, or an order of direction directing the Respondent No. 1 and Respondent No. 8 to first explain the scope of works and the plans and designs to the Gram Sabha of Guirdolim and Chandor-Cavorim Village Panchayats."*

5. Therefore, in essence, this PIL challenges the failure/omission of SWR and RVNL to obtain prior permission under various Central and State legislation prior to carrying out the construction of the double tracking of the Vasco-Hospet railway line through the villages of Goa as well as its refusal to inform the local authorities about the proposed works.

6. Appearing in support of the writ petition, Ms. Collasso, learned advocate contends as follows:

(i) The construction work for the doubling of the railway track is being carried out in violation of the statutory mandate to obtain prior permissions which includes the 2011 CRZ Notification, the LR Code, the Irrigation Act, the Panchayat Act and the T&CP Act;

(ii) The Supreme Court in its decision dated 9th May, 2022 in *T.N. Godavarman Thirumulkpad* v. *Union of India*, 2022 SCC OnLine SC 583, has revoked the permission granted by the Standing Committee of the National Board of Wild Life (hereafter 'NBWL', for short) under the Wildlife (Protection) Act, 1972 for the work of doubling of the railway track on the ground that the railway authorities have failed to provide any substantial basis for such requirement. In the process, the Supreme Court agreed with the report of the Central Empowered Committee (hereafter 'CEC', for short) that the double tracking is unnecessary based on the data obtained from the railway authorities themselves. The CEC had observed that 80% of the rakes are returning empty from Karnataka to Goa, which leaves a huge unutilised capacity in the single line itself. Coal makes up over 90% of the goods traffic from Mormugao Port Trust, and that this was likely to be reduced in the future consequent to Government policy.

(iii) Section 11 of the Railways Act, 1989 (hereafter the 'Railways Act') does not explicitly provide for exemption from permissions required under other laws. The said provision merely enables the

railway authorities to make or construct railway lines upon, across, under or over any lands, etc., but does not state explicitly that permissions mandated under other laws need not be obtained. In the absence of any express provisions exempting the railway authorities from obtaining permissions under other laws, the railway authorities acted illegally, arbitrarily and in a high-handed manner in proceeding to commence the work of double tracking of the railway line without obtaining requisite permissions under the other applicable laws.

(iv) Having regard to the provisions of sections 5 and 24 of the EP Act, such provisions would have effect notwithstanding anything inconsistent therewith contained in any enactment other than the EP Act and, therefore, it was obligatory for the railway authorities to obtain CRZ clearance from the GCZMA. Having not so obtained, commencement of the work is absolutely unauthorised.

(v) Since it is apparent from the decision in *T.N. Godavarman Thirumulkpad* (supra) that the railway authorities had sought for permission under the Wildlife (Protection) Act and though the same was granted by the NBWL, which now stands revoked, the position seems to be clear that section 11 of the Railways Act does not empower the railway authorities to proceed with construction work without obtaining requisite permission under other laws. Significantly, the railway authorities not having invited the attention of the Supreme Court to section 11 of the Railways Act must be deemed to have abandoned their argument touching the *non-obstante* clause in section 11. Also, by not referring to section 11 of the Railways Act, it must be regarded as an admission by the railway authorities that such provision does not give any exemption from obtaining statutory permissions under other laws.

(vi) The railway authorities have applied for permission under the Wildlife (Protection) Act, the Forest (Conservation) Act, 1980 and the Goa Preservation of Trees Act, 1984 (hereafter 'Trees Act', for short) without contesting the applicability of these laws before the authorities or any court. The very acceptance by the railway authorities of the applicability of these laws and the mandate to obtain permissions under these laws would imply that all the laws are applicable to the railway authorities, since section 11 of the Railways Act provides no intelligible differentia for applicability of the provisions to different laws. Section 11 has not been construed by the railway authorities to provide that it enjoys exemption from obtaining permissions under the Wildlife (Protection) Act, the Forest (Conservation) Act and the Trees Act; hence, the same interpretation ought to apply to all other laws.

(viii) The EP Act and the T&CP Act contain *non-obstante* clauses and there has been no attempt to amend such clauses to exempt the Railways Act from the ambit thereof. This also re-affirms the position that the legislative attempt behind section 11 of the Railways Act has never been to exempt the railway authorities from obtaining permissions under other laws.

(ix) There is sufficient material on record to reveal the destruction of water resources, agricultural land and coastal zones by the railway authorities. Such damage to agriculture, water bodies, drainage, etc., can be mitigated only if statutory permissions under various laws are obtained and the authorities are given a chance to apply their mind to ensure that the best methods are followed. The 2011 CRZ Notification framed under the EP Act, the T&CP Act, the LR Code, the Panchayat Act and the Irrigation Act all have objectives, among others, of protecting the environmental facets they deal with and ensuring sustainable development. As such, the rationality and judicial observations related to applicability of environmental laws are equally applicable to all these enactments.

(x) The decision of a coordinate Bench of this Court in *Goa Foundation* v. *Konkan Railway Corporation*, AIR 1992 Bom 471, was sought to be distinguished by contending that the same is no longer relevant in the present context being more than 30 years old. The rapid evolution of environmental jurisprudence has rendered such decision irrelevant and obsolete. Ratio of such decision has been superseded by numerous subsequent decisions which, *inter alia*, include the decision of the Supreme Court in *Vellore Citizens Welfare Forum* v. *Union of India*, (1996) 5 SCC 647, the decision in *Bombay Dyeing & Manufacturing Co. Ltd.* v. *Bombay Environmental Action Group*, (2006) 3 SCC 434, the decision in *T.N. Godavarman Thirumulpad* (supra) and the order dated 18th November, 2021 of the National Green Tribunal (hereafter 'NGT', for short) in Original Application No. 141/2014 (*Saloni Singh* v. *Union of India*). The decision in *Vellore Citizens Welfare Forum* (supra) enlightens as to what sustainable development is and how it is relevant in the present context where development and ecology are opposed to each other. The decision in *Bombay Dyeing & Manufacturing Co. Ltd.* (supra) holds that environmental laws must be read into all statutes. In such decision, the Supreme Court had observed that a legislation subsequent to the EP Act would also require to conform to environmental laws and, thus, it follows that section 11 of the Railways Act would be amenable to all environmental laws. In *Saloni Singh* (supra), the NGT has declared the decision in *Goa Foundation* (supra) to be no longer valid in view of the huge

changes in environmental jurisprudence in the last 30 years; hence, it is no longer open to the railway authorities to contend that section 11 of the Railways Act would not apply to environmental laws.

(xi) The decision of the Supreme Court in *Village Panchayat Calangute* v. *The Additional Director of Panchayat-II*, (2012) 7 SCC 550, highlights the powers and functions of the institution of the Panchayats at different levels and that the primary focus of the subjects enumerated in Schedule XI to the Constitution is on social and economic development of the rural parts of the country by conferring upon the Panchayat the status of a constitutional body. The Parliament has ensured that the Panchayat would no longer perform the role of simply executing the programmes and policies evolved by the political executives of the State but by virtue of the provisions contained in Part IX of the Constitution, the Panchayats have been empowered to formulate and implement their own programmes of economic development and social justice in tune with their status as the third tier of the Government which is mandated to represent the interests of the people living within its jurisdiction. Since the permission of the Panchayat has not been obtained, any construction activity within the Panchayat area would be in the teeth of the Panchayat Act.

(xii) The rights of the villagers protected by Article 14 and Article 21 of the Constitution are being brazenly violated by the ongoing construction work. Article 14 is attracted because the railway authorities themselves have interpreted the *non-obstante* clause in section 11 of the Railways Act as not applicable to the Wildlife (Protection) Act, the Forest (Conservation) Act and the Trees Act, yet, in strange contradiction and indefensible arbitrariness, have now been relying upon the same provisions to argue that permissions mandated by other environmental legislations are not applicable for railway works. Moreover, since Article 21 includes the right to a healthy environment, the railway authorities, as part of the Union Government, are required to ensure that the rights of the citizens to a healthy environment are not compromised for which obtaining statutory permissions under various laws is essential so that the expert authorities can carry out their duties.

7. Resting on the aforesaid contentions, Ms. Collasso prayed that the relief claimed in the public interest litigation may be granted.

8. The Government of Goa is the respondent no. 7 in the writ petition. No reply affidavit has been filed by the Government. However, we have heard Mr. Pangam, learned Advocate General for Goa on the effect and applicability of the legal provisions.

9. Mr. Pangam submits that in view of section 11 of the Railways

Act, the railway authorities are not obliged to obtain any permission under the Panchayat Act, the T&CP Act, the LR Code, the Irrigation Act as well as environmental clearance from the GCZMA under the 2011 CRZ Notification. According to Mr. Pangam, there is no *non-obstante* clause in any of the aforesaid statutory provisions which is a major factor to be appreciated. Having regard to the provisions of section 11 of the Railways Act, the arguments of Ms. Collasso that permission is required to be obtained is not correct.

10. Insofar as the *non-obstante* clause in section 11 of the Railways Act is concerned, Mr. Pangam refers to the decision in *Union of India* v. *G.M. Kokil*, 1984 Supp SCC 196 : AIR 1984 SC 1022, for tracing out the purpose for which a *non-obstante* clause is used in legislation. Such *non-obstante* clause, he submits, has a pivotal position when it comes to purposes connected with a railway as defined in section 2(31) of the Railways Act. According to him, by virtue of the *non-obstante* clause in section 11, activities of the nature permitted by section 11 undertaken by a railway administration would override any other law except those mentioned in the said section. The areas which are the subject matter of the PIL are not part of a planning area and, therefore, the T&CP Act has no application. Also, section 66 of the Panchayat Act which regulates erection of buildings cannot override the provisions of section 11 of the Railways Act since it has an overriding effect and, therefore, the railway authorities were under no obligation to seek permission of the village panchayats.

11. Heavy reliance is placed by Mr. Pangam on the coordinate Bench decisions of this Court in *Goa Foundation* (supra) and in *Union of India* v. *Municipal Corporation of Greater Mumbai*, 2017 SCC OnLine Bom 9424, as well as the Bench decision of the Calcutta High Court in *Subhas Dutta* v. *Union of India*, 2001 SCC OnLine Cal 178, in support of the contention that the statutory authority of SWR and RVNL to lay lines being established, application of the State legislation as well as the 2011 CRZ Notification is excluded by the opening words of section 11 of the Railways Act. He submits that the Railways Act being a legislation enacted subsequent to the EP Act, section 11 would override any prior legislation, including the EP Act, if such prior legislation contains any provision which is either inconsistent with or repugnant to the Railways Act. Also, the Panchayat Act would have no application insofar as laying of railway lines by the railway authorities having regard to the wide and expansive terms of the provisions in section 11.

12. Mr. Pangam further contends that the Legislature is supposed to know the existing provisions of law when it enacts a new law, which can either be a primary legislation or a subordinate legislation. The Railways Act was enacted at a point of time when the EP Act was in force, yet, in its wisdom the Legislature almost conferred unlimited power *vide*

section 11 on the railway administration for the purposes of constructing or maintaining a railway. If indeed it were the legislative intent that the railway administration would be obliged to obtain environmental clearance, there is no reason as to why the Legislature would omit such an important requirement. It must, therefore, be deemed that confined only to projects undertaken by the railway authorities for construction and maintenance, the notifications issued under the EP Act, initially in 1991 and thereafter in 2011, would have no application.

13. Mr. Pangam took pains in pointing out to us that although the notifications issued under the EP Act are replete with references to ports, harbours, jetties, airports, industries, etc., there is complete silence *qua* a railway. It is his contention that when the 2011 CRZ Notification was framed, the draftsman of the notification must be presumed to be aware that there is an enactment wide enough in terms to cover all aspects of a railway and which has a *non-obstante* clause in section 11, the effect whereof is to exempt works of the nature referred to in the various clauses of section 11 and implies that in the matter of construction and maintenance of a railway, the railway administration would be exempt from obtaining environmental clearance. It is, therefore, trite that the 2011 CRZ Notification issued under the EP Act took care not to include a requirement which could be in conflict with section 11 of the Railways Act.

14. Mr. Pangam further contends that the decisions in *Goa Foundation* (supra) and *Subhas Dutta* (supra) were holding the field when the 2011 CRZ Notification was issued. Both these decisions, after interpreting section 11 of the Railways Act, had declared that the provisions of the EP Act would not come in the way of any construction or maintenance undertaken by the railway administration and that in view of the overriding provisions of section 11, all other provisions stand superseded. Since there is no whisper that no railway related works can be commenced without obtaining environmental clearance, the position seems to admit of no doubt that the notification issued under the EP Act has no application to works of construction and maintenance carried out by the railway administration.

15. It was in this connection that our attention was drawn by Mr. Pangam to paragraph 3 of the 2011 CRZ Notification which is titled "*Prohibited activities within CRZ".* It was shown to us that none of the 14 clauses refer to any restriction on a railway. The very fact that paragraph 3 prohibits several activities but does not prohibit any work related to a railway, according to him, the conclusion is inescapable that the 2011 CRZ Notification would have no application insofar as a railway is concerned.

16. Our attention was further drawn by Mr. Pangam to the Major Port

Trusts Act, 1963 as well as the Aircraft Rules, 1937 to contend that the same does not have *non-obstante* clauses similar to the one used in section 11 of the Railways Act. This, according to him, is a clear pointer to the fact that no port or airport without the requisite clearance contemplated by the 2011 CRZ Notification could be set up/established. The complete silence in the 2011 CRZ Notification about a railway would afford ground to believe that the omission is deliberate because the field is occupied by the special provisions in section 11 of the Railways Act.

17. The order of the Supreme Court in *T.N. Godavarman Thirumulpad* v. *Union of India*, (2016) 13 SCC 586 (2), was referred to next by Mr. Pangam. Paragraphs 136 to 138 of such order were read by him to give us the background why the Supreme Court was approached by the CEC, aggrieved by the grant of permission to SWR and RVNL by the Standing Committee of the NBWL. According to him, the Supreme Court has been monitoring activities proposed in forest lands. However, it is the contention of Mr. Pangam that all such matters argued by him were not placed before the Supreme Court while it passed the order dated 9th May 2022 in *T.N. Godavarman Thirumulpad* (supra) and, therefore, such order which was passed in entirely different circumstances does not constitute a binding precedent.

18. The decision in *Union Territory of Chandigarh* v. *Rajesh Kumar Basandhi*, (2003) 11 SCC 549, was then referred to by Mr. Pangam for highlighting what the words, "*for the time being*", mean.

19. Mr. Pangam further refers to Notification bearing SO No. 1533 dated 14th September, 2006 issued by the Ministry of Environment and Forests in exercise of power conferred by sub-section (1) and clause (v) of sub-section (2) of section 3 of the EP Act, 1986 read with clause (d) of sub-rule (3) of rule 5 of the Environment (Protection) Rules, 1986 (hereafter 'EP Rules', for short). Such notification was issued in supersession of notification bearing S.O. No. 60(E) dated 27th January 1994. While taking us through the notification dated 14th September, 2006 and the Schedule appended thereto, Mr. Pangam contends that the Schedule does not include a railway although it includes, *inter alia*, mining of minerals, oil and gas exploration, thermal power plant, airports, highways, ports, harbours, etc. The omission to include a railway is a conscious decision having regard to the provisions of section 11 of the Railways Act. According to him, the previous notification dated 27th January 1994 was considered by the coordinate Bench of the Calcutta High Court in *Subhas Dutta* (supra) and one of the reasons for declining relief rested on the ground that the Ministry of Environment and Forests had not included a railway as one of the projects/activities which would require a prior environmental clearance.

The position has not since been altered by the notification dated 14th September, 2006 and, therefore, the contentions of the petitioners' lack merit.

20. Referring to the decision in *Municipal Corporation of Greater Bombay* (supra), Mr. Pangam urges that the effect, scope and impact of section 11 of the Railways Act was duly considered by the coordinate Bench and it was ultimately held that hoardings erected by the railways on its land would not require the permission of the Municipal Corporation either under section 328 or 328A of the Mumbai Municipal Corporation Act (hereafter 'MMC Act', for short) and, consequently, no licence would be required under section 479 of the MMC Act. It was shown from such decision that the coordinate Bench looked into the provisions of section 7 of the Railways Act of 1890, which was bodily lifted and placed in the Railways Act as section 11. Precedents of ancient vintage were also considered by the Bench while concluding that the powers of the railway administration were not controlled by other ordinary legislations.

21. Mr. Pangam also brought to our notice an order dated 7th December, 1992 passed by the Supreme Court whereby the Special Leave Petition carried from the order in *Goa Foundation* (supra) was dismissed after hearing the parties and by a speaking order.

22. Prior to concluding his submissions, Mr. Pangam contended that there are guidelines of the Ministry of Railways which require an Environment Impact Assessment (hereafter 'EIA', for short) to be conducted internally. It is his submission that there is no reason to assume that such a study has not been conducted. It is also submitted by him that the Government of Goa has no objection to laying of the railway lines by SWR and RVNL in the state.

23. Mr. Pangam, therefore, prays that this PIL be dismissed.

24. Mr. P.P. Singh, learned advocate appearing for SWR, adopts the submissions of Mr. Pangam. He too refers to the wide scope of section 11 of the Railways Act and contends that there is no need to take any environmental clearance. The work of double tracking of the line in question is part of a special project and it is not the requirement of law that the permission of any village panchayat or other State authorities or even environmental clearance is required to be obtained for every such project, which is proposed to be undertaken on the land of a railway. In the present case, 80% of the work of double tracking is complete and any interference at this stage would result in huge wastage of public money. This itself would be contrary to public interest and, therefore, this writ petition deserves to be dismissed.

25. RVNL is represented by Mr. Agha, learned advocate. He submits that since the Government of Goa has not filed any affidavit-in-reply, it

would be appropriate to take the Court through the reply-affidavit of RVNL as well as the relevant provisions of the Railways Act, and as amended by introduction of amendments by the Railways (Amendment) Act, 2008, more particularly Chapter IV-A.

26. Mr. Agha highlights that the Railways Act is a complete code in itself and for giving effect to the 'special railway project' of doubling the track of rail line, RVNL has complied with the entire procedure laid down in Chapter IV-A thereof. First, section 2(37A) is referred to for ascertaining the definition of a 'special railway project'. Thereafter, the provisions contained in section 20A to 20P are placed to show us what the statutory mandate is, in relation to acquisition of land for a 'special railway project'. According to him, four notifications are required to be issued by the Central Government for such purpose, namely, under section 2(37-A) notifying a 'special railway project', section 2(7A) to define who the 'competent authority' is, authorized to perform the functions of the competent authority for such area as may be specified therein, under section 20A(1) declaring the intention to acquire land for a 'special railway project' and under section 20E(1) declaring that land should be acquired for the purpose mentioned in section 20A(1).

27. Paragraphs 28 to 39 of the reply-affidavit of RVNL was next placed by Mr. Agha not only for the purpose of highlighting the statutory compliances but also to apprise us how steps had been taken to carry forward the special railway project.

28. This is where the proceedings closed yesterday.

29. When proceedings resumed today, Mr. Agha placed before us paragraph 6 of the reply-affidavit divided into sub-paragraphs under the caption "Area" and "Expenditure". It is stated under "Area" that the special railway project, namely, doubling of railway track for route from Hospet-Hubbali-Tinaighat-Vasco-da-Gama proposes to cover a length of 362.73 kms spread over the States of Karnataka and Goa of which 79.23% of work has been completed. It was shown to us that the total length of project work in the State of Goa is 79 kms from Caranzol to Vasco. So far as Goa is concerned, 27% of the project work is complete measuring 21.49 kms.

30. In the course of arguments, Mr. Agha submits that the work on the stretch from Margao to Sanvordem, the length of which is 15 kms, is complete. From the diagram at page 558 of the paper-book, it has been shown that Chandor falls between Margao and Sanvordem and it is the categorical statement of Mr. Agha that the reliefs claimed by the petitioners have become redundant in view of completion of the work, *inter alia*, within the territories of villages Guirdolim, Chandor and Cavorim. Mr. Agha points out the statements made in paragraph 6(d) of the reply-affidavit to the effect that the work for the 15 kms stretch between Margao and Sanvordem has been completed has neither been

denied nor disputed by the petitioners in their rejoinder affidavit.

31. It was for such reason that at the beginning of this judgment we have referred to the fact that by reason of intervening events between the date of institution of this public interest litigation and today, it may not be appropriate to grant any relief claimed by the petitioners because of the lapse of time and the developments in the meanwhile. We have noted from the order sheets that hearing of this PIL was deferred on more than a couple of occasions because of absence of representation from the petitioners. Not only that, the petitioners have never urged the Court to grant interim relief, as prayed for in the writ petition. Once the special railway project has been carried forward and double tracking completed for the relevant stretch in respect whereof the petitioners have expressed concern, it would indeed be difficult for us to direct SWR and RVNL to uproot the tracks that have been laid to give shape to the special railway project should the petitioners succeed. Be that as it may, as indicated above, we do not propose to dispose of this PIL by adopting a shortcut method and would proceed further to record the other submissions of Mr. Agha and then decide the contentious issues.

32. Mr. Agha has further brought to our notice from the statements made in the reply affidavit that more or less Rs. 2618 crore has already been spent by the Central Government, of which the expenditure is approximately Rs. 350 crore for the State of Goa. As crores of rupees have been spent for this special railway project, it is his submission that it would be extremely difficult to alter the project or the alignment of the tracks at this stage. In any event, such alteration, if at all required, could impose further burden on the exchequer and the interest of only a handful of villagers must yield to the interest of the public at large. Mr. Agha submits that the special railway project traverses 15 Panchayat areas in Goa and it is only a single Panchayat that has raised objection. Even the Village Panchayat of Guirdolim has not approached the Court with any grievance and it is only the disgruntled petitioners who have moved the Court to stall such an important special railway project.

33. Our attention was further drawn by Mr. Agha to show the extent of plantation of saplings by RVNL to compensate for any loss to the environment arising out of execution of the special railway project. He, therefore, contends that public interest would warrant RVNL to complete the project within the stipulated time.

34. Referring to the decision in *Goa Foundation* (supra), Mr. Agha asserts that the so-called concern expressed by the petitioners in this PIL is mere duplication of the arguments that were raised by the petitioners in such case. He has taken us through the various paragraphs to show how this Court, after considering various aspects of

the matter including the contours of section 11 of the Railways Act, proceeded to hold that environmental clearance under the EP Act would not be necessary. Paragraph 5 of *Subhas Dutta* (supra) was also placed to show the Court's ruling that section 11 of the Railways Act supersedes the EP Act.

35. Next, Mr. Agha refers to the decision of the Supreme Court in *Chandavarkar Sita Ratna Rao* v. *Ashalata S. Guram*, (1986) 4 SCC 447 : AIR 1987 SC 117, where the Court had the occasion to consider the *non-obstante* clause in section 15A of the Bombay Rent, Hotel and Lodging House Rates Control Act, 1947. Paragraphs 35, 36 and 67 to 68 of the decision were placed to draw inspiration for the argument that section 11 of the Railways Act is not subject to any other provisions of law except the Railways Act and any law related to land acquisition when a Government railway is at work.

36. The alternative submission of Mr. Agha has been that while railways happens to be a subject traceable to entry no. 22 of List I of Schedule VII of the Constitution, local bodies are relatable to entry no. 5 of List II; hence, even if there be any inconsistency or repugnancy between the Railways Act and any law which has entry no. 5 as its source, it would be the former that would prevail and the local law, to the extent of repugnancy, would be void.

37. Confronted with the order dated 9th May 2022 passed by the Supreme Court in *T.N. Godavarman* (supra), Mr. Agha submits that such decision would have no application in the facts and circumstances of the present case. According to him, it is only a small stretch of 26 kms in the Ghat section that is the subject matter of consideration before the Supreme Court. Relevant parts of the order were placed in support of the contention that the Supreme Court did not conclusively say that double tracking in such stretch of 26 kms is not to be executed for all times to come; on the contrary, paragraphs 22 and 23 would suggest that the Supreme Court desired re-examination of the entire matter.

38. Mr. Agha also argues that if indeed any relief is proposed to be granted to the petitioners, the Court would have to strike down section 11 of the Railways Act; however, the petitioners have chosen not to challenge section 11. Not only that, the petitioners have also not challenged the special railway project. The contention of the petitioners that while executing the special railway project, RVNL must obtain environmental clearance is misconceived since not a single provision has been brought to the notice of the Court mandating the railway authorities to obtain environmental clearance in the course of execution of the special railway project.

39. Based on the aforesaid submissions, Mr. Agha too prays for

dismissal of the writ petition.

40. At the outset of today's hearing, we had made over to Mr. Pangam the order dated 18th, 19th and 20th July 2018 passed by a coordinate Bench of this Court on several notices of motion filed in connection with Writ Petition (LDG No. 2107) of 2017 (*Mr. Robin Jaisinghani* v. *Mumbai Metro Rail Corporation Ltd.*). Since the coordinate Bench had distinguished the decision in *Goa Foundation* (supra) as well as the decision in *Subhas Dutta* (supra), we called upon Mr. Pangam to argue why such decision shall not be followed.

41. Mr. Pangam responded by submitting that in *Mr. Robin Jaisinghani* (supra), the petitioner instituted the writ petition aggrieved by noise pollution created by the work of a metro railway. It was pointed out that the coordinate Bench did proceed to grant interim relief but not on the ground that the EP Act would prevail over the Railways Act or the Metro Railway (Construction of Works) Act, 1978 or the Metro Railway (Operation & Maintenance) Act, 2002; instead, the Court held that it is duty bound to enforce fundamental rights of citizens and the Court would interfere if any right flowing from Article 21 is violated. He, however, submits that such decision would not apply in a case of the present nature where it is sought to be claimed that environmental clearance under the EP Act as well as the permission of various authorities under diverse State legislation are required to be obtained while going ahead with the project.

42. On his part, Mr. Agha brought to our notice that the coordinate Bench in *Mr. Robin Jaisinghani* (supra) had referred to the decision in *G. Sundarrajan* v. *Union of India*, (2013) 6 SCC 620, where it was held that the larger interest of the community should give way to individual apprehension of violation of human rights and the rights guaranteed by Article 21 of the Constitution.

43. Concern of the Village Panchayat of Guirdolim, represented by Mr. Rodrigues, learned advocate, is confined to the failure or neglect of SWR and RVNL to furnish the plans/sketches. According to him, despite several approaches having been made, the railway authorities turned a deaf ear to all requests which amounts to irrationality. Mr. Rodrigues referred to the decision in *Goa Foundation* v. *State of Goa*, AIR 2001 Bom 318, and the decision in *Village Panchayat Calangute* (supra) and the order dated 9th May 2022 in *T.N. Godavarman* (supra) while supporting the case of the petitioners.

44. After patiently hearing learned advocates for the parties and considering the materials on record, we are tasked to decide the broad question as to whether it is obligatory for SWR and RVNL, the railway authorities, to obtain environmental clearance from the GCZMA while executing a ‘special railway project’ which traverses a CRZ area and

also as to whether permissions are required to be obtained by such railway authorities from the village panchayats under the Panchayat Act or from the other authorities under various other State legislation. Having bestowed our serious and thoughtful consideration, we are clear in our mind that such question must be answered in the negative.

45. While assigning our reasons to support the aforesaid answer, we propose to consider first the provisions of section 11 of the Railways Act vis-à-vis the State legislations to which our notice has been invited and the EP Act as well as the 2011 CRZ Notification; then the order dated 9th May, 2022 in *T.N. Godavarman* (supra) as well as the previous orders passed in such matter; then the decisions in *Goa Foundation* (supra) and *Subhas Dutta* (supra) in the light of what has been laid down in the interim judgment in *Mr. Robin Jaisinghani* (supra), and lastly the decision in *Saloni Singh* (supra).

46. Any conclusion in respect of the contentious issues cannot be resolved without first reading section 11 of the Railways Act. It reads as follows:

> "11. Power of railway administrations to execute all necessary works.- Notwithstanding anything contained in any other law for the time being in force, but subject to the provisions of this Act and the provisions of any law for the acquisition of land for a public purpose or for companies, and subject also, in the case of a non-Government railway, to the provisions of any contract between the non-Government railway and the Central Government, a railway administration may, for the purposes of constructing or maintaining a railway-
>
> (a) make or construct in or upon, across, under or over any lands, or any streets, hills, valleys, roads, railways, tramways, or any rivers, canals, brooks, streams or other waters, or any drains, waterpipes, gas-pipes, oil-pipes, sewers, electric supply lines, or telegraph lines, such temporary or permanent inclined-planes, bridges, tunnels, culverts, embankments, aqueducts, roads, lines of rails ways, passages, conduits, drains, piers, cuttings and fences, in-take wells, tube wells, dams, river training and protection works as it thinks proper;
>
> (b) alter the course of any rivers, brooks, streams or other water courses, for the purpose of constructing and maintaining tunnels, bridges, passages or other works over or under them and divert or alter either temporarily or permanently, the course of any rivers, brooks, streams or other water courses or any roads, streets or ways, or raise or sink the level thereof, in order to carry them more conveniently over or under or by the side of the railway;

(c) make drains or conduits into, through or under any lands adjoining the railway for the purpose of conveying water from or to the railway;

(d) erect and construct such houses, warehouses, offices and other buildings, and such yards, stations, wharves, engines, machinery apparatus and other works and conveniences as the railway administration thinks proper;

(da) developing any railway land for commercial use (e) alter, repair or discontinue such buildings, works and conveniences as aforesaid or any of them and substitute others in their stead;

(f) erect, operate, maintain or repair any telegraph and telephone lines in connection with the working of the railway;

(g) erect, operate, maintain or repair any electric traction equipment, power supply and distribution installation in connection with the working of the railway; and

(h) do all other acts necessary for making, maintaining, altering or repairing and using, the railway."

47. The first difficulty for the petitioners that stares at our faces is, the *non-obstante* clause at the beginning of section 11.

48. Let us begin our discussion with what a *non-obstante* clause is. This discussion is necessitated because of the petitioners' (mis) understanding of the legal position about the effect or impact of a *non-obstante* clause. We refer to Ms. Collasso's argument that section 11 does not either expressly or by necessary implication exempt a railway administration from obtaining environmental clearance under the EP Act, a *fortiori*, under the 2011 CRZ Notification.

49. The decision in *G.M. Kokil* (supra), cited by Mr. Pangam, held that a "non obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions".

50. The decision cited by Mr. Agha in *Chandavarkar Sita Ratna Rao* (supra) lays down as follows:

"68. A clause beginning with the expression 'notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract' is more often than not appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non obstante clause. It is equivalent to saying that in spite of the provision of the Act or any

other Act mentioned in the non ob-stante clause or any contract or document men-tioned the enactment following it will have its full operation or that the provisions embraced in the non obstante clause would not be an impediment for an operation of the enactment. See in this connection the observations of this Court in *South India Corpn. (P) Ltd.* v. *Secretary, Board of Revenue, Trivan-drum*, AIR 1964 SC 207 at p.215.

69. It is well settled that the expression 'notwithstanding' is in contradistinction to the phrase 'subject to', the latter conveying the idea of a provision yielding place to another provision or other provisions to which it is made subject. ***."

51. One finds reiteration of the same legal position in the decision in *State of Bihar* v. *Bihar Rajya M.S.E.S.K.K. Mahasangh*, (2005) 9 SCC 129. The Court held that:

"47. Normally the use of a phrase by the legislature in a statutory provision like 'notwithstanding anything to the contrary contained in this Act' is equivalent to saying that the Act shall be no impediment to the measure (see *Law Lexicon* words 'notwithstanding anything in this Act to the contrary'). Use of such expression is another way of saying that the provision in which the *non obstante* clause occurs usually would prevail over other provisions in the Act. Thus, *non obstante* clauses are not always to be regarded as repealing clauses nor as clauses which expressly or completely supersede any other provision of the law, but merely as clauses which remove all obstructions which might arise out of the provisions of any other law in the way of the operation of the principal enacting provision to which the *non ob-stante* clause is attached.***"

52. In *ICICI Bank Ltd.* v. *Sidco Leathers Limited*, (2006) 10 SCC 452, the Court further held that the impact of a non-obstante clause must be kept measured by the legislative policy and it has to be limited to the extent it is intended by Parliament and not beyond that. In other words, the non-obstante clause must be given effect to, to the extent Parliament intended and not beyond the same.

53. We are also reminded of the Full Bench decision of this Court in *Mohd. Riyazur Rehman Siddiqui* v. *Deputy Director of Health Services*, 2008 Mah LJ 941, where it has been held that the wide meaning of the *non-obstante* clause and the enacting words following it may not be curtailed when the use of wide language accords with the object of the Act.

54. Bearing these principles in mind, we now proceed to consider the impact of the *non-obstante* clause in section 11 of the Railways Act on the other enactments, referred to in section 11 either specifically or generally. We remind ourselves of the settled law that attention should be confined to what is necessary for a particular case. For the purposes

of the present case, to paraphrase section 11 and its relevant clauses, the same must be read as mandating that in spite of any provisions contained in any other law for the time being in force except the provisions of the Railways Act and the provisions of any law in relation to acquisition of land for public purpose or for companies, a railway administration may, for the purposes of constructing or maintaining a railway,

(i) make or construct in or upon, across, under or over any lands such temporary or permanent inclined-planes, bridges, tunnels, culverts, lines of railways, etc. [clause (a)];

(ii) alter the course of any rivers, brooks, streams or other water courses, for the purpose of constructing and maintaining tunnels, bridges, passages or other works over or under them [clause (b)];

(iii) erect and construct such houses, warehouses, offices and other buildings, etc., and other works and conveniences as the railway administration thinks proper [clause (d)];

(iv) alter, repair or discontinue such buildings, works and conveniences [clause (e)]; and

(v) do all other acts necessary for making, maintaining altering or repairing and using the railway [clause (h)].

55. Given these wide ranging powers conferred by the Parliament on a railway administration and bearing in mind the impact that the *non-obstante* clause found at the beginning of section 11 of the Railways Act has on other enactments, barring only the Railways Act and land acquisition laws for a public purpose, it is too late in the day for the petitioners to contend that notwithstanding the presence of section 11 of the Railways Act in the statute book conferring such wide ranging powers with overriding effect, the railway authorities, i.e., SWR and RVNL, are required to obtain building permissions from the village panchayat under the Panchayat Act or other permissions under the other stated State legislation. If we were to accept the contention of the petitioners, we would either have to totally ignore the provisions contained in section 11 or to render section 11 completely ineffective without even outlawing it. Indeed, this is not a permissible course of action. *Qua* the stated State legislation is concerned, we have no option but to hold that the same must yield to section 11 of the Railways Act when a railway administration proceeds to execute the work of construction or maintenance of a railway in accordance with the provisions of the Railways Act and the laws relating to land acquisition.

56. The decision in *Village Panchayat (Calangute)* (supra) relied on by Ms. Collasso and Mr. Rodrigues has been perused by us. The Supreme Court was seized of the question whether a village panchayat can challenge an order passed by the designated officer exercising the

power of an appellate authority qua the action/decision/resolution of the village panchayat in a a petition under Article 226/227 of the Constitution. Observations made by the Court in answering such a question may not provide the guiding light for deciding the contentious issue arising in this case. The said decision, therefore, is distinguishable.

57. The contention of Ms. Collasso that section 11 does not expressly grant exemption to a railway administration from obtaining permissions of various authorities under the stated State legislation or the GCZMA under the EP Act, is too tenuous to commend acceptance. The exemption for a railway administration to execute the works of construction and maintenance of a railway is conferred by the *non-obstante* clause which has an overriding effect over all other laws except the provisions of the Railways Act and the laws relating to land acquisition for public purpose, if execution is undertaken by a Government railway. The contention, therefore, stands rejected.

58. Insofar as the contention raised by Ms. Collasso that the railway authorities were required to obtain prior environmental clearance from the GCZMA is concerned, the same is equally tenuous. Paragraph 3 of the 2011 CRZ Notification lays down the activities which are prohibited within the CRZ area. None of the sub-paragraphs of paragraph 3 refer to a railway. We may, in this connection, consider and apply the legal maxim *expressio unius est exclusio alterius.* This maxim, embodying the principle of implied exclusion, means that expression of one is the exclusion of another. Where the law specifies certain activities to be prohibited, an inference may be drawn that activities other than those prohibited are permitted. Although the courts must guard against indiscriminate application of this maxim, we can safely infer not on the basis of what is provided in paragraph 3 but also in view of the *non-obstante* clause in section 11 of the Railways Act, that whatever has not been included in paragraph 3 of the 2011 CRZ notification has, by implication, been excluded.

59. Reliance placed by Mr. Pangam on the decision of the coordinate Bench in *Municipal Corporation of Greater Mumbai* (supra) is apt. Reading the decision, we find that the bench took into consideration various decisions of the vintage era interpreting section 7 of the Railways Act, 1890, which is the present era section 11, while holding that licences and fees for putting up hoardings by the concerned railways is not required under the MMC Act. We have not the slightest hesitation in recording our agreement with what has been laid down in such decision on interpretation of section 11.

60. While also concurring with the decisions in *Goa Foundation* (supra) and *Subhas Dutta* (supra), we cannot fail to note a particular argument that was advanced before the coordinate Bench in *Goa*

*Foundation* (supra) by learned counsel for the petitioners. It was contended that the Ministry of Environment had issued a draft notification inviting objections, since the Government of India had intended to prescribe that environment clearance from such Government would be required for providing railway lines. This was as far back as in April 1992. If indeed the Government of India had issued a draft notification with a particular intention and had not carried the process further, it stands to reason that the said Government went back on its intention to prescribe environmental clearance to be obtained for providing railway lines. That over the last three decades no such requirement has been spelt out in accordance with law is in itself a pointer to the fact that the Government of India does not intend that environmental clearance is to be obtained for the purposes mentioned in section 11 of the Railways Act.

61. It would also appear from the notification issued by the Ministry of Environment and Forests on 14th September 2006 that the same also does not require a prior environmental clearance to be obtained by a railway administration. The schedule to the notification, it has been brought to our notice by Mr. Pangam, refers to a whole lot of activities that require a prior clearance to be obtained before the same are undertaken by the specified authorities but the Railways is conspicuously absent. We are inclined to think that if at all an environmental clearance for laying railway lines was required in terms of the notification issued by the concerned Ministry, the same would definitely have been incorporated therein. The exclusion is significant and has to be borne in mind while deciding a claim of the present nature.

62. We are, thus, of the considered opinion that if indeed the legislature intended laying of a railway line or other incidental activities to be a prohibited activity within the EP Act, a *fortiori*, the 2011 CRZ notification or even under the notification issued by the Ministry of Environment and Forests on 14th September 2006, such a prohibition could have been included but only after amendment of the Railways Act and not without. Parliament is presumed to have known what the existing state of law is, when a new law is in course of being enacted by it and if a legislation is enacted giving it overriding effect over the law prior in point of time, the newly enacted law has to be given effect no matter what the consequences would be.

63. We have noted above that despite section 11 beginning with a *non-obstante* clause, section 11 is subject to the other provisions of the Railways Act and the laws relating to land acquisition and it does not override such other provisions/laws. In such view of the matter, the petitioners could have succeeded in their plea of stalling the project if it

could be shown that provisions relating to land acquisition have not been followed which is contrary to public interest. Mr. Agha has shown us from the reply affidavit of RVNL how the provisions contained in Chapter IV-A of the Railways Act have been adhered to while acquiring land and making payment to the land losers. This version of RVNL, which is undisputed, is sufficient for us to hold that the railway authorities, i.e., SWR and RVNL, have not bulldozed the rights of land owners and have acted strictly within the confines of section 11. It has also not been shown that the land losers are aggrieved by the compensation paid to them. These are all relevant considerations which cannot be overlooked when a project of this magnitude is under way.

64. Importantly, the petitioners have neither challenged section 11 of the Railways Act nor the 'special railway project'. Their grievance is confined to non-obtention of permissions from the authorities under the stated State legislation and environmental clearance under the 2011 CRZ notification.

65. As has been held above, permissions were not required to be obtained and, therefore, we see no reason to hold that the provisions of the 2011 CRZ Notification were required to be followed by the railway authorities and/or that by not following the same, they have indulged in activities which ought to be held illegal, arbitrary and without jurisdiction by this Court.

66. Our consideration would now shift to the matter in *T.N. Godavarman Thirumulpad* v. *Union of India,*, (1997) 2 SCC 267. Perhaps, this is a case that has generated the longest continuing mandamus. On 12th December 1996, the Supreme Court of India made an interim order banning all ongoing non-forestry activities within any forest in any State throughout the country without prior permission of the Central Government. The Court held that the Forest (Conservation) Act, 1980 was enacted to check further deforestation, resulting in ecological imbalance. Therefore, its provisions would apply to all forests irrespective of the nature of ownership or classification thereof. The Court further held that the expression "forest" must be understood according to its dictionary meaning and include any areas recorded as forests in Government records, irrespective of the ownership.

67. In the interim order dated 12th December 1996, the Court also directed all the States to constitute expert committees to identify and demarcate forests. In addition, some directions were issued in the context of wood-based industries. Even the Ministry of Railways was directed to file an affidavit giving full particulars, including the extent of wood consumed by them, the sources of wood supply, and the steps taken for alternatives to the use of wood.

68. The Court clarified that the orders and directions issued in that

matter were to continue till further orders by the Court and would operate and be complied with by all concerned, notwithstanding any order at variance, made or which may be made thereafter, by any authority, including the Central or any State Government or any Court (including High Court) or Tribunal.

69. After that, the Supreme Court made several orders and directions on various facets concerning the identification and demarcation of forests and the activities that may be permitted or prohibited in such areas. In addition, multiple orders have been passed on the aspects of afforestation, Net Present Value of diverted forest land, mining, wildlife protection, etc.

70. In 2002, the Supreme Court constituted a CEC for effectively implementing court orders and matters connected therewith. By such orders, a scheme was evolved, *inter alia*, for monitoring various forest activities and procedures for seeking exemptions, clarifications, etc.

71. *T.N. Godavarman Thirumulpad* v. *Union of India*, (2016) 13 SCC 586, records several orders and directions issued by the Supreme Court from time to time covering various aspects. The order dated 5th October 2015, referred to by Mr. Pangam and reported in (2016) 13 SCC 586 (2) is relevant to appreciate the genesis of the order dated 9th May 2022, relied upon by the petitioners.

72. One of the aspects considered by the Supreme Court in its order dated 5th October 2015 relates to National Parks and wildlife sanctuaries. The Court ordered that all matters for grant of permissions for implementation of projects in areas falling in National Parks/Sanctuaries, including rationalization of boundaries, etc., will be considered by the Standing Committee of the NBWL on its own merits and in conformity with the orders and directions passed from time to time, i.e., on 14th February 2000, 16th December 2002, 13th November 2000, 9th May 2002, 25th November 2005 and 14th September 2007 and other subsequent clarificatory orders/judgments.

73. Furthermore, the Supreme Court requested the NBWL to furnish a copy of the orders passed by it within 30 days to the CEC. After that, the CEC was granted the liberty to move the Supreme Court of India by filing an appropriate petition/application in case it was aggrieved by the decision of the Standing Committee of the NBWL.

74. The order dated 9th May 2022 relied upon by the petitioners was made by the Supreme Court on a petition/application by the CEC objecting to the clearance granted by the Standing Committee of the NBWL to the double tracking project through a 26 km stretch, admittedly falling within the national park/wildlife sanctuary. Even Ms. Colasso did not claim that this order has any application beyond the

stretch of 26 km that falls within the national park/wildlife sanctuary.

