BEFORE THE HON'BLE NATIONAL GREEN TRIBUNAL,
WESTERN ZONE BENCH PUNE
ORIGINAL APPLICATION NO. 20/2020

IN THE MATTER OF:

MR. TANAJI BALASAHEB GAMBHIRE ... APPLICANT

VERSUS

UNION OF INDIA THROUGH
SECRETARY-MoEF & CC & ORS. ... RESPONDENTS

FILE-A (VOLUME-_____)

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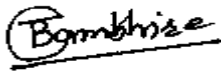
Date: 25.07.2023



(TANAJI B. GAMBHIRE)
ORIGINAL APPLICANT

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2015 SCC OnLine NGT 5

Affirmed in *Mantri Techzone (P) Ltd.* v. *Forward Foundation*, (2019) 18 SCC 494

In the National Green Tribunal, Principal Bench New Delhi

(BEFORE SWATANTER KUMAR, CHAIRPERSON, U.D. SALVI, J.M., DR. D.K. AGRAWAL, E.M. AND PROFESSOR A.R. YOUSUF, E.M.)

In the Matter of:

Forward Foundation A Charitable Trust Having its registered office at 24/B, Haralur Village, HSR Layout Post Bangalore-560102 Through its Secretary and Others ... Applicants;

Versus

State of Karnataka, Vidhana Soudha Bangalore-560001 Through its Chief Secretary and Others ... Respondents.

Original Application No. 222 of 2014

Decided on May 7, 2015, [Reserved on: January 27, 2015]

Counsel for Applicant:

Mr. Raj Pajwani, Sr. Adv. Along with Ms. Megha Mehta Agrawal, Advocate

Counsel for Respondents:

Mr. Devraj Ashok, Advocate for Respondent No. 1, 3, 4 & 5

Mr. B.R. Srinivasa G., Advocate for Respondent No. 7

Mr. R. Venkatramani, Sr. Advocate, Mr. Shekhar G. Devasa, Mr. D. Mahesh, Advocates for respondent No. 9

Mr. Raju Ramachandran, Mr. Devashish Bharuka, Mr. Vaibhav Niti and Mr. Suraj Govindraj, Advocates for Respondent No. 10

Mr. Sajan Poovayya, Sr. Advocate and Mr. Sumit Attri, Advocate for Respondent Nos. 11 & 12

JUDGMENT

1. Whether the judgment is allowed to be published on the net?

2. Whether the judgment is allowed to be published in the NGT Reporter?

SWATANTER KUMAR, (CHAIRPERSON):— All the three applicants have approached the Tribunal under the provisions of the National Green Tribunal Act, 2010 (for short 'the NGT Act'), with a common prayer that a direction be issued to respondent no. 1, the State of Karnataka to take cognizance of the Reports dated 12th June, 2013 and 14th August, 2013 prepared by respondent nos. 6 and 2 respectively, and take coercive and punitive action including restoration of the ecologically sensitive land. Further the applicants also prayed for issuance of a direction that the valley land is to be maintained as a sensitive area, without developments of any sort, so that the ecological balance of the area is not disturbed. Besides this, they even prayed for issuance of such other order or directions as the Tribunal may deem fit in the circumstances of the case and render justice.

The three applicants are either a registered charitable trust and/or a Society, registered under the relevant laws in force. They claim to be keenly interested in protecting the environment and ecology, particularly, in the State of Karnataka. Their principal grievance is in relation to certain commercial projects that are being developed by respondent nos. 9 & 10 in a large-sized, mixed use development project/building complex, including setting up of a SEZ park, Hotels, Residential

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Apartments and a Mall, covering approximately 80 acres on the valley land immediately abutting the Agara Lake and more particularly identified as lying between Agara and Bellandur Lakes, exposing the entire eco system to severe threat of environmental degradation and consequential damage. According to them, it is of alarming significance that the Project has encroached an Ecologically Sensitive Area, namely, the valley and the catchment area and *Rajakaluves* (Storm Water Drains) which drains rain water into the Bellandur Lake. Thus, in the interest of environment and ecology, they have approached the Tribunal with the above prayers.

2. Shorn of any unnecessary details, the precise facts leading to the filing of this application are that, according to these applicants, the ecologically sensitive land was allotted by the Karnataka Industrial Area Development Board (for short the 'KIADB'), respondent no. 7 herein, to respondent nos. 9 & 10 vide Notifications dated 23rd April, 2004 and 7th May, 2004, respectively. This land was allotted for setting up of Software Technology Park, Commercial and Residential complex, hotel and Multi Level Car Parks. The Master Plan formulated by the Bangalore Development Authority (for short the 'BDA'), respondent no. 8, identifies the allotted land as 'Residential Sensitive', though the same land was identified in the draft Master Plan as 'Protected Zone'. It is stated by the applicant that the Revenue Map in respect of properties as referred in the land lease Agreements has multiple *Rajakaluves*. The development projects in question sit right on the catchment and wetland areas which feeds the *Rajakaluves*, which in turn drain rain water into Bellandur Lake. The project will thus encroach two *Rajakaluves* of 1.38 acres and 1.23 acres each. The satellite digital images of the area from year 2000 to 2012 clearly show encroachment upon these *Rajakaluves*, as well as, the manner in which they are covered by this construction. The State Level Expert Appraisal Committee (for short the 'SEAC'), which was to assist State Level Environment Impact Assessment Authority (for short the 'SEIAA'), held its meetings on various dates to examine the project. It had required respondent no. 9 to submit a revised NOC from the Bangalore Water Supply and Sewerage Board (for short the 'BWSSB'), respondent no. 5 herein, for the project in question. It was also observed that the project lies between the above stated two lakes. Respondent no. 9 was also directed to take protective measures to spare the buffer zone around Rajakaluves and also to commit that no construction would be carried out in the buffer zone. In the meeting of 11th November, 2011, it was recorded that the project proposes car parking facility for 14,438 cars in that environmentally sensitive area.

3. It is the case of respondent no. 5 that such NOC was issued but it covers only an area of 17,404 sq mtr, whereas the total built-up area as noted by the SEAC is 13,50,454.98 sq mtr. It is alleged by the applicants that respondent no. 9 obtained NOC from respondent no. 5 by concealing material facts and by misrepresenting that NOC is required only for residential units, which forms a very minuscule part of the total project. Respondent no. 9 had approached the Karnataka State Pollution Control Board (for short the 'KSPCB'), respondent no. 4 herein, for obtaining clearance which was granted on 4th September, 2012, subject to the fulfillment of the conditions stated in the consent order which included leaving the buffer zone all along the valley and towards the lake. The applicant contends that the grant of consent by the KSPCB to respondent no. 9 also contained a condition with regard to obtaining Environmental Clearance from the Competent Authority and no construction was to commence until such clearance was granted.

4. According to the applicants, respondent no. 9 violated the conditions and commenced construction of the project. There was also violation of the stipulations stated in the approval of the SEAC, in relation to buffer zone and construction over *Rajakaluves*. The construction has been commenced over the ecologically sensitive area of the Lake Catchment area and valley, with utter disregard to the statutory compliances. Referring to these blatant irregularities the applicant submits that the

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conversion of land from 'Protected Zone' to 'Residential Sensitive' area is violative of the law. The Project is right in the midst of a fragile wetland area which ought not to have been disturbed by the development activity. The fragile environment of the catchment area has been exposed to grave and irreparable damage. It has severely disturbed and damaged the *Rajakaluves*. It is also alleged that respondent nos. 9 & 10 have started to level the land by filling it with debris, thus causing damage to the drains. It is further stated that the conditions with regard to no-disturbance to the Storm Water Drains, natural valleys and buffer area in and around the *Rajakaluves* have been violated. This has in turn, affected the ground water table and bore wells which are the only source of water for thousands of households. Fishing and agriculture which depends on Bellandur Lake are also severely affected. The construction over the wetland between the two lakes is also in violation of Rule 4 of Wetlands (Conservation and Management) Rules, 2010 (for short Rules of 2010). It is submitted that SEIAA in its meeting dated 29th September, 2012, decided to close the file pertaining to respondent nos. 10 due to non-submission of requisite information and the application therefore was rejected in November, 2012. Despite the rejection, respondent no. 10 commenced construction on the project in full swing.

5. The applicants have also relied on the findings of the Joint Legislative Committee, constituted under the chairmanship of Sh. A.T. Ramaswamy in the month of July, 2005, which stated that there were 262 water bodies in Bangalore city in 1961, which drastically came down because of trespass and encroachments. It was also affirmed that about 840 Kms of *Rajakaluves* have been encroached upon in several places and have become sewage channels.

6. The Hon'ble High Court of Karnataka in *Environment Support Group* v. *State of Karnataka*, Writ Petition No. 817/2008 appointed a Committee under the Chairmanship of Hon'ble Mr. Justice N.K. Patil to suggest immediate remedial action in order to remove encroachments on the lake area and the *Rajakaluves* and preservation of the lakes in and around Bangalore city. Other Expert Committees, including Lakshman Rau Expert Committee had also submitted proposals for Preservation, Restoration or otherwise of the existing tanks in Bangalore Metropolitan Area, 1986 which recommended to maintain good water surface in Bellandur tank and to ensure that the water in the tanks is not polluted. The findings of the Environmental Information System (ENVIS), Centre for Ecological Science, Indian Institute of Sciences, Bangalore, in May 2013 on the Conservation of the Bellandur Wetlands obligation of Decision Makers is ensure Intergenerational Equity recommended restoration of wetlands and cessation of plan to set up the SEZ in the area. Even the Central Government in August 2013 had issued an advisory on conservation and restoration of water bodies in the urban areas.

7. The applicants claim to have obtained the monitoring report of the project by respondent no. 2 through RTI on 21st August, 2013. The report dated 14th August, 2013 revealed that the Project Proponents are in clear breach of their undertaking to carry out all precautionary measures to ensure that the Bellandur lake is not affected by the construction or operational phase of the project. This breach is particularly with regard to the major alteration in natural sloping pattern of the project site and natural hydrology of the area.

8. The Lake Development Authority (for short 'the LDA'), respondent no. 6 herein, had initiated an inspection in the catchment area of the Bellandur Lake. The report dated 12th June, 2013 confirms that the project will have disastrous impact, including deleterious effect on the Bellandur Lake. This report was brought to the notice of respondent no. 7 vide letter dated 7th July, 2013. Respondent no. 6 has also opined that the land should be classified and maintained as Sensitive Area. Respondent no. 7 in furtherance thereto had called upon respondent no. 9 to comply with rules of

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Ecology and Environment Department and to obtain necessary approval from respondent nos. 6 and 4. It is alleged that a vague reply had been submitted by respondent no. 9 making certain misrepresentations. Despite all this, respondent nos. 9 and 10 have continued with their illegal constructions and have caused damage to the ecology and the environment by irreparably jeopardizing the ecological balance in this sensitive area. The applicants also rely upon the fact that the revised Master Plan, 2013 issued by Respondent no. 8 specifically provides that 30 meters buffer zone is to be created around the lakes and 50 meters buffer zone to be created on either side of the *Rajakaluves*. It is also the case pleaded by the applicant that Respondent no. 9 had obtained the NOC from Respondent no. 5 only with regard to residential units and not for the entire project and that the Environmental Clearance obtained by the Respondent No. 9 is based upon the said partial NOC issued by Respondent no. 5 which itself is a misrepresentation. The applicants have pleaded that the projects are bound to create water scarcity as the requirement of project of Respondent no. 9 alone is approximately 4.5 million liters per day, i.e. 135 million liters per month, which is more than what Respondent no. 5 supplies to the entire Agaram Ward. It is stated by the applicants that the construction of respective projects by respondents No. 9 and 10 respectively, besides having commenced without permission from the authorities and being in violation of the conditions imposed for grant of permission/consent, is bound to damage the environment, resulting in change in topography of the area, posing potential threat of extinction of the Bellandur lake, causing traffic congestion, shortening and wiping out the wetlands, extinction of Rajakaluves and causing serious and potential threat of flooding and massive scarcity of water in the city of Bangalore, particularly the areas located near the water bodies.

The applicants have stated that they have filed the application against threat posed to the ecological balance from the ongoing commercial constructions project near Agara Lake and Bellandur Lake, and the same is continuing every day in violation of the law. With these allegations, the three applicants have instituted this application with prayers afore-noticed.

9. Different respondents in the application have filed independent replies as already noticed. Respondent nos. 9 and 10 are the Project Proponents against whom the applicant has raised the principal grievance. Thus, first we may notice the case advanced by respondent nos. 9 and 10. In its replys, respondent no. 9 has submitted that the said respondent corporation was incorporated with the objective of establishing an Information Technology Park and R&D Centre with facilities such as residential complexes, parks, education centres and other allied infrastructure within a single compound. This respondent had submitted the proposal to establish such Information Technology Park and other facilities to the State Government and requested for allotment of land for the project. Proposal of respondent no. 9 was considered in 78th High Level Committee meeting held on 21st June, 2000 and after examining the proposal, the same was approved by the government on 06th July, 2000. Before the State High Level Committee, the Respondent had mentioned that it would require 110 acres of land, 25MW of power from the Karnataka Power Transmission Corporation Limited (for short the 'KPTCL'), and 4 lakh litres of water per day from respondent no. 5. The lands for the project were initially notified by the BDA. However, later the lands were de-notified vide notification dated 10th February, 2004. Subsequently, the lands were allotted to the replying respondent vide letter dated 28th June, 2007 for which lease-cum-sale agreement was signed on 30th June, 2007. Considering the overall development of the State of Bangalore, the said Respondent proposed a Mixed Use Development Project consisting of an Information Technology Park, residential apartments, retail, hotel and office buildings with a total built up area of 13,50,454.98 sq mtr. The Project was conceived as a zero waste discharge project. According to this Respondent, the project is located one and a half kilometres away

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from the southern-side of the Bellandur Lake. Towards the North adjacent to the Project site, lie vast stretches of lands belonging to the Defence, and towards the East, which is completely developed lies the Project of Respondent no. 10 and that another developer is also developing a project on the western side. Respondent no. 9 has submitted that it has obtained sanction plan on 4th July, 2007 which was being renewed from time to time. The Respondent also claims that it has obtained No Objection Certificate from Airport Authority of India on 9th April, 2010, certificate dated 15th April, 2010 from Dr. Ambedkar Institute of Technology and that the Bharat Sanchar Nigam Ltd., vide its communication dated 16th April, 2010, granted clearance for the project construction. BWSSB, respondent no. 5 herein vide its communication dated 26th April, 2011 issued No Objection Certificate for portion of the proposed construction to be built. Bangalore Electricity Supply Company Limited also granted No Objection Certificate for arranging power supply to the proposed residential and commercial building in favour of the Respondent no.

10. Environmental Clearance was granted by SEIAA vide communication dated 17th February, 2012. Director General of Police issued No Objection Certificate and KSPCB vide order dated 4th September, 2012 accorded its consent for construction of the said project site subject to the conditions stated therein.

Respondent no. 9 further states that after grant of the Environmental Clearance on 17th February, 2012, the same was published in the leading newspapers "*Kannada Prabha*" and the "*Indian Express*" on 12th and 14th March, 2012 respectively.

11. Respondent no. 9 later modified the building plan and the same was approved by Respondent no. 7 vide its letter dated 30th August, 2012, which was valid up to 10th August, 2014. It is further claimed that they started the construction of the project in November, 2012, taking all precautions as per terms and conditions of the orders issued by the competent authorities. The respondent further submitted that he has raised the constructions in accordance with the plans and conditions of the Environmental Clearance and consent orders. According to him, he has not violated any of the conditions and has not caused any adverse impact on the ecology and environment of the area. The allegation with regard to the covering and blocking the Rajakaluves (Storm Water Drains) drying the wetland and raising of the construction thereupon adversely affecting the lake, are specifically disputed and denied. The Respondent claims that it has already spent a sum of Rs. 306.73 crores on the project towards procurement of men and materials, machinery, infrastructure, medical and sanitary facilities etc., that it has availed financial assistance from various banks and financial institutions towards the construction and proper execution of the project and that various contracts have been signed with third parties.

12. It is specifically stated by this Respondent that certain print media had published articles stating that construction was unauthorized, illegal and that it was prejudicial to the environmental and ecological interest of that area. Not only this, Namma Bengaluru Foundation, Citizen's Action Forum, Koramangala Residents Association and others, on the basis of a report prepared by Professor T.V. Ramachandra, filed a Public Interest Litigation in the High Court of Karnataka (Writ Petition No. 36567-36574/2013). Besides making the above allegation, it was also alleged in those petitions that the project would adversely affect the Bellandur Lake and prayed for stay of the construction activity. The Hon'ble High Court of Karnataka after hearing the parties issued notice, however, denied to pass any interim order of stay as prayed by the petitioners. The said petition is stated to be pending before the Hon'ble High Court.

In the meanwhile, Bruhat Bengaluru Mahanagara Palike (for short the 'BMP') issued a stop work notice to the said respondent in regard to illegal and unauthorized construction as well as its adverse impacts on the lake. Aggrieved from the stop work

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notice dated 23rd December, 2013, Respondent no. 9 filed a Writ Petition before the Hon'ble High Court being Writ Petition No. 366-367 of 2014 and 530-625/2014 in which the Hon'ble High Court vide its order dated 21st January, 2014 stayed the operation of the stop work notice dated 23rd December, 2013. Another notice was also issued by respondent no. 7 directing stoppage of work on 2nd January, 2014, which was again challenged by the respondent no. 9 in Writ Petition No. 792 of 2014 before the same High Court and vide its order dated 7th January, 2014 the operation of the stay order was also stayed by the Hon'ble High Court. Replying respondent has taken up specific pleas with regard to the present application being barred by time because the Environmental Clearance was granted on 17th February, 2012 and even article in the newspapers were published on 3rd June, 2013 as such the present petition has been filed beyond the prescribed period of limitation and the Tribunal has no power to condone the delay which in fact has not even been prayed by the Applicant. According to respondent no. 9, this Tribunal has no jurisdiction to entertain and decide this application in the form and content in which it has been filed, as no question or substantial question of environment has been raised in relation to the Scheduled Acts under the NGT Act, 2010. Another objection raised by respondent no. 9 is that the applicants are guilty of suppression and misrepresentation of material facts and have not approached the Tribunal with clean hands and also that the proceedings before the Tribunal ought to be dismissed in face of the proceedings pending before the Hon'ble High Court of Karnataka in the Writ Petitions afore-referred. If the dates as stated by the applicant are taken to be correct, even then the application should have been filed within 30 days of the constitution of the Tribunal i.e. 18th October, 2010 and in any case within 60 days thereafter, by showing that they were prevented by sufficient cause. Since the application has been filed much beyond the prescribed period, it is barred by time and suffers from the defect of latches.

13. Respondent no. 10 besides raising the same preliminary objection with regard to the maintainability of the application and jurisdiction of the Tribunal, as raised by respondent no. 9, has also stated that application of applicant is hit by the Principle of *Falsus in Uno, Falsus in Omnibus*. It is also averred that the present application is a cut-paste of the Public Interest Litigation filed before the Hon'ble High Court of Karnataka and that the allegations made therein and in the present application are similar. On merits it is contended that averments made in the application are factually incorrect.

According to respondent no. 10, crux of the dispute is with regard to the allocation of the land and its conversion from 'Protected Zone' to 'Residential Sensitive' in the Master Plan, without giving any reason, which does not fall within the jurisdiction of the Tribunal. The applicants have raised multifarious proceedings against respondent no. 10 which is an abuse of the process of law and are *mala fide*. The applicant has not only stated identical facts in their application before the Tribunal, but have even submitted the same set of documents as were filed before the Hon'ble High Court of Karnataka, which clearly shows that the application before the Tribunal lacks *bona fides* and there is suppression and misrepresentation of material facts.

14. On merits respondent no. 10 has stated that the State of Karnataka has formulated a policy to invite investment in Karnataka and for that purpose the Karnataka Industries (Facilitation) Act, 2002 had been promulgated. Under this Act, State Level Single Window Clearance Committee and State High Level Clearance Committee were created to examine and clear the projects. All investment projects submitted to Karnataka Udyoga Mitra were forwarded to Single Window Agency, if it was less than the value of Rs. 50.00 crores for necessary processing and clearance and for value above Rs. 50.00 crores, is placed before the State High Level Clearance Committee for processing and approval. Respondent no. 10 had submitted a proposal for developing of a Software Technology Park with an investment of 48.75 crores in 25

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acres of land along the outer ring road in Bangalore to which the clearance certificate dated 27th March, 2004 was issued. Respondent no. 10 submitted a revised proposal in respect of the same project and to obtain fresh clearance on 31st August, 2007 and revised proposal was with the investment of Rs. 179.22 crores. The State High Level Committee had cleared the project which was communicated to Respondent no. 10 on 25th January, 2008. According to Respondent no. 10, properties are located in between Bellandur Lake and Agara Lake but there are no primary storm water drain and secondary storm water drains that exist in the above properties. The application by respondent no. 10 seeking sanction of development and building plan in respect of the above properties into a Software Technology Park, Hospitality, Commercial and Residential Complex was also allowed and as per the directive of respondent no. 7, respondent no. 10 has deposited a sum of Rs. 1,28,56,830. Respondent no. 10 had also taken clearance from various authorities including Environmental Clearance and consent for establishment. The details of the same are as follows:

Sl. No.	Date	Document No.	Nature of Document	Issued by	Annexure
1	17.3.2011	ASC/CM(AO)/181/HAL: BG:58/2011	No Objection Certificate	Airport Services Centre, Hindustan Aeronautics Limited, Bangalore Complex	'R22'
2	30.07.2011	AGM(TP)/S:6/IX/2010 –11.	No Objection Certificate	Bharat Shanchar Nigal Ltd., CGM, Telecom, KTK Circle, Bangalore	'R23'
3	22.05.2012	CEE(P&C)/SEE/ (Plg)/EEE(plg)/K CO-95/F-46611/2012–13./R-50 (75)	No Objection Certificate	Karnataka Power Transmission Corporation Ltd., Chief Engineer, Electric City, Cauvery Bhavan, Bangalore	'R24'
4	03.08.2012	GBC(1)478/2011	No Objection Certificate	Office of Director General, Karnataka State Fire & Emergency Services	'R25'
5	04.04.2013	BWSSB/EIC/ACE ®/DCE(M)-II/TA(M)-II/137/2012–13.	No Objection Certificate	Bangalore Water Supply & Sewerage	'R26'

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				Board, Cauvery Bhavan, Bangalore	
6	03.06.2013	PCB/136/CNP/12/H321	No Objection Certificate	Karnataka State Pollution Control Board, Church Street, Bangalore	'R27'
7	30.09.2013	SEIAA:37:CON: 2012	No Objection Certificate	State Level Environment Impact Assessment Authority, Karnataka	'R28'

Certain sections of the media had raised some queries to respondent no. 10 to furnish the copy of the Consent to Establish and Environmental Clearance certificate on 30th September, 2013. They had also expressed that the project had started without such clearances. However, upon issuance of Consent to Establish and Environmental Clearance dated 4th June, 2013 and 30th September, 2013 respectively, same were furnished to the reporter of newspaper. The Hindu', vide letter dated 11th October, 2013. According to respondent no. 10, around this project, much development has already taken place, even around various lakes, but it has not caused any damage to the lakes and similarly, project of respondent no. 10 would also not cause any damage to the area and the lakes. Respondent no. 10 has also referred to the Writ Petition 36567-36574 of 2013, where relief of resumption of land from both the respondent nos. 9 and 10 was prayed. Notice dated 28th February, 2014 was issued by respondent no. 7 to respondent no. 10 containing direction to stop work/construction activity against which respondent no. 10 had also filed a Writ Petition in the Hon'ble High Court of Karnataka, being Writ Petition No. 18119 of 2014. The Writ Petition was pending and Interim Order was passed. This Respondent claims that they are entitled to develop the projects, having received all clearances. It is specifically stated that the Bellandur Lake does not support any fishing activity or forms a source of water for domestic purpose nor is the agricultural activity carried out at the said area. There are no wetlands and none of the functional aspects of the wetland exist on the site in question. It is also denied that the project carried out by respondent no. 10 on the property belonging to it has any adverse impact on environment. Respondent no. 10 further states that the ENVIS report relied upon by the applicant is prepared by persons interested in opposing his project. In any case, the said report dated 14th August, 2013 stood superseded by the Environmental Clearance dated 30th September, 2013, wherein, respondent no. 3 has accorded consent to the project after considering the actual facts, after due application of mind and by subjecting respondent no. 10 to strict terms and conditions as mentioned in the clearance dated 30th September, 2013. On these averments, respondent no. 10 prays that the application should be dismissed and no relief should be granted by the Tribunal to the applicants.

15. Respondent no. 7 has filed a short reply. He submits that after the possession of the land was handed over to respondent no. 9 and 10, one year time was granted to implement the project, which was extended from time to time. According to

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respondent no. 7, the building drawings were approved on 4th July, 2007, modified building drawings were approved on 26th April, 2011 and 30th August, 2012 with specific conditions. In the meeting of the KIADB held on 16th July, 2013, it was resolved to inform respondent no. 9 to fully comply with the Ecology and Environment rules as well as to obtain approvals from the respondent no. 6, LDA and respondent no. 4, KSPCB. Respondent no. 6, LDA vide its letter dated 24th September, 2013, had informed respondent no. 7 that the construction activity in the catchment area in the Bellandur Lake could drastically impact the Lake, with deleterious effects and asked the Respondent no. 7 to stop construction activity of respondent nos. 9 & 10, however, the validity of the building drawings was again extended up to 10th August, 2014. The Lokayukta on 17th December, 2013 had written a letter in respect of complaint filed by South East Forum for Sustainable Development where it had been averred that the decision had been taken by the Board on 21st December, 2013 to keep in abeyance the approval accorded and even the revalidations of plans. This was also informed to respondent no. 9. The Board took a decision which was communicated to respondent no. 9 on 2nd January, 2014, wherein it asked the said respondent no. 9 to stop all construction activities on the allotted lands. It is admitted that the said communication was challenged by respondent no. 9 and on the stop work notice, stay was granted by the Hon'ble High Court of Karnataka. Stop work notice issued by BBMP dated 23rd December, 2013 was also challenged before the Hon'ble High Court and operation of the said communication was stayed vide order dated 21st January, 2014. It is submitted by respondent no. 7 that the project of respondent nos. 9 and 10 had been approved by the Government. It is specifically submitted that the answering respondent had not acquired any '*Rajakaluves*' and the land allotted by respondent no. 7 to respondent no. 10 does not consist of the same. Respondent no. 7 further states that the Storm Water Drains are not always flowing in strict or permanent path and are prone to flow in different paths from time to time. Respondent no. 7 further states that it had allotted 17 acres 33½ guntas of land in favour of respondent no. 10 for the purpose of establishing Software Technology Park, Hospitality, Commercial and Residential Complex and has executed lease-cum-sale agreement on 20th March, 2008.

