BEFORE THE NATIONAL GREEN TRIBUNAL

WESTERN ZONE BENCH, PUNE

[I.A. No. 32/2022 & I.A. No. 33/2022 (WZ)]

IN

Original Application No. 32/2022 (WZ)

Colaba Koliwada Jamshed Ji Bunder Samaj

Swansea Maryadit …Applicants

Versus

MoEF&CC & Ors. …Respondents

COMPILATION OF JUDGMENTS AND RELEVANT DOCUMENTS

VOL I

Sr No	Particulars	Page No
1.	***Federation of Rainbow Warriors v Union of India*** **PIL 19/2019** 1. Statement was made by the counsel of the MoEFCC that the Issue of Limitation would not be raised by the MoEFCC before the NGT in matters challenging the validity of the CRZ Notification of 2019, and the Hon'ble Bombay High Court directed the Hon'ble Tribunal to hear the Application on merits without raising the issue with respect to Limitation. **[Para 7 and Para 8]**	999-1006
2.	***Vanashakti and Anr v Union of India*** **SLP (C) 20495/2021** 1. Petitioners whose Public Interest Litigation Petition was dismissed by the Hon'ble Bombay High Court on the same date that the present Applicants withdrew their Petition before the Hon'ble High Court had their delay condoned by the Hon'ble Supreme Court	1007-1008

3.	***Sridevi Datla v Union of India* (2021) 5 SCC 321.** 1. Nature of legal, scientific and technical support required to access the NGT is complicated, and the application of judicial mind by the Hon'ble Tribunal at the first appellate stage is almost a necessity in matters of substantial environmental damage which can irrevocably change the environment - **Para 30**	1009-1024
4.	***Jaya Mathachan v. Ministry of Environment, Forests and Climate Change* 2021 SCC OnLine NGT 1024** 1. Period of delay must be construed liberally and if found to be not deliberate or wilful, the Court may condone - **Para 13, 18, 19**	1025-1028
5.	***Dyaneshwar Vishnu Shegde v. Union of India and Ors.* 2012 SCC OnLine NGT 80** 1. Approach of the Tribunal should be liberal and not 'hyper-technical' - **Para 10-14**	1029-1031
6.	***Ram Nath Sao v. Gobardhan Sao and Ors.* (2002) 3 SCC 195** 1. Tribunal should take a liberal approach while interpreting the term 'sufficient cause' when condoning delay - **Para 12**	1033-1040
7.	***Padmabati Mohapatra, W/o Sri Ras Bihari Mohapatra v. Union of India and Ors.* [2013 SCC OnLine NGT 98]** 1. If the opposite party fails to discharge its obligations in law to communicate the Order to the opposite party, the limitation period cannot be reckoned, and the bar of limitation does not apply - **Para 20 and 21**	1041-1046

8.	***In re: Cognizance for Extension of Limitation*** 1. Blanket extension on limitation due to Covid-19 - **Para 1,2**	1047-1054
9.	***Municipal corporation of Greater Mumbai v. Ankita Sinha and Ors.*** **Civil Appeal No. 86/2019** 1. Jurisdiction and mandate of the NGT is conceived to be of the widest amplitude [27,40, 54,57,58,79 96,] 2. The Hon'ble NGT is a sui generis body and can prescribe its own procedure**[Para 23, 63-67]**	1055-1078
10.	***Vellore Citizens' Welfare Forum v. UOI*** **1996 AIR 2715** 1. Principle of Sustainable Development recognised and enunciated **Para 10-15**	1079-1102
11.	***Dr. Avinash Ramkrishna Kashiwar v. State of Maharashtra*** **(2015) 5 Mh.L.J. 830** 1. Requirement of previous publication inviting objections and suggestions is not an empty formality - **Para 17**	1103-1113
12.	***State of Tamil Nadu v. P Krishnamurthy*** **(2006) 4 SCC 517** 1. Validity of a subordinate legislation is decided by considering the nature, object and scheme of the enabling act. - **Para 22 and 27**	1114-1134
13.	***Cellular Operators Association of India vs. Telecom Regulatory Authority of India and Ors.*** **(2016) 7 SCC 703** 1. Parameters for challenging subordinate legislation were explained by the Hon'ble Supreme Court - **Para 34**	1135-1192

14.	***Indian Council for Enviro-Legal Action vs. Union of India and Ors.*** **(1996) 5 SCC 281** 1. Amendment to the NDZ struck down for being in violation to the EPA, 1986- **Para 43-44, 47**	1193-1216

Maria S.

IN THE HIGH COURT OF BOMBAY AT GOA

PUBLIC INTEREST LITIGATION WRIT PETITION NO.21 OF 2018
WITH
PUBLIC INTEREST LITIGATION WRIT PETITION NO.18 OF 2019
WITH
PUBLIC INTEREST LITIGATION WRIT PETITION NO.19 OF 2019
WITH
STAMP NUMBER (MAIN) NO.2322 OF 2019(FILING)
WITH
PUBLIC INTEREST LITIGATION WRIT PETITION NO.21 OF 2019
WITH
PUBLIC INTEREST LITIGATION WRIT PETITION NO.22 OF 2018

PUBLIC INTEREST LITIGATION WRIT PETITION NO.21 OF 2018

Kashinath Jairam Shetye And 8 Ors. ...Petitioners

Versus

Union of India, thr. Jt. Secretary, Ritesh Kumar Singh And Anr. ... Respondents

Petitioner in person.

Mr Raviraj Chodankar, Standing Counsel *for Respondent No.1.*

Mr Devidas J. Pangam, Advocate General *with* **Ms Maria S. J. Correia, Additional Government Advocate** *for Respondent State.*

WITH

PUBLIC INTEREST LITIGATION WRIT PETITION NO.18 OF 2019

Kashinath Jairam Shetye And 7 Ors. ...Petitioners

Versus

Union of India, thr. Director MOEF, New Delhi And 2 ors. ... Respondents

Petitioner in person.

Mr Raviraj Chodankar, Standing Counsel *for Respondent No.1.*

Mr Devidas J. Pangam, Advocate General *with* **Ms Maria S. J. Correia, Additional Government Advocate** *for Respondent State.*

WITH

PUBLIC INTEREST LITIGATION WRIT PETITION NO.19 OF 2019

Federation of Rainbow Warriors, thr. Its Secretary, David Rodrigues And 2 Ors. ...Petitioners

Versus

Union of India, thr. The Secretary, Ministry of Environment, New Delhi And Anr. ... Respondents

Ms Maria Caroline Collasso, Advocate *for the Petitioner No.1.*

Mr Raviraj Chodankar, Standing Counsel *for Respondent No.1.*

Mr. Devidas J. Pangam, Advocate General *with* **Mr Suhas Parab, Additional Government Advocate** *for Respondent State.*

WITH
STAMP NUMBER (MAIN) NO.2322 OF 2019 (FILING)

Old Cross Fishing Canoe Owners Co-op. Society Ltd., thr. Its President, Custodio D'Souza And 3 Ors. … Petitioners

Versus

Ministry of Environment, Forests And Climate Change, thr. its Secretary, New Delhi And Anr. ... Respondents

Mr Raviraj Chodankar, Standing Counsel *for Respondent No.1.*

Mr. Devidas J. Pangam, Advocate General *with* **Ms Sulekha Kamat, Additional Government Advocate** *for Respondent State.*

WITH
PUBLIC INTEREST LITIGATION WRIT PETITION NO.21 OF 2019

The Goa Foundation, thr. Its Secretary Dr. Claude Alvares And Anr. … Petitioners

Versus

Ministry of Environment, Forests And Climate Change, thr. its Secretary And Anr. ... Respondents

Ms Norma Alvares *and* **Mr Om D'Costa, Advocates** *for the Petitioner.*

Mr Raviraj Chodankar, Standing Counsel *for Respondent No.1.*

Mr. Devidas J. Pangam, Advocate General *with* **Mr Geetesh Shetye, Additional Government Advocate** *for Respondent State.*

WITH
PUBLIC INTEREST LITIGATION WRIT PETITION NO.*22* OF 2018

Kashinath Jairam Shetye And 8 Ors. … Petitioners

Versus

Union of India, thr. Jt. Secretary, Ritesh Kumar Singh And Anr. ... Respondents

Petitioner in person.

Mr Raviraj Chodankar, Standing Counsel *for Respondent No.1.*

Mr Devidas J. Pangam, Advocate General *with* **Mr Shubham Priolkar, Additional Government Advocate** *for Respondent State.*

CORAM: M. S. SONAK &
BHARAT P. DESHPANDE,JJ.

DATED : 3rd January, 2023

ORAL ORDER:

Heard learned counsel for the parties, learned Advocate General for the State and Mr Chodankar, learned Standing Counsel for the Central Government.

2. In all these petitions, the challenge is to certain provisions of the CRZ Notification, 2019. In the petitions instituted by Mr Kashinath Shetye, he has challenged further notifications issued under the Environment Protection Act, 1986.

3. A coordinate Bench of this Court in the case of ***Vanashakti & Anr. v/s. Union of India & Ors.***[1] has held that such petitions need not be entertained by the High Court because the petitioners have an alternate and efficacious remedy before the National Green Tribunal.

4. The decision in **Vanashakti** (supra) was challenged before the Hon'ble Supreme Court by instituting the petition for Special Leave to Appeal (C) No.20495 of 2021. On 03.08.2022, we had made it clear that we would await the decision of the Hon'ble Supreme Court in the said SLP and only after that, decide whether these petitions should be entertained or whether the petitioners should be relegated to avail of the alternate remedy before the National Green Tribunal.

5. The Hon'ble Supreme Court disposed of the above SLP on 30.09.2022 by making the following Order:

> *'In the facts and circumstances of the case, the High Court has rightly relegated the petitioners to approach the National Green Tribunal (NGT) as number of technical issues arise which can very well be dealt with by the NGT are involved. Therefore, it is appropriate that the petitioners approach the NGT,*

1 2021 0 Supreme (Bom) 368

as observed by the High Court. The Special Leave Petition stands dismissed.

However, it is observed that if the petitioners approach the NGT within a period of four weeks from today, the proceedings be considering in accordance with law and on its own merits without raising the issue with respect to limitation.

All the contentions and defences which may be available to the respective parties are kept open to be considered by the NGT in accordance with law and on its own merits.

Pending application(s), if any, stand disposed of.'

6. Therefore, consistent with the above order, we dispose of these petitions by relegating the petitioners to avail of the alternate remedy before the National Green Tribunal.

7. Some of the petitioners, including, in particular, Mr Kashinath Shetye, expressed apprehension on the issue of limitation. Mr Chodankar, learned Standing Counsel for the Central Government made it clear that if the petitioners indeed approach the NGT within 4 weeks from today, the issue of limitation will not be raised. This statement is entirely consistent with the directions of the Hon'ble Supreme Court in its order dated 30.09.2022 disposing of the above SLP.

8. Even otherwise, all these petitioners, were bonafidely pursuing their petitions before this Court. The issue of alternate remedy was also pending before the Hon'ble Supreme Court in the challenge against the decision in **Vanashakti** (supra). Therefore, consistent with the order made by the Hon'ble Supreme Court, we also observe that in case the petitioners approach the NGT within 4 weeks from today, the proceedings they institute will be considered in accordance with law and on their own merits without raising the issue with respect to limitation. Further, all contentions of all parties are expressly left open because we have not examined the merits and these petitions are being disposed of only by relegating the petitioners to avail of the alternate remedy available before the NGT.

9. All these petitions are, therefore, disposed of by granting the petitioners liberty to approach the NGT. If the petitioners indeed approach the NGT within 4 weeks from today, the proceedings they institute be considered in accordance with law and on their own merits without raising the issue with respect to limitation. The statement of Mr Chodankar, learned Standing Counsel for Central Government in this regard is also noted and accepted.

10. The petitions are disposed of in the above terms without any order for costs.

BHARAT P. DESHPANDE, J. **M. S. SONAK, J.**

MARIA SUZANA REBELLO
Digitally signed by MARIA SUZANA REBELLO
Date: 2023.01.04 10:27:11 +0530

ITEM NO.47 COURT NO.7 SECTION IX

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition for Special Leave to Appeal (C) No. 20495/2021
(Arising out of impugned final judgment and order dated 08-10-2021 in PIL No. 28/2021 passed by the High Court of Judicature at Bombay)

VANASHAKTI & ANR. Petitioner(s)

VERSUS

UNION OF INDIA & ORS. Respondent(s)

(IA No. 163051/2021 - EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT)

Date : 30-09-2022 These matters were called on for hearing today.

CORAM : HON'BLE MR. JUSTICE M.R. SHAH
HON'BLE MR. JUSTICE KRISHNA MURARI

For Petitioner(s) Mr. Santosh Paul, Sr. Adv.
Mr. Zaman Ali, Adv
Mr. A. Karthik, AOR
Mr. Sriharsh N Bundela, Adv.
Mr. Maithrya Shetty, Adv.
Mr. Arsh Khan, Adv
Mr. Vedant Mishra, Adv.
Mr. Akshay Kumar, Adv. .

For Respondent(s) Mr. Tushar Mehta, SG
Ms. Aishwarya Bhati, ASG
Ms. Swarupama Chaturvedi Adv
Ms. Swati Ghildiyal Adv
Ms. Ruchi Kohli Adv
Ms. Shagun Thakur, Adv.
Ms. Srishti Mishra, Adv.
Mr. G.S Makker , AOR

Mr. Nachiketa Joshi, Adv.
Mr. Sidharth Dharamadhikari, Adv.
Mr. Aaditya Pande, Adv.

UPON hearing the counsel the Court made the following

O R D E R

In the facts and circumstances of the case, the High Court has rightly relegated the petitioners to approach the National Green Tribunal (NGT) as number of technical issues arise which can very well be dealt with by the NGT are involved.

contd..

Therefore, it is appropriate that the petitioners approach the NGT, as observed by the High Court. The Special Leave Petition stands dismissed.

However, it is observed that if the petitioners approach the NGT within a period of four weeks from today, the proceedings be considering in accordance with law and on its own merits without raising the issue with respect to limitation.

All the contentions and defences which may be available to the respective parties are kept open to be considered by the NGT in accordance with law and on its own merits.

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

(NEETU SACHDEVA)
ASTT. REGISTRAR-cum-PS

(NISHA TRIPATHI)
ASSISTANT REGISTRAR

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 1 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

(2021) 5 Supreme Court Cases 321

2J

(BEFORE L. NAGESWARA RAO AND S. RAVINDRA BHAT, JJ.)

SRIDEVI DATLA .. Appellant;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Civil Appeal No. 3136 of 2020†, decided on March 2, 2021

A. **Environment Law — National Green Tribunal Act, 2010 — S. 16 proviso — Appeal — Delay — Condonation of — NGT's refusal to exercise discretion — "Sufficient cause" not construed liberally by NGT — Legality — Environmental clearance for construction of greenfield international airport — Held an appeal to NGT in such matters is no ordinary matter — It has potential of irrevocably changing environment with possibility of likely injury — Application of judicial mind by an independent tribunal in such cases, at first appellate stage, is almost a necessity**

— Documentation attendant to clearance granted to project applicant was voluminous, and expert as well as professional legal advice of kind necessary to approach NGT was not available in State of A.P. — Thus, procuring of relevant documents, and correspondence with counsel in Delhi and drafting of appeal entailed some delay — Given the mandate of NGT Act, exercise of discretion, as was done in present case, to reject appeal by dismissing application for condonation of delay, on ground that no sufficient cause was shown, was erroneous and based on a narrow reading of law

B. **Limitation Act, 1963 — S. 29(2) — Express exclusion of Limitation Act, by special law — If a mandatory requirement — Import of words "expressly excluded" in S. 29(2) — Held, provisions of Limitation Act are inapplicable in appeal under S. 16 of the NGT Act**

— National Green Tribunal Act, 2010 — S. 16 — Appeal — Delay condonation — Inapplicability of Limitation Act — Words and Phrases — "Expressly excluded"

C. **Statute Law — General Clauses Act, 1897 — S. 10 — Object and applicability — For S. 10 of the 1897 Act to apply, therefore, all that is requisite is that there should be a period prescribed, and that period should expire on a holiday — Held, S. 10 of the 1897 Act applies proprio vigore to all appeals filed under NGT Act**

— Object of S. 10 is to enable a person to do what he could have done on a holiday — Where a period is prescribed for performance of an act in a court or office, and that period expires on a holiday, then according to S. 10 of the 1897 Act, act in question should be considered to have been done within that period, if it is done on next day on which court or office is open — National Green Tribunal Act, 2010 — S. 16 — Appeal — Delay condonation — Applicability of S. 10 of the General Clauses Act

† Arising from the Judgment and Order in *Sridevi Datla* v. *Union of India*, 2020 SCC OnLine NGT 870 (National Green Tribunal, MA No. 231 of 2017, dt. 31-7-2020)

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 2 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

D. **Limitation Act, 1963 — S. 5 — Expression "sufficient cause" — Held, must receive a liberal construction so as to advance substantial justice — Generally, delays in preferring appeals are required to be condoned in interest of justice where no gross negligence or deliberate inaction or lack of bona fides is imputable to party seeking condonation of delay — National Green Tribunal Act, 2010, S. 16 proviso**

E. **Limitation Act, 1963 — S. 5 — Sufficient cause — There cannot be a universal formula to judge whether sufficient cause has, or has not been shown and the exercise is necessarily fact specific — Adoption of a strict standard of proof sometimes fails to protect public justice and it may result in public mischief — National Green Tribunal Act, 2010, S. 16 proviso**

F. **Limitation Act, 1963 — S. 5 — Delay condonation — Sufficient cause — In cases where delay is inordinate, consideration of prejudice to other side will be a relevant factor while condoning delay — However, in cases where delay is of few days, no such consideration arises — Court, equally should be sensitive to fact that successful litigant has acquired certain rights on basis of judgment under challenge and a lot of time is consumed at various stages of litigation apart from cost — Term "sufficient cause" is relative, fact dependent, and has many hues, largely deriving colour from facts of each case, and behaviour of litigant who seeks condonation of delay (in approaching the court) — However, what can broadly be said to be universally accepted is that in principle, applicant must display bona fides, should not have been negligent, and delay occasioned should not be such that condoning it would seriously prejudice other party — National Green Tribunal Act, 2010, S. 16 proviso**

G. **Environment Law — National Green Tribunal Act, 2010 — Ss. 22, 14, 15 and 16 — State's power to alienate publicly available resources like ponds — Held, such transfer or alienation is impermissible**

H. **Environment Law — National Green Tribunal Act, 2010 — Ss. 16 and 20 — Duties of NGT and proper exercise of power — NGT is under an obligation to consider issues as an expert body, and apply principle of sustainable development, in adjudicating environmental issues, especially while considering validity of grant of clearance to large projects under Environment (Protection) Act, 1986**

I. **Environment Law — National Green Tribunal Act, 2010 — Ss. 14 to 18 — Locus standi/Standing to approach NGT — Held, there is nothing in the NGT Act which excludes parties who would be directly affected by a project that has environmental repercussions, from accessing NGT**

Fifth respondent (project applicant) proposed the construction of a new greenfield international airport. As was required by law and extant statutory notifications, it applied to the Ministry of Environment, Forests and Climate Change (MoEF) to seek environmental clearance. MoEF, after following the prescribed procedure, which included ascertaining the views and objections of the parties concerned, the general public, etc. indicated its approval by an order dated 14-8-2017. In terms of Section 19 of the NGT Act, the approval was posted on the website of MoEF on 14-8-2017. Concededly, the project applicant published the approval in an English daily on 13-9-2017.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 3 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

The appellant preferred her appeal to NGT. Along with the appeal, she preferred an application for condonation of delay in approaching NGT, given the stipulation of Section 19 of the NGT Act that the appeal had to be preferred within 30 days from the date of communication of the order impugned. She explained that since the clearance and related documents were voluminous and the matter required some technical expertise, requiring the papers to be forwarded to experts and lawyers in Delhi, and the inter se communication delay, NGT needed to condone the delay, in the interests of justice. After considering the submissions made by the appellant as well as the project applicant, which opposed the application for condonation of delay, NGT, by its impugned order, rejected the appellant's application and consequently the appeal before the Supreme Court.

It was contended by the appellant that NGT's opinion that sufficient cause was not shown while seeking condonation of delay is erroneous. Any proposal as well as clearances where voluminous documentation is involved, or if any individual or entity is aggrieved, or adversely affected, the only remedy provided is by way of an appeal. To substantiate the grounds of appeal, it would be essential that in many instances, expert advice is obtained based on which the grounds of appeal can be prepared and urged. If the issue were to be considered in this perspective, the explanation provided by the appellant in her application seeking condonation of delay could not be considered unreasonable and in fact amounts to sufficient cause.

The Union of India contended that in terms of the Environment Impact Assessment Notification, 2006, the clearance had to be published within seven days from the date of uploading on the website of MoEF. The publication of environment clearance dated 14-8-2017 was done on 21-8-2017. Thus, the appellant's plea that she came to know of the environmental clearance on 24-8-2017 is baseless.

The project applicant contended that the project concerned has been conceived in public interest and in replacement of the existing airport which is primarily a defence airport. It was further contended that any aggrieved litigant should be vigilant in the exercise of his rights and that he cannot claim the exercise of discretion for condoning any delay as a matter of right.

The issue for determination before the Supreme Court was: whether the approach to the issue of limitation by NGT was correct, and whether on a correct interpretation of law, the appeal under Section 16 of the NGT Act was filed within the 90 days period, in the facts of the present case.

Allowing the appeal, the Supreme Court

Held :

The State has no power to alienate publicly available resources like ponds, etc. (Para 16)

NGT is under an obligation to consider issues as an expert body, and apply the principle of sustainable development, in adjudicating environmental issues, especially while considering the validity of grant of clearance to large projects under Environment (Protection) Act, 1986. (Para 16)

Jitendra Singh v. *Ministry of Environment*, (2020) 20 SCC 581 : 2019 SCC OnLine SC 1510; *Hanuman Laxman Aroskar* v. *Union of India*, (2019) 15 SCC 401, *relied on*

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 4 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Where periods of limitation are prescribed under special laws, appeals that exceed the period granted and are within the extended period of limitation in the special law, can be entertained at the discretion of the tribunal, or court concerned and the Limitation Act would not apply upon expiry of such extended period. Provisions of the Limitation Act are inapplicable in appeal under Section 16 of the NGT Act. (Para 19)

Kaushalya Rani v. *Gopal Singh*, (1964) 4 SCR 982 : AIR 1964 SC 260 : (1964) 1 Cri LJ 152; *CCE* v. *Hongo (India) (P) Ltd.*, (2009) 5 SCC 791; *Union of India* v. *Popular Construction Co.* (2001) 8 SCC 470; *Patel Bros.* v. *State of Assam*, (2017) 2 SCC 350 : (2017) 1 SCC (Civ) 658, *followed*

Object of Section 10 of the General Clauses Act, 1897 is to enable a person to do what he could have done on a holiday. Where a period is prescribed for performance of an act in a court or office, and that period expires on a holiday, then according to Section 10 of the 1897 Act should be considered to have been done within that period, if it is done on next day on which court or office is open. For Section 10 of the 1897 Act to apply, therefore, all that is requisite is that there should be a period prescribed, and that period should expire on a holiday. (Para 21)

Harinder Singh v. *S. Karnail Singh*, 1957 SCR 208 : AIR 1957 SC 271; *Manohar Joshi* v. *Nitin Bhaurao Patil*, (1996) 1 SCC 169; *Mohd. Ayub* v. *State of U.P.*, (2009) 17 SCC 70 : (2011) 1 SCC (L&S) 580, *followed*

There is no indication in the NGT Act that Section 10 of the General Clauses Act cannot be applied. It is, therefore, held that the provision applies proprio vigore to all appeals filed under the NGT Act. (Para 22)

The expression "sufficient cause" in Section 5 of the Limitation Act must receive a liberal construction so as to advance substantial justice and generally delays in preferring appeals are required to be condoned in the interest of justice where no gross negligence or deliberate inaction or lack of bona fides is imputable to the party seeking condonation of the delay. (Para 24)

G. Ramegowda v. *LAO*, (1988) 2 SCC 142, *followed*

Ramlal v. *Rewa Coalfields Ltd.*, (1962) 2 SCR 762 : AIR 1962 SC 361; *Shakuntala Devi Jain* v. *Kuntal Kumari*, (1969) 1 SCR 1006 : AIR 1969 SC 575; *Concord of India Insurance Co. Ltd.* v. *Nirmala Devi*, (1979) 4 SCC 365 : 1979 SCC (Cri) 996; *Mata Din* v. *Narayanan*, (1969) 2 SCC 770; *LAO* v. *Katiji*, (1987) 2 SCC 107 : 1989 SCC (Tax) 172, *relied on*

Adoption of a strict standard of proof sometimes fails to protect public justice and it may result in public mischief. There cannot be a universal formula to judge whether sufficient cause has, or has not been shown and the exercise is necessarily fact specific. (Para 25)

Esha Bhattacharjee v. *Raghunathpur Nafar Academy*, (2013) 12 SCC 649 : (2014) 1 SCC (Civ) 713 : (2014) 4 SCC (Cri) 450 : (2014) 2 SCC (L&S) 595; *Improvement Trust* v. *Ujagar Singh*, (2010) 6 SCC 786 : (2010) 2 SCC (Civ) 798, *followed*

State of Nagaland v. *Lipok Ao*, (2005) 3 SCC 752 : 2005 SCC (Cri) 906; *New India Insurance Co. Ltd.* v. *Shanti Misra*, (1975) 2 SCC 840; *N. Balakrishnan* v. *M. Krishnamurthy*, (1998) 7 SCC 123; *State of Haryana* v. *Chandra Mani*, (1996) 3 SCC 132; *LAO* v. *K.V. Ayisumma*, (1996) 10 SCC 634, *relied on*

A distinction can be underlined between a case where the delay is inordinate, and a case where the delay is of few days and that in the former case the consideration of prejudice to the other side will be a relevant factor; in the latter case, no such consideration arises. After noticing that a liberal and justice-oriented

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 5 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

approach needs to be taken, it was stated that the court, equally should be sensitive to the fact that "the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost". (Para 27)

Maniben Devraj Shah v. *Municipal Corpn. of Brihan Mumbai*, (2012) 5 SCC 157 : (2012) 3 SCC (Civ) 24, *followed*

Thus, it is evident that the term sufficient cause is relative, fact dependent, and has many hues, largely deriving colour from the facts of each case, and the behaviour of the litigant who seeks condonation of delay (in approaching the court). However, what can broadly be said to be universally accepted is that in principle, the applicant must display bona fides, should not have been negligent, and the delay occasioned should not be such that condoning it would seriously prejudice the other party. (Para 28)

The appellant pleaded that since the documentation attendant to the clearance granted to the project applicant was voluminous, and expert as well as professional legal advice of the kind necessary to approach NGT was not available in the State of Andhra Pradesh, the procuring of relevant documents, and correspondence with counsel in Delhi and drafting of the appeal entailed some delay. (Para 29)

There is merit in the appellant's argument. The respondents, especially, the project applicant, had urged that the appellant is an interested party, and cannot be called a public-spirited citizen, because she had opposed acquisition of land for the airport and therefore, was able to access legal advice at the High Court stage. There is nothing in the NGT Act which excludes parties who would be directly affected by a project that has environmental repercussions, from accessing the tribunal (NGT). Likewise, characterising the nature of legal advice that can be accessed for challenging land acquisition, as similar to a challenge to environmental clearance which involves application of mind to technical issues in a detailed manner, would be unfair and simplistic. Scientific or technical support — apart from expert professional legal advice is necessary, if NGT were to be approached. In these circumstances, given the mandate of the NGT Act, the exercise of discretion, as was done in this case, to reject the appeal by dismissing the application for condonation of delay, on the ground that no sufficient cause was shown, was erroneous and based on a narrow reading of the law. An appeal to NGT in such matters is no ordinary matter; it has the potential of irrevocably changing the environment with the possibility of likely injury. Application of judicial mind by an independent tribunal in such cases, at the first appellate stage, is almost a necessity. (Para 30)

The delay in filing the appeal before NGT is hereby condoned. The appeal is allowed. (Para 31)

Sridevi Datla v. *Union of India*, 2020 SCC OnLine NGT 870, *reversed*

Padmabati Mohapatra v. *Union of India*, 2013 SCC OnLine NGT 2177; *Rambir Narhargir Gosai* v. *Prabhakar Bhaskar Gadhaway*, 1954 SCC OnLine MP 46 : AIR 1955 Nag 300; *Save Mon Region Federation* v. *Union of India*, 2013 SCC OnLine NGT 2511; *H. Dohil Constructions Co. (P) Ltd.* v. *Nahar Exports Ltd.*, (2015) 1 SCC 680 : (2015) 1 SCC (Civ) 646; *DSR Steel (P) Ltd.* v. *State of Rajasthan*, (2012) 6 SCC 782 : (2012) 3 SCC (Civ) 1034, *cited*

RM-D/67551/C

SCC ONLINE True Print
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 6 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Advocates who appeared in this case :

Ms Anitha Shenoy, Senior Advocate, for the Appellant;

K.M. Nataraj, Additional Solicitor General and Mukul Rohatgi, Senior Advocate, for the Respondents.

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

1. (2020) 20 SCC 581 : 2019 SCC OnLine SC 1510, *Jitendra Singh* v. *Ministry of Environment* 331*g*
2. 2020 SCC OnLine NGT 870, *Sridevi Datla* v. *Union of India* **(reversed)** 327*a*, 327*e-f*, 328*f*, 328*f-g*, 336*e*
3. (2019) 15 SCC 401, *Hanuman Laxman Aroskar* v. *Union of India* 331*g-h*, 332*a-b*, 332*c-d*
4. (2017) 2 SCC 350 : (2017) 1 SCC (Civ) 658, *Patel Bros.* v. *State of Assam* 333*a*
5. (2015) 1 SCC 680 : (2015) 1 SCC (Civ) 646, *H. Dohil Constructions Co. (P) Ltd.* v. *Nahar Exports Ltd.* 329*e*
6. (2013) 12 SCC 649 : (2014) 1 SCC (Civ) 713 : (2014) 4 SCC (Cri) 450 : (2014) 2 SCC (L&S) 595, *Esha Bhattacharjee* v. *Raghunathpur Nafar Academy* 334*f*
7. 2013 SCC OnLine NGT 2511, *Save Mon Region Federation* v. *Union of India* 329*b-c*
8. 2013 SCC OnLine NGT 2177, *Padmabati Mohapatra* v. *Union of India* 328*e-f*
9. (2012) 6 SCC 782 : (2012) 3 SCC (Civ) 1034, *DSR Steel (P) Ltd.* v. *State of Rajasthan* 329*e-f*
10. (2012) 5 SCC 157 : (2012) 3 SCC (Civ) 24, *Maniben Devraj Shah* v. *Municipal Corpn. of Brihan Mumbai* 335*c*
11. (2010) 6 SCC 786 : (2010) 2 SCC (Civ) 798, *Improvement Trust* v. *Ujagar Singh* 335*a*
12. (2009) 17 SCC 70 : (2011) 1 SCC (L&S) 580, *Mohd. Ayub* v. *State of U.P.* 334*a*
13. (2009) 5 SCC 791, *CCE* v. *Hongo (India) (P) Ltd.* 333*a*
14. (2005) 3 SCC 752 : 2005 SCC (Cri) 906, *State of Nagaland* v. *Lipok Ao* 334*f*
15. (2001) 8 SCC 470, *Union of India* v. *Popular Construction Co.* 333*a*
16. (1998) 7 SCC 123, *N. Balakrishnan* v. *M. Krishnamurthy* 334*f*
17. (1996) 10 SCC 634, *LAO* v. *K.V. Ayisumma* 334*f*
18. (1996) 3 SCC 132, *State of Haryana* v. *Chandra Mani* 334*f*
19. (1996) 1 SCC 169, *Manohar Joshi* v. *Nitin Bhaurao Patil* 334*a*
20. (1988) 2 SCC 142, *G. Ramegowda* v. *LAO* 334*b-c*
21. (1987) 2 SCC 107 : 1989 SCC (Tax) 172, *LAO* v. *Katiji* 334*d*
22. (1979) 4 SCC 365 : 1979 SCC (Cri) 996, *Concord of India Insurance Co. Ltd.* v. *Nirmala Devi* 334*d*
23. (1975) 2 SCC 840, *New India Insurance Co. Ltd.* v. *Shanti Misra* 334*f*
24. (1969) 2 SCC 770, *Mata Din* v. *Narayanan* 334*d*
25. (1969) 1 SCR 1006 : AIR 1969 SC 575, *Shakuntala Devi Jain* v. *Kuntal Kumari* 334*c-d*
26. (1964) 4 SCR 982 : AIR 1964 SC 260 : (1964) 1 Cri LJ 152, *Kaushalya Rani* v. *Gopal Singh* 333*a*
27. (1962) 2 SCR 762 : AIR 1962 SC 361, *Ramlal* v. *Rewa Coalfields Ltd.* 334*c-d*
28. 1957 SCR 208 : AIR 1957 SC 271, *Harinder Singh* v. *S. Karnail Singh* 333*d*
29. 1954 SCC OnLine MP 46 : AIR 1955 Nag 300, *Rambir Narhargir Gosai* v. *Prabhakar Bhaskar Gadhaway* 328*f*

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 7 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

The Judgment of the Court was delivered by

S. RAVINDRA BHAT, J.— The appellant is aggrieved by an order[1] of the National Green Tribunal (hereafter referred to as "NGT"[2]) and has, therefore, approached this Court under Section 22 of the NGT Act. NGT rejected her appeal, preferred to it against the environmental clearance for construction of Greenfield International Airport, Bhogapuram, Visakhapatnam, which had been sought for by the fifth respondent.

2. The facts are simple: the fifth respondent (hereafter called "the project applicant") proposed the construction of a new greenfield international airport. As was required by law and extant statutory notifications, it applied to the Ministry of Environment, Forests and Climate Change (hereinafter, the "MoEF") to seek environmental clearance. MoEF, after following the prescribed procedure, which included ascertaining the views and objections of the parties concerned, the general public, etc. indicated its approval by an order dated 14-8-2017. In terms of Section 19 of the NGT Act, the approval was posted on the website of MoEF on 14-8-2017. Concededly, the project applicant published the approval in an English daily on 13-9-2017.

3. The appellant preferred her appeal to NGT on 13-11-2017. Along with the appeal, she preferred an application for condonation of delay in approaching NGT, given the stipulation of Section 19 that the appeal had to be preferred within 30 days from the date of communication of the order impugned. She explained that since the clearance and related documents were voluminous and the matter required some technical expertise, requiring the papers to be forwarded to experts and lawyers in Delhi, and the inter se communication delay, NGT needed to condone the delay, in the interests of justice. After considering the submissions made by the appellant as well as the project applicant, which opposed the application for condonation of delay, NGT, by its impugned order[1], rejected the appellant's application and consequently the appeal as well.

4. The appellant's arguments before this Court are mainly twofold: that the requirement of Section 16 is to "*communicate the order to the parties concerned as well as the public and that a meaningful interpretation should be given to the provision*". It was emphasised in this context that communication means not merely the publication on the Central Government's website, but also dissemination of the news or the decision to the affected parties. The learned Senior Counsel for the appellant Ms Anitha Shenoy, in this context, relied upon the terms contained in the environmental clearance/approval given by MoEF, especially those which obliged the project applicant to intimate the decision in dailies having local circulation in the vernacular. She also relied upon the stipulations in the environmental clearance ("EC") which prescribed that the successful project applicant had to, in continuation to so publishing the decision or intimation in local newspapers, also ensure that the decision was forwarded to local communities through the panchayats, etc. for dissemination.

1 *Sridevi Datla* v. *Union of India*, 2020 SCC OnLine NGT 870
2 Dated 31-7-2020

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 8 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

5. It was pointed out that the object of these conditions should be construed as part of a larger scheme of the Act to communicate every decision. The appellant argued that if a contrary interpretation were to be accepted, the appeal given by the statute would be meaningless as most often, large projects which involve either displacement of people or which affect habitats and have the tendency to damage or at least cause significant adverse impact upon the environment would not be considered on its merits by NGT since people and neighbourhoods cannot be presumed to have knowledge of deliberations in New Delhi.

6. It was also argued on behalf of the appellant that in the circumstances of the present case, at least the appeal could not be said to be time-barred. It was argued that the date for reckoning (limitation) is from 14-8-2017, when MoEF uploaded the decision on its website. The ninety-day period within which appeal was to be filed, expired on 12-11-2017, which was a Sunday. It was submitted that under Section 10 of the General Clauses Act, if any period prescribed ends on a Sunday or a day on which the court or the tribunal does not function, the next day should be considered as the terminus quo in point of time. Consequently, it was submitted that the appeal should be considered as within time and should have been entertained on merits.

7. Lastly, it was argued that NGT's opinion that sufficient cause was not shown while seeking condonation of delay is erroneous. The learned counsel highlighted that any proposal as well as clearances where voluminous documentation is involved, or if any individual or entity is aggrieved, or adversely affected, the only remedy provided is by way of an appeal. To substantiate the grounds of appeal, it would be essential that in many instances, expert advice is obtained based on which the grounds of appeal can be prepared and urged. If the issue were to be considered in this perspective, the explanation provided by the appellant in her application seeking condonation of delay could not be considered unreasonable and in fact amounts to sufficient cause. The learned counsel relied upon a previous order of NGT in *Padmabati Mohapatra* v. *Union of India*[3]. Reliance was also placed on the judgment of the Nagpur High Court, in *Rambir Narhargir Gosai* v. *Prabhakar Bhaskar Gadhaway*[4].

8. On behalf of the Union of India, the ASG, Mr K.M. Nataraj argued that the impugned order[1] does not require to be disturbed. He pointed out that the impugned order[1] had noticed that the appellant made no complaint that MoEF had put up the decision to grant environmental clearance on its website on 14-8-2017 or that having uploaded the decision it could not be viewed publicly in an uninterrupted manner. He further submitted that the finding that the first date when the decision was communicated by MoEF on its website is determinative for the purpose of reckoning limitation rather than any other later point in time. It was further emphasised on behalf of the UoI that the need to publish environmental clearances under the Environment Impact

3 2013 SCC OnLine NGT 2177
4 1954 SCC OnLine MP 46 : AIR 1955 Nag 300
1 *Sridevi Datla* v. *Union of India*, 2020 SCC OnLine NGT 870

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 9 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Notification 2006, framed under the Environment Protection Act, 1986 is now known to all. The proposal of the project applicant clearly fell within the sweep of the Environment Impact Notification in Item 7(*a*) to the Schedule (to the notification).

9. It was submitted on behalf of the UoI that in terms of the Environment Impact Assessment Notification, 2006, the clearance had to be published within seven days from the date of uploading. The publication of environment clearance dated 14-8-2017 was done on 21-8-2017. Thus, the appellant's plea that she came to know of the environmental clearance on 24-8-2017 is baseless. The learned ASG relied upon a decision of NGT in *Save Mon Region Federation* v. *Union of India*[5] in this regard.

10. The learned ASG lastly argued that by virtue of Section 33 of the Act, the provisions of all other laws stand overridden and consequently, the question of extending the period of limitation by reference to Section 5 of the Limitation Act would not arise. He further urged that the period of limitation prescribed is actually 30 days for the filing of an appeal, and that further period of 60 days is only by way of acceptance of application for condonation of delay. Thus, no appeal is maintainable after the expiry of 90 days. It is pointed out that in the present case, the 90 day period in fact ended a day prior to the filing of the appeal; it was, therefore, clearly time-barred.

11. Mr Mukul Rohatgi, learned Senior Counsel appearing for the project applicant supported the submissions of the Union and argued that the project applicant concerned i.e. M/s Bhogapuram International Airport Corporation Ltd., has been conceived in public interest and in replacement of the existing Vishakhapatnam Airport which is primarily a defence airport. The learned counsel relied upon the decision of this Court in *H. Dohil Constructions Co. (P) Ltd.* v. *Nahar Exports Ltd.*[6] to the effect that any aggrieved litigant should be vigilant in the exercise of his rights and that he cannot claim the exercise of discretion for condoning any delay as a matter of right. Reliance was also placed upon the decision in *DSR Steel (P) Ltd.* v. *State of Rajasthan*[7]. In this regard, it was submitted that the appeal before this Court which purports to be under Section 22 of the Act is confined to the grounds specified under Section 100 CPC, which is only if the Court is satisfied that the case involves a substantial question of law.

12. Lastly, it was submitted by the learned Senior Counsel that the NGT Act correctly surmised in the circumstances of the case that the appellant had adopted a casual approach and did not believe the contents of the application for condonation of delay. The learned counsel in this context argued that the appellant is an interested person in the sense that her lands had been notified for acquisition and was therefore not uninformed or incapable of receiving appropriate legal advice.

5 2013 SCC OnLine NGT 2511
6 (2015) 1 SCC 680 : (2015) 1 SCC (Civ) 646
7 (2012) 6 SCC 782 : (2012) 3 SCC (Civ) 1034

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 10 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Analysis and findings

13. The relevant provision of the Act i.e. Section 16[8] reads as follows:

"**16.** ***Tribunal to have appellate jurisdiction.***—Any person aggrieved by—

(*a*) an order or decision, made, on or after the commencement of the National Green Tribunal Act, 2010, by the appellate authority under Section 28 of the Water (Prevention and Control of Pollution) Act, 1974 (6 of 1974);

(*b*) an order passed, on or after the commencement of the National Green Tribunal Act, 2010, by the State Government under Section 29 of the Water (Prevention and Control of Pollution) Act, 1974 (6 of 1974);

(*c*) directions issued, on or after the commencement of the National Green Tribunal Act, 2010, by a Board, under Section 33-A of the Water (Prevention and Control of Pollution) Act, 1974 (6 of 1974);

(*d*) an order or decision made, on or after the commencement of the National Green Tribunal Act, 2010, by the appellate authority under Section 13 of the Water (Prevention and Control of Pollution) Cess Act, 1977 (36 of 1977);

(*e*) an order or decision made, on or after the commencement of the National Green Tribunal Act, 2010, by the State Government or other authority under Section 2 of the Forest (Conservation) Act, 1980 (69 of 1980);

(*f*) an order or decision, made, on or after the commencement of the National Green Tribunal Act, 2010, by the appellate authority under Section 31 of the Air (Prevention and Control of Pollution) Act, 1981 (14 of 1981);

(*g*) any direction issued, on or after the commencement of the National Green Tribunal Act, 2010, under Section 5 of the Environment (Protection) Act, 1986 (29 of 1986);

(*h*) an order made, on or after the commencement of the National Green Tribunal Act, 2010, granting environmental clearance in the area in which any industries, operations or processes or class of industries, operations and processes shall not be carried out or shall be carried out subject to certain safeguards under the Environment (Protection) Act, 1986 (29 of 1986);

(*i*) an order made, on or after the commencement of the National Green Tribunal Act, 2010, refusing to grant environmental clearance for carrying out any activity or operation or process under the Environment (Protection) Act, 1986 (29 of 1986);

(*j*) any determination of benefit sharing or order made, on or after the commencement of the National Green Tribunal Act, 2010, by the National Biodiversity Authority or a State Biodiversity Board under the provisions of the Biological Diversity Act, 2002 (18 of 2003),

8 Of the NGT Act

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 11 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

may, within a period of thirty days from the date on which the order or decision or direction or determination is communicated to him, prefer an appeal to the Tribunal:

Provided that the Tribunal may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed under this section within a further period not exceeding sixty days."

14. Environmental disputes are complicated and entail expertise in diverse fields (such as ecology, chemistry, biology, economics, administration, management, law, etc.) for their determination in an effective and speedy fashion, that is not possible within the regular judicial and administrative set up in India. In other words, environmental disputes relating to forests, biodiversity, air and water are complicated in nature; resolving and expeditiously disposing of these cases is not possible without a separate special court. Environmental courts or tribunals have been a long-standing demand for other reasons too. For effective prevention and control of environmental protection, there was an urgent need for a separate environmental court or tribunal to adjudicate without much delay. India is a party to the United Nations Conference on the Human Environment (known as the Stockholm Conference), 1972 where it made commitments relating to safeguarding of natural resources and developing international law, and to provide compensation to victims of pollution and other environmental degradation.

15. India is also a signatory to the Rio Declaration adopted at the United Nations Conference on Environment and Development at Rio de Janeiro in 1992. The Rio Declaration states that participating States must make suitable environmental legislation regarding effective access to the people, to judicial and administrative proceedings, including remedies. The Law Commission's 186th report recommended that the Union Government should establish and constitute separate Environmental Courts in each State, to deal with complex, specialised issues concerning the environment. It was in this background that Parliament enacted the NGT Act. The Act amends various other enactments and adds provisions to them, for appeal before NGT. These are incorporated in Section 33-B of the Water (Prevention and Control of Pollution) Act, 1974; Section 13-A of the Water (Prevention and Control of Pollution) Cess Act, 1977; Section 2-A of the Forest (Conservation) Act, 1980; Section 31-B of the Air (Prevention and Control of Pollution) Act, 1981; Section 5-A in the Environment (Protection) Act, 1986 and Section 52-A in the Biological Diversity Act, 2002.

16. In *Jitendra Singh* v. *Ministry of Environment*[9] the narrow, but important question considered was whether a State could alienate publicly available resources like ponds. This Court held that that such transfer or alienation was impermissible. In *Hanuman Laxman Aroskar* v. *Union of India*[10] this Court held that NGT is under an obligation to consider issues as an expert body, and apply the principle of sustainable development, in adjudicating environmental

9 (2020) 20 SCC 581 : 2019 SCC OnLine SC 1510
10 (2019) 15 SCC 401

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 12 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

issues, especially while considering the validity of grant of clearance to large projects under the Environment Protection Act. It was held that NGT Act:

> "provides for the constitution of a tribunal consisting both of judicial and expert members. The mix of judicial and technical members envisaged by the statute is for the reason that the Tribunal is called upon to consider questions which involve the application and assessment of science and its interface with the environment." (*Hanuman Laxman Aroskar case*[10], SCC p. 458, para 133)

17. The Court noted that to be a member of NGT, the individual had to possess specified academic qualifications, including a master's degree in science with a doctorate in engineering or technology, with prescribed experience in certain domains. To be an administrative member, the individual should possess fifteen years' administrative experience including experience of five years in dealing with environmental matters in the Central or State Government or in a reputed national or State level institution. The Court proceeded to hold in *Hanuman Laxman Aroskar*[10], that the grant of environmental clearance to a greenfield airport in Goa did not receive proper merits review by NGT.

18. Having regard to these decisions, and given the nature of jurisdiction which NGT has been invested with, the substantial questions of law that arise in the present case, are whether the approach to the issue of limitation by NGT was correct, and whether on a correct interpretation of law, the appeal under Section 16 was filed within the 90 days period, in the facts of this case.

Applicability of General Clauses Act

19. There can be no dispute that the period of limitation set out in a special law, which provides for remedies and appeals, has to be construed in its terms and without reference to the Limitation Act, if it contains specific provisions delineating the time or period within which applications or appeals can be preferred, and confines the consideration of applications for condoning the delay to a specific number of days. Undoubtedly, in such cases, the Limitation Act would be inapplicable.[11] There are several previous judgments of this Court holding that where periods of limitation are prescribed under special laws,

---

10 *Hanuman Laxman Aroskar* v. *Union of India*, (2019) 15 SCC 401

11 That provision is as follows:

> "**29.** ***Savings***.—(1) Nothing in this Act shall affect Section 25 of the Indian Contract Act, 1872 (9 of 1872).
>
> (2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only insofar as, and to the extent to which, they are not expressly excluded by such special or local law."

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 13 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

appeals that exceed the period granted and are within the extended period of limitation in the special law, can be entertained at the discretion of the tribunal, or court concerned and the Limitation Act would not apply upon expiry of such extended period.[12] This Court holds that there is merit in the contention of the Union that the provisions of the Limitation Act are inapplicable. This is, however, not dispositive of the issue; the next question is whether there is merit in the appellant's argument that NGT should have considered the issue of whether the appeal was filed within the extended period prescribed under the proviso to Section 16 i.e. within sixty days after the expiration of the initial 30 day period, required in the main provision.

20. The appellant argues that since there is no indication to the contrary; the appeal is to be considered as having been filed within the extended period of 60 days, since the last (of the 60 days) was a Sunday (12-7-2020). The appellant relied on Section 10 of the General Clauses Act, for this purpose. The respondents, notably the Union, opposed this argument.

21. Section 10 of the General Clauses Act, 1897[13] stipulates that when the last date for doing something falls on a public holiday, the act "*shall be considered as done*".. if it "*is done or taken on the next day afterwards on which the Court or office is open*". This provision applies to all Central Acts enacted *after* the said Act was brought into force. The scope of this provision was considered by this Court in *Harinder Singh* v. *S. Karnail Singh*[14] by a four-Judge Bench, which explained the object of Section 10 and held as under: (AIR p. 273, para 5)

> "*5.* ... Where, therefore, a period is prescribed for the performance of an act in a court or office, and that period expires on a holiday, then according to the section the act should be considered to have been done within that period, if it is done on the next day on which the court or office is open. For that section to apply, therefore, all that is requisite is that there should be a period prescribed, and that period should expire on a holiday."

---

12 *Kaushalya Rani* v. *Gopal Singh*, (1964) 4 SCR 982 : AIR 1964 SC 260 : (1964) 1 Cri LJ 152; *CCE* v. *Hongo (India) (P) Ltd.*, (2009) 5 SCC 791; *Union of India* v. *Popular Construction Co.* (2001) 8 SCC 470; *Patel Bros.* v. *State of Assam*, (2017) 2 SCC 350 : (2017) 1 SCC (Civ) 658

13 "**10.** ***Computation of time***.—(1) Where, by any Central Act or Regulation made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open:

Provided that nothing in this section shall apply to any act or proceeding to which the Indian Limitation Act, 1877, applies.

(2) This section applies also to all Central Acts and Regulations made on or after the fourteenth day of January, 1887."

14 1957 SCR 208 : AIR 1957 SC 271

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 14 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

22. Other decisions[15] have followed the same reasoning. It is also noticeable that there is no indication in the NGT Act that Section 10 of the General Clauses Act cannot be applied. It is, therefore, held that the provision applies *proprio vigore* to all appeals filed under the NGT Act.

Approach of the court in considering the application for condonation of delay

23. What constitutes "sufficient cause" in terms of Section 16 of the NGT Act? While it is unexceptionable for the project applicant to argue that the Limitation Act is per se inapplicable to proceedings under the NGT Act, given that the basic, and outer period of limitation for filing an appeal have been enacted, nevertheless, what constitutes *sufficient cause*, is left to the discretion of the tribunal. Here, the court discerns a surfeit of authority on what the term denotes, and the general approach of the court, in dealing with delay.

24. In *G. Ramegowda* v. *LAO*[16], speaking for this Court, Venkatachaliah, J. summarised the position in the following terms: (SCC pp. 147-48, para 14)

> "*14*. The contours of the area of discretion of the courts in the matter of condonation of delays in filing appeals are set out in a number of pronouncements of this Court. See: *Ramlal* v. *Rewa Coalfields Ltd.*[17], *Shakuntala Devi Jain* v. *Kuntal Kumari*[18], *Concord of India Insurance Co. Ltd.* v. *Nirmala Devi*[19], *Mata Din* v. *Narayanan*[20] and *LAO* v. *Katiji*[21], etc. There is, it is true, no general principle saving the party from all mistakes of its counsel. If there is negligence, deliberate or gross inaction or lack of bona fides on the part of the party or its counsel there is no reason why the opposite side should be exposed to a time-barred appeal. Each case will have to be considered on the particularities of its own special facts. However, the expression "sufficient cause" in Section 5 must receive a liberal construction so as to advance substantial justice and generally delays in preferring appeals are required to be condoned in the interest of justice where no gross negligence or deliberate inaction or lack of bona fides is imputable to the party seeking condonation of the delay."

25. Much later, in *Esha Bhattacharjee* v. *Raghunathpur Nafar Academy*[22] this Court referred to a large number of previous judgments[23], and observed that adoption of a strict standard of proof sometimes fails to protect public justice

15 *Manohar Joshi* v. *Nitin Bhaurao Patil*, (1996) 1 SCC 169; *Mohd. Ayub* v. *State of U.P.*, (2009) 17 SCC 70 : (2011) 1 SCC (L&S) 580
16 (1988) 2 SCC 142
17 (1962) 2 SCR 762 : AIR 1962 SC 361
18 (1969) 1 SCR 1006 : AIR 1969 SC 575
19 (1979) 4 SCC 365 : 1979 SCC (Cri) 996 : (1979) 3 SCR 694
20 (1969) 2 SCC 770 : (1970) 2 SCR 90
21 (1987) 2 SCC 107 : 1989 SCC (Tax) 172
22 (2013) 12 SCC 649 : (2014) 1 SCC (Civ) 713 : (2014) 4 SCC (Cri) 450 : (2014) 2 SCC (L&S) 595
23 *State of Nagaland* v. *Lipok Ao*, (2005) 3 SCC 752 : 2005 SCC (Cri) 906; *New India Insurance Co. Ltd.* v. *Shanti Misra*, (1975) 2 SCC 840; *N. Balakrishnan* v. *M. Krishnamurthy*, (1998) 7 SCC 123; *State of Haryana* v. *Chandra Mani*, (1996) 3 SCC 132; and *LAO* v. *K.V. Ayisumma*, (1996) 10 SCC 634

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 15 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

and it may result in public mischief. Other decisions have highlighted that there cannot be a universal formula to judge whether sufficient cause has, or has not been shown and the exercise is necessarily fact specific; in *Improvement Trust* v. *Ujagar Singh*[24], the Court held: (*Improvement Trust case*[24], SCC p. 789, para 16)

> "*16*. While considering [an] application for condonation of delay no straitjacket formula is prescribed to come to the conclusion if sufficient and good grounds have been made out or not."

26. The Court also emphasised that each case has to be balanced on the basis of its facts and the surrounding circumstances in which the parties act and behave.

27. Yet another dimension to the issue was highlighted in *Maniben Devraj Shah* v. *Municipal Corpn. of Brihan Mumbai*[25], where the Court underlined a distinction between a case where the delay is inordinate, and a case where the delay is of few days and that in the former case the consideration of prejudice to the other side will be a relevant factor; in the latter case, no such consideration arises. After noticing that a liberal and justice-oriented approach needs to be taken, it was stated that the court, equally should be sensitive to the fact that "*the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost*." The Court then held that: (SCC pp. 168-69, para 24)

> "*24*. What colour the expression "sufficient cause" would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay."

28. It is evident that the term *sufficient cause* is relative, fact dependent, and has many hues, largely deriving colour from the facts of each case, and the behaviour of the litigant who seeks condonation of delay (in approaching the court). However, what can broadly be said to be universally accepted is that in principle, the applicant must display bona fides, should not have been negligent, and the delay occasioned should not be such that condoning it would seriously prejudice the other party.

29. Keeping these principles in mind, it is relevant to consider whether NGT's refusal to exercise discretion, in the facts and circumstances of this case, was erroneous. The Court is conscious of the fact that exercise of discretion, per se, is a fact dependent one, and considerable latitude should be given to the court or tribunal of the first instance, in the performance of that task. Nevertheless, as decided, cases and judgments have shown that the exercise of discretion does at

24 (2010) 6 SCC 786 : (2010) 2 SCC (Civ) 798
25 (2012) 5 SCC 157 : (2012) 3 SCC (Civ) 24

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 16 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

times, call for appellate scrutiny by this Court. This is one such. The appellant pleaded that since the documentation attendant to the clearance granted to the project applicant was voluminous, and expert as well as professional legal advice of the kind necessary to approach NGT was not available in the State of Andhra Pradesh, the procuring of relevant documents, and correspondence with counsel in Delhi and drafting of the appeal entailed some delay.

30. This Court is of the opinion that there is merit in the appellant's argument. The respondents, especially, the project applicant, had urged that the appellant is an interested party, and cannot be called a public-spirited citizen, because she had opposed acquisition of land for the airport and therefore, was able to access legal advice at the High Court stage. There is, in our opinion, nothing in the NGT Act which excludes parties *who would be directly affected by a project*, that has environmental repercussions, from accessing the tribunal (NGT). Likewise, characterising the nature of legal advice that can be accessed for challenging land acquisition, as similar to a challenge to environmental clearance which involves application of mind to technical issues in a detailed manner, would be unfair and simplistic. Scientific or technical support — apart from expert professional legal advice is necessary, if NGT were to be approached. In these circumstances, this Court is of the opinion that given the mandate of the NGT Act, the exercise of discretion, as was done in this case, to reject the appeal by dismissing the application for condonation of delay, on the ground that no sufficient cause was shown, was erroneous and based on a narrow reading of the law. An appeal to NGT in such matters is no ordinary matter; it has the potential of irrevocably changing the environment with the possibility of likely injury. Application of judicial mind by an independent tribunal in such cases, at the first appellate stage, is almost a necessity.

31. In view of the foregoing findings, this Court is of the opinion that the impugned order[1] of NGT has to be and is, therefore set aside. The delay in filing the appeal before NGT is hereby condoned; the parties shall now appear and proceed to argue the appeal on its merit, which shall then be disposed in accordance with law. The appeal is allowed. There shall be no order on costs.

---

1 *Sridevi Datla* v. *Union of India*, 2020 SCC OnLine NGT 870

SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 1 Monday, August 29, 2022
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt.Ltd., Lucknow.

2021 SCC OnLine NGT 1024

In the National Green Tribunal[†]
(Through Video Conference)

(BEFORE K. RAMAKRISHNAN, MEMBER (JUDICIAL) AND SAIBAL DASGUPTA, MEMBER (EXPERT))

Jaya Mathachan … Applicant/Appellant(s);

Versus

Ministry of Environment, Forests & Climate Change, Represented by its Secretary … Respondent(s).

I.A. No. 17 of 2019 (SZ) in Appeal No. 31 of 2020 (SZ) Appeal Dy. No. 59 of 2019 (SZ)

Decided on April 9, 2021

Advocates who appeared in this case :

For Applicant(s) : Mr. Shibu Varghese.

For Respondent(s) : Mrs. M. Sumathi for R1.

Mr. E.K. Kumaresan for R2 to R4.

Mr. Baby Kuriakose for R5.

ORDER

1. This is an interlocutory application filed by the applicant/appellant to condone the delay of ***32 days*** in filing the appeal.

2. It is averred in the delay condonation application that the appeal was filed challenging the Environmental Clearance (EC) dated 07.12.2018 issued by the 2nd respondent in favour of the 5th respondent. The impugned Environmental Clearance (EC) dated 07.12.2018 was published in the official website on 26.03.2019 and the appeal ought to have been filed on or before 25.04.2019 as per the Section 16 of the National Green Tribunal Act, 2010.

3. It is also averred in the application that the appeal was filed only on 27.05.2019 and the delay was not wilful. When they got knowledge about the issuance of the Environmental Clearance (EC), they approached the lawyer at New Delhi and after making necessary research with required documents, they filed this appeal before the Principal Bench of National Green Tribunal, New Delhi, but the same has been returned with direction to file the same before the Southern Zone Bench at Chennai, as it comes within the jurisdiction of Southern Zone. Immediately, the same was filed before this Bench on 27.05.2019 and that was the reason for the delay occurred.

4. The 5th respondent filed counter affidavit to the delay condonation application stating that the appeal is not maintainable, as it was filed beyond 90 days. The Environmental Clearance (EC) granted on 07.12.2018 and the publication was made on 14.12.20218 in the local newspapers and that should be taken as date of knowledge as far as the appellant is concerned. Further, she had no case that she was not aware of the issuance of the Environmental Clearance (EC), as she is the sister-in-law of the 5th respondent and the 5th respondent had already started their activities during the month of December itself. So, it cannot be said that the appellant was not aware of the issuance of the Environmental Clearance (EC) in favour of the 5th respondent and there was no sufficient cause provided for condoning the delay. So, they prayed for dismissal of the application.

5. Though the 1st respondent has filed counter in the delay condonation application, they have not mentioned anything about the delay. But they only explained the circumstances under which the District Environmental Impact Assessment Authority

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 2 Monday, August 29, 2022
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt.Ltd., Lucknow.

(DEIAA) had granted the Environmental Clearance (EC) and they also mentioned about the partial setting aside of the EIA Notification, 2016 by constituting District Environmental Impact Assessment Authority (DEIAA) for consideration of certain activities for issuing Environmental Clearance (EC) as per order in O.A. No. 186 of 2016 titled as *Satendra Pandey* v. *Ministry of Environment, Forests & Climate Change (MoEF&CC)* dated, 30.09.2018 and it is on that basis, the above appeal has been filed challenging the jurisdiction capacity of the District Environmental Impact Assessment Authority (DEIAA) in granting the Environmental Clearance (EC).

6. The 3rd respondent also filed counter affidavit without mentioning anything about the condonation of delay, but they have only justified the issuance of Environmental Clearance (EC) as per the existing laws. They also mentioned that certain Writ Petitions filed before the Hon'ble High Court of Kerala by some persons against considering the Environmental Clearance (EC), as the project proponent had made certain false declaration regarding the existence of water bodies etc. and the Hon'ble High Court of Kerala directed the 5th respondent to approach the competent authority under the Conservation Act for permission under Section 40(2) of the said Act and then approach the District Environmental Impact Assessment Authority (DEIAA) with proper application and only after considering the directions issued by the Hon'ble High Court, the District Environmental Impact Assessment Authority (DEIAA) has granted the Environmental Clearance (EC). According to them, the appeal deserves no merit.

7. The 4th respondent also filed counter affidavit more or less adopting the contentions of the 3rd respondent and also justifying the issuance of the Environmental Clearance (EC) by the District Environmental Impact Assessment Authority (DEIAA) being the Chairman of DEIAA.

8. Heard Mr. Shibu Varghese counsel appearing for the applicant/appellant, Mrs. M. Sumathi counsel appearing for 1st respondent, Mr. E.K. Kumaresan counsel appearing for respondents 2 to 4 and Mr. Baby Kuriakose counsel appearing for 5th respondent.

9. The learned counsel appearing for the applicant/appellant submitted that the delay has been properly explained and there was no undue delay and in fact, they have filed the appeal before the Principal Bench of National Green Tribunal, New Delhi on 26.04.2019. But it was returned with a direction to file the same before this Bench and thereafter, it was filed before this Bench and that was the reason for the delay.

10. On the other hand, the learned counsel appearing for the 5th respondent vehemently opposed the application on the ground that paper publication was effected much earlier. So, that will give the date of knowledge of issuance of Environmental Clearance (EC). Further, she is not a stranger but a close relative to the 5th respondent and she was well aware of the activities of the 5th respondent and also the conduct of the quarry. So, the delay has not been properly explained and the learned counsel had relied on the decisions reported in *Nature Club of Rajasthan (NGO)* v. *Union of India*, 2018 SCC OnLine NGT 1697 in Appeal No. 58 of 2018 (M.A. Nos. 628 & 629 of 2018) dated 22.11.2018 of National Green Tribunal, Principal Bench, *Paryavaran Bachav Samiti* v. *Ultratech Cement Limited* in M.A. No. 702/2018 in Appeal No. 68/2018 reported in 2019 SCC OnLine NGT 955 dated 13.02.2019, *Sunil Kumar Samanta* v. *West Bengal Pollution Control Board* in M.A. No. 573/2013 in Appeal No. 67/2013 reported in 2014 SCC OnLine NGT 5771 dated 24.07.2014, *The Commissioner of Sales Tax, U.P., Lucknow* v. *Parson Tools and Plants, Kanpur*, (1975) 4 SCC 22, *Chhattisgarh State Electricity Board* v. *Central Electricity Regulatory Commission*, (2010) 5 SCC 23, *Union of India* v. *Popular Construction Company*, (2001) 8 SCC 470 and *P.K. Ramachandran* v. *State of Kerala*, (1997) 7 SCC 556 in support of his case. Other counsel appearing for other respondents also supported the submissions of the counsel for 5th respondent.

11. It is an admitted fact that the Environmental Clearance (EC) in this case was

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 3 Monday, August 29, 2022
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt.Ltd., Lucknow.

granted on 07.12.2018 and admittedly, it was uploaded in the official portal of the issuing authority only on 26.03.2019. The project proponent had published the fact regarding the issuance of Environmental Clearance (EC) on 14.12.2018 in the local newspapers.

12. It is also seen from the file that the appeal was originally filed before the Principal Bench of National Green Tribunal, New Delhi on 26.04.2019 and it was seen filed before this Bench on 27.05.2019 and thereafter, it was returned for curing defects and ultimately, represented on 07.09.2019 and lastly, it was represented on 10.07.2019 and thereafter, it was numbered by this Bench.

13. It was alleged in the application that she will have to consult a lawyer in New Delhi and collected certain materials and thereafter, filed the appeal before the Principal Bench and it was returned as the appeal will have to be filed before the Southern Zone Bench and accordingly, it was filed before this Bench.

14. There is no dispute regarding the dictum laid down in the decisions relied on by the counsel appearing for the 5th respondent regarding the discretion to be exercised by the Court in the matter of condoning the delay. In all these decisions, discretion has been given to the Court to exercise the same in a judicious manner and if the Court is satisfied that the delay was not deliberate or wilful, but reasonable, then Court can always incline to condone the delay.

15. It is also settled law that under Section 16 of the National Green Tribunal Act, 2010, the date of knowledge is not the date from which the limitation has to be reckoned for filing the appeal, but it is from the date of communication. The question regarding what is communication has been considered by the Principal Bench of National Green Tribunal in several matters and ultimately held that, it is the date on which it was uploaded by the issuing authority or by the project proponent and not only merely uploading, but it must be available uninterruptedly for downloading the same to enable the parties to proceed against the same as the date to be reckoned as the date of communication as the starting point of limitation.

16. So, the date will have to be reckoned not from the date of issuance of the Environmental Clearance (EC) namely, 07.12.2018 or on the date of publication made by the project proponent namely, 14.12.2018 but only from the date on which it was uploaded and available uninterruptedly for downloading for the parties who want to challenge the order.

17. Further, in this case, it has been seen that the appeal was filed before the Principal Bench of National Green Tribunal on 26.04.2019 i.e., 1 (one) day after the last date for filing the appeal. It is also clear from the endorsement that it has been returned to be presented before this Bench and it was represented before this Tribunal originally on 27.05.2019 and thereafter, it was returned for some defects and ultimately, after curing the defect on several occasions, it was represented on 10.07.2019 and thereafter, it was numbered. So, the delay in filing the appeal can be taken only as 32 days as contended by the counsel appearing for the applicant/appellant.

18. Further, in the recent decision in *Sridevi Datla* v. *Union of India* which was taken up by the appellant in that case against the order passed by the Tribunal in ***M.A. No. 231 of 2017 in Appeal No. 18/2020 as Civil Appeal No. 3136 of 2020 dated 31.07.2020*** holding that the appeal was filed beyond 90 days, as it was filed on the 91st day and also after holding that the delay of even 90 days has not been properly explained, but the Hon'ble Apex Court had observed that this Tribunal, while considering the delay condonation, should not have taken such a pedantic view that each day delay had not been properly explained, especially when the substantial environmental issues have been raised and set aside the order passed by this Tribunal and condoned the delay in filing the appeal and sent back the matter to this Tribunal

SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 4 Monday, August 29, 2022
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt.Ltd., Lucknow.

to consider the appeal on merit.

19. So, if the principle laid down in the above decision has been followed, the Court must be liberal in considering the condonable period of delay in filing the appeal and an opportunity must be given to the parties to meet the case on merit, instead of dismissing the appeal on technical ground of limitation.

20. In this case, the applicant/appellant had challenged the jurisdiction of District Environmental Impact Assessment Authority (DEIAA) in granting Environmental Clearance (EC), as it was granted after the Principal Bench had set aside the EIA Notification dated 15.01.2016 partially in *Satendra Pandey* v. *Ministry of Environment, Forests & Climate Change (MoEF&CC)*

21. So under such circumstances, since such a serious jurisdictional issue has been raised, this Tribunal feel that it is not proper to deny the opportunity for the appellant to meet the case on merit. So, this Tribunal is convinced that reasons stated by the applicant/appellant are sufficient and convincing and the same has to be condoned for giving an opportunity for the appellant to meet the case on merit.

22. So, this interlocutory application (I.A. No. 17/2019) is allowed and the delay of 32 days in filing the appeal is condoned. **I.A. No. 17 of 2019 (SZ) is disposed of accordingly**.

———

† Southern Zone, Chennai

Disclaimer: While every effort is made to avoid any mistake or omission, this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification is being circulated on the condition and understanding that the publisher would not be liable in any manner by reason of any mistake or omission or for any action taken or omitted to be taken or advice rendered or accepted on the basis of this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification. All disputes will be subject exclusively to jurisdiction of courts, tribunals and forums at Lucknow only. The authenticity of this text must be verified from the original source.

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 1 Monday, August 29, 2022
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt.Ltd., Lucknow.

2012 SCC OnLine NGT 80

National Green Tribunal New Delhi
(Principal Bench)

(BEFORE A.S. NAIDU, A.C. AND R. NAGENDRAN, E.M.)

1. Dyaneshwar Vishnu Shedge R/o Mugaon, Taluka Mulshi District Pune, Maharashtra … Appellant(s)/Applicant(s)/Petitioner;

Versus

1. Union of India Ministry of Environment & Forests Through the Secretary Paryavaran Bhavan, CGO Complex Lodhi Road, New Delhi-110003
2. Maharashtra Pollution Control Board Through its Member Secretary Kalpataru Point, 3rd and 4th Floor Opp. Cine Planet, Sion Circle Mumbai-400022
3. M/s Lavasa Corporation Through the Chairman Hincon House, 247 Park, LBS Marg Vikhroli (West) Mumbai-400083 … Respondent(s).

Misc. Application No. 19 of 2012, Arising out of Appeal No. 9 of 2012
Decided on May 24, 2012

Counsel for Appellant:
Mr. Ritwick Dutta
Mr. Rahul Choudhary
Ms. Parul Gupta

Counsel for Respondents:
Ms. Neelam Rathore
Mr. Shekhar Naphde, Senior Advocate
Mr. Gaurav Joshi
Mr. Rishi Agrawal
Ms. Megha Mehta Agrawal

ORDER

A.S. NAIDU, (Acting Chairperson) PROF. DR. R. NAGENDRAN, (Expert Member):—

JUDGMENT BY THE BENCH

1. The Environment Clearance (EC) dated 9th November, 2012, issued by the Ministry of Environment & Forests (MoEF) to Lavasa Corporation Ltd., Respondent No. 3 for the development of hill station, township at Village Munshi appertaining to Velhi Talukas, District Pune, Maharashtra is sought to be assailed in Appeal No. 9/2012.

2. In consonance with Section 16 of the National Green Tribunal (NGT) Act, 2010 any person aggrieved by an order granting EC to any project, may within 30 days from the date on which the order or decision is communicated to him prefer an appeal before this Tribunal. Proviso to the said Section further stipulates that the Tribunal may, if it is satisfied that the Appellant was prevented by sufficient cause from filing the Appeal within the said period i.e., thirty days, allow it to be filed within a further period not exceeding sixty days.

In the case in hand, the Appeal was filed on 6th February, 2012 assailing the order granting EC dated 19th November, 2011. Thus the same was filed after lapse of 30 days but then within ninety days. The Appellant being conscious of the said fact filed a petition for condonation of delay which has been registered as Misc. Case and is the

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 2 Monday, August 29, 2022
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt.Ltd., Lucknow.

subject matter of the present order.

3. The factual matrix of the case lies in a narrow compass and is stated herein below:—

The Appellant claims to be a project affected villager. According to him, several substantial questions relating to environment are involved and if the project comes up, the right of the Appellant as well as other poor villagers living in the vicinity shall be affected under Article 21 of the Constitution, in as much as they will be deprived of clean environment and healthy life. The Appeal it is submitted also involves issues related to the failure on the part of the Respondents to fulfil fundamental duties guaranteed under Article 48 A of the Constitution, which mandates the Authorities to protect and improve the environment. The action of the MoEF granting EC to the project it is alleged is not only arbitrary but also in violation of the principles enshrined under Article 14 of the Constitution of India. Referring to Article 51 A (g) of the Constitution it is stated that said Article casts a fundamental duty upon all the citizens of the country to protect and improve the environment and hence the Appeal has been filed. There are also several other allegations with regard to the faulty procedure adopted as well as de-relegation of Statutory provisions by the MoEF which according to the appellant goes to the root of the decision making process, consequently the EC granted suffers from the vice of non-consideration of relevant facts and law and cannot be sustained.

4. The delay in presenting the appeal has been explained in *extenso* in paragraph 2 to 5 of the Petition filed for condonation of delay. According to the Appellant, the delay of 59 days in filing the Appeal was unintentional. The delay had occurred as the project affected persons were not aware of the impugned order and its impact. After coming to know about it, they assembled and took a decision with regard to the further course of action for setting aside the order granting EC. It also took some time to the inhabitants, who belong to the lower *strata* of the society to understand the real impact of the order as the same was based on certain technical and environmental issues.

5. Further elucidating the reasons for delay it is stated that appellant came to know about the impugned order dated 9th November, 2011 about a week after i.e., on 15th November, 2011. But then, he was not able to procure the copy of the order. After deliberation among the villagers and project affected persons it was decided to obtain a copy of the impugned order taking help of a Learned Advocate, accordingly a Learned Counsel at Pune was contacted. As per the advice of the Learned Advocate, the appellant was able to download a copy of the EC dated 9th November, 2011, from the website of the MoEF only on 30th November, 2011.

6. After obtaining the copy, under the impression that Pune Zonal Bench of NGT has started functioning, the Appellant requested the Learned Counsel to prepare and file the Appeal. Learned Counsel tried to obtain instructions with regard to the facilities for filing Appeal at Pune, in view of the fact the NGT had held a Circuit Bench at Pune, but then it was found that filing of the cases were only possible at Delhi. Thereafter, on 21st of December, 2011, after arranging funds and other documents the appellant came to Delhi and consulted some Advocates who were not willing to file the Appeal as the Tribunal was closed. At last, on the last week of December, 2011, the appellant was able to finalize the draft through a Learned Counsel and presented the Appeal on 6th February, 2012, in the Principal Bench of NGT at New Delhi.

7. Under Solemn affirmation the Petitioner has narrated the facts and given the dates explaining the delay and prayed to condone the delay of 59 days in filing the Appeal as there was no deliberate latches on the part of the appellant who was sacrosanctly and diligently pursuing the *lis*, all along to best of his ability.

8. After receiving notice, the Respondent No. 3 has filed a detailed reply traversing

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 3 Monday, August 29, 2022
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt.Ltd., Lucknow.

each and every averment made in the petition for condonation of delay. According to Respondent 3 the Appellant has not come to the court with clean hands, being a close associate of Ms. Sunita SR who had challenged the project before the High Court, The Appellant was aware about the date when the EC was granted to the project and the delay being deliberate, requires no consideration. Further, it is averred that the grant of EC to Respondent No. 3 by order dated 9th November, 2011, received wide publicity in the media and was published in a number of newspapers at Pune and thus the averment that the Appellant came to know about the impugned order only on 15th November, 2011 is not correct. Further, it is stated that the impugned order was uploaded on the website of the MoEF on 9th November, 2011 itself and nothing prevented the Appellant from downloading the same. The Appellant is an associate of several social activists, who were aware of the order and made statements in the media on the day when the order was passed i.e., 9th November, 2011 and soon thereafter. In short, according to Respondent No. 3 the Appellant has suppressed vital facts and came up with a concocted false story and is thus not entitled to any discretionary relief. Number of documents were also enclosed to the reply to substantiate the stand taken by Respondent No. 3.

9. To make the long story short, according to Respondent No. 3 the Appellant was well aware of the project and having sold lands belonging to him for the purpose of the project, is estopped from raising an objection to the EC granted and oppose the project. The *locus standi* of the appellant to file the Appeal as well as maintainability of the Appeal is also strenuously contended before this Tribunal.

However, the only question which needs to be determined at this stage is with regard to condoning the delay in presenting the Appeal. The question of maintainability of the Appeal as well as *locus standi* of the appellant to prefer this Appeal, involve intricate questions of facts and law which can be dealt with only in course of hearing of the Appeal. Therefore, we refrain ourselves from entering into the arena of controversy with regard to the maintainability of the Appeal on merits and or *locus standi* of the appellant to file this Appeal at this stage.

10. Admittedly, the Appeal has not been filed within thirty days of the impugned order. But then it has been filed within ninety days, thus, in consonance with the provision of Section 16 of the NGT Act, this Tribunal, if it is satisfied that the Appellant was prevented by sufficient cause from filing the Appeal, entertain the same, if the same is filed within 60 (Sixty) days after 30 (Thirty) days from the date of the order sought to be impugned.

11. As far as the explanation given by the Appellant that he approached and discussed with the local villagers and other project affected persons sought their approval and consent and thereafter travelled to Pune consulted an Advocate and on his advice downloaded the impugned order from the website of the MoEF and then proceeded to Delhi, contacted the Advocate and got the Appeal filed. A litigant is legitimately entitled to put forth in a proceeding like this and plead and explain the delay.

12. Respondent No. 3 repudiating the stand taken by the Appellant tried to convince this Tribunal that the Appellant took active part in the movement initiated to stop project implementation. Since long he had contacts with the social activists who are opposing the project, thus the plea of ignorance taken by the Appellant is only an afterthought and is neither *bonafide* nor justified.

13. On consideration of the submissions advanced *interse* by the parties, we feel in a case like the present one, where the Environmental impact of the project on local population in terms of their environmental harm, has to be assessed, the approach of this Tribunal, especially set up for the said purpose, should be liberal and not "hyper-technical".

14. The nature of the disputes, as would be evident, from the aims and objective of the NGT Act, this Tribunal is expected to adjudicate upon, is not really a lis between the litigant parties and or adversary litigation. The jurisdiction of this Tribunal is necessarily a wider one whereby the impact of the decision granting EC *vis-a-vis* the effect thereof on the local community or environment in general and ecology has to be considered. The Tribunal is expected to adopt a broad and liberal approach rather than narrow and cribbed one.

15. In view of the discussions made above, the delay being less than ninety days, this Tribunal after appreciating the pleadings and documents referred is satisfied that there was sufficient reasons and that deliberate latches cannot be attributed to the Appellant. The law as on date mandates that the EC granted under the Environment (Protection) Act, 1986 can only be challenged before this Tribunal, we condone the delay and allow the petition for condonation of delay.

Parties to bear their own cost.

List the Appeal for admission on 24th July, 2012. Respondents are directed to file their Replies to the Appeal in the meanwhile.

———

Disclaimer: While every effort is made to avoid any mistake or omission, this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification is being circulated on the condition and understanding that the publisher would not be liable in any manner by reason of any mistake or omission or for any action taken or omitted to be taken or advice rendered or accepted on the basis of this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification. All disputes will be subject exclusively to jurisdiction of courts, tribunals and forums at Lucknow only. The authenticity of this text must be verified from the original source.

SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 1 Monday, August 29, 2022
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2022 Eastern Book Company.

prescribed by Section 19-A. The question of payment, remittance or deposit of rent by tenant in one of the modes provided by Section 19-A could have arisen if there was no suit or appeal pending between the landlord and the tenant and therein the tenant was not required to deposit, or could not have made deposit of, rent in court. The tenant, in the case before us, was not in default for the period 5-11-1983 to 28-7-1984 and no cause of action arose to the landlord for filing the second suit for eviction. The suit was entirely misconceived. The first appellate court deciding appeal in the second suit was, therefore, right in reversing the decree of the trial court and directing the second suit to be dismissed. The High Court has clearly erred in law in upholding availability of ground under Section 13(1)(*a*) of the Act to the landlord in the second suit.

9. The appeal is, therefore, allowed. The judgment and decree of the High Court is set aside. The suit for eviction filed by the landlord is directed to be dismissed. Costs to be borne as incurred.

10. Before parting, we would like to sound a note of caution. During the course of hearing a decision by the Rajasthan High Court in *Kamruddin* v. *Wahid Ali*[1] was brought to our notice wherein the view taken by the High Court is that compliance with Section 13 of the Act need not be made during the pendency of appeal. We have taken a view to the contrary. To obviate the unforeseen difficulty which the tenants are likely to face in those matters which may be pending in appeal we would like to clarify that before striking out the defence under sub-section (5) or denying the benefit of relief against eviction under sub-section (6), for failure to comply with sub-section (4), of Section 13 of the Act during the pendency of appeal, the appellate court shall afford the tenant a reasonable opportunity for compliance, on this decision coming to or being brought to its notice. However, this judgment shall not be a ground for reopening any matter which stands already concluded.

(2002) 3 Supreme Court Cases 195

(BEFORE M.B. SHAH AND B.N. AGRAWAL, JJ.)

RAM NATH SAO ALIAS RAM NATH SAHU AND OTHERS . . Appellants;

Versus

GOBARDHAN SAO AND OTHERS . . Respondents.

Civil Appeal No. 1704 of 2002†, decided on February 27, 2002

Civil Procedure Code, 1908 — Or. 22 Rr. 9(2) & (3) — "Sufficient cause" for setting aside abatement of suit and condonation of delay in taking steps for substitution of heirs and LRs — Liberal interpretation and balance between rights of parties, necessity of — Held, expression "sufficient cause" should be given a liberal interpretation to ensure that substantial justice is

1 (1987) 1 Raj LR 290

† From the Judgment and Order dated 11-1-2001 of the Jharkhand High Court in Ranchi, in LPA No. 533 of 1998 (R)

SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 2 Monday, August 29, 2022
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2022 Eastern Book Company.

done, but only so long as negligence, inaction or lack of bona fides cannot be imputed to the party concerned — Whether or not sufficient cause has been furnished can be decided only on the facts of a particular case — Straitjacket formula not possible — Acceptance of explanation given should be the rule and refusal, the exception — However, at the same time, court must bear in mind that delay would have caused a valuable right to accrue to the other party and that such right should not be defeated by condonation of delay in a routine manner — Appellant-defendants were unlettered villagers who only learnt of the need for filing substitution applications (following deaths of Appellants 2, 3, 22 and 41) from their lawyer, whom they had gone to see as their first appeal was due for hearing — They then took immediate necessary action — Respondents did not make any allegations regarding mala fides against them — Applications for substitution were late by 130 days, 3 years and 5 years respectively — Held on facts, Division Bench of High Court erred in dismissing LPA of appellants and upholding order of Single Judge disposing of appellants' first appeal as abated and rejecting prayers for condonation of delay — Limitation Act, 1963, S. 5 — "Sufficient cause" — Abatement of appeal

Allowing the appeal and remitting the first appeal to the Single Judge of the High Court for decision on merits, the Supreme Court

Held :

The expression "sufficient cause" within the meaning of Section 5 of the Limitation Act, 1963 or Order 22 Rule 9 CPC or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fides is imputable to a party. In a particular case whether explanation furnished would constitute "sufficient cause" or not will be dependent upon facts of that case. There cannot be a straitjacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. However, courts should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in over-jubilation of disposal drive. Acceptance of explanation furnished should be the rule and refusal, an exception, more so when no negligence or inaction or want of bona fides can be imputed to the defaulting party. On the other hand, while considering the matter the courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine-like manner. However, by taking a pedantic and hypertechnical view of the matter the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the lis terminates, either by default or inaction and defeating valuable right of such a party to have the decision on merit. While considering the matter, courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way. (Para 12)

State of W.B. v. *Administrator, Howrah Municipality*, (1972) 1 SCC 366; *Sital Prasad Saxena* v. *Union of India*, (1985) 1 SCC 163 : AIR 1985 SC 1; *Rama Ravalu Gavade* v. *Sataba Gavadu Gavade*, (1997) 1 SCC 261; *N. Balakrishnan* v. *M. Krishnamurthy*, (1998) 7 SCC 123, *relied on*

Shakuntala Devi Jain v. *Kuntal Kumari*, AIR 1969 SC 575 : (1969) 1 SCR 1006, *cited*

SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 3 Monday, August 29, 2022
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2022 Eastern Book Company.

Advocates who appeared in this case :

Gaurav Agrawal and Prashant Kumar, Advocates, for the Appellants;

A. Sharan, Senior Advocate (Sujit K. Singh, Chander Shekhar Ashri and S.B. Upadhyay, Advocates, with him) for the Respondents.

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

1. (1998) 7 SCC 123, *N. Balakrishnan* v. *M. Krishnamurthy* 200*a*
2. (1997) 1 SCC 261, *Rama Ravalu Gavade* v. *Sataba Gavadu Gavade* 199*f-g*
3. (1985) 1 SCC 163 : AIR 1985 SC 1, *Sital Prasad Saxena* v. *Union of India* 199*c*
4. (1972) 1 SCC 366, *State of W.B.* v. *Administrator, Howrah Municipality* 199*b*, 201*e-f*
5. AIR 1969 SC 575 : (1969) 1 SCR 1006, *Shakuntala Devi Jain* v. *Kuntal Kumari* 201*e-f*

The Judgment of the Court was delivered by

B.N. AGRAWAL, J.— Leave granted.

2. Order impugned in this appeal has been passed by a Division Bench of the Jharkhand High Court in letters patent appeal upholding order passed by learned Single Judge whereby regular first appeal filed by the defendants against decree passed in a partition suit involving approximately 116 acres of land allowing claim of the plaintiffs has been disposed of holding that the entire appeal has become incompetent as during the pendency of the appeal, Appellant 2-Kashinath Sao (Defendant 2), Appellant 3-Buchua Devi (Defendant 3), Appellant 22-Guru Dayal Sao (Defendant 19) and Appellant 41-Ugni Devi (Defendant 35) expired and as no steps for substitution of their heirs and legal representatives were taken within the time prescribed, the same abated and application for substitution of their heirs after setting aside abatement and condonation of delay was rejected after recording a finding that no sufficient cause was shown either for condonation of delay or setting aside abatement.

3. The short facts are that when First Appeal No. 307 of 1989 (R) was listed for hearing, the appellants' counsel wrote a letter intimating the client about listing of the matter, whereupon one of the appellants in the appeal came on 18-9-1998, met his counsel and during the course of discussion, it transpired that Appellants 2, 3, 22 and 41 had already expired whereupon the counsel instructed the client to go to the village and bring the vakalatnama from the heirs and legal representatives of the deceased persons for filing substitution application. After obtaining the vakalatnama, the client came back on 20-9-1998 and thereafter on 24-9-1998, substitution application was filed making a prayer therein for expunging the name of Appellant 2 and making a note that he died on 10-4-1997 leaving behind Appellants 5, 9 and 10 as his heirs and legal representatives who were already on the record, besides a daughter Sheela Devi for whom prayer was made for bringing her on the record in place of the appellant deceased as it is well settled that in such an eventuality, left-out heirs can be brought on the record at any time irrespective of the period of limitation. Further prayer was made in that application for substitution of the heirs and legal representatives named therein, of Appellants 3, 22 and 41 after condonation of delay in filing the application for setting aside abatement and to set aside abatement. Appellant

SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 4 Monday, August 29, 2022
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2022 Eastern Book Company.

3 died on 19-12-1997, Appellant 22 died in the month of February 1993 and Appellant 41 died in the year 1995. In the said appeal, there were 41 appellants belonging to different families, villages and police stations. Some of the appellants who were contesting defendants were members of joint family of the plaintiffs and the contesting defendants whereas others were transferees. As some of the heirs of Appellant 2 were already on the record, his appeal did not abate and prayer for bringing on record one left-out heir was made for which there is no period of limitation. So far as Appellant 3 is concerned, there was delay of 130 days in filing the application for substitution. However, in relation to Appellant 22, the delay was of about five years and in relation to Appellant 41, the delay was about three years, both of whom were transferees and belonged to villages different than the village and police station in which members of joint family of the plaintiffs and contesting defendants resided. The appellants before the High Court were rustic and illiterate villagers and undisputedly no sooner their lawyer advised, steps were taken with utmost expedition without any loss of time.

4. In the said appeal on behalf of the respondents, a counter-affidavit was filed to the aforesaid petition for substitution in which it was not averred that the delay was mala fide, dilatory and/or intentional. Further, there was no denial that all the appellants were rustic villagers and except Appellant 6, all were illiterate.

5. A learned Single Judge of Ranchi Bench of the Patna High Court, as it then existed, by order dated 18-11-1998 directed for expunging the name of Appellant 2 from the record, making a note that Appellants 5, 9 and 10 were already on the record as his heirs and legal representatives and impleading the daughter who was not on the record. So far as the prayer for substitution of the heirs of Appellants 3, 22 and 41 is concerned, the same was refused as it was held that no sufficient cause was shown for condonation of delay in filing the application to set aside abatement and setting aside abatement. Against the said order, the appellants preferred a letters patent appeal before the Jharkhand High Court which was created by then, and the said appeal was dismissed on 11-1-2001. Hence, this appeal by special leave.

6. Shri Gaurav Agrawal, learned counsel appearing on behalf of the appellants, who was thoroughly ready both on facts as well as law, found out all the relevant decisions on the point in issue and by placing the same with fairness, submitted in support of this appeal that as the appellants, who were rustic and illiterate villagers, belonged to different families, different villages within different police stations and in the absence of anything to show that the delay was mala fide, intentional or any dilatory tactics were adopted, the same should have been condoned and abatement set aside as the expression "sufficient cause" should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fides is imputable to a party. On the other hand, Shri Amarendra Sharan, learned Senior Counsel appearing on behalf of the respondents, with his usual vehemence, submitted that the High Court was quite justified in holding that no sufficient cause was made out for condonation of delay and setting aside

SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 5 Monday, August 29, 2022
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2022 Eastern Book Company.

abatement and accordingly no interference with the impugned order is called for in the exercise of discretionary powers of this Court under Article 136 of the Constitution of India.

7. The expression "sufficient cause" within the meaning of Section 5 of the Limitation Act, 1963 (hereinafter referred to as "the Act"), Order 22 Rule 9 of the Code of Civil Procedure (hereinafter referred to as "the Code") as well as similar other provisions and the ambit of exercise of powers thereunder have been the subject-matter of consideration before this Court on numerous occasions. In the case of *State of W.B.* v. *Administrator, Howrah Municipality*[1] while considering scope of the expression "sufficient cause" within the meaning of Section 5 of the Act, *this Court laid down that the said expression should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fides is imputable to a party.*

8. In the case of *Sital Prasad Saxena* v. *Union of India*[2] the Court was dealing with a case where in a second appeal, the appellant died and application for substitution after condonation of delay and setting aside abatement filed after two years by the heirs and legal representatives was rejected on the ground that no sufficient cause was shown and the appeal was held to have abated. When the matter was brought to this Court, the appeal was allowed, delay in filing the petition for setting aside the abatement was condoned, abatement was set aside, prayer for substitution was granted and the High Court was directed to dispose of the appeal on merits and while doing so, it was observed that *once an appeal is pending in the High Court, the heirs are not expected to keep a constant watch on the continued existence of parties to the appeal before the High Court which has a seat far away from where parties in rural areas may be residing inasmuch as in a traditional rural family the father may not have informed his son about the litigation in which he was involved and was a party.* It was further observed (at SCC p. 166, para 6) that courts should recall that "*what has been said umpteen times that rules of procedure are designed to advance justice and should be so interpreted as not to make them penal statutes for punishing erring parties*". (emphasis added)

9. In the case of *Rama Ravalu Gavade* v. *Sataba Gavadu Gavade*[3] during the pendency of the appeal, one of the parties died. In that case, the High Court had refused to condone the delay in making an application for setting aside abatement and set aside abatement, but this Court condoned the delay, set aside abatement and directed the appellate court to dispose of appeal on merit observing that the *High Court was not right in refusing to condone the delay as necessary steps could not be taken within the time prescribed on account of the fact that the appellant was an illiterate farmer.*

1 (1972) 1 SCC 366
2 (1985) 1 SCC 163 : AIR 1985 SC 1
3 (1997) 1 SCC 261

SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 6 Monday, August 29, 2022
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2022 Eastern Book Company.

10. In the case of *N. Balakrishnan* v. *M. Krishnamurthy*[4] there was a delay of 883 days in filing application for setting aside ex parte decree for which application for condonation of delay was filed. The trial court having found that sufficient cause was made out for condonation of delay, condoned the delay but when the matter was taken to the High Court of Judicature at Madras in a revision application under Section 115 of the Code, it was observed that the delay of 883 days in filing the application was not properly explained and it was held that the trial court was not justified in condoning the delay resulting in reversal of its order whereupon this Court was successfully moved which was of the view that the High Court was not justified in interfering with the order passed by the trial court whereby delay in filing the application for setting aside ex parte decree was condoned and accordingly order of the High Court was set aside. K.T. Thomas, J., speaking for the Court succinctly laid down the law observing thus in paras 8, 9 and 10: (SCC p. 127)

> "*8.* The appellant's conduct does not on the whole warrant to castigate him as an irresponsible litigant. What he did in defending the suit was not very much far from what a litigant would broadly do. Of course, it may be said that *he should have been more vigilant by visiting his advocate at short intervals to check up the progress of the litigation. But during these days when everybody is fully occupied with his own avocation of life an omission to adopt such extra vigilance need not be used as a ground to depict him as a litigant not aware of his responsibilities, and to visit him with drastic consequences.*
>
> *9.* It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court.
>
> *10.* * * *
>
> *The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. The time-limit fixed for*

4 (1998) 7 SCC 123

SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 7 Monday, August 29, 2022
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2022 Eastern Book Company.

approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause."

(emphasis added)

11. The Court further observed in paragraphs 11, 12 and 13 which run thus: (SCC pp. 127-28)

"*11. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly.* The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim *interest reipublicae ut sit finis litium* (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

12. A court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words 'sufficient cause' under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide *Shakuntala Devi Jain* v. *Kuntal Kumari*[5] and *State of W.B.* v. *Administrator, Howrah Municipality*[1] .

13. It must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time, then the court should lean against acceptance of the explanation. While condoning the delay, the court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite large litigation expenses."

(emphasis added)

12. Thus it becomes plain that the expression "sufficient cause" within the meaning of Section 5 of the Act or Order 22 Rule 9 of the Code or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fides is

5 AIR 1969 SC 575 : (1969) 1 SCR 1006

SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 8 Monday, August 29, 2022
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2022 Eastern Book Company.

imputable to a party. In a particular case whether explanation furnished would constitute "sufficient cause" or not will be dependent upon facts of each case. There cannot be a straitjacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. But one thing is clear that the courts should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in over-jubilation of disposal drive. Acceptance of explanation furnished should be the rule and refusal, an exception, more so when no negligence or inaction or want of bona fides can be imputed to the defaulting party. On the other hand, while considering the matter the courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine-like manner. However, by taking a pedantic and hypertechnical view of the matter the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the lis terminates, either by default or inaction and defeating valuable right of such a party to have the decision on merit. While considering the matter, courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way.

13. In view of the foregoing discussions, we are clearly of the opinion that on the facts of the present case, the Division Bench of the High Court was not justified in upholding the order passed by the learned Single Judge whereby prayers for condonation of delay and setting aside abatement were refused and accordingly the delay in filing the petition for setting aside abatement is condoned, abatement is set aside and prayer for substitution is granted.

14. In the result, the appeal is allowed, impugned orders passed by the High Court are set aside and the matter is remitted back to the learned Single Judge for deciding the first appeal on merits in accordance with law. In the circumstances of the case, we direct that the parties shall bear their own costs.

(2002) 3 Supreme Court Cases 202

(BEFORE V.N. KHARE AND ASHOK BHAN, JJ.)

SAURASHTRA OIL MILLS ASSN., GUJARAT .. Appellants;

Versus

STATE OF GUJARAT AND ANOTHER .. Respondents.

Civil Appeals Nos. 3959-60 of 2001†, decided on February 19, 2002

A. **Essential Commodities — Gujarat Essential Articles (Licensing, Control and Stock Declaration) Order, 1981 — Cls. 24(1) and 3 — Imposition of limits on storage of edible oils and oilseeds — Validity —**

† From the Judgment and Order dated 19-4-2001 of the Gujarat High Court in LPA No. 330 of 2001 in SCA No. 9764 of 2000 with LPA No. 331 of 2001 in SCA No. 9446 of 2000

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 1 Monday, August 29, 2022
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt.Ltd., Lucknow.

2013 SCC OnLine NGT 98

National Green Tribunal Principal Bench, New Delhi

(BEFORE SWATANTER KUMAR, CHAIRPERSON AND U.D. SALVI, J.M. AND D.K. AGRAWAL, E.M., P.S. RAO, E.M. AND RANJAN CHATTERJEE, E.M.)

In the matter of:

Padmabati Mohapatra, W/o Sri Ras Bihari Mohapatra, Plot No. 2D/303, Sector 11, Abhinab Bidanasi Project Area, P.O. Abhinab Bidanasi, P.S. Markat Nagar, Cuttack-753014 … Appellant;

Versus

1. Union of India, Ministry of Environment and Forests, Represented by its Director, Paryavaran Bhawan, CGO Complex, Lodhi Road, New Delhi-110003
2. The Secretary, Ministry of Power, Shram Shakti Bhawan, Rafi Marg, New Delhi-110001
3. The Secretary (Environment), Environment Department, Govt. of Odisha, Odisha Secretariat Bldg, Sachivalaya Marg, Bhubaneshwar-751001
4. The Chairman, Odisha State Pollution Control Board, A-118, Nilakantha Nagar, Unit VIII, Bhubaneshwar-751012
5. The Chairman, Central Pollution Control Board, CBD-cum-Office Complex, East Arjun Nagar, New Delhi-110032
6. The Chief Conservator of Forests, Regional Office (EZ), Ministry of Environment and Forests, A/3, Chandrasekharpur, Bhubaneshwar-751023
7. The Commissioner-cum-Secretary, Govt. of Odisha, Department of Energy, Odisha Secretariat, Sachivalaya Marg, Bhubaneshwar -751001
8. The Secretary, Govt. of Odisha, Department of Housing and Urban Development, Odisha Secretariat, Sachivalaya Marg, Bhubaneshwar-751001
9. The Collector-cum-District Magistrate, Cuttack-753002
10. Odisha Industrial Infrastructure Development Corporation, IDCO Tower, Janpath, Bhubaneshwar-751022
11. The Chairman & Managing Director, Tata Power Company Ltd., Bombay House, 24, Homymodi Street, Mumbai-400001

M.A. No. 79/2012 in Appeal No. 29/2012

Decided on August 8, 2013

Counsel for Appellant:

Mr. R.B. Mohapatra, Advocate

Counsel for Respondents:

Ms. Neelam Rathor, Advocate for Respondent No. 1

Mr. Priyabrat Sahu, Advocate for Respondent No. 3

Mr. Satyabrata Panda, Advocate for Respondent No. 4

Mr. S. Mishra, Advocate for Respondent No. 10

Mr. Ravindra Srivastava, Sr. Advocate along with Mr. Sarthan Nayak, Advocate for

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 2 Monday, August 29, 2022
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt.Ltd., Lucknow.

Respondent No. 11

ORDER/JUDGMENT

SWATANTER KUMAR, CHAIRPERSON:— This is an application filed by the applicant-appellant under Section 5 of the Limitation Act, 1963 read with Section 14(3) and 16 of the National Green Tribunal Act, 2010 (for short 'the NGT Act') for condonation of delay in filing the present appeal. the applicant claims to be an 'aggrieved person' within the meaning of the NGT Act and challenges the grant of Environment Clearance (for short 'the EC') by the Ministry of Environment & Forests (for short 'the MoEF') in terms of its order dated 15th February, 2011 to establish and operate a coal-based thermal power plant of the capacity of 1000 megawatt at Village Naraj-Marthapur in District Cuttack, State of Orissa.

2. The Government of Orissa issued a notification on 20th June, 2003, to include the revenue Village of Naraj-Marthapur, Nuagaon, Mundali and Talagada under the Naraj-Marthapur-Mundali Gram Panchayat of Cuttack, Sadar Tahasil under the Cuttack Development Authority area for the purposes of its urbanization. The Government also issued a notification under Section 4 of the Land Acquisition Act, 1894 for establishment of an industrial area in the general public interest in these villages. However, in the notification it was not mentioned that the land would be required for setting up of the said thermal power plant. The Government of Orissa signed a Memorandum of Understanding with Tata Power Company Ltd. on 26th September, 2006 to set up the said thermal power plant with an estimated expenditure of Rs. 4,348 crores with a time schedule of 42 months.

3. The applicant claims to be owner in respect of plot no. 928 and 929 under Khata No. 327/9 of an area of 0.190 acres and 0.0330 acres in Mouza Talagada under Cuttack Sadar Tahasil. The acquisition was assailed by the applicant by filing a writ petition being Writ Petition No. 6327/2009 before the High Court of Orissa challenging the notification under Section 4 of the Land Acquisition Act as well as raising the issue with regard to adverse impacts of establishment of coal based thermal power plant on environment and otherwise. According to the applicant, this plant was bound to result in environmental pollution, pollution of the rivers because of discharge of mercury and it would adversely affect the ecology of the District Cuttack and its various parts. The Member Secretary of the State Pollution Control Board had issued an advertisement on 26th March, 2009 in the newspaper fixing the date and venue of public hearing in regard to the project on 29th May, 2009 at the Red Cross Conference Hall, Collectorate, Cuttack at 11.00 a.m. The applicant along with one social activist, Mr. Prafulla Kumar Samantaray, had filed objection before the Member Secretary. Not only this, according to the applicant, the Principal Chief Conservator of Forest (Wildlife) and the Chief Wildlife Warden, Orissa had also raised objection in respect of approval of the site specific Wildlife Conservation Plan of Tata Power Company Ltd. These facts were also noticed in the EIA report. The Pollution Control Board also granted consent in terms of Section 25 of the Water (Prevention & Control of Pollution) Act, 1974 and Section 21 of the Air (Prevention & Control of Pollution) Act, 1981 vide its memorandum dated 26th March, 2010 in favour of the company to establish the coal based thermal power plant. It is the allegation of the applicant that both the above-mentioned impugned orders had been passed during the pendency of the said order dated 29th May, 2009 passed by the High Court of Orissa in CM No. 5927/2009 in Writ Petition No. 6327/2009 and the said writ petition is stated to be pending before that High Court, even as of today. As such the applicant has substantive interest and is an aggrieved person in relation to the orders impugned in the present appeal, i.e. the order of consent granted by State Pollution Control Board dated 26th March, 2010 and EC dated 15th February, 2011.

5. During the course of hearing of the aforementioned writ petition, the counsel

SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 3 Monday, August 29, 2022
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt.Ltd., Lucknow.

appearing for the respondents informed the applicant on 4th April, 2012, that the acquisition proceedings had already been completed and also the fact that the EC had been granted by the MoEF vide its order dated 15th February, 2011. This is how the applicant avers that he came to know about the factum of grant of EC and he filed the present appeal before the Tribunal on 28th May, 2011. He, thus, prays for condonation of 23 days delay in filing the present appeal.

While opposing the application for condonation of delay on behalf of the respondent-company, it is stated that they had put the EC order on their website on 1st March, 2011 and had published the EC order in the Indian Express on 21st February, 2011 and the Odisha Bhaskar on 20th February, 2011. Thus, according to it the limitation, at best, could start from 20th February, 2011 and the present appeal having been filed on 28th May, 2011 is even beyond the period of 90 days as prescribed under Section 16 of the NGT Act. Thus, as per its submission this Tribunal has no jurisdiction to condone the delay and, in any case, no case has been made out by the applicant for condonation of delay. The application, therefore, is liable to be dismissed.

6. On behalf of the MoEF, it is contended that they had put the EC order on its website on 23rd February, 2011. Once the matter was put up on the website it was expected of the applicant to be aware of the said fact and the order, in any case, would be deemed to have been communicated to the applicant on that date. Thus, the appeal at best, could be filed by 22nd March, 2011 and/or within 60 days thereafter but the present appeal having been filed on 28th May, 2011 is beyond 90 days and the delay in filing the appeal cannot and should not be condoned by this Tribunal.

7. In order to determine whether the application is or is not barred by time, the primary factors that require determination are as to when the order was 'communicated' to the person; and if he, has shown sufficient cause for condoning the delay in filing the appeal within the 60 days period after the expiry of the prescribed period of limitation of 30 days.

8. Corollary to such discussion would be the issue as to when the limitation would start running or the date from which such period of limitation is to be reckoned. All these questions need not detain us any longer as they squarely stand answered by a Five-Member Bench of this Tribunal in the case of *Save Mon Region Federation* v. *Union of India* [2013 (1) All India NGT Reporter Page 1]. Following the principles stated therein, it is clear that communication of order is initiated by transmitting the order into the public domain by means which are accessible to the public at large without hindrance. That will be the date from which the period of limitation shall be reckoned as contemplated under Section 16 of the NGT Act. Various stakeholders are expected to comply with different sets of obligations post the passing of an order of EC in accordance with the provisions of the Environment (Protection) Rules, 1986 and the Environmental Clearance Regulations/Notification of 2006. It is only when the stakeholders, particularly the MoEF and the project proponent have discharged their obligations completely in all respects that the period of limitation shall commence. If different stakeholders at different intervals have completely discharged their obligations including putting the order of EC in the public domain at different times, then the earliest of them would be the relevant date.

9. In terms of law stated by the Tribunal in *Save Mon Region Federation* v. *Union of India* supra, MoEF was expected to upload on its website the order of EC within seven days from the date of passing of that order. Such uploaded order should be instantly accessible and downloadable by any person free of any impediment. Further, it was required to put the order in public domain by placing it on its notice board in its premises including the premises of its regional offices. Such notice board was also required to be available to the public at large, without any hindrance.

10. In the present case, it has been stated on behalf of the MoEF that the EC order

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 4 Monday, August 29, 2022
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt.Ltd., Lucknow.

was passed on 15th February, 2011 and was put up on its website on 23rd February, 2011. It is not stated whether the said order was put on the notice board in its office/regional offices. As such the MoEF has not completely discharged its obligation in accordance with law in a way that would trigger the period of limitation from a particular date.

11. The project proponent claims that it had put the order of EC on its website on 1st March, 2011 and that it had further published the intimation of EC order in the Indian Express and the Odisha Bhaskar on 21st February, 2011 and 20th February, 2011 respectively. On this premise, it is submitted that the period of limitation shall commence running from 20th/21st February, 2011 and thus the appeal is barred being beyond 90 days, and therefore, the delay cannot be condoned by the Tribunal.

12. At this stage, we may first notice what are the obligations of a project proponent under the relevant provisions of law. In a more recent judgment of the Tribunal in the case of *Medha Patkar* v. *Ministry of Environment and Forests* (Appeal No. 1 of 2013), decided on 11th July, 2013, a Bench of the Tribunal held as under:

> "12. From the above dictum, it is clear that a communication would mean putting it in public domain and completing the acts as are contemplated in the EIA Notification of 2006, read with conditions of the EC and the provisions of the Act. In terms of the scheme of the notification and law, there are three stakeholders in the process of grant of environmental clearance:
>
> (a) Project Proponent
>
> (b) Ministry of Environment and Forests, and
>
> (c) Other agencies which are required to fulfill their obligations to make the communication complete in terms of the provisions of the Act and the notification concerned.
>
> 13. The MoEF shall discharge its onus and complete its acts to ensure communication of the environmental clearance so as to trigger the period of limitation. The MoEF upon granting of the environmental clearance must upload the same on its website within seven days of such order, which would remain uploaded for at least 90 days, as well as put it on its notice board of the Principal as well as the Regional Office for a period of at least 30 days. It should be accessible to the public at large without impediments (Refer: *Save Mon Region Federation* v. *UOI*).
>
> 14. The project proponent, upon receipt of the environmental clearance, should upload it permanently on its website. In addition thereto, the project proponent should publish it in two local newspapers having circulation where the project is located and one of which being in vernacular language. In such publication, the project proponent should refer to the factum of environmental clearance along with the stipulated conditions and safeguards. The project proponent then also has to submit a copy of the EC to the heads of the local authorities, panchayats and local bodies of the district. It will also give to the departments of the State a copy of the environmental clearance.
>
> 15. Then the Government agencies and local bodies are expected to display the order of environmental clearance for a period of 30 days on its website or display on notice board, as the case may be. This is the function allocated to the Government departments and the local bodies under the provisions of the notification of 2006. Complete performance of its obligations imposed on it by the order of environmental clearance would constitute a communication to an aggrieved person under the Act. In other words, if one set of the above events is completed by any of the stakeholders, the limitation period shall trigger. If they happen on different times and after interval, the one earliest in point of time shall reckon the period of limitation. Communication shall be complete in law upon fulfilment of complete set of obligations by any of the stakeholders. Once the period of limitation is prescribed

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 5 Monday, August 29, 2022
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt.Ltd., Lucknow.

under the provisions of the Act, then it has to be enforced with all its rigour. Commencement of limitation and its reckoning cannot be frustrated by communication to any one of the stakeholders. Such an approach would be opposed to the basic principle of limitation."

13. In light of the above, let us now consider whether the stakeholder has fulfilled completely and entirely its obligations as required under law (Environmental Clearance Regulations/Notification of 2006, and the judgment of the Tribunal in *Save Mon Region Federation case* supra).

14. We have perused the publication of order of EC effected by the applicant in the two newspapers. The law requires the project proponent not only to give intimation in regard to factum of passing an order of EC but also to publish the stipulated conditions and safeguards stated in such order. This admittedly has not been done by the project proponent. The project proponent admittedly did not give copies of the EC to the heads of the local authorities, panchayats and municipal bodies of the district to display on their respective notice boards and thus, could not ensure that it reaches the common man of the area where the project is proposed to be established. These are the apparent breaches of its obligations committed by the project proponent. The project proponent merely put the EC order on its website on 1st March, 2011. Firstly, there is no justification for placing it on the website after a lapse of more than 2 weeks, and secondly, the period of limitation cannot run from 1st March, 2011 as other co-related obligations had not been discharged by the project proponent even on that date.

15. Once there is no compliance of the statutory obligations, then neither the MoEF nor the project proponent can raise any objection with regard to the limitation successfully.

16. The applicant has put forward a version which is supported by an affidavit filed by him stating that he came to know about the passing of the impugned order only on 4th April, 2011 during a hearing in the Writ Petition filed by the applicant, being WP No. 6327/2009. Having come to know of the same on 4th April, 2011, he filed an appeal before the Tribunal on 28th May, 2011 and hence there is only a delay of 23 days in filing the appeal. This delay is neither intentional nor the applicant can be said to have slept over his right as he obtained a copy of the impugned order thereafter. Having obtained the orders, the appeal was prepared and filed before the Tribunal without any undue delay. According to the applicant, it took him some more time in collecting necessary papers including the objections etc. filed during the proceedings before the EAC and during the public hearing. There is nothing on record to factually controvert the averments of the applicant that he came to know of passing of the EC order during the proceedings pending before the High Court.

17. One cannot overlook another fact that if the averments made by the applicant in the appeal are found to be correct, then it would be a serious and substantial question relating to environment and the same would require a proper examination.

18. The major challenge of the applicant is to the EIA proceedings and the report. It is contended that the thermal plant of this magnitude is bound to pose environmental implications and would cause both water and air pollution problems. Even the notification under Section 4 of the Land Acquisition Act covers Reserve Forest and social forestry area without taking any approval from the Central Government and the State Government. The plant in question will be consuming 6 million tons of coal per annum. It will be generating 5238 tons of fly ash per day and 1310 tons of bottom ash per day. In addition to intense heat, this plant will be releasing 3380 tons of flue gases per hour which include 19.45% of carbon dioxide. All these obnoxious gases will add to the green house effect resulting in further increase in temperature and build up of heat with adverse impact on the flora and fauna of the area and on the precious

SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 6 Monday, August 29, 2022
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt.Ltd., Lucknow.

wildlife habitat in the locality. It will affect the vegetation in the area resulting in drying up of water sources along with noise pollution and consequent biotic pressure which will put immense stress on both wildlife and its habitat in the neighbouring Chandka Wildlife Sanctuary and Nandankanan Wildlife Sanctuary. These are the dimensions of environmental impact as stated by the applicant, which may ultimately require due examination by this Tribunal.

19. According to the applicant, the proceedings have been held and orders were passed and given effect to without obtaining leave of the High Court of Orissa in violation of its stay order dated 29th May, 2009.

20. The applicant has been able to show sufficient cause for 23 days' delay in filing the present appeal. It is correct that the Tribunal will not have jurisdiction to condone the delay where the appeal is filed beyond the prescribed period of 30+60 days in terms of Section 16 of the NGT Act. In the present case, however there is no delay in excess of 90 days. In fact, both the respondents have failed to discharge their obligations in accordance with law. They failed to put the EC order in the public domain and ensure that any aggrieved person is able to access such order in accordance with the prescribed procedure and law. In fact, both MoEF and the project proponent are at fault and cannot be permitted to take advantage of their own wrong.

21. The respondents have failed to discharge their composite obligations comprehensively. Thus, in the present case, it is not possible in law to define a date when the order would actually or deemed to be communicated to the applicant. The communication of the order being incomplete in law, the limitation cannot be reckoned from any of the dates stated by any of the respondents. While construing the law of limitation, this Tribunal must take a pragmatic view balancing the rights of the parties to the *lis*. The objection of limitation when renders a petition barred by time, it takes away the right of one and protects the right of the other. One who raises an objection of limitation, onus lies on him to show that the requirements of law, triggering the period of limitation, have been satisfied.

22. For the reasons afore-stated, we find merit in the application under consideration. The delay of 23 days in filing the appeal is condoned. The application, thus, is allowed; however leaving the parties to bear their own costs.

———

Disclaimer: While every effort is made to avoid any mistake or omission, this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification is being circulated on the condition and understanding that the publisher would not be liable in any manner by reason of any mistake or omission or for any action taken or omitted to be taken or advice rendered or accepted on the basis of this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification. All disputes will be subject exclusively to jurisdiction of courts, tribunals and forums at Lucknow only. The authenticity of this text must be verified from the original source.

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

MISCELLANEOUS APPLICATION NO. 21 OF 2022
IN
MISCELLANEOUS APPLICATION NO. 665 OF 2021
IN
SUO MOTU WRIT PETITION (C) NO. 3 OF 2020

IN RE: COGNIZANCE FOR EXTENSION OF LIMITATION

WITH

MISCELLANEOUS APPLICATION NO.29 OF 2022

IN
MISCELLANEOUS APPLICATION NO. 665 OF 2021

IN
SUO MOTU WRIT PETITION (C) NO. 3 OF 2020

Order

1. In March, 2020, this Court took Suo Motu cognizance of the difficulties that might be faced by the litigants in filing petitions/ applications/ suits/ appeals/ all other quasi proceedings within the period of limitation prescribed under the general law of limitation or under any special laws (both Central and/or State) due to the outbreak of the COVID-19 pandemic.

Signature Not Verified
Digitally signed by Vishal Anand
Date: 2022.01.10 21:54:44 IST
Reason:

2. On 23.03.2020, this Court directed extension of the period of limitation in all proceedings before Courts/Tribunals including this Court w.e.f. 15.03.2020 till further orders. On 08.03.2021, the order dated 23.03.2020 was brought to an end, permitting the relaxation of period of limitation between 15.03.2020 and 14.03.2021. While doing so, it was made clear that the period of limitation would start from 15.03.2021.

3. Thereafter, due to a second surge in COVID-19 cases, the Supreme Court Advocates on Record Association (SCAORA) intervened in the Suo Motu proceedings by filing Miscellaneous Application No. 665 of 2021 seeking restoration of the order dated 23.03.2020 relaxing limitation. The aforesaid Miscellaneous Application No.665 of 2021 was disposed of by this Court *vide* Order dated 23.09.2021, wherein this Court extended the period of limitation in all proceedings before the Courts/Tribunals including this Court w.e.f 15.03.2020 till 02.10.2021.

4. The present Miscellaneous Application has been filed by the Supreme Court Advocates-on-Record Association in the context of the spread of the new variant of the COVID-19 and the drastic surge in the number of COVID cases across the country.

Considering the prevailing conditions, the applicants are seeking the following:

i. allow the present application by restoring the order dated 23.03.2020 passed by this Hon'ble Court in Suo Motu Writ Petition (C) NO. 3 of 2020 ; and
ii. allow the present application by restoring the order dated 27.04.2021 passed by this Hon'ble Court in M.A. no. 665 of 2021 in Suo Motu Writ Petition (C) NO. 3 of 2020; and
iii. pass such other order or orders as this Hon'ble Court may deem fit and proper.

5. Taking into consideration the arguments advanced by learned counsel and the impact of the surge of the virus on public health and adversities faced by litigants in the prevailing conditions, we deem it appropriate to dispose of the M.A. No. 21 of 2022 with the following directions:

I. The order dated 23.03.2020 is restored and in continuation of the subsequent orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.

II. Consequently, the balance period of limitation remaining as on 03.10.2021, if any, shall become available with effect from 01.03.2022.

III. In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply.

IV. It is further clarified that the period from 15.03.2020 till 28.02.2022 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.

6. As prayed for by learned Senior Counsel, M.A. No. 29 of 2022 is dismissed as withdrawn.

.....CJI.
(N.V. RAMANA)

.....J.
(L. NAGESWARA RAO)

.....J.
(SURYA KANT)

New Delhi
January 10, 2022

ITEM NO.301 Court 1 (Video Conferencing) SECTION PIL-W

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Miscellaneous Application No.21/2022 in MA 665/2021 in SMW(C) No.3/2020

IN RE: COGNIZANCE FOR EXTENSION OF LIMITATION

(FOR ADMISSION and IA No.1935/2022-APPLICATION UNDER SECTION LV RULE 6 OF THE SUPREME COURT RULES, 2013)

WITH
MA 29/2022 in MA 665/2021 in SMW(C) No. 3/2020 (PIL-W)
(FOR ADMISSION and IA No.3161/2022-APPLICATION UNDER SECTION LV RULE 6 OF THE SUPREME COURT RULES, 2013 and IA No.3444/2022-APPLICATION FOR PERMISSION)

Date : 10-01-2022 These matters were called on for hearing today.

CORAM :
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE L. NAGESWARA RAO
HON'BLE MR. JUSTICE SURYA KANT

For Petitioner(s)
Mr. Shivaji M. Jadhav, Adv.
Ms. Manoj K. Mishra, Adv.
Dr. Joseph Aristotle S., Adv.
Ms. Diksha Rai, Adv.
Mr. Nikhil Jain, Adv.
Mr. Atulesh Kumar, Adv.
Dr. Aman M. Hingorani, Adv.
Ms. Anzu Varkey, Adv.
Mr. Aljo Joseph, Adv.
Mr. Sachin Sharma, Adv.
Mr. Varinder K. Sharma, Adv.
Mr. Abhinav Ramkrishna, AOR

Mr. Neeraj Kishan Kaul, Sr. Adv.
Mr. Himanshu Chaubey, AOR
Mr. Prem Dave, Adv.
Mr. Raghav Agrawal, Adv.
Mr. Toshiv Goyal, Adv.

For Respondent(s)
Mr. K.K. Venugopal, AG
Mr. Tushar Mehta, SG

Mr. Rajat Nair, Adv.
Mr. Kanu Agrawal, Adv.
Mr. Siddhant Kohli, Adv.
Mr. Chinmayee Chandra, Adv.
Mr. Arvind Kumar Sharma, AOR

Ms. Uttara Babbar, AOR
Mr. Manan Bansal, Adv.

Mr. Arjun Garg, AOR
Mr. Aakash Nandolia, Adv.
Ms. Sagun Srivastava, Adv.

Ms. Sunieta Ojha, AOR

Mr. P. I. Jose, AOR
Mr. Jenis V. Frensis, Adv.
Mr. Prashant K. Sharma, Adv.

Ms. Anindita Mitra, AOR

Mr. Sahil Tagotra, AOR
Mr. Subhro Mukherjee, Adv.

Mr. Amit Sharma, AOR

Mr. Sameer Parekh, Adv.
Mr. Kshatrashal Raj, Adv.
Ms. Tanya Chaudhry, Adv.
Ms. Pratyusha Priyadarshini, Adv.
Ms. Nitika Pandey, Adv.
For M/s.Parekh & Co., AOR

M/S. VKC Law Offices, AOR

Mr. Vinod Sharma, AOR

Mr. Mukesh K. Giri, AOR

Mr. Kunal Chatterji, AOR
Ms. Maitrayee Banerjee, Adv.
Mr. Rohit Bansal, Adv.

Ms. Pratibha Jain, AOR

Sh. Soumya Chakraborty, Sr. Adv.
Mr. Sanjai Kumar Pathak, AOR
Ms. Shashi Pathak, Adv.

Mr. Divyakant Lahoti, AOR
Mr. Parikshit Ahuja, Adv.
Ms. Praveena Bisht, Adv.
Ms. Madhur Jhavar, Adv.
Ms. Vindhya Mehra, Adv.
Mr. Kartik Lahoti, Adv.
Mr. Rahul Maheshwari, Adv.
Ms. Shivangi Malhotra, Adv.

Mr. Tapesh Kumar Singh, AOR
Mr. Aditya Pratap Singh, Adv.
Mr. Aditya Narayan Das, Adv.

Ms. Binu Tamta, Adv.
Mr. Dhruv Tamta, Adv.

Mr. Siddhesh Kotwal, Adv.
Ms. Ana Upadhyay, Adv.
Ms. Manya Hasija, Adv.
Ms. Pragya Barsaiyan, Adv.
Mr. Akash Singh, Adv.

Ms. Taruna Ardhendumauli Prasad, AOR

Mr. Sibo Sankar Mishra, AOR
Mr. Niranjan Sahu, Adv.

Mr. Abhimanyu Tewari, Adv.
Ms. Eliza Bar, Adv.

Mr. Avijit Mani Tripathi, AOR
Mr. T.K. Nayak, Adv.

UPON hearing the counsel the Court made the following

O R D E R

The Court is convened through Video Conferencing.

M.A. No.21 of 2022 is disposed of and M.A. No.29/2022 is dismissed as withdrawn, in terms of the signed Order.

(VISHAL ANAND)
ASTT. REGISTRAR-cum-PS

(R.S. NARAYANAN)
COURT MASTER (NSH)

(Signed Order is placed on the file)

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 1 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

2021 SCC OnLine SC 897

In the Supreme Court of India

(BEFORE A.M. KHANWILKAR, HRISHIKESH ROY AND C.T. RAVIKUMAR, JJ.)

Civil Appeal Nos. 12122-12123 of 2018

Municipal Corporation of Greater Mumbai … Appellant(s);

Versus

Ankita Sinha and Others … Respondent(s).

With

Civil Appeal No. 86/2019

Civil Appeal No. 5902/2019

Civil Appeal No. 6273 of 2021

(Arising out of SLP(C) No. 6732/2021)

Civil Appeal No. 6274 of 2021

(Arising out of SLP(C) No. 5930/2021)

Civil Appeal No. 6275 of 2021

(Arising out of SLP(C) No. 6733/2021)

Civil Appeal No. 6276 of 2021

(Arising out of SLP(C) No. 16448 of 2021)

Diary No. 11655/2021

Civil Appeal No. 6277-6278 of 2021

(Arising out of SLP(C) No. 16449-16450 of 2021)

Diary No. 13789/2021

Civil Appeal No. 6279 of 2021

(Arising out of SLP(C) No. 16451 of 2021)

Diary No. 13811/2021

Civil Appeal No. 6280-6281 of 2021

(Arising out of SLP(C) No. 16452-16453 of 2021)

Diary No. 13890/2021

Civil Appeal No. 2897/2021

Civil Appeal No. 6282 of 2021

(Arising out of SLP(C) No. 11426 of 2021)

Civil Appeal No. 6283 of 2021

(Arising out of SLP(C) No. 11427 of 2021)

Civil Appeal No. 6262 of 2021

Diary No. 16948 of 2021

Civil Appeal No. 6284 of 2021

(Arising out of SLP(C) No. 11798 of 2021)

Civil Appeal No. 6285 of 2021

(Arising out of SLP(C) No. 12669 of 2021)

Civil Appeal No. 6286 of 2021

(Arising out of SLP(C) No. 16454 of 2021)

Diary No. 19534/2021

Civil Appeal Nos. 12122-12123 of 2018, Civil Appeal No. 86/2019, Civil Appeal No. 5902/2019, Civil Appeal No. 6273 of 2021 (Arising out of SLP(C) No.

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 2 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

6732/2021), Civil Appeal No. 6274 of 2021 (Arising out of SLP(C) No. 5930/2021), Civil Appeal No. 6275 of 2021 (Arising out of SLP(C) No. 6733/2021), Civil Appeal No. 6276 of 2021 (Arising out of SLP(C) No. 16448 of 2021), Diary No. 11655/2021, Civil Appeal No. 6277-6278 of 2021 (Arising out of SLP(C) No. 16449-16450 of 2021), Diary No. 13789/2021, Civil Appeal No. 6279 of 2021 (Arising out of SLP(C) No. 16451 of 2021), Diary No. 13811/2021, Civil Appeal No. 6280-6281 of 2021 (Arising out of SLP(C) No. 16452-16453 of 2021), Diary No. 13890/2021, Civil Appeal No. 2897/2021, Civil Appeal No. 6282 of 2021 (Arising out of SLP(C) No. 11426 of 2021), Civil Appeal No. 6283 of 2021 (Arising out of SLP(C) No. 11427 of 2021), Civil Appeal No. 6262 of 2021, Diary No. 16948 of 2021, Civil Appeal No. 6284 of 2021 (Arising out of SLP(C) No. 11798 of 2021), Civil Appeal No. 6285 of 2021 (Arising out of SLP(C) No. 12669 of 2021), Civil Appeal No. 6286 of 2021 (Arising out of SLP(C) No. 16454 of 2021) and Diary No. 19534/2021

Decided on October 7, 2021

The Judgment of the Court was delivered by

HRISHIKESH ROY, J.:—

"Estragon : Let's go.
Vladimir : We can't.
Estragon : Why not?
Vladimir : We're waiting for Godot."[1]

2. Leave granted in the Special Leave Petitions.

3. The consideration to be made in these matters is whether the National Green Tribunal (for short "the NGT") has the power to exercise *Suo Motu* jurisdiction in discharge of its functions under the National Green Tribunal Act, 2010 (for short, "the NGT Act 2010").

4. In the lead case in this group, i.e. the Civil Appeal No. 86 of 2019, the NGT noticed an article titled "*Garbage Gangs of Deonar : The Kingpins and Their Multi-Crore Trade*" in the online news portal, *The Quint.* The article spoke of how mismanagement of solid waste had an adverse impact on the environment, public health and lives of individuals living in the vicinity of the dumping ground in Mumbai city.

5. The NGT took *suo motu* cognizance of the above article vide order dated 07.08.2018 and directed that the article writer Ankita Sinha be the applicant in the case OA No. 510 of 2018, registered at the NGT's instance. Thereafter, steps were taken for inspection of the Deonar Dumping site by the representative of the Central Pollution Control Board, Maharashtra Pollution Control Board, the District Collector of the area and also the representative of the Municipal Corporation of Greater Mumbai (for short "the MCGM"). Pursuant to the Report of the inspecting team which highlighted that the landfill site failed to comply with the provisions of the Solid Waste Management Rules, 2016, the NGT vide order dated 30.10.2018 noted that '*damage to the environment and public health is self-evident*' and ordered MCGM to pay compensation to the tune of Rs. 5 crores.

6. This Court while entertaining the Civil Appeal No. 86/2019 of MCGM, ordered stay on the operation of the order passed by the NGT and thereafter arranged for analogous consideration of the related cases where the common threshold jurisdictional issue arises on whether the NGT has the power to exercise *suo motu* jurisdiction.

7. Mr. Mukul Rohatgi, Mr. Dushyant Dave, Mr. Jaideep Gupta, Mr. Dhruv Mehta, Mr. Atmaram Nadkarni, Mr. Krishnan Venugopal, Mr. V. Giri, Mr. Sajan Poovayya and Mr. Sidhartha Dave, learned Senior Counsel together with Mr. E.M.S Anam, Ms. Amrita

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 3 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

Sharma, Mr. S. Thananjayan have taken a common stand. They have argued that the NGT is a Tribunal and a creature of statute and as such, it cannot act on its own motion or exercise the power of judicial review or act *suo motu*, in discharge of its function. Being a creature of the statute, the forum cannot assume inherent powers as under Article 32 and Article 226 and its domain is circumscribed by the limitations so imposed. The learned counsel also argue that the NGT has an adjudicatory role to decide disputes which necessarily mean involvement of two or more contesting parties. Therefore, the NGT by acting *suo motu* cannot transpose itself to the shoes of one such party. The absence of general power of judicial review with the NGT (which is available with superior courts) is highlighted to keep away *suo motu* power from the NGT. Various judgments relating to the Tribunal's power and role are cited by the counsel and those would be discussed in later part of this order.

8. Projecting the contrary view, Mr. Nidhesh Gupta, the learned Senior Counsel appearing for the aggrieved party in SLP(C) No. 6732/2021, Mr. Sanjay Parikh, learned Senior Counsel for the Intervener in C.A. No. 86/2019 and Mr. Gopal Sankaranarayanan, learned Senior Counsel appearing for the Impleader I.A. No. 71482/2021 in the SLP(C) No. 6732/2021, by referring to the special role envisaged for the NGT and the history of its incorporation, make equally powerful submission in support of exercise of *suo motu* jurisdiction, by the NGT.

9. Mr. Anand Grover, the learned Senior Counsel was appointed as the *Amicus Curiae* to assist the Court and he was heard at length. The counsel acknowledges the NGT's role and position under the Act and its wide jurisdiction over environmental matters but Mr. Grover is of the view that the NGT is incapable of triggering action on its own. In other words, the NGT cannot act *suo motu* without someone moving the Forum as otherwise the forum then would be perceived to be judging its own cause. Since *suo motu* power is not conferred under the NGT Act, the specialized tribunal has to be moved by an outside party. But the format of the application is not important and even a letter addressed by an interested party, will clothe the NGT with power to take action is the concessional submission of Mr. Grover.

10. Representing the Central Government, Ms. Aishwarya Bhati, the learned Additional Solicitor General of India submitted that *Suo Motu* power is not exercisable by the NGT since the same has not been conferred on the forum under the NGT Act, unlike the situation in the now repealed *National Environment Tribunal Act, 1995* (hereinafter referred to as the "NET Act"). The counsel refers to the provisions of the NGT Act and submits that the concept of *locus standi* was expanded for NGT's intervention under Section 18(2)(e) but the tribunal is not vested with *suo motu* power to take action on its own unlike the High Courts and the Supreme Court. The learned ASG, however, submits that even on receipt of a letter, the NGT can commence action on environmental matters. Thus, on exercise of epistolary jurisdiction by the NGT, the ASG is on the same page as the *amicus curiae* but as earlier noted both counsel argue for keeping away the *suo motu* power from the NGT.

11. Having summarized the positions taken by the respective Counsel, we may now refer to the specific grounds of challenge to keep away *suo motu* power from the NGT. The concerned counsel project that NGT is a creature of the statute and just like other such statutory tribunals, the NGT is also bound within statutory confines. They have relied upon *Standard Chartered* v. *Dharminder Bhohi*[2] wherein, provisions of the *Recovery of the Debts Due to Banks and Financial Institutions Act, 1993* were analysed to note the limitations of the Debt Recovery Tribunal and Appellate Tribunal. From the analysis of Justice Dipak Misra (as his Lordship then was) for the Division Bench, it can be inferred that the Tribunal was given power under the statute to pass such other orders and give such directions to give effect to its orders or to prevent abuse of its process or to secure the ends of justice but in discharge of its functions the Tribunal was required to confine itself to within the statutory parameters. Thus, Section 19(25)

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 4 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

conferred limited powers and the submission thus is that the Tribunal does not have any inherent powers.

12. Similarly, Justice S.H. Kapadia (as his Lordship then was) in *Transcore* v. *Union of India*[3], opined on behalf of a Division Bench that,

> "67. …The DRT is a tribunal, it is the creature of the statute, it has no inherent power which exists in the civil courts."

13. The counsel also projects that in the context of Consumer Forums, Justice Dalveer Bhandari (as his Lordship then was) speaking for a three judge bench in *Rajeev Hitendra Pathak* v. *Achyut Kashinath*[4], observed as under:—

> "34. On a careful analysis of the provisions of the Act, it is abundantly clear that the Tribunals are creatures of the statute and derive their power from the express provisions of the statute. The District Forums and the State Commissions have not been given any power to set aside ex parte orders and the power of review and the powers which have not been expressly given by the statute cannot be exercised."

14. The second limb of contention is that the Act is applicable to '*disputes*' as, necessarily referring to a *lis* between two parties. The counsel has relied upon *Techi Tagi Tara* v. *Rajendra Singh Bhandari*[5] wherein the term '*substantial question relating to environment*' was interpreted in an attenuated fashion to mean a question arising as part of a dispute. The submission therefore is that a dispute must necessitate a claimant or an applicant. Further, this dispute must also be capable of settlement by the NGT. In the cited case the proposition is articulated in the following fashion,

> "**19.** On a combined reading of all these provisions, it is clear to us that there must be a substantial question relating to the environment and that question must arise in a dispute — it should not be an academic question. There must also be a claimant raising that dispute which dispute is capable of settlement by the NGT by the grant of some relief which could be in the nature of compensation or restitution of property damaged or restitution of the environment and any other incidental or ancillary relief connected therewith.
>
> 20. …In *Prabhakar* v. *Deptt. of Sericulture* [*Prabhakar* v. *Deptt. of Sericulture*, [(2015) 15 SCC 1 : (2016) 2 SCC (L&S) 149] the following definition of "dispute" was noted in paras 34 and 35 of the Report : (SCC p. 21)
>
> "*34*. To understand the meaning of the word "dispute", it would be appropriate to start with the grammatical or dictionary meaning of the term:
>
> '"*Dispute*".—to argue about, to contend for, to oppose by argument, to call in question — to argue or debate (with, about or over) — a contest with words; an argument; a debate; a quarrel;'
>
> *35*. *Black's Law Dictionary*, 5th Edn., p. 424 defines "dispute" as under:
>
> '*Dispute*.—A conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other. The subject of litigation; the matter for which a suit is brought and upon which issue is joined, and in relation to which jurors are called and witnesses examined.'"