75. Thus, it is quite clear that the order dated 9th May 2022 was in the context of the particular scheme evolved by the Supreme Court through its various orders and directions in *T.N. Godavarman* (supra). Admittedly, the lands within the village of Guirdolim, whose cause the petitioners claim to espouse, do not fall within any national park or wildlife sanctuary. The petitioners have not even claimed that any such lands have been demarcated as forests or are otherwise liable for demarcation as forests. Therefore, based upon the order dated 9th May 2022, the petitioners cannot contend that since the Supreme Court set aside the decision of the Standing Committee of the NBWL without adverting to the provisions of section 11 of the Railways Act, even we must hold that the requirements of the Panchayat Act or the T&CP Act must apply to the double tracking project, notwithstanding the clear and unambiguous *non-obstante* clause in section 11 of the Railways Act.

76. In our judgment, no such inference can be drawn, or such conclusion jumped at. A decision is only an authority for what it actually decides. What is of essence is its ratio and not every observation found therein nor what logically follows from the various observations made in the decision. Every decision must be read as applicable to the particular facts proved or assumed to be proved since the generality of the expressions which may be found there is not intended to be the exposition of the law but governed and qualified by the particular facts of the case under which such expressions are to be found. It would, therefore, be not profitable to extract a sentence here and there from the decision and build upon it because the essence of the decision is its ratio and not every observation found therein. We may, in this connection, profitably refer to the decision in *Union of India* v. *Dhanvanti Devi*, (1996) 6 SCC 44.

77. We now move on to consider the other argument of Ms. Collasso that since the railway authorities had sought for permission under the Forest (Conservation) Act and Wildlife (Protection) Act, they cannot choose to ignore the EP Act and not obtain environmental clearance. We have noted above how the Supreme Court in *T.N. Godavarman* (supra) has been monitoring activities in forest land, right from 1996 onwards. Although we are inclined to the view that section 11 of the Railways Act overrides any other inconsistent provisions including provisions in the Forest (Conservation) Act or Wildlife (Protection) Act, which are laws enacted prior to the Railways Act, and that a railway administration may not be bound to obtain permissions under the said enactments in terms of the statutory mandate, such administration is bound to obtain permissions from the forest authorities and the Standing Committee of

the NBWL in view of the various judicial orders passed by the Supreme Court in the *T.N. Godavarman* matter. The permissions that SWR and RVNL sought from the forest as well as the wildlife authorities were because of the judicial orders passed from time to time by the Supreme Court. If indeed the Supreme Court ever passes an order that a rail line cannot be laid in a CRZ area without environment clearance from the authorities of the relevant Coastal Management Authority, any railway administration would be bound to obtain such environmental clearance. However, so long as such a requirement is not expressed in any judicial order, the mere fact that the railway authorities in this case have sought permission from the forest as well as wildlife authorities would not *ipso facto* impose upon SWR and RVNL the obligation to obtain environmental clearance from the GCZMA.

78. Much has been argued by Ms. Collasso on the requirement of the double tracking project drawing inspiration from the order dated 9th May 2022 in *T.N. Godavarman* (supra). It is indeed true that the Supreme Court was not satisfied of the requirement or real necessity for double tracking. However, what the Supreme Court was seized of is the stretch of 26 kms spread over a national park/wild life sanctuary and not the entirety of the special railway project undertaken by SWR and RVNL. In any event, whether or not double tracking is a necessity cannot be decided by us. It is after all a policy decision taken by the Government of India in the appropriate department and unless such policy decision is shown to infringe any of the fundamental rights of the people, the writ court ought to stay at a distance is the settled law.

79. At this stage, it would be apposite to note the concluding observations made by the Supreme Court in the order dated 9th May 2022 in *T.N. Godavarman* (supra). The same read:

> "22. It is necessary that there should be a detailed study and analysis of the impact of the proposed project on the bio-diversity and ecological system of the protected areas under wildlife sanctuary. A detailed study undertaken by NTCA on the viability of the project for the Goa part is essential in view of the Bhagwan Mahaveer Wildlife Sanctuary being an important tiger corridor. Even according to NTCA, an independent and detailed assessment of the cumulative impact of the project for the entire stretch from Tinaighat to Kulem has to be undertaken. The impact of the increase of section capacity by 2.5 times than by doubling the railway line in comparison to the single line along with increased mobility on wildlife problems in terms of sound pollution, vibration etc. has not been taken into account by the Standing Committee of NBWL while recommending the project. Assessment of the impact which the project would have on the environment, especially in the protected

area and wildlife sanctuary taking into account all the major factors such as the impact on the habitat, species, climate, temperature, etc. caused due to felling of trees not only for the laying of railway tracks but also for the secondary works such as setting up machinery, disposal of waste and putting in place various mitigation measures etc.), movement of trains, human-wildlife interactions would have to be strictly undertaken before the project is considered by the NBWL. There is no credible supporting data for the projections that are given by RVNL relating to the traffic between Karnataka and Goa project for the period 2022-2023 and 2030-2031 and there is no explanation regarding the projected traffic for the next 4-5 years which is required for the completion of the construction of the project. Such data, projections and speculations will have to be supported by an independent and credible source before undertaking any kind of construction activity in the Western Ghats which is world's eight hotspots of biological diversity.

23. For the foregoing reasons, we uphold the conclusion of the CEC and revoke the approval granted by the Standing Committee of NBWL for doubling the railway line between Castlerock to Kulem. However, this will not preclude the RVNL to carry out a detailed analysis on the impact of the proposed project on the biodiversity and ecology of the protected areas under the wildlife sanctuary as indicated hereinabove and then submit a fresh proposal to the Standing Committee of NBWL which shall be considered in accordance with law."

(emphasis ours)

80. Therefore, if at all the railway authorities are unable to satisfy the Supreme Court of the necessity to execute the project of double tracking through forest areas, certain alternative routes may have to be explored. However, for reasons discussed above, the order dated 9th May 2022 in *T.N. Godavarman* (supra) does not, in our opinion, operate as a bar for SWR or RVNL to lay lines for double tracking in execution of the special railway project in the other areas which do not fall in a national park/wild life sanctuary.

81. We are now left to consider two other decisions.

82. We quite agree with the coordinate Bench in *Mr. Robin Jaisinghani* (supra), while it proceeded to hold that the Metro Railway cannot execute the work by creating noise which is above the permissible limits laid down under the Noise Pollution Rules. Despite section 11 of the Railways Act being on the statute book, the *non-obstante* clause therein would have to be confined to the purposes that find place therein to achieve the object of the legislation. Most certainly, while constructing or maintaining a railway, the railway administration cannot be heard to say that it would be enjoying

immunity from adhering to other legislation, be it primary or subordinate, which has no relation to the enacting part of section 11. We must remember that the *non-obstante* clause must be kept measured by the legislative policy and has to be limited to the extent it is intended by the Parliament and not beyond. While constructing or maintaining a railway, the railway administration has to execute the work in such a manner that the noise levels are maintained and the Fundamental Rights guaranteed by Article 21 to a person is not invaded.

83. We can imagine two other situations where the railway administration in the course of execution of its project must have regard to other statutory enactments. Section 11 would not authorize the railway administration to deprive the workforce employed at the project of their legitimate dues as prescribed by the relevant enactments. Section 11 would be no answer for a railway administration to pay less. Also, if unfortunately, there be an accident resulting in loss of life of a labourer, section 11 of the Railways Act would not give immunity to the railway administration from paying compensation under any relevant enactment.

84. However, to our mind, the decision in *Mr. Robin Jaisinghani* (supra) would have limited application and cannot be read as a precedent which erodes the binding efficacy of the decisions in *Goa Foundation* (supra) and *Subhas Dutta* (supra).

85. It is now time to deal with the order of the NGT in *Saloni Singh* (supra). According to Ms. Collasso, the NGT has rightly held that the decision in *Goa Foundation* (supra) is of the year 1992 after which much water has flown under the bridges.

86. We find from the order in *Saloni Singh* (supra) that the NGT quoted a previous order passed by it dated 12th December 2019 in the order that was cited before us. We are left to wonder as to how a bench of the NGT, which passed the order dated 12th December 2019, could make observations with regard to a judicial order of this Court which is binding on the NGT. The NGT perhaps was unaware that the decision in *Goa Foundation* (supra), far less from being expressly or impliedly overruled by the Supreme Court, was upheld upon sufficient deliberation though not after grant of special leave to appeal. Apart from a cursory reference to the law laid down in *Goa Foundation* (supra), the NGT did not consider the effect or impact of section 11 of the Railways Act. The observations of the NGT that environment norms have to be read into other regulatory statutes even if such a statute is subsequent to the environment laws, as held in *Bombay Dyeing & Manufacturing Co. Ltd.* (supra) would have application only if it can be demonstrated with reference to adequate and acceptable material that

the Railways Act is a mere regulatory statute. That has not been shown and is not the case. The Railways Act consolidates the law relating to railways and is a complete code in itself. While we hold the order in *Saloni Singh* (supra) to be of little assistance to advance the case of the petitioners, we wish to remind the NGT to remain within its bounds while it discharges duties and functions enjoined by the National Green Tribunal Act upon it.

87. For the reasons aforesaid, we hold that SWR and RVNL are not under any statutory compulsion to obtain environmental clearance from the GCZMA or any building permissions or other permissions from any authority under the diverse legislation referred to by Ms. Collasso.

88. There is no merit in this public interest litigation which, accordingly, stands dismissed.

89. No costs.

2022 SCC OnLine Bom 3526

In the High Court of Bombay at Goa

(BEFORE M.S. SONAK AND BHARAT P. DESHPANDE, JJ.)

Village Panchayat of Velsao - Pale - Issorcim, Through its Sarpanch, Mr. Henrique De Mello … Petitioner;

*Versus*

Ministry of Railways, Through its Secretary and Others … Respondents.

Writ Petition No. 25 of 2022

Decided on October 11, 2022, [Reserved on : 10th October 2022]

Advocates who appeared in this case:

Mr. C.A. Ferreira with Ms. Norma Alvares and Mr. Om D'Costa, Advocates for the Petitioner.

Mr. P.P. Singh, Advocate for Respondent Nos. 1 & 2.

Mr. Iftikhar Agha with Ms. V. Fernandes, Advocates for Respondent No. 3.

Mr. D. Pangam, Advocate General with Ms. M. Correia, Additional Government Advocate for Respondent No. 4.

The Order of the Court was delivered by

M.S. SONAK, J.:— Heard learned Counsel for the parties.

2. The Petitioner is a Village Panchayat. The Petitioner has objections to respondent nos. 1, 2 & 3 undertaking works concerning the railway track doubling project within areas of the Panchayat jurisdiction. The Petitioner contends that permissions from the Panchayat are necessary before the railways can undertake any such works, particularly now that the Panchayats have been conferred a constitutional status by the 73rd amendment to the Constitution of India.

3. Based on the above, the Petitioner, by instituting the present petition, has sought the following reliefs:

> *"(1) For directions to the Respondents to remove the structures and material placed within the jurisdiction of the Petitioner authority in a time bound manner and report compliance;*
>
> *(2) For a declaration that no construction or development work can be carried out by the Respondent Nos. 2 & 3 without a licence of the Village Panchayat."*

4. According to us, the issue raised in this petition is entirely covered against the Petitioner, in our judgment and order dated

03.08.2022 in Public Interest Litigation Writ Petition No. 15/2021 (*Ganv Bhavancho Ekvott* v. *South Western Railways*). In the said judgment and order, the Division Bench of this Court (comprising of Dipankar Datta, CJ. & M.S. Sonak, J.) has rejected a similar contention having regard to the provisions in Section 11 of the Railways Act, 1989. In particular, the Division Bench referred to and relied upon the non-obstante clause with which Section 11 of the Railways Act 1989 begins and the legal effect of such a clause.

5. However, Mr Ferreira, learned Counsel for the Petitioner, submits that the present petition is instituted by a Panchayat, unlike the previous petition that NGO and some private parties instituted. He submits that the argument based on Article 243ZD of the Constitution was neither addressed nor considered by the Division Bench. He urged leave to only address this argument while admitting that the other issues raised in the petition might be substantially covered by the decision earlier referred to. He also relied on a decision of the Hon'ble Supreme Court that we shall discuss later.

6. Mr Ferreira submits that in terms of Article 243ZD, the State must constitute a District Planning Committee at the District level to consolidate plans prepared by Panchayat and Municipalities in the District and to prepare a draft development plan for the District as a whole. The State legislature is required, by law, to make a provision concerning the composition of the District Planning Committees, how the seats in such Committees are to be filled, the functions relating to District Planning which may be assigned to these Committees and how Chairpersons of such Committees shall be chosen. He submits that every District Planning Committee in preparing the development plan must have regard to matters of common interest between Panchayats and Municipalities, including spatial planning, sharing of water and other physical and natural resources, the integrated development of infrastructure and environmental conservation, the extent and type of available resources whether financial or otherwise. The District Planning Committees are also required to consult such institutions and organisations as the Governor may, by order specify. He submits that the Chairperson of every District Planning Committee should then forward the development plan as recommended by such Committee to the Government of the State.

7. Mr Ferreira submitted that the Panchayat Raj Act, 1994 makes provisions for such District Planning Committees. He presents that no development can occur in a Panchayat area that will conflict with the plans to be prepared by the District Planning Committee. He submits that since the constitution and functions of a District Planning Committee have been prescribed under a constitutional provision, Article 243ZD, the plans prepared by the District Planning Committee

will prevail over the provisions of Section 11 of the Railways Act. He, therefore, submits that the rule in this petition may be made absolute and the railways be restricted from undertaking any works without obtaining permission from the Panchayat.

8. The learned Advocate General, Mr P. P. Singh and Mr I. Agha oppose the grant of any relief in this petition. They submit that the issues raised are entirely covered by the decision in *Ganv Bhavancho Ekvott* (supra). They submit that no pleadings back in the issue now raised. Therefore, they submit that such an issue does not even arise. In any case, they submit that the non-obstante clause in Section 11 of the Railways Act will prevail over any of the provisions or actions under the Panchayat Raj Act of 1994 as clearly held in *Ganv Bhavancho Ekvott* (supra). Accordingly, they submit that this petition may be dismissed.

9. The rival contentions now fall for our determination.

10. As noted earlier, most of the contentions urged in the petition are entirely covered by our decision in *Ganv Bhavancho Ekvott* (supra). Even the argument now raised was considered and rejected by us. This is apparent from reference to paragraphs 5(xi), 5(xii), 54, 55 and 60 of our judgment and order delivered on 03.08.2022. There was a reference to the Constitutional status of Panchayats, though there may not have been a direct reference to District planning committees.

11. In any case, the contention now raised is nothing but another shade of the similar arguments raised and considered in *Ganv Bhavancho Ekvott* (supra). Therefore, we will have to dismiss the present petition by adopting the reasonings in the said decision.

12. Further, if the pleadings in this petition are perused, it is apparent that the contention now raised by Mr Ferreira finds no place in the pleadings. None of the grounds refers to the argument now raised. Paragraph 4(b), relied upon by Mr Ferreira, only raises the legal issue as to whether the provisions of the Goa Panchayat Raj Act, 1994, brought into force after the 73rd constitutional amendment, could be disregarded by the Railway Authorities acting under the Railways Act which the Parliament passed in the year 1989. Again, there is no reference to any District Planning Committees or any plans made by such Committees.

13. In the petition, the Petitioner has not even pleaded that some District Planning Committee in terms of Article 243ZD of the Constitution was constituted and that this Committee has prepared some plans for the petitioner Panchayat area. Moreover, there were no pleadings that the activities now undertaken by the railways conflict with such plans. In the absence of such pleadings, we are afraid we cannot examine the contention now raised.

14. Besides, even if we were to assume that the District Planning

Committees were constituted in terms of the Panchayat Raj Act, 1994, any action of such planning authorities at least prima facie, might have to yield to the acts of the railways if permitted under Section 11 of the Railways Act, 1989. The concept of the "*non-obstante clause*" and its impact on the provisions of the Panchayat Raj Act has been discussed by us in *Ganv Bhavancho Ekvott* (supra). Based on such discussion and reasoning, the contention without pleadings will have to be rejected.

15. The learned Advocate General relied on the decision of the Division Bench in *Dada Fire Works Pvt. Ltd.* v. *State of Maharashtra*[1]. The said decision may not be very relevant as the issue involved in the said matter was about the legal status of the planning authorities under the planning regulations after the provisions in Article 243ZD entered force.

16. Mr Ferreira relied on some observations in *Rajendra Shankar Shukla* v. *State of Chhattisgarh*[2] concerning the provisions of Article 243ZD of the Constitution. However, the observations were made in a context that was not even remotely comparable to the context of the present case. Again, in the said case, the Hon'ble Supreme Court was not concerned with the interplay between provisions in a Parliamentary legislation containing a non-obstante clause and State Legislation like a Panchayat Raj Act. Accordingly, even the decision in *Rajendra Shankar Shukla* (supra) can be of no assistance to the Petitioner in the present case.

17. We dismiss this petition for the above reasons and the reasons discussed by us in *Ganv Bhavancho Ekvott* (supra).

18. However, there shall be no order for costs.

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[1] (2005) 4 Bom CR 50

[2] (2015) 10 SCC 400

2022 SCC OnLine Bom 6701 : (2023) 2 Bom CR 208

In the High Court of Bombay

(BEFORE DIPANKAR DATTA, C.J. AND ABHAY AHUJA, J.)

National High Speed Rail Corporation Ltd. ... Petitioner;

*Versus*

State of Maharashtra and Others ... Respondents.

Writ Petition No. 442 of 2020 and Interim Application (L) No. 8034 of 2020

Decided on December 9, 2022, [Reserved On : 1st December, 2022]

Advocates who appeared in this case :

Mr. Prahlad Paranjape a/w. Mr. Manish Kelkar, Advocate for the Petitioner/Applicant.

Mr. Amit Shastri, AGP for the Respondents No. 1 and 3 - State.

Ms. Jaya Bagwe a/w. Ms. A.U. Nair, Advocate for the Respondent No. 2 - MCZMA.

Mr. Anil Singh, ASG a/w. Mr. Rui Rodrigues a/w. Mr. Aditya Thakkar a/w. Mr. N.R. Prajapati, Mr. D. P. Singh and Ms. Smita Thakur, Advocate for the Respondents No. 4 - Union of India.

Mr. Darius Khambata, Senior Advocate a/w. Mr. Tushar Hathiramani a/w. Ms. Naira Jejeebhoy a/w. Ms. Sheetal Shah and Ms. Dimple Bitra i/b. M/s. Mehta & Girdharilal, Advocate for the Respondent No. 5.

The Judgment of the Court was delivered by

ABHAY AHUJA, J.:— This is a writ petition seeking to quash and set aside the communication dated 20th December 2018, pursuant to which, the Maharashtra Coastal Zone Management Authority, Mumbai (hereinafter referred to as "MCZMA" for the sake of brevity) has refused to grant permission to the petitioner, to cut/fell mangroves falling within Coastal Regulation Zone-I (hereinafter referred to as "CRZ-I" for the sake of brevity) deferring the proposal of the petitioner for carrying out work in respect of the Mumbai Ahmedabad High Speed Railway Project (hereinafter referred to as the "Project" for the sake of brevity). The relevant portion of the said communication is quoted as under:

> *"Minutes of the 128th meeting of the Maharashtra Coastal Zone Management Authority (MCZMA) held on 20th December, 2018*
>
> *94.629 Ha. The PP vide letter dated 2.11.2018 submitted the required information as sought by the MCZMA in its 126th meeting.*
>
> *The Authority noted the Hon'ble High Court order dated 17th September, 2018 in PIL 87/2006 passed by Hon'ble High Court of Mumbai. Since proposed activities are situated in 50 m mangrove bufer zone area, the Authority suggested that the project proponent may approach Hon'ble High Court of Mumbai seeking relief from the above said order dated 17th Sep. 2018. Further, the CZMP under CRZ Notification, 2011 for Thane & Palghar is yet to be finalized and approved by MoEF&CC, New Delhi. Therefore, the matter was deferred."*
>
> (*emphasis supplied*)

2. Vide the said decision, the respondent no. 2 MCZMA had deferred the matter since the proposed activities were observed to be situated in the 50 mtrs. mangrove buffer zone and the MCZMA suggested that the petitioner approach the Bombay High Court seeking relief, in

view of the order dated 17th September 2018 in Public Interest Litigation No. 87 of 2006.

3. Mr. Paranjape, learned counsel for the petitioner, submits that the Project is India's first high speed or bullet train project. The Project will connect the cities of Mumbai and Ahmedabad and will have an alignment of 508.17 km. Out of the said alignment, a total alignment of 155.642 km will fall in Maharashtra, 4.302 km in the Union Territory of Dadra Nagar and Haveli and 348.226 km in Gujarat. Out of the said 155.642 km alignment falling in Maharashtra, the area falling in the Coastal Regulation Zone of Maharashtra stands at 21.913 km. The petitioner has proposed the alignment on elevated via ducts and bridges and also 26.915 km of underground tunnels.

4. Mr. Paranjape submits that the project alignment also involves 8 tunnels with the longest tunnel being 20.375 km at the Thane creek. The length of bridges in the alignment is 6.421 km. The remaining alignment of 474.834 km is on viaduct.

5. Mr. Paranjape has submitted before us the various advantages of the Project connecting the cities of Mumbai and Ahmedabad, which are summarized as under:

*"3. Advantages of the Mumbai-Ahmedabad High Speed Rail (Bullet Train):*

*a. The Bullet Train will connect Mumbai - Ahmedabad covering a distance of 508.17 kms. Out of the said distance, 155.642 kms is in Maharashtra, 4.302 kms in the Union Territory of Dadra, Nagar and Haveli and 348.226 kms is in the State of Gujarat. Out of the 155.642 km alignment in Maharashtra, 21.913 km falls within Coastal Regulation Zone.*

*b. NHSRCL:NHSRCL is a Govenment Company set up under Ministry of Railway with partnerships from State of Maharashtra and State of Gujarat. Ministry of Railways have already granted approva to the Bullet Train on a careful consideration of feasibility, environment impact, cost and other important parameters of the project.*

*c. International funding: The projected investment is approximately Rs. One Lakh Ten Thousand crore from which approximately Rs. Eighty Eight Thousand crore wil be received as a loan from Japan International Cooperation Agency (JICA) on a 0.1% interest p.a. with repayment spread over 50 years and grace period of 15 years. This is the first time in India that an infrastructure project is being funded on such favourable terms.*

*d. Land requirement: The land requirement in Maharashtra is approximately 432 H and procedure of acquisition is already on. In Maharashtra, an area 129.6 H falls under forests (original area was 131.30 Hectares). The land requirement in Gujarat is approximately 956.15 H and as per the latest update approximately 98% has been acquired. In Maharashtra, out of the total approximate and requirement, 83% private land has been acquired and 92% government land has been acquired.*

*e. Reduction in travel time: Bullet Train will reduce travel time between Ahmedabad and Mumbai from present six and half hours to two and half hours. This is the first bullet train project conceptualized and being executed in India.*

*f. Globally accepted mode of transport: Bullet Train is a fast, safe, punctual, cost-effective and viable mode of transport in over 20 countries including China, United Kingdom, France, Germany, Japan, Korea, Taiwan and is under development in another 14 countries including Russia, Qatar, South Africa, Brazil, Mexico etc. Thus, the Bullet train is a proven efficient, environment friendly, feasible, viable and globally accepted mode of transport.*

*g. Generation of employment: The project will also generate employment of about 20,000 people in construction phase and operations and maintenance will employ (direct) approximate 4000 people and about 16,000 indirect jobs are also expected to be generated.*

*h. Increase in connectivity in the busy corridor of Ahmedabad and Mumbai: Bullet train would increase connectivity in the busy trade corridor of Ahmedabad and Mumbai which in turn increases economic productivity. Bullet train runs on electricity and hence saves valuable cost on conventional fuel which in turn reduces pollution and carbon footprint."*

6. It is the contention of Mr. Paranjape that the Project is as such of vital importance as it will not only reduce the journey time between important cities like Mumbai and Ahmedabad but will reduce the costs of travelling, reduce the carbon footprints, the pollution being caused by vehicular traffic, and will also be a fast connectivity measure between the two cities. The Project is being envisaged as a pioneer project for bullet trains in India.

7. It is submitted that the total land requirement for the Project in the State of Maharashtra is 438.5360 hectares. Out of the said total requirement of 438.5360 hectares, the area falling under forests stands at 131.3016 hectares and out of the same the area falling under mangrove forests stands at 32.4302 hectares; however, the actual land under mangroves which is going to be affected stands at 13.3668 hectares. That out of 32.4302 hectares, on approximate 8.39 hectares of land, the alignment would be underground and thus the mangroves spread over such area of 8.39 hectares will not be affected. However, out of the area of 24.0253 hectares land under mangroves forest, an area of 13.3668 hectares of land under mangroves vegetation with 53,467 trees is directly going to be affected. That, the approximate footprint of the viaduct on the ground of a pier is 12.50 mtrs and thus the actual area required on the spot is relatively lesser in comparison to any other mode of conventional transport.

8. Mr. Paranjape submits that the petitioner had not only undertaken a comprehensive Environmental Impact Assessment Study but has also formulated an Integrated Mangrove Conservation and Management Plan for the Project.

9. Mr. Paranjape submits that by the judgment of this Court delivered in PIL No. 87 of 2006 (*Bombay Environmental Action Group* v. *The State of Maharashtra*), it has been declared that mangroves are forests. A ban on cutting/felling/destruction of mangroves was imposed thereby with a window being kept open for cases where this Court is satisfied that such cutting/felling/destruction of mangroves is for national good or national interest. He submits that considering the aspect that the mangroves fall in the category of CRZ-I, the petitioner had made an application seeking permission of the Respondent No. 2 MCZMA to carry out the project work. In the said application, it had been stated that the petitioner would conduct afforestation on 1 : 5 ratio or as directed by the Competent Authority, for planting five times the number of trees (including mangroves) or as directed by the Competent Authority which would be cut/felled for the purpose of laying down the alignment of the High Speed Rail through the mangroves area. He submits that inspite of the above, the respondent No. 2 MCZMA in its 128th Meeting had by its letter/order/impugned communication dated 20th December 2018, deferred the request of the petitioner to start the project work in the affected CRZ-I area referring to the decision of this Court in PIL No. 87 of 2006, which has necessitated the filing of this writ petition.

10. When this writ petition was first heard on 29th January 2019, this Court had granted leave to implead the Ministry of Environment and Forests, Union of India, as a party respondent.

11. Thereafter, on 12th February 2019, this Court passed the following order:

*"1. The Petitioner has approached this Court challenging the decision of Respondent no. 2 in its meeting dated 20th December, 2018, thereby deferring the proposal of the Petitioner for Mumbai Ahmedabad High Speed Railway Project. Vide the said decision,*

*Respondent no. 2 deferred the matter in view of the judgment and order of this Court dated 17th September, 2018 in PIL No. 87 of 2006.*

2. *It should be noted that the Division Bench in the said order itself has directed thus:*

> *"In view of applicability of public trust doctrine, the State is duty bound to protect and preserve mangroves. The mangroves cannot be permitted to be destructed by the State for private, commercial or any other use unless the Court finds it necessary for the public good or public interest."*

3. *It can be, thus, seen that the Division Bench itself has carved out a clause wherein a permission can be granted if it is necessary for the public good or the public interest.*

4. *This Court has examined certain matters and has granted permission. It has also granted permission in some matters, wherein, the Court found that the larger public interest demands so. However, in all such matters the permission has been granted only after the expert bodies like Ministry for Environment and Forest, Government of India, the Ministry of Environment and Forest, State of Maharashtra and Respondent no. 2, herein, have granted the permissions. We find that it is for these bodies, who possess necessary expertise, to first find out as to whether the permission is necessary in the larger public interest or not. After application of mind, by such authorities with regard to grant or refusal of permission, the Court can consider, whether the larger public interest demands grant of such permission or not.*

5. *It appears that Respondent no. 2, herein, desires to adopt reverse procedure.*

6. *In that view of the matter, Respondent no. 2 to take decision on the proposal of the Petitioner within a period of four weeks from today.*

7. *Stand over to 18th March, 2019."*

12. On 6th March, 2019, the Respondent No. 2 MCZMA in its 131st meeting granted clearance and recommended the petitioner's proposal of the bullet train project to Respondent No. 4 MOEF & CC subject to conditions contained therein.

13. Thereafter, it appears that an amendment application came to be moved to bring on record the subsequent developments, which was allowed by orders dated 18th March 2019 and 8th April 2019.

14. In the meanwhile, on 29th March 2019, the in-principle Stage I clearance was received by the petitioner.

15. Thereafter, on 12th June 2019, this Court passed the following order:

*"1. Keeping in view the reliefs prayed for and the directions issued by this Court in Public Interest Petition No. 87 of 2006 we direct the petitioner to serve a copy of the writ petition on Bombay Environmental Action Group, the protagonist of Public Interest Petition No. 87 of 2006. Notice be taken out and served upon Bombay Environmental Action Group hamdust. Notice is made returnable on 1 August 2019.*

*2. Liberty is granted to complete the document Exhibit-K by inserting Page No. 136-AA/1."*

16. By order dated 8th March 2021, amendment was permitted whereby Bombay Environmental Action Group was impleaded as the respondent no. 5. Various affidavits in reply/additional affidavits as well as rejoinders have been filed by the respondents and the petitioner.

17. Mr. Paranjape submits that the Regional Empowered Committee of the respondent no. 4 MoEF & CC had, after considering the proposal of the petitioner, granted the in-principle approval (Stage I clearance) under Section 2 of the Forest (Conservation) Act, 1982 on 29th

March 2019, which was received by the petitioner on 10th April 2019. He submits that the respondent no. 4 had imposed almost forty conditions on the petitioner, some of which were to be complied with prior to the seeking of the Stage II clearance and some of the conditions were to be complied with during the implementation of the project work.

18. According to Mr. Paranjape, the petitioner had complied with the conditions and around 10th March, 2021, the compliance of the Stage I conditions was submitted to the Deputy Conservator of Forests for seeking a Stage II clearance and a consequent order for diversion of forest under Section 2 of the Forest (Conservation) Act. He submits that compliance of conditions with respect to Stage I, as submitted by the petitioner, is from pages 1 to 44 of the compilation of compliance of conditions. He also submits that the compliance report is available from pages 3 to 17 and the undertakings are given from pages 18 to 44.

19. Moving further, Mr. Paranjape submits that after submission of the compliance, the Additional Principal Chief Conservator of Forest (hereinafter referred to as APCCF) and Nodal Officer wrote to the State of Maharashtra regarding the compliance of Stage I and requested the State of Maharashtra to move the Government of India for issuing final approval under the Forest (Conservation) Act. Considering the conditions imposed in the permissions, the petitioner has offered to the respondent No. 2 MCZMA to plant a total number of 2,67,335 mangrove trees over an area of 67.5 hectares. That, on 15th July, 2022, the petitioner has deposited the costs of Rs. 9.95 crores as ascertained by the Respondent No. 3 Mangrove Cell, Mumbai for the said purpose. That, thereafter, being satisfied with the detailed compliance report of Stage I, on 18th August 2022, the respondent no. 4 MoEF&CC addressed a communication to the State of Maharashtra according final approval to the petitioner under Section 2 of the Forest (Conservation) Act for diversion of 129.7197 hectares of forest land in Thane, Palghar and Mumbai Suburban Districts subject to fulfilment of the conditions mentioned therein.

20. Learned counsel submits that, in the meantime, on 1st August, 2022, the Chief Conservator of Forests had issued a working permission to the petitioner for work of underground tunnel below the mangrove area of 8.3978 hectare and non-mangrove area from Chainage 7/100 to 22/350 kms. in Thane district and (71.4986 hectare) 75/160 to 155/650 kms. in Palghar district. He further submits that, however, the permission to start the work from Chainage 22/350 to 75/160 (41.5651 hectare) kms. has not been issued by the Chief Conservator of Forests as the remaining area contained some mangrove patches including non-mangrove area in between the mangrove patches, for which permission is required from this Court.

21. It has been submitted by Mr. Paranjape that on 23rd August 2022, the officer of the respondent no. 3, Mangrove Conservation Cell has issued a communication to the APCCF Mangrove Cell, Mumbai with a copy to the petitioner stating that considering the observations of this Court in PIL 87 OF 2006 that an area of 50 metres shall be kept free of construction on all sides of mangroves area and considering the statement of the petitioner in its communication dated 30th January 2021 that the tunnel was 23 metres below the ground, guidance was sought as to whether working permission can be granted for underground tunnel work or whether permission of the High Court was required.

22. Mr. Paranjape submits that the permission of this Court is being sought for by the authorities even for the tunnelling work which is to be done underground.

23. Mr. Paranjape has, from time to time, during the pendency of this petition, furnished a list of the permissions and clearances including the final approval dated 18th August 2022

of the MoEF&CC obtained during the pendency of this petition. A summary of the permissions and clearances is set out in the table below:

TABLE OF PERMISSIONS/CLEARANCES

| Sr. No. | Date | Permission | Exh. No. Page No. | Subsequent Developments | Remarks |
|---|---|---|---|---|---|
| 1 | 2013-2015 | Extensive prefeasibility and feasibility studies conducted including social and environmental impact | | | |
| | | Permissions under Wildlife Act | | | |
| 2 | 5.12.2018 | Approval for the project by the State Wildlife Board in its 14th Meeting on the condition that the petitioner to deposit 2% of project costs as the project is passing through deemed Eco sensitive Zone (ECZ) amounting to 83.02 crores for necessary mitigation measures | Exh.3 of A/Rply of R 1 & R 3 pg 218 | | |
| | | Permissions received pursuant to order dated 12.2.2019 of this court | | | |
| | | Permission under the Coastal Regulation Zone Notification dated 6.1.2011 | | | |
| 3 | 6.3.2019 | MCZMA Clearance (R2) in its 131st Meeting has granted clearance and has recommended the proposal of the Bullet train project to MOEF R 4 | 136-D to 136-F | | |
| 4 | 18.3.2019 | Expert appraisal Committee of MoEF & CC (R4) has granted CRZ clearance for its project in its 210th Meeting subject to conditions imposed in the said Minutes and forwarded to the petitioner on 5.4.2019 | 136-R to 136Y (Exh.15, Pg 259-265 of Rejoinder) | | |
| | | Permissions under the | | | |

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| | | Forest Conservation Act | | | |
| 5 | 29.3.2019 | The Regional Empowered Committee of MOEF (R4) grants in-principle (Stage I) approval to the project under Section 2 subject to fulfillment of certain conditions and subject to shifting of the proposed Thane station out of mangrove forest and Virar station out of reserved forest which has been forwarded to petitioner on 10.4.2019 | 136-Z to 136-AA-1 (Exh. K) | Thane station building shifted out of mangrove forest (Exh.1 - IA pg 9) Virar station has been shifted out of reserved forest (Exh.2 IA(L) No. 8034/2020 pg 10-11) | The affected mangrov e area has been reduced from 13.3668 H to 8.6876 H and the no. of mangrov es affected has reduced from 53,467 to 21,997 (Exh. 3 IA - pg 12) |
| 6 | 5.4.2019 | Director CRZ (MOEF) grants CRZ clearance to petitioner subject to 23 specific and 10 general conditions | Pgs 153-159 A/Rply of R 5 Exh.1 | | As per paragrap h 4 - subject to final order of Supreme Court in W.P.(Civil) No. 460 of 2004 |
| 7 | 26.9.2019 | In pursuance of the Stage I clearance as well as the guidelines dated 28.8.2015 for permissions including felling of trees, for timely completion of linear infrastructure projects like railway lines, all amounts have been deposited (except SGNP 9.95 crores). The user agency has deposited a cost of 9 Ha mangrove plantation in lieu of actually 8.876 Ha being destructed mangrove area in addition to the total cost of NPV of mangrove diverted area. The identification of degraded mangrove area and 39996 at the rate of 444 per Ha. Mangrove saplings to be planted after obtaining Stage II | | | Rs. 146,58,41,170/ -deposited - -Rs. 1,23,1 4,770/- paid to mangrov e and marine bio diversity, conservat ion foundatio n of Maharash tra for additional mangrov e plantatio n in the ratio of 1 : 5 |

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| | | approval by GOI, diversion order by the State Govt. and necessary permissions from the High court by the user agency for the project | | | |
| | 31.12.2019 | Petitioner has deposited an amount of Rs. 31,83,43,188/- to the Dy. Conservator of Forests for payment to Maharashtra Compensatory Afforestation fund management and planning authority (CAMPA), compensatory afforestation (condition 2 of approval dated 10.4.2019, additional compensatory afforestation (mangrove) (condition 4), MPV (condition 5) etc. | Exh. 3 of A/Rply of R 5 pg 223 | | |
| 8 | 1.1.2020 | Petitioner has deposited Rs. 42,52,388/- towards tree felling | | | |
| 9 | 29.7.2020 | Petitioner submitted its compliance report and undertaking to Director IA-III, CRZ, UOI | Pg 258-295 of A/Rej. of Ptnr. (Exh. 15) | | |
| 10 | 9.9.2020 | Petitioner and APCCF, mangrove cell, Mumbai and Executive Director, Mangrove Foundation vide letter dtd. 11.8.2021 have prepared and submitted a mitigation plan for the Thane creek Flamingo in consultation with Bombay Natural History Society | | | |
| 11 | 10.3.2021 | Communication by the petitioner to Dy. Conservator of Forests (Nodal Officer - Thane | Pg 1-44 W/Sub. Of Ptnr. | | |

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| | | Circle), Thane Forest Division, Maharashtra submitting compliance of conditions imposed in Stage I clearance | | | |
| 12 | 24.3.2021 | Dy. Conservator of Forests, Thane submitted the compliance to Chief Conservator of Forests | | | |
| 13 | 19.4.2021 | The Chief Conservator of Forests, Thane after [specifically recording the compliance, recommended] the same to Addl. Principal Chief Conservator of Forests and Nodal Officer, Maharashtra, Nagpur | Pg 45-46 W/Sub. Of Ptnr. | | |
| 14 | 12.5.2021 | The Mitigation plan in respect of the Thane Creek Flamingo sanctuary approved by PCCF (Wildlife), Maharashtra | | | |
| 15 | 18.5.2021 | Addl. Principal Chief Conservator of Forests and Nodal Officer recommended to the Principal Secretary, Forests, Revenue and Forests Department, Maharashtra to move the UOI to issue the final (Stage-II) clearance under the Forest Conservation Act | Pgs 30-41 Addl. Af. of Ptnr. | | |
| 16 | 31.12.2021 | The National Board of Wildlife in its 66th Meeting has directed petitioner to deposit 2% cost of the project passing through protected area and its finally notified ECZ which is Rs. 9.95 crores only | | On 15.7.2022 petitioner has deposited Rs. 9.95 crores with an undertaking to abide by any revision in 2% amount by the said Board in future thereby complying condition no. | |

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| | | | | (x) and (xxiv) (b) stipulated by the GOI in the Stage-I approval | |
| 17 | 20.7.2022 | The State of Maharashtra (R1) requests R 4 (Regional Officer, Central Integrated Regional Office, MoEF&CC) to issue necessary orders under the Forest Conservation Act | Pg 28 Addl. Af. of Petnr. (Exh. D) | | |
| 18 | 1.8.2022 | The Chief Conservator of Forest, Territorial Thane has granted permission for commencement of work regarding diversion of forest land for the project, save and except the mangrove area | Pg 52 of Addl. Af. Of Petnr. Eng. Trasln. at pg 64 | | |
| 19 | 18.8.2022 | Final approval (Stage II) under section 2 by the MoEF&CC (R4) for diversion of a final area of 129.7197 Ha of forest land in favour of petitioner for construction of the project in Thane, Palghar MSD, Maharashtra subject to 36 conditions | Pg 42 of Addl. Af. Of Petnr. (Exh.E) | | To be ensured during the implemen tation of the project and also to submit regular complian ce to various authoritie s |
| 20 | 23.8.2022 | Petitioner also submitted the mitigation plan to Director CRZ-IA-III, MoEF&CC, New Delhi for further review by Expert Appraisal Committee as per specific condition no. (vii) of CRZ Clearance | Pg 46 of Addl. Af. of Petnr. Pgs 46-93 (Exh. F) | | |
| 21 | 19.10.2022 | Proposal for diversion of 6.783 Ha of forest land for shifting of Padghe-Vasai Transmission line towers within alignment of the project submitted to the MoEF & CC | | | Approval is awaited |
| 22 | 17.11.2022 | For diversion of 22.6944 Ha of forest land for | | | |

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| | | reorientation/realignment of existing 400 kv and 220 kv transmission lies within the alignment of the project, the MoEF & CC has granted the Stage I approval subject to a condition of working permission by the Power Grid Corporation of India Ltd., (PGCIL) which permission has been granted by the Chief Conservator of Forest, Territorial Thane to PGCIL | | | |

24. Mr. Paranjape submits that the Mumbai-Ahmedabad High Speed Railway Project is a project of national importance and in public interest and submits that this Court may grant approval so that the requisite permissions can also be issued to the petitioner for speedy completion of the project.

25. He submits that although the Project has been delayed over the last two years, now work has begun on a rapid pace and in order to complete the Project at the earliest, the requisite permission of this Court to the petitioner for felling/cutting the 21,997 mangroves is urgently required as the petitioner has already undertaken to plant five times more the number of mangroves or as may be directed. He submits that the petitioner is also ready to undertake any other environment conservation measures as would be required to be undertaken by it.

26. Finally, Mr. Paranjape has urged this Court to apply the public trust doctrine submitting that the project is not only in public interest but also for public good.

27. On the other hand, Mr. Khambata, learned senior counsel for the respondent no. 5-BEAG, does not dispute the multifarious advantages of the Project but submits that there are certain objections which he would like to place on behalf of the said respondent.

28. Mr. Khambata first submits that apart from the various conditions of the CRZ clearance dated 5th April 2019 and the Stage I clearance dated 10th April 2019, under the Forest (Conservation) Act that the petitioner has failed to comply with, the final Stage II clearance dated 18th August 2022 obtained under the Forest (Conservation) Act also imposes upon the petitioner certain conditions which were also imposed upon it under the Stage I clearance, and the same are also yet to be complied with.

29. Mr. Khambata then raises a preliminary issue by submitting that the writ petition is not maintainable as the Project is not a permissible activity under paragraph 8 of the CRZ Notification, 2011.

30. This, Mr. Khambata submits, in view of law laid down in PIL Petition No. 87 of 2006. He refers to paragraph 55 of the said decision and submits that it has been held therein that destruction of mangroves and failure of the State to take steps for restoration amounts to violation of fundamental rights under Article 21 of the Constitution of India. He further submits that the said decision acknowledged a complete ban on the State Government or any other authority except with the prior approval of the Central Government under Section 2 of the Forest (Conservation) Act on using any forest land or any portion thereof for non-forest purposes. He submits that the said decision imposes an obligation upon public authorities to protect and preserve mangroves, irrespective of whether on private land or

public land and in doing so, to ensure compliance with CRZ Regulations, 2011 and the Forest (Conservation) Act. He refers to paragraphs 50, 52, 54, 55 and 83 (viii) of the said judgment and submits that the said judgment holds that all mangroves irrespective of area will fall in CRZ-I as per CRZ Notification 2011.