16. Respondent no. 6 has taken a stand that it was not at all aware of the project initiated by respondent no. 7, KIADB. The said respondent claims it came to know about the entire project only when certain newspaper reports surfaced during the month of June, 2013 and till that time respondent no. 6 was in the dark. After the complaints, the said respondent immediately inspected the Bellandur Lake and the Agara Lake on 12th June, 2013 and prepared an inspection report. In the report, it was noticed that the large scale construction activities in the catchment area of Bellandur Lake was going on and there was a change in the land use which in turn has directly affected the catchment of Bellandur Lake. The wetland area of Agara Lake had also shrunk which originally formed the irrigation area for the adjoining agricultural lands. Respondent no. 6, vide its letter dated 6th July, 2013, had questioned the decision of respondent no. 7 and even requested to stop the construction activity and to reclassify the land as non-SEZ area. It was thereafter on 31st August, 2013 that respondent no. 9 wrote a letter to respondent no. 6 for according approval for the proposed development projects. However, vide its letter dated 23rd September, 2013, respondent no. 6 informed respondent no. 7 that the replying respondent had no authority to grant or deny construction projects but at the same time it also communicated their objections to respondent no. 7, mentioning that construction activity would be in contravention to the directions of the Hon'ble High Court of Karnataka as well as of the Hon'ble Supreme Court. Despite these warnings, respondent no. 7 granted approval to the extension of building drawings of the project in favour of respondents no. 9 & 10 on 11th October, 2013 and 3rd January, 2013 respectively, with certain conditions like ensuring that all natural valleys, valley zone,

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irrigation tanks and existing roads leading to villages in the said land should not be disturbed; further, that the natural sloping pattern of the project site shall remain unaltered and the lakes and other water bodies within and/or at the vicinity of the project area should be protected and conserved. Despite these objections by respondent no. 6, the plans were approved and approvals extended from time to time. Therefore, respondent no. 6 submits that these projects, as approved by respondent no. 7 would have adverse impacts on Bellandur Lake and Agara Lake.

17. Respondent nos. 1, 3 and 5 though have filed separate replies but they have taken up the stand that the projects have been granted, No Objections Certificates and Environmental Clearance by SEIAA, subject to the conditions noticed above. According to these respondents, if there is any breach, the same would be dealt with in accordance with law. According to respondent nos. 1 & 3, the file of respondent no. 10 was closed by SEIAA, Karnataka on 16th November, 2012 for non-submission of the required information but was later revived in the meeting held on 27th June, 2013 and Environmental Clearance was granted on 30th September, 2013. Both the projects are ongoing projects. The proposals have been considered in accordance with law.

18. Vide order dated 25th July, 2014 of the Tribunal, respondent nos. 11 and 12 were impleaded on their applications. Both these respondents are registered as charitable trust or a society. Replies by both these respondents have been filed wherein they have raised specific objections with regard to allotment of land in Ecologically Sensitive Area in the catchments of the Bellandur Lake for the construction of IT Park and related infrastructure, in flagrant violation of the applicable rules and regulations. According to respondent nos. 11 and 12, the allotment of this land is in contravention of the directions laid down by the Hon'ble Supreme Court in the case of *Karnataka Industrial Areas Development Board* v. *Sri. C. Kenchappa*, (2006) 6 SCC 371. It is further stated that the fact that these projects would essentially result in alteration of natural hydrology of the area and sloping pattern of the project site, clearly shows that there was no application of mind on the part of the concerned authority for granting approvals. The plans sanctioned in favour of respondent nos. 9 and 10 are replete with irregularities and illegalities and despite objections from respondent no. 6, the plans have been renewed contrary to law. For instance, respondent no. 9 had first represented that the project will have a built up area of 1.75 lakh sq.ft. while seeking approval from respondent no. 6, while in reality the built up area is 1.30 crore sq. ft./9.54 lakh sq. mtr., which is evidenced by respondent no. 9's own admission, and is not even disputed by him. The water requirement of the project would be nearly 135 million litres per month, which would exert excessive pressure over the wetland and would also lead to scarcity of water for the residents of the nearby areas. As already stated, the execution of the project will necessarily result in altering the hydrology of the area and the natural sloping pattern of the project site. Therefore, the conditions imposed in the Environmental Clearance are incapable of being complied with. According to these respondents, the Google satellite images that have been placed on record, reveal that the excavation work by respondent nos. 9 and 10 commenced much prior to obtaining approvals by them in 2012 & 2013 respectively, making the construction unauthorised and illegal. The matters before the Hon'ble High Court are stated to be restricted to the prayer for resumption of land and not connected with these proceedings before the Tribunal. According to these respondents, the stop work orders for the construction of the project have been stayed in terms of the orders of the Hon'ble High Court of Karnataka and are subject to the result of the Writ Petition and the Project Proponents are entitled to claim their equities in the event they failed before the Hon'ble High Court. The Hon'ble High Court had granted the interim order staying the stop work orders primarily on the ground that BBMP did not have jurisdiction to issue such order. According to respondent nos. 11 and 12, respondent no. 10 obtained the

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Environmental Clearance on 30th September, 2013, but it still does not have the mandated clearance from the BDA which was one of the conditions imposed by the State High Level Clearance Committee on 25th January, 2008. The project consists of residential block and commercial block, among other constructed areas. It is averred that as of present, a very small part of the project has been completed and if the construction of the project is permitted to be completed in all respects, the environment and ecology of the area would suffer and residents and public at large would have to face severe and fatal environmental consequences. These adverse consequences would not only be limited to flooding, water shortage, geological instability but would also affect the Bellandur Lake, which is one of the largest lakes in Bangalore, gathering an area of 338.28 hectares, with catchment area, of approximately 171.17 square kms.

As already noticed, respondent nos. 11 and 12 were ordered to be impleaded as respondents in this case on the condition that they would withdraw the Public Interest Litigation filed by them before the Hon'ble High Court of Karnataka. These Respondents had thus moved the Hon'ble High Court for withdrawal of the Writ Petitions. However, the Hon'ble High Court only permitted these two Respondents to withdraw themselves from the Writ Petitions in terms of the undertaking given by them before the Tribunal. The Petitioner before the Hon'ble High Court who had not given any undertaking before the Tribunal, their Writ Petitions are still continuing before the Hon'ble High Court. They have denied the allegation that any of them has committed violation of the order of the Tribunal or abused the process of law. It is also denied that the averments made and stand taken by them is false, incorrect and vexatious. Respondent no. 7 had first issued a letter dated 14th August, 2013 requiring respondent no. 9 to comply with the ecology and environmental rules and also to take necessary approval from the LDA, Bangalore and KSPCB before taking up any further activity of the project. Then, it issued the order dated 2nd January, 2014 informing the said respondent that the layout plan has been kept in abeyance and thus the Project Proponent should stop all construction activities in the allotted land until further orders. It is also the case of respondent nos. 11 and 12 that the report by Dr. T.V. Ramachandra is not a report by interested persons, but is part of scientist's social responsibility and the report published in May, 2013 gives the complete and correct position at site. It is their case that the cause of action has arisen on various dates, including first on 11th October, 2013 when respondent no. 7, despite objections from various authorities, extended its approval of plan, on the conditions stated therein. They have, therefore, submitted that the application is neither barred by time nor can it be contended that it does not raise a specific question of environment within the ambit of the Scheduled Acts under the NGT Act, 2010.

19. From the above pleaded case of the respective parties and the submissions advanced on their behalf, the following questions fall for consideration and determination of the Tribunal:

1. Whether the application filed by the applicants and supported by respondent nos. 11 and 12, is barred by time and thus, not maintainable?
2. Whether the petition as framed and reliefs claimed therein, disclose a cause of action over which this Tribunal has jurisdiction to entertain and decide the application, under the provisions of NGT Act, 2010?
3. Whether the present application is barred by the principle of *res judicata* and/or constructive *res judicata?*
4. Whether the application filed by the applicants should not be entertained or it is not maintainable before the Tribunal, in view of the pendency of the Writ Petition 36567-74 of 2013 before the Hon'ble High Court of Karnataka?
5. What relief, if any, are the applicants entitled to? Should or not the Tribunal, in

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the interest of environment and ecology issue any directions and if so, to what effect?

Discussion on Merits

1. Whether the application filed by the applicants and supported by respondent nos. 11 and 12, is barred by time and thus, not maintainable?

20. According to respondent no. 9, it had submitted a proposal to establish Information Technology Park, R & D Centre, Residential Complex and other facilities and sought for allotment of lands for the project in the year 2000. On 15th January, 2001, the Government in exercise of powers conferred upon it under Section 3(1) of the Karnataka Industrial Area Development Act, 1966 declared the land in question as an Industrial Area. Preliminary notification for acquisition of land in question was issued on 15th January, 2001 by KIADB and final Notification for acquisition of the land was issued on 23rd April, 2004, which was preceded by a Global Investor meet held on 10th February, 2004. On 28th June, 2007, respondent no. 7 issued the letter of allotment to respondent no. 9 allotting 63 acres 37½ gunta in Agara and Jakkasandra village. The possession certificate in favour of respondent no. 9 was issued on 29th June, 2007 in furtherance to which said respondent had paid the amount and executed the lease-cum-sale agreement. Project lease was sanctioned on 4th July, 2007. Airport Authority issued the NOC on 9th April, 2010. Clearance for the project construction was issued by BSNL on 16th April, 2010. BWSSB issued NOC on 12th May, 2011. Bangalore Electricity Supply Company Ltd. issued NOC on 27th April, 2011. After meetings of the State Level Expert Appraisal Committee and SEIAA, proposal was considered and Environmental Clearance was granted to respondent no. 9 on 17th February, 2012 for which notice was published in 'Kannada Prabha' and 'Indian Express' on 12th March, 2012 and 14th March, 2012 respectively. Modified building plan had been approved by respondent no. 7 on 30th August, 2012 which was valid up to 10th August, 2014. On 4th September, 2012, KSPCB issued consent for establishment under Water (Prevention and Control of Pollution) Act, 1974 and Air (Prevention and Control of Pollution) Act, 1981 as per conditions stated in the NOC. On 12th June, 2013, the LDA made a report stating that the KIADB has initiated a colossal mixed-use development project in the catchment area of Bellandur Lake. With reference to these dates and events, respondent no. 9 had advanced the plea that the application is barred by limitation. It is the contention of respondent no. 9, that all material events that would give rise to filing of an application under the provisions of NGT Act, 2010, had occurred on and prior to 17th February, 2012 and as the application was filed before the Southern Zone Bench of the Tribunal on 13th March, 2014, thus, same is hopelessly barred by time and is liable to be rejected on that short ground alone.

Similar events had taken place in regard to the project of respondent no. 10 who had been granted Environmental Clearance on 30th September, 2013. The contention raised by this respondent, which is, without prejudice to its other contentions, is that the grant of Environmental Clearance would put an end to all other challenges and even if the reports dated 12th June, 2013 and 14th August, 2013 are taken into consideration, even then the application had to be filed within a period of 6 months from the date on which the 'cause of action for such dispute has first arisen' in terms of Section 14 of the NGT Act, 2010. Admittedly, present application has been filed in March, 2014 i.e. much beyond the prescribed period of limitation. Also, there is no application for condonation of delay accompanying the main application. Even otherwise, the period of 60 days beyond the prescribed period of limitation has long expired and as such the Tribunal will have no jurisdiction to condone the delay. The Applicants contend, which contention is also duly supported by respondent Nos. 11 and 12 that the present application is not an application simplicitor under Section 14 of the NGT Act. It is an application where a specific prayer has been made with reference to the reports dated 12th June, 2013 and 14th August, 2013 for restoration of

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the Ecologically Sensitive Land and for maintaining the sensitive area in its natural condition, so that ecological balance of the area is not disturbed. This being a petition under Section 15 of the NGT Act, it could be filed within five years from the date on which the cause for such compensation or relief 'first arose'. According to the applicants, the present application is even filed within the period of limitation as contemplated under Section 14 of the NGT Act, 2010, for the reason that with reference to the inspection reports dated 12th June, 2013 by respondent no. 6 and 14th August, 2013 by respondent no. 2, various actions had been taken by different authorities, fully substantiating the plea of the applicant that such huge construction activity in the catchment area of the lakes is bound to have adverse impact on the environment and ecology. According to them, it is evident from the record that on 14th August, 2013, respondent no. 7 had issued a communication to respondent no. 9 to comply with Ecology and Environmental Rules, as well as to take approval from the LDA. Various letters were exchanged between different authorities and the Project Proponent about the progress of the project and its irregularities. A letter of stop work notice was issued by the BBMP on 23rd December, 2013. KIADB also issued a stop work notice to respondent no. 9 on 2nd January, 2014. According to these applicants, in light of these facts, it is the case of 'continuing and/or recurring' cause of action relatable to environmental issues. Thus, the application had been filed within the prescribed period of 6 months even in terms of Section 14 of the NGT Act and the limitation would trigger from each of these dates mentioned above.

21. Sections 14 and 15 of the NGT Act, 2010 to a large extent are self contained provisions. They deal with the remedies that an aggrieved person is entitled to invoke. The present application, if treated as an application under Section 15 of the NGT Act, viewed from any angle, is within the prescribed period of limitation. The Environmental Clearance was granted to respondent no. 9 vide order dated 17th February, 2012 and all events have occurred thereafter till institution of the petition. The applicant has prayed for relief and restoration of ecology particularly with reference to the catchment areas of Bellandur Lake & Agara Lake. The applicant could not have availed of any remedy before the Tribunal, prior to 2nd June, 2010 and/or 18th October, 2010 respectively, i.e. the dates on which the Act came into force and the Tribunal was constituted. Thus, the period of limitation would start running at best from these dates. The present application for the purposes of Section 15 has been filed within 5 years there-from and thus, has to be treated as within time.

However, what needs to be deliberated upon is whether in terms of Section 14 of the NGT Act, 2010, the present application has been filed within the prescribed period of limitation or not. Section 14(3) mandates that no application for adjudication of dispute under Section 14(1) shall be entertained by the Tribunal unless it is made within the period of 6 months from the date on which the 'cause of action for such dispute first arose'. The jurisdiction of the Tribunal under Section 14 is over civil cases where a substantial question relating to environment, including enforcement of any legal right relating to environment, is involved and such questions arise out of the implementation of the enactments specified in Schedule I of the NGT Act. The dispute or questions that the Tribunal is required to settle must fall within the ambit and scope of Section 14(1) of the NGT Act. In other words, it must be a dispute raising a substantial question relating to environment.

22. The contesting respondents while relying upon the language of Section 14 read cumulatively, contend that the expression 'within the period of 6 months from the date of which the cause of action for such dispute first arose' mandates that the period of limitation has to be reckoned when the cause of action for such dispute first arose and not thereafter. In the present case, the Environmental Clearance had been granted to respondent no. 9 on 17th February, 2012 and therefore it is their contention

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that the application could at best be filed by 16th August, 2012 and not thereafter.

23. 'Cause of Action' as understood in legal parlance is a bundle of essential facts, which it is necessary for the plaintiff to prove before he can succeed. It is the foundation of a suit or an action. 'Cause of Action' is stated to be entire set of facts that give rise to an enforceable claim; the phrase comprises every fact, which, if traversed, the plaintiff must prove in order to obtain judgment. In other words, it is a bundle of facts which when taken with the law applicable to them gives the plaintiff, the right to relief against defendants. It must contain facts or acts done by the defendants to prove 'cause of action'. While construing or understanding the cause of action, it must be kept in mind that the pleadings must be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or passage and to read it out of the context, in isolation. Although, it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words, or change of its apparent grammatical sense. The intention of the party concerned is to be gathered, from the pleading taken as a whole. [Ref. *Shri Udhav Singh* v. *Madhav Rao Scindia*, (1977) 1 SCC 511, *A.B.C. Laminart Pvt. Ltd.* v. *A.P. Agencies*, AIR 1989 SC 1239].

24. The expression 'cause of action' as normally understood in civil jurisprudence has to be examined with some distinction, while construing it in relation to the provisions of the NGT Act. Such 'cause of action' should essentially have nexus with the matters relating to environment. It should raise a substantial question of environment relating to the implementation of the statutes specified in Schedule I of the NGT Act. A 'cause of action' might arise during the chain of events, in establishment of a project but would not be construed as a 'cause of action' under the provisions of the Section 14 of the NGT Act, 2010 unless it has a direct nexus to environment or it gives rise to a substantial environmental dispute. For example, acquisition of land *simplicitor* or issuance of notification under the provisions of the land acquisition laws, would not be an event that would trigger the period of limitation under the provisions of the NGT Act, 'being cause of action first arose'. A dispute giving rise to a 'cause of action' must essentially be an environmental dispute and should relate to either one or more of the Acts stated in Schedule I to the NGT Act, 2010. If such dispute leading to 'cause of action' is alien to the question of environment or does not raise substantial question relating of environment, it would be incapable of triggering prescribed period of limitation under the NGT Act, 2010. [Ref: *Liverpool and London S.P. and I Asson. Ltd.* v. *M.V. Sea Success I*, (2004) 9 SCC 512, *J. Mehta* v. *Union of India*, 2013 ALL (I) NGT REPORTER (2) Delhi, 106, *Kehar Singh* v. *State of Haryana*, 2013 ALL (I) NGT REPORTER (DELHI) 556, *Goa Foundation* v. *Union of India*, 2013 ALL (I) NGT REPORTER DELHI 234].

Furthermore, the 'cause of action' has to be complete. For a dispute to culminate into a cause of action, actionable under Section 14 of the NGT Act, 2010, it has to be a 'composite cause of action' meaning that, it must combine all the ingredients spelled out under Section 14(1) and (2) of the NGT Act, 2010. It must satisfy all the legal requirements i.e. there must be a dispute. There should be a substantial question relating to environment or enforcement of any legal right relating to environment and such question should arise out of the implementation of the enactments specified in Schedule I. Action before the Tribunal must be taken within the prescribed period of limitation triggering from the date when all such ingredients are satisfied along with other legal requirements. Accrual of 'cause of action' as afore-stated would have to be considered as to when it first arose.

25. In contradistinction to 'cause of action first arose', there could be 'continuing cause of action', 'recurring cause of action' or 'successive cause of action'. These diverse connotations with reference to cause of action are not synonymous. They certainly have a distinct and different meaning in law. 'Cause of action first arose'

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would refer to a definite point of time when requisite ingredients constituting that 'cause of action' were complete, providing applicant right to invoke the jurisdiction of the Court or the Tribunal. The 'Right to Sue' or 'right to take action' would be subsequent to an accrual of such right. The concept of continuing wrong which would be the foundation of continuous cause of action has been accepted by the Hon'ble Supreme Court in the case of *Bal Krishna Savalram Pujari* v. *Sh. Dayaneshwar Maharaj Sansthan*, AIR 1959 SC 798.

26. In the case of *State of Bihar* v. *Deokaran Nenshi*, (1972) 2 SCC 890, Hon'ble Supreme Court was dealing with the provisions of Section 66 and 79 of the Mines Act, 1952. These provisions prescribed for a penalty to be imposed upon guilty, but provided that no Court shall take cognizance of an offence under Act unless a complaint thereof has been made within six months from the date on which the offence is alleged to have been committed or within six months from the date on which the alleged commission of the offence came to the knowledge of the Inspector, whichever is later. The Explanation to the provision specifically provided that if the offence in question is a continuing offence, the period of limitation shall be computed with reference to every point of time during which the said offence continues. The Hon'ble Supreme Court held as under:

> "5. A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and recurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all."

27. Whenever a wrong or offence is committed and ingredients are satisfied and repeated, it evidently would be a case of 'continuing wrong or offence'. For instance, using the factory without registration and licence was an offence committed every time the premises were used as a factory. The Hon'ble Supreme Court in the case of *Maya Rani Punj* v. *Commissioner of Income Tax, Delhi*, (1986) 1 SCC 445, was considering, if not filing return within prescribed time and without reasonable cause, was a continuing wrong or not, the Court held that continued default is obviously on the footing that non-compliance with the obligation of making a return is an infraction as long as the default continued. The penalty is imposable as long as the default continues and as long as the assesse does not comply with the requirements of law he continues to be guilty of the infraction and exposes himself to the penalty provided by law. Hon'ble High Court of Delhi in the case of *Mahavir Spinning Mills Ltd.* v. *Hb Leasing and Finances Co. Ltd.*, 199 (2013) DLT 227, while explaining Section 22 of the Limitation Act took the view that in the case of a continuing breach, or of a continuing tort, a fresh period of limitation begins to run at every moment of time during which the breach or the tort, as the case may be, continues. Therefore, continuing the breach, act or wrong would culminate into the 'continuing cause of action' once all the ingredients are satisfied. Continuing cause of action thus, becomes relevant for even the determination of period of limitation with reference to the facts and circumstances of a given case. The very essence of continuous cause of action is continuing source of injury which renders the doer of the act responsible and liable for consequence in law.

Thus, the expressions 'cause of action first arose', 'continuing cause of action' and

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'recurring cause of action' are well accepted cannons of civil jurisprudence but they have to be understood and applied with reference to the facts and circumstances of a given case. It is not possible to lay down with absolute certainty or exactitude, their definitions or limitations. They would have to be construed with reference to the facts and circumstances of a given case. These are generic concepts of civil law which are to be applied with acceptable variations in law. In light of the above discussed position of law, we may revert to the facts of the case in hand.

28. The settled position of law is that in law of limitation, it is only the injury alone that is relevant and not the consequences of the injury. If the wrongful act causes the injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. In other words distinction must be made between continuance of legal injury and the continuance of its injurious effects. Where a wrongful act produces a state of affairs, every moment continuance of which is a new tort, a fresh cause of action for continuance lies. Wherever a suit is based on multiple cause of action, period of limitation will began to run from the date when the right to sue first accrues and successive violation of the right may not give rise to a fresh cause of action. [Ref: *Khatri Hotels Private Limited* v. *Union of India (UOI)*, (2011) 9 SCC 126, *Bal Krishna Savalram Pujari* v. *Sh. Dayaneshwar Maharaj Sansthan*, AIR 1959 SC 798, *G.C. Sharma* v. *Municipal Corporation of Delhi*, ILR 2 Delhi 771, *Kuchibotha Kanakamma* v. *Tadepalli Ptanga Rao*, AIR 1957 AP 419].

29. A cause of action which is complete in all respects gives the applicant a right to sue. An applicant has a right to bring an action upon a single cause of action while claiming different reliefs. Rule 14 of the National Green Tribunal (Practise and Procedure) Rules, 2011, shows the clear intent of the framers of the Rules that multiple reliefs can be claimed in an application provided they are consequential to one another and are based upon a single cause of action. Different causes of action, thus, may result in institution of different applications and therefore, there is exclusion of the concept of the 'joinder of causes of action' under the Rules of 2011. The multiple cause of action again would be of two kinds. One, which arise simultaneously and other, which arise at a different or successive point of time. In first kind, cause of action accrues at the time of completion of the wrong or injury. In latter, it may give rise to cause of action or if the statutes so provide when the 'cause of action first arose' even if the wrong was repeated. Where the injury or wrong is complete at different times and may be of similar and different nature, then every subsequent wrong depending upon the facts of the case may gives rise to a fresh cause of action.

To this general rule, there could be exceptions. In particular such exceptions could be carved out by the legislature itself. In a statute, where framers of law use the phraseology like 'cause of action first arose' in contradistinction to 'cause of action' simplicitor. Accrual of right to sue means accrual of cause of action for suit. The expressions 'when right to sue first arose' or 'cause of action first arose' connotes date when right to sue first accrued, although cause of action may have arisen even on subsequent occasions. Such expressions are noticed in Articles 58 of the Limitation Act, 1963. We may illustrate this by giving an example with regard to the laws that we are dealing here. When an order granting or refusing Environmental Clearance is passed, right to bring an action accrues in favour of an aggrieved person. An aggrieved person may not challenge the order granting Environmental Clearance, however, if on subsequent event there is a breach or non-implementation of the terms and conditions of the Environmental Clearance order, it would give right to bring a fresh action and would be a complete and composite recurring cause of action providing a fresh period of limitation. It is also for the reason that the cause of action accruing from the breach of the conditions of the consent order is no way dependent upon the initial grant or refusal of the consent. Such an event would be a complete cause of action in itself giving rise to fresh right to sue. Thus, where the legislature specifically requires the

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action to be brought within the prescribed period of limitation computed from the date when the cause of action 'first arose', it would by necessary implication exclude the extension of limitation or fresh limitation being counted from every continuing wrong, so far, it relates to the same wrong or breach and necessarily not a recurring cause of action.

30. Now, we would deal with the concept of recurring cause of action. The word 'recurring' means, something happening again and again and not that which occurs only once. Such reoccurrence could be frequent or periodical. The recurring wrong could have new elements in addition to or in substitution of the first wrong or when 'cause of action first arose'. It could even have the same features but its reoccurrence is complete and composite. The recurring cause of action would not stand excluded by the expression 'cause of action first arose'. In some situation, it could even be a complete, distinct cause of action hardly having nexus to the first breach or wrong, thus, not inviting the implicit consequences of the expression 'cause of action first arose'. The Supreme Court clarified the distinction between continuing and recurring cause of action with some finesse in the case of *M.R. Gupta* v. *Union of India*, (1995) 5 SCC 628, the Court held that:

> "The appellant's grievance that his pay fixation was not in accordance with the rules, was the assertion of a continuing wrong against him which gave rise to a recurring cause of action each time he was paid a salary which was not computed in accordance with the rules. So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that it the appellant's claim is found correct on merits. He would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant's claim, if any, for recovery of arrears calculated on the basis of difference in the pay which has become time barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified. Similarly, any other consequential relief claimed by him, such as, promotion etc. would also be subject to the defence of laches etc. to disentitle him to those reliefs. The pay fixation can be made only on the basis of the situation existing on 1.8.1978 without taking into account any other consequential relief which may be barred by his laches and the bar of limitation. It is to this limited extent of proper pay fixation the application cannot be treated as time barred since it is based on a recurring cause of action.
>
> The Tribunal misdirected itself when it treated the appellant's claim as 'one time action' meaning thereby that it was not a continuing wrong based on a recurring cause of action. The claim to be paid the correct salary computed on the basis of proper pay fixation, is a right which subsists during the entire tenure of service and can be exercised at the time of each payment of the salary when the employee is entitled to salary computed correctly in accordance with the rules. This right of a Government servant to be paid the correct salary throughout his tenure according to computation made in accordance with rules, is akin to the right of redemption which is an incident of a subsisting mortgage and subsists so long as the mortgage itself subsists, unless the equity of redemption is extinguished. It is settled that the right of redemption is of this kind. (See *Thota China Subba Rao* v. *Mattapalli, Raju*, AIR (1950) FC 1."