15. The *amicus curiae* has also addressed this issue, by defining a dispute as necessitating an assertion and a denial. By this reasoning, it is submitted that function of Section 14 of the NGT Act is available only to adjudicate upon disputes, as in an adversarial system but not for any other ameliorative, restorative or preventative functions.

16. Thirdly, the lack of general power of Judicial Review has been argued to show legislative intent to curb *suo motu* powers. Counsel have stated that the NGT, as a Tribunal with prescribed authority under a statute, does not have any general power of judicial review. Thus, it is not within the category of Writ Courts as under Article 226

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 5 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

and Article 32 of the Constitution of India. In the relied upon judgment *Tamil Nadu Pollution Control Board* v. *Sterlite Industries (I) Ltd.*[6] Justice R.F. Nariman speaking about the NGT for a Division Bench of this Court has observed the following,

> "41. …Suffice it to say that the NGT is not a tribunal set up either under Article 323-A or Article 323-B of the Constitution, but is a statutory tribunal set up under the NGT Act. That such a tribunal does not exercise the jurisdiction of all courts except the Supreme Court is clear from a reading of Section 29 of the NGT Act……
>
> 43. …In the present case, it is clear that Section 16 of the NGT Act is cast in terms that are similar to Section 14(*b*) of the Telecom Regulatory Authority of India Act, 1997, in that appeals are against the orders, decisions, directions, or determinations made under the various Acts mentioned in Section 16. It is clear, therefore, that under the NGT Act, the Tribunal exercising appellate jurisdiction cannot strike down rules or regulations made under this Act. Therefore, it would be fallacious to state that the Tribunal has powers of judicial review akin to that of a High Court exercising constitutional powers under Article 226 of the Constitution of India. We must never forget the distinction between a superior court of record and courts of limited jurisdiction that was, in the felicitous language of Gajendragadkar, C.J., in *Powers, Privileges and Immunities of State Legislatures, In re* [*Powers, Privileges and Immunities of State Legislatures, In re*, [(1965) 1 SCR 413 : AIR 1965 SC 745], made in the following words : (SCR p. 499 : AIR p. 789, para 138)
>
> > "*138*. We ought to make it clear that we are dealing with the question of jurisdiction and are not concerned with the propriety or reasonableness of the exercise of such jurisdiction. Besides, in the case of a superior court of record, it is for the court to consider whether any matter falls within its jurisdiction or not. Unlike a court of limited jurisdiction, the superior court is entitled to determine for itself questions about its own jurisdiction.
> >
> > 'Prima facie', says Halsbury, 'no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular court [*Halsbury's Laws of England*, Vol. 9, p. 349]'."
>
> For this reason also, we are of the view that the State Government order made under Section 18 of the Water Act, not being the subject-matter of any appeal under Section 16 of the NGT Act, cannot be "judicially reviewed" by the NGT. Following the judgment in *BSNL* [*BSNL* v. *TRAI*, [(2014) 3 SCC 222], we are of the view that the NGT has no general power of judicial review akin to that vested under Article 226 of the Constitution of India possessed by the High Courts of this country. Shri Sundaram's strong reliance on the NGT judgment dated 17-7-2014 in *Wilfred J.* v. *Ministry of Environment & Forests* [*Wilfred J.* v. *Ministry of Environment & Forests*, [2014 SCC OnLine NGT 6860] must also be rejected as this NGT judgment does not state the law on this aspect correctly. This contention is also without merit, and therefore, rejected."

17. The argument has been that the superior Courts exercising discretionary powers under Article 32 and Article 226, to safeguard fundamental rights, can venture into judicial review. But such a power not being expressly conferred on the NGT would suggest the limited nature of the Forum's powers, which would exclude any *suo motu* exercise.

I. THE BACKDROP OF THE NATIONAL GREEN TRIBUNAL

18. In order to understand the contours of jurisdiction of the NGT, we have thought it necessary to refer to the history of the legislation and also the Preamble and the Statement of Objects and Reasons of the NGT Act. The parliamentary intent which

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 6 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

shaped the creation of the NGT and the broad issues that they sought to address through the specialized institution should now be brought to the fore.

19. The precursor to the NGT Act was the 186th Report of the Law Commission of India dated 23.9.2003 where the Law Commission had made the following pertinent observation espousing the case for the creation of a specialized Court to deal with environmental issues:—

> "It is true that the High Court and Supreme Court have been taking up these and other complex environmental issues and deciding them. But, though they are judicial bodies, they do not have an independent statutory panel of environmental scientists to help and advise them on a permanent basis. They are prone to apply principles like the Wednesbury Principle and refuse to go into the merits. They do not also make spot inspections or receive oral evidence to see for themselves the facts as they exist on ground. On the other hand, if Environmental Courts are established in each State, these Courts can make spot inspections and receive oral evidence. They can receive independent advice on scientific matters by a panel of scientists.
>
> These Environmental Courts need not be Courts of exclusive jurisdiction. However, the High Courts, even if they are approached under Art. 226 either in individual cases or in PIL cases, where orders of environmental authorities could be questioned, may refuse to intervene on the ground that there is an effective alternative remedy before the specialist Environmental Court. As of now, when we have consumer Courts at the District and State level, the High Courts have consistently refused to entertain writ petitions under Art. 226 because parties have a remedy before the fora established under the Consumer Protection Act, 1986. We have also the example of special environmental courts in Australia, New Zealand and in some other countries and these are manned by Judges and expert commissioners. The Royal Commission in UK is also of the view that if environmental courts are established, the High Courts may refuse to entertain applications for judicial review on the ground that there is an effective alternative remedy before these Courts.
>
> It is for the above reasons we are proposing the establishment of separate environmental courts in each State. In Chapter IX, we propose to give the details of the constitution, power and jurisdiction of these Courts."

20. The above would suggest that the Law Commission was of the opinion that it is not convenient for the High Courts and the Supreme Court to make local inquiries or receive evidence. Moreover, the superior courts will not have access to expert environmental scientists on permanent basis to assist them. Therefore, NGT was conceived as a complimentary specialized forum to deal with all environmental multi-disciplinary issues both as original and also as an appellate authority, which complex issues were hitherto dealt with by the High Courts and the Supreme Court.

21. The NGT, therefore, was intended to be the competent forum for dealing with environmental issues instead of those being canvassed under the writ jurisdiction of the Courts. It was explicitly noted that the creation of the NGT would allow for the Supreme Court and High Court to avoid intervening under their inherent jurisdiction when an alternative efficacious remedy would become available before the specialized forum. The 186th Law Commission Report provided the following reasoning,

> "Likewise, we have not thought it fit to enable the Environmental Courts, to have judicial review powers exercised by the High Court under Art. 226 of the Constitution of India. We have felt that it is sufficient to vest original civil jurisdiction as exercisable by a Civil Court, in the Environmental Courts. If we vest powers of Judicial review as under Art. 226, then there may be need to subject the orders to the writ jurisdiction of High Courts as held in *L. Chandra Kumar* v. *Union*

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 7 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

of India, [(1997) 3 SCC 261.

No doubt, the Environment Court exercising powers of a Civil Court or as an appellate Court in civil jurisdiction, may be technically amenable to writ jurisdiction of the High Court but inasmuch as we are providing an appeal to the Supreme Court, the High Courts may decline to interfere on the ground that there is an effective alternative remedy of appeal on law and fact to the Supreme Court, as explained later in this Chapter."[7]

22. Thus, the power of judicial review was omitted to ensure avoidance of High Courts' interference with the Tribunal's orders by way of a mid-way scrutiny by the High Court, before the matter travels to the Supreme Court where NGT's orders can be challenged. The streamlining of the mechanism was to arrest the growing tide of litigation before High Courts and the Supreme Court and shift such issues to the domain of the NGT.

23. This is how the proposed forum was made free from the rules of evidence and the NGT was permitted to lay down its own procedure to entertain oral and documentary evidence, consult experts etc. The observance of the principles of natural justice was however mandated.

II. PREAMBLE & STATEMENT OF OBJECTS AND REASONS

24. The Statement of Objects and Reasons of the NGT Act will now require attention. Paras 2, 3, 4, 5 and 6 of the Statement of Objects and Reasons being relevant are extracted hereinbelow:—

"2. India is a party to the decisions taken at the United Nations Conference on the Human Environment held at Stockholm in June, 1972, in which India participated, calling upon the States to take appropriate steps for the protection and improvement of the human environment. The United Nations Conference on Environment and Development held at *Rio de Janeiro* in June, 1992, in which India participated, has also called upon the States to provide effective access to judicial and administrative proceedings, including redress and remedy, and to develop National laws regarding liability and compensation for the victims of pollution and other environmental damage.

3. The right to healthy environment has been construed as a part of the right to life under article 21 of the Constitution in the judicial pronouncement in India.

4. The National Environment Tribunal Act, 1995 was enacted to provide for strict liability for damages arising out of any accident occurring while handling any hazardous substance and for the establishment of a National Environmental Tribunal for effective and expeditious disposal of cases arising from such accident, with a view to giving relief and compensation for damages to persons, property and the environment. However, the National Environment Tribunal, which had a very limited mandate, was not established. The National Environment Appellate Authority Act, 1997 was enacted to establish the National Environment Appellate Authority to hear appeals with respect to restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards under the Environment (Protection) Act, 1986. The National Environment Appellate Authority has a limited workload because of the narrow scope of its jurisdiction.

5. Taking into account account the large number of environmental cases pending in higher courts and the involvement of multidisciplinary issues in such cases, the Supreme Court requested the Law Commission of India to consider the need for constitution of specialized environmental courts. Pursuant to the same, the Law Commission has recommended the setting up of environmental courts having both original and appellate jurisdiction relating to environmental laws.

6. In view of the foregoing paragraphs, a need has been felt to establish a

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 8 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

specialized tribunal to handle the multidisciplinary issues involved in environmental cases. Accordingly, it has been decided to enact a law to provide for the establishment of the National Green Tribunal for effective and expeditious disposal of civil cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment."

25. A reading of the Statement of Objects and Reasons shows that paragraph 4 thereof refers to the *National Environmental Tribunal Act, 1995 (NET)* which provided for strict liability and damages arising out of accidents occurring while handling hazardous substances. In the same context it was observed that the NET had a very limited and narrow mandate and jurisdiction. Thereafter, in Para 5 it has been recorded that a large number of environmental cases are pending in higher Courts which involve multi-disciplinary issues and, in such cases, the Supreme Court had requested the Law Commission of India to consider the need for constitution of specialized environmental Courts.

26. Significantly, the Statement of Objects and Reasons also refers to right to a healthy environment being a part of the right to life under Article 21 of the Constitution of India. This was consistent with the earlier mentioned 186th Law Commission Report highlighting that the body so created, would aim to "*achieve the objectives of Article 21, 47, 48A, 51A (g) of the Constitution of India by means of a fair, fast and satisfactory judicial procedure*". An institution concerned with a significant aspect of right to life necessarily should be given the most liberal construction.

27. The paragraph 2 of the Statement of Objects and Reasons refers to the United Nations Conference on the Human Environment held at Stockholm in June 1972 which called upon governments and peoples to exert common efforts for the preservation and improvement of the human environment when it involved people and for their posterity. Therefore, the municipal law enacted with such a laudatory objective of not only preventing damage to the environment but also to protect it, must be provided with the wherewithal to discharge its protective, preventive and remedial function towards protection of the environment. The mandate and jurisdiction of the NGT is therefore conceived to be of the widest amplitude and it is in the nature of a *sui generis* forum.

28. The United Nations Conference on Environment and Development held at Rio De Janeiro in June, 1992 where India participated, impressed upon the States to provide effective access to judicial and administrative proceedings, lay out redress and remedy and to develop national laws regarding liability and compensation for the victims of pollution and other environmental damage. The Preamble of the Act significantly emphasized on construing the right to healthy environment as a part of the Right to Life under Article 21 of the Constitution which was accepted by various judicial pronouncements in India. The National Green Tribunal was born in our country with such lofty dreams to deal with multi-disciplinary issues, relating to the environment.

29. The limited mandate conferred on the earlier forum i.e. the NET and the narrow scope of jurisdiction of the National Environment Appellate Authority along with the involvement of multi-disciplinary issues arising in environmental cases, were intended to be addressed through the constitution of the NGT.

III. THE NEED FOR PURPOSIVE INTERPRETATION

30. While adequate clarity is discernible in the phraseology that is employed under Section 14 and other provisions of the NGT Act, as shall be discussed in later parts of the judgement, the intention behind the statute should receive our careful attention. Tracing the legislative history for creation of the NGT it is seen that the NGT is intended to address wide ranging societal concerns and these have prompted us to opt

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 9 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

for purposive interpretation. The Statue will have to be read in its entirety and each provision of the Act must be given its due meaning by comprehending the mischief it intends to remedy. The chosen interpretive exercise is best understood from the treatise *Interpretation of Statutes*, authored by Justice G.P. Singh who explained thus,

> "When the question arises as to the meaning of certain provision in statute, it is not only legitimate but proper to read that provision in its context. The context here means, the statute as a whole, the previous state of the law, other statutes in pari materia, the general scope of the statute, and the mischief that it was intended to remedy. This statement of the rule was later fully adopted by the Supreme Court.
>
> It is a rule now firmly established that the intention of the Legislature must be found by reading the statute as a whole. The rule is referred to as an 'elementary rule' by Viscount Simonds : a compelling rule by Lord Sommervell of Harrow; and a "settled rule" by B.K. Mukherjee J. "I agree" said Lord Halsbury, "that you must look at the whole in order to give effect, if it be possible to do so, to the intention of the framer of it."

31. The mischief that the NGT Act attempted to remedy were underscored in the legislative history, and the pronouncements of the constitutional Courts flagging their environmental concerns.

32. The application of the *Heydon's Rule* could adequately aid us here as the Rule directs adoption of that construction which "*shall suppress the mischief and advance the remedy*" as was pertinently observed by Justice S.R. Das, for a seven judge bench in *Bengal Immunity Co.* v. *State of Bihar*[8],

> "…the office of all judges is to make such construction as shal suppresses the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief; and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*."

33. Francis Bennion in his book *Statutory Interpretation* described 'purposive interpretation' as under:

> 'A purposive construction of an enactment is one which gives effect to the legislative purpose by—
>
> (*a*) following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose, or
>
> (*b*) applying a strained meaning where the literal meaning is not in accordance with the legislative purpose.'

34. Justice Frankfurter of US Supreme Court in '*Some Reflections on the Reading of Statutes*', has elucidated on the principles to ascertain the contextual meaning of statutes in the following manner,

> 'The purpose of construction being the ascertainment of meaning, every consideration brought to bear for the solution of that problem must be devoted to that end alone.
>
> …
>
> Judge Learned Hand speaks of the art of interpretation as 'the proliferation of purpose'."[9]

35. Eventually, Justice Frankfurter relied upon Justice Benjamin Cardozo's phraseology in *Panama Refining Co.* v. *Ryan*, and the same is taken as a lodestar in our quest,

> "the meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view"[10].

36. The laudatory objectives for creation of the NGT would implore us to adopt such an interpretive process which will achieve the legislative purpose and will eschew

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 10 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

procedural impediment or so to say incapacity. The precedents of this Court, suggest a construction which fulfills the object of the Act.[11] The choice for this Court would be to lean towards the interpretation that would allow fructification of the legislative intention and is forward looking. The provisions must be read with the intention to accentuate them, especially as they concern protections of rights under Article 21 and also deal with vital environmental policy and its regulatory aspects.

IV. SALIENT STATUTORY FEATURES OF NGT ACT

37. Applying the chosen tool of interpretation to the statutory layout of the NGT Act, following provisions will require the Court's attention. Section 2(1)(c) of the NGT Act defines the term "environment"; Section 2(1)(m) defines "substantial question relating to environment". Chapter III relates to jurisdiction, power and proceedings of the Tribunal. The Section 14 gives original jurisdiction to the NGT to decide a substantial question relating to environment; Section 15 deals with relief, compensation and restitution whereby besides providing relief to the victims of pollution, the NGT can direct restitution of property damage and restitution of environment for such area(s) "*as the Tribunal may think fit*". Section 16 gives appellate jurisdiction to the Tribunal against the orders passed under various enactments. Section 17 provides for liability to pay relief or compensation in certain cases, Section 18 specifies who can move application/appeal before the Tribunal. It includes, among others, 18(2)(d) "*any person aggrieved including any representative body/organization*" and the *locus standi* is not limited only to the aggrieved party. Section 19 provides for procedure and powers of the Tribunal. Section 19(1) significantly says that the Tribunal shall not be bound by procedures laid down in the CPC and shall be bound by the Principles of Natural Justice. Section 19(2) provides that subject to the provisions of the Act, the Tribunal shall have powers to regulate its own procedure. Section 19(3) mentions that the Tribunal shall not be bound by the rules of evidence contained in the Evidence Act, 1872. While discharging functions under Section 19(4), besides summoning, enforcing attendance, examining persons on oath, requiring discovery and production of documents, receiving evidence on oath, the NGT also has powers to review its decision, to pass interim orders as well as pass cease and desist orders. Section 20 says that while adjudicating issues, the Tribunal shall apply the environmental principles, namely, sustainable development principles, precautionary principles and polluter pays principle. Under Section 25, the Tribunal can execute its order/decision as a decree of the Civil Court and for that purpose shall have all the powers of a Civil Court. Section 29 bars the jurisdiction of the Civil Court to entertain all environmental matters covered by the Tribunal. Under Section 33, the NGT Act has an overriding effect over other laws.

38. While on the statutory provisions, it is seen that the Central Government has framed the *National Green Tribunal (Practice & Procedure) Rules, 2011* (for short "the NGT Rules"). For our purpose, Rule 24 is important which reads thus:

> *"24. Order and directions in certain cases - The Tribunal may make such orders or give such directions as may be necessary or expedient to give effect to its order or to prevent abuse of its process or to secure the ends of justice."*

39. The said Rules make it clear that the NGT has been given wide discretionary powers to *secure the ends of justice*. This power is coupled with the duty to be exercised for achieving the objectives. The intention understandably being to preserve and protect the environment and the matters connected thereto.

40. By choosing to employ a phrase of wide import, i.e. *secure the ends of justice*, the legislature has nudged towards a liberal interpretation. Securing justice is a term of wide amplitude and does not simply mean adjudicating disputes between two rival entities. It also encompasses *inter alia*, advancing causes of environmental rights, granting compensation to victims of calamities, creating schemes for giving effect to

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 11 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

the environmental principles and even hauling up authorities for inaction, when need be.

41. Moreover, unlike the civil courts which cannot travel beyond the relief sought by the parties, the NGT is conferred with power of moulding any relief. The provisions show that the NGT is vested with the widest power to appropriate relief as may be justified in the facts and circumstances of the case, even though such relief may not be specifically prayed for by the parties.

42. Another distinguishing feature of the environmental forum is on the aspect of *locus standi* which was made as wide as is available to the High Courts and the Supreme Court. Thus, any person or organization who may be interested in the subject matter is permitted to approach the NGT.

43. The provisions of the NGT Act and the NGT Rules demonstrate that myriad roles are to be discharged by the NGT, as was encapsulated in the Law Commission Report, the Preamble and the Statement of Objects and Reasons. This is also forthcoming from the international obligation and commitment by India to implement the decision taken at the Stockholm and the Rio De Janeiro Conventions towards protection of the environmental rights under Article 21 of the Constitution.

V. NON-ADJUDICATORY ROLES OF NGT

44. As can be seen, the Parliament intended to confer wide jurisdiction on the NGT so that it can deal with the multitude of issues relating to the environment which were being dealt with by the High Courts under Article 226 of the Constitution or by the Supreme Court under Article 32 of the Constitution. The Tribunal is also expected to proceed with such matters with the understanding that environment and environmental principles are part of Article 21 of the Constitution. [See *Vellore Citizens' Welfare Forum* v. *UOI*[12]; *M.C. Mehta* v. *UOI*[13] etc.]

45. The Schedule I of the NGT Act is concerned with implementation of few environmental related enactments such as the Water Act, the Air Act, the Environment Act, the Forest Conservation Act etc. As one looks at these enactments, an expanded role for the NGT is clearly discernible. The activities of the NGT are not only geared towards the protection of the environment but also to ensure that the developments do not cause serious and irreparable damage to the ecology and the environment. These would suggest a broad canvas for the NGT Act as also its creation.

46. For the environmental forum, tasked with implementation of the statutes mentioned in Schedule I of the NGT Act, the concept of *lis*, would obviously be beyond the usual understanding in civil cases where there is a party (whether private or government) disturbing the environment and the other one (could be an individual, a body or the government itself), who has concern for the protection of environment. Therefore, the NGT is primarily concerned with protection of the environment and also preservation of the natural resources. As the specialized forum, the NGT would be expected to take preventive action, besides settling and adjudicating disputes and pass orders on all environment related questions.

47. The NGT is not just an adjudicatory body but has to perform wider functions in the nature of prevention, remedy and amelioration. This aspect was specifically flagged in the 186th Law Commission Report,

> "The Environment Court, in our view, must have power to frame schemes and monitor them and also have power to modify the schemes from time to time. If one looks at the problems raised in several cases and the directions issued by the Supreme Court, it will be observed that such a power is necessary to be vested in these Courts. …. The Environment Court must be able to provide an "environmental solution" to grave problems like the one mentioned above and unless it has power to frame comprehensive schemes which will involve issuing directions to various departments, the solution cannot be implemented. Such a comprehensive

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 12 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

jurisdiction is now being exercised both by the Supreme Court and High Courts. In our view, the proposed Courts must have similar powers. They will also have to monitor the schemes till they are successfully implemented on ground and, if necessary, modify the schemes from time to time."

48. We have earlier discussed that the NGT is empowered to carry out restitutive exercise for compensating persons adversely affected by environmental events. The larger discourse which informs such functions is related to distributive and corrective justice, as will be elaborated in later paragraphs. Even in the absence of harm inflicted by human agency, in a situation of a natural calamity, the Tribunal will be required to devise a plan for alleviating damage. An inquisitorial function is also available for the Tribunal, within and without adversarial significance. Importantly, many of these functions do not require an active "*dispute*", but the formulation of *decisions*.

49. With the constitution of the NGT, many cases pending before the High Courts were transferred to the NGT. Apprehending the possibility of conflict between the High Courts and the NGT (in matters concerning environment and the statutes mentioned in Schedule I of the NGT Act), Justice Swatanter Kumar speaking for the three Judge Bench in *Bhopal Gas Peedith Mahila Udyog Sangathan* v. *Union of India*[14], highlighted the NGT's role in the context, in the following words:—

"40. Keeping in view the provisions and scheme of the National Green Tribunal Act, 2010 (for short "the NGT Act") particularly Sections 14, 29, 30 and 38(5), it can safely be concluded that the environmental issues and matters covered under the NGT Act, Schedule I should be instituted and litigated before the National Green Tribunal (for short "NGT"). Such approach may be necessary to avoid likelihood of conflict of orders between the High Courts and NGT. Thus, in unambiguous terms, we direct that all the matters instituted after coming into force of the NGT Act and which are covered under the provisions of the NGT Act and/or in Schedule I to the NGT Act shall stand transferred and can be instituted only before NGT. This will help in rendering expeditious and specialised justice in the field of environment to all concerned.

41. We find it imperative to place on record a caution for consideration of the courts of competent jurisdiction that the cases filed and pending prior to coming into force of the NGT Act, involving questions of environmental laws and/or relating to any of the seven statutes specified in Schedule I of the NGT Act, should also be dealt with by the specialised tribunal, that is, NGT, created under the provisions of the NGT Act. The courts may be well advised to direct transfer of such cases to NGT in its discretion, as it will be in the fitness of administration of justice."

50. In the above case, this Court mandated transfer of all cases concerning the statutes mentioned in Schedule I of the NGT Act to the specialized forum as otherwise there can be conflicts with the High Courts. Notably, some of those cases were originally registered *suo motu* by the Courts.

VI EXERCISE OF SUO MOTU POWER BY NGT

51. Let us now explore whether the NGT in discharge of its functions, should also have *suo motu* power. The specialized tribunal's exercise of *suo motu* powers is somewhat distinct from those exercised by the constitutional Courts. The Supreme Court and High Courts can foray into any issues under their constitutional mandate but the NGT cannot naturally travel beyond its environmental domain in reference to the scheduled enactments. However, As long as the sphere of action is not breached, the NGT's powers must be understood to be of the widest amplitude.

52. Explaining the purpose for constituting the special court to deal with environmental issues, in *Mantri Techzone (P) Ltd.* v. *Forward Foundation*[15], Justice S. Abdul Nazeer writing for the three Judge Bench, made the following pertinent observations on the status of the NGT:—

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 13 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

> "40. The Tribunal has been established under a constitutional mandate provided in Schedule VII List I Entry 13 of the Constitution of India, to implement the decision taken at the United Nations Conference on Environment and Development. The Tribunal is a specialised judicial body for effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to the environment. The right to healthy environment has been construed as a part of the right to life under Article 21 by way of judicial pronouncements. Therefore, the Tribunal has special jurisdiction for enforcement of environmental rights."

53. As can be seen from the quoted passage, this Court recognized that the NGT is set up under the constitutional mandate in Entry 13 of List I in Schedule VII to enforce Article 21 with respect to the environment and in the context observed that the Tribunal has special jurisdiction for enforcement of environmental rights.

54. Elaborating further, in paragraphs 44-46, the Supreme Court expressed that the interpretation that is in favour of conferring jurisdiction should be preferred rather than one taking away jurisdiction. It was specifically noted that,

> "46. … As stated supra the typical nature of the Tribunal, its breadth of powers as provided under the statutory provisions of the Act as well as the Scheduled enactments, cumulatively, leaves no manner of doubt that the only tenable interpretation to these provisions would be to read the provisions broadly in favour of cloaking the Tribunal with effective authority. An interpretation that is in favour of conferring jurisdiction should be preferred rather than one taking away jurisdiction."

55. Such being the wide contour of the NGT's powers, the exposition in *Rajeev Suri* v. *DDA*[16] was not to constrict the *suo motu* powers of the NGT. To appreciate the implication of the ratio in *Rajeev Suri*, it must be noticed that it was in the specific context of '*Merits Review*' and the NGT transgressing beyond its environmental mandate. This is why, one of us, Justice A.M. Khanwilkar observed that,

> "503. NGT is not a plenary body with inherent powers to address concerns of a residuary character. It is a statutory body with limited mandate over environmental matters as and when they arise for its consideration. In a cause before it, NGT cannot directly go on to adjudicate on concerns of violation of fundamental rights and once the contours of a subject matter traverse the scope of appeal from a grant of EC, the merits review by tribunal cannot traverse beyond the scope of jurisdiction vested in it by the statute."

56. Thus, the ratio in *Rajeev Suri* to the quoted extent will not clash with the view propounded here as the exposition is not to allow any inherent power of residuary character for the NGT. In its own domain, as crystalized by the statute, the role of the NGT is clearly discernible.

57. The need for an expert body with extensive functions and the sources of inspiration behind it was articulated in *Andhra Pradesh Pollution Control Board* v. *Prof. M. V. Nayudu (Retd.)*[17] where Justice M. Jagannadha Rao speaking for a Division Bench referred to a comparable court in Australia and noted the following,

> "The Land and Environment Court of New South Wales in Australia, established in 1980, could be the ideal. It is a superior court of record and is composed of four Judges and nine technical and conciliation assessors. Its jurisdiction combines appeal, judicial review and enforcement functions. Such a composition in our opinion is necessary and ideal in environmental matters."

58. The above would show that from the very inception, the role of the NGT was not simply adjudicatory in the nature of a *lis* but to perform equally vital roles which are preventative, ameliorative or remedial in nature. The functional capacity of the NGT was intended to leverage wide powers to do full justice in its environmental mandate.

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 14 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

VII. UNIQUENESS OF NGT VIS-A-VIS OTHER TRIBUNALS

59. While we see many tribunals functioning within their specified domains, variances do exist in the manner in which they are designed to function. The statutory Tribunals were categorized to fall under four subheads; Administrative Tribunals under Article 323A; Tribunals under Article 323B; Specialized sector Tribunals and most prominently; Tribunals to safeguard rights under Article 21. As already noted, the duties of NGT brings it within the ambit of the fourth category, creating a compelling proposition for wielding much broader powers as delineated by the statute.

60. The ideal was to create a fairly proactive and responsive Institution which could step into varying roles, as the situation demanded. Commenting on the specialized and unique role of the NGT, Justice Ashok Bhushan in *State of Meghalaya* v. *All Dimasa Students Union*[18], fittingly observed thus:—

> "163. The object for which the said power is given is not far to seek. To fulfil the objective of the NGT Act, 2010, NGT has to exercise a wide range of jurisdiction and has to possess wide range of powers to do justice in a given case. The power is given to exercise for the benefit of those who have right for clean environment which right they have to establish before the Tribunal. The power given to the Tribunal is coupled with duty to exercise such powers for achieving the objects. In this regard reference is made to the judgment of this Court in *L. Hirday Narain* v. *CIT* [*L. Hirday Narain* v. *CIT*, [(1970) 2 SCC 355], wherein this Court was examining provision empowering authority to do something. This Court laid down in para 14 : (SCC p. 359)
>
> > "14. The High Court observed that under Section 35 of the Indian Income Tax Act, 1922, the jurisdiction of the Income Tax Officer is discretionary. If thereby it is intended that the Income Tax Officer has discretion to exercise or not to exercise the power to rectify, that view is in our judgment erroneous. Section 35 enacts that the Commissioner or Appellate Assistant Commissioner or the Income Tax Officer may rectify any mistake apparent from the record. If a statute invests a public officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for exercise of authority are shown to exist. Even if the words used in the statute are prima facie enabling, the courts will readily infer a duty to exercise power which is invested in aid of enforcement of a right—public or private— of a citizen."

61. Reflecting on the expanded role of NGT unlike other Tribunals, this Court so appositely observed that the forum has a duty to do justice while exercising "*wide range of jurisdiction*" and the "*wide range of powers*", given to it by the statute.

62. During the course of its functioning, the NGT has been recognized as one of the most progressive Tribunals in the world. This jurisprudential leap has allowed our country to enter a rather exclusive group of nations which have set up such institutions with broad powers. To understand how the NGT is perceived globally, we may usefully refer to the views of Chief Justice Brian Preston of the Land and Environment Court of NSW Australia,

> "The NGT is an example of a specialized court to better achieve the goals of ensuring access to justice, upholding the rule of law and promoting good governance."[19]

VIII. THE SUI GENERIS ROLE OF NGT

63. The NGT being one of its own kind of forum, commends us to consider the concept of a *sui generis* role, for the institution. The structure of *Sui generis* institutions was explained in *Paramjit Kaur* v. *State of Punjab*[20], wherein Justice S. Saghir Ahmad spoke thus for a Division Bench,

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 15 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

"14. The concept of sui generis is applied quite often with reference to resolution of disputes in the context of international law. When the conventions formulated by compacting nations do not cover any area territorially or any subject topically, then the body to which such power to arbiter is entrusted acts sui generis, that is, on its own and not under any law."

64. In *DG NHAI* v. *Aam Aadmi Lokmanch*[21], Justice S. Ravindra Bhat commenting on the *sui generis* role of the NGT, so appropriately stated as follows:—

"38. A conjoint reading of Sections 14, 15 and the Schedules would lead one to infer that the NGT has circumscribed jurisdiction to deal with, adjudicate, and wherever needed, direct measures such as payment of compensation, or make restitutionary directions in cases where the violation (i.e. harm caused due to pollution or exposure to hazards, etc.) are the result of infraction of any enactment listed in the first schedule. Yet, that, interpretation, in the opinion of this court, is not warranted.

**** **** **** ****
**** **** **** ****

76. The power and jurisdiction of the NGT under Sections 15(1)(b) and (c) are not restitutionary, in the sense of restoring the environment to the position it was before the practise impugned, or before the incident occurred. The NGT's jurisdiction in one sense is a remedial one, based on a reflexive exercise of its powers. In another sense, based on the nature of the abusive practice, its powers can also be preventive.

77. As a quasi-judicial body exercising both appellate jurisdiction over regulatory bodies' orders and directions (under Section 16) and its original jurisdiction under Sections 14, 15 and 17 of the NGT Act, the tribunal, based on the cases and applications made before it, is an expert regulatory body. Its personnel include technically qualified and experienced members. The powers it exercises and directions it can potentially issue, impact not merely those before it, but also state agencies and state departments whose views are heard, after which general directions to prevent the future occurrence of incidents that impact the environment, are issued."

65. In that case, this Court repelled the argument for a restricted jurisdiction for the NGT, and fittingly observed in paragraph 76 that the powers conferred on the NGT are both reflexive and preventive and the role of the NGT was recognized in paragraph 77 as "*an expert regulatory body*", which can issue general directions also *albeit* within the statutory framework.

66. The above discussion would advise us to say that the NGT was conceived as a specialized forum not only as a like substitute for a civil court but more importantly to take over all the environment related cases from the High Courts and the Supreme Court. Many of those cases transferred to the NGT, emanated in the superior courts and it would be appropriate thus to assume that similar power to initiate *suo motu* proceedings should also be available with the NGT.

67. The NGT is a Tribunal with *sui generis* characteristic, with the special and all-encompassing jurisdiction to protect the environment. Besides its adjudicatory role as an appellate authority, it is also conferred with the responsibility to discharge role of supervisory body and to decide substantial questions relating to the environment. The necessity of having a specialized body, with the expertise to handle multidimensional environmental issues allows for an all-encompassing framework for environmental justice. The technical expertise that may be required to address evolving environmental concerns would definitely require a flexible institutional mechanism for its effective exercise.

IX. AUTHORITY WITH SELF-ACTIVATING CAPABILITY

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 16 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

68. Given the multifarious role envisaged for the NGT and the purposive interpretation which ought to be given to the statutory provisions, it would be fitting to regard the NGT as having the mechanism to set in motion all necessary functions within its domain and this, as would follow from the discussion below, should necessarily clothe it with the authority to take *suo motu* cognizance of matters, for effective discharge of its mandate.

69. The analysis for this segment should commence with Section 14 of the NGT Act and the same being of great relevance is being extracted hereunder,

> "14. Tribunal to settle disputes. - (1) The Tribunal shall have the jurisdiction over all civil cases where a substantial question relating to environment (including enforcement of any legal right relating to environment), is involved and such question arises out of the implementation of the enactments specified in Schedule I.
>
> (2) The Tribunal shall hear the disputes arising from the questions referred to in sub-section (1) and settle such disputes and pass order thereon.
>
> (3) No application for adjudication of dispute under this section shall be entertained by the Tribunal unless it is made within a period of six months from the date on which the cause of action for such dispute first arose : Provided that the Tribunal may, if it is satisfied that the applicant was prevented by sufficient cause from filing the application within the said period, allow it to be filed within a further period not exceeding sixty days."

70. The Section 14(1) of the NGT Act deals with jurisdiction, and the jurisdictional provision conspicuously omits to specify that an application is necessary to trigger the NGT into action. In situations where the three prerequisites of Section 14(1) i.e., Civil cases; involvement of substantial question of environment; and implementation of the enactments in Schedule I are satisfied, the jurisdiction and power of the NGT gets activated. On these material aspects, the NGT is not required to be triggered into action by an aggrieved or interested party alone. It would therefore be logical to conclude that the exercise of power by the NGT is not circumscribed by receipt of application. When substantial questions relating to the environment arise and the issue is civil in nature and those relate to the enactments in Schedule I of the Act, the NGT in our opinion even in the absence of an application, can self-ignite action either towards amelioration or towards prevention of harm.

71. In the same spirit, we find merit in the arguments that Section 14(1) exists as a standalone feature, not constricted by the operational mechanism of the subsequent subsections. The sub Section (2) of Section 14 functions as a corollary and comes into play when a dispute arises from the questions referred to in Section 14(1). Likewise sub Section (3) thereafter, refers to the period of limitation concerning applications, when they are addressed to the NGT. Where adjudication is involved, the adjudicatory function under Section 14(2) comes into play. When it is a case warranting NGT's intervention, or may be a situation calling for decisions to meet certain exigencies, the functions under Section 14(1) can be undertaken and those may not involve any formal application or an adjudicatory process. However, the later provisions may not work in similar fashion. Therefore, care must be taken to ensure unrestricted discharge of the responsibilities under Section 14(1) and that wide arena of NGT's functioning.

72. The other pertinent provisions relating to, *inter-alia*, jurisdiction, interim orders, payment of compensation and review, do not require any application or appeal, for the NGT to pass necessary orders. These crucial powers are expected to be exercised by the NGT, would logically suggest that the action/orders of the NGT need not always involve any application or appeal. To hold otherwise would not only reduce its effectiveness but would also defeat the legal mandate given to the forum.

73. It may also be relevant to bear in mind that while dealing with contested cases,

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 17 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

the NGT is required to pass "*award*" and "*order*" and the statute repeatedly uses the word "*decision*". Therefore, it is appropriate to correlate the word "*decision*" to the NGT, in its non-adversarial or inquisitorial role, as was suggested by the Law Commission and recognized in *DG, NHAI* (supra).

74. The duty to safeguard Article 21 rights cannot stand on a narrow compass of interpretation. Procedural provisions must be allowed to fall in step with the substantive rights that are invoked in the environmental domain, in larger public interest. The specialized forum is bestowed with the responsibility to ensure protection of the environment. To be effective in its domain, we need to ascribe to the NGT a public responsibility to initiate action when required, to protect the substantive right of a clean environment and the procedural law should not be obstructive in its application. In the context, Justice V.R. Krishna Iyer speaking for a Division Bench in *State of Punjab* v. *Shamlal Murari*[22] has so correctly prioritized the substantive rights and observed succinctly,

> "8. …We must always remember that processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice."

75. While discussing the NGT's power and responsibility, it is essential to keep in mind the *Principle 10* of *the Rio Declaration* which speaks of three fundamental rights i.e., access to information, access to public participation and access to justice, as key pillars of environmental governance. Access to justice, may however be curtailed by illiteracy, lack of mobility, poverty or even the lack of technical knowledge on the part of citizens. Another deterrence is the likelihood of polluters/violators being powerful entities with adequate wherewithal to skirt regulations. Thus, it may not always be feasible for individuals to knock on the doors of the Tribunal, and NGT in such exigencies must not be made dysfunctional.

X. THE PRECAUTIONARY PRINCIPLE

76. Tracing the origin of the *Precautionary Principle*, Scott Lafranchi in his treatise[23] has expounded on the proactive role of the authorities in the following passage:—

> "Many consider the German development of *Vorsorgeprinzip* to signify the true creation of the precautionary principle, in light of the attention it focuses on "long term planning to avoid damage to the environment, early detection of dangers to health and environment through comprehensive research, and acting in advance of conclusive scientific evidence of harm."16 The precautionary foundation of Vorsorgeprinzip has been described as an "action principle" that holds public authorities responsible for protecting the natural foundations of life and preserving the physical world for the present and future generations, and "'can therefore be used to counter the short-termism endemic in all democratic, consumption oriented societies.'"

77. The origin of the *Precautionary Principle* itself is rooted as an institutional obligation, by holding them primarily responsible for the environmental concerns and remedies.

78. As earlier seen, S.20 of the NGT Act which includes the term "*decision*", in addition to "*order*" and "*award*", also require the Tribunal to apply the '*Precautionary Principle*' and the statutory mandate being relevant is extracted:—

> "20. Tribunal to apply certain principles. - The Tribunal shall, while passing any order or decisions or award, apply the principles of sustainable development, the precautionary principle and the polluter pays principle."

79. The principle set out above must apply in the widest amplitude to ensure that it is not only resorted to for adjudicatory purposes but also for other '*decisions*' or '*orders*' to governmental authorities or polluters, when they fail to "*to anticipate,*

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 18 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

prevent and attack the causes of environmental degradation"[24]. Two aspects must therefore be emphasized i.e. that the Tribunal is itself required to carry out preventive and protective measures, as well as hold governmental and private authorities accountable for failing to uphold environmental interests. Thus, a narrow interpretation for NGT's powers should be eschewed to adopt one which allows for full flow of the forum's power within the environmental domain.

80. It is not only a matter of rhetoric that the Tribunal is to remain ever vigilant, but an important legal onus is cast upon it to act with promptitude to deal with environmental exigencies. The responsibility is not just to resolve legal ambiguities but to arrive at a reasoned and fair result for environmental problems which are adversarial as well as nonadversarial. It would be apposite here to refer to Justice Benjamin Cardozo, of the United States Supreme Court, who in his seminal treatise, '*The Nature of the Judicial Process*', stated thus,

> "It is true that codes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided."

81. The above could be a pointer towards the preemptive functions of the NGT as a *sui generis* body.

XI. ENVIRONMENTAL JUSTICE AND ENVIROMENTAL EQUITY

82. The conceptual frameworks of environmental justice and equity should merit consideration vis-à-vis the NGT's domain and how its functioning and decisions can have wide implications in socio-economic dimensions of people at large. The concept of environmental justice is a trifecta of distributive justice, procedural justice and justice as recognition.[25] Environmental equity as a developing concept has focused on the disproportionate implications of environmental harms on the economically or socially marginalized groups. The concerns of human rights and environmental degradation overlap under this umbrella term, to highlight the human element, apart from economic and environmental ramifications. Environmental equity thus stands to ensure a balanced distribution of environmental risks as well as protections, including application of sustainable development principles.

83. Voicing concerns about the disproportionate harm for the poor segments, Lois J. Schiffer (then Assistant Attorney General, Environment & Natural Resources Division (ENRD), U.S. Department of Justice) and Timothy J. Dowling (then Attorney at ENRD) in their *Reflections on the Role of the Courts in Environmental Law*, wrote the following evocative passage on the concept of environmental justice,

> "Environmental Justice, which focuses on whether minorities and low-income people bear a disproportionate burden of exposure to environmental harms and any resulting health effects. In the past ten to fifteen years, this issue has crystallized a grass-roots movement that combines civil rights issues with environmental issues, with a goal of achieving "environmental justice" or "environmental equity", which is understood to mean the fair distribution of environmental risks and protection from environmental harms."[26]

84. There is also a need to focus on the interconnection between principles of procedural justice and distributive justice. The concern is to create a system which is affirmative enough to balance the disproportionate wielding of power between polluters and affected people.

> "Environmental justice starts with distributive justice, or more accurately, distributive injustice. The rich and powerful derive the most benefit while suffering the least harm from environmentally harmful activities; conversely, the poor and minorities derive the least benefit but suffer the most harm. Further, those who benefit cause harm to the places where people "live, work, play, and go to school",

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 19 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

whereas the people who reside there do little or nothing to harm their community."[27]

85. When substantive justice is elusive for a large segment, disengaging with substantive rights at the very altar, for a perceived procedural lacuna, would surely bring in a process, which furthers inequality, both economic and social. An "*equal footing*" conception may not therefore be feasible to adequately address the asymmetrical relationship between the polluters and those affected by their actions. Instead, a recognition of the historical experience of marginalized classes of persons while accessing and effectively using the legal system, will allow for necessary appreciation of social realities and balancing the arm of justice.

86. The law must be interpreted in such a manner as to foster further development of existing legal concepts by incorporating this sense of equity. The issues which this Court has had the occasion to examine have highlighted the limitations of the mechanisms to reach to the heart of environmental concerns. This Court has previously moulded the jurisdictional jurisprudence in favour of larger societal interest, whether that be in the form of 'Public Interest Litigation' or widening the scope of *locus standi*.

> "The identification of potential environmental justice issues is very important in determining how our enforcement efforts are working in minority and low-income communities, and whether they are comparable to the enforcement efforts in other communities."[28]

87. In the backdrop of the above weighty concerns, this Court should advert to what Schiffer and Dowling have stated on the '*Blindfold of Lady Justice*', which symbolizes "*the ideal of administering equal justice to everyone who comes to our Courts, regardless of race, creed, or economic class.*"[29] The relevance of this concept is particularly apposite when we consider the inability of most marginalized communities, to access the legal machinery.

IX. ENVIRONMENTAL JURISPRUDENCE IN INDIA

88. Proceeding with the above understating, we can comfortably place the NGT within the rubric of the larger environmental jurisprudence which has been informing this unique institution. The role of this Court in establishing the legal connect between matters of environmental concern and fundamental rights of citizens, has produced much academic literature. Amongst others, Armin Rosencranz and Shyam Divan in their writing- *Environmental Law And Policy In India*, have noted that the field of laws pertaining to environmental concerns has been a fairly fertile ground for judicial innovations by this Court; moving the concept of Environmental law from the realm of torts to interlink it with fundamental rights[30], liberalizing the concept of *locus standi* in environmental matters, exercising *suo motu* powers to reign in polluters, using expert committees to monitor implementation of Court orders, etc.[31]

89. By expanding the scope of Articles 21, 32, 48A, 51A(g), this Court has guaranteed the right to a pollution free environment for a holistic existence.[32] Most crucially, the expansion of Right to Life under Article 21 by this Court has become a touchstone to determine many environmental concerns. In *Subhash Kumar* v. *State of Bihar*, this Court explicitly held the following,

> "Right to life is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life."[33]

90. Adopting international principles and moulding them to Indian realities also became a focal concern, given the lacunae in regimes which may be exploited by those who may not have much concern for environmental degradation. Creation of the '*Absolute Liability Principle*'[34] by this Court is a well recognized testament for this. It would thus be appropriate to state that much of the principles, institutions and

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 20 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

mechanisms in this sphere have been created, on account of this Court's initiative.

> "The constitutionally-protected fundamental right to life and liberty has been extended through judicial creativity to cover unarticulated but implicit rights such as the right to a wholesome environment. …The right was recognized as part of the right to life in 1991. … The court has since fleshed out the right to a wholesome environment by integrating into Indian environmental jurisprudence not just established but even nascent principles of international environmental law."[35]

91. It has been noted that the Supreme Court adopted the role of an "amicus environment" by threading together human rights and environmental concerns, resultingly developing a *sui generis* environmental discourse.[36] There were both procedural and substantive innovations made, by entertaining PIL petitions, seeking remedies, including guidelines and directions in the absence of legislation. Many of the landmark cases which hold the fort to this day, were in recognition of the '*at risk*' nature of some populations. The creation of the NGT itself was due in large part to the need expressed by this Court for such a forum.[37]

92. Justice T.S. Doabia in *Environmental & Pollution Laws in India*, has highlighted the larger societal concerns which have informed this Court's deliberation when dealing with environmental matters,

> "The Supreme Court of India, in its interpretation of Article 21 of the Constitution of India, has facilitated the emergence of an environmental jurisprudence in India, while also strengthening human rights jurisprudence.
>
> …The Courts have successfully isolated specific environmental law principles upon the interpretation of Indian statutes and the Constitution, combined with a liberal view towards ensuring social justice and the protection of human rights. The principles have often found reflection in the Constitution in some form, and are usually justified even when not explicitly mentioned in the statute concerned."[38]

93. Environmental jurisprudence in India has therefore been intrinsic to advancing a democratic, welfare oriented legal regime. Issues affecting the ecology and the environment must have a broad perspective and should have a society centric approach. Furthermore, the very nature of ecological and environmental issues has the propensity for rapid deterioration. Many such sensitive matters, as has been noted, stood transferred to the NGT, with the aim that those would be dealt with expediently with the required technical expertise and legal sophistication. The proactiveness of the superior Court was surely expected to be seen in the Tribunal's approach.

94. Analyzing the concept of the functioning of the NGT and its role within the broader concept of the environmental rule of law, Justice D.Y. Chandrachud speaking for a three judges Bench in *H.P. Bus Stand Management & Development Authority* v. *Central Empowered Committee*[39] so succinctly said that,

> "40. The environmental rule of law, at a certain level, is a facet of the concept of the rule of law. But it includes specific features that are unique to environmental governance, features which are sui generis. The environmental rule of law seeks to create essential tools - conceptual, procedural and institutional to bring structure to the discourse on environmental protection. It does so to enhance our understanding of environmental challenges - of how they have been shaped by humanity's interface with nature in the past, how they continue to be affected by its engagement with nature in the present and the prospects for the future, if we were not to radically alter the course of destruction which humanity's actions have charted. The environmental rule of law seeks to facilitate a multi-disciplinary analysis of the nature and consequences of carbon footprints and in doing so it brings a shared understanding between science, regulatory decisions and policy perspectives in the field of environmental protection. It recognizes that the 'law' element in the environmental rule of law does not make the concept peculiarly the

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 21 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

preserve of lawyers and judges. On the contrary, it seeks to draw within the fold all stakeholders in formulating strategies to deal with current challenges posed by environmental degradation, climate change and the destruction of habitats. The environmental rule of law seeks a unified understanding of these concepts."

95. It is this environmental rule of law that has been encapsulated with the NGT's creation at this Court's behest. Professor Domenico Amirante in a comparative analysis of similar bodies across the world, notes that,

"With reference to the judicial enforcement of environmental law - which as we have seen should be considered an important condition not only for sustainable development but also for the sustainability of the legal environmental order - the National Green Tribunal of India seems to be the most comprehensive and promising among the specialized environmental Courts created in Asia over the last decade."[40]

96. The NGT therefore, is the institutionalization of the developments made by this Court in the field of environment law. These progressive steps have allowed it to inherit a very broad conception of environmental concerns. Its functions therefore, must not be viewed in a cribbed manner, which detracts from the progress already made in the Indian environmental jurisprudence.

X. CONCLUSION:

97. Before we set out our conclusion, we acknowledge the able contribution of Mr. Anand Grover as *amicus curiae*, assisted by Ms. Astha Sharma, AOR who were requested to assist the Court on the central issue of *suo motu* jurisdiction of NGT.

98. The NGT Act, when read as a whole, gives much leeway to the NGT to go beyond a mere adjudicatory role. The Parliament's intention is clearly discernible to create a multifunctional body, with the capacity to provide redressal for environmental exigencies. Accordingly, the principles of environmental justice and environmental equity must be explicitly acknowledged as pivotal threads of the NGT's fabric. The NGT must be seen as a *sui generis* institution and not *unus multorum*, and its special and exclusive role to foster public interest in the area of environmental domain delineated in the enactment of 2010 must necessarily receive legal recognition of this Court.

99. The environmental impacts on climate change are gaining increasing visibility in the shape of uncertain rains, species extinction, loss of natural habitat and so on. These also have the propensity to diminish fresh water resources, reduce agricultural yields and impact public health, particularly in the cities. The flooding and erosion in riverine and coastal areas are matters of serious concern. Governmental assessment of India's increased vulnerability to such changes in the near future also exists[41] with many countries declaring climate emergencies and many others being urged to follow suit[42].

100. Therefore, the nature of ecological imbalance which is visible even in our own times may cascade, and the unforeseen injustice of the future may not be capable of being handled within the frontiers set forth today. The long term and very often irreparable environmental damage which are expected to be arrested by the NGT, urge this Court to advert to what is termed as *the 'Seventh Generation' sustainability principle*, or the '*Great Law of the Iroquois*' (as it originates from the Iroquois Tribe) which requires all decision making to withstand for the benefit of seven generations down the line.

101. It is vital for the wellbeing of the nation and its people, to have a flexible mechanism to address all issues pertaining to environmental damage and resultant climate change so that we can leave behind a better environmental legacy, for our children, and the generations thereafter.

102. In circumstances where adverse environmental impact may be egregious, but the community affected is unable to effectively get the machinery into action, a forum

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 22 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

created specifically to address such concerns should surely be expected to move with expediency, and of its own accord. The potentiality of disproportionate harm imposes a higher obligation on authorities to preserve rights which may be waylaid due to such restrictive access. It is also noteworthy that the "*global impacts of climate change will fall disproportionately on minority and low-income communities*".[43] Thus, an affirmative role, beyond mere adjudication at the instance of applicant, is certainly required for *serving the ends of environmental justice*, as the statute itself requires of the NGT. We cannot validate an argument which furthers uncertainty to justify the role of a spectator, if not inaction, and would most assuredly result in injustice.

103. The NGT, with the distinct role envisaged for it, can hardly afford to remain a mute spectator when no-one knocks on its door. The forum itself has correctly identified the need for collective stratagem for addressing environmental concerns. Such a society centric approach must be allowed to work within the established safety valves of the principles of natural justice and appeal to the Supreme Court. The hands-off mode for the NGT, when faced with exigencies requiring immediate and effective response, would debilitate the forum from discharging its responsibility and this must be ruled out in the interest of justice.

104. It would be procedural hairsplitting to argue (as it has been) that the NGT could act upon a letter being written to it, but learning about an environmental exigency through any other means cannot trigger the NGT into action. To endorse such an approach would surely be rendering the forum procedurally shackled or incapacitated.

105. When the Registry of the NGT does indeed receive a communication or letter, including matters published in media, it may cause to initiate *suo motu* action by inviting attention of NGT to such matters in the form of office report. Such circumstances would however require a notice to be given to the sender of the communication or author of the news item, as the case may be, to assist the NGT in the course of hearing and to substantiate the factual matters. It must also be said that the exercise of *suo motu* jurisdiction does not mean eschewing with the principles of natural justice and fair play. In other words, the party likely to be affected should be afforded due opportunity to present their side, before suffering adverse orders.

106. One could admit to the argument of danger of *suo motu* jurisdiction, if the NGT was acting outside its domain. But when it is legitimately working within the contours of its statutory mandate and with procedurals safeguards clarified above in play, the nature of the trigger itself viz. a letter or a '*suo motu*' initiation, cannot be the basis to curtail the role and responsibility of the specialized forum.

107. Institutions which are often addressing urgent concerns gain little from procedural nitpicking, which are unwarranted in the face of both the statutory spirit and the evolving nature of environmental degradation. Not merely should a procedure exist but it must be meaningfully effective to address such concerns. The role of such an institution cannot be mechanical or ornamental. We must therefore adopt an interpretation which sustains the spirit of public good and not render the environmental watchdog of our country toothless and ineffective.

108. Let us now hark back to the dialogues of the two protagonists, in *Waiting for Godot*, the play written by Samuel Beckett with which, we started this judgment. At the end of the deliberations, we find ourselves saying that the National Green Tribunal must act, if the exigencies so demand, without indefinitely waiting for the metaphorical *Godot* to knock on its portal. The preceding discussion advises us to answer the pointed question in the affirmative. It is accordingly declared that the NGT is vested with *suo motu* power in discharge of its functions under the NGT Act.

109. Having answered the common legal issue involved in all these cases regarding the *suo motu* jurisdiction of NGT, we direct delinking of these cases for now being

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 23 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

heard separately on merits. Indeed, if the cases(s) emanate from same/common order of NGT, such case(s) be heard together. Registry may do the needful and post the matters on 25.10.2021 for direction and fixing date of hearing, before the Bench presided over by one of us (Justice A.M. Khanwilkar). For the purpose of further hearing, the respective cases shall not be treated as part-heard before this Bench.

———

[1] *Beckett, S.* (1954). Waiting for Godot : Tragicomedy in 2 Acts.

[2] (2013) 15 SCC 341

[3] (2008) 1 SCC 125

[4] (2011) 9 SCC 541

[5] (2018) 11 SCC 734

[6] (2019) 19 SCC 479

[7] Chapter II, 186th Law Commission Report.

[8] (1955) 2 SCR 603; AIR 1955 SC 661

[9] 47 Columbia Law Review 527

[10] 293 US 388 (1935) (dissenting)

[11] *Sarah Mathew* v. *Institute of Cardio Vascular Diseases*, (2014) 2 SCC 62, *New India Assurance Co. Ltd.* v. *Nusli Neville Wadia*, (2008) 3 SCC 279.

[12] (1996) 5 SCC 647

[13] (1997) 2 SCC 353

[14] (2012) 8 SCC 326

[15] (2019) 18 SCC 494

[16] 2021 SCC OnLine SC 7.

[17] (1999) 2 SCC 718

[18] (2019) 8 SCC 177

[19] GILL, G. (2020). Mapping the Power Struggles of the National Green Tribunal of India : The Rise and Fall? Asian Journal of Law and Society, 7(1), 85-126.

[20] (1999) 2 SCC 131

[21] 2020 SCC OnLine SC 572

[22] (1976) 1 SCC 719

[23] Scott La Franchi, Surveying the Precautionary Principle's Ongoing Global Development : *The Evolution of an Emergent Environmental Management Tool*, [32 B.C. Envtl. Aff. L. Rev. 679 (2005)

[24] *Vellore Citizens* (supra), *S. Jagannathan* v. *Union of India*, (1997) 2 SCC 87, *Karnataka Industrial Areas Development Board* v. *C Kenchappa*, (2006) 6 SCC 371.

[25] Schlosberg D, Defining Environmental Justice : Theories, Movements, and Nature (Oxford University Press 2009)

[26] Schiffer, L. J., & Dowling, T. J. (1997). Reflections On The Role Of The Courts In Environmental Law. Environmental Law, 27(2), 327-342.

[27] Jeff Todd, *A "Sense of Equity" in Environmental Justice Litigation*, [44 HARV. ENVTL. L. REV. 169, 193 (2020).

[28] Supra Note 26.

[29] Ibid

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 24 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

[30] *Rural Litigation And Entitlement Kendra* v. *State Of U. P.*, AIR 1985 SC 652, *Charan Lal Sahu* v. *Union of India*, (1990) 1 SCC 613, *Virender Gaur* v. *State of Haryana*, (1995) 2 SCC 577

[31] See M.A.A. Baig, Environmental Law And Justice(1996). Domenico Amirante, Environmental Courts In Comparative Perspective : Preliminary Reflections On The National Green Tribunal Of India (2012). M.K. Ramesh, Environmental Justice : Courts And Beyond, Indian Jo. Of Envtl. L. 20(2002).

[32] Maheshwara Swamy, N. Law Relating to Environmental Pollution and Protection. India, Thompson Reuters, Vol.I, Ed.5.

[33] (1991) 1 SCC 74.

[34] *M.C. Mehta* v. *Union of India*, [(1987) 1 SCC 395.

[35] Rajamani, Lavanya. 2007. Public Interest Environmental Litigation in India : Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability. Journal of Environmental Law

[36] Supra, Note 19.

[37] *M.C. Mehta* v. *Union of India*, (1986) 2 SCC 176, *Indian Council for Environmental-Legal Action* v. *Union of India*, (1996) 3 SCC 212, *A.P. Pollution Control Board* v. *M.V. Nayudu*, (1999) 2 SCC 718, *A.P. Pollution Control Board II* v. *M.V. Nayudu*, (2001) 2 SCC 62.

[38] Justice T.S. Doabia, Environmental & Pollution Laws in India, 3rd Ed., Vol 2 (2017).

[39] (2021) 4 SCC 309

[40] Domenico Amirante, Environmental Courts in Comparative Perspective : Preliminary Reflections on the National Green Tribunal of India, 29 Pace Envtl. L. Rev. 441 (2012)

[41] Indian Network for Climate Change Assessment, Climate Change and India : A 4X4 Assessment - A sectoral and regional analysis for 2030s, Ministry of Environment and Forests, Government of India, 16 November 2010

[42] Secretary-General's Remarks at the Climate Ambition Summit. United Nations. United Nations, December 12, 2020.

[43] Supra Note 23.

Disclaimer: While every effort is made to avoid any mistake or omission, this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification is being circulated on the condition and understanding that the publisher would not be liable in any manner by reason of any mistake or omission or for any action taken or omitted to be taken or advice rendered or accepted on the basis of this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification. All disputes will be subject exclusively to jurisdiction of courts, tribunals and forums at Lucknow only. The authenticity of this text must be verified from the original source.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 1 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

(1996) 5 Supreme Court Cases 647

(BEFORE KULDIP SINGH, FAIZAN UDDIN AND K. VENKATASWAMI, JJ.)

VELLORE CITIZENS' WELFARE FORUM .. Petitioner;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Writ Petition (C) No. 914 of 1991†, decided on August 28, 1996

A. Constitution of India — Arts. 32, 21, 47, 48-B, 51-A(g) — Environmental pollution by tannery industries — While the industries are vital for country's development, but having regard to pollution caused by them, principle of Sustainable Development has to be adopted as a balancing concept — Precautionary Principle and Polluter Pays Principle acceptable as part of the law of the country and should be implemented — Precautionary environmental measures should be taken by State Govt. and statutory authorities and lack of scientific certainty cannot be a ground for postponing such measures where there are serious threats to ecology — Onus on polluter industries to prove that their actions were environmentally benign — Polluter industries liable to pay compensation to individuals affected as well as to make good the ecological damage — Discharge of untreated effluent by tanneries in State of T.N. rendering river water unfit for human consumption, contaminating the subsoil water and spoiling the physico-chemical properties of the soil making it unfit for agricultural purposes — Held, such industries cannot be permitted to continue their operation unless they set up pollution control devices — Such industries liable to compensate for the past pollution generated by them — Pollution fine of Rs 10,000 imposed on each tannery — Amount to be deposited in Environment Protection Fund which shall be utilised for compensating the affected persons and restoring the ecological balance — Environment (Protection) Act, 1986 — Ecology — Damage to — Compensation

B. Ecology — Environment (Protection) Act, 1986 — S. 3(3) — Authority under — Directed to be constituted by Central Govt. before 30-9-1996 — Authority to be headed by a retired High Court Judge — Authority to have all powers necessary to deal with the situation created by the polluting industries — Authority also to implement the Precautionary Principle and the principle of Polluter Pays — Authority to compute compensation payable by the polluting industries to individuals affected and that payable for restoring the damage it caused to the environment — Authority also to frame a scheme in consultation with expert bodies like NEERI, Central Board and State Board for reversing the ecological damage and environmental pollution

C. Constitution of India — Arts. 32, 226 & 21 — PIL — Ecology — Green Bench — Environmental pollution caused by tanneries in State of T.N. — Suitable directions issued by Supreme Court — However, instead of itself monitoring the matter any further Madras High Court advised to constitute a Green Bench to deal with all the environmental matters — Such Green Benches already functioning in some other High Courts

D. International Law — Customary international law — If not contrary to the municipal law, deemed to be incorporated in domestic law

E. Judicial activism — Inaction on the part of the Govt. to set up regulatory/adjudicatory statutory authorities as directed by the Act makes it imperative for the Court to pass suitable necessary directions

† Under Article 32 of the Constitution of India

SCC ONLINE True Print
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 2 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Held :

Though the leather industry is of vital importance to the country as it generates foreign exchange and provides employment avenues it has no right to destroy the ecology, degrade the environment and pose as a health-hazard. It cannot be permitted to expand or even to continue with the present production unless it tackles by itself the problem of pollution created by the said industry. (Para 9)

The traditional concept that development and ecology are opposed to each other is no longer acceptable. "Sustainable Development" is the answer. In the international sphere, "Sustainable Development" has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting ecosystems. "Sustainable Development" as defined by the Brundtland Report means "Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs". "Sustainable Development" as a balancing concept between ecology and development has been accepted as a part of the customary international law though its salient features have yet to be finalised by the international law jurists. (Para 10)

"The Precautionary Principle" and "the Polluter Pays Principle" are essential features of "Sustainable Development". The "Precautionary Principle" — in the context of the municipal law — means:

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

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

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

"The Polluter Pays Principle" has been held to be a sound principle. The "Polluter Pays Principle" as interpreted by the Supreme Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of "Sustainable Development" and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology. Apart from the constitutional mandate to protect and improve the environment there are plenty of post-independence legislations on the subject. In view of the constitutional and statutory provisions it must be held that the Precautionary Principle and the Polluter Pays Principle are part of the environmental law of the country. (Paras 11 to 14)

Indian Council for Enviro-Legal Action v. *Union of India*, (1996) 3 SCC 212 : JT (1996) 2 SC 196, *relied on*

Even otherwise, once these principles are accepted as part of the customary international law there would be no difficulty in accepting them as part of the domestic law. The rules of customary international law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the courts of law. (Para 15)

A.D.M. v. *Shivakant Shukla*, (1976) 2 SCC 521 : AIR 1976 SC 1207; *Jolly George Varghese* v. *Bank of Cochin*, (1980) 2 SCC 360 : AIR 1980 SC 470; *Gramophone Co. of India Ltd.* v. *Birendra Bahadur Pandey*, (1984) 2 SCC 534 : 1984 SCC (Cri) 313 : AIR 1984 SC 667, *relied on*

The constitutional and statutory provisions protect a person's right to fresh air, clean water and pollution-free environment, but the source of the right is the

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 3 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

inalienable common law right of clean environment. Our legal system having been founded on the British common law the right of a person to a pollution-free environment is a part of the basic jurisprudence of the land. (Paras 16 and 17)

Commentaries on the Laws of England of Sir William Blackstone Vol. III, Fourth Edn. published in 1876. Chapter XIII, *relied on*

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

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

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

[Keeping in view the above position the Supreme Court gave specific directions in para 25.]

However, it is not necessary for the Supreme Court to monitor these mattes any further. The Madras High Court would be in a better position to monitor these matters hereinafter. Therefore, the Chief Justice of the Madras High Court is directed to constitute a Special Bench — "Green Bench" — to deal with this case and other environmental matters. However, it would be open to the Bench to pass any appropriate order/orders keeping in view the directions issued by "Green Benches" already functioning in Calcutta, Madhya Pradesh and some other High Courts.

(Para 26)

R-M/T/16616/C

Advocates who appeared in this case :

R. Mohan, V.A. Bobde, Kapil Sibal, M.R. Sharma, V.C. Mahajan and S.S. Ray, Senior Advocates (K.R.R Pillai, M.C. Mehta, Ms Seema Midha, V.G. Pragasam, Vijay Panjwani, S. Sukumaran, Sudhir Walia, A.T.M. Sampath, M.S. Dahiya, Sudhir Walia, Roy Abraham, Sm. Baby Krishna, P. Sukumar, Praveen Kumar, Romesh C. Pathak, M.A. Krishnamoorthy, V. Krishnamurthi, Ms Anil Katiyar, Ms Indra Sawhney, Deepak Divan, S.M. Jadhav, A.V. Rangam, Zafarullah Khan, Shahid Rizvi, Shakil Ahmed Syed, Jaideep Gupta and Sanjay Hegde, Advocates, with them) for the appearing parties.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 4 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

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

1. (1996) 3 SCC 212 : JT (1996) 2 SC 196, *Indian Council for Enviro-Legal Action* v. *Union of India* 658*g-h*
2. (1984) 2 SCC 534 : 1984 SCC (Cri) 313 : AIR 1984 SC 667, *Gramophone Co. of India Ltd.* v *Birendra Bahadur Pandey* 660*e*
3. (1980) 2 SCC 360 : AIR 1980 SC 470, *Jolly George Varghese* v. *Bank of Cochin* 660*d-e*
4. (1976) 2 SCC 521 : AIR 1976 SC 1207, *A.D.M.* v. *Shivakant Shukla* 660*d-e*

The Judgment of the Court was delivered by

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

> "As per the Technical Report dated 28-5-1983 of the hydrological investigations carried out in Solur village near Ambur it was noticed that 176 chemicals including acids were contained in the tannery effluents. If 40 litres of water with chemicals are required for one kilo of leather, with the production of 200 tons of leather per day at present and likely to

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 5 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

be increased multifold in the next four to five years with the springing up of more tanneries like mushroom in and around Ambur town, the magnitude of the effluent water used with chemicals and acids let out daily can be shockingly imagined. ... The effluents are let out from the tanneries in the nearby lands, then to Goodar and Palar rivers. The lands, the rivulet and the river receive the effluents containing toxic chemicals and acids. The subsoil water is polluted ultimately affecting not only arable lands, wells used for agriculture but also drinking-water wells. The entire Ambur town and the villages situated nearby do not have good drinking water. Some of the influential and rich people are able to get drinking water from a far-off place connected by a few pipes. During rainy days and floods, the chemicals deposited into the rivers and lands spread out quickly to other lands. The effluents thus let out affect cultivation; either crops do not come up at all or if produced the yield is reduced abnormally too low. ... The tanners have come to stay. The industry is a foreign exchange earner. But one moot point is whether at the cost of the lives of lakhs of people with increasing human population the activities of the tanneries should be encouraged on monetary considerations. We find that the tanners have absolutely no regard for the healthy environment in and around their tanneries. The effluents discharged have been stored like a pond openly in most of the places adjacent to cultivable lands with easy access for the animals and the people. The Ambur Municipality, which can exercise its powers as per the provisions of the Madras District Municipalities Act, 1920 (5 of 1920) more particularly under Sections 226 to 231, 249 to 253 and 338 to 342 seems to be a silent spectator. Probably it does not want to antagonise the highly influential and stupendously rich tanners. The powers given under Section 63 of the Water (Prevention and Control of Pollution) Act, 1974 (6 of 1974) have not been exercised in the case of tanneries in Ambur and the surrounding areas."

2. Along with the affidavit dated 21-7-1992 filed by Deputy Secretary to Government, Environment and Forests Department of Tamil Nadu, a list of villages affected by the tanneries has been attached. The list mentions 59 villages in the three divisions of Thirupathur, Vellore and Ranipet. There is acute shortage of drinking water in these 59 villages and as such alternative arrangements were being made by the Government for the supply of drinking water.

3. In the affidavit dated 9-1-1992 filed by Member Secretary, Tamil Nadu Pollution Control Board (the Board), it has been stated as under:

"It is submitted that there are 584 tanneries in North Arcot Ambedkar District vide Annexures 'A' and 'D', out of which 443 tanneries have applied for consent of the Board. The Government were concerned with the treatment and disposal of effluent from tanneries. The Government gave time up to 31-7-1985 to tanneries to put up Effluent Treatment Plant (ETP). So far 33 tanneries in North Arcot

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 6 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Ambedkar District have put up Effluent Treatment Plants. The Board has stipulated standards for the effluent to be disposed of by the tanneries."

4. The affidavits filed on behalf of the State of Tamil Nadu and the Board clearly indicate that the tanneries and other polluting industries in the State of Tamil Nadu are being persuaded for the last about 10 years to control the pollution generated by them. They were given option either to construct common effluent treatment plants for a cluster of industries or to set up individual pollution control devices. The Central Government agreed to give substantial subsidy for the construction of Common Effluent Treatment Plants (CETPs). It is a pity that till date most of the tanneries operating in the State of Tamil Nadu have not taken any step to control the pollution caused by the discharge of effluent. This Court on 1-5-1995 passed a detailed order. In the said order this Court noticed various earlier orders passed by this Court and finally directed as under:

> "Mr R. Mohan, the learned Senior Counsel for the Tamil Nadu Pollution Control Board, has placed before us a consolidated statement dividing the 553 industries into three parts. The first part in Statement 1 and the second part in Statement 2 relate to those tanneries who have set up the Effluent Treatment Plants either individually or collectively to the satisfaction of the Tamil Nadu Pollution Control Board. According to the report placed on the record by the Board, these industries in Statements 1 and 2 have not achieved the standard or have not started functioning to the satisfaction of the Board. So far as the industries in Statements 1 and 2 are concerned, we give them three months' notice from today to complete the setting up of Effluent Treatment Plant (either individually or collectively) failing which they shall be liable to pollution fine on the basis of their past working and also liable to be closed. We direct the Tamil Nadu Pollution Control Board to issue individual notices to all these industries within two weeks from today. The Board is also directed to issue a general notice on three consecutive days in a local newspaper which has circulation in the district concerned.
>
> So far as the 57 tanneries listed in Statement III (including 12 industries who have filed writ petition, numbers of which have been given above) are concerned, these units have not installed and commissioned the Effluent Treatment Plants despite various orders issued by this Court from time to time. Mr R. Mohan, the learned Senior Counsel appearing for Tamil Nadu Pollution Control Board, states that the Board has issued separate notices to these units directing them to set up the Effluent Treatment Plants. Keeping in view the fact that this Court has been monitoring the matter for the last about four years and various orders have been issued by this Court from time to time, there is no justification to grant any further time to these industries. We, therefore, direct the 57 industries listed hereunder to be closed with immediate effect. ... We direct the District Collector and the Senior Superintendent of Police of the district to have our orders complied with

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 7 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

immediately. Both these officers shall file a report in this Court within one week of the receipt of the order.

We give opportunity to these 57 industries to approach this Court as and when any steps towards the setting up of Effluent Treatment Plants and their commissioning have been taken by these industries. If any of the industries wish to be relocated to some other area, they may come out with a proposal in that respect."

5. On 28-7-1995 this Court suspended the closure order in respect of seven industries mentioned therein for a period of eight weeks. It was further observed as under:

"Mr G. Ramaswamy, the learned Senior Advocate appearing for some of the tanneries in Madras, states that the setting up of the Effluent Treatment Plants is progressing satisfactorily. According to him several lakhs have already been spent and in a short time it would start operating. Mr Mohan, the learned counsel for the Tamil Nadu Pollution Control Board, states that the team of the Board will inspect the project and file a report by 3-8-1995."

6. This Court on 8-9-1995 passed the following order:

"The Tamil Nadu Pollution Control Board has filed its report. List No. I relates to about 299 industries. It is stated by Mr G. Ramaswamy, Mr Kapil Sibal and Mr G.L. Sanghi, the learned Senior Advocates appearing for these industries, that the setting up of the projects is in progress. According to the learned counsel Tamil Nadu Leather Development Corporation (TALCO) is in charge of the project. The learned counsel state that the project shall be completed in every respect within 3 months from today. The details of these industries and the projects undertaken by TALCO as per List No. I are as under. ... We are of the view that it would be in the interest of justice to give a little more time to these industries to complete the project. Although the industries have asked for three months' time, we give them time till 31-12-1995. We make it clear that in case the projects are not completed by that time, the industries shall be liable to be closed forthwith. Apart from that, these industries shall also be liable to pollution fine for the past period during which they had been operating.

We also take this opportunity to direct TALCO to take full interest in these projects and have the projects completed within the time granted by us.

Mr Kapil Sibal, the learned counsel appearing for the tanneries, stated that Council for Indian Finished Leather Manufacturers' Export Association is a body which is collecting 5 per cent on all exports. This body also helps the tanneries in various respects. We issue notice to the Association to be present in this Court and assist this Court in all the matters pertaining to the leather tanneries in Madras. Mr Sampath takes notice.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 8 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

So far as List No. II is concerned, it relates to about 163 tanneries (except M/s Vibgyor Tanners & Co., Kailasagiri Road, Mittalam-635 811, Ambur (via). The Pollution Control Board has inspected all these tanneries and placed its report before us. According to the report most of these tanneries have not even started primary work at the spot. Some of them have not even located the land. The tanneries should have themselves set up the pollution control devices right at the time when they started working. They have not done so. They are not even listening to various orders passed by this Court from time to time during the last more than 2 years. It is on the record that these tanneries are polluting the area. Even the water around the area where they are operating is not worth drinking. We give no further time to these tanneries. We direct all the following tanneries which are numbering about 162 to be closed with immediate effect."

It may be mentioned that this Court suspended the closure orders in respect of various industries from time to time to enable the said industries to install the pollution control devices.

7. This Court by the order dated 20-10-1995 directed the National Environmental Engineering Research Institute, Nagpur (NEERI) to send a team of experts to examine, in particular, the feasibility of setting up of CETPs for cluster of tanneries situated at different places in the State of Tamil Nadu where the work of setting up of the CETPs has not started and also to inspect the existing CETPs including those where construction work was in progress. NEERI submitted its first report on 9-12-1995 and the second report on 12-2-1996. This Court examined the two reports and passed the following order on 9-4-1996:

"Pursuant to this Court's order dated December 15, 1995, NEERI has submitted Final Examination Report dated February 12, 1996 regarding CETPs constructed/under construction by the tanneries in various districts of the State of Tamil Nadu. A four-member team constituted by the Director, NEERI inspected the CETPs from January 27, 1996 to February 12, 1996. According to the report, at present, 30 CETP sites have been identified for tannery clusters in the five districts of Tamil Nadu viz., North Arcot Ambedkar, Erode Periyar, Dindigul Anna, Trichi and Chengai M.G.R. All the 30 CETPs were inspected by the team. According to the report, only 7 CETPs are under operation, while 10 are under construction and 13 are proposed. The following 7 CETPs are under operation:

1. M/s TALCO Ranipet Tannery Effluent Treatment Co. Ltd., Ranipet, District North Arcot Ambedkar.

2. M/s TALCO Ambur Tannery Effluent Treatment Co. Ltd., Thuthipet Sector, Ambur, District North Arcot Ambedkar.

3. M/s TALCO Vaniyambadi Tanners Enviro Control Systems Ltd., Vaniyambattu, Vaniyambadi, District North Arcot.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 9 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

4. M/s Pallavaram Tanners Industrial Effluent Treatment Co., Chrompet Area, District Chengai MGR.

5. M/s Ranipet SIDCO Finished Leather Effluent Treatment Co. Pvt. Ltd., Ranipet, District North Arcot Ambedkar.

6. M/s TALCO Vaniyambadi Tanners Enviro Control Systems Ltd., Udayendiram, Vaniyambadi, District North Arcot Ambedkar.

7. M/s TALCO Pernambut Tannery Effluent Treatment Co. Ltd., Bakkalapalli, Pernambut, District North Arcot Ambedkar.

The CETPs mentioned at Sl. Nos. 5, 6 and 7 were commissioned in January 1996 and were on the date of report passing through stabilization period. The report indicates that so far as the above CETPs are concerned, although there is improvement in the performance, they are still not operating at their optimal level and are not meeting the standards as laid down by the Ministry of Environment and Forests and the Tamil Nadu Pollution Control Board for inland surface water discharge. The NEERI has given various recommendations to be followed by the above-mentioned units. We direct the units to comply with the recommendations of NEERI within two months from today. The Tamil Nadu Pollution Control Board shall monitor the directions and have the recommendations of the NEERI complied with. So far as the three units which are under stabilization are concerned, the NEERI Team may inspect the same and place a final report before this Court within the period of two months.

Apart from the tanneries which are connected with the above-mentioned 7 units, there are large number of other tanneries operating in the 5 districts mentioned above which have not set up any satisfactory pollution control devices. Mr Mohan, the learned counsel for the Tamil Nadu Pollution Control Board, states that notices were issued to all those tanneries from time to time directing them to set up the necessary pollution control devices. It is mandatory for the tanneries to set up the pollution control devices. Despite notices it has not been done. This Court has been monitoring these matters for the last about 4 years. There is no awakening or realisation to control the pollution which is being generated by these tanneries.

The NEERI has indicated the physico-chemical characteristics of groundwater from dug wells near tannery clusters. According to the report, water samples show that well waters around the tanneries are unfit for drinking. The report also shows that the quality of water in Palar river downstream from the place where effluent is discharged is highly polluted. We, therefore, direct that all the tanneries in the districts of North Arcot Ambedkar, Erode Periyar, Dindigul Anna, Trichi and Chengai M.G.R. which are not connected with the seven CETPs mentioned above, shall be closed with immediate effect. None of these tanneries shall be permitted to operate till the time the CETPs are constructed to the satisfaction of the Tamil Nadu Pollution Control

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 10 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Board. We direct the District Magistrate and the Superintendent of Police of the area concerned, to have all these tanneries closed with immediate effect. Mr Mehta has placed on record the report of Tamil Nadu Pollution Control Board. In Statement I of the Index, there is a list of 30 industries which have also not been connected with any CETPs. According to the report, these industries have not, till date set up pollution control devices. We direct the closure of these industries also. List is as under. ... The Tamil Nadu Pollution Control Board has filed another report dated January 18, 1996 pertaining to 51 tanneries. There is dispute regarding the permissible limit of the quantity of total dissolved solids (TDS). Since the NEERI Team is visiting these tanneries, they may examine the TDS aspect also and advise this Court accordingly. Meanwhile, we do not propose to close any of the tanneries on the ground that it is discharging more than 2001 TDS.

The report indicates that except the 17 units, all other units are non-complaint units in the sense that they are not complying with the BOD standards. Excepting these 17 industries, the remaining 34 tanneries listed hereunder are directed to be closed forthwith. ... We direct the District Magistrate and the Superintendent of Police of the area concerned to have all these industries mentioned above closed forthwith. The tanneries in the 5 districts of Tamil Nadu referred to in this order have been operating for a long time. Some of the tanneries are operating for a period of more than two decades. All this period, these tanneries have been polluting the area. Needless to say that the total environment in the area has been polluted. We issue show-cause notice to these industries through their learned counsel who are present in Court, why they be not subjected to heavy pollution fine. We direct the State of Tamil Nadu through the Industry Ministry, the Tamil Nadu Pollution Control Board and all other authorities concerned and also the Government of India through the Ministry of Environment and Forests, not to permit the setting up of further tanneries in the State of Tamil Nadu.

Copy of this order be communicated to the authorities concerned within three days. To come up for further consideration after the replies to the show-cause. There are a large number of tanneries in the State of Tamil Nadu which have set up individual pollution control devices and which according to the Tamil Nadu Pollution Control Board are operating satisfactorily. The fact, however, remains that all these tanneries are discharging the treated effluents within the factory precincts itself. We direct NEERI Team which is visiting this area to find out as to whether the discharge of the effluent on the land within the factory premises is permissible environmentally. *M/s Nandeem Tanning Company, Valayampet Vaniyambadi* is one of such industries. Copy of the report submitted by the Tamil Nadu Pollution Control Board be forwarded to the NEERI. NEERI may inspect this industry within ten days and file a report in this Court. Copy of this order be communicated to NEERI.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 11 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Matters regarding distilleries in the State of Tamil Nadu

The Tamil Nadu Pollution Control Board has placed on record the factual report regarding 6 distilleries mentioned in page 4 of the Index of its Report dated April 5, 1996. The learned counsel for the Board states that the Board shall issue necessary notices to these industries to set up pollution control devices to the satisfaction of the Board, failing which these distilleries shall be closed. The Pollution Control Board shall place a status report before this Court."

The NEERI submitted two further reports on 1-5-1996 and 11-6-1996 in respect of CETPs set up by various industries. The NEERI reports indicate that the physico-chemical characteristics of groundwater from dug wells in Ranipet, Thuthipeth, Valayambattu, Vaniyambadi and various other places do not conform to the limits prescribed for drinking purposes.

8. This Court has been monitoring this petition for almost five years. The NEERI, Board and the Central Pollution Control Board (Central Board) have visited the tanning and other industries in the State of Tamil Nadu several times. These expert bodies have offered all possible assistance to these industries. The NEERI reports indicate that even the seven operational CETPs are not functioning to its satisfaction. NEERI has made several recommendations to be followed by the operational CETPs. Out of the 30 CETP sites which have been identified for tannery clusters in the five districts of North Arcot Ambedkar, Erode Periyar, Dindigul Anna, Trichi and Chengai M.G.R., 7 are under operation, 10 are under construction and 13 are proposed. There are a large number of tanneries which are not likely to be connected with any CETP and are required to set up pollution control devices on their own. Despite repeated extensions granted by this Court during the last five years and prior to that by the Board the tanneries in the State of Tamil Nadu have miserably failed to control the pollution generated by them.

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

10. The traditional concept that development and ecology are opposed to each other is no longer acceptable. "Sustainable Development" is the answer. In the international sphere, "Sustainable Development" as a concept came to be known for the first time in the Stockholm Declaration of 1972. Thereafter, in 1987 the concept was given a definite shape by the World Commission on Environment and Development in its report called "Our Common Future". The Commission was chaired by the then Prime Minister of Norway, Ms G.H. Brundtland and as such the report is popularly known

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 12 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

as "Brundtland Report". In 1991 the World Conservation Union, United Nations Environment Programme and Worldwide Fund for Nature, jointly came out with a document called "Caring for the Earth" which is a strategy for sustainable living. Finally, came the Earth Summit held in June 1992 at Rio which saw the largest gathering of world leaders ever in the history — deliberating and chalking out a blueprint for the survival of the planet. Among the tangible achievements of the Rio Conference was the signing of two conventions, one on biological diversity and another on climate change. These conventions were signed by 153 nations. The delegates also approved by consensus three non-binding documents namely, a Statement on Forestry Principles, a declaration of principles on environmental policy and development initiatives and Agenda 21, a programme of action into the next century in areas like poverty, population and pollution. During the two decades from Stockholm to Rio "Sustainable Development" has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting ecosystems. "Sustainable Development" as defined by the Brundtland Report means "Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs". We have no hesitation in holding that "Sustainable Development" as a balancing concept between ecology and development has been accepted as a part of the customary international law though its salient features have yet to be finalised by the international law jurists.

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

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

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

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

12. "The Polluter Pays Principle" has been held to be a sound principle by this Court in *Indian Council for Enviro-Legal Action* v. *Union of India*[1]. The Court observed: (SCC p. 246, para 65)

1 (1996) 3 SCC 212 : JT (1996) 2 SC 196

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 13 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

"... we are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country".

The Court ruled that: (SCC p. 246, para 65)

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

Consequently the polluting industries are "absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected areas". The "Polluter Pays Principle" as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of "Sustainable Development" and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.

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

"47. *Duty of the State to raise the level of nutrition and the standard of living and to improve public health.*—The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

48-A. *Protection and improvement of environment and safeguarding of forests and wildlife.*—The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.

51-A. (*g*) to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures."

Apart from the constitutional mandate to protect and improve the environment there are plenty of post-independence legislations on the subject but more relevant enactments for our purpose are: the Water (Prevention and Control of Pollution) Act, 1974 (the Water Act), the Air (Prevention and Control of Pollution) Act, 1981 (the Air Act) and the Environment (Protection) Act, 1986 (the Environment Act). The Water Act provides for the constitution of the Central Pollution Control Board by the

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 14 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Central Government and the constitution of the State Pollution Control Boards by various State Governments in the country. The Boards function under the control of the Governments concerned. The Water Act prohibits the use of streams and wells for disposal of polluting matters. It also provides for restrictions on outlets and discharge of effluents without obtaining consent from the Board. Prosecution and penalties have been provided which include sentence of imprisonment. The Air Act provides that the Central Pollution Control Board and the State Pollution Control Boards constituted under the Water Act shall also perform the powers and functions under the Air Act. The main function of the Boards, under the Air Act, is to improve the quality of the air and to prevent, control and abate air pollution in the country. We shall deal with the Environment Act in the latter part of this judgment.

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

15. Even otherwise once these principles are accepted as part of the Customary International Law there would be no difficulty in accepting them as part of the domestic law. It is almost an accepted proposition of law that the rules of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the courts of law. To support we may refer to Justice H.R. Khanna's opinion in *A.D.M.* v. *Shivakant Shukla*[2], *Jolly George Varghese case*[3] and *Gramophone Co. case*[4].

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

> "Also, if a person keeps his hogs, or other noisome animals, or allows filth to accumulate on his premises, so near the house of another, that the stench incommodes him and makes the air unwholesome, this is an injurious nuisance, as it tends to deprive him of the use and benefit of his house. A like injury is, if one's neighbour sets up and exercises any offensive trade; as a tanner's, a tallow-chandler's, or the like; for though these are lawful and necessary trades, yet they should be exercised in remote places; for the rule is, 'sic utere tuo, ut alienum non leadas'; this

2 (1976) 2 SCC 521 : AIR 1976 SC 1207

3 *Jolly George Varghese* v. *Bank of Cochin*, (1980) 2 SCC 360 : AIR 1980 SC 470

4 *Gramophone Co of India Ltd* v *Birendra Bahadur Pandey*, (1984) 2 SCC 534 : 1984 SCC (Cri) 313 : AIR 1984 SC 667

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 15 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

therefore is an actionable nuisance. And on a similar principle a constant ringing of bells in one's immediate neighbourhood may be a nuisance.

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

17. Our legal system having been founded on the British common law the right of a person to a pollution-free environment is a part of the basic jurisprudence of the land.

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

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

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

In view of what has been stated above, there is urgent need for the enactment of a general legislation on environmental protection which inter alia, should enable coordination of activities of the various regulatory agencies, creation of an authority or authorities with adequate

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 16 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

powers for environmental protection, regulation of discharge of environmental pollutants and handling of hazardous substances, speedy response in the event of accidents threatening the environment and deterrent punishment to those who endanger human environment, safety and health."

Sections 3, 4, 5, 7 and 8 of the Environment Act which are relevant are as under:

"3. *Power of Central Government to take measures to protect and improve environment.*—(1) Subject to the provisions of this Act, the Central Government shall have the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution.

(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), such measures may include measures with respect to all or any of the following matters, namely—

(*i*) coordination of actions by the State Governments, officers and other authorities—

(*a*) under this Act, or the rules made thereunder; or

(*b*) under any other law for the time being in force which is relatable to the objects of this Act;

(*ii*) planning and execution of a nation-wide programme for the prevention, control and abatement of environmental pollution;

(*iii*) laying down standards for the quality of environment in its various aspects;

(*iv*) laying down standards for emission or discharge of environmental pollutants from various sources whatsoever:

Provided that different standards for emission or discharge may be laid down under this clause from different sources having regard to the quality or composition of the emission or discharge of environmental pollutants from such sources;

(*v*) restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards;

(*vi*) laying down procedures and safeguards for the prevention of accidents which may cause environmental pollution and remedial measures for such accidents;

(*vii*) laying down procedures and safeguards for the handling of hazardous substances;

(*viii*) examination of such manufacturing processes, materials and substances as are likely to cause environmental pollution;

(*ix*) carrying out and sponsoring investigations and research relating to problems of environmental pollution;

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 17 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

(*x*) inspection of any premises, plant, equipment, machinery, manufacturing or other processes, materials or substances and giving, by order, of such directions to such authorities, officers or persons as it may consider necessary to take steps for the prevention, control and abatement of environmental pollution;

(*xi*) establishment or recognition of environmental laboratories and institutes to carry out the functions entrusted to such environmental laboratories and institutes under this Act;

(*xii*) collection and dissemination of information in respect of matters relating to environmental pollution;

(*xiii*) preparation of manuals, codes or guides relating to the prevention, control and abatement of environmental pollution;

(*xiv*) such other matters as the Central Government deems necessary or expedient for the purpose of securing the effective implementation of the provisions of this Act.

(3) The Central Government may, if it considers it necessary or expedient so to do for the purposes of this Act, by order, published in the Official Gazette, constitute an authority or authorities by such name or names as may be specified in the order for the purpose of exercising and performing such of the powers and functions (including the power to issue directions under Section 5) of the Central Government under this Act and for taking measures with respect to such of the matters referred to in sub-section (2) as may be mentioned in the order and subject to the supervision and control of the Central Government and the provisions of such order, such authority or authorities may exercise the powers or perform the functions or take the measures so mentioned in the order as if such authority or authorities had been empowered by this Act to exercise those powers or perform those functions or take such measures.

4. *Appointment of officers and their powers and functions.*—(1) Without prejudice to the provisions of sub-section (3) of Section 3, the Central Government may appoint officers with such designations as it thinks fit for the purposes of this Act and may entrust to them such of the powers and functions under this Act as it may deem fit.

(2) The officers appointed under sub-section (1) shall be subject to the general control and direction of the Central Government or, if so directed by that Government, also of the authority or authorities, if any, constituted under sub-section (3) of Section 3 or of any other authority or officer.

5. *Power to give directions.*—Notwithstanding anything contained in any other law but subject to the provisions of this Act, the Central Government may, in the exercise of its powers and performance of its functions under this Act, issue directions in writing to any person, officer or any authority and such person, officer or authority shall be bound to comply with such directions.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 18 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Explanation.—For the avoidance of doubts, it is hereby declared that the power to issue directions under this section includes the power to direct—

(*a*) the closure, prohibition or regulation of any industry, operation or process; or

(*b*) stoppage or regulation of the supply of electricity or water or any other service.

7. *Persons carrying on industry, operation, etc., not to allow emission or discharge of environmental pollutants in excess of the standards*.—No person carrying on any industry, operation or process shall discharge or emit or permit to be discharged or emitted any environmental pollutant in excess of such standards as may be prescribed.

8. *Persons handling hazardous substances to comply with procedural safeguards*.—No person shall handle or cause to be handled any hazardous substance except in accordance with such procedure and after complying with such safeguards as may be prescribed."

19. Rules 3(1), 3(2) and 5(1) of the Environment (Protection) Rules, 1986 (the Rules) are as under:

"3. *Standards for emission or discharge of environmental pollutants*.—(1) For the purposes of protecting and improving the quality of the environment and preventing and abating environmental pollution, the standards for emission or discharge of environmental pollutants from the industries, operations or processes shall be as specified in Schedules I to IV.

3. (2) Notwithstanding anything contained in sub-rule (1), the Central Board or a State Board may specify more stringent standards from those provided in Schedules I to IV in respect of any specific industry, operation or process depending upon the quality of the recipient system and after recording reasons therefor in writing.

5. *Prohibition and restriction on the location of industries and the carrying on of processes and operations in different areas*.—(1) The Central Government may take into consideration the following factors while prohibiting or restricting the location of industries and carrying on of processes and operations in different areas—

(*i*) Standards for quality of environment in its various aspects laid down for an area.

(*ii*) The maximum allowable limits of concentration of various environmental pollutants (including noise) for an area.

(*iii*) The likely emission or discharge of environmental pollutants from an industry, process or operation proposed to be prohibited or restricted.

(*iv*) The topographic and climatic features of an area.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 19 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

(*v*) The biological diversity of the area which, in the opinion of the Central Government needs to be preserved.

(*vi*) Environmentally compatible land use.

(*vii*) Net adverse environmental impact likely to be caused by an industry, process or operation proposed to be prohibited or restricted.

(*viii*) Proximity to a protected area under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 or a sanctuary, National Park, game reserve or closed area notified as such under the Wild Life (Protection) Act, 1972 or places protected under any treaty, agreement or convention with any other country or countries or in pursuance of any decision made in any international conference, association or other body.

(*ix*) Proximity to human settlements.

(*x*) Any other factor as may be considered by the Central Government to be relevant to the protection of the environment in an area."

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

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

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

"In the government order first read above, the Government have ordered, among other things, that no industry causing serious water

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 20 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

pollution should be permitted within one kilometre from the embankments of rivers, streams, dams, etc. and that the Tamil Nadu Pollution Control Board should furnish a list of such industries to all local bodies. It has been suggested that it is necessary to have a sharper definition for water sources so that ephemeral water collections like rainwater ponds, drains, sewerages (bio-degradable) etc. may be excluded from the purview of the above order. The Chairman, Tamil Nadu Pollution Control Board has stated that the scope of the government order may be restricted to reservoirs, rivers and public drinking-water sources. He has also stated that there should be a complete ban on location of highly polluting industries within 1 kilometre of certain water sources.

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

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

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

23. The learned counsel for the tanneries raised an objection that the standard regarding total dissolved solids (TDS) fixed by the Board was not justified. This Court by the order dated 9-4-1996 directed the NEERI to examine this aspect and give its opinion. In its report dated 11-6-1996 NEERI has justified the standards stipulated by the Board. The reasoning of the NEERI given in its report dated 11-6-1996 is as under:

"The total dissolved solids in ambient water have physiological, industrial and economic significance. The consumer's acceptance of mineralized water decreases in direct proportion to increased mineralization as indicated by Bruvold (1). High total dissolved solids (TDS), including chlorides and sulphates, are objectionable due to possible physiological effects and mineral taste that they impart to water. High levels of total dissolved solids produce laxative/cathartic/purgative effect in consumers. The requirement of soap and other detergents in household and industry is directly related to water hardness as brought

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 21 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

out by DeBoer and Larsen (2). High concentration of mineral salts, particularly sulphates and chlorides, are also associated with costly corrosion damage in wastewater treatment systems, as detailed by Patterson and Banker (3). Of particular importance is the tendency of scale deposits with high TDS thereby resulting in high fuel consumption in boilers.

The Ministry of Environment and Forests (MEF) has not categorically laid down standards for inland surface water discharge for total dissolved solids (TDS), sulphates and chlorides. The decision on these standards rests with the respective State Pollution Control Boards as per the requirements based on local site conditions. The standards stipulated by the TNPCB are justified on the afore-referred considerations.

The prescribed standards of the TNPCB for inland surface water discharge can be met for tannery wastewaters cost effectively through proper implant control measures in tanning operation, and rationally designed and effectively operated wastewater treatment plants (ETPs and CETPs). Tables 3 and 5 depict the quality of groundwater in some areas around tanneries during peak summer period (3-6-1996 to 5-6-1996). Table 8 presents the data collected by TNPCB at individual ETPs indicating that TDS, sulphates and chloride concentrations are below the prescribed standards for inland surface water discharge. The quality of ambient waters needs to be maintained through the standards stipulated by TNPCB."

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

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

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

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 22 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

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

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

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

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

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

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

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 23 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

expenditure shall be met from the "Environment Protection Fund" and from other sources provided by the State Government and the Central Government.

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

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

10. Government Order No. 213 dated March 30, 1989 shall be enforced forthwith. No new industry listed in Annexure I to the notification shall be permitted to be set up within the prohibited area. The authority shall review the cases of all the industries which are already operating in the prohibited area and it would be open to the authority to direct the relocation of any of such industries.

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

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

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 24 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

27. Mr M.C. Mehta has been assisting this Court to our utmost satisfaction. We place on record our appreciation for Mr Mehta. We direct the State of Tamil Nadu to pay Rs 50,000 towards legal fees and other out of pocket expenses incurred by Mr Mehta.

(1996) 5 Supreme Court Cases 670

(BEFORE B.P. JEEVAN REDDY AND SUHAS C. SEN, JJ.)

P. KANNADASAN AND OTHERS .. Appellants/ Petitioners;

Versus

STATE OF T.N. AND OTHERS .. Respondents.

Civil Appeals No. 9847 of 1996 with Nos. 9849, 9780-81, 9905, 9851, 9906-07, 9777, W.Ps. Nos. 269 of 1995, 270 of 1994, 9908-09, 9850, 9778, 9910, 408, 9911-13 of 1996, 518, 9914-15 of 1996, 688 of 1992, 9848, 9774-76, 9916 and 9917 of 1996†, decided on July 26, 1996

A. **Mines and Minerals — Cess and Other Taxes on Minerals (Validation) Act, 1992 — S. 2(1), (2) & (3) and the Sch. — Validity — State laws imposing cess or other taxes on minerals found by the Supreme Court/High Courts to be beyond the legislative competence of the State Legislature — Provision in S. 2 validating such State laws, held, not beyond the legislative competence of Parliament — Contention that the said provision sought to overturn the judicial decisions, repelled — Constitution of India, Arts. 245 & 246, 265 and Sch. VII List I Entries 54 & 97 & List II Entries 23 and 50 — Statute Law — Validating statute — Constitutional law — Separation of powers — Words and phrases — "Checks and balances" — Mines and Minerals (Regulation and Development) Act, 1957, Ss. 2, 9 & 9-A and Sch. II — Panchayats and Zila Parishads — T.N. Panchayats Act, 1958 (35 of 1958), S. 115 — Tax — Cess**

B. **Mines and Minerals — Cess and Other Taxes on Minerals (Validation) Act, 1992 — S. 2(1) and the Sch. — Validity — State laws imposing cess or other taxes on minerals found by the Supreme Court/High Courts to be beyond the legislative competence of the State Legislature — Provision in S. 2(1) validating such State laws from the date on which they were enacted by the State Legislature concerned, held, not bad for retrospectivity — Statute law — Validating statute — Statute validating a tax retrospectively — Validity — Taxation — Taxing statutes — Retrospective validation of an invalid taxing statute — Taxing Statutes — Constitution of India, Art. 265**

C. **Interpretation of the Constitution — Final arbiter on, held, is the Supreme Court — Constitution of India, Arts. 141, 32 and 136 — Interpretation of the Constitution**

Certain States had enacted statutes imposing a local cess on minerals which were annulled by the Supreme Court/High Courts for want of legislative competence. Therefore, Parliament enacted the Cess and Other Taxes on Minerals (Validation) Act, 1992 deeming such Acts, including Tamil Nadu Panchayats Act, 1958, Section 115, always to have been valid as if enacted by Parliament. The 1992

† From the Judgment and Order dated 27-6-1994 of the Madras High Court in W P No 14178 of 1989

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 1 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Maharashtra Law Journal, © 2023 Journal Publications, Nagpur.

also published in three daily newspapers on 20-7-2014 and 21-7-2014. The petitioner therefore cannot now take refuge behind the fact that he was in Hyderabad and therefore, was not aware of the decision taken by the said aghadi in respect of the whip issued to the members. It is expected of the members of any aghadi or front that they are expected to keep in touch with leader or the members of the said aghadi considering the importance that is attached to the election for the post of President and Vice President. In any event, as held by the Division Bench of this Court in *Gajanan Subhashrao Suryawanshi's* case (supra), wherein the Division Bench relying upon the judgment in *Jitendra Himmat Biraris's* case (supra) has held that the bare issuance of a whip is adequate and has to be deemed to be known to every constituent of a Municipal Party. It is pertinent to note that the petitioner has not dealt with the averments made in paragraphs 17, 18 and 19 of the application filed by the petitioner, which averments relate to the issuance of the whip and the knowledge attributed to the petitioner. The petitioner in his reply has dealt with the application only upto paragraph 16. Hence on account of non-traverse the averments made in paragraphs 17, 18 and 19 are deemed to have been accepted by the petitioner. In my view therefore, there is no substance in the said contention of the petitioner and therefore, even if the Collector has not entered into the exercise of recording a finding as regards the signature of the petitioner, the same would not make any difference.

12. For the reasons aforestated, the impugned order as also the impugned orders in the companion Petitions passed by the Collector, Solapur do not suffer from any error of jurisdiction or any other illegality or infirmity for this Court to exercise its Writ Jurisdiction. The Writ Petitions are accordingly dismissed. Rule discharged in all the Petitions with parties to bear their respective costs.

Petitions dismissed.

JUDICIAL REVIEW : SCOPE

(B. R. Gavai and V. M. Deshpande, JJ.)

DR. AVINASH RAMKRISHNA KASHIWAR and others *Petitioners.*

vs.

STATE OF MAHARASHTRA and others *Respondents.*

(a) Maharashtra Land Revenue Code (41 of 1966), S. 4 and Bombay General Clauses Act (1 of 1904), S. 24 — *Constitution of revenue areas — Place for establishment of head-quarter of sub-division of Taluka notified by State Government — Previous publication for inviting objections and suggestions is required — In draft notification place of head quarter was different than final notification — Held that impugned notification was in violation of provisions of section 4 of Revenue Code as well as section 24 of Bombay General Clauses Act — Provisions are mandatory and departure therefrom not sustainable — Change of head quarter from one Taluka as proposed in draft notification to other Taluka which is not proposed in draft notification, not permissible — Impugned notification quashed.* (Paras 22 to 26)

P. I. L. No. 72 of 2013 decided on 10-12-2014. (Nagpur)

SCC ONLINE True Print
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 2 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Maharashtra Law Journal, © 2023 Journal Publications, Nagpur.

(b) Constitution of India, Art. 226 — *Judicial Review — Scope — High Court cannot sit in appeal over decisions of authorities — While exercising powers of judicial review, a limited inquiry that would be permissible is as to whether decision making process of authorities is legal or not and as to whether same suffers from illegality, irrationality or arbitrariness.* (Para 25)

(c) Constitution of India, Art. 141 — *Precedent — Binding force — Everything said by Judge while giving judgment does not constitute a precedent — What is binding is the principle upon which the case is decided — Essence of a decision is its ratio and not every observation found therein nor what logically follows from various observations made in judgment — Every judgment must be read as applicable to particular facts proved or assumed to be proved — It is necessary to see what were facts of case in which decision was given and what was point which is to be decided — Therefore, a word or a clause or a sentence in judgment cannot be regarded as a full exposition of law.* (Paras 21 and 22)

For petitioners : *M. V. Samarth*

For respondents : *S. M. Ukey, Additional Government Pleader*

For interveners : *H. D. Dangre*

List of cases referred :

1. *Bhikubhai Vithlabhai Patel and ors vs. State of Gujarat and another, (2008) 4 SCC 144* (Para 5)
2. *Baldev Singh and others vs. State of H. P. and others, AIR 1987 SC 1239* (Para 5)
3. *Prashant Babusaheb Ghiramkar vs. State of Maharashtra and others, 2013(6) Mh.L.J. 703* (Paras 5, 18, 22)
4. *Ashok Ganapat Jadhav and another vs. State Election Commission, Mumbai, 2000(4) Mh.L.J. 150* (Para 5)
5. *Maidan Bacchav Samiti and ors. vs. Ramchandra Padmakar Vaidya Hall Trust and ors., 2011(4) Mh.L.J. 418 = 2011 Vol. 113(2) Bom. L.R. 1280* (Para 5)
6. *State of Punjab vs. Tehal Singh and ors., AIR 2002 SC 533* (Para 12)
7. *State of Orissa vs. Sridhar Kumar Mallik and ors., (1985) 3 SCC 697* (Para 14)
8. *Municipal Corporation Bhopal, M. P. vs. Misbahul Hasan and others, (1972) 1 SCC 696* (Para 16)
9. *Regional Manager and another vs. Pawan Kumar Dubey, (1976) 3 SCC 334* (Paras 19, 22)
10. *Union of India and others vs. Dhanwanti Devi and ors., (1996) 6 SCC 44* (Para 21)

JUDGMENT

B. R. GAVAI, J. :— Rule. Rule made returnable forthwith. Heard by consent of the learned counsel appearing for the parties.

2. The present public interest litigation has been filed by the residents of Sadak-Arjuni, praying for quashing and setting aside the Notification dated 26-7-2013 issued by respondent No. 1 in respect of location of Sub Division at Morgaon-Arjuni.

3. The petitioners are the residents of Sadak-Arjuni in Gondia district. In the year 2000, Gondia district was carved out from the erstwhile Bhandara district. After carving out Gondia district from Bhandara, it has 8 talukas. It had

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 3 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Maharashtra Law Journal, © 2023 Journal Publications, Nagpur.

only two Sub-Divisions viz. Gondia and Deori. Gondia Sub-Division was consisting of four Talukas i.e. Tiroda, Morgaon-Arjuni, Goregaon and Gondia, whereas Deori Sub Division was consisting of Deori, Sadak-Arjuni, Amgaon and Sakekasa talukas. There was demand from various quarters for having more Sub-Divisions. In response to the said demand, the State Government published a Notification on 26/28th June, 2012 in exercise of powers under section 4 of the Maharashtra Land Revenue Code, 1966 (hereinafter referred to as "the Code" for short) thereby proposing to constitute a separate Sub-Division for the talukas of Sadak-Arjuni and Morgaon-Arjuni and notifying the location of the said Sub-Division to be at Sadak-Arjuni. However, by the final Notification dated 26-7-2013 though the separate Sub-Division has been constituted for the Talukas of Sadak-Arjuni and Morgaon-Arjuni, the location of the headquarter is notified at Morgaon Arjuni and not at Sadak-Arjuni. Being aggrieved thereby, the present public interest litigation is filed.

4. Heard Mr. Samarth, learned counsel for the petitioners, Mr. S. M. Ukey, learned Additional Government Pleader for the respondents/State and Mr. H. D. Dangre, learned counsel for the intervenors who are the residents of Arjuni-Morgaon Taluka and are supporting the location of the headquarter of the Sub-Division at Morgaon-Arjuni.

5. Mr. Samarth, learned counsel appearing on behalf of the petitioners submits that once a draft notification provided that the headquarter of the Sub-Division would be at Sadak-Arjuni, it was not permissible for the State Government to change the same and notify the headquarter at Morgaon-Arjuni. The learned counsel submits that this would be in violation of the principles of natural justice. The learned counsel further submits that as a matter of fact the Collector, Gondia had recommended the establishment of the headquarter of the Sub-Division at Sadak-Arjuni. However, the State Government by ignoring the same, has established the headquarter at Morgaon-Arjuni. The learned counsel submits that this has been done in a *mala fide* manner under the influence of politicians from the Morgaon-Arjuni area. The learned counsel on merits submits that taking into consideration the geographical situation of Sadak-Arjuni, Sadak-Arjuni is the most convenient place for establishment of the headquarter. The learned counsel relies on the judgments of the Apex Court in the case of *Bhikubhai Vithlabhai Patel and ors vs. State of Gujarat and another,* reported in *(2008) 4 SCC 144* and in the case of *Baldev Singh and others vs. State of H. P. and others,* reported in *AIR 1987 SC 1239* and on the judgments of the Division Bench of this Court in the case of *Prashant Babusaheb Ghiramkar vs. State of Maharashtra and others,* reported in *2013(6) Mh.L.J. 703,* in the case of *Ashok Ganapat Jadhav and another vs. State Election Commission, Mumbai,* reported in *2000(4) Mh.L.J. 150,* in the case of *Maidan Bacchav Samiti and ors. vs. Ramchandra Padmakar Vaidya Hall Trust and ors.,* reported in *2011(4) Mh.L.J. 418 = 2011 Vol. 113(2) Bom. L.R. 1280.*

6. As against this, the learned Additional Government Pleader Mr. Ukey and Mr. Dangre, the learned counsel appearing on behalf of the intervenors submit that the powers exercised by the State Government are legislative in nature. It is, therefore, submitted that the principles of natural justice would not be applicable to the facts of the present case. It is further submitted that as a

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 4 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Maharashtra Law Journal, © 2023 Journal Publications, Nagpur.

matter of fact the Collector had himself recommended the headquarter to be situated at Morgaon-Arjuni and not at Sadak-Arjuni. It is further submitted that the entire procedure prescribed under the Statute was followed by the State Government and as such no interference is warranted. The learned counsel interpreting the provision of the Code submits that the opinion of the Collector or the other authorities would not be relevant and it is only the opinion of the State Government which should be relevant for determination of the issue as to which place is the suitable place for establishment of the headquarter of the Sub-Division. The learned counsel, therefore, submits that the petition deserves to be dismissed.

7. For appreciating the rival submissions, it would be necessary to refer to section 4 of the Code.

> ***"4. Constitution of Revenue areas :***
>
> *1. The State Government may, by notification in the Official Gazette specify —*
>
> *i) the districts [(including the City of Bombay)] which constitute a division;*
>
> *ii) the sub-divisions which constitute a district;*
>
> *iii) the talukas which constitute a subdivision;*
>
> *iv) the village which constitute a taluka;*
>
> *v) the local area which constitute a village; and*
>
> *vi) alter the limits of any such revenue area so constituted by amalgamation, division or in any manner whatsoever, or abolish any such revenue area and may name and after the name of any such revenue area; and in any case where any area is renamed, then all references in any law or instrument or other documents to the area under its original name shall be deemed to be references to the area as renamed, unless expressly otherwise provided :*
>
> *Provided that, the State Government shall, as soon as possible after the commencement of this Code, constitute by like notification every wadi, and any area outside the limits of the gaothan of a village having a separate habitation (such wadi or area having a population of not less than [three hundred, as ascertained by a Revenue Officer not below the rank of a Tahsildar)] to be a village; and specify therein limits of the village so constituted.*
>
> *2. The collector may by an order publish in the prescribed manner arrange the villages in a taluka which shall constitute a saza; and the sazas in a taluka which shall constitute a circle, and may alter the limits of, or abolish any saza or circle, so constituted.*
>
> *3. The divisions, districts, sub-divisions, talukas, circles, sazas and villages existing at the commencement of this Code shall continue under the names they bear respectively to be the divisions, districts, sub-divisions, talukas, circles, sazas and villages unless otherwise altered under this section.*
>
> *4. Every notification or order made under this section shall be subject to the condition of previous publication; and the provisions of section 24*

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 5 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Maharashtra Law Journal, © 2023 Journal Publications, Nagpur.

of the Bombay General Clauses Act, 1904, shall so far as may be apply in relation to such notification or order, as they apply in relation to rules to be made after previous publication."

8. The perusal of sub-section (1) of section 4, therefore, would reveal that the State Government is empowered to specify the District which constitute a division; the sub-divisions which constituted a district; the talukas which constitute a sub-division; the village which constitutes a taluka; the local area which constitutes a village by publishing in the official gazette. Likewise under Clause (vi) of sub-section (1) of section 4, the State Government is also empowered to alter the limits of any such revenue area so constituted by amalgamation, division or in any manner whatsoever, or abolish any such revenue area and may name and after the name of any such revenue area. However, sub-section (4) of section 4 provided that every notification or order made under the said section shall be subject to the condition of previous publication and the provisions of section 24 of the Bombay General Clauses Act, 1904, shall, so far as may be applied in relation to such notification or order, as they apply in relation to rules to be made after previous publication.

9. It would thus be necessary to refer to section 24 of the Bombay General Clauses Act, 1904 which reads thus :—

"24. Where, by any Bombay Act [or Maharashtra Act], a power to make rules or by-laws is expressed to be given subject to the condition of the rules or by-laws being made after previous publication, then the following provisions shall apply, namely :—

a) The authority having power to make the rules or by-laws shall, before making them, publish a draft of the proposed rules or by-laws for the information of persons likely to be affected thereby;

b) The publication shall be made in such manner as that authority deems to be sufficient or, if the condition with respect to previous publications so requires, in such manner as the [Central Government, or as the case may be, the [State] Government] prescribe;

c) There shall be published with the draft a notice specifying a date on or after which the draft will be taken into consideration;

d) The authority having power to make the rules or by-laws, and where the rules or by-laws are to be made with the sanction, approval or concurrence of another authority, that authority also, shall consider any objection or suggestion which may be received by the authority, having power to make the rules or by-laws from any person with respect to the draft before the date so specified ;

e) The publication in the [Official Gazette] of a rule or by-laws purporting to have been made in exercise of a power to make rules or by-laws after previous publication shall be conclusive proof that the rule or by-law has been duly made."

10. Clause (a) of section 24 of the Act would, therefore, provide that the authority having power to make the rules or by-laws shall, before making them, publish a draft of the proposed rules or by-laws for the information of persons

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 6 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Maharashtra Law Journal, © 2023 Journal Publications, Nagpur.

likely to be affected thereby. Clause (b) provides that the publication shall be made in such manner as that authority deems to be sufficient or if the condition with respect to previous publication so requires, in such manner as the Central Government, or as the case may be, the State Government, prescribes. Clause (c) provides that there shall be published with the draft a notice specifying a date on or after which the draft will be taken into consideration. Clause (d) provides that the authority having power to make the rules or by-laws, and where the rules or by-laws are to be made with the sanction, approval or concurrence of another authority, that authority also, shall consider any objection or suggestion which may be received by the authority, having power to make the rules or by-laws. Clause (e) provides that the publication in the official gazette of a rule or by-laws purporting to have been made in exercise of a power to make rules or by-laws after previous publication shall be conclusive proof that the rule or by-law has been duly made.

11. No doubt that the power to be exercised by the State under sub-section (4) is legislative in nature. No doubt that it is also equally settled that the principles of natural justice are not required to be followed by the authority when it discharges its legislative function. However, when the Legislature itself in its wisdom has provided that the principles of natural justice are required to be followed, then authority while exercising the power is bound to follow the principles of natural justice. In the present case, sub-section (4) of section 4 of the Code specifically provides that the provision as made in section 24 of the Bombay General Clauses Act shall apply in relation to the notification or order to be issued under said section 4.

12. The Apex Court in the case of *State of Punjab vs. Tehal Singh and ors.*, reported in *AIR 2002 SC 533* has observed thus :

> *"It is almost settled law that an act legislative in character primary or subordinate, is not subjected to rule of natural justice. In case of legislative act of legislature, no question of application of rule of natural justice arises. However, in case of subordinate legislation, the legislature may provide for observance of principle of natural justice or provide for hearing to the resident of the area before making any declaration in regard to the territorial area of a Gram Sabha and also before establishing a Gram Sabha for that area. We have come across many enactments where an opportunity of hearing has been provided for before any area is excluded from one Gram Sabha and included it in different Gram Sabhas or a local authority. However, it depends upon the legislative wisdom and the provisions of an enactment. Where the Legislature has provided for giving an opportunity of hearing before excluding an area from a Gram Sabha and including it in another local authority or body, an opportunity of hearing is sine qua non and failure to give such an opportunity of hearing to the residents would render the declaration invalid."*

13. It could thus be seen that the Apex Court has clearly held that an act legislative in character primary or subordinate, is not subjected to rule of natural justice. It has, however, held that in case of subordinate legislation, the legislature may provide for observance of principle of natural justice or provide for hearing to the residents of the area before making any declaration in regard to

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 7 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Maharashtra Law Journal, © 2023 Journal Publications, Nagpur.

the territorial area of a Gram Sabha and also before establishing a Gram Sabha for that area. The Apex Court has further held that where the Legislature has provided for giving an opportunity of hearing before excluding an area from a Gram Sabha and including it in another local authority or body, an opportunity of hearing is *sine qua non* and failure to give such an opportunity of hearing to the residents would render the declaration invalid.

14. The Apex Court in the case of *State of Orissa vs. Sridhar Kumar Mallik and ors.*, reported in *(1985) 3 SCC 697*, was considering a question as to whether the notification issued by the State Government for the purpose of constituting a notified area under the Orissa Municipal Act, 1950 was legal or not. The Apex Court has observed thus :—

> *"6. The extension of the Orissa Municipality Act to an area other than a municipality is a matter of serious moment to the residents of the area. It results in the provisions of amenities and conveniences necessary to civil life and their regulation by a local body. But the Act also provides for the imposition of taxes of different kinds on the residents. The tax structure does not embody an integrated unified impost expressed in a single tax measure. Different kinds of taxes are contemplated by the Act. The scheme set forth in Chapter XXX-A of the Act intends that before the Government extends the operation of the Act to an area under a municipality it must afford an opportunity to the local residents to object to the proposed action. The objections are submitted to the District Magistrate, who forwards them along with his views to the State Government. The State Government must take into consideration all the material before it and decide thereafter what should be the precise area to which the Act should be extended, and indeed whether all the provisions of the act or only certain specified provisions should be so extended. The possibility of some only of the provisions of the Act being applied to the notified area is evident from the terms in which the grant of power has been conferred on the State Government. Sub-section (1) of section 417-A specifically envisages that when issuing the notification contemplated therein the State Government must decide whether administrative provision needs to be made "for all or any of the purposes" of the Act in the area proposed to be notified. Unless the proposal formulated in the proclamation made under sub-section (1-a) of section 417-A is precise and clear, and indicates with sufficient accuracy the area intended to be notified, and further indicates whether the administrative provision is proposed for all the purposes of the Act or only some of them, and if only some of them then which of them, it will not be possible for the residents to properly avail of the right conferred on them by the statute to make their objections to the proposal of the State Government. We do not see how it can be otherwise." (Underlining ours)*

15. It could thus be seen that the Apex Court has held that the scheme set out in the said Act provides that before the Government extends the operation of the Act to an area under a municipality, it must afford an opportunity to the local residents to object to the proposed action. It could be further seen that the Apex Court has further held that unless the proposal formulated in the proclamation

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 8 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Maharashtra Law Journal, © 2023 Journal Publications, Nagpur.

made under sub-section (1-a) of section 417-A is precise and clear and indicates with sufficient accuracy the area intended to be notified and further indicates whether the administrative provision is proposed for all the purposes of the Act or only some of them, and if only some of them then which of them, it will not be possible for the residents to properly avail of the right conferred on them by the statute to make their objections to the proposal of the State Government. After reproducing the notification in paragraph 7, the Apex Court held that the notification was not of the kind which will ensure that the intention behind making it and calling for objections will be served. It could thus be seen that, it has been held by the Apex Court that a draft notification is not an empty formality. The draft notification must be precise and clear and should indicate with sufficient accuracy the area intended to be notified, so that the opportunity available to the citizens can be effectively availed by them by making their objections/suggestions in proper perspective.

16. It will also be relevant to refer to the observations of the Apex Court in the case of *The Municipal Corporation Bhopal, M. P. vs. Misbahul Hasan and others*, reported in *(1972) 1 SCC 696*. The Apex Court while construing the provisions of section 24 of the M. P. General Clauses Act, 1955 which is *pari materia* with section 24 of the Bombay General Clauses Act, has observed thus:—

> *"13. The legislative procedure envisaged by section 24, set out above, is in consonance with notions of justice and fair-play as it would enable persons likely to be affected to be informed so that they may take such steps as may be open to them to have the wisdom of a proposal duly debated and considered before it becomes law. This mandatory procedure was not shown to have been complied with area."*

17. It could thus be seen that it appears to be settled position of law that the requirement of previous publication inviting objections and suggestions is not an empty formality. It is with an intention to enable persons likely to be affected to be informed, so that they may take steps as may be open to them and the objections/suggestions made would be required to be taken into consideration by the authorities before issuing a final notification. In the present case, the draft notification provided for establishment of headquarter of the sub-division at Sadak-Arjuni. However, the final notification provides for establishment of the headquarter at Morgaon-Arjuni. It could thus be seen that insofar as the establishment of headquarter is concerned, the final notification is totally different from the draft notification.

18. The learned Additional Government Pleader as well as Mr. Dangre, learned counsel appearing on behalf of the intervenors heavily relied on the observations of the Division Bench of this Court in the case of *Prashant Babusaheb Ghiramkar* (supra). In the said case, in the draft notification the headquarter in respect of sub-division of Purandar and Daund talukas was shown at Purandar (Saswad). However, in the final notification the headquarter of the sub-division was notified at Pune. The Division Bench of this Court held that the action of the State Government was not permissible. The Division Bench has observed thus :—

> *"15. We are in respectful agreement with the principle of law enunciated as above by the Rajasthan High Court. When a draft rule or by-law is*

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 9 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Maharashtra Law Journal, © 2023 Journal Publications, Nagpur.

published and objections are invited to it as required under section 24 of the Bombay General Clauses Act, it is open for the rule making authority to consider objections and suggestions and thereafter make changes to it, but those changes must be incidental or ancillary to the draft rule or by-law. Those changes must be conceivable within the frame-work of the draft proposal and not foreign to the draft. ***For example, in our case, when two or more Talukas are proposed to be included within a sub-division with headquarters at one Taluka, the proposal after consideration of suggestions and objections may well be altered by dropping one or the other Taluka/s from the proposal or changing the headquarters from one of those Talukas to the other of them.*** *But providing for a headquarters at an altogether different place not included in any of the Talukas forming the sub-division was a proposal foreign to the draft. There was no opportunity afforded to the members of public to make objections or suggestions to such a proposal. Such a proposal was not conceivable within the framework of the draft proposal."* (emphasis supplied)

Relying on the aforesaid observations of the Division Bench, which have been emphasised by us, it is contended by the learned counsel for the State as well as the intervenors that the Division Bench has clearly held that the change of the headquarter from one of those talukas to the other of them would be permissible. In our considered view the aforesaid observations cannot be held to be a binding precedent or a ratio decidendi to hold that the change of headquarter from one taluka as proposed in the draft notification to the other taluka not proposed in the draft notification is permissible.

19. The Apex Court in the case of the *Regional Manager and another vs. Pawan Kumar Dubey,* reported in *(1976) 3 SCC 334* has observed thus :—

> "It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts."

20. It could thus be seen that the Apex Court has held that it is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. It has been further held that one additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts.

21. It will also be relevant to refer to the judgment of the Apex Court in the case of *Union of India and others vs. Dhanwanti Devi and ors.*, reported in *(1996) 6 SCC 44.* The Apex Court has observed thus :—

> *"What is of the essence in decision is its ratio and not every observation found therein not what logically follows from the various observations made in the judgment. Every judgment 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 exposition*

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 10 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Maharashtra Law Journal, © 2023 Journal Publications, Nagpur.

of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein. The enunciation of the reason or principle on which a question before a Court has been decided is alone binding as a precedent. The concrete decision alone is binding between the parties to it, but it, is the abstract ratio decidendi, ascertained on a consideration of the judgment in relation to the subject matter of the decision, which alone has the force of law and which, when it is clear what it was, is binding. It is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution. A deliberate judicial decision arrived at after hearing an argument on a question which arises in the case or is put in issue may constitute a precedent, no matter for wha reason, and the precedent by long recognition may mature into rul of stare decisis. It is the rule deductible from the application of law to the facts and circumstances of the case which constitutes its ratio decidendi."

It could thus be seen that the Apex Court has clearly held that it is not everything said by a Judge while giving judgment that constitutes a precedent. What is binding is the principle upon which the case is decided. It is further held that what is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in the judgment. It is further held that every judgment must be read as applicable to the particular facts proved or assumed to be proved. It is further held that it would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it. It would be further relevant to refer to the following observations :—

"Therefore, in order to understand and appreciate the binding force of the decision it is always necessary to see what were the fats in the case in which decision was given and what was the point which had to be decided. No judgment can be read as if it is statute. A word or a clause or a sentence in the judgment cannot be regarded as a full exposition of law."

The Apex Court in clear terms has held that in order to understand and appreciate the binding force of a decision, it is always necessary to see what were the facts in the case in which the decision was given and what was the point which had to be decided. It is, therefore, held that a word or a clause or a sentence in the judgment cannot be regarded as a full exposition of law.

22. In the light of the aforesaid, let us examine what were the facts in the case of *Prashant Babusaheb Ghiramkar* (supra) and as to whether the observations on which the learned counsel for the respondents rely can be treated as a binding precedent. The question that arose for consideration in the aforesaid case was that as to whether the headquarter of the sub-division could be permissible at a place outside the sub-division instead of the one proposed in the draft notification. The Division Bench held that that was not permissible. However, the question as to whether if the draft notification provides for

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 11 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Maharashtra Law Journal, © 2023 Journal Publications, Nagpur.

establishment of headquarter at "A" place, whether the final notification can provide for establishment of headquarter at "B" place, never arose for consideration. As such we are of the considered view that the aforesaid observations cannot be said to have a binding effect or constructed as *ratio decidendi* for deciding the present petition. As held by the Apex Court in the case of the *Regional Manager* (supra), a slight difference of facts can make a vast difference in the result.

23. In the present case, we are of the considered view that the objections and suggestions that were invited were for establishing the headquarter of the sub-division at Sadak-Arjuni and not at Morgaon-Arjuni. As already held hereinabove the right provided in the statute to the citizens cannot be an empty formality. It would have been a different matter that the draft proposal itself provided the headquarter to be either at Sadak-Arjuni or Morgaon-Arjuni. However, the draft proposal specifically provided for the headquarter of the sub-division only at Sadak-Arjuni.

24. In that view of the matter, we find that the impugned notification is in violation of the provisions as incorporated in section 4 of the Code as well as section 24 of the Bombay General Clauses Act. As has been held by the Apex Court that provisions are mandatory and any departure therefrom is not sustainable in law.

25. Insofar as the merits of the rival claims are concerned, we do not propose to go into that aspect. By now it is settled position of law that, in such matters, we cannot sit in appeal over the decisions of the authorities. While exercising the powers of the judicial review under Article 226 of the Constitution of India, a limited inquiry that would be permissible is as to whether the decision making process of the authorities is legal or not and as to whether the same suffers from the illegality, irrationality or the arbitrariness. In that view of the matter though it is tried to be urged at length that either Sadak-Arjuni or Morgaon-Arjuni are more suitable, it will not be permissible for us to go into that aspect of the matter. That decision will have to be left to the wisdom of the authority vested with the said power.

26. In the result, we hold that the impugned notification dated 26-7-2013 is not sustainable in law and, therefore, quashed and set aside. Rule is, therefore, made absolute in the aforesaid terms with no orders as to costs.

Rule made absolute.

LEGAL HEIRS OF TENANT : ENTITLED FOR PROTECTION UNDER SECTION 7(15)(d)

(M. S. Sonak, J.)

DATTAKRUPA CONSTRUCTION and another *Petitioners.*

vs.

SHAH VELJI KARMAN AND CO. *Respondent.*

(a) Maharashtra Rent Control Act, 1999 (18 of 2000), S. 7(15)(d) — *Status of tenant — Determination of — Respondent was son of deceased original tenant — No objection by his mother and sisters for devolution of tenancy rights*

Civil Rev. Appln. No. 330 of 2015 decided on 22-7-2015. (Bombay)

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 1 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

(2006) 4 Supreme Court Cases 517

(BEFORE ARUN KUMAR AND R.V. RAVEENDRAN, JJ.)

STATE OF T.N. AND ANOTHER . . Appellants;

Versus

P. KRISHNAMURTHY AND OTHERS . . Respondents.

Civil Appeals Nos. 5572-5644 of 2005†, decided on March 24, 2006

A. Mines and Minerals — T.N. Minor Mineral Concession Rules, 1959 — R. 38-A (as inserted by notification dated 1-10-2003 w.e.f. 2-10-2003) — Part of the rule which provides for premature termination of all existing leases for quarrying of sand in govt. lands and of permissions/leases granted in ryotwari lands forthwith without giving notice or hearing to affected persons, held, invalid being not in conformity with object, scheme and provisions of MMRD Act, 1957 whereunder the Rules were framed — Although R. 38-A, a piece of delegated legislation, is legislative in nature and a legislative act does not require compliance with natural justice principles, but when the enabling Act protects lessee's right to carry on mining operations during the entire period of the lease and provides for termination of the leases only after giving a hearing to the affected lessees, the rule not requiring giving such hearing before premature termination of leases would be invalid on ground of violation of natural justice principles — However, the other part of the rule relating to refund of proportionate lease amount is valid — So also vesting of exclusive right in the State is valid — Valid parts, being severable from the invalid part of the rule, must be saved — Even the invalid part can be saved by reading it down as providing termination of all existing leases granted by Govt. by six months' notice in terms of the contractual provision contained in the lease deeds (based on model form at Appendix I to the Rules) or for the remainder period of the lease whichever is less — Quarrying by any person other than those holding mining leases must also cease — Mines and Minerals (Regulation and Development) Act, 1957, Ss. 4-A(3), 24-A, 15, 17-A and 17 — Interpretation of Statutes — Subsidiary rules — Reading down a provision — Invalid part severable from valid part — When can be saved by reading it down — Administrative Law — Ultra vires — Grounds for plea of ultra vires — Non-compliance with statutory provisions — Inconsistency of Rules with object, scheme and provisions of the enabling Act

B. Mines and Minerals — T.N. Minor Mineral Concession Rules, 1959 — R. 38-A — Part of the rule providing for vesting of exclusive right to quarry sand in State Govt. — Held, valid — State has right to create such monopoly

C. Mines and Minerals — Mines and Minerals (Regulation and Development) Act, 1957 — S. 4-A(3) (as substituted by Act 37 of 1986 w.e.f. 10-2-1987) — Premature termination of mining lease under — An executive

† From the Judgment and Order dated 11-5-2004 of the High Court of Madras in WAs Nos. 3241 and 3242 of 2003 and WPs Nos. 27705-06, 27758, 27768-76, 27805, 27863, 27892-98, 27936, 28079, 28203-05, 28249, 28349, 28438, 28464, 28439, 28584, 28593, 28606-07, 28643, 28661, 28676, 28761, 28789, 28896-98, 28933, 28980, 29009, 29053, 29104, 29189, 29273, 29321, 29331-34, 29519, 29573, 29719, 29738, 29840, 29863, 29964, 30190, 30225, 31080, 31234, 32058, 33274, 33326, 34148 and 35818 of 2003 : **(2004) 4 Mad LJ 418**

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 2 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

and not a legislative act — Affording opportunity of hearing to affected lessee essential prerequisite under — Administrative Law — Administrative action — Administrative or legislative function — Determination of

D. **Administrative Law — Natural justice — Compliance with principles of, not required where act is legislative in nature — Exception to this rule**

E. **Statute Law — Doctrine of severability — Sustaining valid part of a provision — Where valid part is severable from invalid part of the provision, it can be saved instead of striking down the entire provision**

F. **Administrative Law — Delegation of legislative function/power — Where enabling Act, whereunder the delegated legislation made, requires compliance with natural justice principles before affecting lessee's rights, delegated legislation even though legislative in character, if does not require such compliance, will be invalid on ground of violation of natural justice — Natural justice — Applicability of the principles of natural justice**

Pursuant to a PIL filed in the High Court complaining illicit quarrying of sand in riverbeds, the High Court issued certain directions to curb the illicit quarrying. However, complaining non-implementation of the directions by the State Govt., a complaint petition was filed wherein the High Court issued direction to the State Govt. to constitute a High Level Committee to conduct a scientific survey in the matter and submit a report suggesting remedial measures. The High Court also suggested that a suitable regulatory legislation may be made by the State on the basis of such report. Accordingly, a High Level Committee was constituted which submitted a report detailing the extensive damage that had occurred on account of haphazard, irregular and unscientific manner of quarrying sand by the quarry leaseholders, thereby impairing smooth flow of water and causing damage to riverbeds, riverbanks as also to the structures (like bridges and transmission powerlines constructed across rivers or embedded on the riverbed) and drinking water systems branching from rivers, leading to ecological imbalances. Considering the remedial measures suggested by the Committee in its report, the State Government took a decision in public interest to stop quarrying of sand in government lands and *ryotwari* (private *patta*) lands by private agencies and took upon itself exclusively all sand quarrying activities in the State. In this background Rule 38-A came to be inserted in the Rules by notification dated 1-10-2003 with effect from 2-10-2003.

Rule 38-A inter alia provided: "…all existing leases for quarrying sand in government lands and permissions/leases granted in ryotwari lands shall cease to be effective on and from the date of coming into force of this rule and the right to exploit sand in the State shall vest with the State Government to the exclusion of others. The proportionate lease amount for the unexpired period of the lease and the unadjusted seigniorage fee, if any, will be refunded". Section 4-A(3) of the Mines and Minerals (Regulation and Development) Act, 1957 provided: "No order making a premature termination of a prospecting licence or mining lease shall be made except after giving the holder of the licence or lease a reasonable opportunity of being heard."