31. Mr. Khambata submits that paragraphs 41 to 43 read with paragraphs 74 and 83 (iv) emphasise the requirement of compliance with the CRZ Notification, 2011. Further, the said judgment observes that mangroves as well as a 50 m buffer zone where the area of mangroves exceeds 1000 sq.mtrs. falls within the CRZ-IA area, provided for under paragraph 7 of the CRZ Notification. The Court, he submits, noted that only those activities permissible in the CRZ-I area, as enumerated in paragraph 8 of the said Notification, could be undertaken.

32. Mr. Khambata refers to the CRZ Notification of 2011 and submits that all construction activities in CRZ-I are prohibited except those specified in paragraph 8. He submits that railway or railway projects have not been listed in the exceptions carved out, and therefore, railway projects are prohibited as far as CRZ-I is concerned. He submits that in the present case, the piers spanning over several sq.kms. which are proposed to be erected for the purposes of the Project would result in destruction of 22,000 mangrove trees causing severe environmental degradation.

33. Learned senior counsel submits that under the 2011 Notification, all mangrove areas fall in CRZ-I irrespective of its area and in case the said area is 1000 sq.mtrs. or more, even the buffer zone of 50 m along with the said area shall be part of CRZ-I. He submits that the buffer zone of 50 m abutting mangroves having an area of 1000 sq.mtrs. or more was included in CRZ-I from 27th September 1996. He submits that Clause (xi) of paragraph 3 of the 2011 Notification, provides that all construction activities in CRZ-I are prohibited except those specified in paragraph 8. He further submits that no new construction shall be permitted in CRZ-I except:

*"(a) Projects relating to Department of Atomic Energy;*

*(b) Pipelines, conveying systems including transmission lines;*

*(c) Facilities that are essential for activities permissible under CRZ-I;*

*(d) Installation of weather radar for monitoring of cyclones movement and prediction by Indian Meteorological Department;*

*(e) Construction of trans harbour sea link and without affecting the tidal flow of water, between LTL and HTL*

*(f) Development of green field airport already approved at only Navi Mumbai;"*

34. Mr. Khambata submits that neither railways/railway projects nor the high speed rail project is mentioned above thereby meaning that the said activity/project is clearly prohibited with respect to CRZ-I zone. He further submits that the said judgment in the case of *Bombay Environmental Action Group* (supra) does not override the legal prohibitions in the CRZ Notification of 2011 including paragraph 8 thereof. He submits that paragraph 83 (viii) of the said judgment could only have imposed an additional requirement/safeguard upon paragraph 8 that where a proposed project or activity which falls under CRZ-I area is permissible under paragraph 8 of the CRZ Notification, that a project proponent must approach this Court for permission to cut/fell mangroves and it is only if this Court considers that the said project is for public good or is in public interest, that the destruction of mangroves even for activities under paragraph 8 is permitted. The need for this Court's permission, he submits, is notwithstanding that the activity is permissible in CRZ-I. He submits that the Project, i.e., the bullet train project, admittedly, falls within the CRZ-I area. However, since the bullet train project or the railways is not included as a permissible activity under paragraph 8 of the CRZ Notification, he submits that the present petition is

not maintainable.

35. It is submitted that, in fact, the CRZ Notification, 2011 having been issued under the Environment Protection Act, 1986, the same would have an overriding effect over other laws, including Central Acts as well, since:

> *"i. The* Environment Protection Act is enacted under Article 253 of the Constitution of India, which empowers the Parliament to "*make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.*"
>
> *ii. Section 24 of the Environment Protection Act, 1986 contains a non-obstante clause:*
>
> *4. Effect of other laws.-*
>
> *(1) Subject to the provisions of sub-section (2), the provisions of this Act and rules or orders made therein shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act.*

36. Learned senior counsel further refers to the decision of the Supreme Court in *Gulf Goans Hotels Company Ltd.* v. *Union of India*[1], and submits that in paragraph 17 it has held that legislations such as the Environment Protection Act, Forest (Conservation) Act, etc. may be viewed *"...as 'affirmative action', aimed at implementation of Articles 21 and 48-A of the Constitution..."* Further, at Para 26, the Supreme Court held that violation of Article 21 on account of alleged environmental violations could not be determined without referring to the regulations framed under the Environment Protection Act and therefore the CRZ Notification.

37. Mr. Khambata also refers to paragraph 43 of the said judgment to submit that CRZ Notifications are in the nature of orders or directions issued under the Environment (Protection) Act. Therefore, if there is any violation of the CRZ Notifications regarding mangroves or its buffer zone or if there is violation to comply the same, it will attract penal provisions under Section 15 of the Environment (Protection) Act, which would apply in case of failure to comply with the provisions of the orders or directions issued under the said Act.

38. Mr. Khambata also relies upon the decision of the Supreme Court in the case of *S. Jagannath* v. *Union of India*[2] to submit that the CRZ Notifications have an overriding effect and shall prevail over the other laws. He draws the attention of this Court to paragraph 48 of the decision in support of his contention.

39. Mr. Khambata further submits that the permissions on which the project proponent relies requires that the Thane station proposed over mangrove forest and Virar station over reserved forest "*shall be shifted from Mangrove/forest area*". He submits that the station has not been completely relocated from the mangrove forest area, which is further borne out from the Compliance Report dated 10th March 2021. He submits that the condition did not require a reduction in mangrove area to be cut for the purposes of the station. It required the station to be completely shifted from the mangrove area, which does not appear to have been done. He submits that the petitioner is seeking to read "station" as applying only to the main station building and has ignored the station viaduct and viaduct bridge, which also form part of the station.

40. Learned senior counsel further submits that compliance with the conditions imposed in the Forest Clearance for protection of mangroves is a pre-condition that ought to be satisfied before this Hon'ble Court grants its approval. He submits that the Stage II forest clearance issued as recently as August 18, 2022 has reiterated this condition which would not have been necessary had it already been complied with, that unless the stations are duly relocated so as to be shifted completely out of the mangrove area, the work cannot commence.

41. It is further submitted that the petitioner has failed to place on record a Comprehensive Mangrove Conservation and Management Plan being a specific condition of the CRZ clearance.

42. Then Mr. Khambata submits that the Railways Act, 1989 cannot and does not override Article 21 of the Constitution of India. He submits that it is well settled that the expression "*any other law for the time being in force*" cannot extend to each and every law, but only extends to laws operating in the same field. The *non obstante* clause in Section 11 of the Railways Act has to be interpreted keeping this guiding principle in mind. The Railways Act and Environmental laws are not in the same field and, therefore, the *non obstante* clause cannot override the requirements of the CRZ Notification 2011.

43. He submits that reading Section 11 of the Railways Act as overriding all prior laws would lead to absurd consequences not only in the context of the prevalent environment laws but also laws relevant to the Defence of India such as the Works of Defence Act, 1903, which under Section 3 empowers the Central Government with the discretion to impose restrictions on the use and enjoyment of land in the vicinity any work of defence or any site to be used/acquired for any work of defence. If Section 11 of the Railways Act is given such wide operation, it could potentially lead to an absurd situation where the railway administration could in fact construct a railway passing through or near by a work of defence notwithstanding the restrictions imposed by the Central Government under the Works of Defence Act.

44. Mr. Khambata, in support of his contention that the Railways Act is subject to the Environment Protection Act as well as the Forest (Conservation) Act as well as the Wildlife Protection Act, draws the attention of this Court to a communication dated 5th December, 2017 issued by the respondent no. 4 MoEF&CC (Forest Conservation Division) to the Principal Secretary of all the States and Union Territories, pursuant to which, the said Ministry has in paragraph 7 opined that although the Railways has the Right of Ways (RoW) for construction and maintenance of railway lines for public welfare and may acquire land from the owners of the land but the said right is also subject to other provisions and regulations. He submits that it has been clearly mentioned in the said communication that if a forest land cannot be dispensed for the railway track in view of the conservation of the forest and wildlife, then the Railways cannot acquire forest land under Section 11 of the Railways Act without the prior approval under the Forest (Conservation) Act. He submits that the State Government also cannot assign and allot forest land which is not the property of the Railways to Railways without the prior approval of the MoEF&CC under Section 2 of the Forest (Conservation) Act and the National Board of Wildlife, if the area falls in the protected area notified under the provisions of the Wildlife Protection Act, 1972. Referring to paragraph 8 of the said communication, Mr. Khambata submits that although Railway projects passing through the notified Ecosensitive Zone or located within 10 km radius of Wildlife Sanctuary/National Parks and Tiger Reserves are not required to obtain wildlife clearance from the National Board of Wildlife as these projects do not need environment clearance, however, railway projects passing through the areas linking one protected area or Tiger Reserve with another protected area or Tiger Reserve, diversion cannot be allowed for ecologically unsustainable use except in public interest with the approval of National Board of Wildlife on the advice of the National Tiger Conservation Authority.

45. Further, learned senior counsel relies upon the decision in the case of *Bombay Dyeing & Mfg. Co. Ltd. (3)* v. *Bombay Environmental Action Group*[3], to submit that the Supreme Court has held that the principles of sustainable development are to be read into statutes unless excluded. Section 11 of the Railways Act does not expressly exclude environmental laws.

46. Given the above and in view of respondent no. 5's submissions tendered on November 26, 2022, Mr. Khambata reiterates that the provisions of the Railways Act cannot and do not override Article 21 of the Constitution of India and the affirmative action(s) undertaken thereunder. In this regard he relies on the last sentence of paragraph 41 of the judgment of the Supreme Court in *Engineering Kamgar Union* v. *Electro Steels Castings Ltd.*[4], wherein the Supreme Court has held that *"...A non obstante clause contained in a statute cannot override the provisions of the Constitution of India."*

47. Mr. Khambata also relies upon paragraph 83 (vi), (vii) and (viii) of the judgment in the case of *Bombay Environmental Action Group* (supra) and submits that since the destruction of mangroves offends the fundamental rights of citizens under Article 21 of the Constitution of India and Article 21 cannot be overridden by any statute, let alone Section 11 of the Railways Act.

48. Mr. Khambata submits that even assuming whilst denying Section 11 of the Railways Act has an overriding effect over other laws, it cannot and does not override the rights guaranteed under Article 21 of the Constitution of India in view of the decisions of this Court in *Mr. Robin Jaisinghani* v. *Mumbai Metro Rail Corporation*[5]. According to him, this aspect has also been noticed in the decision of a coordinate Bench of this Court in *Ganv Bhavancho Ekvott* v. *South Western Railways*[6]. He contended that paragraph 80 of this decision, has affirmed this position in law that Section 11 cannot override Article 21 rights.

49. Referring to the decision in the case of *Ganv Bhavancho Ekvott* (supra) where this Court has, while holding that the respondents South Western Railway and Rail Vikas Nigam Limited are not under any statutory compulsion to obtain environmental clearance from the Goa Coastal Zone Management Authority or any other permission from any other authority, in view of Section 11 of the Railways Act, learned senior counsel submits that even though Section 11 of the Railways Act would have an overriding effect over other laws that cannot take away the rights guaranteed under Article 21 of the Constitution of India. He submits that in any event since the said decision dealt with paragraph 3 of the CRZ Notification whereas in the present case we are concerned with paragraph, the aforesaid decision would not be applicable in view of complete prohibition of any activity, except as prescribed in the CRZ Notification.

50. In view of the above, learned senior counsel submits that this Court be pleased to dismiss the present petition.

51. Mr. Anil Singh, learned Additional Solicitor General for the Union of India while supporting the prayer of the petitioner for permission to fell mangrove trees contended that in national interests and for greater good of the people, relief claimed in the writ petition ought to be granted. According to him, it cannot be gainsaid that the environment has to be protected for its preservation but at the same time development cannot be altogether stopped. There has to be harmony between the two competing interests and that is what is sought to be achieved by insisting on compliances of stringent conditions. He contends that the main contention raised by Mr. Khambata that no activity within CRZ-I is permissible is no longer *res integra*. Reference is made to the decision in *Ganv Bhavancho Ekvott* (supra) and it is contended that the issue raised herein is squarely answered by such decision; therefore, the same ought to be followed to overrule such contention. Insofar as compliance with the conditions imposed by the various authorities is concerned from time to time is concerned, it is assured by him that the same shall be complied with to the teeth and no efort will be spared to secure environmental interests while the Project work is taken to its conclusion maintaining all safeguards.

52. The parties have been heard and the materials on record considered by us.

53. The concepts of public trusteeship/the public trust doctrine primarily rest on the principle that certain resources like air, sea, water and the forests have such great importance to the people as a whole that their preservation, protection and conservation would be the responsibility of the State such that these gifts of nature should be made available to everyone irrespective of their status in life. The doctrine enjoins upon the Government to protect the resources for enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. The Supreme Court in the case of *Karnataka Industrial Areas Development Board* v. *C. Kenchappa*[7] has with respect to the "public trust doctrine" observed as under:—

> *"82. In the case of* M.C. Mehta *v.* Kamal Nath, *[(1997) 1 SCC 388], this Court dealt with the Public Trust Doctrine in great detail. The Court observed as under:*
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> > *"35. We are fully aware, that the issues presented in this case illustrate the classic struggle between those members of the public who would preserve our rivers, forests, parks and open lands in their pristine purity and those charged with administrative responsibilities, who, under the pressures of the changing needs of an increasingly complex society, find it necessary to encroach to some extent upon open lands heretofore considered inviolate to change. The resolution of this conflict in any given case is for the legislature and not the court. If there is a law made by Parliament or the State Legislatures the courts can serve as an instrument of determining legislative intent in the exercise of its powers of judicial review under the Constitution. But in the absence of any legislation, the executive acting under the doctrine of public trust cannot abdicate the natural resources and convert them into private ownership, or for commercial use. The aesthetic use and the pristine glory of the natural resources, the environment and the ecosystems of our country cannot be permitted to be eroded for private, commercial or any other use unless the courts find it necessary, in good faith, for the public good and in public interest to encroach upon the said resources."*
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> *83. Joseph L. Sax, Professor of Law, University of Michigan-proponent of the modern Public Trust Doctrine-in an erudite article "Public Trust Doctrine in Natural Resource Law : Effective Judicial Intervention", Michigan Law Review, Vol. 68, Part 1 p. 473, has given the historical background of the Public Trust Doctrine as under:*
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> > *"The source of modern public trust law is found in a concept that received much attention in Roman and English law - the nature of property rights in rivers, the sea, and the seashore. That history has been given considerable attention in the legal literature, need not be repeated in detail here. But two points should be emphasized. First, certain interests, such as navigation and fishing, were sought to be presented for the benefit of the public; accordingly; property used for those purposes was distinguished from general public property which the sovereign could routinely grant to private owners. Second, while it was understood that in certain common properties - such as the seashore, highways and running water - 'perpetual use was dedicated to the public', it has never been clear whether the public had an enforceable right to prevent infringement of those interests. Although the State apparently did protect public uses, no evidence is available that pubic, rights could be legally asserted against a recalcitrant government."*

54. Similarly, the concept of "sustainable development" has been a matter of several judicial expositions by the Supreme Court. It has been consistently observed that while economic development should not be allowed to take place at the cost of ecology or by causing widespread environment destruction and violation, at the same time the necessity to preserve ecology and environment should not hamper economic and other development. Both development and environment must go hand in hand, in other words, there should not

be development at the cost of environment and vice versa, but there should be development while taking due care and ensuring the protection of environment. The concept of sustainable development has been aptly described in Paragraph 4 of the Rio Declaration on environment and development of 1992 held in Rio de Janeiro, wherein in Principle 4, it has been agreed that in order to achieve sustainable development, environmental protection shall constitute an integral part of development process and the same cannot be considered in isolation of it. The same principle was articulated in the 1997 "Earth Summit". The following Paragraphs 96, 99 and 100 from the decision in the case of *Karnataka Industrial Areas Development Board* (supra) are apt and are quoted as under:—

> *'96. In the Rio Conference of 1992 great concern has been shown about sustainable development. 'Sustainable development' means 'a development which can be sustained by nature with or without mitigation'. In other words, it is to maintain delicate balance between industrialization and ecology. While development of industry is essential for the growth of economy, at the same time, the environment and the ecosystem are required to be protected. The pollution created as a consequence of development must not exceed the carrying capacity of ecosystem. The Courts in various judgments have developed the basic and essential features of sustainable development. In order to protect sustainable development, it is necessary to implement and enforce some of its main components and ingredients such as - Precautionary Principle, Polluter Pays and Public Trust Doctrine. We can trace foundation of these ingredients in number of judgments delivered by this Court and the High Courts after the Rio Conference, 1992.*
>
> *99. Sustainable use of natural resources should essentially be based on maintaining a balance between development and ecosystem. Coordinated efforts of all concerned would be required to solve the problem of ecological crisis and pollution. Unless we adopt an approach of sustainable use, the problem of environmental degradation cannot be solved.*
>
> *100. The concept of sustainable development was propounded by the 'World Commission on Environment and Development', which very aptly and comprehensively defined it as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. Survival of mankind depends on following the said definition in letter and spirit."*

55. This Court on 17th September 2018 in Public Interest Litigation No. 87 of 2006 in the case of *Bombay Environmental Action Group* (supra), authored by Hon'ble Shri Justice Abhay S. Oka, (as His Lordship then was), after invoking the public trust doctrine in respect of mangroves, in Paragraph 83(viii) has observed that the State is duty bound to protect and preserve mangroves and they cannot be permitted to be destructed by the State for private, commercial or any other use unless the Court finds it necessary for the public good or public interest.

56. After extensively analysing the provisions of the Forest Conservation Act, Environment Protection Act, 1986 as well as the concept of 'forest' pursuant to the decision of the Apex Court in the case of *T.N. Godavarman Thirumulkpad* v. *Union of India*[8], as well as the decision of the Nagpur High Court in the case of *Laxman Ichharam* v. *Divisional Forest*[9], this Court observed that a land covered by mangroves would be a 'forest'. Further, after considering the "Coastal Regulation Zone" (CRZ) notifications of 1991, 2001 and various orders by the Government of India thereunder, it was observed that all mangroves fall in CRZ-I irrespective of its area and in case the said area is one thousand square meter or more, even a buffer zone of fifty meters along the said area shall be a part of CRZ-I, where no new construction shall be permitted except as mentioned in the CRZ Regulations. Highlighting the fundamental duty of the State and the citizens to protect and improve the environment and to safeguard the forests and the wildlife of the country as enshrined in

Article 48-A as well as 51-A (g) of the Constitution of India and taking into account the public trust doctrine, precautionary principle, the RAMSAR Convention and Article 21 of the Constitution of India, this Court observed that mangrove eco systems play a vital role in human life and if a citizen is to lead a meaningful life as contemplated by Article 21 of the Constitution of India, the mangroves will have to be preserved and protected and the destruction of the mangroves and the failure of the State to take steps for its restoration will amount to violation of the fundamental rights guaranteed by Article 21 of the Constitution. This Court, accordingly, directed a total freeze on the destruction and cutting of mangroves in the entire State of Maharashtra. In Paragraph No. 83, a summary of all important findings was set out. The said Paragraph 83 is quoted as under:—

*"SUMMARY OF IMPORTANT FINDINGS*

*83 The summary of some of the important conclusions read thus:*

(*i*) *A land regardless of its ownership on which there are mangroves, is a forest within the meaning of the said Act of 1980 and therefore, the provisions of Section 2 of the said Act of 1980 and the law laid down by the Apex Court in the case of T.N. Godavarman will squarely apply to such land;*

(*ii*) *A mangroves area on a Government land is liable to be declared as a protected forest or a reserved forest, as the case may be, within the meaning of the said Act of 1927;*

(*iii*) *All mangroves lands irrespective of its area will fall in CRZ-I as per both the CRZ notifications of 1991 and 2011;*

(*iv*) *In 1991 CRZ notification, it is provided that all mangrove areas will fall in CRZ-I. By virtue of the order dated 27th September 1996, in case of mangrove areas of 1000 square meters or more, 50 meter buffer zone abutting it was also included in CRZ-I. By order dated 9th January 2000, it was provided that 50 meter buffer zone will not be required, provided a road abutting the mangroves was constructed prior to February 1991. Under the 2011 notification, all mangroves lands fall in CRZ-I and in case the area of such land is 1000 square meters or more, even a buffer zone of 50 meters along the said area shall be a part of CRZ-I. But, the buffer zone of 50 meters which is required to be kept free of constructions in respect of the mangroves area of less than 1000 square meters will not be a part of CRZ-I.;*

(*v*) *If there is any violation of the CRZ notifications regarding mangroves area, it will attract penal provision under Section 15 of the said Act of 1986 which is attracted in case of the failure to comply with the provisions of orders or directions issued under the said Act of 1986. The conditions imposed in the letter dated 27th September 1996 as amended will have to be construed as an order or direction under the said Act of 1986 as CZMP is required to be approved by the Central government in view of the clause 3(i) in the CRZ notification of 1991 which is an order or direction under the said Act of 1986. Hence, if there is any violation of the condition in the letter dated 27th September 1996 in respect of the 50 meter buffer zone, it will attract penal provision of Section 15 of the said Act of 1986.*

(*vi*) *The destruction of mangroves offends the fundamental rights of the citizens under Article 21 of the Constitution of India.*

(*vii*) *In view of the provisions of Articles 21, 47, 48A and 51A(g) of the Constitution of India, it is a mandatory duty of the State and its agencies and instrumentalities to protect and preserve mangroves;*

(*viii*) *In view of applicability of public trust doctrine, the State is duty bound to protect and preserve mangroves. The mangroves cannot be permitted to be destructed by*

*the State for private, commercial or any other use unless the Court finds it necessary for the public good or public interest;*

(*ix*) *The Precautionary Principle makes it mandatory for the State and its agencies and instrumentality to anticipate and attack causes and consequences of degradation of mangroves".*

57. The following directions in the operative part of the order in paragraph 85-A are relevant and are quoted as under:—

"(*A*) *The following directions issued in the interim order dated 6th October 2005 shall continue to operate as final directions in following terms;*

(*I*) *That there shall be a total freeze on the destruction and cutting of mangroves in the entire State of Maharashtra;*

(*II*) *Dumping of rubble/garbage/solid waste on the mangrove areas shall be stopped forthwith;*

(*III*) *Regardless of ownership of the land having mangroves and the area of the land, all constructions taking place within 50 metres on all sides of all mangroves areas shall be forthwith stopped. The area of 50 meters shall be kept free of construction except construction of a compound wall/fencing for its protection.;*

(*IV*) *No development permission whatsoever shall be issued by any authority in the State of Maharashtra in respect of any area under mangroves. All authorities including the Planning Authorities shall note that all mangroves lands irrespective of its area will fall in CRZ-I as per both the CRZ notifications of 1991 and 2011. In case of all mangrove areas of 1000 sq. meter or more, a buffer zone of 50 meters along the mangroves will also be a part of CRZ-I area. Though buffer zone of 50 meters in case of mangroves area of less than 1000 meters will not be a part of CRZ-I, it will be subject to above restrictions specified in clause III above;*

(*V*) *The State of Maharashtra is directed to file in this Court and furnish to the petitioner copies of the maps referred to in paragraph 10 of the affidavit dated 16th August, 2005, filed by Mr. Gajanand Varade, Director, Environment Department, State of Maharashtra (Page 346 on the record), within four weeks from today. The soft or hard copies of the maps be supplied to the Petitioner within the same period;"*

58. Although Mr. Anil Singh has brought to our notice the orders dated 26th April, 2019, 1st July, 2019, 9th September, 2022 of the Supreme Court arising out of the aforesaid PIL No. 87 of 2006 to submit that directions given in the said decision qua the petitioners therein have been stayed, we observe that the order dated 9th September, 2022 simpliciter re-lists the matters in February, 2023 meaning thereby that, the aforesaid directions would therefore continue to apply to projects involving mangroves. In any event we observe that the stay granted earlier was only qua the petitioners in *Blue Star Realtors Pvt. Ltd.* v. *The Bombay Environmental Action Group*[10] therein.

59. The aforesaid decision casts a duty on this Court to protect and preserve and invests it with discretion where any mangroves are sought to be destructed for private, commercial or any other use and unless the Court finds it necessary for the public good or public interest, the same ought not to be permitted. The above decision as set out above has also taken into consideration the CRZ regulations and the Environment Protection Act as well as the rights of the citizens under Article 21 of the Constitution of India with respect to the protection and preservation of mangroves in general and not just the areas permitted under paragraph 8. The said paragraph (no. 8) not specifically referring to railways does not mean that this Court cannot exercise its discretion where cutting of mangroves is involved for

public interest or public good. Mr. Khambata's argument, therefore, that the decision of this Court in PIL 87 of 2006 is an additional safeguard in view of the public trust doctrine and that the writ petition is not maintainable as railways is not mentioned as an exception in the said paragraph would in our view be completely misplaced.

60. Moreover, the decision of this Court in the case of *Ganv Bhavancho Ekvott* (supra) has also observed that although a draft notification for prescribing environmental clearance for providing railway lines was issued in the year 1992, the same has not seen the light of the day. Further, the notification issued by the MOEF on 14th September, 2006 does not require a prior environmental clearance to be obtained by the railway administration. Paragraphs 59 to 61 of said the decision are relevant in this regard.

61. While it cannot be disputed that the CRZ Regulations are enforceable in terms of the Environment Protection Act, however keeping in mind that the Railways Act starts with a *non obstante* clause, as discussed above, it cannot be said to be subject to the Environment Protection Act, as argued by Mr. Khambata, since the intention of the Legislature is quite clear in this regard when considered in the light of the fact that when the Parliament enacted the Railways Act in 1989, the Environment Protection Act was already in place and the Parliament was well aware of what it had enacted a couple of years before.

62. Further, Mr. Khambata, has also sought to make out a case that Section 11 of the Railways Act though containing a non-obstante provision, it cannot override the Environment Protection Act or Article 21 of the Constitution of India.

63. In our view, the decision of this Court in the case of *Ganv Bhavancho Ekvott* (supra), addresses these very concerns raised by learned senior counsel where this Court has, after exhaustively dealing with various aspects in relation to railway projects as well as the said provision of Section 11 of the Railways Act, observed as under:—

> *"53. Bearing these principles in mind, we now proceed to consider the impact of the non-obstante clause in section 11 of the Railways Act on the other enactments, referred to in section 11 either specifically or generally. We remind ourselves of the settled law that attention should be confined to what is necessary for a particular case. For the purposes of the present case, to paraphrase section 11 and its relevant clauses, the same must be read as mandating that in spite of any provisions contained in any other law for the time being in force except the provisions of the Railways Act and the provisions of any law in relation to acquisition of land for public purpose or for companies, a railway administration may, for the purposes of constructing or maintaining a railway,*
>
> *(i) make or construct in or upon, across, under or over any lands such temporary or permanent inclined-planes, bridges, tunnels, culverts, lines of railways, etc. [clause (a)];*
>
> *(ii) alter the course of any rivers, brooks, streams or other water courses, for the purpose of constructing and maintaining tunnels, bridges, passages or other works over or under them [clause (b)];*
>
> *(iii) erect and construct such houses, warehouses, offices and other buildings, etc., and other works and conveniences as the railway administration thinks proper [clause (d)];*
>
> *(iv) alter, repair or discontinue such buildings, works and conveniences [clause (e)]; and*
>
> *(v) do all other acts necessary for making, maintaining altering or repairing and using the railway [clause (h)].*
>
> *54. Given these wide ranging powers conferred by the Parliament on a railway administration and bearing in mind the impact that the non-obstante clause found at the beginning of section 11 of the Railways Act has on other enactments, barring only the*

*Railways Act and land acquisition laws for a public purpose, it is too late in the day for the petitioners to contend that notwithstanding the presence of section 11 of the Railways Act in the statute book conferring such wide ranging powers with overriding effect, the railway authorities, i.e., SWR and RVNL, are required to obtain building permissions from the village panchayat under the Panchayat Act or other permissions under the other stated State legislation. If we were to accept the contention of the petitioners, we would either have to totally ignore the provisions contained in section 11 or to render section 11 completely ineffective without even outlawing it. Indeed, this is not a permissible course of action. Qua the stated State legislation is concerned, we have no option but to hold that the same must yield to section 11 of the Railways Act when a railway administration proceeds to execute the work of construction or maintenance of a railway in accordance with the provisions of the Railways Act and the laws relating to land acquisition.*

*55. The decision in* Village Panchayat (Calangute) *(supra) relied on by Ms. Collasso and Mr. Rodrigues has been perused by us. The Supreme Court was seized of the question whether a village panchayat can challenge an order passed by the designated officer exercising the power of an appellate authority qua the action/decision/resolution of the village panchayat in a a petition under Article 226/227 of the Constitution. Observations made by the Court in answering such a question may not provide the guiding light for deciding the contentious issue arising in this case. The said decision, therefore, is distinguishable.*

*56. The contention of Ms. Collasso that section 11 does not expressly grant exemption to a railway administration from obtaining permissions of various authorities under the stated State legislation or the GCZMA under the EP Act, is too tenuous to commend acceptance. The exemption for a railway administration to execute the works of construction and maintenance of a railway is conferred by the non-obstante clause which has an overriding effect over all other laws except the provisions of the Railways Act and the laws relating to land acquisition for public purpose, if execution is undertaken by a Government railway. The contention, therefore, stands rejected.*

*57. Insofar as the contention raised by Ms. Collasso that the railway authorities were required to obtain prior environmental clearance from the GCZMA is concerned, the same is equally tenuous. Paragraph 3 of the 2011 CRZ Notification lays down the activities which are prohibited within the CRZ area. None of the subparagraphs of paragraph 3 refer to a railway. We may, in this connection, consider and apply the legal maxim expressio unius est exclusio alterius. This maxim, embodying the principle of implied exclusion, means that expression of one is the exclusion of another. Where the law specifies certain activities to be prohibited, an inference may be drawn that activities other than those prohibited are permitted. Although the courts must guard against indiscriminate application of this maxim, we can safely infer not on the basis of what is provided in paragraph 3 but also in view of the non-obstante clause in section 11 of the Railways Act, that whatever has not been included in paragraph 3 of the 2011 CRZ notification has, by implication, been excluded.*

*58. Reliance placed by Mr. Pangam on the decision of the coordinate Bench in* Municipal Corporation of Greater Mumbai *(supra) is apt. Reading the decision, we find that the bench took into consideration various decisions of the vintage era interpreting section 7 of the Railways Act, 1890, which is the present era section 11, while holding that licences and fees for putting up hoardings by the concerned railways is not required under the MMC Act. We have not the slightest hesitation in recording our agreement with what has been laid down in such decision on interpretation of section 11.*

*59. While also concurring with the decisions in* Goa Foundation *(supra) and* Subhas

Dutta *(supra), we cannot fail to note a particular argument that was advanced before the coordinate Bench in* Goa Foundation *(supra) by learned counsel for the petitioners. It was contended that the Ministry of Environment had issued a draft notification inviting objections, since the Government of India had intended to prescribe that environment clearance from such Government would be required for providing railway lines. This was as far back as in April 1992. If indeed the Government of India had issued a draft notification with a particular intention and had not carried the process further, it stands to reason that the said Government went back on its intention to prescribe environmental clearance to be obtained for providing railway lines. That over the last three decades no such requirement has been spelt out in accordance with law is in itself a pointer to the fact that the Government of India does not intend that environmental clearance is to be obtained for the purposes mentioned in section 11 of the Railways Act.*

*60. It would also appear from the notification issued by the Ministry of Environment and Forests on 14th September 2006 that the same also does not require a prior environmental clearance to be obtained by a railway administration. The schedule to the notification, it has been brought to our notice by Mr. Pangam, refers to a whole lot of activities that require a prior clearance to be obtained before the same are undertaken by the specified authorities but the Railways is conspicuously absent. We are inclined to think that if at all an environmental clearance for laying railway lines was required in terms of the notification issued by the concerned Ministry, the same would definitely have been incorporated therein. The exclusion is significant and has to be borne in mind while deciding a claim of the present nature.*

*61. We are, thus, of the considered opinion that if indeed the legislature intended laying of a railway line or other incidental activities to be a prohibited activity within the EP Act, a fortiori, the 2011 CRZ notification or even under the notification issued by the Ministry of Environment and Forests on 14th September 2006, such a prohibition could have been included but only after amendment of the Railways Act and not without. Parliament is presumed to have known what the existing state of law is, when a new law is in course of being enacted by it and if a legislation is enacted giving it overriding effect over the law prior in point of time, the newly enacted law has to be given effect no matter what the consequences would be.*

*62. We have noted above that despite section 11 beginning with a non-obstante clause, section 11 is subject to the other provisions of the Railways Act and the laws relating to land acquisition and it does not override such other provisions/laws. In such view of the matter, the petitioners could have succeeded in their plea of stalling the project if it could be shown that provisions relating to land acquisition have not been followed which is contrary to public interest. Mr. Agha has shown us from the reply affidavit of RVNL how the provisions contained in Chapter IV-A of the Railways Act have been adhered to while acquiring land and making payment to the land losers. This version of RVNL, which is undisputed, is sufficient for us to hold that the railway authorities, i.e., SWR and RVNL, have not bulldozed the rights of land owners and have acted strictly within the confines of section 11. It has also not been shown that the land losers are aggrieved by the compensation paid to them. These are all relevant considerations which cannot be overlooked when a project of this magnitude is under way.*

*63. Importantly, the petitioners have neither challenged section 11 of the Railways Act nor the 'special railway project'. Their grievance is confined to non-obtention of permissions from the authorities under the stated State legislation and environmental clearance under the 2011 CRZ notification.*

*64. As has been held above, permissions were not required to be obtained and,*

*therefore, we see no reason to hold that the provisions of the 2011 CRZ Notification were required to be followed by the railway authorities and/or that by not following the same, they have indulged in activities which ought to be held illegal, arbitrary and without jurisdiction by this Court."*

(*emphasis supplied*)

64. We share the views expressed by the coordinate Bench in *Ganv Bhavancho Ekvott* (supra) and adopt the same for holding the contentions advanced by Mr. Khambata as untenable.

65. While Mr. Khambata was arguing that Section 11 of the Railways Act cannot be read and construed in a manner so as to render nugatory the dicta of this Court in *Bombay Environmental Action Group* (supra) in relation to destruction of mangroves amounting to abrogation of rights protected by Article 21 of the Constitution, we had enquired as to whether the respondent no. 5 in any proceedings had questioned the *vires* of Section 11, to which the answer was in the negative. We had then referred to him paragraph 14 of the judgment of the Supreme Court in the case of *Martin Burn Ltd.* v. *Corporation of Calcutta*[11], wherein the Court in course of declining to accept a particular line of reasoning adopted in the order under challenge and holding it as unsupportable had the occasion to rule that *"A result flowing from a statutory provision is never an evil. A court has no power to ignore a provision to relieve what is considers a distress resulting from its operation. A statute must of course be given effect to whether a court likes the result or not. When the High Court found that Section ... had been attracted to the case, it had no power to set the provision at naught."*

66. When called upon to respond, Mr. Khambata submitted that the said observation does not in any manner dilute the submissions of the Respondent No. 5. He contended that the *non-obstante* clause contained in Section 11 of the Railways Act cannot and does not exclude the Environment Protection Act, the CRZ notification or the Forest (Conservation) Act. Since there is no conflict between the two and the legislations are not in the same field, the environment laws are in fact to be read into the Railways Act and Section 11 of the Railways Act is subject to the provisions of the Environment Protection Act.

67. Pertinently, the relevant observation in *Martin Burn Ltd.* (supra) of the Courts having no authority not to direct enforcement of the law because of the hardship or inconvenience that its operation could have on a subject has been considered and approved by a Constitution Bench of the Supreme Court in *Indore Development Authority* v. *Manoharlal*[12] by referring to the legal maxim "*dura lex sed lex*" meaning that "*the law is hard but it is the law*".

68. Upon due consideration of the response of Mr. Khambata, captured in paragraph 64 above, we are afraid we cannot agree with him.

69. Having regard to the plain and clear terms in which Section 11 of the Railways Act is worded starting with a *non-obstante* clause and with emphasis that it shall be subject only to the other provisions of the Railways Act and the laws relating to land acquisition for a public purpose, the contention appears to us to be misconceived. Although we cannot disagree with the proposition of law that a *non-obstante* clause contained in a statute cannot override the provisions of the supreme law of the land, i.e., the Constitution of India, we find no reason to hold that the *non-obstante* clause in Section 11 of the Railways Act overrides Article 21 or any other provision of the Constitution. A statute is presumed to be *intra vires* the Constitution, unless declared to the contrary. Here or elsewhere, the *vires* of Section 11 has never been challenged. Section 11 cannot be construed in a manner that it loses its efficacy. We, therefore, cannot agree with Mr. Khambata that Section 11, if given full effect in the manner it has been read and construed in *Ganv Bhavancho Ekvott* (supra)

notwithstanding the Environment Protection Act, the fundamental rights of any subject would be abrogated. As has been held in *Martin Burn Ltd.* (supra) and *Indore Development Authority* (supra), the law has to be given effect no matter whether the Court likes the result or not.

70. We have noted that provisions of Section 11 of the Railways Act did not arise for consideration in the decisions in *Gulf Goan Hotels Company Ltd.* (supra) and *S. Jagannath* (supra), relied on by Mr. Khambata. Law is well settled that a decision is an authority for what it actually decides and not what logically follows from it. These decisions, therefore, do not provide adequate guidance to us to hold that the environmental laws would have overriding effect over the Raiways Act.

71. One other submission advanced by Mr. Khambata, in course of the exchanges in Court, was that Section 11 does not use the word "forest" and, therefore, it cannot have applicability insofar as mangroves, which have been declared to be forests, is concerned. Section 2 of the Forest (Conservation) Act, 1980 imposes restriction on de-reservation of forest or use of forest land for non-forest purpose. The expression "forest land" therein is significant. A "forest" has to exist on "land". Now, if one reads Section 11 of the Railways Act, it confers power, authority and competence on a railway administration, for the purposes of constructing or maintaining a railway, to make or construct in or upon, across, under or over any lands (emphasis supplied). In the context the word "any" has been used in clause (a), it is clear that it has been used in the widest sense extending from one to all and admits of no exception. Also, power having been conferred by clause (b) on a railway administration to even change the course of a river, brook, steam, or other water courses, read in the light of "do all other acts necessary" in clause (h), leaves no manner of doubt with regard to the intention the Parliament had in mind while enacting Section 11. We, thus, find no reason to accept Mr. Khambata's argument on the point under consideration.

72. With respect to Mr. Khambata's reliance on the MoEF&CC's communication dated 5th December 2017 to the States and Union Territories, at the outset, we observe that the communication is based on a legal opinion, which is neither a statute nor a binding precedent. Paragraphs 4 and 7 of the said communication are usefully quoted as under:

> *"4 It is informed that the matter has been examined in the Ministry and the legal opinion of the Ministry of Law and Justice (MoLJ) was also obtained on the applicability of the Forest (Conservation) Act, 1980 on the use of forest land falling in the Right of Way (ROW) of the Railway for construction of new railway line and conversion of gauge from existing Meter Gauge (MG) to Broad Gauge (BG) and applicability of provisions of the Railway Act, 1989. The MoLJ has opined on 28.09.2017 that "though the railway administration has the power under Section 11(a) of the Act of 1989, to construct or maintain a railway on any land, but it appears that for so assignment of forest land (other than the railway land) falling in the ROW to the railway by way of lease or otherwise may attract the provisions of the Act of 1980."*
>
> *"7 The Ministry is of considered opinion that the railways has the right of ways for construction and maintenance of railways lines for public welfare and may acquire land from the owners of the land but this right is also subject to the other statutory provisions and regulations. If a forest land cannot be dispensed with for the railway track in view of the conservation of forest and wildlife, then the Railway cannot acquire forest land under Section 11 of the Railway Act, 1980 without the prior approval under FC Act, 1980. The State Government also cannot assign and allot forest land, which is not the property of the Railways, to Railways without the prior approval of the Ministry under Section 2 of the FC Act, 1980 and the NBWL if the area falls in the protected area notified under the provisions of the Wildlife (Protection) Act, 1972. However, any*

*actual diversion of forest land for non-forestry purpose already done before 25.10.1980 will not attract the provisions of FC Act and this position was clarified by the Ministry vide guideline dated 13.10.2016 though clearance under WPA will be required if Protected areas are involved."*

73. Moreover, paragraph 8 of the said communication clearly states that railway projects passing through the notified Ecosensitive Zone or located within 10 km radius of Wildlife Sanctuary/National Parks and Tiger Reserve are not required to obtain any clearance, as these projects do not need any environment clearance. Paragraph 8 of the said communication is also usefully quoted as under:

*"8 Railway projects passing through the notified Eco-sensitive Zone or located within 10 km. radius of Wildlife Sanctuary (WLS)/National Parks (NP) and Tiger Reserve (TR) are not required to obtain wildlife clearance from National Board of Wildlife as these projects do not need Environment Clearance. However, railway projects passing through the areas linking one protected area or Tiger Reserve with another protected area or Tiger Reserve diversion cannot be allowed for ecologically unsustainable use, except in public interest with the approval of NBWL on the advice of the National Tiger Conservation Authority as provided for under Section 38(O)(1)(g) of Wildlife (Protection) Act, 1972."*

74. Further, as has been clearly set out in the Table of Clearances above, which are not disputed by Mr. Khambata, the clearances under the Wildlife Protection Act and under the Forest Conservation Act including the "in-principle" as well as the "fnal approval" have already been obtained, and as such, this objection appears to be misplaced, particularly in the light of the decision in the case of *Ganv Bhavancho Ekvott* v. *South Western Railways*[13] where a coordinate Bench of this Court has already observed that Section 11 of the Railway Act is an overriding provision.

75. Section 11 of the Railways Act as observed is very wide permitting for the purpose of maintaining a railway, any construction, alteration in the course of any rivers, streams, water courses diverting or altering the course of any rivers, streams or water courses or roads, streets or ways or raise or sink their level in order to carry them more conveniently over or under or by the side of the railway and do all other acts for making, maintaining, altering or repairing and using the railway. Further, this court in the case of *The Goa Foundation* v. *Konkan Railway Corporation*[14] held that clearance under the Environment Protection Act is not required even though the railway line passes over rivers, creeks etc.

76. It is also pertinent to note that the State Government, being the respondent no. 1, has filed an affidavit dated 25th November 2022 clearly stating that all the requirements and clearances required to be given by the State Government (Forest Department) have been given for the Mumbai - Ahmedabad High Speed Rail Project and nothing is pending with the State Government except the permission for the mangroves area which will be given in due course, once the petitioner gets the permission from this court. The said affidavit also records that both Stage I and Stage II clearances have been received from the respondent no. 4 MoEF&CC. Mr. Shastri, learned AGP for Respondent No. 1 and 3 has accordingly made his submissions. Ms. Bagve, learned counsel for the Respondent No. 2, MCZMA relies upon the permissions granted by the MCZMA.

77. It has also been stated in the said affidavit that in respect of 129.71 hectares of forest land for Mumbai - Ahmedabad High Speed Rail Project, the Conservator of Forests has granted permission on 1st August 2022 for commencement of work regarding diversion of forest land for the said project.

78. In respect of diversion of 22.6944 hectares of forest land for reorientation/realignment of existing 400 kv and 220 kv transmission lines within the

alignment of the said project, the MoEF&CC, Government of India has accorded in-principle Stage I approval on 10th April 2019 subject to certain conditions and on compliance of such conditions, the Chief Conservator of Forests has granted working permission on 17th November 2022 to Power Grid Corporation of India Ltd.

79. Further, for diversion of 6.783 hectares of forest land for shifting Padghe Vasai transmission line towers within the alignment of Mumbai - Ahmedabad High Speed Railway, the Government of Maharashtra has, on 19th October 2022, submitted a proposal to MoEF&CC.