31. The Continuing cause of action would refer to the same act or transaction or series of such acts or transactions. The recurring cause of action would have an element of fresh cause which by itself would provide the applicant the right to sue. It

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may have even be *de hors* the first cause of action or the first wrong by which the right to sue accrues. Commission of breach or infringement may give recurring and fresh cause of action with each of such infringement like infringement of a trademark. Every rejection of a right in law could be termed as a recurring cause of action. [Ref: *Ex. Sep. Roop Singh* v. *Union of India*, 2006 (91) DRJ 324, *Bengal Waterproof Limited* v. *Bombay Waterproof Manufacturing Company*, (1997) 1 SCC 99].

32. The principle that emerges from the above discussion is that the 'cause of action' satisfying the ingredients for an action which might arise subsequently to an earlier event give result in accrual of fresh right to sue and hence reckoning of fresh period of limitation. A recurring or continuous cause of action may give rise to a fresh cause of action resulting in fresh accrual of right to sue. In such cases, a subsequent wrong or injury would be independent of the first wrong or injury and a subsequent, composite and complete cause of action would not be hit by the expression 'cause of action first arose' as it is independent accrual of right to sue. In other words, a recurring cause of action is a distinct and completed occurrence made of a fact or blend of composite facts giving rise to a fresh legal injury, fresh right to sue and triggering a fresh lease of limitation. It would not materially alter the character of the preposition that it has a reference to an event which had occurred earlier and was a complete cause of action in itself. In that sense, recurring cause of action which is complete in itself and satisfies the requisite ingredients would trigger a fresh period of limitation. To such composite and complete cause of action that has arisen subsequently, the phraseology of the 'cause of action first arose' would not effect in computing the period of limitation. The concept of cause of action first arose must essentially relate to the same event or series of events which have a direct linkage and arise from the same event. To put it simply, it would be act or series of acts which arise from the same event, may be at different stages. This expression would not *de bar* a composite and complete cause of action that has arisen subsequently. To illustratively demonstrate, we may refer to the challenge to the grant of Environmental Clearance. When an appellant challenges the grant of Environmental Clearance, it cannot challenge its legality at one stage and its impacts at a subsequent stage. But, if the order granting Environmental Clearance is amended at a subsequent stage, then the appellant can challenge the subsequent amendments at a later stage, it being a complete and composite cause of action that has subsequently arisen and would not be hit by the concept of cause of action first arose.

33. The Environmental Clearance was granted to the project of Respondent no. 9 on 17th February, 2012 and to Respondent no. 10 on 30th September, 2013. Both these Environmental Clearances being appealable in terms of Section 16 of the NGT Act, 2010, their legality and correctness could be challenged within the prescribed period of limitation i.e. 30 days (or within the extended period of 60 days) which has not been done and as already noticed there is no challenge in this application to the grant of the Environmental Clearance. The applicants have primarily raised a challenge within the ambit and scope of Section 14 and 15 of the NGT Act. As already discussed, the application in so far as it prays for the relief of the restoration, it is within the period of limitation of 5 years. According to the applicants, the facts on record disclose violations of the condition of Environment Clearance and poses serious threat to the environment and ecology because of the reckless construction in the catchment areas of the lakes. During the period of August, 2012 to January, 2014, various notices have been issued by different authorities in relation to the modification of building plans. These stop work notices/orders and the inspection reports including report by LDA clearly demonstrates that the development project in the catchment area of Bellandur Lake as implemented would probably have adverse effect on the Bellandur Lake. The applicant may not challenge the grant of Environmental Clearance *per se* but upon commencement of the project and in view of their being definite documentary

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evidence supported by data, that the Project Proponent has committed breaches and implementation of the project is bound to have serious adverse impacts on ecology, environment and particularly the water bodies would give an independent 'cause of action' to him *de hors* the grant of Environmental Clearance. The averments in the application and the record fully satisfy the ingredients of Section 14 of the NGT Act. From those occurrences particularly of January, 2014, a fresh period of limitation has to be reckoned. The applicant may rely upon various reports, notices and orders in support of its claim. Whether the applicant succeeds on merits or not, is a different issue. However, for the purpose of limitation, the dates of these reports, stop work orders and notices would be relevant dates, which would provide the 'recurring cause of action' to the applicant and thus, the application will be within the prescribed period of limitation. In addition to this, the applicant has also prayed for taking action in accordance with law on the basis of the report dated 14th August, 2013, communication letter of LDA dated 23rd September, 2013, communication dated 12th December, 2013 by LDA to Respondent No. 9, stop work notice dated 23rd December, 2013 issued by BBMP to Respondent No. 9 and stop work notice issued dated 2nd January, 2014 by KIADP to Respondent No. 9. Thus, the application having been instituted on 13th March, 2014 is well within the period of limitation under Section 14 of the NGT Act and for the reasons afore-recorded, we find no merit in the plea of limitation raised on behalf of the Respondents.

2. Whether the petition as framed and reliefs claimed therein, disclose a cause of action over which this Tribunal has jurisdiction to entertain and decide the application, under the provisions of NGT Act, 2010?

34. It is a settled principle that while determining whether the application discloses a cause of action, which would squarely fall within the ambit and scope of the provisions of the NGT Act, the petition has to be read as a whole by the Court or the Tribunal. Thus, we have to examine the cumulative effect of the averments made in the application, read in conjunction with the prayer clause. If upon reading of the entire application together, such cause of action is disclosed, that would fall within the jurisdiction of this Tribunal, the Tribunal would be obliged to entertain and decide such pleas. In the case in hand, the applicant has made reference to various activities in general and illegal and unauthorised activities of respondent nos. 9 and 10 in particular, which are having adverse effect on the water bodies as well as the water supply to the city of Bangalore. It is alleged that the construction activity that is being carried on by respondent no. 9 is in violation of all the stipulations of the Environmental Clearance. Rampant construction work is being carried on in the buffer zone as well as over and around the Rajakaluves. While pointing out the blatant irregularities, it is also averred that the project is in the midst of fragile wetland area and is bound to severely disturb and damage the Rajakaluves. In terms of the Environmental Clearance, a condition has been imposed that the project proponent shall not disturb the storm water drains, natural valleys, etc. and buffer zone area around the Rajakaluves was to be maintained. However, according to the applicant, the project area is located between two lakes and therefore, the construction is in violation of Rule 4 of the Wetlands (Conservation and Management) Rules, 2010. There has been violation of maintaining the buffer zone in accordance with the revised Master Plan of 2015. There has to be 30 meter buffer zone created around the lakes and 50 meter buffer zone created on either side of the Rajakaluves. This has also not been adhered to. Further, the consent had been granted to respondent no. 9 for residential units and not for other activities.

35. While referring the water shortage, the averment is that the project requires 4.5 million litres of water per day i.e. 135 million litre water per month. Such requirement of the project would be beyond the capacity of respondent no. 5, as the quantity of water required for the project would still be more than the water supply

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being made by respondent no. 5 to the entire Agaram ward in Bangalore. The NOC issued by respondent no. 5 covers an area of only 17404 sq. meters whereas the total built up area of the construction is 13,50,454.98 sq. meters. Thus, the NOC was partial. Therefore, it is clear that even the Environmental Clearance had been obtained by respondent no. 9 without disclosure of correct facts. Further, the averments are that the construction activity has severely disturbed and damaged the Rajakaluves that run through the entire land and in fact is likely to result in disappearance of the Rajakaluves. Relying upon the two reports dated 12th June, 2013 and 14th August, 2013, it is averred that the project will have disastrous effect on the Agara Lake and the Bellandur Lake. If the construction is not stopped, the sensitive area and its ecology and environment would be at stake. Even the authorities had issued notices/stop work orders to the respondents for the breach of the conditions committed by them and for the construction activity being illegal.

On these averments, the two prayers that have been made is that the respondent - State of Karnataka - should take cognizance of the reports dated 12th June, 2013 and 14th August, 2013 and should take coercive and punitive actions against the respondents, as well as restore the ecology in the sensitive area. Further that, the Government should be directed to maintain the very land as a sensitive area and no development or construction activity should be allowed to be carried on, that would disturb the ecological balance of the area.

36. We have to examine whether on the facts afore-noticed, the prayers made would squarely fall within the scope of implementation of any of the Acts specified under Schedule I to the NGT Act. This Tribunal has three jurisdictions - original, appellate and special jurisdiction, enabling it to grant reliefs of compensation and restitution of property and environment both. Section 14 gives a very wide jurisdiction to the Tribunal to resolve and pass orders in all civil disputes, where substantial question relating to environment including enforcement of legal right relating to environment is involved and such question arises from the implementation of the enactments specified under Schedule I. Section 16 provides that appeal would lie to the Tribunal against the certain orders passed by authorities and Boards, in relation to the orders specified in clauses (a) to (j) of section 16, which also includes appeal against an order refusing or granting Environmental Clearance for carrying out of any activity, operation or process. Section 15 of the NGT Act gives to the Tribunal jurisdiction to grant relief, compensation and restitution in the event there is a victim of pollution and other environmental damage arising under the enactment specified in Schedule I of the NGT Act, for restitution of property damage as well as for restitution of environment in such areas.

37. The definition of 'environment' under Section 2(c) of the NGT Act again is widely framed. It is comprehensive enough to take within its ambit all matters in relation to environment. This definition practically covers every activity that will have water, air and land and inter-relationship, which exists among and between these and the human being, other living creatures, plants, microorganism and property. This definition is identical to the definition of 'environment' as provided under section 2(a) of the Act of 1986. In terms of the object and purpose of the Act of 1986, it has primarily been enacted to protect and improve the environment and for prevention of hazards to human being, other living creatures, plants and property.

Therefore, both protection and improvement of the environment are two very fundamental aspects of these legislations. Certainly, the applicant has not raised specific challenge to the Environmental Clearances dated 17th February, 2012 and 30th September, 2013 in the present appeal, but what is being questioned is the disappearance and further likelihood of complete extinction of the water bodies in the area in question in the city of Bangalore. Furthermore, since studies have shown

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serious adverse impacts upon the ecology and environment of the area, the authorities concerned, including the State Government, should take appropriate steps in accordance with law and the ecological degradation or damage should be directed to be restored. Once these reliefs are read in conjunction with the averments made in the record and examined within the domain of Order VII Rule 11 of the Code of Civil Procedure, 1908, then it is not possible to hold that the petition does not disclose a cause of action that would squarely fall within the ambit of the jurisdiction conferred upon the Tribunal in terms of Sections 14 and 15 of the NGT Act.

38. Section 15 of the NGT Act provides not only for relief and compensation to victims of pollution and other environmental damage arising under the enactments specified under Schedule I, but also for restitution of property and damage and restitution of environment for such area or areas. It is a general provision and covers victims of the pollution generally. In contradistinction thereto, Section 17 is a specific provision relating to death or specific injury which has occurred to a person, to a property or environment. Such death or injury has to result from an accident or adverse impact of activity or operation or a process, under any enactment specified under Schedule I, then the person responsible shall be liable to pay such relief or compensation for death, injury or damage, in terms of all or any of the heads specified in Schedule II of the Act and as determined by the Tribunal. This provision is person-specific and relates to such injury which results from an activity, operation or process and imposes liability on the person responsible for that activity, operation or process. Furthermore, when the provision of Section 14 and 15 of the NGT Act are examined in light of the Scheme of the Act, then it becomes clear beyond ambiguity that both these provisions operate in independent fields. They are mutually exclusive and not interconnected. Section 15 is not essentially dependent upon an order being passed under Section 14 as a condition precedent. In other words, remedy under Section 15 is not a consequential remedy to the provisions under Section 14. The legislature has provided distinct criteria, procedure and limitation under both these sections. If they were to be treated interconnected or inter dependent, there was no occasion to provide entirely different limitation within which an aggrieved person can invoke the jurisdiction of the Tribunal. The essentials to be pleaded and proved under these provisions are notably different. While under Section 14, an applicant has to show that he has raised a substantial question relating to environment, which arises out of the implementation of the enactments specified under Schedule I, under Section 15, an applicant is called upon only to show that he is victim of pollution or other environmental damage.

39. Another contention raised before the Tribunal by the respondents is that as far as grant of restoration under Section 15 is concerned, the applicant has not made out a case invoking the said jurisdiction and furthermore, that Section 15 comes into play post event. This argument cannot be accepted. Firstly, we have already noticed in some detail that the factual matrix of the case as pleaded by the applicant brings out a case for invoking the jurisdiction of the Tribunal under Sections 14 and 15 both. Secondly, Section 15 when construed on its plain language does not mandate a jurisdiction which can be invoked only post event. We are persuaded to hold so because of the clear distinction in language of Sections 15 and 17 of the NGT Act. Section 17 specifically requires that there ought to have been death, injury to any person or damage to any property or environment from an accident or adverse impact of an activity or operation or process where on the liability of the person to pay such relief or compensation shall be computed on the principle of no fault i.e. strict liability. In contradistinction thereto, Section 15 would operate both to a damage that has occurred as well as the damage which is likely to occur in relation to a property or environment. Of course, such damage will be to the victim of the pollution or other environmental damage arising under the enactments specified in Schedule I. Section

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20 of the Act places an obligation on this Tribunal to apply the three principles of Sustainable Development, Precautionary Principle and the Polluter Pays Principle, in settlement of disputes before it. Since the precautionary principle will also be part of Section 15, its applicability in a likely damage to environment or property cannot be excluded. The legislature in its wisdom has enacted two different and distinct provisions. They have to operate in their respective fields, particularly, when their language is distinct and different. A clear distinction between two is that Section 17 would operate only for compensation while Section 15 would deal both with compensation and restitution.

40. The expression 'dispute' is relatable to a question which is a substantial question of environment and such question should arise out of the implementation of the scheduled enactments under the NGT Act. It is a term of wide connotation and once a fact is asserted by one party and disputed by the other it gives rise to a 'dispute'.

41. Wherever a dispute as afore-noticed would arise, it would certainly give rise to a cause of action and accrue a right to sue in favour of an applicant in order to invoke one or the other jurisdictions of the Tribunal. At this stage it may be useful to refer to the decision of the Tribunal in the case of *Kehar Singh* v. *State of Haryana*, 2013 ALL (I) NGT REPORTER (DELHI) 556, wherein it was held:

> "16. 'Cause of action', therefore, must be read in conjunction with and should take colour from the expression 'such dispute'. Such dispute will in turn draw its meaning from Section 14(2) and consequently Section 14(1) of the NGT Act. These are inter-connected and inter-dependent. 'Such dispute' has to be considered as a dispute which is relating to environment. The NGT Act is a specific Act with a specific purpose and object, and therefore, the cause of action which is specific to other laws or other objects and does not directly relate to environmental issues would not be 'such dispute' as contemplated under the provisions of the NGT Act. The dispute must essentially be an environmental dispute and must relate to either of the Acts stated in Schedule I to the NGT Act and the 'cause of action' referred to under Sub-section (3) of Section 14 should be the cause of action for 'such dispute' and not alien or foreign to the substantial question of environment. The cause of action must have a nexus to such dispute which relates to the issue of environment/substantial question relating to environment, or any such proceeding, to trigger the prescribed period of limitation. A cause of action, which in its true spirit and substance, does not relate to the issue of environment/substantial question relating to environment arising out of the specified legislations, thus, in law cannot trigger the prescribed period of limitation under Section 14(3) of the NGT Act. The term 'cause of action' has to be understood in distinction to the nature or form of the suit. A cause of action means every fact which is necessary to establish to support the right to obtain a judgment. It is a bundle of facts which are to be pleaded and proved for the purpose of obtaining the relief claimed in the suit. It is what a plaintiff must plead and then prove for obtaining the relief. It is the factual situation, the existence of which entitles one person to obtain from the court remedy against another. A cause of action means every fact which, if traversed, would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which, taken with the law applicable to them, gives the plaintiff a right to relief against the defendant. It does not comprise evidence necessary to prove such facts but every fact necessary for the plaintiff to prove to enable him to obtain a decree. The expression 'cause of action' has acquired a judicially settled meaning. In the restricted sense, cause of action means the circumstances forming the infraction of the right or the immediate occasion for the action. In wider sense, it means

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the necessary conditions for the maintenance of the suit including not only the infraction coupled with the right itself. To put it more clearly, the material facts which are imperative for the suitor to allege and prove constitute the cause of action. (Refer: *Rajasthan High Court Advocates Asson.* v. *Union of India* [(2001) 2 SCC 294], *Sri Nasiruddin* v. *State Transport Appellate Tribunal* and *Ramai* v. *State of Uttar Pradesh* [(1975) 2 SCC 671]; *A.B.C. Laminart Pvt. Ltd.* v. *A.P. Agencies, Salem* [(1989) 2 SCC 163]; *Bloom Dekor Limited* v. *Sujbhash Himatlal Desai* with *Bloom Dekor Limited* v. *Arvind B. Sheth* [(1994) 6 SCC 322]; *Kunjan Nair Sivaraman Nair* v. *Narayanan Nair* [(2004) 3 SCC 277]; *Y. Abraham Ajith* v. *Inspector of Police, Chennai* [(2004) 8 SCC 100]; *Liverpool and London S.P. and I. Asson Ltd.* v. *M.V. Sea Success I* [(2004) 9 SCC 512]; *Prem Chand Vijay Kumar* v. *Yashpal Singh* [(2005) 4 SCC 417]; *Mayar (H.K.) Ltd.* v. *Owners and Parties, Vessel M.V. Fortune Express* [(2006) 3 SCC 100].

17. Upon analysis of the above judgments of the Supreme Court, it is clear that the factual situation that existed, the facts which are imperative for the applicant to state and prove that give him a right to obtain an order of the Tribunal, are the bundle of facts which will constitute 'cause of action'. This obviously means that those material facts and situations must have relevancy to the essentials or pre-requisites provided under the Act to claim the relief. Under the NGT Act, in order to establish the cause of action, prerequisites are that the question must relate to environment or it should be a substantial question relating to environment or enforcement of any legal right relating to environment. If this is not satisfied, then the provisions of Section 14 of the NGT Act cannot be called in aid by the applicant to claim relief from the Tribunal. Such question must fall within the ambit of jurisdiction of the Tribunal i.e. it must arise from one of the legislations in Schedule I to the NGT Act or any other relevant provision of the NGT Act. For instance, the Tribunal would have no jurisdiction to determine any question relating to acquisition of land or compensation payable in that regard. However, it would have jurisdiction to award compensation for environmental degradation and for restoration of the property damaged. Thus, the cause of action has to have relevancy to the dispute sought to be raised, right to raise such dispute and the jurisdiction of the forum before which such dispute is sought to be raised."

42. The plea raised by the respondents that the application does not disclose any cause of action within the four corners of the statutory jurisdiction of the Tribunal is, therefore, liable to be rejected. The respondent can raise such plea only while on the assumption that the allegations made in the application are correct. In other words, such plea of rejection of plaint is a plea of demurer. Whether the applicant would ultimately be entitled to any relief or not, is a matter different from rejecting the application on the ground of non-disclosure of any cause of action.

43. Specific averments have been made in the application with regard to the construction activities being carried on in an irregular manner, in violation of Environmental Clearance conditions and its adverse impacts upon environment and ecology, particularly, the water bodies in the area. Furthermore, submissions have been made on the basis of reports that refer to the restitution of degraded and damaged ecology and environment, particularly with reference to the water bodies in the concerned areas. A general question with regard to adverse impacts on water supply and water bodies has been prominently raised. These averments have been denied by the project proponents. The authorities which had issued stop work notices to the project proponents have partly supported the case of the applicant, while some other respondents, including official respondents, have supported the project. Thus, these are the matters which certainly raise a substantial question relating to environment and which arise in relation to implementation of the enactments specified

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in the Schedule to the NGT Act. Once, such disputes are raised which require determination by the Tribunal, it can hardly be contended that the application does not disclose any cause of action falling within the jurisdiction of the Tribunal.

44. Applicant can make a prayer of restitution of property damaged or of environment of such area under Section 15 of NGT Act. However, applicant has to show that it arises under the enactments specified under Schedule I. Thus, there is hardly any commonality in cause of action and ingredients thereto, required to be pleaded and proved and in the scope of jurisdiction exercisable by the Tribunal under sections 14 and 15 of the NGT Act. Therefore, these provisions are mutually exclusive and contentions of the Respondents that jurisdiction under Section 15 can only be invoked as a consequence of invocation of jurisdiction and orders of the Tribunal either under Section 14 or Section 16 of the Act is devoid of any merit.

45. The Learned Counsel appearing for the respondents, particularly the Project Proponents, while relying upon the judgement of the Hon'ble Supreme Court in the case of *T. Arivandandam* v. *T.V. Satyapal*, (1977) 4 SCC 467 and *ITC Ltd.* v. *Debt Recovery Tribunal*, (1998) 2 SCC 70, contended that the application before the Tribunal does not disclose a cause of action, is a vexatious litigation without merits and is cleverly drafted to create an illusion of a cause of action and therefore the application should be rejected. In our considered opinion, the respondents cannot take any advantage from any of the judgements cited by them. Firstly, these were the judgements on their own peculiar facts. In the case of *T. Arivandandam* (supra), the Hon'ble Supreme Court was dealing with an appeal against the order of Hon'ble High Court of Karnataka dismissing the revision petition of the petitioner for granting injunction or stay on the order of the Trial Court directing vacation of premises. The Apex Court observed that it was an audacious attempt by the petitioner for seeking more and more time in vacating premises by filing these fake litigations. It was held by the Hon'ble Supreme Court that the plaint was manifestly vexatious and meritless in the sense of not disclosing a clear right to sue and, therefore, the plaint should be rejected. On the other hand, in the case of *ITC Ltd.* (supra), the appeal was filed against the judgment of the Learned Single Judge of High Court of Karnataka, dismissing the Writ Petition filed by the appellant against the orders of the Debt Recovery Tribunal and Appellate Tribunal, rejecting the application of the appellant under Order VII Rule 11 of the Code of Civil Procedure, 1908. The Hon'ble Supreme Court had therein observed that non-movement of goods can be for a variety of tenable or untenable reasons but that by itself will not give a reason to the plaintiff to use the word “fraud” in the plaint and cleverly get over any objections that may be raised by way of filing an application under Order VII Rule 11. In these circumstances, it was held that if the plaint in fact did not disclose a cause of action, clever drafting cannot create illusionary cause of action. Hon'ble Supreme Court also stated that there was gross abuse of process of law repeatedly and observed that a plaint on a meaningful and not formal reading, should disclose the cause of action.

46. In the case in hand, as has already been held by us before, the litigation pending before the Hon'ble High Court of Karnataka and the Tribunal, fall under different jurisdictions. Even the Project Proponents themselves have filed Writ Petitions before the Hon'ble High Court of Karnataka challenging the stop work notices issued to them. In our considered view, on a meaningful reading of the application, particularly seen in light of the reports and other documents placed on record, the application does disclose a cause of action that would squarely fall within the ambit of jurisdiction of this Tribunal vested in it under Sections 14 and 15 of the NGT Act.

3. Whether the present application is barred by the principle of *res judicata* and/or constructive *res judicata?*

4. Whether the application filed by the applicants should not be entertained

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or it is not maintainable before the Tribunal, in view of the pendency of the Writ Petition 36567-74 of 2013 before the Hon'ble High Court of Karnataka?

47. The Respondents have raised the plea that the present application of the applicant is barred by the Principles of *res judicata*, constructive *res judicata* and in any case principle analogous thereto. This plea is found on the averment that some petitioners including Respondent Nos. 11 and 12 had filed a Writ Petition being Writ Petition No. 36567-574 of 2013, before the Hon'ble High Court of Karnataka with the following prayers:—

"PRAYER

In the above premises, it is prayed that this Hon'ble Court may be pleased to:

(a) Issue a writ of mandamus or any other appropriate writ or order, directing the Respondent no. 2 to resume the land which has been allotted in favour of Respondent no. 8 vide Lease cum sale agreement dated 30.06.2007 at Annexure "B", more fully described in the schedule to the said agreement;

(b) Issue a writ of mandamus or any other appropriate writ or order, directing the Respondent no. 2 to resume the land which has been allotted in favour of Respondent no. 9 vide Lease cum sale agreement dated 20.03.2008 at annexure "C", more fully described in the schedule to the said agreement.

(c) Issue a writ of mandamus or any other appropriate writ or order, restraining the Respondent Nos. 1 and 2 from, in any manner, further alienating the public land, described in the schedule of the Lease cum Sale Agreement at Annexure B and C, in the vicinity of Agara lake to any private individual/institution/trust/societies/nongovernmental associates and organizations without following the due process of law;

(d) Issue a writ of mandamus or any other appropriate writ or order, restraining the Respondent Nos. 1 and 2 from allotting the said land, described in the schedule to the Lease cum Sale Agreement at Annexure B and C, for purpose which may have an adverse consequences on the environment and, in particular the land in issue;

(e) Direct the Respondent no. 1 to appoint a Task Force to look into illegal allotment of land in favour of private persons at the cost of environment and ecology and report to the Respondent no. 1 take action over them;

(f) Pass such other orders and further orders as may be deemed necessary in the facts and in the circumstances of the case.

INTERIM PRAYERS

Pending consideration of this writ petition, this Hon'ble Court be pleased to:

(a) Pass an order staying all construction activity under the project being carried out on the land in issue;

(b) Pass an order restraining the Respondent Nos. 8 and 9 from alienating the land described in the schedule to the Lease cum Sale Agreement at Annexures B and C, or creating any third party rights or encumbrances on the land in issue; and

(c) Pass such other orders and further orders as may be deemed necessary in the facts and in the circumstances of the case."

48. It is alleged that in the above mentioned Writ Petition, averments similar to that of present application had been made and in fact averments identical to the present petition were made in paragraphs 52 to 55 of the Writ Petition. Furthermore, the applicants did not disclose the factum of filing the Writ Petition before the Hon'ble High Court to this Tribunal. Also, the parties to both the proceedings to some extent are common.