A Division Bench of the High Court issued an interim order directing both the parties not to quarry sand from areas covered by leases or court orders, until further orders. Subsequently, it upheld the validity of Rule 38-A insofar as it created an exclusive right in the State to quarry sand. It was, however, of the

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 3 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

view that the leases/permissions which had already been granted and were in force as on 2-10-2003 when the rule came into force, could not be terminated without giving a hearing to the lessees/permission-holders concerned. Consequently, it upheld the validity of Rule 38-A subject to certain conditions (see para 6). Being aggrieved by the conditions the State challenged the judgment of the High Court contending that the rule ought to have been upheld unconditionally, so that there could be cessation of all quarrying activities relating to sand in the State by private agencies with effect from 2-10-2003. It was submitted on behalf of the State that continuation of quarrying operations by the existing leaseholders/permission-holders would negate the very purpose (to save riverbeds from indiscriminate quarrying) of the amendment to the Rules by adding Rule 38-A. It was further submitted that the State has the power to regulate the grant of quarrying and mining leases relating to minor minerals by making appropriate rules, in view of the power delegated to it by Parliament under Section 15 of the Mines and Minerals (Regulation and Development) Act, 1957. It was argued that the power to regulate includes the power to prohibit, in appropriate cases; that termination of all quarrying leases and permissions was nothing but prohibition of quarrying by lease/permission-holders; the State was, therefore, well within its power in making a rule which directed cessation of quarrying of sand by all lease/permission-holders in the State and that Rule 38-A in its entirety is valid. It was also submitted that the State Government took a decision in public interest to stop quarrying of sand in government lands and *ryotwari* (private *patta*) lands by private agencies and took upon itself exclusively, all sand quarrying activities in the State and that it was in this background that Rule 38-A came to be inserted in the Rules by notification dated 1-10-2003 with effect from 2-10-2003. It was submitted that where the power exercised does not concern the interest of an individual but relates to the public in general, or where the power exercised concerns a direction of a general character laying down the future course of action, it should be held to be an exercise of legislative power and not an exercise of administrative or judicial/quasi-judicial power; that Section 4-A(3) refers to performing executive or administrative acts and not to a legislative act, as it requires hearing before making a premature termination of mining leases held by an individual but termination of all leases/permissions relating to quarrying of sand, as a class, under Rule 38-A, is a legislative act and not an executive act and therefore, Section 4-A(3) has application and that Rule 38-A being a delegated legislation, legislative in character, is not open to question on the ground that it violates the principles of natural justice.

The question that arose in these appeals by the State related to validity of part of Rule 38-A, that is, whether the State can, while making a rule providing for exclusive vesting of right to exploit sand in itself, provided that all existing leases relating to quarrying of sand in government land (and all existing permissions to quarry sand in *ryotwari* lands) shall cease to be effective on and from the date when such rule comes into force, and that too without providing a reasonable opportunity of hearing to the aggrieved lease/permission-holders. In other words, the question was whether Rule 38-A ought to be upheld unconditionally or whether holders of existing leases (government lands) and permissions (*ryotwari* lands) should be protected till the expiry or termination of their leases/permissions as per law.

Allowing the appeals in part, the Supreme Court

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 4 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Held :

That part of Rule 38-A which vests the exclusive right to quarry sand, in the State Government, is upheld, having regard to the scheme of the Act and the decisions of the Supreme Court recognising the right of the State to create such monopoly. [Paras 37(*i*) and 8]

State of T.N. v. *Hind Stone*, (1981) 2 SCC 205; *Gem Granites* v. *State of T.N.*, (1995) 2 SCC 413, *relied on*

Though the grounds for premature termination have changed between new and old Section 4-A, the principle laid down in *Ram Kishan case*, (1988) 3 SCC 416 that premature termination of lease under Section 4-A, after giving a hearing to the lessee is an executive act and not legislative act, however, continues to hold good. Therefore, the act of termination of a mining lease, even under the new Section 4-A, is an executive act. (Para 26)

State of Haryana v. *Ram Kishan*, (1988) 3 SCC 416, *relied on*

Baldev Singh v. *State of H.P.*, (1987) 2 SCC 510, *cited*

It is true that making of Rule 38-A is a legislative act and not an administrative act and that an act which is legislative in character, as contrasted from an executive act or a judicial/quasi-judicial function, does not oblige the observance of rules of natural justice. But a delegated legislation, though legislative in character, will be invalid, on the ground of violation of principles of natural justice, if the enabling Act under which the delegated legislation is made, specifically requires observance of the principles of natural justice for doing such an act. (Paras 22 and 27)

When the Act is read as a whole, particularly with reference to Sections 24-A, 17, 17-A and 4-A, the legislative intent is clear that a lease once validly granted cannot be terminated prematurely without a notice and hearing, because exercise of power of termination will have civil consequences adversely affecting the interest of the leaseholders. When the Act assures the lessee the right to carry on mining operations during the entire period of lease and provides for termination only after giving a hearing, the delegate cannot, while making a rule in exercise of the power granted under the Act, make a provision for termination of all leases relating to a particular minor mineral, without giving an opportunity of hearing to the lease/permission-holders. That part of Rule 38-A which purports to terminate all leases forthwith, without notice or hearing to the lessees, does not conform to the object, scheme and the provisions of the Act under which it is made and is therefore, invalid. Parliament never intended to give authority to make such a rule. (Para 29)

Moreover, when the Act requires a hearing for termination on grounds detailed in Section 4-A, it is inconceivable that the delegate will be permitted to exercise the power of termination on such grounds without a hearing. (Para 30)

Apart from the statutory provision for termination in Section 4-A(3), there is a contractual provision for termination in the mining leases granted by the State Government. This provision enables either party to terminate the lease by six months' notice. No cause need be shown for such termination nor such termination entails payment of compensation or other penal consequences. In this case, after considering the High Level Committee Report, the State has taken a decision that all quarrying by private agencies in pursuance of the quarrying leases granted in regard to government lands or permissions granted in respect of *ryotwari* land should be terminated in public interest. If Rule 38-A is read down as terminating all mining leases granted by the Government by six months'

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 5 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

notice (in terms of clause 11 in the lease deeds based on the model form at Appendix I to the Rules) or for the remainder period of the lease, whichever is less, without assigning cause and without any liability to pay compensation, it can be saved, as it will then terminate the leases after notice, in terms of the lease. Except to the limited relief as a consequence of reading down, the respondents will not be entitled to any other reliefs which have been granted by the High Court. [Paras 31, 36 and 37(*ii*), (*iv*)]

The provision in Rule 38-A for refund of proportionate lease amount for the unexpired period of lease and unadjusted seigniorage fee, shall remain undisturbed. [Para 37(*iii*)]

Such of those writ petitioners (the respondents herein) whose leases were subsisting on 2-10-2003 (and whose activities were stopped with effect from that day) will be entitled to carry on the quarrying activities for a period of six months or for the actual unexpired period of the lease (as on 2-10-2003), whichever is less. This benefit will be available to even those who have orders of the court for grant of mining leases, but where mining leases were not executed for one reason or the other. It is, however, made clear that the State Government is at liberty to prematurely terminate the leases for any of the causes mentioned in Section 4-A(2), by giving a notice and hearing under Section 4-A(3), if they want to terminate any lease within the said period of six months. (Para 36)

It is not the case of the State that all the leaseholders have violated the terms of the lease or acted in a manner detrimental to the environment. It has been admitted that several leaseholders had carried on quarrying activities without violating the terms of lease and without causing environmental degradation. If any leaseholder had acted or acts in a manner likely to result in environmental degradation, etc., it is always open to the State Government to terminate the lease after giving a hearing, as provided in Section 4-A(3). (Para 34)

Section 4-A(3) requires the grant of an opportunity of hearing only for premature termination of mining leases (and prospective licences with which the present appeals are not concerned). If anyone was carrying on quarrying of sand as on 2-10-2003 in whatsoever circumstances other than in pursuance of mining leases, there is no question of hearing them before stopping quarrying activities in pursuance of Rule 38-A, as hearing is required only in regard to those holding subsisting leases. Therefore, all quarrying permits for sand stood terminated with effect from 2-10-2003. All quarrying by any person, other than those holding mining leases also ceased with effect from 2-10-2003. (Para 35)

Beg Raj Singh v. *State of U.P.*, (2003) 1 SCC 726, *referred to*

G. **Administrative Law — Subordinate/Delegated legislation — Validity/ Constitutionality — Presumption in favour of — Burden on person challenging it to show that it is invalid — Grounds for challenging validity and court's approach and considerations while examining validity of a subordinate legislation**

There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognised that a subordinate legislation can be challenged under any of the following grounds:

(*a*) Lack of legislative competence to make the subordinate legislation.

(*b*) Violation of fundamental rights guaranteed under the Constitution.

(*c*) Violation of any provision of the Constitution.

(*d*) Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 6 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

(*e*) Repugnancy to the laws of the land, that is, any enactment.

(*f*) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules). (Para 15)

The court considering the validity of a subordinate legislation will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the subordinate legislation conforms to the parent statute. Where a rule is directly inconsistent with a mandatory provision of the statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non-conformity of the rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the parent Act, the court should proceed with caution before declaring invalidity. (Para 16)

Indian Express Newspapers (Bombay) (P) Ltd. v. *Union of India*, (1985) 1 SCC 641 : 1985 SCC (Tax) 121; *Supreme Court Employees' Welfare Assn.* v. *Union of India*, (1989) 4 SCC 187 : 1989 SCC (L&S) 569; *Shri Sitaram Sugar Co. Ltd.* v. *Union of India*, (1990) 3 SCC 223; *St. John's Teachers Training Institute* v. *Regional Director, NCTE*, (2003) 3 SCC 321; *Rameshchandra Kachardas Porwal* v. *State of Maharashtra*, (1981) 2 SCC 722; *Union of India* v. *Cynamide India Ltd.*, (1987) 2 SCC 720, *relied on*

Leila Mourning v. *Family Publications Service*, 411 US 356 : 36 L Ed 2d 318 (1973); *Kruse* v. *Johnson*, (1898) 2 QB 91 : (1895-99) All ER Rep 105, *cited*

R-M/ATZ/34008/C

Advocates who appeared in this case :

K. Ramamoorthy, C.S. Vaidyanathan and A.K. Ganguli, Senior Advocates (Subramonium Prasad, Raghvendra S. Srivastava, Jai Kishore Singh, Sriram J. Thalapathy, Arul Muruganatham, Jayanth Muth Raj, N.R. Shonkar, C.K. Sasi, K.K. Mani, K.B. Sandeep, R.K. Pandey, Mayur R. Shah, A.T.M. Sampath, V. Balaji, T.S. Shanthi, Ms R. Meena Kumari, K.R. Krishnan, P. Narasimhan, V. Krishna Murthy, K.V. Mohan, Harish V. Shankar, Arun Mani, Ms V. Deepa, T. Raja, Ms Indira and John Mathew, Advocates) for the appearing parties.

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

1. (2003) 3 SCC 321, *St. John's Teachers Training Institute* v. *Regional Director, NCTE* 530*a-b*
2. (2003) 1 SCC 726, *Beg Raj Singh* v. *State of U.P.* 536*f*
3. (1995) 2 SCC 413, *Gem Granites* v. *State of T.N.* 526*b-c*, 526*c-d*
4. (1990) 3 SCC 223, *Shri Sitaram Sugar Co. Ltd.* v. *Union of India* 529*f-g*, 534*c-d*
5. (1989) 4 SCC 187 : 1989 SCC (L&S) 569, *Supreme Court Employees' Welfare Assn.* v. *Union of India* 529*d-e*
6. (1988) 3 SCC 416, *State of Haryana* v. *Ram Kishan* 532*a*, 533*h*
7. (1987) 2 SCC 720, *Union of India* v. *Cynamide India Ltd.* 531*c-d*, 533*a-b*, 534*b*
8. (1987) 2 SCC 510, *Baldev Singh* v. *State of H.P.* 533*a*
9. (1985) 1 SCC 641 : 1985 SCC (Tax) 121, *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India* 529*b-c*
10. (1981) 2 SCC 722, *Rameshchandra Kachardas Porwal* v. *State of Maharashtra* 531*a*, 534*b*
11. (1981) 2 SCC 205, *State of T.N.* v. *Hind Stone* 526*b-c*, 526*b-c*
12. 411 US 356 : 36 L Ed 2d 318 (1973), *Leila Mourning* v. *Family Publications Service* 529*h*
13. (1898) 2 QB 91 : (1895-99) All ER Rep 105, *Kruse* v. *Johnson* 530*a-b*

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 7 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

The Judgment of the Court was delivered by

R.V. RAVEENDRAN, J.— These appeals by special leave against the judgment dated 11-5-2004 of a Division Bench of the High Court of Madras in WAs Nos. 3241-42 of 2003 and connected cases, relate to the validity and scope of Rule 38-A of the Tamil Nadu Minor Mineral Concession Rules, 1959 (for short "the Rules") which reads as under:

> "38-A. *Quarrying of sand by the State Government.*—Notwithstanding anything contained in these rules, or any order made or action taken thereunder or any judgment or decree or order of any court, all existing leases for quarrying sand in government lands and permissions/leases granted in ryotwari lands shall cease to be effective on and from the date of coming into force of this rule and the right to exploit sand in the State shall vest with the State Government to the exclusion of others. The proportionate lease amount for the unexpired period of the lease and the unadjusted seigniorage fee, if any, will be refunded."

Background facts

2. We may briefly refer to the circumstances leading to the insertion of Rule 38-A in the Rules. A public interest litigation (WP No. 985 of 2000) was filed in the Madras High Court, complaining about indiscriminate illicit quarrying of sand in riverbeds. The High Court issued certain directions to curb illicit quarrying while disposing of the said writ petition. A contempt petition (Contempt Application No. 561 of 2001) was filed complaining of non-implementation of the said directions by the State Government. In the said contempt proceedings, the High Court issued a direction to the State Government on 26-7-2002 to constitute a High Level Committee consisting of scientists, geologists and environmentalists to conduct a thorough scientific survey of the sand quarrying activities in rivers and riverbeds in the State and submit a report regarding the damage caused on account of indiscriminate illicit quarrying and to suggest the remedial measures. The High Court also suggested that a suitable regulatory legislation may be made by the State on the basis of the report of such Committee, and issued certain interim directions pending such legislation.

3. Accordingly, a High Level Committee was constituted which submitted a report detailing the extensive damage that had occurred on account of haphazard, irregular and unscientific manner of quarrying sand by the quarry leaseholders, thereby impairing smooth flow of water and causing damage to riverbeds, riverbanks as also to the structures (like bridges and transmission powerlines constructed across rivers or embedded on the riverbed) and drinking water systems branching from rivers, leading to ecological imbalances. It was found that the unauthorised use of Poclain machines for quarrying, and the tendency of lessees to extend quarrying activities beyond the leased area and the permissible depth, were the main causes for the devastating situation. The Committee suggested several measures to remedy the situation, one of which was to impose total prohibition on quarrying by private parties. On considering the said report, the State Government took a decision in public interest to stop quarrying of sand in government lands and *ryotwari* (private *patta*) lands by private

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 8 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

agencies and take upon itself exclusively, all sand quarrying activities in the State. It is in this background, Rule 38-A came to be inserted in the Rules by notification dated 1-10-2003 with effect from 2-10-2003.

4. Prior to insertion of the said Rule, the State Government was granting quarrying leases, the term of such leases being three years or less, under Rule 8 of the Rules. It is stated that as on 2-10-2003, private agencies were holding 135 sand quarrying leases granted by the State Government and 52 permissions for sand quarrying in *ryotwari* lands. Out of these, 19 were to expire in 2003, 102 were to expire in 2004, 33 were to expire in 2005 and the remaining 33 were to expire in 2006; and in addition, sand quarrying was carried on by some others on the authority of the orders of the court, even though no leases had been granted in their favour. With effect from 2-10-2003, the State Government stopped all sand quarrying by private agencies. Several writ petitions were filed in the Madras High Court by the lessees/permission-holders, challenging Rule 38-A.

Decision of the High Court

5. On 8-10-2003, a learned Single Judge of the High Court granted an interim stay, until further orders or till the leases granted to the writ petitioners came to an end, whichever was earlier. Being aggrieved by the interim stay, the State Government moved the matter before a Division Bench immediately which in turn issued an interim direction on the same day (8-10-2003) directing both the parties not to quarry sand from areas covered by leases or court orders, until further orders. Subsequently, the writ petitions, which were pending before the learned Single Judge, were taken up for hearing by the Division Bench along with the writ appeals against the interim order, and were disposed of by a common order dated 11-5-2004.

6. The Division Bench upheld the validity of Rule 38-A insofar as it created an exclusive right in the State to quarry sand. It was, however, of the view that the leases/permissions which had already been granted and were in force as on 2-10-2003 when the Rule came into force, could not be terminated without giving a hearing to the lessees/permission-holders concerned. Consequently, it upheld the validity of Rule 38-A subject to the following conditions:

> "*1*. The State is entitled to exploit the sand by quarrying itself on the government lands, which are not covered by the mining leases of the writ petitioners. The same is applicable to patta lands subject to the permission of the landholders or their tenants or lessees in occupation, which are not covered by the mining leases.
>
> *2*. The writ petitioners whose mining leases expired as on this day and which are covered by the court orders shall not be entitled for any relief. This will not cover the court orders passed to make up the deficiency of the lease period.
>
> *3*. The respective District Collectors shall issue notices to the petitioners with regard to the mining leases where there is an allegation of infraction of environmental laws and if there is a contest, then hold an enquiry by affording opportunity to them and then pass orders based on

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 9 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

the material on record. The above exercise shall be made by the District Collector within a period of two months from the date of receipt of a copy of this order and until then, the status quo with regard to mining operations as obtained on this day, shall be maintained.

4. Insofar as the cases not covered by environmental violations are concerned, the said writ petitioners shall be entitled to continue their sand quarry operations till the expiry of their respective lease periods. But this shall not preclude the respondent Government from terminating their leases by issuing a prior notice of six months as contemplated under clause 11 of Appendix I of the Rules insofar as the government lands are concerned.

5. In the cases relating to the petitioners, where there is an allegation of breach of conditions of lease, then a notice has to be issued to them affording opportunity and then pass orders based upon the material on record. But until then, they shall be entitled to quarry."

Some of the writ petitioners, being aggrieved by the judgment upholding the validity of Rule 38-A, approached this Court. This Court did not entertain the SLPs.

The contentions and the issue

7. The State has challenged the judgment of the High Court in these appeals by special leave, being aggrieved by the conditions stipulated by the Court while upholding the validity of Rule 38-A. According to the State, the rule ought to have been upheld unconditionally, so that there could be cessation of all quarrying activities relating to sand in the State by private agencies with effect from 2-10-2003. Though leave was granted on 5-9-2005, the interim prayer of the State to stay the conditions imposed by the High Court was not granted. Instead, hearing was expedited. The State has raised the following contentions:

(*i*) The High Court having upheld the validity of Rule 38-A, ought not to have excluded the existing leaseholders (in regard to government lands) and permission-holders (in regard to *ryotwari* lands) from the operation of the said rule. Continuation of quarrying operations by the existing leaseholders/permission-holders would negate the very purpose (to save riverbeds from indiscriminate quarrying) of the amendment to the Rules by adding Rule 38-A.

(*ii*) The State has the power to regulate the grant of quarrying and mining leases relating to minor minerals by making appropriate rules, in view of the power delegated to it by Parliament under Section 15 of the Mines and Minerals (Regulation and Development) Act, 1957 (for short "the Act"). The power to regulate includes the power to prohibit, in appropriate cases. Termination of all quarrying leases and permissions is nothing but prohibition of quarrying by lease/permission-holders. The State was, therefore, well within its power in making a rule which directed cessation of quarrying of sand by all lease/permission-holders in the State and Rule 38-A in its entirety is valid.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 10 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

(*iii*) The decision to put an end to all leases/permissions was not arbitrary or unreasonable. Rule 38-A manifested the policy of the State Government, formulated after duly considering all relevant aspects and the recommendations of the High Level Committee. Therefore, the High Court erred in imposing conditions, for the applicability of Rule 38-A to existing lease/permission-holders.

8. The validity of Rule 38-A insofar as it seeks to vest the exclusive right in the State Government, in regard to sand quarrying, does not arise for our consideration as the High Court has held that creation of such monopoly is not illegal having regard to the scheme of the Act and the decisions of this Court recognising the right of the State to create such monopoly in *State of T.N.* v. *Hind Stone*[1] and *Gem Granites* v. *State of T.N.*[2] In *Hind Stone*[1] this Court held that the power of regulation vested in the State Government can extend to total prohibition of leases and the State was entitled, in exercise of its regulatory power, in appropriate cases, to take over exclusive exploitation of a particular minor mineral or give it to a sole agency or prohibit exploitation by private agencies with the intention of conservation and prudent exploitation. In *Gem Granites*[2] this Court held that the State Government as owner of a minor mineral, may decline to give any lease to quarry such minor mineral to anyone and may engage in such quarrying operations itself. Therefore, the High Court rightly held that Rule 38-A reserving the exclusive right of quarrying sand, in itself, to the exclusion of others, was valid and did not suffer from any infirmity. This Court also refused to entertain the SLPs, filed by lessees in view of the said settled legal position.

9. The question that arises in these appeals by the State relates to the other part of the rule, that is, whether the State can, while making a rule providing for exclusive vesting of right to exploit sand in itself, provided that all existing leases relating to quarrying of sand in government land (and all existing permissions to quarry sand in *ryotwari* lands) shall cease to be effective on and from the date when such rule comes into force, and that too without providing a reasonable opportunity of hearing to the aggrieved lease/permission-holders. In other words, the question is whether Rule 38-A ought to be upheld unconditionally or whether holders of existing leases (government lands) and permissions (*ryotwari* lands) should be protected till the expiry or termination of their leases/permissions as per law.

10. The respondents contend that Rule 38-A does not conform to Section 4-A(3) of the Act. It is pointed out that sub-section (3) of Section 4-A of the Act mandates that no order making a premature termination of a mining lease shall be made except after giving the holder of the lease a reasonable opportunity of being heard; and that it, therefore, follows that any rule made by the State Government for regulating mining leases in respect of minor minerals, in exercise of the rule-making power conferred by the Act, should conform to Section 4-A(3); and that Rule 38-A made by the State, to the

1 (1981) 2 SCC 205
2 (1995) 2 SCC 413

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 11 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

extent it provides for termination or cessation of all existing leases/ permissions relating to sand, without affording a hearing to the affected leaseholder(s), is clearly contrary to the express provisions of Section 4-A(3) is invalid.

Legal provisions

11. A brief reference to the relevant provisions of the Act and Rules will facilitate the decision on the said question.

12. Section 3(*e*) of the Act defines "minor minerals" as building stones, gravel, ordinary clay, ordinary sand (other than sand used for prescribed purposes), and any other mineral which the Central Government may, by notification in the Official Gazette, declare to be a minor mineral. Section 4 requires the mining operations to be done under leases granted under the Act and the Rules made thereunder. Section 4-A deals with termination of mining leases. While sub-section (1) enables the Central Government to request the State Government to terminate a mining lease in respect of any mineral other than a minor mineral in the circumstances stated therein, sub-section (2) enables the State Government to make premature termination of mining lease in regard to minor minerals. We extract below sub-sections (2) and (3) of Section 4-A which are relevant for our purpose:

> "4-A. (2) Where the State Government is of opinion that it is expedient in the interest of regulation of mines and mineral development, preservation of natural environment, control of floods, prevention of pollution or to avoid danger to public health or communications or to ensure safety of buildings, monuments or other structures or for such other purposes, as the State Government may deem fit, it may, by an order, in respect of any minor mineral, make premature termination of a prospecting licence or mining lease with respect to the area or any part thereof covered by such licence or lease:
>
> * * *
>
> (3) *No order making a premature termination of a prospecting licence or mining lease shall be made except after giving the holder of the licence or lease a reasonable opportunity of being heard.*" (emphasis supplied)

13. Section 15 empowers the State Government to make rules for regulating the grant of quarry leases, mining leases or other mineral concessions in respect of minor minerals and for purposes connected therewith. Section 17 deals with the special power of the Central Government to undertake prospecting or mining operations in certain lands. Section 17-A provides for reservation of any area (not already held under any mining lease) for purposes of conservation of any mineral or for undertaking mining operations through any company/corporation owned by the Central Government or State Government.

14. The Tamil Nadu Minor Mineral Concession Rules, 1959 were made by the State Government in exercise of its power under Section 15 of the Act. Rule 1(3) provides that the said Rules shall apply to all the lands in the State of Tamil Nadu. Rule 2(6) defines "quarry", "quarrying leases" and "quarrying operations" and provides that they shall have the same meaning assigned to "mine", "mining lease" and "mining operations" in the Act. Rule

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 12 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

8 relates to leasing of government lands for quarrying minor minerals (other than certain types of granites covered by Rules 8-A and 8-C). It contemplates the District Collector granting lease to an applicant who offers the highest bid amount for an area advertised and notified for grant of such lease, followed by execution of a lease deed by the State Government and the lessee. Sub-rule (8) of Rule 8 provides that the period of quarry lease for sand shall be three years; and sub-rules (8) and (11) of Rule 8 make it clear that a lease granted under Rule 8 shall neither be extended nor be renewed. Rule 15 provides for absolute prohibition or regulation of quarrying or removal of sand from riverbeds to which the Madras River Conservancy Act, 1884 has been extended and for regulating the quarrying or removal of sand from beds of rivers in charge of the Public Works Department. The form of lease for quarrying and removing minor minerals by private persons is contained in Appendix I to the Rules and clause 11 thereof provides that such lease may be terminated by six months' notice in writing on either side (without any right in the lessee to seek compensation). It is not in dispute that all quarrying leases granted by the State Government contained such a provision for termination simpliciter. Rule 36 deals with general restrictions in respect of quarrying operations. The proviso to sub-rule (1) of Rule 36 provides that there shall be no quarrying of any minor mineral in the riverbeds or adjoining areas within 200 metres radial distance from the location of any bridge, water supply system, infiltration well, or pumping installation of any of the local bodies or the Central or State Government or the State Water Supply and Drainage Board Head Works. Sub-rule 5(*c*) of Rule 36 provides that the lessees and permit-holders shall carry out quarrying operations in a skilful, scientific and systematic manner, keeping in view proper safety of the labour, structure and the public, and public works located in that vicinity of the quarrying area and in a manner to preserve the environment and ecology of the area.

Whether the rule is valid in its entirety?

15. There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognised that a subordinate legislation can be challenged under any of the following grounds:

(*a*) Lack of legislative competence to make the subordinate legislation.

(*b*) Violation of fundamental rights guaranteed under the Constitution of India.

(*c*) Violation of any provision of the Constitution of India.

(*d*) Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.

(*e*) Repugnancy to the laws of the land, that is, any enactment.

(*f*) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules).

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 13 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

16. The court considering the validity of a subordinate legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the subordinate legislation conforms to the parent statute. Where a rule is directly inconsistent with a mandatory provision of the statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non-conformity of the rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the parent Act, the court should proceed with caution before declaring invalidity.

17. In *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*[3] this Court referred to several grounds on which a subordinate legislation can be challenged as follows: (SCC p. 689, para 75)

> "*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."
>
> (emphasis supplied)

18. In *Supreme Court Employees' Welfare Assn.* v. *Union of India*[4] this Court held that the validity of a subordinate legislation is open to question if it is *ultra vires* the Constitution or the governing Act or repugnant to the general principles of the laws of the land or is so arbitrary or unreasonable that no fairminded authority could ever have made it. It was further held that the Rules are liable to be declared invalid if they are manifestly unjust or oppressive or outrageous or directed to be unauthorised and/or violative of the general principles of law of the land or so vague that it cannot be predicted with certainty as to what it prohibited or so unreasonable that they cannot be attributed to the power delegated or otherwise disclose bad faith.

19. In *Shri Sitaram Sugar Co. Ltd.* v. *Union of India*[5] a Constitution Bench of this Court reiterated: (SCC pp. 251-52, para 47)

> "*47.* Power delegated by statute is limited by its terms and subordinate to its objects. The delegate must act in good faith, reasonably, intra vires the power granted, and on relevant consideration of material facts. All his decisions, whether characterised as legislative or administrative or quasi-judicial, must be in harmony with the Constitution and other laws of the land. They must be 'reasonably related to the purposes of the enabling legislation'. See *Leila Mourning* v.

3 (1985) 1 SCC 641 : 1985 SCC (Tax) 121
4 (1989) 4 SCC 187 : 1989 SCC (L&S) 569
5 (1990) 3 SCC 223

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 14 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Family Publications Service[6]. If they are manifestly unjust or oppressive or outrageous or directed to an unauthorised end or do not tend in some degree to the accomplishment of the objects of delegation, court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires': per Lord Russel of Killowen, C.J. in *Kruse* v. *Johnson*[7]."

20. In *St. John's Teachers Training Institute* v. *Regional Director, NCTE*[8] this Court explained the scope and purpose of delegated legislation thus: (SCC p. 331, para 10)

"*10.* A regulation is a rule or order prescribed by a superior for the management of some business and implies a rule for general course of action. Rules and regulations are all comprised in delegated legislations. *The power to make subordinate legislation is derived from the enabling Act and it is fundamental that the delegate on whom such a power is conferred has to act within the limits of authority conferred by the Act. Rules cannot be made to supplant the provisions of the enabling Act but to supplement it.* What is permitted is the delegation of ancillary or subordinate legislative functions, or, what is fictionally called, a power to fill up details. The legislature may, after laying down the legislative policy confer discretion on an administrative agency as to the execution of the policy and leave it to the agency to work out the details within the framework of policy. The need for delegated legislation is that they are framed with care and minuteness when the statutory authority making the rule, after coming into force of the Act, is in a better position to adapt the Act to special circumstances. Delegated legislation permits utilisation of experience and consultation with interests affected by the practical operation of statutes." (emphasis supplied)

21. It is submitted on behalf of the appellant that where the power exercised does not concern the interest of an individual, but relates to the public in general, or where the power exercised concerns a direction of a general character laying down the future course of action, it should be held to be an exercise of legislative power and not an exercise of administrative or judicial/quasi-judicial power. It is contended that Section 4-A(3) refers to performing executive or administrative acts and not to a legislative act, as it requires hearing before making a premature termination of mining leases held by an individual. It is submitted that termination of all leases/ permissions relating to quarrying of sand, as a class, under Rule 38-A, is a legislative act and not an executive act and therefore, Section 4-A(3) has application. It is submitted that Rule 38-A being a delegated legislation, legislative in character, is not open to question on the ground that it violates the principles of natural justice.

22. There is no dispute that making of Rule 38-A is a legislative act and not an administrative act. It is no doubt true that an act which is legislative in

6 411 US 356 : 36 L Ed 2d 318 (1973)
7 (1898) 2 QB 91 : (1895-99) All ER Rep 105
8 (2003) 3 SCC 321

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 15 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

character, as contrasted from an executive act or a judicial/quasi-judicial function, does not oblige the observance of rules of natural justice. In *Rameshchandra Kachardas Porwal* v. *State of Maharashtra*[9] this Court observed: (SCC p. 741, para 17)

> "We are here not concerned with the exercise of a judicial or quasi-judicial function where the very nature of the function involves the application of the rules of natural justice, or of an administrative function affecting the rights of persons, wherefore, a duty to act fairly. We are concerned with legislative activity; we are concerned with the making of a legislative instrument, the declaration by notification of the Government that a certain place shall be a principal market yard for a market area, upon which declaration certain statutory provisions at once spring into action and certain consequences prescribed by statute follow forthwith. The making of the declaration, in the context, is certainly an act legislative in character and does not oblige the observance of the rules of natural justice."

23. In *Union of India* v. *Cynamide India Ltd.*[10] this Court differentiated between legislative acts and non-legislative acts thus: (SCC pp. 735-36, para 7)

> "The distinction between the two has usually been expressed as 'one between the general and the particular'. 'A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act is the making and issue of a specific direction or the application of a general rule to a particular case in accordance with the requirements of policy'. 'Legislation is the process of formulating a general rule of conduct without reference to particular cases and usually operating in future; administration is the process of performing particular acts, of issuing particular orders or of making decisions which apply general rules to particular cases.' It has also been said: 'Rule-making is normally directed toward the formulation of requirements having a general application to all members of a broadly identifiable class' while, 'an adjudication, on the other hand, applies to specific individuals or situations'. But, this is only a broad distinction, not necessarily always true. Administration and administrative adjudication may also be of general application and there may be legislation of particular application only. That is not ruled out. Again, adjudication determines past and present facts and declares rights and liabilities while legislation indicates the future course of action. Adjudication is determinative of the past and the present while legislation is indicative of the future. The object of the rule, the reach of its application, the rights and obligations arising out of it, its intended effect on past, present and future events, its form, the manner of its promulgation are some factors which may help in drawing the line between legislative and non-legislative acts."

9 (1981) 2 SCC 722
10 (1987) 2 SCC 720

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 16 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

24. The contention that the act of premature termination referred to in Section 4-A(3) is an executive act and not a legislative act, finds support from the decision in *State of Haryana* v. *Ram Kishan*[11] wherein this Court considered the scope of Section 4-A, as it originally stood prior to the substitution thereof by Act 37 of 1986. Section 4-A, considered in that case, reads as under:

> "4-A. (1) Where the Central Government, after consultation with the State Government, is of opinion that it is expedient in the interest of regulation of mines and mineral development so to do, it may request the State Government to make a premature termination of a mining lease in respect of any mineral, other than a minor mineral, and, on receipt of such request, the State Government shall make an order making a premature termination of such mining lease and granting a fresh mining lease in favour of such government company or corporation owned or controlled by Government as it may think fit.
>
> (2) Where the State Government, after consultation with the Central Government, is of opinion that it is expedient in the interest of regulation of mines and mineral development so to do, it may, by an order, make premature termination of a mining lease in respect of any minor mineral and grant a fresh lease in respect of such mineral in favour of such government company or corporation owned or controlled by Government as it may think fit."

25. The old Section 4-A did not provide for a hearing before premature termination of the leases. This Court held that Section 4-A providing for premature termination of a lease, was a provision conferring power on the executive to take adverse decisions involving civil consequences. This Court further held that as the act of termination was an executive act and not a legislative act, the provision must be interpreted as implying to preserve a right of hearing to the affected person before taking the decision, in the absence of exclusion of rules of natural justice. We may, for convenience, extract the following reasoning of this Court: (SCC pp. 419-20, paras 7-8)

> "*7.* The language of Section 4-A clearly indicates that the section by itself does not prematurely terminate any mining lease. A decision in this regard has to be taken by the Central Government after considering the circumstances of each case separately. For exercise of power it is necessary that the essential condition mentioned therein is fulfilled, namely, that the proposed action would be in the interest of regulation of mines and mineral development. … The section does not direct termination of all mining leases, merely for the reason that a government company or corporation has equipped itself for the purpose. …
>
> *8.* Considered in this light, the section must be interpreted to imply that the person who may be affected by such a decision should be afforded an opportunity to prove that the proposed step would not advance the interest of mines and mineral development. Not to do so will be violative of the principles of natural justice. Since there is no suggestion in the section to deny the right of the affected persons to be

11 (1988) 3 SCC 416

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 17 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

heard, the provisions have to be interpreted as implying to preserve such a right. Reference may be made to the observations of this Court in *Baldev Singh* v. *State of H.P.*[12] that where exercise of a power results in civil consequences to citizens, unless the statute specifically rules out the application of natural justice, such rule would apply. … The learned counsel placed reliance on the observations in paras 5 to 7 of the judgment in *Union of India* v. *Cynamide India Ltd.*[10] which were made in connection with legislative activity which is not subject to the rule of audi alteram partem. The principles of natural justice have no application to legislative activities, but that is not the position here. It has already been pointed out earlier that the existing mining leases were not brought to their end directly by Section 4-A itself. They had to be terminated by the exercise of the executive authority of the State Government."

26. The old Section 4-A enabled the termination of lease either by the Central Government or by the State Government (in consultation with the other) only for the purpose of granting a fresh lease in favour of any government company/corporation owned by such Government, if it was of the opinion that it was expedient in the interest of regulation of mines and mineral development to do so. Though old Section 4-A did not provide for a hearing before termination, this Court read such a requirement into the section. On the other hand, present Section 4-A (substituted by Act 37 of 1986) enables the Central Government to request the State Government to terminate a mining lease in regard to any mineral (other than a minor mineral) and also enables the State Government to terminate a mining lease in regard to any minor mineral, where the Government concerned is of the opinion that it is expedient in the interest of the regulation of mines and mineral development, preservation of natural environment, control of floods, prevention of pollution or to avoid danger to public health or communication or to ensure safety of buildings, monuments, or other structures (and also additionally on the ground of conservation of mineral resources or for maintaining safety in the mines in the case of minerals other than minor minerals) or for such other purposes, by making an order of premature termination. Granting a lease in favour of a government company/corporation is no longer a purpose for which an existing lease could be terminated under Section 4-A. In fact, along with substitution of Section 4-A by Act 37 of 1986 with effect from 10-2-1987, a new section (Section 17-A) was introduced which provides for reservation of any area for the purpose of granting of a mining lease to a government company or corporation provided such area is not already held under a mining lease. The ground on which a lease could be prematurely terminated under old Section 4-A and the grounds on which a lease can be terminated under new Section 4-A are completely different. Though the grounds for premature termination have changed in Section 4-A, the principle laid down in *Ram Kishan*[11] that premature termination of lease under Section 4-A, after giving a hearing to the lessee is

12 (1987) 2 SCC 510

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 18 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

an executive act and not legislative act, however, continues to hold good. Therefore, the act of termination of a mining lease, even under the new Section 4-A, is an executive act.

27. A delegated legislation, though legislative in character, will be invalid, on the ground of violation of principles of natural justice, if the enabling Act under which the delegated legislation is made, specifically requires observance of the principles of natural justice for doing the act. This was made clear in *Rameshchandra Kachardas Porwal*[9] itself. In *Cynamide India Ltd.*[10] this Court observed: (SCC pp. 734-35, para 5)

> "[L]egislative action, plenary or subordinate, is not subject to rules of natural justice. In the case of parliamentary legislation, the proposition is self-evident. *In the case of subordinate legislation, it may happen that Parliament may itself provide for a notice and for a hearing*…. But, where the legislature has not chosen to provide for any notice or hearing, no one can insist upon it and it will not be permissible to read natural justice into such legislative activity." (emphasis supplied)

28. Reference may also be made to the following observations of a Constitution Bench in *Shri Sitaram Sugar*[5]: (SCC p. 248, para 37)

> "*37.* If a particular function is termed legislative rather than judicial, practical results may follow as far as the parties are concerned. *When the function is treated as legislative, a party affected by the order has no right to notice and hearing, unless, of course, the statute so requires.* It being of general application engulfing a wide sweep of powers, applicable to all persons and situations of a broadly identifiable class, the legislative order may not be vulnerable to challenge merely by reason of its omission to take into account individual peculiarities and differences amongst those falling within the class." (emphasis supplied)

29. When the Act is read as a whole, the legislative intent is clear that a lease once validly granted cannot be terminated prematurely without a notice and hearing. The reason is obvious. Exercise of power of termination will have civil consequences adversely affecting the interest of the leaseholders. We may refer to the three sections inserted by Act 37 of 1986 with effect from 10-2-1987, in this behalf. Section 24-A deals with the rights and liabilities of a holder of a mining lease. It provides that on issue of a mining lease under the Act or the Rules made thereunder, it shall be lawful for the holder of such lease, to enter upon the leased land, *at all times during its currency for carrying on mining operations.* Sub-sections (1) and (2) of Section 4-A contemplate premature termination only when the Government concerned is of the view that it is expedient to do so, in the interest of regulation of mines and mineral development, preservation of natural environment, control of floods, to prevent pollution or to avoid danger to public health or communication or to ensure safety of buildings, monuments or other structures or for such other purposes. Sub-section (3) of Section 4-A prohibits any order of a premature termination of a mining lease being made, without giving a hearing to the leaseholder. The Act does not contemplate

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 19 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

"wholesale" termination of all existing leases/permissions in relation to a minor mineral without hearing. Section 17-A while empowering the Central Government to reserve areas for purposes of conservation of minerals, and empowering the Central/State Government to reserve areas for mining operation by government companies/corporations, specifically exclude areas already held under mining leases. Even, Section 17 while referring to the power of the Central Government to undertake mining operations exclusively in any area, excludes areas already held under mining leases. It is, thus, clear that the Act extends a statutory protection to the holder of a mining lease to carry on mining operations during the period of lease, in terms of the lease deed. The Act further contemplates premature termination only for the reasons stated in sub-section (1) or (2) of Section 4-A and in the manner provided in sub-section (3) of Section 4-A. There is no doubt that the legislature can make a provision in the statute itself for termination of the mining leases without observance of the principles of natural justice. It did not choose to do so. When the Act assures the lessee the right to carry on mining operations during the entire period of lease and provides for termination only after giving a hearing, the delegate cannot, while making a rule in exercise of the power granted under the Act, make a provision for termination of all leases relating to a particular minor mineral, without giving an opportunity of hearing to the lease/permission-holders. That part of Rule 38-A which purports to terminate all leases forthwith, without notice or hearing to the lessees, does not conform to the object, scheme and the provisions of the Act under which it is made and therefore, invalid. Borrowing the words of Russell of Killowen, C.J., we may as well say "Parliament never intended to give authority to make such a rule".

30. We may look at it from another angle. The government order dated 1-10-2003 states the reasons for making Rule 38-A. It states that the rule is introduced as the High Level Committee appointed by it found that illicit and haphazard sand mining has led to deepening of riverbeds, widening of the rivers, damage to civil structures, depletion of groundwater table, degradation of groundwater quality, sea water intrusion in coastal areas, damages to river systems and reduction in biodiversity, apart from causing health hazards and environmental degradation. These are the very grounds which are referred to in Section 4-A as grounds for premature termination. When the Act requires a hearing for termination on such grounds, it is inconceivable that the delegate will be permitted to exercise the power of termination on such grounds without a hearing.

31. If a rule is partly valid and partly invalid, the part that is valid and severable is saved. Even the part which is found to be invalid, can be read down to avoid being declared as invalid. We have already held that premature termination of existing leases, in law, can be only after granting a hearing as required under sub-section (3) of Section 4-A for any of the reasons mentioned in Section 4-A(1) or (2). Therefore, let us examine whether we can save the offending part of Rule 38-A (which terminates quarrying leases/permissions forthwith) by reading it down. Apart from the statutory

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 20 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

provision for termination in Section 4-A(3), there is a contractual provision for termination in the mining leases granted by the State Government. This provision enables either party to terminate the lease by six months' notice. No cause need be shown for such termination nor such termination entails payment of compensation or other penal consequences. In this case, after considering the High Level Committee Report, the State has taken a decision that all quarrying by private agencies in pursuance of the quarrying leases granted in regard to government lands or permissions granted in respect of *ryotwari* land should be terminated in public interest. If Rule 38-A is read down as terminating all mining leases granted by the Government by six months' notice (in terms of clause 11 in the lease deeds based on the model form at Appendix I to the Rules) or for the remainder period of the lease, whichever is less, it can be saved, as it will then terminate the leases after notice, in terms of the lease.

Whether conditions imposed by the High Court require to be modified?

32. The respondents submitted that from 2-10-2003 when Rule 38-A was inserted, the State Government had prevented the existing leaseholders/ permission-holders from quarrying and removing sand. It is submitted that on 8-10-2003, the Division Bench issued a direction that neither party should quarry sand in regard to the area covered by the existing leases and that order was in force till the disposal of the writ petitions. On 11-5-2004, the writ petitions were disposed of upholding Rule 38-A and, at the same time, recognising the right of the existing leaseholders to continue with the quarrying operations till the expiry of their respective lease period. It is submitted that in spite of the said judgment, the State did not permit the leaseholders to carry on quarrying operations, apparently, in view of its decision to challenge the said judgment. The State filed the SLPs in November 2004. As this Court did not stay the order of the High Court, the State Government was bound to permit the respondents to carry on quarrying operations in terms of the order of the High Court, but did not do so. The respondents, therefore, submit that they should be permitted to continue quarrying operations for the unexpired periods of lease as on 2-10-2003. They rely on the decision of this Court in *Beg Raj Singh* v. *State of U.P.*[13] wherein the leaseholders were permitted to carry on operations during the lease period of three years, subject to adjustment of the period during which they have already operated.

33. On the other hand, learned counsel for the State Government, submitted that Rule 38-A was made to prevent environmental degradation and indiscriminate quarrying and, therefore, if the leaseholders are permitted to continue the quarrying operations, the very purpose of Rule 38-A will be defeated.

34. It is not the case of the State that all the leaseholders have violated the terms of the lease or acted in a manner detrimental to the environment. Learned counsel appearing for the State, in fact, fairly admitted that several

13 (2003) 1 SCC 726

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 21 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

leaseholders had carried on quarrying activities without violating the terms of lease and without causing environmental degradation. If any leaseholder had acted or acts in a manner likely to result in environmental degradation, etc., it is always open to the State Government to terminate the lease after giving a hearing, as provided in Section 4-A(3).

35. Section 4-A(3) requires the grant of an opportunity of hearing only for premature termination of mining leases (and prospective licences with which we are not concerned). If anyone was carrying on quarrying of sand as on 2-10-2003 in whatsoever circumstances other than in pursuance of mining leases, there is no question of hearing them before stopping quarrying activities in pursuance of Rule 38-A, as hearing is required only in regard to those holding subsisting leases. Therefore, all quarrying permits for sand stood terminated with effect from 2-10-2003. All quarrying by any person, other than those holding mining leases also ceased with effect from 2-10-2003.

36. In regard to mining leases subsisting as on 2-10-2003, we have read down Rule 38-A as terminating such leases in terms of the contract (lease deeds) by six months, without assigning cause and without any liability to pay compensation. Such of those writ petitioners (the respondents herein) whose leases were subsisting on 2-10-2003 (and whose activities were stopped with effect from that day) will be entitled to carry on the quarrying activities for a period of six months or for the actual unexpired period of the lease (as on 2-10-2003), whichever is less. This benefit will be available to even those who have orders of the court for grant of mining leases, but where mining leases were not executed for one reason or the other. It is, however, made clear that the State Government is at liberty to prematurely terminate the leases for any of the causes mentioned in Section 4-A(2), by giving a notice and hearing under Section 4-A(3), if they want to terminate any lease within the said period of six months.

37. We, accordingly, allow these appeals in part. In place of the conditions stipulated by the Division Bench while upholding the validity of Rule 38-A, we hold and direct as follows:

(*i*) That part of Rule 38-A which vests the exclusive right to quarry sand, in the State Government, is upheld.

(*ii*) That part of Rule 38-A which purports to terminate quarrying leases/permissions forthwith (from 2-10-2003) is read down in terms of para 26 above.

(*iii*) The provision in Rule 38-A for refund of proportionate lease amount for the unexpired period of lease and unadjusted seigniorage fee, shall remain undisturbed.

(*iv*) It is made clear that except to the limited relief as a consequence of reading down as per para 26 above, the respondents will not be entitled to any other reliefs which have been granted by the High Court.

(*v*) Parties to bear their respective costs.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 1 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

(2016) 7 Supreme Court Cases 703

(BEFORE KURIAN JOSEPH AND ROHINTON FALI NARIMAN, JJ.)

CELLULAR OPERATORS ASSOCIATION OF INDIA AND OTHERS .. Appellants;

Versus

TELECOM REGULATORY AUTHORITY OF INDIA AND OTHERS .. Respondents.

Civil Appeals No. 5017 of 2016† with No. 5018 of 2016‡, decided on May 11, 2016

A. **Constitution of India — Arts. 19(1)(g) & (6) — Law restricting right under Art. 19(1)(g), held, has to cumulatively satisfy the two distinct tests of: (1) being in the interest of the general public, *and*, (2) being a reasonable restriction — A law which may be for the common good but which does not pass test of being a reasonable restriction, such as the impugned Regulation herein, held, will not be a valid law**

B. **Constitution of India — Arts. 19(1) & 19(2) to (6) — Law restricting any of the rights under Art. 19(1) — Cumulative satisfaction of distinct tests of (1) being a reasonable restriction, *and* (2) to attain the particular interest(s), respectively, mentioned in Arts. 19(2) to (6)**

C. **Constitution of India — Arts. 19(1)(g) & (6) — Reasonableness of restriction — Determination of — Permissible bases for — Other laws and impugned law as single scheme**

— Held, Court in judging reasonableness of a law, will necessarily see, not only the surrounding circumstances but all contemporaneous legislation passed as part of a single scheme — Reasonableness of the restriction and not of the law has to be found out, and if restriction is under one law but countervailing advantages are created by another law passed as part of the same legislative plan, Court should not refuse to take that other law into account — Thus, countervailing advantage to telecom service providers by way of the allowance of 2% average call drops per month, which was granted under the 2009 Quality of Service Regulations, could not have been ignored by impugned Regulation so as to affect their fundamental rights, and having been so ignored, would render the impugned Regulation manifestly arbitrary and unreasonable

D. **Constitution of India — Arts. 13, 14 and 19 — Statute which is otherwise invalid, held, cannot be saved based on assurance that it will be, or that it is, administered in a reasonable manner — Statute Law — Validity of a Statute or Statutory Provision/Judicial review**

† Arising out of SLP (C) No. 6521 of 2016. From the Judgment and Order dated 29-2-2016 of the High Court of Delhi at New Delhi in WP (C) No. 11596 of 2015

‡ Arising out of SLP (C) No. 6522 of 2016

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 2 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

E. **Infrastructure Laws — Telecommunications Laws — Telecom Consumers Protection (Ninth Amendment) Regulations, 2015 — Validity of — Call drop compensation provisions in, held, ultra vires and invalid — Balance between interests of consumers and service providers as mandated by TRAI Act, held, unacceptably violated thereby**

— By the said amendment, every originating service provider who provided cellular mobile telephone services was made liable to credit calling consumer with one rupee for each call drop which took place within its network, up to a maximum of three call drops per day — Held, impugned Regulations not referable to Ss. 11(1)(b)(i) and (v) of TRAI Act inasmuch as it has not been made to ensure compliance with the terms and conditions of the licence nor has it been made to lay down any standard of quality of service that needs compliance, though it cannot be said to be inconsistent with S. 11 — Further, under S. 36 of TRAI Act, not only does TRAI have to make regulations consistent with the Act and the Rules made thereunder, but it also has to carry out the purposes of the Act, as can be discerned from the Preamble to the Act i.e. to protect the interests of service providers as well as consumers of the telecom sector — In the present case, held, in attempting to protect interest of the consumer of the telecom sector at the cost of the interest of a service provider who complies with the leeway of an average of 2% of call drops per month given to it under Regn. 5 of Quality of Service Regulations, 2009 framed under S. 11(1)(b)(v), the balance that was sought to be achieved by TRAI Act for the orderly growth of the telecom sector had been violated — Therefore, impugned Regulations, which did not carry out the purpose of the Act, held, ultra vires the Act — Telecom Regulatory Authority of India Act, 1997 — Ss. 36 and 11(1)(b)(i) & (v) — Telecom Standards of Quality of Service of Basic Telephone Service (Wireline) and Cellular Mobile Telephone Service Regulations, 2009, Regn. 5

F. **Constitution of India — Arts. 14 and 19(1)(g) — Telecom Consumers Protection (Ninth Amendment) Regulations, 2015 — Held, suffer from vice of arbitrariness and imposes an unreasonable restriction on right of telecom service providers to carry on business — Test of "manifest arbitrariness" — Whether impugned law a result of intelligent care and deliberation — Application of — Imposition of mandatory penalty despite fault not (always) being that of person on whom it was imposed — Impermissibility of**

— Held, when viewed from the angle of manifest arbitrariness or reasonable restriction, sounding in Art. 14 and Art. 19(1)(g), respectively, the Regulation must, in order to pass constitutional muster, be as a result of intelligent care and deliberation — In the present case, the Regulation is based on the fact that the service provider is 100% at fault and is made to pay for call drops that may not be attributable to his fault, and consumer receives compensation for a call drop that may be attributable to the fault of the consumer himself, and that makes impugned Regulation one framed without intelligent care and deliberation — Further, in a technical paper issued by TRAI

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 3 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

on 13-11-2015 i.e. a few days after the impugned Regulation, TRAI has itself recognised that 36.9% of call drops take place because of fault at consumer's end — Hence, a mandatory penalty is payable by the service provider for call drops that may take place which are not due to its fault, and may be due to the fault of the recipient of the penalty, which is violative of Arts. 14 and 19(1)(g)

G. **Interpretation of Statutes — Subsidiary Rules — Reading down a statute/provision — When can be done — Held, doctrine of reading down would apply only when general words used in a statute or regulation can be confined in a particular manner so as to save them — It does not permit the addition of something to the provision which does not exist i.e. amounting to court legislating itself**

— Since language of Telecom Consumers Protection (Ninth Amendment) Regulations, 2015 is definite and unambiguous it cannot be saved by reading it down

— TRAI contended that impugned Regulation should be read down so that service providers are made to pay only for faults attributable to them, which would come to a rough figure of 63% of what is charged, for amounts payable to the consumers under the impugned Regulation — Held, language of Regulation is definite and unambiguous — Every service provider has to credit the account of the calling consumer by one rupee for every single call drop which occurs within its network — Further, to read a proviso into Regulation that it will not apply to consumers who are at fault themselves is not to restrict general words to a particular meaning, but to add something to the provision which does not exist i.e. amounting to court legislating itself

H. **Constitution of India — Arts. 19(1)(g) and 14 — Reasonableness/Non-arbitrariness of impugned law — Motive behind enactment of impugned law, and profits made by party affected by the law concerned i.e. in present case cellular operators — If relevant, in determining the validity of Telecom Consumers Protection (Ninth Amendment) Regulations, 2015**

— TRAI contended that the impugned Regulation was framed keeping in mind the small consumer and that huge profits were being made by telecom service providers — Held, motive for the Regulation does not make it immune from Art. 14 and Art. 19(6) — Further, TRAI must ensure that its means are as pure as its ends — Whether service providers make profits or losses cannot be said to be relevant for determining whether impugned Regulation is otherwise arbitrary or unreasonable — Further, it is always open to TRAI, with the vast powers given to it under the TRAI Act, to ensure, in a reasonable and non-arbitrary manner, that service providers provide the necessary funds for infrastructure development and deal with them so as to protect the interest of the consumer

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 4 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

I. **Infrastructure Laws — Telecommunications Laws — Telecom Consumers Protection (Ninth Amendment) Regulations, 2015 — Imposition of penalty under for call drops — Effect of — Unilateral modification of telecom licence/contract between telecom service providers and consumers, dehors the licence terms and dehors statutory provisions, both of which permitting such modification, by licensor/TRAI to prejudice of telecom licensee service providers — Impermissibility of**

— Modification in question not falling under Cl. 5 or 28 of telecom licence nor under S. 11(1)(b)(i), (ii) or (v) of TRAI Act — Yet licence conditions have been amended to service providers' disadvantage by making service provider pay a penalty for call drops despite there being no fault which could be traceable exclusively to the service provider, and despite the service provider maintaining the necessary standard of quality required of it — Namely, adhering to the limit of an average of 2% of call drops per month under Regn. 5 of Quality of Service Regulations, 2009 — Therefore, impugned Regulation deserves to be struck down

— Telecom Regulatory Authority of India Act, 1997 — Ss. 36 and 11(1)(b)(i), (ii) & (v) — Telegraph Act, 1885 — S. 4 — Contract and Specific Relief — Variation, Rectification and Novation of Contract — Modes of novation/variation and when permissible — Expressly/by renegotiation, etc. — Contract Act, 1872, S. 62

J. **Constitution of India — Art. 14 — Subordinate legislation — Challenge to, on ground of arbitrariness — When can be sustained — Held, subordinate legislation must be so arbitrary that it could not be said to be in conformity with primary statute or that it offends Art. 14**

K. **Administrative Law — Subordinate/Delegated Legislation — Judicial Review/Validity of Subordinate/Delegated Legislation — Parameters for, summarised — Constitution of India, Art. 14**

L. **Infrastructure Laws — Telecommunications Laws — Telecom Regulatory Authority of India Act, 1997 — S. 11(4) — "Transparency" to be ensured by TRAI while exercising its powers and functions, including legislative function of enacting subordinate legislation — Definition of "transparency" in S. 13(4) of AERAI Act, 2008, held, provides a good working test therefor — Airports Economic Regulatory Authority of India Act, 2008 — S. 13(4) — Words and Phrases — "Transparency"**

M. **Infrastructure Laws — Telecommunications Laws — Telecom Regulatory Authority of India Act, 1997 — S. 11(4) and S. 36 — Requirement in S. 11(4) that TRAI ensure transparency while exercising its powers and discharging its functions, including legislative function of enacting subordinate legislation — Absence of due consideration and application of mind to issues raised in consultation with the stakeholders — Effect of, on validity of Regulations framed by TRAI**

— TRAI held due consultations with all stakeholders and did allow all stakeholders to make their submissions to TRAI but no discussion or reasoning

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 5 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

dealing with arguments put forward by telecom service providers i.e. that call drops take place for a variety of reasons, some of which were beyond the control of the service provider and were because of the consumer himself, were provided — Held, conclusion that telecom service providers were alone to blame and were consequently deficient in service was not a conclusion which a reasonable person could reasonably arrive at — Telecom Consumers Protection (Ninth Amendment) Regulations, 2015

N. **Administrative Law — Subordinate/Delegated Legislation — Enactment/Framing of Subordinate/Delegated Legislation — Natural justice principles — When applicable**

— Held, natural justice principles are required to be followed in process of enactment/framing of subordinate/delegated legislation only when primary statute so provides and not otherwise — For instance, S. 11(4), TRAI Act expressly so provides, by requiring "transparency" in such process

O. **Administrative Law — Subordinate/Delegated Legislation — Framing/Enactment of Subordinate/Delegated Legislation — Primary statute providing for application of natural justice during process of — Effective consultation — What is**

— Held, the product of consultation must be conscientiously taken into account when the ultimate decision is taken — In present case, while framing Telecom Consumers Protection (Ninth Amendment) Regulations, 2015, though all stakeholders were permitted to make their arguments, but the same were not effectively considered, rendering the process of consultation nugatory

P. **Constitution of India — Arts. 245, 107 and 196 — Primary legislation — Natural justice during process of enactment of — Reiterated, not applicable at all — Words and Phrases — "Consultation" and "effective consultation"**

Q. **Administrative Law — Subordinate/Delegated Legislation — Generally — Enactment/Framing of — Transparency in — Parliament exhorted to frame legislation to ensure**

— By which all subordinate legislation is subject to a transparent process by which due consultations with all stakeholders are held, and rule or regulation-making power is exercised after due consideration of all stakeholders' submissions, together with an explanatory memorandum which broadly takes into account what they have said and the reasons for agreeing or disagreeing with them — Benefits thereof, enumerated — Constitution of India, Art. 14

R. **Infrastructure Laws — Telecommunications Laws — Telecom Regulatory Authority of India Act, 1997 — S. 14(a)(iii) — Compensation to consumer of telecom services for breach of standard of quality required under TRAI Act — Legislatively pre-determined penalty without ascertainment of actual loss suffered and without ascertainment of fault/causation of loss — Validity of**

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 6 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

— Held, when compensation is to be paid to a person who is affected by breach of a standard of quality required under the TRAI Act, such compensation can only be for actual loss suffered, and only as a result of fault of the service provider being established before a quasi-judicial tribunal — Tort Law — Statutory scheme for compensation — Based on fault principle, or, on no-fault/strict liability principle — Requisites for — Electricity Act, 2003 — Ss. 57, 79(1)(f) & 89(1)(f) — Compensation for failure to meet standards of performance by electricity provider — Matters to be established

Allowing the appeals, the Supreme Court

Held :

1. On parameters of judicial review of subordinate legislation

There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognised that a subordinate legislation can be challenged under any of the following grounds:

(*a*) Lack of legislative competence to make the subordinate legislation.

(*b*) Violation of fundamental rights guaranteed under the Constitution of India.

(*c*) Violation of any provision of the Constitution of India.

(*d*) Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.

(*e*) Repugnancy to the laws of the land, that is, any enactment.

(*f*) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules).

In the present case, the appellants have raised pleas under paras (*b*), (*d*) and (*f*). (Para 34)

State of T.N. v. *P. Krishnamurthy*, (2006) 4 SCC 517, *relied on*

2. On impugned Regulation being ultra vires; and unilateral modification of telecom licence/service provider and consumer contract conditions

It will be seen that though the regulation-making power under the TRAI Act is wide and pervasive, and is not trammelled by the provisions of Sections 11, 12(4) and 13, it is a power that is non-delegable and, therefore, legislative in nature. The exercise of this power is hedged in with the condition that it must be exercised consistently with the Act and the Rules thereunder in order to carry out the purposes of the Act. Since the regulation-making power has first to be consistent with the Act, it is necessary that it not be inconsistent with Section 11 of the Act, and in particular Section 11(1)(*b*) thereof. This is for the reason that the functions of the Authority are laid down by this section, and that the impugned Regulation itself refers to Sections 11(1)(*b*)(*i*) and (*v*) as the source of power under which the impugned Regulation has been framed. (Paras 36 and 37)

BSNL v. *Telecom Regulatory Authority of India*, (2014) 3 SCC 222, *followed*

Two very important clauses of the telecom licence granted to each telecom service provider refer to (*i*) the power to modify the licence conditions which

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 7 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

is contained in Clause 5, and (*ii*) the ensuring by the licensee that the quality of service shall be as prescribed by the licensor or TRAI by Clause 28 thereof. Under Clause 5, the licensor reserves the right to modify the terms and conditions of the licence if in the opinion of the licensor it is necessary or expedient so to do in public interest or in the interest of security of the State or for the proper conduct of telegraphs. It may be stated that no modification of the licence has in fact been attempted or has taken place in the facts of the present case. Therefore, Clause 5 need not detain us further. Moreover, Section 11(1)(*b*)(*ii*) expressly states that the terms and conditions of interconnectivity between the service providers may be fixed notwithstanding anything contained in the terms and conditions of the licence granted before the commencement of the TRAI (Amendment) Act, 2000. (Paras 38 and 74)

Under Clause 28 it is a condition that the licensee shall ensure the quality of service as prescribed by the licensor or TRAI, and shall adhere to such standards as are provided. Under Clause 28.2 the licensee has to keep a record of the number of faults and rectification reports in respect of its service, which will be produced before the licensor/TRAI as and when desired. This being the case, it is clear that the impugned Regulation cannot be said to fall under Section 11(1)(*b*)(*i*) at all inasmuch as it does not seek to enforce any term or condition of the licence between the service provider and the consumer. Coming to Section 11(1)(*b*)(*v*), the impugned Regulation would again have no reference to the said paragraph, inasmuch as it does not lay down any standard of quality of service to be provided by the service provider. In order that sub-clause (*v*) be attracted, not only do standards of quality of service to be provided by the service providers have to be laid down, but standards have to be adhered to by the service providers so as to protect the interests of the consumers. (Para 40)

Once a licence is issued under the proviso to sub-section (1) of Section 4 of the Telegraph Act, the licence becomes a contract between the licensor and the licensee. It is clear that the licence conditions, which are a contract between the service providers and consumers, have been amended to the service providers' disadvantage by making the service provider pay a penalty for call drops despite there being no fault which can be traceable exclusively to the service provider, and despite the service provider maintaining the necessary standard of quality required of it — namely, adhering to the limit of an average of 2% of call drops per month. Clause 28 of the telecom licence requires the licensee to ensure that the quality of service standards, as prescribed by TRAI, are adhered to, and that the impugned Regulation does not lay down quality of service standards. This being so, it is clear that the laying down of a penalty dehors Clause 28, which also requires establishing of fault of the service provider when it does not conform to a quality of service standard laid down by TRAI, would amount to interference with the licence conditions of the service providers without authority of law. On this ground also, therefore, the impugned Regulation deserves to be struck down. (Paras 78 and 79)

Union of India v. *Assn. of Unified Telecom Service Providers of India*, (2011) 10 SCC 543, *relied on*

State of Punjab v. *Devans Modern Breweries Ltd.*, (2004) 11 SCC 26; *Har Shankar* v. *Excise and Taxation Commr.*, (1975) 1 SCC 737; *Panna Lal* v. *State of Rajasthan*, (1975) 2 SCC 633, *cited*

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 8 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

The impugned Regulation is not referable to Sections 11(1)(*b*)(*i*) and (*v*) of the TRAI Act inasmuch as it has not been made to ensure compliance with the terms and conditions of the licence nor has it been made to lay down any standard of quality of service that needs compliance. This being the case, the impugned Regulation is dehors Section 11. The power under Section 36 is not trammelled by Section 11. This being so, the impugned Regulation cannot be said to be inconsistent with Section 11 of the Act. However, what has also to be seen is whether the said Regulation carries out the purpose of the TRAI Act which, under the amended Preamble to the Act, is to protect the interests of service providers as well as consumers of the telecom sector so as to promote and ensure orderly growth of the telecom sector. Under Section 36, not only does TRAI have to make regulations consistent with the Act and the Rules made thereunder, but it also has to carry out the purposes of the Act, as can be discerned from the Preamble to the Act. If, far from carrying out the purposes of the Act, a regulation is made contrary to such purposes, such regulation cannot be said to be consistent with the Act, for it must be consistent with both the letter of the Act and the purposes for which the Act has been enacted. In attempting to protect the interest of the consumer of the telecom sector at the cost of the interest of a service provider who complies with the leeway of an average of 2% of call drops per month given to it by the Quality of Service Regulations, framed under Section 11(1)(*b*)(*v*), the balance that is sought to be achieved by the Act for the orderly growth of the telecom sector has been violated. Therefore, the impugned Regulation does not carry out the purpose of the Act and must be held to be ultra vires the Act on this score. (Para 41)

3. On violation of fundamental rights

One of the tests for challenging the constitutionality of subordinate legislation is that subordinate legislation should not be manifestly arbitrary. Also, it is settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. In India, arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. But subordinate legislation must be so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution. (Paras 42 to 44)

Indian Express Newspapers (Bombay) (P) Ltd. v. *Union of India*, (1985) 1 SCC 641 : 1985 SCC (Tax) 121; *Khoday Distilleries Ltd.* v. *State of Karnataka*, (1996) 10 SCC 304; *Sharma Transport* v. *State of A.P.*, (2002) 2 SCC 188, *relied on*

It is not the object of the authority making the law impairing the right of a citizen, nor the form of action taken that determines the protection he can claim: it is the effect of the law and of the action upon the right which attracts the jurisdiction of the Court to grant relief. If this be the true view in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the legislature nor by the form of the action, but by its direct operation upon the individual's rights. (Para 45)

Rustom Cavasjee Cooper (Banks Nationalisation) v. *Union of India*, (1970) 1 SCC 248, *relied on*

Under Article 19(6) of the Constitution, the State has to conform to two separate and independent tests if it is to pass constitutional muster — the restriction on the petitioner's fundamental right must first be a reasonable restriction, and secondly, it should also be in the interest of the general public. The phrase

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 9 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

"reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(*g*) and the social control permitted by Article 19(6), it must be held to be wanting in that quality. (Para 46)

Chintamanrao v. *State of M.P.*, 1950 SCR 759 : AIR 1951 SC 118, *relied on*

The original Constitution, while enumerating various rights under Article 19(1), when it referred to the right of freedom of speech in Article 19(1)(*a*), laid down in Article 19(2) that any law abridging the right to freedom of speech could only pass constitutional muster if it related to any of the subjects laid down in clause (2). What was conspicuous by its absence was the phrase "reasonable restriction", which was only brought in by the first amendment to the Constitution. Similarly, the first amendment to the Constitution also amended Article 19(6) to provide for a State monopoly, which would not have to be tested on the ground of reasonable restrictions. Therefore, the first amendment to the Constitution of India has made it clear that reasonable restrictions, added in Article 19(2) and subtracted from Article 19(6) (insofar as State monopolies are concerned), point to the fact that this test is a test separate and distinct from the test of the law being in the interest of the general public. It is necessary to stress upon this distinction because TRAI's argument focused primarily on the impugned Regulation being in the public interest i.e. TRAI, as an active trustee, has framed this Regulation for the common good. While accepting that TRAI may have done so, yet it is important to note that, apart from the common good in the form of consumer interest, the Regulation must also pass a separate and independent test of not being manifestly arbitrary or unreasonable. (Paras 47 and 48)

When viewed from the angle of manifest arbitrariness or reasonable restriction, sounding in Articles 14 and 19(1)(*g*), respectively, the Regulation must, in order to pass constitutional muster, be as a result of intelligent care and deliberation, that is, the choice of a course which reason dictates. Any arbitrary invasion of a fundamental right cannot be said to contain this quality. A proper balance between the freedoms guaranteed and the control permitted under Article 19(6) must be struck in all cases before the impugned law can be said to be a reasonable restriction in the public interest. (Para 48)

Delhi Science Forum v. *Union of India*, (1996) 2 SCC 405, *referred to*

Even if the demarcation of the cause of call drops is accepted to be what TRAI says it is, the impugned Regulation must be held to be manifestly arbitrary and an unreasonable restriction on the appellants' fundamental rights to carry on business. According to TRAI, the cause for call drops is twofold — one owing to the fault of the consumer, and the other owing to the fault of the service provider. And, for this dichotomy, it has referred to the technical paper dated 13-11-2015, which shows that an average of 36.9% can be call drops owing to the fault of the consumer. If this is so, the impugned Regulation's very basis is destroyed: the Regulation is based on the fact that the telecom service provider is 100% at fault. This becomes clear from a reading of the text of the said Regulations together with the Explanatory Memorandum set out hereinabove. This being the case, it is clear that the service provider is made to pay for call drops that may not be attributable to his fault,

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 10 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

and the consumer receives compensation for a call drop that may be attributable to the fault of the consumer himself, and that makes the impugned Regulation a regulation framed without intelligent care and deliberation. (Para 49)

But it was said that the aforesaid Regulation should be read down to mean that it would apply only when the fault is that of the service provider. However, such a course is not open, for it is well settled that the doctrine of reading down would apply only when general words used in a statute or regulation can be confined in a particular manner. (Para 50)

Hindu Women's Rights to Property Act, 1937, In re, 1941 SCC OnLine FC 3 : AIR 1941 FC 72, *relied on*

Owners of SS Kalibia v. *Wilson*, (1910) 11 CLR 689 (Aust); *Vacuum Oil Co. Pty. Ltd.* v. *Queensland*, (1934) 51 CLR 677 (Aust); *R.* v. *Commonwealth Court of Conciliation and Arbitration, ex p Whybrow & Co.*, (1910) 11 CLR 1 (Aust); *British Imperial Oil Co. Ltd.* v. *Federal Commr. of Taxation*, (1925) 35 CLR 422 (Aust), *cited*

The language of the Regulation is definite and unambiguous — every service provider has to credit the account of the calling consumer by one rupee for every single call drop which occurs within its network. The Explanatory Memorandum to the aforesaid Regulation further makes it clear, in Para 19 thereof, that the Authority has come to the conclusion that call drops are instances of deficiency in service delivery on the part of the service provider. It is thus unambiguously clear that the impugned Regulation is based on the fact that the service provider is alone at fault and must pay for that fault. In these circumstances, to read a proviso into the Regulation that it will not apply to consumers who are at fault themselves is not to restrict general words to a particular meaning, but to add something to the provision which does not exist, which would be nothing short of the court itself legislating. (Para 52)

DTC v. *Mazdoor Congress*, 1991 Supp (1) SCC 600 : 1991 SCC (L&S) 1213, *followed*

The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. The converse must also follow that a statute which is otherwise invalid as being unreasonable cannot be saved by its being administered in a reasonable manner. This proposition of the law applies on all fours to the facts of the present case, and is a complete answer to the TRAI's contention that the impugned Regulation would be administered so that the service provider would be liable under it only when it is at fault for call drops. (Paras 54 and 55)

Collector of Customs v. *Nathella Sampathu Chetty*, (1962) 3 SCR 786 : AIR 1962 SC 316 : (1962) 1 Cri LJ 364, *followed*

The orderly growth of the telecom sector cannot be ensured or promoted by a manifestly arbitrary or unreasonable regulation which makes a service provider pay a penalty without it being necessarily at fault. (Para 55)

The motive of the impugned Regulation may well be that it was framed keeping in mind the small consumer, that is, a person who has a pre-paid SIM card with an average balance of Rs 10 at a time, and that the Regulation goes a long way to compensate such person. However, that does not make it immune from Article 14 and the twin tests of Article 19(6). (Para 56)

It was then contended that huge profits were made by the service providers, and that the amount they would have to pay would not even be a flea bite compared to the profits they make, viewed in the background that they are not pouring in enough funds for infrastructure development. First and foremost, whether the service providers make profits or losses cannot be said to be relevant for determining whether the impugned Regulation is otherwise arbitrary or unreasonable. Secondly,

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 11 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

it is always open to the Authority, with the vast powers given to it under the TRAI Act, to ensure, in a reasonable and non-arbitrary manner, that service providers provide the necessary funds for infrastructure development and deal with them so as to protect the interest of the consumer. (Para 57)

In the present case, if the appellants had not gone to court when they did, the Regulation would have affected their fundamental rights on and from 1-1-2016. Further, they would have been denied interim and/or other relief on the ground that they have not moved the Court without undue delay. Also, to say that the impugned Regulation is only an experimental measure that would last in its present form for six months is again wholly incorrect. The impugned Regulation begins to tick on and from 1-1-2016, in which case three rupees per day, for call drops made not exclusively owing to the fault of the service provider, would have to be paid. Further, it is only the Explanatory Memorandum which says that the Authority may review the aforesaid Regulation after working of the said Regulation after six months, and that too only if found to be necessary. Obviously, this would not mean that the aforesaid Regulation would necessarily be reviewed at all, even after six months. (Para 59)

Prag Ice & Oil Mills v. *Union of India*, (1978) 3 SCC 459, *distinguished*

Premier Automobiles Ltd. v. *Union of India*, (1972) 4 SCC (N) 1 : AIR 1972 SC 1690; *Permian Basin Area Rate Cases, In re*, 1968 SCC OnLine US SC 87 : 20 L Ed 2d 312 : 390 US 747 (1968), *cited*

The Court in judging the reasonableness of a law, will necessarily see, not only the surrounding circumstances but all contemporaneous legislation passed as part of a single scheme. The reasonableness of the restriction and not of the law has to be found out, and if restriction is under one law but countervailing advantages are created by another law passed as part of the same legislative plan, the Court should not refuse to take that other law into account. Hence, the Quality of Service Regulations, 2009 and the impugned Consumer Regulations must be read together as part of a single scheme in order to test the reasonableness thereof. The countervailing advantage to service providers by way of the allowance of 2% average call drops per month, which has been granted under the 2009 Quality of Service Regulations, could not have been ignored by the impugned Regulation so as to affect the fundamental rights of the appellants, and having been so ignored, would render the impugned Regulation manifestly arbitrary and unreasonable. (Paras 61, 62 and 97)

Lord Krishna Sugar Mills Ltd. v. *Union of India*, (1960) 1 SCR 39 : AIR 1959 SC 1124, *relied on*

A mandatory penalty is payable by the service provider for call drops that may take place which are not due to its fault, and may be due to the fault of the recipient of the penalty, which is violative of Articles 14 and 19(1)(*g*). (Paras 63 to 65)

Shree Bhagwati Steel Rolling Mills v. *CCE*, (2016) 3 SCC 643, *relied on*

The very notion that only notional compensation is awarded, is also entirely without basis. A consumer may well suffer a call drop after 3 or 4 seconds in a voice call. Whereas the consumer is charged only 4 or 5 paise for such dropped call, the service provider has to pay a sum of rupee one to the said consumer. This cannot be called notional at all. It is also not clear as to why the Authority decided to limit compensation to three call drops per day or how it arrived at the figure of Re 1 to compensate inconvenience caused to the consumer. It is equally unclear as to why the calling party alone is provided compensation because,

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 12 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

according to the Explanatory Memorandum, inconvenience is suffered due to the interruption of a call, and such inconvenience is suffered both by the calling party and the person who receives the call. The receiving party can legitimately claim that his inconvenience when a call drops, is as great as that of the calling party. And the receiving party may need to make the second call, in which case he receives nothing, and the calling party receives Re 1 for the additional expense made by the receiving party. All this betrays a complete lack of intelligent care and deliberation in framing such a regulation by TRAI, rendering the impugned Regulation manifestly arbitrary and unreasonable. (Para 66)

DSC-Viacon Ventures (P) Ltd. v. *Lal Manohar Pandey*, (2015) 15 SCC 509, *distinguished*

The technical paper issued by TRAI on 13-11-2015 i.e. a few days after the impugned Regulation, itself recognises that 36.9% of call drops take place because of the fault at the consumer's end. Instead of having a relook at the problem in the light of the said technical paper, TRAI has gone ahead with the impugned Regulation, which states that the said Regulation has been brought into force because of deficiency of service by service providers leading to call drops. This itself shows the manifest arbitrariness on the part of TRAI, which has not bothered to have a relook into the said problem. (Para 69)

When compensation is to be paid to a person who is affected by a breach of a standard of quality required under the TRAI Act, such compensation can only be for actual loss suffered, and only as a result of fault of the service provider being established before a quasi-judicial tribunal. This may be notwithstanding the fact that the service provider otherwise meets the average of 2% call drops per month allowed to him by the 2009 Quality of Service Regulations. This is for the reason that once fault and actual loss suffered are established before a quasi-judicial tribunal, it would not be open to plead, on the facts of an individual case, that an overall standard of performance has been met. For this reason also, a legislatively pre-determined penalty, without fault or loss being established by evidence before a quasi-judicial authority, and where the cause of a call drop may be because of the consumer himself, renders the impugned Regulation manifestly arbitrary and unreasonable. (Paras 71 to 73)

The impugned Regulation completely avoids the adjudicatory process, and legislatively lays down a penal consequence to a service provider for a call drop taking place without the consumer being able to prove that he is not himself responsible for such call drop and without proof of any actual monetary loss. Whereas individual consumers, either before the Consumer Forum, or in a dispute as a group with service providers before TRAI, would fail in an action to recover compensation for call drops, yet a statutory penalty is laid down, applicable legislatively, and without any adjudication. This again makes the impugned Regulation manifestly arbitrary and unreasonable. (Para 70)

[**Ed.**: The arbitrariness of the pre-determined legislative penalty in the present case may be contrasted with the manner of imposition of no-fault or strict liability in Sections 140/163-A/163-B of the Motor Vehicles Act, 1988. Under the said provisions of the Motor Vehicles Act, 1988, all the ingredients for a reasonable scheme for grant of compensation laid down herein are present, except for the claimant having to prove fault: (*i*) there has to be an adjudication by a quasi-judicial tribunal; (*ii*) actual loss has to be established (though not the quantum of loss as the legislature has specified lump sum/structured compensation that may be paid); and (*iii*) causation of loss by the defendant has to be established.]

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 13 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Hence, for all these reasons the impugned Regulation is manifestly arbitrary and therefore violative of Article 14, and is an unreasonable restriction on the right of the appellants' fundamental right under Article 19(1)(*g*) to carry on business, and is therefore struck down as such. (Para 69)

4. On Transparency

Section 11(4) of the TRAI Act requires that TRAI shall ensure transparency while exercising its powers and discharging its functions. "Transparency" has not been defined anywhere in the TRAI Act. However, in the Airports Economic Regulatory Authority of India Act, 2008, in S. 13(4) "transparency" is defined to mean inter alia:

> (*a*) by holding due consultations with all stakeholders with the airport; (*b*) by allowing all stakeholders to make their submissions to the authority; and (*c*) by making all decisions of the authority fully documented and explained.

This definition of "transparency" provides a good working test of "transparency" referred to in Section 11(4) of the TRAI Act. (Paras 80 and 81)

No doubt in the facts of the present case, TRAI did hold due consultations with all stakeholders and did allow all stakeholders to make their submissions to TRAI. However, there is no discussion or reasoning dealing with the arguments put forward by the service providers, that call drops take place for a variety of reasons, some of which are beyond the control of the service provider and are because of the consumer himself. The product of consultation must be conscientiously taken into account when the ultimate decision is taken. Consequently, the conclusion that service providers are alone to blame and are consequently deficient in service when it comes to call drops is not a conclusion which a reasonable person can reasonably arrive at. (Paras 83 and 94)

Ordinarily, legislative functions do not require that natural justice be followed. However, it has been recognised in some of the judgments dealing with this aspect that natural justice need not be followed except where the statute so provides. Legislative action, plenary or subordinate, is not subject to rules of natural justice. In the case of parliamentary legislation, the proposition is self-evident. In the case of subordinate legislation, it may happen that Parliament may itself provide for a notice and for a hearing—there are several instances of the legislature requiring the subordinate legislating authority to give public notice and a public hearing before say, for example, levying a municipal rate—in which case the substantial non-observance of the statutorily prescribed mode of observing natural justice may have the effect of invalidating the subordinate legislation. But, where the legislature has not chosen to provide for any notice or hearing, no one can insist upon it and it will not be permissible to read natural justice into such legislative activity. (Paras 83 and 84)

Union of India v. *Cynamide India Ltd.*, (1987) 2 SCC 720; *M.R.F. Ltd.* v. *State of Kerala*, (1998) 8 SCC 227 : 1999 SCC (L&S) 1, *relied on*

R. v. *North and East Devon Health Authority, ex p Coughlan*, 2001 QB 213 : (2000) 2 WLR 622 (CA), *approved*

The question of transparency raises a more fundamental question, namely, that of openness in governance. The Right to Information Act, 2005 has gone a long

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 14 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

way to strengthen democracy by requiring that the Government be transparent in its actions, so that an informed citizenry is able then to contain corruption, and hold the Governments and their instrumentalities accountable to the people of India. (Para 86)

Chief Information Commr. v. *State of Manipur*, (2011) 15 SCC 1; *Global Energy Ltd.* v. *Central Electricity Regulatory Commission*, (2009) 15 SCC 570, *relied on*

State of U.P. v. *Raj Narain*, (1975) 4 SCC 428; *New York Times Co.* v. *United States*, 1971 SCC OnLine US SC 147 : 29 L Ed 2d 822 : 403 US 713 (1971); *S.P. Gupta* v. *Union of India*, 1981 Supp SCC 87; *Ministry of Information & Broadcasting, Govt. of India* v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161; *Reliance Petrochemicals Ltd.* v. *Indian Express Newspapers Bombay (P) Ltd.*, (1988) 4 SCC 592; *People's Union for Civil Liberties* v. *Union of India*, (2004) 2 SCC 476, *cited*

Subject to certain well-defined exceptions, it would be a healthy functioning of our democracy if all subordinate legislation were to be "transparent" in the manner pointed out above. Since it is beyond the scope of this judgment to deal with subordinate legislation generally, and in particular with statutes which provide for rule making and regulation making without any added requirement of transparency, we would exhort Parliament to take up this issue and frame a legislation along the lines of the US Administrative Procedure Act (with certain well-defined exceptions) by which all subordinate legislation is subject to a transparent process by which due consultations with all stakeholders are held, and the rule or regulation-making power is exercised after due consideration of all stakeholders' submissions, together with an explanatory memorandum which broadly takes into account what they have said and the reasons for agreeing or disagreeing with them. Not only would such legislation reduce arbitrariness in subordinate legislation-making, but it would also conduce to openness in governance. It would also ensure the redressal, partial or otherwise, of grievances of the stakeholders concerned *prior* to the making of subordinate legislation. This would obviate, in many cases, the need for persons to approach courts to strike down subordinate legislation on the ground of such legislation being manifestly arbitrary or unreasonable. (Para 92)

Cellular Operators Assn. of India v. *Telecom Regulatory Authority of India*, 2016 SCC OnLine Del 1388 : (2016) 228 DLT 491, *reversed*

Corpus Juris Secundum (March 2016 Update), *relied on*

VN-D/57030/C

Advocates who appeared in this case :

Kapil Sibal, Dr A.M. Singhvi and Gopal Jain, Senior Advocates (Manjul Bajpai, Mahesh Agarwal, Rishi Agarwal, Ms Shelly Bhasin, Lakshmeesh Kamath, Paras Anand, Shashawat Bajwai, Ms Vasudha Gupta, Ms Stephanie Sonwane, Avishkar Singhvi, Anusha, Nidhiram Sharma and E.C. Agrawala, Advocates) for the Appellants;

P.S. Narasimha, Additional Solicitor General, Pinaki Mishra, Senior Advocate (Sanjay Kapur, Amol Chandan, Ms Priyanka Das, Prabhash Kumar, Ajay Sharma, R.S. Nagar, Vibhu Shankar Mishra, Shadman Ali, K. Permeshwar, R.K. Rathod, Rajesh Mishra, Rishabh Jain, Ms Kaanan Gupta, Akash Jindal, S.S. Rawat, Ms Sudha Mehra, Ushab Jain, D.S. Mahra, A. Deb Kumar, Surya Narayana Patro, Vakul Sharma, Vikas Kumar, Manish Paliwal, Ms Seema Sharma, Vivek Chib, Asif Ahmed, Ms Ruchira Goel, Rishab Kapoor, Vimal Kirti Singh, Siddharth, Ms Pooja Dhar, Ms Saumya Sharma, K. Vaghen, Surya Prakash and V. Shyamohan, Advocates) for the Respondents.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 15 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

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

1. (2016) 3 SCC 643, *Shree Bhagwati Steel Rolling Mills* v. *CCE* 745*g-h*
2. 2016 SCC OnLine Del 1388 : (2016) 228 DLT 491, *Cellular Operators Assn. of India* v. *Telecom Regulatory Authority of India* **(reversed)** 723*c*, 759*f*
3. (2015) 15 SCC 509, *DSC-Viacon Ventures (P) Ltd.* v. *Lal Manohar Pandey* 747*a*, 747*a-b*
4. (2014) 3 SCC 222, *BSNL* v. *Telecom Regulatory Authority of India* 723*d-e*, 726*e*, 733*e*, 736*c*
5. (2011) 15 SCC 1, *Chief Information Commr.* v. *State of Manipur* 754*a-b*
6. (2011) 10 SCC 543, *Union of India* v. *Assn. of Unified Telecom Service Providers of India* 750*e*
7. (2009) 15 SCC 570, *Global Energy Ltd.* v. *Central Electricity Regulatory Commission* 756*g-h*
8. (2006) 4 SCC 517, *State of T.N.* v. *P. Krishnamurthy* 732*f-g*, 733*d*
9. (2004) 11 SCC 26, *State of Punjab* v. *Devans Modern Breweries Ltd.* 750*e*
10. (2004) 2 SCC 476, *People's Union for Civil Liberties* v. *Union of India* 755*g*
11. (2002) 2 SCC 188, *Sharma Transport* v. *State of A.P.* 737*e-f*
12. 2001 QB 213 : (2000) 2 WLR 622 (CA), *R.* v. *North and East Devon Health Authority, ex p Coughlan* 751*f*
13. (1998) 8 SCC 227 : 1999 SCC (L&S) 1, *M.R.F. Ltd.* v. *State of Kerala* 752*e-f*
14. (1996) 10 SCC 304, *Khoday Distilleries Ltd.* v. *State of Karnataka* 737*a*
15. (1996) 2 SCC 405, *Delhi Science Forum* v. *Union of India* 739*b-c*
16. (1995) 2 SCC 161, *Ministry of Information & Broadcasting, Govt. of India* v. *Cricket Assn. of Bengal* 755*d*
17. 1991 Supp (1) SCC 600 : 1991 SCC (L&S) 1213, *DTC* v. *Mazdoor Congress* 740*e*
18. (1988) 4 SCC 592, *Reliance Petrochemicals Ltd.* v. *Indian Express Newspapers Bombay (P) Ltd.* 755*d-e*
19. (1987) 2 SCC 720, *Union of India* v. *Cynamide India Ltd.* 752*c*
20. (1985) 1 SCC 641 : 1985 SCC (Tax) 121, *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India* 736*g-h*, 737*c-d*
21. 1981 Supp SCC 87, *S.P. Gupta* v. *Union of India* 755*a*
22. (1978) 3 SCC 459, *Prag Ice & Oil Mills* v. *Union of India* 743*c*
23. (1975) 4 SCC 428, *State of U.P.* v. *Raj Narain* 754*e*, 755*a*
24. (1975) 2 SCC 633, *Panna Lal* v. *State of Rajasthan* 750*e-f*
25. (1975) 1 SCC 737, *Har Shankar* v. *Excise and Taxation Commr.* 750*e*
26. (1972) 4 SCC (N) 1 : AIR 1972 SC 1690, *Premier Automobiles Ltd.* v. *Union of India* 743*c-d*
27. 1971 SCC OnLine US SC 147 : 29 L Ed 2d 822 : 403 US 713 (1971), *New York Times Co.* v. *United States* 754*f-g*
28. (1970) 1 SCC 248, *Rustom Cavasjee Cooper (Banks Nationalisation)* v. *Union of India* 738*a*
29. 1968 SCC OnLine US SC 87 : 20 L Ed 2d 312 : 390 US 747 (1968), *Permian Basin Area Rate Cases, In re* 743*d-e*
30. (1962) 3 SCR 786 : AIR 1962 SC 316 : (1962) 1 Cri LJ 364, *Collector of Customs* v. *Nathella Sampathu Chetty* 741*g-h*
31. (1960) 1 SCR 39 : AIR 1959 SC 1124, *Lord Krishna Sugar Mills Ltd.* v. *Union of India* 745*a*
32. 1950 SCR 759 : AIR 1951 SC 118, *Chintamanrao* v. *State of M.P.* 738*d-e*
33. 1941 SCC OnLine FC 3 : AIR 1941 FC 72, *Hindu Women's Rights to Property Act, 1937, In re* 740*b*
34. (1934) 51 CLR 677 (Aust), *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* 740*d-e*
35. (1925) 35 CLR 422 (Aust), *British Imperial Oil Co. Ltd.* v. *Federal Commr. of Taxation* 740*d-e*

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 16 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

36. (1910) 11 CLR 689 (Aust), *Owners of SS Kalibia* v. *Wilson* 740*d*
37. (1910) 11 CLR 1 (Aust), *R.* v. *Commonwealth Court of Conciliation and Arbitration, ex p Whybrow & Co.* 740*d-e*

The Judgment of the Court was delivered by

ROHINTON FALI NARIMAN, J.— Leave granted. This group of appeals before us is by various telecom operators who offer telecommunication services to the public generally. Various writ petitions were filed in the Delhi High Court challenging the validity of the Telecom Consumers Protection (Ninth Amendment) Regulations, 2015 (hereinafter referred to as "the impugned Regulation"), notified on 16-10-2015 (to take effect from 1-1-2016), by the Telecom Regulatory Authority of India. The aforesaid amendment was made purportedly in the exercise of powers conferred by Section 36 read with Section 11 of the Telecom Regulatory Authority of India Act, 1997. By the aforesaid amendment, every originating service provider who provides cellular mobile telephone services, is made liable to credit only the calling consumer (and not the receiving consumer) with one rupee for each call drop (as defined), which takes place within its network, up to a maximum of three call drops per day. Further, the service provider is also to provide details of the amount credited to the calling consumer within four hours of the occurrence of a call drop either through SMS/USSD message. In the case of a post-paid consumer, such details of amount credited in the account of the calling consumer were to be provided in the next bill.

2. A brief background is necessary in order to appreciate the controversy at hand. Under an Act of ancient vintage, namely, the Telegraph Act, 1885, the Central Government or the Telegraph Authority is the licensing authority by which persons are licensed under Section 4(1) of the said Act for providing specified public telecommunication services. Given the fact that it is the Central Government or the Telegraph Authority who is the licensor in all these cases, the said licensor enters into what are described as licence agreements for the provision of Unified Access Services in the specified service areas. Various standard terms and conditions are laid down in these licences, some of which are described hereinbelow:

2.1. Vide Clause 2.1, such licences are granted to provide telecommunication services, as defined, on a non-exclusive basis in designated service areas. It is mandatory that the licensee provides such services of a good standard, by establishing a state of the art digital network. Licences are usually given for a period of 20 years at a time with a 10 year extension if the licensor so deems expedient.

2.2. Under Clause 5 of the aforesaid licence agreement, the licensor reserves the right to modify, at any time, the terms and conditions of the licence, if in its opinion it is necessary or expedient so to do in public interest, in the interest of security of the State, or for the proper conduct of telegraphs.

2.3. Under Clause 28, which is of some relevance to determine the question involved in these appeals, the licensee shall ensure that the quality of service

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 17 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

standards as prescribed either by the licensor or the Telecom Regulatory Authority of India shall be adhered to. The licensee is made responsible for maintaining performance and quality of service standards and is to keep a record of the number of faults and rectification reports in respect of a particular service which is to be produced before the licensor/TRAI as and when desired. It is also important that the licensee be responsive to complaints lodged by its subscribers and rectify the same.

2.4. Under Clause 34, which deals with roll-out obligations, the licensee is to ensure that coverage of district headquarters/town would mean that at least 90% of the area bounded by municipal limits should get the required street and in-building coverage.

2.5. Interestingly, under Clause 35, liquidated damages are also provided for, in case the licensee does not commission the service within 15 days of the expiry of the commissioning date and for certain other delays relatable to commissioning of service.

3. It may also be noted that right from September 2005, TRAI has been lamenting the shortage and consequent distance of mobile towers from each other and both the Government as well as TRAI have been writing to the Chief Secretaries of various State Governments to grant timely permissions for establishing telecom towers. In this behalf, we have been shown guidelines issued by DoT to the Chief Secretaries dated 1-8-2013. We have also been shown an amendment to the Quality of Service Regulations dated 21-8-2014 by which TRAI has noticed practical difficulties that are faced due to various reasons by which cable breakdowns and indoor faults take place, with the Authority requiring the striking of a balance between the problems faced by the licensees and the need to ensure quality of service to customers. We were also shown a letter from the Ministry of Communications written to Chief Ministers of all the States to permit installation of towers on government buildings. This Letter is dated 3-8-2015. Further, there is a constant tussle between cellphone operators and municipal authorities, landing cellphone operators in court against municipal authorities, who seek to restrict the setting up of cellphone towers, given the apprehension that radiation from these towers has a direct causal link with cancer in human beings.

4. It is also important to note that by the Quality of Service Regulations dated 20-3-2009*, issued under Section 11 read with Section 36 of the TRAI Act, TRAI has provided, insofar as cellular mobile phone services are concerned, for a call drop rate of 2% averaged over a period of one month. It has also provided for financial disincentives in case there is a failure to meet this parameter by enacting a second amendment to the Quality of Service Regulations dated 8-11-2012 by which a service provider is liable to pay, by way of financial disincentive, an amount not exceeding Rs 50,000 per parameter that is contravened as the Authority may by order direct, and in the case of second or subsequent contravention, to pay an amount not exceeding Rs 1,00,000 per parameter for each such contravention as the Authority may

* **Ed.**: The Standards of Quality of Service of Basic Telephone Service (Wireline) and Cellular Mobile Telephone Service Regulations, 2009

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 18 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

by order direct. One day before the impugned Regulation i.e. on 15-10-2015, this financial disincentive was raised from Rs 50,000 to Rs 1,00,000, and Rs 1,00,000 to Rs 1,50,000 for the second consecutive contravention, and Rs 2,00,000 for each subsequent consecutive contravention.

5. It is in this background that the impugned Ninth Amendment to the Telecom Consumers Protection Regulations, 2012 was made, on 16-10-2015. The impugned Regulations read as under:

TELECOM CONSUMERS PROTECTION (NINTH AMENDMENT) REGULATIONS, 2015

(9 OF 2015)

No. 301/2015-F&EA.—In exercise of the powers conferred by Section 36, read with sub-clauses (*i*) and (*v*) of clause (*b*) of sub-section (1) of Section 11, of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997), the Telecom Regulatory Authority of India hereby makes the following regulations further to amend the Telecom Consumers Protection Regulations, 2012 (2 of 2012), namely—

1. (1) These Regulations may be called the Telecom Consumers Protection (Ninth Amendment) Regulations, 2015.

(2) They shall come into force from 1-1-2016.

2. In Regulation 2 of the Telecom Consumers Protection Regulations, 2012 (hereinafter referred to as the Principal Regulations), after clause (*ba*), the following clauses shall be inserted, namely—

"(*bb*) "**call drop**" means a voice call which, after being successfully established, is interrupted prior to its normal completion; the cause of early termination is within the network of the service provider;

(*bc*) "**calling consumer**" means a consumer who initiates a voice call;"

3. After Chapter IV of the Principal Regulations, the following Chapter shall be inserted, namely—

"CHAPTER V

RELIEF TO CONSUMERS FOR CALL DROPS

16. ***Measures to provide relief to consumers***.—Every originating service provider providing Cellular Mobile Telephone Service shall, for each call drop within its network,

(*a*) credit the account of the calling consumer by one rupee:

Provided that such credit in the account of the calling consumer shall be limited to three dropped calls in a day (00:00:00 hours to 23:59:59 hours);

(*b*) provide the calling consumer, through SMS/USSD message, within four hours of the occurrence of call drop, the details of amount credited in his account; and

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 19 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

(*c*) in case of post-paid consumers, provide the details of the credit in the next bill."

6. The Explanatory Memorandum to the aforesaid amendment makes interesting reading. In the first paragraph of the said memorandum, the Quality of Service Regulations, 2009 referred to hereinabove, granting an allowance of an average of 2% call drops per month, is specifically referred to. Also, interestingly enough, the service providers have stated that they are meeting this benchmark completely with one or two minor exceptions. Despite this, the Authority has embarked on the impugned Regulation, stating that consumers, at various fora, have raised the issue of call drops, complaining that in their experience, the quality of making voice calls has deteriorated.

7. The Authority responded by issuing a consultation paper marked "Compensation to the Consumers in the Event of Dropped Calls" dated 4-9-2015. The stakeholders were given time till 21-9-2015 to submit their comments in writing with counter-comments thereto being given one week thereafter i.e. by 28-9-2015. The Authority records that written comments were received from 4 industry associations, 11 Cellular Mobile Telephone Service Providers, 2 consumer advocacy groups, 2 organisations and 518 individual consumers. Five counter-comments were also received. The Authority notes that an open house discussion was held on 1-10-2015 in New Delhi with the stakeholders.

8. According to the Authority, consumers wanted relief in the event of dropped calls under two broad heads — excess charging and inconvenience caused to them. In Paras 6 and 7, the arguments of service providers have been noted, in which service providers stated their difficulties in the matter of sealing/closing down existing sites for towers by municipal authorities and other related issues together with spectrum related issues. They specifically informed the Authority that a large proportion of call drops are beyond their control. In reply thereto, the consumers spoke of the inconvenience caused to them by call drops. Some consumers also contended that the financial disincentive levied for failing to meet the benchmark for call drop rates should be revised upwards. (This was in fact done, as we have seen, just one day before the impugned Regulation itself i.e. on 15-10-2015).

9. The Explanatory Memorandum then goes on to state:

"**18.** Based on the above, it is clear that while all CMTSPs and the industry associations have argued that question for compensation to the consumers on call drops does not arise as it is neither justifiable nor practicable, most of the consumers and consumer advocacy groups have insisted that they should be compensated by CMTSPs for the inconvenience caused to them.

19. *After a careful analysis, the Authority has come to the conclusion that call drops are instances of deficiency in service delivery on part of the CMTSPs which cause inconvenience to the consumers, and hence it would be appropriate to put in place a mechanism for compensating the consumers in the event of dropped calls.* The Authority is of the opinion that compensatory

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 20 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

mechanism should be kept simple for the ease of consumer understanding and its implementation by CMTSPs. While one may argue that amount of compensation should be commensurate to the loss/suffering caused due to an event but in case of a dropped call it is difficult to quantify the loss/suffering/ inconvenience caused to the consumers as it may vary from one consumer to another and also in accordance with their situations. Accordingly, the Authority has decided to mandate originating CMTSPs to credit one rupee for a dropped call to the calling consumers as notional compensation. Similarly, the Authority has decided that such credit in the account of the calling consumer shall be limited to three dropped calls in a day (00:00:00 hours to 23:59:59 hours). The Authority is of the view that such a mandate would compensate the consumers for the inconvenience caused due to interruption in service by way of call drops, to a certain extent.

20. The Authority is also aware that communication to the consumers is important and therefore, the Authority has decided to mandate that, each originating CMTSP, within four hours of the occurrence of call drop within its network, inform the calling consumer, through SMS/USSD message the details of amount credited in his account for the dropped call, if applicable.

21. The Authority is conscious of the fact that for carrying out the aforementioned mandate, CMTSPs would have to make suitable provisions in their technical systems, which would require time and efforts. Accordingly, the Authority has decided that the aforementioned mandate would become applicable on CMTSPs with effect from 1-1-2016.

22. The Authority shall keep a close watch on the implementation of the mandate as well as the measures being initiated by CMTSPs to minimise the problem of dropped calls as given in their submissions during the consultation process and may review after six months, if necessary." (emphasis supplied)

10. At this stage, it is necessary to refer to a technical paper issued by the very same Authority a few days after the impugned Regulation. On 13-11-2015, TRAI issued a paper called "Technical Paper on call drops in cellular network". TRAI noticed that the consumer base in the country is growing very fast and that the mobile telecom infrastructure is not growing at the same pace. This leads to a dip in the quality of service provided. It is interesting to notice that TRAI specifically adverts to the fact that call drops can take place due to a variety of reasons. It pointed out that one of the reasons is due to the consumer's own fault, and that 36.9% of call drops are attributable to consumer faults. It further went on to notice that the benchmark set for call drops is 2%, and it is seen that only 3 out of 12 licensees are not adhering to the said benchmark — 2 of them being BSNL, who is not an appellant before us, the other one being Aircel. The Authority ultimately concluded:

"5.27. In light of the reasons discussed above about the increase in call drops, it must be realised that mobile towers do not have an unlimited capacity for handling the current network load. There is an urgent need to increase the number of the towers so as to cater to the demands of a growing subscriber base. At the same time, problems like removal of towers from certain areas by Authorities should be adequately addressed. This problem

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 21 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

is particularly evident in urban areas. Moreover, with the increase in the usage of 3G networks, the growth rate of mobile towers supporting 2G networks has reduced. This must be addressed.

5.28. The previous sections highlighted some important countermeasures at the TSPs' end. Measures like Dynamic Channel Allocation, multiple call routing and optimised resource management can be employed by the TSPs besides usage of mobile signal boosters through the TSPs at users' buildings or premises. Some prioritisation schemes like MBPS, CAC, Guard Channels, Handoff Queuing and Auxiliary Stations essentially need to be incorporated by TSPs to reduce call drops."

11. A writ petition, being Writ Petition (Civil) No. 11596 of 2015, was filed before the Delhi High Court, together with various other petitions, in which the Ninth Amendment, being the impugned amendment to the Regulation pointed out hereinabove, was challenged. By the impugned judgment dated 29-2-2016[1], the Delhi High Court noticed the various arguments addressed on behalf of the various appellants, together with the reply given by Shri P.S. Narasimha, learned Additional Solicitor General of India appearing on behalf of TRAI. The High Court then went on to discuss the validity of the impugned Regulation under two grounds — the ground of being ultra vires the parent Act, and the ground that the Regulation was otherwise unreasonable and manifestly arbitrary. The High Court repelled the challenge of the appellants on both the aforesaid grounds.

12. The High Court first referred to *BSNL* v. *Telecom Regulatory Authority of India*[2] in some detail, and then went on to hold that the power vested in TRAI under Section 36(1) to make regulations is wide and pervasive, and that as there can be no dispute that the impugned Regulation has been made to ensure quality of service extended to the consumer by the service provider, it would fall within Section 36(1) read with Section 11(1)(*b*)(*v*). The High Court further held that the contention that the compensation provided under the impugned Regulation amounts to imposition of penalty is liable to be rejected, since compensation as provided under the impugned Regulation is only notional compensation to consumers who have suffered as a result of call drops.

13. The High Court then went on to say that a transparent consultative process was followed by TRAI in making the impugned Regulation, and that the technical paper on call drops issued on 13-11-2015 addressed all the issues that were sought to be raised in the present petitions. The contention that 100% performance is demanded under the impugned Regulation was rejected as being factually incorrect and without any basis. It was further added that the impossibility of identification of the reason for the call drop was incorrect inasmuch as these reasons are network-related, and that is something that has not been disputed by telecom equipment manufacturers like M/s Nokia and

1 *Cellular Operators Assn. of India* v. *Telecom Regulatory Authority of India*, 2016 SCC OnLine Del 1388 : (2016) 228 DLT 491

2 (2014) 3 SCC 222

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 22 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

M/s Ericsson. It was further held that the impugned Regulation attempted to balance the interest of consumers with the interest of service providers by limiting call drops that are to be compensated to only 3 and also mandating that only the calling consumer and not the receiving consumer was liable to be so compensated.

14. In dealing with manifest arbitrariness, the High Court held that the 2% standard imposed by the Quality of Service Regulations is distinct and different from compensation provided to consumers for dropped calls. The High Court sought to make a distinction between the 2% tolerance limit as being a quality parameter for the entire network area, as against compensation provided which specifies an individual standard. On the plea that the difficulties faced by service providers in setting up mobile towers being something beyond their control, the High Court declined to enter into the said controversy since the High Court does not have the expertise to adjudicate on such rival claims. The validity of the impugned Regulation was upheld and the writ petitions were dismissed.

15. At this stage, it would be important to notice the arguments made on behalf of the various appellants before us. We have heard learned Senior Advocates Shri Kapil Sibal, Dr Abhishek Manu Singhvi and Shri Gopal Jain. The arguments that were made by them can fall into four neat logical compartments. First and foremost, they argued that the Ninth Amendment to the Telecom Consumers Protection Regulations, 2015, is ultra vires Section 36 read with Section 11 of the Telecom Regulatory Authority of India Act, 1997. They argued that, in any event, these Regulations, being in the nature of subordinate legislation, were manifestly arbitrary and unreasonable, and therefore affected their fundamental rights under Article 14 and Article 19(1)(*g*) of the Constitution. They further went on to state that there was no power in TRAI to interfere with their licence conditions which are contract conditions between the licensor and the licensee, and that the said Regulations in seeking to impose a penalty not provided for by the licence should be struck down as such. Fourthly, they argued that Section 11(4) of the said Act requires the Authority to be transparent in its dealings with the various stakeholders, and it has miserably failed in this also.

16. Under the broad head "ultra vires", the learned counsel have argued that regulations can only be made under Section 36(1) of the TRAI Act if they are consistent with and carry out the purposes of the Act. The present Regulations having purportedly been made under Sections 11(1)(*b*)(*i*) and (*v*) of the Act are in fact dehors Sections 11(1)(*b*)(*i*) and (*v*), and contrary to the Quality of Service Regulations already made by the same Authority under the selfsame provision. They argued that the present impugned Regulation has nothing to do with ensuring compliance with the terms and conditions of licence inasmuch as none of such terms and conditions empowers the Authority to levy a penalty based on no-fault liability. They also argued that no standard of quality of service is prescribed by the Regulation at all, and therefore the so-called protection of the consumers is without laying down a standard of quality of service and is also directly contrary to the 2% standard already laid down. It was argued by

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 23 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

them that as all of them met the 2% standard laid down by the 2009 Standard of Quality Regulation, they could not be penalised as that would then amount to substituting 98% with 100% as even one call drop would lead to a payment of penalty of rupee one. They also argued that such penalty was not authorised by either Section 36 or by Section 11, and, unlike Section 29 of the Act, no such authority is to be found in the said sections.

17. Under the broad head "manifestly arbitrary", and "unreasonable restrictions" the learned counsel for the appellants argued that without there being any fault on their part, they were foisted with a penal liability. This is not only contrary to any norm of law or justice, but directly contrary to Section 14 of the Act which speaks of adjudication taking place between a service provider and a group of consumers. The complaint of an individual consumer before a Consumer Disputes Redressal Forum would be dismissed on the ground that penal damages cannot be awarded without the establishment of fault in any adjudication for "inconvenience" as opposed to "loss caused". To lay down by way of subordinate legislation, a strict no-fault penal liability would go contrary to the scheme of the TRAI Act, particularly when it is contrasted with the Electricity Act, 2003. We were shown Section 57 and certain other sections of the said Act in which the Central and State Commissions for Electricity, unlike TRAI, also have adjudicatory functions. If, as a result of the adjudicatory function, compensation for loss is decreed, the Commission under the Electricity Act could do so, but not TRAI, as it has no adjudicatory functions but only recommendatory, administrative and legislative functions. It was argued by them that Sections 73 and 74 of the Contract Act were also breached as damages by way of penalty, which are not a genuine pre-estimate of loss, have been laid down by the impugned Regulation, as it is admitted that no loss but only inconvenience has been caused to the consumers.

18. It was further argued by the learned counsel for the appellants, based on the amended Preamble to the TRAI Act, that the impugned Regulation only protects the interest of the consumers of the telecom sector, whereas a balancing of the interests of service providers and consumers is required by the said Preamble. Further, orderly growth of the telecom sector would also be directly affected if arbitrary penalties of this nature were to be inflicted upon service providers. It was also argued that having made the financial disincentive for a breach of the 2% benchmark even higher just one day before the impugned Regulation, the impugned Regulations were wholly uncalled for. Further, one hand of TRAI does not seem to know what the other hand is doing. A few days after the impugned Regulation, TRAI's own technical paper makes it clear that TRAI has itself admitted that call drops are caused in many ways, most of which are not attributable to service providers. That being so, the impugned amendment is wholly arbitrary in that the assumption on which it is based, namely, that the service provider is at fault every time a call drop takes place, is wholly unfounded, as has been found by TRAI itself in the said technical paper.

19. The learned counsel have also argued, based on Section 402 of the Companies Act, 1956 and Section 27(*d*) of the Competition Act, 2002, that no

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 24 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

power is given by the TRAI Act for interference with licence conditions, which amount to a contract between the licensor and licensee. They also referred to Section 11(1)(*b*)(*ii*) which uses the familiar "notwithstanding anything contained in the terms and conditions of the licence…". which is missing from the other provisions of the TRAI Act. The argument, therefore, being that when the licence conditions/contract itself makes it clear that a no-fault liability for call drops cannot be made, the impugned amendment would follow the terms and conditions of the licence between the licensor and licensee and would be bad as a result.

20. Finally, it was argued that Section 11(4) of the Act was breached inasmuch as the transparency mandated by the Act in the framing of the Regulations was wholly missing as no reason whatsoever has been given for negativing the objections of the service providers and laying down a no-fault strict penal liability on them.

21. The learned Attorney General, appearing on behalf of the Telecom Regulatory Authority of India, has countered these submissions and sought to defend the High Court judgment. According to the learned Attorney General, it is first necessary to see the Statement of Objects and Reasons of the Telecom Regulatory Authority of India Act, 1997. Paragraph one of the said statement was referred to in order to emphasise that the National Telecom Policy of 1994 provided for the meeting of customer's demands at a reasonable price, and the promotion of consumer interest by ensuring fair competition. When read in light of the Statement of Objects and Reasons, it is clear that the impugned Regulation has been made bearing this object in mind. According to the learned Attorney General, Section 36 of the Act has to be read in a wide and expansive manner, as has been done in *BSNL*[2] judgment, and when so read, it is clear that the impugned Regulation conforms to Sections 11(1)(*b*)(*i*) and (*v*) and is otherwise not ultra vires the Act.

22. Countering the submission as to arbitrariness and unreasonableness of the impugned Regulation, the learned Attorney General argued that the said Regulation was really framed keeping the small man in mind, and told us that 96% of consumers are pre-paid customers who recharge their account balance for an average of Rs 10 at a time. The impugned Regulation seeks to provide some solace to these persons for dropped calls.

23. The learned Attorney General further argued that members of the appellants have made huge profits from the aforesaid business and have pumped in very little funds for infrastructural development. He referred to funds pumped in in China, for example, which were ten times more than the funds in this country. He, therefore, submitted that if the revenues of service providers were computed at a rough average of approximately Rs 96,560 crores per annum, payments that they would have to make, according to a calculation made by him, for call drops under the impugned Regulation, would amount to a sum of roughly only Rs 280 crores per annum, which would not therefore really affect the appellants' right to carry on business. He further argued that

2 *BSNL* v. *Telecom Regulatory Authority of India*, (2014) 3 SCC 222

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 25 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

the impugned Regulation is only an experimental measure and was liable to be revisited in six months. This being so, the appellants should not have rushed to court, but allowed the regulation to work, and if there were any shortfalls, these could be ironed out in the working of the impugned Regulation.

24. The learned Attorney General countered the argument made on behalf of the appellants that it is not possible, technically speaking, to arrive at the cause of a call drop, and read manuals from some of the service providers to show that this was, in fact, possible, and that the reason for the call drop could ultimately be pinpointed to the service providers when they are at fault. He also refuted the submission made on behalf of the appellants that there were four broad reasons for call drops, three of which cannot be laid at the appellants door. He referred to the technical paper dated 13-11-2015, in particular, and to various other documents, to show that call drops occurred basically due to two reasons alone—those that can be said to be due to the fault of the service providers, and those that can be said to be due to the fault of the consumers. In particular, he referred to and relied upon a statistic showing that an average of 36.9% of call drops take place owing to the fault of the consumer—the rest take place because of the fault of the service provider, or the fact that it has not pumped in enough funds for technical advancements to prevent the cause for such call drops. According to him, with the provision of equipment, including boosters, call drops need not take place inside buildings with thick walls and/or lifts. In any case, the number of call drops that take place owing to such reasons is itself minimal. According to him, therefore, the impugned Regulation should be read down so that service providers are made to pay only for faults attributable to them, which would come to a rough figure of 63% of what is charged, for amounts payable to the consumers under the impugned Regulation. The learned Attorney General has assured us that, in point of fact, the authorities will administer the impugned Regulation in such a manner that service providers would only be made liable to pay for call drops owing to their own fault.

25. The learned Attorney General further argued that three documents, if read together, would make it clear that the impugned Regulation cannot be said to be manifestly arbitrary or unreasonable, and that the consultation paper dated 4-9-2015, the impugned Regulation dated 16-10-2015, and the technical paper dated 13-11-2015, should all be read together as being part of one joint exercise to alleviate the small consumers' inconvenience because of call drops. He further went on to argue that it is not correct to say that TRAI has contradicted itself in the technical paper of 13-11-2015, when compared to the impugned Regulation, and stated that the Quality of Service Regulations which allowed a 2% average per month for call drops should not be confused with the impugned Regulation. They are, according to him, a parallel set of Regulations which have to be read separately, both having been framed by TRAI, in order to protect consumer interest. He also added that guesswork is inherent in framing a regulation of the sort that is impugned, and further stated that three call drops per day mitigated the rigour of having to pay for more than 3 call drops per

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 26 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

day, and that rupee one per call drop would really be payment or recompense for call drops which take place because the consumer has to incur an extra charge to connect with the person whose call dropped yet again and spend more money for the second call. He also added that only the consumer who dials the call, which has dropped, is paid and not the receiving consumer, thereby again mitigating the rigour of what could amount to a double payment for one call.

26. The learned Attorney General cited a number of judgments to buttress the aforesaid submissions, stating that the said judgments would show that the Court should not substitute its wisdom for that of the wisdom of legislative policy, and that TRAI being an active trustee for the common good has framed this Regulation acting as such. He also refuted the submission that the licence conditions were illegally modified by the impugned Regulation, and stated that the Explanatory Memorandum to the impugned Regulation would show that the transparency required under Section 11(4) of the Act was duly and faithfully observed by TRAI.

27. In rejoinder, the learned Senior Counsel for the appellants stoutly resisted the factual statements made by the learned Attorney General. They pointed out that the net debt of the various telecom operators before us, as on 31-12-2015, ran into approximately Rs 3,80,000 crores and that this was because huge amounts had to be borrowed from banks in order to pay for both spectrum and infrastructure. They were at pains to point out that though service providers in India contributed to 13% of the world's telecommunication services, the revenue earned by them was only 2.7%, and even this was fast decreasing. According to the learned counsel, they have covered over 5,00,000 villages in India contributing to 6% of India's GDP, thus being amongst the highest contributors in foreign direct investment in this country in the last decade. They have also made the second large private sector investment in infrastructure amounting to Rs 8,00,000 crores despite the return on investment being only 1%. Contrary to what the learned Attorney General had to say, a vast number of towers have been set up—more than two lakh sites in the last 15 months alone. When viewed with the gigantic net debt and return on investment, the figure of gross revenue given by the learned Attorney General is said to be a highly misleading figure. Also, the comparison with infrastructure investment in China is wholly misplaced inasmuch as the Chinese Government has unlimited funds to pour into its telecom companies, over 70% of their share capital being held by the Government. Spectrum allocation to Chinese operators is at almost no cost, whereas in India, thousands of crores of rupees have to be spent as spectrum is now auctioned to the highest bidder. Also, the revenue of the top three Chinese telecom operators is more than six times the revenue of the top three Indian operators. In addition, it was argued that the facts and figures reeled out by the learned Attorney General are not based on the record of the case, and, in any case, have very little connection with the challenge to the impugned Regulation in the present case.

28. We have also heard the learned counsel appearing for various consumer groups. They supported the arguments of the learned Attorney General and went on to state that since the focus of the TRAI Act and the impugned

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 27 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Regulation was for the small and impoverished consumers in India, this Court would be loath to strike down the impugned Regulation. They further argued that the doctrine of public trust would apply to the impugned Regulation, as the Regulation was part of the overall social responsibility that the regulator TRAI has cast upon the service providers in favour of consumers. They also cited a few judgments dealing with the vires of subordinate legislation and with transparency in the context of the impugned Regulation.

29. Having heard the learned counsel for all the parties, it is first necessary to set out the relevant provisions of the Telecom Regulatory Authority of India Act, 1997.

30. The Statement of Objects and Reasons for the said Act is as follows:

> "**1.** In the context of the National Telecom Policy, 1994, which amongst other things, stresses on achieving the universal service, bringing the quality of telecom services to world standards, provisions of wide range of services to meet the customers' demand at reasonable price, and participation of the companies registered in India in the area of basic as well as value-added telecom services as also making arrangements for protection and promotion of consumer interest and ensuring fair competition, there is a felt need to separate regulatory functions from service providing functions which will be in keeping with the general trend in the world. In the multi-operator situation arising out of opening of basic as well as value-added services in which private operator will be competing with government operators, there is a pressing need for an independent telecom regulatory body for regulation of telecom services for orderly and healthy growth of telecommunication infrastructure apart from protection of consumer interest."

31. The Preamble of the Telecom Regulatory Authority of India Act, 1997 reads as under:

> "An Act to provide for the establishment of the Telecom Regulatory Authority of India to regulate the telecommunication services, and for matters connected therewith or incidental thereto."

32. Section 11(*n*) read as under:

> "**11.** ***Functions of Authority***.—(1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1985), the functions of the Authority shall be to—
>
> * * *
>
> (*n*) settle disputes between service providers;"

33. In 2000, the Act was amended. By the amended Act, the adjudicatory function of TRAI was taken away from it and was vested in an Appellate Tribunal. The relevant provisions of the Act as amended in 2000 are as follows:

> "An Act to provide for the establishment of the Telecom Regulatory Authority of India and the Telecom Disputes Settlement and Appellate Tribunal to regulate the telecommunication services, adjudicate disputes,

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 28 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

dispose of appeals and to protect the interests of service providers and consumers of the telecom sector, to promote and ensure orderly growth of the telecom sector and for matters connected therewith or incidental thereto."

"**11.** ***Functions of Authority***.—(1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall be to—

* * *

(*b*) discharge the following functions, namely—

(*i*) ensure compliance of terms and conditions of licence;

(*ii*) notwithstanding anything contained in the terms and conditions of the licence granted before the commencement of the Telecom Regulatory Authority (Amendment) Act, 2000, fix the terms and conditions of inter-connectivity between the service providers;

* * *

(*v*) lay down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication service;

* * *

(4) The Authority shall ensure transparency while exercising its powers and discharging its functions.

12. ***Powers of Authority to call for information, conduct investigations, etc***.—(1)-(3) * * *

(4) The Authority shall have the power to issue such directions to service providers as it may consider necessary for proper functioning by service providers.

13. ***Power of Authority to issue directions***.—The Authority may, for the discharge of its functions under sub-section (1) of Section 11, issue such directions from time to time to the service providers, as it may consider necessary:

Provided that no direction under sub-section (4) of Section 12 or under this section shall be issued except on the matters specified in clause (*b*) of sub-section (1) of Section 11.

14. ***Establishment of Appellate Tribunal***.—The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal to—

(*a*) adjudicate any dispute—

(*i*) between a licensor and a licensee;

(*ii*) between two or more service providers;

(*iii*) between a service provider and a group of consumers:

Provided that nothing in this clause shall apply in respect of matters relating to—

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 29 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

(*A*) the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of Section 5 of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969);

(*B*) the complaint of an individual consumer maintainable before a Consumer Disputes Redressal Forum or a Consumer Disputes Redressal Commission or the National Consumer Redressal Commission established under Section 9 of the Consumer Protection Act, 1986 (68 of 1986);

(*C*) the dispute between telegraph authority and any other person referred to in sub-section (1) of Section 7-B of the Indian Telegraph Act, 1885 (13 of 1885);

(*b*) hear and dispose of appeal against any direction, decision or order of the Authority under this Act.

* * *

15. ***Civil court not to have jurisdiction***.—No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

* * *

25. ***Power of Central Government to issue directions***.—(1) The Central Government may, from time to time, issue to the Authority such directions as it may think necessary in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality.

(2) Without prejudice to the foregoing provisions, the Authority shall, in exercise of its powers or the performance of its functions, be bound by such directions on questions of policy as the Central Government may give in writing to it from time to time:

Provided that the Authority shall, as far as practicable, be given an opportunity to express its views before any direction is given under this sub-section.

(3) The decision of the Central Government whether a question is one of policy or not shall be final.

* * *

29. ***Penalty for contravention of directions of Authority***.—If a person violates directions of the Authority, such person shall be punishable with fine which may extend to one lakh rupees and in case of second or subsequent offence with fine which may extend to two lakh rupees and in the case of continuing contravention with additional fine which may extend to two lakh rupees for every day during which the default continues.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 30 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

* * *

36. ***Power to make regulations***.—(1) The Authority may, by notification, make regulations consistent with this Act and the rules made thereunder to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely—

(*a*) the times and places of meetings of the Authority and the procedure to be followed at such meetings under sub-section (1) of Section 8, including quorum necessary for the transaction of business;

(*b*) the transaction of business at the meetings of the Authority under sub-section (4) of Section 8;

(*c*) * * *

(*d*) matters in respect of which register is to be maintained by the Authority under sub-clause (*vii*) of clause (*b*) of sub-section (1) of Section 11;

(*e*) levy of fee and lay down such other requirements on fulfilment of which a copy of register may be obtained under sub-clause (*viii*) of clause (*b*) of sub-section (1) of Section 11;

(*f*) levy of fees and other charges under clause (*c*) of sub-section (1) of Section 11.

37. ***Rules and regulations to be laid before Parliament***.—Every rule and every regulations made under this Act shall be paid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation."

Parameters of judicial review of subordinate legislation

34. In *State of T.N.* v. *P. Krishnamurthy*[3], this Court after adverting to the relevant case law on the subject, laid down the parameters of judicial review of subordinate legislation generally thus: (SCC pp. 528-29, paras 15-16)

"*15*. There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognised that a subordinate legislation can be challenged under any of the following grounds:

(*a*) Lack of legislative competence to make the subordinate legislation.

3 (2006) 4 SCC 517

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 31 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

(*b*) Violation of fundamental rights guaranteed under the Constitution of India.

(*c*) Violation of any provision of the Constitution of India.

(*d*) Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.

(*e*) Repugnancy to the laws of the land, that is, any enactment.

(*f*) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules).

16. The court considering the validity of a subordinate legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the subordinate legislation conforms to the parent statute. Where a rule is directly inconsistent with a mandatory provision of the statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non-conformity of the rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the parent Act, the court should proceed with caution before declaring invalidity."

35. In the present case, the appellants have raised pleas under paras (*b*), (*d*) and (*f*) of para 15 of the said judgment in *P. Krishnamurthy case*[3]. We now move on to consider their arguments.

Ultra vires

36. The power to make the impugned Regulation is traceable to Section 36(1) of the Telecom Regulatory Authority of India Act, 1997. This Court in *BSNL* v. *Telecom Regulatory Authority of India*[2], after analysing the aforesaid provision in the backdrop of the Act held as follows: (SCC pp. 283-84 & 289-90, paras 89 & 99-100)

"*89*. We may now advert to Section 36. Under sub-section (1) thereof TRAI can make regulations to carry out the purposes of the TRAI Act specified in various provisions of the TRAI Act including Sections 11, 12 and 13. The exercise of power under Section 36(1) is hedged with the condition that the regulations must be consistent with the TRAI Act and the rules made thereunder. There is no other restriction on the power of TRAI to make regulations. In terms of Section 37, the regulations are required to be laid before Parliament which can either approve, modify or annul the same. Section 36(2), which begins with the words 'without prejudice to the generality of the power under sub-section (1)' specifies various topics on which regulations can be made by TRAI. Three of these topics relate to meetings of TRAI, the procedure to be followed at such meetings, the transaction of business at the meetings and the register to be maintained by TRAI. The remaining two topics specified in clauses (*e*) and (*f*) of

3 *State of T.N.* v. *P. Krishnamurthy*, (2006) 4 SCC 517
2 (2014) 3 SCC 222

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 32 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Section 36(2) are directly referable to Sections 11(1)(*b*)(*viii*) and 11(1)(*c*). These are substantive functions of TRAI. However, there is nothing in the language of Section 36(2) from which it can be inferred that the provisions contained therein control the exercise of power by TRAI under Section 36(1) or that Section 36(2) restricts the scope of Section 36(1).

* * *

99. Before parting with this aspect of the matter, we may notice Sections 33 and 37. A reading of the plain language of Section 33 makes it clear that TRAI can, by general or special order, delegate to any member or officer of TRAI or any other person such of its powers and functions under the TRAI Act except the power to settle disputes under Chapter IV or make regulations under Section 36. This means that the power to make regulations under Section 36 is non-delegable. The reason for excluding Section 36 from the purview of Section 33 is simple. The power under Section 36 is legislative as opposed to administrative. By virtue of Section 37, the regulations made under the TRAI Act are placed on a par with the rules which can be framed by the Central Government under Section 35 and being in the nature of subordinate legislations, the rules and regulations have to be laid before both the Houses of Parliament which can annul or modify the same. Thus, the regulations framed by TRAI can be made ineffective or modified by Parliament and by no other body.

100. In view of the above discussion and the propositions laid down in the judgments referred to in the preceding paragraphs, we hold that the power vested in TRAI under Section 36(1) to make regulations is wide and pervasive. The exercise of this power is only subject to the provisions of the TRAI Act and the Rules framed under Section 35 thereof. There is no other limitation on the exercise of power by TRAI under Section 36(1). It is not controlled or limited by Section 36(2) or Sections 11, 12 and 13."

37. It will thus be seen that though the regulation-making power under the said Act is wide and pervasive, and is not trammelled by the provisions of Sections 11, 12(4) and 13, it is a power that is non-delegable and, therefore, legislative in nature. The exercise of this power is hedged in with the condition that it must be exercised consistently with the Act and the Rules thereunder in order to carry out the purposes of the Act. Since the regulation-making power has first to be consistent with the Act, it is necessary that it not be inconsistent with Section 11 of the Act, and in particular Section 11(1)(*b*) thereof. This is for the reason that the functions of the Authority are laid down by this section, and that the impugned Regulation itself refers to Sections 11(1)(*b*)(*i*) and (*v*) as the source of power under which the impugned Regulation has been framed.

38. Since ensuring compliance with the terms and conditions of licence is the first thing that has been argued on behalf of the respondents, it is important to advert to the provisions of the licence between the service provider and the consumer. As has been mentioned above, two very important clauses of this licence refer to (*i*) the power to modify the licence conditions which is

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 33 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

contained in Clause 5, and (*ii*) the ensuring by the licensee that the quality of service shall be as prescribed by the licensor or TRAI by Clause 28 thereof. Under Clause 5, the licensor reserves the right to modify the terms and conditions of the licence if in the opinion of the licensor it is necessary or expedient so to do in public interest or in the interest of security of the State or for the proper conduct of telegraphs. It may be stated that no modification of the licence has in fact been attempted or has taken place in the facts of the present case. Therefore, Clause 5 need not detain us further.

39. Clause 28 of the licence agreement reads as follows:

"**28.** ***Quality of performance***:

28.1. The LICENSEE shall ensure the quality of service (QoS) as prescribed by the LICENSOR or TRAI. The LICENSEE shall adhere to such QoS standards and provide timely information as required therein.

28.2. The LICENSEE shall be responsible for:

(*i*) Maintaining the performance and quality of service standards.

(*ii*) Maintaining the MTTR (Mean Time To Restore) within the specified limits of the quality of service.

(*iii*) The LICENSEE will keep a record of number of faults and rectification reports in respect of the service, which will be produced before the LICENSOR/TRAI as and when and in whatever form desired.

28.3. The LICENSEE shall be responsive to the complaints lodged by his subscribers. The licensee shall rectify the anomalies within the MTTR specified and maintain the history sheets for each installation, statistics and analysis on the overall maintenance status.

28.4. The LICENSOR or TRAI may carry out performance tests on LICENSEE's network and also evaluate quality of service parameters in LICENSEE's network prior to grant of permission for commercial launch of the service after successful completion of interconnection tests and/or at any time during the currency of the licence to ascertain that the network meets the specified standards on Quality of Service (QoS). The LICENSEE shall provide ingress and other support including instruments, equipments, etc., for such tests.

28.5. The LICENSEE shall enforce and ensure QoS, as prescribed by the LICENSOR/TRAI, from the INFRASTRUCTURE PROVIDER(s) with whom it may enter into agreement/contract for leasing/hiring/buying or any such instrument for provision of infrastructure or provision of bandwidth. The responsibility of ensuring QoS shall be that of LICENSEE."

40. Under Clause 28 it is a condition that the licensee shall ensure the quality of service as prescribed by the licensor or TRAI, and shall adhere to such standards as are provided. Another important thing to notice is that under Clause 28.2 the licensee has to keep a record of the number of faults and rectification reports in respect of its service, which will be produced before the licensor/TRAI as and when desired. This being the case, it is clear that

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 34 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

the impugned Regulation cannot be said to fall under Section 11(1)(*b*)(*i*) at all inasmuch as it does not seek to enforce any term or condition of the licence between the service provider and the consumer. Coming to sub-clause (*v*) of Section 11(1)(*b*), the impugned Regulation would again have no reference to the said paragraph, inasmuch as it does not lay down any standard of quality of service to be provided by the service provider. In order that sub-clause (*v*) be attracted, not only do standards of quality of service to be provided by the service providers have to be laid down, but standards have to be adhered to by the service providers so as to protect the interests of the consumers.

41. We find that the impugned Regulation is not referable to Sections 11(1)(*b*)(*i*) and (*v*) of the Act inasmuch as it has not been made to ensure compliance with the terms and conditions of the licence nor has it been made to lay down any standard of quality of service that needs compliance. This being the case, the impugned Regulation is dehors Section 11 but cannot be said to be inconsistent with Section 11 of the Act. This Court has categorically held in *BSNL*[2] judgment that the power under Section 36 is not trammelled by Section 11. This being so, the impugned Regulation cannot be said to be inconsistent with Section 11 of the Act. However, what has also to be seen is whether the said Regulation carries out the purpose of the Act which, as has been pointed out hereinabove, under the amended Preamble to the Act, is to protect the interests of service providers as well as consumers of the telecom sector so as to promote and ensure orderly growth of the telecom sector. Under Section 36, not only does the Authority have to make regulations consistent with the Act and the Rules made thereunder, but it also has to carry out the purposes of the Act, as can be discerned from the Preamble to the Act. If, far from carrying out the purposes of the Act, a regulation is made contrary to such purposes, such regulation cannot be said to be consistent with the Act, for it must be consistent with both the letter of the Act and the purposes for which the Act has been enacted. In attempting to protect the interest of the consumer of the telecom sector at the cost of the interest of a service provider who complies with the leeway of an average of 2% of call drops per month given to it by another Regulation, framed under Section 11(1)(*b*)(*v*), the balance that is sought to be achieved by the Act for the orderly growth of the telecom sector has been violated. Therefore, we hold that the impugned Regulation does not carry out the purpose of the Act and must be held to be ultra vires the Act on this score.

Violation of fundamental rights

42. We have already seen that one of the tests for challenging the constitutionality of subordinate legislation is that subordinate legislation should not be manifestly arbitrary. Also, it is settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. (See *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*[4], SCC at p. 689, para 75.)

2 *BSNL* v. *Telecom Regulatory Authority of India*, (2014) 3 SCC 222
4 (1985) 1 SCC 641 : 1985 SCC (Tax) 121

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 35 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

43. The test of "manifest arbitrariness" is well explained in two judgments of this Court. In *Khoday Distilleries Ltd.* v. *State of Karnataka*[5], this Court held: (SCC p. 314, para 13)

> "*13*. It is next submitted before us that the amended Rules are arbitrary, unreasonable and cause undue hardship and, therefore, violate Article 14 of the Constitution. Although the protection of Article 19(1)(*g*) may not be available to the appellants, the Rules must, undoubtedly, satisfy the test of Article 14, which is a guarantee against arbitrary action. However, one must bear in mind that what is being challenged here under Article 14 is not executive action but delegated legislation. *The tests of arbitrary action which apply to executive actions do not necessarily apply to delegated legislation. In order that delegated legislation can be struck down, such legislation must be manifestly arbitrary; a law which could not be reasonably expected to emanate from an authority delegated with the law-making power.* In *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*[4], this Court said that a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. *A subordinate legislation may be questioned under Article 14 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*'. Drawing a comparison between the law in England and in India, the Court further observed that in England the Judges would say, 'Parliament never intended the authority to make such Rules; they are unreasonable and ultra vires'. *In India, arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. But subordinate legislation must be so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution*." (emphasis supplied)

44. Also, in *Sharma Transport* v. *State of A.P.*[6], this Court held: (SCC pp. 203-04, para 25)

> "*25*. … The tests of arbitrary action applicable to executive action do not necessarily apply to delegated legislation. In order to strike down a delegated legislation as arbitrary it has to be established that there is manifest arbitrariness. In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression "arbitrarily" means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone."