80. With respect to the Wildlife clearance for the said project, the State Board of Wildlife, Maharashtra in its 14th Meeting dated 5th December 2018 has accorded approval on the condition that the petitioner deposits 2% of the costs of the project passing through protected area and deemed Eco-Sensitive Zone, amounting to Rs. 83.02 crores for necessary mitigation measures. However, the National Board for Wildlife in its 66th Meeting held on 31st December 2001, has directed the user agency to deposit 2% of the costs of the project passing through the protected area and its finally notified Eco-Sensitive Zone which amounts to Rs. 9.95 crores, which amount as noted above has already been deposited by petitioner.

81. Going by the decision of *Ganv Bhavancho Ekvott* (supra), the Project for laying down of railway lines in terms of the provisions contained in Section 11 of the Railways Act, in our view, would not require any permission of this Court. However, since mangroves have been held to be forests and that the decision and the directions in PIL No. 87 of 2006 would apply to all projects where mangroves are involved, we need to satisfy ourselves that the mangrove trees are proposed to be felled/cut for sub-serving national interest and public good. Given the benefits the Project is likely to offer to the public at large by way of reduction of travel time together with reduction of carbon footprint, which is intended for the protection of environment, we are satisfied that the condition subject to which permission ought to be granted, as enunciated in paragraph 83 (viii) of the decision in *Bombay Environmental Action Group* (supra) stands fulfilled and that this is a ft case for exercise of discretion in favour of the petitioner.

82. As regards Mr. Khambata's objection with respect to the shifting of Thane and Virar stations is concerned, as noted at item 5 of the Table quoted above, the Thane Station Building has already been shifted out of the mangrove forest and the Virar Station has also been shifted out of the reserve forest. In fact the learned counsel for the petitioner has also placed on record the maps indicating the same with which we are satisfied. Therefore Mr. Khambata's concern with respect to the same also should be allayed.

83. We further note from the Affidavits filed on behalf of the petitioner and the State that a comprehensive mangrove conservation management plan has already been put in place and that the petitioner has not only undertaken to plant 2,67,335 mangrove saplings but also deposited an amount of Rs. 9.95 crores on 15th July 2022 as noted above.

84. It would be pertinent here to briefly refer to the decision of the Supreme Court in *T.N. Godavarman Thirumulpad* (supra), where the Supreme Court observed that the forest policy had a statutory favour and the non-fulfillment of the principal aim of the policy which is environmental stability and maintenance of ecological balance would be violative of Articles 14 and 21 of the Constitution. The Supreme Court emphasized compulsory afforestation and a need for a systematic approach so as to balance economic development and environmental protection. It held that in the ultimate analysis, economic development at the cost of degradation of environment and depreciation of forest cover would be counter productive and that there was an absolute need to take all precautionary measures when forest lands were sought to be diverted for non-forest use.

85. Considering that this project will not only cover the distance of 508.17 kms within a period of two and a half hours, instead of presently six and a half hours and be a convenio par excellence for the rail passengers of the two cities and the two States, increasing connectivity between the busy trade corridor of Ahmedabad and Mumbai which will increase the economic productivity, running on electricity not only saving valuable cost on conventional fuel but also generating employment of about twenty thousand people in the construction phase and with an approximate of four thousand people during the operations and maintenance and about sixteen thousand indirect jobs expected to be generated during the Operations and Maintenance phase, by undertaking to plant over 1,10,000 mangrove saplings in between the piers to be installed in the mangrove area along with other safeguards as set out in the permissions/approvals set out in the Table above, in our view, would strike a balance between development and protection and conservation of environment. In our view, therefore, the need for sustainable development, where both - the needs of development and economy on the one hand and protection and conservation of the environment on the other are balanced, would also be satisfied. The elucidation of the public trust doctrine and sustainable development by the Supreme Court in the case of *Karnataka Industrial Areas Development Board* (supra) supports this view of ours.

86. Further, the decision of this Court in the case of *Bombay Environmental Action Group* (supra) not only highlights these principles, but also reinforces the trust that the public reposes in the Courts, when in paragraph 83 (viii), it observes that the mangroves cannot be permitted to be destructed by the State for private, commercial or any other use unless the Court finds it necessary for the public good or public interest. The Courts therefore need to be fully aware and conscious of its responsibility as a guardian of public good and public interest.

87. This Court in a number of cases involving public corporations including the Mumbai Metropolitan Region Development Authority and Mumbai Maritime Board, where similar projects of public importance are involved, has granted orders directing the relevant authorities to permit execution of the projects of *bona fide* public utility, pursuant to the public trust doctrine, subject to petitioners therein strictly complying with the conditions imposed in the permissions granted by the respondents/authorities. In fact, many of the projects where this Court has permitted were at the stage of “in principle” approval, whereas this Project has already been granted the final approval by the MOEF&CC which is even better.

88. Further, in our view, considering the advantages set out above, the Mumbai-Ahmedabad High Speed Rail Project is in public interest and necessary for public good and a project of *bona fide* public utility.

89. Having considered the aforesaid submissions and the above discussion, it would appear to us that if the petitioner is put to terms by way of an undertaking for compulsory afforestation as well as an undertaking to comply with the conditions of the permissions/clearances already granted as well as to be granted and more particularly in terms of the in-principle approval dated 29th March 2019 as well as the final approval dated 18th August 2022, that should adequately meet the requirements of sustainable development discussed above.

90. Considering that similar directions have been previously issued by this Court in appropriate cases where the projects have been sought to be executed for public good or in bona fide public interest, although strictly not necessary in view of our discussion above, we deem it appropriate to give our assent to the execution of the project, subject to the undertakings from the petitioner as discussed above.

91. We, accordingly, direct the Respondent authorities including the MCZMA to permit the petitioner to execute the Mumbai-Ahmedabad High Speed Rail Project including in the area falling in the mangrove area and in the Buffer Zone in view of the public importance of the Project, subject to the following:

(i) The petitioner is directed to comply with all the conditions imposed in the clearances/permissions granted by the Respondent authorities;

(ii) A responsible officer of the petitioner files an undertaking before this Court within a period of 10 days of the uploading of this order binding the petitioner (a) that the petitioner will undertake compensatory plantation of 110000 mangrove saplings, (b) shall strictly comply with the conditions as imposed in the permissions/clearances granted by the various authorities including the MoEF and CC, MCZMA, Chief Conservator of Forests (Mangroves Cell), Forest Department and other authorities that have granted permissions/clearances, and (c) that the petitioner will obtain any further approvals/permissions that may be necessary for executing the Project and to comply with the conditions therein.

92. The writ petition, accordingly, stands allowed on the above terms. No costs.

93. In the light of the disposal of the writ petition, the interim application does not survive and stands disposed of.

LATER:

94. Ms. Shah, learned advocate for the respondent no. 5 prays for stay of the judgment and order. The prayer is considered and refused.

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[1] (2014) 10 SCC 673

[2] (1997) 2 SCC 87

[3] (2006) 3 SCC 434

[4] (2004) 6 SCC 36

[5] Writ Petition (L) No. 2107 of 2017

[6] PILWP NO. 15-2021 Judgment dated 3.8.2022 of High Court of Bombay at Goa

[7] (2006) 6 SCC 371 : AIR 2006 SC 2038

[8] (1997) 2 SCC 267

[9] AIR 1953 Nag 51

[10] SLP (Civil) Diary No(s).6388 of 2019

[11] AIR 1966 SC 529

[12] (2020) 8 SCC 129

[13] PILWP NO. 15-2021 Judgment dated 3.8.2022 of High Court of Bombay Bench at Goa

[14] AIR 1992 Bom 471

regarded as satisfactory explanation of the delay. In that case the petition had been dismissed for delay alone. (See *State of Orissa* v. *Arun Kumar Patnaik*[9] also.)

**11.** Additionally, whether clause (4) of the settlement was applicable to Respondent 1 workman could not have been adjudicated in a writ petition. In fact, the High Court has not even given any finding in that regard. As has been observed by this Court in *ONGC Ltd.* v. *Shyamal Chandra Bhowmik*[10] in cases of this nature a writ petition is not the proper remedy.

**12.** Looked at from any angle, Respondent 1 workman was not entitled to any relief. The orders of the learned Single Judge and the Division Bench cannot be maintained and are set aside.

**13.** The appeal is allowed but in the circumstances with no order as to costs.

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**(2006) 4 Supreme Court Cases 327**

(BEFORE S.B. SINHA AND P.K. BALASUBRAMANYAN, JJ.)

KERALA SAMSTHANA CHETHU THOZHILALI UNION .. Appellant;

*Versus*

STATE OF KERALA AND OTHERS .. Respondents.

Civil Appeals No. 1732 of 2006† with No. 1733 of 2006‡, decided on March 24, 2006

A. **Administrative Law — Ultra vires — Compliance with statutory provisions — Subordinate legislation — A rule, held, must conform to not only the provisions of the parent Act but also to the provisions of other Acts — Power of delegated legislation cannot, in the absence of an enabling provision of a special statute operating in the field, be exercised to compel an unwilling employer to appoint a person — Provision in Rr. 4(2) and 9(10)(b), Kerala Abkari Shops Disposal Rules, 2002 requiring one quondam arrack worker to be employed in each toddy shop as specified therein, held, beyond the scope of Ss. 8, 18-A, 24(c) & (d) and 29(1) of Kerala Abkari Act — Moreover, making of the rules for a purpose which was not the object of the Act, held, amounted to unreasonable exercise of rule-making power — Rr. 4(2) and 9(10)(b) having been framed in exercise of a specific power of delegated legislation, Arts. 39, 42, 43 and Entries 23 & 24 of List III of Sch. VII to the Constitution could not be invoked to sustain them — Nor could they be saved by S. 69(1) of the Act or R. 7(38) of the Rules which protect only a validly made rule — Also, the rights and liabilities of a workman of a closed industry having been laid down in the Industrial Disputes Act, the State could not frame the said rules — Hence, Rr. 4(2) and**

9 (1976) 3 SCC 579 : 1976 SCC (L&S) 468 : AIR 1976 SC 1639

10 (2006) 1 SCC 337 : 2006 SCC (L&S) 113

† Arising out of SLP (C) No. 8588 of 2005. From the Final Judgment dated 22-3-2005 of the Kerala High Court in WP (C) No. 26918 of 2004

‡ Arising out of SLPs (C) Nos. 10703-04 of 2005

**9(10)(b), held, ultra vires — Excise — Kerala Abkari Act, 1077 (1 of 1077), Ss. 8, 18-A, 24(c) & (d), 29, 69, 3(6-A) & (8) — Scope**

B. **Administrative Law — Delegated/Subordinate Legislation — Rule-making power — Interpretation of — Parent Act conferring power to make rules for the purposes of carrying out its provisions and, in particular and without prejudice to the generality thereof conferring power to make rules in respect of certain specified heads — Interrelation between the said two provisions — The former provision although contained the general power to make rules, the latter provision, held, nonetheless indicative of the heads under which the statutory frame work should ordinarily be worked out — Excise — Kerala Abkari Act, 1077 (1 of 1077), S. 29(1) & (2) — Interrelation between Ss. 29(1) and 29(2)**

C. **Labour Law — Contract of employment — Scope of State's interference with — In the absence of a statutory or constitutional prohibition on contract of employment in a particular trade, held, interference of the State with such a contract impermissible — Provision in Rr. 4(2) and 9(10)(b) of Kerala Abkari Shops Disposal Rules, 2002 requiring one quondam arrack worker to be employed in each toddy shop as specified therein, held, contrary to the provisions of Contract Act as well as Specific Relief Act — Moreover, business in liquor, even if not a fundamental right, when carried on in terms of the licence, held, the right to grant or seek employment in that business, not subject to regulation by the State — Excise — Kerala Abkari Act, 1077 (1 of 1077), S. 15 — Contract Act, 1872, Ss. 23 and 10 — Specific Relief Act, 1963, Ss. 10(b) and 14(1)(a) — Constitution of India — Arts. 19(1)(g) & (6) — Business in liquor — Right to seek or grant employment in, held, not subject to regulation by State**

D. **Excise — Licence — Conditions of — Held can be imposed only fairly and reasonably — Having regard to Art. 14, the State is not free to impose any condition it desires — Constitution of India — Art. 14 — Kerala Abkari Act, 1077 (1 of 1077) — Ss. 24 and 15**

E. **Excise — Kerala Abkari Act, 1077 (1 of 1077) — Preamble — Object of the Act, restated**

In 1996, the State of Kerala banned the sale of arrack. The Labour and Rehabilitation Department of the State took a policy decision to rehabilitate the workers who had till then been engaged in manufacture, import, export, transport, sale and possession of arrack. In 2002 i.e. after a lapse of about six years, the State enacted the Kerala Abkari Shops Disposal Rules, 2002, inter alia by Rules 4(2) and 9(10)(*b*) directing that one arrack worker each must be employed in all toddy shops. The licence-holders as well as the toddy workers challenged the validity of Rules 4(2) and 9(10)(*b*) before the High Court but were unsuccessful. The High Court held that the source of the power of the State to frame such rules could be traced to Entries 23 and 24 of List III of Schedule VII to the Constitution. The appellant herein, a federation of trade unions of toddy tappers and workers in toddy shops, then filed the present appeals.

Before the Supreme Court, the appellants contended that: (*i*) the State in making the Rules impugned herein transgressed its power of delegated legislation as the Act did not contain any provision regarding adoption of welfare measures by the State, (*ii*) the social purpose for which the said rules were framed was governed by a Central Act viz. the Industrial Disputes Act and

therefore the State had no competence to make such a rule, (*iii*) the power under Section 29(1) of the Act could be resorted to only for the purpose of giving effect to the Act and not for a purpose dehors the same, (*iv*) the entries contained in the three lists of Schedule VII to the Constitution enumerated only the legislative field, and in terms thereof, the State had no power to make the impugned rules, and (*v*) that the State had the exclusive privilege of carrying on business in liquor did not mean that while parting therewith the State could impose any unreasonable restriction in violation of Article 14.

On the other hand, the State contended that: (*i*) imposition of such a condition was within the domain of the State in terms of Sections 18-A, 24(*c*), 24(*d*) and 29 of the Act and also under Articles 39, 42 and 43 of the Constitution, (*ii*) a provision enabling the employment of quondam arrack workers in toddy shops had a reasonable nexus with the purposes of the Act and came within the purview of Section 29(1) thereof, (*iv*) while considering the validity of the rules in terms of Section 29(1) not only the object and purport of the Act but also the purpose served thereby, had to be taken into consideration, and (*v*) in terms of Section 69, the rules validly made became part of the Act itself.

Another party appearing as intervenor contended, inter alia, that while parting with the privilege the State could impose any condition and it was for the licensee to take or leave the same. That since dealing in liquor was res extra commercium, the licensee could not contend that the condition imposed for grant of licence was onerous.

Allowing the appeals, the Supreme Court

*Held* :

The Kerala Abkari Act was enacted to consolidate and amend the law relating to the import, export, transport, manufacture, sale and possession of intoxicating liquors and/or intoxicating drugs in the State of Kerala. While framing the rules for the purposes of the Act, the legislative policy cannot be abridged. The rules must be framed to carry out the purposes of the Act.

(Paras 15 and 4)

By reason of Section 8 of the Act, trade in arrack was prohibited as far back as in the year 1996. By reason of the impugned Rules, the State has not laid down the terms and conditions for employment of a worker. The Act does not contain any provision therefor. Under the common law as also under the provisions of the Specific Relief Act, an employer is entitled to employ any person he likes. It is well settled that no person can be thrust upon an unwilling employer except in accordance with the provisions of a special statute operating in the field. Such a provision cannot be made by the State in exercise of its power under delegated legislation unless the same is expressly conferred by the statute.

(Para 16)

A rule is not only required to be made in conformity with the provisions of the Act whereunder it is made, but the same must be in conformity with the provisions of any other Act, as a subordinate legislation cannot be violative of any plenary legislation made by Parliament or the State Legislature. (Para 17)

Once, having regard to the principles contained in Article 47, the State exercised its right to prohibit the sale of arrack, and no trade in arrack remained in existence, the question of exercise of any control thereover would not arise. Such a power in view of Section 8 of the Act must be held to be confined only to carrying out the provisions thereof meaning thereby, no person could be allowed

to deal in arrack and in the event, any person was found to be dealing therewith, to take appropriate penal action in respect thereof as provided. (Para 18)

Rules 4(2) and 9(10)(*b*) were introduced six years after the trade in arrack was completely prohibited. The question as regards applicability of the provisions of Sections 18-A, 24(*c*) and (*d*) of the Act is required to be construed in that backdrop of events. Section 18-A is an enabling provision. It was enacted evidently having regard to Article 47 of the Constitution. The State while parting with its exclusive privilege or a part thereof, may impose conditions but once such terms and conditions are laid down by reason of a statute, the same cannot be deviated from. (Para 19)

*Har Shankar* v. *Dy. Excise and Taxation Commr.*, (1975) 1 SCC 737, *distinguished*

*Jage Ram* v. *State of Haryana*, CW No. 1376 of 1967 dated 12-3-1968 (P&H); *Bhajan Lal* v. *State of Punjab*, CW No. 538 of 1966 decided on 6-2-1967 (P&H), *referred to*

While imposing terms and conditions in terms of Section 18-A of the Act, the State cannot take recourse to something which is not within its jurisdiction or what is otherwise prohibited in law. Sections 24(*c*) and 24(*d*) are also subject to the inherent limitations of the statute. Such an inherent limitation is that the rules framed under the Act must be lawful and may not be contrary to the legislative policy. The power of the State under Section 29, therefore, was to make rules only for the purpose of carrying out the purposes of the Act and not dehors the same. Rules could not be framed in matters not contemplated under the Act. In the absence of any statutory provision, the State could not in purported exercise of its power to regulate the manufacture, sale or export-import sale of intoxicants, direct a particular class of workers to be employed in other categories of liquor shops. Both the power to frame rules and the power to impose terms and conditions are, therefore, subject to the provisions of the Act. They must conform to the legislative policy. They must not be contrary to the other provisions of the Act. They must not be framed in contravention of the constitutional or statutory scheme. (Paras 26, 43, 27 and 28)

*Ashok Lanka* v. *Rishi Dixit*, (2005) 5 SCC 598; *Bombay Dyeing & Mfg. Co. Ltd.* v. *Bombay Environmental Action Group*, (2006) 3 SCC 434 : (2006) 3 Scale 1; *Clariant International Ltd.* v. *Securities & Exchange Board of India*, (2004) 8 SCC 524; *State of Rajasthan* v. *Basant Nahata*, (2005) 12 SCC 77 : AIR 2005 SC 3401; *B.K. Industries* v. *Union of India*, 1993 Supp (3) SCC 621, *relied on*

*Secy., Ministry of Chemicals & Fertilizers, Govt. of India* v. *Cipla Ltd.*, (2003) 7 SCC 1; *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225, *referred to*

*Craies on Statute Law*, 7th Edn., pp. 297-98; Singh, G.P.: *Principles of Statutory Interpretation*, 10th Edn., p. 916, *referred to*

Furthermore, the terms and conditions which can be imposed by the State for the purpose of parting with its right of exclusive privilege more or less have been exhaustively dealt with in the illustrations in Section 29(2) of the Act. Although the general power to make rules is contained in Section 29(1) and the provisions contained in Section 29(2) are illustrative in nature, but the latter provisions are indicative of the heads under which the statutory framework should ordinarily be worked out. (Para 37)

Neither Section 18-A nor Sections 24(*c*) and 24(*d*) of the Act confer power upon the delegatee to encroach upon the jurisdiction of the other departments of the State and take upon its head something which is not within its domain or which otherwise would not come within the purview of the control and

regulation of trade in liquor. The conditions imposed must be such which would promote the policy or secure the object of the Act. To grant employment to one arrack worker in each toddy shop in preference to the toddy workers neither promotes the policy nor secures the object of the Act. The object of such Rules is to rehabilitate the former employees of arrack shops. Rehabilitation of the employees is not within the statutory scheme and, thus, the Rules are ultra vires the provisions of the Act. (Para 38)

*State of Kerala* v. *Maharashtra Distilleries Ltd.*, (2005) 11 SCC 1, *relied on*

So far as trade in toddy is concerned, the toddy workers not only act in the shops, some of them are also toddy tappers. It requires a specialised skill. They form a different class. Even assuming that both toddy and former arrack workers belong to the same class, the rehabilitation of arrack workers who had been thrown out of employment because of an excise policy on the part of the State, does not have any reasonable nexus with the purpose of the Act, namely, the prohibition of grant of excise licence in relation to the trade in arrack. Thus, the power in the present case, has not been exercised in a reasonable manner. (Paras 41 and 42)

*State of M.P.* v. *Nandlal Jaiswal*, (1986) 4 SCC 566; *Khoday Distilleries Ltd.* v. *State of Karnataka*, (1995) 1 SCC 574, *relied on*

The reference to Articles 39, 42 and 43 of the Constitution by the respondent is misconceived. While exercising the power of rehabilitation, the State did not take recourse to the provisions of Article 47. It exercised rather a specific power of delegated legislation. (Para 44)

*Hotel Balaji* v. *State of A.P.*, 1993 Supp (4) SCC 536, *considered*

The reference to Rule 7(38) by the intervenor is fallacious as the Rules contemplated thereunder would mean a valid rule and not a rule made dehors the statute. (Para 47)

The High Court erred in tracing the legislative power of the State to Entries 23 and 24 of List III of Schedule VII to the Constitution. The legislative field contained in the said Schedule provides for field of plenary power of the legislature but what a legislature can do, evidently, a delegatee may not, unless otherwise provided for in the statute itself. (Para 48)

The right of a workman in case an industry is closed is governed by Section 25-FFF and/or Section 25-J of the Industrial Disputes Act. The State while pursuing its social object or policy may do something to rehabilitate the workers affected by the ban but it cannot thrust such employees upon an unwilling employer. Moreover, the State could not rehabilitate one set of workers at the cost of the other. (Paras 49 and 50)

*Pearlite Liners (P) Ltd.* v. *Manorama Sirsi*, (2004) 3 SCC 172 : 2004 SCC (L&S) 453, *relied on*

Moreover, when an employer gives employment to a person, a contract of employment is entered into. Such a power to enter into a contract is within the realm of the Contract Act. So long as the contract of employment in a particular trade is not prohibited either in terms of the statutory or constitutional scheme, the State's intervention would be unwarranted. Thus, the impugned Rules are also contrary to the provisions of the Contract Act as well as the Specific Relief Act, 1963. Furthermore, a person may not have any fundamental right to trade or do business in liquor, but the person's right to grant employment or seek

employment, when a business is carried on in terms of the provisions of the licence, is not regulated. (Paras 53 and 55)

*C.M. Joseph* v. *State of Kerala*, (2001) 10 SCC 578, *distinguished*

*Solomon Antony* v. *State of Kerala*, (2001) 3 SCC 694, *referred to*

"Take it or leave it" argument advanced by the intervenor has to be rejected. The State while parting with its exclusive privilege cannot take recourse to the said doctrine having regard to the equity clause enshrined under Article 14 of the Constitution. The State in its dealings must act fairly and reasonably. The bargaining power of the State does not entitle it to impose any condition it desires. (Para 58)

*Hindustan Times* v. *State of U.P.*, (2003) 1 SCC 591, *followed*

*Central Inland Water Transport Corpn. Ltd.* v. *Brojo Nath Ganguly*, (1986) 3 SCC 156 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103; *Delhi Transport Corpn.* v. *D.T.C. Mazdoor Congress*, 1991 Supp (1) SCC 600 : 1991 SCC (L&S) 1213, *referred to*

However, Rule 4(2) has to be held to be ultra vires in its entirety as even the part of it, vis-à-vis, the toddy workers, is not severable. (Para 60)

*Anilkumar* v. *State of Kerala*, (2005) 1 KLT 130, *referred to* H-M/Z/34009/CL

Advocates who appeared in this case :

C.K. Sasi and Ms Malini Poduval, Advocates, for the Appellant;

U.U. Lalit, Senior Advocate (K.R. Sasiprabhu, Roy Abraham, M.P. Vinod, Ms Seema Jain, Himinder Lal, Romy Chacko and P.V. Dinesh, Advocates, with him) for the Respondents.

***Chronological list of cases cited*** ***on page(s)***

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2. (2005) 12 SCC 77 : AIR 2005 SC 3401, *State of Rajasthan* v. *Basant Nahata* 342*a*
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5. (2005) 1 KLT 130, *Anilkumar* v. *State of Kerala* 333*c-d*
6. (2004) 8 SCC 524, *Clariant International Ltd.* v. *Securities & Exchange Board of India* 341*g*
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16. (1986) 4 SCC 566, *State of M.P.* v. *Nandlal Jaiswal* 338*f-g*

17. (1986) 3 SCC 156 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103, *Central Inland Water Transport Corpn. Ltd.* v. *Brojo Nath Ganguly* 346*d-e*
18. (1975) 1 SCC 737, *Har Shankar* v. *Dy. Excise and Taxation Commr.* 337*b-c*, 338*c*
19. (1973) 4 SCC 225, *Kesavananda Bharati* v. *State of Kerala* 342*d*
20. CW No. 1376 of 1967 dated 12-3-1968 (P&H), *Jage Ram* v. *State of Haryana* 338*d*
21. CW No. 538 of 1966 decided on 6-2-1967 (P&H), *Bhajan Lal* v. *State of Punjab* 338*d-e*

The Judgment of the Court was delivered by

**S.B. SINHA, J.**— Leave granted.

**2.** Whether Rules 4(2) and 9(10)(*b*) of the Kerala Abkari Shops Disposal Rules, 2002 (for short "the Rules") are ultra vires the Abkari Act (for short "the Act") is the question involved in these appeals which arise out of a judgment and order dated 22-3-2005 passed by a Division Bench of the Kerala High Court at Ernakulam in Writ Appeals Nos. 676, 677, 680, 722 of 2004 and Writ Petitions (C) Nos. 17138 of 2003 and 26918, 27105 and 37762 of 2004 whereby and whereunder the High Court following its earlier decision in *Anilkumar* v. *State of Kerala*[1] dismissed the appeals and the writ petitions.

**3.** The appellant herein is a federation of trade unions of toddy tappers and workers in toddy shops situate in the State of Kerala.

**4.** The Abkari Act was enacted by the Maharaja of Cochin in the year 1902. It is a pre-constitutional statute. It is applicable to the entire State of Kerala. The provisions of the said Act seek to control and regulate various categories of intoxicating liquor and intoxicating drugs including arrack, toddy, Indian made foreign liquor (IMFL), country liquor and other types of foreign liquor.

**5.** On or about 1-4-1996, the State of Kerala banned the sale of arrack. A policy decision admittedly was taken by the Labour and Rehabilitation Department of the State of Kerala that the workers who had been engaged in manufacture, import, export, transport, sale and possession of arrack should be rehabilitated. The State of Kerala paid compensation at the rate of Rs 30,000 per worker. The said workers were also paid benefits under the Abkari Workers' Welfare Fund Board Act. It is not in dispute that a Welfare Board has also been constituted for the workers working in the toddy shops.

**6.** The expressions "arrack" and "toddy" have been defined in Sections 3(6-A) and 3(8) of the Act as under:

> "3. (6-A) 'Arrack' means any potable liquor other than toddy, beer, spirits of wine, wine, Indian made spirit, foreign liquor and any medicinal preparation containing alcohol manufactured according to a formula prescribed in a pharmacopoeia approved by the Government of India or the Government of Kerala, or manufactured according to a formula approved by the Government of Kerala in respect of patent and proprietary preparations

1 (2005) 1 KLT 130

or approved as a bona fide medicinal preparation by the Expert Committee approved under Section 68-A of the Act;

(8) 'Toddy' means fermented or unfermented juice drawn from a coconut, palmyra, date, or any other kind of palm tree;"

**7.** Section 8 of the Act dealing with trade in arrack was amended by Act 16 of 1997 which came into force from 3-6-1997. The trade was banned.

**8.** Sections 18-A, 24(*c*), 24(*d*) and 29(1), which are relevant for our purpose, read as under:

"18-A. *Grant of exclusive or other privilege of manufacture, etc., on payment of rentals.*—(1) It shall be lawful for the Government to grant to any person or persons, on such conditions and for such period as they may deem fit, the exclusive or other privilege—

(*i*) of manufacturing or supplying by wholesale; or

(*ii*) of selling by retail; or

(*iii*) of manufacturing or supplying by wholesale and selling by retail, any liquor or intoxicating drugs within any local area on his or their payment to the Government of an amount as rental in consideration of the grant of such privilege. The amount of rental may be settled by auction, negotiation or by any other method as may be determined by the Government, from time to time, and may be collected to the exclusion of, or in addition, to the duty or tax leviable under Sections 17 and 18.

(2) No grantee of any privilege under sub-section (1) shall exercise the same until he has received a licence in that behalf from the Commissioner.

(3) In such cases, if the Government shall by notification so direct, the provisions of Section 12 relating to toddy and toddy producing trees shall not apply.

* * *

24. *Forms and conditions of licences, etc.*—Every licence or permit granted under this Act shall be granted—

(*a*)-(*b*) * * *

(*c*) subject to such restrictions and on such conditions; and

(*d*) shall be in such form and contain particulars—as the Government may direct either generally, or in any particular instance in this behalf.

* * *

29. *Power to make rules.*—(1) The Government may, by notification in the gazette, either prospectively or retrospectively, make rules for the purposes of this Act."

**9.** In exercise of the said power, the Rules were framed. After a lapse of about six years, the State enacted the impugned Rules, inter alia directing that one arrack worker each must be employed in all toddy shops in the following terms:

"4. (2) The shops so notified under sub-rule (1) above shall be such shops as are retained after abolition of certain existing shops. Grantees of privilege of such retained shops shall undertake to engage the existing

workers and such eligible workers of the abolished shops who were registered with the Toddy Workers' Welfare Fund Board as on 31-3-2000 and as are redeployed to their shops. Grantee of privilege shall also undertake to engage one arrack worker of the abolished arrack shops of the State as would be allotted to his shop for rehabilitation, on the basis of district-level seniority.

* * *

9. (10) In order to ensure that the employment of workers of abolished toddy and arrack shops are protected, the licensees shall abide by the following conditions also:

(*a*) * * *

(*b*) One arrack worker who has remained unemployed since the abolition of arrack shops with effect from 1-4-1996 shall be absorbed in the shop as may be decided by the Government by observing the district-level seniority of such arrack workers."

**10.** The validity of the said Rules was questioned both by the holders of licences as also by the toddy workers. The employees of the toddy shops are traditional workers. A learned Single Judge of the High Court upheld the validity of the Rules inter alia holding:

(*i*) in view of Section 18-A of the Act, as control of liquor in trade is within the exclusive domain of the State and as terms and conditions can be prescribed for granting a licence, the impugned Rules were validly made.

(*ii*) Although, Section 29(2) does not contain any provision enabling the State to make such a provision, the same would, however, come within the purview of sub-section (1) thereof.

(*iii*) Source of power of the State to frame such rules can be traced to Entries 23 and 24 of List III of the Seventh Schedule of the Constitution.

**11.** The Division Bench of the said High Court upheld the said conclusions of the learned Single Judge. Only the toddy workers are in appeal before us. Mr Ranjit Kumar, learned Senior Counsel appearing on behalf of the appellants would submit:

(*i*) The State in making the aforementioned Rules transgressed its power of delegated legislation as the Act does not contain any provision as regards adoption of welfare measures to be taken by the State.

(*ii*) The social purpose for which the said Rules were made is governed by the provisions of the Industrial Disputes Act.

(*iii*) As the matter relating to the terms and conditions of employment of the workmen is covered by the said parliamentary legislation, the State had no competence whatsoever to make such a rule.

(*iv*) The power under sub-section (1) of Section 29 of the Act could be resorted to only for the purpose of giving effect to the Act and not for a purpose dehors the same.

(*v*) The entries contained in the three lists of the Seventh Schedule of the Constitution enumerate only the legislative field, specifying the sources of legislation by Parliament and the State Legislatures and in terms thereof, the State has no power to make the rule concerned.

(*vi*) It may be true that the State has the exclusive privilege of carrying on business in liquor but the same would not mean that while parting with the said privilege the State can impose any unreasonable restriction which would be violative of Article 14 of the Constitution.

**12.** Mr T.L.V. Iyer, learned Senior Counsel appearing on behalf of the State, on the other hand, would contend that:

(*i*) Imposition of such a condition is within the domain of the State in terms of Sections 18-A, 24(*c*), 24(*d*) and 29 of the Act inasmuch as while granting a licence for sale of toddy, the State merely parts with a privilege which exclusively vested in it and in that view of the matter if in terms of the policy decision of the State, arrack workers were to be rehabilitated, it could direct employment of unemployed arrack workers and, thus, there was absolutely no reason as to why such a condition cannot be imposed while parting with the privilege by the State in terms of Section 18-A of the Act which enables the State to impose such conditions or restrictions as it may deem fit for the purpose of grant of a licence to sell intoxicating liquor.

(*ii*) As arrack and toddy both come within the purview of the Act, the State is entitled to exercise its control thereover which in turn would mean that a provision enabling the arrack workers, thrown out of employment, to be employed in toddy shops has a reasonable nexus with the purposes of the Act and such a provision cannot be said to be extraneous to the provisions of the Act and would come within the purview of sub-section (1) of Section 29 thereof.

(*iii*) The Rules which are impugned in these appeals enable the State to direct employment of toddy workers also who are displaced by the relocation of the toddy shops or reduction in their number and as such the workers cannot successfully question the validity of the Rules.

(*iv*) The right of the State to impose conditions is recognised by Sections 18-A, 24(*c*) and (*d*) and in that view of the matter while considering the validity of the Rules made in terms of sub-section (1) of Section 29 of the Act, the jurisdiction of this Court should not be confined only to looking at the object and purport of the Act as contended by the appellants herein but also look to the purposes which are subserved thereby.

(*v*) Section 69 of the Act also assumes importance in this context and confers a statutory flavour on the Rules made under the Act and the Rules validly made in terms thereof become a part of the Act itself.

**13.** Mr Romy Chacko, learned counsel appearing on behalf of the intervener would supplement the submissions of Mr Iyer contending that the purpose of the Act must be found out from the various provisions of the Act and not from Section 18-A of the Act or Section 24 alone. The learned counsel would contend that while parting with the privilege, the State can impose any condition and it is for the licensee to take it or leave it. The learned counsel would further submit that as dealing in liquor is res extra commercium, as has been held by this Court in *Har Shankar* v. *Dy. Excise and Taxation Commr.*[2] the licensee could not have contended that the condition imposed for grant of licence was onerous.

**14.** Drawing our attention to sub-rule (38) of Rule 7, it was urged that the licensees are bound by all the Rules which have either been passed under the Act or which may thereafter be made thereunder or under any law relating to Abkari Revenue which may be made in future and, thus, the power conferred upon the State must be held to be of wide amplitude.

**15.** The Act was enacted to consolidate and amend the law relating to the import, export, transport, manufacture, sale and possession of intoxicating liquor and/or intoxicating drugs in the State of Kerala. While framing the Rules for the purposes of the Act, the legislative policy cannot be abridged. The Rules must be framed to carry out the purposes of the Act.

**16.** By reason of Section 8 of the Act, trade in arrack was prohibited as far back as in the year 1996. By reason of the impugned Rules, the State has not laid down the terms and conditions for employment of a worker. The Act does not contain any provision therefor. Under the common law as also under the provisions of the Specific Relief Act, an employer is entitled to employ any person he likes. It is well settled that no person can be thrust upon an unwilling employer except in accordance with the provisions of a special statute operating in the field. Such a provision cannot be made by the State in exercise of its power under delegated legislation unless the same is expressly conferred by the statute.

**17.** A rule is not only required to be made in conformity with the provisions of the Act whereunder it is made, but the same must be in conformity with the provisions of any other Act, as a subordinate legislation cannot be violative of any plenary legislation made by Parliament or the State Legislature.

**18.** The State by enacting Section 8 of the Act prohibited sale of arrack. Once such a right to bring about prohibition, having regard to the principles contained in Article 47 of the Constitution is exercised, no trade being in existence, the question of exercise of any control thereover would not arise. Such a power in view of Section 8 of the Act must be held to be confined

2 (1975) 1 SCC 737

only to carrying out the provisions thereof meaning thereby, no person can be allowed to deal in arrack and in the event, any person is found to be dealing therewith, to take appropriate penal action in respect thereof as provided.

**19.** Rules 4(2) and 9(10)(*b*) in the Rules were introduced six years after the trade in arrack was completely prohibited. In the aforementioned backdrop of events, the question as regards applicability of the provisions of Sections 18-A, 24(*c*) and (*d*) of the Act is required to be construed. Section 18-A of the Act recognises the common law right of the State to part with the privilege. The State's exclusive privilege of supply or sale of liquor is also not in question. But, we may notice that Section 18-A is an enabling provision. It was enacted evidently having regard to Article 47 of the Constitution. The State while parting with its exclusive privilege or a part thereof, may impose such conditions but once such terms and conditions are laid down by reason of a statute, the same cannot be deviated from.

**20.** In *Har Shankar*[2] whereupon Mr Chacko placed reliance, it was stated: (SCC p. 742, para 5)

> "*5.* Auctions for granting the right to sell country liquor for the year 1968-69 were initially held in various districts of Punjab on or about 8-3-1968 in pursuance of conditions of auction framed on 19-2-1968. Those auctions became ineffective by reason of a judgment dated 12-3-1968 of a Division Bench of the High Court of Punjab and Haryana in *Jage Ram* v. *State of Haryana*[3]. Following an earlier judgment in *Bhajan Lal* v. *State of Punjab*[4] the High Court took the view that the licence fee realised through the medium of auctions was really in the nature of 'still-head duty' and that the licensees could not be called upon by the Government to pay still-head duty on the liquor quota which, under the terms of auctions, they were bound to lift but which in fact was not lifted by them."

**21.** The said decision has no application to the fact of the present case, as therein this Court was concerned with a different question.

**22.** It is, furthermore, not in dispute that Article 14 of the Constitution would be attracted even in the matter of trade in liquor.

**23.** In *State of M.P.* v. *Nandlal Jaiswal*[5] this Court opined: (SCC pp. 604-05, para 33)

> "The State under its regulatory power has the power to prohibit absolutely every form of activity in relation to intoxicants—its manufacture, storage, export, import, sale and possession. No one can claim as against the State the right to carry on trade or business in liquor and the State cannot be compelled to part with its exclusive right or privilege of manufacturing and selling liquor. But when the State decides to grant such right or privilege to others the State cannot escape the

3 CW No. 1376 of 1967 dated 12-3-1968 (P&H)
4 CW No. 538 of 1966 decided on 6-2-1967 (P&H)
5 (1986) 4 SCC 566

rigour of Article 14. It cannot act arbitrarily or at its sweet will. It must comply with the equality clause while granting the exclusive right or privilege of manufacturing or selling liquor. It is, therefore, not possible to uphold the contention of the State Government and Respondents 5 to 11 that Article 14 can have no application in a case where the licence to manufacture or sell liquor is being granted by the State Government. The State cannot ride roughshod over the requirement of that article."

**24.** In *Khoday Distilleries Ltd.* v. *State of Karnataka*[6] a Constitution Bench of this Court upon referring to a large number of decisions summed up its findings in the following terms: (SCC p. 609, para 60)

"*60.* (*e*) For the same reason, the State can create a monopoly either in itself or in the agency created by it for the manufacture, possession, sale and distribution of the liquor as a beverage and also sell the licences to the citizens for the said purpose by charging fees. This can be done under Article 19(6) or even otherwise.

(*f*) For the same reason, again, the State can impose limitations and restrictions on the trade or business in potable liquor as a beverage which restrictions are in nature different from those imposed on the trade or business in legitimate activities and goods and articles which are res commercium. The restrictions and limitations on the trade or business in potable liquor can again be both under Article 19(6) or otherwise. The restrictions and limitations can extend to the State carrying on the trade or business itself to the exclusion of and elimination of others and/or to preserving to itself the right to sell licences to do trade or business in the same, to others.

(*g*) When the State permits trade or business in the potable liquor with or without limitation, the citizen has the right to carry on trade or business subject to the limitations, if any, and the State cannot make discrimination between the citizens who are qualified to carry on the trade or business."

**25.** While imposing terms and conditions in terms of Section 18-A of the Act, the State cannot take recourse to something which is not within its jurisdiction or what is otherwise prohibited in law. Sub-sections (*c*) and (*d*) of Section 24 of the Act provide that every licence or permit granted under the Act would be subject to such restrictions and on such conditions and shall be in such form and contain such particulars as the Government may direct either generally or in any particular instance in this behalf. The said provisions are also subject to the inherent limitations of the statute. Such an inherent limitation is that the rules framed under the Act must be lawful and may not be contrary to the legislative policy. The rule-making power is contained in Section 29 of the Act. At the relevant time, sub-section (1) of Section 29 of the Act provided that the Government may make rules for the purpose of carrying out the provisions of the Act which has been amended by

6 (1995) 1 SCC 574

Act 12 of 2003 with effect from 1-4-2003 empowering the State to make rules either prospectively or retrospectively for the purposes of the Act.

**26.** Its power, therefore, was to make rules only for the purpose of carrying out the purposes of the Act and not dehors the same. In other words, rules cannot be framed in matters that are not contemplated under the Act.

**27.** The State may have unfettered power to regulate the manufacture, sale or export-import sale of intoxicants but in the absence of any statutory provision, it cannot, in purported exercise of the said power, direct a particular class of workers to be employed in other categories of liquor shops.

**28.** The Rules in terms of sub-section (1) of Section 29 of the Act, thus, could be framed only for the purpose of carrying out the provisions of the Act. Both the power to frame rules and the power to impose terms and conditions are, therefore, subject to the provisions of the Act. They must conform to the legislative policy. They must not be contrary to the other provisions of the Act. They must not be framed in contravention of the constitutional or statutory scheme.

**29.** In *Ashok Lanka* v. *Rishi Dixit*[7] it was held: (SCC p. 622, para 57)

> "We are not oblivious of the fact that framing of rules is not an executive act but a legislative act; but there cannot be any doubt whatsoever that such subordinate legislation must be framed strictly in consonance with the legislative intent as reflected in the rule-making power contained in Section 62 of the Act."

**30.** In *Bombay Dyeing & Mfg. Co. Ltd.* v. *Bombay Environmental Action Group*[8] this Court has stated the law in the following terms: (SCC p. 488, para 104)

> "*104*. A policy decision, as is well known, should not be lightly interfered with but it is difficult to accept the submissions made on behalf of the learned counsel appearing on behalf of the appellants that the courts cannot exercise their power of judicial review at all. By reason of any legislation, whether enacted by the legislature or by way of subordinate legislation, the State gives effect to its legislative policy. Such legislation, however, must not be ultra vires the Constitution. A subordinate legislation apart from being intra vires the Constitution, should not also be ultra vires the parent Act under which it has been made. A subordinate legislation, it is trite, must be reasonable and in consonance with the legislative policy as also give effect to the purport and object of the Act and in good faith."