It is also argued that respondent nos. 9 and 10 have also filed two Writ Petitions

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before the Hon'ble High Court of Karnataka being Writ Petition No. 792 of 2014 and Writ Petition No. 366-367 of 2014, challenging the stop work notices issued to the respective respondents on 23rd December, 2013 and 2nd January, 2014 and that the operation of these notices have been stayed by the Hon'ble High Court on 21st January, 2014.

Thus, it is contended that the issues in the present application are directly and substantially in issue before the Hon'ble High Court of Karnataka and therefore, the present proceedings are barred by the Principle of *res judicata* and/or constructive *res judicata*. Neither the applicant nor respondent nos. 11 and 12 have disputed the filing of these Writ Petitions before the Hon'ble High Court, but have vehemently contended that neither the parties are common nor the issues in both the applications are directly and substantially the same. According to them, there is no commonality of cause of action or likelihood of a conflict between the judgments. It is therefore, their contention that the application is not liable to be rejected on that ground.

49. The pendency of the Writ Petitions before the Hon'ble High Court would not directly or incidentally render the proceedings before the Tribunal unsustainable. The scope of those Writ Petitions and the reliefs claimed therein are distinct and different. The matters relating to environment or the matters raising serious environmental issues are to be more appropriately tried before the Tribunal. We may at this stage refer to a recent judgment of the Supreme Court of India in the case of *Union of India* v. *Shrikant Sharma*, Civil Appeal No. 7400 of 2013 decided on 11th March, 2015. The Supreme Court in that case was dealing with a question of law whether the right of appeal under Section 30 of the Armed Forces Tribunal Act, 2007 against an order of the Tribunal with the leave granted by the Supreme Court against such orders, under Article 136(2) of the Constitution of India will bar the jurisdiction of the High Court Under Article 226 of the Constitution of India. After discussing the various provisions of the Act and various judgments of the Supreme Court in relation to basic principle for exercising power under Article 226 of the Constitution stated:

> "34.
>
> (iii) When a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.
>
> (Refer: *Nivedita Sharma).*
>
> (iv) The High Court will not entertain a petition Under
>
> Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance. (Refer: *Nivedita Sharma).*
>
> 36. *In Executive Engineer, Southern Electricity Supply Company of Orissa Limited (SOUTHCO)* this Court observed that it should only be for the specialised tribunal or the appellate authorities to examine the merits of assessment or even the factual matrix of the case.
>
> In *Chhabil Dass Agrawal* this Court held that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

The Court then proceeded to examine the likelihood of analogous situation that could arise by exercise of such jurisdiction and finally concluded held as under:

> "37.
>
> ...Once, the High Court entertains a petition Under Article 226 of the Constitution against the order of Armed Forces Tribunal and decides the matter, the person who thus approached the High Court, will also be precluded from filing an appeal Under Section 30 with leave to appeal Under Section 31 of the Act against the

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order of the Armed Forces Tribunal as he cannot challenge the order passed by the High Court Under Article 226 of the Constitution Under Section 30 read with Section 31 of the Act. Thereby, there is a chance of anomalous situation. Therefore, it is always desirable for the High Court to act in terms of the law laid down by this Court as referred to above, which is binding on the High Court Under Article 141 of the Constitution of India, allowing the aggrieved person to avail the remedy Under Section 30 read with Section 31 Armed Forces Act.

38. The High Court (Delhi High Court) while entertaining the writ petition Under Article 226 of the Constitution bypassed the machinery created Under Sections 30 and 31 of Act. However, we find that Andhra Pradesh High Court and the Allahabad High Court had not entertained the petitions Under Article 226 and directed the writ Petitioners to seek resort Under Sections 30 and 31 of the Act. Further, the law laid down by this Court, as referred to above, being binding on the High Court, we are of the view that Delhi High Court was not justified in entertaining the petition Under Article 226 of the Constitution of India.

39. For the reasons aforesaid, we set aside the impugned judgments passed by the Delhi High Court and upheld the judgments and orders passed by the Andhra Pradesh High Court and Allahabad High Court. Aggrieved persons are given liberty to avail the remedy Under Section 30 with leave to appeal Under Section 31 of the Act, and if so necessary may file petition for condonation of delay to avail remedy before this Court."

50. Now firstly, let us examine if the parties in both these proceedings are common. The present application was instituted by 3 applicants and none of them is a party to the Writ Petition before Hon'ble High Court of Karnataka. The official Respondents are common in both the proceedings. Respondent Nos. 11 and 12 were the petitioners No. 1 and 2 in the Writ Petition before the Hon'ble High Court. However, at a later stage of pendency of this application, they filed M.A. No. 139 and 140 for being impleaded as party to the present application. This application was contested by the respondents including Respondent no. 9 and 10 in the present application and the same was allowed vide order dated 25th July, 2014 passed by the Tribunal. In the said order, it was recorded that both these Respondent Nos. 11 and 12 have given an undertaking to the Tribunal that they would withdraw the Writ Petition that they had filed before the Hon'ble High Court of Karnataka. In compliance to the undertaking given to the Tribunal, these two Respondents filed an application before the Hon'ble High Court and vide order dated 1st August, 2014 passed in Writ Petition No. 36567 of 2013, the name of these two Respondents as Petitioner Nos. 1 and 2 were ordered to be deleted. Thus, as of today, none of the above applicants is the party in the Writ Petition before the High Court and in fact, they have been impleaded as Respondent Nos. 11 and 12 in consonance with the order of the Tribunal and that of the High Court as afore-referred. Now, we may proceed to deal with the content and scope of these proceedings. Undisputedly, the jurisdiction of the High Court under Article 226 of the Constitution of India is very wide. The jurisdiction of the Tribunal is very limited and it has to exercise it within the limitation of the Statute that created it. There are similar and at some places even identical contentions raised by the applicants in the present application, to the facts averred in the Writ Petition by the Petitioners before the High Court of Karnataka. The prayers in the Writ Petition as referred to above, both generally and substantially relate to acquisition of land, requiring the respondent authorities to resume the land in question, to examine the question of illegal allotment of the land and stop allotment and alienation of land. While the prayers before the Tribunal are and have to be restricted to environmental degradation and its restoration along with treating the areas in question as sensitive areas. The rampant development activities carried out by Respondent Nos. 9 and 10 are stated to have adverse impact on ecology, environment and the water bodies. It is

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further prayed before tribunal that there should be restoration of ecology of sensitive area. Thus, it is evident from the prayers and genesis of the respective proceedings that they are entirely distinct and different in their scope and relief. The issues before the Tribunal would essentially relate to environment, ecology and its restoration and have to be essentially a civil proceeding. While the proceedings before the High Court relate to entirely different issues i.e. the acquisition of land, its allotment and its transfer to third party. Thus, the issues in both the proceedings are neither substantially nor materially identical. Both jurisdictions have to operate in different fields governed by different and distinct laws. The objection taken by the Respondent does not satisfy the basic ingredients to attract the application of *res judicata* or constructive *res judicata*.

51. One of the tests in regard to the above is that a 'cause of action' should culminate into a judgment and lose its identity by merging into the result of the judgment. Once a 'cause of action' is culminated into the judgment, the general principle of *res judicata* or *constructive res judicata* bars re-agitating the same issue all over again. The object is to prevent abuse of process of law by re-agitating the same issues in different courts.

For these reasons, we find no merit in this contention of respondent Nos. 9 and 10. The purpose of the doctrine of *res judicata* is to provide finality and conclusiveness to the judicial decisions as well as to avoid multiplicity of litigation. In the present case, the question of re-agitating the issues or agitating similar issues in two different proceedings does not arise. The ambit and scope of jurisdiction is clearly decipherable. The jurisdictions of the Hon'ble High Court of Karnataka and this Tribunal are operating in distinct fields and have no commonality in so far as the issues which are raised directly and substantially in these petitions, as well as the reliefs that have been prayed for before the Hon'ble High Court and the Tribunal are concerned. There is no commonality in parties before the Tribunal and the High Court. The 'cause of action' in both proceedings is different and distinct. The matters substantially and materially in issue in one proceedings are not the same in the other proceeding. There is hardly any likelihood of conflicting judgments being pronounced by the Tribunal on the one hand and the High Court on the other. Therefore, we are of the considered view that the present applications are neither hit by the principles of *res judicata* nor *constructive res judicata*. We also hold that culmination of proceedings before the Tribunal into a final judgment would not offend the principle of judicial propriety', because of the Writ Petitions pending before the Hon'ble High Court of Karnataka.

In light of the above law enunciated by the Supreme Court of India, the contention raised on behalf of the applicant that this Tribunal should entertain and decide the application despite pendency of Writ Petitions before the High Court, deserves to be accepted.

5. What relief, if any, are the applicants entitled to? Should or not the Tribunal, in the interest of environment and ecology issue any directions and if so, to what effect?

52. Discussion on this issue with reference to the facts of the case would require the Tribunal to decide as to what relief, if any, could be granted to the applicant and whether there is any need for the Tribunal to pass any direction in the interest of environment and ecology in the peculiar facts and circumstances of the case. As already noticed in the afore-indicated discussions, the serious objection herein is that these projects commenced their construction activities without seeking Environmental Clearance and therefore, the constructions are illegal and unauthorised. These huge constructions of residential, commercial and other purposes are located on the wetlands of different water bodies in the city of Bengaluru. The constructions have been raised even on the catchment areas of the water bodies. With reference to the

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reports afore-noticed, averments are that these constructions have adversely affected the environment, ecology and particularly the water bodies and their biodiversity. These constructions would have tremendous impact on the water supply to the city of Bengaluru and that there is a likelihood of complete extinguishment of these historical lakes, which have been the basic factor behind maintaining the environmental and ecological balance in the city of Bengaluru.

53. One of the most important facets of deliberation on this issue would be the alleged construction on the wetlands and catchment areas of the water bodies, i.e. the Agara and the Bellandur Lakes. In common parlance, 'wetlands' are the areas where water is the primary factor controlling the environment and the associated plant and animal life. They occur where the water table is at or near the surface of the land or where the land is covered by water.

54. Ramsar Convention uses a broad definition of wetlands. It includes all lakes and rivers, underground aquifers, swamps and marshes, wet grasslands, peatlands, oases, estuaries, deltas and tidal flats, mangroves and other coastal areas, coral reefs, and all human-made sites such as fish ponds, rice paddies, reservoirs and salt pans.

55. The Indian definition of a 'wetland' means "an area or of marsh, fen, peatland or water; natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water, the depth of which at low tide does not exceed six meters and includes all inland waters such as lakes, reservoir, tanks, backwaters, lagoon, creeks, estuaries and manmade wetland and zone of direct influence on wetlands that is to say the drainage area or catchment region of the wetlands as determined by the authority but does not include main river channels, paddy fields and the coastal wetland covered under the notification of the Government of India in the Ministry of environment and Forest, S.O. number 114(E) dated the 19th February, 1991."

56. Wetlands are amongst the most productive ecosystems on the Earth, and provide many important services to human society. However, they are also ecologically sensitive and adaptive systems. "Free" services provided by wetlands are often taken for granted, but they can easily be lost as wetlands are altered or degraded in a watershed. Estimates of the per acre value of wetland services run as high as $370,000/acre in 1992 dollars (Heimlich *et al.* 1998). The exact value can be attributed to the type and location of the wetland, the services it provides, and the economic methods and assumptions used.

57. Ecosystem goods provided by the wetlands mainly include: water for irrigation; fisheries; non-timber forest products; water supply; Pollutant removal, Flood attenuation, Groundwater recharge, Shoreline protection, Wildlife habitat and recreation. Major services include: carbon sequestration, flood control, groundwater recharge, nutrient removal, toxics retention and biodiversity maintenance (Turner et al., 2000).

58. Various services provided by wetlands include Carbon Cycle/Carbon Sequestration: Swamps, mangroves, peat lands, mires and marshes play an important role in carbon cycle. Though wetlands contribute about 40% of the global methane (CH4) emissions, they have the highest carbon (C) density among terrestrial ecosystems and relatively greater capacities to sequester additional carbon dioxide (CO2). Wetlands provide for habitat for more aquatic, terrestrial, and avian species on an area basis than any other habitat type, making them one of the most ecologically and economically important ecosystems on earth. Thus, wetlands provide for soil life, habitat, biodiversity maintenance and recreation. Wetlands are a service provider to Nutrient Removal, Flood attenuation and Water supply and Ground water recharge and even are a source of employment [Ref: Pant *et. al*, 2003; Groffman and Crawford, 2003; Juliano and Simonovic, 1999; Olewiler, 2004; MFPED, 2004]. It is essential to

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provide an effective institutional framework to manage water bodies through governmental and even non-governmental organizations.

59. Bengaluru has many artificial lakes, built for various hydrological purposes and mainly to serve the needs of irrigated agriculture and other allied purposes. The studies placed on record show that lakes of Bengaluru occupy about 4.8 per cent of the city's geographical area (640 square meters) covering both urban and non-urban areas (Krishna M.B. *et al.*, 1996). The number of these lakes has rapidly fallen from 262 in 1960 to 81 in 1985. The quality of water has reduced due to discharge of industrial effluents and domestic sewage. Conversion of lakes for residential, agricultural and industrial purposes has engulfed many lakes. Similarly, between 1973 and 2007, this region lost 66 lakes with a water spread area of around 1100 hectares due to urban sprawl (Nitin Bassi *et al.*, 2014). General factors affecting wetlands especially lakes are Eutrophication, low dissolved oxygen and pH, sedimentation and heavy metal pollution, biodiversity loss, etc.

60. Studies also reflect that a comparative analysis of drainage network between the Bengaluru urban and rural areas showed that the water bodies in Bengaluru urban district were subjected to intense pressure due to the process of urbanization and increasing population, resulting in loss of interconnectivity, in contrast to water bodies in rural Bangalore, where less pressures from direct human activities were noticed. At Madivala and Bellandur, there is interconnectivity of lakes with the adjacent lakes. Due to conversion and encroachment of two water bodies, connectivity between Yelchenahallikere and Madivala is lost as in the case of *Bellandur* and *Ulsoor lakes* with the conversion of Challegatta tank into a golf course. The GIS analysis revealed that due to developmental activities in the catchment area, the drainage connectivity between the water bodies has been lost.

61. The loss in wetland interconnectivity in Bangalore district is attributed to the enormous increase in population and the reclamation of tanks for various developmental activities. Analysis of Madivala and Bellandur drainage network revealed that encroachment and conversion has resulted in the loss of connectivity between Yelchenhallikere and Madivala. Similarly the drainage network between Bellandur and Ulsoor is lost due to conversion of Chelgatta tank into a golf course (Status of wetlands in Bangalore).

62. In 1995, the National Lake Conservation Authority (NLCA) came up with National Lakes Conservation Plan (NLCP) for Bangalore, specifically aimed at raising the highest state of environmental alarm for dwindling quality of the remnants of the city's lakes. The National Lake Conservation Plan for Bangalore came with the theme of "*Integrated Lake Ecology with Water Quality*. This plan aimed at improving urban sanitation and health conditions, especially for the weaker sections of the society living within the lake catchment area. The plan also called for eco-friendly, low-cost, waste management bio-systems like "engineered wetlands". A total of 4 sub-systems comprising of around 20 lakes were selected for the first phase of the NLCP. These four subsystems included Agara Lake System (Hulimavu, Doddabegur, Madiwala, Puttenahalli; Agara Kere); Hebbal System (Narasipura I and II; Dodda Bomassandra, Hebbal Kere, and Nagavara); Bellandur Lake System (Ulsoor, Bellandur, Vartur); and Dorekere System (Vasanthapura, Janardhana, Dorekere, Moggekere). Rs. 5.542 Crore were sanctioned for the restoration of the Bellandur Lake under NLCP in January 2003. The proposal specified the following tasks for the restoration: de-silting of lakes, fencing around the lakes, afforestation and gardening, sewage water treatment, interception chambers, diversion channels, oxidation ponds, de-weeding of lakes, community sanitation, solid waste and garbage disposal, recreational facilities. This was to be a five year phasing project (1995–2000.) divided into the catchment area development (CAD); Sewage diversion channels; De-silting and Weed control; Face-lifting of lake; Biological studies and public awareness program; land acquisition, and

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others. The total cost for five years was estimated at Rupees Twenty-One Crores, Twenty Lakhs and Thirty five thousands.

63. In late 2000, the Research and Development wing of KSPCB published its report on comprehensive monitoring of lakes in and around Bangalore Metropolitan area to assess the state of the water quality. This was an interesting report given the weight of the output carried after the first phase of the city's lakes restoration process. KSPCB's results as a result of water quality monitoring on 44 selected lakes (including all but 2 in the NLCP list) revealed that most lakes still remained highly polluted.

64. The LDA instituted in January 2002, identified about 60 lakes for immediate restoration soon after it was established. This program, like the NCLP one previously was proposed to be a five year phasing project costing Rs. 250 Crores, almost ten times the estimated cost proposed by the NLCA in 1995. These selected lakes included Ulsoor Lake, Sankey tank, Agara Lake, Narasipura Lake, Lal Bagh Lake, Dodda Bamasandra Lake, Hebbal Lake, Nagavara Lake and Bellandur Lake. The LDA's main objectives were: Resuscitation of lakes to boost aquifers, Diversion and treatment of sewage to generate alternative sources of raw water; improving sanitation and health conditions; and preserving the habitat of aquatic life.

65. The wetland management program generally involves activities to protect, restore, manipulate, and provide for the functions and values emphasizing both quality and acreage by still advocating sustainable usage of them [Walters, C. 1986.]. Management of wetland ecosystems requires an intense monitoring, increased interaction and co-operation among the various agencies (state departments concerned with environment, soil, natural resource management, public interest groups, citizen groups, agriculture, forestry, urban planning and development, research institutions, government, policy makers, etc.). Such management goals should not only involve buffering wetlands from any direct human pressures that could affect the wetlands normal functions, but also in maintaining important natural processes that operate on them that may be altered by human activities. Wetland management has to be an integrated approach in terms of planning, execution and monitoring requiring effective knowledge on a range of subjects from ecology, economics, watershed management, and planners and decision makers, etc. All this would help in understanding wetlands better and evolving a more comprehensive solution for long-term conservation and management strategies.

We have noticed the above studies on record to bring clarity in regard to the importance of these water bodies and need-oriented significance to maintain the wetlands and catchment areas in the interest of environment, ecology, biodiversity and hydrological balance. The merit or otherwise, of these cases have to be examined in light of these studies, which is a matter of record.

66. It is alleged that respondents 9 and 10 had started the construction activity of their projects without grant of Environmental Clearance and it is sought to be substantiated by placing the Google Images on record. However, it cannot be disputed that subsequently both these respondents obtained ECs for the projects in question on 17th February, 2012 and 30th September, 2013, respectively. After the grant of Environmental Clearance, the respondents were expected to carry on with the projects strictly as per the terms and conditions of the orders granting them Environmental Clearance. The allegation is that they have carried out the constructions in violation of the conditions of the Environmental Clearance and have encroached upon the wetlands and catchment areas of the lakes.

67. The Environmental Information System (ENVIS), Centre for Ecological Sciences, Indian Institute of Science, Bangalore had carried out a study and submitted a report on the need for ‘Conservation of Bellandur Wetlands: Obligation of Decision Makers to Ensure Intergenerational Equity’. This report had specifically dealt with the activity of

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the SEZ projects by Karnataka Industrial Area Development Board in six zones. It was opined that this activity is contrary to Sustainable Development as the natural resources, lakes and wetlands get affected due to such activity. Removal of Rajakaluve (storm water drains) and gradual encroachment over them amounts to removal of lake connectivity, which enhances the episodes of flood and associated disasters. The Supreme Court of India, in Civil Appeal No. 1132/2011 while expressing concern regarding encroachment, particularly over lakes, had directed the State Governments to remove encroachments on all community lands. Even the High Court of Karnataka in Writ Petition No. 817/2008 had directed that the lakes should be protected across Karnataka, prohibited dumping of garbage and sewage in lakes, removal of encroachments, plantation of trees in consultation with experts lake surroundings and to declare it a 'No Development Zone' around the lakes. The report also speaks of water shortage by stating that BWSSB had not given NOC to respondent no. 9 and had communicated inability to supply such huge quantity of water on regular basis, as these projects require 4,587 kilolitres water per day (4.58 MLD per day). In this report, the Institute did not approve of the decision of the authorities to go ahead with such huge project, but also made reference to the ecological and environmental implications as follows:—

"Ecological and Environmental Implications:

- Land use change: Conversion of watershed area especially valley regions of the lake to paved surfaces would alter the hydrological regime.
- Loss of Drainage Network: Removal of drain (Rajakaluve) and reducing the width of the drain would flood the surrounding residential as the interconnectivities among lakes are lost and there are no mechanisms for the excessive storm water to drain and thus the water stagnates flooding in the surroundings.
- Alteration in landscape topography: This activity alters the integrity of the region affecting the lake catchment. This would also have serious implications on the storm water flow in the catchment.

  The dumping of construction waste along the lakebed and lake has altered the natural topography thus rendering the storm water runoff to take a new course that might get into the existing residential areas. Such alteration of topography would not be geologically stable apart from causing soil erosion and lead to siltation in the lake.
- Loss of Shoreline: The loss of shoreline along the lakebed results in the habitat destruction for most of the shoreline birds that wade in this region. Some of the shoreline wading birds like the Stilts, Sandpipers; etc will be devoid of their habitat forcing them to move out such disturbed habitats. It was also apparent from the field investigations that with the illogical land filling and dumping taking place in the Bellandur lakebed, the shoreline are gobbled up by these activities.
- Loss of livelihood: Local people are dependent on the wetlands for fodder, fish etc. estimate shows that wetlands provide goods and services worth Rs. 10500 per hectare per day (Ramachandra et al., 2005).

Decision makers need to learn from the similar historical blunder of plundering ecosystems as in the case of *Black Swan event* (http://blackswanevents.org/?page_id=26) of evacuating half of the city in 10 years due to water scarcity, contaminated water, etc. or abandoning of Fatehpur Sikhri and fading out of AdilShahi's Bijapur, or ecological disaster at Easter Island or Vijayanagara empire.

It is the responsibility of Bangalore citizens (for intergenerational equity, sustenance of natural resources and to prevent human-made disasters such as floods, etc.) to stall the irrational conversion of land in the name of development

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and restrict the decision makers taking the system (ecosystem including humans) for granted as in the case of *Bellandur wetlands* by KIADB."

This report also highlighted the threats faced by the wetlands in Bengaluru with particular reference to SEZ Bellandur wetlands, which is the land in question. The report recorded as follows:

"Greater Bangalore had 207 water bodies in 1973 (Figure 6), which declined to 93 (in 2010). The rapid development of urban sprawl has many potentially detrimental effects including the loss of valuable agricultural and eco-sensitive (e.g. wetlands, forests) lands, enhanced energy consumption and greenhouse gas emissions from increasing private vehicle use (Ramachandra and Shwetmala, 2009). Vegetation has decreased by 32% (during 1973 to 1992), 38% (1992 to 2002) and 63% (2002 to 2010).

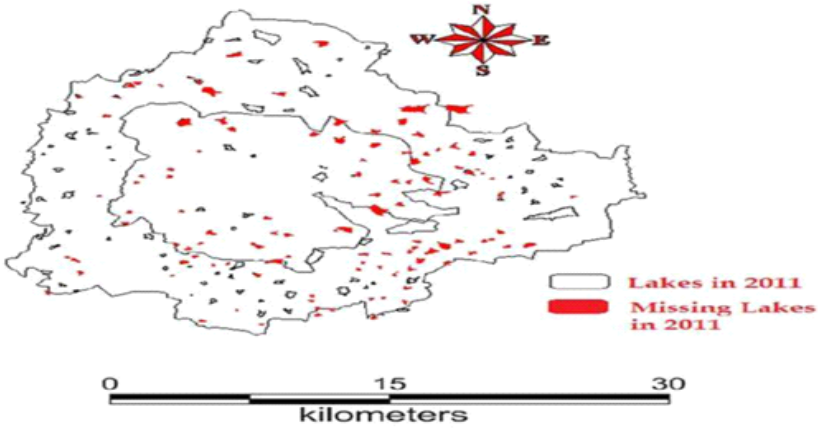

Figure 6: Lakes encroached by land mafia

Disappearance of water bodies or sharp decline in the number of water bodies in Bangalore is mainly due to intense urbanisation and urban sprawl. Many lakes (54%) were encroached for illegal buildings. Field survey of all lakes (in 2007) shows that nearly 66% of lakes are sewage fed, 14% surrounded by slums and 72% showed loss of catchment area. Also, lake catchments were used as dumping yards for either municipal solid waste or building debris (Ramachandra, 2009a; 2012a). The surrounding of these lakes have illegal constructions of buildings and most of the times, slum dwellers occupy the adjoining areas. At many sites, water is used for washing and household activities and even fishing was observed at one of these sites. Multi-storied buildings have come up on some lake beds that have totally intervene the natural catchment flow leading to sharp decline and deteriorating quality of water bodies. This is correlated with the increase in built up area from the concentrated growth model focusing on Bangalore, adopted by the state machinery, affecting severely open spaces and in particular water bodies. Some of the lakes have been restored by the city corporation and the concerned authorities in recent times. Threats faced by lakes and drainages of Bangalore:

1. Encroachment of lakebed, flood plains, and lake itself;
2. Encroachment of rajakaluves/storm water drains and loss of interconnectivity;
3. Lake reclamation for infrastructure activities;
4. Topography alterations in lake catchment;
5. Unauthorised dumping of municipal solid waste and building debris;
6. Sustained inflow of untreated or partially treated sewage and industrial effluents;

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7. Removal of shoreline riparian vegetation;
8. Pollution due to enhanced vehicular traffic.

These anthropogenic activities particularly, indiscriminate disposal of industrial effluents and sewage wastes, dumping of building debris have altered the physical, chemical as well as biological integrity of the ecosystem. This has resulted in the ecological degradation, which is evident from the current ecosystem valuation of wetlands. Global valuation of coastal wetland ecosystem shows a total of 14,785/ha US$ annual economic value. Valuation of relatively pristine wetland in Bangalore shows the value of Rs. 10,435/ha/day while the polluted wetland shows the value of Rs. 20/ha/day (Ramachandra et al., 2005). In contrast to this, Varthur, a sewage fed wetland has a value of Rs. 118.9/ha/day (Ramachandra et al., 2011). The pollutants and subsequent contamination of the wetland has telling effects such as disappearance of native species, dominance of invasive exotic species (such as African catfish, water hyacinth, etc.), in addition to profuse breeding of disease vectors and pathogens. Water qualityanalyses revealed of high phosphates (4.22-5.76 ppm) levels in addition to the enhanced BOD (119-140 ppm) and decreased DO (0-1.06 ppm). The amplified decline of ecosystem goods and services with degradation of water quality necessitates the implementation of sustainable management strategies to recover the lost wetland benefits.