5 (1996) 10 SCC 304
4 (1985) 1 SCC 641 : 1985 SCC (Tax) 121
6 (2002) 2 SCC 188

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 36 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

45. When we come to Article 19(1)(*g*) of the Constitution, the tests for challenge to plenary legislation are well settled. First and foremost, a sea change took place with the eleven-Judge Bench judgment in *Rustom Cavasjee Cooper (Banks Nationalisation)* v. *Union of India*[7], in which the impact of State action upon fundamental rights was stated thus: (SCC p. 288, para 49)

> "*49*. We have carefully considered the weighty pronouncements of the eminent Judges who gave shape to the concept that the extent of protection of important guarantees, such as the liberty of person, and right to property, depends upon the form and object of the State action, and not upon its direct operation upon the individual's freedom. But it is not the object of the authority making the law impairing the right of a citizen, nor the form of action taken that determines the protection he can claim: it is the effect of the law and of the action upon the right which attracts the jurisdiction of the Court to grant relief. If this be the true view and we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the legislature nor by the form of the action, but by its direct operation upon the individual's rights."

46. Under Article 19(6) of the Constitution, the State has to conform to two separate and independent tests if it is to pass constitutional muster — the restriction on the appellants' fundamental right must first be a reasonable restriction, and secondly, it should also be in the interest of the general public. Perhaps the best exposition of what the expression "reasonable restriction" connotes, was laid down in *Chintamanrao* v. *State of M.P.*[8], as follows: (SCR p. 763 : AIR p. 119, para 7)

> "*7*. The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(*g*) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in that quality."

47. It is interesting to note that the original Constitution, while enumerating various rights under Article 19(1), when it referred to the right of freedom of speech in Article 19(1)(*a*), laid down in Article 19(2) that any law abridging the right to freedom of speech could only pass constitutional muster if it related to any of the subjects laid down in clause (2). What was conspicuous by its absence was the phrase "reasonable restriction", which was only brought in by the first amendment to the Constitution.

7 (1970) 1 SCC 248
8 1950 SCR 759 : AIR 1951 SC 118

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 37 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

48. Similarly, the first amendment to the Constitution also amended Article 19(6), with which we are directly concerned, to provide for a State monopoly, which would not have to be tested on the ground of reasonable restrictions. Therefore, the first amendment to the Constitution of India has made it clear that reasonable restrictions, added in Article 19(2) and subtracted from Article 19(6) (insofar as State monopolies are concerned), point to the fact that this test is a test separate and distinct from the test of the law being in the interest of the general public. Why we are at pains to point this out is because the learned Attorney General's argument focused primarily on the impugned Regulation being in the public interest. He referred to *Delhi Science Forum* v. *Union of India*[9], for the proposition that TRAI, as an active trustee, has framed this Regulation for the common good. While accepting that TRAI may have done so, yet it is important to note that, apart from the common good in the form of consumer interest, the Regulation must also pass a separate and independent test of not being manifestly arbitrary or unreasonable. We cannot forget that when viewed from the angle of manifest arbitrariness or reasonable restriction, sounding in Article 14 and Article 19(1)(*g*) respectively, the Regulation must, in order to pass constitutional muster, be as a result of intelligent care and deliberation, that is, the choice of a course which reason dictates. Any arbitrary invasion of a fundamental right cannot be said to contain this quality. A proper balance between the freedoms guaranteed and the control permitted under Article 19(6) must be struck in all cases before the impugned law can be said to be a reasonable restriction in the public interest.

49. We find that it is not necessary to go in detail into many of the submissions made on either side as to the technical difficulties which may or may not lead to call drops. This is for the reason that even if we accept the demarcation of the cause of call drops to be what the learned Attorney General says it is, the impugned Regulation must be held to be manifestly arbitrary and an unreasonable restriction on the appellants' fundamental rights to carry on business. According to the learned Attorney General, the cause for call drops is twofold — one owing to the fault of the consumer, and the other owing to the fault of the service provider. And, for this dichotomy, he has referred to the technical paper dated 13-11-2015, which shows that an average of 36.9% can be call drops owing to the fault of the consumer. If this is so, the impugned Regulation's very basis is destroyed: the Regulation is based on the fact that the service provider is 100% at fault. This becomes clear from a reading of the text of the said Regulations together with the Explanatory Memorandum set out hereinabove. This being the case, it is clear that the service provider is made to pay for call drops that may not be attributable to his fault, and the consumer receives compensation for a call drop that may be attributable to the fault of the consumer himself, and that makes the impugned Regulation a regulation framed without intelligent care and deliberation.

9 (1996) 2 SCC 405

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 38 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

50. But it was said that the aforesaid Regulation should be read down to mean that it would apply only when the fault is that of the service provider. We are afraid that such a course is not open to us in law, for it is well settled that the doctrine of reading down would apply only when general words used in a statute or regulation can be confined in a particular manner so as not to infringe a constitutional right. This was best exemplified in one of the earliest judgments dealing with the doctrine of reading down, namely, the judgment of the Federal Court in *Hindu Women's Rights to Property Act, 1937, In re*[10]. In that judgment, the word "property" in Section 3 of the Hindu Women's Rights to Property Act was read down so as not to include agricultural land, which would be outside the Central Legislature's powers under the Government of India Act, 1935. This is done because it is presumed that the legislature did not intend to transgress constitutional limitations. While so reading down the word "property", the Federal Court held: (SCC OnLine FC)

> " … If the restriction of the general words to purposes within the power of the legislature would be to leave an Act with nothing or next to nothing in it, *or an Act different in kind, and not merely in degree*, from an Act in which the general words were given the wider meaning, then it is plain that the Act as a whole must be held invalid, because in such circumstances it is impossible to assert with any confidence that the legislature intended the general words which it has used to be construed only in the narrower sense: *Owners of SS Kalibia* v. *Wilson*[11], *Vacuum Oil Co. Pty. Ltd.* v. *Queensland*[12], *R.* v. *Commonwealth Court of Conciliation and Arbitration, ex p Whybrow & Co.*[13] and *British Imperial Oil Co. Ltd.* v. *Federal Commr. of Taxation*[14]." (emphasis supplied)

51. This judgment was followed by a Constitution Bench of this Court in *DTC* v. *Mazdoor Congress*[15]. In that case, a question arose as to whether a particular regulation which conferred power on an authority to terminate the services of a permanent and confirmed employee by issuing a notice terminating his services, or by making payment in lieu of such notice without assigning any reasons and without any opportunity of hearing to the employee, could be said to be violative of the appellants' fundamental rights. Four of the learned Judges who heard the case, the Chief Justice alone dissenting on this aspect, decided that the regulation cannot be read down, and must, therefore, be held to be unconstitutional. In the lead judgment on this aspect by Sawant, J., this Court stated: (SCC pp. 728-29, para 255)

> "*255.* It is thus clear that the doctrine of reading down or of recasting the statute can be applied in limited situations. It is essentially used, firstly, for saving a statute from being struck down on account

10 1941 SCC OnLine FC 3 : AIR 1941 FC 72
11 (1910) 11 CLR 689 (Aust)
12 (1934) 51 CLR 677 (Aust)
13 (1910) 11 CLR 1 (Aust)
14 (1925) 35 CLR 422 (Aust)
15 1991 Supp (1) SCC 600 : 1991 SCC (L&S) 1213

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 39 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

of its unconstitutionality. It is an extension of the principle that when two interpretations are possible—one rendering it constitutional and the other making it unconstitutional, the former should be preferred. The unconstitutionality may spring from either the incompetence of the legislature to enact the statute or from its violation of any of the provisions of the Constitution. The second situation which summons its aid is where the provisions of the statute are vague and ambiguous and it is possible to gather the intentions of the legislature from the object of the statute, the context in which the provision occurs and the purpose for which it is made. *However, when the provision is cast in a definite and unambiguous language and its intention is clear, it is not permissible either to mend or bend it even if such recasting is in accord with good reason and conscience.* In such circumstances, it is not possible for the court to remake the statute. Its only duty is to strike it down and leave it to the legislature if it so desires, to amend it. What is further, if the remaking of the statute by the courts is to lead to its distortion that course is to be scrupulously avoided. One of the situations further where the doctrine can never be called into play is where the statute requires extensive additions and deletions. Not only it is no part of the court's duty to undertake such exercise, but it is beyond its jurisdiction to do so." (emphasis supplied)

52. Applying the aforesaid test to the impugned Regulation, it is clear that the language of the Regulation is definite and unambiguous — every service provider has to credit the account of the calling consumer by one rupee for every single call drop which occurs within its network. The Explanatory Memorandum to the aforesaid Regulation further makes it clear, in Para 19 thereof, that the Authority has come to the conclusion that call drops are instances of deficiency in service delivery on the part of the service provider. It is thus unambiguously clear that the impugned Regulation is based on the fact that the service provider is alone at fault and must pay for that fault. In these circumstances, to read a proviso into the Regulation that it will not apply to consumers who are at fault themselves is not to restrict general words to a particular meaning, but to add something to the provision which does not exist, which would be nothing short of the court itself legislating. For this reason, it is not possible to accept the learned Attorney General's contention that the impugned Regulation be read down in the manner suggested by him.

53. The other string to the bow of this argument is that the impugned Regulation would be worked in such a manner that the service provider would be liable to pay only when it is found that it is at fault. This again falls foul of the constitutional doctrine. In *Collector of Customs* v. *Nathella Sampathu Chetty*[16], this Court held: (SCR pp. 825-26 : AIR p. 332, para 33)

"*33*. The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. *The converse must also follow that a statute which is otherwise invalid as being unreasonable cannot be*

16 (1962) 3 SCR 786 : AIR 1962 SC 316 : (1962) 1 Cri LJ 364

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 40 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

saved by its being administered in a reasonable manner. The constitutional validity of the statute would have to be determined on the basis of its provisions and on the ambit of its operation as reasonably construed. If so judged, it passes the test of reasonableness, possibility of the powers conferred being improperly used is no ground for pronouncing the law itself invalid and similarly if the law properly interpreted and tested in the light of the requirements set out in Part III of the Constitution does not pass the test it cannot be pronounced valid merely because it is administered in a manner which might not conflict with the constitutional requirements." (emphasis supplied)

54. This statement of the law applies on all fours to the facts of the present case, and is a complete answer to the Attorney General's contention that the impugned Regulation would be administered so that the service provider would be liable under it only when it is at fault for call drops.

55. The learned Attorney General has argued that the impugned Regulation accords with the Statement of Objects and Reasons of the TRAI Act, 1997. As has been pointed out by us, the original Act was amended in the year 2000, in which its Preamble was substituted. The substitution indicates that the policy of the 1997 Act, as amended by the 2000 Act, is to protect the interests of service providers and consumers of the telecom sector together, so that the orderly growth of the telecom sector is ensured thereby. We are afraid that the orderly growth of the telecom sector cannot be ensured or promoted by a manifestly arbitrary or unreasonable regulation which makes a service provider pay a penalty without it being necessarily at fault.

56. We were then told that the impugned Regulation was framed keeping in mind the small consumer, that is, a person who has a pre-paid SIM card with an average balance of Rs 10 at a time, and that the Regulation goes a long way to compensate such person. The motive for the Regulation may well be what the Attorney General says it is, but that does not make it immune from Article 14 and the twin tests of Article 19(6). The Authority framing the regulation must ensure that its means are as pure as its ends — only then will regulations made by it pass constitutional muster.

57. We were also told that huge profits were made by the service providers, and that the amount they would have to pay would not even be a flea bite compared to the profits they make, viewed in the background that they are not pouring in enough funds for infrastructure development. This was stoutly resisted by the appellants, pointing out that the so-called huge profits earned is misleading, as the figure of net debt is far greater than that of the revenue earned, and that huge sums had been pumped in for infrastructure development. Without going into the factual controversy thus presented, there are two answers to this submission. First and foremost, whether the service providers make profits or losses cannot be said to be relevant for determining whether the impugned Regulation is otherwise arbitrary or unreasonable. If the Attorney General were correct, then the converse proposition would also be true— namely, that even if all the service providers were suffering huge losses, then

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 41 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

such Regulation, since it makes them fork out crores of rupees and add to their losses, would have to be held to be unconstitutional. Assuming that six out of the twelve service providers make profits, and the other six make losses, the impugned Regulation cannot be held to be constitutional so far as those making a profit, and unconstitutional qua those making losses. And what if the same service provider makes a profit in one year and a loss in the succeeding year. Is the impugned Regulation unconstitutional in the first year and constitutional in the succeeding year? Obviously not. Secondly, it is always open to the Authority, with the vast powers given to it under the TRAI Act, to ensure, in a reasonable and non-arbitrary manner, that service providers provide the necessary funds for infrastructure development and deal with them so as to protect the interest of the consumer. Consequently, this submission is also without substance.

58. The learned Attorney General strongly relied upon a passage from a Constitution Bench judgment in *Prag Ice & Oil Mills* v. *Union of India*[17] to the following effect: (SCC pp. 498-99, paras 71-72)

> "*71*. Parliament having entrusted the fixation of prices to the expert judgment of the Government, it would be wrong for this Court, as was done by common consent in *Premier Automobiles*[18] to examine each and every minute detail pertaining to the governmental decision. The Government, as was said in *Permian Basin Area Rate Cases*[19], is entitled to make pragmatic adjustments which may be called for by particular circumstances and the price control can be declared unconstitutional only if it is patently arbitrary, discriminatory or demonstrably irrelevant to the policy which the legislature is free to adopt. The interest of the producer and the investor is only one of the variables in the "constitutional calculus of reasonableness" and courts ought not to interfere so long as the exercise of governmental power to fix fair prices is broadly within a "zone of reasonableness". If we were to embark upon an examination of the disparate contentions raised before us on behalf of the contending parties, we have no doubt that we shall have exceeded our narrow and circumscribed authority.
>
> *72*. Before closing, we would like to mention that the petitioners rushed to this Court too precipitately on the heels of the Price Control Order. Thereby they deprived themselves of an opportunity to show that in actual fact, the Order causes them irreparable prejudice. Instead, they were driven through their ill-thought haste to rely on speculative hypothesis in order to buttress their grievance that their right to property and the right to do trade was gone or was substantially affected. A little more patience, which could have been utilised to observe how the experiment functioned, might have paid better dividends."

17 (1978) 3 SCC 459

18 *Premier Automobiles Ltd.* v. *Union of India*, (1972) 4 SCC (N) 1 : AIR 1972 SC 1690

19 *Permian Basin Area Rate Cases, In re*, 1968 SCC OnLine US SC 87 : 20 L Ed 2d 312 : 390 US 747 (1968)

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 42 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

59. The observations made in the aforesaid judgment are wholly distinguishable. In the present case, if the appellants had not gone to court when they did, the Regulation would have affected their fundamental rights on and from 1-1-2016. Further, they would have been denied interim and/or other relief on the ground that they have not moved the Court without undue delay. Also, to say that the impugned Regulation is only an experimental measure that would last in its present form for six months is again wholly incorrect. The impugned Regulation begins to tick on and from 1-1-2016, in which case three rupees per day, for call drops made not exclusively owing to the fault of the service provider, would have to be paid. Further, it is only the Explanatory Memorandum which says that the Authority may review the aforesaid Regulation after working of the said Regulation after six months, and that too only if found to be necessary. Obviously, this would not mean that the aforesaid Regulation would necessarily be reviewed at all, even after six months. We are, therefore, unable to subscribe to the aforesaid submission.

60. We now come to a very important part of the submissions made on behalf of the appellants. The appellants have strongly contended that a 2% allowance of call drops on the basis of averaging call drops per month has been allowed to them by the Quality of Service Regulations already referred to hereinabove. This would amount to the Authority penalising the service provider even when it complies with another regulation made under the same source of power, and for this reason alone, the impugned Regulation must be held to be bad as being manifestly arbitrary. The learned Attorney General refuted this submission in two ways. First, he argued that Quality of Service Regulations and regulations made to benefit consumers must be viewed separately, as they are distinct regulations in parallel streams. He also argued that the 2% average allowance for call drops is different and distinct from paying compensation for call drops inasmuch as, conceivably, in a given set of facts, call drops may take place extensively in a given sector but not in other sectors so that an average of 2% per month is yet maintained, but the service provider would be penalised as it has not been able to maintain a 3% standard laid down qua deficiency of service in individual towers leading to call drops. However, the persons who suffer in the sector in which call drops are many and frequent would then have no protection. We are afraid neither of these reasons avails the Authority. First and foremost, the 2009 Quality of Service Regulations are made under Section 11(1)(*b*)(*v*), which is the very section which is claimed to be the source of the impugned Regulation. Secondly, both the Regulations deal with the same subject-matter — namely, call drops, and both the Regulations are made in the interest of the consumer. If an average of 2% per month is allowable to every service provider for call drops, and it is the admitted position that all service providers before us, short of Aircel, and that too in a very small way, have complied with the standard, penalising a service provider who complies with another Regulation framed with reference to the same source of power would itself be manifestly arbitrary and would render the Regulation to be at odds with both Articles 14 and 19(1)(*g*).

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 43 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

61. In this regard, it would be of assistance to note what this Court held in *Lord Krishna Sugar Mills Ltd.* v. *Union of India*[20]: (SCR p. 56 : AIR p. 1132, para 26)

> "*26*. It is, however, contended that though one can look at the surrounding circumstances, it is not open to the Court to examine other laws on the subject, unless those laws be incorporated by reference. In our opinion, this is a fallacious argument. *The Court in judging the reasonableness of a law, will necessarily see, not only the surrounding circumstances but all contemporaneous legislation passed as part of a single scheme. The reasonableness of the restriction and not of the law has to be found out, and if restriction is under one law but countervailing advantages are created by another law passed as part of the same legislative plan, the Court should not refuse to take that other law into account.*" (emphasis supplied)

62. In view of the aforesaid, it is clear that the Quality of Service Regulations and the Consumer Regulations must be read together as part of a single scheme in order to test the reasonableness thereof. The countervailing advantage to service providers by way of the allowance of 2% average call drops per month, which has been granted under the 2009 Quality of Service Regulations, could not have been ignored by the impugned Regulation so as to affect the fundamental rights of the appellants, and having been so ignored, would render the impugned Regulation manifestly arbitrary and unreasonable.

63. Secondly, no facts have been shown to us which would indicate that a particular area would be filled with call drops thanks to the fault on the part of the service providers in which consumers would be severely inconvenienced. The mere ipse dixit of the learned Attorney General, without any facts being pleaded to this effect, cannot possibly make an unconstitutional regulation constitutional. We, therefore, hold that a strict penal liability laid down on the erroneous basis that the fault is entirely with the service provider is manifestly arbitrary and unreasonable. Also, the payment of such penalty to a consumer who may himself be at fault, and which gives an unjustifiable windfall to such consumer, is also manifestly arbitrary and unreasonable. In the circumstances, it is not necessary to go into the appellants' submissions that call drops take place because of four reasons, three of which are not attributable to the fault of the service provider, which includes sealing and shutting down towers by municipal authorities over which they have no control, or whether they are attributable to only two causes, as suggested by the Attorney General, being network-related causes or user-related causes. Equally, it is not necessary to determine finally as to whether the reason for a call drop can technologically be found out and whether it is a network-related reason or a user-related reason.

64. In *Shree Bhagwati Steel Rolling Mills* v. *CCE*[21], Rules 96-ZO, 96-ZP and 96-ZQ of the Central Excise Rules, 1994, which consisted inter alia of

20 (1960) 1 SCR 39 : AIR 1959 SC 1124
21 (2016) 3 SCC 643

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 44 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

penalty provisions, were struck down by this Court. One of the reasons for striking down the aforesaid Rules is that a mandatory penalty became leviable despite the fact that fault on the part of the assessee could not be established. This Court held: (SCC p. 664, para 35)

> "*35.* … It is also correct in saying that there may be circumstances of force majeure which may prevent a bona fide assessee from paying the duty in time, and on certain given factual circumstances, despite there being no fault on the part of the assessee in making the deposit of duty in time, a mandatory penalty of an equivalent amount of duty would be compulsorily leviable and recoverable from such assessee. This would be extremely arbitrary and violative of Article 14 for this reason as well. Further, we agree with the High Court in stating that this would also be violative of the appellant's fundamental rights under Article 19(1)(*g*) and would not be saved by Article 19(6), being an unreasonable restriction on the right to carry on trade or business. Clearly the levy of penalty in these cases of a mandatory nature for even one day's delay, which may be beyond the control of the assessee, would be arbitrary and excessive."

65. In the present case, also, a mandatory penalty is payable by the service provider for call drops that may take place which are not due to its fault, and may be due to the fault of the recipient of the penalty, which is violative of Articles 14 and 19(1)(*g*).

66. The reason given in the Explanatory Memorandum for compensating the consumer is that the compensation given is only notional. The very notion that only notional compensation is awarded, is also entirely without basis. A consumer may well suffer a call drop after 3 or 4 seconds in a voice call. Whereas the consumer is charged only 4 or 5 paise for such dropped call, the service provider has to pay a sum of rupee one to the said consumer. This cannot be called notional at all. It is also not clear as to why the Authority decided to limit compensation to three call drops per day or how it arrived at the figure of Re 1 to compensate inconvenience caused to the consumer. It is equally unclear as to why the calling party alone is provided compensation because, according to the Explanatory Memorandum, inconvenience is suffered due to the interruption of a call, and such inconvenience is suffered both by the calling party and the person who receives the call. The receiving party can legitimately claim that his inconvenience when a call drops, is as great as that of the calling party. And the receiving party may need to make the second call, in which case he receives nothing, and the calling party receives Re 1 for the additional expense made by the receiving party. All this betrays a complete lack of intelligent care and deliberation in framing such a regulation by the Authority, rendering the impugned Regulation manifestly arbitrary and unreasonable.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 45 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

67. However, the learned Attorney General referred to a recent judgment being *DSC-Viacon Ventures (P) Ltd.* v. *Lal Manohar Pandey*[22]. He referred to para 23 in order to show that a certain amount of guesswork is unavoidable in matters of this nature.

68. The context in which this statement occurs in para 23 is very different from the present context. This Court in *DSC-Viacon Ventures (P) Ltd.*[22] held that a toll can only be collected for maintaining a road. The patches in which the road is not properly maintained should reduce proportionately the amount of toll that is to be paid. As there was no data in that case to indicate the extent of road length and the resultant inconvenience to users of the road, a certain amount of guesswork was said to be unavoidable. The present is a case in which we are not informed as to how rupee one is computed, how three call drops per day has been arrived at, or why the calling party alone is provided compensation. These matters go out of mere guesswork, and into the realm of unreasonableness, as obviously, as has been held by us, there was no intelligent care and deliberation before any of these parameters have been fixed.

69. We have already seen that the impugned Regulation is dated 16-10-2015, which was to come into force only on 1-1-2016. We have been shown a technical paper issued by the same Authority on 13-11-2015 i.e. a few days after the impugned Regulation, in which the Authority has itself recognised that 36.9% of call drops take place because of the fault at the consumer's end. Instead of having a relook at the problem in the light of the said technical paper, the Authority has gone ahead with the impugned Regulation, which states that the said Regulation has been brought into force because of deficiency of service by service providers leading to call drops. The very basis of this statement contained in the Explanatory Memorandum to the impugned Regulation is found by the selfsame Authority to be incorrect only a few days after publishing the impugned Regulation. This itself shows the manifest arbitrariness on the part of TRAI, which has not bothered to have a relook into the said problem. For all the aforesaid reasons, we find that the impugned Regulation is manifestly arbitrary and therefore violative of Article 14, and is an unreasonable restriction on the right of the appellants' fundamental right under Article 19(1)(*g*) to carry on business, and is therefore struck down as such.

70. Viewed at from a slightly different angle it is clear that if an individual consumer were to go to the consumer forum for compensation for call drops, he would have to prove that the call drop took place due to the fault of the service provider. He would further have to prove that he has suffered a monetary loss for which he has to be compensated, which the Explanatory Memorandum itself says is impossible to compute. Thus, the impugned Regulation completely avoids the adjudicatory process, and legislatively lays down a penal consequence to a service provider for a call drop taking place without the consumer being able to prove that he is not himself responsible for such call drop and without proof of any actual monetary loss. Whereas

22 (2015) 15 SCC 509

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 46 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

individual consumers, either before the Consumer Forum, or in a dispute as a group with service providers before TRAI, would fail in an action to recover compensation for call drops, yet a statutory penalty is laid down, applicable legislatively, and without any adjudication. This again makes the impugned Regulation manifestly arbitrary and unreasonable.

71. We have seen that the 2000 Amendment has taken away adjudicatory functions from TRAI, leaving it with administrative and legislative functions. By Section 14 of the Act, adjudicatory functions have been vested in an Appellate Tribunal, where disputes between a group of consumers and the service providers are to be adjudicated by the Appellate Tribunal. In stark contrast, under the scheme of the Electricity Act, 2003, the Central Electricity Regulatory Commission and the various State Electricity Regulatory Commissions have to discharge legislative, administrative and quasi-judicial functions. This is clear on a reading of Section 79(1)(*f*) and Section 86(1)(*f*) of the Electricity Act, which are set out hereinbelow:

> "**79.** ***Functions of Central Commission***.—(1) The Central Commission shall discharge the following functions, namely—
>
> * * *
>
> (*f*) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (*a*) to (*d*) above and to refer any dispute for arbitration;
>
> * * *
>
> **86.** ***Functions of State Commission***.—(1) The State Commission shall discharge the following functions, namely—
>
> * * *
>
> (*f*) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration."

72. Secondly, as part of the adjudicatory process, compensation can be paid to an affected person if a licensee fails to meet the standards prescribed without prejudice to any penalty which may be imposed or prosecution which may be initiated. This takes place under Section 57 of the said Act, which reads as under:

> "**57.** ***Standards of performance of licensee***.—(1) The appropriate Commission may, after consultation with the licensees and persons likely to be affected, specify standards of performance of a licensee or a class of licensees.
>
> (2) If a licensee fails to meet the standards specified under sub-section (1), without prejudice to any penalty which may be imposed or prosecution be initiated, he shall be liable to pay such compensation to the person affected as may be determined by the appropriate Commission:
>
> Provided that before determination of compensation, the licensee concerned shall be given a reasonable opportunity of being heard.
>
> (3) The compensation determined under sub-section (2) shall be paid by the licensee concerned within ninety days of such determination."

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 47 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

73. Obviously, when such compensation is to be paid to a person who is affected by breach of a standard of quality required under the Act, such compensation can only be for actual loss suffered, and only as a result of fault of the service provider being established before a quasi-judicial tribunal. This may be notwithstanding the fact that the service provider otherwise meets the average of 2% call drops per month allowed to him by the 2009 Quality of Service Regulations. This is for the reason that once fault and actual loss suffered are established before a quasi-judicial tribunal, it would not be open to plead, on the facts of an individual case, that an overall standard of performance has been met. For this reason also, a legislatively pre-determined penalty, without fault or loss being established by evidence before a quasi-judicial authority, and where the cause of a call drop may be because of the consumer himself, renders the impugned Regulation manifestly arbitrary and unreasonable.

Modification of licence condition by impugned Regulation

74. The appellants have also argued that the impugned Regulation seeks to modify the licence conditions, and the licence conditions being a contract between the service provider and the consumer, such conditions can be modified only where the statute contains language by which an authority is empowered to disregard an agreement between the parties. It will be seen that Section 11(1)(*b*)(*ii*), which has been set out hereinabove, expressly contains such language and therefore states that the terms and conditions of interconnectivity between the service providers may be fixed notwithstanding anything contained in the terms and conditions of the licence granted before the commencement of the TRAI (Amendment) Act, 2000.

75. The same kind of language is contained in Section 402(*d*) of the Companies Act, 1956, which reads as follows:

> "**402.** ***Powers of Tribunal on application under Section 397 or 398.*** —Without prejudice to the generality of the powers of the Tribunal under Section 397 or 398, any order under either section may provide for—
>
> * * *
>
> (*d*) the termination, setting aside or modification of any agreement, howsoever arrived at, between the company on the one hand, and any of the following persons, on the other, namely—
>
> (*i*) the managing director,
>
> (*ii*) any other director,
>
> (*iii*) and (*iv*) * * *
>
> (*v*) the manager,
>
> upon such terms and conditions as may, in the opinion of the Tribunal be just and equitable in all the circumstances of the case."

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 48 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

76. The said section is now contained in Section 242(2)(*e*) of the Companies Act, 2013:

> "**242.** ***Powers of Tribunal.***—(1) * * *
>
> (2) Without prejudice to the generality of the powers under sub-section (1), an order under that sub-section may provide for—
>
> * * *
>
> (*e*) the termination, setting aside or modification, of any agreement, howsoever arrived at, between the company and the managing director, any other director or manager, upon such terms and conditions as may, in the opinion of the Tribunal, be just and equitable in the circumstances of the case."

77. We were also referred to Section 27(*d*) of the Competition Act, 2002, in this behalf which reads as follows:

> "**27.** ***Orders by Commission after inquiry into agreements or abuse of dominant position.***—Where after inquiry the Commission finds that any agreement referred to in Section 3 or action of an enterprise in a dominant position, is in contravention of Section 3 or Section 4, as the case may be, it may pass all or any of the following orders, namely—
>
> * * *
>
> (*d*) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;"

78. In *Union of India* v. *Assn. of Unified Telecom Service Providers of India*[23], this Court held: (SCC p. 564, para 40)

> "*40*. A Constitution Bench of this Court in *State of Punjab* v. *Devans Modern Breweries Ltd.*[24] relying on *Har Shankar case*[25] and *Panna Lal* v. *State of Rajasthan*[26] has held in para 121 at p. 106 that issuance of liquor licence constitutes a contract between the parties. Thus, once a licence is issued under the proviso to sub-section (1) of Section 4 of the Telegraph Act, the licence becomes a contract between the licensor and the licensee."

79. Having regard to the above, it is clear that the licence conditions, which are a contract between the service providers and consumers, have been amended to the former's disadvantage by making the service provider pay a penalty for call drops despite there being no fault which can be traceable exclusively to the service provider, and despite the service provider maintaining the necessary standard of quality required of it — namely, adhering to the limit of an average of 2% of call drops per month. We have already seen that Clause 28 of the licence requires the licensee to ensure that the quality of

23 (2011) 10 SCC 543
24 (2004) 11 SCC 26
25 *Har Shankar* v. *Excise and Taxation Commr.*, (1975) 1 SCC 737
26 (1975) 2 SCC 633

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 49 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

service standards, as prescribed by TRAI, are adhered to, and that the impugned Regulation does not lay down quality of service standards. This being so, it is clear that the laying down of a penalty dehors Clause 28, which, as we have seen, also requires establishing of fault of the service provider when it does not conform to a quality of service standard laid down by TRAI, would amount to interference with the licence conditions of the service providers without authority of law. On this ground also, therefore, the impugned Regulation deserves to be struck down.

Transparency

80. Section 11(4) of the Act requires that the Authority shall ensure transparency while exercising its powers and discharging its functions. "Transparency" has not been defined anywhere in the Act. However, we find, in a later parliamentary enactment, namely, the Airports Economic Regulatory Authority of India Act, 2008, that Section 13 deals with the functions of the Airports Economic Regulatory Authority (which is an Authority which has legislative and administrative functions). "Transparency" is defined, by sub-section (4), as follows:

The Airports Economic Regulatory Authority of India Act, 2008

"**13.** ***Functions of Authority***.—(1)-(3) * * *

(4) The Authority shall ensure transparency while exercising its powers and discharging its functions, inter alia—

(*a*) by holding due consultations with all stakeholders with the airport;

(*b*) by allowing all stakeholders to make their submissions to the authority; and

(*c*) by making all decisions of the authority fully documented and explained."

81. This definition of "transparency" provides a good working test of "transparency" referred to in Section 11(4) of the TRAI Act.

82. In fact, a judgment of the Court of Appeal in England, being *R.* v. *North and East Devon Health Authority, ex p Coughlan*[27], puts the meaning of "consultation" rather well as follows: (QB p. 258 C-D, para 108)

"*108.* It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; *and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.* ..." (emphasis supplied)

27 2001 QB 213 : (2000) 2 WLR 622 (CA)

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 50 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

No doubt in the facts of the present case, the Authority did hold due consultations with all stakeholders and did allow all stakeholders to make their submissions to the Authority. However, we find no discussion or reasoning dealing with the arguments put forward by the service providers, that call drops take place for a variety of reasons, some of which are beyond the control of the service provider and are because of the consumer himself. Consequently, we find that the conclusion that service providers are alone to blame and are consequently deficient in service when it comes to call drops is not a conclusion which a reasonable person can reasonably arrive at.

83. We are cognizant of the fact that ordinarily legislative functions do not require that natural justice be followed. However, it has been recognised in some of the judgments dealing with this aspect that natural justice need not be followed except where the statute so provides.

84. In *Union of India* v. *Cynamide India Ltd.*[28] this Court held: (SCC pp. 734-35, para 5)

> "*5*. The second observation we wish to make is, legislative action, plenary or subordinate, is not subject to rules of natural justice. In the case of parliamentary legislation, the proposition is self-evident. In the case of subordinate legislation, it may happen that Parliament may itself provide for a notice and for a hearing—there are several instances of the legislature requiring the subordinate legislating authority to give public notice and a public hearing before say, for example, levying a municipal rate—in which case the substantial non-observance of the statutorily prescribed mode of observing natural justice may have the effect of invalidating the subordinate legislation. The right here given to rate payers or others is in the nature of a concession which is not to detract from the character of the activity as legislative and not quasi-judicial. But, where the legislature has not chosen to provide for any notice or hearing, no one can insist upon it and it will not be permissible to read natural justice into such legislative activity."

85. Similarly, in *M.R.F. Ltd.* v. *State of Kerala*[29], this Court held: (SCC p. 236, paras 23-24)

> "*23*. The learned counsel for the appellants contended that before raising the national and festival holidays from their original number under the Parent Act to the number of days contemplated by the amending Act, the industries or their representatives should have been given an opportunity of a hearing. This argument is wholly untenable. The principles of natural justice cannot be imported in the matter of legislative action. If the legislature in exercise of its plenary power under Article 245 of the Constitution, proceeds to enact a law, those who would be affected by that law cannot legally raise a grievance that before the law was made, they should have been given an opportunity of a hearing.

28 (1987) 2 SCC 720
29 (1998) 8 SCC 227 : 1999 SCC (L&S) 1

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 51 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

24. This principle may, in limited cases, be invoked in the case of subordinate legislation specially where the main legislation itself lays down that before the subordinate legislation is made, a public notice shall be given and objections shall be invited as is usually the case, for example, in the making of municipal bye-laws. But the principle of natural justice, including the right of hearing, cannot be invoked in the making of law either by Parliament or by the State Legislature."

86. The question of transparency raises a more fundamental question, namely, that of openness in governance. We find that the Right to Information Act, 2005 has gone a long way to strengthen democracy by requiring that the Government be transparent in its actions, so that an informed citizenry is able then to contain corruption, and hold the Governments and their instrumentalities accountable to the people of India. The Preamble to the said Act, in ringing terms, states:

"... Whereas the Constitution of India has established democratic Republic;

And whereas democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;

And whereas revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;

And whereas it is necessary to harmonise these conflicting interests while preserving the paramountcy of the democratic ideal;

Now, therefore, it is expedient to provide for furnishing certain information to citizens who desire to have it." (emphasis supplied)

87. We find that under Section 4(1) every public authority is not only to maintain all its records duly catalogued and indexed but is to publish, within 120 days from the enactment of the said Act, the procedure followed by it in its decision-making process, which includes channels of supervision and accountability. Section 4(1)(*b*)(*iii*) states:

"**4.** ***Obligations of public authorities***.—(1) Every public authority shall—

* * *

(*b*) publish within one hundred and twenty days from the enactment of this Act—

* * *

(*iii*) the procedure followed in the decision-making process, including channels of supervision and accountability;"

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 52 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

88. Under Section 8, there is no obligation to give to any citizen information disclosure of which would prejudicially affect the sovereignty and integrity of India, the security of the State, etc. Subject, therefore, to well-defined exceptions, openness in governance is now a legislatively established fact. In fact, in *Chief Information Commr.* v. *State of Manipur*[30], this Court had occasion to deal with the aforesaid Act in the following terms: (SCC pp. 6-9, paras 5-16)

> "*5*. Before dealing with the controversy in this case, let us consider the object and purpose of the Act and the evolving mosaic of jurisprudential thinking which virtually led to its enactment in 2005.
>
> *6*. As its Preamble shows, the Act was enacted to promote transparency and accountability in the working of every public authority in order to strengthen the core constitutional values of a democratic republic. *It is clear that Parliament enacted the said Act keeping in mind the rights of an informed citizenry in which transparency of information is vital in curbing corruption and making the Government and its instrumentalities accountable*. The Act is meant to harmonise the conflicting interests of the Government to preserve the confidentiality of sensitive information with the right of citizens to know the functioning of the governmental process in such a way as to preserve the paramountcy of the democratic ideal. *The Preamble would obviously show that the Act is based on the concept of an open society*.
>
> *7*. On the emerging concept of an "open Government", about more than three decades ago, the Constitution Bench of this Court in *State of U.P.* v. *Raj Narain*[31] speaking through Mathew, J. held: (SCC p. 453, para 74)
>
> > '*74*. … The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. **The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security.**; (Ed.: See *New York Times Co.* v. *United States*[32].) To cover with veil of secrecy, the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired.'

30 (2011) 15 SCC 1
31 (1975) 4 SCC 428
* **Ed.**: The matter between two asterisks has been emphasised in *Chief Information Commr. case*, (2011) 15 SCC 1.
32 1971 SCC OnLine US SC 147 : 29 L Ed 2d 822 : 403 US 713 (1971)

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 53 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

8. Another Constitution Bench in *S.P. Gupta* v. *Union of India*[33] relying on the ratio in *Raj Narain*[31] held: (*S.P. Gupta case*[33], SCC p. 275, para 67)

'*67*. … The concept of an open Government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(*a*). **Therefore, disclosure of information in regard to the functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands.** The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest.'

9. It is, therefore, clear from the ratio in the above decisions of the Constitution Bench of this Court that the right to information, which is basically founded on the right to know, is an intrinsic part of the fundamental right to free speech and expression guaranteed under Article 19(1)(*a*) of the Constitution. The said Act was, thus, enacted to consolidate the fundamental right of free speech.

10. In *Ministry of Information & Broadcasting, Govt. of India* v. *Cricket Assn. of Bengal*[34] this Court also held that right to acquire information and to disseminate it is an intrinsic component of freedom of speech and expression. (See p. 213, para 43 of the Report.)

11. Again in *Reliance Petrochemicals Ltd.* v. *Indian Express Newspapers Bombay (P) Ltd.*[35] this Court recognised that the right to information is a fundamental right under Article 21 of the Constitution. This Court speaking through Sabyasachi Mukharji, J., as His Lordship then was, held: (SCC p. 613, para 34)

'*34*. … We must remember that the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of our Constitution. That right has reached new dimensions and urgency. That right puts greater responsibility upon those who take upon themselves the responsibility to inform.'

12. In *People's Union for Civil Liberties* v. *Union of India*[36] this Court reiterated, relying on the aforesaid judgments, that right to information is

33 1981 Supp SCC 87
31 *State of U.P.* v. *Raj Narain*, (1975) 4 SCC 428
* **Ed.**: The matter between two asterisks has been emphasised in *Chief Information Commr. case*, (2011) 15 SCC 1.
34 (1995) 2 SCC 161
35 (1988) 4 SCC 592
36 (2004) 2 SCC 476

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 54 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

a facet of the right to freedom of "speech and expression" as contained in Article 19(1)(*a*) of the Constitution of India and also held that right to information is definitely a fundamental right. In coming to this conclusion, this Court traced the origin of the said right from the Universal Declaration of Human Rights, 1948 and also Article 19 of the International Covenant on Civil and Political Rights, which was ratified by India in 1978. This Court also found a similar enunciation of principle in the Declaration of European Convention for the Protection of Human Rights (1950) and found that the spirit of the Universal Declaration of 1948 is echoed in Article 19(1)(*a*) of the Constitution. (See paras 45, 46 and 47 at pp. 494-95 of the Report.)

13. The exercise of judicial discretion in favour of free speech is not only peculiar to our jurisprudence, the same is a part of the jurisprudence in all the countries which are governed by the rule of law with an independent judiciary. In this connection, if we may quote what Lord Acton said in one of his speeches:

> 'Everything secret degenerates, even the administration of justice; nothing is safe that does not show how it can bear discussion and publicity.'

14. It is, therefore, clear that a society which adopts openness as a value of overarching significance not only permits its citizens a wide range of freedom of expression, it also goes further in actually opening up the deliberative process of the Government itself to the sunlight of public scrutiny.

15. Frankfurter, J. also opined:

> 'The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilisation. "We live by symbols." The flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution.'

16. Actually the concept of active liberty, which is structured on free speech, means sharing of a nation's sovereign authority among its people. Sovereignty involves the legitimacy of a governmental action. And a sharing of sovereign authority suggests intimate correlation between the functioning of the Government and common man's knowledge of such functioning. (*Active Liberty* by Stephen Breyer, p. 15.)" (emphasis supplied)

89. In another context also this Court has emphasised the importance of openness of governance. In *Global Energy Ltd.* v. *Central Electricity Regulatory Commission*[37], this Court stated: (SCC p. 589, para 71)

> "*71*. The law sometimes can be written in such a subjective manner that it affects the efficiency and transparent function of the Government.

37 (2009) 15 SCC 570

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 55 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

If the statute provides for pointless discretion to agency, it is in essence demolishing the accountability strand within the administrative process as the agency is not under obligation from an objective norm, which can enforce accountability in decision-making process. *All law-making, be it in the context of delegated legislation or primary legislation, has to conform to the fundamental tenets of transparency and openness on one hand and responsiveness and accountability on the other*. These are fundamental tenets flowing from due process requirement under Article 21, equal protection clause embodied in Article 14 and fundamental freedoms clause ingrained under Article 19. A modern deliberative democracy cannot function without these attributes." (emphasis supplied)

90. We have been referred to the US Administrative Procedure Act, Section 553 of which states as follows:

"***5 USCA Section 553***

553. ***Rule making***.—(*a*) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(*b*) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule-making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this sub-section does not apply—

(*A*) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(*B*) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(*c*) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 56 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

required by statute to be made on the record after opportunity for an agency hearing, Sections 556 and 557 of this title apply instead of this sub-section.

(*d*) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(*e*) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

91. In *Corpus Juris Secundum (March 2016 Update)* it is stated:

"Under the informal rule-making requirements of the Federal Administrative Procedure Act, after a federal administrative agency considers the relevant matter presented, it must incorporate in the rules adopted a concise general statement of their basis and purpose. The purpose of the requirement is to enable courts, which have the duty to exercise review, to be aware of the legal and factual framework underlying the agency's actions. *The requirement is a means of holding an agency accountable for administering the laws in a responsible manner, free from arbitrary conduct. The statement is not intended to be an abstract explanation addressed to an imaginary complaint but is intended, rather, to respond in a reasoned manner to the comments received, to explain how the agency resolved the significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule*. The statement must identify what major issues of policy were ventilated and why the agency reacted to them as it did and should enable a reviewing court to ascertain such matters. The statement must respond to the major comments received, explain how they affected the regulation, and, where an old regulation is being replaced, explain why the old regulation is no longer desirable.

Agencies have a good deal of discretion in expressing the basis of a rule. The requirement is not to be interpreted over literally, but it should not be stretched into a mandate to refer to all specific issues raised in the comments on the proposed regulations. Although an agency must genuinely consider comments it receives from interested parties, there is no requirement that an agency discuss in great detail all comments, especially those which are frivolous or repetitive. *Although the agency need not address every comment received, it must respond in a reasoned manner to those that raise significant problems, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule*. Conclusory statements will not fulfil the administrative agency's duty to incorporate in adopted rules a concise general statement of their basis and purpose. *The agency must articulate a satisfactory explanation for its action, including a rational*

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 57 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

connection between the facts it found and the choices it made. Under some circumstance, agencies must identify specific studies or data that they rely upon in arriving at their decision to adopt a rule.

Regulations which lack a statement of basis and purpose may be upheld if the basis and purpose are obvious. Moreover, the failure of an agency to incorporate the statement does not render a rule ineffective as to parties to litigation who had knowledge of the rule.

Despite the statutory language mandating that the statement of basis of purposes be 'incorporate[d] in the rules adopted,' the statement of basis and purpose does not have to be published at precisely the same moment as the rules. Rather, the rules and statement need only be published close enough together in time so that there is no doubt that the statement accompanies, rather than rationalizes, the rules." (emphasis supplied)

92. We find that, subject to certain well-defined exceptions, it would be a healthy functioning of our democracy if all subordinate legislation were to be "transparent" in the manner pointed out above. Since it is beyond the scope of this judgment to deal with subordinate legislation generally, and in particular with statutes which provide for rule making and regulation making without any added requirement of transparency, we would exhort Parliament to take up this issue and frame a legislation along the lines of the US Administrative Procedure Act (with certain well-defined exceptions) by which all subordinate legislation is subject to a transparent process by which due consultations with all stakeholders are held, and the rule or regulation-making power is exercised after due consideration of all stakeholders' submissions, together with an explanatory memorandum which broadly takes into account what they have said and the reasons for agreeing or disagreeing with them. Not only would such legislation reduce arbitrariness in subordinate legislation-making, but it would also conduce to openness in governance. It would also ensure the redressal, partial or otherwise, of grievances of the stakeholders concerned *prior* to the making of subordinate legislation. This would obviate, in many cases, the need for persons to approach courts to strike down subordinate legislation on the ground of such legislation being manifestly arbitrary or unreasonable.

93. In the present case, we find that the High Court judgment[1] is flawed for several reasons. The judgment is not correct when it says that there can be no dispute that the impugned Regulation has been made to ensure quality of service extended to consumers by service providers. As has been pointed out hereinabove, the impugned Regulation does not lay down any quality of service —what it does is to penalise service providers even though they conform to the 2% standard laid down by the Quality of Service Regulations, 2009. In holding that the impugned Regulation therefore conforms to Section 11(1)(*b*)(*v*), the judgment is plainly incorrect. Similarly, the finding that notional compensation is given, and that therefore no penalty is imposed, is also wrong and set aside for the reasons given by us hereinabove.

1 *Cellular Operators Assn. of India* v. *Telecom Regulatory Authority of India*, 2016 SCC OnLine Del 1388 : (2016) 228 DLT 491

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 58 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

94. The finding of the High Court that a transparent process was followed by TRAI in making the impugned Regulation is only partly correct. While it is true that all stakeholders were consulted, but unfortunately nothing is disclosed as to why service providers were incorrect when they said that call drops were due to various reasons, some of which cannot be said to be because of the fault of the service provider. Indeed, the Regulation, in assuming that every call drop is a deficiency of service on the part of the service provider, is plainly incorrect.

95. Further, the High Court judgment, when it speaks of the technical paper of 13-11-2015, seems to have mixed it up with the consultation paper dated 4-9-2015 referred to in the Explanatory Memorandum to the impugned Regulation. The judgment has entirely missed the fact that the technical paper of 13-11-2015 unequivocally states that the causes for call drops are many and are often beyond the control of service providers and attributable to the extent of 36.9% to the consumers themselves. The judgment is also incorrect when it says that 100% performance is not demanded from service providers when call drops are made. We have already pointed out that the 2% standard has admittedly been met by almost all the service providers, and this being so, even if the very first call drop and all other subsequent call drops are made within the network of a service provider and are within the parameters of 2%, yet the penal consequence of the amended Regulation must follow.

96. The High Court judgment is also incorrect in stating that the impugned Regulation has attempted to balance the interest of service providers by limiting call drops to be compensated to only three and by limiting compensation to only the calling and not the receiving consumer. We have already pointed out that a penalty that is imposed without any reason either as to the number of call drops made being three, and only to the calling consumer, far from balancing the interest of consumers and service providers, is manifestly arbitrary, not being based on any factual data or reason.

97. We also find that when the service provider argued that it was being penalised despite being within the tolerance limit of 2%, the answer given by the High Court is disingenuous, to say the least, when the High Court says that 2% is a quality parameter for the entire network as opposed to payment of compensation to an individual consumer. We are unable to appreciate the aforesaid reasoning. As has been held by us above, the two sets of Regulations have to be considered together when the impugned Regulation is being tested on the ground of violation of fundamental rights. Also, the High Court did not advert to a large number of other submissions made by the appellants before them and/or answer them correctly in law.

98. As a result, therefore, we set aside the judgment of the High Court and allow these appeals, declaring that the impugned Regulation is ultra vires the TRAI Act and violative of the appellant's fundamental rights under Articles 14 and 19(1)(*g*) of the Constitution.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 1 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

(1996) 5 Supreme Court Cases 281

(BEFORE KULDIP SINGH, S. SAGHIR AHMAD AND B.N. KIRPAL, JJ.)

INDIAN COUNCIL FOR ENVIRO-LEGAL ACTION .. Petitioner;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Writ Petition (C) No. 664 of 1993†, decided on April 18, 1996

A. Constitution of India — Arts. 32 & 226, 21, 48-A and 51-A — PIL — Ecological fragility — Non-compliance with anti-pollution laws — Govt. apathy — Orders and directions are issued by court for implementation and enforcement of the laws to protect the fundamental right to life of the people — Passing such orders and directions do not amount to usurpation of legislative or executive function — They are issued by the court in discharge of its judicial function — However, Court is not concerned with day-to-day enforcement of the law which is the function of the executive — High Courts being acquainted with the local conditions, they would be in a better position of ensure proper implementation of the law — PIL complaining ecological degradation in coastal areas — Notification issued by Central Govt. under R. 5(3)(d) of Environment Protection Rules, 1986 after detailed study of relevant issues — Non-compliance with the notification alleged and subsequent amendments to the notification challenged on ground that the same resulted in defeating the intent of the notification — Contentions directed to be raised before respective High Courts — Meanwhile no development should take place in 'no-development zone' in the coastal area — Environment Protection Act, 1986, S. 3(1) and (2)(v) — Environment Protection Rules, 1986, R. 5(3)(d)

B. Ecology — Generally — Anti-pollution laws — Proper implementation and enforcement of, is of prime importance to avoid ecological degradation and its adverse effects — Jurisprudence — Law — Enforcement of

C. Environment Protection Rules, 1986 — R. 5(3)(d) — Central Govt.'s notification under — Presumed to have been issued after due deliberations and study — While issuing such notification Govt. should endeavour to strike a balance between ecological interests and economic, social and cultural interests — Industrial development at the cost of environmental degradation or environmental protection at the cost of industrial and economic growth not warranted

D. Jurisprudence — Law — Object and purpose of — Non-enforcement or condonation of violation of — Propriety — Rule of law — Public Interest Litigation — Seeking enforcement of laws — Maintainability — Constitution of India, Arts. 32 & 226, 51-A and 48-A

E. Constitution of India — Art. 226 — PIL — High Courts must shoulder greater responsibilities in taking up local issues of which they can have closer awareness and easy monitoring such as ecological matters in their respective States in the light of law laid down by the Supreme Court — This would ensure that the orders passed are effective and complied with — Ecology — PIL — Place of filing

The Central Government issued a notification dated 19-2-1991 ('the main Notification') in exercise of the powers conferred on it by clause (*d*) of sub-rule (3) of Rule 5 of the Environment Protection Rules, 1986. By this notification, it declared

† Under Article 32 of the Constitution of India

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 2 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

the coastal stretches of seas, bays, estuaries, creeks, rivers and backwaters which were influenced by tidal action (in the landward side) up to 500 metres from the High Tide Line ('HTL') and the land between Low Tide Line ('LTL') and HTL as Regulation Zones. With regard to this area, it imposed, with effect from the date of the said notification, various restrictions on the setting up and expansion of industries, operation or processes etc. in the said Regulation Zones. It was clarified that for the purposes of the main Notification, HTL was defined as the line up to which the highest high tide reaches at springtime. Subsequently, a Notification dated 18-8-1994 was issued making six amendments in the main Notification. These amendments were made after the receipt of the report of a committee, headed by Mr B.B. Vohra, which had been set up by the Central Government. There is no challenge to the validity of the main Notification. A writ petition by way of public interest litigation was filed alleging that there had been blatant violation of the main notification and industries were illegally being set up, thereby causing serious damage to the environment and ecology of the area. It was also submitted that the Ministry of Environment and Forests except for issuing the main Notification, had taken no steps to follow up its own directions contained in the main Notification. The validity of the Notification dated 18-8-1994 was also challenged. The main prayer in the writ petition was that the Supreme Court should issue appropriate writ, order or direction to the respondent so as to enforce the main Notification.

Held :

The main Notification was issued under Sections 3(1) and 3(2)(*v*) of the Environment Protection Act, presumably after a lot of study had been undertaken by the Government. Normally, such notifications are issued after a detailed study and examination of all relevant issues. In matters relating to environment, it may not always be possible to lay down rigid or uniform standards for the entire country. While issuing the notifications like the present, the Government has to balance various interests including economic, ecological, social and cultural. 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 and vice versa, but there should be development while taking due care and ensuring the protection of environment. This is sought to be achieved by issuing notifications like the present, relating to developmental activities being carried out in such a way so that unnecessary environmental degradation does not take place. In other words, in order to prevent ecological imbalance and degradation such developmental activity is sought to be regulated. (Paras 32 and 31)

Having issued the main Notification, no follow-up action was taken either by the coastal States and Union Territories or by the Central Government. The provisions of the main Notification appear to have been ignored and, possibly violated with impunity. There has been a complete laxity in the implementation of the Act and other related statutes. (Paras 27 and 45)

Enactment of a law, but tolerating its infringement, is worse than not enacting a law at all. The continued infringement of law, over a period of time, is made possible by adoption of such means which are best known to the violators of law. Continued tolerance of such violations of law not only renders legal provisions nugatory but such tolerance by the enforcement authorities encourages lawlessness and adoption of means which cannot, or ought not to, be tolerated in any civilized society. Law should not only be meant for the law-abiding but is meant to be obeyed by all for whom it has been enacted. A law is usually enacted because the legislature feels that

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 3 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

it is necessary. It is with a view to protect and preserve the environment and save it for the future generations and to ensure good quality of life that Parliament enacted the anti-pollution laws, namely, the Water Act, Air Act and the Environment (Protection) Act, 1986. These Acts and Rules framed and notification issued thereunder contain provisions which prohibit and/or regulate certain activities with a view to protect and preserve the environment. When a law is enacted containing some provisions which prohibit certain types of activities, then, it is of utmost importance that such legal provisions are effectively enforced. If a law is enacted but is not being voluntarily obeyed, then, it has to be enforced. Otherwise, infringement of law, which is actively or passively condoned for personal gain, will be encouraged which will in turn lead to a lawless society. Violation of anti-pollution laws not only adversely affects the existing quality of life but the non-enforcement of the legal provisions often results in ecological imbalance and degradation of environment, the adverse effect of which will have to be borne by the future generations. (Para 26)

With rapid industrialisation taking place, there is an increasing threat to the maintenance of the ecological balance. The general public is becoming aware of the need to protect environment. Even though, laws have been passed for the protection of environment, the enforcement of the same has been tardy, to say the least. With the governmental authorities not showing any concern with the enforcement of the said Acts, and with the development taking place for personal gains at the expense of environment and with disregard of the mandatory provisions of law, some public-spirited persons have been initiating public interest litigations. The legal position relating to the exercise of jurisdiction by the courts for preventing environmental degradation and thereby, seeking to protect the fundamental rights of the citizens, is now well settled by various decisions of this Court. (Para 41)

The primary effort of the court, while dealing with the environmental-related issues, is to see that the enforcement agencies, whether it be the State or any other authority, take effective steps for the enforcement of the laws. The courts, in a way, act as the guardian of the people's fundamental rights but in regard to many technical matters, the courts may not be fully equipped. Perforce, it has to rely on outside agencies for reports and recommendations whereupon orders have been passed from time to time. Even though, it is not the function of the court to see the day-to-day enforcement of the law, that being the function of the executive, but because of the non-functioning of the enforcement agencies, the courts as of necessity have had to pass orders directing the enforcement agencies to implement the law for the protection of the fundamental rights of the people. Passing of appropriate orders requiring the implementation of the law cannot be regarded as the court having usurped the functions of the legislature or the executive. The orders are passed and directions are issued by the court in discharge of its judicial function, namely, to see that if there is a complaint by a petitioner regarding the infringement of any constitutional or other legal right, as a result of any wrong action or inaction on the part of the State, then such wrong should not be permitted to continue.
(Paras 41 and 28)

For effective orders to be passed, so as to ensure that there can be protection of environment along with development, it becomes necessary for the court dealing with such issues to know about the local conditions. Such conditions in different parts of the country are supposed to be better known to the High Courts. The High Courts would be in a better position to ascertain facts and to ensure and examine the implementation of the anti-pollution laws where the allegations relate to the spreading of pollution or non-compliance of other legal provisions leading to the infringement of the anti-pollution laws. For a more effective control and monitoring of such laws, the High Courts have to shoulder greater responsibilities in tackling

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 4 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

such issues which arise or pertain to the geographical areas within their respective States. Even in cases which have ramifications all over India, where general directions are issued by the Supreme Court, more effective implementation of the same can, in a number of cases, be effected, if the High Courts concerned assume the responsibility of seeing to the enforcement of the laws and examine the complaints, mostly made by the local inhabitants, about the infringement of the laws and spreading of pollution or degradation of ecology. (Para 42)

There is a likelihood that there will be instances of infringement of the main Notification and also of the Management Plans, as and when framed, taking place in different parts of the country. Instead of agitating these questions before the Supreme Court, now that the general principles have been laid down and are well-established, it will be more appropriate that action with regard to such infringement even if they relate to the violation of fundamental rights, should first be raised before the High Court having territorial jurisdiction over the area in question It is expected that each High Court will deal with such issues urgently. Environmental law has now become a specialised field. In the decision which was taken at the United Nations Conference on Environment and Development held at Rio de Janeiro in June 1992 in which India had also participated, the States had been called upon to develop national laws regarding liability and compensation for the victims of pollution and other environmental damages. (Para 43)

Allegations relating to infringement of any Government notification should be filed in the High Courts having territorial jurisdiction and the High Courts should issue appropriate orders and directions. (Para 43)

There is 6000 kms long coastline of India. It is the responsibility of the coastal States and Union Territories in which these stretches exist to see that both the notifications are complied with and enforced Management Plans have to be prepared by the States and approved by the Central Government. If the said plans have been approved, the development can take place only in accordance therewith. Till the preparation and approval of the said plans by virtue of the provisions of the main Notification, no development in the coastal areas within the NDZ can take place. Therefore, it is in the interest of all concerned that the Management Plans are submitted and approved at the earliest. (Para 44)

With increasing threat to the environmental degradation taking place in different parts of the country, it may not be possible for any single authority to effectively control the same. Environmental degradation is best protected by the people themselves. In this connection, some of the non-governmental organisations (NGOs) and other environmentalists are doing singular service. Time has perhaps come when the Government can usefully draw upon the resources of such NGOs to help and assist in the implementation of the laws relating to protection of the environment. Under Section 3 of the Act, the Central Government has the power to constitute one or more authorities for the purposes of exercising and performing such powers and functions, including the power to issue directions under Section 5 of the Act of the Central Government as may be delegated to them. (Para 47)

Considering the fact that the Pollution Control Boards are not only overworked but simultaneously have a limited role to play insofar as it relates to controlling of pollution for the purpose of ensuring effective implementation of the notifications of 1991 and 1994, as also of the Management Plans, the Central Government should consider setting up under Section 3 of the Act, State Coastal Management Authorities in each State or zone and also a National Coastal Management Authority. (Para 47)

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 5 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

[Directions for the State and Central Governments and submission of reports passed. (Para 47)]

Indian Council for Enviro-Legal Action v. *Union of India*, (1995) 3 SCC 77, *referred to*

R-M/T/16136/C

Advocates who appeared in this case :

Ms Seema Midha and K.R. Rajesekaran, Advocates, for the Petitioner;

Ms H. Wahi, P.K. Manohar, S.K. Sinha, R.K. Mehta, K.L. Taneja, C.V.S. Rao, S.K. Mehta, A.S. Bhasme, Ms M. Karanjawala, V. Krishnamurthi, Vineet Kumar, K. Ram Kumar, A. Mariarputham, R. Sasiprabhu, P.N. Puri, Kh. Nobin Singh, Ms Indu Malhotra, Ms Meenakshi Arora, Sanjay Parikh, Anip Sachthey, H.K. Puri, S.N. Bhat and Ms Ruby Ahuja, Advocates, for the Respondents.

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

1. (1995) 3 SCC 77, *Indian Council for Enviro-Legal Action* v. *Union of India* 292*a*

ORDER

1. Concern for the protection of ecology and for preventing irreversible ecological damage to the coastal areas of the country has led to the filing of the present petition under Article 32 of the Constitution of India as a public interest litigation.

2. The main grievance in this petition is that a notification dated 19-2-1991 declaring coastal stretches as Coastal Regulation Zones (hereinafter referred to as 'the Regulation Zones') which regulates the activities in the said zones has not been implemented or enforced. This has led to continued degradation of ecology in the said coastal areas. There is also a challenge to the validity of the notification dated 18-8-1994 whereby the first notification dated 19-2-1991 has been amended, resulting in further relaxations of the provisions of the 1991 Notification and such relaxation, it is alleged, will help in defeating the intent of the main Notification itself.

3. The petitioner is a registered voluntary organisation working for the cause of environment protection in India. India has a coastline running into 6000 kms which has abundance of natural endowments, geographic attractions and natural beauty. According to the petitioner, these coastal areas are highly complex and have dynamic ecosystems, sensitive to development pressures. The stresses and pressure of high population growth, non-restrained development, lack of adequate infrastructure facilities for the resident population are stated to be some of the factors responsible for the decline in environmental quality in these areas. The developmental activities in the coastal areas are stated to cause short-term and long-term physical, chemical and biological changes that will and has caused damage to flora and fauna, public health and environment. It is further alleged that as a consequence of indiscriminate industrialisation and urbanisation, without the requisite pollution control systems, the coastal waters are highly polluted.

4. It is further the case of the petitioner that some of the coastal areas contained extensive groundwater resources and sometimes mineral resources, while in other areas, there are iron ore, oil and gas resources and mangrove forests. As a result of the impact of tidal waves and cyclones, mangrove forests are being increasingly destroyed, while some of the major

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 6 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

fishing areas in some of the coastal areas of the country are undergoing serious damage consequent to ecologically unsound development. Over-exploitation of groundwater in the coastal areas in places like Madras and Vishakhapatnam is stated to have resulted in growing intrusion of salt water from the sea to inland areas and fresh water aquifers previously used for drinking, agriculture and horticulture are getting highly damaged. Unplanned urbanisation and industrialisation in the coastal belts is stated to be causing fast disappearance of fertile agricultural lands, fruit gardens and energy plantations like casuarina trees, that serve as windbreakers and protect inland habitations from the cyclonic damages.

5. With a view to protect the ecological balance in the coastal areas, the then Prime Minister is stated to have written a letter in November 1981 to the Chief Ministers of coastal States in which she stated as under:

> "The degradation and misutilization of beaches in the coastal States is worrying as the beaches have aesthetic and environmental value as well as other values. They have to be kept clear of all activities at least up to 500 metres from the water at the maximum high tide. If the area is vulnerable to erosion, suitable trees and plants have to be planted on the beaches without marring their beauty. Beaches must be kept free from all kinds of artificial development. Pollution from industrial and town wastes must also be avoided totally."

Working groups were set up by the Ministry of Environment and Forests in 1982 to prepare environmental guidelines for development of beaches and coastal areas. In July 1983 environmental guidelines for beaches were promulgated which, inter alia, stated:

> "The traditional use of sea water as a dump site from our land-derived wastes has increased the polluted loads of sea and reduced its development potentials including the economic support it provides to people living nearby. Degradation and misutilization of beaches are affecting the aesthetic and environmental loss. These could be avoided through prudent coastal development and management based on assessment of ecological values and potential damages from coastal developments."

These guidelines further stated that "adverse direct impact" of development activities was possible within 500 metres from the high watermark or beyond two kilometres from it. The example which was given was that the sand-dunes and vegetation clearing, high density construction etc. along the coast could alter the ecological system of the area.

6. The environment guidelines for the development of beaches, inter alia, required the State Governments to prepare a status report on the obtaining situation of the coastal areas, as a prerequisite to environmental management of the area. Such a status report was required to be followed by a master plan identifying the areas required for conservation, preservation and development and other activities. A master plan so prepared would ensure a scientific assessment and development of the coastline and this

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 7 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

would ultimately ensure the preservation and enforcement of the coastal eco-system.

7. The Ministry of Environment and Forests undertook an exercise with regard to the protection and development of the coastal areas. It invited objections against the declaration of the coastal stretches as Regulation Zones and imposing restrictions on industries, operation and processes in the Regulation Zones.

8. After considering all the objections, the Central Government issued a notification dated 19-2-1991 (hereinafter referred to as 'the main Notification') in exercise of the powers conferred on it by clause (*d*) of sub-rule (3) of Rule 5 of the Environment Protection Rules, 1986. By this notification, it declared the coastal stretches of seas, bays, estuaries, creeks, rivers and backwaters which were influenced by tidal action (in the landward side) up to 500 metres from the High Tide Line (hereinafter referred to as 'HTL') and the land between Low Tide Line (hereinafter referred to as 'LTL') and HTL as Regulation Zones. With regard to this area, it imposed, with effect from the date of the said notification, various restrictions on the setting up and expansion of industries, operation or processes etc. in the said Regulation Zones. It was clarified that for the purposes of the main Notification, HTL was defined as the line up to which the highest high tide reaches at springtime.

9. The salient features of the main Notification are that a number of activities were declared as prohibited in the Regulation Zones, which are as follows:

> "(*i*) setting up of new industries and expansion of existing industries, except those directly related to waterfront or directly needing foreshore facilities;
>
> (*ii*) manufacture or handling or storage or disposal of hazardous substances as specified in the notifications of the Government of India in the Ministry of Environment and Forests No. SO 594(E) dated 28-7-1989, SO 966(E) dated 27-11-1989 and GSR 1037(E) dated 5-12-1989;
>
> (*iii*) setting up and expansion of fish processing units including warehousing (excluding hatchery and natural fish drying permitted areas);
>
> (*iv*) setting up and expansion of units mechanisms for disposal of wastes and effluents, except facilities required for discharging treated effluents into the watercourse with approval under the Water (Prevention and Control of Pollution) Act, 1974 except for storm water drains;
>
> (*v*) discharge of untreated wastes and effluents from industries, cities or towns and other human settlements; schemes shall be implemented by the authorities concerned for phasing out the existing practices, if any, within a reasonable time period not exceeding three years from the date of this notification;
>
> (*vi*) dumping of city or town wastes for the purposes of landfilling or otherwise; the existing practice, if any, shall be phased out within a

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 8 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

reasonable time not exceeding three years from the date of this notification;

(*vii*) dumping of ash or any wastes from thermal power stations;

(*viii*) land reclamation, bunding or disturbing the natural course of sea water with similar obstructions, except those required for control of coastal erosion and maintenance or clearing of waterways, channels and ports and for prevention of sandbars and also except for tidal regulators, storm water drains and structures for prevention of salinity ingress and for sweet water recharge;

(*ix*) mining of sands, rocks and other substrata materials, except those rare minerals not available outside the CRZ areas;

(*x*) harvesting or drawal of groundwater and construction of mechanisms therefore, within 200 m of HTL; in the 200 m to 500 m zone it shall be permitted only when done manually through ordinary wells for drinking, horticulture, agriculture and fisheries;

(*xi*) construction activities in ecologically sensitive areas as specified in Annexure I of this notification;

(*xii*) any construction activity between the Low Tide Line and High Tide Line except facilities for carrying treated effluents and waste water discharges into the sea, facilities for carrying sea water for cooling purposes, oil, gas and similar pipelines and facilities essential for activities permitted under this notification; and

(*xiii*) dressing or altering of sand-dunes, hills, natural features including landscape changes, 50 per cent of the plot size and the total height of construction shall not exceed 9 metres."

Secondly, the main Notification provided for regulation of permissible activities. Furthermore, the coastal States and Union Territory Administrations were required to prepare, within one year from the date of the main Notification, Coastal Zone Management Plans (hereinafter referred to as 'the Management Plans') identifying and clarifying the Regulation Zones areas within their respective territories in accordance with the guidelines contained in the main Notification and those plans were required to be approved, with or without modification, by the Central Government, Ministry of Environment and Forests. The main Notification also stipulated that within the framework of the approved Management Plans, all developments and activities within the Regulation Zones, except the prohibited activities and those which required environment clearance from Ministry of Environment and Forests, Government of India, were to be regulated by the State Government, Union Territory Administration or the local Authority, as the case may be, in accordance with the guidelines contained in Annexures I and II of the main Notification.

10. Anticipating that it will take time till the Management Plans are prepared and approved, the main Notification provided that till the approval of the Management Plans, "all development and activities within CRZ shall not violate the provisions of this Notification". The State Governments and

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 9 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Union Territory Administrations were required to ensure adherence to the provisions of the main Notification and it was provided that any violation thereof, shall be subject to the provisions of the Environment Protection Act, 1986 (hereinafter referred to as 'the Act').

11. It was also provided in clause 4 of the main Notification that the Ministry of Environment and Forests and the State Government or Union Territory, and such other authorities at the State or Union Territory levels, as may be designated for the purpose, shall be responsible for the monitoring and enforcement of the main Notification within their respective jurisdictions.

12. As already noticed, there are two annexures, namely, Annexure I and Annexure II to the main Notification. While Annexure I contains the Coastal Area Classification and Development Regulations which are for general application, Annexure II is the specific provision which contains the guidelines for development of beach resorts/hotels in the designated areas of CRZ III for temporary occupation of tourists/visitors with prior approval of the Ministry of Environment and Forests.

13. Annexure I consists of clause 6(1) which relates to the classification of Coastal Regulation Zones. The norms for regulation activities in the said zones are provided by clause 6(2) for regulating development activities. The coastal stretches within 500 metres of HTL of the landward side are classified under clause 6(1) into four categories, which are as under:

(*a*) Category I (CRZ I) includes the areas that are ecologically sensitive and important, such as national parks/marine parks, sanctuaries etc., areas rich in genetic diversity, areas likely to be inundated due to rise in sea level consequent upon global warming and such other areas as have been declared by the Central Government or the authorities concerned at the State/Union Territory level from time to time. In addition thereto, CRZ I also contains the area between the LTL and the HTL.

(*b*) Category II (CRZ II) contains the areas that have already been developed up to or close to the shore line. This is the area which is within the municipal limits or in other legally designated urban areas which is already substantially built up and which has been provided with drainage and approach roads and other infrastructural facilities, such as water supply and sewerage mains.

(*c*) Category III (CRZ III) is the area which was originally undisturbed and includes those areas which do not belong either to Category I or Category II. CRZ III includes coastal zone in the rural areas (developed and undeveloped) and also areas within the municipal limits or in other legally designated urban areas which are not substantially built up.

(*d*) Category IV (CRZ IV) contains the coastal stretches in the Andaman and Nicobar, Lakshadweep and small islands except those designated as CRZ I, CRZ II or CRZ III.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 10 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

14. Clause 6(2) of Annexure I provides for norms for regulation of activities in CRZ I, II, III and IV. With regard to CRZ I, the norms for regulation of activities do not permit new construction within 500 metres of the HTL. Furthermore, practically, no construction activity is allowed between the LTL and HTL. The norms for regulation of activities in CRZ II relate to construction or reconstruction of the buildings within the said zone.

15. With regard to CRZ III, the norms for regulation of activities, inter alia, provide that the area up to 200 metres from the HTL is to be earmarked as "No Development Zone". The only exception is that there can be repairs of existing authorised structures but, the permissible activity in this zone is for its use for agriculture, horticulture, gardens, pastures etc. The norms further provide for development of vacant plots between 200 and 500 metres of HTL in designated areas of CRZ III with prior approval of the Ministry of Environment and Forests for construction of hotels/beach resorts for temporary occupation of tourists/visitors subject to the conditions as stipulated in the guidelines in Annexure II.

16. In CRZ IV also, detailed norms for regulation of activities are provided in the said clause 6(2) of Annexure I.

17. As already noticed, Annexure II contains the guidelines for development of beach resorts/hotels in the designated area of CRZ III for temporary occupation of tourists/visitors. The vacant area beyond 200 metres in the landward side, even if it is within 500 metres of the HTL can be used, after obtaining permission, for construction of beach resorts for tourists/visitors. There was no provision for allowing any fresh construction within 200 metres of the HTL or within the LTL and HTL. Clause 7(1) of the main Notification which comes under Annexure II contains various conditions which have to be fulfilled before approval can be granted by the Ministry of Environment and Forests for the construction of beach resorts/hotels in the designated area of CRZ III.

18. In the background of the aforesaid facts, we will now deal with the main contentions raised, namely, the non-implementation of the main Notification and the validity of the notification dated 18-8-1994 (hereinafter referred to as 'the 1994 Notification').

Re: Non-Implementation of the main Notification

19. It is the case of the petitioner that with a view to protect the ecological balance in the coastal areas, the aforesaid notification was issued by the Central Government which contained various provisions for regulating development in the coastal areas. It was contended that there had been a blatant violation of this notification and industries were illegally being set up, thereby causing serious damage to the environment and ecology of the area. It was also submitted that the Ministry of Environment and Forests except for issuing the main Notification, had taken no steps to follow up its own directions contained in the main Notification. The main prayer in the writ petition was that this Court should issue appropriate writ, order or direction to the respondent so as to enforce the main Notification.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 11 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

20. In the writ petition, specific allegations were also contained to the effect that the Ministry of Environment and Forests, Government of India had issued another notification dated 20-6-1991 under clause (5) of sub-section (2) of Section 3 of the Act declaring Dahanu Taluka, District Thane, Maharashtra as an ecologically fragile area.

21. The main Notification was issued so as to ensure that the development activities are consistent with the environmental guidelines for beaches and coastal areas and to impose restrictions on the setting up of industries which have detrimental effect on the coastal environment. This notification also required the Government of Maharashtra to prepare a master plan or regional plan for the Dahanu Taluka based on the existing land use of Dahanu within a period of one year from the notification and to get the said plan approved by the Ministry of Environment and Forests. The master plan and the regional plan was to demarcate all the existing green areas, orchards, tribal areas and other environmentally sensitive areas in the said Dahanu Taluka. Industries which were using chemicals above the limits/quantities prescribed by the Act or by the rules were to be considered hazardous industries. The hazardous waste was required to be disposed of in the identified areas after taking precautionary measures. This notification also required the Government of Maharashtra to constitute a monitoring committee to ensure the compliance or conditions mentioned in the notification in which local representatives may be included. According to the petitioner, the Maharashtra Government has not implemented the directions contained in the said notification and has permitted development activities which have resulted in new polluting industries being established in the coastal area, thereby seriously endangering the ecology. The industries which are operating in Dahanu are stated to be balloon-manufacturing units, buffing and chromium-plating units and chemical units. There has been a failure to make the master plan or the regional plan for the said Dahanu Taluka and indiscriminate licences have been issued and consent given to new industries by the State Government and the predominately agricultural area is slowly being converted into an industrial area in complete disregard of environmental laws, guidelines and notifications. There are other instances stated to be in the writ petition with relation to the Dahanu Taluka but, for the view we are taking, it is not necessary to deal with the same in any great length.

22. Notices were issued by this Court on 3-10-1994 to the respondents including the coastal States, namely, Maharashtra, Kerala, Karnataka, Orissa, West Bengal, Tamil Nadu, Andhra Pradesh and the Union Territory of Pondicherry. On 12-12-1994, while granting time to the respondents to file their counter-affidavits, this Court directed that "the respondent States shall not permit the setting up of any industry or construction of any type on the area at least up to 500 metres from the sea water at the maximum high tide". Notice was also directed to issue to the State of Goa, the Union Territory of Daman and Diu and the islands of Andaman & Nicobar and Lakshadweep, which were added as respondents. The aforesaid interim order dated 12-12-

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 12 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

1994 was slightly modified by this Court by its order dated 9-3-1995* in the following terms: (SCC pp. 77-78, para 1)

> "We modify our order dated 12-12-1994 and direct that all the restrictions, prohibitions regarding construction and setting up of industries or for any other purpose contained in the notification dated 19-2-1991 issued by the Ministry of Environment and Forests, Government of India under clause (*d*) of sub-rule (3) of Rule 5 of the Environment (Protection) Rules, 1986 shall be meticulously followed by all the States concerned. The activities which have been declared as prohibited within the Coastal Regulation Zone shall not be undertaken by any of the respondent-States. The regulations of permissible activities shall also be meticulously followed. The restrictions imposed by the Coastal Areas Classification and Development Regulations contained in Annexure I to the abovesaid notification shall also be strictly followed by the respondent-States."

23. According to clause 3(*i*) of the main Notification, the coastal States and Union Territory administrations were required to prepare the Management Plans within one year from the date of the main Notification. This was essential for the implementation of the said notification. The lack of commitment on the part of these States and administrations, towards the protection and regulation of the coastal stretches, is evident from their inaction in complying with the aforesaid statutory directive requiring the preparation of Management Plans within the specified period. In view of the fact that there had been a non-compliance with this provision, this Court on 3-4-1995 directed all the coastal States and Union Territory Administrations to frame their plans within a further period of six weeks thereof.

24. A status report was filed in court by the Union of India which shows non-compliance of clause 3(*i*) by practically everyone concerned. While some of the States and Union Territory Administrations submitted their plans, though belatedly, except in the case of Pondicherry, none of the other plans were approved by the Central Government. It appears that some modifications were suggested and those States and Union Territories had to resubmit their plans. Directions will have to be issued to these States and Union Territories to resubmit their plans and the Central Government will also be required to approve the resubmitted plans within a specified time. The State of Orissa had only partly complied with this Court's order dated 3-4-1995 inasmuch as the plans submitted by it were only for a small part of a coast. The State of West Bengal only submitted a preliminary concept while the States of Andhra Pradesh, Gujarat, Karnataka and Kerala did not care to submit any plans at all. Therefore, these six States namely, Orissa, West Bengal, Andhra Pradesh, Gujarat, Karnataka and Kerala have to be answerable for non-compliance with the directions issued by this Court on 3-4-1995.

* *Indian Council for Enviro-Legal Action* v *Union of India*, (1995) 3 SCC 77

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 13 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

25. Affidavits which have been filed by the respondents clearly show that all the provisions of the main Notification have not been complied with. Explanations for the delay in preparation of the Management Plans and their approval have been offered, but they are far from satisfactory. If the mere enactment of the laws relating to the protection of environment was to ensure a clean and pollution-free environment, then India would, perhaps, be the least polluted country in the world. But, this is not so. There are stated to be over 200 Central and State Statutes which have at least some concern with environment protection, either directly or indirectly. The plethora of such enactments has, unfortunately, not resulted in preventing environmental degradation which, on the contrary, has increased over the years. Enactment of a law, relating to protection of environment, usually provides for what activity can or cannot be done by people. If the people were to voluntarily respect such a law, and abide by it, then it would result in law being able to achieve the object for which it was enacted. Where, however, there is a conflict between the provision of law and personal interest, then it often happens that self-discipline and respect for law disappears.

26. Enactment of a law, but tolerating its infringement, is worse than not enacting a law at all. The continued infringement of law, over a period of time, is made possible by adoption of such means which are best known to the violators of law. Continued tolerance of such violations of law not only renders legal provisions nugatory but such tolerance by the enforcement authorities encourages lawlessness and adoption of means which cannot, or ought not to, be tolerated in any civilized society. Law should not only be meant for the law-abiding but is meant to be obeyed by all for whom it has been enacted. A law is usually enacted because the legislature feels that it is necessary. It is with a view to protect and preserve the environment and save it for the future generations and to ensure good quality of life that Parliament enacted the anti-pollution laws, namely, the Water Act, Air Act and the Environment (Protection) Act, 1986. These Acts and Rules framed and notification issued thereunder contain provisions which prohibit and/or regulate certain activities with a view to protect and preserve the environment. When a law is enacted containing some provisions which prohibit certain types of activities, then, it is of utmost importance that such legal provisions are effectively enforced. If a law is enacted but is not being voluntarily obeyed, then, it has to be enforced. Otherwise, infringement of law, which is actively or passively condoned for personal gain, will be encouraged which will in turn lead to a lawless society. Violation of anti-pollution laws not only adversely affects the existing quality of life but the non-enforcement of the legal provisions often results in ecological imbalance and degradation of environment, the adverse effect of which will have to be borne by the future generations.

27. The present case also shows that having issued the main Notification, no follow-up action was taken either by the coastal States and Union Territories or by the Central Government. The provisions of the main Notification appear to have been ignored and, possibly violated with

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 14 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

impunity. The coastal States and Union Territory administrations were required to prepare Management Plans within a period of one year from the date of the notification but this was not done. The Central Government was to approve the plans which were to be prepared but it did not appear to have reminded any of the coastal States or the Union Territory administrations that the plans had not been received by it. Clause 4 of the main Notification required the Central Government and the State Governments as well as Union Territory administrations to monitor and enforce the provisions of the main Notification, but no effective steps appear to have been taken and this is what led to the filing of the present writ petition.

28. There is no challenge to the validity of the main Notification. Counsel for all the parties are agreed that the main Notification is valid and has to be enforced. Instances have been given by the petitioner as well as some of the intervenors where in different States, infringement of the main Notification is taking place but no action has been taken by the authorities concerned. The courts are ill-equipped and it is not their function to see day-to-day enforcement of law. This is an executive function which it is bound to discharge. A public interest litigation like the present, would not have been necessary if the authorities, as well as the people concerned, had voluntarily obeyed and/or complied with the main Notification or if the authorities who were entrusted with the responsibility, had enforced the main Notification. It is only the failure of enforcement of this notification which has led to the filing of the present petition. The effort of this Court while dealing with public interest litigation relating to environmental issues, is to see that the executive authorities take steps for implementation and enforcement of law. As such the court has to pass orders and give directions for the protection of the fundamental rights of the people. Passing of appropriate orders requiring the implementation of the law cannot be regarded as the court having usurped the functions of the legislature or the executive. The orders are passed and directions are issued by the court in discharge of its judicial function, namely, to see that if there is a complaint by a petitioner regarding the infringement of any constitutional or other legal right, as a result of any wrong action or inaction on the part of the State, then such wrong should not be permitted to continue. It is by keeping the aforesaid principles in mind that one has to consider as to what directions should be issued to ensure, in the best possible manner, that the provisions of the main Notification which has been issued for preserving the coastal areas are not infringed.

Validity of notification of 1994

29. The notification dated 18-8-1994 made six amendments in the main Notification. These amendments were made after the receipt of the report of a committee, headed by Mr B.B. Vohra, which had been set up by the Central Government. The validity of the amended notification was also challenged in IA No. 19 of 1995 which was filed by three environment protection groups, namely, the Goa Foundation, Nirmal Vishwa and Indian Heritage Society (Goa Chapter). In the said application, the applicants gave a table containing the main points of the main Notification, the

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 15 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

recommendations made by the Vohra Committee and the amendments made by amended notification of 1994. The said particulars are as follows:

	"Main CRZ Notification dated 19-2-1991 issues for relaxation	*Vohra Committee recommendations*	*Amending notification dated 18-8-1994*
1.	200 metres from HTL is no-development zone.	Relaxation allowed rocky and hilly areas; no limit specified.	Blanket relaxation for all areas up to HTL if Central Government so desires.
2.	No-development zone for rivers, creeks and backwaters 100 metres.	Clarification demanded about limits; no relaxation suggested.	No-development zone relaxed to 50 metres.
3.	No levelling or digging of sand-dunes or sand.	Allows destruction of sand-dunes	No destruction of sand-dunes allowed. However, goalposts, net posts, lampposts allowed.
4.	No-development zone area cannot be used for FSI calculations.	Recommends no-development zone area be permitted for FSI calculations.	Relevant section not amended but explanation added as an afterthought in the notification permitting no-development zone area to be included for FSI calculations.
5.	No basements allowed area not to be included in FSI.	Basements permitted.	Basements allowed.
6.	No fencing permitted within 200 metre-zone from HTL.	Only green fencing permitted, no barbed wire fencing allowed.	Allows green and barbed wire fencing."

Contending that the 1994 Notification will adversely affect the environment and would lead to unscientific and unsustainable development and ecological destruction, an application was filed by the petitioner being IA No. 16 of 1995, inter alia, praying for the quashing of the said notification.

30. A reply was filed by the Union of India justifying the amendments and giving reasons for the issuance of the 1994 Notification.

31. While examining the validity of the 1994 Notification, it has to be borne in mind that normally, such notifications are issued after a detailed

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 16 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

study and examination of all relevant issues. In matters relating to environment, it may not always be possible to lay down rigid or uniform standards for the entire country. While issuing the notifications like the present, the Government has to balance various interests including economic, ecological, social and cultural. 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 and vice versa, but there should be development while taking due care and ensuring the protection of environment. This is sought to be achieved by issuing notifications like the present, relating to developmental activities being carried out in such a way so that unnecessary environmental degradation does not take place. In other words, in order to prevent ecological imbalance and degradation that developmental activity is sought to be regulated.

32. The main Notification was issued under Sections 3(1) and 3(2)(*v*) of the Environment Protection Act, presumably after a lot of study had been undertaken by the Government. That such a study had taken place is evident from the bare perusal of notification itself which shows how coastal areas have been classified into different zones and the activities which are prohibited or permitted to be carried out in certain areas with a view to preserve and maintain the ecological balance.

33. According to the Union of India, while implementing the main Notification, certain practical difficulties were faced by the authorities concerned. There was a need for having sustainable development of tourism in coastal areas and that amendments were effected after giving due consideration to all relevant issues pertaining to environment protection and balancing of the same with the requirement of development. It has been specifically averred that a committee headed by Mr B.B. Vohra was set up by the Government in response to the need for examining the issues relating to development of tourism and hotel industry in coastal areas and to regulate the same keeping in view the requirements of sustainable development and the fragile coastal ecology. According to the Union of India, the Committee also included three environmentalist members who had expressed their views and that the Government had accepted the recommendations of the Vohra Committee with slight modifications. According to it, there has been no blanket relaxation in any area as alleged and adequate environmental safeguards have been provided in the 1994 Notification.

34. In this background, we now deal with each of these six amendments separately:

(*i*) According to the main Notification, distance of 200 metres from the HTL was a no-development zone (hereinafter referred to as 'NDZ'). The representation of the Hotel and Tourism Industry was that the

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 17 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

existing 200 metres' depth of NDZ constituted a serious handicap to the said industry competing with the beach hotels of other countries where there were no such restrictions. It was represented that a reduction of the NDZ would not be ecologically harmful and there was no convincing scientific reason for fixing 200 metres as the appropriate width for the NDZ. It was also stated before the Committee that according to its projection, the Hotel Industry in India would at the most require only about 20-30 kms of coastline for the construction of seaside resorts over the next 15 years or so. If this requirement was viewed in the context of the fact that the total coastline of the country was over 6000 kms in length, the industry represented that relaxation with regard to this limited area would not pose any big threat to the country's ecology.

35. The Vohra Committee in its recommendations observed that certain members of the Committee had felt that a blanket provision of 200 metres in the case of sandy beaches would lead to difficulties and there should be provision for relaxation to be made in suitable cases, but the consensus that emerged was that the present regulations should not be disturbed. The Committee, however, recommended that relaxations in 200 metres' rule may be made in a case-to-case basis with regard to such stretches of the coastline which were rocky or hilly, but the relaxations should be made after carrying out necessary impact assessment studies. Furthermore, this relaxation should be made by the Ministry of Environment and Forests and not by the State Governments concerned.

36. In the 1994 Notification, there is a clear departure from the recommendations of the Vohra Committee. The notification now provides that for reasons to be recorded, the Central Government may permit any construction within the said 200 metres NDZ subject to such conditions and restrictions as it may deem fit.

37. In the written submissions filed by the Union of India in this Court on 29-9-1995, this amendment has been sought to be justified and explained by it in the following words:

> "As regards the developmental activities up to the High Tide Line, the Central Government may for reasons recorded in writing permit construction in any particular case taking into account the geographical features and other relevant aspects.
>
> This is necessary as providing of 200 metres of no-development zone all along was not possible in the coastal line in a uniform way on account of wide variations in geographical features, existing human settlements and developmental activities requiring foreshore facilities etc."

The relaxation with regard to NDZ was sought by the Hotel and Tourism Industry and they desired concession only with regard to 20-30 kms of coastline. By the amended notification, power had been given to the Central Government to make such relaxation with regard to any part of the 6000 kms long coastline of India. The Central Government has, thus, retained the

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 18 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

absolute power of relaxation of the entire 6000 kms long coastline and this, in effect, may lead to the causing of serious ecological damage as the said provision gives unbridled power and does not contain any guidelines as to how or when the power is to be exercised. The said provision is capable of abuse. The Central Government also did not confine the relaxation to the extent as specified by the Vohra Committee. No satisfactory reason has been given by the Union of India as to why it departed from the opinion of the Expert Committee and that too in such a manner that the concession which has now been given is far in excess of what was demanded by the Hotel and Tourism Industry.

38. We, accordingly, hold that the newly added proviso in Annexure II in paragraph 7 in sub-paragraph (1) (Item *i*) which gives the Central Government arbitrary, uncanalized and unguided power, the exercise of which may result in serious ecological degradation and may make the NDZ ineffective is ultra vires and is hereby quashed. No suitable reason has been given which can persuade us to hold that the enactment of such a proviso was necessary, in the larger public interest, and the exercise of power under the said proviso will not result in large-scale ecological degradation and violation of Article 21 of the citizens living in those areas.

(*ii*) The NDZ for rivers, creeks and backwaters which was 100 metres from HTL has, by the amended notification, been relaxed to 50 metres. As already seen the main Notification does not apply to all the rivers. It applies only to tidal rivers which are part of the coastal environment. It was contended that the reduction from 100 metres to 50 metres was arbitrary and was not made on any basis. It was also contended that the Vohra Committee had made no proposal for relaxation along the rivers but it merely asked for a clarification of the limits to which the control would apply since in some areas, tidal ingress could go up to 50 kms from the coastline.

39. Justifying this amendment, it was contended by the Union of India that in case of creeks, rivers or backwaters, it is not possible to have a uniform basis for demarcating NDZ. The zone shall be regulated based upon each individual case. It is no doubt true that there can be no uniform basis for demarcating NDZ and it will depend upon the requirements by each State authority concerned in their own Management Plans but no reason has been given why in relation to tidal rivers, there has been a reduction of the ban on construction from 100 metres to 50 metres. Even the Vohra Committee which had been set up to look into the demands of Hotel and Tourism Industry had not made such a proposal and, therefore, it appears to us that such a reduction does not appear to have been made for any valid reason and is arbitrary. This is more so when it has been alleged that in some areas like Goa, there are mangrove forests that need protection and which stretch to more than 100 metres from the river bank and this contention had not been denied. In the absence of any justification for this reduction being given the only conclusion which can be arrived at is that the relaxation to 50 metres has been done for some extraneous reason. It was submitted, at the time of

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 19 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

arguments by the Additional Solicitor General that construction has already taken place along such rivers, creeks etc. at a distance of 50 metres and more, but no such explanation has been given in the reply affidavit. Even if this be so such reduction will permit new construction to take place and this reduction cannot be regarded as a protection only to the existing structures. In the absence of a categorical statement being made in an affidavit that such reduction will not be harmful or result in serious ecological imbalance, we are unable to conclude that the said amendment has been made in the larger public interest and is valid. This amendment is, therefore, contrary to the object of the Environment Act and has not been made for any valid reason and is, therefore, held to be illegal.

(*iii*) The main Notification had provided that there would be no levelling of sand-dunes or sand extraction. The Vohra Committee, however, allowed extraction of sand. This recommendation has not been accepted but the amended notification allowed the installation of goalposts or lampposts. Justifying this amendment, it was contended by the Union of India that installing such goalposts or lampposts will not result in flattening of sand-dunes and will also not have any other undesirable effect with regard to the said sand-dunes. No permanent structure for sport facilities is permitted. We do not see any illegality having been committed by allowing the goalposts, net posts and lampposts to be erected. In fact the erection of these would facilitate or lead to more enjoyment of the beaches. Therefore, the challenge to this amendment fails.

(*iv*) By the amended notification, the NDZ is now to be included for FSI calculations. Justifying this amendment, it was submitted by the Union of India that an explanation had been added to the effect that although no construction is allowed in NDZ, for the purpose of calculation of FSI the area of the entire plot including portions which fall within NDZ shall be taken into account. This modification has been brought in because the area in NDZ will in any case be left vacant and although this land may belong to a private owner, he has to keep it vacant. To compensate for this, he is allowed to construct a building of such FSI as permissible after taking into account the area which falls in NDZ. This, it was submitted, is based upon fair and equitable conditions and as such this would have no effect on the ecological balance in the coastal area.

40. In view of the aforesaid reasons given by the Union of India and also keeping in view the fact that a similar recommendation had also been made by the Vohra Committee, we agree with the principle that some compensation is to be allowed to the private owner whose land falls in the NDZ, but at the same time haphazard and congested construction — a pollutant in itself — cannot be permitted in any area of the city. We, therefore, modify the amendment and direct that a private owner of land in NDZ shall be entitled to take into account half of such land for the purpose

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 20 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

of permissible FSI in respect of the construction undertaken by him outside the NDZ.

(*v*) With regard to the amendment which allows construction of the basements, it was contended that the deep foundations and structure could interfere in the coastal areas where there is an intermixture of salt and sweet aquifers. According to the Union of India, this amendment has been made on the recommendation of the Vohra Committee. It was, however, stated that the basements shall be allowed subject to the condition that the other authorities such as State Ground Water Boards will permit such construction and will issue no-objection certificate after confirming that the basement will not hamper free flow of groundwater in that area. It is, therefore, obvious that there will not be any adverse effect to the ecological balance in the area if basements are allowed to be constructed subject to the satisfaction of the authorities concerned that the same will not hamper free flow of groundwater.

(*vi*) The main Notification had not permitted fencing within 200 metres' zone from HTL. By the amended notification, green and barbed wire fencing within the said zone has been permitted. Challenging this amendment, it was contended that the effect of such fencing would be to prevent the public from using the beaches. Justifying this amendment, the Union of India had stated that the Vohra Committee had permitted green fencing. By the amended notification barbed fencing, in addition to green fencing, has also been allowed. The reason for this is that green and barbed fencing has been allowed so that private owners are in a position to stop encroachment on their properties. Furthermore, in the interest of security also, a private owner would like to have some kind of boundary so that his property is safe. The implication, therefore, clearly is that it is not as if public beaches will be encroached upon or fenced. The fencing is being allowed only of the privately-owned property in order to protect the same. We, however, direct that fencing should not be raised in such a manner so as to prevent access of the public to public beaches. In other words, the right of way enjoyed by the general public to those areas which they are free to enjoy, should in no way be closed, hampered or curtailed. The amendment as made, does not, in our opinion, call for any interference.

General conclusion

41. With rapid industrialisation taking place, there is an increasing threat to the maintenance of the ecological balance. The general public is becoming aware of the need to protect environment. Even though, laws have been passed for the protection of environment, the enforcement of the same has been tardy, to say the least. With the governmental authorities not showing any concern with the enforcement of the said Acts, and with the development taking place for personal gains at the expense of environment and with disregard of the mandatory provisions of law, some public-spirited persons have been initiating public interest litigations. The legal position relating to the exercise of jurisdiction by the courts for preventing

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 21 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

environmental degradation and thereby, seeking to protect the fundamental rights of the citizens, is now well settled by various decisions of this Court. The primary effort of the court, while dealing with the environmental-related issues, is to see that the enforcement agencies, whether it be the State or any other authority, take effective steps for the enforcement of the laws. The courts, in a way, act as the guardian of the people's fundamental rights but in regard to many technical matters, the courts may not be fully equipped. Perforce, it has to rely on outside agencies for reports and recommendations whereupon orders have been passed from time to time. Even though, it is not the function of the court to see the day-to-day enforcement of the law, that being the function of the Executive, but because of the non-functioning of the enforcement agencies, the courts as of necessity have had to pass orders directing the enforcement agencies to implement the law.

42. As far as this Court is concerned, being conscious of its constitutional obligation to protect the fundamental rights of the people, it has issued directions in various types of cases relating to the protection of environment and preventing pollution. For effective orders to be passed, so as to ensure that there can be protection of environment along with development, it becomes necessary for the court dealing with such issues to know about the local conditions. Such conditions in different parts of the country are supposed to be better known to the High Courts. The High Courts would be in a better position to ascertain facts and to ensure and examine the implementation of the anti-pollution laws where the allegations relate to the spreading of pollution or non-compliance of other legal provisions leading to the infringement of the anti-pollution laws. For a more effective control and monitoring of such laws, the High Courts have to shoulder greater responsibilities in tackling such issues which arise or pertain to the geographical areas within their respective States. Even in cases which have ramifications all over India, where general directions are issued by this Court, more effective implementation of the same can, in a number of cases, be effected, if the High Courts concerned assume the responsibility of seeing to the enforcement of the laws and examine the complaints, mostly made by the local inhabitants, about the infringement of the laws and spreading of pollution or degradation of ecology.

43. There is a likelihood that there will be instances of infringement of the main Notification and also of the Management Plans, as and when framed, taking place in different parts of the country. In our opinion, instead of agitating these questions before this Court, now that the general principles have been laid down and are well-established, it will be more appropriate that action with regard to such infringement even if they relate to the violation of fundamental rights, should first be raised before the High Court having territorial jurisdiction over the area in question. We are sure and we expect that each High Court will deal with such issues urgently. Environmental law has now become a specialised field. In the decision which was taken at the United Nations Conference on Environment and Development held at Rio de Janeiro in June 1992 in which India had also participated, the States had been called upon to develop national laws

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 22 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

regarding liability and compensation for the victims of pollution and other environmental damages.

44. There is 6000 kms long coastline of India. It is the responsibility of the coastal States and Union Territories in which these stretches exist to see that both the notifications are complied with and enforced. Management Plans have to be prepared by the States and approved by the Central Government. If the said plans have been approved, the development can take place only in accordance therewith. Till the preparation and approval of the said plans by virtue of the provisions of the main Notification, no development in the coastal areas within the NDZ can take place. Therefore, it is in the interest of all concerned that the Management Plans are submitted and approved at the earliest.

45. There has been a complete laxity in the implementation of the Act and other related statutes. Under the said Act, the Central Government has essentially been entrusted with the responsibility to enforce and implement the Act. Section 23 of the Act, however, enables the Central Government, by notification in the Official Gazette, to delegate such of its powers and functions to the State Governments or authorities. Thus, the implementation of the provisions of the Act has now essentially become the function of the State Governments. In an effort to control pollution, State Pollution Boards have also been established but the extent of its effectiveness is yet to be demonstrated. The Environment (Protection) Act, as framed, and Section 5 of the Act in particular, gives the Government extensive powers to issue directions to any person, officer or authority which they are bound to comply. The directions as issued have necessarily to be in accordance with the provisions of law and to give protection to environment.

46. As far as the implementation of the main Notification is concerned, the Vohra Committee has stated in its report that many members of the Committee expressed great concern that sufficient attention was not being paid to the enforcement of regulations. It also noted that "in the absence of anything like adequate machinery to implement the regulations, a great deal of unauthorised development is taking place on most beaches which it will be difficult if not impossible to remove in the future". The Committee also recommended that the problems relating to the implementation of the regulations should be given high priority by the Ministry, if these are not to become a mockery.

47. With increasing threat to the environmental degradation taking place in different parts of the country, it may not be possible for any single authority to effectively control the same. Environmental degradation is best protected by the people themselves. In this connection, some of the non-governmental organisations (NGOs) and other environmentalists are doing singular service. Time has perhaps come when the Government can usefully draw upon the resources of such NGOs to help and assist in the implementation of the laws relating to protection of the environment. Under Section 3 of the Act, the Central Government has the power to constitute one or more authorities for the purposes of exercising and performing such

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 23 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

powers and functions, including the power to issue directions under Section 5 of the Act of the Central Government as may be delegated to them.

Directions

(1) Keeping in view the aforesaid observations in mind, we would direct that if any question arises with regard to the enforcement or implementation or infringement of the main Notification as amended by the notification of 1994, the same should be raised before and dealt with by the respective High Courts. In the present case, there were allegations of infringement having been taking place by allowing the setting up of industries in Dahanu Taluka in Maharashtra in violation of the provisions of the main Notification and which industries are stated to be causing pollution. Similarly, there were allegations of non-compliance with the provisions of law by a unit manufacturing alcohol in Pondicherry; with regard to Goa also allegations have been made. As we have already observed, it will be more appropriate if the allegations so made are dealt with by the respective High Courts, for they would be in a better position to know about and appreciate the local conditions which are prevailing and the extent of environmental damage which is being caused. We, accordingly, direct that the contentions raised in the petition regarding infringement of the main Notification and of the notification dated 20-6-1991 relating to Dahanu Taluka should be dealt with by the Bombay High Court. The High Court may issue such directions as it may deem fit and proper in order to ensure that the said notifications are effectively implemented and complied with. A copy of the writ petition along with a copy of the judgment should be sent to the High Court by the Registry for appropriate orders. As regards IAs Nos. 17-18 of 1995 relating to alcohol-manufacturing unit at Pondicherry, the said application is transferred to the Madras High Court for disposal in accordance with law.

(2) Any allegation with regard to the infringement of any of the notifications dated 19-2-1991, 20-6-1991 and 18-8-1994 be filed in the High Courts having territorial jurisdiction over the areas in respect of which the allegations are made. As far as this Court is concerned, this matter stands concluded except to examine the reports which are to be filed by all the States with regard to the approval of the Management Plans, or any classification which may be sought.

(3) Considering the fact that the Pollution Control Boards are not only overworked but simultaneously have a limited role to play insofar as it relates to controlling of pollution for the purpose of ensuring effective implementation of the notifications of 1991 and 1994, as also of the Management Plans, the Central Government should consider setting up under Section 3 of the Act, State Coastal Management Authorities in each State or zone and also a National Coastal Management Authority.

(4) The States which have not filed the Management Plans with the Central Government are directed to file the complete plans by 30-6-1996. The Central Government shall finalise and approve the said plans,

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 24 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

with or without modifications within three months thereafter. It is possible that the plans as submitted by the respective State Governments and Union Territories may not be acceptable to the Ministry of Environment and Forests. Returning the said plans for modifications and then resubmission of the same may become an unnecessary, time-consuming and, perhaps, a futile exercise. In order to ensure that these plans are finalised at the very earliest, we direct that the plans as submitted will be examined by the Central Government who will inform the State Government or the Union Territory concerned with regard to any shortcomings or modifications which the Ministry of Environment and Forests may suggest. If necessary, a discussion amongst the representatives of the State Governments and the Ministry of Environment and Forests should take place and thereafter the plans should be finalised by the Ministry of Environment, if necessary, by carrying out such modifications as may be required. The decision by the Ministry of Environment and Forests in this regard shall be final and binding.

A report with regard to the submission and the finalisation of the plans should be filed in this Court and the case will be listed for noting compliance in September 1996.

(5) Pending finalisation of the plans, the interim orders passed by this Court on 12-12-1994 and 9-3-1995 shall continue to operate.

(6) Four States, namely, Andhra Pradesh, Gujarat, Karnataka and Kerala have not yet submitted their Management Plans to the Central Government. There is thus a clear non-compliance with the direction issued by this Court on 12-12-1994 and 9-3-1995. We issue notices to the Chief Secretaries of these States to explain and show cause why further appropriate action be not taken for this non-compliance. The notices are to be returnable after six weeks.

(1996) 5 Supreme Court Cases 304

(BEFORE K. RAMASWAMY, FAIZAN UDDIN AND G.B. PATTANAIK, JJ.)

CH. RAMA RAO . . Petitioner;

Versus

LOKAYUKTA AND OTHERS . . Respondents.

SLPs (C) Nos. 10754-55 of 1996†, decided on May 9, 1996

A. **Andhra Pradesh Lokayukta and Upa-Lokayukta Act, 1983 (2 of 1983) — Ss. 10(1)(a), (b) & (2)(a) and 11(2) — Preliminary verification and investigation — Procedure — Affording opportunity to a public servant, held, necessary at the stage of the investigation but not at the stage of the preliminary verification — Administrative Law — Natural justice — Applicability**

† From the Judgment and Order dated 23-4-1996 of the Andhra Pradesh High Court in WPs Nos. 8274 and 8715 of 1996

BEFORE THE NATIONAL GREEN TRIBUNAL

WESTERN ZONE BENCH, PUNE

[I.A. No. 32/2022 & I.A. No. 33/2022 (WZ)]

IN

Original Application No. 32/2022 (WZ)

Colaba Koliwada Jamshed Ji Bunder Samaj

Swansea Maryadit …Applicants

Versus

MoEF&CC & Ors. …Respondents

COMPILATION OF JUDGMENTS AND RELEVANT DOCUMENTS

VOL -II

Sr No	Particulars	Page No
1	***MC Mehta v. Kamal Nath and Ors.*** **(1997) 1 SCC 388** 1. The Doctrine of Public Trust was elaborated by the Hon'ble Supreme Court- **Para 23-25, 33-35, 39**	1217-1244
2.	***S. Jagannath v. UOI*** **(1997) 2 SCC 877** 1. Keeping in mind the international commitments and general public interest, the Government of India is under a legal obligation to control marine pollution and protect the coastal environment - **Para 48-49**	1245-1308
3.	***Ratheesh KR v. State of Kerala*** **2013 SccOnLine Ker 14359** 1. Breach of CRZ regulation not to be viewed lightly. Commitment to follow court-issued safeguards, does not undo wrong and thus, should not influence the Court - **Para 107-108**	1309-1383

4.	***AP Pollution Control Board v. Prof. MV Nayadu and Ors.*** **AIR 1999 SC 812** 1. The Precautionary Principle was explained and enunciated - **Para 37, 39.**	1384-1408
5.	***Society for Protection of Environment & Biodiversity v Union of India (OA No 677 of 2016)- Hon'ble Principle Bench of the Hon'ble NGT*** a. Under International law, the doctrine of Non-regression is an accepted norm. It is founded on the idea that environmental law should not be modified to the detriment of environmental protection. This principle needs to be brought into play because today environmental law is facing a number of threats such as deregulation, a movement to simplify and at the same time diminish, environmental legislation perceived as too complex and an economic climate which favours development at the expense of protection of environment.**[Para 19]**	1409-1436

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 1 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

(1997) 1 Supreme Court Cases 388

(BEFORE KULDIP SINGH AND S. SAGHIR AHMAD, JJ.)

M.C. MEHTA .. Petitioner;

Versus

KAMAL NATH AND OTHERS .. Respondents.

Writ Petition (C) No. 182 of 1996†, decided on December 13, 1996

Constitution of India — Arts. 21 and 32 — Ecology — Public Trust doctrine — Is part of the Indian law — It extends to natural resources such as rivers, forests, seashores, air etc. for the purpose of protecting the ecosystem — Lease granted by State Govt. of riparian forest land for commercial purpose to a private company having a Motel located at the bank of river Beas — Motel management interfering with natural flow of river by blocking natural relief/spill channel of the river — Held, State Govt. committed breach of public trust — Prior approval granted by Govt. of India, Ministry of Environment and Forest and lease granted in favour of the Motel quashed — Polluter Pays Principle applicable — Accordingly the polluter company liable to compensate by way of cost for restitution of environment and ecology of the area — Other directions issued — Doctrines — Public Trust

A news item appeared in Indian Express stating that a private company Span Motels Pvt. Ltd., in which the family of Kamal Nath (a former Minister for Environment and Forests) had direct link, had built a club at the bank of River Beas by encroaching land including substantial forest land which was later regularised and leased out to the company when Kamal Nath was the Minister. It was stated that the Motel used earth-movers and bulldozers to turn the course of the river. The effort on the part of the Motel was to create a new channel by diverting the river-flow. According to the news item three private companies were engaged to reclaim huge tracts of land around the Motel. The main allegation in the news item was that the course of the river was being diverted to save the Motel from future floods. The Supreme Court took notice of the news item because the facts disclosed therein, if true, were be a serious act of environmental-degradation on the part of the Motel. Disposing of the writ petition

Held :

The notion that the public has a right to expect certain lands and natural areas to retain their natural characteristic is finding its way into the law of the land. The ancient Roman Empire developed a legal theory known as the "Doctrine of the Public Trust". The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. Though the public trust doctrine under the English common law extended only to certain traditional uses such as navigation, commerce and fishing, the American Courts in recent cases expanded the concept of the public trust doctrine. The observations of the Supreme Court of California in *Mono Lake case* clearly show the judicial concern in protecting all ecologically important lands, for example fresh

† Under Article 32 of the Constitution of India

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 2 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

water, wetlands or riparian forests. The observations therein to the effect that the protection of ecological values is among the purposes of public trust, may give rise to an argument that the ecology and the environment protection is a relevant factor to determine which lands, waters or airs are protected by the public trust doctrine. The Courts in United States are finally beginning to adopt this reasoning and are expanding the public trust to encompass new types of lands and waters. There is no reason why the public trust doctrine should not be expanded to include all ecosystems operating in our natural resources. Our legal system — based on English common law — includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership. Thus the Public Trust doctrine is a part of the law of the land. (Paras 23 to 25, 33, 34 and 39)

"*Public Trust Doctrine in Natural Resource Law : Effective Judicial Intervention*", Michigan Law Review, Vol. 68, part 1, p. 473, *relied on*

Illinois Central Railroad Co. v. *People of the State of Illinois*, 146 US 387 . 36 L Ed 1018 (1892); *Gould* v *Greylock Reservation Commission*, 350 Mass 410 (1966), *Sacco* v. *Development of Public Works*, 532 Mass 670; *Robbins* v. *Deptt. of Public Works*, 244 NE 2d 577; *National Audubon Society* v *Superior Court of Alpine County (Mono Lake case)*, 33 Cal 3d 419; *Phillips Petroleum Co.* v. *Mississippi*, 108 SCt 791 (1988), *relied on*

Priewev v. *Wisconsin State Land and Improvement Co* , 93 Wis 534 (1896), *Crawford County Lever and Drainage Distt. No. I*, 182 Wis 404, *City of Milwaukee* v *State*, 193 Wis 423; *State* v *Public Service Commission*, 275 Wis 112, *referred to*

Marks v *Whitney*, 6 Cal 3d 251; *United Plainsmen* v *N.D State Water Cons Comm'n*, 247 NW 2d 457 (ND 1976), *cited*

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

In the present case, large area of the bank of River Beas which is part of protected forest has been given on a lease purely for commercial purposes to the Motels. The area being ecologically fragile and full of scenic beauty should not have been permitted to be converted into private ownership and for commercial gains. Therefore, the Himachal Pradesh Government committed patent breach of public trust by leasing the ecologically fragile land to the Motel management. The lease transactions are in patent breach of the trust held by the State Government. (Paras 36 and 22)

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 3 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Further, the admissions by the Motel management in various letters written to the Government, the counter-affidavits filed by the various government officers and the report placed on record by the Board clearly show that the Motel management has by their illegal constructions and callous interference with the natural flow of River Beas has degraded the environment. The Motel interfered with the natural flow of the river by trying to block the natural relief/spill channel of the river. It is now settled by the Supreme Court that one who pollutes the environment must pay to reverse the damage caused by his acts. (Paras 21 and 38)

Vellore Citizens' Welfare Forum v. *Union of India*, (1996) 5 SCC 647 · JT (1996) 7 SC 375, *followed*

Indian Council for Enviro-Legal Action v. *Union of India*, (1996) 3 SCC 212 : JT (1996) 2 SC 196, *cited*

Therefore, the Motel shall pay compensation by way of cost for the restitution of the environment and ecology of the area. The pollution caused by various constructions made by the Motel in the riverbed and the banks of River Beas has to be removed and reversed. NEERI is directed through its Director to inspect the area, if necessary, and give an assessment of the cost which is likely to be incurred for reversing the damage caused by the Motel to the environment and ecology of the area. NEERI may take into consideration the report by the Board in this respect. The Motel through its management shall show cause why pollution fine in addition be not imposed on the Motel. The Motel shall construct a boundary wall at a distance of not more than 4 metres from the cluster of rooms (main building of the Motel) towards the river basin. The boundary wall shall be on the area of the Motel which is covered by the lease. The Motel shall not encroach/cover/utilise any part of the river basin. The boundary wall shall separate the Motel building from the river basin. The river bank and the river basin shall be left open for the public use. The Motel shall not discharge untreated effluents into the river. The Himachal Pradesh Pollution Control Board is directed to inspect the pollution control devices/treatment plants set up by the Motel. If the effluent/waste discharged by the Motel is not conforming to the prescribed standards, action in accordance with law be taken against the Motel. The Himachal Pradesh Pollution Control Board shall not permit the discharge of untreated effluent into River Beas. The Board shall inspect all the hotels/institutions/factories in Kullu-Manali area and in case any of them are discharging untreated effluent/waste into the river, the Board shall take action in accordance with law. The Motel shall show cause on 18-12-1996 why pollution fine and damages be not imposed as directed by us. NEERI shall send its report to the Court by 17-12-1996. To be listed on 18-12-1996. (Para 39)

R-M/17231/C

Advocates who appeared in this case :

In person, for the Petitioner;

H.N. Salve, Senior Advocate (M.S. Vashisht, Rajiv Dutta, Shiv Pujan Singh, J.S. Attri and L.R. Rath, Advocates, with him) for the Respondents.

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

1. (1996) 5 SCC 647 . JT (1996) 7 SC 375, *Vellore Citizens' Welfare Forum* v. *Union of India* 413*g*
2. (1996) 3 SCC 212 . JT (1996) 2 SC 196, *Indian Council for Enviro-Legal Action* v. *Union of India* 414*c-d*
3. 532 Mass 670, *Sacco* v. *Development of Public Works* 409*e-f*
4. 350 Mass 410 (1966), *Gould* v. *Greylock Reservation Commission* 408*f*
5. 275 Wis 112, *State* v. *Public Service Commission* 410*a*

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 4 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

6. 247 NW 2d 457 (ND 1976), *United Plainsmen* v. *N.D. State Water Cons. Comm'n* 412*c-d*
7. 244 NE 2d 577, *Robbins* v. *Deptt. of Public Works* 409*g*
8. 146 US 387 : 36 L Ed 1018 (1892), *Illinois Central Railroad Co.* v. *People of the State of Illinois* 408*b*, 408*d-e*
9. 193 Wis 423, *City of Milwaukee* v. *State* 410*a*
10. 182 Wis 404, *Crawford County Lever and Drainage Distt. No. 1* 410*a*
11. 108 SCt 791 (1988), *Phillips Petroleum Co.* v. *Mississippi* 412*g*, 412*g-h*
12. 93 Wis 534 (1896), *Priewev* v. *Wisconsin State Land and Improvement Co.* 410*a*
13. 33 Cal 3d 419, *National Audubon Society* v. *Superior Court of Alpine County* 410*d-e*, 412*e-f*, 412*f*
14. 6 Cal 3d 251, *Marks* v. *Whitney* 411*b-c*, 411*g*

The Judgment of the Court was delivered by

KULDIP SINGH, J.— This Court took notice of the news item appearing in the *Indian Express* dated 25-2-1996 under the caption — "Kamal Nath dares the mighty Beas to keep his dreams afloat". The relevant part of the news item is as under:

> "Kamal Nath's family has direct links with a private company, Span Motels Private Limited, which owns a resort — Span Resorts — for tourists in Kullu-Manali Valley. The problem is with another ambitious venture floated by the same company — Span Club.
>
> The club represents Kamal Nath's dream of having a house on the bank of the Beas in the shadow of the snow-capped Zanskar Range. The club was built after encroaching upon 27.12 bighas of land, including substantial forest land, in 1990. The land was later regularised and leased out to the company on 11-4-1994. The regularisation was done when Mr Kamal Nath was Minister of Environment and Forests.... The swollen Beas changed its course and engulfed the Span Club and the adjoining lawns, washing it away.
>
> For almost five months now, the Span Resorts management has been moving bulldozers and earth-movers to turn the course of the Beas for a second time.
>
> The heavy earth-mover has been used to block the flow of the river just 500 metres upstream. The bulldozers are creating a new channel to divert the river to at least one kilometre downstream. The tractor-trolleys move earth and boulders to shore up the embankment surrounding Span Resorts for laying a lawn. According to the Span Resorts management, the entire reclaiming operation should be over by March 31 and is likely to cost over a crore of rupees.
>
> Three private companies — one each from Chandigarh, Mandi and Kullu — have moved in one heavy earth-mover (hired at the rate of Rs 2000 per hour), four earth-movers and four bulldozers (rates varying from Rs 650 to Rs 850 each per hour) and 35 tractor-trolleys. A security ring has been thrown all around. ... Another worrying thought is that of the river eating into the mountains, leading to landslides which are an

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 5 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

occasional occurrence in this area. Last September, these caused floods in the Beas and property estimated to be worth Rs 105 crores was destroyed. ... Once they succeed in diverting the river, the Span management plans to go in for landscaping the reclaimed land. But as of today, they are not so sure. Even they confess the river may just return.

'Mr Kamal Nath was here for a short while two-three months ago. He came, saw what was going on and left. I suppose he knows what he is doing', says another executive.

The District Administration pleads helplessness. Rivers and forest land, officials point out, are not under their jurisdiction. Only the Kullu Conservator of Forests or the District Forest Officer can intervene in this case.

But who is going to bell the country's former Environment and Forests Minister?

Interestingly, a query faxed to Kamal Nath for his views on these developments fetched a reply from Mr S. Mukerji, President of the Span Motels Private Limited.

Admitting that the Nath family had 'business interests' in the company since 1981, he said, 'the company is managed by a team of professional managers and Mr Kamal Nath is not involved in the management activity of the company'.

'The Board comprises professionals, some of whom are friends and relatives of the Nath family', Mr Mukerji said. He expressed surprise that a reference had been made to Rangri and Chakki villagers 'since these villagers are at least 2/3 kilometres away and not even on the river side'.

He said the Span Club was 'not for the exclusive use of any one individual'. 'We would like to emphasize that we are only "restoring the river" to its original and natural course and are restoring our land and of those of neighbouring villagers similarly affected by the flood.'

He maintained that 'Mr Kamal Nath has definitely not been to Span Resorts in the last two months and in fact, to the best of my knowledge, has not travelled to Kullu Valley for quite some time now. ... In any case, we had never 'blocked' any channel in the vicinity of Span.' "

2. Mr Kamal Nath filed one-page counter-affidavit dated 8-6-1996. Paras 1 and 3 of the counter are as under:

"I say that I have been wrongly arrayed as a respondent in the above petition inasmuch as I have no right, title or interest in the property known as 'Span Resorts' owned by 'Span Motels Private Limited'.

I further say that the allegations made in the press reports based on which this Hon'ble Court was pleased to issue notice are highly exaggerated, erroneous, mala fide, mischievous and have been published only to harm and malign the reputation of this respondent."

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 6 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

3. On behalf of Span Motels Private Limited (the Motel), Mr Banwari Lal Mathur, its Executive Director, filed counter-affidavit. Paras 2 and 3 of the counter are as under:

> "I say that Mr Kamal Nath who has been arrayed as Respondent 1 in the above writ petition has no right, title or interest in the property known as SPAN RESORTS owned by Span Motels Pvt. Ltd. or in the lands leased out to the said company by the State of Himachal Pradesh.
>
> I say that the shareholding of SPAN MOTELS PVT. LTD. is as under:

	No. of Shares held	*% Share-holding*
Mrs Leela Nath	32,560	42
EMC Projects Pvt. Ltd.	14,700	19
SHAKA Properties Pvt. Ltd.	15,000	19
SHAKA Estate & Finance Pvt. Ltd.	15,000	19
Capt. Alok Chandola	250	01
	77,510	100

4. It was not disputed before us by Mr Harish Salve, learned counsel appearing for Mr Kamal Nath, that almost all the shares in the Motel are owned by the family of Mr Kamal Nath. We do not wish to comment on the averment made on oath by Mr Kamal Nath that he has "no right, title or *interest* in the property known as Span Resorts owned by Span Motels Private Limited".

5. Mr B.L. Mathur filed an additional counter-affidavit dated 30-7-1996 on behalf of the Motel. The counter-affidavit mentioned above states that government land measuring 40 bighas 3 biswas situated alongside Kullu-Manali Road on the bank of River Beas was granted on lease to the Motel for a period of 99 years with effect from 1-10-1972 to 1-10-2071. The lessee was granted permission to enter and occupy the said area for the purpose of putting up a Motel and for installing ancillaries in due course as may be subsequently approved by the lessor. We may refer to paras 6 and 7 of the lease deed dated 29-9-1972 which are as under:

> "The lessee shall not dig deep pits of trenches in the said land, which may lead to the danger of erosion and shall make good the lessor defects caused by their acts of defaults within one month of notice by the lessor.
>
> In the event of said land being required by lesser for any other purpose, whatsoever the lessor will be entitled to terminate this lease at any time by giving six months' notice in writing to the lessee and the lessee shall not be entitled to any compensation whatsoever on account of such termination."

6. The current management (Shri Kamal Nath's family) took over the Motel in the year 1981. Fresh lease was signed on 29-11-1981. The new lease was for the same period from 1972 to 2071. Paras 4 and 5 of the additional affidavit are as under:

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 7 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

"I say that the Motel commenced operations in 1975. There are over 800 trees in this area of 40 bighas. The Motel has two clusters with 8 dwelling units of 3 rooms each. The rooms are nowhere near the river — the distance between the cluster of rooms and the beginning of the river basin is about 10 metres — actually the river is another 30 metres therefrom. Thus, the effective distance between the edge of the river and the cluster of rooms is 40 metres.

I say that in the peak of the flood, the river did not come closer than 10 metres to the rooms and did not, therefore, pose any danger to the rooms, particularly there are no problems qua rooms as the rooms are on a higher level — at least 5-7 metres at their closest point."

Along with the additional affidavit the correspondence between the Motel and the Government has been annexed. In a letter dated 19-10-1988 addressed to the Chief Minister, Himachal Pradesh, the Motel gave details of the flood-damage during the year 1988 and finally requested the Government for the following steps:

"Further it is imperative that the Government take immediate steps to stop erosion of the land under lease to us. It would appear that strong concrete blackened retaining walls will be necessary to be placed at appropriate points to protect the landmass around us."

7. The Motel addressed letter dated 30-8-1989 to the Divisional Forest Officer, Kullu. The relevant part of the letter is as under:

"When we acquired our land on lease, there were no clear demarcations of the surrounding areas and boundaries. There has existed a stretch of waste and 'banjar' (Class III) forest land in a longitudinal strip along the river bank admeasuring about 22.2 bighas, contiguous and adjacent to our leased land. Over the years, and especially after the *severe flood erosion* last year, we have built extensive stone, cemented and wire-mesh-crated embankments all along the river banks at considerable expense and cost. We have also gradually and painstakingly developed this entire waste and 'banjar' area, beautified and landscaped it, planted ornamental, fruiting and varied forest trees extensively such that it blends with our estate and with the surrounding flora and environment in a harmonious manner. A revenue map along with all Revenue Department records covering this entire area, is forwarded enclosed herewith for your reference and perusal.

We are aware that in accordance with the Forest Conservation Act of 1980, the use of forest land by private agency even for natural development and afforestation scheme, requires alternative matching compensatory afforestation land areas to be surrendered by the concerned party, after due approval of the Government. In view of this statutory precondition, we wish to submit that we can immediately surrender to the Government nearly 28 bighas and 13 biswas of private agricultural cultivated land located at Village MAJHACH, (Burua), MANALI, in exchange for the above-mentioned 22.2 bighas of Class III

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 8 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

banjar forest land adjoining our land in Village Baragran Bihal, which we request for transfer to our company in lieu of the land we are willing to surrender. The specific revenue maps and records concerning this area of land at Village Majhach, are also enclosed herewith for your kind perusal."

It is obvious from the contents of the letter quoted above that the Motel had encroached upon an additional area of 22.2 bighas adjoining to the leasehold area. Apart from that the Motel had built extensive stone, cemented and wire-mesh-crated embankments all along the river banks. The Motel was keen to have the encroached land by way of exchange/lease. A request to that effect was repeated in the letter dated 12-9-1989 addressed to the Divisional Forest Officer, Kullu. The Motel again repeated its request for lease of the additional land by the letter dated 9-7-1991. The said letter further stated as under:

"We would also like to mention that the banjar land adjoining our hotel, referred to in para 1 above, lies along the bank of River Beas which erodes it every year. About ten years ago almost 4 bighas of this land were washed away and the onflowing water has posed a serious threat to our hotel buildings and adjoining area. To protect our property we were compelled to erect deep protection embankments along the banjar land in question at huge cost the details of which will be sent to you shortly. If our proposal is accepted for the exchange of land it will become possible for us to take further steps to protect this land."

8. The Divisional Forest Officer, Kullu sent reply dated 12-1-1993 which stated as under:

"In this connection it is intimated that at present we are not having funds to put crates and spurs along the river side near your hotel to check the soil erosion, as indicated in your letter referred to above. In order to protect your property from the damage, you can carry out such works at your level, subject to the condition that the ownership of the land would vest with Forest Department and the Department would not be liable to pay any amount incurred for the purpose by you at a later stage and you would not claim any right on government property."

The above-quoted letter can be of no consequence because much before the said letter the Motel had built extensive stone, cemented and wire-mesh-crated embankments all along the river bank. This is obvious from the contents of the letter dated 30-8-1989 (quoted above).

9. The Motel addressed a letter dated 21-6-1993 to the Chief Secretary, Himachal Pradesh wherein it is clearly stated that the adjoining land measuring 22 bighas and 3 biswas had been reclaimed by the Motel. The relevant part of the letter is as under:

"Adjoining our Resort and contiguous to our leased land is a stretch of Class III — banjar forest land in a longitudinal strip along the river bank admeasuring 22 bighas and 3 biswas. This was a stony piece of land and used to get flooded every year during monsoons and often got

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 9 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

washed away and reduced in size by river erosion year by year. This land was reclaimed by us and protected by an embankment and filling from the river side." a

The said letter further states as under:

"Similarly on the river side part of our leased land there used to be floods and erosion every year. If we would have let this continue, the leased land would have also got reduced every year. In order to protect our leased land and to save damage to our hotel property, we at our own considerable expense and cost built stone and wire-mesh-crated b embankment all along the river bank. This not only protected our hotel land but also the forest land....

In 1988 there were severe floods when every portion of leased land got washed away. It became imperative for us at considerable expense to build an embankment on the river front along the leased property. In c order to build an embankment on the river front along the leased property the washed away area and part of the river bank had to be filled at huge cost. Once the river bed and the washed away area was filled, the choice before us was either to put soil on it and grow grass and trees to secure it or let it remain unsecured and aesthetically displeasing. We chose the former. As a result of land-filling and embankment our leased d area when measured will obviously show an increase. This increase is not an encroachment but reclamation with the objective of protecting the leased property."

10. In the letter dated 7-8-1993 addressed to the Divisional Forest Officer, the Motel again asked for lease of adjoining area. The relevant part of the letter is as under: e

"We had explained in our previous letters dated 21-6-1993 and 23-7-1993 (copies of which have been sent to you with our letter dated 5-8-1993) the circumstances under which we had to spend enormous sum of money in protecting and reclaiming the forest land adjoining our Resort. It had become necessary for us to undertake this reclamation and protection work by filling the land from the river bed, constructing f embankments, retaining walls and crating etc. in order to protect the land leased by the Government to our Span Resort and property thereon but we were unable to complete the entire work as we were restrained from carrying on with the work under undue allegations of encroachment on the forest land....

In order to expedite the process of commencing protection work on g an urgent basis on the forest land, we propose that the forest land be given to us on long lease coterminous with the lease of the land granted by the Government for our Span Resorts. This could be done by a supplementary lease as it is imperative to save the land under the original lease.

All we have done is to reclaim and protect the land from erosion by h constructing crates, retaining walls and embankments along River Beas

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 10 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

by investing huge amounts which unfortunately have all been washed away due to floods and now requires reconstruction to save the forest land and our adjoining property from total destruction."

11. The Government of India, Ministry of Environment and Forests by the letter dated 24-11-1993 addressed to the Secretary, Forest, Government of Himachal Pradesh, Shimla conveyed its prior approval in terms of Section 2 of the Forest (Conservation) Act, 1980 for leasing to the Motel 27 bighas and 12 biswas of forest land adjoining to the land already on lease with the Motel. A lease deed dated 11-4-1994 regarding the said land was executed between the Himachal Government and the Motel. The additional affidavit filed by the Motel refers to the prior approval granted by the Government of India as under:

> "In the Ministry of Environment and Forests, the proposal was cleared by the Secretary and forwarded to the Forest Advisory Committee bypassing the Minister concerned. The Forest Advisory Committee cleared the proposal subject to severe restrictions — and also certain restrictions which are not normally imposed in such cases. The proposal was then cleared at the level of the Prime Minister and by a letter of 24-11-1993, approval was communicated to the State Government and SMPL."

12. It may be mentioned that Mr Kamal Nath was the Minister-in-charge, Department of Environment and Forests at the relevant time. What is sought to be conveyed by the above-quoted paragraph is that Mr Kamal Nath did not deal with the file. The correspondence between the Motel and the Himachal Government referred to and quoted by us shows that from 1988 the Motel had been writing to the Government for the exchange/lease of the additional forest land. It is only in November 1993 when Mr Kamal Nath was the Minister, in charge of the Department that the clearance was given by the Government of India and the lease was granted. Surely it cannot be a coincidence.

13. This Court took notice of the news item — quoted above — because the facts disclosed therein, if true, would be a serious act of environmental-degradation on the part of the Motel. It is not disputed that in September 1995 the swollen Beas engulfed some part of the land in possession of the Motel. The news item stated that the Motel used earth-movers and bulldozers to turn the course of the river. The effort on the part of the Motel was to create a new channel by diverting the river-flow. According to the news item three private companies were engaged to reclaim huge tracts of land around the Motel. The main allegation in the news item was that the course of the river was being diverted to save the Motel from future floods. In the counter-affidavit filed by the Motel, the allegations in the news item have been dealt with in the following manner:

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

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 11 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

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

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

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

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

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

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

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

* * *

(*w*) It is further submitted that whereas the report mischievously refers to villagers of Rangri, Chakki and Naggar nowhere does it take into account the very real problems of villagers of Baragran Bihal which is located immediately on the right bank near the SPAN Resort who were seriously affected by the floods. Chakki, Rangri and Naggar villages have not at all been affected by the floods and there is no remote possibility of these villages being affected due to the flood-protection works conducted by the Company."

In the additional affidavit filed by the Motel the facts pleaded are as under:

"(*ii*) it had become necessary for them to undertake this reclamation and protection work by filling the land from river bed, constructing embankments, retaining walls and crates, etc. in order to protect the land leased by the Government to the Resort and the property thereon.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 12 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

* * *

(*vii*) The forest land which is susceptible to heavy river erosion by floods involves high cost for its protection from getting washed away every year and would be protected by construction of embankments and filling from the river side by the Company. ... local community of Kullu and Manali and surrounding villages will benefit."

14. Mr G.D. Khachi, Under Secretary (Revenue), Government of Himachal Pradesh in the counter-affidavit filed in this Court stated as under:

"(*iii*) That subsequently, a piece of land measuring 21-09 bighas was encroached by M/s Span Motels. On coming to the notice of the Government of such encroachment, the Government of Himachal Pradesh in Revenue Department took action and reportedly got the encroached land vacated, and the possession of which has been taken over by the Forest Department.

That on 21-22 July, 1992, the then Chief Secretary to the Government of Himachal Pradesh visited the site who drew the inference that M/s Span Motels Ltd. were still using the encroached land. The copy of note on inspection of the then Chief Secretary is annexed as R-1.

That immediately on receipt of the recommendations of the then Chief Secretary (Annexure R-I), the Department of Forest started working at the site but in the meantime, it was decided to lease out a piece of land measuring 27-12 bighas which includes the said encroached land measuring 21-09 bighas. The lease granted by the Government of Himachal Pradesh in Revenue Department vide letter No. Rev. D(G)6-53/93, dated 5-4-1994 is annexed as Annexure R-II after obtaining the approval of Government of India, Ministry of Environment and Forest, New Delhi vide letter No. 9-116/93-ROC, dated 24-11-1993 (copy annexed as Annexure R-III) for the purpose of protecting earlier leased land.

That the developmental activities which was being undertaken by M/s Span Motels Ltd. came to the knowledge of the Government from the news item which appeared in the Press and field officers of all the departments concerned took an exercise to carry out the inspection and reported the matter to the Government."

15. C.P. Sujaya, Financial Commissioner-cum-Secretary (Irrigation and Public Health), Government of Himachal Pradesh in her counter-affidavit filed in this Court, inter alia, stated as under:

"Admitted to the extent that the Span Resorts management had deployed heavy earth-moving machinery to reclaim their land and to divert/channelise the course of river to its course which it was following prior to 1995 floods by dredging and raising of earthen and wire-crated embankments.

The flow of river has been changed/diverted by dredging/raising of wire-crated embankments and creating channel from a point u/s of Span

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 13 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Resorts to d/s of Span Resorts. The approximate length of channel is about 1000 metres.

Admitted to the extent that Villages Rangri and Chakki are located on left bank of River Beas. However, channelization of river has been done slightly away from the toe of foothills except for the last about 500 metres where it is running along the foothills.