**31.** In *Craies on Statute Law*, 7th Edn., it is stated at pp. 297-98:

> "The initial difference between subordinate legislation (of the kind dealt with in this chapter) and statute law lies in the fact that a subordinate law-making body is bound by the terms of its delegated or derived authority, and that courts of law, as a general rule, will not give

7 (2005) 5 SCC 598

8 (2006) 3 SCC 434 : (2006) 3 Scale 1

effect to the rules, etc., thus made, unless satisfied that all the conditions precedent to the validity of the rules have been fulfilled. The validity of statutes cannot be canvassed by the courts, the validity of delegated legislation as a general rule can be. The courts therefore (*1*) will require due proof that the rules have been made and promulgated in accordance with the statutory authority, unless the statute directs them to be judicially noticed; (*2*) in the absence of express statutory provision to the contrary, may inquire whether the rule-making power has been exercised in accordance with the provisions of the statute by which it is created, either with respect to the procedure adopted, the form or substance of the regulation, or the sanction, if any, attached to the regulation: and it follows that the court may reject as invalid and ultra vires a regulation which fails to comply with the statutory essentials."

**32.** In *G.P. Singh's Principles of Statutory Interpretation*, 10th Edn., it is stated at p. 916:

"*Grounds of judicial review*: Delegated legislation is open to the scrutiny of courts and may be declared invalid particularly on two grounds: (*a*) Violation of the Constitution; and (*b*) Violation of the enabling Act. The second ground includes within itself not only cases of violation of the substantive provisions of the enabling Act, but also cases of violation of the mandatory procedure prescribed. It may also be challenged on the ground that it cannot be said to be in conformity with the statute or Article 14 of the Constitution or that it has been exercised in bad faith. The limitations which apply to the exercise of administrative or quasi-judicial power conferred by a statute except the requirement of natural justice also apply to the exercise of power of delegated legislation. Rules made under the Constitution do not qualify as legislation in true sense and are treated as subordinate legislation and can be challenged in judicial review like delegated legislation. Compliance with the laying requirement or even approval by a resolution of Parliament does not confer any immunity to the delegated legislation but it may be a circumstance to be taken into account along with other factors to uphold its validity although as earlier seen a laying clause may prevent the enabling Act being declared invalid for excessive delegation."

**33.** In *Clariant International Ltd.* v. *Securities & Exchange Board of India*[9] this Court observed: (SCC p. 547, para 63)

"*63*. When any criterion is fixed by a statute or by a policy, an attempt should be made by the authority making the delegated legislation to follow the policy formulation broadly and substantially and in conformity therewith. (See *Secy., Ministry of Chemicals & Fertilizers, Govt. of India* v. *Cipla Ltd.*[10], SCC para 4.1.)

9 (2004) 8 SCC 524
10 (2003) 7 SCC 1

**34.** We may notice that in *State of Rajasthan* v. *Basant Nahata*[11] it was pointed out: (SCC p. 103, para 66)

> "*66.* The contention raised to the effect that this Court would not interfere with the policy decision is again devoid of any merit. A legislative policy must conform to the provisions of the constitutional mandates. Even otherwise a policy decision can be subjected to judicial review."

**35.** In *B.K. Industries* v. *Union of India*[12] this Court clearly held that a delegate cannot act contrary to the basic feature of the Act stating: (SCC p. 626, para 10)

> "The words 'so far as may be' occurring in Section 3(4) of the Cess Act cannot be stretched to that extent. Above all it is extremely doubtful whether the power of exemption conferred by Rule 8 can be carried to the extent of nullifying the very Act itself. *It would be difficult to agree that by virtue of the power of exemption, the very levy created by Section 3(1) can be dispensed with. Doing so would amount to nullifying the Cess Act itself. Nothing remains thereafter to be done under the Cess Act.* Even the language of Rule 8 does not warrant such extensive power. Rule 8 contemplates merely exempting of certain exciseable goods from the whole or any part of the duty leviable on such goods. The principle of the decision of this Court in *Kesavananda Bharati* v. *State of Kerala*[13] applies here perfectly. It was held therein that the power of amendment conferred by Article 368 cannot extend to scrapping of the Constitution or to altering the basic structure of the Constitution. Applying the principle of the decision, it must be held that the power of exemption cannot be utilised for, nor can it extend to, the scrapping of the very Act itself. To repeat, the power of exemption cannot be utilised to dispense with the very levy created under Section 3 of the Cess Act or for that matter under Section 3 of the Central Excise Act." (emphasis supplied)

**36.** The law that has, thus, been laid down is that if by a notification the Act itself stands affected the notification may be struck down.

**37.** Furthermore, the terms and conditions which can be imposed by the State for the purpose of parting with its right of exclusive privilege more or less have been exhaustively dealt with in the illustrations in sub-section (2) of Section 29 of the Act. There cannot be any doubt whatsoever that the general power to make rules is contained in sub-section (1) of Section 29. The provisions contained in sub-section (2) are illustrative in nature. But, the factors enumerated in sub-section (2) of Section 29 are indicative of the heads under which the statutory framework should ordinarily be worked out.

**38.** Neither Section 18-A nor sub-sections (*c*) and (*d*) of Section 24 of the Act confer power upon the delegatee to encroach upon the jurisdiction of the other department of the State and take upon its head something which is not

11 (2005) 12 SCC 77 : AIR 2005 SC 3401
12 1993 Supp (3) SCC 621
13 (1973) 4 SCC 225

within its domain or which otherwise would not come within the purview of the control and regulation of trade in liquor. The conditions imposed must be such which would promote the policy or secure the object of the Act. To grant employment to one arrack worker in each toddy shop in preference to the toddy workers neither promotes the policy nor secures the object of the Act. It is not in dispute that the purport and object of such Rules is to rehabilitate the former employees of arrack shops. Rehabilitation of the employees is not within the statutory scheme and, thus, the Rules are ultra vires the provisions of the Act.

**39.** In *State of Kerala* v. *Maharashtra Distilleries Ltd.*[14] this Court took notice of the provisions of Section 18-A of the Act. It was held that the State had no jurisdiction to realise the turnover tax from the manufacturers in the garb of exercising its monopoly power. It was held that turnover tax cannot be directed to be paid either by way of excise duty or as a price of privilege.

**40.** The said decision, therefore, is an authority for the proposition that the State while implementing the purposes of the Act must act within the four corners thereof. It may be true that all types of intoxicating liquors including "toddy" are subject-matter of control but the power to control has been arbitrarily exercised. Whereas in the case of arrack, the trade has totally been prohibited, the trade in toddy has merely been subjected to the control within the purview of the provisions of the Act.

**41.** So far as trade in toddy is concerned, the toddy workers not only act in the shops, some of them are also toddy tappers. It requires a specialised skill. They form a different class. Even assuming that both toddy and former arrack workers belong to the same class, the rehabilitation of arrack workers who had been thrown out of employment because of an excise policy on the part of the State, does not have any reasonable nexus with the purpose of the Act, namely, the prohibition of grant of excise licence in relation to the trade in arrack.

**42.** If a policy decision is taken, the consequences therefor must ensue. Rehabilitation of the workers, being not a part of the legislative policy for which the Act was enacted, we are of the opinion that by reason thereof, the power has not been exercised in a reasonable manner. Rehabilitation of the workers is not one of the objectives of the Act.

**43.** The submission of Mr Iyer that there exists a distinction between carrying out the provisions of the Act and the purpose of the Act, is not relevant for our purpose. The power of delegated legislation cannot be exercised for the purpose of framing a new policy. The power can be exercised only to give effect to the provisions of the Act and not dehors the same. While considering the carrying out of the provisions of the Act, the court must see to it that the rule framed therefor is in conformity with the provisions thereof.

14 (2005) 11 SCC 1

**44.** Reference to the provisions of Articles 39, 42 and 43 of the Constitution by the learned counsel for the respondent is misconceived. While exercising the power of rehabilitation, the State did not take recourse to the provisions of Article 47 of the Constitution. The matter might have been different if the State took a decision in exercise of its executive power in consonance with the legislative policy of the State as also for the purpose of giving effect to Articles 39, 42 and 43 of the Constitution. But, herein, the State was exercising a specific power of delegated legislation.

**45.** Recourse to Section 69(1) of the Act is again misconceived. Only a rule validly made will have a statutory flavour. If a rule is not validly made, the question of its being interpreted in the same manner as if enacted or as if the same is a part of the statute, would not arise.

**46.** In *Hotel Balaji* v. *State of A.P.*[15] whereupon Mr Iyer placed reliance, it is stated: (SCC p. 558, para 31)

> "The necessity and significance of the delegated legislation is well accepted and needs no elaboration at our hands. Even so, it is well to remind ourselves that rules represent *subordinate legislation*. They cannot travel beyond the purview of the Act. Where the Act says that rules on being made shall be deemed 'as if enacted in this Act', the position may be different. (It is not necessary to express any definite opinion on this aspect for the purpose of this case.) But where the Act does not say so, the rules do not become part of the Act."
>
> (emphasis in original)

The said decision runs counter to the position in the present case.

**47.** Mr Chacko has referred to Rule 7(38) of the Rules. For the reasons stated hereinbefore, reference to sub-rule (38) of Rule 7 which mandates the licensee to be bound by the Rules made under the Act is fallacious as the Rules contemplated thereunder would mean a valid Rule and not a Rule which has been made dehors the statute.

**48.** The High Court, furthermore, in our opinion, is not correct in tracing the legislative power of the State to Entries 23 and 24 of List III of the Seventh Schedule of the Constitution. The legislative field contained in the Seventh Schedule of the Constitution provides for field of plenary power of the legislature but what a legislature can do, evidently, a delegatee may not, unless otherwise provided for in the statute itself.

**49.** The rights and liabilities of a workman would fall within the purview of the provisions of the Industrial Disputes Act. What is the right of a workman in case an industry is closed is governed by Section 25-FFF and/or Section 25-J of the Industrial Disputes Act.

**50.** The State while pursuing its social object or policy may do something to rehabilitate the workers affected by the ban but the same would not mean that the State can thrust such employees upon an unwilling employer. It,

15 1993 Supp (4) SCC 536

furthermore, would not mean that the State can rehabilitate one set of workers at the cost of the other.

**51.** The employees in the arrack shops had already been paid an amount of Rs 30,000 as compensation and other benefits under the Abkari Workers' Welfare Fund Board Act. We are informed that they have also been paid a sum of Rs 2000 each in 1997. If they became entitled to any other benefit, the State may provide the same as a part of welfare policy but not in pursuit of an excise policy.

**52.** The matter can be considered from another angle.

**53.** When an employer gives employment to a person, a contract of employment is entered into. The right of the citizens to enter into any contract, unless it is expressly prohibited by law or is opposed to public policy, cannot be restricted. Such a power to enter into a contract is within the realm of the Contract Act. It has not been and could not be contended that a contract of employment in the toddy shops would be hit by Section 23 of the Contract Act. So long as the contract of employment in a particular trade is not prohibited either in terms of the statutory or constitutional scheme, the State's intervention would be unwarranted unless there exists a statutory interdict. Even to what extent such a legislative power can be exercised would be the subject-matter of debate but in a case of this nature there cannot be any doubt that the impugned Rules are also contrary to the provisions of the Contract Act as also the Specific Relief Act, 1963.

**54.** In *Pearlite Liners (P) Ltd.* v. *Manorama Sirsi*[16] it is stated: (SCC pp. 175-76, para 7)

> "It is a well-settled principle of law that a contract of personal service cannot be specifically enforced and a court will not give a declaration that the contract subsists and the employee continues to be in service against the will and consent of the employer. This general rule of law is subject to three well-recognised exceptions: (*i*) where a public servant is sought to be removed from service in contravention of the provisions of Article 311 of the Constitution; (*ii*) where a worker is sought to be reinstated on being dismissed under the industrial law; and (*iii*) where a statutory body acts in breach of violation of the mandatory provisions of the statute."

**55.** Furthermore, a person may not have any fundamental right to trade or do business in liquor, but the person's right to grant employment or seek employment, when a business is carried on in terms of the provisions of the licence, is not regulated.

**56.** Reliance placed by the learned counsel on *C.M. Joseph* v. *State of Kerala*[17] is again misplaced. Therein, Rule 6(39) of the Rules was held to be suffering from no infirmity and it is in that situation it was held that as the

16 (2004) 3 SCC 172 : 2004 SCC (L&S) 453
17 (2001) 10 SCC 578

said rule was in existence at the time when licence was granted, the licensee could not be allowed to impugn the same. We are not concerned with the right of the licensee but the right of the workmen.

**57.** In *Solomon Antony* v. *State of Kerala*[18] this Court again held that the contractors were liable to pay the duty on even unlifted portion of the designated quantum of rectified spirit having regard to the binding nature of the contract.

**58.** "Take it or leave it" argument advanced by Mr Chacko is stated to be rejected. The State while parting with its exclusive privilege cannot take recourse to the said doctrine having regard to the equity clause enshrined under Article 14 of the Constitution. The State in its dealings must act fairly and reasonably. The bargaining power of the State does not entitle it to impose any condition it desires.

**59.** In *Hindustan Times* v. *State of U.P.*[19] wherein one of us was a member, this Court observed: (SCC p. 604, para 39)

> "*39.* The respondents being a State, cannot in view of the equality doctrine contained in Article 14 of the Constitution, resort to the theory of 'take it or leave it'. The bargaining power of the State and the newspapers in matters of release of advertisements is unequal. Any unjust condition thrust upon the petitioners by the State in such matters, in our considered opinion, would attract the wrath of Article 14 of the Constitution as also Section 23 of the Indian Contract Act. See *Central Inland Water Transport Corpn. Ltd.* v. *Brojo Nath Ganguly*[20] and *Delhi Transport Corpn.* v. *D.T.C. Mazdoor Congress*[21]. It is trite that the State in all its activities must not act arbitrarily. Equity and good conscience should be at the core of all governmental functions. It is now well settled that every executive action which operates to the prejudice of any person must have the sanction of law. The executive cannot interfere with the rights and liabilities of any person unless the legality thereof is supportable in any court of law. The impugned action of the State does not fulfil the aforementioned criteria."

**60.** We, however, accept the submission that Rule 4(2) of the Rules must be held to be ultra vires in its entirety as even that part of it, vis-à-vis, the toddy workers, is not severable. Hence Rule 4(2) is declared ultra vires in its entirety.

**61.** For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. The appeals are allowed. No costs.

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18 (2001) 3 SCC 694
19 (2003) 1 SCC 591
20 (1986) 3 SCC 156 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103
21 1991 Supp (1) SCC 600 : 1991 SCC (L&S) 1213

**(1985) 1 Supreme Court Cases 641**

(BEFORE O. CHINNAPPA REDDY, A.P. SEN AND E.S. VENKATARAMIAH, JJ.)

Writ Petitions Nos. 2656-60, 2935-40, 2941-46, etc. of 1981, 1325 of 1982, 470-72 and 1114-15 of 1984, Transferred Cases Nos. 23 of 1983 and 23 of 1984†

INDIAN EXPRESS NEWSPAPERS (BOMBAY) PRIVATE LTD. AND OTHERS .. Petitioners ;

*Versus*

UNION OF INDIA AND OTHERS .. Respondents.

Writ Petitions Nos. 3114-17 of 1981

BENNETT, COLEMAN AND COMPANY LTD. AND OTHERS .. Petitioners ;

*Versus*

UNION OF INDIA AND OTHERS .. Respondents.

Writ Petitions Nos. 3392-93 of 1981

STATESMAN LTD. AND OTHERS .. Petitioners ;

*Versus*

UNION OF INDIA AND OTHERS .. Respondents.

Writ Petition No. 3853 of 1981

KASTURI AND SONS LTD. AND ANOTHER .. Petitioners ;

*Versus*

UNION OF INDIA AND OTHERS .. Respondents.

And

Writ Petitions Nos. 6446-47 of 1982

ANANDA BAZAR PATRIKA LTD. AND ANOTHER .. Petitioners ;

*Versus*

UNION OF INDIA AND OTHERS .. Respondents.

Writ Petitions Nos. 2656-60, 3114-17, 3392-93, 3853, etc. of 1981, 1325 and 6446-47 of 1982 and 470-72 and 1114-15 of 1984 and Transferred Cases Nos. 23 of 1983 and 23 of 1984, decided on December 6, 1984

†Under Article 32 of the Constitution of India

**Constitution of India — Articles 19(1)(a) and (g) and 14 — Levy of import duty and auxiliary dnty on newsprint — Reasonableness of — Effect on freedom of the press — Classification of newspapers into small, medium and big if proper — Customs Act, 1962, Sections 12 and 25 — Customs Tariff Act, 1975, Section 2 and Second Schedule, Heading 48.01/21, sub-heading (2) — Finance Act, 1981, Section 47 — Import duty at a flat rate of Rs 550 per MT and auxiliary duty at Rs 275 per MT on newsprint — Validity**

The petitioners, publishers of daily newspapers and periodicals, challenged the imposition of import duty and the levy of auxiliary duty on newsprint on ground of infringement of the freedom of the press by imposing a burden beyond the capacity of the industry and also affecting the circulation of the newspapers and periodicals. At the time of filing the first set of the petitions under the Customs Act, 1962 read with the Customs Tariff Act, 1975, customs duty of 40% ad valorem was payable on newsprint imported from abroad. Under the Finance Act, 1981 an auxiliary duty of 30% ad valorem was payable in addition to the customs duty. But by notifications issued under Section 25 of the Customs Act, 1962, the customs duty was reduced to 10% ad valorem and auxiliary duty was reduced to 5% ad valorem in the case of newsprint used for printing newspapers, books and periodicals. During pendency of these petitions, however, while the Customs Tariff Act, 1975 was amended levying 40% ad valorem plus Rs 1000 per MT as customs duty on newsprint, the auxiliary duty payable on all goods subject to customs duty was increased to 50% ad valorem. But by reason of notifications issued under Section 25 of the Customs Act, 1962 customs duty at a flat rate of Rs 550 per MT and auxiliary duty of Rs 275 per MT are now being levied on newsprint i.e. in all Rs 825 per MT was being levied Supreme Court allowed the writ petitions and made suitable orders under Article 142 (para 111) of the Judgment).

## I FREEDOM OF THE PRESS

**Constitution of India — Article 19(1)(a) — Freedom of the press — Court's duty to protect — Utility of the press**

The expression 'freedom of the press' has not been used in Article 19 but it is comprehended within Article 19(1)(a). This expression means freedom from interference from authority which would have the effect of interference with the content and circulation of newspapers. There cannot be any interference with that freedom in the name of public interest. The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments. Freedom of the press is the heart of social and political intercourse. It is the primary duty of the courts to uphold the freedom of the press and invalidate all laws or administrative actions which interfere with it contrary to the constitutional mandate. (Paras 32 and 84)

Brij Bhushan v. State of Delhi, 1950 SCR 605 : AIR 1950 SC 129 ; Bennett Coleman & Co. v. Union of India, (1972) 2 SCC 788 : (1973) 2 SCR 757 : AIR 1973 SC 106 ; Romesh Thappar v. State of Madras, 1950 SCR 594 : AIR 1950 SC 124 ; Express Newspapers (Private) Ltd. v. Union of India, 1959 SCR 12 : AIR 1958 SC 578 and Sakal Papers (P) Ltd. v Union of India, (1962) 3 SCR 842 : AIR 1962 SC 305, relied on

## II. CLASSIFICATION OF NEWSPAPERS BY SIZE — CONSTITUTIONALITY

**Constitution of India — Article 14 — Classification of newspapers into**

**small, medium and big newspapers on the basis of their circulation for the purpose of levying customs duty on newsprint — Held, not violative of Article 14**

**Held :**

The object of exempting all small newspapers from the payment of customs duty and levying only marginal duty on medium newspapers while levying full customs duty on big newspapers is to assist the small and medium newspapers in bringing down their cost of production. Such papers do not command large advertisement revenue. Their area of circulation is limited and majority of them are in Indian languages catering to rural sector. There is nothing sinister in the object nor can it be said that the classification has no nexus with the object to be achieved. It is the duty of the State to encourage education of the masses through the medium of the press under Article 41. (Para 103)

Bennett Coleman & Co. v. Union of India, (1972) 2 SCC 788 : (1973) 2 SCR 757 : AIR 1973 SC 106, relied on

## III. OBJECT OF FREEDOM OF SPEECH AND EXPRESSION

**Constitution of India — Article 19(1)(a) and (2) — Nature and objective of the freedom of speech and expression and limit of reasonable restrictions thereon — Reasonableness of levy of taxes affecting this right**

Freedom of expression, as learned writers have observed, has four broad social purposes to serve : (i) it helps an individual to attain self fulfilment, (ii) it assists in the discovery of truth, (iii) it strengthens the capacity of an individual in participating in decision-making and (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. All members of society should be able to form their own beliefs and communicate them freely to others. In sum, the fundamental principle involved here is the people's right to know. Freedom of speech and expression should, therefore, receive a generous support from all those who believe in the participation of people in the administration. It is on account of this special interest which society has in the freedom of speech and expression that the approach of the Government should be more cautious while levying taxes on matters concerning newspaper industry than while levying taxes on other matters. (Para 68)

## IV. TAX ON NEWSPAPER INDUSTRY — LEVY ON NEWSPRINT — CONSTITUTIONALITY

**Constitution of India — Article 19(1)(a) & (g) and 265 — Levy of indirect tax on newspaper industry through levies on imported newsprint — Constitutionality — Test to determine — Levies to be subject to judicial review — Burden of proof — Court's approach indicated — Reasonableness of restrictions under Article 19(2) & (6) — Factors to be considered**

**Held :**

The newspaper industry enjoys two of the fundamental rights, namely the freedom of speech and expression guaranteed under Article 19(1)(a) and the freedom to engage in any profession, occupation, trade, industry or business guaranteed under Article 19(1)(g). While there can be no tax on the right to exercise freedom of expression, tax is leviable on profession, occupation, trade, business and industry. Hence tax is leviable on newspapers as an industry. Taxes have to be levied by reason of public services, facilities and amenities enjoyed by the newspaper industry, the burden of providing and

maintaining which falls on the Government. Hence their liability to contribute a fair and reasonable amount to the public exchequer. Recognition of power to levy such tax cannot be said to be fatal to the freedom of press and against the spirit of the Constitution. It is inherent in the very concept of government and is sanctioned by Entry 92 of List I of Schedule VII. As long as such tax is within reasonable limits and does not impede freedom of expression it will not be contravening the limitations of Article 19(2). But when such tax transgresses into the field of freedom of expression and stifles that freedom, it becomes unconstitutional. It should not be an overburden on newspapers. Nor should it single out newspaper industry for harsh treatment. (Paras 43, 44, 46, 49, 63, 65, 68 and 90)

Alice Lee Grosjean, Supervisor of Public Accounts for the State of Louisiana v. American Press Co., 297 US 233 : 80 L Ed 660 : 56 S Ct 444 (1936) and Robert Murdock, Jr. v. Commonwealth of Pennsylvania (City of Jeannette), 319 US 105 : 87 L Ed 1292 : 63 S Ct 870 (1943), explained

Attorney-General v. Antigua Times, (1975) 3 All ER 81 (PC) : (1976 AC 16 : (1975) 3 WLR 232, relied on

Constituent Assembly Debates, Vol. IX, pp. 1175-80, Report of Second Press Commission .(Vol. I) and Thomas I. Emerson on First Amendment, 72 Yale Law Journal 941 (1963), relied on

The exercise of power to levy tax on newspaper industry is subject to review by courts in the light of the provisions of the Constitution. The courts are always there to strike down curtailment of freedom of the press by unconstitutional means. The delicate task of determining when it crosses from the area of profession, occupation, trade, business or industry into the area of freedom of expression and interferes with that freedom is entrusted to the courts. In deciding the reasonableness of restrictions imposed on any fundamental right the court should take into consideration the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the disproportion of the imposition and the prevailing conditions at the relevant time including the social values whose needs are sought to be satisfied by means of the restrictions. (Paras 49, 64, 65, 70 and 82)

Sakal Papers (P) Ltd. v. Union of India, (1962) 3 SCR 842 : AIR 1962 SC 305 : (1962) 2 SCJ 400 and Bennett Coleman & Co. v. Union of India, (1973) 2 SCR 757 : (1972) 2 SCC 788 : AIR 1973 SC 106, distinguished on this point

State of Madras v. V.G. Row, 1952 SCR 597 : AIR 1952 SC 196 : 1952 Cri LJ 966, relied on

If any duty is levied on newsprint by Government, it necessarily has to be passed on to the purchasers of newspapers, unless the industry is able to absorb it. In order to pass on the duty to the consumer the price of newspapers has to be increased. Such increase naturally affects the circulation of newspapers adversely. The imposition of a tax like the customs duty on newsprint is an imposition on knowledge and would virtually amount to a burden imposed on a man for being literate and for being conscious of his duty as a citizen to inform himself about the world around him. (Paras 86, 89 and 68)

Sakal Papers (P) Ltd. v. Union of India, (1962) 3 SCR 842 : AIR 1962 SC 305 : (1962) 2 SCJ 400, relied on

The pattern of the law imposing customs duties and the manner in which it is operated, to a certain extent exposes the citizens who are liable to pay customs duties to the vagaries of executive discretion. (Para 90)

In case of levy on imported newsprint the Court is called upon to reconcile the social interest involved in the freedom of speech and expression with the public interest involved in the fiscal levies imposed by the Government. In view of the intimate connection of newsprint with the freedom of the press, the tests for determining the vires of a statute taxing newsprint have, therefore, to be different from the tests usually adopted for testing the vires of other taxing statutes. In the case of ordinary taxing statutes, the laws may be questioned only if they are either openly confiscatory or a colourable device to confiscate. On the other hand, in the case of a tax on newsprint, it may be sufficient to show a distinct and noticeable burdensomeness, clearly and directly attributable to the tax. (Paras 68, 69 and 102)

Attorney-General v. Times Newspapers Ltd., (1973) 3 All ER 54 : 1974 AC 273 : (1973) 3 WLR 298 (HL), relied on

## V. JUDICIAL REVIEW OF EXERCISE OF POWER UNDER SECTION 25(1) OF CUSTOMS ACT

**Customs Act, 1925 — Section 25(1) — Power to grant exemption under — Scope of judicial review pointed ont — Constitution of India, Articles 13, 14 and 19**

**Administrative Law — Snbordinate legislation — Notification issued under a statutory provision being a 'law' under Article 13(3)(a) must be struck down if violates Part III of the Constitution — Constiution of India, Article 13(3)(a)**

The power to grant exemption from customs duty under Section 25(1) is not in the nature of exercise of a delegated legislative power to tax or not as in **Narinder Chand Hem Raj case** but a power of the Government to grant exemption under a power to grant exemption. As such the claim made by the Government that the impugned notifications are beyond the reach of administrative law cannot be accepted without qualification even though all the grounds that may be urged against an administrative order may not be available against them. (Paras 72 and 81)

Narinder Chand Hem Raj v. Lt.-Governor, Administrator, Union Territory, Himachal Pradesh, (1971) 2 SCC 747 : (1972) 1 SCR 940 : AIR 1971 SC 2399, explained and distinguished

The power under Section 25(1) though discretionary is not unrestricted. The burden of import duty imposed on newsprint is a restriction on the rights protected by Article 19(1)(a) and so the reasonableness of the restriction is open to question. The Government has a duty to examine the whole issue in the light of the public interest. It should strike a just and reasonable balance between the need for ensuring the right of people to freedom of speech and expression so vital to our democratic existence and the need to impose social control on the business of publication of a newspaper. The Government must be guided by relevant considerations and not those which are irrelevant or extraneous. (Para 82)

In deciding the reasonableness of restrictions imposed on any fundamental right the Court should take into consideration the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the disproportion of the imposition and the prevailing conditions at the relevant

time including the social values whose needs are sought to be satisfied by means of the restrictions. **(Para 82)**

State of Madras v. V.G. Row, 1952 SCR 597 : AIR 1952 SC 196 : 1952 Cri LJ 966 ; Breen v. Amalgamated Engineering Union, (1971) 2 QB 175 : (1971) 1 All ER 1148 : (1971) 2 WLR 742 (CA) and Padfield v. Minister of Agriculture, Fisheries and Food, 1968 AC 997 : (1968) 1 All ER 694 : (1968) 2 WLR 924 (HL), relied on

The exercise of power to grant exemption in public interest requires that it be exercised in a "reasonable way" in accordance with the spirit of the Constitution. **(Paras 79, 80 and 90)**

Concept of "reasonable way" explained by Lord Greene, M.R. in Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223 : (1947) 2 All ER 680, relied on

That notifications under Section 25(1) are laid before Parliament under Section 159 does not immunize them from judicial control. **(Para 79)**

Moreover, a notification under Section 25(1) being 'law' under Article 13(3)(a) must not infringe any of the fundamental rights in Part III of the Constitution. **(Para 83)**

**Administrative Law — Subordinate legislation — Grounds of challenge open against — Compared with challenges open against an administrative order — Position in England — Additional grounds of arbitrariness and unreasonableness under Articles 14 and 19 available in India — Constitution of India, Articles 13(3)(a), 14 and 19**

Held :

A subordinate legislation may be questioned on the grounds of (1) legislative competence on which the plenary legislation which delegated the power is also subject; (2) being ultra vires the parent statute or the Constitution in that it fails to take into account the very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute or the Constitution or that it does not conform to the statutory or constitutional requirements; (3) being in conflict with any other statute; (4) being so arbitrary that it could not be said to conform to the statute or be violative of Article 14. But subordinate legislature cannot be questioned on ground of violation of natural justice which is available against an administrative action. It cannot be challenged merely on the ground that it is not reasonable or that it has not taken into account relevant circumstances which the court considers relevant. **(Paras 75, 77 and 78)**

A distinction however must be made between delegation of a legislative function in the case of which the question of reasonableness cannot be enquired into and the investment by statute to exercise particular discretionary powers. In the latter case the question may be considered on all grounds on which administrative action may be questioned, such as, non-application of mind, taking irrelevant matters into consideration, failure to take relevant matters into consideration, etc., etc. **(Paras 75, 77 and 78)**

Municipal Corporation of Delhi v. Birla Cotton, Spinning and Weaving Mills, Delhi, (1968) 3 SCR 251 : AIR 1968 SC 1232 : (1969) 1 SCJ 621 and Kruse v. Johnson, (1898) 2 QB 91 : 67 LJQB 782 : 78 LT 647 : 46 WR 630, doubted

Tulsipur Sugar Co. Ltd. v. Notified Area Committee, Tulsipur, (1980) 2 SCC 295 : (1980) 2 SCR 1111 : AIR 1980 SC 882; Rameshchandra Kachardas Porwal v. State of Maharashtra, (1981) 2 SCC 722 : (1981) 2 SCR 866 : AIR 1981 SC 1127 and Bates v. Lord Hailsham of St. Marylebone, (1972) 1 WLR 1373 : (1972) 3 All ER 1019 (ChD), referred to

Position in England stated. (Paras 75 and 76)

Mixnam's Properties Ltd. v. Chertsey Urban District Council, (1964) 1 QB 214 : (1963) 2 All ER 787 : (1963) 3 WLR 38 (CA); Prof. Alam Wharam's 'Judicial Control of Delegated Legislation · The Test of Reasonableness' in 36 Modern Law Review 611 at pages 622-623 and H.W.R. Wade's, Administrative Law, 5th Edn., pp. 747-48, referred to

## VI. VALIDITY OF LEVIES IMPOSED ON NEWSPRINT

**Constitntion of India — Article 19(1)(a) — Customs duty on newsprint — Whether directly affects Article 19(1)(g) — Adverse effect on commercial advertisements — Whether valid gronnd for challenging the duty on the basis of violation of Article 19(1)(a) — That the effect of the levy on newspapers *was minimal* or a Minister's view that the newspapers generally contain 'piffle' not sufficient gronnds for imposing the duty — Reasons given by Government justifying the levy not snfficient and convincing *and indicating non*-consideration of relevant matters — Newspaper industries showing the levy to be burdensome — Held, Government must reconsider the matter afresh**

**Constitution of India — Articles 32 and 19(1)(a) — Where violation of Article 19(1)(a) is alleged, Court should not decide the matter merely on the question of burden of proof — Practice**

Held :

In the absence of sufficient material, the levy of 40% plus Rs 1000 per tonne would become vulnerable to attack. But having regard to the prevailing legislative practice it may be assumed that in order to determine the actual levy not merely the rate of duty mentioned in the Customs Tariff Act but also any notification issued under Section 25 of the Customs Act which is in force should be taken into consideration. Even then the reasons given by the Government to justify the total customs duty of 15% levied from March 1, 1981 or Rs 825 per tonne as it is currently being levied appear to be inadequate. The counter-affidavit filed on behalf of the Government in these cases does not show whether the Government ever considered the relevant matters. The petitioners have succeeded in showing a fall in circulation but whether it is a direct consequence of the customs levy and the increase in price has not been duly established. The petitioners have made no efforts to produce their balance sheets or profit and loss statements to give the Court a true idea of how burdensome the customs levy really is. On the other hand, the Government also has made no efforts to show the effect of the impact of the levy on the newspaper industry as a whole. On the material before the Court while it is not possible to come to the conclusion that the effect of the levy is so burdensome as to affect the freedom of the press, it is not possible to come to the conclusion that it will not be burdensome. Imposition of duty on newsprint is one of the factors for increase in the price of newspapers. There are factors indicating that the present levy is heavy and is perhaps heavy enough to affect circulation. On such a vital issue, Court cannot merely say that the petitioners have not placed sufficient material to establish that the drop in circulation is directly linked to the increase of the levy when, on the side of the Government, the entire exercise is thought to be irrelevant.

Hence there appears to be a good ground to direct the Central Government to reconsider the matter. (Paras 89, 90, 98 and 102)

The levy of customs duty on newsprint used in the production of newspapers is a restriction on the activity of publishing a newspaper and the levy of customs duties had a direct effect on that activity. There exists no analogy between Article 289(1) and Article 19(1)(a) and (2) of the Constitution. Hence the levy cannot be justified merely on the ground that it was not on any property of the publishers of newspapers. (Paras 94 and 84)

In re Sea Customs Act, (1964) 3 SCR 787 : AIR 1963 SC 1760 : (1964) 1 ITJ 671, distinguished

The argument of the petitioners that the imposition of customs duty has compelled them to reduce the extent of the area of the newspapers for advertisements which supply a major part of the sinews of a newspaper and consequently has adversely affected their revenue from advertisements, cannot be answered by relying upon **Hamdard Dawakhana case** on the ground that the right to publish commercial advertisement is not part of freedom of speech and expression. All commercial advertisements cannot be denied the protection of Article 19(1)(a) of the Constitution merely because they are issued by businessmen. In **Hamdard Dawakhana case** the Court was principally dealing with the right to advertise prohibited drugs, to prevent self-medication and self-treatment. That was the main issue in the case. Some of the observations of the Court went beyond the needs of the case and tended to affect the right to publish all commercial advertisements. Such broad observations appear to have been made in the light of the decision of the American Court in **Lewis J. Valentine v. F.J. Chrestensen.** But the view expressed in this American case has not been fully approved by the American Supreme Court itself in its subsequent decisions. (Paras 91, 92 and 93)

Hamdard Dawakhana (Wakf) Lal Kuan, Delhi, (1960) 2 SCR 671 : AIR 1960 SC 554 : 1960 Cri LJ 735 and Lewis J. Valentine v. F.J. Chrestensen, 86 L Ed 1262 . 316 US 52 : 62 S Ct 920 (1942), doubted

William B. Cammarane v. United States of America, 358 US 498 : 3 L Ed 2d 462 and Jeffrey Cole Bigelow v. Commonwealth of Virginia, 421 US 809 : 44 L Ed 2d 600 : 95 S Ct 2222 (1975), referred to

One of the reasons for levying the duty was that certain writing in newspapers appeared to the Finance Minister as 'piffles', which means foolish nonsense. Such action is not permissible under our Constitution for two reasons — (i) that the judgment of the Minister about the nature of writings cannot be a true description of the writings and (ii) that even if the writings are piffles it cannot be a ground for imposing a duty which will hinder circulation of newspapers. This shows that the levy is being made on a consideration which is wholly outside the constitutional limitations. The Government cannot arrogate to itself the power to prejudge the nature of contents of newspapers even before they are printed. Imposition of such a tax restriction virtually amounts to conferring on the Government the power to precensor a newspaper. The reason given by the Minister to levy the customs duty is wholly irrelevant. (Paras 95 and 97)

Robert E. Hannegan v. Esquire Inc., 327 US 146 : 90 L Ed 586 (1946), relied on

The argument on behalf of the Government that the effect of the impugned levy is minimal cannot be accepted. Where fundamental rights and freedom

of the individual are being considered, a court should be cautious before accepting the view that some particular disregard of them is of minimal account. While levying tax on an activity which is protected also by Article 19(1)(a) a greater degree of care should be exhibited, and the freedom enunciated therein must be fully protected. Moreover in the absence of a proper examination of all relevant matters, it is not possible to hold that the effect of the levy is minimal. In fact the impact of the impugned levy in these cases is not minimal at all. (Paras 90, 99 and 101)

Olivier v. Buttigieg, (1967) AC 115 : (1966) 2 All ER 459 (PC); Thomas v. Collins, 323 US 516 : 89 L Ed 430 : 65 S Ct 315 (1945) and Martin v. City of Struthers, 319 US 141 : 87 L Ed 1313 : 63 S Ct 862 (1943), approved

## VII. RELIEF

**Administrative Law — Subordinate legislation — Notifications — *Quashing* of subsequent notification which was issued superseding an earlier notification would not effect automatic revival of the earlier notification — Use of words 'substitution', 'supersession' — Effect — Customs Act, 1962, Section 25 — Customs Tariff Act, 1975 — Statute Law**

**Practice and Procedure — Relief giving rise to disastrous result must be avoided — Constitution of India, Article 32**

Held :

The quashing of a subsequent notification would not effect in revival of an earlier notification in whose place the subsequent notification was issued. The legal effect on an earlier law when the later law enacted in its place is declared invalid does not depend merely upon the use of words like, 'substitution', or 'supersession'. It depends upon the totality of circumstances and the context in which they are used. **(Para 107)**

B.N. Tiwari v. Union of India, (1965) 2 SCR 421 : AIR 1965 SC 1430 : (1966) 1 SCJ 805, followed

T. Devadasan v. Union of India, (1964) 4 SCR 680 : AIR 1964 SC 179 : (1965) 2 LLJ 560 and Firm A.T.B. Mehtab Majid and Co. v. State of Madras, 1963 Supp 2 SCR 435 : AIR 1963 SC 928 : (1963) 14 STC 355, relied on

Mohd. Shaukat Hussain Khan v. State of A.P., (1974) 2 SCC 376 : (1975) 1 SCR 429 : AIR 1974 SC 1480; Mulchand Odhavji v. Rajkot Borough Municipality, (1971) 3 SCR 53 : AIR 1970 SC 685; Koteswar Vittal Kamath v. K. Rangappa Baliga & Co., (1969) 1 SCC 255 : (1969) 3 SCR 40 : AIR 1969 SC 504 and State of Maharashtra v. Central Provinces Manganese Ore Co. Ltd., (1977) 1 SCC 643 : 1977 SCC (Tax) 211 : (1977) 1 SCR 1002 : AIR 1977 SC 879 : 1977 Tax LR 1861 : (1977) 39 STC 340, distinguished

In the present case if the impugned notifications are merely quashed, they being notifications granting exemptions, the exemptions granted under them will cease. The impugned notification dated March 1, 1981 was issued in supersession of the notification dated July 15, 1977 and thereby it achieved two objects — the notification dated July 15, 1977 came to be repealed and 10% ad valorem customs duty was imposed on newsprint. Since the notification dated July 15, 1977 had been repealed by the Government of India itself, it cannot be revived on the quashing of the notification of March 1, 1981. Thus the result would be disastrous to the petitioners as they would

have to pay customs duty of 40% ad valorem from March 1, 1981 to February 28, 1982 and 40% ad valorem plus Rs 1000 per MT from March 1, 1982 onwards. In addition to it they would also be liable to pay auxiliary duty of 30% ad valorem during the fiscal year 1982-83 and auxiliary duty of 50% ad valorem during the fiscal year 1983-84. They would straightaway be liable to pay the whole of customs duty and any other duty levied during the current fiscal year also. Such a result cannot be allowed to ensue. **(Paras 104 and 109)**

The governmental practice in the matter of customs duties has made the law imposing customs virtually a hovering legislation. Parliament expects the Government to review the situation in each case periodically and to decide what duty should be levied within the limit prescribed by the Customs Tariff Act, 1975. Hence the validity of the provision in the Customs Tariff Act, 1975 need not be examined now. Since it is established that the Government has failed to discharge its statutory obligations in accordance with law while issuing the impugned notifications issued under Section 25 of the Customs Act, 1962 on and after March 1, 1981, the Government should be directed to re-examine the whole issue relating to the extent of exemption that should be granted in respect of imports of newsprint after taking into account all relevant considerations for the period subsequent to March 1, 1981. (Para 110)

## VIII. MISCELLANEOUS

**Administrative Law — Administrative action — Power to grant exemption should be exercised in a reasonable way (Para 82)**

**Interpretation of the Constitution — American cases —Freedom of speech and expression — Held, American cases though not the sole guide they help in understanding the basic principles relating to — Constitution of India, Article 19(1)(a) and (g) — Different from the American First Amendment (Para 44)**

**R-M/6799/CT**

Advocates who appeared in this case :

A.K. Sen, A.B. Divan, F.S. Nariman and K.K. Venugopal, Senior Advocates (B.R. Agarwala, Miss Vijay Lakshmi Menon, A.K. Ganguli, P.H. Parekh, C.S. Vaidyanathan, D.N. Mishra, Pravin Kumar, K.R. Nambiar, M.C. Dhingra, Miss Sieta Vaidyalingam, P.C. Kapur, Pramod Dayal, C.M. Nayar, S.S. Munjral, K.K. Jain, S.K. Gupta, A.D. Sangar, Ranjan Mukherjee, Sudip Sarkar, P.K. Ganguli, Miss Indu Malhotra, P.R. Seetharaman and V. Shekhar, Advocates, with them), for the Petitioners ;

K. Parasaran, Attorney-General of India ; Krishna Iyer and P.A. Francis, Senior Advocates. (A. Subbarao, Dalveer Bhandari and R.N. Poddar, Advocates, with them), for the Respondents ;

F.S. Nariman, S.K. Dholakia, Soli J. Sorabjee and Anil B. Divan, Senior Advocates (J.B. Dadachanji, S. Sukumaran, D.N. Mishra, K.P. Dhandapani, R.C. Bhatia, P.C. Kapur, A.N. Haksar, O.C. Mathur, Miss Meera Mathur, Dr Roxna Swamy, Arun Jetley, P.H. Parekh, Miss Divya Bhalla and Pinaki Misra, Advocates, with them), for the Intervener.

The Judgment of the Court was delivered by

VENKATARAMIAH, J.—*1. Pleadings*

The majority of petitioners in these petitions filed under Article 32 of the Constitution are certain companies, their shareholders and their employees engaged in the business of editing, printing and publishing

newspapers, periodicals, magazines etc. Some of them are trusts or other kinds of establishments carrying on the same kind of business. They consume in the course of their activity large quantities of newsprint and it is stated that 60% of the expenditure involved in the production of newspaper is utilised for buying newsprint, a substantial part of which is imported from abroad. They challenge in these petitions the validity of the imposition of import duty on newsprint imported from abroad under Section 12 of the Customs Act, 1962 (Act 52 of 1962) read with Section 2 and Heading No. 48.01/21 sub-heading No. (2) in the First Schedule to the Customs Tariff Act, 1975 (Act 51 of 1975) and the levy of auxiliary duty under the Finance Act, 1981 on newsprint as modified by notifications issued under Section 25 of the Customs Act, 1962 with effect from March 1, 1981.