SEZ in Bellandur Wetlands: Irrational decision of setting up SEZ at Bellandur wetland would affect the lake. The Mixed Use Development Project - SEZ (figure 6) is proposed along Sarjapur Road in a wetland between Bellandur and Agara Lake, extending from 77°38′28.96″ E to 77°38′57.99″E of Longitude and 12°55′ 24.98″ N to 12°55′44.43″ N of Latitude with an area of 33 hectare. The proposal of the project is to construct residential areas, offices, and retail and hotel buildings in this area.

Figure 6: SEZ

Significance of the Region:

1. Wetlands with remediation functional ability (function as *kidneys* of the landscape). Removal of wetlands will affect the functional ability of the lake and would result in the death of Bellandur lake;
2. Considering severe water shortage to meet the drinking water requirement in Bangalore, there is a need to remove deposited silt in the Bellandur lake, which will enhance the storage capacity and in turn helps in mitigating the water

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requirement;

3. Wetlands aid in recharging groundwater as soil are permeable;
4. Belanduru lake provide food (fish, etc.) and fodder;
5. Retain the excess water and prevent flooding in the vicinity;
6. Large number of farmers in the downstream is dependent on Belanduru lake water for agriculture, vegetable, etc.

Realizing these, BDA has aptly earmarked these regions in CDP 2005 for "ENVIRONMENT PROTECTION AND HERITAGE CONSERVATION". The masterplan includes the protection of valleys and tanks as part of the vision and enforcing the ban on construction over protected areas. CDP 2015: As per CDP 2015, valley region are "No Development Zone"

1. In case of water bodies a 30.0 m buffer of 'no development zone' is to be maintained around the lake (as per revenue records) with exception of activities associated with lake and this buffer may be taken into account for reservation of park while sanctioning plans.
2. If the valley portion is a part of the layout/development plan, then that part of the valley zone could be taken into account for reservation of parks and open spaces both in development plan and under subdivision regulations subject to fulfilling section 17 of KTCP Act, 1961 and sec 32 of BDA Act, 1976.
3. Rajakaluve/storm water drains categorized into 3 types namely primary, secondary and tertiary. These drains will have a buffer of 50, 25 and 15m (measured from the centre of the drain) respectively on either side. No activities shall be permitted in the buffer zone."

This technical report was prepared in the year 2013 when these projects had already commenced their constructions. Of course, as per the case of the project proponents themselves, the construction activity was not in full swing.

68. After inspection of the projects in question, another report was prepared by the Regional Office, Southern Zone (Bengaluru) of the Ministry of Environment and Forests, Government of India, in relation to the building project undertaken by respondents No. 9, which was sent to the Additional Principal Chief Conservator of Forests (Central), Ministry of Environment and Forests, Bangalore, on 14th August, 2013. It reported on the construction of mixed use development with residential, retail, hotel office, SEZ and Non-SEZ by respondent No. 9. In part III of this report, the MoEF commented upon each condition of the order granting Environmental Clearance and compliance thereto. It noticed that the projects are under initial stages, i.e. only levelling and excavation works are going on. It will be useful to refer to some of the significant observations relating to the compliance of the conditions of the Environmental Clearance in relation to the project of Respondent No. 9 in this Report. They read as follows:

Sl. No.	Conditions	Compliance
xiv)	Disposal of muck, construction debris during construction phase should not neighbouring communities and be disposed taking the necessary precautions for general safety and health aspects of people, only in approved sites with the approval of competent authority	The project authorities stated that, the excavated soil from the project site would be stored in Rachenahalli village, K.R. Puram Hobli, Bangalore East Taluk which is about 10 km away from the site and further stated that, the construction debris will be reused/recycled for back filling/sub base work for roads, pavements, drains

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		etc., within the project site and the earth work excavated material will be managed through back filling between foundations on the back side of retaining walls and underground tanks/sumps and also will be reused for filing up low lying areas within the site. As on today the levelling and excavation works are going on. The foundation work of commercial block in Phase-I has been started from here the excavated earth is kept just adjacent to this foundation work within the site and agreed to reuse back.
xv)	Soil and ground water samples should be tested at the project site during the construction phase to ascertain that there is no threat to ground water quality by leaching of heavy metals and or other toxic contaminants and reports submitted to SIEAA.	Soil (one location) and ground water (…….location) samples are being tested on monthly basis through the third party. The heavy metal has not been analyzed yet and agreed to analyse in future.
xvi)	Construction spoils, including bituminous material and other hazardous materials, must not be allowed to contaminate water courses and the dumpsites for such material must be secured so that they should not leach into the ground water.	The project authorities assured that hazardous material will not be used in the site.
xx)	Fly ash should be used as building material in construction as per the provisions of fly Ash Notification of September 1999 and amended as on August, 2003.	Fly ash bricks are not used because there is no coal based thermal power plant located within 200 km of the project site.
xxiv)	No ground water is to be drawn without permission from the Central Ground Water Authority.	Agreed to comply. The project construction activities are under initial stages. As gathered that, the ground water is purchased from outside for drinking and sanitation purpose.
xxxiv)	The project authority shall maintain and operate the common infrastructure facilities created including STP and solid waste management facility for a period of 5 years after commissioning the project.	Agreed to comply.
xxxix)	The natural sloping pattern of the project site shall remain unaltered and the natural hydrology of the area be	Execution of the project will necessarily sloping pattern of the project site and the natural

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	maintained as it is to ensure natural flow of storm water.	hydrology of the area and hence specific condition no xxxix cannot be complied.
xl)	Lakes and other water bodies (if any) within and/or at the vicinity of the project area shall be protected and conserved.	The project area is in the catchment area of Bellandur lake and the project authorities have informed that they will take all precautionary measures to ensure that the lake will not be affected by the project activities either during construction or during operation phase.
B. General Conditions		
ii)	All commitments made by the proponents in their application, and subsequent letters addressed to the SEAC/SEIAA should be accomplished before the construction work of the project is completed.	The project authorities have agreed to implement all the commitments made to the SEAC/SEIAA before the construction work of the project is completed.
v)	In case of any changes(s) in the scope of the project, the project would require a fresh appraisal by this Authority	Agreed to comply.
xii)	The issuance of Environmental Clearance doesn't confer any right to the project proponent to operate/run the project without obtaining Statutory clearance/sanctions from all other concerned authorities.	Agreed to comply.

There does not appear to be any such similar report in relation to the project of respondent no. 10. However, there are other general reports which deal with the project properties of respondent No. 10.

69. We have also noticed above that the High Court of Karnataka in W.P. No. 817/2008 had passed certain directions in regard to the preservation of lakes and wetlands in the State of Karnataka. These directions were based upon the report dated 21st February, 2011, submitted to the High Court by the Committee Chaired by Justice N.K. Patil, in relation to the preservation and restoration of lakes in and around the city of Bangalore. In the report, recommendation had been made with regard to preservation of lakes, noticing rapid urbanisation of Bangalore city as the main cause for reduction in water bodies. While referring to an earlier report of 1985, prepared by Shri N. Lakshman Rau Expert Committee, constituted by the Government of Karnataka, it was emphatically stated that necessity of lake preservation is more pronounced in the context of urbanization, when city takes more and more villages into its fold, as in case of Bangalore city. It stated that the lakes are the lung spaces of a city and climate moderators, adding to thermal ambience. Most importantly in this report, emphasis was made on the role of the LDA in preservation of lakes. It was referred that the LDA was constituted in the year 2002 as a registered society. Its jurisdiction extends over lakes in metropolitan cities area of Bangalore inclusive of Bangalore Metropolitan Region Development Authority area, besides this LDA has jurisdiction over the lakes in other Municipal Corporations and Town Municipal Councils within the State. It is the regulatory, planning and policy making body with nodal

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functions for protection, conservation, reclamation, restoration, regeneration and integrated development of lakes in its jurisdiction. Another important feature of this report was in relation to augmenting water supply to Bangalore city from these lakes. It stated that Bangalore population was likely to exceed 12 million by 2020 and at the current growth rate, the water shortage may lead to water crisis, if the problem is not tackled with advance planning. Report further stated that, the ground water was depleting and that bore-wells of 700 to 1000 feet deep were quite common in this city. These all were indicators of a grave situation.

70. The Hindu newspaper on 3rd June, 2013 had widely raised the issue of environmental degradation in the catchment area of the Bellandur Lake due to construction of mixed use development projects, as also undertaken by both the respondents no. 9 and 10. After this report, instructions were issued by the CEO of LDA on 4th June, 2013 to inspect the lake premises. Inspection was conducted by Shri S.R. Nagraj, EE, LDA and Sh. C. Nagesh Rao, AEE, LDA. After the inspection, a report dated on 12th June, 2013 was prepared which concluded as under:

> At the time of inspection it was observed that huge construction activities were observed in this catchment area and on enquiry it was informed that the above said land was acquired by the KIADB for SEZ and allotted for different agencies for construction of apartment complexes, malls, etc., Due to huge construction activities in this catchment area there is change of land use and directly impacting the catchment of Bellandur lake.
>
> As per the Para 2 of the report, it is reported that the wet land (a marshland ecosystem typically found around water bodies) has shrunk. It is not the wetland of Bellandur lake. It is achcutland of Agara lake. Originally Bellandur lake was with MI Department and MI has not constructed any wetland in Bellandur lake was with MI Department and MI has not constructed any wetland in Bellandur lake. It is catchment area which was shrunk due to allotment of agricultural land by KIADB to different agencies for construction of apartment complexes, malls etc.
>
> Hence KIADB's colossal “mixed - use development project in the catchment area of Bellandur will probably have adverse effect to Bellandur lake.

The above conclusions suggest that these multi-purpose construction activities of huge dimensions could have adverse environmental and ecological impacts. Of course, the report submitted by the MoEF primarily deals with the construction activity and projects of respondent No. 9 only. However, the other reports are of general nature which deals with the construction of multi-purpose projects and their adverse impacts on environment, ecology with particular reference to the water bodies like lakes etc.

71. In order to analyse the environmental and ecological impacts of these multipurpose projects appropriately, the case can be divided into two parts: First, what are the irregularities or breaches which the project proponents, i.e. respondent nos. 9 and 10 as stated to have been committed. Secondly, the likely impacts of these projects upon the environment and ecology of the area in question, particularly on the water bodies.

Proposed Mixed Use Development Project is located at Agara Village and Jakkasandra Village, Begur Hobli, Bangalore South. Special Economic Zone (SEZ) is located between the Agara Lake & Bellandur lake. The Mixed Use Development Project - SEZ is proposed along Sarjapur Road in the catchment of lakes Bellandur and Agara Lake, extending from 77°38′28.96″ E to 77°38′57.99″ E of Longitude and 12°55′ 44.43″ N of Latitude with an area of 33 hectare. Agara Lake is located at other side of 45 m wide road whereas Bellandur Lake is just 50 m away from the project boundary. Rajakaluve (Natural Drain) is running all along the project site.

Proposal envisages for construction of residential apartment with (Block-1 (Block A:

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2B+G+ 14UF; Block B: 2b+G+10 UF) + Block 2 (2B+G+14UF), retail, hotel & office building with 3B+G+11 UF, SEZ with 3B+G+11UF +Terrace and Non-SEZ 3B+G+12UF+Terrace on the plot area of 2,92,636.03 sqm. The total built-up area is 11,50,454.98 sq. m. The total water requirement is 4587 KLD and the investment is of Rs. 2347 crores.

72. In light of the above scope of the project and records before the Tribunal and the defaults on the part of the Project Proponents, the cumulative adverse effects of the activities undertaken by the respondents before us can be summed up as under:

1) The construction of both the projects had started prior to the grant to Environmental Clearance.
2) The EIA Notification of 2006 requires that without grant of Environmental Clearance, no project can commence its activity. This restriction applies not only to operationalization of the project but even for the purposes of establishment.
3) Revenue Map images shows multiple Rajakaluves flowing through the project(s) in question. The images further show encroachment on Rajakaluves.
4) Digital images of the land available on Google satellite images showing encroachment on two major Rajakaluves.
5) Google Satellite images retrieved from Google archives clearly reflect two distinct features. Firstly, change in the wetland area between the period of 13th November, 2000 and 23rd November, 2010. Secondly, it reveals the excavation work carried out by Respondent Nos. 9 and 10 commenced prior to obtaining Environmental Clearance.
6) Restriction in regard to extraction of ground water was not strictly complied with as permission of Central Ground Water Authority was not obtained before construction.
7) The conditions with regard to the natural slopping pattern of the project site to remain unaltered and natural hydrology of the area to be maintained as it is, to ensure natural flow of storm water as well as in relation to Lakes and other water bodies within and/or at the vicinity of the project area to be protected and conserved: The inspection report by the MoEF clearly notes that condition nos. (xxxix) and (xl) in the Environmental Clearance of respondent no. 9 cannot be complied with as it will necessarily result in some alteration of the natural slopping pattern of the project site and the natural hydrology of the area. It noted that the project area is located in the catchment area of the Bellandur Lake and the project authorities have informed that they will take all precautionary measures to ensure that the lake will not be affected by project activities either during construction or operation phase.

73. There are four reports on record which are suggestive enough that there would be adverse impacts of these projects upon the environment and ecology of the area, particularly on the lakes and the wetlands. The report prepared by the Committee chaired by Justice N.K. Patil filed before the Tribunal states that the lakes and the wetlands should be protected in the city of Bangalore. Measures were required to be taken in that direction and to remove encroachment in lake area and *Rajakaluves*. The large construction activity was stated to be prejudicial to the environment in those areas. Contents of this report are neither denied nor admitted by respondent no. 9 who, in its reply, has required contents of the report to be proved by the applicants. On the other hand, respondent no. 10 has submitted that there are no *Rajakaluves* or canal in his property and thus the above recommendations are not applicable to respondent no. 10. The other report on record is prepared by ENVIS, Centre for Ecological Sciences, Indian Institute of Science, Bangalore. This report focuses on possible consequences for setting up SEZ in Bellandur Lake area and also recommends restoration of wetlands in that area. In this report, how the land use changed from

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2007 to 2012 was illustrated, stating that the wetlands have decreased from 32.80 ha to 5.95 ha, whereas the Open land (Conversion of Wetlands to SEZ Construction site) has increased from 0.6 ha to 27.46 ha. Noticing the major violations, it was recorded that development in wetland violates the CDP 2015, which would result into flooding in the vicinity due to encroachment of drains, alterations in topography, encroachment of lake-bed and encroachment of lake itself by dumping debris and filling up of same; there was violation of 30 metre buffer (lake floodplain); traffic congestion and filling of a portion of lake with building debris. While respondent no. 9 termed the report as speculative and based on presumptions, respondent no. 10 denied it as frivolous and baseless and termed it as tailor made to support the case of the applicants. At this stage, we may also notice that in the column of 'Acknowledgement' of this Report, the name of Koramangala Residents Association has been mentioned. It is contended that this Association had approached Dr. T.V. Ramachandran to prepare the Report. The said Resident Association is a party to one of the Writ Petitions before the Hon'ble High Court of Karnataka. Therefore, it is argued that the report stand vitiated because of the self-interest of Dr. T.V. Ramachandran who was a member of the Committee which prepared the said report. On the other hand, the contention of the applicant and respondent nos. 11 and 12 is that Dr. T.V. Ramachandran prepared the said Report as a part of scientists' social responsibility and that the observations and findings of the report by the scientists do not become invalid/*non est* merely because the study was undertaken at the request of a concerned group of citizens.

74. The objection taken by the respondents does not appeal to us. This report was not prepared by an individual but by a team of scientists from a Government Institute. Apparently, it appears to be in discharge of his scientists' social responsibility that Dr. T.V. Ramachandran participated in preparing this report. However, this issue loses its significance, because it is the content of the report which is to be considered by the Tribunal and not the persons who have prepared the report. There is a vague denial to the contents of the report by the respondents, who have not placed any report on record to contradict the contents of this report, which itself is largely supported by three other reports placed on record.

75. Report which is placed on record by respondent no. 10 is prepared by a Private Consultant, which only mentions that there will be no adverse impacts on environment. This report does not aspire confidence, as it is not data based and in fact, does not meet any of the issues raised in the four reports placed by the applicant on record. The other two reports are the MoEF Monitoring Committee report and the inspection report prepared by the LDA, which we have already discussed in some detail above.

76. The MoEF monitoring report prepared by regional office of MoEF has forwarded on 14th August, 2013 mentions two most significant conditions which have a substantial bearing on the matters in issue before us is with regard to the preservation of the water bodies in Bengaluru and the natural slopping pattern and natural hydrology of the area to remain unaltered. These conditions having been noticed as not possible to be adhered to, we really do not understand as to how these projects have been permitted to progress any further.

77. Lastly, it is the report of LDA, which as already noticed is the Society created by the Government of Karnataka with a specific purpose of protecting the lakes and the wetlands. This report had specifically recorded that the projects are bound to have adverse impacts on the catchment area of Ballendur Lake. This report has also been denied by the respondents stating that it is frivolous and according to respondent no. 10, there are no wetlands around Bellandur Lake.

78. There is sufficient material by way of reports, google images and other documents that the Bellandur Lake and even other lakes for that matter have wetlands

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and catchment areas. There are encroachments on the Rajakaluves as well as on the catchment areas of the water bodies. The adverse impacts of this colossal mixed development projects had got the attention of all concerned, including the Press and the issue was widely raised. This resulted in the inspection by the LDA as well as other authorities, which commented on the adverse impacts of this project in the interest of environment and ecology. Furthermore, the stop-work notices issued by different authorities from time to time also suggest that the work and progress of the projects was in violation of the laws in force. Of course, these stop-work notices have been challenged before the Hon'ble High Court of Karnataka which has granted stay on these notices, but the fact of the matter remains that various authorities including the BBMP and the KIADB have found out and observed that the construction should be stopped forthwith.

79. The cumulative effect of the above discussion would be that there is a definite possibility of environment, ecology, lakes and the wetlands being adversely affected by these projects. There are multiple public authorities including SEIAA involved in regulating such projects and they are also responsible for protecting interest of environment and ecology while keeping in mind the settled canon of sustainable development. It is the contention of the respondent nos. 9 and 10 that there are large numbers of other projects located around these lakes. If that be so, then we have no hesitation in observing that various regulatory authorities including SEIAA ought to have examined the cumulative Environmental Impact Assessment in these cases on the water bodies as the protection of the water bodies, the wetland and the catchment areas of the lakes is the obligation of these authorities.

80. It was vehemently contended before us that the construction of the projects is nearing completion and huge money of respondent nos. 9 and 10 including investments made by various land and other area purchasers is at stake. Thus, according to these respondents, the application should be declined by the Tribunal only on that fact. We are not impressed with this contention at all. The respondents have started the construction even prior to the grant of Environmental Clearance and instigated the public to invest money. They cannot be permitted to take advantage of their own wrong. However, it may also not be in the interest of justice and particularly, while applying the Principle of Sustainable Development in terms of Section 20 of the NGT Act, that these properties be demolished but that does not mean that they should not be directed to take all measures and precautions, even if it results in necessary demolition of some parts of the projects in the interest of environment, ecology and protection of lakes and wetlands. It cannot be disputed that there is serious scarcity of water in the city of Bangalore. Impact of these projects on water bodies ought to have been of fundamental consideration before the authorities concerned. In our considered view, they have failed to take complete notice of this fact and act objectively in light of the laws in force.

81. The project proponents, i.e. respondent nos. 9 and 10 submitted their respective applications for grant of Environmental Clearance to the concerned authorities in the year 2011 and 2012 respectively. The Environmental Clearance was granted to the Project proponents on 17th February, 2012 and 30th September, 2013 respectively. However, construction activities had been carried out by the project proponents much prior to the grant of Environmental Clearance. There is not even an iota, much less valid, reason placed by the project proponents before the Tribunal as to why the applications for Environmental Clearance were moved at such belated stage and why construction was started prior to grant of Environmental Clearance. The provisions of the EIA Notification, 2006 which was in force at all relevant times does not permit carrying on of any construction or any other activity in relation to the project prior to the grant of Environmental Clearance. The provisions of this Notification admit of no ambiguity that specific project or activities shall not require

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prior Environmental Clearance. All steps in that direction, including site selection, are the subject matter of scrutiny at the time of grant of Environmental Clearance. The project proponents are clear defaulters of compliance of the statutory provisions. They cannot take advantage of their own wrong of raising construction prior to submission of the application for Environmental Clearance and even grant of Environmental Clearance. The respondent nos. 9 & 10 are intentional defaulters. They violated the law being fully conscious of their obligations under different laws in force. The authorities concerned had sanctioned the building plans of these respondents subject to a specific stipulation that such sanction was subject to grant of other clearances including Environmental Clearance under different laws. Since the construction and allied activities were being carried on contrary to law, they even would be deemed to have caused pollution not only of the environment but more particularly of the lakes and caused obstructions of the Rajakaluves in the area. Applying the Principle of 'Polluter Pays' as contemplated under Section 20 of the NGT Act, the project proponents must be held liable to pay compensation for restoration and restitution of the environmental pollution and degradation. There is sufficient material on record to show that there has been environmental degradation. From the date of grant of Environmental Clearance, the construction is supposed to be carried on in accordance the conditions of the Environmental Clearance and with due protection of the environment, which the respondents have failed to comply with. The project proponents are liable to pay compensation under the 'Polluter Pays' Principle, for the illegal and unauthorised construction carried on in violation of the environmental laws and prior to grant of Environmental Clearance. One who violates law renders itself liable for consequences of such violations.— Respondent nos. 9 & 10 commenced excavation and even construction prior to submission of their application for grant of Environmental Clearance. Obviously at that stage they did not take any protections in the interest of environment and ecology in relation to the project activities. The terms & conditions in that behalf came to be stipulated only in the order granting Environmental Clearance; prior thereto the entire project activity was illegal and unauthorised. The mining, excavation and construction work adversely affected the Lakes and the Rajakaluves. The possible risk and degradation, due to construction and operation of the project include actual damage and even threats to environment and ecology pertaining to pollution, encroachment, eutrophication, illegal mining of soil, loss of Biodiversity, ungoverned human activities and cultural misuse. The consequential damage and degradation of environment and ecology from the activities of these projects can broadly be placed under two distinct heads, while invoking the Polluter Pays Principle. First being the damage that has already been caused because of such activity, particularly, for the period when the activity was carried out in an illegal and unauthorised manner and without sanction of the competent authorities. Secondly, the damage and environmental degradation that is likely to occur upon completion of these projects and the liability of the concerned respondents in regard to restoration and restitution of environment. Another very important aspect which cannot be overlooked by the Tribunal is with regard to the respondent nos. 9 & 10 carrying on their project activity fully knowing that they were incapable of or it was not possible for them to comply with condition no. xxxix and xl (or alike conditions) in the order granting the Environmental Clearance. This has even been noticed by the MoEF in its monitoring report dated 14th August, 2013. These respondents never applied for variation or amendment of these conditions and continued with their construction activities. This renders these respondents entirely liable for environmental and ecological damage and the restoration and restitution thereof.

82. It may not be possible to determine the above compensation with exactitude but that does not mean that the project proponents can avoid liability in that regard. The Supreme Court in the case of *Sterlite Industries (India) Ltd.* v. *Tamil Nadu PCB*, JT

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2013 (4) SC 388, had directed payment of Rs. 100 crores by the Company which operated without consent of the Board. It needs to be noticed that M/s Sterlite Industries was possessed of the consent from the Board prior as well as subsequent to the period for which the compensation was imposed. In order to comply with the principle stated by the Hon'ble Supreme Court in the case of *Sterlite Industries* (supra) and as followed in the case of *Sarang Yadwadkar* v. *The Commissioner, Pune Municipal Corporation*, 2013 ALL (I) NGT REPORTER (DELHI) 299, discussed hereafter, we may refer to some relevant facts and figures from the records before us. The project area of respondent no. 9 is nearly 2,92,636.03 sq. m, while the built-up area is 13,50,454.98 sq.m., with a project cost of Rs. 2,347 Crores. While in the case of respondent no. 10 the plot area is 33,333.00 sq.m., while the built-up area is 72,180.64 sq. m., with a project cost of Rs. 450 Crores. The afore-noticed project activities and construction started much prior to moving of application and grant of Environmental Clearance. The principle which has often been adopted by the Courts, including the Hon'ble Supreme Court in the case of *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590, is to direct deposit of certain percentage of the cost of the project at the first instance. In the case of *Goa Foundation*, the Supreme Court had directed deposit of 10 per cent of the value of the mineral extracted. In the case of *Krishankant Singh* v. *National Ganga River Basin Authority*, 2014 ALL (I) NGT REPORTER 3 DELHI 1, this Tribunal directed Simbhaoli Sugar Mills which had operated without consent of the concerned Board for a long period and had polluted the environment, Phuldera drain as well as the underground water, to pay a compensation of Rs. Five Crores. The said sugar factory had operated with the consent of the Board prior and subsequent to this period. The compensation was imposed for flouting the law and for causing the pollution. It may be noticed that the appeal against the said judgment of the Tribunal was dismissed by the Supreme Court in Civil Appeal No. Civil Appeal No. 10434 of 2014 vide its order dated 21st January, 2015. This liability primarily accrues on account of the illegal and unauthorised activities carried on by the Project Proponents. These are purely commercial ventures of respondent nos. 9 & 10 to make high profits, while causing environmental and ecological degradation and also by carrying on illegal and unauthorised activities, particularly, for the period prior to grant of Environmental Clearance.

83. The drawings and construction plans had been approved by respondent no. 7 vide its letter dated 4th July, 2007 and 22nd April, 2008, for respondent nos. 9 and 10 respectively. Despite this, the applications for seeking Environmental Clearance were moved much later i.e. on 3rd March, 2011 and 4th February, 2012. Even these letters granting approval of drawing and plans had mandated that these Respondents are expected to comply with all bye-laws and even other laws in force. When they applied for renewal of building plans and drawings, the same were granted vide letter dated 11th October, 2013 and 3rd January, 2013 respectively, where specific conditions were stipulated that other laws in force relating to construction and use of premises should be complied with and they were required to install ETP/STPs and use of recycled water for washing and flushing was mandated. From this, it emerges that there was clear onus on the part of these respondents to seek Environmental Clearance before commencing construction, which they intentionally and flagrantly violated and furthermore, there is nothing on record to show that the conditions with regard to setting up of ETP/STP and recycling of water have fully been satisfied. Furthermore, respondent no. 10 has been issued a specific letter on 18th March, 2013 by respondent no. 7 directing it that no construction works should commence prior to obtaining Environmental Clearance. They were also directed to obtain Consent for Establishment from KSPCB which was also not adhered to. They were required to furnish the requisite information within 7 days. These are the apparent violations of law committed by respondent nos. 9 and 10.