The hill on which Villages Rangri and Chakki are situated consists of small boulders embedded in sandy strata and is quite fragile/unstable in nature. Therefore, this reach of river is prone to landslides in the normal course also. However, it is feared that flow of river along the foothills may hasten/aggravate the process of landslides. The Span Management has provided wire-crated embankment in a reach of about 90 metres on left bank and about 270 metres on right bank to channelise the flow and also to reclaim part of land on right bank of River Beas.

Admitted to the extent that the diversion/channelization of river has been done to restore it to its course of pre-1995 floods and in doing so, by raising the earthen and wire-crated embankments, some land of villagers situated on right bank of River Beas has also been reclaimed along with land of Span Resort."

16. This Court by the order dated 6-5-1996 directed the Central Pollution Control Board (the Board) through its Member Secretary to inspect the environments around the area in possession of the Motel and file a report. This Court further ordered as under:

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

17. Pursuant to this Court's order dated 6-5-1996 the Board filed its report along with the affidavit of Dr S.P. Chakrabarti, Member Secretary of the Board. It is stated in the affidavit that a team comprising Dr Bharat Singh, Former Vice-Chancellor and Professor Emeritus, University of Roorkee, Dr S.K. Ghosh, Senior Scientist and former Head, Division of Plant Pathology (NF), Kerala Forest Research Institute, Peechi, Trichur and Dr S.P. Chakrabarti, Member Secretary, Board was constituted. The team inspected the area and prepared the report. Para 4.2 of the report gives details of the construction done by the Motel prior to 1995 floods. The relevant part of the paragraph is as under:

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

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

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

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 14 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

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

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

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

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

18. The happening of events in the vicinity of the Motel during the 1995 flood and the steps taken by the Motel have been stated in the report as under:

"A big slip occurred on the hillside on the left bank, at a distance about 200 m upstream from the point where division into main and spill channels was occurring, on the afternoon of September 4, 1995. This partially blocked the main left side channel which was relatively narrow at this location. This presumably triggered the major change of course in the river, diverting the major portion of the flow into spill channel towards the right and almost over the entire land area of the club island. The entire club building and the plantation as well as the protection works built in 1993 were washed away. Heavy debris was deposited on this land. Damage occurred on the right bank also but the buildings of the main SMPL resort remained more or less unaffected. A large hotel and many buildings on the right bank, almost adjacent to SMPL in the downstream were also washed away. The bar of blocks at the upstream end of the spill channel as well as most of the studs on this channel were also washed away. Some remnants of five downstream studs could be seen at the time of the visit. After the passage of 1995 flood, SMPL have taken further steps to protect their property as shown in Fig. 3. These are as follows:

1. The left side channel (the main channel), which had become less active, has been dredged to increase its capacity. Wire crate revetments (A, B & C) on both banks of this channel have been made to direct the flow through this channel. These revetments and earth restoration work done would curtail the entry of water into the right side relief/spill channel which had developed into the main channel during the flood. A relatively small channel (the relief/spill channel) still exists and carries very little flow. Bulk of the flow is now going into the left bank channel.

On the left bank, there are steep unstable slopes at higher elevations left after the slides during the flood. These are likely to

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 15 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

slip in any case, and if so happens, may block the left channel again. This land belongs to some villagers from Rangri. The left bank channel is again sub-dividing into two streams (D) and the small stream is flowing close to the toe of the hills for a distance of about 500 to 600 m before it turns towards midstream. Some of the dredged material is piled on the right bank and some on the divide between the main channel and the subsidiary channel on the left. Slips can be seen in this reach of 500-600 m even now, and erosion at toe may aggravate sliding tendency. SMPL has also put 190 m wire crates (C) as protection against erosion of this bank, which may be helpful up to moderate flood conditions.

The dredging and channelisation of the left bank channel, though aimed at protecting SMPL land, should normally keep high intensity of flow away from both banks in moderate floods. This should thus not be a cause of concern. In high floods, the water would spill or spread beyond this channel. Due to restriction of entry in the right relief/spill channel, though the works may not withstand a high flood, there may be a tendency for more flow towards the left bank. However, the river is presently in a highly unstable regime after the 1995 extraordinary floods, and it is difficult to predict its behaviour if another high flood occurs in the near future."

The conclusion given by the inspecting team in the report are as under:

"6.4 M/s Span Motels Private Limited had taken some flood-control measures at the immediate upstream by construction of wire crates (Fig. 3) on both sides (A, B and C) and also dredged the main channel of the river by blasting the big boulders and removing the debris. The flood-control measures, taken by them on the right bank of the main channel and at the mouth of relief channel after the 1993 flood, were also washed off. There is no sign of any boundary of the premises of the newly-acquired land.

6.5 The mouth of the natural relief/spill channel has been blocked by construction of wire crate and dumping of boulders (A & B). The area has almost been levelled. Although a little discharge was observed due to seepage through boulders and flowing through the remnants of the relief channel to the downstream, the channel is blocked by a stonewall across the channel (F) at the downstream of M/s SMPL by a private property owner who has even constructed two wells (E) on the bed of the channel. This indicates the intention of the occupiers of the right bank properties in the concerned stretch in favour of filling up of the natural spill/relief channel.

6.6 M/s Span Motels has not consulted any Flood Control Expert as it appeared from the way of construction of the wire crate. No proper revetment was done while crating. As such, these cratings may not last long.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 16 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

6.7 In the process of channelising the main course, the main stream has been divided into two, one of which goes very near to the left bank (G) because of which fresh land slip in future is not ruled out.

6.8 The relief channel is supposed to be the government land. Construction of any sort to block the natural flow of water is illegal and no permission has been taken from the department concerned.

6.9 The lease agreement of 1994 had the clause for protection of the land but it should have been done not by blocking the flood spill/relief channel.

6.10 Relief channel is the shortest path between the two bends. Any future slip on left bank due to training of discharge at its foot may cause flood on the right bank where the leasehold land (1994) exists.

6.11 No new construction should be allowed in this flood-prone area except flood-protection measures. No economic activity should be undertaken in the aforementioned stretch.

6.12 Since newly-acquired land of M/s SMPL is located on the flood plain sandwiched between the main channel and the relief/spill channel, the land may be de-leased and the Forest Department take care of plantation in the area after adequate flood-control measures are taken by the Irrigation Department. This is necessitated in view of the fact that the left bank opposite SMPL is very steep (almost vertical) and is subjected to potential threat of land slip to block the channel and cause change of course of the river flow again.

6.13 Even if land slips occur, the impact will be local, limited only to the stretch of Beas River near SMPL .

6.14 The river is presently in a highly unstable regime after 1995 extraordinary floods, and it is difficult to predict its behaviour if another high flood occurs in the near future. A long-term planning for flood control in Kullu Valley needs to be taken up immediately with the advice of an organisation having expertise in the field, and permanent measures shall be taken to protect the area so that recurrence of such a heavy flood is mitigated permanently."

19. On a careful examination of the counter-affidavits filed by the parties, the report placed on record by the Board and other material placed on record, the following facts are established:

1. The leasehold area in possession of the Motel is a part of the protected forest land owned by the State Government.

2. The forest land measuring 27 bighas and 12 biswas leased to the Motel by the lease deed dated 11-4-1994 is situated on the right bank of the river and is separated from the Motel by a natural relief/spill channel of the river.

3. A wooden bridge on the spill channel connects the main Motel land and the land acquired under the 1994 lease deed.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 17 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

4. 22.2 bighas out of the land leased to the Motel in 1994 was encroached upon by the Motel in the years 1988/89.

5. Prior to the 1995 floods the Motel constructed 8 studs of concrete blocks 8 m long and 20 m apart on the upstream bank of the river, 150 m long stepped wall on the downstream side of the river and 2 m high bar of concrete blocks at the entry of the spill channel and additional 8 studs 8 m long and 20 m apart on the right bank of River Beas in front of the restaurant of the Motel.

6. After the 1995 floods the Motel has dredged the left side channel (the main channel) of the river to increase its capacity. Wire crate revetments on both banks of the main channel of river have been made to direct the flow through the said channel. This has been done with a view to curtail the entry of water into the right side relief/spill channel.

7. The Motel has constructed 190 m wire crates on the bank of the river (upstream). The dredged material is piled up on the banks of the river. The dredging and channelising of the left bank has been done on a large scale with a view to keep high intensity of flow away from the Motel.

8. The dredging of the main channel of river was done by blasting the big boulders and removing the debris.

9. The mouth of the natural relief/spill channel has been blocked by wire crates and dumping of boulders.

10. The construction work was not done under expert advice.

11. The construction work undertaken by the Motel for channelising the main course has divided the main stream into two, one of which goes very near to the left bank because of which, according to the report, fresh land slip in future cannot be ruled out.

20. The report further indicates that the relief channel being part of the natural flow of the river no construction of any sort could be made to block the said flow. According to the report no permission whatsoever was sought for the construction done by the Motel. The Board in its report has further opined that the clause in the lease agreement for protection of land did not permit the Motel to block the flood spill/relief channel of the river. The report categorically states that no new construction should be allowed in this flood-prone area and no economic activities should be permitted in the said stretch. It has been finally recommended by the inspection team that the land acquired by the Motel under the 1994 lease deed is located on the flood plain, sandwiched between the main channel and the relief/spill channel and as such it should be de-leased so that the Forest Department may take care of the plantation in the area and also preserve the ecologically fragile area of River Beas.

21. Mr Harish Salve vehemently contended that whatever construction activity was done by the Motel on the land under its possession and on the area around, if any, was done with a view to protect the leasehold land from floods. According to him the Divisional Forest Officer by the letter dated

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 18 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

12-1-1993 — quoted above — permitted the Motel to carry out the necessary works subject to the conditions that the department would not be liable to pay any amount incurred for the said purpose by the Motel. We do not agree. It is obvious from the correspondence between the Motel and the Government, referred to by us, that much before the letter of the Divisional Forest Officer dated 12-1-1993, the Motel had made various constructions on the surrounding area and on the banks of the river. In the letter dated 30-8-1989 addressed to the Divisional Forest Officer, Kullu — quoted above — the Motel management admitted that "over the years, and especially after the severe flood erosion last year, we have built extensive stone, cemented and wire-mesh-crated embankments all along the river banks at considerable expense and cost. We have also gradually and painstakingly developed this entire waste and banjar area". The "Banjar area" referred to in the letter was the adjoining area admeasuring 22.2 bighas which was not on lease with the Motel at that time. The admissions by the Motel management in various letters written to the Government, the counter-affidavits filed by the various government officers and the report placed on record by the Board clearly show that the Motel management has by their illegal constructions and callous interference with the natural flow of River Beas has degraded the environment. We have no hesitation in holding that the Motel interfered with the natural flow of the river by trying to block the natural relief/spill channel of the river.

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

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

> "Another major ecological tenet is that the world is finite. The earth can support only so many people and only so much human activity before limits are reached. This lesson was driven home by the oil crisis

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 19 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

of the 1970s as well as by the pesticide scare of the 1960s. The current deterioration of the ozone layer is another vivid example of the complex, unpredictable and potentially catastrophic effects posed by our disregard of the environmental limits to economic growth. The absolute finiteness of the environment, when coupled with human dependency on the environment, leads to the unquestionable result that human activities will at some point be constrained.

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

Professor Barbara Ward has written of this ecological imperative in particularly vivid language:

> 'We can forget moral imperatives. But today the morals of respect and care and modesty come to us in a form we cannot evade. We cannot cheat on DNA. We cannot get round photosynthesis. We cannot say I am not going to give a damn about phytoplankton. All these tiny mechanisms provide the preconditions of our planetary life. To say we do not care is to say in the most literal sense that "we choose death".'

There is a commonly-recognized link between laws and social values, but to ecologists a balance between laws and values is not alone sufficient to ensure a stable relationship between humans and their environment. Laws and values must also contend with the constraints imposed by the outside environment. Unfortunately, current legal doctrine rarely accounts for such constraints, and thus environmental stability is threatened.

Historically, we have changed the environment to fit our conceptions of property. We have fenced, plowed and paved. The environment has proven malleable and to a large extent still is. But there is a limit to this malleability, and certain types of ecologically important resources — for example, wetlands and riparian forests — can no longer be destroyed without enormous long-term effects on environmental and therefore social stability. To ecologists, the need for preserving sensitive resources does not reflect value choices but rather is the necessary result of objective observations of the laws of nature.

In sum, ecologists view the environmental sciences as providing us with certain laws of nature. These laws, just like our own laws, restrict our freedom of conduct and choice. Unlike our laws, the laws of nature cannot be changed by legislative fiat; they are imposed on us by the

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 20 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

natural world. An understanding of the laws of nature must therefore inform all of our social institutions."

24. The ancient Roman Empire developed a legal theory known as the "Doctrine of the Public Trust". It was founded on the ideas that certain common properties such as rivers, seashore, forests and the air were held by Government in trusteeship for the free and unimpeded use of the general public. Our contemporary concern about "the environment" bear a very close conceptual relationship to this legal doctrine. Under the Roman law these resources were either owned by no one (*res nullious*) or by every one in common (*res communious*). Under the English common law, however, the Sovereign could own these resources but the ownership was limited in nature, the Crown could not grant these properties to private owners if the effect was to interfere with the public interests in navigation or fishing. Resources that were suitable for these uses were deemed to be held in trust by the Crown for the benefit of the public. Joseph L. Sax, Professor of Law, University of Michigan — proponent of the Modern Public Trust Doctrine — in an erudite article "*Public Trust Doctrine in Natural Resource Law : Effective Judicial Intervention*", Michigan Law Review, Vol. 68, Part 1 p. 473, has given the historical background of the Public Trust Doctrine as under:

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

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

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 21 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

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

26. The American law on the subject is primarily based on the decision of the United States Supreme Court in *Illinois Central Railroad Co.* v. *People of the State of Illinois*[1]. In the year 1869 the Illinois Legislature made a substantial grant of submerged lands — a mile strip along the shores of Lake Michigan extending one mile out from the shoreline — to the Illinois Central Railroad. In 1873, the Legislature changed its mind and repealed the 1869 grant. The State of Illinois sued to quit title. The Court while accepting the stand of the State of Illinois held that the title of the State in the land in dispute was a title different in character from that which the State held in lands intended for sale. It was different from the title which the United States held in public lands which were open to pre-emption and sale. It was a title held in trust — for the people of the State that they may enjoy the navigation of the water, carry on commerce over them and have liberty of fishing therein free from obstruction or interference of private parties. The abdication of the general control of the State over lands in dispute was not consistent with the exercise of the trust which required the Government of the State to preserve such waters for the use of the public. According to Professor Sax the Court in *Illinois Central*[1] "articulated a principle that has become the central substantive thought in public trust litigation. When a State holds a resource which is available for the free use of the general public, a court will look with considerable scepticism upon any governmental conduct which is calculated either to relocate that resource to more restricted uses or to subject public uses to the self-interest of private parties".

27. In *Gould* v. *Greylock Reservation Commission*[2] the Supreme Judicial Court of Massachusetts took the first major step in developing the doctrine applicable to changes in the use of lands dedicated to the public interest. In 1886 a group of citizens interested in preserving Mount Greylock as an unspoiled natural forest, promoted the creation of an association for the purpose of laying out a public park on it. The State ultimately acquired about 9000 acres, and the legislature enacted a statute creating the Greylock Reservation Commission. In the year 1953, the legislature enacted a statute creating an Authority to construct and operate on Mount Greylock an Aerial Tramway and certain other facilities and it authorised the Commission to lease to the Authority any portion of the Mount Greylock Reservation. Before the project commenced, five citizens brought an action against both the Greylock Reservation Commission and the Tramway Authority. The

1 146 US 387 : 36 L Ed 1018 (1892)
2 350 Mass 410 (1966)

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 22 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

plaintiffs brought the suit as beneficiaries of the public trust. The Court held both the lease and the management agreement invalid on the ground that they were in excess of the statutory grant of the authority. The crucial passage in the judgment of the Court is as under:

> "The profit-sharing feature and some aspects of the project itself strongly suggest a commercial enterprise. In addition to the absence of any clear or express statutory authorization of as broad a delegation of responsibility by the Authority as is given by the management agreement, we find no express grant to the Authority or power to permit use of public lands and of the Authority's borrowed funds for what seems, in part at least, a commercial venture for private profit."

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

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

28. In *Sacco* v. *Development of Public Works*[3], the Massachusetts Court restrained the Department of Public Works from filling a great pond as part of its plan to relocate part of State Highway. The Department purported to act under the legislative authority. The court found the statutory power inadequate and held as under:

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

29. In *Robbins* v. *Deptt. of Public Works*[4], the Supreme Judicial Court of Massachusetts restrained the Public Works Department from acquiring Fowl Meadows, "wetlands of considerable natural beauty ... often used for nature study and recreation" for highway use.

3 532 Mass 670
4 244 NE 2d 577

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 23 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

30. Professor Sax in the article (Michigan Law Review) refers to *Priewev* v. *Wisconsin State Land and Improvement Co.*[5], *Crawford County Lever and Drainage Distt. No. 1*[6], *City of Milwaukee* v. *State*[7], *State* v. *Public Service Commission*[8] and opines that "the Supreme Court of Wisconsin has probably made a more conscientious effort to rise above rhetoric and to work out a reasonable meaning for the public trust doctrine than have the courts of any other State".

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

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

32. We may at this stage refer to the judgment of the Supreme Court of California in *National Audubon Society* v. *Superior Court of Alpine County*[9]. The case is popularly known as "*the Mono Lake case*". Mono Lake is the second largest lake in California. The lake is saline. It contains no fish but supports a large population of brine shrimp which feed vast numbers of nesting and migrating birds. Islands in the lake protect a large breeding colony of California gulls, and the lake itself serves as a haven on the migration route for thousands of birds. Towers and spires of tura (*sic*) on the north and south shores are matters of geological interest and a tourist attraction. In 1940, the Division of Water Resources granted the Department of Water and Power of the City of Los Angeles a permit to appropriate virtually the entire flow of 4 of the 5 streams flowing into the lake. As a result of these diversions, the level of the lake dropped, the surface area diminished, the gulls were abandoning the lake and the scenic beauty and the ecological values of Mono Lake were imperilled. The plaintiffs environmentalist — using the public trust doctrine — filed a law suit against Los Angeles Water Diversions. The case eventually came to the California Supreme Court, on a Federal Trial Judge's request for clarification of the

5 93 Wis 534 (1896)
6 182 Wis 404
7 193 Wis 423
8 275 Wis 112
9 33 Cal 3d 419

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 24 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

State's public trust doctrine. The Court explained the concept of public trust doctrine in the following words:

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

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

"The objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways. As we observed in *Marks* v. *Whitney*[10], '[p]ublic trust easements (were) traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the State, and to use the bottom of the navigable waters for anchoring, standing, or other purposes. We went on, however, to hold that the traditional triad of uses — navigation, commerce and fishing — did not limit the public interest in the trust res. In language of special importance to the present setting, we stated that '[t]he public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the State is not burdened with an outmoded classification favouring one mode of utilization over another. There is a growing public recognition that one of the important public uses of the tidelands — a use encompassed within the tidelands trust — is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favourably affect the scenery and climate of the area.'

Mono Lake is a navigable waterway. It supports a small local industry which harvests brine shrimp for sale as fish food, which endeavour probably qualifies the lake as a 'fishery' under the traditional public trust cases. The principal values plaintiffs seek to protect, however, are recreational and ecological — the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds. Under *Marks* v. *Whitney*[10], it is clear that protection of these values is among the purposes of the public trust."

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

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

10 6 Cal 3d 251

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 25 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

rare cases when the abandonment of that right is consistent with the purposes of the trust...."

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

> "The State has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. Just as the history of this State shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests. (*See* Johnson, 14 U.C. Davis L. Rev. 233, 256-57/; Robie, *Some Reflections on Environmental Considerations in Water Rights Administration*, 2 Ecology L.Q. 695, 710-711 (1972); Comment, 33 Hastings L.J. 653, 654.) As a matter of practical necessity the State may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the State must bear in mind its duty as trustee to consider the effect of the taking on the public trust (see *United Plainsmen* v. *N.D. State Water Cons. Comm'n*[11] at pp. 462-463, and to preserve, so far as consistent with the public interest, the uses protected by the trust."

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

33. It is no doubt correct that the public trust doctrine under the English common law extended only to certain traditional uses such as navigation, commerce and fishing. But the American Courts in recent cases have expanded the concept of the public trust doctrine. The observations of the Supreme Court of California in *Mono Lake case*[9] clearly show the judicial concern in protecting all ecologically important lands, for example fresh water, wetlands or riparian forests. The observations of the Court in *Mono Lake case*[9] to the effect that the protection of ecological values is among the purposes of public trust, may give rise to an argument that the ecology and the environment protection is a relevant factor to determine which lands, waters or airs are protected by the public trust doctrine. The Courts in United States are finally beginning to adopt this reasoning and are expanding the public trust to encompass new types of lands and waters. In *Phillips Petroleum Co.* v. *Mississippi*[12] the United States Supreme Court upheld Mississippi's extension of public trust doctrine to lands underlying non-navigable tidal areas. The majority judgment adopted ecological concepts to determine which lands can be considered tide lands. *Phillips Petroleum case*[12] assumes importance because the Supreme Court expanded the public trust doctrine to identify the tide lands not on commercial considerations but

11 247 NW 2d 457 (ND 1976)
12 108 SCt 791 (1988)

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 26 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

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

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

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

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

37. This Court in *Vellore Citizens' Welfare Forum* v. *Union of India*[13] explained the "Precautionary Principle" and "Polluters Pays Principle" as under: (SCC pp. 658-59, paras 11-13)

> "Some of the salient principles of 'Sustainable Development', as culled out from Brundtland Report and other international documents, are Inter-Generational Equity, Use and Conservation of Natural Resources, Environmental Protection, the Precautionary Principle, Polluter Pays Principle, Obligation to Assist and Cooperate, Eradication

13 (1996) 5 SCC 647 : JT (1996) 7 SC 375

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 27 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

of Poverty and Financial Assistance to the developing countries. We are, however, of the view that 'the Precautionary Principle' and 'the Polluter Pays Principle' are essential features of 'Sustainable Development'. The 'Precautionary Principle' — in the context of the municipal law — means:

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

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

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

'The Polluter Pays Principle' has been held to be a sound principle by this Court in *Indian Council for Enviro-Legal Action* v. *Union of India*[14]. The Court observed: (SCC p. 246, para 65)

> '... we are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country'.

The Court ruled that: (SCC p. 246, para 65)

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

Consequently the polluting industries are 'absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected areas'. The 'Polluter Pays Principle' as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of 'Sustainable Development' and as such polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.

The Precautionary Principle and the Polluter Pays Principle have been accepted as part of the law of the land."

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

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

14 (1996) 3 SCC 212 : JT (1996) 2 SC 196

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 28 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

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

2. The prior approval granted by the Government of India, Ministry of Environment and Forest by the letter dated 24-11-1993 and the lease deed dated 11-4-1994 in favour of the Motel are quashed. The lease granted to the Motel by the said lease deed in respect of 27 bighas and 12 biswas of area, is cancelled and set aside. The Himachal Pradesh Government shall take over the area and restore it to its original-natural conditions.

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

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

5. The Motel shall construct a boundary wall at a distance of not more than 4 metres from the cluster of rooms (main building of the Motel) towards the river basin. The boundary wall shall be on the area of the Motel which is covered by the lease dated 29-9-1981. The Motel shall not encroach/cover/utilise any part of the river basin. The boundary wall shall separate the Motel building from the river basin. The river bank and the river basin shall be left open for the public use.

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

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

8. The Motel shall show cause on 18-12-1996 why pollution fine and damages be not imposed as directed by us. NEERI shall send its report by 17-12-1996. To be listed on 18-12-1996.

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

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 1 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

during his stay is an integral part of his expenditure incurred for the treatment. Consequently the Government is required to reimburse the expenditure incurred for the period during which the patient stayed in the approved hospital for treatment. It is incongruous that while the patient is admitted to undergo treatment, he is refused the reimbursement of the actual expenditure incurred towards room rent and is given the expenditure of the room rent chargeable in another institute whereat he had not actually undergone treatment. Under these circumstances, the contention of the State Government is obviously untenable and incongruous. We hold that the High Court was right in giving the direction for reimbursement of a sum of Rs 20,000 incurred by the respondent towards the room rent for his stay while undergoing treatment in Escorts Heart Institute, New Delhi.

12. The appeal is disposed of accordingly. No costs.

In CA @ SLP (C) No. 18828 of 1996

13. Leave granted.

14. Heard counsel for the parties.

15. The appeal is disposed of in terms of order passed in CA No. 16980 of 1996 @ SLP (C) No. 12945 of 1996.

(1997) 2 Supreme Court Cases 87

(BEFORE KULDIP SINGH AND S. SAGHIR AHMAD, JJ.)

S. JAGANNATH .. Petitioner;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Writ Petition (C) No. 561 of 1994†, decided on December 11, 1996

A. **Constitution of India — Arts. 21, 48-A, 51-A and 32 — Ecology — Commercial aquaculture farming — Shrimp (prawn) farming culture industry in coastal areas — Causing degradation of mangrove ecosystem, depletion of plantation, commercial user of agriculture lands and salt farms, discharge of highly polluting effluents, pollution of potable water and ground water, obstruction of natural drainage of flood water, reduction of fish catch and blockage of direct approach to seashore — Besides, normal traditional life and vocational activities of the local population of the coastal areas seriously hampered — Held, sea coast and beaches are gift of nature and any activity polluting the same cannot be permitted — Having regard to reports of experts (e.g. NEERI, Central Board for Prevention and Control of Water Pollution, Dr K. Alagarswami, Director, Central Institute of Brackish Water Aquaculture, Madras), held, the intensified shrimp farming culture by modern methods violative of constitutional provisions and Central Acts, especially Environment Protection Act, Water (Prevention and Control of Pollution) Act, Hazardous Waste (Management and Handling) Rules — Such activity also violative of Govt. of India Notification No. S.O. 114(E), dated 19-2-1991 issued under Rule 5(3)(d) of the Environment (Protection) Rules, 1986 — Therefore, it cannot be**

† Under Article 32 of the Constitution of India

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 2 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

permitted to operate — These Central Acts would override State Acts, if any, inconsistent with them — However, traditional shrimp farming is pollution free — A high-powered Authority to be constituted under S. 8(3) of Environment (Protection) Act must scrutinise each and every case — Appropriate order and directions issued — Environment (Protection) Act, 1986, Ss. 2(a), (b), (c), (e), 3(1) & (2)(v), 5 7, 8, 15 — Environment (Protection) Rules, 1986, R. 5(3)(d) — Hazardous Wastes (Management and Handling) Rules, 1989, Rr. 2(i), 5 — Water (Prevention and Control of Pollution) Act, 1974, Ss. 2(j), (k), 25 — Fisheries Act, 1897 — Wild Life Protection Act, 1972 — Forest Conservation Act, 1980

B. **Environment (Protection) Act, 1986 — Preamble — Act enacted under Entry 13 List I Sch. VII r/w Art. 253 to implement international agreement — Held, would override and prevail over any inconsistent State Act — Constitution of India, Arts. 253, 254 and Sch. VII List I Entry 13**

C. **Jurisprudence — Law — Social engineering — Modernity versus tradition — Ecology versus industry and commerce — Irreparable harm to environment and to traditional social and vocational activities of local inhabitants — Bentham — Greatest good for the greatest numbers**

During the last decade the traditional system which, apart from producing rice, produced 140 kgs of shrimp per hectare of land began to give way to more intensive methods of shrimp culture which could produce thousands of kilograms of shrimp per hectare. The modern method is owned and operated by commercial and often foreign-owned companies which mainly export the shrimp. In intensive aquaculture, selected species are bred using a dense stocking rate. To maintain the very crowded shrimp population and attain higher production efficiency, artificial feed, chemical additives and antibiotics are used. The present petition under Article 32 of the Constitution of India — in public interest — was filed by S. Jagannathan, Chairman, Gram Swaraj Movement, a voluntary organisation working for the upliftment of the weaker sections of society. The petitioner inter alia sought the enforcement of Coastal Zone Regulation Notification dated 19-2-1991 issued by the Government of India, stoppage of intensive and semi-intensive type of prawn farming in the ecologically fragile coastal areas, prohibition from using the wastelands/wetlands for prawn farming and the constitution of a National Coastal Management Authority to safeguard the marine life and coastal areas. Allowing the writ petition with costs

Held

Due to commercial aquaculture farming there is considerable degradation of the mangrove ecosystems, depletion of casuarina plantations, pollution of potable waters, reduction in fish catch, and blockage of direct approach to the seashore. Agriculture lands and salt farms are being converted into commercial aquaculture farms. The groundwater has got contaminated due to seepage of impounded water from the aquaculture farms. Highly polluted effluents are discharged by the shrimp farms into the sea and on the sea-coast. Social and environmental changes resulting from expanding shrimp industry in coastal areas are largely due to the conversion into shrimp farms of the lands, waters and forests which were earlier dedicated to other uses In fact, shrimp farms are developing at the expense of other agriculture, aquaculture, forest uses and fisheries that are better suited in many places for meeting local food and employment requirements. Intensive and semi-intensive types of shrimp production hardly seems to meet these requirements. The increasing need for land by shrimp entrepreneurs has meant a dramatic rise in land prices in many areas. After the installation of shrimp farms near village lands, prices rise astronomically. Local farmers can no longer afford to purchase land, while indebted farmers are tempted to sell their holdings. Much of the coastal land recently

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 3 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

converted into shrimp farms was previously used for food crops and traditional fishing. Further, the expansion of modern shrimp ponds in the coastal areas has meant that local fishermen could only reach the beach by trespassing at great risk on shrimp farms or by taking a long detour. Local people have not only lost access to their fishing grounds and to their sources of riverine seafoods and seaweeds, but they also have to relinquish social and recreational activities traditionally taking place on their beaches. (Paras 31, 33, 35 and 38)

Sea coast and beaches are a gift of nature to the mankind. The aesthetic qualities and recreational utility of the said area has to be maintained. Any activity which has the effect of degrading the environment cannot be permitted. Apart from that the right of the fishermen and farmers living in the coastal areas to eke their living by way of fishing and farming cannot be denied to them. Keeping in view the NEERI report and other material, it must be held that the traditional and improved traditional types of shrimp-farm technologies — defined by Alagarswami — are environmentally benign and pollution free. Other types of technologies — extensive, modified-extensive, semi-intensive and intensive — create pollution and have degrading effect on the environment and coastal ecology. Such type of shrimp farms cannot be permitted to operate. (Para 39)

The effluents discharged by the commercial shrimp culture farms are covered by the definition of environmental pollutant, environmental pollution and hazardous substance The NEERI Reports indicate that the effluents discharged by the farms at various places were in excess of the prescribed standards. Unfortunately, no action is being taken by the authorities under the Environment (Protection) Act. Besides there are Hazardous Wastes (Management and Handling) Rules, 1989, Water (Prevention and Control of Pollution) Act, 1974, Fisheries Act, 1897, Wild Life Protection Act, 1972 and Forest Conservation Act, 1980 which contain useful provisions for environmental protection and pollution control. Unfortunately, the authorities responsible for the implementation of various statutory provisions are wholly remiss in the performance of their duties under the said provisions. (Paras 40 to 47)

Under para 2 of the CRZ Notification, the activities listed thereunder are declared as prohibited activities. Various State Governments have enacted coastal aquaculture legislations regulating the industries set up in the coastal areas. The Environment (Protection) Act, being a Central legislation has overriding effect. The Environment Protection Act, 1986 has been enacted under Entry 13 of List I Schedule VII of the Constitution of India. The preamble to the Act clearly states that it was enacted to implement the decisions taken at the United Nations' Conference on the Human Environment held at Stockholm in June 1972. Parliament has enacted the Act under Entry 13 of List I Schedule VII read with Article 253 of the Constitution of India. The CRZ Notification having been issued under the Act shall have overriding effect and shall prevail over the law made by the legislatures of the States (Para 48)

Before any shrimp industry or shrimp pond is permitted to be installed in the ecology fragile coastal area it must pass through a strict environmental test. There has to be a high-powered "Authority" under the Act to scrutinise each and every case from the environmental point of view. There must be an environmental impact assessment before permission is granted to install commercial shrimp farms. The conceptual framework of the assessment must be broadbased primarily concerning environmental degradation linked with shrimp farming. The assessment must also include the social impact on different population strata in the area. The quality of the assessment must be analytically based on superior technology. It must take into consideration the inter-generational equity and the compensation for those who are affected and prejudiced. (Para 50)

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 4 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Vellore Citizens' Welfare Forum v *Union of India*, (1996) 5 SCC 647 JT (1996) 7 SC 375, *relied on*

Indian Council for Enviro-Legal Action v. *Union of India*, (1996) 3 SCC 212 : JT (1996) 2 SC 196, *cited*

It may be that the industry has achieved singular distinction by earning maximum foreign exchange in the country. But the farm-raised production of shrimp is much lesser than the wild-caught production. Even if some of the shrimp culture farms which are polluting the environment, are closed, the production of shrimp by environmentally friendly techniques would not be affected and there may not be any loss to the economy specially in view of the finding given by NEERI that the damage caused to ecology and economics by the aquaculture farming is higher than the earnings from the sale of coastal aquaculture produce. (Para 51)

[The Supreme Court therefore, issued appropriate order and directions.] (Para 52)

D. **Environment (Protection) Act, 1986 — S. 3 — Notification No. S.O. 114(E), dated 19-2-1991 (CRZ Notification) issued by Ministry of Environment and Forests, Govt. of India — Cls. 2(*i*) & (viii) — Shrimp (prawn) farming culture industry — Held, neither "directly related to waterfront", nor "directly needing foreshore facility" and as such is a prohibited activity under cl. 2(i) — It is also violative of cl. 2(viii) — Words and phrases — 'Waterfront' and 'foreshore' — Meaning**

Held :

The part of the shore which remains covered with water at the High Tide and gets uncovered and becomes visible at the Low Tide is called "foreshore". It is not possible to set up a shrimp culture farm in the said area because it would completely submerge in water at the High Tide. It is, therefore, obvious that foreshore facilities are neither directly nor indirectly needed in the setting up of a shrimp farm. So far as "waterfront" is concerned it is no doubt correct that a shrimp farm may have some relation to the waterfront in the sense that the farm is dependent on brackish water which can be drawn from the sea. But on a close scrutiny, that shrimp culture farming has no relation or connection with the "waterfront" though it has relation with brackish water which is available from various water bodies including sea. What is required is the "brackish water" and not the "waterfront". The purpose of CRZ Notification is to protect the ecologically fragile coastal areas and to safeguard the aesthetic qualities and uses of the sea coast. The setting up of modern shrimp aquaculture farms right on the sea coast and construction of ponds and other infrastructure thereon is per se hazardous and is bound to degrade the marine ecology, coastal environment and the aesthetic uses of the sea coast. (Para 23)

Para 2(*viii*) of the CRZ Notification prohibits bunding or disturbing the natural course of sea water with similar obstructions. A bund is an embankment or dyke. Alagarswami Report in para 4.3.2 has specifically mentioned that huge cyclone-protection dykes and peripheral dykes are constructed by the shrimp farmers. The report further states that due to physical obstruction caused by the dykes the natural drain is blocked and flood water accumulated in the hinterland villages. The report notices that the shrimp ponds are constructed right on the bank of the creeks without leaving any area for draining of flood waters. A shrimp farm on the coastal area by itself operates as a dyke or a bund as it leaves no area for draining of the flood waters. The construction of the shrimp farms, therefore, violates clause (*viii*) of para 2 of the CRZ Notification. In view of the findings by the Alagarswami Report it may be useful to hold an inquiry/investigation to find out the extent of loss occurred, if any, to the villages during the recent cyclone in the State of Andhra Pradesh because of the dykes constructed by the shrimp farmers. (Para 24)

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 5 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

E. **Labour Law — Industrial Disputes Act, 1947 — S. 25-B — Compensation to workmen displaced by closure of shrimp culture industries — Those who have put in one year entitled to get compensation in terms of S. 25-F(b) — They will also get six years' wages as compensation [Para 52(16)]**

R-M/T/17234/C

Advocates who appeared in this case :

Dipankar P. Gupta, Solicitor General, V.R. Reddy and Altaf Ahmed, Additional Solicitor Generals, Ms Indira Jaising, P.P. Malhotra, Kapil Sibal, H.N. Salve, Tapas Ray, Sivasubramaniam, G.L. Sanghi, N. Santosh Hegde, Jayant Das, V.N. Ganpule and Bhimrao Naik, Senior Advocates (M.C. Mehta, Ms Seema Midha, K.R.R. Pillai, Sanjay Parikh, Ms Anita Shenoy, Vijay Panjwani, Krishan Mahajan, Ms Anil Katiyar, K.R. Nagaraja, K K. Lahiri, Brij Kumar Mishra, Ejaz Maqbool, V.B. Nadkarni, S.K. Mehta, Dhurv Mehta, Fazlin Anam, H.K. Puri, Rajesh Srivastava, S.P. Lenka, Dilip Sinha, J.R. Das, A.K. Mylsamy, V. Balachandran, K.R. Nambiar, M. Krishanappan, Avijit Bhattacharjee, K. Ram Kumar, Ms Asha Nair, C. Balasubramaniam, Ashok Bhan, B.K. Prasad, R.P. Srivastava, K.K. Mani, S. Srinivasan, C. Srinivasan, Ms A.K. Verma and P.D. Tyagi, Advocates, for JBD & Co., Advocates, P.K. Manohar, Vivek Gambhir, Anil Kumar, S.M. Jadhav, D.M. Nargolkar, C.S. Vaidyanathan, A. Mariarputham, Ajay Kapur, Ms Aruna Mathur, P.P. Singh, A. Subba Rao, D.S. Murthy, A.D.N. Rao, M.T. George, V. Krishnamurthi, B. Kanta Rao, Ms Rekha Pandey, Ms H. Wahi, E.M.S. Anam, M.P. Vinod, S.V. Deshpandey, K.L. Taneja, P. Mahale, Rajesh, Shantha Kumar, Inderjeet Roy, Raj Kumar Mehta, A.N.S. Nadkarni, A.M. Khanwilkar, D.N. Mishra, Umesh Bhagwat, G.B. Sathe, Vinoo Bhagat, M A. Krishnamoorthy and C.V.S. Rao, Advocates, with them) for the appearing parties

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

1. (1996) 5 SCC 647 : JT (1996) 7 SC 375, *Vellore Citizens' Welfare Forum* v. *Union of India* 143*h*
2. (1996) 3 SCC 212 JT (1996) 2 SC 196, *Indian Council for Enviro-Legal Action* v *Union of India* 145*b*

The Judgment of the Court was delivered by

KULDIP SINGH, J.— Shrimp (Prawn) Culture Industry is taking roots in India. Since long the fishermen in India have been following the traditional rice/shrimp rotating aquaculture system. Rice is grown during part of the year and shrimp and other fish species are cultured during the rest of the year. However, during the last decade the traditional system which, apart from producing rice, produced 140 kgs of shrimp per hectare of land began to give way to more intensive methods of shrimp culture which could produce thousands of kilograms per hectare. A large number of private companies and multinational corporations have started investing in shrimp farms. In the last few years more than eighty thousand hectares of land have been converted to shrimp farming. India's marine export weighed in at 70,000 tonnes in 1993 and these exports are projected to reach 200 thousand tonnes by the year 2000. The shrimp farming advocates regard aquaculture as potential saviour of developing countries because it is a short-duration crop that provides a high investment return and enjoys an expanding market. The said expectation is sought to be achieved by replacing the environmentally benign traditional mode of culture by semi-intensive and intensive methods. More and more areas are being brought under semi-

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 6 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

intensive and intensive modes of shrimp farming. The environmental impact of shrimp culture essentially depends on the mode of culture adopted in the shrimp farming. Indeed, the new trend of more intensified shrimp farming in certain parts of the country — without much control of feeds, seeds and other inputs and water management practices — has brought to the fore a serious threat to the environment and ecology which has been highlighted before us.

2. This petition under Article 32 of the Constitution of India — in public interest — has been filed by S. Jagannathan, Chairman, Gram Swaraj Movement, a voluntary organisation working for the upliftment of the weaker sections of society. The petitioner has sought the enforcement of Coastal Zone Regulation Notification dated 19-2-1991 issued by the Government of India, stoppage of intensive and semi-intensive type of prawn farming in the ecologically fragile coastal areas, prohibition from using the wastelands/wetlands for prawn farming and the constitution of a National Coastal Management Authority to safeguard the marine life and coastal areas. Various other prayers have been made in the writ petition. This Court issued notice by the order dated 3-10-1994. On 12-12-1994, this Court passed the following order:

> "Ministry of Environment and Forests, Government of India issued a Notification dated 19-2-1991, under clause (*d*) of sub-rule (3) of Rule 5 of the Environment (Protection) Rules, 1986 wherein it was declared that the coastal stretches of seas, bays, estuaries, creeks, rivers and backwater which are influenced by the tidal action (in the landward side) up to 500 metres from the High Tide Line (HTL) and the land between the Low Tide Line (LTL) and the HTL are Coastal Regulation Zone. The Central Government has imposed various restrictions in the said notification. Mr Mehta, learned advocate appearing for the petitioner, states that despite the issue of the notification unauthorised industries and other construction is being permitted by various States within the area which has been declared as Coastal Regulation Zone. ... Meanwhile we direct all the respondent-States not to permit the setting up of any industry or the construction of any type on the area at least up to 500 metres from the sea water at the maximum High Tide. The abovesaid area i.e. from the High Tide Level up to 500 metres shall be kept free from all construction of any type."

3. The Union of India and States/Union Territories of Gujarat, Maharashtra, Orissa, Kerala, Tamil Nadu, West Bengal, Goa, Pondicherry, Daman/Diu, Andaman/Nicobar and Lakshadweep have filed replies to the writ petitions. This Court on 27-3-1995 passed the following order:

> "This public interest petition is directed against the setting up of prawn farms on the coastal areas of Andhra Pradesh, Tamil Nadu and other coastal States. It is alleged that the coastal States are allowing big business houses to develop prawn farms on a large scale in the ecologically fragile coastal areas of the States concerned in violation of the Environment Protection Act, 1986 and the rules framed thereunder

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 7 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

and various other provisions of law. It is also alleged that establishment of prawn farms on rural cultivable lands is creating serious environmental, social and economic problems for the rural people living along the coastal bed specially in the east coast. ... Meanwhile, we direct NEERI, Nagpur through its Director to appoint an investigating team to visit the coastal areas of the States of Andhra Pradesh and Tamil Nadu and give its report to this Court regarding the various farms which are being set up in the said area.

In case the investigating team finds that the ecologically fragile area is being environmentally degraded then it shall suggest the remedial measures in that respect. The NEERI team shall keep in view the Notification dated 19-2-1991 of the Ministry of Environment and Forests, Government of India, issued under the Environment Protection Act, 1986 and also the provisions of the Tamil Nadu Agriculture (Regulation) Act, 1995. The NEERI shall submit its report before 30-4-1995."

4. Pursuant to the above-quoted order, the National Environmental Engineering Research Institute, Nagpur (NEERI) submitted its report dated 25-4-1995 before this Court. This Court further directed NEERI to send an expert team to the coastal areas in other States and file its report within two months. The report was filed in this Court within the specified time. This Court on 9-5-1995 passed the following order:

"This matter be listed for final hearing on 4-8-1995. Meanwhile we direct that no part of agricultural lands and salt farms be converted into commercial aquaculture farms hereinafter. We further direct that no groundwater withdrawal, be allowed for aquaculture purposes to any of the industries whether already existing or in the process of being set up. No further shrimp farms or any aquaculture farms be permitted to be set up in the areas in dispute hereinafter.

We direct the respective State Governments (the Collector concerned or any other officer appointed by the Government) to provide free access through aquaculture units to the sea coast to the fishermen/tourists after hearing the parties concerned.

Mr Mehta has contended that due to these farms occupying most of the coastal areas it has become difficult for the villagers to search for fresh water. The State Government may examine this aspect and provide water by way of tankers wherever it is necessary.

So far as the farmers in the State of Tamil Nadu are concerned they are all represented through Mr Kapil Sibal and his team, we direct the State of A.P. to send a copy of the order of this Court to all the aquaculture farms in the State of A.P. informing them that the matter shall be taken up by this Court for final hearing on 4-8-1995. This may be done by the State of A.P. by the end of June 1995.

We direct the Pondicherry Administration to send a copy of the order of this Court to all the aquaculture farms in Pondicherry informing

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 8 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

them that the matter shall be taken up by this Court for final hearing on 4-8-1995. This may be done by the Pondicherry Administration by the end of June 1995.

We further direct the Superintendent of Police and the Collector of the areas concerned to see that the order of this Court specially the directions given are meticulously complied with by all the farms."

Before finally hearing this matter, this Court passed the following order on 24-8-1995:

"We are of the view that it would be in the interest of justice to have full representation before us so far as individual aquafarms in various States/Union Territories are concerned. We, therefore, adjourn the hearing to 17-10-1995. Meanwhile, we direct the coastal States/Union Territory Governments through their learned counsel who are present in the Court, to issue individual notices to all the aquafarms which are located in their respective territories. It may be stated in the notices that the same are being issued under the direction of this Court. It should also be specifically mentioned that if they want to be heard in these matters by this Court, they be present through their counsel/representatives in the Court, on the next date of hearing, which is 17-10-1995. We also direct the Marine Products Export Development Authority (MPEDA), through its counsel, Mr Harish N. Salve, to do the same exercise at its level also. Apart from that, we further direct all the State Governments/Union Territories to issue public notices in this respect in daily newspapers which have circulation in the coastal areas, informing the aquafarms regarding the hearing of these matters in this Court on 17-10-1995. This may be done on two consecutive days.

Notices and publication be completed within 3 weeks from today. Meanwhile, we direct all the State Governments/Union Territories not to give fresh licences/permission for setting up/establishment of any aquafarm in their respective territories till further orders."

5. Coastal pollution, universally, is an emerging problem. So far as India is concerned it has already become a serious environmental problem. Besides direct dumping of waste materials in the seas, discharge through marine outfalls, large volumes of untreated or semi-treated wastes generated in various land-based sources/activities ultimately find way to the seas. The coastal waters directly receive the inland waters, by way of surface run-off and land-drainage, laden with myriad of refuse materials — the rejects or wastes of the civilisation. Apart from inputs from rivers and effluent outfalls, the coastal areas are subject to intensive fishing, navigational activities, recreations, ports, industrial discharge and harbours which are causative factors of water quality degradation to varying degrees. Contrary to the open sea, the changes in the quality of coastal waters, are much greater due to river discharges under tidal conditions.

6. With noticeable increase in marine pollution and the consequential decline in marine resources, serious concern was expressed in the United

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 9 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Nations' Conference on Human Environments in Stockholm (1972) attracting global attention towards the urgent need of identifying the critically polluted areas of the marine environments, specially in coastal waters, for urgent remedial actions. The Conference unanimously resolved that the littoral States should take early action at their national level for assessment and control of marine pollution from all sources and carry out systematic monitoring to ascertain the efficacy of pollution regulatory actions taken by them. In the background of the Stockholm Conference and in view of 1982 Convention on the "Law of the Sea" defining jurisdiction of territorial waters, a model comprehensive Action Plan has been evolved under the United Nations' Environment Programme (UNEP). Keeping with the international commitments and in greater national interest, the Government of India and the Governments of the coastal States are under a legal obligation to control marine pollution and protect the coastal environment.

7. According to the facts placed on record by the Central Pollution Control Board (the Board) the coastline of India's mainland is about 6000 kms long. Out of the total landmass of about 3.28 million sq kms nearly 0.15 million sq kms of coastal land-belt (considering 25 kms landward distance) girdles three sides of the country's sea front which in turn underlays about 0.13 million sq kms seabed up to the territorial limit. The country being riverine, has 14 major, 44 medium and 55 minor rivers which discharge annually about 1566 thousand million cubic metres of water through land drainage into the seas transporting a wide range of pollutants generated by land-based activities. Nine out of fourteen major rivers meet the sea in the east coast (Brahmaputra through Bangladesh) and the remaining five in the west coast (Indus through Pakistan).

8. Besides land drainage, there are large number of marine coastal outfalls discharging directly or indirectly industrial and municipal effluents into the seas. Uncontrolled disposal of land-based waste into the seas, through rivers and effluent outfalls, is a major cause of pollution of coastal waters. There are nine coastal States and one Union Territory (UT) in India namely, Gujarat, Maharashtra, Goa, Karnataka, Kerala, Tamil Nadu, Pondicherry (UT), Andhra Pradesh, Orissa and West Bengal. More than one-fourth of the total population of the country is settled in the coastal areas. The Board in the report regarding "Pollution Potential of Industries in Coastal Areas of India" dated November 1995 gives the following data regarding aquaculture farms:

> "The effluent generation from aquaculture farms in the east coast only, in absence of data on west coast farms, is to the tune of 2.37 million cubic metres per day, out of which Andhra Pradesh has the lion's share of about 2.12 million cubic metres per day. ... It may be noted that in all the States, in most cases, the effluent discharge is indirect (through estuaries, creeks, canals, harbours). It may also be noteworthy that the effluents from aquaculture farms are discharged directly/indirectly into the coastal waters practically without any treatment. For disposal of

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 10 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

solid waste, on the other hand, open dumping and land filling is a common practice."

9. In marine pollution control utmost importance has to be given to the beaches. The beaches and other areas of special interest, are to be maintained aesthetically and at permissible levels of enteric bacteria. Protection of ecologically sensitive areas and land-sea interface resource areas is equally important. The Central Board for the Prevention and Control of Water Pollution (Central Board) in its report "Coastal pollution control series COPOCS/1/1982" recommended as under:

"The mangrove forest at Pichavaram, the bird sanctuary and forest areas at Point Calimere and Coral reef at Mandapam are ecologically sensitive areas warranting special watch and preservation.

* Recreational coastal portions of some sectors of the stretch under investigation such as Marina and Elliot Beaches at Madras, Mahabalipuram, Pondicherry beach at Pondicherry and Poompuhar at the confluence of River Cauvery with the sea are to be maintained at appropriate quality level.

* Continuous monitoring of the coastal waters especially heavy metals and pesticides in the biota should be carried out to detect possible biomagnification of some toxic chemicals and to provide early warning."

The Central Board in its report "Coastal Pollution Control Series COPOCS/5/1986-87" sought protection of the ecologically fragile areas in the following terms:

"The mangrove forest and the wildlife sanctuary in Coringa Island, Pulicat Lake and the bird sanctuary at Nelapattu are the ecologically sensitive areas warranting special attention and protection. No industrial activity which may pose a danger to the ecosystem in these areas should be permitted.

At Pulicat Lake Area, Machilipatnam, Naupada and Ichchapuram, salt pan irrigation is practised. No water-polluting industry should be allowed nearby.

The domestic sewage and the industrial effluents entering Kolleru Lake through various drains be properly treated so that no pollutants enter the coastal waters through Upputeru drain."

10. Shrimps are basically marine. Shrimps are also called prawns. In commercial jargon, marine prawns are referred to as shrimps and freshwater ones as prawns. Prawns and shrimps are invertebrates and are decapod crustaceans. Sea is their home and they grow to adulthood and breed in the sea. The progeny start their life by drifting into estuaries and such other brackish water areas for feeding. In about 4-6 months the larvae grow into adolescence and go back to their real home of birth, the sea.

11. Aquaculture has been practised for many centuries by small farmers and fisherfolk in Asia to improve their living conditions. However, there is a

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 11 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

vast difference between the traditional methods and the new commercialised system. The traditional aquaculture, including shrimp, is usually small scale, using low inputs and relies on natural tidal action for water-exchange. In some countries, such as India, Bangladesh and Thailand, there is a tradition of rice/shrimp rotating, with rice-grown part of the year and shrimp and other fish species cultured the rest of the year. Chemicals, antibiotics and processed feeds are not used in the traditional method. In this low-yield, natural method, the harvest is small but sustainable over long periods. It has no adverse effect on the environment and ecology. The modern method, on the other hand, is larger in scale and intensive or semi-intensive in nature. It is owned and operated by commercial and often foreign-owned companies which mainly export the shrimp. In intensive aquaculture, selected species are bred using a dense stocking rate. To maintain the very crowded shrimp population and attain higher production efficiency, artificial feed, chemical additives and antibiotics are used.

12. The Food and Agriculture Organisation (FAO) — an organ of United Nations Organisation (UNO) — published a report in April 1995 on a Regional study and workshop on the Environmental Assessment and Management of Aquaculture Development. Copy of the report has been placed on record by Mr Santosh Hegde, learned counsel for the State of Karnataka. India was one of the 16 countries who participated in the workshop. Dr K. Alagarswami, Director, Central Institute of Brackish Water Aquaculture, Madras presented a paper titled "the current status of aquaculture in India, the present phase of development and future growth potential", (hereinafter called Alagarswami Report). It has been published as an Annexure to the workshop-report published by the FAO. Para 5.1.2 of Alagarswami Report gives various types of technologies adopted by the aquaculture industry in India. It would be useful to reproduce the same hereunder:

> "5.1.2. *Types of technology — Changes in technology with time*:
>
> *Traditional*: Practised in West Bengal, Kerala, Karnataka and Goa, also adopted in some areas of Orissa. Coastal low-lying areas with tidal effects along estuaries, creeks and canals; impoundments of vast areas ranging from 2-200 ha in size. *Characteristics*: fully tidally-fed; salinity variations according to monsoon regime; seed resource of mixed species from the adjoining creeks and canals by auto-stocking; dependent on natural food; water intake and draining managed through sluice gates depending on local tidal effect; no feeding; periodic harvesting during full and new moon periods; collection at sluice gates by traps and by bag nets; seasonal fields alternating paddy (monsoon) crop with shrimp/fish crop (inter monsoon); fields called locally as bheries, pokkali fields and khazan lands.
>
> *Improved traditional*: System as above but with stock entry control; supplementary stocking with desired species of shrimp seed (P. monodon or P. indicus); practised in ponds of smaller area 2-5 ha.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 12 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Extensive: New pond systems; 1-2 ha ponds; tidally fed; no water exchange, stocking with seed; local feeds such as clams, snails and pond-side prepared feed with fishmeal, soya, oilcake, cereal flour etc.; wet dough ball form; stocking density around 20,000/ha.

Modified Extensive: System as above; pond preparation with tilling, liming and fertilisation; some water exchange with pumpsets; pellet feeds indigenous or imported; stocking density around 50,000/ha.

Semi-intensive: New pond systems; ponds 0.25 to 1.0 ha in size; elevated ground with supply and drainage canals; pond preparation methods carefully followed; regular and periodic water exchange as required; pond aerators (paddle wheel) at 8 per ha; generally imported feed with FCR better than 1:1.5 or high energy indigenous feeds; application of drugs and chemicals when need arises; regular monitoring and management stocking density 15-25/m^2.

Intensive: Ponds 0.25-0.50 ha in size; management practices as above; 4 aerators in each pond; salinity manipulation as possible; central drainage system to remove accumulated sludge; imported feed; drugs and chemicals used as prophylactic measures; strict control and management; stocking density 20-35/m^2.

Changes in technology: As already indicated, the initial concept and practice was to develop tide-fed systems. This slowly gave way to pump-fed systems. Presently, the emphasis is on sea water based farming systems for P. monodon with a water intake system extending far into the sea with submerged pipelines, pier system and gravity flow. From sandy clay soils, the present coastal farms are located in sandy soils also with seepage control provisions."

Alagarswami Report further states as under:

"The Ministry of Environment and Forests, Government of India, issued a Notification S.O. No. 114(E) in 1991, under 'the Environment (Protection) Act, 1986' declaring coastal stretches as Coastal Regulation Zones (CRZ) and regulating activities in the CRZ. This Notification has implications for coastal aquaculture, particularly those activities within 500 m from the High Tide Line.... No regulations to control the use of chemicals and drugs exist, Pollution Control Board general regulations on effluent discharges include hazardous substances, but they are not specific to aquaculture. In some regions, there is indiscriminate use of chemicals and pesticides, particularly in shrimp farms.... Under the Notification of Union Ministry of Environment and Forests, each maritime State is expected to have its own coastal zone management plan, which would consider aquaculture zonation requirements, along with shoreline development. The zone up to 500 metres from the waterline along the sea is restricted against any construction activity."

13. Alagarswami Report highlights various environmental and social problems created by coastal aquaculture. The relevant part of the report is as under:

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 13 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

"Physical factors

Shrimp farming along the coastal area of the whole country is developing at a rapid rate. Huge cyclone protection dykes and peripheral dykes are constructed by the shrimp farmers. In many cases as in Kandleru creek (Andhra Pradesh), the farm areas are the natural drainage areas for floods. Due to physical obstruction caused by the dykes, the natural drain is blocked and flood water accumulates in the hinterland villages. Protests are being made by people in some of the villages against such dykes. The ponds are constructed right on the bank of the creeks without leaving any area for draining of flood water.

Right of passage of coastal fishermen

The shrimp farms do not provide access to the beach for traditional fishermen who have to reach the sea from their villages. As farms are located and entry is restricted, the fishermen have to take a longer route to the sea for their operations. This is being objected to by traditional fishermen.

Drinking water problems

The Corporate sector has purchased vast areas adjoining the villages which, in some cases, include drinking water public wells of the villages. The villagers cannot use these wells anymore as they are located in private land owned by the farmers. This is causing social problems.

Salinisation

It is reported that salinisation of land is spreading further landwards and the wells yield only saline water. In Tamil Nadu and Andhra Pradesh protests have been voiced against salinisation. Some of the socially conscious shrimp farm operators are providing drinking water to the affected villages by laying a pipeline from their own freshwater source wherever available. Apart from wells, the agricultural farms adjoining the shrimp farms are reported to be affected. However, there is increasing conversion of paddy fields as in the Bhimavaram area of Andhra Pradesh and even on the fringes of Chilka Lake into shrimp farms.

Mangrove areas

The status report on mangroves of India published by the Ministry of Environment and Forests (GOI, 1987) is shown in Table 5. In the earlier years, vast areas of mangrove were destroyed for agriculture, aquaculture and other uses. In the more recent years, the mangroves have been protected by law. However, the satellite imagery pictures show destruction of mangroves in Krishna and Guntur Districts of Andhra Pradesh for construction of shrimp farms. Gujarat State is planning major shrimp culture programmes in the Narmada region adjoining Gulf of Cambay. Protection of mangroves should receive attention."

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 14 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

14. Alagarswami Report further indicates that the demand for shrimp seed is growing with the expansion of shrimp culture and hatchery production is unable to meet it. Exploitation of natural seed resources is growing unabated, particularly in West Bengal, Orissa and Andhra Pradesh. Large quantity of fry by catch are discarded by the fry collectors because their value is insignificant. The report states "elimination of fry in the fry by catch is not only detrimental to the predators thriving on them, but it also creates an ecological imbalance".

15. Agitations by the environmentally conscious people of the coastal areas against polluting aquaculture technologies has been noticed by Alagarswami Report as under:

"People's awareness

People in general have become aware of the environmental issues related to aquaculture. A current case in point is the agitation against a large commercial farm coming up in Chilka Lake (Orissa). People have demanded an EIA of the project. People in Nellore District in Andhra Pradesh have raised environmental issues and called for adoption of environmentally-friendly technologies and rejection of 'imported' technologies from regions which have suffered environmental damage. Protests have been voiced by the local people in Tuticorin area in Tamil Nadu. Both print and visual media take up environmental issues with a great deal of zeal. This appears to augur well for regulating coastal shrimp farming with eco-friendliness."

16. The intensive farming technique and the pollutants generated by such farming have been noticed by *Alagarswami* in the following words:

"In intensive farming, stocking densities are on the increase. In one instance, P. indicus was stocked at 70 post larvae/m^2, almost reaching the levels of Taiwan before the disease outbreak in 1988. This necessitates heavy inputs of high energy feeds, the use of drugs and chemicals and good water exchange. The organic load and accumulation of metabolites in the water drained into the sea should be very high as could be seen from the dark-brown colour and consistency of the drain water."

17. The Alagarswami Report further states that paddy fields are being converted to shrimp farms, as in some parts of Andhra Pradesh (e.g. Bhimavaram). Some paddy lands along the fringe of Chilka Lake have been lost to shrimp farming.

18. The report suggests future management strategies — quoted hereunder — for farms and Government in resolving any conflicts or environmental problems:

"As shrimp farming is developing fast, the following strategies have been developed for avoiding problems which have arisen in other countries (or reducing their impact):

1. India needs to boost production of shrimp through aquaculture with environment and development as a unified motto.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 15 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

2. Since the area available is vast, this can be achieved by application of environmentally-friendly technologies for optimal production rates against maximum production rates.

3. Sustainable development or shrimp aquaculture should be guided by the principles of social equity, nutritional security, environmental protection and economic development with a holistic approach to achieve long-term benefits.

4. New definitions and parameters of extensive, semi-intensive and intensive culture systems as suited to Indian conditions and Government policies rather than copying models of other countries (particularly those which have rushed and suffered) and the development of guidelines thereof.

5. Diversification of species among shrimps and to integrate fish wherever possible to suit the different agro-climatic and aquatic zones of the country.

6. Careful development of Coastal Zone Management Plans under CRZ to meet the requirements of coastal aquaculture development plans with some flexibility (as required) for specific areas.

7. Identification of aquaculture zones or careful consideration and provision of buffer zones against possible impact on other land uses; also intermediate buffer zones within aquaculture zones.

8. Consideration of the living, social and vocational needs of local people in villages/towns in aquaculture plans in order to avoid conflicts.

9. Development of sets of regulations on use/ban of drugs and chemicals, including antibiotics in hatcheries and farms; on abstraction of groundwater and salinisation problems.

10. Development of standards for effluent discharge as applicable to local conditions.

11. Development of viable technologies for secondary aquaculture to gainfully utilise nutrient enriched farm effluents and encourage farmers to adopt such technologies with the necessary support.

12. In view of the fact that coastal farms are located generally in remote areas and cannot be monitored by external agencies on a reasonably effective basis, farmers/group of farmers should equip themselves with facilities to monitor possible important parameters at periodic intervals and maintain such records for their own benefits and for production to inspecting agencies.

13. Brackish Water Fish Farmer Development Agencies to be strengthened in all respects, including environmental management and disease diagnosis, prevention and control, through appropriate

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 16 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

training and setting up district level laboratories for essential analytical and diagnostic work.

14. Manpower development at managerial and technical level.

15. Research-extension-farmer group meet for appropriate technologies and feedback.

16. Effective monitoring and enforcement of regulations, use of nets and fishing in any specified water for a period not exceeding two years. Thus, legal provisions were made on fisheries matters in India nearly a century ago."

19. Alagarswami's Report identifies salinisation of land, salinisation of drinking water wells, obstruction of natural drainage of flood water, passage of access to sea by fishermen and public, self-pollution of ponds, pollution of source water, destruction of mangroves, land subsidence and pressure on wild seed resources and consequences thereof as environmental issues in shrimp culture. Para 6.2 of the report lists the following preventive measures:

"6.2 PREVENTION

(*i*) Aquaculture units causing harmful changes to the environment; and

(*ii*) Non-aquaculturists from modifying the environment to the detriment of aquaculture production units.

1. Enforcement of legal provisions under the relevant Acts of the Government.

2. CRZ regulations to consider specific needs of aquaculture as an expanding production activity and the Coastal Zone Management Plans of the States/Union Territories to carefully plan taking into consideration present situation and future needs.

3. Early development of regulations on permissible levels of most significant parameters of water quality keeping in view the limited intervention of aquaculture for promoting growth of stock in the medium.

4. Environment Impact Assessment (EIA) and Environmental Monitoring Plan (EMP) to be insisted upon for larger units and self-assessment/monitoring for smaller units, subject to verification at inspection.

5. Zonations and appropriate siting of farms; not to proliferate indiscriminately but to develop in a planned manner for sustaining production (Alagarswami, 1991).

6. More hatcheries to be encouraged and supported to meet seed demands to reduce pressure on wild seed resources.

7. Feed mills to maintain quality of feeds and to ensure water stability as required; self/external inspection mechanism to be introduced to maintain specific standards.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 17 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

8. Mangrove forests not to be touched for aquaculture purposes."

The FAO Report — based on Alagarswami Report — states the impact of aquaculture on the environment, in India, as under:

"The impact of aquaculture on the environment are as follows:

By shrimp culture: Loss of agricultural land and mangroves, obstruction of natural drains, salinisation, destruction of natural seed resources, use of drugs and chemicals, and extraction of groundwater. Social conflicts have arisen."

20. Alagarswami Report — quoted by us extensively — is an authentic document relating to the functioning of shrimp culture industry in India. It has rightly been suggested in the report that sustainable development should be the guiding principle for shrimp aquaculture. The industry must develop under the unified motto of Environment and Development. Environmentally-friendly technologies are to be adopted with a view to achieve optimal production. The report calls for a ban on the use of drugs, chemicals and antibiotics in the shrimp culture farms. The report clearly indicates that except the traditional and improved traditional, the other methods of shrimp aquaculture are polluting and as such may have an adverse impact on the environment.

21. Mr M.C. Mehta, learned counsel for the petitioner, has taken us through the NEERI Reports and other voluminous material on the record. He has vehemently contended that the modern — other than traditional — techniques of shrimp farming are highly polluting and are detrimental to the coastal environment and marine ecology. According to him only the traditional and improved traditional systems of shrimp farming which are environmentally friendly should be permitted. Mr Mehta has taken us through the Notification dated 19-2-1991 issued by the Government of India under Section 3 of the Environment (Protection) Act, 1986 (the Act) (CRZ Notification) and has vehemently contended that setting up of shrimp farms on the coastal stretches of seas, bays, estuaries, creeks, rivers and backwaters up to 500 metres from the High Tide Line (HTL) and the line between the Low Tide Line (LTL) and the HTL is totally prohibited under para 2 of the said notification. The relevant part of the Notification No. S.O. 114(E) dated 19-2-1991 is as under:

"2. *Prohibited Activities*.—The following activities are declared as prohibited within the Coastal Regulations Zone, namely:

(*i*) setting up of new industries and expansion of existing industries, except those directly related to waterfront or directly needing foreshore facilities;

(*ii*) manufacture or handling or storage or disposal of hazardous substances as specified in the Notifications of the Government of India in the Ministry of Environment and Forests No. S.O. 594(E) dated 28-7-1989, S.O. 966(E) dated 27-11-1989 and G.S.R. 1037(E) dated 5-12-1989;

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 18 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

(*iii*) setting up and expansion of fish-processing units including warehousing (excluding hatchery and natural fish drying in permitted areas);

* * *

(*v*) discharge of untreated wastes and effluent from industries, cities, or towns and other human settlements. Schemes shall be implemented by the authorities concerned authorities for phasing out the existing practices, if any, within a reasonable time period not exceeding three years from the date of this notification.

* * *

(*viii*) land reclamation, bunding or disturbing the natural course of sea water with similar obstructions, except those required for control of coastal erosion and maintenance or clearing of waterways, channels and ports and for prevention of sandbars and also except for tidal regulators, storm water drains and structures for prevention of salinity ingress and for sweet water recharge.

* * *

(*x*) harvesting or drawal of groundwater and construction of mechanisms therefor with 200 m of HTL; in the 200 m to 500 m zone it shall be permitted only when done manually through ordinary wells for drinking, horticulture, agriculture and fisheries;

* * *"

22. According to Mr Mehta the shrimp culture industry is neither "directly related to waterfront" nor "directly needing foreshore facility" and as such is a prohibited activity under para 2(*i*) of the CRZ Notification. Mr Kapil Sibal on the other hand has argued that a shrimp farm is an industry which is directly related to waterfront and cannot exist without foreshore facilities. Relying upon *Oxford English Dictionary* Mr Sibal contended that "waterfront" means land abetting on the sea, that part of a town which fronts on a body of water. According to him "foreshore" in terms of the said dictionary means the part of the shore that lies between the High Tide and the Low Tide. According to *Webster's Comprehensive Dictionary*, International Edn., the expression "foreshore" means "that part of a shore uncovered at low tide".

23. It is, thus, clear that the part of the shore which remains covered with water at the High Tide and gets uncovered and becomes visible at the Low Tide is called "foreshore". It is not possible to set up a shrimp culture farm in the said area because it would completely submerge in water at the High Tide. It is, therefore, obvious that foreshore facilities are neither directly nor indirectly needed in the setting up of a shrimp farm. So far as "waterfront" is concerned it is no doubt correct that a shrimp farm may have some relation to the waterfront in the sense that the farm is dependent on brackish water which can be drawn from the sea. But on a close scrutiny, we are of the view that shrimp culture farming has no relation or connection with the "waterfront" though it has relation with brackish water which is available

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 19 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

from various water bodies including sea. What is required is the "brackish water" and not the "waterfront". The material on record shows that the shrimp ponds constructed by the farms draw water from the sea by pipes, jetties etc. It is not the "waterfront" which is needed by the industry. What is required is brackish water which can be drawn from any source including sea and carried to any distance by pipes etc. The purpose of CRZ Notification is to protect the ecologically fragile coastal areas and to safeguard the aesthetic qualities and uses of the sea coast. The setting up of modern shrimp aquaculture farms right on the sea coast and construction of ponds and other infrastructure thereon is per se hazardous and is bound to degrade the marine ecology, coastal environment and the aesthetic uses of the sea coast. We have, therefore, no hesitation in holding that the shrimp culture industry is neither "directly related to waterfront" not "directly needing foreshore facilities". The setting up of shrimp culture farms within the prohibited areas under the CRZ Notification cannot be permitted.

24. Para 2(*viii*) of the CRZ Notification quoted above, prohibits the bunding or disturbing the natural course of sea water with similar obstructions. A bund is an embankment or dyke. Alagarswami Report in para 4.3.2 (quoted above) has specifically mentioned that huge cyclone protection dykes and peripheral dykes are constructed by the shrimp farmers. The report further states that due to physical obstruction caused by the dykes the natural drain is blocked and flood water accumulated in the hinterland villages. The report notices that the shrimp ponds are constructed right on the bank of the creeks without leaving any area for draining of flood waters. A shrimp farm on the coastal area by itself operates as a dyke or a bund as it leaves no area for draining of the flood waters. The construction of the shrimp farms, therefore, violates clause (*viii*) of para 2 of the CRZ Notification. In view of the findings by the Alagarswami Report it may be useful to hold an inquiry/investigation to find out the extent of loss occurred, if any, to the villages during the recent cyclone in the State of Andhra Pradesh because of the dykes constructed by the shrimp farmers.

25. Annexure I to the CRZ Notification contains regulations regarding Coastal Area Classification and Development. The coastal stretches within 500 m of HTL of the landward side are classified into four categories, namely, CRZ-I, CRZ-II, CRZ-III and CRZ-IV. Para 6(2) of the CRZ Notification lays down the norms for the development or construction activities in different categories of CRZ areas. In CRZ-III Zone agriculture, horticulture, gardens, pastures, parks, playfields, forestry, and salt manufacture from sea level may be permitted up to 200 m from the high tide line. The aquaculture or shrimp farming has not been included as a permissible use and as such is prohibited even in this zone. A relevant point arises at this stage. Salt manufacturing process like the shrimp culture industry depends on sea water. Salt manufacturers can also raise the argument that since they are wholly dependent on sea water theirs is an industry "directly related to waterfront" or "directly needing foreshore facilities". The argument stands negatived by inclusion of the salt

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 20 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

manufacturing industry in CRZ-III Zone under para 6(2) of the CRZ Notification otherwise it was not necessary to include the industry therein because it could be set up anywhere in the coastal regulation zone in terms of para 2(1) of the CRZ Notification. It is thus obvious that an industry dependent on sea water cannot by itself be an industry "directly related to waterfront" or "directly needing foreshore facilities". The shrimp culture industry, therefore, cannot be permitted to be set up anywhere in the coastal regulation zone under the CRZ Notification.

26. We may examine the issue from another angle. Sea coast and beaches are a gift of nature to the mankind. The aesthetic qualities and recreational utility of the said area has to be maintained. Any activity which has the effect of degrading the environment cannot be permitted. Apart from that the right of the fishermen and farmers living in the coastal areas to eke their living by way of fishing and farming cannot be denied to them. Alagarswami Report states that "the shrimp farms do not provide access to the beach for traditional fishermen who have to reach the sea from their villages. As farms are located and entry is restricted the fishermen have to take a longer route to the sea for their operation. This is being objected to by traditional fishermen."

27. The Alagarswami Report further highlights drinking water problem, salinisation and destruction of mangrove by the shrimp culture industry. The relevant paragraphs have already been quoted above. The increase of stocking densities, heavy inputs of high energy feeds, use of drugs and chemicals result in the discharge of highly polluted effluents into the sea, creeks etc. and on the sea coast by the shrimp farms. It is, therefore, not possible to agree with Mr Sibal that commercial shrimp farming has no adverse effect on environment and coastal ecology.

28. We may at this stage refer to the two investigation reports dated 23-4-1995 and 10-7-1995 by NEERI regarding the ecologically fragile coastal areas of India.

29. The report dated 23-4-1995 stated that a 13-member team of scientists, led by Dr A.S. Bali and Dr S.K. Kaul inspected the shrimp farms situated on the ecologically fragile coastal areas in the States of Andhra Pradesh and Tamil Nadu between 10-4-1995 and 19-4-1995. It is further stated that the coastal areas in the Union Territory of Pondicherry were also inspected by the team. Regarding the CRZ Notification, the report states as under:

> "The MEF's notification dated 19-2-1995 stipulates that the aquaculture farms on the coastal areas should not be constructed within 500 m from the high tide line (HTL) of the seas. The hatcheries, however, may be constructed between 250 m and 500 m from HTL of the sea.
>
> The inspection team observed during field investigations that the MEF's norms for location of aquaculture and hatcheries have been violated in the States of Andhra Pradesh, Tamil Nadu, and the Union

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 21 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Territory of Pondicherry. ... There is an urgent need to ensure scrupulous implementation of the provisions made in the MEF's notification dated 19-2-1991 in the States and Union Territory inspected by the team. In addition, the damage caused to the land and water ecosystems by coastal aquaculture activity, as detailed in the report, must be restored to its original ecological state. The cost for eco-restoration of the coastal fragile area must be borne by individual entrepreneurs of the coastal aquaculture farms in keeping with the Polluter Pays principle. ... Further, no activity of commercial coastal aquaculture should be undertaken even beyond 500 m HTL unless a comprehensive and scientific Environmental Impact Assessment (EIA) Study has been conducted by the entrepreneur, and the Environmental Management Plan approved by the respective State Department of Environment, Pollution Control Board, Shore Development Authority, and also by the Ministry of Environment and Forests. Appropriate terms of reference for EIA have been incorporated in the report."

Regarding the socio-economic assessment of aquaculture in the area, the report gives the following finding:

"A socio-economic assessment of aquaculture in the ecologically fragile coastal areas in the States of A.P. and T.N. has been conducted by the NEERI team. This assessment, detailed in the report, indicates that the cost of ecological and social damage far exceeds the benefits that accrue out of coastal aquaculture activities "

The adverse impacts of aquaculture farming on the environment and the ecologically fragile areas in the States of Andhra Pradesh, Tamil Nadu and Union Territory of Pondicherry have been stated in the report as under:

"3.0 *Observations on the Impacts of Aquaculture Farming on Ecologically Fragile Areas in States of A.P., T.N. and Union Territory of Pondicherry*:

Coastal aquaculture units are situated within 500 m of High Tide Line of the sea. This is not in consonance with the MEF's notification dated 19-2-1991.

It is a common practice to convert agricultural land, and land under salt production, into coastal aquaculture units which infringes the fundamental rights to life and livelihood.

Conversion of agricultural farms and salt making lands into commercial aquaculture farms is rampant in the fragile coastal areas of Andhra Pradesh, Tamil Nadu and Union Territory of Pondicherry.

Brackish aquaculture units have been installed in deltaic regions which is an ecologically unsound practice.

Natural saline canals which travel from sea to the mainland are being used for brackish aquaculture farming. The flow of the natural saline canals is being obstructed due to prawn farming activity which has resulted in the spread of brackish water over agricultural farms resulting in loss of agricultural lands, and potable water.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 22 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Villages situated along the sea coast, deltaic regions, and natural saline canals are under threat due to diversion of land to aquaculture farms.

Traditional fishermen have lost their landing grounds for fish catch.

Coastal aquaculture has resulted in loss of mangrove ecosystems which provide protection against cyclones and other natural hazards, and which provide natural habitat for spawning of marine biota. Indiscriminate destruction of mangrove areas in and around the creeks, estuaries, and sea has resulted in loss of natural breeding grounds for shrimps.

Natural Casuarina plantations have also been destroyed. This may result in increasing damage from cyclones and intrusion of saline water into the mainland.

Coastal aquaculture farms have not been scientifically designed and located, resulting in excessive ecological damages.

No proper peripheral drainage has been provided around the aquaculture farms.

The saline water intake and effluent discharge points from aquaculture farms are located in close vicinity, resulting in contamination of feed water to the aquaculture units threatening their productivity.

Three types of saline water supply systems are in vogue for the aquaculture farming, viz.

— direct pumping from the sea, creek, and estuary,
— direct pumping from deep sea with jetties,
— using high tides of sea for carrying saline water through excavated canals.

These activities for feed water supply to the aquaculture ponds have resulted in:

— loss of fish catch (except in the case of feed water supply through sea water canal system),
— loss due to damage of fishing nets,
— degradation of fragile coastal land.

Large commercial aquaculture farms have installed fencing in and around the farms resulting in blockage of free access for the fishermen to the seashore.

The wastewater discharge from the aquaculture farms released into the creeks is not properly flushed out of the creek during low tides thereby leads in the accumulation of pollutants in the creek, affecting the quality of intake water to aquaculture farm with concomitant loss in productivity, and damage to creek ecosystem.

Disappearance of the native fish species due to increase in salinity of the creek water has been observed by the team and reported by the

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 23 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

fishermen. Increase in salinity has also reduced the ingress of shrimp seedlings in the creek.

Indiscriminate catch of natural shrimp seedlings from the coastal waters, creeks and estuaries has resulted in reduction of their availability, which in turn has forced the commercial aquaculture farmers to import the seeds.

Unscientific management practices adopted by the commercial aquaculture farmers and improper design of aquaculture farms including inadequate drainage systems have resulted in skin, eye, and water-borne diseases in the contiguous population.

Commercial aquaculture farm owners have not contributed to any social infrastructure facilities for the villagers.

Employment avenues of the contiguous population have considerably reduced due to the commercial aquaculture farming. The unemployed villagers are seeking employment in nearby towns and cities.

Owners of the commercial aquaculture farms are using various means to encroach upon the government lands and also forcing the agricultural landowners/salt-making villagers to sell their lands. In addition, the fishermen are also being forced to migrate to other coastal areas."

Regarding the socio-economic status of the ecologically fragile coastal areas in the States of Andhra Pradesh and Tamil Nadu, the report states as under:

"During the inspection of the aquaculture units located on the Ecologically Fragile Coastal Areas of A.P. and T.N., the inspection team collected data and information and discussed the issues related to socio-economic status of the affected people with the farmers, fishermen, NGOs and government officials.

The basic socio-economic issues are presented in Table 4.1 which also lists the parametric values in the assessment of the damage caused by the aquaculture units located in the Ecologically Fragile Coastal Areas. Tables 4.2 and 4.3 present the socio-economic assessment of aquaculture in the Ecologically Fragile Coastal Areas of the States of A.P. and T.N.

Tables 4.2 and 4.3 bring forth that the damage caused to ecology and economics by the aquaculture farming is higher than the earnings from the sale of coastal aquaculture produce."

30. The NEERI has, thus, given a positive finding that the damage caused to ecology and economics by the aquaculture farming is higher than the earnings from the sale of coastal aquaculture produce. The finding is based on the assessment keeping in view fourteen parameters listed in Tables 4.2 and 4.3 regarding the States of Andhra Pradesh and Tamil Nadu respectively. The parameters taken into consideration are land, equivalent wages for the farmers to be earned, equivalent amount of agricultural

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 24 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

produce (rice, husk), loss due to cutting of Casuarina in terms of fuel, loss in terms of grazing grounds, loss involving diseases, loss caused by cyclones due to cutting of Casuarina forests, loss due to desertification of land, loss in terms of potable water, total loss due to mangrove destruction, loss in fishing income, loss due to damage of fishing nets and man-days lost due to non-approachability to sea coast. These losses are computed in money and are then compared with the total earnings from the sale of coastal aquaculture produce. On the basis of the assessment of socio-economic status of aquaculture in a systematic manner the NEERI has reached the conclusion that the damage caused to ecology and economics by the aquaculture farming is higher than the earnings from the sale of coastal aquaculture produce. Paras 6.1, 6.2 and 6.3 of the report clearly show the environmental degradation caused by the shrimp culture farming by its adverse impact on surface water, contamination of soil and groundwater and destruction of mangrove vegetation. The said paragraphs are reproduced hereunder:

"6.1 *Impact on Surface Waters*

Mangrove vegetation is important in protecting marine and terrestrial ecosystem. This vegetation is also important as it removes the pollutants like carbon, nitrogen, phosphate and other nutrients, as also certain toxic compounds. The importance of mangrove plants especially Vettivera zaizonoids is known in reducing the impact of pollution due to discharge of aquaculture pond effluents, and the Cauvery Delta farmers are now propagating the cultivation of this species in estuaries. Mangrove vegetation also acts as a barrier of floods and provides spawning grounds and nesting places for fishes; it also supports avian fauna (birds) thus maintaining the natural ecosystem.

The observations on the water quality in the aquaculture ponds show that the pond water harbours a dense algal bloom compared to the water in estuaries, creeks or sea indicating eutrophic nature of pond effluent. When water in large volumes, from the ponds is discharged during flushing of ponds, in a creek or estuary, the pollutants remain stagnated in the estuary or near sea coast due to the typical tidal activity in creeks. As a result, the raw water source to the ponds gets contaminated in course of time. The wastewater discharge from the ponds warrant proper treatment before discharge. Uncontrolled discharge of wastewater triggers a series of deleterious impacts, e.g.

* With the increase in eutrophication levels, there is a shifting in dominance of phytoplankton flora in pond effluents from diatoms to blue-green algae. Decomposition of dead blue-green algae may lead to the generation of toxic substances, e.g., ammonia, hydrogen sulphide etc. Further, some of the blue-greens also excrete biotoxins in large quantities which are toxic to aquatic animals, i.e., prawns in ponds or fishes in estuaries or coastal waters. Large amount of blue-green algae was recorded by the inspection team in Sirkali area (e.g. S&S Industries & Enterprises Ltd; High Tide Sea Farms) and Killai

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 25 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

area (Aqua Gold Shrimp Farm; MRV Aquafarm; Mohi Aquafarm). The presence of Oscillatoria, Microcystis and some other filamentous blue-green algae is undesirable in the pond effluent as they choke the gills of fishes.

* The suspended solids released from the ponds are laden with unconsumed food and other organic contaminants. Accumulation of these organics in the intake water creates problems in the intake water quality when the intake and discharge points are in close proximity.

6.2 *Contamination of soil and groundwater*

The shrimp farms are constructed well above the ground levels. Seepage of pond effluents in the surrounding fields was noted by the inspection team in a number of farms. Seepage of pond effluent deteriorates the soil quality in the adjoining aquacultural fields. It has also contaminated potable water in surrounding villages.

Deterioration of groundwater quality in villages that are over one km away from the pond sites was not noticed. This observation is based on analysis of borewell water at three sites by the inspection team. This observation justified the locational constraints on aquaculture farms in coastal areas.

6.3 *Destruction of mangrove vegetation*

The inspection team noticed destruction of mangrove vegetation at most of the prawn farming sites for the development of shrimp farms.

Significant destruction of mangrove forests was observed near the Aqua Gold Shrimp Farm at Village Vellar in Killai Taluk of South Arcot District similarly on Pichavarum estuary in Village Pichavarum in Killai Taluk of South Arcot District of T.N., the shrimp farms are constructed by clearing mangrove vegetation. Mangrove vegetation in Kuchipalam Village is also facing threat due to the expansion of prawn farming activity.

The final conclusions and recommendations are in para 6 of the NEERI Report which is as under:

"8.0 *Conclusions and Recommendations on the attenuation of the Impact of Aquaculture Farming on Ecologically Fragile Areas in States of A.P., T.N., and Union Territory of Pondicherry* :

Socio-economic assessment of aquaculture in the ecologically fragile areas in the States of A.P. and T.N. reveals that the cost of ecological and social damage far exceeds the benefits that accrue out of the coastal aquaculture activities.

The MEF's norms for location of aquaculture and hatcheries have been violated in the States of A.P., T.N. and Union Territory of Pondicherry.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 26 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

The current practice of installation of coastal aquaculture farms within 500 m HTL violates the fundamental rights and livelihood of people in the States of A.P. and T.N., and the Union Territory of Pondicherry.

The State of A.P. has adopted twenty-point guidelines as ad hoc measures for management of aquaculture in the district of Nellore. These guidelines have not been made mandatory in the State of A.P. as a whole. Also, these guidelines do not address all socio-economic, and ecological aspects of coastal habitats.

The State Government of T.N. has enacted a Bill to provide for the regulation of coastal aquaculture on 10-4-1995. This Bill is not in consonance with the MEF's notification dated 19-2-1991 as it allows the construction of aquaculture units within 500 m of HTL of the sea.

The cost of eco-restoration of the coastal fragile area must be borne by the individual entrepreneur of the commercial aquaculture farms in keeping with the Polluter Pays Principle.

No commercial coastal aquaculture activity should be undertaken even beyond 500 m HTL unless a comprehensive and scientific environmental impact assessment (EIA) study has been conducted by the entrepreneur, and the environment management plan (EMP) approved by the respective State Department of Environment, Pollution Control Board, Shore Development Authority, and also by the Ministry of Environment and Forests.

Agricultural lands are being converted into commercial aquaculture farms, which causes unemployment to the landless labourers and also in loss of cultivable land.

Commercial aquaculture farms are being installed near the cultivated lands and the salt water from the farms damages the productivity of the adjoining lands.

Groundwater also gets contaminated due to seepage of impounded water from the aquaculture ponds.

Desertification of cultivable land is on the increase due to salinity intrusion.

Due to commercial aquaculture farms, there is a loss of

* mangrove ecosystems
* casuarina plantations
* grazing grounds for cattle
* potable water to contiguous population
* fish catch
* fishing nets
* agricultural produce
* manpower loss due to non-approachability of fishermen to seashore directly.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 27 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

There is a perceptible increase in the diseases of skin and eye, and water-borne diseases in the contiguous population.

The designs of the aquaculture farms are inadequate. No provision has been made for wastewater treatment facility enabling recycling and reuse of wastewater.

Prohibition on conversion of agricultural lands and salt farms into commercial aquaculture farms must be enforced with immediate effect.

No groundwater withdrawal must be allowed for aquaculture purposes.

Free access through aquaculture unit to the sea coast must be provided to the traditional fishermen.

No aquaculture farm based on brackish water should be installed on inland brackish water bodies.

Wild seed collection from creek and sea must be prohibited. Seed must be procured from hatcheries. If seed collection is noticed it must immediately be seized and dumped back into the creek.

An eco-restoration fund must be created by collecting the stipulated fees from the owners of aquaculture farms. In addition, one per cent of total export earnings per annum must also be collected from commercial aquaculture farm owners and used for rejuvenation of coastal ecosystem with special reference to plantation of mangroves and common eco-sensitive zones. The wastewater treatment system with reuse and recycle must be installed by all units. The smaller units can form a cooperative and treat their water through common effluent treatment plant. The aquaculture units must be closed down if the wastewater treatment system is not functioning to its design efficiency."

31. The second NEERI Report dated 10-7-1995 states that a 19-member team of scientists led by Dr A.S. Bali and Dr S.N. Kaul inspected the shrimp farms situated on the ecologically fragile coastal areas in the States of West Bengal, Orissa, Kerala, Karnataka, Goa, Maharashtra and Gujarat during 20-5-1995 and 10-6-1995. The summary of salient comments in the report regarding aquafarming in the State of West Bengal is as under:

* Organic pollution in creeks and estuaries with respect to BOD;
* microbiological deterioration of water quality;
* accumulation of organic carbon and heavy metals in the sediments of shrimp farms;
* Shanon Weaver index values less than 3 indicate organic contamination;
* borewell water characteristics near M/s Index Port Ltd., Sarberia, Basanti, North 24-Parganas, show intrusion of salinity in drinking water source;
* conversion of land and traditional fish farm at M/s Index Port Ltd., North 24-Parganas;

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 28 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

* conversion of land, traditional fish farm and mangrove plantation at M/s Sundarban Aquatics, South 24-Parganas;
* violation of CRZ regulations regarding high tide line (HTL) has taken place at M/s Sundarban Aquatics, South 24-Parganas. In addition, violations of CRZ for setting up the aquafarm on creeks have taken place at the following places:
  — M/s Index Port Ltd., North 24-Parganas,
  — M/s Sundarban Aquatics, South 24-Parganas,
  — All shrimp farms developed by BWFD at Ramnagar, Midnapore."

The comments regarding the aquafarming in the State of Orissa by the NEERI team are as under:

"* Organic pollution in creeks and estuaries with respect to BOD;
* deterioration of microbiological water quality;
* accumulation of organic carbon and heavy metals in the sediments of shrimp farms;
* Shanon Weaver index values less than 3 indicate organic contamination;
* characteristics of borewell water samples near M/s Sundeep Aquatics, District Bhadrak and M/s Suryo Udyog Pvt. Ltd., District Balasore, show intrusion of salinity into drinking water;
* conversion of cultivable land for the establishment of aquafarms/hatcheries in all districts;
* violation of CRZ regulations by all aquafarms on creeks in the districts of Balasore and Bhadrak. Hatcheries have been constructed/under construction within 200 m of high tide line (HTL) in contravention of CRZ regulations."

The status of aquafarming in the State of Kerala as indicated in the NEERI Report is as under:

"The comments on aquafarming in the State of Kerala are presented in the footnotes of Tables 2.2.1.2 through 2.2.1.7. Summary of the salient comments is given hereunder:

* Organic pollution in river, creeks and estuaries;
* deterioration of microbiological water quality;
* accumulation of organic carbon and heavy metals in the sediments of shrimp farms;
* Shanon Weaver index values less than 3 indicate organic contamination;
* well water characteristics in the vicinity of M/s Agalapuzha Aquafarm, Kozhikode show the intrusion of salinity in drinking water source;
* conversion of land, and traditional fish farm by M/s Vasu Aquafarms at Kozhikode;

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 29 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

* conversion of land, traditional fish farm, and mangrove plantation by M/s West Coast Aquafarms Irinavu, Kannur;
* violation of CRZ regulations regarding the location of aquafarms on creeks has taken place at the following sites:
  — M/s Consolidated Aquafarm, Poyya, Trissur.
  — M/s Jaladhi Aquafarm, Cherchi.
  — M/s Keetodiyal Aquafarm, Arookutty, Alleppey.
  — M/s Mejovi Fisheries, Irinavu, Kannur."

The report further indicates the status of aquaculture in the State of Karnataka as under:

* "Organic pollution in river, creeks, and estuaries;
* Shanon Weaver index values less than 3 indicate organic contamination;
* well water characteristics in vicinity of M/s Raja Ram Bhat Aquafarm, Hanmav, Kumta show the intrusion of salinity in drinking water source;
* conversion of agricultural land into shrimp farms was observed at
  — M/s Popular Aquafarm, Tallur, Kundapur
  — M/s Raja Ram Bhat Aquafarm, Hanmav, Kumta
  — M/s Shri Arya Durga Aquafarm, Karwar
* destruction of mangrove vegetation by M/s Popular Aquafarm, Tallur, Kundapur was observed by the inspection team;
* violation of CRZ regulations by aquafarms situated on the creek or Razadi River at Kundapur, Hanmav creek at Kumta, and Hgnashree creeks were noted by the inspection team."

The comments of the NEERI Report regarding aquafarms in the State of Goa are as under:

"* Organic pollution in river, estuary and discharges from ponds;
* Shanon Weaver index values less than 3 indicate organic contamination;
* well water characteristics in vicinity of M/s Govt. Prawn Farm, Choraho, indicate salinity intrusion;
* conversion of agricultural land into shrimp farm was observed by the inspection team at M/s Sky Pak Aquafarm Ltd., Paliyam, Goa;
* violation of CRZ regulations by all the aquafarms on the creeks, viz. Masem creek at Kankun, and Chahora at Pernem were observed by the inspection team."

Summary of the salient comments on aquaculture in the State of Maharashtra is as under:

"* Organic pollution in river, estuary and discharges from ponds;
* microbiological deterioration of water quality;

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 30 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

* accumulation of organic carbon and heavy metals in the sediments of shrimp farms;
* Shanon Weaver index values less than 3 indicate organic contamination;
* conversion of agricultural land into shrimp farms;
* violation of CRZ regulations regarding location of shrimp farms on creeks, viz. Dharamtar, Satpati, and Dahanu."

The comments regarding the State of Gujarat are as under:

"* Organic pollution in river, estuary and discharges from ponds;
* destruction of mangrove and shrubs in the marine zone by M/s GFCCA, Onjal and M/s Sea Crest Pvt. Ltd., Mendhar;
* violation of CRZ regulations for setting up the shrimp farms on the creeks, viz. Kanai, Ambika and Purna."

Para 3 of the NEERI Report dated 10-7-1995 gives in detail the impact of aquaculture farming on ecologically fragile coastal areas of India:

"3.0 *Observations on the Impacts of Aquaculture Farming on Ecologically Fragile Coastal Areas of India*:

3.1 *East Coast*

* The shrimp farms at Ramnagar, Midnapur District are located right on the creek, and therefore, are not in consonance with the CRZ regulations.
* No wastewater/sediment treatment facilities exist at any of the aquaculture farms.
* No direct withdrawal of water from creek/estuary.
* No conversion of land has taken place except in cases of M/s Index Port Ltd., North 24-Parganas and M/s Sundarban Aquatic Farms Ltd., South 24-Parganas.
* Wild shrimp seedling collection by villagers including children is a common practice.
* M/s Index Port Ltd., North 24-Parganas has created the following problems:
  — design of aquaculture farm is not proper, and no wastewater/sediment treatment facility exists in this shrimp farm;
  — intensive mode of operation creates wastewater problems. Presently, there is no treatment facility existing for reuse and recycle of treated wastewater;
  — deposition of clay in the intake water reservoir, and no proper mechanism exists for its disposal;
  — seepage from the bunds create additional problems around the farm;
  — inspection team observed that groundwater in the vicinity of this aquaculture farm has become saline;

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 31 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

— conversion of agricultural land, and traditional fishing farm;

— barbed wire fencing along the periphery of the farm has resulted in restriction to free access for the farmers, fishermen and cattle to the creek;

* M/s Sundarban Aquatic Farms Ltd., South 24-Parganas has created the following problems:

— conversion of agricultural land, traditional fish farming and mangrove plantation;

— the aquafarm is located below ground level. Therefore, it is difficult to assess the seepages from this farm unless peizometers are installed around the aquafarm;

— a well-designed sedimentation tank is being used as a wastewater treatment system. However, it is not adequate. Necessary arrangements have to be made for recycle and reuse of wastewater;

— no provision exists for treatment of sediments;

— the location of the aquafarm is not as per MEF notification dated 19-2-1991, keeping in view high tide line, and minimum distance from the creek.

The important areas of environmental concern regarding shrimp farming in the State of Orissa are:

WORLD BANK AIDED PROJECTS

Narendrapur, Bhadrak District

World Bank aided project comes within the National Park area. Therefore, it is desirable that this project proposal must be dropped. It was also informed to the inspection team that two private shrimp farms are in operation at present near the proposed World Bank Aided Project which must be closed immediately, in view of proximity of the National Park.

Beidipur, Bhadrak District

There are plans to construct large shrimp farms. It is necessary to mention that this area is profusely covered with wild seaweeds, which has direct relationship with the ecology of the marine biota. Keeping this aspect in view, a detailed EIA is required before finalising the development of shrimp farms in the area which must include private farms in the region.

In addition, there is a salt dyke which prevents the flow of sea water into the agricultural lands. It is worth mentioning that more than 50 shrimp farms, 1 ha, each have come up in this area. This leads to conversion of fertile agricultural lands into brackish water-based shrimp farming resulting in salinity, intrusion and desertification of land.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 32 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Jagatjore — Banapada, Kendrapara District

Construction work of shrimp farm is in progress. Mechanised systems for excavation, and construction are being used. In addition, inhabitants are prosecuted. There is a signpost "Trespassers will be prosecuted". It was informed to the inspection team by the nearby villagers that this place was used for agriculture. Farmers, fishermen, and cattle had free access to the nearby creeks. Now it has been limited to a large extent. In addition, the inspection team was informed about indiscriminate cutting of mangrove bushes around the area. This project must be reviewed critically keeping Bhitar Kanika Wild Life Sanctuary in view.

Local entrepreneurs have started small shrimp farms of about 1 ha each. This will cause waterlogging problems in the area. Finally, the high tide line (HTL) just touches the saline dyke. Therefore, World Bank project proposal and other shrimp farms fall within 500 m of HTL, and do not conform to the MEF's notification dated 19-2-1991.

Chilka Lagoon

The silt carried by two main rivers, viz. Daya and Bhargabi gets deposited in the lagoon. There is little exchange of water from the sea because the mouth of the lagoon (35 kms long) has been blocked by three factors, viz.

* silt
* improper mixing, and
* large clusters of shrimp farms hinder the passage of water into/out of the lagoon.

The bird sanctuary at Nalaban has also been affected by siltation and shrimp farming activities. 35 kms of the canal mouth of the lagoon needs immediate attention, because the exchange of sea water into and from the lagoon is vital from ecological considerations. In addition, deposited silt has to be removed. Shrimp farms must be closed down immediately to restore the Chilka Lagoon, to its original ecological condition by application of scientific management practices.

Subarnarekha Mouth

A large number of shrimp farms have come up on both sides of the lower reaches of the Subarnarekha river to utilise the tidal brackish water as observed by the inspection team. It was reported to the inspection team by local people that this has resulted in waterlogging in upper reaches of Subarnarekha River.

The inspection team observed that the shrimp farming is at least three times more than what has been presented by the State Government of Orissa.

All the shrimp farms do not observe the MEF notification dated 19-2-1991. The creek/estuarine water-based shrimp farms are also not observing the CRZ guidelines of MEF.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 33 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Agricultural land is being converted to shrimp farming because of Land Reform Act of Government of Orissa.

Artificial creeks are being constructed to allow high tides of creek/estuarine water into the large reservoir. In addition, this factor must result in flooding of low-lying areas.

Reservoirs act as a settling-cum-concentration basin. Therefore, it is necessary sometimes for the shrimp farmers to dilute this water by withdrawing groundwater, resulting in depletion of groundwater resources in the nearby villages. In addition, groundwater has become saline. This is confirmed by the situation in Adhuan Village in Bhadrak District.

The shrimp farming has resulted in several social problems viz.

- — denial of free access to fishermen
- — denial of job opportunities
- — conversion of agricultural land to shrimp farming
- — social displacement
- — salination of groundwater
- — reduction in grazing ground of cattle, and free access to creek/estuarine water.

Wild shrimp seedling collection is still in practice. This will have detrimental effect on the ecology of the sea, creek, and estuarine waterbodies.

Direct pumping from the creek/estuarine water system is being practised. This results in reduction of fish catch and must be stopped immediately.

No shrimp farm had any type of wastewater and sediment treatment systems including hatcheries.

All hatcheries are located within 200 m of the HTL in contravance of the MEF's notification dated 19-2-1991. It is necessary to stop the commissioning of all new hatcheries which are not being constructed as per CRZ regulations.

Intake points and wastewater discharge channels of the prawn farms are nearby. This is not a scientific water management of shrimp farms.

It has been observed by the inspection team that some shrimp farms have barbed wires along the periphery of project site, e.g.

- — M/s Deep Sun Culture Pvt. Ltd.
- — M/s Surya Udyog Pvt. Ltd.
- — M/s Manas Prawn Farm

Therefore, there is no free access to creek and estuarine water for the fishermen and cattle.

3.2 *West Coast*

The shrimp farming activity in the west coast is mostly confined to the traditional extensive type of farming. Limited number of commercial

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 34 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

shrimp farms having areas more than 5 ha, working on the semi-intensive type have been installed in the coastal areas since last 3 years.

Though in limited numbers, prawn farms working on the semi-intensive type specifically in the States of Karnataka, Maharashtra, and Gujarat are situated within 500 m of high tide line of the sea, which is not in consonance with MEF's notification dated 19-2-1991.

Incidence of conversion of agricultural land into coastal aquaculture units, which infringes the fundamental right to life and livelihood, could be noticed in States of Karnataka (Kumta Taluk), Maharashtra (Ratnagiri District and Palghar Taluk) and in Gujarat (Valsad District).

In States situated on the west coast of India brackish water aquaculture units have been mainly installed along the estuaries and river banks, where impounded backwater is being used for shrimp farming. Such practices of extensive type of farming may not have significant adverse impact on environment due to the fact that limited quantities of brackish water are required for recharging these ponds, and the wastewater generation is negligible. However, this practice of utilisation of backwaters will prove to be unsound if carried out for large-scale farms using semi-intensive type of farming.

Villages situated along the sea coast, and backwater zones, specifically at Gunda, Kumta and Karwar (Karnataka), Palghar and Dahanu (Maharashtra) and Valsad (Gujarat) are under threat due to conversion of land into aquaculture farms.

In the State of Karnataka, the inspecting team observed that M/s Murudeshwar Food and Export Ltd. prawn aquafarm units are located within 100 m of HTL.

The intake and discharge points of M/s Samudra Aquafarms and M/s Skyline Biotechnologies Pvt. Ltd., Kagil, Kumta are very close to each other which may create problems of contamination in the ponds. The prawns grown in these farms were reported to be affected by viral infection. Disposal of sediments from the ponds was also observed to be carried out on the side of the river.

It was also observed by the inspecting team in the State of Karnataka that aquafarm of M/s Rajaram Bhat Pvt. Ltd. at Honnavar in Kumta Taluk has been installed on the periphery of the village. The bunds constructed for making the ponds have obstructed the free flow of storm water, and domestic wastewater from the village to sea and this has created health hazards for the villagers. Intrusion of saline water in the soil was also observed, and reports on damage to coconut plantations in nearby areas were also received. Contamination of drinking water sources due to saline water intrusion was observed.

In the State of Karnataka, M/s Agnasana Aquafarm Pvt. Ltd. has come up adjacent to a school in Village Gunda, and the constructed bund of the pond touches the compound of the school. Seepage of saline water from the bund and subsequent damage to the foundation of the school

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 35 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

building, and damage to coconut plants in nearby areas was observed. Such practices of allowing the ponds to come up near residential and public utility places must be stopped immediately.

Coastal aquaculture has resulted in loss of mangrove ecosystems to a limited extent on the west coast. However, significant destruction mangroves could be noticed in the coastal areas of the districts of Karwar and Kumta (Karnataka), Palghar and Shrivardhan (Maharashtra), and Valsad (Gujarat). Since the mangrove ecosystems provide natural habitat for spawning of marine biota, the practice of indiscriminate destruction of mangrove ecosystem due to installation of shrimp farms must be stopped.

No proper peripheral drainage has been provided around the aquaculture ponds following semi-intensive mode of farming in the States of Kerala, Karnataka and Maharashtra, and the wastewater from the ponds was observed to be discharged into the receiving bodies without treatment.

The brackish water intake and effluent discharge points for the ponds are located in close vicinity resulting in contamination of feed water of the aquaculture units. The situation is predominant at Kumta (Karnataka), Palghar (Maharashtra) and Valsad (Gujarat) where a large number of medium and large aquafarms have been installed.

Since large number of medium and big farms have been installed on the coastal areas at places mentioned above, the wastewater discharged into the creeks and backwater zones is not properly flushed out during low tide, thereby, affecting the intakes water quality of aquaculture farms.

The situation in the State of Goa has not reached such an alarming situation as yet due to limited number of farms, and abundant quantities of backwater available in the riverine zones of Zuari and Mandavi rivers. However, future expansion of the shrimp farming practices warrant careful control, in view of tourism potential of the State.

Shrimp farming activity in the State of Gujarat is presently confined to the coastal areas of Valsad, Bharuch and Surat. Two large commercial shrimp farms are proposed to be installed in the Jamnagar district where salt farms are being operated currently. Sanctions for such installations warrant careful consideration to avoid damages to the highly ecosensitive coral reef zones near this coast."

The conclusions and recommendations as given in para 7 of the NEERI Report are as under:

"7.0 *Conclusions and Recommendations on the attenuation of adverse Impacts of Aquaculture Farming on Ecologically Fragile Coastal Areas* :

7.1 *East Coast*

The shrimp farming activity in east coast is mostly confined to the traditional and extensive mode. However, a large number of commercial

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 36 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

shrimp farms have started functioning on modified extensive, semi-intensive and intensive modes since last three years.

The large-scale shrimp farms and hatcheries have violated CRZ Notification of MEF dated 19-2-1991 in the States of West Bengal and Orissa.

Incidence of conversion of agricultural land into coastal aquaculture units which infringe upon the fundamental rights to life and livelihood were noticed particularly in the State of Orissa.

It is desirable to establish aquaculture farms on modified extensive mode. Semi-intensive and intensive mode of aquaculture must not be adopted in the States of West Bengal and Orissa.

Maintenance of quality of the feed, and stocking of healthy seed from the Government-approved hatcheries associated with appropriate water management practices warrants proper attention in the prawn farming activities of the coastal areas.

The proposed guidelines for shrimp farming in the State of West Bengal do not address all socio-economic and ecological status of coastal habitats.

The State of Orissa has not formulated any guidelines related to aquaculture practices.

The cost of eco-restoration of the coastal fragile area must be borne by the individual entrepreneurs of the commercial farms in keeping with the Polluter Pays Principle with specific reference to:

— Sundarban Mangrove/Littoral Forest, West Bengal
— Chilka Lagoon, Orissa
— Bhitar Kanika Wild Life Sanctuary, Orissa
— National Park, Orissa
— Subarnarekha Mouth, Orissa

No commercial coastal aquaculture activity should be undertaken even beyond 500 m HTL unless a comprehensive and scientific environmental impact assessment (EIA) study has been made by the entrepreneur and the environment management plan (EMP) approved by the respective State Department of Environment, Pollution Control Board, and also by the MEF.

Agricultural lands are being converted into commercial aquaculture, which causes unemployment to the landless labourers and also in loss of cultivable land.

Groundwater also gets contaminated due to seepage of impounded water from aquaculture farms.

Due to commercial aquaculture farms, there is a loss of:

— mangrove ecosystem
— grazing grounds for cattle
— potable water to contiguous population

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 37 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

— fish catch

— agricultural produce

— economic loss due to non-approachability of fishermen to creek, estuary and sea directly.

The designs of the aquaculture farms are inadequate. No provision has been made for wastewater treatment facility enabling recycling and reuse of wastewater in shrimp farms and hatcheries to minimise water exchange. In addition, there is a necessity to treat deposited sediments from the shrimp farms. Sediments can be converted into manure for land application after proper treatment.

Prohibition on conversion of agricultural land must be enforced with immediate effect.

Wild seed collection from creek, estuary, and sea must be prohibited. Seed must be procured from hatcheries.

An eco-restoration fund must be created by collecting the stipulated fees from the owners of aquaculture farms. In addition, one per cent of total export earnings per annum must also be collected from commercial aquaculture farm owners, and used for rejuvenation of coastal ecosystem. The wastewater treatment system including sediment control with reuse and recycle must be installed by all units. The smaller units can form a cooperative, and treat water through common effluent treatment plant. The aquaculture units must be closed down if the wastewater treatment system including sediment control is not functioning to its design efficiency.

A strict vigilance by the State Department of Fisheries and Pollution Control Board is required to keep a check on pollution abatement measures. It may be mentioned that even a small, one ha shrimp farm can be tailored to function on any mode of production, i.e. modified-extensive; semi-intensive and intensive. Therefore, strong control measures for production and pollution (wastewater and sediments) are essential.

Water (from sources such as creek, estuary or sea) cess must be charged from the shrimp farm owners.

Cultivable lands must not be converted for aquaculture. There is a perceptible difference between cultivable and not cultivated land. Thus, even if aquaculturist buys agricultural land and keeps them fallow for say 2 or 3 years, that does not mean that the land has become non-cultivable. Currently almost all the farms that exist are cultivable lands except those in Midnapur District (7 aquafarms in wastelands). Even those farmers who do not sell their land to prawn farm owners, are affected due to lack of drainage from paddy fields which in turn causes flooding of the crop during rainy season.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 38 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

The location of shrimp farms in Midnapur District on wasteland developed by the Department of Fisheries, Government of West Bengal fulfils all scientific conditions except:

- — CRZ guidelines for creeks
- — Wastewater and sediment management practices, and
- — Mode of operation which is mostly semi-intensive and intensive.

There are two commercial aquaculture units in the State of West Bengal, viz., M/s Sundarban Aquatic Farms Ltd., and M/s Index Port Ltd., which are violating the regulations of MEF dated 19-2-1991 as discussed hereunder:

M/s Sundarban Aquatic Farms Ltd. : Conversion of agricultural land and traditional fish farm, and destruction of mangrove plantation have taken place. In addition, this farm falls within 500 m from HTL. Further, CRZ regulations for location of aquaculture farm near the creek have also been violated.

M/s Index Port Ltd. : Conversion of agricultural land and traditional fish farm have taken place. Groundwater has become saline around the farm. Shrimp farms are not well designed resulting in seepage. Barbed wire fencing has restricted free access to farmers, fishermen and cattle to the creek. In addition, CRZ regulations for location of aquaculture farm near the creek have also been violated.

No treatment facilities have been provided by both the farms.

It is necessary to review the World Bank aided projects and commercial shrimp farms in and around Chilka Lagoon, keeping in view the MEF norms dated 19-2-1991 in the State of Orissa, viz.

Narendrapur project must be abandoned as it is within the National Park. Also the existing commercial farms in operation must be closed down.

Bideipur project requires EIA studies. Several farms have come up on the other side of the saline dyke which must also be included for evaluation in the EIA studies.

Jagatjaore-Banaspada project is within 500 m HTL. Farmers, fishermen and cattle earlier had free access to the nearby creek, which has been limited to a great extent due to the commercial shrimp farming activity. Also indiscriminate cutting of mangrove bushes has been reported. This project must, therefore, be reviewed critically keeping Bhitar Kanika Wild Life Sanctuary in view.

The commercial shrimp farms in Chilka Lagoon must be abandoned keeping in view the ecological condition of the lagoon and also the location of National Bird Sanctuary.

7.2 *West Coast*

MEF's norms for location of aquaculture farms and hatcheries have been violated at many places in the States situated on west coast of India.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 39 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

The current practice of installation of coastal aquaculture farms within 500 m HTL violates the fundamental right and livelihood of people in the coastal States.

The States of Kerala, Karnataka, Maharashtra and Gujarat have neither formulated nor adopted any guidelines in consonance with CRZ Notification, Ministry of Environment and Forests (MEF), Government of India for scientific control and management of the shrimp farms in the respective States. These States must formulate and adopt legislative Acts for proper management and regulation of existing shrimp farms in the respective States.

The State Government of Goa has enacted a bill dated 17-11-1994 in order to regulate, promote and manage the shrimp farms in this State, in a scientific manner. However, this bill is not in consonance with the MEF notification dated 19-2-1991 as it allows the construction of aquaculture units within 500 m of HTL of the sea. The bill is limited to the guidelines pertaining to the allotment of lands for the entrepreneurs.

The cost of eco-restoration of the coastal fragile area must be borne by the individual entrepreneur of the commercial aquaculture farms in keeping with the Polluter Pays Principle.

No commercial coastal aquaculture activity should be undertaken even beyond 500 m HTL unless a comprehensive and scientific environmental impact assessment (EIA) study has been conducted by the entrepreneur, and the environment management plan (EMP) approved by the respective State Department of Environment, Pollution Control Board, Shore Development Authority, and also by the Ministry of Environment and Forests.

Commercial aquaculture farms are planned to be installed near the cultivated lands in all the States of west coast. Salt water from the farms results in damage to the productivity of the adjoining lands.

Groundwater also gets contaminated due to seepage of impounded water from the aquaculture ponds.

Desertification of cultivable land can result in increased saline intrusion on west coast.

Due to commercial aquaculture farms, there is a loss of :

- mangrove ecosystems,
- casuarina plantations,
- grazing grounds for cattle,
- potable water to contiguous population,
- fish catch,
- fishing nets,
- agricultural produce,
- economic loss due to non-approachability of fishermen to seashore directly.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 40 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

The designs of the aquaculture farms are inadequate. No provision has been made for wastewater treatment facility enabling recycling and reuse of wastewater.

Prohibition on conversion of agricultural lands and salt farms into commercial aquaculture farms must be enforced with immediate effect.

Wild seed collection from creek and sea must be prohibited. Seed must be procured from hatcheries.

An eco-restoration fund must be created by collecting the stipulated fees from the owners of aquaculture farms. In addition, one per cent of total export earnings per annum must also be collected from commercial aquaculture farm owners and used for rejuvenation of coastal ecosystem with special reference to plantation of mangroves and common eco-sensitive zones. The wastewater treatment system with reuse and recycle must be installed by all units. The smaller units can form a cooperative and treat their water through common effluent treatment plant. The aquaculture units must be closed down if the wastewater treatment system is not functioning to its design efficiency.

Drainage canals must be constructed around the existing ponds to collect seepage from the pond which will prevent the intrusion of saline water into the adjoining agricultural fields and residential areas. The design and construction of the drainage canal/bund must be undertaken scientifically based on the topographical features of the area. This will avoid the flooding of the area with saline water, and will help in restoration of hygienic and sanitary conditions in the nearby residential areas."

The two NEERI Reports clearly indicate that due to commercial aquaculture farming there is considerable degradation of the mangrove ecosystems, depletion of casuarina plantations, pollution of potable waters, reduction in fish catch, and blockage of direct approach to the seashore. Agriculture lands and salt farms are being converted into commercial aquaculture farms. The groundwater has got contaminated due to seepage of impounded water from the aquaculture farms. Highly polluted effluents are discharged by the shrimp farms into the sea and on the sea coast.

32. A report titled "*Expert Committee Report on Impact of Shrimp Farms Along the Coast of Tamil Nadu and Pondicherry*" has been placed on the record. Justice H. Suresh, a retired Judge of the Bombay High Court and A. Sreenivasan, Joint Director of Fisheries (retd.), Dr A.G.K. Menon, an Ichthyologist, Mr V. Karuppan, IAS (retd.), Dr M. Arunachalam, Lecturer, Centre for Environmental Sciences, Manommaniam Sundarauar University, Tamil Nadu and Dr K. Dakshinamoorthy, a medical surgeon constituted the "expert committee" (Suresh Committee). Although the investigation by the Suresh Committee was done at the instance of "complaint against shrimp industries" but keeping in view the status of the Committee members and the factual data collected and relied upon by the Committee it would be useful to examine the same. The Suresh Committee visited various villages in Tamil

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 41 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Nadu and Pondicherry and gave its findings based on the evidence collected by the Committee. Some of the findings of Suresh Committee are as under:

"The farmers of Perunthottam told us that they have sold nearly 140 acres of their own lands to the Bask Company and 40 acres to the Bismi Company. Evidence was also given to us showing in the lands purchased by Bask Farms, where three or two crops were being cultivated. It also revealed that the percentage of yield was as much as 60%. Details regarding this are found in Annexure 15. The Bismi Company has erected a pipeline till the boundary of the farm for draining sea water. It is yet to be connected to the sea.

The Bask Company is situated at a distance of 150 m from the Scheduled Caste households. Bask Aqua Farm is situated within 500 m from the sea and the distance of Bismi Aqua Farms is just 25 m from the sea. During our visit, we found Bask Farms engaged in construction of prawn farms on agricultural lands that had been purchased (Photos Nos. 23 and 24) ... Representative of Perunthottam Village also shared before the Expert team that the yield obtained from the fields adjacent to prawn farms were affected. Moreover the villagers have lost their access to potable water as the water tables have become alkaline due to the seepage of sea water from the prawn farms. Bask farms have been using groundwater for nearly two years' crop. The Managing Director confirmed this before the Expert team."

The Committee visited Pichavaram Vedaranyam on 13-7-1995/15-7-1995 and observed as under:

"It was observed that the palmyran trees in this area which is the most drought-resistant tree has dried after the onset of prawn farms in this area. Majority of the coconut trees have dried up and few remaining have stopped yielding fruits.

The unanimous opinion of the people is that most of the mangrove species are on the decline. These mangroves serve as a source of fuel wood for domestic purposes, grazing ground for animals, waterway for locals and tourists and an important habitat for fisheries are increasingly polluted because of the effluent discharged by the shrimp farms. They also brought to our notice the greater value of the mangrove as a stabiliser of the coast and how, because of this being disturbed by the destruction of the palmyran, coconut and casuarina groves, coastal erosion has become common."

Regarding visit to Pudhupettai, the Committee stated as under:

"We visited Pudhupettai on 14th July in order to get a first-hand knowledge about the impact of Farisa Aqua Farm details of which were narrated by the Pudhupettai representative to the Expert team on 13th July at Nagai. We saw the pucca construction of the Farisa farm's jetty into the sea to enable the pumping of the sea water. This clearly is acting as a hindrance for the free mobility of the fishing community and their access to sea and land. ... All these three farms are situated within 25 m

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 42 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

from the sea. Further these farms are closely situated to the dwelling houses also. Coastal Enterprises is situated at a distance of 20 m, the Farisa Aqua Farm at a distance of 250 m and Blue Base Aqua Farm at 20 m from the dwellings of Perumalpettai the next fishing village from Pudhupettai. There is a fourth enterprise namely Abhirami Aqua Farms which owns about 150 acres of wetland has not commenced work as yet. ... Pipes have been laid to discharge effluent either to the sea, or adjoining dry lands belonging to the village or to the water channel used by villages for bathing. Effluent is also being discharged close to the dwelling houses. In particular, 'effluent is being collected right in front of my house' said Kalvikarasi a resident of Pudhupettai Village who made a representation to the Expert team on July 13th. She said that 'Drinking water in the village is now turning salty'. ... The advantages of shore seine net fishing is the abundant catch of "Anchovy" fish which has commercially viable market. The construction of permanent jetties has eliminated the 'shore seine net fishing'. Shore seine net fishing needs uninterrupted coastline and it has become an impossibility in Pudhupettai. About 10 shore seine nets are idle in the village. The construction of pipe to discharge effluent is a permanent one. By construction of the permanent jetties, the natural sand dunes in the village were destroyed. These sand dunes are a natural cyclone barrier. Hence a threat of cyclone is imminent since these natural cyclone barriers are destroyed.

The construction of pipelines ending in the sea for pumping in sea water has damaged nearly 10 nets worth Rs 60,000. Details of nets damaged is given in Annexure 19. The Coastal Enterprises Ltd. has encroached upon the burial ground of Pudhupettai and Blue Base Aqua Farms has encroached upon the burial ground of Perumalpettai."

The Committee visited the Pulicat Lake area on 16-7-1995. The findings of the Committee are as under:

"Ecologically the Tamil Nadu part of Pulicat Lake is important since it has the only opening of the lake into the sea thus functioning as the migratory route of these spawning animals like prawns, fish and mud crabs. The mud flats of Pulicat Lake harbour a number of winter migratory birds. We were told that the water fowl sanctuary at Pulicat is slowly being destroyed. ... We observed that prawn farms are located all around the wetland. In the northern region of the lake prawn farms are situated even in the lakebed. Maheshwari Export India Ltd. is constructing a prawn farm across the Pulicat lakebed, clearly violative of the Tamil Nadu Aqua Culture Regulation Act. We also noticed water being pumped out from the lake into the prawn farms.

According to Dr Sanjeeva Raj, Pulicat Lake has two bird sanctuaries namely Yedurapattu and Nelapattu. It is estimated that nearly 10-15 thousands of Flamingoes and other rare birds visit Pulicat Lake for four months only for feeding all the way from Rann of Kutch. Other water

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 43 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

birds like Pelicans, Cormorants, Egrets and Herons breed at Nelapattu and feed at this Pulicat Lake. At Yedurapattu, Painted Storks, Pelicans, and Upen Bills also feed here. In 1993 it was estimated that there were 10,000 to 15,000 Flamingoes. By 1994 this has been reduced to less than 1000. The reason for this can be attributed to the effluent from prawn farms which kills the organisms on which the Flamingoes feed. The depletion of natural feed could have caused this reduction. ... The Tamil Nadu Forest Department is establishing a third sanctuary in the southern tip of Pulicat Lake. We were told that due to the noise of oil engines, bulldozers and other disturbances by the prawn farms many birds especially Painted Storks have deserted this lake.

Dr Sanjeeva Raj also states that Pulicat is ecologically very sensitive and fragile. The east coast is vulnerable to cyclones. With the hundreds of prawn farms along the coast excavating sand along the coastline every possibility existed for inviting the sea to enter and destroy the water table. Further, prawn farms destroy sand dunes and vegetation and in times of tidal waves sea water could enter in a big way.

Further, Dr Sanjeeva Raj said that Pulicat Lake is fairly shallow with an average depth of about 1.5 m. It can be described as a saucer. The pumping of water by aquafarms will result in an artificial drying up of the lake. Added to this the road from Sulurpet that has been constructed for reaching the Sriharikotta rocket launching site through the lake has obstructed free flow of water. It is generally claimed by the prawn farm owners that the land on the eastern side of the road is not the part of Pulicat Lake and hence prawn farms can be constructed. This is false as all this land area is part of Pulicat Lake. The tragedy is that if prawn farms are erected on the higher side of the lake, the effluent from the prawn farms will flow back into the lake causing serious damage to marine and estuarine biota. ... Pasiapuram Rajiv Gandhi Nagar has a dalit hamlet Edamani. This hamlet had a water tank which provided water to the nearby 35 villages. The source of water was the village groundwater. But due to the impact of the adjoining farm the water became saline making it unsuitable for consumption.

An eminent danger by the prawn companies is to the village called Jamila Badh. This village has 150 Muslim families (fishermen). They were originally living in the land on which the Sriharikotta Space Research Station is built. These families were relocated by the Government, promising jobs and providing free housing site near Pulicat Lake. They built their own huts at the cost of Rs 5000 each. These huts today face serious flood threat since on both sides of the village two prawn enterprises have obstructed Ponneri Lake water to flow into the sea. This obstruction due to the construction of prawn farms floods the village. From 1991 till date every year water reaches the boundary of the village and before it could enter inside nearly 2000 village people manually divert the water to the sea. Though the village people have made representation and protested to the owners, they use their

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 44 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

economic and political power to scare the fishing people and make them live in a permanent state of fear. People also told us that they are affected by itching, scabies, and fever which could be due to the discharge of effluent."

The Committee's observations regarding Karaikal District, Pondicherry are as under:

"As quoted by the Pondicherry Science Forum, 'Karaikal region has only 20 kms of coastal stretch. This coastal stretch is of environmental significance as the area and its environs have creeks and lagoons, beaches with dunes, coastal plains, natural reeves, flood plain and is also the tail end of the Cauvery river basin. Karaikal is considered as the granary of Pondicherry and has main irrigation canals like Nini Kattalai Pidari Kattalai and Arasapuram'.

The groundwater reserves of Karaikal are frightfully meagre but for the only sweet water aquifer at about 10 to 20 feet deep there is no other potable aquifer. This water source cannot be exploited continuously since it takes time to recharge and poses danger of sea water intrusion. Only manual hand pumps are being used to tap this water at present.

It is in this context Karaikal is posed with the serious danger of losing this sweet water aquifer as most of the small prawn farms are in the process of deriving water during the high tides from the rivers like Mullaiyar, Thirumalairayananar, Arasalar Nandalar and Pravidayanar and also use groundwater for shrimp culture. This continuous withdrawal of freshwater will alter surface water resources. So, there is no possibility for the recharging mechanisms as the wetlands near these river basins are converted to aquafarms and these wetlands have lost their function of absorbing rain water and recharging the aquifer zones."

The conclusions reached by the Suresh Committee under various headings indicating the impact of shrimp culture farming on environment are reproduced hereunder:

"(*a*) *Effluent Pollution*

As shrimp culture using high protein feeds is a highly polluting activity, presently 78,000 tonnes feed is used in India in shrimp culture. This is bio-degradable, if properly treated. It leaves behind responded solids (organic) and the decomposition liberates inorganic N and P. 77.5% of N and 86% of P from the feed are worked and enter the pond environment. 1 ton of P. monodon production results in a pollution load of 56.3-48.1 kgs N and 13.0-24.4 kgs P. (Phillips et al 1993, ICLARM. Conf. Proc. 81 1/1 198).

Excess amounts of P and N are detrimental to environment [Rumseg 1994 SACMONID XVII (4): 10-14]. These lead to 'hyper eutrophication' resulting in massive algal blooms and oxygen depletion which are harmful to aquatic life. These blooms such as 'Red tide' cause fish mortality. The effluent quality during harvesting the shrimp pond is: total nitrogen 1900-2000 ppm, total 0 40-110 ppm and organic carbon

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 45 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

7.3-13.7 ppm. The impact of this is the reduced oxygen, hyper nitrification, alteration of community structure, sedinextation, changes in besithic communities etc. (Phillips et al 1993).

Further 'Self-pollution' results from feed wasted, which becomes unmanageable (Imre Csavas 1994. Shrimp News International, March-April 1994). Organic wastes, solid matter, dissolved metabolites like ammonia, carbon dioxide are produced. Decomposing organic matter depletes oxygen from water. Admittedly being biodegradable the effluents consume oxygen and so denude the water of its oxygen. When there is oxygen deficit, fish avoid such low oxygen zones and move further away to oxygen saturated zones and when there is oxygen depletion fish die en masse. Fishing village near whose coast shrimp ponds have come up — fish have become scarce and the artisanal fishermen have to go further away from shore to catch fish. Population of fish and their diversity decrease. ... With regard to farm effluents being treated and discharged into the sea and other water bodies, we did not see or hear about any such scientific process of effluent treatment having been set up by prawn farms. In M/s Bask Farms we were shown two partially dry sedimentation tanks. We saw untreated effluents from M/s Amalgam Shrimp Farm being discharged into the beach (not even into the sea causing degradation of the beach shore with dark brown, foul-smelling organic matter, which is a health hazard. The Joint Director, MPEDA itself has stated that most of the farms have not set up effluent treatment systems.

(*b*) *Salinisation*

The dominant species of shrimp cultured is Penaeus monodon, the tiger prawn and next comes the white prawn, P. indicus. Both are marine prawns. P. monodon grows best at salinities of 10-20 ppt (20% but tolerates slightly higher or lower salinities. P. indicus requires higher salinity 20-30 ppt. Thus sea water is the primary medium of growth. Sea water of salinity 85-86 ppt is taken into the ponds. The growing period ranges from 120-150 days. Sea water is periodically replaced. Sea water remaining in the pond for a long period seeps into neighbouring areas where agriculture is practised and salinizes the soils which therefore lose their productivity for crops and become unfit for agriculture. Even assuring that the 500 m zonation is enforced it will not solve the problem of salinisation. Agriculture lands, inwards (towards inland) of shrimp ponds will become saline and the chain reaction will continue. ... Many shrimp industries assert that they are taking only sea water for shrimp culture and do not use groundwater. Sea water has a salinity around 35 ppt. It has mostly Penaeus monodon, the tiger shrimp. This needs a salinity in the range of 15-20 ppt for optimum growth. So the shrimp producers have necessarily to dilute it to bring down the salinity by adding freshwater. Let along groundwater, we have even seen river water being pumped near Poompuhar into shrimp ponds. ... Salinization is not only possible but has actually happened all over the world. The

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 46 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Bhagwathi Institute of Environment and Development, analysed numerous samples of water adjacent to shrimp farms in Sirkali Taluk, T.N. and found that in most of them chlorides exceeded the permitted limits even by over 100 times for e.g. 15265 mg/l in drinking water source near Suryakumar Shrimp Co., Mahendrapalle. In Kurru Village, Nellore District, drinking water became saline after four shrimp farms were established and 800 people of this village had no drinking water (Vandana Shiva, 1994, '*Social and Environmental Impact of Aquaculture*'). Dr Alagarswami, Director CIBA identifies salinization of drinking water, wells, dwelling units adjoining agriculture lands and aquifers as critical issues in shrimp culture. (National Workshop on Transfer of Technology for sustainable shrimp farming, M/s Swaminathan Foundation, Madras, January 9-10, 1995). Dr V. Gopalakrishnan, former FAO expert says 'salt water seepage problem appears to be genuine and such area should be avoided for establishing new shrimp farms' (Fish and Fisheries, Newsletter No. 4 January 1995). Dr Sanjeeva Raj noted that in Pulicat Lake, saltwater from prawn ponds was known to be seeping into drinking water tables (COPDANET NEWSLETTER winter 1994). ... We have noted the salinization of drinking water in Pudukuppam, Naicker Kuppam, Poompuhar, Perunthottam, Pudupet, etc. in Sirkali Taluk caused by large shrimp units and also in a very acute manner in Pattinamarudur, Tuticorin, VOC District which is sandwiched between two large farms viz. LTL and MAC Aqua Farms Ltd.

(*c*) *Feed and Wastes*

In a moderate 3 t/ha yield of shrimp, 4-6 t/ha feed is applied while for a yield of 5 t/ha it is 15 t/ha. The magnitude of putrescible organic matter from these wastes is enormous. Hence, the practice of discharging such effluents into common water bodies needs to be strongly discouraged because of the strongly polluting effect (Mackintosh, D.J. INFOFISH, International 6/92, 38-41). Feed wastes are more toxic than sewage and this is a sufficient ground for banning industrial shrimp culture. ... The Team found that *Amalgam Marine Harvests was blatantly discharging the effluents into the foreshore narrow sandy beach at Pudukuppam.* This has spoiled the aesthetic appearance of the beach. *The area is dark brown in colour and foul-smelling. This will pose a serious hazard to public health. The wastes also enter 'Uppanar' stream hardly 5 m away from discharge point. This is illegal and affects the health of villagers.* Settleable solids silt up the ponds and canals. Over-accumulation of detritus leads to profusion of protozoa, and ciliates, which cover the body of fish. Respiratory diseases, loss of appetite, black gill disease, shell disease, foul smell of internal parts, tail rot etc. are caused by such unhealthy pond conditions. The quality of effluents discharged into the environment are so poor that biological methods will not be sufficient to treat them. Most of the environmental troubles are caused by the industrial shrimp. The coastal

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 47 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

zone used for culturing aquatic organisms is only a narrow strip on the continental shelf and on the low-lying flatlands. Hence the very fragile nature of the coastal ecosystem is getting destroyed.

(*d*) *Fertilizers and Therapeutants*

Large quantities of feeds are being used and fertilizer applications are generally minimal. Lime is regularly used but continued use of lime impoverishes the soil. It also hardens the soil.

However, it is the use of therapeutants that is highly destructive of the environment. A very incisive account of the use of drugs in aquaculture is available from P. de. Kinklein and C. Michael (INFOFISL International 4/92: 45-48 1992) and an exhaustive report is provided by Fred P. Meyer, an authority on the subject. (Review in Aquaculture Sciences Ve 1 (4): 693-710 1989). However the use of drugs has only aggravated the damage to environment. Sulpha drugs, Tetracyclines, Quinolones, Nitrofurans, Macrolids (for e.g. Erythromycin), Chloramphenicol, and dozens of similar drugs are in use. Organophosphorus compounds like Dichlorvas are also used. Formalin, malachite, green copper sulphate, quaternary ammonium compounds, lodophores, chloramine-I etc. are used as sanitizers.

Viruses cannot be treated by any of the drugs. Renibacterium SP is also resistant to drugs. Chemotherapy leads to transit of drugs and their long persistence. Rebase of drugs or their metabolites into the environment affects the non-target organisms. Use of steroids (Di-dehyl stilboestrol) to fatten shrimp in ponds has carcinogenic effect on humans. Use of Chloramphenicol has unpredictable risks for human beings. Effluent treatment and self-recovery are hampered by the drugs by suppressing saprophytic bacteria involved in purification processes. Soils accumulate drug residues.

(*e*) *Loss of Mangroves and Biodiversity*

We observed that removal or destruction of these important mangrove habitats for establishing shrimp farms is becoming increasingly common along the coast of Tamil Nadu. From the photographs (Nos. 40-45 showing the destruction of mangroves-bunds are already built), it is evident that there are several shrimp farms on the banks of Pitchavaram mangrove forests, a valuable habitat. For the farms, water intake from the habitat will lead to virtual dryness of the habitat and the loss of biodiversity in this valuable realm. It is evident that the consequences are felt by the existing farms (Palmyarh and coconut trees in nearby farms are withering — Photographs Nos. 46 and 47). The destruction of the mangroves (Photos Nos. 40-42) for shrimp farm will be a major cause for the loss of habitat diversity along the coastline of Tamil Nadu. We are going to lose a valuable gene pool and thus conservation of mangrove genetic resources from the activities of shrimp industry is a mater of primary urgency.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 48 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

(f) Loss of Biodiversity in Cauvery Flood Plain and Delta

The stagnation of water in this lower reaches is due to the illegal damming at several places along the course and the obstruction of feeder canals and distributors to the main river. Once considered a best estuary and the delta of Cauvery are now vanished (Photo No. 48 showing the ill-fated Cauvery). Also in the lower reaches in Nagai District, Tamil Nadu, low land drains regulator has been used for their effluent release (Photo No. 49) showing the block and the PWD feeder canals are either blocked by the farm owners or using as drainage for effluent release by Amalgam Marine Harvests Ltd. at Pudukuppam (Photo No. 50) from the farms. These canals and drains once used as a freshwater resource for bathing and rechargers for the wells for the fisherfolk in several villages now become saline because of the cessation of flow (example: Pudukuppam Village of Sirkali Taluk District; Pudupettai Village Tharangampadi Taluk). ... Seed collection of Peneaus monodon (tiger prawn) by children is a regular practice in these canals now. During their collection of seeds the children picked only the tiger prawn seeds and threw away all other shrimp and fish seeds, thus depleting the estuarine and coastal fishery resources. One child gets paise 0.10 for the tiger prawn seed and one earns about Rupees one hundred (Rs 100 per day and 40-50 children are engaged in seed collection). This involves child labour and depletion of fishery resources and the loss of biodiversity in coastal and deltaic regions of Cauvery. Nursery grounds for shell and fin fishes are lost in this ancient river delta.