**2.** The first set of writ petitions challenging the above levy was filed in May 1981. At that time under the Customs Act, 1962 read with the Customs Tariff Act, 1975, customs duty of 40% ad valorem was payable on newsprint. Under the Finance Act, 1981 an auxiliary duty of 30% ad valorem was payable in addition to the customs duty. But by notifications issued under Section 25 of the Customs Act, 1962, the custom duty had been reduced to 10% ad valorem and auxiliary duty had been reduced to 5% ad valorem in the case of newsprint used for printing newspaper, books and periodicals.

**3.** During the pendency of these petitions while the Customs Tariff Act, 1975 was amended levying 40% ad valorem plus Rs 1000 per MT as customs duty on newsprint, the auxiliary duty payable on all goods subject to customs duty was increased to 50% ad valorem. But by reason of notifications issued under Section 25 of the Customs Act, 1962 customs duty at a flat rate of Rs 550 per MT and auxiliary duty of Rs 275 per MT are now being levied on newsprint i.e. in all Rs 825 per MT is now being levied.

**4.** The petitioners inter alia contend that the imposition of the import duty has the direct effect of crippling the freedom of speech and expression guaranteed by the Constitution as it has led to the increase in the price of newspapers and the inevitable consequence of reduction of their circulation. It is urged by them that with the growth of population and literacy in the country every newspaper is expected to register an automatic growth of at least 5% in its circulation every year but this growth is directly impeded by the increase in the price of newspapers. It is further urged that the method adopted by the Customs Act, 1962 and the Customs Tariff Act, 1975 in determining the rate of import duty has exposed the newspaper publishers to Executive interference. The petitioners contend that

there was no need to impose customs duty on newsprint which had enjoyed total exemption from its payment till March 1, 1981, as the foreign exchange position was quite comfortable. Under the scheme in force, the State Trading Corporation of India sells newsprint to small newspapers with a circulation of less than 15,000 at a price which does not include any import duty, to medium newspapers with a circulation between 15,000 and 50,000 at a price which includes 5% ad valorem duty (now Rs 275 per MT) and to big newspapers having a circulation of over 50,000 at a price which includes the levy of 15% ad valorem duty (now Rs 825 per MT). It is stated that the classification of newspapers into big, medium and small newspapers is irrational as the purchases on high seas are sometimes effected by a publisher owning many newspapers which may belong to different classes. The petitioners state that the enormous increase in the price of newsprint subsequent to March 1, 1981 and the inflationary economic conditions which have led to higher cost of production have made it impossible for the industry to bear the duty any longer. Since the capacity to bear the duty is an essential element in determining the reasonableness of the levy, it is urged, that the continuance of the levy is violative of Article 19(1)(*a*) and Article 19(1)(*g*) of the Constitution. It is suggested that the imposition of the levy on large newspapers by the Executive is done with a view to stifling circulation of newspapers which are highly critical of the performance of the administration. Incidentally the petitioners have contended that the classification of newspapers into small, medium and big for purposes of levy of import duty is violative of Article 14 of the Constitution. The petitioners have appended to their petitions a number of annexures in support of their pleas.

**5.** On behalf of the Union Government a counter-affidavit is filed. The deponent of the counter-affidavit is R.S. Sidhu, Under-Secretary to the Government of India, Ministry of Finance, Department of Revenue. In paragraph 5 of the counter-affidavit it is claimed that the Government had levied the duty in the public interest to augment the revenue of the Government. It is stated that when exemption is given from the customs duty, the Executive has to satisfy itself that there is some other corresponding public interest justifying such exemption and that in the absence of any such public interest, the Executive has no power to exempt and that it has to carry out the mandate of Parliament which has fixed the rate of duty by the Customs Tariff Act, 1975. It is also claimed that the classification of newspapers for purposes of granting exemption is done in the public interest having regard to the relevant considerations. It is denied that the levy suffers from any mala fides. It is pleaded that since every section of the society has to bear its due share of the economic burden

of the State, levy of customs duty on newsprint cannot be considered to be violative of Article 19(1)(*a*) of the Constitution. But regarding the plea of the petitioners that the burden of taxation is excessive, the counter-affidavit states that the said fact is irrelevant to the levy of import duty on newsprint. In reply to the allegation of the petitioners that there was no valid reason for imposing the duty as the foreign exchange position was quite comfortable, the Union Government has stated that the fact the foreign exchange position was comfortable was no bar to the imposition of import duty. It is further pleaded that since the duty imposed is an indirect tax which would be borne by the purchaser of newspaper, the petitioners cannot feel aggrieved by it.

*II. A Brief History of the Levy of Customs Duty on Newsprint*

**6.** In order to appreciate the various contentions of the parties it is necessary to set out briefly the history of the levy of customs duty on newsprint in India.

**7.** Even though originally under the Indian Tariff Act, 1934, there was a levy of customs duty on imported paper, exemption had been granted for import of white, grey or unglazed newsprint from the levy of any kind of customs duty in excess of 1.57 per cent ad valorem but subsequently a specific import duty of Rs 50 per MT used to be levied on newsprint imports upto 1966. The question of levy of customs duty on newsprint was examined by the Inquiry Committee on Small Newspapers. In its Report submitted in 1965 that Committee recommended total exemption of newsprint from customs duty because in 90% of the countries in the world no such levy was being imposed because newspapers played a vial role in a democracy. On the basis of the said recommendation, the Government of India abolished customs duty on newsprint altogether in the year 1966 in exercise of its power under Section 25 of the Customs Act, 1962. The price of newsprint was Rs 725 per MT during the year 1965-66 but there was a sudden spurt in its price in 1966-67 when it rose to Rs 1155 per MT. During the period 1966-71 although almost all imported goods suffered basic regulatory and auxiliary customs duty, there was no such levy on newsprint in spite of severe foreign exchange crisis which arose on the devaluation of the Indian Rupee in 1966. But on account of the financial difficulties which the country had to face as a consequence of the Bangladesh war in 1971, a regulatory duty of 2½% was levied on newsprint imports to meet the difficult situation by the Finance Act of 1972. The price of newsprint in the year 1971-72 was Rs 1134 per MT. The above 2½% ad valorem regulatory duty was abolished by the Finance Act of 1973 and was converted into 5% auxiliary duty by the said Act.

This levy of 5% was on all goods including newsprint imported into India. On April 1, 1974 under the Import Control Order issued under Section 3 of the Imports and Exports Control Act, 1947, import of newsprint by private parties was banned and its import was canalised through the State Trading Corporation of India. In 1975, the Customs Tariff Act, 1975 came into force. By this Act the Indian Tariff Act, 1934 was repealed. Under Section 2 read with Heading No. 48.01/21 of the First Schedule to the Customs Tariff Act, 1975, a levy of basic customs duty of 40% ad valorem was imposed on newsprint. But in view of the exemption granted in the year 1966 which remained in force, the imposition made by the Customs Tariff Act, 1975 did not come into force. Only 5% auxiliary duty which was levied from April 1, 1973 continued to be in operation. In the budget proposals of July 1977, the 5% auxiliary duty was reduced to 2½% but it was totally abolished by a notification issued under Section 25 of the Customs Act on July 15, 1977. The notification dated July 15, 1977 read as follows :

NOTIFICATION
CUSTOMS

GSR No. 485-E : In exercise of the powers conferred by sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962), and in supersession of the notification of the Government of India in the Department of Revenue and Banking No. 72 — Customs dated June 18, 1977, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts newsprint, falling under sub-heading (2) of Heading No. 48.01/21 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when imported into India, from the whole of that portion of the duty of customs leviable thereon, which is specified in the said First Schedule.

Sd.
(Joseph Dominic)
Under-Secretary to the Government of India.

**8.** The price of newsprint during the year 1975-76 was Rs 3676 per MT. The total exemption from customs duty imposed on newsprint was in force till March 1, 1981. In the meanwhile the Central Government notified increased salaries and wages to employees of newspaper establishments in December, 1980 on the recommendations contained in the Palekar Award. On March 1, 1981, the notification dated July 15, 1977 issued under Section 25(1) of the Customs Act, 1962 granting total exemption from customs duty was superseded by the issue of a fresh notification which stated that the Central Government had in the public interest exempted newsprint imported

into India for printing of newspapers, books and periodicals from so much of that portion of the duty of customs leviable thereon as was in excess of 10 per cent ad valorem. The effect of the said notification was that publishers of newspapers had to pay ten per cent ad valorem customs duty on imported newsprint. By another notification issued at about the same time auxiliary duty imposed by the Finance Act of 1981 above 5 per cent ad valorem was exempted in the case of newsprint. The net result was that a total duty of 15 per cent ad valorem came to be imposed on newsprint for the year 1981-82.

**9.** The explanation given by the Government in support of the the above notification was as follows :

> Customs duty on newsprint :
>
> Originally, import of newsprint did not attract any customs duty. The Government of India abolished the cusoms duty on newsprint after the devaluation of the rupee on the recommendation of the Inquiry Committee on Small Newspapers (1965). The Committee had mentioned in its report that 90% (*sic*) of the newsprint in international trade was free from customs duty and had recommended complete abolition of customs duty on newsprint. However, during the Bangladesh crisis in 1971, a 2½% ad valorem regulatory duty was imposed on newsprint imports. Subsequently, this was abolished on April 1, 1973 and in its place a 5% auxiliary customs duty on newsprint imports was proposed in the Union Budget Proposals for 1973-74. While no customs duty was levied on newsprint because of the exemption granted by Customs Notification No. 235/F. No. 527/1/76-CUS (TU) dated August 2, 1976 of the Department of Revenue and Banking, 5% auxiliary duty was continued to be levied on imported newsprint till July 15, 1977 when the Ministry of Finance, Department of Revenue by its Notification No. 148/F. No. Bud (2) Cus/77 dated July 15, 1977 exempted newsprint from the whole of duty of customs. Prior to this, the Ministry of Finance, Department of Revenue vide its Customs Notification No. 72/F.No. Bud. (2) Cus/77 dated June 18. 1977 had reduced the auxiliary duty to 2½%.
>
> In the Budget proposals for the current year, the Minister of Finance has proposed a customs duty of 15% on newsprint imports which has become effective from March 1, 1981 because of the Customs Notification No. 24/F.No. Bud(Cus)/81 dated March 1. 1981. This 15% customs duty constitutes 10% basic duty and 5% auxiliary duty.

**10.** The price of imported newsprint in March 1, 1981 was

Rs 4560 per MT. The extract from the speech of the Finance Minister in support of the imposition of a total 15% of duty (10% basic duty and 5% auxiliary duty) on newsprint is given below :

> The levy of 15 per cent customs duty on newsprint has understandably attracted a good deal of comment both within the House and outside. As it has been explained in the Budget speech, this levy is intended to promote a measure of restraint in the consumption of imported newsprint and thus help in conserving foreign exchange. In the light of the observations made by the Hon. Members in the course of the General Debate on the Budget I had assured the House that I would try to work out a scheme of providing relief to small and medium newspapers about which Members had voiced their special concern. We have now worked out the modalities of a scheme for affording relief to small and medium newspapers. Under this scheme, the State Trading Corporation would sell imported newsprint to small newspapers at a price which would not include any amount relatable to import duty. Medium newspapers will get their newsprint at a price which would include an amount relatable to import duty of 5 per cent ad valorem. Big newspapers would, however, pay a price which will reflect the full duty burden of 15 per cent ad valorem. There is a definition of small, medium and big newspapers in the Press Council. At the moment the present definition is that those which have a circulation of 15,000 or less are classified as small, those with a circulation of more than 15,000 but less than 50,000 are classified as medium and those with a circulation of over 50,000 are called big newspapers. Therefore, the small newspapers with a circulation of 15,000 and less will not pay any customs duty, those with a circulation between 15,000 and 50,000 will pay customs duty of 5 per cent and with a circulation of over 50,000 will pay 15 per cent. Suitable financial arrangements will be worked out as between Government and the State Trading Corporation to enable the STC to give effect to these concessions. As Hon. Members are aware, the categorisation of newspapers as small, medium and big in terms of circulation is already well understood in the industry and is being followed by the Ministry of Information and Broadcasting for purposes of determining initial allocation of newsprint and for setting the rates of growth of consumption of newsprint by various newspapers from year to year. The State Trading Corporation will, for purposes of the present scheme, follow the same categorisation of newspapers into small, medium and big. These arrangements will, in effect, provide a relief of about Rs 5·86 crores to small and medium newspapers.

**11.** The relevant provisions of the laws imposing customs duty and auxiliary duty on newsprint which arise for consideration are these :

**12.** Section 12 of the Customs Act, 1962 reads :

12. *Dutiable goods.*—(1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, on goods imported into or exported from India.

(2) * * *

**13.** Section 2 of the Customs Tariff Act, 1975 reads :

2. *Duties specified in the Schedules to be levied.*—The rates at which duties of customs shall be levied under the Customs Act, 1962, are specified in the First and Second Schedules.

**14.** The relevant part of Chapter 48 of the First Schedule to the Customs Tariff Act, 1975 which deals with import tariff read in 1981 thus :

| Heading No. | Sub-heading No. and description of article | Rate of duty | | Duration when rates of duty are protective |
|---|---|---|---|---|
| | | Standard | Preferential Areas | |
| (1) | (2) | (3) | (4) | (5) |
| 48·01/21 | * | * | * | |
| (2) | Newsprint containing mechanical wood pulp amounting to not less than 70 per cent of the fibre content (excluding chrome, marble, flint, poster, stereo and art paper) | 40% | .. | .. |
| | * | * | * | |

**15.** Newsprint used by the petitioners falls under sub-heading No. (2) of Heading No. 48.01/21 by which 40% ad valorem customs duty is levied on it. By the Finance Act of 1982 in sub-heading No. (2) of Heading No. 48.01/21, for the entry in column (3), the entry "40% plus Rs 1000 per tonne" was substituted.

**16.** The relevant part of Section 44 of the Finance Act, 1982 which levied an auxiliary duty of customs read thus :

44. (1) In the case of goods mentioned in the First

Schedule to the Customs Tariff Act, or in that Schedule, as amended from time to time, there shall be levied and collected as an auxiliary duty of customs an amount equal to thirty per cent of the value of the goods as determined in accordance with the provisions of Section 14 of the Customs Act, 1962 (hereinafter referred to as the Customs Act).

**17.** The above rate of auxiliary duty was to be in force during the financial year 1982-83 and it was open to the Government to grant exemption from the whole or any part of it under Section 25 of the Customs Act, 1962.

**18.** Section 45 of the Finance Act, 1983 imposed fifty per cent of the value of the goods as auxiliary duty in the place of thirty per cent imposed by the Finance Act, 1982.

**19.** But by notifications issued on February 28, 1982 under Section 25(2) of the Customs Act, 1962, which were issued in supersession of the notification dated March 1, 1981, Rs 550 per tonne was imposed as customs duty on newsprint and auxiliary duty was fixed at Rs 275 per tonne. In all Rs 825 per tonne of newspaper has to be paid as duty. The high seas sale price of newsprint had by that time gone up above Rs 5600 per tonne.

**20.** What is of significance is that when the Government was of the view that the total customs duty on newsprint in the public interest should be not more than 15 per cent and when these writ petitions questioning even that 15 per cent levy were pending in this Court, Parliament was moved by the Government specifically to increase the basic customs duty on newsprint by Rs 1000 per tonne by the Finance Act, 1982. Hence today if the Executive Government withdraws the notifications issued under Section 25 of the Customs Act, a total duty of 90 per cent plus Rs 1000 per tonne would get clamped on imported newsprint.

**21.** The effect of the imposition of 15 per cent duty may to some extent have led to the increase in the price of newspapers in 1981 and it resulted in the fall in circulation of newspapers. On this point the Second Press Commission has made the following observations in its Report (Vol. 1 page 18) :

Fall in circulation during 1981 :

94. To examine recent trends in circulation and their relationship to recent trends in the economic environment, the Commission's office undertook an analysis of the Audit Bureau of Circulations (ABC) certificates for the period July 1980 to June 1981. It was found that there was a decline in circulation

in the period January-June 1981 compared to the previous six-month period in the case of dailies and periodicals.

**22.** The two important events which had taken place during the period between July 1980 to June 1981 were the enforcement of the Palekar Award regarding the wages and salaries payable in the newspaper industry and the imposition of the customs duty of 15% on the imported newsprint. Under the newsprint policy of the Government there are three sources of supply of newsprint — (*i*) high seas sales, (*ii*) sales from the buffer stock built up by the State Trading Corporation which includes imported newsprint and (*iii*) newsprint manufactured in India. Imported newsprint is an important component of the total quantity of newsprint utilised by any newspaper establishment.

### *III. The Importance of Freedom of Press in a Democratic Society and the Role of Courts*

**23.** Our Constitution does not use the expression 'freedom of press' in Article 19 but it is declared by this Court that it is included in Article 19(1)(*a*) which guarantees freedom of speech and expression. (See *Brij Bhushan* v. *State of Delhi*[1] and *Bennett Coleman & Co.* v. *Union of India*[2].)

**24.** The material part of Article 19 of the Constitution reads :

> 19. (1) All citizens shall have the right—
>
> (*a*) to freedom of speech and expression :
>
> * * *
>
> (*g*) to practise any profession, or to carry on any occupation, trade or business.
>
> (2) Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.
>
> * * *
>
> (6) Nothing in sub-clause (*g*) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevents the State from making any law imposing, in the interests of the

1. 1950 SCR 605 : AIR 1950 SC 129 : 51 Cri LJ 1525
2. (1973) 2 SCR 757 : (1972) 2 SCC 788 : AIR 1973 SC 106

general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause. . . .

**25.** The freedom of press, as one of the members of the Constituent Assembly said, is one of the items around which the greatest and the bitterest of constitutional struggles have been waged in all countries where liberal constitutions prevail. The said freedom is attained at considerable sacrifice and suffering and ultimately it has come to be incorporated in the various written constitutions. James Madison when he offered the Bill of Rights to the Congress in 1789 is reported as having said : "The right of freedom of speech is secured, the liberty of the press is expressly declared to be beyond the reach of this Government." [See 1 *Annals of Congress* (1789-96) p. 141]. Even where there are no written constitutions, there are well established constitutional conventions or judicial pronouncements securing the said freedom for the people. The basic documents of the United Nations and of some other international bodies to which reference will be made hereafter give prominence to the said right. The leaders of the Indian independence movement attached special significance to the freedom of speech and expression which included freedom of press apart from other freedoms. During their struggle for freedom they were moved by the American Bill of Rights containing the First Amendment to the Constitution of the United States of America which guaranteed the freedom of the press. Pandit Jawaharlal Nehru in his historic resolution containing the aims and objects of the Constitution to be enacted by the Constituent Assembly said that the Constitution should guarantee and secure to all the people of India among others freedom of thought and expression. He also stated elsewhere that "I would rather have a completely free press with all the dangers involved in the wrong use of that freedom than a suppressed or regulated press" [See D.R. Mankekar : *The Press under Pressure* (1973) p. 25]. The Constituent Assembly and its various committees and sub-committees considered freedom of speech and expression which included freedom of press also as a precious right. The Preamble to the Constitution says that it is intended to secure to all citizens among others liberty of thought, expression, and belief. It is significant that in the kinds of restrictions that may be imposed on the freedom of speech and expression, any reasonable restriction imposeable in the public interest is not one enumerated in clause (2) of Article 19. In *Romesh Thappar* v. *State of Madras*[3] and *Brij Bhushan case*[1] this Court firmly expressed its view that there could not be any kind of restrictions on the freedom of speech and expression other than those mentioned in Article 19(2) and thereby

3. 1950 SCR 594 : AIR 1950 SC 124 : 51 Cri LJ 1514

made it clear that there could not be any interference with that freedom in the name of public interest. Even when clause (2) of Article 19 was subsequently substituted under the Constitution (First Amendment) Act, 1951 by a new clause which permitted the imposition of reasonable restrictions on the freedom of speech and expression in the interests of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality in relation to contempt of court, defamation or incitement to an offence, Parliament did not choose to include a clause enabling the imposition of reasonable restrictions in the public interest.

**26.** Article 19 of the Universal Declaration of Human Rights, 1948 declares : "Everyone has the right to freedom of opinion and expression ; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

**27.** Article 19 of the International Covenant on Civil and Political Rights, 1966 reads :

> *Article* 19.—(1) Everyone shall have the right to hold opinions without interference.
>
> (2) Everyone shall have the right to freedom of expression ; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> (3) The exercise of the rights provided for in Paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary :
>
> (*a*) For respect of the rights or reputations of others ;
>
> (*b*) For the protection of national security or of public order (*ordre public*), or of public health or morals.

**28.** Article 10 of the European Convention on Human Rights reads :

> *Article* 10.—(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, con-

ditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

**29.** The First Amendment to the Constitution of the United States of America declares :

*Amendment I.*—Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ; or abridging the freedom of speech or of the press ; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**30.** Frank C. Newman and Karel Vasak in their article on 'Civil and Political Rights' in the *International Dimensions of Human Rights* (edited by Karel Vasak) Vol. I state at pages 155-156 thus :

(ii) *Freedom of opinion, expression, information and communication.*—A pre-eminent human right, insofar as it allows everyone to have both an intellectual and political activity, freedom of expression in the broad sense actually includes several specific rights, all linked together in a "continuum" made increasingly perceptible by modern technological advance. What is primarily involved is the classic notion of freedom of opinion, that is to say, the right to say what one thinks and not to be harassed for one's opinions. This is followed by freedom of expression, in the limited sense of the term, which includes the right to seek, receive and impart information and ideas, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of one's choice. When freedom of expression is put to use by the mass media, it acquires an additional dimension and becomes freedom of information. A new freedom is being recognised which is such as to encompass the multiform requirements of these various elements, while incorporating their at once individual and collective character, their implications in terms of both "rights" and "responsibilities" : this is the right to communication, in connection with which UNESCO has recently undertaken considerable work with a view to its further elaboration and implementation.

**31.** "*Many Voices, One World*" a publication of UNESCO which contains the Final Report of the International Commission for the Study of Communication Problems, presided over by Sean MacBride,

in Part V thereof dealing with 'Communication Tomorrow' at page 265 emphasizes the importance of freedom of speech and press in the preservation of human rights in the following terms :

*IV. Democratisation of Communication*

HUMAN RIGHTS

Freedom of speech, of the press, of information and of assembly are vital for the realization of human rights. Extension of these communication freedoms to a broader individual and collective right to communicate is an evolving principle in the democratization process. Among the human rights to be emphasized are those of equality for women and between races. Defence of all human rights is one of the media's most vital tasks. We recommend :

52. All those working in the mass media should contribute to the fulfilment of human rights, both individual and collective, in the spirit of the UNESCO Declaration on the mass media and the Helsinki Final Act, and the International Bill of Human Rights. The contribution of the media in this regard is not only to foster these principles, but also to expose all infringements, wherever they occur, and to support those whose rights have been neglected or violated. Professional associations and public opinion should support journalists subject to pressure or who suffer adverse consequences from their dedication to the defence of human rights.

53. The media should contribute to promoting the just cause of peoples struggling for freedom and independence and their right to live in peace and equality without foreign interference. This is especially important for all oppressed peoples who, while struggling against colonialism, religious and racial discrimination, are deprived of opportunity to make their voices heard within their own countries.

54. Communication needs in a democratic society should be met by the extension of specific rights such as the right to be informed, the right to inform, the right to privacy, the right to participate in public communication — all elements of a new concept, the right to communicate. In developing what might be called a new era of social rights, we suggest all the implications of the right to communicate be further explored.

REMOVAL OF OBSTACLES

Communication, with its immense possibilities for influencing the minds and behaviour of people, can be a powerful means of promoting democratization of society and of widening public

participation in the decision-making process. This depends on the structures and practices of the media and their management and to what extent they facilitate broader access and open the communication process to a free interchange of ideas, information and experience among equals, without dominance or discrimination.

**32.** In today's free world freedom of press is the heart of social and political intercourse. The press has now assumed the role of the public educator making formal and non-formal education possible in a large scale particularly in the developing world, where television and other kinds of modern communication are not still available for all sections of society. The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments. Newspapers being purveyors of news and views having a bearing on public administration very often carry material which would not be palatable to governments and other authorities. The authors of the articles which are published in newspapers have to be critical of the actions of Government in order to expose its weaknesses. Such articles tend to become an irritant or even a threat to power. Governments naturally take recourse to suppress newspapers publishing such articles in different ways. Over the years, Governments in different parts of the world have used diverse methods to keep press under control. They have followed carrot-and-stick methods. Secret payments of money, open monetary grants and subventions, grants of lands, postal concessions, Government advertisements, conferment of titles on editors and proprietors of newspapers, inclusion of press barons in cabinet and inner political councils etc. constitute one method of influencing the press. The other kind of pressure is one of using force against the press. Enactment of laws providing for pre-censorship, seizures, interference with the transit of newspapers and demanding security deposit, imposition of restriction on the price of newspapers, on the number of pages of newspapers and the area that can be devoted for advertisements, withholding of Government advertisements, increase of postal rates, imposition of taxes on newsprint, canalisation of import of newsprint with the object of making it unjustly costlier etc. are some of the ways in which Governments have tried to interfere with freedom of press. It is with a view to checking such malpractices which interfere with free flow of information, democratic constitutions all over the world have made provisions guaranteeing the freedom of speech and expression laying down the limits of interference with it. It is, therefore, the primary duty of all the national courts to uphold the said freedom and invalidate all laws or administrative actions which interfere with it, contrary to the constitutional mandate.

**33.** Thomas I. Emerson in his article entitled 'Toward a General Theory of the First Amendment' [(1963) 72 *Yale Law Journal* 877 at p. 906] while dealing with the role of the judicial institutions in a democratic society and in particular of the Apex Court of U.S.A. in upholding the freedom of speech and expression writes :

> The objection that our judicial institutions lack the political power and prestige to perform an active role in protecting freedom of expression against the will of the majority raises more difficult questions. Certainly judicial institutions must reflect the traditions, ideals and assumptions, and in the end must respond to the needs, claims and expectations, of the social order in which they operate. They must not, and ultimately cannot, move too far ahead or lag too far behind. The problem for the Supreme Court is one of finding the proper degree of responsiveness and leadership, or perhaps better, of short-term and long-term responsiveness. Yet in seeking out this position the Court should not underestimate the authority and prestige it has achieved over the years. Representing the "conscience of the community" it has come to possess a very real power to keep alive and vital the higher values and goals toward which our society imperfectly strives.... Given its prestige, it would appear that the power of the Court to protect freedom of expression is unlikely to be substantially curtailed unless the whole structure of our democratic institutions is threatened.

**34.** What is stated above applies to the Indian courts with equal force. In *Romesh Thappar case*[3], *Brij Bhushan case*[1], *Express Newspapers (Private) Ltd.* v. *Union of India*[4], *Sakal Papers (P) Ltd.* v. *Union of India*[5] and *Bennett Coleman case*[2] this Court has very strongly pronounced in favour of the freedom of press. Of these, we shall refer to some observations made by this Court in some of them.

**35.** In *Romesh Thappar case*[3] this Court said at page 602 :

> ...(The freedom) lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible. A freedom of such amplitude might involve risks of abuse.... (But) "it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits".

4. 1959 SCR 12 AIR 1958 SC 578 : 14 FJR 211 : (1961) 1 LLJ 339
5. (1962) 3 SCR 842 : AIR 1962 SC 305 : (1962) 2 SCJ 400

**36.** In *Bennett Coleman case*[2] A.N. Ray, C.J. on behalf of the majority said at page 796 (SCC p. 823, para 80) thus :

> The faith of a citizen is that political wisdom and virtue will sustain themselves in the free market of ideas so long as the channels of communication are left open. The faith in the popular Government rests on the old dictum "let the people have the truth and the freedom to discuss it and all will go well". The liberty of the press remains an "Ark of the Covenant" in every democracy.... The newspapers give ideas. The newspapers give the people the freedom to find out what ideas are correct.

**37.** In the very same case, Mathew, J. observed at page 818 : (SCC p. 846, paras 168, 169)

> The constitutional guarantee of freedom of speech is not so much for the benefit of the press as it is for the benefit of the public. The freedom of speech includes within its compass the right of all citizens to read and be informed. In *Time Inc.* v. *Hill*[6], the U.S. Supreme Court said :
>
> > The constitutional guarantee of freedom of speech and press are not for the benefit of the press so much as for the benefit of all the people.
>
> In *Griswold* v. *Connecticut*[7], the U.S. Supreme Court was of the opinion that the right of freedom of speech and press includes not only the right to utter or to print, but the right to read.

**38.** Justice Mathew proceeded to observe (at pp. 819-20) : (SCC pp. 847-48, paras 173, 174, 175)

> Under Article 41 of the Constitution the State has a duty to take effective steps to educate the people within limits of its available economic resources. That includes political education also.
>
> Public discussion of public issues together with the spreading of information and any opinion on these issues is supposed to be the main function of newspaper. The highest and lowest in the scale of intelligence resort to its columns for information. Newspaper is the most potent means for educating the people as it is read by those who read nothing else and, in politics, the common man gets his education mostly from newspaper.

6. 385 US 374 : 17 L Ed 2d 456 : 87 S Ct 534 (1967)
7. 381 US 479, 482 : 14 L Ed 2d 510 : 85 SCt 1678 (1965)

> The affirmative obligation of the Government to permit the import of newsprint by expending foreign exchange in that behalf is not only because press has a fundamental right to express itself, but also because the community has a right to be supplied with information and the Government a duty to educate the people within the limits of its resources. The Government may, under Clause 3 of the Imports (Control) Order, 1955, totally prohibit the import of newsprint and thus disable any person from carrying on a business in newsprint, if it is in the general interest of the public not to expend any foreign exchange on that score. If the affirmative obligation to expend foreign exchange and permit the import of newsprint stems from the need of the community for information and the fundamental duty of Government to educate the people as also to satisfy the individual need for self expression, it is not for the proprietor of a newspaper alone to say that he will reduce the circulation of the newspaper and increase its page level, as the community has an interest in maintaining or increasing circulation of the newspapers. It is said that a proprietor of a newspaper has the freedom to cater to the needs of intellectual highbrows who may choose to browse in rich pastures and for that he would require more pages for a newspaper and that it would be a denial of his fundamental right if he were told that he cannot curtail the circulation and increase the pages. A claim to enlarge the volume of speech by diminishing the circulation raises the problem of reconciling the citizens' right to unfettered exercise of speech in volume with the community's right to undiminished circulation. Both rights fall within the ambit of the concept of freedom of speech as explained above.

**39.** The Second Press Commission has explained the concept of freedom of press in its Report (Vol. I pp. 34-35) thus :

> The expression 'freedom of the press' carries different meanings to different people. Individuals, whether professional journalists or not, assert their right to address the public through the medium of the press. Some people stress the freedom of the editor to decide what shall be published in his paper. Some others emphasize the right of the owners to market their publication. To Justice Holmes, the main purpose of the freedom was to prevent all prior restraint on publication.
>
> 16. The theory is that in a democracy freedom of expression is indispensable as all men are entitled to participate in the process of formulation of common decisions. Indeed, freedom of expression is the first condition of liberty. It occupies a preferred position in the hierarchy of liberties giving succour and

protection to other liberties. It has been truly said that it is the mother of all other liberties. The Press as a medium of communication is a modern phenomenon. It has immense power to advance or thwart the progress of civilization. Its freedom can be used to create a brave new world or to bring about universal catastrophe.

17. Freedom of speech presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. It rests on the assumption that the widest possible dissemination of information from as many diverse and antagonistic sources as possible is essential to the welfare of the public. It is the function of the Press to disseminate news from as many different sources and with as many different facts and colours as possible. A citizen is entirely dependent on the Press for the quality, proportion and extent of his news supply. In such a situation, the exclusive and continuous advocacy of one point of view through the medium of a newspaper which holds a monopolistic position is not conducive to the formation of healthy public opinion. If the newspaper industry is concentrated in a few hands, the chance of an idea antagonistic to the idea of the owners getting access to the market becomes very remote. But our constitutional law has been indifferent to the reality and implication of non-governmental restraint on exercise of freedom of speech by citizens. The indifference becomes critical when comparatively a few persons are in a position to determine not only the content of information but also its very availability. The assumption in a democratic set-up is that the freedom of the press will produce a sufficiently diverse Press not only to satisfy the public interest by throwing up a broad spectrum of views but also to fulfil the individual interest by enabling virtually everyone with a distinctive opinion to find some place to express it.

**40.** The petitioners have heavily relied upon the decision of this Court in *Sakal case*[5] in which the constitutionality of the Newspaper (Price and Page) Act, 1956 and the Daily Newspaper (Price and Page) Order, 1960 arose for consideration. The petitioner in that petition was a private limited company engaged in the business inter alia of publishing daily and weekly newspapers in Marathi named 'Sakal' from Poona. The newspaper 'Sakal' had a net circulation of 52,000 copies on weekdays and 56,000 copies on Sundays. The daily edition contained six pages a day for five days in a week and four pages on one day. This edition was priced at 7 paise. The Sunday edition consisted of ten pages and was priced at 12 paise.

About 40% of the space in the newspaper was taken up by the advertisements and the rest by news, views and other usual features. The Newspaper (Price and Page) Act, 1956 regulated the number of pages according to the price charged, prescribed the number of supplements to be published and prohibited the publication and sale of newspapers in contravention of the Act. It also provided for the regulation of the size and area of advertising matter contained in a newspaper. Penalties were prescribed for contravention of that Act or the Order made thereunder. As a result of the enforcement of that Act, in order to publish 34 pages on six days in a week as it was doing then, the petitioner had to raise the price from 7 paise to 8 paise per day and if it did not wish to increase the price, it had to reduce the total number of pages to 24. The petitioner which could publish any number of supplements as and when it desired to do so before the Order impugned in that case was passed could do so thereafter only with permission of the Government. The contention of the petitioner in that case was that the impugned Act and the impugned Order were pieces of legislation designed to curtail the circulation of the newspaper as the increase in the price of the paper would adversely affect its circulation and they directly interfered with the freedom of the press. The validity of these pieces of legislation was challenged on the ground that they violated Article 19(1)(*a*) of the Constitution. The Union Government contested the petition. It pleaded that the impugned Act and the Order had been passed with a view to preventing unfair competition among newspapers and also with a view to preventing the rise of monopolistic combines so that newspapers might have fair opportunities of free discussion. It was also contended that the impugned Act and the impugned Order had been passed in the public interest and the petitioner's business being a trading activity falling under Article 19(1)(*g*) of the Constitution any restriction imposed by the said Act and the Order was protected by Article 19(6) of the Constitution. This Court negativing the contention of the Union Government observed at page 866 thus :

> Its object thus is to regulate something which, as already stated, is directly related to the circulation of a newspaper. Since circulation of a newspaper is a part of the right of freedom of speech the Act must be regarded as one directed against the freedom of speech. It has selected the fact or thing which is an essential and basic attribute of the conception of the freedom of speech viz., the right to circulate one's views to all whom one can reach or care to reach for the imposition of a restriction. It seeks to achieve its object of enabling what are termed the smaller newspapers to secure larger circulation by provisions which without disguise are aimed at restricting the circulation of what

are termed the larger papers with better financial strength. The impugned law far from being one, which merely interferes with the right of freedom of speech incidentally. does so directly though it seeks to achieve the end by purporting to regulate the business aspect of a newspaper. Such a course is not permissible and the courts must be ever vigilant in guarding perhaps the most precious of all the freedoms guaranteed by our Constitution. The reason for this is obvious. The freedom of speech and expression of opinion is of paramount importance under a democratic Constitution which envisages changes in the composition of legislatures and governments and must be preserved. No doubt, the law in question was made upon the recommendation of the Press Commission but since its object is to affect directly the right of circulation of newspapers which would necessarily undermine their power to influence public opinion it cannot but be regarded as a dangerous weapon which is capable of being used against democracy itself.

**41.** Continuing further the Court observed at pages 867 and 868 thus :

It was argued that the object of the Act was to prevent monopolies and that monopolies are obnoxious. We will assume that monopolies are always against public interest and deserve to be suppressed. Even so, upon the view we have taken that the intendment of the Act and the direct and immediate effect of the Act taken along with the impugned order was to interfere with the freedom of circulation of newspapers the circumstance that its object was to suppress monopolies and prevent unfair practices is of no assistance.

The legitimacy of the result intended to be achieved does not necessarily imply that every means to achieve it is permissible ; for even if the end is desirable and permissible, the means employed must not transgress the limits laid down by the Constitution, if they directly impinge on any of the fundamental rights guaranteed by the Constitution it is no answer when the constitutionality of the measure is challenged that apart from the fundamental right infringed the provision is otherwise legal.

**42.** We have so far seen the importance of the freedom of speech and expression which includes the freedom of press. We shall now proceed to consider whether it is open to the Government to levy any tax on any of the aspects of the press industry.

*IV. Do newspapers have immunity from taxation ?*

**43.** Leaving aside small newspaper establishments whose circula-

tion may be less than about 10,000 copies a day, all other bigger newspaper establishments have the characteristics of a large industry. Such bigger newspaper concerns are mostly situated in urban areas occupying large buildings which have to be provided with all the services rendered by municipal authorities. They employ hundreds of employees. Capital investment in many of them is in the order of millions of rupees. Large quantities of printing machinery are utilised by them, a large part of which is imported from abroad. They have to be provided with telephones, teleprinters, postal and telegraphic services, wireless communication system etc. Their newspapers have to be transported by roads, railways and air services. Arrangements for security of their property have to be made. The Government has to provide many other services to them. All these result in a big drain on the financial resources of the State as many of these services are heavily subsidized. Naturally such big newspaper organisations have to contribute their due share to the public exchequer. They have to bear the common fiscal burden like all others.

**44.** While examining the constitutionality of a law which is alleged to contravene Article 19(1)(*a*) of the Constitution, we cannot, no doubt, be solely guided by the decisions of the Supreme Court of the United States of America. But in order to understand the basic principles of freedom of speech and expression and the need for that freedom in a democratic country, we may take them into consideration. The pattern of Article 19(1)(*a*) and of Article 19(1)(*g*) of our Constitution is different from the pattern of the First Amendment to the American Constitution which is almost absolute in its terms. The rights guaranteed under Article 19(1)(*a*) and Article 19(1)(*g*) of the Constitution are to be read along with clauses (2) and (6) of Article 19 which carve out areas in respect of which valid legislation can be made. It may be noticed that the newspaper industry has not been granted exemption from taxation in express terms. On the other hand Entry 92 of List I of the Seventh Schedule to the Constitution empowers Parliament to make laws levying taxes on sale or purchase of newspapers and on advertisements published therein.

**45.** It is relevant to refer here to a few extracts from the speech of Shri Deshbandhu Gupta on the floor of the Constituent Assembly opposing the provisions in the Draft Constitution which authorised the State Legislatures to levy sales tax on sale of newspapers and tax on advertisements in newspapers. He said :

> . . No one would be happier than myself and my friends belonging to the press, if the House were to decide today that newspapers will be free from all such taxes. Of course that is what it should be because in no free country with a democratic

Government we have any such taxes as the sales tax or the advertisement tax.... I claim that newspapers do deserve a distinctive treatment. They are not an industry in the sense that other industries are. This has been recognised all over the world. They have a mission to perform. And I am glad to say that the newspapers in India have performed that mission of public service very creditably and we have reason to feel proud of it. I would, therefore, expect this House and my friend Mr Sidhva to bear it in mind at the time when God forbid any proposal comes before the Parliament for taxation. That would be the time for them to oppose it.

Sir, after all, this is an enabling clause. It does not say that there shall be sales and advertisement tax imposed on newspapers. It does not commit the House today to the imposition of a tax on the sales of or a tax on advertisements published in newspapers. All that we have emphasised is that newspapers as such should be taken away from the purview of the provincial Governments and brought to the Central List so that if at all at any time a tax is to be imposed on newspapers it should be done by the representatives of the whole country realising the full implications of their action. It should not be an isolated act on the part of some Ministry of some Province. That was the fundamental basis of our amendment.... If today all newspapers including those published from Delhi are opposing the imposition of these taxes with one voice and demanding their inclusion in the Central List, they do so, not because it is a question of saving some money, but because the fundamental question of the liberty of the press is involved. By advocating their transfer to the Central List we are prepared to run the risk of having these taxes imposed in Delhi, and in other provinces which have not sought to impose such taxes so far. But we do not want to leave it to the Provinces so that the liberty of the press remains unimpaired. We have faith in the Parliament ; we have faith in the collective wisdom of the country and we have no doubt that when this matter is viewed in the correct perspective, there will be no such taxes imposed on the newspapers, but we have not got that much faith in the Provincial Ministries. It is in that hope and having a full realisation of the situation that we have agreed, as a matter of compromise, or should I say as a lesser evil, to have these two taxes transferred from the Provincial to the Central List. (Vide *Constituent Assembly Debates*, Vol. IX, pp. 1175-1180 dated September 9, 1949.)

**46.** Ultimately the power to levy taxes on the sale or purchase of newspapers and on advertisement published therein was conferred on Parliament by Entry 92 of List I of the Seventh Schedule to the Constitution. This shows the anxiety on the part of the framers of our Constitution to protect the newspapers against local pressures. But they, however, did not agree to provide any constitutional immunity against such taxation. The power to levy customs duties on goods imported into the country is also entrusted to Parliament by Entry 83 in List I of the Seventh Schedule to the Constitution.

**47.** On the power of the Government in the United States of America to levy taxes on and to provide for the licensing of newspapers, *Corpus Juris Secundum* (Vol. 16) says at page 1132 as follows :

> 213(13) *Taxing and Licensing.—The constitutional guaranties of freedom of speech and of the press are subject to the proper exercise of the government's power of taxation, and reasonable license fees may be imposed on trades or occupations concerned with the dissemination of literature or ideas.*
>
> As a general rule, the constitutional guaranties of freedom of speech and of the press are subject to the proper exercise of the government's power of taxation, so that the imposition of uniform and non-discriminatory taxes is not invalid as applied to persons or organisations engaged in the dissemination of ideas through the publication or distribution of writing. The guarantee of freedom of the press does not forbid the taxation of money or property employed in the publishing business, or the imposition of reasonable licenses and license fees on trades or occupations concerned with the dissemination of literature or ideas.
>
> A license or license tax to permit the enjoyment of freedom of speech and freedom of press may not, however, be required as a form of censorship, and where the purpose of the tax or license is not for revenue, or for reasonable regulation, but is a deliberate and calculated device to prevent, or to curtail the opportunity for the acquisition of knowledge by the people in respect of their governmental affairs, the statute or ordinance violates the constitutional guaranties, and particularly the Fourteenth Amendment to the federal Constitution. While an ordinance imposing a tax on, and requiring a license for, the privilege of advertising by distributing books, circulars, or pamphlets has been held valid, an ordinance requiring the payment of a license tax by street vendors or peddlers is invalid as applied to members of a religious group distributing religious literature as part of their activities, at least where the fee is not merely a nominal one imposed to defray the cost of regulation, notwithstanding the ordinance is

non-discriminatory. A governmental regulation requiring a license to solicit, for compensation, memberships in organizations requiring the payment of dues is invalid, where it fixes indefinite standards for the granting of a license to an applicant. A provision of a retail sales tax act providing that a retailer shall not advertise as to the non-collection of sales tax from purchasers does not deprive retailers of the constitutional right of free speech.