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84. We are conscious of the fact that the projects in question have already been granted the Environmental Clearances and that they have raised constructions in furtherance to such Environmental Clearances. Still as discussed above, the matters in relation to conditions of the orders granting Environmental Clearances, adverse impacts of these projects upon the environment, ecology, lakes and wetlands, need for taking preventive and remedial measures for restoration of the environment and ecology as well as protection of the water bodies in future, are the matters which have been examined by us above. We may also appropriately make reference to the judgment of this Tribunal in the case of *Sarang Yadwadkar* v. *The Commissioner, Pune Municipal Corporation*, 2013 ALL (I) NGT REPORTER (DELHI) 299, wherein under somewhat similar circumstances, the Tribunal had while declining to demolish the construction raised in the project, issued substantive directions in the interest of environment and ecology and for protection of River Mutha in Pune. The Respondent Corporation had preferred an appeal before the Supreme Court of India being Civil Appeal Diary No. 3445 of 2015, which was dismissed on merits on 12th February, 2015. The Project Proponent was thus directed to comply with the directions of the Tribunal including partial demolition of the project in question. We have already indicated that at this stage the entire amount of compensation payable on various counts by the Project Proponent cannot be determined with exactitude, however, liability to pay for violation of law, raising construction unauthorizedly and illegally, renders the Project Proponent liable to pay the environmental compensation forthwith. The final amounts for restoration of environment and ecology would be determined by the Committee constituted in this judgment. We are of the considered view that 10 per cent of the project cost may be somewhat on the higher side and to maintain the equitable balance between the default and the consequential liability of the applicant, we direct the Project Proponents to pay at the first instance compensation for their default at the rate of 5 per cent of the cost of the project. In light of this, Respondent No. 10 would be liable to pay a sum of Rs. 22.5 crores and Respondent No. 9 would be liable to pay a sum of 117.35 crores.

85. This is a fit case where in exercise of its jurisdiction in terms of Section 20 of the NGT Act, the Tribunal has to invoke both polluter pays principle as well as precautionary principle. Further, where the Tribunal should also apply the principles of law enunciated by the Supreme Court and this Tribunal in the case of *Sterlite Industries* (supra), *Krishankant Singh* (supra) and *Sarang Yadwadkar* (supra) and issue the following directions:

1) We decline to pass any direction or order to stop further progress and/or demolition of the project or any part thereof at this stage. However, we constitute the following Committee to inspect the projects in question and submit a report to the Tribunal *inter alia* but specifically on the issues stated herein after.
   a) Advisor in the Ministry of Environment and Forest dealing with the subject of wetlands.
   b) CEO of the Lake Development Authority, Karnataka State.
   c) Chief Town Planner of BBMP, Bangalore.
   d) Chairman of SEAC which recommended the grant of Environmental Clearance to the projects in question.
   e) Sr. Scientist (Ecology) from the Indian Institute of Sciences, Bangalore.
   f) Dr. Siddharth Kaul, former Advisor to MoEF.
   g) An Senior Officer from the National Institute of Hydrology, Roorkee.
2) Member Secretary of the Karnataka State Pollution Control Board shall act as the Convenor of the Committee and would submit the final report to the Tribunal.
3) The Committee shall inspect not only the sites where the projects in question are

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located but even other areas of Bangalore which the Committee in its wisdom may consider appropriate, in order to examine the interconnectivity of lakes and impact of such activities upon the water bodies, with particular reference to lakes.

4) The Committee shall submit whether the projects in question have encroached upon or are constructed on the wetlands and Rajakaluves. If so, are there any adverse environmental and ecological impact of these projects on the lake particularly, Bellandur Lake and Agara Lake, as well the Rajakaluves. The report should specify if any Rajakaluves have been covered by the construction activities of respondent nos. 9 and 10 or by any of the projects in the area in question.

5) Committee should submit in its report if these projects have any adverse impacts upon the surrounding ecology and environment, with particular reference to lakes and wetlands. If yes, then whether any part of the project is required to be demolished. If so, details thereof along with reasons.

6) The Committee shall substantially notice if any of the conditions of the Environmental Clearance order in each case of respondent nos. 9 and 10 have been violated. If so, to what extent and suggest remedial measures in that behalf to restore the ecology of the area.

7) The Committee would also recommend what should be the buffer zone around the lake(s) and interconnecting passages and wetlands. The committee shall also report whether activities of multipurpose projects which have serious repercussions on traffic, air pollution, environment and allied subjects should be permitted any further or not, particularly, in wetlands and catchment areas of water bodies.

8) Recommendations should be made with regard to the steps and measures that should be taken for restoration of lakes, particularly, in the city of Bangalore.

9) The Committee shall also find out that whether the construction of the projects is in accordance with the sanctioned drawings and bye-laws in accordance with the letter dated 4th July, 2007 and 22nd April, 2008 respectively. Further, the Committee would also report whether both respondent nos. 9 and 10 have installed ETP/STP and have taken full measures for recycling of used water for washing and flushing etc., in terms of letters dated 11th October, 2013 and 3rd January, 2013, issued by the Karnataka Industrial Area Development Board to respondent nos. 9 and 10 respectively.

10) In the event, the Committee is of the opinion that the adverse impacts noticed are redeemable, then what directions need to be issued in that behalf and the cost involved for achieving the said conservation and restoration of lakes and water bodies.

11) Till the submission of the report by the Committee and directions passed by the Tribunal in that regard, both respondent nos. 9 and 10 are hereby restrained from creating any 3rd party interests or part with the possession of the property in question or any part thereof, in favour of any person.

12) The committee shall submit its report to MoEF and to this Tribunal as expeditiously as possible and in any case not later than three months from today. During that period we restrain MoEF, SEIAA and/or any public authority from sanctioning any construction project on the wetlands and catchment areas of the water bodies in the city of Bangalore.

13) The Committee shall report if the project proponents are proposing to discharge their trade or domestic effluents into the lake or any of the water bodies in and around of the area in question.

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14) For the reasons stated in the judgment respondent no. 9 is liable and shall pay a sum of Rs. 117.35 crores, while respondent no. 10 shall pay a sum of Rs. 22.5 crores respectively being 5 per cent of the project value, within two weeks from today. The said amount would be paid to the KSPCB, which shall maintain a separate account for the same and would spend this amount for environmental and ecological restoration, restitution and other measures to be taken to rectify the damage resulting from default and non-compliance to law by the Project Proponent in that area, after taking approval of the Tribunal.

15) We make it clear that the said respondents would not be entitled to pass on the amount in terms of direction 14, onto the purchasers because this liability accrues as a result of their own intentional defaults, disobedience of law in force and carrying on project activities and construction illegally and unauthorizedly.

86. Thus, we dispose of the Original Application No. 222 of 2014 in the above terms while leaving the parties to bear their own costs.

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2015 SCC OnLine NGT 169

Before the National Green Tribunal Principal Bench, New Delhi

(BEFORE SWATANTER KUMAR, CHAIRPERSON, U.D. SALVI, J.M., DR. D.K. AGRAWAL, E.M., PROF. A.R. YOUSUF, E.M. AND BIKRAM SINGH SAJWAN, E.M.)

Original Application No. 37 of 2015
(M.A. No. 291, 293 & 294 of 2015)
AND
Original Application No. 213 of 2014
(M.A. 755 of 2014 & M.A. No. 177 of 2015)

In the Matter of:

S.P. Muthuraman S/o. Ponnusamy, No. 204, Railway Feeder Road, Sankar Nagar Post-627357 Tirunelveli Distict. ... Applicant;

Versus

1. Union of India Rep. by the Secretary to Government, Ministry of Environment and Forests, Government of India, Paryavaran Bhavan, New Delhi-110003
2. The State of Tamil Nadu Rep. by the Secretary to Government, Ministry of Environment and Forests, Government of Tamil Nadu, Fort St. George, Chennai-600003 ... Respondents.

AND

In the Matter of:

Manoj Mishra Convener, Yamuna Jiye Abhiyaan, 178-F, Pocket-4, Mayur Vihar, Phase-I, Delhi-110091. ... Applicant;

Versus

Union of India Through the Secretary, Ministry of Environment, Forest & Climate Change, Indira Paryavaran Bhawan, Jor Bagh Road, New Delhi-110003. ... Respondent.

Original Application No. 37 of 2015, M.A. No. 291, 293 & 294 of 2015, Original Application No. 213 of 2014 and M.A. 755 of 2014 & M.A. No. 177 of 2015

Decided on July 7, 2015, [Hearing on: 29th April, 2015]

Original Application No. 37 of 2015

Counsel for Applicant:

Mr. T. Mohan and Mr. A. Yogeshwaran, Advocate.

Counsel for Respondents:

Mr. Vivek Chib, Mr. Asif Ahmed, Ms. Ruchira Goel, Mr. Kushal Gupta, Mr. Joby Varghese and Mr. Ankit Prakash, Advocates for Respondent No. 1

Mr. M. Yogesh Kanna and Ms. J. Janani, Advocates for Respondent No. 2.

Mr. Ashwani Kumar, Sr. Advocate, with M/s. R. Mohan and Mr. V. Balaji

Mr. K.S. Mahadevan and Mr. Krishna Kumar, Advocate

Mr. R. Chandrachud, Advocate

Mr. Ashwani Kumar, Sr. Advocate with M/s. R. Mohan Parasawarn,

Mr. Varun Sharma and Mr. Srikantha Sriniwas

Mr. Amit S. Chadha, Sr. Advocate, Mr. R. Chandrachud, Advocate

Mr. Shyamal Anand, Mr. R. Jawahar Lal and Mr. Sarvanna Kumar, Advocates for

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Respondent No. 3 & 5.

Original Application No. 213 of 2015

Counsel for Applicant:

Mr. Rahul Choudhary and Ms. Neha Kurian, Advocates.

Counsel for Respondents:

Mr. Vivek Chib, Mr. Asif Ahmed, Ms. Ruchira Goel, Mr. Kushal Gupta, Mr. Joby Varghese and Mr. Ankit Prakash, Advocates for Respondent No. 1

1. Whether the judgment is allowed to be published on the net?

2. Whether the judgment is allowed to be published in the NGT Reporter?

SWATANTER KUMAR, CHAIRPERSON:— By this common judgment, we shall dispose of the Original Applications No. 213 of 2014 and 135 of 2014 (upon transfer from SZ Bench, numbered as Original Application No. 37 of 2015) as well as Miscellaneous Applications No. 291, 293, 294 of 2015 in Original Application No. 37 of 2015, Miscellaneous Applications No. 755 of 2014 & M.A. No. 177 of 2015 in Original Applications No. 213 of 2014 and the claims of all the seven interveners/Respondents, as common question of law on somewhat similar facts arise for determination of the Tribunal in all these cases. We may briefly notice the facts of each Original Application giving rise to their filing.

2. In Original Application No. 213 of 2014, the Applicant claims that he is a former member of the Indian Forest Service and is the convener of the "*Yamuna Jiye Abhiyaan*". The Organization is working for promotion of nature conservation as a strategy for establishment of a peaceful world.

3. According to the Applicant, the State is under a constitutional duty in terms of Article 51A of the Constitution of India, to protect and improve the natural environment, including forests, lakes, rivers and wildlife. Respondent No. 1 has issued a Notification dated 14th September, 2006 titled the Environment Clearance Regulations of 2006 (for short 'Notification of 2006'), under the powers conferred upon it by sub-Section (1) and clause (v) of sub-Section (2) of Section 3 of the Environmental Protection Act, 1986 (for short 'Act of 1986'). As per the provisions of the Notification of 2006, the project or activities falling under Category 'A' of the Schedule require prior permission from the Central Government while project and activities falling under Category 'B' require prior permission from the State Environment Impact Assessment Authority (for short 'SEIAA'). These permissions are to be obtained before any construction work or preparation of the land by the project management except for securing the land is started on project or activity. Respondent No. 1 issued the Office Memorandum dated 16th November, 2010 for consideration of proposals involving violation of the Act of 1986 and the Notification of 2006. On 12th December, 2012, the Ministry of Environment, Forest and Climate Change (for short 'MoEF') issued another Office Memorandum, superseding the Office Memorandum of 16th November, 2010. In terms of this Office Memorandum, it was stated that as soon as any case of violation with respect to the Notification of 2006 is brought to the notice of the MoEF, it will proceed to verify the veracity of the complaint through the regional offices and upon such verification the explanation of Project Proponent will be asked for. If the Ministry is satisfied that it is a case of violation, then before proceeding any further, the authorities would require the Project Proponent to submit its environment related policy, plan of action and a written commitment to ensure that violation will not be repeated within 60 days in terms of the Office Memorandum dated 12th December, 2012 and would delist the project in the meanwhile. Other detailed consequences were also provided in the Office Memorandum dated 12th December, 2012. The Office Memorandum dated 12th December, 2012 was further amended by the Office Memorandum dated 27th June, 2013, which *inter alia*, also provided as under:

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"It is felt that in addition to these guidelines circulated vide aforesaid Office Memorandum dated 12.12.2012, in case of violation cases, the Project Proponent needs to be restrained, through appropriate directions under Section 5 of the Environment (Protection) Act, 1986 from carrying out any construction or operation activity without the required clearance or beyond the level/capacity stated in the existing clearance, as the case may be, till it procures the requisite EC/CRZ Clearance for the same."

4. According to the Applicant all the three Office Memoranda dated 16th November, 2010, 12th December, 2012 and 27th June, 2013 have been placed on record for the first time by the MoEF along with its reply filed in Appeal No. 98 of 2013. Thus, the Applicant has acquired the knowledge of these circulars only during the hearing of the said Appeal. The Applicant challenges the legality and correctness of these circulars on various grounds, including, that these Office Memoranda are contrary to and in contradiction with the provisions of the Notification of 2006; the Notification of 2006 having been issued under the provisions of Section 3 of Act of 1986, cannot be diluted, rendered ineffective or infructuous by issuance of these Office Memoranda. The Notification of 2006 requires that not only the new projects falling under category 'A' and 'B' listed in the Schedule to the Notification of 2006, but even the expansion and modernisation of such existing projects or activities would require prior Environmental Clearance from the competent authority. The Notification of 2006 further contemplates that prior Environmental Clearance would be necessary even when there is any change in the product mix in an existing manufacturing unit beyond the specified range. It is the case of the Applicant that Para 7 of the Notification of 2006 requires mandatory compliance to the process prescribed for grant of Environmental Clearance. There are four stages i.e. Screening, Scoping, Public Consultation and Appraisal prescribed under Para 7 of the Notification of 2006. This process has to be followed in terms of the Notification of 2006 before a prior Environmental Clearance can be granted to the listed projects. The Applicant alleges that impugned Office Memoranda provide for considering the project of any Applicant where construction has been done already and does not specify the compliance of these four stages prescribed under Para 7 of the Notification of 2006. Therefore, the very purpose of the provisions of Act of 1986 and the Notification of 2006 stands frustrated by these Office Memoranda. If the construction has already commenced and/or even completed, compliance to the provisions of these laws would be impossible. It is the case of the Applicant that the Notification of 2006 has been issued in furtherance to exercise of subordinate delegated legislation for satisfying and complying with the provisions of Section 3 of the Act of 1986 which mandates that 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. The law requires the Project Proponent to take prior Environmental Clearance while these Office Memoranda state exactly to the contrary, thus, encouraging people to flout the law in force on the one hand and cause environmental damage and degradation on the other.

5. In Original Application No. 37 of 2015 (Application 135 of 2014, SZ Bench), the Applicant has impugned the Office Memoranda dated 12th December, 2012 and 27th June, 2013. While raising the challenge on similar grounds as of the Applicant in Original Application No. 213 of 2014, he has further stated that the impugned Office Memoranda are against India's international obligation such as Stockholm Conference, 1972 and Rio De Janeiro Declaration 1992 and has also violated the mandate of Article 51 of the Constitution. It is submitted that environmental management or planning is the study of unintended consequences of a project. Its purpose is to identify, examine, assess and evaluate the likely and probable impacts of a proposed project on the environment and, thereby, to work out remedial action plans to minimize these

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adverse impacts on the environment. All this is required to be done at a stage before the commencement of the project. The law does not visualise such examination post-commencement and upon completion of the project, in relation to the covered projects and activities. According to the Applicant, the aim and purpose of Environmental Impact Assessment (for short 'EIA') is to inform the process of decision-making by identifying the potentially significant environmental effects and risks of development proposals and to promote sustainable development by ensuring that development proposals do not undermine critical resource and ecological functions or the well being, lifestyle and livelihood of the communities and people who depend on them. The importance of conducting an exhaustive EIA before any project is granted Environmental Clearance has been acknowledged internationally. The United Nations Environment Programme's (UNEP) Charter states that EIA should be ensured to minimize adverse effects on nature and nature assessments should be included in the fundamental elements of all planning and should be publicly disclosed and deliberated. The EIA Directive (85/337/EEC) of the European Union which is in force since 1985, requires a defined EIA to be implemented by member nations prior to official authorization for projects with potential significant environmental impacts. The very purpose of conducting an EIA before a project is granted clearance is to ensure that no development takes place without sufficient assessment of the risks and damages that would be caused to the environment due to the project's construction and development. The authorization should follow such study and imposition of conditions rather than the converse. The application for seeking Environmental Clearance has to be made in Form 1 or the Supplementary Form 1A, as the case may be. The requisites required under Form 1 have to be supplied prior to the date of commencement of the project except to the extent of arranging land. The State Level Expert Appraisal Committee (for short 'SEAC') has to assess the project as on that date and stage, then alone it has to recommend whether such project should or should not be granted such Environmental Clearance. According to the Applicant, the impugned Office Memoranda have stated that the projects which have attained substantial physical progress relating to the construction at the site shall be considered by the Expert Committee for the grant of prospective Environmental Clearance, though no Environmental Clearance was obtained prior to commencement of development, as mandated by law. Thus, the impugned Office Memoranda are contrary to law.

The impugned Office Memoranda in question provide that violations could come to the notice of the Ministry at various stages of processing of the proposals and provide for grant of Environmental Clearance even to those projects. Under these Office Memoranda, if a Project Proponent commits breach of the conditions or has already commenced or completed the construction without obtaining required Environmental Clearance for the project, then the concerned State Government is required to initiate credible action on these violations by invoking powers under Section 15 and 19 of the Act of 1986. This is an entirely unworkable system and is even contrary to the federal structure of the Constitution. If this approach and procedure is allowed to be followed then any builder/Project Proponent would complete his project causing irreversible damage to the environment and will then seek post-facto Environmental Clearance from the authorities making it a *fait accompli* situation. In that event, even the most illegal and irregular projects, which are completely violating the Environmental norms, may have to be legalised and legitimized, which would be contrary to law, would even defeat the potential penal consequences prescribed under the Act of 1986 and thus, would be unable to prevent damage to environment and ecology.

Both the Applicants have relied upon the judgment of the Supreme Court in the cases of *Lafarge Umiam Mining Pvt. Ltd.* v. *Union of India (UOI)*, (2011) 7 SCC 338 and *M.C. Mehta* v. *Union of India (UOI)*, (2004) 12 SCC 118, to contend that the

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circulars issued by the MoEF cannot nullify a statutory Notification. In the case of *M.C. Mehta* (supra), the MoEF had issued a circular dated 14th May, 2002, thereby providing an opportunity to people to seek clearance in relation to projects which were already operational but in violation of the Notification of 2006. The Supreme Court observed that it showed total non-sensitivity of the MoEF towards the principle of Sustainable Development and the object behind the issuance of the Notification of 2006. The Supreme Court in the case of *M.C. Mehta* v. *Union of India*, (1987) 4 SCC 463, held that life, public health and ecology have priority over unemployment and loss of revenue. Clearly, the grant of ex post facto Environmental Clearance has not met the approval of Supreme Court legally. According to the Applicants, the circulars are violative of the spirit behind Articles 48A and 51A(g) of the Constitution of India. Under Article 21 of the Constitution, right to a decent and clean environment is a Fundamental Right and thus, its protection by all, including the State, is a Constitutional obligation.

Before we revert to the case advanced on behalf of the respective Respondents, it is essential for us to notice that a number of applications were filed for impleadment by various Project Proponents who had taken advantage of these impugned Office Memoranda or were in the process of seeking advantage thereof. MA Nos. 232, 281, 282, 166, 97 and 110, all of 2015, were filed for impleadment by different builders. These applications came to be allowed vide order dated 12th February, 2015 and 1st April, 2015 respectively. Vide these orders, the following Respondents were directed to be impleaded as contesting Respondents:

Mr. Y. Pondurai (Respondent No. 3)

M/s Ruby Manoharan Property Developers Pvt. Ltd. (Respondent No. 4)

M/s Jones Foundations Pvt. Ltd. (Respondent No. 5)

M/s SSM Builders and Promoters (Respondent No. 6)

M/s SPR and RG Construction Pvt. Ltd. (Respondent No. 7)

M/s Dugar Housing Ltd. (Respondent No. 8)

6. M/s SAS Realtors Pvt. Ltd. has also filed an application M.A. No. 291 of 2015 for impleadment and directions. The said application was heard when the Original Applications were being heard on merits. The Applicant was permitted to address the Tribunal on the merit and otherwise of his impleadment application, as well as on the Original Applications. Since we had permitted the Applicant to participate in the proceeding and address argument, this application stood allowed and consequently, M.A. No. 291 of 2015 for impleadment of M/s SAS Realtors Pvt. Ltd. as Respondent No. 9 is also allowed.

7. MAs 293 and 294 of 2015 were filed by M/s Dugar Housing Ltd. and M/s SPR and RG Construction Ltd. respectively, for producing additional documents on record which were permitted and the documents are on the file of the Tribunal. Consequently, both these Applications No. 293 and 294 of 2015 stand allowed.

Still another set of application was filed, being M.A. No. 167, 168, 169 and 172 of 2015 by different builders for impleadment and directions. During the course of hearing, none appeared on their behalf to argue and pursue these applications and resultantly vide order dated 1st April, 2015, these applications were dismissed. However, the Applicants were granted liberty to raise their grievances before the Tribunal or if they had their independent cause of action, by taking recourse to independent remedy in accordance with law.

8. M.A. 755 of 2014 has been filed in Original Application No. 213 of 2014 praying for stay of operation of these Office Memoranda. Since we are dealing with the Original Applications finally by this Judgment, M.A. No. 755 of 2014 does not survive for consideration and is accordingly disposed of. M.A. 177 of 2015 had been filed on behalf of the MoEF for waiver of cost of Rs. 20,000 which was imposed vide order of

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the Registrar dated 16th February, 2015, for not filing a counter affidavit. Since the arguments have already been concluded and all parties have addressed their submissions, we do not consider it necessary to direct the payment of the cost imposed by the above order in the interest of justice. Resultantly, this application is allowed. The cost of Rs. 20,000 by order dated 16th February, 2015 is waived. The application is disposed of.

9. The Project Proponents upon their applications were directed to be impleaded as Respondents in the main application. The Applicants as well as these newly added Respondents submitted affidavits, documents and other details in regard to the projects in question. The Applicant in the main application in relation to M/s Y. Pondurai (Respondent No. 3), submitted that it is a construction project extending to 28,262.81 sq. mtrs. to which the planning permission was issued on 31st December, 2013. The construction was started even prior thereto on receipt of the recommendation from the Government. The application to SEIAA was filed on 21st February, 2014. On 28th February, 2014, SEIAA informed the Project Proponent that no activity should be carried on prior to grant of Environmental Clearance. SEIAA on 11th March, 2014 asked for photographs of the site to consider the application. On 21st March, 2014, the photographs of the project and an apology along with undertaking were submitted by the Project Proponent to the SEIAA. SEIAA on 1st April, 2014 wrote to Additional Secretary for initiation of prosecution against the said Respondent. The Applicant heavily relies upon this letter of 1st April, 2014 placed on record vide which, the Member Secretary of the SEIAA, Tamil Nadu had written to the Additional Chief Secretary to the Government, stating that there were repeated breaches on the part of the Project Proponent and that action needs to be taken. The relevant part of the said letter reads as under:

> "I inform that as per the EIA Notification 2006, all new projects or activities or expansion and modernization of those existing projects or activities listed in the schedule to the said Notification with capacity beyond the threshold limits prescribed there under, to obtain prior Environmental Clearance under the provision thereof.
>
> The Proponent vide letter dated 21.03.14 has forwarded the expressing regret over the commencing of construction without obtaining EC and also expressed assurance to not to repeat such violations in future. The Authority after careful consideration decided to address the Additional Chief Secretary, E&F Department, Government of Tamil Nadu to take action against the violation of EIA Notification, 2006 under provision of Environment (Protection) Act, 1986.
>
> In the light of the above and as per the clause 5(ii) of O.M. of MoEF, GOI, New Delhi dt: 12.12.2012 (copy is enclosed), it is requested to initiate action against Thiry Y. Pondurai, No. 129, Usman Road, T. Nagar, Chennai-600017., by invoking powers under Section 19 of the Environment (Protection) Act, 1986 for having started the construction work without obtaining requisite Prior Environmental Clearance. It is requested that the action taken in this regard may be informed to the Ministry of Environment & Forests, Government of India and to this office along with supporting documents to enable us to take further action in the matter."

10. On 22nd April, 2014, the Principal Secretary, FAC wrote to the Principal Secretary, SEIAA, bringing to his notice the Notification issued by the Ministry dated 28th February, 2014 which delegated powers vested under Section 5 of the Act of 1986, to all the State and Union Territory Environment Impact Assessment Authorities, under whose jurisdiction the project was located, to issue show cause notice for the violations committed. On 28th May, 2014, SEIAA wrote to the Principal Secretary that in case of violation of EIA Notification, 2006, prior to issuance of Environmental Clearance, a show cause notice should be issued and action has to be

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taken by the State Government. On 5th June, 2014, the Principal Secretary wrote to the Tamil Nadu Pollution Control Board (for short TNPCB') requesting them to take legal action in accordance with the Notification of 2006. This resulted in the issuance of show cause notice to Respondent No. 3 on 12th July, 2014 by the TNPCB, reply to which was submitted by the Project Proponent on 23rd July, 2014.