(g) Threatened Wetlands of National and International Importance

The marshy swamps of Vedaranyam are now as threatened habitats with the formation of shrimp culture all along the brackish water zones and in the marshy swamps. ... Another wetland of national importance, which is being threatened is Pulicat Lake. Report A (1992) by the Ministry of Environment and Forests, Government of India clearly stressed the need of conserving these wetlands of national importance. ... In the Government of India Report Pulicat Lake has been identified as an important lagoon (p. 8 of the Report). This fragile ecosystem has been under great threat by the industrial shrimp farming. In the main brackish water area, construction of bunds is going on (Photos Nos. 55 to 66). From the photographs it is evident that the marshy land with its typical marshy vegetation is the only area left and almost all the marshy areas are being lost because of the upcoming shrimp culture ponds. These areas of marshy vegetation act as spawning/nursery grounds for a variety of estuarine/marine invertebrates, and fishes. These areas also provide wildlife habitats to several migrant birds.

(h) Impact on Agriculture

Dr Alagarswami, Director CIBA identifies 'indiscriminate conversion of agricultural lands into shrimp culture' as a critical issue. Most shrimp farmers in coastal areas have converted agricultural lands

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 49 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

into shrimp ponds. More relevant is the fact that shrimp industry causes salinisation of crop lands. Sea water (Salinity around 35 ppt i.e. 35%) is pumped into the shrimp ponds. The growing period is from 120-150 days. This long detention of saline water in the shrimp ponds seeps into the adjacent crop lands and salinizes them resulting in reduction of productivity or even barrenness. Then this 'Unproductive' land (so declared by the shrimp industries) is converted into shrimp ponds.

We are concerned that conversion of paddy fields to shrimp ponds is already adversely affecting local rice production. In all the places we visited in NOM District Pattinamarudur of Tuticorin, Pulicat of Chengai MGR Districts etc.; most of the shrimp ponds are constructed on fertile agricultural land or on marginal lands whereon crop is raised. Owing to the recent shortage of Cauvery water (dispute between T.N. and Karnataka) the yield of crops has been affected. Taking advantage of this, shrimp industries have been buying up agricultural land through inducement, persuasion and high pressure on revenue authorities. Salinization of soil and water adjoining the shrimp farms is very well documented for Perunthottam Village. As per the cultivation record for land purchased by M/s Bask Farms we see clearly that the lands purchased were fertile agricultural lands with an average of two crops having a 60% harvest yield.

(i) Denial of Potable Water

'Nagai, Q.M districts of Tamil Nadu, the erstwhile granary of South' is today threatened with pollution, ecological imbalance and land alienation because of the arrival of large number of private companies and transnational corporations that have been investing heavily in shrimp farms etc. (Mukul Sharma: Interpress service 11-11-1994). Drinking water in the vicinity of shrimp farms has become saline, wherever such farms were operated. Shrimp culture may increase salinity through facilitating the flow of saline water inland and discharge of saline effluent (Phillips, Kwei Lin and Beveridge 1993.) Water samples from 7 villages in Sirkazhi near the shrimp farms were analysed by Bhagwathi Environment Development Institute at Dindigul. It was found that the water from borewells and handpumps was unpotable (See Annexure). The villages affected were Mahendrapatti, Neithavasal, Pudukuppam, Eranyimedu, Keelaiyur, Thirunagari, Nirajimedu etc. This was also confirmed by the Bhartiya Mazdoor Sangh in Kurru Village. Nellore District where all the freshwater wells became saline and unpotable after 4 shrimp farms were established. The proof of this was the fact that the District Collector, Nellore ordered the supply of drinking water through tankers, to these villages. Dr P. Sanjeeva Raj (COPDANET NEWS LETTER winter 1994) also found that salt water from shrimp ponds seeped into drinking water sources. Dr Vandana Shiva, after visiting some villages recorded that 'shortage of drinking water and deterioration of its quality have resulted in the neighbourhood of shrimp farms'.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 50 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Protection of groundwater sources may be viewed as non-tradeable capital, as once contaminated, they may prove impossible to rehabilitate. (Mark Evarard 1994).

As per the study done by BEDI, water sample from a drinking water well in Naikarkuppam had a TDS of 2164 mg/l and a chloride content of 993 mg/l in addition to excessive quantities of Mg and Ca. Samples collected from a drinking water handpump near Shriram Shrimp Farm now Amalgam Farms had an exceedingly high TDS of 35778 mg/l, hardness of 7506 mg/l which is as bad as sea water. Unacceptably high Ca, Mg and sulphate were recorded. Another handpump near the same farm had a TDS of 1466 mg/l and a chloride content of 656 ppm which are unpotable.

Drinking water from a handpump near the shrimp farm of Coastal Enterprises Ltd. had a TDS of 7694, chloride of 3879, hardness of 2470 mg/l and so was unpotable."

33. The three reports discussed above give a rather depressing scenario of the shrimp industry. While the production increases and export earnings of the industry are well publicised, the socio-economic losses and environmental degradation affecting the well-being of coastal population are hardly noticed. The traditional production systems are being replaced by more intensive ones. This has been encouraged by increasing demand from high income countries. Shrimp yield per hectare in many areas increased within a few years from an average 100 kgs/ha per harvest to an average of 1000 kgs/ha/crop for semi-intensive shrimp farms and to between 2000 and 10,000 kgs/ha/crop for intensive type of production. The social and environmental costs of the expending shrimp industry are closely interrelated. Pollution and other types of natural resource degradation induced by shrimp farming have been considerably, highlighted in the NEERI Reports and other material quoted and discussed by us. Social and environmental changes resulting from expending shrimp industry in coastal areas are largely due to the conversion into shrimp farms of the lands, waters and forests which were earlier dedicated to other uses. In fact, shrimp farms are developing at the expense of other agriculture, aquaculture, forest uses and fisheries that are better suited in many places for meeting local food and employment requirements. Intensive and semi-intensive types of shrimp production hardly seems to meet these requirements.

34. Mangrove forests constitute an important component of coastal ecosystems. They thrive in tidal estuaries, salt marshes and muddy coastlines. Conversion of mangrove to shrimp farms significantly reduces the natural production of wild capture shrimp as well as other fishes. Moreover, their production role for low-lying coastal regions is rapidly diminishing by their replacement by shrimp ponds. The Sundarbans, which constitute one of the biggest mangrove areas in the world, covered in the early 1990s about 12,000 sq kms in India and Bangladesh. In the West

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 51 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Bengal part of Sundarbans large mangrove areas have been replaced by the shrimp ponds.

35. The increasing need for land by shrimp entrepreneurs has meant a dramatic rise in land prices in many areas. After the installation of shrimp farms near village lands, prices rise astronomically. Local farmers can no longer afford to purchase land, while indebted farmers are tempted to sell their holdings. Much of the coastal land recently converted into shrimp farms was previously used for food crops and traditional fishing.

36. The United Nations Research Institute for Social Development in collaboration with the World Wide Fund for Nature International has conducted a study and published a report dated 19-6-1995 called '*Some Ecological and Social Implications of Commercial Shrimp Farming in Asia*". The report is prepared by Solon Barraclong and Andrea Finger-Stich (the UN Report).

37. The UN Report gives the following picture regarding polluted waters and depleted fisheries:

> "*Polluted waters and depleted fisheries*: Shrimp farms use both sea and freshwater to replenish their ponds. This brings them into competition with other users of these water resources. In areas where commercial shrimp ponds have been constructed there is frequently insufficient freshwater left to meet customary needs for irrigation, drinking, washing or other household and livestock related uses, and water supplies may be contaminated, or both. Groundwater salinization has been reported in several places. This often means that people — most of the time women — have to bring water from more distant wells. In a village in Tamil Nadu (Nagai-Quaid-Millet District, Pompuhar region), for example, women have to walk two to three kilometres to fetch drinking water that previously was available nearby before the expansion of shrimp farms on about 10,000 hectares (Bhagat, 1994). In Andhra Pradesh, a case study conducted by Vandana Shiva reports that, in Nellore District, there was no drinking water available for the 600 fisherfolk of the village of Kurru due to aquaculture farms salinizing groundwater. She adds that 'after protest from the local women, drinking water was supplied in tankers' (Mukul, 1994). ... Local stocks of native fish and crustaceans are being depleted in many places because of the removal of mangroves which served as nurserybeds, and also as a result of indiscriminate overfishing of wild shrimp fry [over 90 per cent of randomly caught fry are often wasted (Gujja, 1994)]. Natural fisheries are also frequently damaged by pollution caused by overloads of nutrients, sediments and chemicals from shrimp farms. In another Indian coastal village, Ramachandrapuram, fishermen reported that the value of their average catch of shrimp used to be Rs 50,000 per catamaran per month, but after one year of operation of nearby aquafarms their catch was ten times smaller (Mukul, 1994). In the Chokoria part of the Sundarbans of Bangladesh, fishermen report an 80 per cent drop in fish

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 52 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

capture since the destruction of the mangroves and building of dykes for shrimp farming (Sultna, 1994). Frequently, fisherfolk protest because their traditional access to the coast has been restricted or because stocks of wild crustaceans and fish have disappeared."

38. All the reports referred to by us clearly indicate that the expansion of modern shrimp ponds in the coastal areas has meant that local fishermen could only reach the beach by trespassing at great risk on shrimp farms or by taking a long detour. Local people have not only lost access to their fishing grounds and to their sources of riverine seafoods and seaweeds, but they also have to relinquish social and recreational activities traditionally taking place on their beaches. The UN Report gives the following picture regarding natural resource degradation as a result of shrimp farming:

"In areas densely covered with intensive shrimp farms, however, the industry is responsible for considerable self-pollution and particularly for bacteriological and viral contamination. Each hectare of pond produces tons of undigested feed and faecal wastes for every crop cycle. This induces the growth of phytoplankton, protozoa, fungus, bacteria and viruses (like the Vibrio group growing in shrimp faeces and in large part responsible for the 1988 collapse of Taiwan's production) (Lin, 1989). The overuse of fertilizers and of veterinary and sanitary products such as antibiotics adds to the water pollution problem. It also contributes to the decreasing resistance of the shrimp stock. Where intensive shrimp farms are densely spaced, waste-laden water tends to slosh from one pond to another before it is finally discharged into the sea. Shrimp producers are extremely concerned about assured supplies of clean water as it is vital for their immediate economic returns.

Large amounts of sedimentation in intensive shrimp ponds is posing serious disposal problems for shrimp farmers. From 100 to 500 tons of sediment per hectare per year are apparently accumulating. Since only some 10 tons of feed is used to produce about 5 tons of shrimp per hectare per year, this raises questions about where such incredible quantities of sediment come from (Rosenberry, 1994a:42). Ponds are cleaned after each crop cycle and the sediments are often discarded in waterways leading into the sea, or they are sometimes used to build dykes. Their putrefaction inside and outside the ponds causes foul odour, hypernutrification and eutrophisation, siltation and turbidity of water courses and estuaries, with detrimental implications on local fauna and flora. ...

Biodiversity Losses: The impacts of semi-intensive and intensive shrimp aquaculture on biodiversity ('the totality of genes, species and ecosystems in a region') are multiple. This is because of the land area they cover; the water they pollute; the water circulation systems they alter; the wild fish and crustacean habitats they replace; the risks they pose of disease transfer; the impacts of released raised shrimp on the

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 53 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

genetic diversity and resilience of indigenous shrimp and possibly also their negative impacts on other native fauna and flora. ...

Health Hazards: Health hazards to local populations living near or working in shrimp farms have been observed in several places. For instance, in Tamil Nadu (Quaid-e-Milleth District near Pondicherry) an approximately 1500 acre large shrimp farm has been reported to have caused eight deaths from previously unknown diseases within a period of two months following the installation of the aquaculture farm (Naganathan et al., 1995:607). There are numerous hazards to public health along the shrimp production chain from the farmers through the various processors to the often distant consumers. The workers employed on shrimp farms handle several potentially dangerous chemicals, and may be exposed to unsanitary working conditions."

According to the UN Report — intensive ponds have a maximum life of only 5 to 10 years. Abandoned ponds can no longer be used for shrimp and there are few known alternative uses for them except some other types of aquaculture. Apparently they can seldom be economically rehabilitated for other uses such as crop land. The extent of abandoned areas by the shrimp industry has been indicated by the UN Report in the following words:

"After a production cycle of about four or five months, shrimp ponds under intensive use are cleaned and disinfected and the polluted sludge is removed and often disposed of unsafely. This treatment, however, does not usually suffice to maintain the ponds' productivity for more than five to ten years (Ibid., Annex III/12). Entrepreneurs then move to other areas because of pollution and disease. *This mode of production has been called 'rape and run'* (Csavas, 1994b). The altered milieu of these abandoned ponds inhibits the spontaneous regeneration of vegetation and their use for agriculture, forestry, other aquaculture or related fishing activities. These abandoned areas do not appear in worldwide estimates of areas used for shrimp farming, which for 1993 were estimated to include 962,600 hectares, of which 847,000 hectares were in Asia. In December 1994 these areas were estimated to have increased worldwide. to 1,147,300 with 1,017,000 hectares in Asia (Rosenberry, 1993 and 1994). Globally, areas affected by the industry's practices over the last decade are probably at least one-third larger, or even more if the total infrastructures surrounding the ponds are accounted for."

The UN Report pithily sums up the "conflicts and externalities" as under:

"A major portion of the conflicts arising from the expansion of shrimp farming are the result of environmental and social degradation that is not included in the costs of shrimp production. Where the industry assumes no responsibility for damages to other groups arising from its activities, economists call them 'externalities'. For example, abandoned ponds are usually virtually unusable for other purposes for indefinite periods without costly rehabilitation, which is seldom

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 54 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

undertaken. Mangrove destruction, flooding of crops, salinization or pollution of land and water associated with the expansion of shrimp farming all affect the local people depending on these resources."

39. Alagarswami has divided the shrimp-farm technology into six types. We have already quoted the relevant paragraph 5.1.2 of the report. Although different experts have given different nomenclature to different types of shrimp farm technologies, we are of the view that the types indicated by Alagarswami in his report are based on the functioning of the shrimp culture industry in India and as such are acceptable. Keeping in view the NEERI Report and other material quoted and discussed by us, we are of the view that the traditional and improved traditional types of shrimp-farm technologies — defined by Alagarswami — are environmentally benign and pollution free. Other types of technologies — extensive, modified-extensive, semi-intensive and intensive — create pollution and have degrading effect on the environment and coastal ecology. Such type of shrimp farms cannot be permitted to operate.

40. We may refer to constitutional and statutory provisions which mandate the State to protect and improve the environment. Article 48-A of the Constitution of India states that "the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country". Article 51-A of the Constitution imposes as one of the fundamental duties on every citizen, the duty to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures. The Environment (Protection) Act, 1986 (the Act) was enacted as a result of the decisions taken at the United Nations' Conference on Human Environment held at Stockholm in June 1972 in which India participated. The Indian delegation was led by the then Prime Minister of India. The Statement of Objects and Reasons to the Act is as under:

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

Sections 2(*a*), 2(*b*), 2(*c*) and 2(*e*) of the Environment Act are as under:

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 55 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

"2. *Definitions.*—In this Act, unless the context otherwise requires,—

(*a*) 'environment' includes water, air and land and the inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property;

(*b*) 'environmental pollutant' means any solid, liquid or gaseous substance present in such concentration as may be, or tend to be, injurious to environment;

(*c*) 'environmental pollution' means the presence in the environment of any environmental pollutant;

* * *

(*e*) 'hazardous substance' means any substance or preparation which, by reason of its chemical or physico-chemical properties or handling, is liable to cause harm to human beings, other living creatures, plants, micro-organism, property or the environment;"

Sections 7 and 8 of the Environment Act are as under :

"7. *Persons carrying on industry, operation, etc., not to allow emission or discharge of environmental pollutants in excess of the standards.*—No person carrying on any industry, operation or process shall discharge or emit or permit to be discharged or emitted any environmental pollutant in excess of such standards as may be prescribed.

8. *Persons handling hazardous substances to comply with procedural safeguards.*—No person shall handle or cause to be handled any hazardous substance except in accordance with such procedure and after complying with such safeguards as may be prescribed."

41. Section 15 of the Act makes contravention of the provisions of the said Act punishable with imprisonment for a term which may extend to five years or with fine which may extend to one lakh rupees or with both. If the failure or contravention continues beyond a period of one year after the date of conviction, the offender shall be punishable with imprisonment for a term which may extend to seven years. The effluents discharged by the commercial shrimp culture farms are covered by the definition of environmental pollutant, environmental pollution and hazardous substance. The NEERI Reports indicate that the effluents discharged by the farms at various places were in excess of the prescribed standards. Unfortunately, no action is being taken by the authorities under the Act.

42. Hazardous Wastes (Management and Handling) Rules, 1989 (the Rules) have been framed under the Act. Rule 2(*i*) of the Rules defines "hazardous wastes" to mean categories of wastes specified in the Schedule appended to the Rules. Waste Category No. 12 under the Schedule to the Rules is as under:

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 56 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

"SCHEDULE

[*See* Rules 3(*i*), 3(*n*) and 4]

Categories of Hazardous Wastes

Waste Categories	Types of wastes	Regulatory Quantities
1	2	3
Waste Category No. 12	Sludges arising from treatment of wastewaters containing heavy metals, toxic organics, oils, emulsions and spent chemicals and incineration ash."	Irrespective of any quality.

43. Rule 5 of the Rules makes it obligatory for every occupier generating hazardous wastes to obtain authorisation as provided under the said rule. Rule 5(4) requires the State Pollution Control Board not to issue any authorisation unless it is satisfied that the operator of a facility or an occupier, as the case may be, possesses appropriate facilities, technical capabilities and equipment to handle hazardous waste safely.

44. Mr Mehta has vehemently contended that the shrimp culture farms are discharging highly polluting effluent which is "hazardous waste" under the Rules. Mr Mehta relying upon the NEERI Reports and other reports placed on record has contended that none of the farms have obtained authorisation from the State Pollution Control Boards.

45. The Water (Prevention and Control of Pollution) Act, 1974 (the Water Act) has been enacted to provide for the prevention and control of water pollution and maintaining or restoring of wholesomeness of water. The Statement of Objects and Reasons of the Water Act, inter alia, state as under:

> "The problem of pollution of rivers and streams has assumed considerable importance and urgency in recent years as a result of the growth of industries and the increasing tendency to urbanization. It is, therefore, essential to ensure that the domestic and industrial effluents are not allowed to be discharged into the water courses without adequate treatment as such discharges would render the water unsuitable as source of drinking water as well as for supporting fish life and for use in irrigation. Pollution of rivers and streams also causes increasing damage to the country's economy."

Sections 2(*j*) and 2(*k*) of the Water Act are as under :

> "2. *Definitions.*—In this Act, unless the context otherwise requires,—
>
> (*j*) 'stream' includes—
>
> (*i*) river;
>
> (*ii*) water course (whether flowing or for the time being dry);
>
> (*iii*) inland water (whether natural or artificial);
>
> (*iv*) subterranean water;

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 57 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

(*v*) sea or tidal waters to such extent or, as the case may be, to such point as the State Government may, by notification in the Official Gazette, specify in this behalf;

(*k*) 'trade effluent' includes any liquid, gaseous or solid substance which is discharged from any premises used for carrying on any industry operation or process, or treatment and disposal system, other than domestic sewage."

46. Section 25 of the Water Act provides that no person shall, without the previous consent of the State Board establish any industry, operation or process, or any treatment and disposal system which is likely in discharge sewage or trade effluent into a stream or well or sewer or on land. There is nothing on the record to show that the shrimp culture farm owners are even conscious of the statutory provisions which require them to obtain the necessary consent/authorisation from the Pollution Control Boards concerned.

47. There are other legislations like Fisheries Act, 1897, Wild Life Protection Act, 1972 and Forest Conservation Act, 1980 which contain useful provisions for environment protection and pollution control. Unfortunately, the authorities responsible for the implementation of various statutory provisions are wholly remiss in the performance of their duties under the said provisions.

48. At this stage we may deal with a question which has incidentally come up for our consideration. Under para 2 of the CRZ Notification, the activities listed thereunder are declared as prohibited activities. Various State Governments have enacted coastal aquaculture legislations regulating the industries set up in the coastal areas. It was argued before us that certain provisions of the State legislations including that of the State of Tamil Nadu are not in consonance with the CRZ Notification issued by the Government of India under Section 3(3) of the Act. Assuming that be so, we are of the view that the Act being a Central legislation has the overriding effect. The Act (the Environment Protection Act, 1986) has been enacted under Entry 13 of List I Schedule VII of the Constitution of India. The said entry is as under:

"Participation in international conferences, assessment and other bodies and implementing of decisions made thereat."

The preamble to the Act clearly states that it was enacted to implement the decisions taken at the United Nations' Conference on the Human Environment held at Stockholm in June 1972. Parliament has enacted the Act under Entry 13 of List I Schedule VII read with Article 253 of the Constitution of India. The CRZ Notification having been issued under the Act shall have overriding effect and shall prevail over the law made by the legislatures of the States.

49. This Court in *Vellore Citizens' Welfare Forum* v. *Union of India*[1] has dealt with the concept of "sustainable development" and has specifically

1 (1996) 5 SCC 647 JT (1996) 7 SC 375

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 58 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

accepted "The Precautionary Principle" and "The Polluter Pays Principle" as part of the environmental laws of the land. The relevant part of the judgment is as under: (SCC pp. 657-60, paras 10-14)

"The traditional concept that development and ecology are opposed to each other is no longer acceptable. 'Sustainable Development' is the answer. In the international sphere, 'Sustainable Development' as a concept came to be known for the first time in the Stockholm Declaration of 1972. Thereafter, in 1987 the concept was given a definite shape by the World Commission on Environment and Development in its report called 'Our Common Future'. The Commission was chaired by the then Prime Minister of Norway, Ms G.H. Brundtland and as such the report is popularly known as 'Brundtland Report'. In 1991 the World Conservation Union, United Nations Environment Programme and Worldwide Fund for Nature, jointly came out with a document called 'Caring for the Earth' which is a strategy for sustainable living. Finally, came the Earth Summit held in June 1992 at Rio which saw the largest gathering of world leaders ever in the history — deliberating and chalking out a blueprint for the survival of the planet. Among the tangible achievements of the Rio Conference was the signing of two conventions, one on biological diversity and another on climate change. These conventions were signed by 153 nations. The delegates also approved by consensus three non-binding documents namely, a Statement on Forestry Principles, a declaration of principles on environmental policy and development initiatives and Agenda 21, a programme of action into the next century in areas like poverty, population and pollution. During the two decades from Stockholm to Rio 'Sustainable Development' has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting ecosystems. 'Sustainable Development' as defined by the Brundtland Report means 'Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs'. We have no hesitation in holding that 'Sustainable Development' as a balancing concept between ecology and development has been accepted as a part of the customary international law though its salient features have yet to be finalised by the international law jurists.

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

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 59 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

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

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

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

'The Polluter Pays Principle' has been held to be a sound principle by this Court in *Indian Council for Enviro-Legal Action* v. *Union of India*[2]. The Court observed: (SCC p. 246, para 65)

> '... we are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country'.

The Court ruled that: (SCC p. 246, para 65)

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

Consequently the polluting industries are 'absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected areas'. The 'Polluter Pays Principle' as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of 'Sustainable Development' and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.

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

> '47. *Duty of the State to raise the level of nutrition and the standard of living and to improve pubic health.*—The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

2 (1996) 3 SCC 212 : JT (1996) 2 SC 196

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 60 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

48-A. *Protection and improvement of environment and safeguarding of forests and wildlife.*—The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.

51-A. (*g*) to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures.'

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

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

50. We are of the view that before any shrimp industry or shrimp pond is permitted to be installed in the ecology fragile coastal area it must pass through a strict environmental test. There has to be a high-powered "Authority" under the Act to scrutinise each and every case from the environmental point of view. There must be an environmental impact assessment before permission is granted to install commercial shrimp farms. The conceptual framework of the assessment must be broadbased primarily concerning environmental degradation linked with shrimp farming. The assessment must also include the social impact on different population strata in the area. The quality of the assessment must be analytically based on superior technology. It must take into consideration the inter-generational equity and the compensation for those who are affected and prejudiced.

51. Before parting with this judgment, we may notice the "Dollar" based argument advanced before us. It was contended before us by the learned

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 61 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

counsel appearing for the shrimp aquaculture industry that the industry has achieved singular distinction by earning maximum foreign exchange in the country. Almost 100 per cent of the produce is exported to America, Europe and Japan and as such the industry has a large potential to earn "Dollars". That may be so, but the farm-raised production of shrimp is much lesser than the wild-caught production. The UN Report shows the world production of shrimp from 1982 to 1983 as under:

"TABLE 1

World Production of Shrimp

	Thousands of metric tons		
Year	Farm-raised	Wild-caught	Total
1982	84	1652	1736
1983	143	1683	1826
1984	174	1733	1907
1985	213	1908	2121
1986	309	1909	2218
1987	551	1733	2284
1988	604	1914	2518
1989	611	1832	2443
1990	633	1968	2601
1991	690	2118	2808
1992	721	2191	2912
1993	610	2100	2710"

It is obvious from the figures quoted above that farm-raised production of shrimp is of very small quantity as compared to wild-caught. Even if some of the shrimp culture farms which are polluting the environment, are closed, the production of shrimp by environmentally friendly techniques would not be affected and there may not be any loss to the economy specially in view of the finding given by NEERI that the damage caused to ecology and economics by the aquaculture farming is higher than the earnings from the sale of coastal aquaculture produce. That may be the reason for the European and American countries for not permitting their sea coasts to be exploited for shrimp culture farming. The UN report shows that 80% of the farm-cultured shrimp comes from the developing countries of Asia.

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

1. The Central Government shall constitute an authority under Section 8(3) of the Environment (Protection) Act, 1986 and shall confer on the said authority all the powers necessary to protect the ecologically fragile coastal areas, seashore, waterfront and other coastal areas and specially to deal with the situation created by the shrimp culture industry in the coastal States/Union Territories. The authority shall be headed by a retired Judge of a High Court. Other members preferably with

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 62 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

expertise in the field of aquaculture, pollution control and environment protection shall be appointed by the Central Government. The Central Government shall confer on the said authority the powers to issue directions under Section 5 of the Act and for taking measures with respect to the matters referred to in clauses (*v*), (*vi*), (*vii*), (*viii*), (*ix*), (*x*) and (*xii*) of sub-section (2) of Section 3. The Central Government shall constitute the authority before 15-1-1997.

2. The authority so constituted by the Central Government shall implement "the Precautionary Principle" and "the Polluter Pays Principle".

3. The shrimp culture industry/the shrimp ponds are covered by the prohibition contained in para 2(*i*) of the CRZ Notification. No shrimp culture pond can be constructed or set up within the coastal regulation zone as defined in the CRZ notification. This shall be applicable to all seas, bays, estuaries, creeks, rivers and backwaters. This direction shall not apply to traditional and improved traditional types of technologies (as defined in Alagarswami Report) which are practised in the coastal low-lying areas.

4. All aquaculture industries/shrimp culture industries/shrimp culture ponds operating/set up in the coastal regulation zone as defined under the CRZ Notification shall be demolished and removed from the said area before 31-3-1997. We direct the Superintendent of Police/ Deputy Commissioner of Police and the District Magistrate/Collector of the area to enforce this direction and close/demolish all aquaculture industries/shrimp culture industries, shrimp culture ponds on or before 31-3-1997. A compliance report in this respect shall be filed in this Court by these authorities before 15-4-1997.

5. The farmers who are operating traditional and improved traditional systems of aquaculture may adopt improved technology for increased production, productivity and return with prior approval of the "authority" constituted by this order.

6. The agricultural lands, salt pan lands, mangroves, wetlands, forest lands, land for village common purpose and the land meant for public purposes shall not be used/converted for construction of shrimp culture ponds.

7. No aquaculture industry/shrimp culture industry/shrimp culture ponds shall be constructed/set up within 1000 mts of Chilka Lake and Pulicat Lake (including Bird Sanctuaries namely Yadurapattu and Nelapattu).

8. Aquaculture industry/shrimp culture industry/shrimp culture ponds already operating and functioning in the said area of 1000 mts shall be closed and demolished before 31-3-1997. We direct the Superintendent of Police/Deputy Commissioner of Police and the District Magistrate/Collector of the area to enforce this direction and close/demolish all aquaculture industries/shrimp culture industries, shrimp culture ponds on or before 31-3-1997. A compliance report in

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 63 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

this respect shall be filed in this Court by these authorities before 15-4-1997.

9. Aquaculture industry/shrimp culture industry/shrimp culture ponds other than traditional and improved traditional may be set up/constructed outside the coastal regulation zone as defined by the CRZ Notification and outside 1000 mts of Chilka and Pulicat Lakes with the prior approval of the "Authority" as constituted by this Court. Such industries which are already operating in the said areas shall obtain authorisation from the "Authority" before 30-4-1997 failing which the industry concerned shall stop functioning with effect from the said date. We further direct that any aquaculture activity including intensive and semi-intensive which has the effect of causing salinity of soil, or the drinking water or wells and/or by the use of chemical feeds increases shrimp or prawn production with consequent increase in sedimentation which, on putrefaction is a potential health hazard, apart from causing siltation, turbidity of water courses and estuaries with detrimental implication on local fauna and flora shall not be allowed by the aforesaid Authority.

10. Aquaculture industry/shrimp culture industry/shrimp culture ponds which have been functioning/operating within the coastal regulation zone as defined by the CRZ Notification and within 1000 mts from Chilka and Pulicat Lakes shall be liable to compensate the affected persons on the basis of the "Polluter Pays" principle.

11. The Authority shall, with the help of expert opinion and after giving opportunity to the polluters concerned assess the loss to the ecology/environment in the affected areas and shall also identify the individuals/families who have suffered because of the pollution and shall assess the compensation to be paid to the said individuals/families. The Authority shall further determine the compensation to be recovered from the polluters as cost of reversing the damaged environment. The authority shall lay down just and fair procedure for completing the exercise.

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

13. We further direct that any violation or non-compliance of the directions of this Court shall attract the provisions of the Contempt of Courts Act in addition.

14. The compensation amount recovered from the polluters shall be deposited under a separate head called "Environment Protection Fund"

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 64 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

and shall be utilised for compensating the affected persons as identified by the Authority and also for restoring the damaged environment.

15. The authority, in consultation with expert bodies like NEERI, Central Pollution Control Board, respective State Pollution Control Boards shall frame scheme/schemes for reversing the damage caused to the ecology and environment by pollution in the coastal States/Union Territories. The scheme/schemes so framed shall be executed by the respective State Governments/Union Territory Governments under the supervision of the Central Government. The expenditure shall be met from the "Environment Protection Fund" and from other sources provided by the respective State Governments/Union Territory Governments and the Central Government.

16. The workmen employed in the shrimp culture industries which are to be closed in terms of this order, shall be deemed to have been retrenched with effect from 30-4-1997 provided they have been in continuous service (as defined in Section 25-B of the Industrial Disputes Act, 1947) for not less than one year in the industry concerned before the said date. They shall be paid compensation in terms of Section 25-F(*b*) of the Industrial Disputes Act, 1947. These workmen shall also be paid, in addition, six years' wages as additional compensation. The compensation shall be paid to the workmen before 31-5-1997. The gratuity amount payable to the workmen shall be paid in addition.

53. The writ petition is allowed with costs. We quantify the costs as Rs 1,40,000 (Rupees one lakh forty thousand) to be paid by the States of Gujarat, Maharashtra, Orissa, Kerala, Tamil Nadu, Andhra Pradesh and West Bengal in equal shares of Rs 20,000 each. The amount of Rs 1,40,000 realised from the seven coastal States shall be paid to Mr M.C. Mehta, Advocate who has assisted us in this case throughout. We place on record our appreciation for the assistance rendered by Mr Mehta.

(1997) 2 Supreme Court Cases 150

(BEFORE K. RAMASWAMY AND G.T. NANAVATI, JJ.)

MAJOR YOGENDRA NARAIN YADAV AND OTHERS .. Appellants;

Versus

BINDESHWAR PRASAD AND OTHERS .. Respondents.

Civil Appeals Nos. 1394 and 1395 of 1991† and 16974-75 of 1996, decided on December 10, 1996

Service Law — Seniority — Determination of — Substantive appointment criterion — Appellant, a released Short Service Commissioned Officer selected

† From the Judgment and Order dated 17-12-1990 of the Patna High Court in C.W.J.C. No. 3941 of 1983

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 1 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

2013 SCC OnLine Ker 14359 : (2013) 4 KLJ 120 : (2013) 3 KLT 840

Affirmed in *Kapico Kerala Resorts (P) Ltd.* v. *State of Kerala*, (2020) 3 SCC 18

Approved in *Kerala State Coastal Zone Management Authority* v. *State of Kerala*, (2019) 7 SCC 248

Affirmed in *Vaamika Island (Green Lagoon Resort)* v. *Union of India*, (2013) 8 SCC 760

In the High Court of Kerala

(BEFORE K.M. JOSEPH AND K. HARILAL, JJ.)

Ratheesh. K.R and Others … Petitioners;

Versus

State of Kerala, Represented by the Chief Secretary and Others … Respondents.

W.P. (C). Nos. 19564/11 U, 28485/11 I, 34799/11S, 4808/12A, 12965/12S, 8299/12S & 2947/13P

Decided on July 25, 2013

Advocates who appeared in this case:

By Advs. Sri. P.K. Ibrahim, Smt. K.P. Ambika.

R1 to R3 & R6 by Spl. Government Pleader Sri. Tom K. Thomas,

R4 by Advs. Sri. A. Jayasankar, Sri. Manu Govind,

R5 by Sri. Prakash C. Vadakkan. J., S.C,

R7 by Adv. Sri. P.A. Augustine, S.C,

R8 by Advs. Sri. E.K. Nandakumar, Sri. K. John Mathai, Sri. P. Benny Thomas, Sri. P. Gopinath Menon,

R9 by Adv. Sri. Bechu Kurian Thomas.

The Judgment of the Court was delivered by

K.M. JOSEPH, J.:— Nediyathuruthu and Vettilathuruthu, once two sleepy islands which lay nestled in the Vembanad Lake which is the longest lake in India and a backwater in the State of Kerala, are at the centre of the controversy which we are called upon to resolve in these batch of seven Writ Petitions. There are five Writ Petitions touching the Nediyathuruthu island. The others relate to the Vettilathuruthu island. Is there violation of the Coastal Regulation Zone Notifications issued in the year 1991 and 2011, and is there encroachment on puramboke land and kayal, are the questions which substantially arise for our consideration. Writ Petitions relating to the Nediyathuruthu Island:

W.P. (C). No. 19564/11 (filed on 18.7.2011).

2. This Writ Petition has been filed by ten petitioners. The 8th respondent is the Kapico Kerala Resorts (P) Ltd. and Shri. Roy M. Mathew as the party respondent (hereinafter referred to as the company). The ninth respondent is a Director. This is a Writ Petition filed on the basis that there were "Oonnipads" (stake nets) located near the Nediyathuruthu island. Essentially, the petitioners claim under one Karumban Krishnan who is stated to be a traditional fisherman and who had obtained stake nets 1, 2 and 3 under patta No. 947 from the Fisheries Department, Government of Kerala about seventy years back. It is their case that the Nediyathuruthu island was agricultural land cultivated with paddy field in water-locked area and the sand bund. In some portions, it is alleged that prawn cultivation was also being carried out. There

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 2 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

were only few families in the entire island. It is the petitioners' case that the company has no permit to reclaim paddy field. It is alleged that respondents 8 and 9 proceeded to construct resorts in the island. Ext.P5 is the report of the Assistant Engineer of Thykkattussery Grama Panchayat recommending building permit subject to the condition that the proposed construction must be upto or beyond the existing building, otherwise, CRZ will be applicable. There is a case of encroachment into the Vembanad Kayal (Lake) by respondents 8 and 9. There is reference to O.S. No. 556/08 filed by owners of stake nets 9, 10 and 11 before the Munsiff Court, Cherthala. The Suit was dismissed on 13.12.2010. Ext.P6 was a commission report dated 14.12.2010 filed on 03.01.2010. The plaintiff carried the matter in appeal and injunction order was granted vide Ext.P7. According to the petitioners, the stake nets belong to the petitioners, they are closer to the island and the illegal reclamation has damaged the three nets. Ext.P8 is a complaint to the District Collector. Exts.P9 to P11 are further complaints. It is alleged that the total income from the stakes was Rs. 4,20,000/= per year out of which Rs. 1,20,000/= will go towards expenditure. There is a loss of income of around Rs. 3,00,000/=. Ext.P12 purports to be the photographs of the island in 2011 before the construction encroaching the lake. Ext.P13 purports to be photograph of concrete pipes filled by respondents 8 and 9 around the island encroaching the Vembanad Kayal (lake) for constructing the resorts. Ext.P14 is produced to show reclamation of the lake around the island showing JCB. It is produced to show the alleged encroachment (alleged reclamation of the integrated portion). Ext.P15 is further photograph produced to show the construction of the resort in the island and it is alleged that it is done encroaching the Vembanad Lake. In Ext.P16 photograph it is alleged further that it is in the area where the stake nets of the petitioners were situated. Ext.P17 is also photograph showing the stake net No. 4 and the present platform. Inaction is alleged against respondents 1 to 7.

3. The fourth respondent Secretary of the Panchayat has filed Counter Affidavit. Therein, it is, inter alia, stated that on 02.8.1996 a NOC has been granted to one Ratna Eswaran and Babu George for the purpose of building construction in certain survey numbers. It is also stated that the NOC was transferred along with the land to the 8th respondent and upon an application made by the grantee, the NOC has been transferred to the 8th respondent. Since the Building Rules were made applicable from 06.6.2007 onwards, the 8th respondent made an application on 23.7.2007 for construction of a building having an area of 13351.42 sq. metres in 1123 cents of land. Building Permit dated 10.10.2007 was issued to the 8th respondent company with conditions. On 14.8.2010, on application, the permit was extended by three years from 10.10.2010. The allegation that the Panchayat permitted the 8th respondent to construct building in such a manner that the petitioners' stake nets would be destroyed, is denied as incorrect, inte alia.

4. The 8th respondent has filed Counter Affidavit. In the Counter Affidavit, the case that the petitioners have been paying tax in respect of the stake nets is stated to be false. It is their case that the stake nets 1, 2 and 3 of Nediyathuruthu Oonnippadu were removed for development of the National Water Way. Ext.R8(a) letter is produced from the Sub Inspector of Fisheries. It is pointed out that in the Judgment of the Munsiff Court, Cherthala dismissing the Suit filed by the brothers of Karumban Krishnan, it is found that there is no way in which the stake nets could be identified. Ext.R8(c) is the Judgment. It is stated that the petitioners have not produced any document to show that they have obtained a licence as required under the Rules for the management and control of Fisheries and Government Water Rules, 1974. Ext.R8 (d) is the Rules. Ext.R8(e) is the plaint in O.S. No. 556/08. It is stated that action was taken by the officers on the complaint. Inspection was conducted by the authorities. It is stated that there were no stake nets near the island at any point of time. After the present phase of the construction was started, some persons brought some poles

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 3 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

(stakes) and placed the same in front of the Jetty constructed by the respondents in order to make it as if their fishing activities had been affected. The allegation that the land in question was paddy field is stated to be incorrect. It is stated that the water available on the island is brackish water and fresh water for cultivation of paddy is not available. It is specifically stated that on enquiry it is learnt that no paddy cultivation has either been carried out on any part of the land belonging to the respondent at any time in the past more than fifty years. There is reference to the No Objection Certificate dated 02.8.1996 issued by the Panchayat. It is their case that though substantial progress was made in finishing the foundation work for construction of a resort and completing some villas and getting it numbered by the said Panchayat, on the basis of this permission, further construction of the villas could not be completed. Thereafter, the then owners of the property entered into a memorandum of understanding with leading entrepreneurs in the hospitality business for setting up a world class resort, it is alleged. Thereafter, on the basis of the Building Rules being applicable and by virtue of certain Government Orders, all constructions which had not progressed beyond the stage of foundation work on the basis of the NOC issued prior to the extension of the Building Rules were required to get permit and the permit was obtained insisting that the existing building line will not be exceeded. It is stated that the respondent has strictly adhered to the condition.

5. Petitioners have filed a detailed Reply Affidavit producing Exts.P20 to P23. It is, inter alia, therein, stated that there has been no acquisition proceedings of stake nets 1 to 12 and 1A in Nediyathuruthu island. It is also stated that the 10th respondent was related to petitioners 1 to 9 and he is also fisherman. It is stated that the petitioners have been paying tax for the stake nets 1 to 3 without any break from 1965 to 1968, 1970 to 1980 and 1988 to 2009 (Ext.P21). It is stated that Nediyathuruthu island is known as "Kari Nilam". Ext.P22 is the order of the Sub Judge, Cherthala dismissing the application filed by respondents 8 and 9 to vacate Ext.P7 interim order. Ext.P23 is a photograph produced to show the stage before the construction began. It is also stated that the land in Nediyathuruthu island is known as "Kari Nilam" which means field where fresh water pours for six months and saline water for the remaining period. The land after it was acquired by the 8th respondent, was used as an island farm to cultivate fish and prawn. It is pointed out that the the statement that there was no paddy cultivation for the past more than fifty years is false. It is stated that the Sale Deed No. 2922/90 dated 16.10.1990 in favour of Ratna Eswaran even refers to the agricultural loan liability outstanding in the property covered under that document. The 9th respondent has filed a separate Counter Affidavit.

6. The fifth respondent is the Coastal Management Authority (hereinafter referred to as the Authority). In the Counter Affidavit filed, it is, inter alia, stated that the authorities had issued several circulars to the Local Self Government Departments regarding implementation of the Notification from 1996 onwards. Respondents 8 and 9 have constructed resorts without any clearance from the Ministry of Environment and Forests as per 1991 and 2011 Notifications. It is not permitted. The Nediyathuruthu island has CRZ land ward of HTL upto 100 metres. The water body is classified as CRZ-IV. Reference is made to conditions in Annexure II of 1991 Notification and Annexure III of 2011 Notification. The Vembanad Kayal is also CRZ area and is classified as CRZ IV. Vembanad Kayal is also declared critical, vulnerable coastal area. Some of the circulars are produced. Respondents 8 and 9 have constructed a bund which prevents the natural course of tidal water which is also prohibited activity. It is stated that both panchayats do not have sea front, but they have water bodies. Hence they are considered to be falling under CRZ-III category. Hence 100 metre distance has to be maintained while constructing resorts in the area. The panchayat cannot issue building permits when CRZ Notification is applicable. The petitioner has filed a Reply Affidavit to the Counter Affidavit of the 9th respondent, producing two CDs, a newspaper report,

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 4 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

a notice by the All India Youth Federation about a mass match and dharna besides two commission reports. It is, inter alia, stated in the Reply Affidavit that the island being an area close to breeding and spawning grounds of fish and other marine life, comes under CRZ-I. Respondents 8 and 9 have constructed four "Pulimuttu" at various places around the island. The reclamation around the island has doubled the total extent of the island which now comes around 24 acres as against its original extent of 12 acres, it is stated. The 8th respondent has filed an Additional Counter Affidavit wherein it is, inter alia, stated that the No Objection Certificate of the panchayat is dated 02.8.1996 while the plan was notified only on 27.9.1996. The 7th respondent, the Inland Waterways Authority of India, has filed a Counter Affidavit wherein it is, inter alia stated that the exact location of the stake nets situated between Buoy No. 150 of IWAI and Nediyathuruthu island needs to be physically verified for authenticity. No control is vested in IWAI over the "Kayal" (lake) except the maintenance of navigable fairway channel having sixty metres wide along the deepest route. It is also stated that the petitioners have stated that the stake nets, 13 in number, were situated between Buoy 150 of IWAI in Vembanad Kayal and Nediyathuruthu island. It is further stated that since the stake nets are away from NW3, the navigation route, IWAI do not have any objection for the fishing nets situated away from the navigational channel of national water way No. 3. However, if the channel is obstructed, the same needs to be shifted away from the navigational channel, that is, leaving sixty metres wide channel for which State Government/Fisheries Department is assisting IWAI.

7. A Counter Affidavit is filed also by respondents 1 and 2. The second respondent is the District Collector, Alappuzha. The Fisheries Department has issued licence No. 947 in regard to Nediyathuruthu stake nets 1 to 3 in favour of Karumban Krishnan. The legal heirs of Karumban Krishnan, it is stated, were paying tax in the name of Karumban Krishnan. It is stated that the land as per the revenue records is shown as "Nilam" and no permission is seen given by the Revenue Department for reclamation and therefore, directions were issued to the sixth respondent to take necessary action. The stake nets in question were removed as part of deepening of national water ways. Government has sanctioned Rs. 1,00,000/= as compensation. Ext.R1(a) is the order sanctioning compensation. Hence stake nets were removed by the Fisheries Department and not due to reclamation of "Kayal" as alleged, it is stated, and the stake nets were removed by the Deputy Director of Fisheries, Alappuzha on 06.10.2008. Government has sanctioned compensation to the owners of chinese nets and illegal nets at the rate of Rs. 1,00,000/= and Rs. 50,000/= respectively. The name of Karumban Krishnan is also included in the list of beneficiaries. It is stated that any encroachment, if any, after removal of the roads will be evicted by the Revenue Department.

8. The Deputy Director of Fisheries has filed a Counter Affidavit. Therein, he has, inter alia, stated that as per ENDT No. C3-5490/95 dated 22.12.2007 of the Director of Fisheries, Thiruvananthapuram, the Deputy Director of Fisheries, Alappuzha removed these three stake nets and other stake nets from the route of the national water way on 06.10.2008 along with the national water way authorities and cleared the route and transferred it to the National Water Way Authorities. The Deputy Director directed the stake nets owners to refix their stake nets on suitable places for fishering. It is further stated that they could not identify suitable fishing places due to obstruction. They asked for compensation. It is stated that the legal heirs of late Karumban Krishnan requested for compensation. Compensation has been sanctioned.

9. A Reply Affidavit is filed by the petitioners, wherein it is, inter alia, stated that the case of removal of the stake nets as part of the deepening of the national water way, is absolutely false. There is a distance of 105 metres from the boundary of the national water way No. 3 to Nediyathuruthu island. The national water way has only a width of 38 metres. There is encroachment by respondents 8 and 9 into a total of 35

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 5 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

metres where stake nets 1 to 3 of the petitioners were located. Ext.P3 location map is produced showing the national water way No. 3. If stake nets were removed, the respondent could not have accepted the tax of stake nets 1 to 3 for 2009-2010 and 2010-2011 Non-mentioning of the removal of the stake nets in Ext.P34 written statement filed in O.S. No. 556/08 is taken as another circumstance to contend that there was no such removal.

10. Learned counsel for the petitioners also relied on the following case law, inter alia:

(i) *Indian Council for Enviro-Legal Action* v. *Union of India* (1996 KHC 766) which deals with the polluter pay principle.

(ii) *Essar Telecom Infrastructure (P) Ltd.* v. *State of Kerala* (2011 (2) KLT 516) - for the proposition that under the Building Rules, there must be site approval before permit is granted.

(iii) *Krishnadevi Maichand Kamathia* v. *Bombay Environmental Action Group* (2011 KHC 4094) - to contend that even if the conditions in an order are void, it is binding on the parties unless set aside by competent authority.

(iv) He sought to draw support from the decision in *Rabindra Nath Ghosal* v. *University of Calcutta* ((2002) 7 SCC 478 : AIR 2002 SC 3560) and *Smt. Nilabati Behera alias Lalita Behera* v. *State of Orissa* ((1993) 2 SCC 746) to contend that compensation can be ordered under Article 226.

(v) He further canvassed the Judgment in *Olga Tellis* v. *Bombay Municipal Corporation* ((1985) 3 SCC 545) in regard to the liability of the State under Article 14 and 21 of the Constitution.

(vi) On the same lines, he relied on the Judgment in *Lucknow Development Authority* v. *M.K. Gupta* ((1994) 1 SCC 243 : AIR 1994 SC 787).

(vii) The decision in *Intellectuals Forum, Tirupathi* v. *State of A.P.* ((2006) 3 SCC 549) is relied on to contend that the Court must not be swayed by the fact that considerable sums have been spent on mega projects. In this regard, support is also drawn from the decision in *Virender Gaur* v. *State of Haryana* ((1995) 2 SCC 577) wherein the Apex Court insisted on demolition of structure constructed on the lands reserved for common purposes.

(viii) In *Piedade Filomena Gonsives* v. *State of Goa* ((2004) 3 SCC 445), the Apex Court took the view that the construction raised in violation of Coastal Regulation Zone Notifications cannot be lightly condoned.

(ix) The decision in *Delhi Jal Board* v. *National Campaign for Dignity and Rights of Sewerage and Allied Workers* ((2011) 8 SCC 568) is cited to contend that the Apex Court has stressed the need for the Court to be sensitized to the need for doing justice to the large mass of people to whom justice has been denied by a cruel and heartless society for generations. The said decision also is cited to contend that compensation can be ordered by the Court.

(x) The decision in *Ismayil* v. *Deputy Tahsildar* (2011 (2) KLT 322) stresses the need to protect and improve the natural environment and to have compassion for living creature and such values must be borne in mind in scrutinizing the concept of sustainable development.

11. The prayers sought are as follows:

"i) Issue a writ of mandamus commanding the respondents to restore the Oonipads/Stake nets 1, 2 and 3 of the petitioners situated between 150 buoy of inland waterways in Vembanattu Kayal and Nediyathuruthu Island covered under Patta No. 947 issued by the Fisheries Department, Government of Kerala.

ii) Issue a writ of mandamus commanding the respondents jointly and severally to pay compensation to the tune of Rs. 1 Crore for the deprivation of their livelihood

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 6 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

protected under Article 21 of the Constitution.

iii) Issue a writ of mandamus commanding the respondents to demolish the illegal constructions made around the Nediyathuruth Island by encroaching into the Vembanadu Kayal and the Pulimuttu/Bund constructed across the Vembanadu kayal to stall the high tide and low tide effect.

iv) Issue a writ of mandamus commanding the respondents to survey the land in Nediyathuruth island and evict respondents 8 and 9 from the land found to be encroached by them.

v). Issue a writ of mandamus commanding the respondents 1 to 7 to survey and identify the land claimed by the respondents 8 and 9 in Sy. No. 266/1/1 under title deed No. 1625/07 dated 14.5.2007 registered at the Sub Registrar's office, Panavally and restore 50 cents of puramboke land occupied by respondents 8 and 9 in Nediathuruth island on the strength of the said document."

12. W.P. (C). No. 28485/11 (filed on 25.10.2011) is filed by the company seeking police protection to the petitioner and its employees, etc. to carry out construction work at the company's resort at the island as against obstruction from the fourth respondent (who is the 10th petitioner in W.P. (C). No. 19564/11) and supporters. The said writ petition was filed on 25.10.2011.

13. W.P. (C). No. 4808/12 (filed on 24.02.2012) is again filed by the company and its Director/share-holder as the second petitioner. Therein, they seek the following reliefs:

"i) declare that Map 32A of the approved Coastal Zone Management Plan for Kerala Ext.P6, to the extent that it includes Nediyathuruthu Island, within the jurisdiction of the 2nd respondent Panchayat, in Allappuzha District within the Coastal Regulation Zone is ultra-vires the notification dated 19.02.1991 issued under Section 3(1) and Section 3(2)(v) of the Environment (Protection) Act, 1986 (commonly referred to as the Coastal Regulation Zone Notification 1991).

ii) declare that the notification issued under Section 3(1) and Section 3(2)(v) of the Environment (Protection) Act, 1986 commonly referred to as the CRZ Regulation dated 19.02.1991 does not apply to islands within the backwaters of the State of Kerala and that the islands such as the one belonging to the Ist petitioner has been brought within the Coastal Regulation Zone only by the notification issued on 6.1.2011 (the Coastal Regulation Zone Notification, 2011);

iii) in the alternative declare that the absence of any study for classification of Nediyathuruth island as contemplated under Annexure-I of the Coastal Regulation Zone Notification dated 19.02.1991, no restriction can be placed on the use and enjoyment of the said Island on any ground referable to the said notification;

iv) issue a writ, order or direction in the nature of the writ of prohibition restraining the respondents from interfering with the operation of the resort at Nediyathuruthu Island at Panavalli, Allappuzha, on the ground that the construction was made in contravention of the Coastal Regulation Zone Notifications; We have referred to the company's case in brief as respondent. We will deal with their case more elaborately later in this Judgment.

W.P. (C). No. 34799/11 (filed on 16.12.2011).

14. Petitioner is a society registered under the Travancore-Cochin Literary, Scientific and Charitable Societies Registration Act. It is allegedly intended to strive for a corruption free society. According to it, on coming to know that a resort is being constructed in violation of the Coastal Zone Regulations and the Building Rules, it made application under the Right to Information Act. According to them, there is violation of the Coastal Zone Regulations. They would also contend that there is no development permit issued under Rule 3 of the Municipal Building Rules. There is no

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 7 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

permit issued in favour of the company under Rule 4 of the Building Rules. They have obtained only the building permit. They would also point out that the application is filed for building permit only on 10.10.2007 and without following the law, it was issued on the very same day. According to the petitioner, there is clear illegality committed and this Court must interfere.

"1. to call for the records leading to granting of permission and no objection for the construction of resorts including Ext.P14 granted by the Ist and 3rd respondents to the 7th respondent in the banks of Vembanad Kayal within the area covered by Exhibits P4, P10 & P11 and quash the same.

ii) to issue a writ of mandamus to the respondents 1 to 6 and such other authorities to take necessary and proper action for demolishing the illegal constructions carried out in violation of the coastal zone regulation notification and other laws and restore the area into its original lie, situation and state of affairs and to evict the 7th respondent from the Govt. property including puramboke kayal which has been encroached into by the 7th respondent and restore the same to Govt.

iii) to take necessary action against the authorities and officials concerned, who have joined hands and colluded with the 7th respondent by granting permission or clearance for the construction of resorts, in any manner violating the Coastal Zone Regulation and other laws in force.

iv). to issue such other appropriate writ, order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

The stand of the company is the same and we will deal with it in greater detail later on.

W.P. (C). No. 12965/12 (filed on 04.6.2012):

15. Petitioner in this Writ Petition is a trade union of fishermen and workers engaged in fishing, represented by the President of its Thykkattusseri Block Committee. According to them, the No Objection Certificate issued itself is without any basis and there is no power. Therefore, the construction sought to be supported on the basis of the No Objection Certificate cannot itself be countenanced. According to them, further, the building permit is illegal, as it was issued without following the procedure under the Building Rules made applicable from 06.6.2007. There is also violation of the Coastal Regulation Zone Notification.

There is also a case that there is reclamation by the company without permit under the Land Utilisation Order, 1967 and the Kerala Conservation of Paddy Land and Wet Land Act, 2008. Further more, it is contended that an under water electric line was laid at a cost of Rs. 1.5 crores, which is illegal. There is no permission as required. It has the effect of interfering with the rights of the fishermen, as it will have impact on the fishing. It is hazardous.

Writ Petitions relating to Vettilathuruthu Island:

W.P. (C) No. 8299 of 2012 (filed on 30.3.2012):

16. Petitioner claims to be a registered charitable society. The writ petition is filed purportedly in public interest. Briefly put, the case of the petitioner is as follows:

Petitioner noticed good number of resorts were coming upon the banks of Vembanad lake. Vettilathuruth is a small Island of less than 10 acres out of which 1/3rd of the area is Government land encroached by the private owners of the land. Vembanad lake is one of the important backwaters of the State of Kerala. It is the largest and longest lake in India. The notification is issued under the Environment Protection Act as the Coastal Zone Management Regulation of 1991 and it is amended up to date in 2011. Ext.P2 is the notification of 1991 with subsequent amendment upto 2005. Ext.P3 is the revised Coastal Zone Regulation notification on 6.1.2011.

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 8 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

Petitioner filed application under the Right to Information Act. Ext.P4 is the answer. It reads as follows:

"Information requested furnish here under:

1. Muddy waters Island Pvt. Ltd. has remitted Rs. 16900/- towards professional tax.
2. No orders have been received from government, in the panchayath, exempting the above said establishment from the purview of coastal zone regulation.
3. Not received.
4. No details of un empires un authorized building obtained by instruction.
5. First half yearly professional tax of 2011-2012 for 16 employees remitted.
6. No orders from the coastal zone regulation authority has been obtained."

Petitioner, knowing about the illegal constructions requested the authorities to take action. Ext.P5 is the representation. There is no action taken. No permission is obtained from respondents 1 to 4 by respondents 7 and 8 for making any permanent construction. The party respondents were being assisted by the office bearers of the 6th respondent panchayat and the Village Officer and Tahsildar and other Revenue officers. Ext.P6 is the Circular dated 17.7.1996 issued by the 4th respondent (CZMA). Ext.P7 is another communication by the management authority. Petitioner filed further representation as Ext.P9. Ext.P10 is the building permit dated 30.4.2012. The following reliefs are sought:

"i) To call for the records leading to Ext.P10 building permit and all other records and proceedings issued by the 6th respondent so far as it granted permission for effecting reconstruction of structures for resorts, hotels or for any other purpose by the respondents 7 and 8 at Vettilathuruthu and quash the same by issuing a writ of certiorari.

(i)(a) : To direct the 5th respondent to measure and demarcate the Kayal area encroached by the respondents 7 and 8 at Vettilathuruthu and declare that all such encroachment and illegal constructions therein are liable to be demolished and removed and to restore the area in its original position.

ii) To issue a writ of mandamus to the respondents 1 to 6 and such other authorities to take necessary and proper action for demolishing the illegal constructions carried out in violation of the coastal zone regulation notifications, the Kerala Municipality Building Rules and other laws and evict the respondents 7 and 8 from the illegal encroachment of Kayal area and restore the area into its original lie, situation and state of affairs.

iii) To direct respondents 1 and 2 to take necessary action against the authorities and officials concerned, who have joined hands and colluded with the respondents 7 and 8, in what ever manner, for allowing the encroachment and illegal constructions at Vettilathuruthu, violating the Coastal Zone Regulation and other laws in force.

iv) To issue such other appropriate writ, order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

17. A Counter Affidavit is filed by the 6th respondent (panchayat) wherein it is, inter alia, stated as follows:

On the basis of the petitioner's complaint inspection is conducted, stop memo is issued to the 8th respondent intimating that the constructions without prior permission should be stopped and on the basis of the same the 8th respondent stopped further constructions. It is further stated that, by communication dated 24.4.2012, the 8th respondent explained that the construction activities now being carried out are only repair works of the existing buildings in old model and no new

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 9 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

construction activities are being undertaken (Archaic style). Pursuant to the communication, the 8th respondent, by request dated 30.4.2012 applied for permit for reconstruction and repair and after conducting necessary inspection it is found that the repair works are being conducted on very old building, 6 in number which were already allotted with panchayat numbers. In such circumstances, the 8th respondent was granted a permit for reconstruction of the existing 6 old buildings with a condition that the reconstruction activity shall not alter the existing plinth area and that the Coastal Zone Regulations shall also be complied with strictly. As per the records maintained by the panchayat, the existing plinth area was 999.23 Sq. meter. However, the reconstruction permit was issued for 869.20 Sq. meter only. In such circumstances, it is pointed out that, there cannot be an allegation that by virtue of the reconstructions, the Coastal Zone Regulations have been violated. The enquiries conducted by the Village Officer has not revealed any instance of encroachment of purampokku land. The 8th respondent, from available records maintained by the pachayat would show that it has remitted license fee, employment tax etc. from 2007 onwards. No new construction has been brought to the notice of the 6th respondent.

18. Subsequently, an affidavit is filed wherein it is inter alia stated by the Secretary of the panchayat that, on further verification, it is found that, on 30.4.2012, the respondent issued a permit for repair and reconstruction. The application for the same was made by request dated 26.4.2012. The mistaken statement that request was made on 30.4.2012 is sought to be corrected.

19. A Statement is filed by the 4th respondent Coastal Management Authority. Therein, it is inter alia stated as follows:

"(1). The Vettilathuruthu Island is in Vembanad backwaters. As per the Kerala Coastal Zone management plan Map No. 32A, the area is marked as filtration ponds which are categorized as CRZ 1 (i) as per CRZ Notification 1991, in these areas no new constructions can be permitted except projects relating to Department of Atomic Energy and pipelines and conveying systems including transmission lines. Facilities that are essential for permissible activities under CRZ1, installation of weather radar for monitoring of cyclone movement, and prediction by Indian Meteorological Department and construction of trans-harbour sea links can also be permitted. Any other construction made in the CRZ 1 area will be blatant violation of provisions of CRZ Notification 1991 and 2011.

(2). The provisions of CRZ notification in Vembanad Kayal as per the approved coastal Zone Management Plan of the State are made upto Thaneermukkam bund. As per CRZ notification 2011 the Vembanad backwaters are declared critically vulnerable coastal area.

(3). As per CRZ notification 1991, the CRZ 11 areas are developed to coastal shoreline within the municipal limit or other legally designated urban area. The CRZ Notification 2011 has been modified to the extent that the classification I, II and III remains same. The category IV includes the water body are influenced tidal action from sea and also upto nautical miles seaward from the Low Tide Line of sea. The notification has provided special dispensation to the backwater islands of Kerala where the CRZ will be 50m landward of High Tide Line.

(4). No new constructions can be permitted in CRZ I area except projects relating to Department of Atomic Energy and pipelines and conveying systems including transmission lines. Facilities that are essential for permissible activities under CRZ I, installation of weather radar for monitoring of cyclone movement and prediction by Indian Meteorological Department and construction of trans-harbour sea links alone can also be permitted. The statement that as far as CRZ I area is concerned building shall be permitted in landward side of road is not

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 10 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

correct. It is applicable only to CRZ II.

It is also stated that the construction made in the Vettilathuruthu Island is a blatant violation of the 1991 and 2011 notifications.

The Centre for Earth Science Studies on request reported that all the construction held and the ongoing landscape modifications/new construction by M/s. Vamika Resorts in Vettilathuruthu Islands are in violation of the provisions of the notifications. The authority has received petitions which have been forwarded to CESS for verification and any construction made without obtaining statutory clearance will amount to violation.

20. A Reply Affidavit is filed by the petitioner.

Respondents 7 and 8 filed counter affidavits wherein it is inter alia stated as follows:

A total extent of 211.06 Ares (521.52 cents) comprised in various survey numbers is owned by the 8th respondent having obtained the same under sale deeds of the years 1999, 2000, 2001 and 2005. They denied the case of illegal construction. They would say that the structures in the property were in existence in 1991 also. There are 12 buildings in the property of which 8 have been numbered by the panchayat. All the buildings have been in existence even in 1991, ie., even prior to purchase of the property by the petitioner. The unnumbered buildings are presently used for storing of materials for staying of labourers who are residing in the property in connection with the renovation work.

Respondents 7 and 8 were running a hotel in their property from the year 2006-2007 onwards in the said property. Subsequently, as is the general practice some of the authorised structures needed to be renovated in order to provide comfortable stay for the guests.

In such circumstances, it was decided to reconstruct 6 of the authorised structures within the limitations of existing floor space index and less than the existing plinth area and for this purpose permit had been applied for and granted. Along with the same, interiors are also being renovated in terms of electrical and lighting fittings, beddings, bathrooms etc. It is also stated that in view of of Rule 10 of the Panchayat Building Rules, a building permit is not necessary in Category II-Village Panchayats for buildings up to 150 Sq. meters and it was in this background and understanding of the provisions that a separate building permit was not applied for.

W.P. (C) No. 2947 of 2013 (filed on 30.01.2013):

21. The above writ petition is filed by the 8th respondent (island owner) in W.P. (C) No. 8299/2012. The prayers in the writ petition are as follows:

> "a) Declare that Ext.P3 to the extent that it includes the property of the petitioner comprised of 16.19 Ares in Sy. No. 236/1-3, 3.40 Ares in Sy. No. 236/1-1-5, 59.94 Ares in Sy. No. 236/2ABCD,
>
> 4.04 Ares in Sy. No. 236/2B2, 16.20 Ares in Sy. No. 236/2A, 4.05 Ares in Sy. No. 236/2B3, 8.10 Ares in Sy. No. 236/1-2ABC, 29.94 Ares in Sy. No. 236/1-5 and 69.20 Ares in Sy. No. 236/3C comprising north eastern and southern portion of the island of Vettilla Thuruthu in Allapuzha District within the Coastal Regulation Zone is ultra vires the Coastal Regulation Zone Notification, 1991 and the Coastal Regulation Zone Notification, 2011, by an appropriate writ, direction or order.
>
> b) In the alternative, declare that the classification of the property of the petitioner situated in Vettila Thuruthu Island as Filtration Pond in Ext.P3 and the consequent categorization of the same under CRZ-I by the 3rd respondent is unconstitutional besides being ultra vires the Coastal Regulation Zone Notification, 1991 and the Coastal Regulation Zone Notification, 2011 by an appropriate writ, direction or order."

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 11 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

Briefly put, the case of the petitioner is as follows:

Petitioner is the absolute owner in possession and enjoyment of an extent of 16.19 Ares in Sy. No. 236/1-3, 3.40 Ares in Sy. No. 236/1-1-5, 59.94 Ares in Sy. No. 236/2ABCD, 4.04 Ares in Sy. No. 236/2B2, 16.20 Ares in Sy. No. 236/2A, 4.05 Ares in Sy. No. 236/2B3, 8.10 Ares in Sy. No. 236/1-2ABC, 29.94 Ares in Sy. No. 236/1-5 and 69.20 Ares in Sy. No. 236/3C comprising north eastern and southern portion of the island of Vettilla Thuruthu.

The said properties comprising the island was earlier prior to the purchase of the same by the petitioner inhabited by several families who had constructed buildings in the properties and were staying therein. The extent owned by the petitioner on the said island is a pucca garden land. Even prior to 1991, there were families staying in the island and having houses of their own. In order for repair and reconstruction of existing structures bearing Door Nos. I/93, I/94, I/95, I/93A, I/93 B, I/93C, in the property of the petitioner, petitioner obtained building permit NO. C/1/KPBR/2012-13 dated 30-4-2012 from the 4th respondent.

The panchayat gave such permit after fully satisfied genuineness of the request made by the petitioner in that regard. The reconstruction has been completed and the same are being used by the petitioner. The writ petition is filed on the basis of the stand adopted by the Kerala Coastal Zone Management Authority and the counter filed in W.P. (C) No. 8299/2012 wherein they have stated that the entire Island and Vettilathuruth wherein the property of the petitioner is situated is a filtration pond which is categorized as CRZ I (i) as per CRZ Notification 1991. It is the case that Map 32A in so far as it relates to the property of the petitioner on Vettilathuruthu is prepared ignoring the mandate of CRZ 1991 notification and various directives issued by the first respondent. It is arbitrary. The property of the petitioner is not filtration pond. The classification made of Vettilathurutu under CRZ I (i) under the 1991 notification is absolutely erroneous. CRZ 1991 notification does not contemplate any "Filtration Pond". The terms 'filtration pond' is not referred to in the notification in the Environment Protection Act. The Vettilathurutu Island is not an area developed for aquaculture and cannot be characterized as CRZ I (i). No part of the Island is low lying nor the area where fish is grown in large numbers. It is stated that prior surveys does not include the Island as water bodies. No new plan is prepared after 2002. By virtue of the amendment to the notification in 2002, there is a mandate that the distance which the tidal effects are experienced should be determined based on salinity concentration of 5 parts per thousand (ppt). It is their case that, salinity measurement was not conducted in 1993 or earlier point of time. Under the 1991 notification, the salinity measurement is to be done during the driest period of the year implied that salinity is to be measured afresh after the amendment in 2002. The law contemplates the Mapping authority to prepare cadastral maps. But, the same is never done. There were several families residing in the Island prior to CRZ notification and there were structures. It is also submitted that, on account of the global warming salinity would be reduced. It is also submitted that, at any rate, the Island would come only under the CRZ-III.

22. A Counter Affidavit is filed by the authority. Therein, it is, inter alia, stated as follows : Filtration ponds and the adjoining fifty metre belt are demarcated as CRZ-I. Vettilathuruthu is categorised as per the Plan Map 32A as filtration pond. The area is also low lying and it is likely to be inundated due to sea level rise. As per the CRZ Notification, 1991 the entire Vettilathuruthu is CRZ-I and as per 2011 Notification, it is CRZ-III and IV. The 2011 Notification has also defined the Vembanad backwaters as CVCA. An expert team has conducted site inspection and given Ext.R3(c) report. The Coastal Zone Management Plan was prepared based on guidelines of MoEF The geographic maps prepared by the Survey of India (Government of India) and the Cadastral Maps prepared by the Survey Department of Kerala Government was used as

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 12 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

base map for preparation of plan. The 1991 Notification and 2011 Notification do not differentiate between natural and man-made water bodies:

> "7. The Coastal Zone Management Plan was prepared in 1994-1995 periods. The data of 1993-94 was used by CESS for demarcating the CRZ area. While mapping the CRZ, the area up to 5 PPT was demarked and marked in Coastal Zone Management Plan. There was no direction to prepare fresh Coastal Zone Management Plan during 2002. The salinity measurements were done to fix the landward extent of the tidal influence in the back water or rivers. Salinity is an indicator of tidal effects. The salinity measurements were done as per standard measurement technique in Parts Per Thousand (PPT)". The preparation of cadastral scale map has to be done by the Local Self Government Institutions for their applications. The maps are thus cadastral scale maps, which is a mandatory document to be submitted along with the application:
>
> "9. The CRZ notification 2011 had provided special dispensation to the islands in the backwater of Kerala. The CRZ notification 1991 was made applicable to the Islands in proximity to the tidally influenced water bodies. The category IV in CRZ notification 1991 was for Islands in the territorial waters like Lakshadweep and Andaman & Nicobar. The category IV as per CRZ notification 2011 is water body. The islands in the territorial waters have been brought under a separate notification during 2011 and this does not include the backwater islands in Kerala."

The CRZ Notification of 2011 is made applicable with effect from 06.01.2011. The new Coastal Zone Management Plan is being prepared based on the 2011 Notification. Until the new coastal zone map is approved, the plan based on 1991 Notification will be in place. The reconstruction permit issued by the panchayat is subject to CRZ provisions. The petitioner was directed to follow the CRZ Notifications and it has not been followed. Reference is made to the special dispensation for the State in view of the unique coastal system of backwater and backwater islands.

23. AReply Affidavit is filed reiterating the stand in the Writ Petition. The fifth respondent has also filed detailed Counter Affidavit. The fifth respondent is the petitioner in W.P. (C). No. 8299/12.

24. We have heard Shri. K.V. Viswanathan, learned senior counsel who appeared with Shri. P. Gopinath Menon, Shri. T.M. Mohammed Youseff, learned senior counsel, Shri. P. K. Ibrahim, Shri. T. M. Raman Kartha, Shri. K. I. Mayankutty Mather, Shri. Bechu Kurian Thomas, Smt. T.B. Mini, Shri. Prakash C. Vadakkan, Shri. Manu Govind and also Shri. Tom Thomas, learned Government Pleader.

The Coastal Regulation Zone Notifications;

Its salient Features:

25. Let us examine the provisions contained in the Notifications issued under the Environment (Protection) Act, 1986 (hereinafter referred to as the Act). The Coastal Regulation Zone Notification was first issued in the year 1991 which is issued under Section 3 (1) and Section 3 (2) (v) of the Environment (Protection) Act, 1986. Government declared that coastal stretches of seas, bays, estuaries, creeks, rivers and backwaters which are influenced by the tidal action (in the landward side) upto 500 meters from the High Tide Line (HTL) and the land between the Low Tide Line (LTL) and the HTL as Coastal Regulation Zone and imposed with effect from the date of the Notification the restrictions on the setting up and expansion of industries operations or processes. It was further provided that for the purpose of the Notification, the High Tide Line will be defined as a line upto which the highest Highest Tide reaches at spring tide. Thereafter, there was a Note which read as follows:

> "Note.- The distance from the High Tide Line (HTL) to which the proposed regulations will apply in the case of rivers, creeks and backwaters may be

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 13 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

modified on a case by case basis for reasons to be recorded while preparing the Coastal Zone Management Plans (referred to below); however, this distance shall not be less than 100 metres or the width of the creek, river or backwater whichever is less." Thereafter, by Notification dated 18.8.1994, for the portion beginning with the words "For the purposes of this notification, the High Tide Line" and ending with the words "width of the creek, river and backwater whichever is less", the following was substituted:

"For the purposes of this notification, the High Tide Line means the line on the land upto which the highest water line reaches during the spring tide and shall be demarcated uniformly in all parts of the country by the demarcating authority so authorised by the Central Government in consultation with the Surveyor General of India.

NOTE:— The distance from the High Tide Line shall apply to both sides in the case of rivers, creeks and back waters and may be modified on a case by case basis for reasons to be recorded while preparing the Coastal Zone Management Plans. However, this distance shall not be less than 50 metres or the width of the creek, river or back-water whichever is less.

The distance upto which development along rivers, creeks and back-waters is to be regulated shall be governed by the distance upto which the tidal effect of sea is experienced in rivers, creeks or back-waters, as the case may be, and should be clearly identified in the Coastal Zone management Plans."

There were certain other amendments with which we are not concerned.

26. Still later, by Notification dated 29.12.1998, the following amendment was brought about:

"In paragraph 1, sub-paragraph (3), for the words "For the purposes of this notification, the High Tide Line means the line on the land upto which the highest water line reaches during the spring tide and shall be demarcated uniformly in all parts of the country by the demarcating authority so authorised by the Central Government in consultation with the Surveyor General of India", the following shall be substituted, namely:—

"For the purposes of this notification, the High Tide Line means the line on the land upto which the highest water line reaches during the spring tide. The High Tide Line shall be demarcated uniformly in all parts of the country by the demarcating authority or authorities so authorised by the Central Government, in accordance with the general guidelines issued in this regard."

Thereafter, by Notification dated 21.5.2002, the following amendments were effected, inter alia:

"1. In the said notification, (i) in paragraph 1, in sub-paragraph (3),—

(1) the portion beginning with the words, "For the purpose of this notification" and ending with words "general guidelines issued in this regard", shall be numbered as clause (i);

(2) after clause (i) as so numbered, the following clause shall be inserted, namely;

"(ii) The distance from the High Tide Line shall apply to both sides in the case of rivers, creeks and backwaters and may be modified on a case to case basis for reasons to be recorded in writing while preparing the Coastal Zone Management Plans provided that this distance shall not be less than 100 meters or the width of the creek, river or backwaters, whichever is less. The distance upto which development along rivers, creeks and backwaters is to be regulated shall be governed by the distance upto which the tidal effects are experienced which shall be determined based on salinity concentration of 5 parts per thousand (ppt). For

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 14 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

the purpose of this notification, the salinity measurements shall be made during the driest period of the year and the distance upto which tidal effects are experienced shall be clearly identified and demarcated accordingly in the Coastal Zone Management Plans."

(iii) the Note shall be omitted." After the amendment, the provisions read as follows:"i) For the purposes of this notification, the High Tide Line means the line on the land up to which the highest water line reaches during the spring tide. The High Tide Line shall be demarcated uniformly in all parts of the country by the demarcating authority or authorities so authorized by the Central Government, in accordance with the general guidelines issued in this regard." Sub-paragraph (ii) reads as follows after the amendment:"(ii) The distance from the High Tide Line shall apply to both sides in the case of rivers, creeks and backwaters and may be modified on a case to case basis for reasons to be recorded in writing while preparing the Coastal Zone Management Plans provided that this distance shall not be less than 100 meters or the width of the creek, river or backwaters, which ever is less. The distance upto which development along rivers, creeks and backwaters is to be regulated shall be governed by the distance upto which the tidal effects are experienced which shall be determined based on salinity concentration of 5 parts per thousand (ppt). For the purpose of this notification, the salinity measurements shall be made during the driest period of the year and the distance upto which tidal effects are experienced shall be clearly identified and demarcated accordingly in the Coastal Zone Management Plans." Para 2 declares certain activities as prohibited within the Coastal Regulation Zone (hereinafter referred to as 'the Zone"). Para 3 of the 1991 Notification provides that all other activities except those which are prohibited in para 2 is sought to be regulated. Para 3 provided that clearance shall be given for any activity within the Zone only if it requires water front and foreshore facilities. Clause (2) of para 3 details various activities which require environmental clearance from the Ministry of Environment and Forests, Government of India. Among the activities which require environment clearance is "all other activities with investment of five crore rupees or more". (See Para 3 (v)). Annexure-I to the Notification deals with coastal area classification and development regulations. The notification provides for classifying coastal stretches within 500 meters in the High Tide Line area into four categories. They are Categories CRZ-I, CRZ-II, CRZ-III, CRZ-IV. They being relevant for the purpose of our case we extract the same.

"Classification of Coastal Regulation Zone : 6(1) For regulating development activities, the coastal stretches within 500 meters of High Tide Line on the landward side are classified into four categories, namely : Category I (CRZ-I):

(i) Areas that are ecologically sensitive and important, such as national parks/marine parks, sanctuaries, reserve forests, wildlife habitats, mangroves, corals/coral reefs, areas close to breeding and spawning grounds of fish and other marine life, areas of outstanding natural beauty/historically/heritage areas, areas rich in genetic diversity, areas likely to be inundated due to rise in sea level consequent upon global warming and such other areas as may be declared by the Central Government or the concerned authorities at the State/Union Territory level from time to time.

(ii) Area between Low Tide Line and the high Tide Line. Category-II (CRZ-II):

The areas that have already been developed up to or close to the shoreline. For this purpose, "developed area" is referred to as that area within the municipal limits or in other legally designated urban areas which is already substantially built up and which has been provided with drainage and approach roads and other

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 15 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

infrastructural facilities, such as water supply and sewerage mains. Category-III (CRZ-III):

Areas that are relatively undisturbed and those which do not belong to either Category-I or II. These will include coastal zone in the rural areas (developed and undeveloped) and also areas within Municipal limits or in other legally designated urban areas which are not substantially built up. Category-IV (CRZ-IV) : Coastal stretches in the Andaman & Nicobar, Lashadweep and small islands, except those designated as CRZ-I, CRZ-II or CRZ-III."

27. Norms have been made for regulating activities. As far as CRZ-I is concerned, no new construction is permitted except certain activities which are not relevant for our purpose. As already noted, CRZ-IV relates to coastal stretches in Andaman and Nicobar Islands, Lakshadweep and small islands except as designated as CRZ-I, CRZ-II or CRZ-III. Regulations have been put in place separately for Andaman and Nicobar Islands on the one hand and Lakshadweep and small islands on the other. Guidelines have been framed by Annexure-II for development of beach resorts/hotels in the designated areas of CRZ-III for temporary occupation of tourist/visitors with prior approval of the Ministry of Environment and Forests.

28. We may at once also refer to the Coastal Regulation Zone Notification 2011. The same was published on 6.1.2011 in the Gazette. In Para 1 of the Notification it is inter alia stated as follows:

"Now, therefore, in exercise of the powers conferred by sub-section (1) and clause (v) of sub-section (2) of section of the Environment (Protection) Act, 1986 (29 of 1986), the Central Government, with a view to ensure livelihood security to the fisher communities and other local communities, living in the coastal areas, to conserve and protect coastal stretches, its unique environment and its marine area and to promote development through sustainable manner based on scientific principles taking into account the dangers of natural hazards in the coastal areas, sea level rise due to global warming, does hereby, declare the coastal stretches of the country and the water area up to its territorial water limit, excluding the islands of Andaman and Nicobar and lakshadweep and the marine areas surrounding these islands up to its territorial limit, as Coastal Regulation Zone (hereinafter referred to as the CRZ) and restricts the setting up and expansion of any industry, operations or processed and manufacture or handling or storage or disposal of hazardous substances as specified in the Hazardous Substances (Handling, Management and Transboundary Movement) Rules, 2009 in the aforesaid CRZ; and In exercise of powers also conferred by clause (d) and sub rule (3) of rule 5 of Environment (Protection) Act, 1986 and in supersession of the notification of the Government of India in the Ministry of Environment and Forests, number S.O.

114. (E), dated the 19th February, 1991 except as respect things done or omitted to be done before such supercession, the Central Government hereby declares the following areas as CRZ and imposes with effect from the date of the notification the following restrictions on the setting up and expansion of industries, operations or processes and the like in the CRZ—

(i) the land area from High Tide Line (hereinafter referred to as the HTL) to 500 mts on the landward wide along the sea front.

(ii) CRZ shall apply to the land area between HTL to 100 mts or width of the creek whichever is less on the landward side along the tidal influenced water bodies that are connected to the sea and the distance up to which development along such tidal influenced water bodies is to be regulated shall be governed by the distance up to which the tidal effects are experienced which shall be determined based on salinity concentration of 5 parts per thousand (ppt) measured during the driest period of the year and distance up

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 16 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

to which tidal effects are experienced shall be clearly identified and demarcated accordingly in the Coastal Zone Management Plans (hereinafter referred to as the CZMPs).

Explanation.-For the purposes of this sub-paragraph the expression tidal influenced water bodies means the water bodies influenced by tidal effects from sea, in the bays, estuaries, rivers, creeks, back waters, lagoons, ponds connected to the sea or creeks and the like.

(iii) the land area falling between the hazard line and 500 mts from HTL, on the landward side, in case of seafront and between the hazard line and 100 mts line in case of tidal influenced water body. The word 'hazard line' denotes the line demarcated by Ministry of Environment and Forests (hereinafter referred to as the Sol) taking into account tides, waves, sea level rise and shoreline changes.

(iv) land area between HTL and Low Tide Line (hereinafter referred to as the LTL) which will be termed as the inter tidal Zone.

(v) the water and the bed area between the LTL to the territorial water limit (12 Nm) in case of sea and the water and the bed area between LTL at the bank to the LTL on the opposite side of the bank, of tidal influenced water bodies.

2. For the purposes of this notification, the HTL means the line on the land up to which the highest water line reaches during the spring tide and shall be demarcated uniformly in all parts of the country by the demarcating authority (s) so authorized by the MoEF in accordance with the general guidelines issued at Annexure-I HTL shall be demarcated within one year from the date of issue of this notification."

Para 3 deals with prohibited activities. Para 4 deals with regulation of permissible activities in the zone area. Para 4 inter alia provides that activities which are mentioned shall be regulated except those prohibited in para 3. The notification also clearly provides that clearance will be provided within the zone only if it requires waterfront and foreshore facilities. Clause 4(b) inter alia reads as follows:

"(b) for those projects which are listed under this notification and also attract EIA notification, 2006 (S.O.1533 (E), dated the 14th September, 2006), for such projects clearance under EIA notification only shall be required subject to being recommended by the concerned State or Union territory Coastal Zone Management Authority (hereinafter referred to as the CZMA)."

Clause 'd' reads as follows:

"(d) Construction involving more than 20,000 sq.mts build-up area in CRZ-II shall be considered in accordance with EIA notification, 2006 and in case of projects less than 20,000 sq.mts. built-up area shall be approved by the concerned State or Union territory Planning authorities in accordance with this notification after obtaining recommendation from the concerned CZMA and prior recommendations of the concern CZMA shall be essential for considering the grant of environmental clearance under EIA notification, 2006 or grant of approval by the relevant planning authority."

Para 4.2 deals with the procedure for clearance of permissible activities. The project proponents are to apply the documents which are mentioned therein. Further, it provides for getting no objection certificate from the State Pollution Control Board inter alia for projects involving discharge of effluents, solid wastes, sewage and the like. Para 5 provides for preparation of Coastal Zone Management Plans. It inter alia provides that the Ministry of Environment Forests (MOEF) may obtain Coastal Zone management Plans (CZMPs) prepared through respective State Government or Union Territory. The plans may be prepared by the concerned State Government by engaging reputed and experienced scientific institutions or agencies as provided inter alia. The coastal States and Union Territories are to prepare within a period of twenty four

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 17 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

months from the date of issue of the notification draft CZMPs in 1 : 25,000 scale map identifying and classifying the CRZ areas within the respective territories in accordance with the guidelines in Annexure-I of the notification which involve public consultation. The draft CZMPs are to be submitted by the State Government or Union territory to the concerned CZMA for appraisal including appropriate consultations and recommendations as provided under the Environment (Protection) Act, 1986. Ultimately, the MoEF shall consider and approve the CZMPs within a period of 4 months from the date of receipt of the CZMPs complete in all respects. All developmental activities listed in the notification are to be regulated within the framework of CZMPs as the case may be in accordance with the provisions of the notification. Para 5(xii) reads as follows:

"(xii) The CZMPs already approved under CRZ notification, 1991 shall be valid for a period of twenty four months unless the aforesaid period is extended by MoEF by a specific notification subject to such terms and conditions as may be specified therein."

Para 6 deals with Enforcement of the CRZ.

Clause (d) therein provides as follows:

"(d) The dwelling units of the traditional coastal communities including fisherfolk; tribals as were permissible under the provisions of the CRZ notification, 1991, but which have not obtained formed approval from concerned authorities under the aforesaid notification shall be considered by the respective Union territory CZMAs and the dwelling units shall be regularized subject to the following condition, namely:—

(i) these are not used for any commercial activity.

(ii) these are not sold or transferred to non-traditional coastal community."

Para 7 deals with classification of the Zone and it provides that for the purpose of conserving and protecting the coastal areas and marine waters, the Zone area is to be classified as CRZ-I, CRZ-II, CRZ-III, CRZ-IV and V. CRZ-I reads as follows:

(i) CRZ-I,- A. The areas that are ecologically sensitive and the geomorphological features which play a role in the maintaining the integrity of the coast,—

(a) Mangroves, in case mangrove area is more than 1000 sq.mts, a buffer of 50 meters along the mangroves shall be provided;

(b) Corals and coral reefs and associated biodiversity;

(c) Sand Dunes;

(d) Mudflats which are biologically active;

(e) National parks, marine parks, sanctuaries, reserve forests, wildlife habituate and other protected areas under the provisions of Wild Life (Protection) Act, 1972 (53 of 1972), the Forest (Conservation) Act, 1980 (69 of 1980) or Environment (Protection) Act, 1986 (29 of 1986); including Biosphere Reserves;

(f) Salt Marshes;

(g) Turtle nesting grounds;

(h) Horse shoe crabs habitats.

(i) Sea grass beds;

(j) Nesting grounds of birds;

(k) Areas or structures of archaeological importance and heritage sites.

B. The area between Low Tide Line and High Tide Line:"

It is also relevant to extract the area classified as V. It reads as under.

"(V). Areas requiring special consideration for the purpose of protecting the critical coastal environment and difficulties faced by local communities,- A. (i) CRZ area

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 18 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

falling within municipal limits of Greater Mumbai;

(ii) the CRZ areas of Kerala including the backwaters and backwater islands;

(iii) CRZ areas of Goa.

B. Critically Vulnerable Coastal Areas (CVCA) such as Sunderbans region of West Bengal and other ecologically sensitive areas identified as under Environment (Protection) Act, 18\986 and managed with the involvement of coastal communities including fisherfolk."

Para 8 provides for regulation of permissible activities. Regarding V it is divided as follows:

"1. CRZ area falling within municipal limits of Greater Mumbai : 2 deals with CRZ areas of Kerala. It being relevant we extract the same.

"2. CRZ for Kerala In view of the unique coastal systems of backwater and backwater islands along with space limitation present in the coastal stretches of the State of Kerala, the following activities in CRZ shall be regulated as follows, namely:—

(i) all the islands in the backwaters of Kerala shall be covered under the CRZ notification;

(ii) the islands within the backwaters shall have 50 mts width from the High Tide Line on the landward wide as the CRZ area.

(iii) within 50 mts from the HTL of these backwater islands existing dwelling units of local communities may be repaired or reconstructed however no new construction shall be permitted.

(iv) beyond 50 mts. from the HTL on the landward side of backwater islands, dwelling units of local communities may be constructed with the prior permission of the Grama Panchayath;

(v) foreshore facilities such as fishing jetty, fish drying yards, net mending yard, fishing processing by traditional methods, boat building yards, ice plant, boat repairs and the like, may be taken up within 50 mts. width from HTL of these backwater islands."

29. Still further, we may notice that clause 4(a) purports to deal with what is called Critical Vulnerable Coastal Areas and we extract the same.

"4(a) Critical Vulnerable Coastal Areas (CVCA) which includes Sunderbans and other identified ecological sensitive areas which shall be managed with the involvement of the local coastal communities including the fisher folk;-

(b) the entire Sunderbans mangrove area and other identified ecologically important areas such as Gulf of Khambat and Gulf of Kutchchh in Gujarat, Malvan, Achra-Ratnagiri in Maharashtra, Karwar and Coondapur in Karnataka, Vembanad in Kerala, Gulf of Munnar in Tamil Nadu, Bhaitarkanika in Orissa, Coringa, East Godavari and krishna in Andhra Pradesh shall be declared as Critical Vulnerable Coastal Areas (CVCA) through a process of consultation with local fisher and other communities inhabiting the area and depend on its resources for their livelihood with the objective of promoting conservation and sustainable use of coastal resources and habitats;

(c) the process of identifying planning, notifying and implementing CVCA shall be detailed in the guideline which will be developed and notified by MoEF in consultations with the stakeholders like the State Government, local coastal communities ad fisherfolk and the like inhabiting the area;

(d) the Integrated management Plans (IMP) prepared for such CVCA shall interalia keep in view the conservation and management of mangroves, needs of local communities such as, dispensaries, schools, public rain shelter, community toilets, bridges, roads, jetties, water supply, drainage, sewerage and the impact

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 19 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

of sea level rise and other natural disasters and the IMPs will be prepared in line with the para 5 above for preparation of Coastal Zone Management Plans;

(e) till such time the IMPs are approved and notified, construction of dispensaries, schools, public rain shelters, community toilets, bridges, roads, jetties, water supply, drainage, sewerage which are required for traditional inhabitants shall be permitted on a case to case basis, by the CZMA with due regards to the views of coastal communities including fisherfolk."

Annexure-I of the 2011 notification provides for guidelines for preparation of coastal zone management plans. It inter alia provides under the heading "Hazard Mapping" that CZM maps shall be prepared in accordance with the CZM Maps. Para 5 deals with demarcating CRZ-I, II, III, IV and V. Maps should clearly demarcate land use plan of the area and list out CRZ-I area. CRZ-I area listed under para I.A and B should be specifically classified.

Clause 8 reads as follows:

"8. No developmental activities other than those listed above shall be permitted in the areas between the hazard line and 500 mts or 100 mts. or width of the creek on the landward side. The dwelling unit of the local communities including that of the fishers will not be relocated if the dwelling units are located on the seaward side of the hazard line. The State Government will provide necessary safeguards from natural disaster to such dwelling units of local communities."

Still further, clause 12 provides as follows:

"12. In the CRZ V areas the land use maps shall be superimposed on the Coastal Zone Management Plan and clearly demarcating the CRZ I, II, III, IV."

Para III. of Annexure reads as follows:

"III. CZMPs approved by MoEF in accordance with CRZ notification, 1991

1. While preparing the CZMPs under CRZ notification, 2011, the CZMPs that have been approved under the CRZ Notification, 1991 shall be compared. A justification shall be provided by the concerned CZMA in case the CSMPs prepared under CRZ notification, 2011 varies with respect to the approved CZMP prepared under CRZ notification, 1991."

Para IV reads as follows:

"IV. Public Views on the CZMP.

a) The draft CZSMPs prepared shall be given wide publicity and suggestions and objections received in accordance with the Environment (Protection) Act, 1986, Public hearing on the draft CZMPs shall be held at district level by the concerned CZMAs.

b) Based on the suggestions and objections received the CZMPs shall be revised and approval of MoEF shall be obtained.

c) The approved CZMP shall be put up on the website of MoEF, concerned website of the State, Union Territory CZMA and hard copy made available in the panchayat office, District Collector office and the like."

Annexure III deals with guidelines for development of beach resorts or hotels in the designated areas of CRZ-III and CRZ-II for occupation of tourist or visitors with prior approval of the Ministry of Environment and Forests (MoEF). An authority has been constituted in Kerala Coastal Zone Management Authority with various Government officers and others.

30. In view of the vexed nature of the issues, we directed that a person competent to answer questions be present. He was present. We asked him certain questions, many of which were put at the instance of the learned counsel appearing for the parties.

The following are the questions and the answers given by Dr. P.T. Thomas, Head of

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 20 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

the CESS:

"05.11.2012:

Today, Dr. K.V. Thomas, Scientist G, Head, Marine Sciences Division, Centre for Earth Science Studies, Akkulam, Thiruvananthapuram - 695 031 is present in Court. We asked him a few questions.

First of all, we asked him as to whether there can be a High Tide Line in the interior parts of a State or whether High Tide Line is necessarily to be found on the sea coast? We asked him on what basis the High Tide Line was prepared in connection with Coastal Regulation Zone Plan in the year 1995? The answer was as follows:—

There can be a High Tide Line in the interior parts of the State. Three tests were employed by the CESS. They are as follows:—

Firstly it was pointed out that there must be salinity of 5 parts per thousand (5 PPT). Secondly they also relied on the reversal of current based on tide levels or tide status. Lastly morphological signatures such as tidal flat (inter tidal zone) or existence of filtration pond were relied on. He pointed out, when confronted with the question, that salinity test was introduced by the amendment in 2002, that the test was employed by the CESS even in 1995. It was part of the methodology employed by the CESS to determine whether there is a Coastal Regulation Zone and with reference to the same a High Tide Line is fixed.

In answer to the question as to why the island in controversy namely Nediyathuruthu island is not earmarked, the answer was that Nediyathuruthu island is shown as the filtration pond and the maximum width of the land part is 50 metres and with this scale of the map, it cannot be shown. It is stated that the filtration pond is marked in the land part and the entire land parts will be CRZ i.e. Coastal Regulation Zone.

In answer to the question as to what is meant by the word 'coasts', the officer would say that it is not confined to sea coast and had it been so, it would have been specified as sea coast.

In regard to the question as to how the island in question was identified as containing filtration pond, the answer was as follows:—

(1) Satellite imagery was employed

(2) Aerial photographs were used

(3) Survey of India top sheets and field maps.

The officer is not very certain as to whether in the case of the particular island, field map was used.

In regard to the question as to whether cadastral survey has been done, the answer was as follows:—

It is for the project proponent to make request to the CESS and then the CESS will undertake the work of cadastral survey. It is submitted that in respect to the island in question, there is no request for cadastral survey and no cadastral survey has been done.

In answer to the question as to whether the island in controversy would not come within the ambit of CRZ IV as per 1991 Notification, the officer would say that CRZ IV is meant to cover Marine Islands.

In answer to another question, namely whether pursuant to notification dated 4/1/1999 demarcation of the HTL and LTL was made on th basis of the guidelines mentioned therein, the officer stated as follows:

The plan was prepared in 1995 with reference to the very same guidelines which were in fact mentioned in the notification.

In answer to the question as to whether the Cadastral survey which was directed to be undertaken by letter dated 4/1/1999 which is referred to in paragraph 6 of the

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 21 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

judgment of this Court reported in 2003 (3) KLT 424 was undertaken, the officer answered by saying that this huge efforts required. It is submitted that cadastral survey as such has not been done. It is submitted that the survey being taken up on a priority basis starting from Kozhikode, Varkkala, Kollam, Thiruvananthapurm and it is on going in Kochi, Ernakulam and Maradu. It is submitted that otherwise it is undertaken on request. He also stated that cadastral survey has not been undertaken in Alleppey District. In answer to the question as to whether pursuant to 2011 notification, Coastal Regulation Zone Plan has been prepared, it is answered by saying that it is an on going process in Kochi pursuant to 2011 notification and further plan will be made on the basis of 2011 notification.

The officer during the course of his statement mentioned that the filtration pond was prepared on the basis of certain criteria. They included aerial survey, satellite survey and photographs. The 4th respondent in W.P. (C) No. 4808/2012 will make available all materials in his possession which was basis for him in Nediyathuruthu Island as filtration pond.

20.11.2012:

Dr. K.V. Thomas, Head Marine Sciences Division, CESS is present today also. We asked him that certain islands are appearing smaller than the island in question. These islands are not F.P. But Land. According to him, having regard to the small size of the land, it is not possible to mark the details.

2. As regards some other maps, which are pointed out by the learned Senior Counsel for the Company, Dr. K.V. Thomas would submit that egg-shaped portion is actually marked and having regard to the smaller land size the entire area is No Development Zone under CRZ3. In regard to 10 and 15, he would say that these are small land portions. They are completely land mass. The 'line' seen on the map of the small island is part of the legend for CRZ3

3. In regard to the islands, maps 43 and 53 were written as mangroves and maps 64, 67A and 68B were certain areas specifically marked as mangroves-eco system. Root system of mangroves spread to adjoining mudflat. Hence mangrove eco-system. He would say that mangroves are found in the inter tidal zone. Healthy mangroves will not survive in the landward of High Tide Line. In other words mangroves will be found in between high tide line and low tide line.

4. We also asked him what is the explanation of the word in 6(1) of Annexure-I to the 1991 notification, wherein it is stated that coastal stretches within 500 metres of high tide line on the landward side read with the inclusion of mangroves in CRZ1. According to him, CRZ1 extent between the low tide line and high tide line and mangroves can survive only in the inter tidal zone. Mangroves extent between the high tide line and low tide line and if spatial extent of mappable size, it can be earmarked and marked. He would add that in case of very smaller areas where the mangroves are in a smaller extent, it may not be marked.

5. In an answer to the question put at the instance of the learned Senior Counsel for the company that at page 23 of the Coastal Management Plan of Kerala, it is mentioned that the zone of filtration pond is dark gray and as far as the road, rail and canal, it is also gray to dark gray, gray to dark gray and dark gray respectively. How filtration pond could be distinguished from a road, rail and canal, he would say that it can be distinguished on the basis of shape. Roads, rails and canals are a linear shape unlike filtration ponds.

6. Another question asked at the instance of the learned Senior Counsel for the Company is that how they could find out whether it is merely a water body or a filtration pond. He answered that the boundary or bund of a filtration pond will be having a definite shape and it will be seen only in the saline water system and this will not be there in a fresh water system.

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 22 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

7. In regard to the question as to why in the toposheet one area shown as FP in blue, which indicates as a water body, and why it is not shown in regard to the island in question. His answer is that probably it was because it was alternatively being cultivated paddy and prawn culture. Filtration ponds were not considered for that mapping.

02.5.2013

Dr. K.V. Thomas, Head marine Sciences Division, Centre for Earth Science Studies is present today. We asked him as to whether in which Zone under the Coastal Regulation Zone Notification, 2011 Vettilathuruthu Island falls. He would say that, the detailed plan contemplated under the 2011 notification in regard to the Island has not been prepared. According to him, the Island falls within the 2011 notification, but as to in which specific Zone it will fall he would say that a part of it will fall within Coastal Regulation Zone-I and part will fall in Coastal Regulation Zone-III, yet another part falls in Coastal Regulation Zone-IV. According to him, a part of the Island come under Coastal Regulation Zone-I on account of the fact that, that part has mangroves which would bring it under Coastal Regulation Zone-I under the 2011 notification.

2. To the question why does it fall according to him as part of Coastal Regulation Zone-III the answer is that the Island falls within the boundaries of the Panavally Grama Panchayat land part which is not developed and in the rural area will fall in Coastal Regulation Zone-III.

3. A portion of the Island fall within Coastal Regulation Zone-IV on account of it being part of water body and bed. We asked him as to whether the Critically Vulnerable Coastal Area (CVCA) would fall in Coastal Regulation Zone-IV. According to DR. K.V. Thomas, the area which is declared as CVCAs will not fall under Coastal Regulation Zone-IV. He would further submit that, once the IMP is prepared as contemplated under the notification and approved by the Ministry of Environment and Forest, operations in respect of that area can be done in terms of the approved IMP. Part of it is attributable to clause B under Coastal Regulation Zone-IV.

4. He would say that, Vettilathuruthu Island falls partly in Coastal Regulation Zone-I under the 2011 notification for the reason there are mangroves.

5. In answer to the question why the Map is not prepared he would say that the process for the preparation of plan under the 2011 notification is on going.

6. He would say that as far as Coastal Regulation Zone for Kerala is concerned, it specifically provided that the Coastal Regulation Zone for the Islands in the backwaters will have a width of 50 meters from the High Tide Line on the landward area which is to be treated as Coastal Regulation Zone area. The officer would say that as to what really is the effect of the notification in respect of landward area beyond 50 meters from the High Tide Line in respect of backwater islands in Kerala the question is mooted in the form of clarification before the Ministry of Environment and Forests and they are awaiting reply.

7. When we pointed out sub paragraph 12 under Annexure-I relating to the guidelines for preparation CZMPs falling under classification of Coastal Regulation Zone areas the answer given by Dr. Thomas was that, first of all, the plan is to be prepared and thereafter the land use map must indeed be indicated which has not yet been done (it is in the process) by way of superimposition. When we pointed out that in para 12 there is a reference specifically that Coastal Regulation Zone-V under the 2011 notification the Coastal Regulation Zone areas of Kerala including backwaters and backwater Islands is brought under areas requiring special consideration under para 7, his answer is that it comes under that special category. According to him, land use in respect of the Vettilathuruthu Island will be distributed between Coastal Regulation Zone-I, Coastal Regulation Zone-III and Coastal Regulation Zone-IV.

8. In answer to the question put at the instance of the learned counsel for the

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 23 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

petitioner in W.P. (C) No. 2947/2013 to the question what is the basis for there are mangroves in the Island in question Dr. K.V. Thomas would say that an inspection was conducted on 6.10.2012 and mangroves were found there as reported. He would say that counter affidavit is filed also on the basis of verification done. He does not dispute the fact that it is not mentioned specifically in the report or counter and that there is no reference to there being mangroves in the Island either in the affidavit or report. But, according to him, it is on the basis of the same he would refer to the photographs produced along with the report. In answer to the question put at the instance of the learned counsel for the petitioner as aforesaid, he would say that the exact area occupied by mangroves is not measured and ascertained.

9. At the instance of the learned counsel for the petitioner again he was asked the further question as to whether it is ascertained that mangrove area is more than 1000 sq.meters. The answer is that it is not ascertained. According to him, the visual estimate would show that the mangrove area is not more than 1000 sq.meters on continuous basis. He would add that in answer to the Court's question as to what will be the position if there are only a few mangroves and the area is not more than 1000 sq.meters that even if there is a single mangrove it will fall under Coastal Regulation Zone-I.

10. When a question was put to Dr. K.V. Thomas at the instance of the learned counsel for the petitioner in W.P. (C) No. 2947/2013 as to what he has to say to the statement in the report (Ext.R3(c)) filed along with the counter affidavit to the effect that the committee was constituted on 8.10.2012 and it made visit on 6.10.2012 the officer would say that he has to verify and may state on the contradiction.

11. In answer to the question asked at the instance of the learned counsel for the petitioner aforesaid that Vettilathuruthu has not been marked and some other island has been marked he would insist that it was indeed Vettilathuruthu Island which was marked. According to him, there is an arrow indicating that it was Vettilathuruthu which was identified.

12. In response to the question of the learned counsel for the petitioner aforesaid again which was to the effect that the google photo produced are not consistent with the contours of the Island he would say that the Vettilathuruthu and adjoining Filtration Ponds have been demarcated as single Filtration Pond (FP) in the Coastal Zone Management Plan 1995. Since the scale of the Map does not permit to give details of the canal in that FP in that area it has been marked as FPs. He would say that the conglomeration of Island was taken as one when it was pointed out to him at the instance of the learned counsel for the petitioner that the Island marked is Kakkathuruthu and not Vettilathuruthu. The officer would say that going by the latitude and longitude the officer is able to identify the Island Vettilathurutu and the report was given on that basis and it is also mentioned in the report. He would say that, in the report the features pertinent to Vettilathuruthu Island alone have been indicated.

13. In answer to the question at the instance of the learned counsel for the petitioner whether the Island of 5 acres can be shown as larger than Island of about 17 acres (Nediyathuruthu) the officer would say that it is the area mentioned by the petitioner is to be verified.

14. In answer to the further question again at the instance of the learned counsel for the petitioner that the Island falls in Coastal Regulation Zone - IV when there is special connotation for the words water body and it cannot be referred to as water body within the landmass the officer would say as follows. The water body and the canal network within the Island is connected to the backwater system with exchange tidal water and FP was initially part of the backwater system which was bunded and separated from the backwater system providing connection to the backwater.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 24 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

15. A question was put to Dr. K.V. Thomas as to whether there exists any document which could be the foundation for concluding that it is being used as FP. He would submit that no document as such has been looked into but it was signatures such as presence of bund and the connection with the backwater. He would add that there are indeed aerial photographs and satellite images which indicated existence of FPs.

16. In answer to the question how it could be found from the satellite area photographs that it was man made, he would say that geometrical shape of the bund and the connection that is given to the backwater indicates the signatures which were used to find the same.

17. In answer to another question at the instance of the learned counsel for the petitioner aforesaid, as to whether the FP will take within its sweep man made and natural grounds of breeding fish, the answer is as follows. it takes in both. Another question is put at the instance of the learned counsel for the petitioner that from pages 23 and 38 of the Plan of the authority what is contemplated is only man made breeding grounds and there is no reference to natural breeding ground. The answer is as follows. Natural seedlings from the backwater enters and is grown therein. Seedlings are also brought from hatcheries. Both system exist in different places. Both will be treated as FP.

18. In answer to the question as to whether any area could be declared as falling in Coastal Regulation Zone area without conducting a salinity test the officer would say that salinity test was commissioned and conducted in the year 1993-94 through a project sponsored by the Ministry of Environment and Forest, Government of India through Space Application Centre and Centre for Earth Science Studies (Kerala).

19. In answer to the question the test was conducted in respect of Kaithapuzha kayal he would say that Kaithapuzha kayal is part of Vembanad Kayal and salinity test has been conducted under the project marked above.

20. We asked Dr. Thomas as to the purport of Ext.R3(b) Land Use Map in the context of a question which is sought to be put by the learned counsel for the company that in R3(b) Land Use Map, Nediyamthuruthu island contains reference to part of the island being under coconut cultivation (2.2) and in Map 32A, the whole area were shown as F.P. The Land Use Map was prepared as part of the projects which CESS submitted to the Kerala State Council for Science Technology and Environment (KSCSTE) for getting information on the general land use of coastal regulation zone and the adjoining areas. He would state that in the plan prepared by the coastal management authority the land use such as coconut cultivation or other cultivations was not a criteria. But in the Land Use Map, these classifications relating to the actual land use showing the agricultural operations and other operations were included. It was shown in the coastal management plan as F.P. because of the filtration pond and the net work of canals and coconut trees cannot be separately shown because of scale limit. When the learned counsel for the company pointed out the manner in which an island just below Nediyamthuruthu island is shown in map 32A wherein only a portion is shown as F.P. and the other area had shown as partly no development zone and separately marked in other words which is in consonance with the classification in R3 (b) Land Use Map, the answer we were given is that in Nediyamthuruthu island there is more water body part in the form of filtration pond, canals and channels. Dr. Thomas would say further that in the report itself that for detailed planning of Coastal Regulation Zone and the adjoining areas, it may necessary to use Cadastral Scale Map and in such cases the maps may be given as general guide lines.

21. In answer to the question given by the learned counsel for the company as to how we can reconcile its earlier statements given to the court that cadastral maps were being prepared on the basis of the request made by proponents and the

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 25 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

statement in R3(c) report wherein it is stated that the Science Technology and Environment Departments have directed to coastal local bodies on 16.06.1999 to prepare cadastral CRZ Maps and to implement Coastal Regulation Zone, he would say that the local bodies never prepared and such information is a must for giving clearance, and the project proponents were being asked to get prepared the cadastral level CRZ maps for the specific areas for which permission was sought. It is stated that there are seven authorised agencies and the CESS is one of those agencies.

22. At the instance of the petitioner we asked what is the distance between the Island and the salinity testing point. The officer said he is not aware."

Common Issues in respect of both islands:

31. Whether islands in the back waters of Kerala are covered under the Notification of 1991 and whether, at any rate, the stand of the Coastal Regulations and Management Authority is legally flawed by reason of the fact that the salinity test as contemplated in the amendment incorporated in 2002 is not fulfilled?

In considering the question as to whether the back water islands in Kerala are covered by the 1991 Notification, we must first consider and appreciate as to what is the concept of High Tide Line (hereinafter referred to as HTL). A contention was raised that the Coastal Regulation Zone is intended to apply only in respect of areas close to the sea coast. In fact, reliance is placed on the decision of a Division Bench of this Court in *Institute of Social Welfare* v. *State* (1996 (1) KLT 718) wherein the Court, inter alia, held as follows:

> "6. While dealing with the second contention, an understanding is necessary regarding the farthest limits of CRZ. It is described as the coastal stretch influenced by tidal action "upto 500 meters from the High Tide Line (HTL) and the land between the Low Tide Line (LTL) and the HTL". The zone can in the appropriate cases include estuaries, creeks, rivers and backwaters which are influenced by tidal action. In order to fix up the farthest line, an idea of what is meant by HTL is necessary. The Central Government brought about some amendments to the earlier notifications dealing with this subject through S.O.114(E) dated 19-2-1991 and declared that "the High Tide Line means the line on the land upto which the highest water line reaches during the spring tide and shall be demarcated uniformly in all parts of the country by the demarcating authority so authorised by the Central Government in consultation with the Surveyor General of India."
>
> No material has been made available to us regarding the said demarcation, if any, made by the demarcating authority. Without fixing HTL it is difficult to decide whether the proposed reclamation is within the prohibited area. Third respondent has a case that the proposed reclamation would be in the backwaters situated at a distance of 4.2 to 4.5 kilometres from the mouth of the sea. We are thus not in a position to find that the proposed reclamation would come within the CRZ until it is established that the High Tide Line had been demarcated in accordance with the procedure prescribed by the Central Government in the notification mentioned above."

Support is also sought to be drawn from the decision of the Full Bench of this Court in *Jacob Vadakkancherry* v. *The State of Kerala* (AIR 1998 Ker. 114), wherein the Court was concerned with the case relating to development of certain islands within the Cochin Port limits and falling within the Cochin backwaters. The development project was given environmental clearance by the Ministry of Environment & Forests, Government of India, subject to certain conditions. There were objections to the project. Writ Petitions were filed and the Full Bench referred to the judgment in *Institute of Social Welfare* v. *State* (1996 (1) KLT 718) which we have already referred to. The Court noted that it was after the judgment of the Division Bench that the Apex Court rendered its judgment on 19.6.1996 in Writ Petition No. 664/93. The Court took

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 26 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

note of the fact that the new project would involve reclamation of 25 hectares near the Marine Drive, inter alia. The Court found that taking into consideration all aspects of the matter it was difficult to hold prima facie, that the land proposed to be reclaimed will fall within the CRZ. It was also held "serious impairment to aquatic resources, ecology and environment are unlikely to result by reclamation of a small strip of land along with existing Marine Drive, that would not also involve violation of CRZ Regulations." The Court issued certain directions. Much reliance also is placed on the Bench decision of this Court in *Citizens Interest Agency* v. *Lakeshore Hospital & Research Centre Pvt. Ltd.* (2003 (3) KLT 424). As the very first sentence of the judgment shows, a question arose as to whether a 350 bed hospital and the show room should be ordered to be demolished for violation of the 1991 Notification. According to the petitioner, Kundannoor area is included in the CRZ I category. It is described in the plan as Map No. 33A. The fourth respondent (Coastal Authority) in the said case filed a Reply wherein it was, inter alia, stated that the authority had forwarded the application of the seventh respondent (who had allegedly violated the Notification) as a special case for CRZ clearance to the National Coastal Zone Management Authority. It is further submitted that the plan of the State is prepared in 1 : 12,500 on a base map enlarged from Survey of India top sheets of 1 : 50,000 scale with the use aerial photograph and satellite imageries. Hence, it is difficult to arrive at the exact conclusions on the CRZ status of the disputed area. We notice that in the said judgment, reference is made to letter dated 4.1.1999 by the Ministry of Environment and Forest directing the State Government to prepare local level CRZ maps in cadastral scale (1 : 3960 or the nearest scale) to ascertain the CRZ. We further find in the judgment that it is stated as follows:

> Apparently the stand of the authority itself was that the actual status of the disputed construction could be "ascertained only with the help of such large scale map which has not been prepared for this purpose." Thereafter, in paragraph 18, it is stated as follows:
>
> "18. Learned counsel were repeatedly asked as to when was the land reclaimed. There is no material on the record to indicate any time. Mr. Tojan, learned counsel for the petitioner in O.P. No. 22314 of 2002 has vaguely submitted that it was sometime in the year 1996. However, learned counsel was unable to specify as to who had done it. Even in the Writ Petitions, no specific allegation regarding the time of reclamation has been given. No other evidence regarding any fish culture has been produced or pointed out. In this situation, it is clear that there is no evidence on the record to show that there was any filtration pond at the site. In fact, the evidence on record as produced on behalf of the respondents shows that construction has existed at the site since the year 1983. The Club House building has been charged to property tax by the Village Panchayat for the year 1983-84. A copy from the Panchayat record has been produced as Ext.R7(a) with the counter-affidavit filed by the 7th respondent. In fact, in the counter petition filed by the respondents, there is an indication of the existence of other buildings even prior to 1983. In view of the evidence produced by the respondents, the contention as sought to be raised on behalf of the petitioner that there was a filtration pond at the site and it has been reclaimed, cannot be sustained."

We further notice that the Court notes that despite being repeatedly asked, the petitioners were not able to indicate from the plan produced by them that the land falls within 500 metres of the HTL. It is further stated that counsel were not even able to point out as to where the HTL or LTL could be said to start. The Court also took note of the fact that the construction of the hospital started many years back and the claim of the respondent that it had spent more than Rs. 50 crores approximately. Counsel for the company also drew our attention to paragraph 32 which reads as follows:

> "32. Mr. Rajan Joseph, learned Additional Advocate General appearing for the

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 27 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

official respondents, states that the original plan was prepared on the basis of the plan given by the Survey of India and the Satellite imageries. These plans are prepared in 1 : 12,500 and 1 : 50,000 scale. He points out that depicting an area of 12 = thousand sq. kms. In one inch is a difficult job. Similarly, in the case of the scale prepared in the ratio 1 : 50,000, it is still more difficult. In view of this situation, the Government is preparing cadastral plans. Thereafter, a fresh plan and map shall be issued. In view of the factual position, learned counsel states that the three petitions are premature."

We may, in this connection, also notice a Bench decision rendered in *Ansari Komath* v. *State of Kerala* (2011 (1) KLT 1043). One of the petitioner therein was a society. It established and operated a Mangrove Theme Park on the banks of Valapattanam river and its branch in Pappinissery. Public interest litigation was filed alleging violation of the 1991 Notification. The Court found that mangroves area would come under CRZ I category. The Court relied on map No. 66A of the Coastal Plan of Kerala. The Court noted that the park was situated on the northern bank of the Valapattanam river and its branch. It was further held that "coastal line is only one of the considerations and not the only consideration for inclusion in CRZ I." We notice further that the Court also made reference to the remarks which we have already referred to in page 23 of the Coastal Management Plan wherein filtration ponds are referred to as another fish spawning and breeding area. The Court also notes that the plan prepared in 1995 was approved by the Central Government. The Court further took the view that it was not impressed by the contention that if mangroves were planted after the Notification, it will not attract CRZ I. As far as the decision in *Citizens Interest Agency* v. *Lakeshore Hospital & Research Centre Pvt. Ltd.* (2003 (3) KLT 424), the Court notes that in the said case, the area in question was not found to be within the CRZ I category for reason of lack of materials on record. The Court also took the view that a reading of the decision would show that the building in question was constructed on the side of a canal (artificial) unlike the banks of a river or a branch. We are in agreement with the said view.

32. It is contended that in these cases, the islands are located far away from the sea coast and it is inconceivable as to how the islands could be brought within the purview of the CRZ in the first place. It is further pointed out that the 1991 Notification does not expressly refer to and cover the backwater islands of Kerala. If an interpretation is placed seeking to bring the island within the CRZ, it will have far reaching consequences. There are drastic consequences on the owners of the property or persons in possession of lands covered by the CRZ, it is contended. The Notification is expropriatory and a strict construction is warranted. The Court also is requested to bear in mind the undeniable fact that from 6.1.2011, when the fresh Notification was issued, backwater islands of Kerala were expressly included.

33. We are of the view that there is no merit in the contention of the company or the island owner that backwater islands of Kerala are not covered by the Notification issued in the year 1991. By the 1991 Notification, Government has declared the coastal stretches of seas, base, estuaries, creeks, rivers and backwaters which are influenced by the tidal action (in the landward side) upto 500 metres from the HTL and the land between the LTL and the HTL as the Coastal Regulation Zone. Originally, the HTL was defined to mean the line on the land upto which the highest water line reaches during spring tide. It was to be uniformly demarcated in all parts of the country by the authorised authority in consultation with the Surveyor General of India. The only change brought about by the amendment in 1998 was that the demarcation was to be done after the amendment in accordance with the general guidelines issued in this regard.

34. The contention of the company and the island owner appeared to be that there

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 28 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

cannot be HTL except on the sea coast. We are unable to agree. In the first place, as already noted, the coastal stretches of not only seas, but also rivers and backwaters, no doubt, which are influenced by the tidal action upto 500 metres from the HTL in the landward side also constitute the Coastal Regulation Zone. The coastal stretches of river or a backwater would take in not only the main land, but clearly would embrace within its scope islands. Backwater Islands would also, in other words, be coastal stretches of a river or a backwater. In other words, the framers of the Notification have specifically included coastal stretches of backwaters also, no doubt, which are influenced by the tidal action as provided. In fact, Sub-paragraph (ii) of paragraph (1) provided from 1991 itself that the distance from the High Tidal Line shall apply to both sides of the rivers, creeks and backwaters and it could be modified on a case to case basis. Reasons must be recorded. It was, however, subject to the stipulation that the distance shall not be less than 100 metres or the width of the creek, river or backwaters whichever is less. It was by amendment dated 18.8.1994 that a Note was amended by providing that the distance shall not be less than 50 metres (in place of 500 metres) or the width of the water body. It was also provided that the distance upto which development along rivers, creeks and backwaters is to be regulated shall be governed by the distance upto which the tidal effect of the sea is experienced in the water bodies as the case may be and it was to be clearly identified from the Plan. It is while so that a public interest litigation was filed under Article 32 of the Constitution before the Apex Court and the decision is reported in *Indian Council for Enviro-Legal Action* v. *Union of India* ((1996) 5 SCC 281). Therein, the Court was called upon to consider the vires of the amendments made to the 1991 Notification by the Notification dated 18.8.1994. There were six amendments. The amendments were made on the basis of a Report of the Committee headed by B.B. Vohra which was set up by the Central Government. Among the amendments, the Court considered the amendment by which the No Development Zone was relaxed to 50 metres as already noticed. The Vohra Committee did not suggest any relaxation. It is relevant to extract the following discussion of the Apex Court in the Judgment:

> "(ii) The NDZ for rivers, creeks and backwaters which was 100 metres from HTL has, by the amended notification, been relaxed to 50 metres. As already seen, the main Notification does not apply to all the rivers. It applies only to tidal rivers which are part of the coastal environment. It was contended that the reduction from 100 metres to 50 metres was arbitrary and was not made on any basis. It was also contended that the Vohra Committee had made no proposal for relaxation along the rivers but it merely asked for a clarification of the limits to which the control would apply since in some areas, tidal ingress could go up to 50 kms from the coastline.

39. Justifying this amendment, it was contended by the Union of India that in case of creeks, rivers or backwaters, it is not possible to have a uniform basis for demarcating NDZ. The zone shall be regulated based upon each individual case. It is no doubt true that there can be no uniform basis for demarcating NDZ and it will depend upon the requirements by each State authority concerned in their own Management Plans, but no reason has been given why in relation to tidal rivers, there has been a reduction of the ban on construction from 100 metres to 50 metres. Even the Vohra Committee which had been set up to look into the demands of Hotel and Tourism Industry had not made such a proposal and, therefore, it appears to us that such a reduction does not appear to have been made for any valid reason and is arbitrary. This is more so when it has been alleged that in some areas like Goa, there are mangrove forests that need protection and which stretch to more than 100 metres from the river bank and this contention had not been denied. In the absence of any justification for this reduction being given, the only conclusion which can be arrived at is that the relaxation to 50 metres has been done for some extraneous reason. It was

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 29 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

submitted, at the time of arguments by the Additional Solicitor General that construction has already taken place along such rivers, creeks etc. at a distance of 50 metres and more, but no such explanation has been given in the reply affidavit. Even if this be so, such reduction will permit new construction to take place and this reduction cannot be regarded as a protection only to the existing structures. In the absence of a categorical statement being made in an affidavit that such reduction will not be harmful or result in serious ecological imbalance, we are unable to conclude that the said amendment has been made in the larger public interest and is valid. This amendment is, therefore, contrary to the object of the Environment Act and has not been made for any valid reason and is, therefore, held to be illegal."

We may in this context specifically notice, inter alia, that the Vohra Committee had sought clarification of the limits to which the control would apply, since in some areas the tidal ingress could go upto 50 kilometres from the coastal line. It is thus that the terms of the original Notification providing that the distance shall not be less than 100 metres was restored in place of 50 metres, no doubt, subject to the condition that if the width of the water body was less than 100 metres, it would prevail.

35. It is true that the said sub-paragraph clothed the authority with the power to make a case by case study. But, in no case, could it be reduced to below 100 metres or the width of the water body whichever is less. In this context, we may also consider that in the Plan prepared by the Government of Kerala, it is, inter alia, stated as follows:

"Coastal Water Bodies:

All the water bodies falling in the coastal area, except the very small streams which are marked by a single line in the toposheet, are transferred on to the base map and are verified using satellite imageries to incorporate their present status. At several places the land water boundary was found to be modified due to natural or anthropogenic (bunding, reclamation, etc) activities. The filtration ponds (FP), tidal marshes, etc, though are shallow in nature, are considered as a part of the backwater system. Hence the backwater boundaries are drawn around them (Fig.12).

For the purpose of regulation, the Notification says "The Distance from the High Tide Line shall apply to both sides in the case of rivers, creeks and backwaters and may be modified on a case by case basis for reasons to be recorded while preparing the Coastal Zone Management Plans. However, this distance shall not be less than 50 metres or the width of the creek, river or backwater whichever is less. The distance upto which development along rivers, creeks and backwaters is to be regulated shall be governed by the distance upto which the tidal effect of sea is experienced in rivers, creeks or backwaters, as the case may be, and should be clearly identified in the Coastal zone Management Plans."

The landward extent of the tidal influx in the backwaters or rivers are decided by the measure of salinity, which is an indicator of tidal effect. For this the salinity measurement programme was undertaken (Kurian, et al, 1993) and the limit (at which up to 5 ppt is recorded) is demarcated on the map. The HTL at the water bodies is the river or the backwater boundary itself due to (i) the water-land boundary is almost vertical so that the low water and high water lines cannot be differentiated spatially, unlike several locations in other parts of the country and (ii) the tidal range in Kerala is around one metre only.

According to the Notification, the regulation zone can extend up to 500 m from the HTL even in the case of water bodies. It would mean that, if the 500 m norm is adopted, vast stretches of land in Kerala (eg. Ashtamudi, Cochin, Alappuzha, Vypeen, Parur, Valapatanam, etc) will have to be brought under the regulation zone (Fig. 13). This will cause difficulty in implementing the regulation on two accounts; (i) these areas are thickly populated with a population density per square kilometer of 2097 in

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 30 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

rural areas and 4228 in urban areas; (ii) with about 25% of the State's population living in this coastal stretch, the effective area available for the development activities may not be in proportion to the population. Hence, declaring several kilometre stretch as regulation zone will prevent developmental activities, which are crucial for the upliftment of the coastal population. Moreover, the backwater is not prone to the erosion problem, unlike the sea coast of Kerala. Hence a lesser regulation zone is proposed for the water bodies, ie. a regulation not less than 50 metres or the width of the creek, backwater or river, whichever is less from the land-water boundary."

Apparently, there is reference that the distance should not be less than 50 metres. But, the said amendment, as already noticed, was struck down by the Judgment of the Apex Court which was decided on 18.4.1996. The Plan was prepared apparently in December, 1995 by the Centre for Earth Science Studies, an authorised body. The said Plan came to be approved by Ext.P6 in W.P. (C). No. 4808/12 (which is challenged by the company). Ext.P6 is a communication dated 27.9.1996 under Section 3(3)(i) of the Notification subject to certain conditions. The Government of Kerala was to delineate the LTL, HTL 200 metres, 500 metres lines and other relative lines in respect of creeks, backwaters and rivers affected by the tidal action so that the distances can be measured whenever required. It was further provided that all uninhabited islands are classified as CRZ-I (subject to the continuation of existing traditional rights, special rights and customary uses) except those islands which have been approved by the MoEF as CRZ-IV. It is also provided that in exceptional cases, in case of uninhabited islands classified as CRZ-I should have a carrying capacity study established that a proposed development will not have adverse ecological impacts, those particular islands should be re-classified as CRZ-IV, subject to the prior approval of the Ministry of Environment and Forest. It is also provided that the distance from the High Tide Line to which the CRZ Regulations will apply in case of rivers, creeks and backwaters should be kept as 100 metres, not 50 metres as proposed or the width of the rivers, creeks or backwaters whichever is less. Apparently, the last condition mentioned was stipulated in view of the decision of the Apex Court declaring the amendment dated 18.8.1994 illegal by Judgment dated 18.4.1996 as aforesaid. It is true that by amendment dated 21.5.2002, it was, inter alia, provided that the distance upto which a development along rivers, creeks and backwaters is to be governed by the distance upto which the tidal effects are experienced, to be determined on the basis of salinity concentration of 5 parts per thousand (ppt). It is also provided that for the purpose of the Notification, the salinity measurements are to be made during the driest period of the year and the distance upto which the tidal effects are experienced shall be clearly identified and demarcated accordingly in the Management Plans. The Note was omitted by the amendment and instead, the aforesaid amendment became part of sub-paragraph (ii) of paragraph (1).

36. We would only think that the said provision also reiterates that there can be a HTL applicable to the backwaters and which are away from the sea. However, only a distance of 100 metres or the width of the backwaters (in the case of backwater) whichever is less, could constitute the reduced zone if the authority considers it so.

37. We have already noticed the Statement given by the expert also that HTL is not confined to the sea coast and also that the word "coast" is not to confine the sea coast. HTL is relevant and possible with regard to backwaters in so far as the line is defined as the line on the land upto which the highest water reaches during the spring tide. The spring tide does not leave the backwaters unaffected. We may also notice that in the guidelines issued for demarcation of HTL, it is, inter alia, stated that the HTL as defined in the CRZ Notification of 1991 and LTL will also be demarcated along the banks of tidal influenced inland water bodies with the help of geomorphological signatures/features. Coastal stretches of backwaters would specifically include islands in the backwaters and the backwater islands would also, if influenced by the tidal

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 31 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

action, come within the scope of the Notification issued in 1991. In this regard, we are reinforced by the action of the authority in issuing the coastal plan wherein admittedly both islands have been marked with the words "F.P." and which admittedly is indicative of the presence of filtration ponds and which, in turn, unmistakably, is intended to refer to the area being one falling within CRZ I of the 1991 Notification.

38. We are also not impressed by the argument that backwater islands of the State of Kerala are covered expressly by the 2011 Notification and, therefore, backwater islands were not covered by the 1991 Notification. It is true that in the 2011 Notification, there is reference to backwater islands expressly under Category V which provides for areas requiring special consideration for the purpose of protecting the critical coastal environment and the difficulties faced by the local communities. What is stated therein is as follows:

> "CRZ areas of Kerala including the backwaters and backwater islands". It is also true that in clause (2) under paragraph 8 under the heading "CRZ for Kerala", it is stated that all the islands in the backwaters shall be covered under the CRZ Notification. In this context, we may note that when the 2011 Notification was framed, apparently the Government had the experience of the working of the 1991 Notification. On account of the Notification, apparently there were difficulties faced by the fishermen communities and other local communities living in the coastal areas. That was why, apparently the Government wanted to provide certain relaxation for certain categories. This view of ours is reinforced by the fact that under the head "CRZ for Kerala" under paragraph 8, reference is made to the unique coastal system of backwater and backwater islands along with the space limitation present in the coastal stretches in the State of Kerala. Therefore, the mere fact that backwater islands in the State of Kerala are specifically referred to or rather the CRZ areas of Kerala including its backwaters and backwater islands are specifically referred to, will not detract from the applicability of the terms of the 1991 Notification to the backwater islands in the State of Kerala even under the 1991 Notification. Apart from the islands in question, the 1995 plan would show that other islands in the backwaters were also included. It is inconceivable that the authorities were not aware of such inclusion. In fact, we would think that the very fact that they have used the words "coastal stretches of Kerala including its backwaters and backwater islands" itself show that the islands in the backwaters of Kerala were already considered as included within the Zone otherwise. The plan is also approved by the Central Government.

39. With the wealth of the aforesaid inputs, there can be no doubt that the distance from the sea as observed by this Court and which is relied on, cannot be the criterion for deciding whether the Zone applies in respect of the coastal stretch of water bodies like the river or the backwater. What is relevant is the tidal effect. The tidal effect can be felt in the interior portions and away from the sea coast. There can be no doubt that islands could be coastal stretches of river or backwater and backwater islands in Kerala were clearly covered by the 1991 Notification and also perceived as covered by all the authorities including the Central Government. The next question which we must answer is whether the classification of the islands in question are bad for the reason that salinity test was conducted? The salinity test was actually introduced by way of an amendment as noticed in the year 2002. The definite case of the authority is that, however, the salinity test was employed for the purpose of preparation of the Plan in question in the year 1995. Not only is there pleadings to the aforesaid effect, but there is also reference to the same in the Plan itself which we have noticed, namely the landward extent of the tidal effect in the backwaters or rivers was decided by the measure of salinity test which is an indicator of tidal effect and more particularly, that the salinity measurement programme was undertaken and the limit (at which upto 5 parts per thousand (ppt) is recorded) is demarcated in the map.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 32 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

40. It is true that there is a principle that when the statute commands that a thing should be done in a particular manner, it should be done in that manner only. The island owners have a definite case that the 1991 Notification requires that the salinity measurement is to be done during the driest period of the year, and that it shows that there must be fresh salinity measurement. The stand of the authority is contained in paragraph (7) of its Counter Affidavit in W.P. (C). No. 2947/13 which reads as follows:

> "7. The Coastal Zone Management Plan was prepared in 1994-1995 periods. The data of 1993-94 was used by CESS for demarcating the CRZ area. While mapping the CRZ, the area up to 5 PPT was demarked and marked in Coastal Zone Management Plan. There was no direction to prepare fresh Coastal Zone Management Plan during 2002. The salinity measurements were done to fix the landward extent of the tidal influence in the back water or rivers. Salinity is an indicator of tidal effects. The salinity measurement programme was undertaken during 1993-94. The salinity measurements were done as per standard measurement technique in Parts Per Thousand (PPT)."

41. In examining this question, while we do feel troubled by the lack of any definite response, in that, it is not stated that whether the test was done in the year 1993-94 by CESS during the driest season, we may, however, also not overlook the following aspects:

We are of the view that we can safely hold that even before the requirement of salinity test was incorporated by the amendment in 2002, reliance has been placed on the salinity test and that too, on the basis of 5 ppt. Apparently, the said test appears to be an accepted test. It is also to be noted that in the Counter Affidavit it has been categorically stated that the salinity measurements were done as per standard measurement technique in Parts Per Thousand (ppt). We cannot overlook the fact that the island owners obtained permit with the condition, inter alia, that the conditions of CRZ should be strictly adhered to. They have also specifically, apparently, proceeded on the basis that they were granted the permit for repair and reconstruction on the basis that the same is permissible in respect of CRZ-III. In other words, they have accepted the condition that the island falls within the embrace of the Coastal Regulation Zone. The island owner has not challenged the condition in the permit. They have accepted the condition. It may not be permissible for them to, at any rate, disregard the said condition. There is no challenge to the same, at any rate. Thus, we reason that accepting the condition, it may not be open to them to contend that the island will not fall in the Zone. The Writ Petition is filed, as already noted, by the island owner in the year 2013 (No doubt, they have filed it in the light of the Counter Affidavit of the authority in W.P. (C). No. 8299/12). In fact, we notice that in Ext.R3 (e) report, it is stated that the salinity is 5 ppt during the driest month in an year. No doubt, there is nothing to show that this report was prepared with notice to the island owner. As far as the company is concerned also, we may notice that the company has specifically been visited with the condition indicating to them clearly that the construction should be compliant with the 1991 Notification, apart from providing that the construction should not go beyond the existing building line, otherwise CRZ will be applicable. Further more, we notice that as far as the company is concerned, the company has a case that the construction work was commenced and foundation work as well as developmental activities were substantially undertaken on the strength of the No Objection given by the panchayat dated 02.8.1996. It is not clear whether the said work was undertaken before 2002 and what was the extent of work done before 2002. We may not be justified in striking down or declaring the Plan illegal which has also been acted upon on the ground that the salinity test was not done, at any rate, strictly as prescribed by the amendment, that is during the driest period, in 2002.

Whether the Islands would fall under CRZ-IV of 1991 Notification? Effect of

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 33 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

property rights and doctrine of legitimate expectation.