**48.** The above subject is summarised in American Jurisprudence 2d (Vol. 16) at page 662 thus :

> Speech can be effectively limited by the exercise of the taxing power. Where the constitutional right to speak is sought to be deterred by a state's general taxing program, due process demands that the speech be unencumbered until the state comes forward with sufficient proof to justify its inhibition. But constitutional guaranties are not violated by a statute the controlling purpose of which is to raise revenue to help defray the current expenses of state government and state obligations, and which shows no hostility to the press nor exhibits any purpose or design to restrain the press.

**49.** It may be mentioned here that the First Amendment to the Constitution of the United States of America is almost in absolute terms. It says that the Congress shall make no law abridging the freedom of the press. Yet the American courts have recognised the power of the State to levy taxes on newspaper establishments, of course, subject to judicial review by courts by the application of the due process of law principle. "Due process of law does not forbid all social control ; but it protects personal liberty against social control, unless such social control is reasonable either because of a constitutional exercise of the police power, or of the power of taxation or of the power of eminent domain". If any legislation delimiting personal liberty is held to be outside of all three of these categories, it is taking away of personal liberty without due process of law and is unconstitutional. The police power, taxation and eminent domain are all forms of social control which are essential for peace and good government. "The police power is the legal capacity of the sovereignty or one of its governmental agents, to delimit the personal liberty of persons by means which bear a substantial relation to the end to be accomplished for the protection of social interes's which reasonably need protection. Taxation is the legal capacity of sovereignty or one of its governmental agents to exact or impose a charge upon persons or their property for the support of the government and for the payment for any other public purposes which it may constitutionally carry out.

Eminent domain is the legal capacity of sovereignty or one of its governmental agents, to take private property for public use upon the payment of just compensation." It is under the above said sovereign power of taxation the government is able to levy taxes on the publishers of newspapers too, subject to judicial review by courts notwithstanding the language of the First Amendment which is absolute in terms. In India too the power to levy tax even on persons carrying on the business of publishing newspapers has got to be recognised as it is inherent in the very concept of government. But the exercise of such power should, however, be subject to scrutiny by courts. Entry 92 of List I of the Seventh Schedule to the Constitution expressly suggests the existence of such power.

**50.** Thomas I. Emerson in his article on the First Amendment [(1963) 72 *Yale Law Journal*, 941] has made certain relevant observations on the power of the State to impose taxes and economic regulations on newspaper industry. He says :

> (*a*) *Taxation and Economic Regulation.*—Regular tax measures, economic regulations, social welfare legislation and similar provisions may, of course, have some effect upon freedom of expression when applied to persons or organizations engaged in various forms of communication. But where the burden is the same as that borne by others engaged in different forms of activitiy, the similar impact on expression seems clearly insufficient to constitute an "abridging" of freedom of expression. Hence a general corporate tax, wage and hour or collective bargaining legislation, factory laws and the like are as applicable to a corporation engaged in newspaper publishing as to other business organisations. *On the other hand, the use of such measures as a sanction to diminish the volume of expression or control its content would clearly be as impermissible an "abridgment" as direct criminal prohibitions.* The line may sometimes be difficult to draw, the more so as the scope of the regulation is narrowed.
>
> Two principles for delineating the bounds of "abridging" may be stated. First, as a general proposition the validity of the measure may be tested by the rule that it must be equally applicable to a substantially larger group than that engaged in expression. *Thus a special tax on the press alone*, or a tax exemption available only to those with particular political views or associations, *would not be permitted. Second, neither the substantive nor procedural provisions of the measure, even though framed in general terms, may place any substantial burden on expression because of their peculiar impact in that area.* Thus the enforcement of a tax or corporate registration statute by

requiring disclosure of membership in an association, where such disclosure would substantially impair freedom of expression, should be found to violate first amendment protection.

(emphasis supplied)

**51.** This view appears to have been accepted by our Second Press Commission in its Report (Vol. I) at page 35. The Commission observes :

> 21. Economic and tax measures, legislation relating to social welfare and wages, factory laws, etc., may have some effect upon freedom of the Press when applied to persons or institutions engaged in various forms of communication. But where the burden placed on them is the same as that borne by others engaged in different forms of activity, it does not constitute abridgment of freedom of the Press. The use of such measures, however, to control the 'content' of expression would be clearly impermissible.

**52.** In *Alice Lee Grosjean, Supervisor of Public Accounts for the State of Louisiana* v. *American Press Co.*[8] in which the appellants had questioned the constitutional validity of an Act of Louisiana which required every person engaged in the business of selling, or making any charge for, advertising or for advertisements, printed or published in any newspaper, periodical etc. having a circulation of more than 20,000 copies per week to pay, in addition to all other taxes, a license tax for the privilege of engaging in such business in the State of Louisiana of two per cent (2%) of the gross receipts of such business, the Supreme Court of the United States observed at pages 668-669:

> In the light of all that has now been said, it is evident that the restricted rules of the English law in respect of the freedom of the press in force when the Constitution was adopted were never accepted by the American colonists, and that by the First Amendment it was meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting any form of previous restraint upon printed publications, or their circulation, including that which had theretofore been effected by these two well known and odious methods. . . .
>
> *It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government.* But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.

8. 297 US 233 : 80 L Ed 660 : 56 S Ct 444 (1936)

> The predominant purpose of the grant of immunity here invoked was to preserve an untramelled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity ; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. *The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties.* A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves. (emphasis supplied)

**53.** The levy imposed by Louisiana was quashed by the Supreme Court of the United States of America in the above case on the ground that it violated the First Amendment to the Constitution of the United States of America since it was of the view that the tax levied in this case was a device to limit the circulation of information. The Court, however, did not say that no tax could be levied on the press in any event.

**54.** In *Robert Murdock, Jr.* v. *Commonwealth of Pennsylvania (City of Jeannette)*[9] the Supreme Court of the United States of America declared as unconstitutional and violative of the First Amendment to the Constitution of the United States of America which guaranteed freedom of speech and expression, an ordinance which imposed a licence tax on persons canvassing for and soliciting within the ctiy of Jeannette orders for goods, paintings, pictures, wares or merchandise of any kind or persons delivering such articles under orders so obtained or solicited. The petitioners in that case were 'Jehovah's Witnesses' who went about from door to door in the city of Jeannette distributing literature and soliciting people to purchase certain religious books and pamphlets. None of them obtained a licence by paying the prescribed fee and they were convicted for violating the Ordinance by the Superior Court of Pennsylvania. The Supreme Court of the United States of America quashed the conviction holding that the Ordinance violated the First Amendment. Douglas, J. who wrote the majority opinion

9 319 US 105 87 L Ed 1292 : 63 SCt 870 (1943)

observed at pages 1299 and 1300 thus :

> In all of these cases the issuance of the permit or license is dependent on the payment of a license tax. *And the license tax is fixed in amount and unrelated to the scope of the activities of petitioners or to their realized revenues.* It is not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question. It is in no way apportioned. It is a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment. Accordingly, it restrains in advance those constitutional liberties of press and religion and inevitably tends to suppress their exercise. That is almost uniformly recognised as the inherent vice and evil of this flat license tax....
>
> The fact that the ordinance is "non-discriminatory" is immaterial. The protection afforded by the First Amendment is not so restricted. A licence tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a *preferred position.* (emphasis supplied)

**55.** Justice Reed who dissented from the majority observed at page 1306 thus :

> *It will be observed that there is no suggestion of freedom from taxation, and this statement is equally true of the other State constitutional provisions. It may be concluded that neither in the state or the federal constitutions was general taxation of church or press interdicted.*
>
> Is there anything in the decisions of this Court which indicates that church or press is free from the financial burdens of government ? We find nothing. Religious societies depend for their exemptions from taxation upon state constitutions or general statutes, not upon the Federal Constitution. *Gibbons* v. *District of Columbia*[10]. This Court has held that the chief purpose of the free press guarantee was to prevent previous restraints upon publication. *Near* v. *Minnesota*[11]. In *Grosjean* v. *American Press Co.*[12] it was said that the predominant purpose was to preserve "an untramelled press as a vital source of public

10. 116 US 404 : 29 L Ed 680 : 6 S Ct 427 (1885)
11. 283 US 697, 713 : 75 L Ed 1357, 1366, 51 S Ct 625 (1931)
12. 297 US 233, 250 : 80 L Ed 660, 668 : 56 S Ct 444 (1936)

information". In that case, a gross receipts tax on advertisements in papers with a circulation of more than twenty thousand copies per week was held invalid because "a deliberate and calculated device in the guise of a tax to limit the circulation...".

**56.** There was this further comment :

It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.[12]

It may be said, however, that ours is a too narrow, technical and legalistic approach to the problem of state taxation of the activities of church and press ; that we should look not to the expressed or historical meaning of the First Amendment but to the broad principles of free speech and free exercise of religion which pervade our national way of life. It may be that the Fourteenth Amendment guarantees these principles rather than the more definite concept expressed in the First Amendment. This would mean that as a Court, we should determine what sort of liberty it is that the due process clause of the Fourteenth Amendment guarantees against state restrictions on speech and church....

Nor do we understand that the Court now maintains that the Federal Constitution frees press or religion of any tax except such occupational taxes as those here levied. Income taxes, ad valorem taxes, even occupational taxes are presumably valid, save only a license tax on sales of religious books. Can it be that the Constitution permits a tax on the printing presses and the gross income of a metropolitan newspaper but denies the right to lay an occupational tax on the distributors of the same papers ? Does the exemption apply to booksellers or distributors of magazines or only to religious publications ? And, if the latter, to what distributors ? Or to what books ? Or is this Court saying that a religious practice of book distribution is free from taxation because a state cannot prohibit the "free exercise thereof" and a newspaper is subject to the same tax even though the same Constitutional Amendment says the state cannot abridge the freedom of the press ? It has never been thought before that freedom from taxation was a perquisite attaching to the privileges of the First Amendment.

**57.** Justice Reed added at pages 1307 and 1308 thus :

It is urged that such a tax as this may be used readily to

restrict the dissemination of ideas. This must be conceded but the possibility of misuse does not make a tax unconstitutional. No abuse is claimed here. The ordinances in some of these cases are the general occupation license type covering many businesses. In the Jeannette prosecutions, the ordinance involved lays the usual tax on canvassing or soliciting sales of goods, wares and merchandise. It was passed in 1898. Every power of taxation or regulation is capable of abuse. Each one, to some extent, prohibits the free exercise of religion and abridges the freedom of the press, but that is hardly a reason for denying the power. *If the tax is used oppressively the law will protect the victims of such action.* (emphasis supplied)

**58.** Justice Frankfurter who also dissented from the majority observed at pages 1310 and 1311 thus :

> It cannot be said that the petitioners are constitutionally exempt from taxation merely because they may be engaged in religious activities or because such activities may constitute an exercise of a constitutional right. . . .
>
> Nor can a tax be invalidated merely because it falls upon activities which constitute an exercise of a constitutional right. The First Amendment of course protects the right to publish a newspaper or a magazine or a book. But the crucial question is — how much protection does the Amendment give, and against what is the right protected ? It is certainly true that the protection afforded the freedom of the press by the First Amendment does not include exemption from all taxation. A tax upon newspaper publishing is not invalid simply because it falls upon the exercise of a constitutional right. *Such a tax might be invalid if it invidiously singled out newspapers publishing for bearing the burdens of taxation or imposed upon them in such ways as to encroach on the essential scope of a free press. If the Court could justifiably hold that the tax measures in these cases were vulnerable on that ground, I would unreservedly agree.* But the Court has not done so, and indeed could not. (emphasis supplied)

**59.** In the above case it may be noticed that Douglas, J. who gave the majority opinion did not say that no tax could be levied at all on a press, but he did not approve of a uniform license tax unrelated to the scope of the activities of the persons who had to bear it. The dissenting opinions have clearly stated that the press does not enjoy any immunity from taxation. They, however, say that the taxation should not encroach upon the essential scope of a free press.

**60.** We may usefully refer here to a passage in the footnote given below the Essay No. 84 by Alexander Hamilton in 'The Federalist'. It reads :

> It cannot certainly be pretended that any degree of duties, however low, would be an abridgment of the liberty of the press. We know that newspapers are taxed in Great Britain, and yet it is notorious that the press nowhere enjoys greater liberty than in that country. And if duties of any kind may be laid without a violation of that liberty, it is evident that the extent must depend on legislative discretion, regulated by public opinion ;. . .

**61.** At this stage we find it useful to refer to a decision of the Privy Council in *Attorney-General* v. *Antigua Times Ltd.*[13] where the Judicial Committee of the Privy Council was called upon to decide about the validity of the imposition of a licence fee of $ 600 annually on the publisher of a newspaper under the Newspapers Registration (Amendment) Act, 1971. Section 10 of the Constitution of Antigua read as follows :

> 10. (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes the freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence and other means of communication.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision — (*a*) that is reasonably required — (*i*) in the interests of defence, public safety, public order, public morality or public health ; or (*ii*) for the purpose of protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating telephony, telegraphy, posts, wireless, broadcasting, television or other means of communication, public exhibitions or public entertainments ; or (*b*) that imposes restrictions upon public officers.

**62.** Lord Fraser who delivered the judgment of the Privy Council upheld the levy of the licence fee as being reasonably required in the interests of defence and for securing public safety etc. referred to in Section 10(2)(*a*)(i) of the Constitution of Antigua. The learned

13. (1975) 3 All ER 81 (PC) : 1976 AC 16 (1975) 3 WLR 232

Lord observed in that connection thus :

> Revenue requires to be raised in the interests of defence and for securing public safety, public order, public morality and public health and if this tax was reasonably required to raise revenue for these purposes or for any of them, then S IB is not to be treated as contravening the Constitution.
>
> In some cases it may be possible for a court to decide from a mere perusal of an Act whether it was or was not reasonably required. In other cases the Act will not provide the answer to that question. In such cases has evidence to be brought before the court of the reasons for the Act and to show that it was reasonably required ? Their Lordships think that the proper approach to the question is to presume, until the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required. This presumption will be rebutted if the statutory provisions in question are, to use the words of Louisy, J., 'so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power but constitutes in substance and effect, the direct execution of a different and forbidden power'. *If the amount of the licence fee was so manifestly excessive as to lead to the conclusion that the real reason for its imposition was not the raising of revenue but the preventing of the publication of newspapers, then that would justify the conclusion that the law was not reasonably required for the raising of revenue.*
>
> In their Lordships' opinion the presumption that the Newspapers Registration (Amendment) Act, 1971 was reasonably required has not been rebutted and they do not regard the amount of the licence fee as manifestly excessive and of such a character as to lead to the conclusion that S IB was not enacted to raise revenue but for some other purpose. (emphasis supplied)

**63.** Here again it is seen that the Privy Council was of the view that the law did not forbid the levy of fee on the publisher of a newspaper but it would be open to challenge if the real reason for its imposition was not the raising of revenue but the preventing of the publication of newspaper.

**64.** At this stage it is necessary to refer to a forceful argument addressed before us. It was urged on behalf of the petitioners that the recognition of the power of the Government to levy taxes of any kind on the newspaper establishments would ring in the death-knell of the freedom of press and would be totally against the spirit of the Constitution. It is contended that the Government is likely to use

it to make the press subservient to the Government. It is argued that when once this power is conceded, newspapermen will have to run after the Government and hence it ought not to be done. This raises a philosophical question — Press versus Government. We do not think it is necessary for the press to be subservient to the Government. As long as 'this Court sits' newspapermen need not have the fear of their freedom being curtailed by unconstitutional means. It is, however, good to remember some statements made in the past by some wise men connected with newspapers in order to develop the culture of an independent press. Hazlitt advised editors to stay in their garrets and avoid exposing themselves to the subtleties of power. Walter Lippman in his address to the International Press Institute some years ago said that the danger to the independence and integrity of journalists did not come from the pressures that might be put on them ; it was that they might be captured and captivated by the company they keep. Arthus Krock after 60 years of experience said that it "is true that in most cases, the price of friendship with a politician is so great for any newspaperman to pay". A.P. Wadsworth of the Manchester Guardian said "that no editor should ever be on personal terms with our leaders for fear of creating a false sense of relation of confidence". James Margach says that "when leading media figures see too much rather than too little of Prime Ministers that the freedom of press is endangered". Lord Salisbury told Buckle a famous editor in England "You are the first person who has not come to see me in the last few days who is not wanting something at my hands — place or decoration or peerage. *You* only want information". Charles Mitchell wrote in 'Newspaper Directory' : "The Press has now so great and so extensive an influence on public opinion. . . that. . . its conductors should be *gentlemen* in the true sense of the word. They should be equally above corruption and intimidation incapable of being warped by personal considerations from the broad path of truth and honour ; superior to all attempts at misrepresenting or mystifying public events". If the press ceases to be independent the healthy influence of the press and public opinion will soon be substituted by the traditional influences of landlordism and feudalism. The press lords should endeavour to see that their interests do not come into conflict with their duties. All this is said only to show that Government alone may not always be the culprit in destroying the independence of the press. Be that as it may, it is difficult to grant that merely because the Government has the power to levy taxes, the freedom of press would be totally lost. As stated earlier, the court is always there to hold the balance even and to strike down any unconstitutional invasion of that freedom.

**65.** Newspaper industry enjoys two of the fundamental rights,

namely the freedom of speech and expression guaranteed under Article 19(1)(*a*) and the freedom to engage in any profession, occupation, trade, industry or business guaranteed under Article 19(1)(*g*) of the Constitution, the first because it is concerned with the field of expression and communication and the second because communication has become an occupation or profession and because there is an invasion of trade, business and industry into that field where freedom of expression is being exercised. While there can be no tax on the right to exercise freedom of expression, tax is leviable on profession, occupation, trade, business and industry. Hence tax is leviable on newspaper industry. But when such tax transgresses into the field of freedom of expression and stifles that freedom, it becomes unconstitutional. As long as it is within reasonable limits and does not impede freedom of expression it will not be contravening the limitation of Article 19(2). The delicate task of determining when it crosses from the area of profession, occupation, trade, business or industry into the area of freedom of expression and interferes with that freedom is entrusted to the courts.

**66.** The petitioners, however, have placed strong reliance on the *Sakal case*[5] and the *Bennett Coleman case*[2] in support of their case that any tax on newsprint which is the most important component of a newspaper is unconstitutional. They have drawn our attention to the following passage in the decision in *Sakal case*[5] which is at page 863 :

> It may well be within the power of the State to place, in the interest of the general public, restrictions upon the right of a citizen to carry on business but it is not open to the State to achieve this object by directly and immediately curtailing any other freedom of that citizen guaranteed by the Constitution and which is not susceptible of abridgment on the same grounds as are set out in clause (6) of Article 19. Therefore, the right of freedom of speech cannot be taken away with the object of placing restrictions on the business activities of a citizen. Freedom of speech can be restricted only in the interests of the security of the State, friendly relations with foreign State, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. It cannot, like the freedom to carry on business, be curtailed in the interest of the general public. If a law directly affecting it is challenged it is no answer that the restrictions enacted by it are justifiable under clauses (3) to (6). For, the scheme of Article 19 is to enumerate different freedoms separately and then to specify the extent of restrictions to which they may be subjected and the objects for securing which this could be done. A citizen is entitled to

enjoy each and every one of the freedoms together and clause (1) does not prefer one freedom to another. That is the plain meaning of this clause. It follows from this that the State cannot make a law which directly restricts one freedom even for securing the better enjoyment of another freedom. All the greater reason, therefore for holding that the State cannot directly restrict one freedom by placing an otherwise permissible restriction on another freedom.

**67.** In *Bennett Coleman case*[2] the question which arise for consideration related to the validity of a restriction imposed under the newsprint policy which had certain objectionable features such as (*i*) that no newspaper or new edition could be started by a common ownership unit even within the authorised quota of newsprint, (*ii*) that there was a limitation on the maximum number of pages, no adjustment being permitted between circulation and pages so as to increase pages, (*iii*) that a big newspaper was prohibited and prevented from increasing the number of pages, page area, and periodicity by reducing circulation to meet the requirement even within its admissible quota etc. The majority held that the fixation of page limit had not only deprived the petitioners of their economic vitality but also restricted their freedom of expression. It also held that such restriction of pages resulted in reduction of advertisement revenue and thus adversely affected the capacity of a newspaper to carry on its activity which is protected by Article 19(1)(*a*) of the Constitution.

**68.** We have carefully considered the above two decisions. In the first case the Court was concerned with the newspaper price-page policy and in the second the newsprint policy imposed by the Government had been challenged. Neither of them was concerned with the power of Parliament to levy tax on any goods used by the newspaper industry. As we have observed earlier taxes have to be levied for the support of the Government and newspapers which derive benefit from the public expenditure cannot disclaim their liability to contribute a fair and reasonable amount to the public exchequer. What may, however, have to be observed in levying a tax on newspaper industry is that it should not be an over-burden on newspapers which constitute the Fourth Estate of the country. Nor should it single out newspaper industry for harsh treatment. A wise administrator should realise that the imposition of a tax like the customs duty on newsprint is an imposition of knowledge and would virtually amount to a burden imposed on a man for being literate and for being conscious of his duty as a citizen to inform himself about the world around him. "The public interest in freedom of discussion (of which the freedom of the press is one aspect) stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelli-

gently the decisions which may affect themselves." (Per Lord Simon of Glaisdale in *Attorney-General* v. *Times Newspapers Ltd.*[14]). Freedom of expression, as learned writers have observed, has four broad social purposes to serve : (*i*) it helps an individual to attain self fulfilment, (*ii*) it assists in the discovery of truth, (*iii*) it strengthens the capacity of an individual in participating in decision-making and (*iv*) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. All members of society should be able to form their own beliefs and communicate them freely to others. In sum, the fundamental principle involved here is the people's right to know. Freedom of speech and expression should, therefore, receive a generous support from all those who believe in the participation of people in the administration. It is on account of this special interest which society has in the freedom of speech and expression that the approach of the Government should be more cautious while levying taxes on matters concerning newspaper industry than while levying taxes on other matters. It is true that this Court has adopted a liberal approach while dealing with fiscal measures and has upheld different kinds of taxes levied on property, business, trade and industry as they were found to be in the public interest. But in the cases before us the Court is called upon to reconcile the social interest involved in the freedom of speech and expression with the public interest involved in the fiscal levies imposed by the Government specially because newsprint constitutes the body, if expression happens to be the soul.

**69.** In view of the intimate connection of newsprint with the freedom of the press, the tests for determining the vires of a statute taxing newsprint have, therefore, to be different from the tests usually adopted for testing the vires of other taxing statutes. In the case of ordinary taxing statutes, the laws may be questioned only if they are either openly confiscatory or a colourable device to confiscate. On the other hand, in the case of a tax on newsprint, it may be sufficient to show a distinct and noticeable burdensomeness, clearly and directly attributable to the tax.

**70.** While we, therefore, cannot agree with the contention that no tax can be levied on newspaper industry, we hold that any such levy is subject to review by courts in the light of the provisions of the Constitution.

*V. Are the impugned notifications issued under Section 25 of the Customs Act, 1962 beyond the reach of the Administrative Law ?*

**71.** It is argued on behalf of the Government that a notification

14. (1973) 3 All ER 54 : 1974 AC 273 : (1973) 3 WLR 298 (HL)

issued under Section 25(1) of the Customs Act granting, modifying or withdrawing an exemption from duty being in the nature of a piece of subordinate legislation, its validity cannot be tested by the Court by applying the standards applicable to an administrative action. Reliance is placed on the decision of this Court in *Narinder Chand Hem Raj* v. *Lt. Governor, Administrator, Union Territory, Himachal Pradesh*[15] in support of the above contention. In that case the appellants were wine merchants carrying on business in Simla. At the auction held for the purpose of granting the privilege to sell the Indian-made foreign liquor the appellants were the highest bidders. It appears that before the auction was held the Collector of Excise and Taxation had announced that no sales tax would be liable to be paid on the sale of liquor and despite this assurance the Government had levied and collected from the appellants a certain amount by way of sales tax. The appellants prayed for the issue of a writ to the Government restraining them from levying any sales tax and to refund what had been recovered from them by way of sales tax already. It was contended on behalf of the Government of Himachal Pradesh that non-collection of sales tax was possible only on the issue of a notification by the Government pursuant to its statutory power under the Punjab General Sales Tax Act which was in force in the area in question shifting 'liquor' which was in Schedule 'A' to Schedule 'B' to the Punjab General Sales Tax Act and that such a notification could not be issued because the Central Government had not given its requisite approval. Hence it was urged by the Government that since sales tax had been imposed by law on all items in Schedule 'A' it could not disobey the mandate of law. It further contended that the Court could not issue a mandamus to the Government to issue a notification to amend the Schedules to the statute as the act of issuing such a notification was a legislative act and no writ could be issued to a legislative body or a subordinate legislative body to make a law or to issue a notification, as the case may be, which would have the effect of amending a law in force. This Court upheld the contention of the Government. The Court said : (SCC p. 751, para 7)

> *Our attention has not been drawn to any provision in that Act empowering the Government to exempt any assessee from payment of tax.* Therefore it is clear that the appellant was liable to pay the tax imposed under the law. What the appellant really wants is a mandate from the Court to the competent authority to delete the concerned entry from Schedule A and include the same in Schedule B. We shall not go into the question whether the Government of Himachal Pradesh on its

15. (1972) 1 SCR 940 : (1971) 2 SCC 747 : AIR 1971 SC 2399

own authority was competent to make the alteration in question or not. We shall assume for our present purpose that it had such a power. The power to impose a tax is undoubtedly a legislative power. That power can be exercised by the Legislature directly or subject to certain conditions the Legislature may delegate that power to some other authority. But the exercise of that power, whether by the Legislature or by its delegate is an exercise of a legislative power. The fact that the power was delegated to the executive does not convert that power into an executive or administrative power. No Court can issue a mandate to a Legislature to enact a particular law. Similarly no Court can direct a subordinate legislative body to enact or not to enact a law which it may be competent to enact. The relief as framed by the appellant in his writ petition does not bring out the real issue calling for determination. In reality he wants this Court to direct the Government to delete the entry in question from Schedule A and include the same in Schedule B. Article 265 of the Constitution lays down that no tax can be levied and collected except by authority of law. Hence the levy of a tax can only be done by the authority of law and not by any executive order. *Unless the executive is specifically empowered by law to give any exemption, it cannot say that it will not enforce the law as against a particular person.* No Court can give a direction to a Government to refrain from enforcing a provision of law. Under these circumstances, we must hold that the relief asked for by the appellant cannot be granted. (emphasis supplied)

**72.** The above decision does not in fact support the contention of the Government in the cases before us. It is noteworthy that the Court in the passage extracted above has made a distinction between the amendment of the Schedule to the Punjab General Sales Tax Act by the issue of a notification by the Government of Himachal Pradesh in exercise of its power delegated by the Legislature and the power of that Government to grant exemption under a power to grant exemption. In the present cases we are concerned with a power to grant exemption conferred on Government by Section 25 of the Customs Act, 1962 and not with a power to amend the Act by means of a notification. Moreover this was just a case relating to business in liquor.

**73.** We shall assume for purposes of these cases that the power to grant exemption under Section 25 of the Customs Act, 1962 is a legislative power and a notification issued by the Government thereunder amounts to a piece of subordinate legislation. Even then the notification is liable to be questioned on the ground that it is an

unreasonable one. The decision of this Court in *Municipal Corporation of Delhi* v. *Birla Cotton, Spinning and Weaving Mills, Delhi*[16] has laid down the above principle. In that case Wanchoo, C.J. while upholding certain taxes levied by the Corporation of Delhi under Section 150 of the Delhi Municipal Corporation Act, 1957 observed thus :

> Finally there is another check on the power of the Corporation which is inherent in the matter of exercise of power by subordinate public representative bodies, such as municipal boards. In such cases if the act of such a body in the exercise of the power conferred on it by the law is unreasonable, the courts can hold that such exercise is void for unreasonableness. This principle was laid down as far back as 1898 in *Kruse* v. *Johnson*[17].

**74.** But it appears that the principle enunciated in *Kruse* v. *Johnson*[17] is not being applied so stringently in England now.

**75.** A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent Legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute. That is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary. In England, the Judges would say "Parliament never intended authority to make such rules. They are unreasonable and ultra vires". The present position of law bearing on the above point is stated by Diplock, L.J. in *Mixnam's Properties Ltd.* v. *Chertsey Urban District Council*[18] thus :

> The various special grounds on which subordinate legislation has sometimes been said to be void... can, I think, today be properly regarded as being particular applications of the general rule that subordinate legislation, to be valid, must be shown to be within the powers conferred by the statute. Thus, the kind of unreasonableness which invalidates a bye-law is not the antonym of "reasonableness" in the sense in which that expression is used in the common law, but such manifest arbitrariness, injustice or partiality that a court would say : "Parlia-

16. (1968) 3 SCR 251 · AIR 1968 SC 1232 · (1969) 1 SCJ 621
17. (1898) 2 QB 91 67 LJQB 782 : 78 LT 647 : 46 WR 630
18. (1964) 1 QB 214 (1963) 2 All ER 787 · (1963) 3 WLR 38 (CA)

ment never intended to give authority to make such rules ; they are unreasonable and ultra vires"...if the courts can declare subordinate legislation to be invalid for "uncertainty" as distinct from unenforceable...this must be because Parliament is to be presumed not to have intended to authorise the subordinate legislative authority to make changes in the existing law which are uncertain.

**76.** Prof. Alan Wharam in his article entitled "Judicial Control of Delegated Legislation : The Test of Reasonableness" in 36 Modern Law Review 611 at pages 622-23 has summarised the present position in England as follows :

(i) It is possible that the courts might invalidate a statutory instrument on the grounds of unreasonableness or uncertainty, vagueness or arbitrariness ; but the writer's view is that for all practical purposes such instruments must be read as forming part of the parent statute, subject only to the ultra vires test.

(ii) The courts are prepared to invalidate bye-laws, or any other form of legislation, emanating from an elected, representative authority, on the grounds of unreasonableness, uncertainty or repugnance to the ordinary law ; but they are reluctant to do so and will exercise their power only in clear cases.

(iii) The courts may be readier to invalidate bye-laws passed by commercial undertakings under statutory power, although cases reported during the present century suggest that the distinction between elected authorities and commercial undertakings, as explained in *Kruse* v. *Johnson*[17], might not now be applied so stringently.

(iv) As far as subordinate legislation of non-statutory origin is concerned, this is virtually obsolete, but it is clear from *In re French Protestant Hospital*[18] that it would be subject to strict control. [See also H.W.R Wade : *Administrative Law* (Fifth Edn.) pp. 747-748.]

**77.** In India arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. In India any enquiry into the vires of delegated legislation must be confined to the grounds on which plenary legislation may be questioned, to the ground that it is contrary to the statute under which it is made, to the ground that it is contrary to other statutory provisions or that it is so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution.

19 1951 Ch 567 : (1951) 1 All ER 938 (Ch D)

**78.** That subordinate legislation cannot be questioned on the ground of violation of principles of natural justice on which administrative action may be questioned has been held by this Court in *The Tulsipur Sugar Co. Ltd.* v. *Notified Area Committee, Tulsipur*[20], *Rameshchandra Kachardas Porwal* v. *State of Maharashtra*[21] and in *Bates* v. *Lord Hailsham of St. Marylebone*[22]. A distinction must be made between delegation of a legislative function in the case of which the question of reasonableness cannot be enquired into and the investment by statute to exercise particular discretionary powers. In the latter case the question may be considered on all grounds on which administrative action may be questioned, such as, non-application of mind, taking irrelevant matters into consideration, failure to take relevant matters into consideration, etc., etc. On the facts and circumstances of a case, a subordinate legislation may be struck down as arbitrary or contrary to statute if it fails to take into account very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute or, say, the Constitution. This can only be done on the ground that it does not conform to the statutory or constitutional requirements or that it offends Article 14 or Article 19(1)(*a*) of the Constitution. It cannot, no doubt, be done merely on the ground that it is not reasonable or that it has not taken into account relevant circumstances which the Court considers relevant.

**79.** We do not, therefore, find much substance in the contention that the courts cannot at all exercise judicial control over the impugned notifications. In cases where the power vested in the Government is a power which has got to be exercised in the public interest, as it happens to be here, the Court may require the Government to exercise that power in a reasonable way in accordance with the spirit of the Constitution. The fact that a notification issued under Section 25(1) of the Customs Act, 1962 is required to be laid before Parliament under Section 159 thereof does not make any substantial difference as regards the jurisdiction of the Court to pronounce on its validity.

**80.** The power to grant exemption should, however, be exercised in a reasonable way. Lord Greene, M.R. has explained in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*[23] what a 'reasonable way' means as follows :

> It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology

20. (1980) 2 SCR 1111 : (1980) 2 SCC 295 : AIR 1980 SC 882
21. (1981) 2 SCR 866 : (1981) 2 SCC 722 : AIR 1981 SC 1127
22. (1972) 1 WLR 1373 : (1972) 3 All ER 1019 (Ch D)
23. (1948) 1 KB 223 : (1947) 2 All ER 680 : 177 LT 641 (CA)

commonly used in relation to the exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington, L.J. in *Short* v. *Poole Corporation*[24] gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and in fact, all these things run into one another.

**81.** Hence the claim made on behalf of the Government that the impugned notifications are beyond the reach of the administrative law cannot be accepted without qualification even though all the grounds that may be urged against an administrative order may not be available against them.

**82.** Now the notifications issued on March 1, 1981 and February 28, 1982 under Section 25 of the Customs Act, 1962 which grant exemptions from payment of certain duty beyond what is mentioned in them are issued by the executive Government. They were issued in substitution of earlier notifications which had granted total exemption. Such notifications have to be issued by the Government after taking into consideration all relevant factors which bear on the reasonableness of the levy on the newsprint. The Government should strike a just and reasonable balance between the need for ensuring the right of people to freedom of speech and expression on the one hand and the need to impose social control on the business of publication of a newspaper on the other. In other words, the Government must at all material times be conscious of the fact that it is dealing with an activity protected by Article 19(1)(*a*) of the Constitution which is vital to our democractic existence. In deciding the reasonableness of restrictions imposed on any fundamental right the Court should take into consideration the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the disproportion of the imposition and the prevailing con-

24. 1926 Ch 66 : 95 LJ Ch 110 : 1925 All ER Rep 74 : 134 LT 110 (CA)

ditions at the relevant time including the social values whose needs are sought to be satisfied by means of the restrictions. (See *State of Madras* v. *V.G. Row*[25].) The restriction in question is the burden of import duty imposed on newsprint. Section 25 of the Customs Act, 1962 under which the notifications are issued confers a power on the Central Government coupled with a duty to examine the whole issue in the light of the public interest. It provides that if the Central Government is satisfied that it is necessary in the public interest so to do it may exempt generally either absolutely or subject to such conditions goods of any description from the whole or any part of the customs duty leviable thereon. The Central Government may if it is satisfied that in the public interest so to do exempt from the payment of duty by a special order in each case under circumstances of an exceptional nature to be stated in such order any goods on which duty is leviable. The power exercisable under Section 25 of the Customs Act, 1962 is no doubt discretionary but it is not unrestricted. It is useful to refer here to the observations of Lord Denning, M.R. in *Breen* v. *Amalgamated Engineering Union*[26] at page 190 read thus :

> The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this : the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith ; nevertheless the decision will be set aside. That is established by *Padfield* v. *Minister of Agriculture, Fisheries and Food*[27], which is a landmark in modern administrative law.

**83.** In any event any notification issued under a statute also being a 'law' as defined under Article 13(3)(*a*) of the Constitution is liable to be struck down if it is contrary to any of the fundamental rights guaranteed under Part III of the Constitution.

*VI. Has there been proper exercise of power under Section* 25(1) *of the Customs Act,* 1962 ?

**84.** Freedom of press as the petitioners rightly assert means freedom from interference from authority which would have the effect of interference with the content and circulation of newspapers. The

25. 1952 SCR 597 : AIR 1952 SC 196 : 1952 Cri LJ 966
26. (1971) 2 QB 175 . (1971) 1 All ER 1148 : (1971) 2 WLR 742 (CA)
27. 1968 AC 997 · (1968) 1 All ER 694 : (1968) 2 WLR 924 (HL)

most important raw material in the production of a newspaper is the newsprint. The cost and availability of newsprint determine the price, size and volume of the publication and also the quantum of news, views and advertisements appearing therein. It is not disputed that the cost of newsprint works out to nearly 60% of the cost of production of newspaper. In the case of a big newspaper the realisation by the sale of newspaper is just about about 40% of its total cost of production. The remaining cost is met by advertisements revenue which is about 40%, by revenue from waste sales and job work which comes to about 5% and revenue from other sources such as the income from properties and other investments of the newspaper establishment. These figures have been derived from the statement furnished by one of the big newspapers. The case of all other big newspapers may be more or less the same. The financial and other difficulties felt by the newspaper presses in securing newsprint in recent years which have become an international phenomenon are set out in the Final Report of the International Commission for the Study of Communication Problems referred to above at page 141 thus :

> Extremely serious on an international scale has been the effect of high costs of important materials or facilities.... Paper is a material consumed in vast quantities whose price in recent years has spiralled out of proportion to the general world-wide inflation.... As for newsprint, its price on world markets rose from a datum figure of 100 in 1970 to 329 in May 1977, and has continued to rise since. A sad by-product of this situation has been the introduction of a covert form of censorship, as some governments limit the import of newsprint, distribute it by official allocation schemes, and use these schemes to discriminate against the opposition newspapers.

**85.** In Chapter 4 of the same Report at page 100 the International Commission has observed thus :

> While newspapers which are commercial enterprises expect to sustain themselves by sales and advertising, they are not always viable on this traditional basis. Capital and profits from other media and from business in general are often injected into the newspaper industry. In many cases, the financing, or at least the deficits are covered by governments or political bodies. Assistance from the State has taken various forms, including tax concessions not enjoyed by other industries, reduced postal and telephone rates, guaranteed Government advertising, and subsidies to the price of newsprint. Although the press is suspicious of Government involvement in its affairs, a desire to preserve variety by keeping the weaker papers alive has led to considera-

tion of various schemes. Direct grants to papers in need are made in seven European nations.

Smaller newspapers and some parts of the "quality" or "specialized" press have experienced difficulties from a contraction of operations and size, which has led to limitations on the variety of information sources. This has induced many governments to examine the possibility of subsidies to help keep newspapers alive or to establish new ones, in monopoly circulation areas and to promote plurality and variety in general.

**86.** If any duty is levied on newsprint by Government, it necessarily has to be passed on to the purchasers of newspapers, unless the industry is able to absorb it. In order to pass on the duty to the consumer the price of newspapers has to be increased. Such increase naturally affects the circulation of newspapers adversely.

**87.** In *Sakal case*[5], this Court has observed thus :

The effect of raising the selling price of newspaper has been considered by the Press Commission. In Paragraph 164 of the Report it is observed :

> The selling price of a paper would naturally have an important effect on its circulation. In this connection we have examined the effect of price-cuts adopted by two English papers at Bombay on the circulation of those two papers as well as of the leading paper which did not reduce its price. Prior to October 27, 1952, Times of India which had the highest circulation at Bombay was being sold at Rs 0-2-6 while Free Press Journal and National Standard which rank next in circulation were being sold for Rs 0-2-0. On October 27, 1952, Free Press Journal reduced its price to Re 0-1-0 and within a year had claimed to have doubled its circulation. On July 1, 1953, the National Standard was converted into a Bombay edition of Indian Express with a selling price of Re 0-1-6. Within six months it too claimed to have doubled its circulation.... During this period the Times of India which did not reduce its selling price continued to retain its readership. Thus it would appear that Free Press Journal and Indian Express by reducing their price have been able to tap new readership which was latent in the market but which could not pay the higher prices prevailing earlier.
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> * * *

Though the prices of newspapers appear to be on the low

side it is a fact that even so many people find it difficult to pay that small price. This is what has been pointed out by the Press Commission in Paragraph 52 of its report. According to it the most common reason for people in not purchasing newspapers is the cost of the newspaper and the inability of the household to spare the necessary amount. This conclusion is based upon the evidence of a very large number of individuals and representatives of Associations. We would, therefore, be justified in relying upon it and holding that raising the price of newspaper even by a small amount such as one nP. in order that its present size be maintained would adversely affect its circulation.

**88.** This is not a novel phenomenon. A stamp tax on newspapers came to be levied in England in 1712. It virtually crippled the growth of the English press and thus became unpopular. There was a lot of agitation against the said tax. But on its abolition in 1861, the circulation of newspapers increased enormously. The following account found in the *Encyclopaedia Britannica* (1962) Vol. 16 at page 339 is quite instructive :

> *Abolition of "Taxes on Knowledge".*—The development of the press was enormously assisted by the gradual abolition of the "taxes on knowledge", and also by the introduction of a cheap postal system. . . .
>
> To Lord Lytton, the novelist and politician, and subsequently to Milner Gibson and Richard Cobden, is chiefly due the credit of grappling with this question in Parliament to secure first the reduction of the tax to a penny in 1836, and then its total abolition in 1855. The number of newspapers established from the early part of 1855, when the repeal of the duty had become a certainty, and continuing in existence at the beginning of 1857, amounted to 107 ; 26 were metropolitan and 81 provincial. The duties on paper itself were finally abolished in 1861.
>
> The abolition of the stamp taxes brought about such reductions in the prices of newspapers that they speedily began to reach the many instead of the few. Some idea of the extent of the tax on knowledge imposed in the early nineteenth century may be gathered from the fact that the number of stamps issued in 1820 was nearly 29,400,000, and the incidence of the advertisement tax, fixed at 3s. 6d. in 1804, made it impossible for the newspaper owner to pass on the stamp tax to the advertiser. In 1828 the proprietors of the Times had to pay the State more than £ 68,000 in stamp and advertisement taxes and paper duty. But after the reduction of the stamp tax in 1836 from four pence

to one penny, the circulation of English newspapers, based on the stamp returns, rose from 39,000,000 to 122,000,000 in 1854.

**89.** The Second Press Commission in its Report (Vol. II) at pages 182-183 has stated that the figures of circulation of newspapers complied by the Audit Bureau of Circulation (ABC) for the period January to June 1981 indicated that the circulation of newspapers in the period January to June 1981 was 1.9% lower than in the previous six months' period. The decline in the circulation of dailies was more in the case of every big newspapers with circulation of one lac and above than in the case of smaller papers. The Commission said that the decline in circulation would appear to be attributable mainly to two factors — increase in the retail price of newspapers in September-October 1980 and again in April-May 1981 and that the increase in retail prices appeared to have become necessary following continuing increase in newsprint prices in the last few years including levy of import duty in 1981 and increase in wages and salaries cost on account of Palekar Award. Of these factors which were responsible for increase in prices, the imposition of import duty on newsprint was on account of State action. This aspect of the matter is not seriously disputed by the Government.