11. On 26th November, 2014, SEIAA informed the Project Proponent that there was substantial progress in the construction of its project which was noticed even during the scrutiny of the application of Respondent No. 3. An affidavit was filed before the Tribunal by the TNPCB in April, 2015 on the basis of inspection conducted by a team on 2nd April, 2015, stating that the civil construction work in all blocks had been completed, however, outer and interior works were being carried on. On 4th April, 2015, the Project Proponent responded to the TNPCB that the structural work was completed long back and the same was started as soon as the principal approval from the Government Housing and Urban Development Department and the planning permit from the Chennai Metropolitan Development Authority (for short 'CMDA') were obtained. According to the Applicant, while referring to the report submitted by SEIAA and other documents on record, it is clear that the total project cost is Rs. 148.25 Crores. It is a project for development of commercial complex consisting of Main Block — 2 basements + ground floor + 10; Service Block - basement + ground floor + 2 floors and MLCP Block - 2 basements + ground floor + 4 floors. According to SEIAA, construction work for the project was under progress at the time of submission of the apology letter and the undertaking. In inspection of 14th April, 2015, it was noticed that civil work of all the blocks were completed.

12. Vide letter dated 26th November, 2014, the Project Proponent had been informed not to carry on any construction activity. Photographs on record taken on 21st March, 2014 had shown digging or excavation of earth and some construction activity at that level. None of the blocks had been completed at that time. While the photographs taken on 14th April, 2015 show that some of the blocks have been completed and even finished internally and exteriorly. The Applicant has also pointed out that in the application for impleadment, it is averred by the Project Proponent that he had made application to SEIAA on 21st February, 2014 for Environmental Clearance, after obtaining planning permission. In the meeting dated 11th March, 2014, SEIAA had asked him to furnish additional documents to which he replied on 21st March, 2014, but in the meanwhile the Project Proponent had commenced construction activity investing huge sums of money. However, in his letter dated 4th April, 2015, a different stand was taken and it was stated that the project was completed long back and was carried out as soon as approval was granted by the Government and after granting of permission and the planning permit being issued by the CMDA. From this, it is clear that the Project Proponent had raised construction much prior to the submission of the application for the Environmental Clearance on 21st February, 2014. In the application, he falsely declared that he was planning to start the construction activity. He continued with the construction, even after filing the letter of apology and undertaking and despite show cause notice dated 12th July, 2014 continued it till 2nd April, 2015 when the premises were inspected by the SEIAA and TNPCB. In the submission of the Applicant, the entire project of Respondent No. 3 has therefore, been constructed illegally, in an unauthorized manner and by making misrepresentations to the concerned authorities.

Stand of Respondent No. 3 (Mr. Y. Pondurai):

13. The stand of this Respondent is that after obtaining the planning permission, it had applied to SEIAA on 21st February, 2014 seeking the Environmental Clearance for the Project. The Project Proponent was required to file additional documents which he had filed on 21st March, 2014. Construction had been started by the Project Proponent on receipt of the recommendation from the Government and after the Planning

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Permission had been issued. We may notice here that the Applicant however, submitted while referring to the letter of the Project Proponent dated 4th April, 2015 that even this submission of the Project Proponent is factually incorrect. In the said letter, it has been stated that the project work was structurally completed long back and the same was carried forward as soon as principal letter of approval from the Government, Housing and Urban Development Department was issued in the year 2013. The construction activity thus, had started even before filing the application before SEIAA for grant of Environmental Clearance.

According to the Project Proponent, the construction was carried out under a *bona fide* belief. The Project Proponent also claimed that it had obtained permission from the Airport Authority on 2nd November, 2012. The condition No. 2 of the letter dated 31st May, 2013 is relied by the Project Proponent to say that Environmental Clearance was to be furnished before issue of the Completion Certificate. Thus, there is no fault of the Project Proponent in raising the construction without Environmental Clearance. According to this Respondent, the main application is not maintainable either on law or on facts. Plea of limitation was also taken by this Respondent but without referring as to how the application is barred by time.

14. In relation to M/s SPR and RG Construction Pvt. Ltd. (Respondent No. 7), the Applicant has averred that planning permit from the CMDA was granted on 20th July, 2012 in which combined basement 1 & 2 + ground floor + 14 floors of block 1 to 9 residential building with 950 dwelling units was permitted. Permissions from various other authorities during the period from 25th February, 2011 to 28th April, 2011 have also been filed on record, but there is variance in the Survey Nos. given in Annexure R8 and R9 and R10, R11, R12, R13. The Project Proponent claims to have filed application to SEIAA on 28th January, 2011, which fact is not admitted by SEIAA. The Project Proponent then moved fresh application on 12th June, 2013 dated 10th June, 2013 to SEIAA for grant of Environmental Clearance. The Project Proponent had been seeking extra time from SEIAA and in regard to this, reference is made to the letters dated 20th February, 2013, 25th April, 2013 and 21st March, 2013 from SEIAA, reference of which have also been placed on record and it does not refer to the application of the Project Proponent dated 28th January, 2011. SEIAA on 12th June, 2013 acknowledged this application and passed an order that no activity should be undertaken unless Environmental Clearance was granted. On *1st* July, 2013, the Project Proponent submitted photographs with the letter of apology, pursuant to the Board meeting of Project Proponent held on 17th June, 2013, assuring non-repetition of violation. Photographs which have been placed on record show that the construction was at the very initial stages i.e. excavation work had been done and pillars were being raised. Further details were asked for by the SEIAA vide its letter dated 22nd August, 2013 clearly mentioning that if the additional particulars were not submitted by 10th September, 2013, the project would be closed without notice. The Project Proponent did not provide the requisite information within the stipulated time. On 13th September, 2013, the Project Proponent submitted some documents with the promise to provide rest of them at a subsequent date. The SEAC on 30th September, 2013 prescribed the TOR which was issued by SEIAA on 7th October, 2013. The TNPCB conducted an inspection on 10th December, 2013 and noticed that the construction activity was being carried on. Later, a compliance report of the TOR was submitted which mentions about the collection of primary data from August, 2013 to October, 2013 which is prior to even issuance of the data of the TOR. Thereafter, an EIA report was submitted on 28th April, 2014. On 22nd January, 2015, the Project Proponent wrote to the TNPCB, referring to the inspection and denying continuation of construction in violation of the undertaking provided, though a case being C.C. No. 56 of 2014 had been filed against this Respondent which was pending before the Judicial Magistrate, Ambattur. SEIAA on 19th May, 2014 wrote to the Project Proponent to furnish

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additional details. According to the Applicants, the construction was going on even at that stage. Thereafter, SEAC decided to recommend proposal to SEIAA to issue Environmental Clearance but only after obtaining and considering the information stated in the recommendations. It included even that the landscape area and green area was not to be less than 15 per cent of the total area. On 20th June, 2014, SEIAA asked for further documents from the Project Proponent. The Project Proponent had written a letter to SEIAA vide its letter dated 23rd July, 2014. This letter according to the Applicant is a departure from the CMDA's planning permit since the Project Proponent was sanctioned 9 blocks, while this letter talks of 10 blocks. SEIAA again on 10th November, 2014 required the Project Proponent not to carry out any construction of the project. The 26th November, 2014 letter of the CMDA refers to a new PPA made by the Project Proponent and states that the planning permission application would be returned in the absence of a revised plan incorporating EIA Clearance for the revised proposal. On 30th January, 2015, the Project Proponent resubmitted revised PPA without EIA and asked for further three weeks time to submit the latest developments for Clearance. The Project Proponent appointed new Consultant on 11th February, 2015 and vide its letter dated 19th February, 2015, CMDA asked for a structural stability certificate.

Pursuant to Tribunal's orders, an inspection was carried out by the Tamil Nadu Pollution Control Board on 2nd April, 2015, based on which an affidavit was filed before the Tribunal, stating that the construction is almost complete in all the blocks and that outer and inner works were going on and construction was going on even on 2nd April, 2015. On 4th April, 2015, the Project Proponent submitted a reply to the show cause notice served by District Environmental Engineer, Tamil Nadu Pollution Control Board, Ambattur, where it was stated that construction had been stopped. From the current photographs placed on record, it is clear that the construction work is at its completion stage in complete contrast to the photographs submitted at the time of the filing of the documents by the Project Proponent. Stop work notice was also issued by the Tamil Nadu Pollution Control Board on 2nd April, 2015 to which the Project Proponent responded on 3rd April, 2015 by stating that they have stopped the construction activity upon the receipt of the stop work notice. According to the Applicant, this Project Proponent had all through violated its letter of apology and undertaking given to SEIAA. It carried on construction illegally and in an unauthorized manner. It even revised its plan and raised further construction in relation to additional block for which there was no construction permission and other permissions from the authorities. Even till date, the Environmental Clearance has not been granted to this project and the project has caused serious and adverse environmental and ecological impacts.

Stand of Respondent No. 7 (M/s SPR and RG Construction Pvt. Ltd.)

15. Respondent No. 7, M/s SPR and RG Construction Pvt. Ltd. has taken a stand that they are engaged in construction of residential complexes. They intend to construct residential apartments at different Survey Nos. 137/1, 138/1, 148/5A and 148/7A Karambakkam Village, Ambattur Taluk, Thiruvallur District, TN, under the name and style of “Osian Chlorophyll”. This Respondent submitted its application to SEIAA on 28th January, 2011 for grant of Environmental Clearance for the project. This project was to have the construction of floors as already indicated with a total project area of 35786.05 sq meters with a built up area of 166479.79 sq meters at a total cost of project of Rs. 251.01 crores as proposed. SEIAA had asked for additional particulars and the Project Proponent was advised to give a presentation before the SEAC which was done by the Project Proponent on 30th September, 2013. The said Expert Appraisal Committee recommended the project for grant of Environmental Clearance subject to furnishing of certain details/approvals. The Respondent claims to have complied with those requirements. According to the Project Proponent, the term of the presiding officer of SEIAA had expired around 2nd March, 2011 and remained so till 4th March,

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2012 and no action was taken on the application submitted by the Project Proponent. While simultaneously pursuing the application with SEIAA, the Project Proponent also took NOCs from different authorities like Airport Authority of India, Chennai, Traffic Police, Chennai Water Supply and Sewage Board and planning permit from CMDA on 28th January, 2013. Because of the non-availability of the Members of SEIAA, the Project Proponents like other builders, started construction after seeking the planning permit. The planning permission was granted subject to the condition that the Project Proponents would obtain Environmental Clearance prior to seeking completion certificate for construction. The Applicant started construction under a *bona fide* belief. It is not disputed by this Respondent that the construction raised by it was objected to by the authorities, but taking into account the circumstances and in view of the circulars, Respondent continued with its construction. An undertaking cum apology was also furnished under the format given by the SEIAA on 26th September, 2013. Appraisal Committee on 17th June, 2014 recommended the project with some observation which the Project Proponents was willing to comply. The said Respondent upon enquiry and vide letter dated 10th November, 2014 came to know that since operation of the had been stayed by the National Green Tribunal, SEIAA had de-listed their application subject to the orders of the Tribunal.

16. It is the specific plea of the Respondent that he had applied for Environmental Clearance which had neither been accepted nor rejected within 45 days despite recommendation by the Expert Appraisal Committee, thus, there would be deemed sanction in favour of the Project Proponent under the Notification of 2006.

17. The authorities i.e. SEIAA, Tamil Nadu and Tamil Nadu Pollution Control Board have taken up the stand that the construction without prior Environmental Clearance was not permissible. The Tamil Nadu Pollution Control Board vide their letter dated 14th February, 2014 had informed the SEIAA that cases had been registered against violators i.e. Project Proponents. The inspection was conducted and stop work notice was issued on 2nd April, 2015 55 complaints have been filed against the violators including the Respondent - Project Proponents. However, in some cases, the proceedings have been stayed by the High Court of Madras. The unauthorized construction by the Project Proponent was brought to notice as back on 15th July, 2013 and despite orders, the construction was continued which was stopped only upon inspection as on 4th April, 2015. Even on 24th December, 2013, the Project Proponent was served with a notice that no construction should be carried out without grant of Environmental Clearance. The construction work in all the 10 blocks had been completed however some interior work was still to be carried out. The Board of Directors of the Project Proponent had furnished a resolution on 12th July, 2013 along with the letter of apology and assurance that no construction would be carried out. However, this was not adhered to. According to SEIAA, tenure of the State Level Environmental Assessment Authority was notified on 4th April, 2012 and after the completion of 3 years of tenure, the same has ended on 3rd April, 2015. Its reconstitution is awaited.

18. In relation to M/s Dugar Housing Ltd. (Respondent No. 8), according to the Applicant on 28th January, 2013, building permit for the construction of combined basement floor + combined stilt floor + first floor to third floor + two towers with fourth floor to 10th floor residential cum commercial building with 285 dwelling units, community hall, gymnasiums, swimming pool and office space at survey no. 779/2A, 2B, 2C, 2D, 2E & 2F of Korattur Village, Ambattur, Chennai was issued in favour of the said Respondent. This permission states that the Project Proponent had also furnished an undertaking to abide by the terms and conditions put by various authorities specified therein and the Project Proponent was to submit necessary applications to the authorities. However, in para 7, it has been stated specifically that this approval is not final and that the Project Proponent has to approach Commissioner of Corporation.

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Chennai for issuance of Building Permit under the Local Body Act. On 8th May, 2013, a building license from Corporation of Chennai was applied for and was granted on the same date. However, the averment of the Project Proponent that he had applied for building license on 28th January, 2013 is factually not correct. Thereafter, application for Environmental Clearance was moved to SEIAA for construction of 56,153.22 sq mtr in a total plot area of 11,789 sq mtrs. It is also pointed out by the Applicant that there is serious variance in the documents placed on record. In the letter dated 17th June, 2011 addressed by Fire and Rescue Services Department to the Project Proponent, it has been stated that plot area in the proposal is 12,006.92 sq mtr and the proposed built up area is 41,327.80 sq mtrs. Vide this letter, the Department had given 'No Objection' to accord planning permit to the proposal, but subject to the satisfaction of the conditions specified in the report. The compliance report was to be submitted before actual Occupancy Certificate is issued and the Department was to conduct re-inspection. In response to the letter and application for Environmental Clearance dated 4th June, 2013 by the Project Proponent, SEIAA had responded vide letter dated 7th June, 2013, acknowledging the receipt of the application and clearly informing the Project Proponent that as per the Notification of 2006 along with amendments therein notified by the MoEF, no activity should be taken in any part of India unless prior Environmental Clearance is granted in accordance with the objective of the National Environmental Policy. This letter specifically requires the Project Proponent not to commence any construction activity other than clearing the site, fencing the site and putting up the temporary structure for accommodation of labour etc. On 21st June, 2013, SEIAA asked the Project Proponent to furnish additional documents including approved building site plan, photographs of the building site and a commitment letter that no activity shall be carried out before obtaining the Environmental Clearance from the competent authority.

19. According to the Applicant, no additional documents or particulars were furnished by the Project Proponent till 20th July, 2013, the last date given by the SEIAA to close their application in event of default in furnishing documents or particulars, without further notice. However, some documents were submitted by the Project Proponent on 30th July, 2013. Various letters including letter dated 21st June, 2013, 8th August, 2013 and 10th September, 2013 were written by the SEIAA to Project Proponent seeking further information. Finally, vide its letter dated 24th September, 2013, SEIAA informed the Project Proponent that SEAC meeting would be held on 30th September, 2013. In the meeting held on that day, SEAC recommended the project for grant of Environmental Clearance, subject to conditions. According to the Applicant, the documents requisitioned were not placed before SEAC as the extract of minutes of meeting of SEAC makes no reference to construction in violation of Notification of 2006 and belies the submission of alleged letter dated 26th September, 2013, which claims to have enclosed Board resolution dated 12th August, 2013. The Tamil Nadu Pollution Control Board conducted inspection of the site on 20th May, 2014 and found that the ground level work had already started which resulted in issuance of a show cause notice dated 21st May, 2014. This inspection report contradicts the resolution dated 12th August, 2013 that has been placed by the Project Proponent on record and therefore, there were clear violations of the Notification of 2006. In the show cause notice, it had been specifically noticed that the construction of the work had been carried out without obtaining Environmental Clearance. The reply to this show cause notice was submitted by Project Proponent vide their letter dated 16th June, 2014, wherein it was nowhere denied that the construction work was carried on without obtaining Environmental Clearance; in fact, the stand taken was that other clearances except Environmental Clearance have been issued in favour of the Project Proponent. According to the Project Proponent, the project construction was started because there was huge investment involving client's money and the construction has

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to be taken up on time to deliver the property as committed or else it could lead to huge losses to the developer and unwarranted hassles to the end user. It was averred that after the inspection of the site, the work has been suspended.

20. Upon inspection by the Tamil Nadu Pollution Control Board, it was noticed that the unit had completed construction work of 5 blocks and interior work is under process. It is not clear that when permission was granted for building 2 blocks, how come 5 blocks were constructed. This inspection was conducted on 2nd April, 2015 and stop work notice was issued by the Board on the same day. An inspection had also been conducted on 14th April, 2015. The photographs submitted to SEIAA on 26th September, 2013 and the photographs taken on 14th April, 2015 clearly show that there are environmental violations by the Project Proponent. The entire construction has been raised without grant of Environmental Clearance and even without compliance with other laws, thus, at this stage affecting the environment and ecology of that area. Though, the Project Proponent never applied for the Environmental Clearance on the basis of the revised project but the Tamil Nadu Pollution Control Board during the course of inspection *inter alia* noticed the existence of revised plan of construction and the noncompliance to the conditions contained in the orders of various authorities.

21. In the latest affidavit of the Tamil Nadu Pollution Control Board that has been placed on record before the Tribunal on 8th April, 2015, it was observed that the unit has almost completed the civil construction work and despite issuance of show cause notice dated 21st May, 2014 and stop work notice issued by Tamil Nadu Pollution Control Board, the Project Proponent carried on with the construction work.

Stand of Respondent No. 8 (M/s Dugar Housing Ltd.)

22. The above factual position is hardly disputed by this Respondent. However, the stand taken by the Respondent is that there were vacancy in SEIAA from 2nd March, 2011 to 4th March, 2012 and therefore, they could not have sought Environmental Clearance. The construction was commenced with a view to avoid delay of the project. Though, there was objection from some of the authorities, the construction activity continued in the interest of the developer and the prospective purchasers. It is not disputed by this Project Proponent that resolution dated 12th August, 2013 was submitted to SEIAA. Finally this Respondent has raised the plea of deemed clearance. According to him, he had submitted an application for Environmental Clearance on 7th June, 2013 and it has not been given or denied till date, therefore, it would be deemed to have been granted to him as per Para 8 of Notification of 2006. Further, it is averred that in the meeting of the SEAC on 30th September, 2013, the project was not granted Environmental Clearance but recommended to SEIAA for grant of Environmental Clearance, therefore, the permission would be deemed to have been granted. It is also the plea of this Respondent that he had obtained No Objection Certificates from the Air Port Authority, Traffic Police, Fire and Rescue Services, Metro Water Supply and Sewerage Board during the year 2011–2012. He had also obtained planning permit from Chennai Metropolitan Development Authority dated 28th January, 2013 and building permission from Corporation of Chennai dated 28th January, 2013. Since the process was taking time, the construction had been started. The Project Proponent had also tendered apology to SEIAA in compliance of the letters dated 12th December, 2012 and 27th June, 2013.

In response to the above contentions raised by the Project Proponent and some of the official Respondents, it has been stated by the Applicant that the plea of vacancies in SEIAA is irrelevant as the application for Environmental Clearance was moved on 7th June, 2013 and thereafter, there was no vacancy in SEIAA, thus, no prejudice is caused to the Project Proponent on that count. The plea of *bona fide* taken by the Project Proponent is of no consequences because upon violation of the law, they

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cannot take up the plea of *bona fide*, as they intentionally carried on the construction despite objections from the authorities, show cause notice, stop work notice and even their own undertaking to the authorities not to raise any construction. Now the Project Proponent has completed the construction and therefore, the misrepresentations made by it to the authorities, including the variation in the plot and construction area, would vitiate the permissions that had been granted to the Project Proponent. Since the application for obtaining the Environmental Clearance is still pending for consideration of the authorities and the Project Proponent had been asked to submit documents, the Project Proponent cannot claim any benefit under the garb of 'deeming fiction'. This principle is not applicable to the case of Respondent No. 8 either on facts and/or on law. The meeting of SEIAA held on 30th September, 2013 had clearly noticed the unauthorized construction that they began in violation of the Notification of 2006 and resolution of the Project Proponent dated 12th August, 2013, which fact is undisputable. The plea of 'deeming fiction' and *bona fide* construction can therefore, hardly be taken by this Project Proponent. SEIAA had while requiring the Project Proponent to comply with the Notification of 2006, clearly mandated on 7th June, 2013 that no construction should be carried out. This has been violated by the Respondent No. 8 frequently. The different figures of plot size and construction area having been submitted by the said Respondent to various authorities, shows that he has not approached the authorities with clean hands and *bonafidely*.

23. According to the Applicant, this project of M/s Ruby Manoharan (Respondent No. 4) relates to the construction of basement floor + stilt pt + 1st to 15th Floor residential building with 206 Dus (ground floor pt & 1st Floor pt departmental store and 12th floor swimming pool) on Survey No. 64/2, Vengaivasal Village at Tamabaram, Velachery Main Road, Vengaivasal, Chennai. It was a project of total built up area of 22,130.944 sq meters on plot of 6,173.40 sq meters. The Project Proponent had moved an application to CMDA for his planning permit, in response to which the Authority on 24th July, 2012 wrote to the Project Proponent to pay development charges and submit other documents. The CMDA on 4th January, 2013 granted planning permit to the project. It needs to be noticed that in the letter dated 24th July, 2012, detailed conditions for compliance were stated which also included a condition that the Project Proponent was to furnish an undertaking that Environmental Clearance would be taken before the said authority could issue the planning permit. After submission of its plan, it appears that the Project Proponent started construction immediately after the issuance of the letter dated 24th July, 2012.

24. On 11th January, 2013, the Project Proponent submitted an application seeking Environmental Clearance. To this application, the authorities (Member Secretary, SEIAA) responded instantaneously and informed the Project Proponent about the necessity to comply with the requirements of the Notification of 2006 and directed the Project Proponent not to raise any construction without obtaining prior Environmental Clearance. The relevant extract of the letter written by SEIAA to the Project Proponent can be usefully reproduced here:

> "It shall be noticed that construction activity towards the project implementation without obtaining prior Environmental Clearance is a cognizable offence under Section 19 of Environment (Protection) Act, 1986 and is also liable to punishment for contravention of the provision of the said Act and the Rules or orders and directions, under Section 15, 16 or 17 of the said Act. In the above circumstances, it is hereby instructed that the Proponent shall not commence any activity, other than clearing the site, fencing the site and putting up temporary structure for accommodation of labour, along with basic facilities like toilets and water supply, made as a temporary arrangement."

25. On 15th May, 2013, SEIAA wrote to the Project Proponent requiring them to file additional documents and submit the requisite technical details for grant of

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Environmental Clearance. These details, required to be furnished by 3rd June, 2013, were not submitted, thereby resulting in issuance of reminder by SEIAA to Project Proponent on 8th July, 2013. This letter was responded to by the Project Proponent on 17th July, 2013, wherein they clearly stated that they shall initiate the activity on the site only after obtaining Environmental Clearance. In this letter, the built up area was stated to be 35,017 sq meters as against 22,139 sq. meters as stated in the letter of the Project Proponent itself dated 11th January, 2013.

26. The Project Proponent was again informed by SEIAA vide its letter on 22nd July, 2013 that he should not carry out any construction activity at the site other than clearing the site, fencing the site and raising temporary structure for accommodation of labour. On 27th August, 2013, the Project Proponent informed the SEIAA that they had submitted the documents and circulated the same to the members of SEAC. Conceptual Plan was submitted by the Project Proponent to SEIAA on 29th August, 2013, in which discrepancies were pointed out by the SEIAA and it asked the Project Proponent to provide reasons for change in the built up area vide its letter dated 4th September, 2013. It was also pointed out by SEIAA in this letter that the project is located at a distance of 50 mtrs. from Nanmangalam Reserve Forest and thus Project Proponent was asked to furnish No Objection Certificate (for short 'NOC') from the District Forest Officer (for short 'DFO'). The Project Proponent vide their letter dated 13th September, 2013 responded to the letter dated 4th September, 2013 furnishing the 'NOC from DFO while stating that this 'NOC from DFO was not necessary, it being a 'B' category project and in relation to the discrepancy in the built up area, it was stated that the difference in area is the consolidation of the Non-FSI and Free of FSI areas, which are otherwise not mentioned in CMDA approved plan. SEIAA again vide its letter dated 24th September, 2013, directed the Project Proponent to furnish the NOC from the DFO on account of the fact that the project was located at a distance of 50 meters from Nanmangalam Reserve Forest. In response, the Project Proponent vide its letter dated 25th September, 2013 stated that the development is categorised as General Building Construction Project and is not covered under the Notification of 2006.

27. The matter was placed in the 44th meeting of SEAC on 30th September, 2013 asking the Project Proponent to furnish additional documents including NOC from DFO and an undertaking as required and the above was communicated by the SEIAA to the Project Proponent vide its letter dated 7th October, 2013. The Project Proponent thereupon vide their letter dated 21st February, 2014 informed SEIAA that the required resolution from the Board of Directors has been passed during the meeting held on 24th January, 2014 that they would not commit violation of the Notification of 2006 and also that such violations shall not be repeated. Having noticed various violations and non-compliance by the Project Proponent, SEIAA vide its letter dated 11th March, 2014 wrote to the Additional Chief Secretary to the Government that action should be taken against this Respondent in terms of Section 19 of the Act of 1986. This letter was responded to by the Government on 22nd April, 2014, asking SEIAA to take necessary steps. The Tamil Nadu Pollution Control Board filed a complaint against this Respondent before the Court of Judicial Magistrate, Court II, Chengalpattu on 17th July, 2014. The Project Proponent filed an affidavit on 22nd July, 2014 stating that they have stopped the construction activity at site as per commitment in the Board Resolution dated 24th January, 2014 and shall carry on construction only upon securing the Environmental Clearance. On 3rd September, 2014, the Project Proponent requested SEIAA to dispose of its application notwithstanding the order passed by this Tribunal dated 21st May, 2014.