42. We are not impressed by the argument that the islands in the backwaters of Kerala would fall in CRZ IV of the 1991 Notification. CRZ IV of the 1991 Notification provides as follows:

> "Coastal stretches in the Andaman and Nicobar, Lakshadweep and small islands, except those designated as CRZ I, CRZ II or CRZ III."

The argument of the company appears to be, in fact, as follows:

The words "small islands" occurring after "Lakshadweep" only denote the cluster of small islands which forms part and parcel of Lakshadweep. It is further contended that if "small islands" is used independently, then it would draw its colour from the preceding words which would show that all the islands, either sea islands or marine islands and backwater islands are not covered. The non-mentioning of backwater islands is a conscious departure. It is further contended that the words "small islands" which come after the words "Andaman, Nicobar and Lakshadweep" must receive the interpretation in the context of which it is used. Therefore, small islands are intended to denote marine islands in the vicinity of Andaman and Nicobar and Lakshadweep.

43. We are also in agreement with the contention of the company and which is adopted by the island owner that the words "small islands" in CRZ IV in the 1991 Notification is intended to cover the small islands in the vicinity of Andaman and Nicobar and Lakshadweep. They are essentially marine islands and not the backwater islands. As far as backwater islands are concerned, we are of the view that they are also intended to be covered by the 1991 Notification, being coastal stretches of backwaters which are otherwise influenced by the tidal effect as contemplated in the Notification. They would fall to be governed by the terms of the appropriate Zone in which they would otherwise fall. For instance, if there are mangroves in or around the island, necessarily such backwater island in the State of Kerala will fall within CRZ I. If it is an area close to breeding and spawning of fish and other marine life, then also, it will fall under CRZ I. If the islands are not otherwise covered by CRZ I, then we would have to examine whether it would fall in CRZ II. If the backwater island falls in the terms of CRZ II, it may have to be classified as CRZ II. If it does not fall either in CRZ I or CRZ II, then it would necessarily fall under CRZ III.

44. We may advert to the case law cited by the company:

In *Dwarkadas Shrinivas* v. *The Sholapur Spinning & Weaving Co. Ltd.* (AIR 1954 SC 119), an ordinance which purported to take away the management and administration of a company was challenged on the ground, inter alia, that it contravened Article 31 (2) (Article 31 stands omitted by the 44th Amendment to the Constitution). His Lordship Justice Mahajan noted that the scope of Article 19(1)(f) (since deleted by the 44th Amendment) and Article 31 is different. Article 31 was held to deal with the field of eminent domain. It was further held that Article 31(1) (which provides that "no person shall be deprived of his property save by authority of law") declared the first requisite for the exercise of the power of eminent domain. Article 31(2) in substance prohibited property being taken in possession or acquired for public purpose under any law, unless compensation was provided for and either the amount was fixed or the principles regarding fixing the same was specified. Thus, Article 31(2) was held to define the power of the Legislature in the field of eminent domain. It was further held that Article 31(1) and (2) deal with the same topic of compulsory acquisition of property:

> "25. The next contention of the learned counsel that the word "acquisition" in Art.31(2) means the acquisition of title by the State & that unless the State becomes vested with the property there can be no acquisition within the meaning of the clause and that the expression "taking possession" connoted the idea of requisition cannot be sustained and does not, to my mind, affect the decision of the

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 34 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

case. As above pointed, both these expressions used in clause (2) convey the same meaning that is conveyed in Clause (1) by the expression "deprivation". As I read Art.31, it gives complete protection to private property as against executive action, no matter by what process a person is deprived of possession of it. In other words, the Constitution declares that no person shall be deprived of possession of private property without payment of compensation and that too under the authority of law, provided there was a public purpose behind that law.

It is immaterial to the person who is deprived of property as to what use the State makes of his property or what title it acquires in it. The protection is against loss of property to the owner and there is no protection given to the State by the Article. It has no fundamental right as against the individual citizen. article 31 states the limitations on the power of the State in the field of taking property and those limitations are in the interests of the person sought to be deprived of his property. the question whether acquisition has a larger concept than is conveyed by the expression "taking possession" is really of academic interest in view of the comprehensive phraseology employed by Clause (2) of Art.31. As the matter was argued at some length, I propose to briefly indicate my opinion on that point."

In *Tolaram Relumal* v. *The State of Bombay* (1955 SCR 158), the Apex Court was dealing with a provision in a Rent Act which rendered punishable receipt of any fine, premium or other like sum, etc. other than the standard rate in respect of the grant/renewal/continuance of a lease. The Court declared that the provisions contemplated a subsisting lease, and not an executory contract to grant lease. It was held that the Section does not make the intention punishable. It makes an act punishable which is related to the existence of a lease. The Court further held as follows:

"As pointed out by Lord *Macmillan in London and North Eastern Railway Co.* v. *Beriman*, "where penalties for infringement are imposed it is not legitimate to stretch the language of a rule, however beneficent its intention, beyond the fair and ordinary meaning of its language."

The Court held further that if executory contracts were intended to be covered, the Legislature should have used clear and unambiguous language. Though the learned senior counsel for the company drew support from the decision, we are of the view that it will not apply to the facts of the present case. The terms of the 1991 Notification are clear. If the island comes under CRZ - 1, then the prohibition operates.

45. Reliance was further placed on the decision in *Krishi Utpadan Mandi Samiti* v. *Pilibhit Pantnagar Beej Ltd.* ((2004) 1 SCC 391). The question which arose there was whether the respondent therein was liable to pay market fee under the U.P. Krishi Utpadan Mandi Adiniyan. The respondent sold wheat seeds purchased from the firms after treating them, rendering them unfit for human consumption. In the majority judgment it was held that as wheat seeds is not included in the Schedule and that when it was intended to be covered, it was specifically mentioned as seeds. The company appeared to lay store by the following passages in the concurrent Judgment authored by S.B. Sinha, J:

"57. The rule of strict construction should be applied in the instant case. The intention of the legislature in directing the trader to obtain licence is absolutely clear and unambiguous insofar as it seeks to regulate the trade for purchase and sale. Thus a person who is not buying an agricultural produce for the purpose of selling it whether in the same form or in the transformed form may not be a trader. Furthermore, it is well known that construction of a statute will depend upon the purport and object of the Act, as has been held in Sri Krishna Coconut case itself. Therefore, different provisions of the statute which have the object of enforcing the provisions thereof, namely, levy of market fee, which was to be collected for the

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 35 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

benefit of the producers, in our opinion, is to be interpreted differently from a provision where it requires a person to obtain a licence so as to regulate a trade. It is now well known that in case of doubt in construction of a penal statute, the same should be construed in favour of the subject and against the State.

58. In the case of *London and North Eastern Rly. Co.* v. *Berriman, Lord Simonds quoted with approval* (at All ER p.270 C-D) the following observations of Lord Esher, M.R. In the case of *Tuck & Sons* v. *Priester*, QBD at p.637:

"We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there were two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections."

It is trite that fiscal statute must not only be construed literally, but also strictly. It is further well known that if in terms of the provisions of a penal statute a person becomes liable to follow the provisions thereof it should be clear and unambiguous so as to let him know his legal obligations and liabilities thereunder.

59. The matter may be considered from another angle:"expressio unius personae vel rei est exclusio alterius" is a well-known maxim which means the express intention of one person or thing is the exclusion of another. The said maxim is applicable in the instant case. (See *Khemka & Co. (Agencies) (P) Ltd.* v. *State of Maharashtra*, SCC paras 47 and 48)."

The learned Judge also went on to hold that seeds is also an essential commodity under the Essential Commodities Act, 1955. That the seed purchased by the respondent was not meant to be used as a cereal could not be an agricultural product, reasoned the Court.

46. In *Teri Oat Estates (P) Ltd.* v. *U.T., Chandigarh* ((2004) 2 SCC 130), again relied on by the company, the power of resumption and forfeiture was exercised by the estate officer under Section 8A of the Capital of Punjab (Development and Regulation) Act, 1952. The Court on a conspectus of the facts found that the lands in question were transferred to the appellant for all intents and purposes and they were merely to pay the balance amount of 75% of the consideration in installments. The Court noted the appellant's contention that it had constructed a three storyed building including the basement floor. The Court also considered the appellant's conduct in expressing willingness to deposit the difference and the amount of interest ordered. The Court, inter alia, held as follows:

"43. In terms of the provisions of the Act, the respondents are entitled to : (1) resumption of the land, (2) resumption of the building and (3) forfeiture of the entire amount paid or deposited. Having regard to the extreme hardship which may be faced by the parties, the same shall not ordinarily be resorted to.

49. Ever since 1952, the principle of proportionality has been applied vigorously to legislative and administrative action in India. While dealing with the validity of legislation infringing fundamental freedoms enumerated in Article 19(1) of the Constitution of India, this Court had occasion to consider whether the restrictions imposed by legislation were disproportionate to the situation and were not the least restrictive of the choices. In cases where such legislation is made and the restrictions are reasonable; yet, if the statute concerned permitted administrative authorities to exercise power or discretion while imposing restrictions in individual situations, question frequently arises whether a wrong choice is made by the administrator for imposing the restriction or whether the administrator has not properly balanced the fundamental right and the need for the restriction or whether he has imposed the least of the restrictions or the reasonable quantum of restrictions etc. In such cases, the administrative action in our country has to be

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 36 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

tested on the principle of proportionality, just as it is one in the case of main legislation. This, in fact, is being done by the courts. Administrative action in India affecting the fundamental freedom has always been tested on the anvil of the proportionality in the last 50 years even though it has not been expressly stated that the principle that is applied is the proportionality principle. (See Om Kumar)."

We would think that the facts are distinguishable. In *T. Vijayalakshmi* v. *Town Planning Member* ((2006) 8 SCC 502), under the existing valid development plan, agricultural land falling within residential areas were permitted to be used for residential purposes. Amendments were proposed. Pending the proposed amendment, an application was rejected, stating that the land fell within the Valley Zone in the proposed comprehensive plan. The Plan was not notified. The Court held that the doctrine of legitimate expectation applied. The Court, inter alia, held as follows:

"Town planning legislations are regulatory in nature. The right to property of a person would include a right to construct a building. Such a right, however, can be restricted by reason of a legislation. In terms of the provisions of the Karnataka Town and Country Planning Act, a comprehensive development plan was prepared. It indisputably was still in force. Whether the amendments to the said comprehensive development plan as proposed by the Authority would ultimately be accepted by the State or not was uncertain……The High Court has not held that the existing laws were ultra vires. The right of a person to construct residential houses in the residential area is a valuable right. The said right can only be regulated in terms of a regulatory statute but unless there exists a clear provision the same cannot be taken away. It is also a trite law that the building plans are required to be dealt with in terms of the existing law. Determination of such a question cannot be postponed far less taken away. Doctrine of legitimate expectation in a case of this nature would have a role to play……..It is settled law that an application for grant of permission for construction of a building is required to be decided in accordance with law applicable on the day on which such permission is granted. However, a statutory authority must exercise its jurisdiction within a reasonable time."

We see no scope for applying the principle of legitimate expectation in favour of the company or the island owners against the terms of a notification, statutory in nature.

47. In *Chairman, Indore Vikas Pradhikaran* v. *Pure Industrial Coke & Chemicals Ltd.* ((2007) 8 SCC 705), the application made by the respondent for development of the land was rejected on 14.12.2004 on the basis of purported publication of a draft development plan. The appellant constituted by the State Government had published a draft development plan on 27.6.2003 affecting villages "B and K" in which plan, the respondent's land was situated. The plan was returned by the State Government with a direction to prepare the plan for the projected population as in the year 2021. The Government published a Notification bringing villages "B and K" within the operation of the appellant on 28.10.2005. A draft plan was published on 13.7.2006. The Court noted that the villages in question have been included in the area of the appellant only on 28.10.2005. It was held as follows:

"67. We do not see any force in the said argument. It is possible to enforce a draft development plan in a given case, but the statute must specifically provide for the same. But, a draft development plan which has not attained finality cannot be held to be determinative of the rights and obligations of the parties and, thus, it can never be implemented. Section 50 of the Actexplicitly states that the authority may declare its intention to prepare a town development scheme which having regard to Section 2(u) of the Act must be read to mean declaration of its implementation (sic intention) to prepare a scheme for the implementation of the provisions of a development plan."

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 37 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

But, the learned senior counsel would highlight the following passages:

"53. The right to property is now considered to be not only a constitutional right but also a human right.

55. Earlier human rights were existed to the claim of individuals right to health, right to livelihood, right to shelter and employment, etc. but now human rights have started gaining a multifaceted approach. Now property rights are also incorporated within the definition of human rights. Even claim of adverse possession has to be read in consonance with human rights. As President John Adamam (197-1801) pu it:

"Property is surely a right of mankind as real as liberty".

Adding,

"The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."

57. The Act being regulatory in nature as by reason thereof the right of an owner of property to use and develop stands restricted, requires strict construction. An owner of land ordinarily would be entitled to use or develop the same for any purpose unless there exists certain regulation in a statute or a statutory rules. Regulations contained in such statute must be interpreted in such a manner so as to least interfere with the right to property of the owner of such land. Restrictions are made in larger public interest. Such restrictions, indisputably must be reasonable ones. (See *Balram Kumawat* v. *Union of India*, *Krishi Utpadan Mandi Samiti* v. *Pilibhit Pantnagar Beej Ltd.* And *Union of India* v. *West Coast Paper Mills Ltd.*). The statutory scheme contemplates that a person and owner of land should not ordinarily be deprived from the user thereof by way of reservation or designation.

58. Expropriatory legislation, as is well-known, must be given a strict construction."

We would think that the said decision cannot come to the assistance of the company. It is a case where the Court on a conspectus of the provisions, noted the effect of publication of a mere draft plan and it can have no application to the facts of this case.

48. In *Karnataka State Financial Corporation* v. *N. Narasimahaiah* ((2008) 5 SCC 176), the Court held that the power under Section 29 of the State Financial Corporation Act, 1951 could be exercised only against defaulting concern and not against the surety. The Court held, inter alia, as follows:

"40. Right to property, although no longer a fundamental right, is still a constitutional right. It is also human right. In absence of any provision either expressly or by necessary implication, depriving a person therefrom, the court shall not construe a provision leaning in favour of such deprivation. Recently, this Court in *P.T. Munichikkana Reddy* v. *Revamma dealing with adverse possession opined*:

(SCC p.77, para 43):

"43. Human rights have been historically considered in the realm of individual rights such as, right to health, right to livelihood, right to shelter and employment, etc.but now human rights are gaining a multifaceted dimension. Right to property is also considered very much a part of the new dimension. Therefore, even claim of adverse possession has to be read in that context. The activist approach of the English Courts is quote visible from the judgment of *Beaulane Properties Ltd.* v. *Palmer* and *Japye (Oxford) Ltd.* v. *United Kingdom*. The Court herein tried to read the human rights position in the context of adverse possession. But what is commendable is that the dimensions of human rights have widened so much that now property dispute issues are also being raised within the contours of human rights."

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 38 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

49. The 1991 Notification, in our view, clearly provides for creation of the Coastal Regulation Zone in regard to the coastal stretches of backwaters which, in our view, will clearly take within its sweep the coastal stretches of the backwater islands and we see no reason at all to deviate from this view even applying the principles of strict interpretation of a Statute which has penal consequences, no doubt. This is for the reason that in our view, the declaration of the law by the framer of the law is clear and on the other hand, it is reinforced by the actions of those charged with the duty of implementing the same (the act of preparation of the plan) which unambiguously discloses the inclusion of not only the islands in question, but various other islands wherein restrictions have been imposed and enforced for a long period of time. The acceptance of the contention of the company and island owners would, in fact, be in the teeth of the clear provisions contained in paragraph 1 by which not only the coastal stretches of the sea, but the coastal stretches of the backwaters are specifically brought within the scope of the Notification. We are also not impressed by the argument that the Court must bear in mind the fact of right to property, though no longer a fundamental right is none-the-less recognized as a human right.

50. Undoubtedly, it is true that the right to property is a very important right. Most of the other rights may be rendered meaningless and impossible of enjoyment, unless the right to property is guaranteed. The constituent body took a conscious decision by the 44th amendment, however, to delete Article 19(1)(f) and thereby deprive it of the high position it occupied as a fundamental right. The right to property is today a constitutional right and it is a right to not be deprived of property, except in accordance with the procedure established by law. A Notification issued under the Environment Protection Act is undoubtedly law. The terms of the Notification by which restrictions are put, are not specifically called in question in the Writ Petitions. What is impugned is the inclusion of the property of the company and island owners. If we find that the challenge raised to the inclusion of their properties as without foundation, then, necessarily they would become subject to the various restrictions and regulations which are imposed under the Notification. Therefore, we are of the view that even on the ground that right to property is recognized as a human right and even proceeding on the basis that the Notification and the plan regulates and strict interpretation is necessary even on the basis that it is an expropriatory law, in view of the fact that the backwater islands are covered by the Notification in 1991, it was specifically shown as covered in the plan and also various backwater islands in the State of Kerala are shown as covered and the provisions in the Zone were being enforced, it does not lie in their mouth to contend that the Notification must not be used against them. Restrictions are imposed, admittedly under the Notification on the properties falling within the main land. The fact that the islands have only much lesser width and the restrictions would have an undeniably devastating effect on the enjoyment of the property rights cannot, in our opinion, stand in the way of the regulation of activities therein by way of absolute prohibition of certain activities and regulation of others. We cannot be unmindful of principles which are far to well established in environmental jurisprudence like inter-generational equity and sustainable development as being vitally important concepts. The threat of global warming is not the figment of imagination any more. In judicial review proceedings, this Court would be loathe in finding ways by interpretational activism to derail Governmental action having the noble purpose of protecting the environment and promoting sustainable development.

Certain Miscellaneous Objections to the Plan:

51. It is contended that identification of the island as a filtration pond is not based on any scientific or acceptable process and it is on the basis of maps drawn to the scale of 1 : 12,500 using aerial photographs and/or satellite imageries without any field check. Unless a fresh map is drawn after getting cadastral map, it cannot be

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 39 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

identified as done, it is contended. It is submitted that Filtration Ponds had been identified on the basis of colour classification code in satellite imagery interpretation. It is submitted that in the plan of 1995, reference is made in page 56 in Map 32A under Ernakulam District whereas the area is actually in Alleppey District (at page 54, though it is correctly shown as falling in Panavally - Vaduthala area in Allappey District), it is submitted that at the maximum, it is a recommendation by the CRZ Authority/recommendation general guideline which got implemented only in 2011 Notification. A Filtration Pond is a water body - a part of the backwater system and thus, it cannot be an island, it is contended. It is the shallow water body and, therefore, it cannot be an elevation in relation to the backwater, it is contended. Regulation Zones can be marked only on the land and, therefore, a filtration pond cannot have regulation zone being part of the backwater system, is another submission. It is pointed out that every land mark which has been recognized as such including small islands have been provided with a fifty metre regulation zone. It is further pointed out that some of these islands are left with a small no regulation zone and, therefore, the entire island has been considered as regulated. As far as the island is concerned, it is without marking the fifty metre regulation zone. It is submitted that without marking the fifty metre regulation zone and it being ascertained as to whether the area left over is a small isolated patch requiring the entire island to be treated as regulated, the action cannot be supported. It is further submitted that small islands can be situated in a filtration pond or the backwater itself, but, the island cannot lose its identity. There is no guideline suggesting that if a small island contains filtration pond, the entire island should be treated as regulated or depicted as Filtration Pond. With reference to certain map numbers (10, 12, 14A, 15, 16, 16A and others), it is submitted that they are small islands which are completely regulated. Map Nos. 31A, 32, 32A, 33A, 35A, 36, 37, 38A, 39 and 39A are shown as plates showing islands in filtration ponds. It is pointed out that wherever small islands exist, they have been faithfully marked in the maps. Small islands in filtration ponds have been distinguished from the filtration pond and have also been demarcated for the regulation zones either fully or marking out the No Regulation Zone. The filtration ponds are specifically marked wherever they exist. Their boundaries in the backwaters are also marked in some maps. All maps are drawn to an identical scale. Islands in filtration ponds are designated under CRZ-I. The maps have been drawn on toposheet formats. It is unacceptable for an island to be depicted as a filtration pond. The failure to depict the Nediyathuruthu island itself and its regulation zone concludes that the plan does not apply to it. There is nothing in the map, plan or any other contemporaneous records to suggest that there exists a filtration pond on the island. It is an impossibility as filtration ponds are parts of backwaters and there cannot be any backwater body on an island. The depiction of the island as a filtration pond is an obvious error. Admittedly, there exists residential buildings on it, it is contended. It is an impossibility as no construction can be made on a filtration pond. There is nothing in the map to suggest that the island contains a filtration pond. A close examination of maps 32, 32A and 32B with the corresponding commentary shows that the reference to small islands in filtration pond as backwaters are made to such islands which are demarcated with regulation zones. Such islands are clearly identifiable from the maps in question. Clearly, therefore, the reference was not to Nediyathuruthu island. It is further emphasised that the plan does not make a distinction between Filtration Ponds which are natural and those formed due to anthropogenic causes. It is further submitted that there are several small islands with regulation zone and no regulation zone. Many of these islands are smaller than Nediyathuruthu island and there is hostile discrimination and illegal classification. The official satellite imagery for the area as published by the National Remote Sensing Agency depicts the Nediyathuruthu island as an agricultural land, and not as a filtration pond. The island is adjacent to the

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 40 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

national water way No. 3 and a shallow water body cannot lie in the path of an island water way for obvious reasons, it is contended.

52. Learned counsel for the island owners has adopted the contentions and would emphasise that the very concept of filtration ponds is alien to the idea of areas close to breeding and spawning of fish and other marine life found in CRZ-I of the 1991 Notification. He would also emphasise that a perusal of the commentaries in the plan of 1995 would show that filtration ponds are shown as shallow water bodies adjoining the backwater system where certain species of fish are grown in large numbers (see page 38). He would highlight the word "grown" and contend that it is not in consonance with the concept "area close to breeding and spawning of fish and other marine life". In short, it is contended that when fish are grown, it is not a case where there is breeding or spawning as contemplated in the Notification.

Findings:

53. In the 1995 plan, it is, inter alia, stated as follows:

> "The State has a large expanse of brackish water areas in the form of lower reaches of rivers, backwaters, lakes, tidal marshes and mangroves with vast potential for developing aquaculture. The well known "Prawn filtration" method of aquaculture is carried out in about 4300 ha paddy fields (Filtration Ponds) adjacent to estuaries in central Kerala."

(See page 20)

In the plan, it is further stated that the existing reliable maps of the coastal areas are basically of two types. The survey of India topographic maps in 1 : 50,000 (prepared in 1967) or 1 : 25000 (prepared in 1981) scale and the cadastral or village maps of 1 : 3960, 1 : 7820 or 1 : 5000 scales. The cadastral maps, it is stated further, are suitable for micro level planning at the village or grama panchayat level (Cess, 1994) and they do not contain the terrain, resource or assets information. It is stated that for the objection sets forth in the work, the toposheets will be more convenient as all the informations can either be derived from them or plotted in it. It is stated further as follows:

> "A more recent source of information is the Satellite data, which is available as False Colour Composites (FCC) in 1 : 50,000 scale. However, for the satellite data the scale is not a constraint as the available FCC film positive/digital data can be easily blown up to any required level up to a maximum enlargement of 70 times and any required scale can be arrived at. PROCOM, an equipment used for blowing up FCC positive is available in CESS. The third source of information, the aerial photographs is more detailed and accurate and is available for this region in 1 : 15,000 scale.
>
> In these circumstances it is decided to use a scale of 1 : 12,500, which is nothing but a double or four times enlargement of 1 : 25,000 or 1 : 50,000 toposheets respectively. This scale of 1 : 12,500 has also the advantage that it is closer to the scale of aerial photographs."

It is further stated that filtration ponds are specifically identified with reference to the tone, shape, texture, location and association. Mangroves, going by the commentary at page 38, are spawning and breeding grounds of fish and the fifty metre belt around them is shown as CRZ-I. Filtration Ponds are also shown as falling in CRZ-I as they are shallow water bodies adjoining the backwater system where certain species of fish are grown in large numbers. It is also commented that it is a low lying area and, therefore, it is likely to be inundated due to sea level rise (SLR). At page 56 of the plan, no doubt, under Ernakulam District, after referring to Panavally - Vaduthala (32A) besides two other maps, it is, inter alia, stated that small islands are seen, both in the filtration ponds and the backwaters. In these islands, after providing the fifty metre regulation zone, there exists very small isolated patches of No

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 41 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

Regulation Zone. It is in such cases, the whole island may be considered as regulated, it is stated. At page 54, under table 11, area of regulation zones coming under different categories, as against 32A, Panavally - Vaduthala is shown under Alleppey District. The area of fifty metre zone (in sq. kms) is shown as 1.622. The area shown under CRZ-I as against 32A, Panavally - Vaduthala is 1.221 sq. kms.

54. We are of the view that there is no merit in the contentions of the company or the island owners. A specific stand has been taken in W.P. (C). No. 4808/12 filed by the company by the authority that Nediyathuruhu island falls in CRZ-I. It is shown as filtration pond. Moreover, it is also shown as a low lying area likely to be inundated by sea level rise (SLR). Undoubtedly, areas likely to be inundated due to rise in sea level consequent upon global warming are one of the areas falling under CRZ-I. More importantly, the areas close to breeding and spawning grounds of fish and other marine life would also fall under CRZ-I. The island in question has been admittedly marked as filtration pond. We cannot accept the argument that the words "areas close to breeding and spawning grounds of fish and other marine life" will not take in places where the fish are grown by taking advantage of the topography, namely the closeness to the backwaters. What we gather is that bunding is done and the fish are bred. The word "breed" has been defined in the Chambers (20th Century) Dictionary, inter alia, as follows:

> "breed = to generate or bring forth; to cause or promote the generation of, or the production of breeds of; to train or bring up; to cause or occasion; to be with young; to produce offspring; to be produced or brought forth; to be in training, to be educated."

The word "spawn" has been defined in the same Dictionary as follows:"spawn = a mass of eggs laid in water; fry; brood; contemptuously, offspring' mushroom mycelium;- v.t. to produce as spawn; contemptuously, to generate, esp. in mass; to produce or deposit spawn; to teem; to come forth as or like spawn-n. spawner one who spawns; a female fish, esp. at spawning time.- n. and adj. spawning.-spawn-brick, -cake a consolidated cake of horse-dung with mushroom spawn; spawning-bed, -ground a bed or place in the bottom of a stream on which fish deposit their spawn."

The word "eco" has been defined in the same Dictionary as "any composition, concerned with habitat and environment in relation to living organisms as in ecology". "Ecocide" is defined in Chambers Dictionary as "the destruction of the aspects of the environment which enables it to support life". The word "ecology" is defined as a study of plants or of animals or of people and institutions in relation to environment." Therefore, the coastal stretches that are located in areas that are ecologically sensitive and important take in areas close to breeding and spawning grounds of fish and other marine life. Filtration Ponds are shallow water bodies. Fish are bred or grown in the said area. Developmental activities would have deleterious effects on fishing, whether it is natural fish breeding or fish being bred by permissible aqua-culture.

55. In appreciating the arguments of the company and the island owners, it is crucial to bear in mind that what CRZ-I contemplates, is areas close to breeding and spawning grounds of fish and other marine life. The concept of areas close to breeding and spawning grounds of fish, is different from areas of breeding and spawning grounds of fish and other marine life. Filtration Pond is a water body. Therefore, keeping in view of the concerns of the framers of the Notification, the areas close to the breeding and spawning grounds which would be larger than the actual breeding and spawning grounds itself can be classified as CRZ-I. Therefore, we are not much impressed by the contention that because it is a part of the water body, there cannot be a regulation zone in regard to a filtration pond. When it is said that there is a filtration pond, it means that it is a shallow water body which is lying along with the backwater system or rather adjoining it and filtration pond would be part of the

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 42 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

islands.

56. We are not impressed by the argument that in every island, the fifty metre regulation zone has to be marked. We find that even in the argument note, even according to the company, the average width of the backwater island where the construction has been now completed, is only 20 to 60 metres. It is for the concerned authority to ascertain and demarcate an area as one falling in the different zones. In this case, subject to our repelling the argument that there are no materials at all to find that they could be treated as filtration ponds, the classification of the entire island which is admittedly a small island having an average width of 20 to 60 metres where construction was done even according to the company cannot be the subject matter of interference by this Court under Article 226. We must bear in mind the limitations on the Court under Article 226. The Court does not sit as an appellate body reviewing factual findings or issues, in particular, when the work impugned is that of an expert body. The court will show greater deference. It was for the company to have made necessary enquiries and ascertained about the implications of the contents of the plan. The body entrusted with the work under the statute, an expert body at that, has found the entire area is one falling under CRZ-I. We find no basis at all to interfere with the same.

57. The island in question appears to have water bodies and also areas which do not contain any water body. It will be doing injustice to interpret the Notification as being one not being applicable, when there is a water body within the island also. Once it is found that the island is an area close to breeding area of fish, then, it would, in our view, fall under CRZ-I. The Zone, no doubt, is landward side (500 metres) or 100 metres or width of the water body at the minimum, if so decided, in respect of back water islands. But, landward side is indicated to show that the Zone, being coastal stretch, is not towards the sea, bay, creek, river or backwater. From the high tide line towards the land will take in all including water bodies within the landward side.

58. The fact that the No Development Zone is not marked, may not avail the company or the island owners. The word "No Development Zone" is found under Category III. When it falls under CRZ-III, the Notification contemplates ear-marking of an area upto 200 metres from the HTL, as the "No Development Zone". It may be true that some filtration ponds are specifically marked and their boundaries in the backwaters are also marked. As far as plan 32A is concerned, the entire area is shown as filtration pond. This is apparently on the basis of the special topography. It is also not irrelevant to note that the island is stated to be a low lying area. We cannot, therefore, find that it cannot be shown as falling under CRZ-I. Nediyathuruthu is an island with filtration ponds in it. The filtration ponds by its very nature lies adjacent to the backwaters. Having regard to the low width, that is a little over fifty metres which clearly cannot be developed the entire area has been marked as filtration pond, and a perusal of the commentary in the plan makes it clear that the entire area falls in CRZ-I. We find no basis to interfere with such a classification.

59. It is to be noted that under the 1991 Notification, paragraph (1) declares that the coastal stretches of seas, base, estuaries, creeks, rivers and backwaters which are influenced by the tidal action in the landward side upto 500 metres will be the Zone, inter alia. In 1991 itself, under the Note to paragraph (1), the distance from the HTL was to apply to both sides of the rivers, creeks and backwaters. It could be modified on a case to case basis. The reasons were to be recorded when the plans were to be prepared. But, the distance after such modification was not to be less than 100 metres or the width of the water body whichever was less. In 1994, by the amendment, the distance of 100 metres was reduced to 50 metres. This was, as already noticed, declared illegal by the Apex Court by its Judgment rendered in April, 1996. Thus, while the Plan was prepared in the year 1995, apparently, the authorities have

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 43 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

proceeded on the basis that the prevalent position was that the distance should not be less than 50 metres or the width of the water bodies, whichever is less. When the Apex Court pronounced it illegal in April, 1996, the decision of the Apex Court was given effect to by the Central Government, when it gave its approval vide Ext.P6 in W.P. (C). No. 4808/12 wherein the Plan of the State Authority was modified and it was directed that the distance should be treated as 100 metres or the width of the water body whichever is less, and not 50 metres. There are two things to be noticed. Under the provisions in paragraph (1) of the 1991 Notification, there is a discretion, undoubtedly, for modifying the Zone (the distance from the HTL) in the case of rivers, creeks and backwaters on a case to case basis for which reasons are to be recorded. The words used are "may be modified". At any rate, as far as the cases at hand are concerned, it is clear that the authority has proceeded on the basis that the distance is to be treated as 50 metres, seeking shelter under the provision which came to be declared as illegal and under the law applicable, the distance could not be less than 100 metres or the width of the water body whichever is less and it is declared also in Ext.P6, as already noticed. There is no case for the company or the island owners that the width of the water body is less than 100 metres. It is important to remember that the modified distance is not to fall below 100 metres or the width of the water body, whichever is less. The distance can be 500 metres as declared in paragraph (1) itself. What the Notification contemplated is permitting a reduced Coastal Regulation zone in respect of coastal stretches of rivers, creeks and back waters. It is to be noted that even according to the company, the width of the island (where the constructions exist) appears to be between 20 to 60 metres. Going by Ext.P6, a distance of 100 metres is to be treated as the Zone. This is in tune with what the Apex Court has held about the amendment in 1994, reducing the width from 100 metres to 50 metres. At any rate, the authorities have themselves found that the extent which was there after providing for the 50 metre zone, is only little and, therefore, the entire island is to be treated as regulated. It is to be borne in mind that 50 metres which has been struck down by the Apex court, was the shortest distance, if the authority so decided. In other words, the distance could not be less than 50 metres or the width of the water body whichever is less. It could always be more than 50 metres or the width of the water body even under the amendment which was declared illegal.

60. We are also not impressed by the argument that there are no guidelines, that is if a small island contains a filtration pond, the entire area is to be regulated. We would think that the authority is given to an expert body and the alleged absence of guidelines as such cannot deprive the plan of its validity. We are clearly unimpressed by the argument that the filtration pond is distinct from an island. Actually, it is part of the island, as it is a water body within the island.

61. It is, no doubt, stated at one place (page 34 of the plan) that a filtration pond, inter alia, is considered as part of the backwater system and hence the backwater boundary are drawn around them. In page 38, however, filtration ponds are stated to be shallow water bodies adjoining the backwater system. The 50 metre belt adjoining the filtration ponds are stated to be demarcated as CRZ-I (it is also stated examples "Alappuzha, Ernakulam and Kannur coasts"). Besides this, this area is stated to be low lying is likely to be inundated by SLR. As we understand, the way to reconcile both the statements is as follows:

Filtration ponds are stated to be adjoining the backwater system, as they are water bodies lying by the side of the backwaters. It is also part of the backwater system, as there is an integral connection with the backwater system, as there is exchange of waters which, no doubt, is controlled.

62. The further argument that as admittedly there are buildings on it, it is an impossibility as no construction can be made on a filtration pond, is equally based on a

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 44 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

mis-conception of the terms of CRZ-I. As already noted, CRZ-I deals with areas close to breeding and spawning grounds. The actual breeding takes place in the water body or the filtration pond as such. There would be areas which are not water bodies which are landmass within the island. On the same, it may be that constructions of the buildings were there prior to the Notification. That fact, however, would not take away the classification of the island containing the water body along with the adjoining landmass as areas close to breeding and spawning of fish and other marine line. There is no merit in the contention that there is nothing in the maps to suggest that the islands contained filtration pond. The plans have been prepared apparently by expert bodies. Islands have been specifically marked in the map 32A as (FP). There is absolutely no room for any ambiguity or uncertainty. Anyone reading the plan and seeing the map would have immediately come to the conclusion that the framers of the map had intended the islands to be treated as an area falling under CRZ-I. At page 43 of the plan, it is stated that the low lying areas adjoining the filtration ponds are also vulnerable and they are also marked as CRZ-I). It may also be noted that under map 32A in which admittedly the islands are shown marked as filtration ponds, at page 56, it is specifically provided that after providing for the fifty metre zone, there exists very small isolated patches No Regulation Zone and in such cases, the entire island is to be treated as regulated.

Whether filtration ponds are anathema, in view of the decision in *S. Jagannath* v. *Union of India* ((1997) 2 SCC 87)?

63. In *S. Jagannath* v. *Union of India* ((1997) 2 SCC 87), the Apex Court was dealing with the petition under Article 32 of the Constitution in public interest seeking enforcement of the Notification of 1991, stoppage of intensive and semi-intensive type prawn farming in the ecologically fragile areas, among other reliefs. The Apex Court after consideration of various aspects, disposed of the Writ Petition by giving various directions. They include the following:

> "3. The shrimp culture industry/the shrimp ponds are covered by the prohibition contained in para 2(i) of the CRZ Notification. No shrimp culture pond can be constructed or set up within the coastal regulation zone as defined in the CRZ notification. This shall be applicable to all seas, bays, estuaries, creeks, rivers and backwaters. This direction shall not apply to traditional and improved traditional types of technologies (as defined in Alagarswami Report) which are practised in the coastal low-lying areas.
>
> **4.** All aquaculture industries/shrimp culture industries/shrimp culture ponds operating/set up in the coastal regulation zone as defined under the CRZ Notification shall be demolished and removed from the said area before 31-3-1997. We direct the Superintendent of Police/Deputy Commissioner of Police and the District Magistrate/Collector of the area to enforce this direction and close/demolish all aquaculture industries/shrimp culture industries shrimp culture ponds on or before 31-3-1997. A compliance report in this respect shall be filed in this Court by these authorities before 15-4-1997.
>
> **5.** The farmers who are operating traditional and improved traditional systems of aquaculture may adopt improved technology for increased production, productivity and return with prior approval of the "authority" constituted by this order."

The traditional and improved traditional technology of aqua culture are set out in the judgment as follows:

> "Traditional : Practised in West Bengal, Kerala, Karnataka and Goa, also adopted in some areas of Orissa. Coastal low-lying areas with tidal effects along estuaries, creeks and canals; impoundments of vast areas ranging from 2-200 ha in size. Characteristics : fully tidally-fed; salinity variations according to monsoon regime; seed resource of mixed species from the adjoining creeks and canals by auto-

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 45 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

stocking; dependent on natural food; water intake and draining managed through sluice gates depending on local tidal effect; no feeding; periodic harvesting during full and new moon periods; collection at sluice gates by traps and by bag nets; seasonal fields alternating paddy (monsoon) crop with shrimp/fish crop (inter monsoon); fields called locally as bheries, pokkali fields and khazan lands.

Improved traditional : System as above but with stock entry control; supplementary stocking with desired species of shrimp seed (P. monodon or P. indicus); practised in ponds of smaller area 2-5 ha."

64. In the first place, going by the Notification of 1991, the authority has chosen it fit to characterise certain areas as filtration ponds on the basis of their perception that they are areas close to breeding and spawning of fish and other marine life. We have already found that filtration ponds as understood by the authorities would fall within the scope of CRZ-I, as they are essentially areas where breeding takes place. Therefore, we would think that it may not be open to us to further consider whether such a classification which incidentally was done prior to the judgment of the Apex Court would not survive after the judgment of the Apex Court. But, we do not wish to rest repelling the contentions of the company and the island owners on the said score. We feel that we are on surer foundations, when we hold that the said contention is meritless for the following reasons:

The Apex Court has, no doubt, directed certain kinds of aqua culture to be stopped. They are aqua culture industries, shrimp culture industries and shrimp culture ponds. The Apex Court has held that the shrimp culture industries/shrimp ponds are covered by the prohibition contained in paragraph 2(i) of the Notification. It was further directed that no shrimp culture pond can be constructed or set up within the zone. This includes the backwaters. But, the Court has specifically directed that the said direction will not apply to traditional and improved traditional types of technology as defined in Alagar Swami Report which are practised in the coastal low lying areas. The Court has, in fact, categorically held that the farmers who are operating traditional and improved traditional systems of aqua culture may adopt improved technology for increased production, productivity and return, with the prior approval of the authority constituted by its Order. Thus, the Apex Court has countenanced the continuance of the traditional and improved traditional forms of aqua culture even in coastal ares. It is not argued before us that there was aqua culture of the prohibited variety which was the basis of the Filtration Pond classification. In fact, the case of the company and island owners is that there is no basis to classify it as a filtration pond at all. On the aforesaid reasoning, we have no hesitation in repelling the contention of the learned counsel for the company and island owners based on the judgment in *S. Jagannath* v. *Union of India* ((1997) 2 SCC 87).

Whether there is any reliable material to classify the areas as filtration ponds?

65. The contentions are that there is no reliable material for the authority to classify the areas as filtration ponds and there is no document which would show that it was being used as filtration pond. Learned counsel for the company would point out that in the Counter Affidavit filed in W.P. (C). No. 2947/13 (the writ petition filed by the island owners), the authority has produced the land use map. In the land use map, it was pointed out, in regard to Nediyathuruthu island, that a portion is shown as occupied by coconut plantation. He poses the question as to how in map No. 32A the entire area could be classified as filtration pond. In fact, he would submit that this land use map was not produced in the proceedings of the company. It is further contended that the official satellite imagery for the area as published by the National Remote Sensing Agency depicts the Nediyathuruthu island as an agricultural land and not as a filtration pond or a wet land. The island is adjacent to the national water way No. 3, a fact which is verifiable from the map of the National Waterway Authority and

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 46 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

the shallow water body cannot lie in the path of an island water way, it is contended.

66. On the other hand, apparently the case of the respondent/authority is that the filtration ponds were identified on the basis of satellite imagery and aerial photographs. Survey of India toposheets were also used. Clearly no cadastral survey as such was done. In our approach to such problem, we must bear in mind the principles of law which are applicable. A Writ Court is not essentially a fact finding court (this is not to say that the Court does not have the jurisdiction to decide even disputed questions of facts capable of resolution in writ jurisdiction). The Court is not an appellate forum. The Court employs principles of judicial review, when administrative action is assailed. It is true that under the Wednesbury Concept of Judicial Review, an approach or a finding which is perverse may be vulnerable. A perverse view is a view which no reasonable man would take in the circumstances of a case. If two views are possible, the Court will not interfere. Equally, a perverse view is one which is entertained without the support of any material. When the view is a view taken by an expert body, it is elementary that the Court will be slow to substitute its view for that of the expert body. Within the confines of the aforesaid principles, let us consider the issue raised by the company and the island owners. It is apparent that the authority has before it aerial photographs and satellite images. The work was undertaken in 1990s, in the aftermath of the Notification in 1991. The company and the island owners would make an attempt to persuade this Court, after nearly two decades, that there was no material to warrant classification of the areas as filtration ponds. We cannot ignore this aspect also. At any rate, we would think that there were materials with the authorities in the form of aerial photographs, satellite imageries besides toposheets. It is not a case where there were no material at all as to the interpretation of the aforesaid materials. We should also bear in mind that the interpretation was done by the persons who are experts. We must further remind ourselves that the plan as prepared has been approved by the Government of India. This is also very important circumstance which we cannot ignore. Furthermore, we would also notice that it is specifically stated that the satellite imagery of 2006 prior to the construction of the resort building confirms that the entire island consisted of filtration ponds.

67. We may notice also that the company has in the Counter Affidavit filed in W.P. (C). No. 19564/11, categorically stated that the water available on the island is brackish water and fresh water required for cultivation of paddy is not available there. They have specifically stated that it is learnt on enquiries that no paddy cultivation has been carried out on any part of the land belonging to the respondent at any time for more than the past fifty years. We have already noted in the plan at page 20, that it is noted that the State has a large expanse of brackish water area in the form of lower reaches of the rivers, backwaters, etc. with vast potential for developing aqua-culture and prawn filtration method of aqua-culture is practised in filtration ponds. It is also to be noted that what is declared as CRZ Zone in regard to the filtration ponds is in respect of the area adjoining the filtration ponds which is in keeping with the areas close to breeding and spawning of fish and other marine life contemplated in CRZ-I.

68. We must also repel the argument of the company that there were earlier materials suggesting that it was being used for agricultural purpose. We may notice that prawn farms in the backwaters were being run and are still being done in many areas by doing agriculture and prawn cultivation alternatively. We cannot also discountenance the possibility of areas which were earlier being occupied by agriculture activities being used for aqua culture. What is relevant is for what use the lands were being put to at the time when the studies were conducted which led to the 1995 plan. We have already noticed the stand of the company itself. It is also categorically stated by the authority, as already noted, that the satellite imagery of 2006 confirmed that the entire island consisted of filtration ponds. We would also be

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 47 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

overstepping the limits of our jurisdiction, if we were to re-evaluate and sift the materials and substitute the view which we are persuaded to accept, at the instance of the company and island owners.

69. We would arrive at the same conclusions ultimately in regard to the argument based on the land use map produced as Ext.R3(b) in the Counter Affidavit filed by the third respondent in W.P. (C). No. 2947/13. It is no doubt shown as prepared in 1993. The expert would say before us that the land use map was prepared as part of the project which Cess submitted to the Kerala State Council for Science, Technology and Environment for getting information in general, land use of the Coastal Regulation Zone and adjoining areas and that the land use map suggesting coconut cultivation or other cultivation was not a criterion when the plan was prepared by the Coastal Management Authority. He has also stated that it was shown as Filtration Pond because of the filtration pond and net-work of canals and coconut trees cannot be separately shown because of the scale limit. He would also say, in answer to a question as to why the island just below Nediyathuruthu island where a portion is shown as Filtration Pond and other area is shown as partly No Development Zone which is in consonance with Ext.R3(b) land use map that in the Nediyathuruthu island, there is more water body part in the form of filtration pond, canals and channels. No doubt, he would also say that in the Report itself it is stated that for detailed planning of the Coastal Regulation Zone and the adjoining areas, it may be necessary to use cadastral scale map and in such cases, the maps may be given as general guidelines. (The last observation of the expert is made with reference to the statement contained in the Coastal Regulation Plan of 1995).

70. We are of the view that therefore these are all aspects which we must view from the perspective of our jurisdictional limits and hence we take the view that we cannot, at any rate, characterize the classification of the area as filtration ponds as without basis. In *Tata Housing Development Co. Ltd.* v. *Goa Foundation* ((2003) 11 SCC 714), relied on by the company, a public interest case was launched impugning permission granted to the appellants for change of land used, construction and felling of trees in a plot which was allegedly forest. There were three interim reports. The High Court accepted the third interim report of the Sawant Committee and allowed the Writ. In the said report, the committee relied on satellite imagery. In the second report, three criteria were considered to determine any area as forest. The Apex Court found that the third report revealed that the three criteria laid down in the second report were given a complete go by. It is pertinent, however, to refer to the following passage in paragraph 15.

> "15. In its Second Interim Report the Sawant Committee categorically rejected satellite imagery and toposheets as one of the criteria for identifying a forest as the same would at best show natural green cover which, according to the Committee, would include plantations, seasonal crops etc. and the same cannot be a relevant consideration for classifying a forest, as such the Committee in its report relating to the appellants' plot was not justified in taking the same into consideration. Likewise, in its Second Interim Report, the Committee had rejected Nature Reserve Green Belt Map as a relevant consideration for holding a land to be forest on the ground that the same would show all types of vegetation including cashew crops etc. as such in the Third Interim Report the Committee was not justified in placing reliance upon the Report of the Sub-Committee for maintaining nature reserve around the city. So far as the third criterion that weighed with the Committee is concerned, it may be stated that enumeration of the plants in a 50 metre belt adjoining the appellants' plot on three sides was irrelevant, especially when the Committee did not find that 75% of the plants, in the 50-metre-wide belt adjoining the boundaries of the appellants' land, were of forestry species."

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 48 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

71. We are of the view that the facts are clearly distinguishable. We are also of the view that the said decision cannot be taken as an authority for the proposition that in no circumstances, can satellite imagery be relied on as appears to be the line of argument advanced by Shri. Vishwanathan. Satellite imagery and toposheets would only show green colour and it would not necessarily prove that it is a forest. It is in the said context that the Apex Court took the view it did. In Anand *Arya* v. *Union of India* ((2011) 1 SCC 744), the two applicants before the Court who were residents of Noida challenged the very large project on the ground that the project area was a forest and there was no environmental clearance. The Court found that it was not a forest area. More importantly, the company seeks support from the finding that satellite image may not reveal the complete story. It is relevant to quote from page 745:

> "In the revenue records, none of the khasras (plots) falling in the project area was ever shown as jungle or forest. According to the settlement year 1359 Fasli (1952 AD) all the khasras are recorded as agricultural land, banjar (uncultivable) or parti (uncultivated). The records of the land acquisition proceedings in 1980 to 1983 and 1991 also complement the revenue record of 1952 in which the lands were shown as agricultural and not as jungle or forest. There is no reason not to give due credence to these records since they pertain to a time when the impugned project was not even in anyone's imagination and its proponents were nowhere on the scene……The records pertaining to satellite images have not given information about the different species of trees, their age and the girth of their trunks, etc. The satellite images only reveal that in October, 2006 there was thin to moderately dense tree cover over about half of the project site. But this fact is all but admitted. The State Government admits to felling of over 6000 trees in 2008. As per government information on a large tract of land (33.45 ha in area) that was forever agricultural in character, trees were planted with the object of creating an urban park (and not for afforestation!). The trees, thus, planted were allowed to stand and grow for about 12-14 years when they were cut down to make the area clear for the project……..But trees planted in the project area cannot be branded as "forest". It is inconceivable that trees planted with the intent to set up an urban park would turn into forest with a span of 10 to 12 years and the land that was forever agricultural, would be converted into forest land. One may feel strongly about cutting trees in such large numbers and question the wisdom behind replacing a patch of trees by large stone columns and statues but that would not change the trees into a forest or the land over which those trees were standing into forest land."

72. We would think that the case law cited by the learned counsel is clearly distinguishable, as we do not think that the Apex Court has completely tabooed use of satellite imagery in the matter of deciding whether an area is to be classified as a filtration pond. There were aerial photographs also available apparently.

The plan clearly shows how the authority has understood the features of the filtration ponds. That is to say, we must defer to the expert's understanding of various topographical features. In regard to Filtration Ponds, the features are as follows:

Table 3. Elements of image interpretation of satellite imageries.

Category Tone Shape Texture Location Association Remarks 4. Filtration Dark Gray Irregular Smooth Estuarine region With backwater filtration ponds ponds are mud flats/tidal flats developed for aquaculture.

We have noted that when the Expert was specifically asked at the instance of the company that the tone of filtration pond is dark gray and as far as the road, rail and canal are also gray to dark gray etc., he explained it by saying that it can be distinguished on the basis of shape as roads, rails and canals which are a linear shape unlike the filtration ponds. Therefore, in the light of these circumstances, we would

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 49 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

repel the argument of the company and the island owners that there was no basis at all to classify the areas in question as filtration ponds.

Whether there must be island specific study?

73. We see no merit in the contention of the company and island owners that there must be an island specific study. This argument apparently is based on the argument that the backwater islands would fall under CRZ-IV of the 1991 Notification. In paragraph 6 under the caption "Lakshadweep and small islands" it is stated that for permitting construction of buildings, the distance from the HTL shall be decided depending on the size of the islands. It is further stated that this shall be laid down for each island on the basis of integrated coastal zone management study and with the approval of the Ministry of Environment & Forest, keeping in view the land use requirements for specific purposes, vis-a-vis, the local conditions including hydrological aspects, erosion and ecological sensitivity. It is true that it is provided also that in some of the islands, there is provision for designating the same as falling under CRZ-I, CRZ-II or CRZ-III. There is a process of designation involved undoubtedly as it has to be done with the prior approval of the Ministry of Environment & Forest. When such designation takes place, the Regulations which are appropriate to CRZ-I, CRZ-II or CRZ-III would apply. We are of the view that all these aspects are irrelevant for the purpose of considering the Regulations applicable in regard to the islands with which we are concerned. As already noted, the need for a study would arise only in respect of the marine islands which are small islands which are apart from the Lakshadweep. The Notification does not contemplate or provide for such study in regard to the backwater islands in the State of Kerala. We may also notice that there is no challenge against the Notification as such and any contention against the same, cannot also be examined by us. Therefore, we find the arguments clearly unacceptable.

Whether the 2011 Notification will not apply in view of the provisions "except things done or omitted to be done"?

74. The company has a case that in view of the provisions contained in 2011 Notification that it has been issued in supersession of the 1991 Notification and that it would have effect except as regards things done or omitted to be done before the supersession and in so far as there was sanction by the appropriate authority for commencement of construction and they form integrated parts of the same transaction, the 2011 Notification does not alter the position with regard to the construction already done or in process. In this context, reliance is placed on the decision of the Apex Court in *Universal Imports Agency* v. *The Chief Controller of Imports and Exports* (1961 (1) SCR 305). We see no merit in the said argument. We have already found that the backwater islands were already within the ambit of the 1991 Notification. The island in question was one which was specifically shown as Filtration Pond and it is intended to denote an area close to breeding and spawning of fish and other marine life and hence it fell within CRZ-I. Any act contrary to the terms of the 1991 Notification would clearly attract action as contemplated under law.

Whether the contradictory stand of the Authority will avail the company?

75. We are also not impressed by the contention of the company that there was contradictory stand adopted by the authority in so far as, in the Counter Affidavit filed by it in W.P. (C). No. 19564/11 it took the stand that the island falls within CRZ-III whereas in W.P. (C). No. 4808/12 the authority takes the stand that the island is covered as CRZ-I and this, according to the company shows that even the authority is not sure as to how the scheduled premises is covered under the Regulations.

76. While it may be true that the authority has taken two different stands, ultimately the lis must be terminated by the Court considering the matter with reference to the materials. In this case, we have found that the island is covered by

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 50 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

the marking "Filtration Pond" and it is intended to denote an area coming under CRZ-I. Once the area comes under CRZ-I, then there is no question of it falling also under CRZ-III.

77. We have found that the island cannot fall in CRZ-IV. The island admittedly falls in a panchayat area. If that be so, it will fall under CRZ-III. The constructions of the nature carried out by the company would be clearly impermissible, having regard to the restrictions imposed under the 1991 Notification in regard to CRZ-III areas. Even according to the company, constructions were carried out on an island where the average width was between 20 to 60 metres. This means that it would be clearly part of the No Development Zone. No doubt, the No Development Zone as such is not marked as the entire island itself was treated as falling under CRZ-I. But, even in the absence of marking as No Development Zone, in view of the width (20-60 metres), the constructions are illegal.

Whether the maxim "expressio unius est exclusio alterius" will avail the company?

78. The contention that the backwater islands are not expressly referred to in the 1991 Notification and therefore the maxim "expressio unius est exclusio alterius" applies and the portions which were not expressly included must be deemed to be excluded, is misplaced. We are of the view that there is no scope for applying the said maxim, in the teeth of the express words used in the Notification indicating that coastal stretches in the backwaters are intended to be covered. We see no reason to limit coastal stretches to the coastal stretches of the main land of the backwaters. The coastal stretches of the island in the backwaters would also be coastal stretches of the backwaters. Further more, the understanding of the said words in the Notification by the authority followed by the Plan clearly shows that the backwater islands of the State of Kerala were also comprehended within the 1991 Notification. Such an understanding of the authority has also been approved by the Central Government.

Whether cadastral survey a must and its absence fatal?

79. Guidelines have been issued for demarcation of the HTL/LTL under the 1991 Notification. It is stated that the demarcation of the HTL/LTL shall be made on the coastal zone management maps of scale 1 : 25,000 prepared by the agencies identified by the Central Government. Thereafter, the base map of 1 : 25,000 scale is to be acquired from the Survey of India. Where such map is not available, 1 : 50,000 maps will be enlarged to 1 : 25,000. High water level and low water level marked on the base maps should be transferred to the Coastal Zone Management Maps (CZM Maps). Coastal Geomorphological signature in the field/satellite imageries/aerial photographs will be used for appropriate adjustments in the HWL and LWL for demarcating the HTL/LTL. Landward(Monsoonal) berm crest in the case of sandy beaches, rocks, hard lands, clips, sea walls, revetments and embankments are the geomorphological features which will be considered for demarcating HTL/LTL.

80. Local level CZM maps are to be prepared by the officials of the local bodies for accurate determination of the regulation zone. They are to be prepared on the cadastral scale. The cadastral (village) maps in 1 : 3960 or the nearest scale will be used as the base maps which are available with the revenue authorities. HTL and LTL are to be demarcated in the cadastral map base on the detailed physical verification, using coastal geomorphological signatures/features in accordance with the CZM Maps approved by the Central Government. The 500 metres and 200 metres lines are to be demarcated in regard to the HTL marked. It is also stipulated that HTL as defined in the 1991 Notification and the LTL will also be demarcated along the banks of the tidal influenced island water bodies with the help of the geomorphological signatures and features. The demarcation on cadastral maps is to be done by the local agencies approved by the Central Government. They are to work under the guidance of the concerned State Authorities in the case of States.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 51 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

81. In the *Lakeshore's case* (supra) is concerned, while there is reference to letter dated 04.01.1999 of the Ministry of Environment and Forest to the State Government to prepare local level CRZ Maps in cadastral scale and further the Court has also recorded the stand of the Additional Advocate General, inter alia, that depicting an area of 12 & 1= thousand sq. Kilometres in one inch is a difficult job and that the Government is preparing cadastral plans and thereafter a fresh plan and map shall be issued and therefore the Writ Petitions were premature.

82. We are not impressed by the said argument. There is a plan prepared with the use of satellite imageries, aerial photographs and apparently using toposheets. In regard to the islands, it is not doubt true that field studies cannot be stated to have been done as such with certainty. As stated in the plan itself, cadastral maps are suitable for micro level planning at the village or grama panchayat level. It is undoubtedly true that there was communication from the Government dated 4.1.1999 and also in the guidelines there is reference to the need to prepare cadastral plans that the local level CZM Maps (Coastal Zone Management Maps) for use in the local bodies for which cadastral village maps were to be used as the base maps. The guidelines also contemplates classification to be transferred from the CZM maps to the local CZM maps.

83. As far as the CZM maps are concerned, no complaint can be had. In fact, under the plan, the scale used is 1 : 12,500 which is double enlargement of 1 : 25,000. In fact, when comes to the 2011 Notification, Annexure I guidelines also contemplated demarcation of HTL or LTL on a scale of 1 : 25,000. In fact, there is no difference in the guidelines. Under the 2011 Notification, the CZM maps are to be prepared in accordance with paragraph 5 of the Notification, demarcating CRZ I, II, III, IV & V. The maps should demarcate the land use plan of the area and must list out CRZ I areas.

84. Under the head "Hazard Mapping", various directions have been given. They include the following, inter alia:

> "1. The CZM Maps shall be prepared in accordance with para 5 of the CRZ notification demarcating CRZ I, II, III, IV and V.
>
> 2. The CZM Maps shall clearly demarcate the land use plan of the area and lists out the CRZ-I, areas. All the CRZ-I, areas listed under para 7(1) A and B shall be clearly demarcated and colour codes given so that each of the CRZ-I, areas can be clearly identified.
>
> 5. The hazard line to be drawn up by MoEF shall be superimposed on the CZM maps in 1 : 25,000 scale and also on the cadastral scale maps.
>
> 9. The water areas of CRZ IV shall be demarcated and clearly demarcated if the water body is sea, lagoon, backwater, creek, bay, estuary and for such classification of the water bodies are terminology used by Naval Hydrographic Office shall be relied upon.
>
> 10. The fishing Zones in the water bodies and the fish breeding areas shall be clearly marked.
>
> 12. In the CRZ V areas the land use maps shall be superimposed on the Coastal Zone Management Plan and clearly demarcating the CRZ I, II, III, IV."

The guidelines also contemplate the draft plans being given wide publicity and calling for objections/suggestion from the public, holding a public hearing at District level. The plans are to be revised and with the approval of the Ministry of Environment and Forest, approved plans should be put on the web site.

85. There is no dispute that the plan as contemplated under the 2011 Notification has not been prepared. As far as the company is concerned, according to it, it has admittedly made various constructions. The constructions began, according to it, on the basis of the NOC which was obtained in the year 1997. Still later, according to the

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 52 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

company, they have obtained permit from the panchayat in the year 2007. They proceeded to make construction. The police protection writ petition is filed on 25.10.2011. We have found that the Nediyathuruthu island comes squarely under CRZ -I of the 1991 Notification. This means that no activity can be done, virtually on the island. There cannot be any dispute that the company has indeed made constructions even within fifty metres of the HTL which was clearly prohibited. At any rate, the constructions began during the time the 1991 Notification was in force. The same appears to us to be clearly illegal. This is unlike the situation in *Lakeshore's* case where, apart from the fact that the canal was man-made canal, even according to the authority, there was absence of material indicating whether the building in question fell within the prohibited zone. We may advert to the following commentary in regard to the word "cadastral" to be found in Pleaders' Survey Manual by Shibanath Basu, inter alia:

> "The word "cadastral" is one which is not familiarly used in surveying nomenclature and the meaning of which is variously and frequently erroneously interpreted. It is probably of French origin and was apparently first applied with any definiteness at the statistical conference held in Brussels in 1853, as referring to national maps on very large scales, approximately I : 2500. The word "Cadastre" has been accepted in Great Britain as being referred to a map or survey on a large scale, because the scale of the map corresponds with "cadrer" being that scale in nature which will permit of representing accurately the width of a road and the dimensions of a building. More recently on the continent the expression "Cadastral Surey is applied to a plan from which the area of land may be computed and from which its revenue may be valued."

We must bear in mind that cadastral survey is intended under the Guidelines for the use of the local bodies and other agencies to facilitate implement ion of the CRZ plans. Obviously cadastral plan would contain micro details. Apparently, the reason the proponents being expected to produce the cadastral plan is that with reference to the cadastral plan which is prepared on a large scale, it can be categorically found out whether the property of the applicant is affected by the Notification and whether it falls in a particular zone. As far as the islands of the company and island owner are concerned, we may notice that there is no dispute that it is having very low width. According to the company itself, the average width where the construction has been done is between 20 to 60 metres. Thus, we have already noticed that the plan contemplates that in the islands in question, very little space is available after the fifty metre belt is provided and, therefore, the entire island must be treated as regulated. In such a scenario, we are at a loss as to how when constructions have been made, even as contended by the company, the absence of the cadastral survey will be of any avail. Undoubtedly, we do express our concern at the apathy shown by the local authority in not having prepared the cadastral plan which it had been directed to do. But, the fact that it has failed to do its duty, cannot, in our view, assist the company or the island owner in wriggling out of the regulation contained in the Notification. In this case, the fact that there is no map prepared to the cadastral scale which, no doubt, was to be done by the local body, cannot avail them. Admittedly, the islands are located adjoining the Vembanattu lake which is a backwater in the State of Kerala and not an artificial canal. Even according to the company, the average width is between 20 to 60 metres. The entire island is classified as CRZ I. If that be so, the non-preparation of the cadastral plan cannot avail the company or the island owner which has put up various buildings which is indisputably well within the prohibited zone.

Whether there is encroachment by the company into the Vembanad Kayal (lake) and in the island itself?

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 53 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

86. As far as this issue is concerned, we had directed that the extent of the property in the possession of the company must be measured. The exact extent of the island was also directed to be measured. Survey was also directed to be conducted by the Deputy Surveyor of Alappuzha in the presence of the District Collector, Alappuzha. This was done by order dated 22.11.2012. Pursuant to the same, a report was submitted. On the strength of the same, finding encroachment, notice has already been issued under Section 11 of the Kerala Land Conservancy Act. On I.A. No. 16744/12, a petition seeking clarification filed by the company, we had left it open to the company to impugn the correctness of the report of the survey conducted by the Assistant Director of Survey (Re-survey), Chengannur and also the consequential report of the Deputy Director of Survey and also the report of the District Collector, Alappuzha along with the sketch before the statutory authorities as also before any competent forum which the company has the legal right to approach. In the light of this development, we need not be detained by the prayers in the Writ Petitions seeking action on the encroachment. Besides reiterating what we have stated in I.A. No. 16744/12 dated 17.12.2012 as aforesaid, we can only direct that proceedings started against the company will be continued in accordance with law.

W.P. (C). No. 19564/11

87. We have already referred to the pleadings in some detail. On the one hand, according to the petitioners, the stake nets in question were damaged on account of the activities of the company. On the other hand, the case is resisted by both the Government of Kerala and its authorities besides the company, as already noticed. No doubt, the learned counsel for the petitioners would reiterate the contentions which have been taken. In particular, he would submit that the case of the company and the Government cannot be accepted in the light of the various circumstances which have been referred to, including the stand of the Inland Water Authority of India and the Rules for Management and Control of Fisheries and Government Water Rules, 1974.

88. The writ court is not an appellate court. The writ court does not ordinarily decide disputed questions of fact. This Court cannot on the basis of the materials, come to a definite conclusion that the petitioners have established that the stake nets in question were lost in the manner contended for by them. In such circumstances, we cannot consider the grant of the relief of either compensation or a direction to restore the stake nets. Petitioners may have to work out their remedies in any other competent forum.

W.P. (C). No. 12965/12

89. W.P. (C). No. 12965/12, as already noted, is a writ petition filed by a trade union of fishermen. There is a challenge to the permit issued to the company by the panchayat. Direction is sought to proceed against the company and to demolish the building constructed as detailed in the permit. Further direction is sought in regard to the reclamation and filling up of wet land in violation of the Kerala Conservation of Paddy Land and Wet Land Act, 2008 and the Kerala Land Utilization Order, 1967. A writ of prohibition is sought against respondents 5 and 8 (the State Electricity Board and its Executive Engineer respectively) from laying under-water electrical line to the company's premises. The case of the company essentially is one which is common and we need not replicate the same. As far as the laying of the under-water cable and associated work is concerned, it is stated by the company that it is being done at a cost of Rs. 1.5 crores and that the cables are laid under water after obtaining lease from the Government of Kerala in the Irrigation Department. Ext.R6(a) is the lease agreement. Ext.R6(b) permission has already been received from the Inland Water Authority of India, is the company's case. We would think that as far as the issue relating to laying of under-water cable is concerned, the petitioner has not been able to establish any illegality and we reject the contention of the petitioner.

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 54 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

Whether the building permits granted to the company and island owner are liable to be interfered with?

90. The permit in favour of the company has been challenged specifically in W.P. (C). No. 12965/12. The Writ Petition was filed on 04.6.2012. In W.P. (C). No. 19564/11 there is no challenge to the permit as such. In W.P. (C). No. 34799/11 which was filed on 16.12.2011, the permit as such issued to the company is challenged by way of an amendment permitted during the pendency of the Writ Petition. We have noticed the 1st prayer though where there is a challenge without producing the permit. According to the company and the panchayat, the permit cannot be challenged and there is a provision for appeal to the tribunal under the Act. Learned counsel for the panchayat drew our attention to the unreported Judgment of this Court in W.P. (C). No. 24020/09 & connected cases. In the said Judgment, no doubt, the Division Bench of this Court has, inter alia, held as follows:

> "Apparently such challenges could not have been taken up before this court in the ordinary course since any person aggrieved by an order passed by the local authority is to pursue his grievance before the Tribunal for Local Self Government Institutions. Similarly any person aggrieved by the licence granted by the Department of Telecommunications is to pursue the matter before the TDSAT. If there is any other issue, the same is to be sorted out before the civil court." As observed by the Court, ordinarily as there is a remedy open by way of a statutory appeal, direct approach to the Writ Court challenging the permit may not be permissible. It is one thing to say that the Court will not entertain a writ petition challenging the permit without exhausting the alternate remedy, as a matter of wise policy imposing self-restraint and bearing in mind that writ jurisdiction is discretionary in nature. But, it is another thing to say that the Court does not have jurisdiction in no circumstances to entertain such writ petition.

91. The next question is whether the challenge being made after a long time is to be entertained. The Building Permit is issued in the year 2007 to the company. Writ Petition is filed challenging the permit in the years 2011 and 2012. No doubt, according to the petitioner in W.P. (C). No. 12965/12, though the permit was obtained in 2007, construction was not being done.

92. The common complaint, no doubt, is that the permit was granted virtually at an incredible speed. The permit dated 10.10.2007 is stated to be on the basis of application which is also dated 10.10.2007. It is a non-family residential permit. The construction of standard villas, delux villas, two bed room villas, resident villas, A spa and house block in all measuring a large extent of 13211.22 sq. metres is permitted. According to the panchayat, it is to be noted, Ext.R2(a) purports to be a letter from Ratna Easwaran who is the second petitioner in W.P. (C). No. 4808/12 and who is stated to be one of the Directors and share holder of the company. Going by Ext.R2(a) dated 03.8.1995 produced by the panchayat in its Counter Affidavit in W.P. (C). No. 4808/12, Ratna Easwaran stated that she would like to set up a resort in certain survey numbers mentioned, which is owned by her and jointly with one Babu George. The resort was to consist of fiftytwo pool villas with reception and restaurant, health club and conference hall buildings. There is reference to the resort if implemented, helping to increase the revenue of the panchayat and generating employment potential. Ext.R2(b) purports to be the plan.

93. The permit is pointed out to be illegal and there is no prior site inspection as held necessary by this Court. Shri. T. M. Mohamed Youseff, learned senior counsel appearing in W.P. (C). No. 34799/11 would also point out that actually the company has not obtained a development permit as mandated in the Building Rules. It is pointed out that clearly development work was done and it is patently illegal without a development permit. According to the company, development permit as such is not

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 55 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

necessary. Rule 12 of the Kerala Municipality Building Rules, 1999 which was made applicable to panchayats in Kerala from 06.6.2007, inter alia, reads as follows:

> "12. Grounds on which approval of site or permission to construct or reconstruct building may be rejected.- The grounds on which approval of site for construction or reconstruction of a building or permission to construct or reconstruct a building shall be refused are the following:—
>
> (i) that the work or use of the site for the work or any particulars comprised in the site plan, ground plan, elevations, sections or specifications would contravene provisions of any law or order, rule, declaration or bye law made under such law."

Under Rule 12(1) of the Municipal Building Rules which we have just extracted, permit cannot be granted if it would result in violation of any law or order, rule, declaration or byelaw made under such law. Interestingly, the word "Notification" is not mentioned. No doubt, the word "law" would in the general sense, take in a statutory Notification, as the Notification is subordinate legislation. In Rule 26(4) of the Kerala Panchayat Building Rules 201, it is provided as follows:

> "26. General requirements regarding plot.-
>
> (4) Any land development or redevelopment of land or construction in any area notified by Government of India as Coastal Regulation Zone under the Environment (Protection) Act, 1986 (29 of 1986) and Rules made thereunder shall be subject to the restrictions that may be imposed by Government of India contained in the said notification as amended from time to time."

In the Kerala Municipality Building Rules, 1999 which was made applicable to the Panchayats on 06.6.2007, Rule 23(4) is an identical provision.

94. As far as the challenge to the No Objection Certificate and the Permit issued to the company are concerned, we may notice the following facts:

The No Objection is dated 02.8.1996 and the permit is issued in the year 2007. The earliest of the Writ Petitions in which there is a challenge is in the year 2011. We may also notice that in *Assistant Commissioner of Central Excise* v. *Krishna Poduval* (2005 (4) KLT 947) a Bench of this Court took the view that once the period of limitation has run out and there is no power with the appellate authority to condone the delay in filing the appeal, the discretionary remedy under Article 226 cannot be invoked. We further notice that in *Tiyarcee Tiles* v. *Addl. Sales Tax Officer* (2006 (3) KLT SN.87 Case No. 123) the Division Bench held that the assessment orders are amenable for statutory appeal and if the original petition is entertained after years, it will result in circumventing the statutory provisions regarding limitation. There is also the Judgment of this Court in *District Executive Officer* v. *Abel* (2006 (2) KLT 758). Therein, the Court took the view that where the party was not vigilant and had failed to avail of the statutory remedy, he is not justified in invoking the extraordinary jurisdiction of the Court under Article 226 of the Constitution of India. That was a case under the Motor Transport Workers' Welfare Fund Act, 1985 wherein the Court took the view that there was no power with the Government to condone the delay in filing an appeal beyond sixty days from the date of receipt of the order under Section 8 sub-section (5) of the aforesaid Act. No doubt, the petitioners may have a case that they were not aware of the permit. But, at the same time, to permit them to challenge the No Objection Certificate and permit may not be appropriate, no doubt, particularly, in view of the view we are taking as to the effect of the Notification.

95. As far as the permit issued in favour of the island owners is concerned, the permit is issued in the year 2012. There is a pending Writ Petition (W.P. (C). No. 8299/12). The permit was challenged by way of an amendment. The permit is issued on 30.4.2012. According to the petitioner in W.P. (C). No. 8299/12, the petitioner came to know when a Counter Affidavit producing the permit was filed. No doubt, there was already a prayer in the Writ Petition (prayer No. 1) under which Reports

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 56 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

were to be called, enabling them to make any such construction in Vembanad Lake and to declare any such construction as illegal and liable to be demolished. As noticed, we note that the permit was specifically challenged in 2013. We may notice that the permit is apparently issued on the basis that the area is covered by CRZ III under which, even according to the authority, part of the island falls in CRZ III of 2011 Notification. We do not intend to pronounce on the legality of the permit as such, particularly in the view we are taking of the effect of the Coastal Regulation Notifications.

96. We cannot but note, however, that as far as the permit to the company is concerned, there can be no doubt that it betrays clear non-application of mind and exposes palpable ignorance of the mandatory provisions of the Notification. The third condition is that the construction should be in compliance with the Notification (obviously referring to the 1991 Notification). The last condition is to the effect that the proposed construction must be upto or beyond the existing buildings, otherwise CRZ will be applicable. Taking the last condition first, it is palpable that the condition is absolutely untenable. Under the 1991 Notification, it is in regard to CRZ-II areas that the Notification permits buildings on the landward side of the existing road or on the landward side of existing authorised structures. Admittedly, the island is part of the Panavally Grama Panchayat. Therefore, the island cannot fall as an area within municipal limits or any other legally designated urban areas. If CRZ-I is not applicable, then it will only be CRZ-III which should be applicable. At any rate, there is no question of countenancing construction of buildings by providing that the construction should not be beyond the existing building.

97. Coming next to the condition that the construction should be compliant with the Notification, we are at a loss to understand how, even in a case where if the land in question fell in CRZ-III, a permit could be issued permitting construction within "20 to 60" metres as admitted even by the company and provide that the construction should be in accordance with the Notification. When construction of the buildings as sought for was patently impermissible, we cannot escape the feeling that the panchayat is paying lip service to the mandate of the Notification while countenancing a flagrant breach of its terms.

98. However, we would rather rest our decision without pronouncing on the validity of the permits as such. We have found that the Notification is applicable to the island, the island falls in CRZ-I and construction is impermissible. By merely getting a permit under the Building Rules, it cannot be in the region of any doubt that the company cannot arrogate to itself, the right to flout the terms of the Notification. We have already noticed Rule 23(4) of the Kerala Municipality Building Rules, 1999 and Rule 26 (4) of the Kerala Panchayat Building Rules, 2011. In this case, we may also note that there is no permission sought from the authority. It is apposite to note that paragraph 3(v) clearly mandates that for investment of Rs. 5 crores and above, permission must be obtained from the Ministry of Environment and Forest. In this case, the investment of the company is far above Rs. 5 crores. In respect of investments below Rs. 5 crores, for activities which are not prohibited, permission must be obtained from the concerned authority in the State. The company has not made any such attempt at getting permission. That apart, this is a case where, even if permission had been applied for, the terms of the Notification would stand in the way of any such permission being granted in so far as the island is treated as falling in CRZ-I. Construction of buildings as has been done by the company was absolutely impermissible. The fact that in a situation where the construction activity was permissible under the Notification and if the company had obtained permit from the local body, would have made its activities legal, cannot avail the company for the reason that under the terms of the Notification, such permit obtained from the panchayat will be of little avail to it in the light of the nature of the restrictions

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 57 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

brought about by the Regulations in respect of CRZ-I in which zone the island falls. According to the panchayat, no doubt, the conditions have been imposed also as recommended by the Assistant Engineer who is alleged to have even visited the island. Whatever that be, as observed by us, in the light of the view we have taken, namely that the 1991 Notification applies to the island, it is squarely covered by the same being included in CRZ-I and the constructions were begun even during the currency of the 1991 Notification. The conclusion is inescapable that it is in the teeth of the prohibition contained in the 1991 Notification and, therefore, it is palpably illegal.

Effect of the No Objection Certificate:

99. According to the company, the company has obtained a No Objection Certificate from the panchayat in 1996 (granted on 02.8.1996). According to the Panchayat, the No Objection was given in favour of the second petitioner in W.P. (C). No. 4808/12 Mrs. Retna Easwaran and Mr. Babu George vide Ext.R2(a) for the construction in certain survey numbers. It is stated that the plan was sanctioned vide Ext.R2(b). What is stated in the No Objection Certificate is that the panchayat has no objection in constructing new buildings in the survey numbers owned by the two persons, since the Kerala Building Municipal Regulation Act (must be the Building Rules) have not been enforced in the panchayat area. It is stated by the panchayat also that it is seen that the No Objection Certificate was transferred along with the land to the company on 20.3.2007. It is to be noted that there is actually no provision as such under which a No Objection Certificate is to be issued. Apparently, the Municipal Building Rules had not been made applicable to the panchayats (they were made applicable for the first time from 06.6.2007). Thus, when the No Objection Certificate was issued, the Building Rules were inapplicable. There were no Rules made by the government under the Kerala Panchayat Raj Act either. Thus, apparently in the absence of the Rules, the panchayat was not giving any permit for construction as such. Even if there was no No Objection Certificate issued and the construction was made, unless there was a transgression of the provision in the Act, there could not be any obstacle in the numbering of the building. Thus, the No Objection Certificate cannot be treated as a permit as such. It only signifies the lack of any objection by the panchayat to the construction. We are not able also to appreciate the basis for contending that the said No Objection was transferred to the company as such. In such circumstances, even if construction is started on the basis of the same, it is clear that the person who does any activity violating the Notification (which is subordinate legislation) he cannot defend his actions with reference to the so-called No Objection Certificate. Nor can such construction be the basis of legalizing construction contravening the Notification of 1991, by contending that it was done under the No Objection given before the Plan of 1995 being notified. It is noteworthy that the Notification itself was in force even in 1991. The mere fact that the approval of the Central Government came after the No Objection can in no way legitimize the construction. The No Objection Certificate is dated 02.8.1996. The Notification came into force on 19.2.1991. The plan was prepared in the year 1995. The approval came, going by Ext.P6 in W.P. (C). No. 4808/12, on 27.9.1996. It is also to be noted that Paragraph 3(3)(iii) of the Coastal Regulation Zone Notification, 1991 reads as follows:

> "3. Regulation of Permissible Activities:
>
> All other activities, except those prohibited in para 2 above, will be regulated as under:
>
> (3)(iii) : In the interim period till the Coastal Zone Management Plans mentioned in para 3(3)(i) above are prepared and approved, all developments and activities within the CRZ shall not violate the provisions of this Notification. State Governments and Union Territory Administrations shall ensure adherence

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 58 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

to these regulations and violations, if any, shall be subject to the provisions of the Environment (Protection) Act, 1986." Even though it could be said that the plan showing the islands as "F.P." was approved only on 27.9.1996, it is inconceivable that after 27.9.1996 when the islands were shown as marked with "F.P." and it fell under CRZ-I that the No Objection Certificate can still, in any way, assist the company to violate the terms of the said Notification.

Effect of the 2011 Notification:

100. There are differences between the 1991 Notification and the 2011 Notification. We have already referred to the manner in which the Coastal Regulation Zone itself is defined in the 2011 Notification. That apart, in the 1991 Notification, areas close to breeding and spawning of fish and other marine life, is included in CRZ-I. Marine parks are included both in the 1991 Notification and 2011 Notification under CRZ-I. In the 2011 Notification, areas close to breeding and spawning of fish and other marine life, is conspicuous by their absence. Therefore, it is our understanding that areas close to breeding and spawning of fish and other marine life, does not fall within CRZ-I after 06.01.2011. But then, what is the effect of the provision in the Notification by which it is provided that the plan prepared under the 1991 Notification will continue to hold the field for a period of 24 months. Admittedly, no new plan has been made under the 2011 Notification as such. In the plan prepared under the 1991 Notification, as we have understood, areas close to breeding and spawning of fish and other marine life have been marked with the word "FP". Till 06.01.2011, any activity which was undertaken in regard to these areas, the islands in question which are admittedly marked with the words "FP" would fall foul of the terms of the Notification. But then, what is the effect of the non-inclusion of the words "areas close to breeding and spawning of fish and other marine life" in the categories under CRZ-I in the 2011 Notification. Can it be argued that it would still fall under CRZ-I for the reason that it is ecologically sensitive as provided in the main heading of the CRZ-I in the 2011 Notification. Does the 2011 Notification in regard to CRZ-I contemplate areas which are ecologically sensitive being comprehended under CRZ-I even though such areas are not specifically enumerated thereunder. Is it the requirement of the 2011 Notification that areas must not only be ecologically sensitive, but is there a further requirement in terms of the geomorphological features which play a role in maintaining the integrity of the coasts. This is for the reason that under CRZ-I, what is provided is that the areas that are ecologically sensitive and geomorphological features which play a role in maintaining the integrity of the coasts. Still further, we notice that unlike the CRZ-I category in the 1991 Notification, there is no provision providing for power with the Central Government or the concerned authorities in the State or Union Territory level to declare further areas from time to time. The words "such as" are used in the 1991 Notification. The Apex Court in the decision rendered, no doubt under the Andhra Pradesh General Sales Tax Act, 1957, held, inter alia, as follows:

> "So far as the words "such as" is concerned, there is no dispute that they are meant to be illustrative and not exhaustive." (See *Royal Hatcheries Pvt. Ltd.* v. *State of A.P.* - 1994 Supp (1) SCC 429).

101. We are of the view that in view of the absence of the words "areas close to breeding and spawning of fish and other marine life" in the category of CRZ-I in the 2011 Notification, merely because the plan prepared under the 1991 Notification was to hold good for a period of 24 months from 06/01/2011, such areas would not fall under the 2011 Notification. We cannot overlook the fact that by the 2011 Notification, the terms of the 1991 Notification was superseded. The effect of the supersession of the 1991 Notification is that we must ignore the 1991 Notification and instead we must give effect to the 2011 Notification from 06.01.2011. Even while it is true that the 2011 Notification mandates that the plan prepared under the 1991 Notification must hold good for a period of two years, in so far as CRZI is worded differently in the

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 59 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

2011 Notification in contrast to the words used in the 1991 Notification, unless an area falls under CRZ in the 2011 Notification, by a mere reference to the plan prepared giving effect to the terms of the 1991 Notification which, no doubt, is to hold good for two years from 06.01.2011, it can be understood as only meaning that the plan will hold good to the extent that it is in conformity with the mandate of the 2011 Notification.

102. However, we should hasten to notice that as far as the company is concerned, its case is undoubtedly that it commenced construction pursuant to the No Objection given in 1996 and continued the construction under the permit issued in 2007, both being points of time when the 1991 Notification was in force. Therefore, the construction was at least partly effected or rather it was begun when the 1991 Notification was very much in force.

Therefore, such constructions are patently illegal.

The issue of laches:

103. The first Writ Petition to be filed in relation to the company is W.P. (C). No. 19564/11 which was filed on 18.7.2011. The second Writ Petition is the Writ Petition filed by the company seeking police protection (W.P. (C). No. 28485/11) which was filed on 25.10.2011. It was thereafter that W.P. (C). No. 34799/11 (public interest litigation) was filed on 16.12.2011. The next Writ Petition in relation to the company is filed by the company as W.P. (C). No. 4808/12 which was filed on 24.02.2012. Finally, W.P. (C). No. 12965/12 was filed on 04.6.2012. According to the company, the company commenced construction on the strength of the No Objection Certificate dated 02.8.1996 issued by the panchayat. It was also their case that substantial progress was made in finishing the foundation work for construction of the resort. It is their further case that further construction could not be completed. The Building Rules were made applicable from 06.6.2007. Thereafter, they applied for permit which was granted in 2007 and on the strength of the same, they made further construction. The company filed W.P. (C). No. 28485/11 seeking police protection and it obtained an order of police protection at the admission stage itself and thereafter this Court passed an order dated 21.8.2012 in W.P. (C). No. 34799/11 which reads as follows:

> "This is an application for a direction to respondents 1 to 6 to take action to immediately stop any further construction of buildings or structures, pavements, boundary walls or fences for Kapico Resorts and the use of any buildings/structure constructed in full or part or any portion thereof for any business, recreation or any other purpose, by the 7th respondent on the banks of Vembanad Kayal which comes under CRZ and under area of Critical Vulnerable Area (ACVA) within the limits of the first respondent Panchayath and to direct the 7th respondent to stop any further construction therein or use of the premises for any business, recreation or any other purpose.

2. We heard the learned senior counsel for the petitioner and learned counsel for the parties appearing in this I.A. We had by our order dated 17.08.2012 called for certain details. A memo has been filed by the State Attorney. Therein, it is inter alia stated as follows:

> "Out of the total 65 numbers of permanent structures, Panchayat has issued building numbers for 54 numbers. For one structure for which building permit has been given and number has to be issued by the Panchayat on completion. Ten numbers of structures including water treatment plant, sewage treatment plant, bridge, maid sheds (two number), building for Yoga, piling work for a structure, reportedly viewing gallery, and other two building under construction at southern corner and a building between villas 279/A12 and 279/A13 are not numbered by the Panchayat. Balance 7 numbers are temporary sheds including old damaged urinal shed at southern end. Whether sanction is obtained from the authorities for

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 60 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

the construction of these structures or the construction is as per approval is not verified as sanctioned plan is not available. Outer bund road is seen constructed and the resort owners clarified that it will be demolished and will be submerged into the lake when construction is over. The legality of the constructions and the question of encroachment of lake is not looked into."

54. items of buildings have been brought under the category of structures as on 19.08.2012 for which building numbers were issued by the Panchayath. 12 numbers of structures have been shown separately under the caption stage of structures as on 19.07.2012 for which building numbers have not issued by the Panchayat.

3. We are only considering the question of interim relief. On the one hand, it is the case of the senior counsel for the petitioner that this is a case where in gross violation of the law relating to coastal regulation, the 7th respondent company has proceeded to put up various structures. Accordingly, it is that the application is filed and pressed before us. Per contra, the learned counsel appearing on behalf of the 7th respondent would submit that the petitioners are guilty of laches. According to him, huge investment has been made. A writ petition is filed by the 7th respondent questioning the legality of imposing the notification itself on it. In such circumstances, he would submit that the court may not grant any order stopping the constructions.

4. We have already heard the learned counsel for the Panchayath, the learned counsel for the Coastal Zone Management Authority, and Sri. Ibrahim, the learned counsel for the 9th respondent in W.P. (C). No. 19564 of 2011 and Shri. Bechu Kurian Thomas. We have also heard Shri. Raman Kartha, the learned counsel for the petitioner in W.P. (C). No. 12965/2012. We heard the learned Government Pleader also.

5. We bear in mind the fact that originally there was a notification issued in 1991. Subsequently, with effect from January 2011, it stands superseded by another notification under which, even according to the 7th respondent, Islands in back waters of the State of Kerala are explicitly covered in the manner provided therein, no doubt. We are of the view that interests of justice would be satisfied if we categorised the construction into two as broadly done by the District Collector, namely the structures for which building numbers were issued by the Panchayath and the structures for which building numbers have not been issued. As far as the structures for which building numbers have been issued, it would appear that the structures have been completed and what remains to be done is flooring, painting, sealing, finishing works, electrical and sanitary fittings etc. As far as structures 1 to 54 forming part of building structures for which building numbers have been issued, we are not inclined to pass an order stopping the further activities as such, which are remaining to be done going by the report of the District Collector. But, necessarily we add the rider that any work which they undertake of the nature which is indicated in the report given by the Collector will be entirely at their risk and that they will not be permitted to raise any equity, if it is later found that the activity is illegal and it will be subject to the result of the writ petition and further orders to be passed by this court.

6. As far as item Nos. 1 to 9 of the structures for which building numbers have not been issued by the Panchayath, we are of the view that further construction must be stopped. Accordingly, we direct that the 7th respondent shall not carry on any further construction in respect of item Nos. 1 to 9 are concerned. We further direct that respondents 4 and 5 will enforce our direction that there will be no construction by the 7th respondent in so far as item Nos. 1 to 9. We further record the undertaking given by the learned counsel for the 7th respondent that

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 61 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

construction of no new structures shall be commenced till the disposal of the writ petition."

It is undoubtedly true that considerable construction work was done by the company. No doubt, according to the petitioner in W.P. (C). No. 12965/12, no permit was obtained and no construction work was being done on account of objection. It must be true that there was objection as it is evident that the company itself had filed Writ Petition against obstruction in the construction work. Learned counsel for the company would, no doubt, point out that going by the CD relied on by the petitioner in W.P. (C). No. 19564/11 which was filmed in the year 2009, the petitioner must be attributed with the knowledge of activities being carried out by the company since earlier.

104. The other aspect of the matter is that this is a case where, in our view, the company has clearly brazenly violated the law of the land as contained in the Notification issued in the year 1991. It has chosen to make a huge investment as it claims without even caring to ascertain what is the purport of the Notification. Even in the permit issued in the year 2007, there is reference to the fact that the Notification applies. It does not have a case that it has made any further enquiries. No doubt, the conditions in the building permit are most mischievous and perhaps even misleading. As already noticed by us, it has not even cared to apply for permission from the Ministry of Environment and Forest, at least for the reason that the investment being made is more than Rs. 5 crores as contemplated in paragraph 3(v) of the Notification. Construction of hotels and beach resorts are permissible on prior permission from the Ministry of Environment and Forest (MoEF) under the 1991 Notification only in vacant plots between 200 metres and 500 metres of High Tide Line and that in designated areas falling in CRZ-III. No new construction is permissible of the type involved in CRZ-I. In short, this appears to us to be the case where the company has chosen to flout the law with impunity. We cannot overlook the fact that this is a case where the company has proceeded to put up large number of structures in disregard with the Notification. As already noticed, the island is classified as falling under CRZ-I. We cannot overlook the fact that as early as in 1996, by its Judgment in *Indian Council for Enviro-Legal Action* v. *Union of India* ((1996) 5 SCC 281) (supra), the Apex Court had specifically directed that petitions complaining of violation of the Coastal Regulation Zones be filed in the High Court concerned. We may notice that the Apex Court has expressed its disquiet at the attitude of the authorities in matters relating to violations of environmental law.

105. We may in this regard notice that the stand of the Central Government and the Authority is that the actions of the company cannot be supported. In such circumstances, in as much as we have already rejected the company's Writ Petition seeking to wriggle out of the 1991 Notification and the Plan prepared thereunder, necessarily action is bound to be taken. In this regard, we may notice Section 5 of the Environment (Protection) Act, 1986 under which the Notifications have been issued. It reads as follows:

"5. Power to give directions.- Notwithstanding anything contained in any other law but subject to the provisions of this Act, the Central Government may, in the exercise of its powers and performance of its functions under this Act, issue directions in writing to any person, officer or any authority and such person, officer or authority shall be bound to comply with such directions.

Explanation.- For the avoidance of doubts, it is hereby declared that the power to issue directions under this section includes the power to direct—

(a) the closure, prohibition or regulation of any industry, operation or process; or

(b) stoppage or regulation of the supply of electricity or water or any other service."

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 62 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

Besides, there are Sections relating to penal provisions. Thus, there is power with the authority to take action to ensure that the action of the company in violation of the law is set at naught.

106. In W.P. (C). No. 28485/11 filed by the company, it is true that the company obtained an interim order directing police protection be given. It was apparently on the strength of the same that overlooking the objections, the construction was proceeded with. Since there was objection being raised, the company obtained interim order. When a party obtains an interim order and finally it is found that the company did not have a case in law for getting the interim order, it is settled law that the interim orders will not stand in the way of the Court reversing the injustice brought about by the interim order being acted upon (See in this regard *Amarjeet Singh* v. *Devi Ratan* ((2010) 1 SCC 417 and *Indian Council For Enviro-Legal Action* v. *Union of India* ((2011) 8 SCC 161). Clearly, the police protection writ petition is liable to be dismissed. In such circumstances of this case, we are of the view that the constructions being in the teeth of the Coastal Regulation Zone cannot be allowed to stand as such.

107. At this stage, we must deal with the argument raised before us by the company. It is submitted that a world class resort has been put up which will promote tourism in a State like Kerala which does not have any industries as such and where tourism has immense potential and jobs will be created. It is submitted that the Court may bear in mind that the company is eco-friendly and if at all the Court is inclined to find against the company, the Court may, in the facts of this case, give direction to the company and the company will strictly abide by any safe-guards essential for the preservation of environment.

108. We do not think that this Court should be detained by such an argument. The Notification issued under the Environment (Protection) Act is meant to protect the environment and bring about sustainable development. It is the law of the land. It is meant to be obeyed and enforced. As held by the Apex Court, construction in violation of the Coastal Regulation Zone Regulations are not to be viewed lightly and he who breaches its terms does so at his own peril. The fait accompli of constructions being made which are in the teeth of the Notification cannot present, but a highly vulnerable argument.

The Specific Issues Relating to Vettilathuruthu Island:

109. We have already repelled the contention of the island owner that back water islands of the State of Kerala are not covered by the 1991 Notification as also other common arguments. Admittedly, Vettilathuruthu island is located in Vembanad lake. Vembanad lake is admittedly a backwater in the State of Kerala. In the plan prepared by the authority, Vettilathuruthu island is marked with the words "FP" indicating filtration ponds over it. It is part of the Panavally Grama Panchayat. In regard to Vettilathuruthu also, there were satellite imageries and aerial photographs which formed the basis for the conclusion that the area is filtration pond. It is accordingly classified as filtration pond, indicating the island to be an area close to breeding and spawning of fish and other marine life. We have already dealt with the argument that there are no reliable material and we have rejected the same. Therefore, we proceed on the basis that even in regard to the Vettilathuruthu island, it will fall under CRZ-I under the 1991 Notification. Constructions are shown to be in progress, going by the google image taken in 2006. Quite clearly, such construction would be in the teeth of the terms of the 1991 Notification. As far as the 2011 CRZ Notification is concerned, according to the Expert and the report, the entire island is either CRZ-I, III or IV, that is to say, the case of the expert would appear to be as follows:

Part of the island would have to be classified under CRZ-I on account of the presence of mangroves. Another part would come under CRZ-III for the reason that it

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 63 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

is part of a panchayat area and which is not developed. The reason why another portion would come under CRZ-IV is as follows:

CRZ-IV(B) takes in water area of the tidal influenced water body from the mouth of the water body at the sea upto the influence of tide which is measured as five parts per thousand during the driest season of the year. The following are the Norms for regulation in CRZ-IV:

"(IV) In CRZ-IV areas,-

The activities impugning on the sea and tidal influenced water bodies will be regulated except for traditional fishing and related activities undertaken by local communities as follows:—

(a) No untreated sewage, effluents, ballast water, ship washes, fly ash or solid waste from all activities including from aquaculture operations shall be let off or dumped. A comprehensive plan for treatment of sewage generating from the coastal towns and cities shall be formulated within a period of one year in consultation with stakeholders including traditional coastal communities, traditional fisherfolk and implemented;

(b) Pollution from oil and gas exploration and drilling, mining, boat house and shipping;

(c) There shall be no restriction on the traditional fishing and allied activities undertaken by local communities."

According to the island owners, they have only carried out the repairs and re-construction pursuant to Ext.P1 in their Writ Petition. Ext.P1 permit issued by the Panchayat is dated 30.4.2012. It is granted for three years, that is till 29.4.2015. It is granted for repairing or reconstruction works of existing buildings. It is to be done in accordance with the approved plan and various provisions of the Kerala Panchayat Building Rules, 2011. It is categorically provided in Ext.P1 that the conditions of CRZ should be strictly adhered to. The existing plinth area which is shown as 999.23 sq. metres is not to be enhanced in any circumstances. The existing building Numbers are shown as 1/93, 94, 95, 93A, 93B and 93C. The survey numbers are also given. The proposed construction is shown as 869.20 sq. metres. According to the Statement of the Government, there are 13 number of buildings existing belonging to the island owner. The stand of the authority is that the authority has initiated enquiry, CESS has been directed to enquire and report and that it will be placed for necessary action. There is a report prepared and submitted by CESS and it is in the said report that it is, inter alia, found that the entire Vettilathuruthu is shown as filtration pond in the 1995 plan, the island is on the Vembanad backwater which is a lake influenced by the tidal action as defined in the Notification and the entire island falls under CRZ-I, III and IV of the 2011 Notification. The conclusions in the report are as follows:

"4. Conclusions:

The part of Vembanad backwater adjoining Vettila thuruthu and the connected water bodies such as lagoons and filtration ponds are influenced by tidal action as defined in CRZ notification 1991 and 2011. The salinity is > 5ppt during the driest month in an year.

The referred site (Vettila thuruth) where constructions are in progress lies in CRZ as per the approved CZMP (1995) of the State (Map no. 32A of the CZMP).

The entire Vettila thuruth is in CRZ as per the provisions of CRZ (2011) also.

All the constructions already carried out and the ongoing landscape modifications and new constructions by M/s. Vaamika Resorts in Vettila thuruth island are in violation of the provisions of CRZ Notifications 1991 and 2011.

The local body and the project proponents violated the directions of the Hon. Courts and the concerned departments in implementing the provisions of CRZ notification."

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 64 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

110. As regards the buildings for which Ext.P1 permit has been granted is concerned, the following details are forthcoming in the Additional Counter Affidavit of the panchayat in W.P. (C). No. 8299/12:

As on the date of the issue of reconstruction permits, there were thirteen buildings and eight were already having building numbers. As far as building No. 1/93 is concerned, the original owner is shown as one Ayyani Kochilan. The original number is shown as existing from 1973 onwards. 1/94 is also existing from 1973 onwards and the original owner is shown as Kochupilly Sankaran. As far as 1/95 is concerned. It is shown as existing from 1993 onwards and the original owner is Kochilan. In regard to 1/93A and 1/93B (year 2002), the original owner is shown as M/s. Muddy Waters (the name of the island owner with which it was initially incorporated). As far as 1/93C is concerned, the original number is shown as 2003 onwards and the original owner is shown as M/s. Muddy Waters. There are two other building numbers were given, 1/93D and 1/93E. Both have been shown as numbered in the name of M/s. Muddy Waters and the original Number is from 2011 onwards. It is stated that the first six mentioned were given reconstruction permits in 2012. The island owners have filed a Counter Affidavit in regard to the Additional Counter Affidavit of the panchayat. Therein, it is, inter alia, stated as follows:

The structures in the property which were in existence in 1991 also, the predecessors in interest of the island owners and their family members who were residing in the property had constructed several structures and had been using the same. There are twelve buildings in the property of which eight have been numbered by the panchayat. All the buildings have been in existence even in 1991, ie. even prior to the purchase of the property by the petitioner. The unnumbered buildings are presently used for storing of materials and for the staying of labourers who are residing in the property in connection with renovation works, etc. It is further stated as follows:

> "4. It is respectfully submitted that the 7th and 8th respondents were running a hotel in their property from the year 2006-2007 onwards in the authorized structures existing in the said property. Subsequently, as is the general practice in the hospitality industry, some of the authorized structures needed to be renovated ion order provide comfortable stay for the guests. In such circumstances, it was decided to reconstruct six of the authorized structures within the limitations of existing floor space index and less than the existing plinth area and for this purpose permit had been applied for and granted. Along with the same, interiors are also being renovated in terms of electrical and lighting fightings, beddings, bathrooms etc."

In regard to the new building seen referred to in the Additional Counter Affidavit of the panchayat for which no permission was obtained, what is stated is that in view of Rule 10 of the Rules, for buildings upto 150 sq. metres, building permit is not required, and that it is on the said understanding of the provision that a separate building permit was not applied for. The said structure is having a plinth area of less than 150 sq. metres and is constructed beyond the 50 metre CRZ limit.

111. We can conclude that building Nos. 1/93A to 1/93C have been put up by the island owner during the time when the 1991 Notification was in force and at the time when the island was falling in the CRZ-I Zone. It is to be noted that it is in respect of the said three buildings also that the island owner has been given permit by the panchayat purporting to be for reconstruction.

In other words, as far these three buildings are concerned, they have been put up violating the 1991 Notification. The panchayat has proceeded to number the same. May be, at that time, the Municipal Building Rules were not applicable, as they were made applicable to the panchayat only on 06.6.2007. In 2011, again we notice, two

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 65 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

buildings are seen numbered, namely 193/D and 193/E. Besides these eight buildings, there are five buildings which are apparently not numbered. We cannot hold as to when the construction began and was completed. We notice that the building Nos. 193A to 193E, that is, all the five buildings in the name of the island owner were put up from 2000 to 2011. At any rate, even proceeding on the basis that they were existing buildings (six in numbers), they have been reconstructed pursuant to permit in 2012. We will deal with the effect of the reconstruction later on. A new building is also being constructed for which no permit is obtained. The panchayat has promised action.

112. In view of our finding, as far as buildings 4 to 6 are concerned, they have been put up during the operation of the 1991 Notification, when no construction was permissible in the CRZ-I area. The panchayat has proceeded to number the same. Admittedly, no permission was even sought from the authority. As far as building Nos. 193 and 194 are concerned, they are existing buildings. In regard to the same also, reconstruction has been carried out pursuant to permit issued in 2012 (30/04/2012). As on that date, the 1991 Notification had been superseded and the 2011 Notification was in force. Under the 2011 Notification areas close to breeding and spawning of fish and other marine life are not seen included in CRZ-I. In fact, CRZ-I is sought to be made applicable on the basis that it is an area where there are mangroves. Such a case is not specifically set up either in the Counter Affidavit and it is not adverted to in the report of the team which is alleged to have visited the island. It is true that photographs are produced showing the presence of mangroves. No doubt, going by the Judgment of this Court in *Ansari Komath* v. *State of Kerala* (2011 (1) KLT 1043) which we have referred to, even if mangroves are planted after the Notification, it would attract the Notification. A plea as such has not been taken also that there are mangroves. The plan under the 2011 Notification is to be prepared.

113. As far as activity in regard to the area falling in CRZ-III is concerned (we must notice that it is the case of the island owner that if the island falls in a Zone, it must fall in CRZ-III), the case of the island owner is that it is only doing repair and reconstruction which is permissible activity under the 2011 Notification.

114. We notice that the island owners have a definite case that the report of the committee is prepared without giving notice to the island owners. There is no case for the authority that notice was given. The report itself does not appear to indicate that notice was given. We may notice that the stand of the authority is that under the Notification, the entire island is covered under CRZ-III or IV of the 2011 Notification. The authority has decided to take action. We record the following findings:

> Admittedly, after 06.01.2011, the backwater islands are covered by the 2011 Notification. Vettilathuruthu island is a backwater island in the State of Kerala which is covered by the 1991 Notification. Going by the materials in the form of the plan of 1995 made under the 1991 Notification, the island fell under CRZ-I. If any construction was commenced or carried out during the currency of the 1991 Notification in the island, it would be clearly hit by the 1991 Notification. Photograph produced along with the report is produced to indicate that the constructions of buildings were underway in the year 2006. The island owners have a case that a hotel was begun in the year 2007. Apparently, the case sought to be projected is that a hotel was commenced in an existing building and there was no construction.

115. It is relevant to recall that under the 2011 Notification, under the caption "CRZ for Kerala", it is provided as follows:

> "2. CRZ for Kerala
>
> In view of the unique coastal systems of backwater and backwater islands along with space limitation present in the coastal stretches of the State of Kerala, the

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 66 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

following activities in CRZ shall be regulated as follows, namely:—

(i) all the islands in the backwaters of Kerala shall be covered under the CRZ notification;

(ii) the islands within the backwaters shall have 50 mts width from the High Tide Line on the landward wide as the CRZ area;

(iii) within 50 mts. from the HTL of these backwater islands existing dwelling units of local communities may be repaired or reconstructed however no new construction shall be permitted.

(iv) beyond 50 mts. from the HTL on the landward side of backwater islands, dwelling units of local communities may be constructed with the prior permission of the Grama Panchayath."

Thereafter, clause (v) provides for various foreshore facilities which may be taken up within 50 metres which are not relevant for our purpose. Thus, 50 metres from the High Tide Line on the landward side, is to be the CRZ area in regard to the backwater islands in Kerala. Under clause (iii) within 50 metres from the High Tide Line, existing dwelling units of local communities may be repaired or reconstructed. No new construction is to be permitted. Beyond 50 metres, dwelling units of local communities may be constructed with permission. It is clear that the island owner cannot claim the benefit of the aforesaid clause, aswhat is permitted is dwelling unit of local community. The island owner which is also a corporate body, cannot be treated as local community. But then, Shri. K. I. Mayankutty Mather would submit that under the 2011 Notification, what is provided as aforesaid, is a further relaxation and what is contemplated is to locate the island in the appropriate zone. Thus, if the island falls in CRZ-III, then the relevant clause therein would also apply. We deem it necessary to refer to Ground Nos. 44 and 47 in W.P. (C). No. 2947/13 filed by the island owners. They read as follows:

"44. It is further submitted that this respondent is entitled to re-construct authorized structures as the same is permitted under CRZ Notification, 2011. It is respectfully submitted that category V creates a separate category in respect of backwater islands. Within CRZ V, i.e. Within 50 metres from the High Tide Line, the categorization would have to be done on the basis of CRZ I, II and III. It is submitted that in respect of the petitioner's land being situated in the Panchayat area, the same would have to necessarily be classified as Category III. In respect 4 of CRZ III, although there is the concept of No-Development Zone, it is submitted that re-construction of existing authorized structure not exceeding the existing floor space index and existing plinth area is permitted, even within the No-Development Zone. In this view of the matter, it is respectfully submitted that the works carried on by this respondent in the matter of reconstruction of existing authorized structures pursuant to the valid building permit issued by the Panchayat is perfectly legal and valid.

47. It is further submitted that the restriction placed in CRZ V is that no new construction shall be permitted in the CRZ area of 50 metres from the High Tide Line. Reconstruction of existing authorized structures is permitted."

116. Let us consider the relevant provisions in CRZ-III. It, inter alia, reads as follows:

"III. CRZ-III,- A. Area upto 200 mts. from HTL on the landward side in case of seafront and 100 mts. along tidal influenced water bodies or width of the creek whichever is less is to be earmarked as "No Development Zone (NDZ)"-

(i) the NDZ shall not be applicable in such area falling within any notified port limits;

(ii) No construction shall be permitted within NDZ except for repairs or reconstruction of existing authorized structure not exceeding existing Floor

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 67 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

Space Index, existing plinth area and existing density and for permissible activities under the notification including facilities essential for activities; Construction/reconstruction of dwelling units of traditional coastal communities including fisherfolk may be permitted between 100 and 200 metres from the HTL along the seafront in accordance with a comprehensive plan prepared by the State Government or the Union territory in consultation with the traditional coastal communities including fisherfolk and incorporating the necessary disaster management provision, sanitation and recommended by the concerned State or the Union territory CZMA to NCZMA for approval by MoEF;

(iii) however, the following activities may be permitted in NDZ-

(a) agriculture, horticulture, gardens, pasture, parks, play field, and forestry;

(b) projects relating to Department of Atomic Energy;

(c) mining of rare minerals;

(d) salt manufacture from seawater;

(e) facilities for receipt and storage of petroleum products and liquefied natural gas as specified in Annexure-II;

(f) facilities for regasification of liquefied natural gas subject to conditions as mentioned in subparagraph (ii) of paragraph 3;

(g) facilities for generating power by non conventional energy sources;

(h) Foreshore facilities for desalination plants and associated facilities;

(i) weather radars;

(j) construction of dispensaries, schools, public rain shelter, community toilets, bridges, roads, provision of facilities for water supply, drainage, sewerage, crematoria, cemeteries and electric sub-station which are required for the local inhabitants may be permitted on a case to case basis by CZMA;

(k) construction of units or auxiliary thereto for domestic sewage, treatment and disposal with the prior approval of the concerned Pollution Control Board or Committee;

(l) facilities required for local fishing communities such as fish drying yards, auction halls, net mending yards, traditional boat building yards, ice plant, ice crushing units, fish curing facilities and the like;

(m) development of green field airport already permitted only at Navi Mumbai." Thereafter, under Clause B, area between 200 metres to 500 metres, it is stated that various activities which are mentioned in clauses (i) and (x) are permissible. of the same, we feel that clauses (i), (vii) and (ix) are relevant and they are extracted hereunder:

"B. Area between 200 mts. to 500 mts.-

The following activities shall be permissible in the above areas;

(i) development of vacant plot in designated areas for construction of hotels or beach resorts for tourists or visitors subject to the conditions as specified in the guidelines at Annexure-III;

(vii) construction or reconstruction of dwelling units so long it is within the ambit of traditional rights and customary uses such as existing fishing villages and goathans.

(ix) reconstruction or alteration of existing authorised building subject to sub-paragraph (vii),

(viii);"

Apparently, the island owners are claiming the benefit of clause A (ii) under CRZ-III. In regard to the same, we record the following reasoning and conclusions:

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 68 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

The No Development Zone under CRZ-III extends to 100 metres in respect of islands (there is no case that the width of the water body is less than 100 metres). What is permitted is the construction by way of repairs or reconstruction of existing authorised structure, not exceeding existing floor space index, existing plinth area and existing density. More important is the further requirement. The repair or reconstruction must be for permissible activities under the Notification including facilities essential for activities. It is apparently for running the resorts/hotel that the reconstruction work was done (In this connection we must notice that the permit granted by the panchayat states that it is for reconstruction). No doubt, in the provision relating to conditions, there is also reference to repair. Whatever that be, the question arises whether, is the running of a hotel or resort permissible activity under the Notification. Furthermore, the next question which would arise is whether, if it is permissible, permission was sought and obtained from the Authority empowered under the Notification.

117. We have already referred to the Norms for regulation of activities which are permitted in the No Development Zone. They include agriculture, horticulture, gardens, pasture, parks, play field, forestry, projects relating to Department of Atomic Energy, mining of rare minerals, salt manufacture from sea water, facilities for receipt and storage of petroleum products and liquefied natural gas, facilities for generating power by non conventional energy sources, construction of dispensaries, schools and other facilities, etc. Tourism related activities, namely running a hotel or resort are clearly not seen among the permitted activities in the No Development Zone. Thus, even if it is for reconstruction or repairs, it must be in respect of an existing authorised structure. Apart from requirements as to floor space index, plinth area and density, the reconstruction or repairs must be for carrying out permissible activities. It is only between 100 and 200 metres. Construction/reconstruction or repairs of dwelling units of traditional coastal communities including fisher folk is permitted along the sea front in accordance with the comprehensive plan prepared by the Government in consultation with the concerned community and incorporating the necessary disaster management provision, sanitation and recommended by the concerned State for approval by MoEF. Therefore, in this case, even though the panchayat granted building permit for reconstruction, under Rule 26(4) of the Kerala Panchayat Building Rules 2011, the reconstruction can only be in conformity with the terms of the Notification.

118. Under paragraph 4 of the 2011 Notification dealing with regulation of permissible activities in CRZ areas it is, inter alia, provided under clause (ii)(a) that those activities not enlisted in the EIA Notification 2006 require clearance from MoEF. The reconstruction/repair for running a resort which is essentially tourism activity does not appear to be covered by the EIA Notification 2006. The island owners do not even have a case that they have obtained any permission from the MoEF for the activity. In fact, if one goes by the permissible activities under CRZ-III which we have already referred to in the No Development Zone and in respect of which zone, in fact, the island owners lay their claim, as already noted by us, the reconstruction/repair is not for any permissible activity and the question of granting permission itself may not arise. Though it could be said that what is not prohibited under Paragraph (3) can be treated as permitted under the Notification, provided, no doubt, that it required water front and foreshore facilities, since what is permitted in the No Development Zone (1 to 200 metres) in CRZ-III is specifically provided for in CRZ-III and it does not include tourism projects, the construction (reconstruction) is insupportable. (Even bringing it under clause (ii)(a) of paragraph 3 as mentioned above, clearly the activities would require clearance from the Ministry of Environment and Forest (MoEF). Admittedly, no such permission is obtained. Therefore, we have no hesitation in taking the view that the activity of reconstruction which has been done, is patently illegal. In fact, we uphold the contention of the Authority in this regard that the activities of the

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 69 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

island owner which are tourism related, are impermissible in the No Development Zone.

119. We are not inclined to take a different view of the matter, even though it could be said that the No Development Zone as such is not marked in the plan prepared in the year 1995. Going by the case of the island owners in grounds Nos. 44 and 47, it is clear that the reconstruction was done within fifty metres of the High Tide Line. In the plan prepared in the year 1995, the entire island was treated as CRZ-I under the 1991 Notification. The new plan is not yet prepared. But, at the same time, if construction has been done in the No Development Zone of the CRZ-III area, as appears to be the case, then such reconstruction is insupportable and must be dealt with. We must further also notice that under the caption "CRZ for Kerala", the zone has been determined at 50 metres from the High Tide Line on the landward side. Beyond 50 metres from the HTL, all that is permitted under "CRZ for Kerala" is the putting up of dwelling units of local community with the prior permission of the Grama Panchayat. Thus, whichever way one looks at it, the construction or rather reconstruction work done by the island owners appears to us to be patently illegal, even though the plan as such is not yet prepared under the 2011 Notification. The island owners cannot claim protection from the wrath of the terms of the Notification which are clear. It becomes clear that even assuming that the six structures mentioned in the building permit issued to the island owner were existing in 1991, since they have been reconstructed as per the building permit issued on 30.4.2012, when the 2011 Notification was in force and in violation of the same, the said reconstructed buildings are clearly illegal. In fact, of the six buildings, we have already noted that building Nos. 193A, 193B and 193/C are seen numbered with the island owner as the original owner and they are seen numbered from 2002 and 2003 onwards. Even 1/95 is shown as numbered from 1993 onwards. The reconstruction activity, as already held by us, is seen to have been done by the island owners themselves in the No Development Zone and they cannot be allowed to stand. Equally, there cannot be any doubt that the new construction referred to by the panchayat itself and which is admitted by the island owner, is patently illegal. Even if the structure does not require a permit and even if it is beyond fifty metres, in so far as the Notification under CRZ-V, does not appear to permit the same, the said construction is illegal. The terms of the 2011 Notification are not challenged. Then there remains the question of building Nos. 193/D and 193/E. The island owner is shown as the original owner. It is stated by the panchayat that they are the owners from 2011 onwards. There is no denial of the said fact in the Counter Affidavit by the island owner. That is to say, there is no case that the island owner is not the original owner and that too from the year 2011 onwards. The 1991 Notification has been there from 19.02.1991. At least from 24.9.1994 under the 1991 Notification, new constructions were forbidden in the CRZ-I area. Proceeding on the basis of the CRZ 2011, and that it fell within CRZ-III, also constructions as done cannot be done within fifty metres from the High Tide Line. In fact, there is no case that the said buildings are mentioned in the sale deeds under which the island owners have acquired the property. In such circumstances, we would think that we can safely conclude that either they were constructed during the currency of the 1991 Notification or the construction was completed during the currency of the 2011 Notification by the island owner. If it was commenced and completed in 2011 also, it falls foul of the Notification of the year 2011. We would think that in regard to the said structures also, namely 193/D and 193/E, it can be concluded that they were put up by the island owners. 193/D is incidentally shown as four rooms having concrete flooring and it is from 2011 onwards, it is stated. As far as building No. 193/E is concerned it is shown to be from 2011 onwards with three rooms and cement flooring. As regards the unnumbered buildings - five in number, are concerned, according to the island owners, they have a case apparently that they are used for storing of

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 70 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

materials and for the staying of labourers who are residing in the property in connection with the renovation works, etc. They have a case that there are twelve buildings and that all the buildings have been in existence even in the year 1991. We cannot positively find as to when these buildings have been put up. The authority is to consider and take action with opportunity to the island owner in regard to the said unnumbered buildings. The exact width of the island is, no doubt, not before us. But, there is no case for the island owner that the island has a width of more than 200 metres.

120. The next area where we must consider the question is the effect of the reference to Vembanad Lake as falling in Critical Vulnerable Coastal Area (hereinafter referred to as CVCA). The CVCA is referred to under areas requiring special consideration for the purpose of protecting the critical coastal environment and difficulties faced by local bodies. They are referred to as the Sunderban regions of West Bengal and other ecologically sensitive areas identified as under the Environment (Protection) Act and managed with the involvement of the coastal communities including fisher folk. It is thereafter that it is provided that the entire Sunderban mangrove area and other ecologically important areas, such as, Vembanad in Kerala among other areas, shall be declared as CVCA through a process of consultation with the local fishermen and other communities inhabiting the area and depend on its resources for their livelihood with the objective of promoting conservation and sustainable use of coastal resources and habitats. It is also provided that the process of identifying planning, notifying and implementing the CVCA shall be detailed in the guideline which will be developed and notified by the Ministry of Environment and Forest in consultation with the stake holders, like the State Government, local communities and fisher fake and the like inhabiting the area. There is reference to integrated management plan being prepared taking into account various elements which are detailed. It is further provided that till such time as the plans are approved and notified, construction of dispensaries, school, public rain shelters, community toilets, bridges, roads, jettys, water supply shall be permitted on a case to case basis as required by the inhabitants. The stand of the authority is that Vembanad has been notified as CVCA. There are two ways of looking at the issue. Vembanad in Kerala is referred as an identified ecologically important area. The provisions contemplate declaring Vembanad as a CVCA. The authority would take the stand that it has so been declared. The provisions contemplate that the process of identifying, planning, notifying and implementing the CVCA will be detailed in the guideline. The guideline is to be developed and notified by the Ministry of Environment and Forest (MoEF). The guideline is to be made on the basis of consultation with various stake holders. We are not apprised of the guidelines. The actual process declaring the Vembanad as CVCA through the process of consultation with the local fisher and other communities who inhabit the area and depend on the resources for their livelihood, has not been done. But, we notice that till such time as the integrated management plan are approved and notified only certain facilities required for the traditional inhabitants are to be permitted on a case to case basis by the authority with due regard to the views of the coastal communities including the fisher folk.

121. In this regard, we may notice one feature. Vembanad in Kerala is referred to as the ecologically sensitive area. The process of declaring the same as CVCA on the basis of consultation is apparently an ongoing process. We may pose a question. The whole purport of the CVCA is that it is an ecologically sensitive area. As we understand, the whole idea behind the CVCA is that it becomes a ecologically sensitive area by reason of the fact that it requires special consideration for protecting its environment. The underlying crucial assumption is that there are local fisher and other communities inhabiting the area and depend on its resources for their livelihood. In the islands in question, as on the date of the 2011 Notification, could it be said that

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 71 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

there are local fisher or local communities as such, as the company and island owners have virtually own the substantial portion and the rest, appears to be puramboke. If that is so, could it be said that the islands also fall within the Vembanad of Kerala and, therefore, is a CVCA. The other way of looking at it is Vembanad is declared as ecologically sensitive. The Vembanad, a wet land system was included in the list of wet lands of international importance, as defined by the Ramsar Convention for the conservation and sustainable utilization of wet lands in 2002. When the whole of Vembanad lake is seen included as a Critical Vulnerable Coastal Area (no doubt to be declared through a process of consultation which is yet to take place), a view may have to be taken which serves the purpose of the area being treated as ecologically sensitive area and hence Critical Vulnerable Coastal Area. Apparently, the underlying concept and the focus is on the fisher folk. Any developmental activity on the islands may have an impact on the fishing activities and the rights of the fishermen operating in the area.

122. It may be noticed that in the 1991 Notification and the 2011 Notification, marine parks are specifically mentioned as falling under CRZ-I. In the CRZ-I under the 1991 Notification, apart from marine parks, there is reference to areas close to breeding and spawning of fish and other marine life. In the 2011 Notification, however, while retaining the marine parks, the words "areas close to breeding and spawning of fish and other marine life" are not present. Likewise, under the 1991 Notification, the areas likely to be inundated due to rise in sea level consequent upon global warming are shown under CRZ-I. This category is not seen included in CRZ-I in the 2011 Notification. Therefore, it is a conscious decision to exclude such areas from the ambit of CRZ-I. However, the words "breeding and spawning grounds of fish" are found used in connection with the words "ecologically sensitive areas" in Annexure III guidelines relating to development of beach resorts or hotels in designated areas of CRZ-III and CRZ-II.

123. As far as Vettilathuruthu Island is concerned, there are three ways to look at the issue. In so far as buildings which have been constructed by the island owner during the currency of the Notification issued in 1991 are concerned, they are clearly in the teeth of the 1991 Notification and action must necessarily be taken for removal of the same. Secondly, reconstruction work appears to have been done during the currency of the 2011 Notification. Two buildings (193/D and 193/E) were also constructed illegally. Also another new construction was admittedly underway. We have already recorded our findings. It appears to be clear to us that the so-called reconstruction work has been done contrary to the 2011 Notification which was in force and, therefore, the construction also attracts Rule 26(4) of the Kerala Panchayat Building Rules, 2011 and also there was no permission even sought or obtained from the Authority under the Notification and hence action must necessarily would have to be taken for the removal of the same also. If the constructions have been made in respect of the area falling in CRZ-IV of 2011 Notification, clearly that would be illegal. Here, we have no material to hold as to whether any construction has been made in CRZ-IV. It is to be noticed that CRZ-IV under the 2011 Notification, is the water area from the Low Tide Line to 12 nautical miles on the sea ward side and also the water area of the tidal influenced water body from the mouth of the water body at the sea upto the influence of the tide which is measured as 5 Parts Per Thousand during the driest season of the year. We will proceed on the basis that the construction is done in the CRZ-III area, but as found by us, it is illegal. The third aspect of the matter is that in so far as the islands fall in the Vembanad in Kerala, going by Clause 4(e) of Paragraph 8 of the 2011 Notification which we have adverted to, till such time as the integrated management plan are approved and notified, only certain constructions required by the traditional inhabitants are to be permitted which include Dispensary, Schools, Bridges, Roads and the like. If that is so, any construction which is not

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 72 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

covered by Clause 4(e) may be impermissible. In so far as the islands in question are concerned, they are clearly in the Vembanad. Therefore, they would be subject to the special provision relating to the Vembanad which permits construction of certain public utility buildings which we have already adverted to. Impliedly, any construction as such would appear to be tabooed. It is pertinent to note in this regard that the island owners have claimed that what they have done is only reconstruction works which are not constructions. The word "construction" is used as the opening words of Paragraph 8 would show as construction activities, inter alia. Thereafter, there is reference to the words "new construction" used in CRZ-I. Further, the words used are "no construction is to be permitted in the No Development Zone under CRZ-III except for repairs or re-construction". Under clause B(i) of CRZ-III it is stated "development of vacant plots in designated areas for construction of hotels or beach resorts". Since therein, the words used are "development of vacant plot", the construction intended obviously must be a new construction. The words "reconstruction or alteration of existing authorised building" are found in clause B(ix) under CRZ-III. Therefore, we notice that under the concept of "construction", various activities are specifically referred to as new construction, repairs, reconstruction and also alteration. If one goes by clause 4(b), all that is to be permitted are dispensary, schools, etc. Therefore, the activity of the island owner does not appear to fall within what is permitted. Therefore, it is clear that the structures put up by the island owner may not stand when placed side by side the terms of the Notification.

124. We do not deem it necessary to go into the question raised that the guidelines framed under the 1991 Notification permitting development of vacant plots for construction of hotels and beach resorts, are intended to apply only to the beach resorts or hotels meaning thereby that it is not intended to apply for the constructions done on the islands. There is also a case for the island owners that they have only started the hotels in the existing buildings. We may only notice that the word "beach" is defined in the Oxford Dictionary as, inter alia, the seashore or lakeshore covered with pebbles or sand. As far as construction activity is concerned, the further question may also arise whether it is the construction of the building housing the tourist activities or the operation of a building for the purpose of resort or hotel or both which are covered. The housing of a resort or a hotel in an existing building may also produce deleterious impact on the environment. No doubt, the guidelines issued under the 1991 and the 2011 Notifications prohibit construction of beach resorts and hotels in ecologically sensitive areas which include areas of breeding and spawning of fish. We do not wish to pronounce on the said issue as such.

125. As far as the question of encroachment by the island owners is concerned, we notice that a Statement is already filed stating that there is no encroachment by the island owner.

Reliefs:

126. We see that no ground has been made out for granting any relief in W.P. (C). Nos. 2947/13 and 28485/11. We also see no ground has been made out to grant relief in W.P. (C). No. 4808/12. No ground has been made out to interfere with Exts.P5 and P6 in W.P. (C). No. 4808/12. The contention raised that the Plan was prepared in a hurry and this is evident from the Judgment of the Apex Court in *Indian Council for Enviro-Legal Action* v. *Union of India* ((1996) 5 SCC 281), cannot be accepted. The Plan has been approved by the Central Government. There is no basis for the challenge made by the company.

127. What is the relief to be granted in W.P. (C). Nos. 8299/12, 19564/11, 34799/11 and 12965/12. As far as the company is concerned, the case of the company is that they have started construction on the basis of the No Objection granted on 02.8.1996. Its further case is that in the year 2007, it was issued building

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 73 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

permit by the panchayat and on the strength of the same, constructions proceeded. As already noted, it is true that the earliest of the Writ Petitions was filed in the year 2011 against the construction. At the same time, we must, as already noted by us, even according to the company it obtained building permit in which we have already referred to the conditions 3 and 4. Even according to those conditions, the construction was to be compliant with the Coastal Regulation Notification. We have also already noticed that under Section 23(4) of the Building Rules, even with a building permit, it is not open to the company to ignore the Notification. We have already commented on the magnitude and scale of the constructions. We would think that those constructions were undertaken which can only be described as a misadventure, without having regard to the consequences on the environment and in utter disregard of the law. The company must be treated as being cognizant of the Coastal Regulation Notification and must be treated as cognizant of the breach they were committing. The company cannot justify the naked violation of the mandatory terms of the Notification in the circumstances of the case. The relief is sought by the petitioners for demolition of the structures.

128. This is a matter relating to depredation of the environment. Violation of the environmental law, it has been held, is not to be viewed lightly. There is no power under the Notification or the Environment (Protection) Act to regularise such illegal constructions unlike the power available under the Building Rules. Having regard to the object of the Act and the Notification which is to preserve such sensitive areas as such, also it becomes necessary to order the demolition of the constructions. An order for demolition would in other words advance the object of the law and the Notification. At this juncture, we may also consider that even if the island is not treated as falling under CRZ-I where constructions of the nature put up by the company is completely prohibited and treating it as falling under CRZ-III in which zone alone the company can fall, the constructions which have been put up by the company are clearly uncontemplated by the provisions relating to CRZ-III. Therefore, whichever way we look at it, the conclusion is inescapable that permitting the constructions to remain, will be a affront to the rule of law and allowing the breach of the Notification to remain unremedied. We have already been referred to Section 5 of the Environment (Protection) Act which endows the concerned authority with power to issue any direction in the performance of its duties and functions to any person and which is binding on the person.

129. As far as the island owners are concerned also, regarding the illegality of constructions made during the currency of the 1991 Notification is concerned, we see no reason to take a different view. At any rate, those constructions along three earlier constructions became the subject matter of re-construction under the permit issued in the year 2012 which was done during the pendency of the Writ Petition. Here also, we have found that the concerned activity based on the reconstruction is a palpable violation of the Notification in force. We see no reason to take a different view. The same is the position with regard to constructions numbered in 2011 and another noted as underway.

130. The threat of global warming has assumed alarming proportions. In matters relating to the protection of the environment, a short sighted and myopic approach, may satisfy some and may be many in the short run. But, the Court when it enforces laws in protection of the environment becomes the custodian of the interests of not only the present generation, but also of posterity. While it is convenient and even may sound as just to overlook the mandate of a cumbersome or seemingly oppressive law, both the law giver and the Courts have to enforce the law and cannot but act with vision. Prompt and effective enforcement of such laws will in due course result in the inculcation of the values embedded in the law as habits which will be followed by the future generations.

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 74 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

131. The upshot of the above discussion is as follows : W.P. (C). Nos. 4808/12, 2947/13 and 28485/11 will stand dismissed. W.P. (C). Nos. 8299/12, 19564/11, 34799/11 and 12965/12 are disposed of as follows:

As far as encroachment by the company is concerned, we notice that already action has been taken under the Land Conservancy Act. We only direct that the said action will be proceeded with in accordance with law and we also reiterate that it will be open to the company to take up all the contentions available in law. We decline jurisdiction in so far as reliefs relating to compensation and the restoration of stake nets are concerned in W.P. (C). No. 19564/11. But, we make it clear that the petitioners are free to agitate their grievances in any competent forum.

132. There will be a direction to the Government of India/Authority to ensure that the constructions which have been made by the company in the Nediyathuruthu island are removed in so far as it violates the terms of the 1991 Notification, as held by us. Action in this regard shall be taken within a period of three months from the date of receipt of a copy of this Judgment.

133. We further direct that till such time as our directions as above are complied with, the company shall not proceed to make any further constructions. The company cannot carry out any kind of operations in the structures constructed in the island till the removal as ordered. As far as the island owners are concerned also, we direct that they will not carry out any further operations in the structures which are the subject matter of these cases after one week from today till such time as the direction given by us is complied with. We are allowing one week, as according to them, they are running the business. Thereafter, no kind of operations shall be done in those structures.

134. We further direct the Government of India/Authority to take action against the island owner to ensure that the unauthorised structures which have been put up on the basis of the permit issued by the panchayat in 2012 and the buildings bearing Nos. 193/D and 193/E are removed within a period of three months from the date of receipt of a copy of this Judgment. This direction will also embrace any new construction which has been noted by the panchayat itself. We are not pronouncing on the issue of mangroves being present as there is no plea as such raised.

135. We further direct the Government of India/Authority to consider taking action in regard to the unnumbered buildings found on Vettilathuruthu island as per law as against the island owners.

136. We are constrained to make certain observations which we consider highly essential in the interest of justice. The cases which we are disposing of by this Judgment characterise the total indifference and non-application of mind by the authorities and particularly the local bodies. The Notifications issued are intended to protect the coasts, the environment in general and to achieve the sustainable development, particularly of the fisher folk and other local population. The Notifications are meant to be enforced with full vigour. Circulars have been issued to the local bodies. We notice, however, that only lip service is being paid if at all to the terms of the Notifications. By such callous indifference and consequent blatant violation of the Notifications, a law which is meant to address serious environmental issues which adversely affect the present and future generations, is being completely undermined. If only the local body was vigilant and had conformed to the law, the matters would not have come to the sorry state of affairs the parties find themselves in. The non-preparation of the cadastral survey, though specifically directed to be done by the local bodies, is indefensible. The action of the Assistant Engineer in incorporating the conditions in the permit issued to the company is to say the least, most intriguing and unsupportable. We would hope that all the authorities including the Governments, both Central and State, will put their heads together and bring about not only

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 75 Wednesday, January 11, 2023
Printed For: Socio Legal Information Centre .
SCC Online Web Edition: http://www.scconline.com
© 2023 EBC Publishing Pvt. Ltd., Lucknow.

dissemination of clear information regarding the Notification, but also implement its terms in an effective manner.

———

Disclaimer: While every effort is made to avoid any mistake or omission, this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification is being circulated on the condition and understanding that the publisher would not be liable in any manner by reason of any mistake or omission or for any action taken or omitted to be taken or advice rendered or accepted on the basis of this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification. All disputes will be subject exclusively to jurisdiction of courts, tribunals and forums at Lucknow only. The authenticity of this text must be verified from the original source.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 1 Monday, January 16, 2023
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

reclassifying posts, it is quite clear that certain posts which then carried a higher scale of pay, were clubbed together and classified as Senior Work Inspectors while some other posts which then also carried a lower pay scale were clubbed together and redesignated as Junior Work Inspectors. Therefore, right from the year 1971, there has been a clear distinction between the two posts and the scales of pay attached to the two posts. The order of the Administrative Tribunal in *Thimmaiah case* was also not challenged further and has become final and binding.

9. The respondents have also pointed out in their affidavit that since all these posts are in the work-charged establishment, they shall cease to exist immediately after the retirement of the incumbents. There is no promotional avenue in the work-charged establishment. There is also no fresh recruitment. It is only in the case of absorption that the persons in the work-charged establishment will be fitted into appropriate posts. Looking to all these circumstances, we do not see any reason to disagree with the view taken by the Tribunal in the present case. The State Government may consider the question of recovery of arrears in the light of the directions given by the Tribunal. The appeal is, accordingly, dismissed. There will, however, be no order as to costs.

(1999) 2 Supreme Court Cases 718

(BEFORE S.B. MAJMUDAR AND M. JAGANNADHA RAO, JJ.)

A.P. POLLUTION CONTROL BOARD .. Appellant;

Versus

PROF. M.V. NAYUDU (RETD.) AND OTHERS .. Respondents.