**90.** The pattern of the law imposing customs duties and the manner in which it is operated, to a certain extent exposes the citizens who are liable to pay customs duties to the vagaries of executive discretion. While Parliament has imposed duties by enacting the Customs Act, 1962 and the Customs Tariff Act, 1975, the Executive Government is given wide power by Section 25 of the Customs Act, 1962 to grant exemptions from the levy of customs duty. It is ordinarily assumed that while such power to grant exemptions is given to the Government it will consider all relevant aspects governing the question whether exemption should be granted or not. In the instant case in 1975 when the Customs Tariff Act, 1975 was enacted, 40% ad valorem was levied on newsprint even though it had been exempted from payment of such duty. If the exemption had not been continued, newspaper publishers had to pay 40% ad valorem customs duty on the coming into force of the Customs Tariff Act, 1975. Then again in 1982 by the Finance Act, 1982 an extra levy of Rs 1000 per tonne was imposed in addition to the original 40% ad valorem duty even though under the exemption notification the basic duty had been fixed at 10% of the value of the imported newsprint. No information is forthcoming from the Government as to whether there was any material which justified the said additional levy. It is also not clear why this futile exercise of levying an additional duty of Rs 1000 per tonne was done when under the notification issued under Section 25 of the Customs Act, 1962 on March 1, 1981, which was in force then,

customs duty on newsprint above 10% ad valorem had been exempted. As mentioned elsewhere in the course of this judgment while levying tax on an activity which is protected also by Article 19(1)(*a*) a greater degree of care should be exhibited. While it is indisputable that the newspaper industry should also bear its due share of the total burden of taxation along with the rest of the community when any tax is specially imposed on newspaper industry, it should be capable of being justified as a reasonable levy in court when its validity is challenged. In the absence of sufficient material, the levy of 40% plus Rs 1000 per tonne would become vulnerable to attack. If the levy imposed by the statute itself fails, there would be no need to question the notifications issued under Section 25 of the Customs Act, 1962. But having regard to the prevailing legislative practice let us assume that in order to determine the actual levy we should take into consideration not merely the rate of duty mentioned in the Customs Tariff Act, 1975 but also any notification issued under Section 25 of the Customs Act, 1962 which is in force. Even then the reasons given by the Government to justify the total customs duty of 15% levied from March 1, 1981 or Rs 825 per tonne as it is currently being levied appear to be inadequate. In the Finance Minister's speech delivered on the floor of the Lok Sabha in 1981, the first reason given for the levy of 15% duty was that it was intended "to promote a measure of restraint in the consumption of imported newsprint and thus help in conserving foreign exchange". This ground appears to be not tenable for two reasons. In the counter-affidavit filed on behalf of the Government, it is stated that the allegation that the position of foreign exchange reserve is comfortable is irrelevant. This shows that nobody in Government had ever taken into consideration the effect of the import of newsprint on the foreign exchange reserve before issuing the notifications levying 15% duty. Secondly no newspaper owner can import newsprint directly. Newsprint import is canalised through the State Trading Corporation. If excessive import of newsprint adversely affects foreign exchange reserve, the State Trading Corporation may reduce the import of newsprint and allocate lesser quantity of imported newsprint to newspaper establishments. There is, however, no need to impose import duty with a view to curbing excessive import of newsprint. In the Finance Minister's speech there is no reference to the capacity of the newspaper industry to bear the levy of 15% duty. In the counter-affidavit it is asserted that the extent of burden faced by the newspaper industry in India is irrelevant to the levy of import duty on newsprint. This clearly shows again that the Government had not also considered a vital aspect of the questions before withdrawing the total exemption which was being enjoyed by newspaper industry till March 1, 1981 and imposing 15% duty on newsprint.

**91.** The petitioners have alleged that the imposition of customs duty has compelled them to reduce the extent of the area of the newspapers for advertisements which supply a major part of the sinews of a newspaper and consequently has adversely affected their revenue from advertisements. It is argued by them relying upon the ruling in *Bennett Coleman case*[2] that Article 19(1)(*a*) is infringed thereby. Our attention is drawn to the following passages in *Bennett Coleman case*[2] which are at pages 777-78 and at page 782 : (SCC pp. 810, 813, paras 34, 43)

> Publication means dissemination and circulation. The press has to carry on its activity by keeping in view the class of readers, the conditions of labour, price of material, availability of advertisements, size of paper and the different kinds of news comments and views and advertisements which are to be published and circulated. The law which lays excessive and prohibitive burden which would restrict the circulation of a newspaper will not be saved by Article 19(2). If the area of advertisement is restricted, price of paper goes up. If the price goes up circulation will go down. This was held in *Sakal Papers case*[5] to be the direct consequence of curtailment of advertisement. The freedom of a newspaper to publish any number of pages or to circulate it to any number of persons has been held by this Court to be an integral part of the freedom of speech and expression. This freedom is violated by placing restraints upon it or by placing restraints upon something which is essential part of that freedom. A restraint on the number of pages, a restraint on circulation and a restraint on advertisements would affect the fundamental rights under Article 19(1)(*a*) on the aspects of propagation, publication and circulation.
>
> The various provisions of the newsprint import policy have been examined to indicate as to how the petitioners' fundamental rights have been infringed by the restrictions on page limit, prohibition against new newspapers and new editions. The effect and consequence of the impugned policy upon the newspapers is directly controlling the growth and circulation of newspapers. The direct effect is the restriction upon circulation of newspapers. The direct effect is upon growth of newspaper through pages. The direct effect is that newspapers are deprived of their area of advertisement. The direct effect is that they are exposed to financial loss. The direct effect is that freedom of speech and expression is infringed.

**92.** In meeting the above contention the Government relying on the decision in *Hamdard Dawakhana (Wakf), Lal Kuan, Delhi* v. *Union*

*of India*[28] has pleaded in defence of its action that the right to publish commercial advertisement is not part of freedom of speech and expression. We have carefully considered the decision in *Hamdard Dawakhana case*[28]. The main plank of that decision was that the type of advertisement dealt with there did not carry with it the protection of Article 19(1)(*a*). On examining the history of the legislation, the surrounding circumstances and the scheme of the Act which had been challenged there namely the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 (21 of 1954) the Court held that the object of that Act was the prevention of self-medication and self-treatment by prohibiting instruments which may be used to advocate the same or which tended to spread the evil. The Court relying on the decision of the American Supreme Court in *Lewis J. Valentine* v. *F.J. Chrestensen*[29] observed at pages 687-89 thus :

> It cannot be said that the right to publish and distribute commercial advertisements advertising an individual's personal business is a part of freedom of speech guaranteed by the Constitution. In *Lewis J.* v. *Chrestensen*[9] it was held that the constitutional right of free speech is not infringed by prohibiting the distribution in city streets of handbills bearing on one side a protest against action taken by public officials and on the other advertising matter. The object of affixing of the protest to the advertising circular was the evasion of the prohibition of a city ordinance forbidding the distribution in the city streets of commercial and business advertising matter. Mr Justice Roberts, delivering the opinion of the Court said :
>
> > This Court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. . . . If the respondent was attempting to use the streets of New York by distributing commercial advertising, the prohibition of the Code provisions was lawfully invoked against such conduct.
>
> It cannot be said therefore that every advertisement is a matter dealing with freedom of speech nor can it be said that it is an expression of ideas. In every case one has to see what

28. (1960) 2 SCR 671 AIR 1960 SC 554 : 1960 Cri LJ 735
29. 86 L Ed 1262 : 316 US 52 : 62 S Ct 920 (1942)

> is the nature of the advertisement and what activitv falling under Article 19(1) it seeks to further. The advertisements in the instant case relate to commerce or trade and not to propagating of ideas ; and advertising of prohibited drugs or commodities of which the sale is not in the interest of the general public cannot be speech within the meaning of freedom of speech and would not fall within Article 19(1)(*a*). The main purpose and true intent and aim, object and scope of the Act is to prevent self-medication or self-treatment and for that purpose advertisements commending certain drugs and medicines have been prohibited. Can it be said that this is an abridgement of the petitioners' right of free speech. In our opinion it is not. Just as in *Chamarbaugwalla case*[30] it was said that activities undertaken and carried on with a view to earning profits e.g. the business of betting and gambling will not be protected as falling within the guaranteed right of carrying on business or trade so it cannot be said that an advertisement commending drugs and substances as appropriate cure for certain diseases is an exercise of the right of freedom of speech.

**93.** In the above said case the Court was principally dealing with the right to advertise prohibited drugs, to prevent self-medication and self-treatment. That was the main issue in the case. It is no doubt true that some of the observations referred to above go beyond the needs of the case and tend to affect the right to publish all commercial advertisements Such broad observations appear to have been made in the light of the decision of the American Court in *Lewis J. Valentine* v. *F.J. Chrestensen*[29]. But it is worthy of notice that the view expressed in this American case has not been fully approved by the American Supreme Court itself in its subsequent decisions. We shall refer only to two of them. In his concurring judgment in *William B Cammarane* v. *United States of America*[31] Justice Douglas said :

> *Lewis J. Valentine* v. *F.J. Chrestensen*[29] . . .held that business of advertisements and commercial matters did not enjoy the protection of the First Amendment, made applicable to the States by the Fourteenth. The ruling was casual, almost off hand. And it has not survived reflection.

In *Jeffrey Cole Bigelow* v. *Commonwealth of Virginia*[32] the American Supreme Court held that the holding in *Lewis J. Valentine* v. *F.J.*

30 R.M.D. Chamarbaugwalla v. Union of India, 1957 SCR 930 : AIR 1957 SC 628 : 1967 SCJ 593
31. 358 US 498 : 3 L Ed 2d 462
32 421 US 809 · 44 L Ed 2d 600, 610 · 95 S Ct 2222 (1975)

*Chrestensen*[20] was distinctly a limited one. In view of the foregoing, we feel that the observations made in the *Hamdard Dawakhana case*[28] are too broadly stated and the Government cannot draw much support from it. We are of the view that all commercial advertisements cannot be denied the protection of Article 19(1)(*a*) of the Constitution merely because they are issued by businessmen. In any event the Government cannot derive any assistance from this case to sustain the impugned notifications.

**94.** It was next urged on behalf of the Government that the levy of customs duty on newsprint was not strictly a levy on newsprint as such since though customs duties were levied with reference to goods, the taxable event was the import of goods within the customs barrier and hence there could be no direct effect on the freedom of speech and expression by virtue of the levy of customs duty on newsprint. Reliance was placed in support of the above contention on the decision in *In re Sea Customs Act*[33]. That decision was rendered on a reference made by the President under Article 143 of the Constitution requesting this Court to record its opinion on the question whether the Central Government could levy customs duty on goods imported by a State. The contention of the majority of the States in that case was that the goods imported by them being their property no tax by way of customs could be levied by reason of Article 289(1) of the Constitution which exempted the property of a State from taxation by the Union. This Court (majority 5, minority 4) held that in view of clause (1) of Article 289 which was distinct from clause (2) thereof which provided that nothing in clause (1) of Article 289 would prevent the Union from imposing or authorising the imposition of any tax to such extent, if any, as Parliament might by law provide in respect of a trade or business of any kind carried on by or on behalf of a State or any operations connected therewith or any property used or occupied for the purposes of such trade or business or any income accruing or arising in connection therewith and the other provisions of the Constitution which enabled the Union to levy different kinds of taxes, customs duty levied on the importation of goods was only a tax levied on international trade and property. The Court further held that the immunity granted under Article 289(1) in favour of States had to be restricted to taxes levied directly on property and even though customs duties had reference to goods and commodities they were not taxes on property and hence not within the exemption in Article 289(1). The above decision is again of very little assistance to the Government since it cannot be denied that the levy of customs duty on newsprint used in the production of newspapers is a restriction on the activity of publishing a news-

33. (1964) 3 SCR 787 · AIR 1963 SC 1760 · (1964) 1 ITJ 671

paper and the levy of customs duties had a direct effect on that activity. There exists no analogy between Article 289(1) and Article 19(1)(*a*) and (2) of the Constitution. Hence the levy cannot be justified merely on the ground that it was not on any property of the publishers of newspapers.

**95.** Our attention has been particularly drawn to the statement of the Finance Minister that one of the considerations which prevailed upon the Government to levy the customs duty was that the newspapers contained 'piffles'. A 'piffle' means foolish nonsense. It appears that one of the reasons for levying the duty was that certain writings in newspapers appeared to the Minister as 'piffles'. Such action is not permissible under our Constitution for two reasons — (*i*) that the judgment of the Minister about the nature of writings cannot be a true description of the writings and (*ii*) that even if the writings are piffles it cannot be a ground for imposing a duty which will hinder circulation of newspapers. In this connection it is useful to refer to the decision of the American Supreme Court in ***Robert E. Hannegan*** v. ***Esquire Inc.***[34] in which it was held that a publication could not be deprived of the benefit of second class mailing rates accorded to publications disseminating "information of a public character, or devoted literature, the sciences, arts, or some special industry" because its contents might seem to the Postmaster-General by reason of vulgarity or poor taste, not to contribute to the public good. Justice Douglas observed in that decision thus :

> It is plain, as we have said, that the favourable second-class rates were granted to periodicals meeting the requirements of the Fourth condition, so that the public good might be served through a dissemination of the class of periodicals described. But that is a far cry from assuming that Congress had any idea that each applicant for the second-class rate must convince the Postmaster-General that his publication positively contributes to the public good or public welfare. Under our system of government there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. There doubtless would be a contrariety of views concerning Cervantes' Don Quixote, Shakespeare's Venus and Adonis, or Zola's Nana. But a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system. The basic values implicit in the requirements of the Fourth condition can be served only by uncensored distribution

34 327 US 146 · 90 L Ed 586 (1946)

of literature. From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values.

**96.** Matters concerning the intellect and ethics do undergo fluctuations from era to era. The world of mind is a changing one. It is not static. The streams of literature and of taste and judgment in that sphere are not stagnant. They have a quality of freshness and vigour. They keep on changing from time to time, from place to place and from community to community.

**97.** It is one thing to say that in view of considerations relevant to public finance which require every citizen to contribute a reasonable amount to public exchequer customs duty is leviable even on newsprint used by newspaper industry and an entirely different thing to say that the levy is imposed because the newspapers generally contain 'piffles'. While the former may be valid if the circulation of newspapers is not affected prejudicially, the latter is impermissible under the Constitution as the levy is being made on a consideration which is wholly outside the constitutional limitations. The Government cannot arrogate to itself the power to prejudge the nature of contents of newspapers even before they are printed. Imposition of a restriction of the above kind virtually amounts to conferring on the Government the power to precensor a newspaper. The above reason given by the Minister to levy the customs duty is wholly irrelevant.

**98.** To sum up, the counter-affidavit filed on behalf of the Government in these cases does not show whether the Government ever considered the relevant matters. It says that the extent of burden on the newspaper industry imposed by the impugned levy is irrelevant. It says that the position that foreign exchange reserve is comfortable is not relevant. It does not say that the increasing cost of imported newsprint was taken into consideration. The Finance Minister says that the levy was imposed because he found 'piffles' in some newspapers. There is no reference to the effect of the implementation of the Palekar Award on the newspaper industry. It does not also state what effect it will have on the members of the public who read newspapers and how far it will reduce the circulation of newspapers.

**99.** It is argued on behalf of the Government that the effect of the impugned levy being minimal, there is no need to consider the contentions urged by the petitioners. As observed by Lord Morris of Borth-Y-Gest in *Olivier* v. *Buttigieg*[35] a case from Malta, that where fundamental rights and freedom of the individual are being considered,

35. 1967 AC 115 : (1966) 2 All ER 459 : (1966) 3 WLR 310 (PC)

a court should be cautious before accepting the view that some particular disregard of them is of minimal account. The learned Lord observed in the above case that there was always the likelihood of the violation being vastly widened and extended with impunity. He also referred to the words of Portia — 'Twill be recorded for a precedent, and many an error by the same example will rush into the state', and the following passage from the American case i.e. *Thomas* v. *Collins*[36] :

> The restraint is not small when it is considered what was restrained. The right is a national right, federally guaranteed. There is some modicum of freedom of thought, speech and assembly which all citizens of the republic may exercise throughout its length and breadth, which no state, nor all together, not the nation itself, can prohibit, restrain or impede. If the restraint were smaller than it is, it is from petty tyrannies that large ones take root and grow. This fact can be more plain than when they are imposed on the most basic rights of all. Seedlings planted in that soil grow great and, growing, break down the foundations of liberty.

**100.** In the above decision the Privy Council cited with approval the view expressed by this Court in *Romesh Thappar case*[3] and the US Court in *Martin* v. *City of Struthers*[37]. The Privy Council observed thus :

> A measure of interference with the free handling of the newspaper and its free circulation was involved in the prohibition which the circular imposed. It was said in an Indian case (*Romesh Thappar* v. *State of Madras*[3]) :
>
> > . . . there can be no doubt that freedom of speech and expression includes freedom of propagation of ideas, and that freedom is ensured by the freedom of circulation.
> >
> > 'Liberty of circulation is as essential to that freedom as the liberty of publication. Indeed, without circulation the publication would be of little value.'
>
> Similar thoughts were expressed by Black, J., in his judgment in *Martin* v. *City of Struthers*[37] when he said :
>
> > Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved.

36. 323 US 516 : 89 L Ed 430 : 65 S Ct 315 (1945)
37. 319 US 141 : 87 L Ed 1313 : 63 S Ct 862 (1943)

**101.** We respectfully endorse the high principle expounded by the Privy Council in the above case. Moreover in the absence of a proper examination of all relevant matters, it is not possible to hold that the effect of the levy is minimal. In fact the impact of the impugned levy in these cases is not minimal at all. For example, The Tribune Trust has to pay Rs 18·7 lacs and The Statesman Ltd. has to pay Rs 35·9 lacs by way of customs duty on newsprint imported during 1983-84. Other big newspapers have also to pay large sums by way of customs duty annually.

**102.** The question in the present cases is whether the tax has been shown to be so burdensome as to warrant its being struck down ? The petitioners have succeeded in showing a fall in circulation but whether it is a direct consequence of the customs levy and the increase in price has not been duly established. It may be due to various circumstances. The fall in circulation may be due to the general rise in cost of living and the reluctance of people to buy as many newspapers as they used to buy before. It may be due to bad management. It may be due to change of editorial policy. It may be due to the absence of certain feature writers. It may be due to other circumstances which it is not possible to enumerate. Except the synchronising of time, there is nothing to indicate that the slight fall in circulation is directly due to the levy of customs duty. One curious feature of the case is that the petitioners have made no efforts to produce their balance sheets or profit and loss statements to give us a true idea of how burdensome the customs levy really is. On the other hand, the Government also has made no efforts to show the effect of the impact of the levy on the newspaper industry as a whole. All these years, the very exemption which they granted was an indication that the levy was likely to have a serious impact on the newspaper industry. Even now the exemption given to the small and medium newspapers shows that there is bound to be an impact. No effort has been made on the part of the Government to show the precise nature of the impact. On the other hand, the case of the Government appears to be that such considerations are entirely irrelevant, though the outstanding fact remains that for several years, the Government itself thought that the newsprint deserved total exemption. On the material now available to us, while it is not possible to come to the conclusion that the effect of the levy is indeed so burdensome as to affect the freedom of the press, we are also not able to come to the conclusion that it will not be burdensome. This is a matter which touches the freedom of the press which is, as we said, the very soul of democracy. This is certainly not a question which should be decided on the mere question of burden of proof. There are factors indicating that the present levy is heavy and is perhaps heavy enough to affect circula-

tion. On such a vital issue, we cannot merely say that the petitioners have not placed sufficient material to establish the drop in circulation is directly linked to the increase of the levy when, on the side of the Government, the entire exercise is thought to be irrelevant. Hence there appears to be a good ground to direct the Central Government to reconsider the matter afresh in the light of what has been said here.

### *VII. Is the classification of newspapers made for the purpose of exemption violative of Article* 14 ?

**103.** We do not, however, see much substance in the contention of some of the petitioners that the classification of the newspapers into small, medium and big newspapers for purposes of levying customs duty is violative of Article 14 of the Constitution. The object of exempting small newspapers from the payment of customs duty and levying 5% ad valorem (now Rs 275 per MT) on medium newspapers while levying full customs duty on big newspapers is to assist the small and medium newspapers in bringing down their cost of production. Such papers do not command large advertisement revenue. Their area of circulation is limited and majority of them are in Indian languages catering to rural sector. We do not find anything sinister in the object nor can it be said that the classification has no nexus with the object to be achieved. As observed by Mathew, J. in the *Bennett Coleman case*[2] it is the duty of the State to encourage education of the masses through the medium of the press under Article 41 of the Constitution. We, therefore, reject this contention.

### *VIII. Relief*

**104.** Now arises the question relating to the nature of relief that may be granted in these petitions. These cases present a peculiar difficulty which arises out of the pattern of legislation under consideration. If the impugned notifications are merely quashed, they being notifications granting exemptions, the exemptions granted under them will cease. Will such quashing revive the notification dated July 15, 1977 which was in force prior to March 1, 1981 under which total exemption had been granted ? We do not think so. The impugned notification dated March 1, 1981 was issued in supersession of the notification dated July 15, 1977 and thereby it achieved two objects — the notification dated July 15, 1977 came to be repealed and 10% ad valorem customs duty was imposed on newsprint. Since the notification dated July 15, 1977 had been repealed by the Government of India itself, it cannot be revived on the quashing of the notification of March 1, 1981. The effect of such quashing of a subsequent notification on an earlier notification in whose place the subsequent notification was issued has been considered by this

Court in *B.N. Tiwari* v. *Union of India*[38]. In that case the facts were these : In 1952, a 'carry forward' rule governing the Central Services was introduced whereby the unfilled reserved vacancies of a particular year would be carried forward for one year only. In 1955 the above rule was substituted by another providing that the unfilled reserved vacancies of a particular year would be carried forward for two years. In *T. Devadasan* v. *Union of India*[39] the 1955 rule was declared unconstitutional. One of the questions which arose for consideration in this case (*Tiwari case*[38]) was whether the 1952 rule had revived after the 1955 rule was struck down. This Court held that it could not revive. The following are the observations of this Court on the above question :

> In the result the petition succeeds partially and the carry forward rule of 1952 still exists. It is true that in *Devadasan case*[39], the final order of this Court was in these terms :
>
> > In the result the petition succeeds partially and the carry forward rule as modified in 1955 is declared invalid.
>
> That however does not mean that this Court held that the 1952-rule must be deemed to exist because this Court said that the carry forward rule as modified in 1955 was declared invalid. The carry forward rule of 1952 was substituted by the carry forward rule of 1955. On this substitution the carry forward rule of 1952 clearly ceased to exist because its place was taken by the carry forward rule of 1955. Thus by promulgating the new carry forward rule in 1955, the Government of India itself cancelled the carry forward rule of 1952. When therefore this Court struck down the carry forward rule as modified in 1955 that did not mean that the carry forward rule of 1952 which had already ceased to exist, because the Government of India itself cancelled it and had substituted a modified rule in 1955 in its place, could revive. We are therefore of opinion that after the judgment of this Court in *Devadasan case*[38] there is no carry forward rule at all, for the carry forward rule of 1955 was struck down by this Court while the carry forward rule of 1952 had ceased to exist when the Government of India substituted the carry forward rule of 1955 in its place.

**105.** In *Firm A.T.B. Mehtab Majid and Co.* v. *State of Madras*[40] also this Court has taken the view that once an old rule has been substituted by a new rule, it ceases to exist and it does not get revived when the new rule is held invalid.

38. (1965) 2 SCR 421 : AIR 1965 SC 1430 : (1966) 1 SCJ 805
39. (1964) 4 SCR 680 : AIR 1964 SC 179 : (1965) 2 LLJ 560
40. 1963 Supp 2 SCR 435, 446 : AIR 1963 SC 928 : (1963) 14 STC 355

**106.** The rule in *Mohd. Shaukat Hussain Khan* v. *State of A.P.*[41] is inapplicable to these cases. In that case the subsequent law which modified the earlier one and which was held to be void was one which according to the Court could not have been passed at all by the State Legislature. In such a case the earlier law could be deemed to have never been modified or repealed and would, therefore, continue to be in force. It was strictly not a case of revival of an earlier law which had been repealed or modified on the striking down of a later law which purported to modify or repeal the earlier one. It was a case where the earlier law had not been either modified or repealed effectively. The decision of this Court in *Mulchand Odhavji* v. *Rajkot Borough Municipality*[42] is also distinguishable. In that case the State Government had been empowered by Section 3 of the Saurashtra Terminal Tax and Octroi Ordinance (47 of 1949) to impose octroi duty in towns and cities specified in Schedule I thereof and Section 4 authorised the Government to make rules for the imposition and collection of octroi duty. These rules were to be in force until the City Municipalities made their own rules. The rules framed by the Municipality concerned were held to be inoperative. Then the question arose whether the rules of the Government continued to be in force. The Court held : (SCC p. 56, para 8)

> The Government rules, however, were to cease to operate as the notification provided "from the date the said Municipality put into force their independent bye-laws". It is clear beyond doubt that the Government rules would cease to apply from the time the respondent-Municipality brought into force its own bye-laws and rules under which it could validly impose, levy and recover the octroi duty. The said notification did not intend any hiatus when neither the Government rules nor the municipal rules would be in the field. Therefore, it is clear that if the bye-laws made by the respondent-Municipality could not be legally in force for some reason or the other, for instance, for not having been validly made, the Government rules would continue to operate as it cannot be said that the Municipality had "put into force their independent bye-laws". The Trial Court, as also the District Court, were, therefore, perfectly right in holding that the respondent-Municipality could levy and collect octroi duty from the appellant-firm under the Government rules. There was no question of the Government rules being revived, as in the absence of valid rules of the respondent-Municipality they continued to operate. The submission of counsel in this behalf, therefore, cannot be sustained.

41. (1975) 1 SCR 429 : (1974) 2 SCC 376 : AIR 1974 SC 1480
42. AIR 1970 SC 685 · (1971) 3 SCC 53

**107.** In the cases before us we do not have rules made by two different authorities as in *Mulchand case*[42] and no intention on the part of the Central Government to keep alive the exemption in the event of the subsequent notification being struck down is also established. The decision of this Court in *Koteswar Vittal Kamath* v. *K. Rangappa Baliga & Co.*[43] does not also support the petitioners. In that case again the question was whether a subsequent legislation which was passed by a Legislature without competence would have the effect of reviving an earlier rule which it professed to supersede. This case again belongs to the category of *Mohd. Shaukat Hussain Khan case*[41]. It may also be noticed that in *Koteswar Vittal Kamath case*[43] the ruling in the case of *Firm A.T.B. Mehtab Majid and Co.*[40] has been distinguished. The case of *State of Maharashtra* v. *Central Provinces Manganese Ore Co. Ltd.*[44] is again distinguishable. In this case the whole legislative process termed substitution was abortive, because, it did not take effect for want of the assent of the Governor-General and the Court distinguished that case from *Tiwari case*[38]. We may also state that the legal effect on an earlier law when the later law enacted in its place is declared invalid does not depend merely upon the use of words like, 'substitution', or 'supersession'. It depends upon the totality of circumstances and the context in which they are used.

**108.** In the cases before us the competence of the Central Government to repeal or annul or supersede the notification dated July 15, 1977 is not questioned. Hence its revival on the impugned notifications being held to be void would not arise. The present cases are governed by the rule laid down in *Tiwari case*[38].

**109.** Hence if the notification dated July 15, 1977 cannot revive on the quashing of the impugned notifications, the result would be disastrous to the petitioners as they would have to pay customs duty of 40% ad valorem from March 1, 1981 to February 28, 1982 and 40% ad valorem plus Rs 1000 per MT from March 1, 1982 onwards. In addition to it they would also be liable to pay auxiliary duty of 30% ad valorem during the fiscal year 1982-83 and auxiliary duty of 50% ad valorem during the fiscal year 1983-84. They would straightaway be liable to pay the whole of customs duty and any other duty levied during the current fiscal year also. Such a result cannot be allowed to ensue.

**110.** It is no doubt true that some of the petitioners have also questioned the validity of the levy prescribed by the Customs Tariff

43. (1969) 3 SCR 40 : (1969) 1 SCC 255 : AIR 1969 SC 504
44. (1977) 1 SCR 1002 : (1977) 1 SCC 643 : 1977 SCC (Tax) 211: AIR 1977 SC 879 : 1977 Tax LR 1861 : (1977) 39 STC 340

Act, 1975 itself. But we are of the view that it is unnecessary to quash it because of the pattern of the legislative provisions levying customs duty which authorise the Government in appropriate cases either to reduce the duty or to grant total exemption under Section 25 of the Customs Act, 1962 having regard to the prevailing circumstances and to vary such concessions from time to time. The governmental practice in the matter of customs duties has made the law imposing customs virtually a hovering legislation. Parliament expects the Government to review the situation in each case periodically and to decide what duty should be levied within the limit prescribed by the Customs Tariff Act, 1975. Hence the validity of the provision in the Customs Tariff Act, 1975 need not be examined now. Since it is established that the Government has failed to discharge its statutory obligations in accordance with law while issuing the impugned notifications issued under Section 25 of the Customs Act, 1962 on and after March 1, 1981, the Government should be directed to re-examine the whole issue relating to the extent of exemption that should be granted in respect of imports of newsprint after taking into account all relevant considerations for the period subsequent to March 1, 1981. We adopt this course since we do not also wish that the Government should be deprived of the legitimate duty which the petitioners would have to pay on the imported newsprint during the relevant period.

**111.** In the result, in view of the peculiar features of these cases and having regard to Article 32 of the Constitution which imposes an obligation on this Court to enforce the fundamental rights and Article 142 of the Constitution which enables this Court in the exercise of its jurisdiction to make such order as is necessary for doing complete justice in any cause or matter pending before it, we make the following order in these cases :

(1) The Government of India shall reconsider within six months the entire question of levy of import duty or auxiliary duty payable by the petitioners and others on newsprint used for printing newspapers, periodicals, etc. with effect from March 1, 1981. The petitioners and others who are engaged in newspaper business shall make available to the Government all information necessary to decide the question.

(2) If on such reconsideration the Government decides that there should be any modification in the levy of customs duty or auxiliary duty with effect from March 1, 1981, it shall take necessary steps to implement its decision.

(3) Until such redetermination of the liability of the petitioners and others is made, the Government shall recover only

Rs 550 per MT on imported newsprint towards customs duty and auxiliary duty and shall not insist upon payment of duty in accordance with the impugned notifications. The concessions extended to medium and small newspapers may, however, remain in force.

(4) If, after such redetermination, it is found that any of the petitioners is liable to pay any deficit amount by way of duty, such deficit amount shall be paid by such petitioner within four months from the date on which a notice of demand is served on such petitioner by the concerned authority. Any bank guarantee or security given by the petitioners shall be available for recovery of such deficit amounts.

(5) If, after such redetermination, it is found that any of the petitioners is entitled to any refund, such refund shall be made by the Government within four months from the date of such redetermination.

(6) A writ shall issue to the respondents accordingly in these cases. Parties shall, however, bear their own costs.

**112.** The petitions are accordingly allowed.

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**(1985) 1 Supreme Court Cases 712**

(BEFORE V.D. TULZAPURKAR, RANGANATH MISRA AND V. KHALID, JJ.)

J.R. VOHRA .. Appellant ;

*Versus*

INDIA EXPORT HOUSE PVT. LTD. AND ANOTHER .. Respondents.

Civil Appeal No. 3381 of 1982†,
decided on February 14, 1985

**Rent Control and Eviction — Eviction after expiry of limited period of tenancy — Special summary procedure regarding — Rent Controller must issue warrant for recovery of possession as a matter of course once lsndlord makes applicafion invoking the special provision — If any pleas regarding fraud, collusiou or mechanical application of mind in granting permission for creation of a limited tenancy raised by tenant after landlord's application, Rent Controller not obliged to issue a prior notice to the parties and make inquiry before issuing the warrant — Such pleas can be raised during currency of**

†From the Judgment and Order dated October 18, 1982 of the High Court of Delhi in C.M.(M) No. 174 of 1982

**(2001) 3 Supreme Court Cases 71**

(BEFORE B.N. KIRPAL, RUMA PAL AND BRIJESH KUMAR, JJ.)

SOLIDAIRE INDIA LTD. . . Appellant;

*Versus*

FAIRGROWTH FINANCIAL SERVICES LTD. AND OTHERS . . Respondents.

Civil Appeal No. 3760 of 1995†, decided on February 7, 2001

A. **Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 — Provisions of, held, would prevail over those of the earlier Sick Industrial Companies (Special Provisions) Act, 1985 as in case of conflict between two special Acts, the later one prevails — Where respondent's suit for recovery against appellant (for loan amount of Rs one crore along with interest) had been decreed by Special Court and during pendency of appeal before Supreme Court, appellant Company became sick and proceedings were initiated under Sick Industrial Companies (Special Provisions) Act, 1985, held, the Special Court Act would have overriding effect despite contrary provisions in 1985 Act and despite the fact that proceedings were taking place before BIFR — Special Court rightly concluded the proceedings before it and rightly decreed respondent's suit — Interpretation of Statutes — Subsidiary Rules of Interpretation — Leges posteriores priores contraries abrogant — In case of conflict between two Special Acts, the later one prevails — Interpretation of Statutes — Internal aids — Non obstante clause (Para 11)**

*Bhoruka Steel Ltd.* v. *Fairgrowth Financial Services Ltd.*, (1997) 89 Comp Cas 547 (Special Court), *approved*

*Maharashtra Tubes Ltd.* v. *State Industrial & Investment Corpn. of Maharashtra Ltd.*, (1993) 2 SCC 144; *Sarwan Singh* v. *Kasturi Lal*, (1977) 1 SCC 750 : (1977) 2 SCR 421; *Allahabad Bank* v. *Canara Bank*, (2000) 4 SCC 406; *Ram Narain* v. *Simla Banking & Industrial Co. Ltd.*, AIR 1956 SC 614 : 1956 SCR 603, *referred to*

[**Ed.** : In this context see also (1990) 4 SCC 406]

**Suggested Case Finder Search Text** (*inter alia*) :

(later or latter) prevail* (former or earlier) (statute or interpretation)

B. **Interest — Generally — Where no formal agreement exists, interest, as claimed must be paid, unless refuted at the earliest opportunity — Correspondence on record between appellant, to whom loan was advanced, and respondent lender clearly indicating that respondent had claimed interest at the rate of 21.5% on the higher amount (Rs 50 lakh) and 23% on the lesser amount (two amounts of Rs 25 lakh each) — No document on record showing that appellant had immediately refuted interest claimed — Held, on facts, appellant would be liable to pay interest as claimed (Para 6)**

Appeal dismissed with costs A-M/23747/C

† From the Judgment and Order dated 16-2-1995 of the Special Court, (Trial of Offences Relating to Transactions in Securities) at Bombay, in Misc. P. No. 70 of 1994

Advocates who appeared in this case :

A. Subba Rao and Dr A. Francis Julian, Advocates for Arputham Aruna & Co., Advocates, for the Appellant;

Altaf Ahmed, Additional Solicitor General (T.C. Sharma, P. Parameswaran, Ms Sushma Suri, Shiraz Rustomjee, Mustafa S. Doctor, K. Subba Rao and A.T. Rao, Advocates, with him) for the Respondents.

***Chronological list of cases cited*** ***on page(s)***

1. (2000) 4 SCC 406, *Allahabad Bank* v. *Canara Bank* 73*g*
2. (1997) 89 Comp Cas 547 (Special Court), *Bhoruka Steel Ltd.* v. *Fairgrowth Financial Services Ltd.* 73*g-h*
3. (1993) 2 SCC 144, *Maharashtra Tubes Ltd.* v. *State Industrial & Investment Corpn. of Maharashtra Ltd.* 73*g*
4. (1977) 1 SCC 750 : (1977) 2 SCR 421, *Sarwan Singh* v. *Kasturi Lal* 73*g*
5. AIR 1956 SC 614 : 1956 SCR 603, *Ram Narain* v. *Simla Banking & Industrial Co. Ltd.* 73*g*

The Judgment of the Court was delivered by

**KIRPAL, J.**— The appellant herein on 3-3-1992, 20-3-1992 and 25-3-1992 took a loan of Rs 50 lakhs, Rs 25 lakhs and Rs 25 lakhs respectively from Respondent 1. According to the appellant, the agreement was to repay the loan amount within three years together with interest at 18 per cent per annum.

**2.** Repayment not having been made and Respondent 1 having been notified under Section 3 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 (hereinafter referred to as "the Special Court Act"), proceedings were initiated by the Custodian before the Special Court for the recovery of the said money.

**3.** There was no dispute before the Special Court with regard to the fact that Rs 1 crore had been taken on loan by the appellant. The claim against the appellant before the Special Court was for a sum of Rs 1,57,20,216.24 consisting of principal plus interest. The main contention raised before the Special Court related to the rate of interest. The respondent had claimed interest at the rate of 21.5 per cent on the amount of Rs 50 lakhs and 23 per cent on the two loans of Rs 25 lakhs each. The Special Court came to the conclusion that the appellant herein had been put to notice by the Custodian as far back as 3-6-1993 that if it did not deposit the amount it will become liable to pay interest at a higher rate and the payment had not been made. The Special Court came to the conclusion that the claim of interest made by the respondent was justified. The suit of the respondent was, accordingly, decreed as prayed for along with costs.

**4.** During the pendency of this appeal, a further development had taken place and that is that the appellant has become sick and proceedings are going on under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985.

**5.** It is contended on behalf of the appellant that firstly, the Special Court was not justified in awarding interest in excess of 18 per cent and the second contention was that in view of the special provisions contained in the Sick

Industrial Companies (Special Provisions) Act, 1985 no proceedings should have been initiated or continued under the Special Court Act.

**6.** As far as the question of interest is concerned, it appears that there was no formal agreement which had been entered into between the parties at the time when the loan was advanced in March 1992. The correspondence which has been placed on record, however, clearly indicates that the respondent had claimed interest at the rate of 21.5 per cent on the loan of Rs 50 lakhs first advanced and on the balance amount the claim was of 23 per cent. There is no document on the record to show that the amount of interest claimed was immediately refuted, though it was belatedly refuted by the appellant. We do not find any infirmity in the decision of the Special Court in coming to the conclusion that the appellant was liable to pay the rate of interest as claimed by the respondent.

**7.** Coming to the second question, there is no doubt that the 1985 Act is a special Act. Section 32(1) of the said Act reads as follows:

> "32. *Effect of the Act on other laws.*—(1) The provisions of this Act and of any rules or schemes made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973 (46 of 1973) and the Urban Land (Ceiling and Regulation) Act, 1976 (33 of 1976) for the time being in force or in the Memorandum or Articles of Association of an industrial company or in any other instrument having effect by virtue of any law other than this Act."

**8.** The effect of this provision is that the said Act will have effect notwithstanding anything inconsistent therewith contained in any other law except to the provisions of the Foreign Exchange Regulation Act, 1973 and the Urban Land (Ceiling and Regulation) Act, 1976. A similar non obstante provision is contained in Section 13 of the Special Court Act which reads as follows:

> "13. *Act to have overriding effect.*—The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law, other than this Act, or in any decree or order of any court, tribunal or other authority."

**9.** It is clear that both these Acts are special Acts. This Court has laid down in no uncertain terms that in such an event it is the later Act which must prevail. The decisions cited in the above context are as follows: *Maharashtra Tubes Ltd.* v. *State Industrial & Investment Corpn. of Maharashtra Ltd.*[1]; *Sarwan Singh* v. *Kasturi Lal*[2]; *Allahabad Bank* v. *Canara Bank*[3] and *Ram Narain* v. *Simla Banking & Industrial Co. Ltd.*[4]

**10.** We may notice that the Special Court had in another case dealt with a similar contention. In *Bhoruka Steel Ltd.* v. *Fairgrowth Financial Services*

1 (1993) 2 SCC 144
2 (1977) 1 SCC 750 : (1977) 2 SCR 421
3 (2000) 4 SCC 406
4 AIR 1956 SC 614 : 1956 SCR 603

*Ltd.*[5] it had been contended that recovery proceedings under the Special Court Act should be stayed in view of the provisions of the 1985 Act. Rejecting this contention, the Special Court had come to the conclusion that the Special Court Act being a later enactment would prevail. The headnote which brings out succinctly the ratio of the said decision is as follows:

> "Where there are two special statutes which contain non obstante clauses the later statute must prevail. This is because at the time of enactment of the later statute, the Legislature was aware of the earlier legislation and its non obstante clause. If the Legislature still confers the later enactment with a non obstante clause it means that the Legislature wanted that enactment to prevail. If the Legislature does not want the later enactment to prevail then it could and would provide in the later enactment that the provisions of the earlier enactment continue to apply.
>
> The Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992, provides in Section 13, that its provisions are to prevail over any other Act. Being a later enactment, it would prevail over the Sick Industrial Companies (Special Provisions) Act, 1985. Had the Legislature wanted to exclude the provisions of the Sick Companies Act from the ambit of the said Act, the Legislature would have specifically so provided. The fact that the Legislature did not specifically so provide necessarily means that the Legislature intended that the provisions of the said Act were to prevail even over the provisions of the Sick Companies Act.
>
> Under Section 3 of the 1992 Act, all property of notified persons is to stand attached. Under Section 3(4), it is only the Special Court which can give directions to the Custodian in respect of property of the notified party. Similarly, under Section 11(1), the Special Court can give directions regarding property of a notified party. Under Section 11(2), the Special Court is to distribute the assets of the notified party in the manner set out thereunder. Monies payable to the notified parties are assets of the notified party and are, therefore, assets which stand attached. These are assets which have to be collected by the Special Court for the purposes of distribution under Section 11(2). The distribution can only take place provided the assets are first collected. The whole aim of these provisions is to ensure that monies which are siphoned off from banks and financial institutions into private pockets are returned to the banks and financial institutions. The time and manner of distribution is to be decided by the Special Court only. Under Section 22 of the 1985 Act, recovery proceedings can only be with the consent of the Board for Industrial and Financial Reconstruction or the appellate authority under that Act. The Legislature being aware of the provisions of Section 22 under the 1985 Act still empowered only the Special Court under the 1992 Act to give directions to recover and to distribute the assets of the notified persons in the manner set down under Section 11(2)

5 (1997) 89 Comp Cas 547 (Special Court)

of the 1992 Act. This can only mean that the Legislature wanted the provisions of Section 11(2) of the 1992 Act to prevail over the provisions of any other law including those of the Sick Industrial Companies (Special Provisions) Act, 1985.

It is a settled rule of interpretation that if one construction leads to a conflict, whereas on another construction, two Acts can be harmoniously constructed then the latter must be adopted. If an interpretation is given that the Sick Industrial Companies (Special Provisions) Act, 1985, is to prevail then there would be a clear conflict. However, there would be no conflict if it is held that the 1992 Act is to prevail. On such an interpretation the objects of both would be fulfilled and there would be no conflict. It is clear that the Legislature intended that public monies should be recovered first even from sick companies. Provided the sick company was in a position to first pay back the public money, there would be no difficulty in reconstruction. The Board for Industrial and Financial Reconstruction whilst considering a scheme for reconstruction has to keep in mind the fact that it is to be paid off or directed by the Special Court. The Special Court can, if it is convinced, grant time or instalments.

There can, therefore, be no stay of any proceedings for recovery against a sick company so far as the Special Court under the 1992 Act is concerned."

**11.** We are in agreement with the aforesaid decision of the case, more so when we find that whenever the legislature wishes to do so it makes appropriate provisions in the Act in that behalf. Mr Shiraz Rustomjee has drawn our attention to Section 34 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 wherein after giving an overriding effect to the 1993 Act it is specifically provided that the said Act will be in addition to and not in derogation of a number of other Acts including the 1985 Act. Similarly under Section 32 of the 1985 Act the applicability of the Foreign Exchange Regulation Act and the Urban Land (Ceiling and Regulation) Act is not excluded. It is clear that in the instant case there was no intention of the legislature to permit the 1985 Act to apply, notwithstanding the fact that proceedings in respect of a company may be going on before the BIFR. The 1992 Act is to have an overriding effect notwithstanding any provision to the contrary in another Act.

**12.** For the aforesaid reasons, we do not find any merit in this appeal. The appeal is dismissed with costs.