Civil Appeals Nos. 368-371 of 1999 with Nos. 372 and 373 of 1999†, decided on January 27, 1999

A. **Constitution of India — Arts. 32, 136, 226 and 21 — Interference in environmental matters — Procedure — Making reference to expert body — Permissibility — Keeping Art. 21 in view, Supreme Court while dealing with environmental matters under Arts. 32 or 136 and High Court, under Art. 226, held, can refer scientific and technical aspects for investigation and opinion to statutory expert bodies having combination of both judicial and technical expertise in such matters, like the appellate authority under the National Environmental Appellate Authority Act, 1997 — In State Pollution Control Board's appeal against the order of the Authority under S. 28 of Water (Prevention and Control of Pollution) Act, 1974, Supreme Court referring to the appellate authority under the 1997 Act the questions: (i) whether the industry for production of "BSS castor oil derivatives" with "glycerine, spent bleaching earth and carbon and spent nickel catalysts" as by-products, was a hazardous industry and what its pollution potentiality was, and (ii) whether its operation was likely to affect the sensitive catchment area resulting in pollution of the lakes supplying drinking water to the twin cities of Hyderabad and**

† From the Judgment and Order dated 1-5-1998 of the Andhra Pradesh High Court in W.Ps. Nos. 17832, 16969, 18681 of 1997 and 2215 of 1998

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 2 Monday, January 16, 2023
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Secunderabad — The question of granting or not granting permission to the industry to make trial runs to enable the monitoring and analysis of the results of pollution, also left to be decided by the said authority — Three months' time-limit suggested for submission of the opinion by the said authority — Environment and Pollution Control — Water (Prevention and Control of Pollution) Act, 1974, Ss. 25 and 28 — Practice and procedure — Reference of scientific and technical aspects of environmental matters by Supreme Court/ High Courts to expert bodies having both judicial and technical expertise — Permissibility

B. **Constitution of India — Arts. 21 and 32 & 226 — "Life" and "liberty" — Environmental degradation — Environment aspects concern "life" and human right aspects concern "liberty" — Jurisdiction under Arts. 32 and 226 invocable — Environment Protection and Pollution Control**

The respondent-Company was incorporated with the object of setting up an industry for production of BSS castor oil derivatives. The Government of India granted the respondent-Company a letter of intent under the Industries (Development and Regulation) Act, 1951 subject, inter alia, to obtaining NOC from the A.P. Pollution Control Board. On 7-4-1997, the Company applied to the A.P. Pollution Control Board, seeking clearance to set up the unit under Section 25 of the Water (Prevention and Control of Pollution Act, 1974 (hereinafter "Water Act"). It listed "glycerine, spent bleaching earth and carbon and spent nickel catalysts" as by-products of its process. The A.P. Pollution Control Board rejected the Company's application mainly on the ground that the unit was a polluting industry which fell under the red category of polluting industry under Section 11 of the classification of industries adopted by MOEF, GOI. The appellate authority under Section 28 of the Water Act, 1974, by order dated 5-1-1998 allowed the appeal of the Company against A.P. Pollution Control Board's order. The appellate authority held the industry in question to be not a polluting industry and directed the A.P. Pollution Control Board to give its consent for the establishment of the factory. The High Court upheld the appellate authority's order. In the instant appeals filed by the A.P. Pollution Control Board and another, a question arose whether the Supreme Court while dealing with environmental matters under Article 32 or Article 136 or High Courts under Article 226 can make reference to the National Environmental Appellate Authority under the 1997 for investigation and opinion. Answering in the affirmative, the Supreme Court

Held :

Environmental concerns arising in the Supreme Court under Article 32 or under Article 136 or under Article 226 in the High Courts are of equal importance as human rights concerns. Both are to be traced to Article 21 which deals with the fundamental right to life and liberty. While environmental aspects concern "life", human rights aspects concern "liberty". In the context of emerging jurisprudence relating to environmental matters, — as is the case in matters relating to human rights, — it is the duty of the Supreme Court to render justice by taking all aspects into consideration. However, in such cases sometimes the Supreme Court has been finding sufficient difficulty in providing adequate solutions to meet the requirements of public interest, environmental protection, elimination of pollution and sustained development. The monitoring of a case as it progresses before the professional authority and the consideration of objections raised by affected parties to the opinion given by these professional technical bodies have again been creating complex problems. Therefore, with a view to ensure that there is neither danger to the environment nor to the ecology and, at the same time, ensuring sustainable development, it has to be held that the Supreme Court can refer scientific and

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 3 Monday, January 16, 2023
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

technical aspects for investigation and opinion to expert bodies such as the appellate authority under the National Environmental Appellate Authority Act, 1997. The said authority comprises a retired Judge of the Supreme Court and members having technical expertise in environmental matters whose investigation, analysis of facts and opinion on objections raised by parties, could give adequate help to the Supreme Court or the High Courts and also the needed reassurance. Any opinions rendered by the said authority would of course be subject to the approval of the Supreme Court. Such a procedure can be adopted in matters arising in the Supreme Court under Article 32 or under Article 136 or arising before the High Courts under Article 226 of the Constitution of India. (Paras 57 and 54)

Paramjit Kaur v. *State of Punjab*, (1999) 2 SCC 131: (1998) 5 Scale 219 : JT (1998) 6 SC 338; *Paramjit Kaur* v. *State of Punjab*, (1999) 2 SCC 131 at p. 141, *relied on*

In the instant case, the following questions are being referred to the appellate authority under the National Environmental Appellate Authority Act, 1997 for being decided as far as possible within three months:

> "(*a*) Is the respondent-industry a hazardous one and what is its pollution potentiality, taking into account the nature of the product, the effluents and its location?
>
> (*b*) Whether the operation of the industry is likely to affect the sensitive catchment area resulting in pollution of the Himayat Sagar and Osman Sagar Lakes supplying drinking water to the twin cities of Hyderabad and Secunderabad?" (Paras 58, 59 and 62)

The question whether the industry concerned may be permitted to make trial runs has also to be decided by the said authority. (Para 61)

C. **Environment Protection and Pollution Control — Judicial intervention — Nature, scope and limits of — Industrial pollution cases — Nature of problems arising in such cases under Arts. 32, 136 and 226 pointed out, solutions suggested and necessary directions given by Supreme Court — Such cases involve correctness of technological and scientific opinions regarding efficacy of the technology adopted by the industry or regarding the alternative technology or modification suggested by Pollution Control Board, while scientific opinions are themselves uncertain in nature — The difficulty faced by the courts in dealing with such problems is a global phenomenon — Position in India, U.K. and U.S.A. reviewed — Development of new legal theories and rules of evidence formulated on account of uncertainty of science in the environmental context traced — Replacement of assimilative capacity principle by precautionary principle and evolution of special burden of proof noticed — Need for modification of statute law and inclusion of both judicial and technical personnel in the appellate body or tribunal re-emphasised and necessary directions issued — Principle of inter-generational equity — Precautionary principle — Development and scope of explained — Water (Prevention and Control of Pollution) Act, 1974, Ss. 25 and 28 — Air (Prevention and Control of Pollution) Act, 1981, S. 31 — Hazardous Wastes (Management and Handling) Rules, 1989, R. 12 — Environment (Protection) Act, 1986, S. 3(3) — National Environment Tribunal Act, 1995, Ss. 10(1)(b), 10(2)(b) & 10(2)(c) — National Environmental Appellate Authority Act, 1997 — Constitution of India, Arts. 32, 136 and 226 — Interference in environmental matters — Stockholm Declaration of the U.N. Conference on Human Environment, 1972, Principle 6 — U.N. General Assembly Resolution on World Charter of Nature, 1982, Principle 11 — Rio Conference of 1992, Principle 15 — Special Rapporteur, International Law Commission dated 3-4-1998, paras 61 to 72**

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 4 Monday, January 16, 2023
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

D. **Evidence Act, 1872 — Ss. 101 and 106 — Environment cases — Reversal of burden of proof based on precautionary principle — Onus of proof now on person who wants to change the status quo — Environment Protection and Pollution Control**

In matters regarding industrial pollution and in particular, in relation to the alleged breach of the provisions of the Water (Prevention and Control of Pollution) Act, 1974, its Rules or notifications issued thereunder, serious issues involving pollution and related technology have been arising in appeals under Article 136 and in writ petitions under Article 32 of the Constitution of India filed in the Supreme Court and also in writ petitions before High Courts under Article 226. The cases involve the correctness of opinions on technological aspects expressed by the Pollution Control Boards or other bodies whose opinions are placed before the courts. In such a situation, considerable difficulty is experienced by the Supreme Court or the High Courts in adjudicating upon the correctness of the technological and scientific opinions presented to the courts or in regard to the efficacy of the technology proposed to be adopted by the industry or in regard to the need for alternative technology or modifications as suggested by the Pollution Control Board or other bodies. (Para 23)

The difficulty faced by environmental courts in dealing with highly technological or scientific data appears to be a global phenomenon. (Para 24)

Lord Woolf: "*Are the Judiciary Environmentally Myopic*", 1992 Journal of Envtl Law, Vol. 4, No. 1, p. 1; *Environment Enforcement*: *The Need for a Specialised Court*; Jour of Planning & Environment, 1992, p. 798, p. 806; Final Report of Carnegie Commission of Science and Technology (1993), *referred to*

In the environment field, the uncertainty of scientific opinions has created serious problems for the courts. It is this uncertainty of science in the environmental context, that has led international conferences to formulate new legal theories and rules of evidence. (Paras 27 and 30)

Daubert v. *Merrel Dow Pharmaceuticals Inc.*, (1993) 113 S Ct 2786, *referred to*

The "uncertainty" of scientific proof and its changing frontiers from time to time has led to great changes in environmental concepts during the period between the Stockholm Conference of 1972 and the Rio Conference of 1992. A three-Judge Bench of the Supreme Court has referred to these changes, to the "precautionary principle" and the new concept of "burden of proof" in environmental matters. However, the meaning of these principles is herein being explained in more detail. (Paras 31 and 32)

Vellore Citizens' Welfare Forum v. *Union of India*, (1996) 5 SCC 647, *referred to*

The precautionary principle replaces the assimilative capacity principle

A basic shift in the approach to environmental protection occurred initially between 1972 and 1982. Earlier, the concept was based on the "assimilative capacity" rule as revealed from Principle 6 of the Stockholm Declaration of the U.N. Conference on Human Environment, 1972. The said principle *assumed* that science could provide policy-makers with the information and means necessary to avoid encroaching upon the capacity of the environment to assimilate impacts and it *presumed* that relevant technical expertise would be available when environmental harm was predicted and there would be sufficient time to act in order to avoid such harm. But in the 11th Principle of the U.N. General Assembly Resolution on World Charter for Nature, 1982, the emphasis shifted to the "precautionary principle", and this was reiterated in the Rio Conference of 1992 in its Principle 15. The inadequacies of science is the real basis that has led to the precautionary principle of 1982. It is based on the theory that it is better to err on the side of caution and

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 5 Monday, January 16, 2023
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

prevent environmental harm which may indeed become irreversible.
(Paras 33 and 34)

The precautionary principle was recommended by the UNEP Governing Council (1989). The Bomako Convention also lowered the threshold at which scientific evidence might require action by not referring to "serious" or "irreversible" as adjectives qualifying harm. (Para 35)

Special Rapporteur, International Law Commission, dated 3-4-1998, paras 61 to 72, *referred to*

The special burden of proof in environmental cases

While the inadequacies of science have led to the "precautionary principle", which in its turn, has led to the special principle of *burden of proof* in environmental cases where burden as to the absence of injurious effect of the actions proposed is placed on those who want to change the status quo. This is often termed as a reversal of the burden of proof, because otherwise in environmental cases, those opposing the change would be compelled to shoulder the evidentiary burden, a procedure which is not fair. Therefore, it is necessary that the party attempting to preserve the status quo by maintaining a less polluted state should not carry the burden of proof and the party who wants to alter it, must bear this burden. If the environmental risks being run by regulatory inaction are in some way "*uncertain* but *non-negligible*", then regulatory action is justified. This will lead to the question as to what is the "non-negligible risk". In such a situation, the burden of proof is to be placed on those attempting to alter the status quo. If insufficient evidence is presented by them to alleviate concern about the level of uncertainty, then the presumption should operate in favour of environmental protection. (Paras 37 and 39)

Ashburton Acclimatisation Society v. *Federated Farmers of New Zealand*, (1988) 1 NZLR 78, *relied on*

Uncertainty and Environmental Learning: (2 Global Envtl. Change 111); Charmian Barton: *The Status of the Precautionary Principle in Australia*, (Vol. 22) (1998) (Harv. Envtt. Law Review, p. 509 at pp. 510-511); *Alyson C. Flournay*: Scientific Uncertainty in Protective Environmental Decision-Making, (Vol. 15) 1991 Harv. Envtt. Law Review, p. 327 at pp. 333-335, *referred to*

Deficiencies in judicial and technical outputs in environmental appellate authorities/ Tribunals

Different statutes in India relating to the environment provide appeals to appellate authorities. But most of them still fall short of a combination of judicial and scientific needs. For example, the qualifications of the persons to be appointed as appellate authorities under Section 28 of the Water (Prevention and Control of Pollution) Act, 1974, Section 31 of the Air (Prevention and Control of Pollution) Act, 1981, under Rule 12 of the Hazardous Wastes (Management and Handling) Rules, 1989 are not clearly spelled out. While the appellate authority under Section 28 in Andhra Pradesh as per the notification of the A.P. Government is a retired High Court Judge and there is nobody on his panel to help him in technical matters, the same authority as per the notification in Delhi is the Financial Commissioner (*see* notification dated 18-2-1992) resulting in there being in NCT, neither a regular judicial member nor a technical one. Again, the Tribunal under the National Environmental Tribunal Act, 1995, which has power to award compensation for death or injury to any person (other than workmen), under Section 10 consists of a Chairman who could be a Judge or retired Judge of the Supreme Court or High Court and a technical member. But Section 10(1)(*b*) read with Section 10(2)(*b*) or (*c*) permits a Secretary to the Government or the Additional Secretary who has been a Vice-Chairman for 2 years to be appointed as the Chairman. These are instances of grave inadequacies. (Para 41)

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 6 Monday, January 16, 2023
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Principle of good governance: need for modification of statutes, rules and notifications by including adequate judicial and scientific inputs

a Of paramount importance in the establishment of environmental courts, authorities and tribunals is the need for providing adequate judicial and scientific inputs rather than leave complicated disputes regarding environmental pollution to officers drawn only from the executive. There is an urgent need to make appropriate amendments so as to ensure that at all times, the appellate authorities or tribunals consist of judicial and also technical personnel well versed in environmental laws. (Paras 42 and 43)

b The Supreme Court has not only contemplated a combination of a Judge and technical experts but also an appeal to the Supreme Court from the environmental court. (Paras 45 and 46)

M.C. Mehta v. *Union of India*, (1986) 2 SCC 176, 202 : 1986 SCC (Cri) 122; *Vellore Citizens' Welfare Forum* v. *Union of India*, (1996) 5 SCC 647, *referred to*

c The Government of India should bring about appropriate amendments in the environmental statutes, rules and notifications to ensure that in all environmental courts, tribunals and appellate authorities, there is always a Judge of the rank of a High Court Judge or a Supreme Court Judge, — sitting or retired — and a scientist or group of scientists of high ranking and experience so as to help a proper and fair adjudication of disputes relating to the environment and pollution. (Para 47)

d There is also an immediate need that in all the States and Union Territories, the appellate authorities under Section 28 of the Water (Prevention of Pollution) Act, 1974 and Section 31 of the Air (Prevention and Control of Pollution) Act, 1981 there is always a Judge of the High Court, sitting or retired, and a scientist or group of scientists of high ranking and experience, to help in the adjudication of disputes relating to the environment and pollution. An amendment to existing notifications under these Acts can be made for the present. Moreover, there is need to see that the appellate authority under the notification issued under Section 3(3) of the Environment (Protection) Act, 1986 for the National Capital Territory and under e Section 10 of the National Environment Tribunal Act, 1995 and other appellate bodies, there are invariably judicial and technical members included. Further, there should be a right of *regular appeal to the Supreme Court*, i.e., an appeal incorporated in the relevant statutes. This is a matter for the Governments concerned to consider urgently, by appropriate legislation, whether plenary or subordinate, or by amending the notifications. (Paras 48, 52 and 65)

f There is also need for amending the notifications issued under Rule 12 of the Hazardous Wastes (Management and Handling) Rules, 1989. What has been said herein applies to all other such rules or notifications issued either by the Central Government or the State Governments. (Paras 49 and 50)

g The appellate authority under the National Environment Appellate Authority Act, 1997 comes very near to the ideals set by the Supreme Court. Under that statute, the appellate authority is to consist of a sitting or retired Supreme Court Judge or a sitting or retired Chief Justice of a High Court and a Vice-Chairman who has been an administrator of high rank with expertise in technical aspects of problems relating to the environment; and technical members, not exceeding three, who have professional knowledge or practical experience in the areas pertaining to conservation, environmental management, land or planning and development. (Para 51)

Principle of inter-generational equity : rights of the future against the present

h The 1972 Stockholm Declaration incorporates this principle in Principles 1 and 2. Several international conventions and treaties have recognised these principles

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 7 Monday, January 16, 2023
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

and, in fact, several imaginative proposals have been submitted including the locus standi of individuals or groups to take out actions as representatives of future generations, or appointing an ombudsman to take care of the rights of the future against the present. (Para 53)

Matter to be listed again H-M/AT/20722/C

Advocates who appeared in this case :

R.N. Trivedi, Additional Solicitor General (Nikhil Nayyar, S.V. Bhatt and Ms Urmila Sirur, Advocates, with him) for the Appellant in CAs Nos. 368-371 and 372 of 1999.

P.S. Narasimha and V.G. Pragasam, Advocates, for the Appellant in C.A. No. 373 of 1999.

M.N. Rao, Senior Advocate (K. Ram Kumar, Y. Subba Rao, Ms Asha G. Nair, Sridhar, Ms Santinarayan and A. Subba Rao, Advocates, with him) for the Respondents/State of A.P.

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

1. (1999) 2 SCC 131 at p. 141, *Paramjit Kaur* v. *State of Punjab* 740*b*
2. (1999) 2 SCC 131: (1998) 5 Scale 219 : JT (1998) 6 SC 338, *Paramjit Kaur* v. *State of Punjab* 740*a*, 740*e*, 740*g*, 741*c-d*
3. (1996) 5 SCC 647, *Vellore Citizens' Welfare Forum* v. *Union of India* 732*f*, 732*h*, 733*c*, 734*e-f*, 737*c-d*, 737*e*
4. (1993) 113 S Ct 2786, *Daubert* v. *Merrel Dow Pharmaceuticals Inc.* 731*f-g*
5. (1988) 1 NZLR 78, *Ashburton Acclimatisation Society* v. *Federated Farmers of New Zealand* 735*d*
6. (1986) 2 SCC 176, 202 : 1986 SCC (Cri) 122, *M.C. Mehta* v. *Union of India* 737*a*, 738*g*

The Judgment of the Court was delivered by

M. JAGANNADHA RAO, J.— Leave granted in all the special leave petitions.

2. It is said:

> "The basic insight of ecology is that all living things exist in interrelated systems; nothing exists in isolation. The world system is weblike; to pluck one strand is to cause all to vibrate; whatever happens to one part has ramifications for all the rest. Our actions are not individual but social; they reverberate throughout the whole ecosystem."
>
> [*Science Action Coalition* by A. Fritsch, *Environmental Ethics*: *Choices for Concerned Citizens*, 3-4 (1980)] (1988, Vol. 12, Harv. Env. L. Rev. at p. 313)

3. Four of these appeals which arise out of SLPs (C) Nos. 10317-10320 of 1998 were filed against the judgment of the Andhra Pradesh High Court dated 1-5-1998 in four writ petitions, namely, WP No. 17832 of 1997 and three other connected writ petitions. All the appeals were filed by the A.P. Pollution Control Board. Three of the above writ petitions were filed as public interest cases by certain persons and the fourth writ petition was filed by the Gram Panchayat, Peddaspur.

4. The fifth civil appeal which arises out of SLP (C) No. 13380 of 1998 was filed against the judgment in WP No. 16969 of 1997 by the Society for Preservation of Environment and Quality of Life (for short "SPEQL")

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 8 Monday, January 16, 2023
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

represented by Shri P. Janardan Reddi, the petitioner in the said writ petition. The High Court dismissed all these writ petitions.

5. The sixth civil appeal which arises out of SLP (C) No. 10330 of 1998 was filed by the A.P. Pollution Control Board against the order dated 1-5-1998 in Writ Petition No. 11803 of 1998. The said writ petition was filed by M/s Surana Oils and Derivatives (India) Ltd. (hereinafter called "the respondent-Company") for implementation of the directions given by the appellate authority under the Water (Prevention and Control of Pollution) Act, 1974 (hereinafter called "the Water Act, 1974") in favour of the Company.

6. In other words, the A.P. Pollution Control Board is the appellant in five appeals and the SPEQL is the appellant in one of the appeals.

7. According to the Pollution Control Board, under Notification No. J.20011/15/88-1A, Ministry of Environment and Forests, Government of India dated 27-9-1988, "vegetable oils including solved extracted oils" (Item 37) was listed in the "RED" hazardous category. The Pollution Board contends that Notification No. J.120012/38/86-1A, Ministry of Environment and Forests of the Government of India dated 1-2-1989, prohibits the location of the industry of the type proposed to be established by the respondent-Company, which will fall under categorisation at No. 11 (*sic*) same category of industry in Doon Valley.

8. On 31-3-1994, based on an Interim Report of the Expert Committee constituted by the Hyderabad Metropolitan Water Supply and Sewerage Board, the Municipal Administration and Urban Development, Government of Andhra Pradesh issued GOMs No. 192 dated 31-3-1994 prohibited various types of development within a 10 km radius of the two lakes, Himayat Sagar and Osman Sagar, in order to monitor the quality of water in these reservoirs which supply water to the twin cities of Hyderabad and Secunderabad.

9. In January 1995, the respondent-Company was incorporated as a public limited company with the object of setting up an industry for production of BSS castor oil derivatives such as hydrogenated castor oil, 12-hydroxystearic acid, dehydrated castor oil, methylated 12-HSA, D.Co., fatty acids with by-products like glycerine, spent bleaching earth and carbon and spent nickel catalyst. Thereafter the industry applied to the Ministry of Industries, Government of India for letter of intent under the Industries (Development and Regulation) Act, 1951.

10. The respondent-Company purchased 12 acres of land on 26-9-1995 in Peddaspur Village, Shamshabad Mandal. The Company also applied for consent for establishment of the industry through the Single-Window Clearance Committee of the Commissionerate of Industries, Government of Andhra Pradesh, in November 1995. On 28-11-1995, the Government of Andhra Pradesh wrote to the Ministry of Industry, Government of India as follows:

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 9 Monday, January 16, 2023
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

"The State Government recommends the application of the unit for grant of letter of intent for the manufacture of BSS grade castor oil in relaxation of locational restriction *subject to NOC from the A.P. Pollution Control Board*, prior to taking implementation steps."

On 9-1-1996, the Government of India issued letter of intent for manufacture of BSS grade castor oil (15,000 tons per annum) and glycerine (600 tons per annum). The issuance of licence was subject to various conditions, inter alia, as follows:

"(*a*) you shall obtain a confirmation from the State Director of Industries that the site of the project has been *approved from the environmental angle by the competent State authority*.

(*b*) you shall obtain a certificate from the concerned *State Pollution Control Board* to the effect that the *measures* envisaged for pollution control and the equipment proposed to be installed meet their requirements."

Therefore, the respondent-Company had to obtain NOC from the A.P. Pollution Control Board.

11. According to the A.P. Pollution Control Board (the appellant), the respondent-Company could not have commenced civil works and construction of its factory, without obtaining the clearance of the A.P. Pollution Control Board — as the relaxation by the Government from location restriction as stated in their letter dated 28-11-1995, was *subject* to such clearance. On 8-3-1996, on receipt of the 2nd Interim Report of the Expert Committee of the Hyderabad Metropolitan Water Supply and Sewerage Board, the Municipal Administration and Urban Development Department issued GO No. 111 on 8-3-1996 reiterating the 10 km prohibition as contained in GO No. 192 dated 31-3-1994 but making some concessions in favour of residential development.

12. In the pre-scrutiny stage on 24-5-1996, by the Single-Window Clearance Committee, which the Company's representative attended, the application of the industry was rejected by the A.P. Pollution Control Board since the proposed site fell within 10 km and such a location was not permissible as per GOMs No. 111 dated 8-3-1996. On 31-5-1994, the Gram Panchayat approved plans for establishing a factory.

13. On 31-3-1996, the Commissionerate of Industries rejected the location and directed an alternative site to be selected. On 7-9-1996, the District Collector granted permission for conversion of the site (i.e., within 10 km) to be used for non-agricultural purposes.

14. On 7-4-1997, the Company applied to the A.P. Pollution Control Board, seeking clearance to set up the unit under Section 25 of the Water Act. It may be noted that in the said application, the Company listed the following as by-products of its processes:

"Glycerine, spent bleaching earth and carbon and spent nickel catalysts."

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 10 Monday, January 16, 2023
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

According to the A.P. Pollution Control Board, the products manufactured by this industry would lead to the following sources of pollution:

"(*a*) Nickel (solid waste) which is a heavy metal and also a hazardous waste under the Hazardous Waste (Management and Handling) Rules, 1989.

(*b*) There is a potential of discharge or run-off from the factory combined joining oil and other waste products.

(*c*) Emission of sulphur dioxide and oxide of nitrogen."

It was at that juncture that the Company secured from the Government of A.P. by GOMs No. 153 dated 3-7-1997 exemption from the operation of GOMs No. 111 of 8-3-1996 which prescribed the 10 km rule from the Osman Sagar and Himayat Sagar Lakes.

15. In regard to grant of NOC by the A.P. Pollution Control Board, the said Board by letter dated 30-7-1997, rejected the application dated 7-4-1997 for consent, stating

"(*1*) The unit is a polluting industry and falls under the red category of polluting industry under Section 11 of the classification of industries adopted by MOEF, GOI and opined that it would not be desirable to locate such industry in the catchment area of Himayat Sagar in view of GOMs No. 111 dated 8-3-1996.

(*2*) The proposal to set up this unit was rejected at the pre-scrutiny level during the meeting of CDCC/DIPC held on 24-5-1996 in view of the State Government Order No. 111 dated 8-3-1996."

Aggrieved by the above letter of rejection, the respondent-Company appealed under Section 28 of the Water Act. Before the appellate authority, the industry filed an affidavit of Prof. M. Santappa, Scientific Officer to the Tamil Nadu Pollution Control Board in support of its contentions.

16. The appellate authority under Section 28 of the Water Act, 1974 [Justice M. Ranga Reddy, (Retd.)] by order dated 5-1-1998 allowed the appeal of the Company. Before the appellate authority, as already stated, an affidavit was filed by Prof. M. Shantappa, a retired scientist and technologist (at that time, Scientific Advisor for the T.N. Pollution Control Board) stating that the respondent had adopted the latest eco-friendly technology using all the safeguards regarding pollution. The appellate authority stated that Dr Siddhu, formerly Scientific Advisor to the Government of India and who acted as Director General, Council of Scientific and Industrial Research (CSIR) and who was the Chairman of the Board of Directors of this Company also filed an affidavit. The Managing Director of the respondent-Company filed an affidavit explaining the details of the technology employed in the erection of the plant. Prof. M. Shantappa in his report stated that the Company has used the technology obtained from the Indian Institute of Chemical Technology of (IICT), Hyderabad which is a premier institute and that he could not think of a better institute in the country for transfer of technology. The said Institute has issued a certificate that this industry will not discharge any acidic effluents and the solid wastes

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 11 Monday, January 16, 2023
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

which are the by-products are saleable and they will be collected in MS drums by mechanical process and sold. The report of Dr Shantappa also showed that none of the by-products would fall on the ground of the factory premises. He also stated that all the conditions which were proposed to be imposed by the Technical Committee on the Company at its meeting held on 16-7-1997 have been complied with. On the basis of these reports, the appellate authority stated that this industry "is not a polluting industry". It further held that the notification dated 1-2-1989 of the Ministry of Environment and Forests, Government of India, whereby industries manufacturing hydrogenated vegetable oils were categorised as "red category" industries, did not apply to the catchment areas of Himayat Sagar and Osman Sagar Lakes and that notification was applicable only to the Doon Valley of U.P. and Dahanu in Maharashtra. The appellate authority accordingly directed the A.P. Pollution Control Board to give its consent for establishment of the factory on such conditions the Board may deem fit as per GOMs No. 153 dated 3-7-1997 (as amended by GO No. 181 dated 7-8-1997).

17. Before the above order dated 5-1-1998 was passed by the appellate authority, some of these public interest cases had already been filed. After the 5-1-1998 order of the appellate authority, a direction was sought in the public interest case, WP No. 2215 of 1996 that the order dated 5-1-1998 passed by the appellate authority was arbitrary and contrary to interim orders passed by the High Court in WPs Nos. 17832, 16969 and 16881 of 1997.

18. The respondent-Company, in its turn filed WP No. 11803 of 1998 for directing the A.P. Pollution Control Board to give its consent, as a consequence to the order of the appellate authority dated 5-1-1998.

19. As stated earlier, the A.P. Pollution Control Board contends that the categorisation of industries into red, green and orange had already been made prior to the notification of 1-2-1989 by office memorandum of the Ministry of Environment and Forests, Government of India dated 27-9-1988 and that in that notification also

> " 'Vegetable oils including solvent extracted oils' (Item 7) and 'Vanaspati hydrogenated vegetable oils for industrial purposes' (Item 37)"

were also included in the red category. It also contends that the Company could not have started civil works unless NOC was given by the Board.

20. The Division Bench of the High Court in its judgment dated 1-5-1998, held that the writ petitioners who filed the public interest cases could not be said to be having no locus standi to file the writ petitions. The High Court observed that while the Technical Committee of the A.P. Pollution Control Board had, some time before its refusal, suggested certain safeguards to be followed by the Company, the Board could not have suddenly refused the consent and that this showed double standards. The High Court referred to the order of the appellate authority under Section 28 of the Water Act dated 5-1-1998 and the report of Dr Siddhu to the effect

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 12 Monday, January 16, 2023
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

that even if hazardous waste was a by-product, the same could be controlled if the safeguards mentioned in the Hazardous Wastes (Management and Handling) Rules, 1989 were followed and, in particular, those in Rules 5, 6 and 11 were taken. The Rules made under the Manufacture, Storage and Import of Hazardous Chemical (MSIHC) Rules, 1989 also permit industrial activity provided the safeguards mentioned therein are taken. The Chemical Accidents (Emergency Planning, Preparedness and Response) Rules, 1991 supplement the MSIHC Rules, 1989 on accident preparedness and envisage a 4-tier crisis management system in the country. Therefore, merely because an industry produced hazardous substances, the consent could not be refused. It was stated that *as the matter was highly technical, interference was not called for*, as "rightly" contended by the learned counsel for the respondent-Company. The High Court *could not sit in appeal* over the order of the appellate authority. For the above reasons, the High Court dismissed the three public interest cases, and the writ petitions filed by the Gram Panchayat. The High Court allowed the writ petition filed by the respondent-industry and directed grant of consent by the A.P. Pollution Control Board subject to such conditions as might be imposed by the Board. It is against the said judgment that the A.P. Pollution Control Board has filed the five appeals. One appeal is filed by SPEQL.

21. In these appeals, we have heard the preliminary submission of Shri R.N. Trivedi, learned Additional Solicitor General for the A.P. Pollution Control Board, Shri M.N. Rao, learned Senior Counsel for the respondent-Company, and Shri P.S. Narasimha for the appellant in the appeal arising out of SLP (C) No. 13380 of 1998 and others.

22. It will be noticed that various issues arise in these appeals concerning the validity of the orders passed by the A.P. Pollution Control Board dated 30-7-1997, the correctness of the order dated 5-1-1998 of the appellate authority under Section 28 of the Water Act, the validity of GOMs No. 153 dated 3-7-1997 by which the Government of A.P. granted exemption for the operation of the 10 km rule in GOMs No. 111 dated 8-3-1996. Questions also arise regarding the alleged breach of the provisions of the Act, Rules or notification issued by the Central Government and the standards prescribed under the Water Act or Rules or notifications. Question also arises whether the "*appellate*" authority could have said that as it was a highly *technical* matter, *no interference* was called for. We are just now not going into all these aspects but are confining ourselves to the issues on the technological side.

23. In matters regarding industrial pollution and in particular, in relation to the alleged breach of the provisions of the Water (Prevention and Control of Pollution) Act, 1974, its Rules or notifications issued thereunder, serious issues involving pollution and related technology have been arising in appeals under Article 136 and in writ petitions under Article 32 of the Constitution of India filed in this Court and also in writ petitions before High Courts under Article 226. The cases involve the correctness of opinions on technological aspects expressed by the Pollution Control Boards or other

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 13 Monday, January 16, 2023
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

bodies whose opinions are placed before the courts. In such a situation, considerable difficulty is experienced by this Court or the High Courts in adjudicating upon the correctness of the technological and scientific opinions presented to the courts or in regard to the efficacy of the technology proposed to be adopted by the industry or in regard to the need for alternative technology or modifications as suggested by the Pollution Control Board or other bodies. The present case illustrates such problems. It has become, therefore, necessary to refer to certain aspects of environmental law already decided by this Court and also to go into the above scientific problems at some length and find solutions for the same.

Environmental courts/tribunals — problems of complex technology

24. The difficulty faced by environmental courts in dealing with highly technological or scientific data appears to be a global phenomenon.

25. Lord Woolf, in his Garner lecture to UKELA, on the theme "*Are the Judiciary Environmentally Myopic*?" (see 1992, J Envtl Law, Vol. 4, No. 1, p. 1) commented upon the problem of increasing specialisation in environmental law and on the difficulty of the courts, in their present form, moving beyond their traditional role of detached "*Wednesbury*" review. He pointed out the need for a court or tribunal

> "having a general responsibility for overseeing and enforcing the safeguards provided for the protection of the environment.... The Tribunal could be granted a wider discretion to determine its procedure so that it was able to bring to bear its *specialist experience* of environmental issues in the most effective way".

Lord Woolf pointed out the need for

> "a multi-faceted, multi-skilled body which would combine the services provided by existing courts, tribunals and inspectors in the environmental field. It would be a '*one-stop shop*', which should lead to faster, cheaper and the more effective resolution of disputes in the environmental area. It would avoid increasing the load on already overburdened lay institutions by trying to compel them to resolve issues with which they are not designed to deal. It could be a forum in which the judges could play a different role. A role which enabled them not to examine environmental problems with limited vision. It could, however, be based on our existing experience, combining the skills of the existing inspectorate, the Land Tribunal and other administrative bodies. It could be an exciting project".

According to Lord Woolf, "while environmental law is now clearly a permanent feature of the legal scene, it still lacks clear boundaries". It might be "preferable that the boundaries are left to be established by judicial decision as the law developed. After all, the great strength of the English law has been its pragmatic approach". Further, where urgent decisions are required, there are often no easy options for preserving the status quo pending the resolution of the dispute. If the project is allowed to go ahead, there may be irreparable damage to the environment; if it is stopped, there

SCC ONLINE True Print
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 14 Monday, January 16, 2023
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

may be irreparable damage to an important economic interest. [See "*Environment Enforcement*: *The Need for a Specialised Court*" — by Robert Cranworth QC (Jour of Planning & Environment, 1992, p. 798 at p. 806).] Robert Cranworth advocates the constitution of a unified tribunal with a simple procedure which looks to the need of customers, which takes the form of a court or an expert panel, the allocation of a procedure adapted to the needs of each case — which would operate at two levels — first tier by a Single Judge or technical person and a review by a panel of experts presided over by a High Court Judge — and *not* limited to "*Wednesbury*" *grounds*.

26. In the U.S.A., the position is not different. It is accepted that when the adversary process yields a conflicting testimony on complicated and unfamiliar issues and the participants cannot fully understand the nature of the dispute, courts may not be competent to make reasoned and principled decisions. Concern over this problem led the Carnegie Commission of Science and Technology (1993) and the Government to undertake a study of the problems of science and technology in judicial decision-making. In the introduction to its final report, the Commission concluded:

> "The courts' ability to handle complex science-rich cases has recently been called into question, with widespread allegations that the judicial system is increasingly unable to manage and adjudicate science and technology (S&T) issues. Critics have objected that judges cannot make appropriate decisions because they lack technical training, that the jurors do not comprehend the complexity of the evidence they are supposed to analyse, and that the expert witnesses on whom the system relies are mercenaries whose biased testimony frequently produces erroneous and inconsistent determinations. If these claims go unanswered, or are not dealt with, confidence in the judiciary will be undermined as the public becomes convinced that the *courts as now constituted* are incapable of correctly resolving some of the more pressing legal issues of our day."

The uncertain nature of scientific opinions

27. In the environment field, the uncertainty of scientific opinions has created serious problems for the courts. In regard to the different goals of *science* and the *law* in the ascertainment of truth, the U.S. Supreme Court observed in *Daubert* v. *Merrel Dow Pharmaceuticals Inc.*[1] as follows:

> "... there are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory. *Scientific conclusions are subject to perpetual revision.* Law, on the other hand, must resolve disputes finally and quickly."

28. It has also been stated by Brian Wynne in *Uncertainty and Environmental Learning*: (2 Global Envtl. Change 111) (1992)

> "Uncertainty, resulting from inadequate data, ignorance and indeterminacy, is an inherent part of science."

1 (1993) 113 S Ct 2786

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 15 Monday, January 16, 2023
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Uncertainty becomes a problem when scientific knowledge is institutionalised in policy-making or used as a basis for decision-making by agencies and courts. Scientists may refine, modify or discard variables or models when more information is available; however, agencies and courts must make choices based on existing scientific knowledge. In addition, agency decision-making evidence is generally presented in a scientific form that cannot be easily tested. Therefore, inadequacies in the record due to uncertainty or insufficient knowledge may not be properly considered. [Charmian Barton : *The Status of the Precautionary Principle in Australia*: (Vol. 22) (1998) (Harv. Envtt. Law Review, p. 509 at pp. 510-511).]

29. The inadequacies of science result from identification of adverse effects of a hazard and then working backwards to find the causes. Secondly, clinical tests are performed, particularly where toxins are involved, on animals and not on humans, that is to say, are based on animal studies or short-term cell-testing. Thirdly, conclusions based on epidemiological studies are flawed by the scientist's inability to control or even accurately assess past exposure of the subjects. Moreover, these studies do not permit the scientist to isolate the effects of the substance of concern. The latency period of many carcinogens and other toxins exacerbates problems of later interpretation. The timing between exposure and observable effect creates intolerable delays before regulation occurs. [See Alyson C. Flournay: *Scientific Uncertainty in Protective Environmental Decision-Making*, (Vol. 15) 1991 Harv. Envtt. Law Review, p. 327 at pp. 333-335.]

30. It is the above uncertainty of science in the environmental context, that has led international conferences to formulate new legal theories and rules of evidence. We shall presently refer to them.

The precautionary principle and the new burden of proof — the Vellore case

31. The "uncertainty" of scientific proof and its changing frontiers from time to time has led to great changes in environmental concepts during the period between the Stockholm Conference of 1972 and the Rio Conference of 1992. In *Vellore Citizens' Welfare Forum* v. *Union of India*[2] a three-Judge Bench of this Court referred to these changes, to the "precautionary principle" and the new concept of "burden of proof" in environmental matters. Kuldip Singh, J. after referring to the principles evolved in various international conferences and to the concept of "sustainable development", stated that the precautionary principle, the polluter-pays principle and the special concept of onus of proof have now emerged and govern the law in our country too, as is clear from Articles 47, 48-A and 51-A(*g*) of our Constitution and that, in fact, in the various environmental statutes, such as the Water Act, 1974 and other statutes, including the Environment (Protection) Act, 1986, these concepts are already implied. The learned Judge declared that these principles have now become part of our law. The relevant observations in the *Vellore case*[2] in this behalf read as follows: (SCC p. 660, para 14)

2 (1996) 5 SCC 647

SCC ONLINE True Print
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 16 Monday, January 16, 2023
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

"*14*. In view of the above-mentioned constitutional and statutory provisions we have no hesitation in holding that the *precautionary principle* and the polluter-pays principle are part of the environmental law of the country." (emphasis supplied)

The Court observed that even otherwise, the abovesaid principles are accepted as part of the customary international law and hence there should be no difficulty in accepting them as part of our domestic law. In fact, on the facts of the case before this Court, it was directed that the authority to be appointed under Section 3(3) of the Environment (Protection) Act, 1986

"shall implement the 'precautionary principle' and the 'polluter-pays principle' ".

The learned Judges also observed that the new concept which places the burden of proof on the developer or industrialist who is proposing to alter the status quo, has also become part of our environmental law.

32. The *Vellore judgment*[2] has referred to these principles briefly but, in our view, it is necessary to explain their meaning in more detail, so that courts and tribunals or environmental authorities can properly apply the said principles in the matters which come before them.

The precautionary principle replaces the assimilative capacity principle

33. A basic shift in the approach to environmental protection occurred initially between 1972 and 1982. Earlier, the concept was based on the "assimilative capacity" rule as revealed from Principle 6 of the Stockholm Declaration of the U.N. Conference on Human Environment, 1972. The said principle *assumed* that science could provide policy-makers with the information and means necessary to avoid encroaching upon the capacity of the environment to assimilate impacts and it *presumed* that relevant technical expertise would be available when environmental harm was predicted and there would be sufficient time to act in order to avoid such harm. But in the 11th Principle of the U.N. General Assembly Resolution on World Charter for Nature, 1982, the emphasis shifted to the "precautionary principle", and this was reiterated in the Rio Conference of 1992 in its Principle 15 which reads as follows:

"*Principle 15*.—In order to protect the environment, the *precautionary approach* shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full *scientific certainty* shall not be used as a reason for proposing cost-effective measures to prevent environmental degradation."

34. In regard to the cause for the emergence of this principle, Charmian Barton, in the article earlier referred to in Vol. 22, Harv. Envtt. L. Rev. (1998), p. 509 at p. 547 says:

"There is nothing to prevent decision-makers from assessing the record and concluding that there is inadequate information on which to reach a determination. If it is not possible to make a decision with 'some' confidence, then it *makes sense to err on the side of caution and*

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 17 Monday, January 16, 2023
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

prevent activities that may cause serious or irreversible harm. An informed decision can be made at a later stage when additional data is available or resources permit further research. To ensure that greater caution is taken in environmental management, implementation of the principle through *judicial and legislative means* is necessary."

In other words, the inadequacies of science is the real basis that has led to the precautionary principle of 1982. It is based on the theory that it is better to err on the side of caution and prevent environmental harm which may indeed become irreversible.

35. The principle of precaution involves the anticipation of environmental harm and taking measures to avoid it or to choose the least environmentally harmful activity. It is *based* on scientific uncertainty. Environmental protection should not only aim at protecting health, property and economic interest but also protect the environment for its own sake. Precautionary duties must not only be triggered by the suspicion of concrete danger but also by (justified) concern or risk potential. The precautionary principle was recommended by the UNEP Governing Council (1989). The Bomako Convention also lowered the threshold at which scientific evidence might require action by not referring to "serious" or "irreversible" as adjectives qualifying harm. However, summing up the legal status of the precautionary principle, one commentator characterised the principle as still "evolving" for though it is accepted as part of the international customary law, "the consequences of its application in any potential situation will be influenced by the circumstances of each case". (*See* First Report of Dr Sreenivasa Rao Pemmaraju* — Special Rapporteur, International Law Commission dated 3-4-1998, paras 61 to 72.)

The special burden of proof in environmental cases

36. We shall next elaborate the new concept of burden of proof referred to in the *Vellore case*[2] at p. 658. In that case, Kuldip Singh, J. stated as follows: (SCC p. 658, para 11)

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

37. It is to be noticed that while the inadequacies of science have led to the "precautionary principle", the said "precautionary principle" in its turn, has led to the special principle of *burden of proof* in environmental cases where burden as to the absence of injurious effect of the actions proposed, — is placed on those who want to change the status quo [Wynne, *Uncertainty and Environmental Learning*, 2 Global Envtl. Change 111 (1992) at p. 123]. This is often termed as a reversal of the burden of proof, because otherwise in environmental cases, those opposing the change would be compelled to shoulder the evidentiary burden, a procedure which is not fair. Therefore, it is necessary that the party attempting to preserve the status quo by maintaining a less polluted state should not carry the burden of proof

* Joint Secretary and Legal Adviser, Ministry of External Affairs, New Delhi

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 18 Monday, January 16, 2023
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

and the party who wants to alter it, must bear this burden. [See James M. Olson: "*Shifting the Burden of Proof*", 20 Envtl. Law, p. 891 at p. 898 (1990).] [Quoted in Vol. 22 (1998), Harv. Env. Law Review, p. 509 at pp. 519, 550.]

38. The precautionary principle suggests that where there is an identifiable risk of serious or irreversible harm, including, for example, extinction of species, widespread toxic pollution in major threats to essential ecological processes, it may be appropriate to place the burden of proof on the person or entity proposing the activity that is potentially harmful to the environment. (*See* Report of Dr Sreenivasa Rao Pemmaraju, Special Rapporteur, International Law Commission, dated 3-4-1998, para 61.)

39. It is also explained that if the environmental risks being run by regulatory inaction are in some way "*uncertain* but *non-negligible*", then regulatory action is justified. This will lead to the question as to what is the "non-negligible risk". In such a situation, the burden of proof is to be placed on those attempting to alter the status quo. They are to discharge this burden by showing the absence of a "reasonable ecological or medical concern". That is the required standard of proof. The result would be that if insufficient evidence is presented by them to alleviate concern about the level of uncertainty, then the presumption should operate in favour of environmental protection. Such a presumption has been applied in *Ashburton Acclimatisation Society* v. *Federated Farmers of New Zealand*[3]. The required standard now is that the risk of harm to the environment or to human health is to be decided in public interest, according to a "reasonable persons" test. [See Charmian Barton: *Precautionary Principle in Australia* (Vol. 22) (1998) Harv. Env. L. Rev., p. 509 at p. 549.]

Brief survey of judicial and technical inputs in environmental appellate authorities/tribunals

40. We propose to briefly examine the deficiencies in the judicial and technical inputs in the appellate system under some of our existing environmental laws.

41. Different statutes in our country relating to the environment provide appeals to appellate authorities. But most of them still fall short of a combination of judicial and scientific needs. For example, the qualifications of the persons to be appointed as appellate authorities under Section 28 of the Water (Prevention and Control of Pollution) Act, 1974, Section 31 of the Air (Prevention and Control of Pollution) Act, 1981, under Rule 12 of the Hazardous Wastes (Management and Handling) Rules, 1989 are not clearly spelled out. While the appellate authority under Section 28 in Andhra Pradesh as per the notification of the Andhra Pradesh Government is a retired High Court Judge and there is nobody on his panel to help him in technical matters, the same authority as per the notification in Delhi is the Financial Commissioner (*see* notification dated 18-2-1992) resulting in there being in NCT, neither a regular judicial member nor a technical one. Again,

3 (1988) 1 NZLR 78

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 19 Monday, January 16, 2023
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

under the National Environmental Tribunal Act, 1995, which has power to award compensation for death or injury to any person (other than workmen), the said Tribunal under Section 10 no doubt consists of a Chairman who could be a Judge or retired Judge of the Supreme Court or High Court and a technical member. But Section 10(1)(*b*) read with Section 10(2)(*b*) or (*c*) permits a Secretary to the Government or the Additional Secretary who has been a Vice-Chairman for 2 years to be appointed as the Chairman. We are citing the above as instances of the grave inadequacies.

Principle of good governance: need for modification of our statutes, rules and notifications by including adequate judicial and scientific inputs

42. Good governance is an accepted principle of international and domestic laws. It comprises of the rule of law, effective State institutions, transparency and accountability in public affairs, respect for human rights and the meaningful participation of citizens — (including scientists) — in the political processes of their countries and in decisions affecting their lives. [Report of the Secretary General on the work of the Organization, official records of the UN General Assembly, 52nd Session, Suppl. I (A/52/1) (para 22).] It includes the need for the State to take the necessary "legislative, administrative and other actions" to implement the duty of prevention of environmental harm, as noted in Article 7 of the draft approved by the Working Group of the International Law Commission in 1996. (*See* Report of Dr Sreenivasa Rao Pemmaraju, Special Rapporteur of the International Law Commission dated 3-4-1998 on "Prevention of Transboundary Damage from Hazardous Activities") (paras 103, 104). Of paramount importance in the establishment of environmental courts, authorities and tribunals is the need for providing adequate judicial and scientific inputs rather than leave complicated disputes regarding environmental pollution to officers drawn only from the executive.

43. It appears to us from what has been stated earlier that things are not quite satisfactory and there is an urgent need to make appropriate amendments so as to ensure that at all times, the appellate authorities or tribunals consist of judicial and also technical personnel well versed in environmental laws. Such defects in the constitution of these bodies can certainly undermine the very purpose of those legislations. We have already referred to the extreme complexity of the scientific or technological issues that arise in environmental matters. Nor, as pointed out by Lord Woolf and Robert Cranworth, should the appellate bodies be restricted to *Wednesbury* limitations.

44. The Land and Environment Court of New South Wales in Australia, established in 1980, could be the ideal. It is a superior court of record and is composed of four Judges and nine technical and conciliation assessors. Its jurisdiction combines appeal, judicial review and enforcement functions. Such a composition in our opinion is necessary and ideal in environmental matters.

SCC ONLINE True Print
SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 20 Monday, January 16, 2023
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

45. In fact, such an environmental court was envisaged by this Court at least in two judgments. As long back as 1986, Bhagwati, C.J. in *M.C. Mehta* v. *Union of India*[4] (SCC at p. 202) observed: (SCC para 22)

> "We would also suggest to the Government of India that since cases involving issues of environmental pollution, ecological destruction and conflicts over national resources are increasingly coming up for adjudication and these cases involve assessment and evolution of scientific and technical data, it might be desirable to set up environment courts on the regional basis with one professional *Judge* and *two experts* drawn from the Ecological Sciences Research Group keeping in view the nature of the case and the expertise required for its adjudication. There would of course be a right of appeal to this Court from the decision of the environment court." (emphasis supplied)

In other words, this Court not only contemplated a combination of a Judge and technical experts but also an appeal to the Supreme Court from the environmental court.

46. Similarly, in the *Vellore case*[2] while criticising the inaction on the part of the Government of India in the appointment of an authority under Section 3(3) of the Environment (Protection) Act, 1996, Kuldip Singh, J. observed that the Central Government should constitute an authority under Section 3(3): (SCC p. 667, para 25)

> "headed by a retired *Judge of the High Court* and it may have other *members* — preferably with *expertise* in the field of pollution control and environment protection — to be appointed by the Central Government." (emphasis supplied)

We have tried to find out the result of the said directions. We have noticed that pursuant to the observations of this Court in *Vellore case*[2] certain notifications have been issued by including a High Court Judge in the said authority. In Notification No. SO. 671(E) dated 30-9-1996 issued by the Government of India for the State of Tamil Nadu under Section 3(3) of the 1986 Act, appointing a "Loss of Ecology (Prevention and Payment of Compensation) Authority", it is stated that it shall be manned by a retired High Court Judge and other technical members who would frame a scheme or schemes in consultation with NEERI etc. It could deal with all industries including tanning industries. A similar Notification No. SO. 704 (E) dated 9-10-1996 was issued for the "Environmental Impact Assessment Authority" for NCT including a High Court Judge. Notification dated 6-2-1997 [No. 88(E)] under Section 3(3) of the 1986 Act dealing with the shrimp industry, of course, includes a retired High Court Judge and technical persons.

47. As stated earlier, the Government of India should, in our opinion, bring about appropriate amendments in the environmental statutes, rules and notifications to ensure that in all environmental courts, tribunals and appellate authorities, there is always a Judge of the rank of a High Court

4 (1986) 2 SCC 176, 202 . 1986 SCC (Cri) 122

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 21 Monday, January 16, 2023
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

Judge or a Supreme Court Judge, — sitting or retired — and a scientist or group of scientists of high ranking and experience so as to help a proper and fair adjudication of disputes relating to the environment and pollution.

48. There is also an immediate need that in all the States and Union Territories, the appellate authorities under Section 28 of the Water (Prevention and Control of Pollution) Act, 1974 and Section 31 of the Air (Prevention and Control of Pollution) Act, 1981 or other rules, there is always a Judge of the High Court, sitting or retired, and a scientist or group of scientists of high ranking and experience, to help in the adjudication of disputes relating to the environment and pollution. An amendment to existing notifications under these Acts can be made for the present.

49. There is also need for amending the notifications issued under Rule 12 of the Hazardous Wastes (Management and Handling) Rules, 1989. What we have said applies to all other such rules or notifications issued either by the Central Government or the State Governments.

50. We request the Central and State Governments to take notice of these recommendations and take appropriate action urgently.

51. We finally come to the appellate authority under the National Environment Appellate Authority Act, 1997. In our view, it comes very near to the ideals set by this Court. Under that statute, the appellate authority is to consist of a sitting or retired Supreme Court Judge or a sitting or retired Chief Justice of a High Court and a Vice-Chairman who has been an administrator of high rank with expertise in technical aspects of problems relating to the environment; and technical members, not exceeding three, who have professional knowledge or practical experience in the areas pertaining to conservation, environmental management, land or planning and development. Appeals to this appellate authority are to be preferred by persons aggrieved by an order granting environmental clearance in the areas in which any industries, operations or processes etc. are to be carried or carried subject to safeguards.

52. As stated above and we reiterate that there is need to see that in the appellate authority under the Water (Prevention and Control of Pollution) Act, 1974, the Air (Prevention and Control of Pollution) Act, and the appellate authority under Rule 12 of the Hazardous Wastes (Management and Handling) Rules, 1989, under the notification issued under Section 3(3) of the Environment (Protection) Act, 1986 for the National Capital Territory and under Section 10 of the National Environment Tribunal Act, 1995 and other appellate bodies, there are invariably judicial and technical members included. This Court has also observed in *M.C. Mehta* v. *Union of India*[4] (SCC at p. 262) that there should be a right of *regular appeal to the Supreme Court*, i.e., an appeal incorporated in the relevant statutes. This is a matter for the Governments concerned to consider urgently, by appropriate legislation, whether plenary or subordinate, or by amending the notifications.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 22 Monday, January 16, 2023
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

The duty of the present generation towards posterity: principle of inter-generational equity: rights of the future against the present

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

> "*Principle 1.*—Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment *for the present* and *future generations*....
>
> *Principle 2.*—The natural resources of the earth, including the air, water, lands, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of the *present* and *future* generations through careful planning or management, as appropriate."

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

Whether the Supreme Court while dealing with environmental matters under Article 32 or Article 136 or High Courts under Article 226 can make reference to the National Environmental Appellate Authority under the 1997 for investigation and opinion

54. In a large number of matters coming up before this Court either under Article 32 or under Article 136 and also before the High Courts under Article 226, complex issues relating to the environment and pollution, science and technology have been arising and in some cases, this Court has been finding sufficient difficulty in providing adequate solutions to meet the requirements of public interest, environmental protection, elimination of pollution and sustained development. In some cases, this Court has been referring matters to professional or technical bodies. The monitoring of a case as it progresses before the professional authority and the consideration of objections raised by affected parties to the opinion given by these professional technical bodies have again been creating complex problems. Further, these matters sometimes require day-to-day hearing which, having regard to other workload of this Court, — (a factor mentioned by Lord Woolf) — it is not always possible to give urgent decisions. In such a situation, this Court has been feeling the need for an alternative procedure which can be expeditious and scientifically adequate. Question is whether, in such a situation, involving grave public interest, this Court could seek the help of other statutory bodies which have an adequate combination of both

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 23 Monday, January 16, 2023
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

judicial and technical expertise in environmental matters, like the appellate authority under the National Environmental Appellate Authority Act, 1997.

55. A similar question arose in *Paramjit Kaur* v. *State of Punjab*[5] decided by this Court on 10-9-1998. In that case, initially, Writ Petitions (Crl.) Nos. 447 and 497 of 1995 were filed under Article 32 of the Constitution of India alleging flagrant violations of human rights in the State of Punjab as disclosed by a CBI report submitted to this Court. This Court felt the need to have these allegations investigated by an independent body. This Court then passed an order on 12-12-1996[6] requesting the National Human Rights Commission to examine the matter. The said Commission is headed by a retired Chief Justice of India and other expert members. After the matter went before the said Commission, various objections were raised as to its jurisdiction. It was also contended that if these issues were to be otherwise enquired into by the Commission upon a complaint, they would have stood time-barred. These objections were rejected by the Commission by an elaborate order on 4-8-1997 holding that once the Supreme Court referred the matters to the Commission, it was acting sui juris, that its services could be utilised by the Supreme Court treating the Commission as an instrumentality or agency of the Supreme Court, that the period of limitation under the Protection of Human Rights Act, 1993 would not apply, that in spite of the reference to the Commission, the Supreme Court would continue to have seisin of the case and any determination by the Commission, wherever necessary or appropriate, would be subject to the approval of the Supreme Court.

56. Not satisfied with the above order of the Commission, the Union of India filed clarification application Crl. MP No. 6674 of 1997 etc. This Court then passed the order aforementioned in *Paramjit Kaur* v. *State of Punjab*[5] on 10-9-1998 accepting the reasons given by the Commission in rejecting the objections. In that context, this Court held that:

(*i*) the Commission was an expert body consisting of experts in the field,

(*ii*) if this Court could exercise certain powers under Article 32, it could also request the expert body to investigate or look into the allegations, unfettered by any limitations in the Protection of Human Rights Act, 1993,

(*iii*) that by so referring the matters to the Commission, this Court was not conferring any new jurisdiction on the Commission, and

(*iv*) that the Commission would be acting only in aid of this Court.

In our view, the above procedure in *Paramjit Kaur* v. *State of Punjab*[5] is equally applicable in the case before us for the following reasons.

57. Environmental concerns arising in this Court under Article 32 or under Article 136 or under Article 226 in the High Courts are, in our view, of

5 (1999) 2 SCC 131 : (1998) 5 Scale 219 : JT (1998) 6 SC 338

6 *Paramjit Kaur* v. *State of Punjab*, (1999) 2 SCC 131 at p. 141

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 24 Monday, January 16, 2023
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

equal importance as human rights concerns. In fact, both are to be traced to Article 21 which deals with the fundamental right to life and liberty. While environmental aspects concern "life", human rights aspects concern "liberty". In our view, in the context of emerging jurisprudence relating to environmental matters, — as is the case in matters relating to human rights, — it is the duty of this Court to render justice by taking all aspects into consideration. With a view to ensure that there is neither danger to the environment nor to the ecology and, at the same time, ensuring sustainable development, this Court in our view, can refer scientific and technical aspects for investigation and opinion to expert bodies such as the appellate authority under the National Environmental Appellate Authority Act, 1997. The said authority comprises a retired Judge of the Supreme Court and members having technical expertise in environmental matters whose investigation, analysis of facts and opinion on objections raised by parties, could give adequate help to this Court or the High Courts and also the needed reassurance. Any opinions rendered by the said authority would of course be subject to the approval of this Court. On the analogy of *Paramjit Kaur case*[5] such a procedure, in our opinion, is perfectly within the bounds of the law. Such a procedure, in our view, can be adopted in matters arising in this Court under Article 32 or under Article 136 or arising before the High Courts under Article 226 of the Constitution of India.

The order of reference

58. After the above view was expressed to counsel on both sides, certain draft issues were prepared for reference. There was some argument that some of the draft issues could not be referred to the Commission while some others required modification. After hearing arguments, parties on both sides agreed for reference of the following issues to the appellate authority under the National Environmental Appellate Authority Act, 1997.

59. We shall now set out these issues. They are:

(*a*) Is the respondent-industry a hazardous one and what is its pollution potentiality, taking into account the nature of the product, the effluents and its location?

(*b*) Whether the operation of the industry is likely to affect the sensitive catchment area resulting in pollution of the Himayat Sagar and Osman Sagar Lakes supplying drinking water to the twin cities of Hyderabad and Secunderabad?

60. We may add that it shall be open to the authority to inspect the premises of the factory, call for documents from the parties or any other body or authority or from the Government of Andhra Pradesh or the Union Government and to examine witnesses, if need be. The authority shall also have all powers for obtaining data or technical advice as it may deem necessary from any source. It shall give an opportunity to the parties or their counsel to file objections and lead such oral evidence or produce such documentary evidence as they may deem fit and shall also give a hearing to the appellant or its counsel to make submissions.

SCC Online Web Edition, © 2023 EBC Publishing Pvt. Ltd.
Page 25 Monday, January 16, 2023
Printed For: Mr. Siddarth .
SCC Online Web Edition: http://www.scconline.com
TruePrint™ source: Supreme Court Cases, © 2023 Eastern Book Company. The text of this version of this judgment is protected by the law declared by the Supreme Court in Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1 paras 61, 62 & 63.

61. A question has been raised by the respondent-industry that it may be permitted to make *trial runs* for at least three months so that the results of pollution could be monitored and analysed. This was opposed by the appellant and the private respondent. We have not thought it fit to go into this question and we have informed counsel that this issue could also be left to the said authority to decide because we do not know whether any such trial runs would affect the environment or cause pollution. On this aspect also, it shall be open to the authority to take a decision after hearing the parties.

62. Parties have requested that the authority may be required to give its opinion as early as possible. We are of the view that the authority could be requested to give its opinion within a period of three months from the date of receipt of this order. We, therefore, refer the above issues to the abovesaid appellate authority for its opinion and request the authority to give its opinion, as far as possible, within the period above-mentioned. If the authority feels any further clarifications or directions are necessary from this Court, it will be open to it to seek such clarifications or directions from this Court.

63. The Company shall make available photocopies of the paper-books filed in this Court or other papers filed in the High Court or before the authority under Section 28 of the Water Act, 1974, for the use of the appellate authority.

64. The Registry shall communicate a copy of this order to the appellate authority under the National Environmental Appellate Authority Act, 1997. Matter may be listed before us after three months as part-heard. Ordered accordingly.

65. In the context of recommendations made for amendment of the environmental laws and rules by the Central Government and notifications issued by the Central and State Governments, we direct copies of this judgment to be communicated to the Secretary, Environment & Forests (Government of India), New Delhi, to the Secretaries of Environment & Forests in all State Governments and Union Territories, and to the Central Pollution Control Board, New Delhi. We further direct the Central Pollution Control Board to communicate a copy of this judgment to all State Pollution Control Boards and other authorities dealing with environment, pollution, ecology, forest and wildlife. The State Governments shall also take steps to communicate this judgment to their respective State Pollution Control Boards and other authorities dealing with the above subjects — so that appropriate action can be taken expeditiously as indicated in this judgment.

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 1 Wednesday, November 23, 2022
Printed For: Mr. Rajive .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt. Ltd., Lucknow.

2017 SCC OnLine NGT 981

National Green Tribunal
Principal Bench, New Delhi

(BEFORE SWATANTER KUMAR, CHAIRPERSON, JAWAD RAHIM, JUDICIAL MEMBER AND BIKRAM SINGH SAJWAN, EXPERT MEMBER)

Original Application No. 677 of 2016 (M.A. No. 148/2017)

In the Matter of:

Society for Protection of Environment & Biodiversity Through the Convener R-7/17, Raj Nagar Ghaziabad (UP)-201001 … Applicant;

Versus

1. Union of India Through Secretary, Govt. of India Ministry of Environment, Forest and Climate Change Indira Paryavaran Bhavan, Jorbagh Road, New Delhi-110003
2. Ministry of Urban Development Through Secretary, Govt. of India Maulana Azad Road Rajpath Area, Central Secretariat New Delhi
3. Central Pollution Control Board Through Member Secretary CBD-Cum-Office Complex East Arjun Nagar New Delhi … Respondents.

And

Original Application No. 01 of 2017 (M.A. No. 03/2017 & M.A. No. 445/2017)

In the Matter of:

Pushp Jain S/o Shri Dhanpat Rai Jain R/o I A/2C Phase-I Ashok Vihar New Delhi-110052 … Applicant;

Versus

1. Union of India Through the Secretary Ministry of Environment, Forest and Climate Change Indira Paryavaran Bhavan Jorbagh Road, New Delhi-110003
2. Ministry of Urban Development Through the Secretary Maulana Azad Road Nirman Bhawan New Delhi 110 011 … Respondents.

And

Original Application No. 7 of 2017 (M.A. No. 879/2017)

In the Matter of:

Ajay Kumar Singh 236, Lawyers Chambers M.C. Sitalwad Block Supreme Court of India New Delhi … Applicant;

Versus

1. Ministry of Environment, Forest and Climate Change Govt. of India Through the Secretary Indira Paryavaran Bhavan Jorbagh Road, New Delhi-110003
2. Ministry of Urban Development Govt. of India Through the Secretary Nirman Bhawan New Delhi 110 011
3. Delhi Development Authority Through its Vice Chairman Vikas Sadan, INA New Delhi
4. Central Pollution Control Board Through Member Secretary

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 2 Wednesday, November 23, 2022
Printed For: Mr. Rajive .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt. Ltd., Lucknow.

Parivesh Bhawan, East Arjun Nagar New Delhi

5. Central Ground Water Authority Through its Member Secretary Faridabad
6. Delhi Pollution Control Committee Through Member Secretary 4th Floor, ISBT Building Kashmeri Gate New Delhi
7. North Delhi Municipal Corporation New Delhi
8. South Delhi Municipal Corporation New Delhi
9. East Delhi Municipal Corporation New Delhi
10. State Level Environment Impact Assessment Authority, Delhi Govt. Secretariat Delhi … Respondents.

And

Original Application No. 55 of 2017

In the Matter of:

Mahendra Pandey S/o Sh. H.C. Pandey R/o Flat No. 18, Kanishka Apartment C&D Block, Shalimar Bagh Delhi … Applicant;

Versus

1. Union of India Through Secretary Ministry of Environment, Forest and Climate Change Paryavaran Bhavan, Jorbagh Road, New Delhi-110003
2. Ministry of Urban Development Through its Secretary Maulana Azad Road Rajpat Area, Central Secretariat New Delhi
3. Central Pollution Control Board Through its Member Secretary CBD cut Office Complex East Arjun Nagar New Delhi … Respondents.

And

Original Application No. 67 of 2017 (M.A. No. 620/2017)

In the Matter of:

R. Sreedhar R/o A-1/39, 2nd Floor Freedom Fighter Colony IGNOU Road, Gate No. 1 Neb Sarhai, New Delhi … Applicant;

Versus

Union of India Through the Secretary Ministry of Environment, Forest and Climate Change Indira Paryavaran Bhavan Jorbagh Road, New Delhi-110003 … Respondent.

Original Application No. 677 of 2016 (M.A. No. 148/2017), Original Application No. 01 of 2017 (M.A. No. 03/2017 & M.A. No. 445/2017), Original Application No. 7 of 2017 (M.A. No. 879/2017), Original Application No. 55 of 2017 and Original Application No. 67 of 2017 (M.A. No. 620/2017)

Decided on December 8, 2017 [Reserved on: 8th November, 2017]

Counsel for Applicants: Mr. Raj Panjwani, Sr. Advocate

Mr. Ritwick Dutta, Mr. Rahul Choudhary, Ms. Meera Gopal and Mr. Utkarsh Jain, Advocates

Mr. I.K. Kapila & Ms. Disha Singh, Advocates

Mr. Sanjay Upadhyay, Ms. Upama Bhattacharjee and Mr. Salik Shafique, Advocates

Mr. Gaurav Kumar Bansal, Mr. Ompal Shukin and Ms. Nandit Bansal, Advocates

Counsel for Respondents: Mr. B.V. Niren with Mr. Vinayak Gupta, Advocates

Mr. Abhimanyu Garg and Ms. Preety Makkar, Advocates for Government of Puducherry

Mr. Tarunvir Singh Khehar, Ms. Guneet Khehar and Mr. Sandeep Mishra, Advocates

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 3 Wednesday, November 23, 2022
Printed For: Mr. Rajive .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt. Ltd., Lucknow.

and Mr. Dinesh Jindal L.O. for DPCC

Mr. Bairaja Mahapatra, Advocate and Mr. Dinesh Jindal, L.O.

Mr. Rajkumar, Advocate with Mr. Bhupender, LA for Central Pollution Control Board

Mr. D. Rajeshwar Rao, Advocate

Mr. Atma Ram N.S. Naadkarni, Ld. ASG for MoEF&CC

Mr. Divya Prakash Pandey, Advocate

Mr. Utkarsh Sharma, Advocate for State of Uttar Pradesh

Mr. Ravindra Kumar, Advocate for NOIDA Authority

Mr. Krishna Kumar Singh and Mr. Anurag Kumar, Advocates

Mr. Rahul Pratap, Advocate

Ms. Puja Kalra, Advocate

JUDGMENT

SWATANTER KUMAR, CHAIRPERSON— By this judgement, we shall dispose of all the five cases connected with Original Application No. 677 of 2016 as a common question of law and fact arises for consideration before the Tribunal in all these cases. However, it is not necessary for us to notice the facts of each case in greater detail and it would be sufficient to refer to the factual matrix of the lead application only, i.e., Original Application No. 677 of 2016, *Society for Protection of Environment & Biodiversity* v. *Union of India*.

2. The Applicant-Society claims that it works in the area of environmental conservation and aims at protection of the environment, ecology, natural resources, wildlife and bio-diversity existing on earth. It has filed various cases raising several environmental issues and concerns before the Courts as well as before this Tribunal. According to the Applicant, there is pathetic condition of urban local bodies in the area under their jurisdiction more particularly in Ghaziabad. The exemption granted from Environmental Clearance for building and construction projects would be a huge retrograde step in the area of environment conservation. It would take us back to a pre-2004 scenario, i.e., prior to issuance of EIA framework pursuant to specific orders of the Hon'ble Supreme Court. The Applicant believes that such a step will have a disastrous effect on the environment and would cause irreversible damage to the environment. The magnitude of the environmental footprint would be immense and unregulated building and construction activity would cause immense environmental damage. The Ministry of Environment, Forest & Climate Change (for short, "MoEF&CC"), Respondent No. 1 had issued a draft notification dated 29th April, 2016 with regard to amendment of the Notification of 2006 providing exemption to various construction projects all over the country. At that stage, the Applicant had filed an application bearing Original Application No. 168 of 2016 expressing its apprehension and raising serious objections to the draft Notification. The principal contention raised at that time was that the proposed Notification intends to dilute and exempt prior Environmental Clearance for buildings and construction projects through Model Building Bye Laws, 2016, as issued by the Town & Country Planning Organizing, Ministry of Urban Development and the subsequent Notification by Delhi Development Authority of the Unified Building Bye Laws for Delhi, 2016 which were notified vide Notification dated 22nd March, 2016 in pursuance to Chapter-XIV of the Model Building Bye Laws, 2016 and in concurrence with the impugned Notification of MoEF&CC. These amendments and Bye Laws sought to defeat and do away with the substantive provisions of EIA Notification, 2006 that require prior Environmental Clearance by building and construction projects under item no. 8(a) of the Schedule to EIA Notification, 2006. Original Application No. 168 of 2016 was disposed of by the Tribunal vide its order dated 30th September, 2016 directing MoEF&CC to consider the objections filed by the Applicant prior to issuance of the final Notification. The order

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 4 Wednesday, November 23, 2022
Printed For: Mr. Rajive .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt. Ltd., Lucknow.

dated 30th September, 2016 of the Tribunal reads as under:

> "Learned Counsel appearing for the Ministry of Environment, Forests and Climate Change submits that they are in the process of amending the EIA Notification, 2006. According to her the draft Notification has already been published and objections/suggestions have been invited and after expiry of the Statutory period they would issue the final Notification after considering the objections filed.
>
> Learned Counsel appearing for the DDA on instruction from Director of Planning submits that DDA has already notified the unified building bye laws, however, the chapter on environment conditions for sanctioning building plans would not be put into practice/implemented till Ministry of Environment, Forests and Climate Change give its approval/concurrence.
>
> The Learned Counsel appearing for the applicant has raised an issue with regard to the unified bye laws being in conflict with the Notification of EIA, 2006. According to the applicant these objections should be considered.
>
> In view of the statement made by the Learned Counsel appearing for the respective parties, we are of the considered view that nothing survives in this application. The respective authorities will abide by their statements. We also direct the Ministry of Environment, Forests and Climate Change to consider the objections of the applicant before issuing final Notification so that the unified building bye laws are not in conflict with EIA Notification, 2006.
>
> In view of the above, the Original Application No. 168 of 2016 stands disposed of with no order as to cost."

3. After passing of the above order, Respondent no. 1 issued the final Notification on 9th December, 2016. Though, the objections to the draft Notification was filed by the Applicant on 23rd November, 2016 but no intimation for hearing was given to the Applicant except when the Applicant was invited through Counsel for meeting with Shri Manoj Kumar Singh, Joint Secretary, MoEF&CC, Government of India on 8th December, 2016 to discuss and make presentation on behalf of the Applicant. The discussion went on for about an hour or so and the Applicant was assured that the objections would be considered objectively by the Ministry. However, the final Notification was issued on 9th December, 2016 making substantial changes even in the draft Notification dated 29th April, 2016 which were in total derogation to the environmental laws in force.

4. The Applicant, thus, in the present case prays that the Notification dated 9th December, 2016 should be quashed and set-aside, inter-alia, but primarily on the following grounds:

I. The Impugned Notification not only dilutes but also renders otiose the substantive provisions of Environmental Impact Assessment Notification, 2006 and even that of Environment (Protection) Act, 1986 (for short, "Act of 1986"). The provisions of the impugned Notification, if implemented would potentially destroy the environment and ecology due to unregulated building and construction activities and will have disastrous effect on environment and would cause irreversible damage to the environment. The magnitude of Environmental footprint would be immense. The objections filed by the Applicant and others have not been considered objectively and appropriately by the Ministry. The impugned Notification, thus suffers, from the element of non-application of mind as well as is violative of Principle of Natural Justice.

II. The Impugned final Notification is not only at variance with the draft Notification but even introduces new provisions which are diametrically opposite, beyond the scope and purview of the Draft Notification and even had destructive essence to the draft Notification. In this regard, the following significant variance can be noticed:

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 5 Wednesday, November 23, 2022
Printed For: Mr. Rajive .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt. Ltd., Lucknow.

(a). Draft Notification did not contain any provision with regard to grant of exemption to the construction building projects from the provisions of Air (Prevention and Control of Pollution) Act, 1981 (for short, "Air Act, 1981) and Water (Prevention and Control of Pollution) Act, 1974 (for short, "Water Act, 1974) in relation to Consent to Establish and Consent to Operate.

(b). The composition of the Environmental Cells to monitor the conditions particularly in reference to Environmental Clearance is entirely at variance to the draft Notification.

(c). Accreditation of Environmental auditors in terms of Appendix XV to the impugned Notification is also at variance from the one proposed in the Draft Notification.

III. In exercise of subordinate legislative power, a delegatee cannot affect the application of another legislation enacted by the Parliament. In other words, while amending the Notification of 2006 in exercise of subordinate legislation, the delegated authority cannot render the provisions of Water Act, 1974 and Air Act, 1981 as inapplicable and also take away the powers of the Pollution Control Boards under the said Acts, to grant/refuse consent to establish and/or operate to a project.

IV. Neither any comprehensive study was carried out nor any data collected to support the drastic changes being made by the impugned Notification and also ignored the Precautionary Principle, the fundamental cannon of environmental jurisprudence.

V. The impugned Notification has several deficiencies which are against the basic letter and spirit of the Act of 1986 and the Notification of 2006.

VI. 'Ease of doing responsible business' cannot be in fact and in law the ground for making amendment to the environmental laws, as it primarily falls beyond the scope of the object and purposes of the environmental laws in force. It is only a ploy to circumvent the provisions of the environmental assessment. The comprehensive process for evaluating the impact on environment due to various projects has been negated by the said amendment.

VII. Under the impugned Notification, local authority is responsible for development and passing the development plan vested through the environment cell with the power to impose conditions relating to environmental protection and ensure their compliance. The local authorities which are the sanctioning authorities would also become adjudicatory authorities under the impugned Notification. This dual functioning by the same authority make them judge in their own cause in contravention with the Principle of Natural Justice, *nemo judex in sua causa*, as well as give rise to the plea of conflicting interest.

VIII. Exemption granted under the amended Notification has no nexus to the object sought to be achieved, i.e., the environmental protection.

IX. The impugned Notification is in derogation of India's international commitment and obligation under the Rio Declaration (1992), particularly Principle 15 to 17 and the Paris Agreement, 2015.

X. The impugned Notification, if given effect to, as framed would result in wiping out the effect of environmental laws in force and hence would not be in consonance with the doctrine of non-regression.

XI. In addition to above, Applicant has also contended that the impugned Notification has an impact of disturbing the federal structure as provided in the Constitution of India. The Central Government cannot exercise power, authority and control in relation to subject matter of the Notification over the local authorities. The Environmental Cell, constituted under the amended Notification, would be under control of the local authority or the State Government, as the

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 6 Wednesday, November 23, 2022
Printed For: Mr. Rajive .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt. Ltd., Lucknow.

case may be and, therefore, it will have apparent conflict with the Central Regulating Authority.

XII. In terms of the Notification, the violations of environmental conditions would be punishable and action would be taken under local laws, thus, divesting the CPCB or the State Regulatory Authority from taking punitive action against the defaulters and, therefore, would not be in consonance with the scheme of 1986 Act. The Notification is a manifest ploy for ousting of the application of the Environmental Acts and even the jurisdiction of the Tribunal. Furthermore, power under Section 3(1) of the Act of 1986 can be exercised in harmony and consonance with other provisions of the Act. The power under Section 3 is to be exercised for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution. The measures contemplated under Section 3 can only be taken in that behalf. Thus, power cannot be exercised for purposes beyond Section 3(1) and the provisions of the Act of 1986.

XIII. It is also contended by Applicant that MoEF has not provided any appropriate answer to the questions formulated by the Tribunal in its order dated 21st December, 2016 and 28th July, 2017.

XIV. There is no power with the Central Government to transfer its responsibility to the local authorities. The impugned Notification does not provide power of refusal or rejection of the application seeking Environmental Clearance. The impugned Notification which introduces Paragraph no. 14 to the Notification of 2006, would be in apparent conflict with Para 1 to 13 of the Notification 2006. The Environmental Cell would not be able to function independently, fairly and in a transparent manner.

XV. The impugned Notification is unsustainable as on one hand it is not based on any study and on the other it ignores the recommendations made in the various studies conducted by the Ministry itself including Dr. Kasturirangan's reports. The positive suggestions and recommendations made in these reports have been ignored. The Notification attempts to hide behind the poor for the benefit of the builders. It also lacks in providing for requisite expertise of the members constituting the environmental cell in the interest of environment. No, criteria or qualifications have been fixed for the Member of environmental cell unlike the law in existence, which certainly would have adverse impacts as there will be massive construction activity causing serious environmental degradation.

5. From the above grounds, the applicants in all these applications pray that the impugned Notification dated 9th December, 2016 should be declared as *ultra vires* and be quashed. The challenge to the Notification is on legal grounds as well as on other reasons that it will have an adverse impact on environment, ecology and natural resources. In fact, it is contended that it will also have serious repercussion on climate change. The Notification though claims to serve social cause of providing housing for the poor but, in fact, result of its enforcement would be contrary. It would permit construction of huge buildings and apartments without strictly complying with the environmental norms.

6. It will be appropriate to commonly state the response of various respondents together to the applications filed by the applicants. The preliminary objection has been raised as to the maintainability of the applications. It is contended that the validity of the Notification dated 9th December, 2016, has been challenged which is amending the EIA Notification, 2006 in exercise of the power conferred under Section 3 of the Environment (Protection) Act, 1986 (for short, the 'act of 1986') on the ground that it is violative of Articles 21 and 14 of the Constitution of India, which is beyond the ambit of Section 14 read with Section 18 of the NGT Act and the Tribunal has no

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 7 Wednesday, November 23, 2022
Printed For: Mr. Rajive .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt. Ltd., Lucknow.

jurisdiction to examine the validity of the subordinate legislations. The object of Notification is to delegate the power to Urban Local Bodies to grant Environmental Clearance. The scope of the Environmental Clearance has been widened as, now, Environmental Clearance is required even for building size having a built-up area 5000 sq. mtr. to 20,000 sq. mtr. While under the earlier Notification the built-up area of 20,000 sq. mtr. and above was covered. Urban Local Bodies and Urban Development Authorities are involved in the building plan approval and while granting approval, the process of granting Environmental Clearance can very well be integrated and can be given online. This will hasten the grant of clearances and there would not be any adverse impact on the construction projects. The Notification attempts to decentralize the clearance process and has also attempted to integrate the environmental conditions along with building permissions. The local authorities would be conferred with the responsibility with support from expert bodies to discharge the important function. It is proposed to have a system of Qualified Building Environment Auditors (QBEA) providing for Third Party Auditing of environmental plans and its implementation. The QBEA will undertake certification that whether the environmental conditions have been adequately planned in the building design or not, it will thoroughly check its implementation during construction and regularly monitor its performance every five years. The setting up of an Environmental Cell at the level of Local Authority has been directed after taking into consideration lack of capacity at the level of Local Authorities. The Environmental Cell will comprise of three dedicated experts in the field of Waste Management (Solid and Liquid), Water Conservation and Management, Resource Efficiency including Building Materials, Energy Efficiency and Renewal Energy, Environmental Planning including Air Quality Management, Transport Planning and Management. The environment cell will also perform various other functions. The Local Authorities will prescribe the fee for environmental appraisal along with the fee for building permissions. Relying upon the judgement of the High Court of Delhi in the case of *Delhi Pollution Control Committee* v. *Splendor Landbase Ltd.* in LPA 1/2011 and C.M. No. 6781/2011, the Notification has been issued to grant exemption to the residential complexes from the operation of Air and Water Act, respectively. The High Court expressed the view that residential complexes do not require any permission to establish or operate under the said Acts. The QBEA is to be accredited by the MoEF&CC through qualified agency which would assess and certify building projects. The project proponent shall submit performance data and certificate of continued compliance of the project for the environmental conditions and parameters applicable after completion of construction from QBEA every five years to the environment cell focusing on different issues. If, there were violations committed by the builders who failed to take prior Environment Clearance in terms of the EIA Notification, 2006 and to deal with the violation in excess, the Ministry had issued certain Office Memorandums granting one time exemption which came to be set aside by the Tribunal *vide* its judgement dated 7th July, 2015 in the case of *S.P. Muthuraman* v. *Union of India*, (2015) ALL(I) NGT REPORTER (2) (DELHI) 170. 400 cases were kept on hold at different stages and in order to deal with the same, the present Notification had been issued. The purpose is to bring the entities under Environmental Compliance Regime at the earliest. The Notification provides various stages to be followed for granting prior Environmental Clearance which protects the environment in all respects. The Notification dated 9th December, 2016, provides that the States adopting the environmental conditions prescribed in appendix XIV of the Notification and incorporating it in the building bye laws and relevant state laws and incorporating the said conditions in the approvals given for building construction and making it legally enforceable, shall not require a separate Environmental Clearance from the MoEF&CC. The proposed changes by the State Government in its bylaws are to be examined by MoEF&CC and only after the concurrence of MoEF&CC to the

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 8 Wednesday, November 23, 2022
Printed For: Mr. Rajive .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt. Ltd., Lucknow.

changes made by the State Government, that the requirement of separate environmental Clearance by the Central government for buildings to be constructed in the State or Local Authority areas, is dispensed with. Appendix XVI provides setting up of Environmental Cell in terms thereof the cell shall be responsible for assessing and appraising the environmental concerns for the area under its jurisdiction where building activities are proposed. The environmental cell can evolve and propose additional environmental conditions as per requirement. The procedure for seeking building permission incorporating environmental conditions has been made more stringent in comparison to the earlier provisions. The burden lies on the project proponent for furnishing requisite information and the Local Authorities are expected to take greater caution and care in assessing them. The comparative analysis of the Notification dated 14th September, 2006 and 9th December, 2016 shows that the later is more comprehensive in terms of prescription of environmental protection standards and conditions. The Notification dated 9th December, 2016 was issued in view of the policy decision taken by the Government of India to provide affordable housing to weaker sections in Urban areas in terms of scheme of 'Housing for All by 2022'. The general conditions that were provided under the Notification of 14th September, 2006 in substance continue but only change that has been brought about is that instead of obtaining prior Environmental Clearance from the Central Government the same shall be obtained from the State/Union Territory Environmental Impact Assessment Authority. The requirement of obtaining prior Environmental Clearance has not been dispensed with. The Draft Notification was also challenged by the applicant which was disposed of *vide* order dated 30th September, 2016. The suggestions and objections were invited and after considering the same the final Notification was issued. The reliance placed by the applicants on the judgement of *Dr. Avinash Ramkrishna Kashiwar* v. *State of Maharashtra*; (2015) 5 Mh. L.J. 830 is of no consequence as on facts that judgement has no applicability in relation to the examination of the present Notification.

JURISDICTION OF THE TRIBUNAL:

7. According to the respondents, reliance placed by the applicant on the judgement in the case of *Dr. Avinash Ramkrishna Kashiwar* v. *State of Maharashtra* (supra) is misplaced as that judgement has no application to the facts of the present case and particularly, for examining the validity of the impugned Notification. The respondents, therefore, prayed that the application requires to be dismissed on merits as well as on the preliminary objections taken by them.

8. In light of the above factual matrix of the case, we have to examine the merit or otherwise of the preliminary objections taken by the respondents in regard to the jurisdiction of this Tribunal to examine the validity of the impugned Notification. To examine this issue, we do not have to refer to the facts in any detail suffices it to notice that challenge in the present case is to the legality and validity of the Notification dated 9th December, 2016. The contentions of the respondents are that this Tribunal has been constituted under the provisions of the National Green Tribunal Act, 2010 (for short, Act of 2010') and it being a statutory Tribunal is not vested with the powers to examine the validity or constitutionality of a subordinate legislation, i.e., Notification dated 9th December, 2016. Such aspects can only be examined by a constitutional Court, i.e., the Hon'ble Supreme Court of India or Hon'ble High Court. Reliance in this regard has been placed by them upon the judgement of the Division Bench of the Bombay High Court in the case of *Central India Ayush Drugs Manufacturers Association, Nagpur* v. *State of Maharashtra*, AIR 2016 BOM 261. The respondents also relied upon the judgement of Hon'ble Supreme Court of India in the case of *Alpha Chem* v. *State of Uttar Pradesh*, 1991 Supp (1) SCC 518, wherein it was held that challenge to the constitutionality of a statute is maintainable in proceedings initiated under Articles 226 and 32 of the Constitution of India and not in appeal or

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 9 Wednesday, November 23, 2022
Printed For: Mr. Rajive .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt. Ltd., Lucknow.

revision before High Court or in proceedings initiated under a statute before an authority constituted under the said statute itself. Contrary to this, the contention of the applicant is that the Tribunal is competent and is vested with the jurisdiction and power of judicial review. In exercise of such powers it can examine the constitutionality, validity and legality of a subordinate legislation, particularly, when the Notification issued in exercise of the subordinate legislation is for the implementation of the enactments specified in Schedule I of the Act of 2010. Under the provision of the Act of 2010, such power of the Tribunal is neither expressly nor impliedly barred. On the contrary, the scheme of the Act clearly demonstrates that the Tribunal is competent to examine the correctness of a Notification issued under any of the Scheduled Acts in so far as the Notification implement or impliedly implement the provisions, object and purpose of the scheduled Act under which it is issued. In support of their contention, the applicants rely upon the judgements of the Hon'ble Supreme Court of India in the case of *L. Chandra Kumar* v. *Union of India*, 1997 (2) SCR 1186, *SP Sampath Kumar* v. *Union of India*, (1987) 1 SCC 124, *State of West Bengal* v. *Ashish Kumar Roy*, (2005) 10 SCC 110 and judgements of this Tribunal in the case of *Wilfred J.* v. *Union of India*, 204 ALL (I) NGT REPORTER 2013, *SP Muthuraman* v. *Union of India*, 2015 ALL (I) NGT REPORTER (2) DELHI 170 and *Himmat Singh Shekhawat* v. *State of Rajasthan*, ALL (I) NGT REPORTER (1) DELHI 44.

9. As far as this bench of the Tribunal is concerned the question of jurisdiction is no longer *res integra*. It has been conclusively decided by larger bench of the Tribunal in the case of *Wilfred J.* (supra), where the Tribunal held as under:

> "39. Having dealt with the constitution of the Tribunal and having established its independence, now let us proceed to examine the scope of power of the Tribunal, with particular reference to examining a subordinate or delegated legislation as being ultra vires, unconstitutional or illegal. Judicial review is the power of the court to review statutes or administrative acts or determine their constitutionality or validity according to a written constitution. In a wider sense, judicial review is not only concerned with the merits of the decision but also the decision making process. It tends to protect individuals against the misuse or abuse of power by a wide range of authorities. Judicial review is a protection to the individual and not a weapon. It is the doctrine under which legislative and/or executive actions are subject to review (and possible invalidation) by the judiciary. A specific court with the power of judicial review may annul the acts of the State, when it finds them incompatible with a higher authority (such as the terms of a written constitution). Judicial review is an example of checks and balances in a modern governmental system, where the judiciary checks the other branches of government. This principle is interpreted differently in different jurisdictions, which also have differing views on the different hierarchy of governmental norms. As a result, the procedure and scope of judicial review may differ from country to country and State to State. Unlike in England, where the judiciary has no power to review the statutes/Acts made by the Parliament, the United States Supreme Court in terms of Article III and Article VI exercises the power of judicial review of the Acts passed by the Congress and has struck down several statutes as unconstitutional. In India, the Supreme Court and the High Courts have frequently exercised the power of judicial review keeping intact the 'doctrine of separation of power'. Challenge to legislation before the Courts in India has primarily been permitted on a very limited ground. The legislation in question should either be unconstitutional, or should lack legislative competence. Challenge to such legislation as being unreasonable has also been permitted, if it violates or unreasonably restricts the fundamental rights, particularly under Article 14 and 19 adumbrated in our Constitution.
>
> 40. The Courts are vested with the power of judicial review in relation to legislative acts and even in relation to judgments of the Courts. The power of

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 10 Wednesday, November 23, 2022
Printed For: Mr. Rajive .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt. Ltd., Lucknow.

judicial review has been exercised by the Courts in India sparingly and within the prescribed constitutional limitations. The Courts have also taken a view that functions of the Tribunal being judicial in nature, the public have a major stake in its functioning, for effective and orderly administration of justice. A Tribunal should have judicial autonomy and its administration relating to dispensation of justice should be free of opinions. (*Ajay Gandhi* v. *B. Singh*, (2004) 2 SCC 120). The National Green Tribunal has complete control over its functioning and all the administrative powers, including transfer of cases, constitution of benches and other administrative control over the functioning of the Tribunal, are vested in the Chairperson of the NGT under the provisions of the NGT Act".

10. The Tribunal in the case of *S.P. Muthuraman* (supra) also held that:

"This Tribunal has been vested with Original, Appellate and Special jurisdiction in regard to directing payment of compensation for damage to and for restitution and restoration of the environment. The legislature in its wisdom worded the provisions relating to the jurisdiction of the Tribunal (Sections 14 to 17 of the Act of 2010) very widely, and with a clear intent to provide this Tribunal with jurisdiction of a very wide magnitude. Upon reading the various provisions of the Act of 112 2010 cumulatively and in light of the underlying scheme of the Act of 2010, including the definition of 'environment' in terms of Section 2(c) of the Act of 2010, it is quite clear that this Tribunal is having all the trappings of a Court and is conferred with the twin powers of judicial as well as merit review. There is no provision in the Act of 2010 which curtails the jurisdiction of the Tribunal to examine the validity and correctness of a delegated legislation and/or administrative or executive order passed by the Government including any of its instrumentalities or authorities. The fundamental principle for invoking the jurisdiction of this Tribunal is that, the question raised should be a substantial question relating to environment and should arise out of the implementation of the enactments specified in Schedule I of the Act of 2010. It could even relate to enforcement of any legal right relating to environment with regard to these enactments. Delegated or subordinate legislation, executive orders and/or administrative orders in so far as they relate to the implementation of the Scheduled Acts would be open to challenge before the Tribunal and hardly any argument can be raised that the documents like Office Memoranda would not be subject to judicial scrutiny before the Tribunal".

11. The parties to the *lis* had preferred statutory appeal against the above cited judgement of the Tribunal before the Hon'ble Supreme Court of India. The Hon'ble Supreme Court of India had issued notice on the appeals and *vide* its order dated 21st January, 2015 in Civil Appeal No. 7884-7885 of 2014 had directed that further proceedings qua the appellants shall remain stay till further orders. However, in the same order the Hon'ble Supreme Court also directed that this Tribunal shall continue to exercise its powers in terms of Section 14, 16 and 18 of the NGT Act, 2010 in other cases. *Vide* order dated 3rd February, 2016, passed by the Hon'ble Supreme Court of India in another set of appeals being Appeals No. 8550-8551 of 2014 passed an order by modifying order dated 21st January, 2015. The order dated 3rd February, 2016 reads as under:

"…….By our Order dated 21.01.2015, we had stayed further proceedings in Appeals No. 14 of 2014, 17 of 2014 and 88 of 2014 and Original Application No. 74 of 2014 pending before the National Green Tribunal, Principal Bench at Delhi. Having heard learned counsel for the parties at some length, we are inclined to modify the said order so as to permit the Tribunal to proceed with the hearing of the Appeals and the Original Application for an expeditious disposal of the same. Learned counsel for the parties also agree that the appeals and the original application could be finally heard and that neither party shall pray for any interim

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 11 Wednesday, November 23, 2022
Printed For: Mr. Rajive .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt. Ltd., Lucknow.

direction in the said matters nor seek any adjournment which may unnecessarily procrastinate the entire controversy.

In the circumstances, therefore, we modify our Order dated 21.01.2015 and permit the National Green Tribunal, Principal Bench at Delhi to proceed with the hearing of the appeals and Original Application and make an endeavour to dispose of the same as far as possible within a period of six weeks from the date a copy of this 3 order is placed before it. We make it clear that hearing of the Appeals and O.A. on merits pending before the Tribunal shall be without prejudice to the contentions open to the parties in these appeals which shall await the final hearing and disposal of the matter by the Tribunal. These appeals shall accordingly stand over for being listed after the disposal of the matters by the Tribunal. Liberty is given to the parties to mention the matter once the Tribunal passes final orders in the case before it."

12. In terms of the above order, the matters were finally heard by the Tribunal and disposed of *vide* order dated 2nd September, 2016. The parties had approached the Hon'ble Supreme Court after the final judgement by the Tribunal. The matter was heard by the Hon'ble Supreme Court and the Appeals were disposed of *vide* order dated 3rd July, 2017. The order dated 3rd July, 2017 while leaving the question of law open, reads as under:

> "……Pursuant to the order dated 3rd February, 2016, the National Green Tribunal has delivered judgment and order dated 2nd September, 2016. A review petition filed against that decision was disposed of on 30th November, 2016.
>
> We are told by the learned Attorney General that the project has been upheld by the National Green Tribunal. Under the circumstances, we dispose of these appeals leaving open the question decided by the National Green Tribunal on its jurisdiction to set aside subordinate legislation.
>
> In the event any of the aggrieved parties raises a dispute against the final order passed by the National Green Tribunal, it will be open to the appellant as well as the State of Kerala to agitate the issue of a 2 challenge to the subordinate legislation.
>
> Pending applications, if any, are disposed of."

13. In terms of the above order, it is clear that the law stated by the Tribunal in its judgement in the case of *Wilfred J.* (supra) was not disturbed by the Hon'ble Supreme Court either at the interim stage or while finally disposing of the appeals. Interim stay granted by the Hon'ble Supreme Court was limited to the appeals with a specific dictum that the Tribunal could decide other cases in terms of the provisions of the Act thereby clearly stating that the judgement in the case of *Wilfred J.* (supra) on the question of law was neither interfered nor stayed. Thus the law stated by the larger bench of the Tribunal attains finality and is binding on this bench. In any case, we have no reason not to accept the mandate of the larger bench and apply to the present case. The reliance placed by the respondents upon the judgement of the High Court of Bombay in the case of *Central India Ayush* (supra) will not be of any benefit to the respondents. Firstly, the judgement of the High Court of Bombay does not consider the larger bench of the Tribunal in the case of *Wilfred J.* (supra). It also does not refer to the judgements of the Hon'ble Supreme Court in *L. Chandra Kumar* (supra) wherein Hon'ble Supreme Court had clearly stated that the Tribunals are competent to hear matters challenging *vires* of the statutory provisions or *vires* of the subordinate legislation. Of course such jurisdiction falls in a limited compass. In the case of *SP Sampat Kumar* (supra), the Hon'ble Supreme Court clearly stated that the Tribunal has power of the judicial review and even vested with the powers of the Civil Courts so it has wide jurisdiction including the power of judicial review. There are other judgements from other High Courts which have taken entirely a different view than the

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 12 Wednesday, November 23, 2022
Printed For: Mr. Rajive .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt. Ltd., Lucknow.

view taken by the High Court of Bombay. These High Courts have specifically referred to the Tribunal for adjudication of cases involving challenge to the Notifications issued in exercise of subordinate legislation with regard to noise pollution, plastic bags and other such matters. In this regard, we may refer to the judgement of the High Court of Delhi in the case of *All India Plastic Industries Association* v. *Govt. of NCT of Delhi*, Writ Petition No. 7012 of 2012 decided on 5th December, 2016. The Division Bench of the High Court while relying upon the judgement of *L Chandra Kumar* (supra) of the Hon'ble Supreme Court of India and the provisions of the Schedule I to the Act of 2010, held that the matter before it challenging the Notification issued under Section 5 of the Environment (Protection) Act, 1986 (for short, 'act of 1986') imposing a ban on manufacture, import, store, sale or transport of any kind of plastic, carrying bags etc be transferred to this Tribunal for deciding the same on merits including the question, validity of the Notification. It may be noticed that High Court of Delhi would be the jurisdictional High Court for the Principal Bench, National Green Tribunal.

14. The Punjab & Haryana High Court, Tripura High Court and Jharkhand High Court has also transferred the cases of *Goodwill Plastic Industries* v. *Union Territory of Chandigarh*, *All India Plastic Industries Association* v. *Tripura* and *RDS Bricks* v. *State of Jharkhand*, respectively to the Tribunal. In all these cases, *vires* to the Notifications dated 30th July, 2008 and 3rd July, 2013 both relating to banning of plastic and Notification dated 29th March, 2012 relating to eco-sensitive zone were challenged. To put it simply all these High Courts have taken a view that the Tribunal can examine the validity of a Notification issued for implementation of a subordinate legislation.

15. In the another judgment of the Tribunal in the case of *SP Muthuraman* v. *Union of India* (supra), wherein the office memorandums issued by the MoEF&CC dated 12th December, 2012 and 27th June, 2013 were quashed. The Tribunal took the view that it had the limited power of judicial review and it can examine the office memorandums issued in furtherance to the rules framed by MoEF&CC. A review application was filed by the different project proponents in that case, which was also dismissed *vide* order dated 1st September, 2015. The orders of the Tribunal were challenged before the Hon'ble Supreme Court of India and the Hon'ble Supreme Court *vide* its order dated 24th September, 2015, stayed the order of the Tribunal. *Vide* order dated 23rd November, 2015 and upon application of MoEF&CC the Hon'ble Supreme Court of India clarified its order and stated that stay was applicable only to the appellant's before it. During the pendency of the appeals, some directions were passed by the Hon'ble Supreme court in relation to deposit of the environmental compensation imposed by the Tribunal. The Hon'ble Supreme Court *vide* order dated 4th July, 2016 made it clear that the Tribunal could proceed by passing of directions as contained in para 163(13) of its order dated 7th July, 2015 and parties were granted liberty to raise all submissions open to them on fact and law before the Tribunal. Even the judgement of the Tribunal on the question of jurisdiction has not been stayed by the Hon'ble Supreme Court. However, the parties have been granted liberty to raise all pleas of facts and law. The Tribunal had also passed similar judgments in the case of *Himmat Singh Shekhawat* v. *State of Rajasthan* (supra) and *Kalpvriksha* v. *Union of India*, in OA No. 116 of 2013 (T_{HC}) decided on 17th July, 2014. All these orders have attained finality and remain undisturbed.

16. Another aspect that needs specific mentioning by us is that this Tribunal is a special and unique Tribunal constituted under the legislation enacted by the Parliament in exercise of its powers under Article 253 of the Constitution of India. It needs to be distinguished from other Tribunals enacted under Article 323(A) and 323 (B) of the Constitution. This Tribunal has been constituted for the purpose of implementing the decisions at the United Nations Conference on the Human Environment held at Stockholm in June 1972, where India also participated. 186th Law Commission Report also noticed that the environmental Tribunal constituted under

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 13 Wednesday, November 23, 2022
Printed For: Mr. Rajive .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt. Ltd., Lucknow.

Article 253 could be traced as an act of implementation of the decisions taken at the International Conference with reference to Rio-declaration of 1992. The purpose of implementing the decisions at Rio conference & Stockholm Conference and constituting the Tribunal was to provide speedy adjudicatory body in respect of the disputes arising in environmental matters. In the case of *Braj Foundation* v. *State Government of UP*, Application No. 278 of 2013 decided on 5th August, 2014, the bench of the Tribunal held that one is to remember that the Tribunal is created in furtherance to the enactment of the Parliament to give effect to the true spirit of the terms of Article 253 of the Constitution of India and, therefore, there is no iota of doubt in our mind that the Tribunal has inherent power of not only enforcing its orders but also dealing with any person who either disobeys or violates its orders. The inherent power would co-exist with the Tribunal examining the correctness of any office order or subordinate legislation whether it is in consonance or not with the provisions of the environmental laws in force particularly when it is issued under those very legislations.

17. In light of the above position of law and the fact that the judgments of the Tribunal in the case of *Wilfred J.* (supra) and *S.P. Muthuraman* (supra) are binding upon this bench. We have no hesitation in rejecting the objection raised by the respondents as without merit.

DISCUSISON ON MERITS OF THE CONTENTIONS RELATING TO VALIDITY OF THE NOTIFICATION

18. The draft Notification dated 29th April, 2016 was published by the Respondent inviting objections and suggestions thereto. After considering the objections/suggestions received by the MoEF&CC, it had issued the final Notification dated 9th December, 2016. According to the Applicant, not only the Notification dated 9th December, 2016 but also the entire process of finalizing the Notification suffers from factual and legal infirmities. It is also the contention that it defeats the very object and purpose of the Act of 1986, EIA Notification of 2006 and is also opposed to the federal scheme under the Constitution of India. The detailed objections raised by the Applicant has already been noticed by us in paragraph no. 4 of the judgment (supra). According to the respondent, the notification does not suffer from any error much less legal infirmity or validity. The contentions of the respondents have also been noticed above. And within the ambit of the contentions raised before us, now, we will proceed to deliberate on these issues. First and foremost, we may refer to the comparative study of the existing and proposed regime in terms of the Notifications dated 14th September, 2006 and 9th December, 2016. The useful reference can be made to the following chart:

Sl. No.	Particulars	EIA Notification dated 09 December, 2016	EIA Notification dated 14 September, 2006
1.	Consent to Establish & Operate	• Prior to the actual construction activities, the project proponent has to obtain Consent to Establish from the Board under the Water (Prevention and Control of Pollution) Act, 1974 and the Air	• No Consent to Establish and Operate under the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981 will be required from the State Pollution

SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 14 Wednesday, November 23, 2022
Printed For: Mr. Rajive .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt. Ltd., Lucknow.

		(Prevention and Control of Pollution) Act, 1981 for all construction projects having BUA above 20,000 m^2 • After completion of the construction activity, the proponent has to obtain Consent to Operate from the Board under the Water the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981 will be required from the State Pollution Control Boards for residential buildings up to 1,50,000 square meters and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981 for all construction projects having BUA above 20,000 m^2.	Control Boards for residential buildings up to 1,50,000 square meters
2.	Construction projects having built up area below 20,000 m^2	• Projects having built up area below 20,000 m2 not require prior environmental clearance from MoEF	• BUILDINGS CATEGORY '1' (5,000 to < 20,000 Square meters) - A Self declaration Form to comply with the environmental conditions (Appendix XIV-attached below) along with Form 1A and certification by the Qualified Building Environment

SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 15 Wednesday, November 23, 2022
Printed For: Mr. Rajive .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt. Ltd., Lucknow.

			Auditor to be submitted online by the project proponent besides application for building permission to the local authority along with the specified fee in separate accounts - Thereafter, the local authority shall issue the building permission incorporating the environmental conditions in it and allow the project to start based on the self declaration and certification along with the application - After completion of the construction of the building, the project proponent may update Form 1A online based on audit done by the Qualified Building Environment Auditor and shall furnish the revised compliance undertaking to the local authority. - Any non-compliance issues in buildings less than 20,000 square meters shall be dealt at the level of local body and the State through existing mechanism
3.	Construction Projects having built up area above 20,000 m^2	• An application seeking prior environmental clearance in all cases shall be made in the prescribed Form 1	• The project proponent to submit online application in Form 1 A along with specified fee for environmental

SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 16 Wednesday, November 23, 2022
Printed For: Mr. Rajive .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt. Ltd., Lucknow.

			annexed herewith and-The project proponent to submit online application in Form 1 A along with specified fee for environmental appraisal and additional fee for building permission -The fee for environmental appraisal will be deposited in a separate account Supplementary Form 1A, if applicable, as given in Appendix II, after the identification of prospective site(s) for the project and/or activities to which the application relates, before commencing any construction activity, or preparation of land, at the site by the applicant.	appraisal and additional fee for building permission -the fee for environmental appraisal will be deposited in a separate account. • The Environment Cell will process the application and present it in the meeting of the Committee headed by the authority competent to give building permission in that local authority-The Committee will appraise the project and stipulate the environmental conditions to be integrated in the building permission -After recommendations of the Committee, the building permission and environmental clearance will be issued in an integrated format by the local authority-The project proponent to submit Performance Data and Certificate of Continued Compliance of the project for the environmental conditions parameters applicable after completion of construction from Qualified Building Environment Auditors every five

SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 17 Wednesday, November 23, 2022
Printed For: Mr. Rajive .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt. Ltd., Lucknow.

				years to the Environment Cell with special focus on the following parameters; 1. Energy Use (including all energy sources) 2. Energy generated on site from onsite Renewable energy sources 3. Water use and waste water generated, treated and reused on site 4. Waste Segregated and Treated on site 5. Tree plantation and maintenance -After completion of the project, the Cell shall randomly check the projects compliance status including the five years audit report-The State Governments may enact the suitable law for imposing penalties for non-compliances of the environmental conditions and parameters-The Cell shall recommend financial penalty, as applicable under relevant State laws for noncompliance of conditions or parameters to the local authority. • On the basis of the recommendation of the Cell, the local authority may impose the penalty

SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 18 Wednesday, November 23, 2022
Printed For: Mr. Rajive .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt. Ltd., Lucknow.

			under relevant State laws-The cases of false declaration or certification shall be reported to the accreditation body and to the local body for blacklisting of Qualified Building Environment Auditors and financial penalty on the owner and Qualified Building Environment Auditors
4.	Built up Area considered for EC	• Built up area for covered construction; in the case of facilities open to the sky, it will be the activity area	• The term "built up area" for the purpose of this notification is the built up or covered area on all floors put together including its basement and other service areas, which are proposed in the buildings and construction projects
5.	Monitoring of environmental compliances	• Earlier, it was mandatory for the project proponent to submit compliance report every six months.	• Project proponent shall submit performance data & certificate of continued compliance of the project for the environmental conditions after completion of construction every five years.
6.	Process of granting permission for construction and building projects	• Under 2006 notification prior Environment clearance from SEIAA was mandatorily required even before starting of the construction	• Under 2016 notification Environmental conditions are to be imposed by Environmental cell at the level of local authority. The cell will then process

SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 19 Wednesday, November 23, 2022
Printed For: Mr. Rajive .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt. Ltd., Lucknow.

		work or preparation of land. SEIAA was to screen scope and appraise projects before granting of environment clearance. • The environmental clearance process before SEIAA comprises of four stages, all of which may not apply to particular cases as set forth. These four stages in sequential order are:— • Stage (1) Screening (Only for Category 'B' projects and activities) • Stage (2) Scoping • Stage (3) Public Consultation • Stage (4) Appraisal	the application and place it before the committee headed by the authority competent to give building permissions. The committee will then appraise the project and stipulate environmental conditions without any provisions of public consultation which is an integral part of 2006 notification. • Therefore, the environmental cells work under the building permit issuing authority therefore not a independent authority to impose environmental conditions. Moreover building permit authority is not a scientifically sound body as SEIAA or SEAC.
7.	Environment Clearance Authority concerning Building and Construction projects	• Clearance was given after screening and appraising of the projects by government constituted bodies' i.e. SEIAA or SEAC who are independent bodies.	• Imposition of environmental conditions by local authority on the basis of assessment and certification by Qualified Building Environment Auditors (QBEAs) which could be a firm/Organization or an individual expert accredited by the accreditation authority.
8.	Violation of environmental conditions	• Violation of environmental conditions and parameters are dealt under section 15 and section 19	• The state Government may enact suitable laws for imposing penalties for non compliance. The

SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 20 Wednesday, November 23, 2022
Printed For: Mr. Rajive .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt. Ltd., Lucknow.

		of EPA, Act 1986.	local Authorities shall impose penalties based on the recommendation of environmental cell of local body.
9.	Qualification of Experts	• Multi sectoral/Multi disciplinary experts in SEAC. • Qualification as per the Schedule 6 of the current EIA notification.	• Experts of limited sectors like Water, Air, Solid Waste, Energy and transport in environmental cell.

19. From the above comparative study of the two regimes, it is clear that the regime in terms of the Notification dated 9th December, 2016 would considerably dilute the environmental safeguards provided not only under the Regulation of 2006 but even under the Act of 1986. The Applicants have rightly placed reliance on the Principle of Non-regression. Under the International law, the doctrine of Non-regression is an accepted norm. It is founded on the idea that environmental law should not be modified to the detriment of environmental protection. This principle needs to be brought into play because today environmental law is facing a number of threats such as deregulation, a movement to simplify and at the same time diminish, environmental legislation perceived as too complex and an economic climate which favours development at the expense of protection of environment. The draft amendment of the existing environmental laws should be done with least impact on environment protection that was available under the existing law or regime. The present amendment in the Notification particularly few clauses that we will refer hereinafter can lead to severe environmental impacts.

20. The Precautionary Principle as propounded by the Hon'ble Apex Court is a cornerstone of environmental jurisprudence in the country as the environmental conditions imposed are not comprehensive enough and are only a tick-box exercise taken by the project proponent without any prior environment assessment process especially its impact on ecologically sensitive area and other environmental vulnerable area.

21. The impugned notification, takes away the power of the Pollution Control Boards and Committee to grant/refuse Consent to Establish and Consent to Operate for building and construction projects up to an area of 1,50,000 sq meter. It further dilutes the entire environmental assessment framework under the EIA notification 2006, which has been periodically strengthened and amended by the numerous orders of this Hon'ble Tribunal.

22. The impugned notification has several deficiencies that go against the basic letter and spirit of EPA Act, 1986 and the EIA notification issued there under. Power under Section 3 read with Rule 5 of Environment (Protection) Act, 1986 can only be exercised by the central government or the authorities constituted by it. Whereas the impugned notification gives power to the State Government for constitution of an authority to exercise and perform such of the powers and functions as provide under Environment Protection Act, 1986, which Includes assessment and granting of environment clearance to the projects. This would be apparently in conflict with the provisions of the Act of 1986. In this regard reference can also be made to the judgement of the constitutional bench of the Hon'ble Supreme Court in the case of *LIC*

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 21 Wednesday, November 23, 2022
Printed For: Mr. Rajive .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt. Ltd., Lucknow.

v. *Escorts Ltd.*, (1986) 1 SCC 264, where the Hon'ble Supreme Court held that it may be open to a subordinate legislating body to make appropriate rules and regulations to regulate the exercise of a power which the Parliament has vested in it, or as to carry out the purposes of the legislation, but it cannot divest itself of the power.

23. It is further stated that these conditions fall substantially below the prior environmental assessment procedure which was much detailed and brought within EIA framework after the direction of the Hon'ble Supreme Court in the *Maily Yamuna Case* (W.P.C. No. 725 of 1994).

24. The impugned notification provides that the local authorities such as the development authorities and Municipal Corporation may certify compliance of Environmental Conditions prior to issuance of completion certificate based on recommendations of the Environmental Cell to be constituted in the local authority. Further, the purpose of notification regarding integration of environmental conditions, the MoEF&CC through competent agencies would accredit Qualified Building Environmental Auditor (QBEA's) to assess and certify the building projects. It is clear from the above that the entire assessment procedure has been replaced over which the MoEF&CC has no control.

25. The MoEF&CC has failed to produce any study, literature, evaluation of the reason for taking such a retrograde decision to go back to a pre-2004 situation wherein the failure of the local bodies was considered to be the primary reason for bringing building and constructions activity within the EIA framework. In pre-2004 the position was that the construction sector projects were only regulated through Bye Laws and no Environmental Clearance was required.

26. The proposal for exemption of Environmental Clearance for construction and building project with built-up area to 1,50,000 Sq mtrs. is baseless as there is no study that indicates any improvement in environment quality with regard to all environmental facets/availability of natural resources, following which there can be a consideration for relaxation of current norms.

27. The said amendment notification is only a ploy to circumvent the provisions of environmental assessment under the EIA Notification, 2006 in the name of `ease of doing responsible business' and there is no mechanism laid down under the amendment notification for evaluation, assessment or monitoring of the environment impact of the building and construction activity. The construction industry consumes enormous resources and has a significant energy footprint; the sector emits 22 per cent of India's total annual carbon-dioxide emission. The Hon'ble Tribunal in the matter of *S.P. Muthuraman* v. *Union of India* (supra) Observed:

> *"In recent past, building construction activities in our country have been carried out without much attention to environmental issues and this has caused tremendous pressure on various finite natural resources. The green cover, water bodies and ground water resources have been forced to give way to the rapid construction activities. Modern buildings generally have high levels of energy consumption because of requirements of air-conditioning and lighting in addition to water consumption. In this scenario, it is necessary to critically assess the utilization of natural resources in these activities."*

28. The very purpose of including the construction projects in the EIA Notification was the failure of the local bodies to ensure compliance with environmental norms. The ULB's/DA's have always had specific stipulation on environmental concerns. However, such conditions were never adhered to or made a pre-requisite to such sanction. It was therefore the case of MoEF&CC that the local body have been approving new construction projects without adhering to environmental norms. Now, the MoEF&CC itself is taking a step in backward direction without there being any changes brought about in the capacity and technical competence of the local body to

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 22 Wednesday, November 23, 2022
Printed For: Mr. Rajive .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt. Ltd., Lucknow.

assess, evaluate and monitor the environmental norms or to ensure compliance.

29. The EIA Notification, 2006, has a comprehensive process for evaluating the impact on environment which will not be the case after the said notification. For instance, the EIA Notification, 2006 provides Expert Appraisal Committee at the Centre and the State Expert Appraisal Committee at the State level. The composition of these committees comprises as per Appendix-VI to EIA Notification, 2006 of independent experts, such as, Environment Quality Expert, Sectoral Expert in Project Management etc. But as per the amendment notification the same local body which is responsible for the stipulation of the condition would be responsible for ensuring the compliance of the same with the help of Environmental cell and QBEAs. This is in contravention of the principle of *nemo judex in sua causa,* which is a principle of natural justice, meaning that a person cannot be judge of his own cause. Also, there is no technical expertise or competence within the local bodies to either evaluate impact or to ensure compliance of environmental conditions.

30. As per the EIA Notification 2006, clause 1.3 states "*what are the likely impacts of the proposed activity on the existing facilities adjacent to the proposed site? (Such as open spaces, community facilities).* But as per the amended notification of 2016, no such provision is laid down.

31. This Hon'ble Tribunal in O.A. No. 171 of 2013 (*NGT Bar Association* v. *MoEF*) vide Order dated 13.01.2015 stated "*We direct Secretary, MoEF along with such experts and the States Afore referred will also consider the possibility of constituting the branches of SEIAA at the district or at least, division levels to ensure easy accessibility to encourage the mine holders to take EC*". Similarly, the O.M. dated 19.06.2013 states that "*In case of a large pendency case the concerned state Government feels that there is need for another SEAC, the State Government may accordingly send the proposal to MoEF&CC for setting up/notifying another SEAC and MoEF may consider the same*". However instead of adhering to their own O.M.'s and the categorical judgement of the this Tribunal, they have chosen to completely dilute EC process and violate the EIA Notification, 2006 and thereby Act of 1986.

32. A bare perusal of amendment notification would show that there is complete dilution of the norms as provided under the EIA Notification, 2006. For instance, totality of issues related to conservation of water is completely ignored for building of built-up area up to 5000 sq.mtr. There is no sewage treatment or municipal solid waste processing facilities stipulated within the premises for building up to 5000 sq. mtr. of built up area.

33. The MoEF&CC has failed to fulfil its statutory responsibilities. By transferring the powers to ULBs/Development Authority, it has created a situation of conflict of interest as all the powers have been vested with the same authority. National documents (CAG Report, 2016) also discourage such an integration of environment condition to the sanctioning authority under the urban local bodies instead of independent assessment by environmental experts of building and construction projects. Thus for example, the report by Comptroller and Auditor General of India (CAG Report, 2016) clearly states that urban local bodies have not been performing on environmental parameters. In most compliance audit, the environmental parameters including MSW, Waste minimisation, e-waste etc. have been grossly violated.

34. It is submitted that on para wise comparison of the draft notification and final notification are entirely different. The main addition which were not part of draft notification but found place in the final notification are as follows:

- *Consent to establish and Consent to Operate under Water Pollution Act, 1974 and Air Pollution Act, 1981 will not be required from SPCB for residential buildings up to 1,50,000 sq.m.*
- *Stripping of building construction projects of built up area of 20,000 sq.m upto*

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 23 Wednesday, November 23, 2022
Printed For: Mr. Rajive .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt. Ltd., Lucknow.

1,50,000 sq.m. from the purview of EPA Act, 1986 and bringing under the concerned State Laws.

- *The draft Notification specifically mentions that the exclusion/amendments mentioned in the draft notification are not intended for hospitals whereas the final notification clearly excludes hospitals also from the purview of EIA Notification and EPA Act, 1986.*
- *Addition of Appendix-XV, Accreditation of Environmental Auditors. (qualified Building Auditors).*
- *Addition of Appendix-XVI, Environmental Cell at the level of Local Authority.*

35. When the residential building construction projects of built up area more than 20,000 sq.m up to 1,50,000 sq.m are excluded from the requirement of "Consent to Establish" or "Consent to Operate" then these building construction projects will be out of the purview of these statutes, what will be the relevance of CPCB norms and this will encourage indiscriminate discharge of untreated sewage into river and drains.

36. In the said notification, there is no definition of "Area". In the absence of such a definition, the "Area" can be for the whole of the State or District or Region. In this connection, attention is brought to the EIA Notification, 2006 wherein the word "built-up area" was introduced. There was no definition of "built up area" in the impugned Notification and which leads to confusion in the building construction sector.

37. The said notification is contrary to the recommendations of the report of the committee constituted by MoEF&CC on 11.12.2012 (The Kasturirangan report) to review the provisions of EIA Notification, 2006 relating to buildings, etc. which was then accepted by MoEF&CC. The MoEF&CC vide OM dated 10.11.2015, reiterated and vetted the recommendations of Kasturirangan Committee among other things. If the MoEF&CC is now changing its stand, it is duty bound to produce back-up study or research material to prove that the local bodies have concern towards environment.

38. Besides noticing the above mentioned deficiencies in and dilutions of the existing laws by the impugned Notification, we must also notice a very strong legal infirmity in it. Admittedly, the notification has been issued by the MoEF&CC in exercise of its powers under sub-section (1) read with clause (V) of sub-section (2) of Section (3) of the Act of 1986 and clause (d) of sub-rule (3) of Rule (5) of the Environment (Protection) Rules, 1986. By the impugned Notification, paragraph 14 is sought to be inserted after paragraph 13 of the existing Notification/Regulations of 2006. The powers under these provisions can be exercised under Section 3(2)(5) of the Act of 1986 which empowers the Central Government to take measures to protect and improvement of the quality of environment in regard to restrictions of areas in which any industry/operations or process or class of industries operations or processes shall not be carried out or shall be carried out subject to certain safeguards. In terms of section 3(1) of the Act, this power of taking measures is to be exercised by the Central Government when it deems necessary and expedient for the purpose of protecting and improving the quality of environment and preventing, controlling and abating environmental pollution (emphasis supplied). Rule 5 deals with the prohibition and restriction on the locations of industries and the carrying on process and operations in different areas. It gives power to the Central Government to take into consideration the factors while prohibiting or restricting the locations of industries and carrying on of process/operations in different areas. Sub-rule 3 of this Rule contemplates the procedure to be followed by the Central Government while issuing the notification for imposing prohibition or restriction as stated in Sub-rule (1) of Rule 5.

39. Thus, both the sections and the rule gives power for issuing of any notification and placing prohibition/restriction in their terms, subject to the conditions, i.e., while issuing notification the procedure under Rule 5(3) should be followed and more importantly it should be exercised only for the purpose of protecting and improving

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 24 Wednesday, November 23, 2022
Printed For: Mr. Rajive .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt. Ltd., Lucknow.

the quality of the environment and preventing pollution. Once any of these essential statutory features are missing the notification issued would be liable to be interfered with. The major part of the Notification does not satisfy these ingredients.

40. The amended clause 14 while dealing with the other building category more than 20000 sq. meter also provides that no Consent to Establish and Operate under the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981 will be required from the State Pollution Control Boards for residential buildings upto 150000 sq. meter. This amendment is *exfacie* opposed to the above objects and in fact lacks legislative competence. While exercising powers under a subordinate legislation in furtherance to Section 3 and Rule 5, the authority cannot in exercise of its subordinate legislation exclude the operation of a substantive law that is Water Act, 1974 and Air Act, 1981 enacted by the Parliament. This would suffer from the *vires* of excessive legislation. It is strange that the MoEF&CC, a delegatee under the said provision could venture upon excluding the application and enforcing of a Parliament Act without even making any amendment under that act or the rules framed under that act. This action of the MoEF&CC cannot stand the scrutiny of law.

41. The Environmental Cell is to be constituted by the local authority or the State Government, whereas the implementation of the environmental law is vested with the Central Government. The Environmental Clearance is expected to be issued by the authorities in an integrated format. Any offence or violation thereto which is punishable under the Act of the Parliament, i.e., the Act of 1986 thus subordinate legislative amendment takes away that power and requires a local authority to take precedence in relation to providing punishment for such violation or offence. There is clear ambiguity and uncertainty in the Constitution of the Environmental Cell and its functions. There is no clarity as to the qualification which the Member of the Environmental Cell should possess. A Cell, primary duty of which is to protect the environment would have to work in subordination to a local authority whose primary object is to permit development. Thus, the possibility of conflicting interest arising in the functioning of the local authority and the Environmental Cell cannot be ruled out. It may arise even then thus defeating the very purpose of the amendment.

42. Another serious objection raised to the Notification is that the final Notification has been issued without considering the objections filed to the draft Notification. Of course, in terms of the procedure prescribed under Rule 5(3) of the Rules of 1986 the procedure must be strictly adhered to. The MoEF&CC had invited objections which were filed and even the Applicant was heard. There cannot be a doubt that requirement of considering objections effectively is not a mere formality. It should be done objectively and in accordance with law as held in the case of *Dr. Avinash Ramkrishna Kashiwar* v. *the State of Maharashtra* (supra):

> 17. *"It could thus be seen that it appears to be settled position of law that the requirement of previous publication inviting objections and suggestions is not an empty formality. It is with an intention to enable persons likely to be affected, to be informed, so that they may take steps as may be open to them and the objections/suggestions made would be required to be taken into consideration by the authorities before issuing a final notification".*

43. *"In the result, we hold that the impugned notification dated 26.07.2013 is not sustainable in law and, therefore, quashed and set aside. Rule is, therefore, made absolute in the aforesaid terms with no orders as to costs."*

44. The Applicant had filed objections which were duly considered by the MoEF&CC and even the Applicant was heard. There is nothing on record before us that would show that there is no application of mind and that the objections were not considered objectively by the MoEF&CC. In light of this, we are unable to accept this contention

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 25 Wednesday, November 23, 2022
Printed For: Mr. Rajive .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt. Ltd., Lucknow.

raised on behalf of the Applicants.

45. The other argument of the Applicant which deserves to be considered with some merit is that the final impugned Notification is at substantial variance to the draft Notification. This has not only resulted in prejudice to the environment but has also defeated the purpose of Rule 5(3) of the Environment (Protection) Rules, 1986. Following are few examples of such variance and which have significant effect on the environmental laws:

(a). The exclusion of application of the Water Act and the Air Act was never proposed or stated in the draft Notification, while it has been introduced in the final Notification.

(b). Role of the State Pollution Control Boards to monitor and verify the environmental conditions is eliminated in the final notification. The construction of built up area upto area of 20,000 sq. meter upto 1,50,000 sq. meter which were otherwise covered under the Act of 1986 now have been brought under the State Laws without specifying them in the draft notification. The draft Notification specifically mentions that the exclusion/amendment benefits mentioned in the draft Notification are not intended for hospitals whereas the final notification clearly excludes hospitals from the purview of the EIA Notification, 2006 and Environment (Protection) Act, 1986. It is at substantial variance as the hospitals fall under red category under the Central Pollution Control Board categorization dated 7th March, 2016. So, provision of dealing with the environmental conditions of hospitals falling under the environmental norms.

(C). Addition of Appendix XV, accreditation of environmental auditor (Qualified Building Environment Auditor).

(D). Addition of Appendix XVI, Environmental Cell at the level of local authority.

46. On the above premises, it is contended that on the one hand, there is substantial difference between the draft and the final notifications while on the other hand Applicants were deprived of the right to file objections on these aspects. Reliance is placed on the judgement of the Hon'ble Supreme Court of India in the case of *State of Punjab* v. *Tehal Singh*, AIR 2002 SC 533 wherein the Supreme Court held that Principle of Natural Justice to subordinate legislation may be applied but where the legislature provides an opportunity of hearing and filing objections then it must be adhered to *senso stricto*.

47. From the records before the Tribunal, it is clear that there are variations even of substantial nature between the draft and the final Notification dated 9th December, 2016 issued by the respondent. One of the significant failures of the same is that the applicants or public at large has lost substantive right to file objections on these aspects to the draft Notification. They have also lost the right to be heard in terms of Rule 5(3) of the Rules of 1986. Incorporation of such provisions from the draft Notification into the final Notification would not be permissible.

48. Some of the portions of the impugned Notification; particularly, relating to granting of exemption from the application of Water and Air Acts; Rendering the provisions of the central law for taking action, penalizing defaulters and offenders of the environmental law being rendered ineffective; ambiguity and deficiencies in constitution of the Environmental Cell are some of the patent features of the impugned Notification which dilutes the environmental impacts on the one hand, while on the other, they are in derogation to India's international commitments to the Rio Declaration, 1992 and Paris Agreement, 2015. If principle 15 to 17 of the Rio Declaration is read along with clauses of the Paris Agreement, 2015, particularly, in face of precautionary approach, preventing irreparable damage forming definite environmental impact assessment to examine adverse impact on the environment, reduction on the growth of is carbon emission and to adopt best practices and achieve

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 26 Wednesday, November 23, 2022
Printed For: Mr. Rajive .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt. Ltd., Lucknow.

the ambitious targets between the stipulated time then the adopting cumulative effect of the Notification dated 9th December, 2016 would have some element of derogation. The Notification also ignores some essential features like source of water, source of raw material, urban ecology, provision of no development zone and construction face impacts. These aspects have a direct bearing on protection of environment and keeping in line with the Principle of Sustainable Development. It is important that there should be development and particularly, when the development is guided by the social cause but that development should not be permitted to cause irreparable loss to the environment and ecology. Sustainable development has to be the ultimate criteria. The Hon'ble Supreme Court in the case of *N.D. Dayal* v. *Union of India*, (2004) 9 SCC 362 deliberated upon the Doctrine of Sustainable Development and while comparing with the economic growth and well being held as under:

> "24. The right to development cannot be treated as a mere right to economic betterment or cannot be limited to as a misnomer to simple construction activities. The right to development encompasses much more than economic well being, and includes within its definition the guarantee of fundamental human rights. The 'development' is not related only to the growth of GNP. In the classic work - '*Development As Freedom*' the Nobel prize winner Amartya Sen pointed out that 'the issue of development cannot be separated from the conceptual framework of human right'. This idea is also part of the UN Declaration on the Right to Development. The right to development includes the whole spectrum of civil, cultural, economic, political and social process, for the improvement of peoples' well being and realization of their full potential. It is an integral part of human right. Of course, construction of a dam or a mega project is definitely an attempt to achieve the goal of wholesome development. Such works could very well be treated as integral component for development.
>
> 25. Therefore, the adherence of sustainable development principle is a sine qua non for the maintenance of the symbiotic balance between the rights to environment and development. Right to environment is a fundamental right. On the other hand right to development is also one. Here the right to 'sustainable development' cannot be singled out. Therefore, the concept of 'sustainable development' is to be treated an integral part of 'life' under Article 21. The weighty concepts like intergenerational equity (*State of Himachal Pradesh* v. *Ganesh Wood Products*, (1995) 6 SCC 363), public trust doctrine (*MC Mehta* v. *Kamal Nath*, (1997) 1 SCC 388 and precautionary principle (*Vellore Citizens*), which we declared as inseparable ingredients of our environmental jurisprudence, could only be nurtured by ensuring sustainable development.
>
> 26. To ensure sustainable development is one of the goals of Environmental Protection Act, 1986 (for short 'the Act') and this is quiet necessary to guarantee 'right to life' under Article 21. If the Act is not armed with the powers to ensure sustainable development, it will become a barren shell. In other words, *sustainable development is one of the means to achieve the object and purpose of the Act as well as the protection of 'life' under Article 21.* Acknowledgment of this principle will breath new life into our environmental jurisprudence and constitutional resolve. Sustainable development could be achieved only by strict compliance of the directions under the Act. The object and purpose of the Act-"to provide for the protection and improvement of environment" could only be achieved by ensuring the strict compliance of its directions. The concerned authorities by exercising its powers under the Act will have to ensure the acquiescence of sustainable development. Therefore, the directions or conditions put forward by the Act need to be strictly complied with. Thus the power under the Act cannot be treated as a power simpliciter, but it is a power coupled with duty. It is the duty of the State to make sure the fulfilment of conditions or direction under the Act. Without strict

SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 27 Wednesday, November 23, 2022
Printed For: Mr. Rajive .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt. Ltd., Lucknow.

compliance, right to environment under Article 21 could not be guaranteed and the purpose of the Act will also be defeated. The commitment to the conditions thereof is an obligation both under Article 21 and under the Act. The conditions glued to the environmental clearance for the Tehri Dam Project given by the Ministry of Environment vide its Order dated July 19, 1990 has to be viewed from this perspective".

49. Despite the above shortcomings of the Notification and some clauses suffering from legal infirmity, the impugned Notification has certainly good and effective aspects as well. As already noticed by us, it brings into effect a social cause of providing affordable housing to the poor strata of the society. It also proposes to decentralize and bring authorities granting environmental clearance and those granting building permission together under a single window system so as to address environmental concerns. The concept of one window system is sought to be introduced. The Notification specifically provides for emphasis on the aspects that are required to be considered by the environmental cell with special focus on energy use, energy generated on site from on site renewable energy sources, water use and waste water generated, treated on site, waste segregated and treated on site, waste segregation and treated on site, tree plantation and maintenance. These are the few good features of the Notification which also do not suffer from element of illegality. 'Housing for all by 2022' is a purpose and object in conformity with the constitutional mandate. There would be collective and coordinated effort by the Environmental Cell, local and other authorities at the State level to expeditiously deal with environmental clearance.

ORDER/DIRECTIONS

50. The object of the Notification is laudable that is providing housing to the poor. The provisions of the existing regime under the Regulation/Notification of 2006 are sought to be liberalized and expanded for obtaining that object. Some of the provisions of the Notification are being amended to provide for decentralized regulation in relation to building projects. Certain specified building and construction projects of specified area are proposed to be exempted from the rigours of the Notification. But these amendments would have to be in consonance with the law, where certain provisions of the amended Notification dated 9th December, 2016 are in consonance with the provisions of the Act of 1986 and do not suffer from the *vires* of illegality. Thus, some other provisions of the same Notification *exfacie* suffer from legal infirmities and are incapable of being implemented in accordance with the scheme of federal structure under the Constitution of India. Out of them, some provisions are directly opposed to the Principle of Non-regression as they considerably dilute the existing environmental laws and standards to the prejudice of the environment. Thus, in the facts and circumstances of the present case, the Tribunal can safely take recourse to the doctrine of severability to declare some of the provisions of the Notification as *ultra-vires* or ineffective while holding the other part of the Notification as legally sound and sustainable.

51. In view of the above, we pass the following order/directions:

1. We hold and declare that this Tribunal has jurisdiction to examine the legality, validity and correctness of a Notification issued by the competent forum in exercise of its power of subordinate legislation with regard to acts stated in Schedule-I to the National Green Tribunal Act, 2010.
2. We hold and declare that (i) clause 14(8), (ii) the provisions relating to exclusion of Consent to Operate and Consent to Establish under Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981 in clause 14 of the impugned Notification; (iii) Appendix-XVI relating to constitution and functioning of Environmental Cell, cannot be sustained and are liable to be quashed for the reasons afore-stated. Thus, we direct MoEF&CC

SCC ONLINE
The surest way to legal research!
SCC Online Web Edition, © 2022 EBC Publishing Pvt. Ltd.
Page 28 Wednesday, November 23, 2022
Printed For: Mr. Rajive .
SCC Online Web Edition: http://www.scconline.com
© 2022 EBC Publishing Pvt. Ltd., Lucknow.

to re-examine its Notification dated 9th December, 2016 and take appropriate steps to delete, amend and rectify the clauses of the said Notification in light of this judgement.

3. As a result of the above, the byelaws amended by the DDA vide its Notification dated 22nd March, 2016 can also not be given effect to, unless the Notification dated 9th December, 2016 is amended in terms of this judgement.
4. Till the time the Ministry comply with the above directions and notify the amended provisions of Regulations of 2006, it will not implement the impugned Notifications. However, once the amended regulations are notified, MoEF&CC/SEIAA/Local Authorities can give effect to that, without any further reference to the Tribunal.
5. MoEF&CC shall, particularly take care that the laudable social cause of 'providing Housing to the poor' does not get defeated by business, economic profitability with reference to 'ease of doing business', while particularly protecting the environment.

52. With the above order/directions, the Original Applications No. 677 of 2016, 01 of 2017, 07 of 2017, 55 of 2017 and 67 of 2017 stand disposed of, with no order as to costs.

53. All the Miscellaneous Applications No. 148 of 2017, 03 of 2017, 445 of 2017, 879 of 2017 and 620 of 2017 have become infructuous and are accordingly disposed of.

———

Disclaimer: While every effort is made to avoid any mistake or omission, this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification is being circulated on the condition and understanding that the publisher would not be liable in any manner by reason of any mistake or omission or for any action taken or omitted to be taken or advice rendered or accepted on the basis of this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification. All disputes will be subject exclusively to jurisdiction of courts, tribunals and forums at Lucknow only. The authenticity of this text must be verified from the original source.