In the meanwhile, Tamil Nadu Pollution Control Board issued a show cause notice to the Project Proponent. The premises were also inspected on 2nd April, 2015 and it was noticed that the construction had been carried on in the past but was found to be

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stopped at the time of inspection. From the photographs on record which were filed by the Project Proponent before SEIAA on 6th March, 2014 and the photographs taken during the course of inspection on 15th April, 2015, it is clear that the Project Proponent has violated its own undertaking, orders and directions of SEIAA, as well as other laws in force. Therefore, the Applicant has submitted that the project of Respondent No. 4 has seriously affected the environment and ecology of area and the entire construction is unauthorised and illegal.

Stand of the Respondent (M/s Ruby Manoharan)

28. The stand of the Respondent Project Proponent is that he had obtained the Planning Permit on 4th January, 2013. The Project Proponent had also obtained Airport Authority clearance with regard to height of the building from Director General of Civil Aviation on 17th October, 2011. He also claims to have obtained clearance from the Fire Department. Before the issuance of planning permit by the CMDA, the proposal was approved by the Government Housing and Urban Development Department of the State of Tamil Nadu vide their letter dated 19th June, 2012. Vide their letter dated 24th July, 2012, the CMDA asked the Project Proponent to pay the development charges for land and building, security deposits as well as infrastructure and amenity charges. As per the terms and conditions of this letter, the Project Proponent was called upon to comply with various directions and it was stated that if the directions were not complied with, the sanction was required to be revoked. Even according to the Project Proponent in an affidavit, it has been admitted that they were required to furnish an undertaking to produce 'NOC for EIA Clearance before obtaining the completion certificate. The Project Proponent started the construction after receipt of the Planning Permit which was valid till 3rd January, 2016. After obtaining the Planning Permit, it applied for grant of Environmental Clearance to SEIAA on 11th January, 2013. After submission of the said application, the Project Proponent was called upon to submit certain documents and provide more particulars. The application of the Project Proponent was pending when interim order was passed by the Tribunal staying the operation of the impugned. Before the SEIAA, the Project Proponent had filed an apology letter on 21st February, 2014. The Project Proponent filed an application before the Southern Bench of National Green Tribunal seeking for direction to SEIAA for considering its application and disposing it expeditiously. Keeping in view the fact that the interim orders of stay have been passed by the Principal Bench at New Delhi, the Project Proponent also filed an application for impleadment, praying that the interim orders passed by the Tribunal on 15th December, 2014 in M.A. 809 of 2014 in Original Application No. 135 of 2014 be vacated.

29. SEIAA and Tamil Nadu Pollution Control Board have taken clear stand that the Project Proponent had carried the construction activity without obtaining Environmental Clearance. The apology filed by the Project Proponent had clearly stated that he will not carry out any construction without obtaining Environmental Clearance and such violation will not be repeated. SEIAA had requested the Government of Tamil Nadu to take action under Section 15 and 19 of the Act of 1986 as per the guidelines of the MoEF against the Project Proponent. According to SEIAA, in view of the interim order passed by the National Green Tribunal, the application for grant of Environmental Clearance was not processed. According to SEIAA, it had acted in furtherance to the issued by MoEF dated 12th December, 2012 and 27th June, 2013 to consider the application submitted by the Project Proponent. But this application has been de-listed from the pending list of projects, as they are awaiting orders of the National Green Tribunal. The Project Proponent had been informed by various letters including that of 19th November, 2014, not to proceed with the project construction. The site was inspected on 15th April, 2014 and it was noticed that the civil structural work for all the blocks were completed. In reliance thereto, SEIAA has submitted

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certain photographs.

30. According to the Tami Nadu Pollution Control Board, they had conducted the inspection on 2nd April, 2015 and they noticed that no construction work was going on at the time of inspection. They have also taken photographs in reliance thereto. They were also informed by the Project Proponent on 2nd April, 2015 that all the construction work had been stopped w.e.f 4th April, 2014.

31. According to the Applicant, the project of M/s Jones Foundation (P) Ltd (Respondent No. 5) was for construction of Group Development residential project constituting six blocks, stilt + 7 floors out of which 329 are dwelling units, a clubhouse and a ground floor plus one residential building in S. Nos. 170/1A1F2, 1B, 2B, 1C1, 1C2, 2C1, 2C2, 172, 173/1A1, 1A2, 1B1, 1B2, 1C, 1D, 1E&2; at Pallikaranai Village, Tambaram Taluk, Kancheepuram District, Tamil Nadu. The total project area is 20,895.02 sq meters with built up area of 35,848.88 sq meters with a project cost of Rs. 140 crores. The Project Proponent filed an application seeking planning permission from the CMDA on 19th May, 2010. This remained pending and various correspondences were exchanged between the parties. The planning permission according to the Project Proponent was issued on 3rd August, 2012. In terms of this letter of the CMDA, Project Proponent was required to deposit various charges like development and plot regularisation etc. The Project Proponent was to construct strictly in accordance with the sanctioned plan and no deviation was to be made. Further, it was stipulated that even the building would not be occupied without issuance of the completion certificate by the said authority. Rain water conservation measures as notified by the CMDA were expected to be adhered to strictly. Undertaking was required to be furnished for NOC from the IAF and EIA clearance before the issue of the Completion Certificate. In the event of non-compliance of the conditions, the sanction was liable to be revoked. The Project Proponent started the construction immediately thereafter and carried on with the same. The application for grant of Environmental Clearance was submitted on 3rd February, 2014 which was responded to by SEIAA vide its letter dated 5th February, 2014, directing the Project Proponent not to raise any construction, other than cleaning the site, fencing the site and putting up temporary structure for accommodation of labour. It will be useful to refer to the relevant part of the said letter:

> "Your attention is drawn to the EIA Notification dated 14th September, 2006 along with amendments thereon, notified by the Ministry of Environment and Forests, Government of India, wherein it has Imposed certain restrictions and prohibitions on new projects or activities, or on the expansion or modernization of existing projects or activities based on their potential environmental impacts as indicated in the Schedule to the notification, being undertaken in any part of India, unless prior environmental clearance has been accorded in accordance with the objectives of National Environment Policy.
>
> The Government of India, Ministry of Environment and Forests in various circulars have repeatedly emphasized that any activity started or being executed before obtaining an Environmental Clearance from the Competent Regulatory Authority i.e. State Level Environment Impact Assessment Authority shall be construed as a violation, as per the provision of the Environment (Protection) Act, 1986. The Ministry has also delegated required powers and instructed the concerned State Government to take legal action against such proponent who has started project activity without a prior Environmental Clearance for violation, by invoking powers under Section 19 of Environment (Protection) Act, 1986.
>
> It shall be noticed that activity towards the project implementation without obtaining prior Environmental Clearance is a cognizable offence under section 19 of Environment (Protection) Act, 1986 and is also liable to punishment for

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contravention of the provision of the said Act and the Rules or Orders and directions, under section 15, 16 or 17 of the said Act. In the above circumstances, it is hereby instructed that the Proponent shall not commence any activity, other than cleaning the site, fencing the site and putting up temporary structure for accommodation of labour, along with basic facilities like toilets and water supply, made as a temporary arrangement.

The receipt of this communication should be acknowledged immediately."

32. Vide their letter dated 10th February, 2014, the SEIAA asked the Project Proponent to submit additional documents as well as the photographs of the construction and a resolution/undertaking of the Project Proponent. In compliance to these directions, on 27th February, 2014, the Project Proponent submitted an affidavit along with photographs showing status of the site and also other documents. SEIAA vide their letter dated 4th March, 2014, informed the Project Proponent that construction had commenced and this was in clear breach of the Notification of 2006 and they were asked to furnish a letter of commitment and expression of apology for the same and then alone the proposal would be considered any further. On 10th March, 2014, the Project Proponent submitted an apology and requested that issuance of Environmental Clearance may be considered. The letter of commitment and expression tendered by the Project Proponent read as under:

"LETTER OF COMMITMENT AND EXPRESSION OF APOLOGY

We understand the violations on the part of making substantial construction in our project at Survey No. s-170/1C2, 170/1A1F2, 170/2C2, 170/2B, 172, 170/1B, 170/2C2, 170/1C1, 173/1D, 173/1A1, 1A2, 173/1B1, 1B2, 173/1E, 2, 173/1C of Pallikarnai Village, Tambaram Taluk, Kanchipuram District, Tamil Nadu in West Anna Nagar, (Near Chettinadu Enclave), Door No: 190 Zone-14 Corporation of Chennai, which is a Multi-storeyed Residential Apartment, with (6-Blovcks-Stilt + 7 Floors and a Club House) for residential purpose with 329 dwelling units by M/s Jones Foundations Private Limited without obtaining prior Environmental Clearance under EIA notification

The subject was taken up in a meeting held by the Board of Directors of M/s. Jones Foundations Private Limited on 24/02/2014 for consideration of the environment related policy/of action and resolved to ensure that such violations will not be repeated in future.

We here by express our apology for the violations carried out by construction of the project without obtaining prior Environmental Clearance under EIA Notification 2006 and request SEIAA, Tamil Nadu to consider the issuance of the Environmental Clearance for the said project."

33. The Tamil Nadu Pollution Control Board conducted an inspection and issued a show cause notice on 16th July, 2014, clearly evidencing that the construction work was continuing even as on 15th July, 2014. In the show cause notice, the Project Proponent was required to answer as to why the prosecution should not be initiated against him by filing a complaint as per the powers conferred under Section 19(a) of the Act of 1986 and as to why recommendation should not be made to the MoEF, Government of India/Government of Tamil Nadu, for the issuance of directions under Section 5 of the Act of 1986 to suspend the construction activity till such time Environmental Clearance is obtained. Reply to this show cause notice was submitted by the Project Proponent on 26th July, 2014, in which it was said that they have already submitted the application in Form I and IA along with a conceptual plan to SEIAA, Tamil Nadu and that they were waiting for grant of Environmental Clearance to the Project. In this letter, it was stated that they have stopped all construction activities pertaining to the project after the show cause notice and that construction would be started only after grant of Environmental Clearance. The Tamil Nadu Pollution

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Control Board during inspection noticed that the main civil construction work for the residential complex was almost completed and found works such as interior finishing and site cleaning work were going on. The inspection report submitted on 2nd April, 2015 resulted in a stop work notice being issued to the Project Proponent by the Tamil Nadu Pollution Control Board. The photographs submitted by the Project Proponent to SEIAA on 5th January, 2014 and the photographs taken by SEIAA on 15th April, 2015 along with the report of SEIAA, clearly show that the construction work is in violation of the law and is continued illegally during all this time and this has caused irreparable loss and damage to environment and ecology. The SEIAA vide its letter dated 18th November, 2014 had informed the Project Proponent that his project stands de-listed for grant of Environmental Clearance and would be considered only after further orders of the Tribunal.

The Project Proponent had relied upon the office order dated 21st January, 2010 issued by the Member Secretary, Chennai Metropolitan Development Authority approving the norms and procedures evolved in terms of the guidance of the Monitoring Committee to contend that they had taken permissions from the concerned authorities to raise constructions with reference to this office order dated 21st January, 2010. The office order related to issuance of completion certificate on the basis of these revised guidelines. The office order provided that the insistence for compliance report from other agencies, including CMDA, Tamil Nadu Pollution Control Board, Revenue Department and ELCOT was proposed to be dispensed with. The Project Proponent also claimed that he had obtained other statutory clearances for the purposes of construction and construction had been carried out on the basis of the approved drawings. The Project Proponent conceded in his Application M.A. No. 110 of 2015 that he had commenced and had almost completed the construction activity by investing huge sums of money and has employed large number of labourers as on 3rd February, 2014 when he applied for obtaining the Environmental Clearance. The Project Proponent submits that he was under *bona fide* impression that Environmental Clearance would be given since all particulars have been complied with. Rest of the facts afore-referred are not disputed. The Respondent stated that the main application of the Applicant was not maintainable and the same should be dismissed.

34. According to the Applicant, M/s SSM Builders and Promoters (Respondent No. 6) is a registered partnership firm engaged in the business as civil engineering contractors, lay out promoters, flat promoters, real-estate and housing/commercial project developers. In November, 2012, the Project Proponent submitted a plan for approval to the CMDA for the project 'SSM Housing Complex at Perungalthur, Chennai'. The project was envisaged in an area of 49.28 acres. The proposed housing complex contemplated 59 blocks, out of which 6 blocks were for LIG housing with GF + 3 floors and balance 53 blocks with stilt plus 4 floors comprising of a total 2952 flats. There are six commercial blocks and one club house. The total built up area of the project comes to 37.84 lakhs sq ft. The estimated project cost involved was Rs. 792.56 crores. The application for planning permission was filed with the CMDA on 2nd November, 2012 and revision of this application was sought on 11th December, 2012, 27th December, 2012 and 7th February, 2013. On 11th March, 2013, necessary fee for process was demanded by CMDA from the Project Proponent. On 5th August, 2013, the Planning Permission was granted to the Project Proponent in relation to the project in question. Project Proponent had submitted the application for grant of Environmental Clearance on 24th July, 2013. According to the Applicant, the Project Proponent claims that he had collected samples for making available for baseline data from July to September, 2013 and that it had commenced construction by 13th August, 2013. However, the Applicant has submitted that the Project Proponent had erroneously classified the project as a category 'B2' project under clause 8(b) of the Schedule to the Notification of 2006, while in Column (2) of Form 1, the Project was categorised as

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8(a) under the Schedule of Notification of 2006. It is also averred by the Applicant that the samples have been collected much subsequent to the application for grant of Environmental Clearance and are even pre-dated to the TOR. Furthermore, as they were not collected by an accredited consultant they cannot be used for EIA report. On 1st August, 2013, SEIAA asked for additional documents and particulars so as to proceed with the case. These documents are stated to have been submitted on 20th August, 2013. SEIAA vide its letter dated 19th September, 2013 stated that the ToRs as well as the clarifications should also be furnished in the EIA report. On the basis of the said EIA Report, the Project Proponent was required to take further necessary actions for obtaining Environmental Clearance. The Project Proponent on 14th February, 2014 submitted a Rapid EIA report. On 24th February, 2014, the partners of the Project Proponent passed a Board Resolution expressly apologizing for violations of the Notification of 2006 by commencing construction work without grant of Environmental Clearance and undertook not to commit further violation. In fact, on 19th March, 2014, letter of commitment and expression of apology' was submitted to SEIAA. The Tamil Nadu Pollution Control Board on 11th July, 2014 conducted an inspection of the project. On the basis of this inspection, the Tamil Nadu Pollution Control Board issued a notice dated 15th July, 2014 referring to the whole background, the breaches and violation committed by this Project Proponent and the fact that during inspection on 11th July, 2014, it was found that the residential complex project was under progress without obtaining Environmental Clearance which was violative of Notification of 2006 and documents submitted by the Project Proponent. The Project Proponent thus, was required to show cause within 15 days as to why prosecution should not be launched by filing a complaint as contemplated under Section 19 of the Act of 1986 and also why recommendation should not be made to the MoEF for issuance of direction under section 5 of Act of 1986 stopping operation of the project till such Environmental Clearance is obtained. Reply to this show cause notice was submitted by Project Proponent on 22nd July, 2014. It was stated therein that in response to the issuance of the TOR, the Project Proponent had submitted rapid Environmental Impact Assessment report on 14th February, 2014 and were awaiting Environmental Clearance. It was further stated that they have stopped all construction activity pertaining to the said project and no construction would be carried out without obtaining the Environmental Clearance. On 25th November, 2014, SEIAA issued a letter to the Project Proponent stating that their application stands de-listed and would be processed only after further orders of the National Green Tribunal.

35. Under the orders of the Tribunal, the Tamil Nadu Pollution Control Board had also conducted an inspection of the premises of Respondent No. 6 on 2nd April, 2015. Photographs were also taken by SEIAA on 14th April, 2015. Photographs submitted by the Project Proponent on 26th March, 2014 and the photographs taken on 14th April, 2015 by SEIAA clearly show that there has been frequent violation of the laws in force, Notification of 2006 and even the undertaking of apology given by the Project Proponent itself.

36. On 2nd April, 2015, the inspecting team of Tamil Nadu Pollution Control Board found that the work had been stopped and the photographs taken had supported such observations made by the inspecting team.

Stand of M/s SSM Builders and Promoters (Respondent No. 6)

37. The Project Proponent has taken a stand that it was under a *bona fide* impression that he could commence construction on making an application for Environmental Clearance to SEIAA and once the Planning Permit had been granted by the CMDA. According to Respondent No. 6, he had paid the processing fee of Rs. 5 Lakhs on 27th July, 2013 and after receiving the letter from the CMDA on 5th August, 2013, it had started construction. Submission of documents including rapid Environmental Impact Assessment and issuance of TOR was a genuine basis for the

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Project Proponent to start construction. Relying upon the dated 12th December, 2012, it is stated that the letter of commitment and expression of apology' was submitted on 19th March, 2014. According to the Project Proponent, green space had been left between the buildings so that there is reduced heat gain. The buildings are designed to maximize the use of solar power, rain water harvesting system have been made and STP's installed to recycle water. According to the Project Proponent, out of 2952 flats and 135 shops, 1566 flats and 82 shops have already been sold and undivided share in the land has been conveyed to the buyers. Thus, third party interests have been created. According to the Project Proponent he would be gravely prejudiced by non-processing of the Environmental Clearance application and has submitted that dated 12th December, 2012 as amended on 27th June, 2013, is in consonance with the Notification of 2006 and the Project Proponent is entitled to the benefit of the process as envisaged under the impugned Office Memoranda. According to the Project Proponent, the main application should thus be dismissed.

38. S.A.S. Pvt. Ltd. (Respondent No. 9) had filed its application through its authorised signatory which was allowed. The application for intervention/impleadment was filed in furtherance of the interim order dated 21st May, 2014 passed by the Southern Zone Bench at Chennai. Thereafter, vide order dated 15th December, 2014, the operation of the impugned is dated 12th December, 2012 and 27th June, 2013 was stayed by the Principal Bench.

39. According to the Applicant, the project of this Respondent at Village Saligramam, Chennai was for development of residential complex consisting of construction of 2 block with combined lower and upper basements and Block 1 - ground plus 17 floors, block 2 - basement plus ground floor plus 2 floors - Service, Gym and swimming Pool providing 166 residential units. The total project area is 6,985 sq meters with built up area of the project is 28,330.95 sq meters. The estimated cost of the project was 90 crores. According to the Applicant, the planning permission from the CMDA was obtained by the Project Proponent on 30th March, 2012, in furtherance to which building license was obtained by the Project Proponent from Corporation of Chennai on 23rd May, 2012. Thereafter, the Project Proponent commenced the construction without even applying for Environmental Clearance. The Project Proponent applied to SEIAA for obtaining Environmental Clearance on 4th July, 2012. No acknowledgement thereof had been placed on record by the Project Proponent. From the letter of the SEIAA dated 13th March, 2013, it is clear that the application with documents was of 13th March, 2013 itself. In terms of this letter, a bank draft towards the processing fee that was given by the Project Proponent itself, was dated 13th February, 2013. In this very letter, SEIAA had informed the Project Proponent that it shall not commence any construction other than cleaning the site or fencing the site. It was specifically re-emphasized that any construction activity started or being executed before obtaining Environmental Clearance from the competent authority would be in violation of the Act and the Notification. Vide letter dated 19th March, 2013, the Project Proponent was asked to furnish additional documents and additional fee on or before 15th April, 2013 failing which the application would be recorded as closed. The Applicant has stated that till that date, no clarifications were filed nor the fee submitted. On 25th June, 2013, the Project Proponent passed a Board Resolution expressing apology and submitting an undertaking not to repeat any violation and not to raise any constructions. In this letter of commitment and expression of apology, the Project Proponent prayed for consideration of the issue relating to Environmental Clearance. However, on 18th November, 2014, SEIAA informed the Project Proponent that the project had been de-listed. During the inspection on 14th April, 2015, photographs had been taken which if compared with the photographs submitted by the Project Proponent on 6th May, 2013 reveal that there was clear violation of the law, Notification of 2006 as well as the

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undertaking given by the Project Proponent.

40. According to the authorities including Tamil Nadu Pollution Control Board and the SEIAA, they came to know of unauthorized construction by the Project Proponent on 13th May, 2013. On 21st May, 2013, Project Proponent had submitted certain photographs taken at the project site. SEIAA while following the guidelines issued by the MoEF had asked the Project Proponent to furnish certain documents. The Project Proponent submitted their Board Resolution dated 25th June, 2013 which was received by the SEIAA on 2nd August, 2013. Thereafter, Member Secretary, SEIAA vide letter dated 8th August, 2013 requested the State Government to take action for violation of the Notification of 2006. Vide letter dated 10th September, 2013, the State Government requested the Tamil Nadu Pollution Control Board to take legal action against the Project Proponent in terms of Section 19 of the Act of 1986 for having commenced the construction without obtaining prior Environmental Clearance. Thereafter, the Tamil Nadu Pollution Control Board vide its letter dated 3rd June, 2014 informed the Member Secretary, SEIAA, Tamil Nadu that District Environmental Engineer, Chennai has filed a Criminal Complaint in the Judicial Magistrate Court at Saidapet against Respondent No. 9 on 26th May, 2014. It is averred by the authorities that upon compliance with the requirements pointed out by the authorities, the application for Environmental Clearance of the Project Proponent was placed before SEIAA in its 45th Meeting held on 29th - 30th October, 2013. According to SEIAA, the project site was inspected on 14th April, 2015 in the presence of Project Proponent's representative (Site Engineer). It was noticed that civil structural works (core and shell) of all 2 blocks were completed, though at the time of inspection, no work had been carried on. Photographs were taken during the inspection and have been submitted before the Tribunal. The Project Proponent was informed vide letter dated 18th November, 2014 not to proceed with the project construction work, which had not been adhered to. The photographs furnished by the Project Proponent at time of submission of the expression of apology on 6th May, 2013, show that the construction work was structurally in progress but without any walls or without even completion of pillars of any floor. However, photographs taken on 14th April, 2015 show that the building was majorly finished from outside and inside, which was clearly in violation of the law and the undertaking furnished by the Project Proponent.

Stand of Respondent No. 9 (SAS Realtors Pvt. Ltd.)

41. The stand of the Project Proponent is that he had obtained various approvals from the local authorities since 2011 along with Planning Permission from the CMDA on 30th March, 2012 and Planning Permit from the Chennai Corporation on 23rd May, 2012. The Project Proponent commenced construction activity in compliance with these approvals to meet the timelines promised to its clients for timely delivery of the residential apartments. The authorities thereafter informed the Project Proponent that he is required to obtain Environmental Clearance. The Project Proponent had submitted the application for Environmental Clearance to the SEIAA on 4th July, 2012 but because of the change in the fees payable, the Project Proponent filed a fresh application on 18th February, 2013. In compliance to the Office Memorandum dated 12th December, 2012, it submitted a letter of commitment and an expression of apology' on 25th June, 2013, for having commenced construction activity before the receipt of the Environmental Clearance. Thereafter, it was informed to the Project Proponent by the authorities that its application was not processed in view of the stay orders of the Tribunal and that further action would be taken in accordance with further orders of the Tribunal.

42. Further, according to the Project Proponent, action of SEIAA in refusing the grant of Environmental Clearance is violative of legitimate expectation of the Project Proponent, after they have complied with all the requirements of the dated 12th

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December, 2012. Since SEIAA failed to comply with the timeline of maximum 105 days provided under Para 8 of the Notification of 2006, the deemed approval would operate in favour of the Project Proponent when there is no rejection of the application from the authorities. According to the Project Proponent the action of SEIAA in delisting its project is violative of Article 14 of the Constitution of India. It is also the submission of the Project Proponent that they have taken all steps in furtherance to dated 12th December, 2012 and therefore, they are entitled to grant of Environmental Clearance and SEIAA has erroneously linked it to the orders of stay passed by the Tribunal. A feeble attempt has been made on behalf of this Respondent to point out that the Notification of 2006 does not apply to residential building projects and it extends only to location of 'industries' or on carrying on of processes and operations. Furthermore, that the Notification of 2006 goes beyond the purview of Rule 5(3) of the Environment (Protection) Rules, 1986 and hence it is *ultra vires*. According to the Project Proponent their application for EC was considered by the SEIAA in its 45th meeting held on 29th - 30th October, 2013 and whatever requirements were to be complied with by the Project Proponent had been complied with. The interim orders of stay on the impugned Office Memoranda by the Tribunal were only in relation to category 'A' projects which require Environmental Impact Assessment, public consultations and Consent to Establish. The project in question is not covered under this category and therefore, the view taken by the Official Respondents was not correct. The Project Proponent had so claimed even before the authorities.

43. The Project Proponent in its application had submitted that they would challenge the validity and correctness of the Notification of 2006 but no such steps were taken by the Applicant till the conclusion of the arguments.

44. Upon analysis of the case advanced on behalf of the respective parties and as is evident from the pleadings and records before us, we may concisely note the arguments advanced. It is contended on behalf of the Applicant that the Office Memorandum dated 12th December, 2012 and as amended by Office Memorandum dated 27th June, 2013 which provides grant of ex-post facto Environmental Clearance in terms of the Notification of 2006 and the CRZ Notification of 2011 are contrary to these Notifications, themselves. These Office Memoranda at best are administrative orders and therefore, cannot amend or modify the Notifications. It is further the contention of the Applicant that these Office Memoranda are in derogation not only to the Notification of 2006 and the CRZ Notification of 2011 but even of India's International obligations. The Office Memoranda are neither problem solving nor are they compliant with law. These Office Memoranda are not executive orders issued under the authority of Article 73 of the Constitution of India, as these Orders have neither been authenticated by the required authority nor have they complied with the procedure for exercise of executive power under that Article. In fact, they amend the statutory Notification of 2006. The Office Memoranda, in fact, destroy the very object of the Act of 1986, Notification of 2006 and they have the effect of not only going beyond scope of the Notification of 2006 but even are clearly in derogation to the procedure prescribed under it. The language of the impugned Office Memoranda suggests that they have not been issued in exercise of the powers vested in the Ministry under Section 5 of the Act of 1986 and they are not issued as per the prescribed procedure. They also do not supply the gaps, if any, in the Notification of 2006.

45. According to the Applicants, impugned Office Memoranda are arbitrary and they do not provide for any guidelines. They have an inbuilt element of discrimination and they vest unguided and unfettered discretion with the concerned authority.

Contra to these contentions, the submission on behalf of the Respondents (private Respondents) is that the Office Memoranda have been issued by the MoEF in exercise of its executive powers under Article 73 of the Constitution of India. The source of

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power of the Union of India to issue such Memorandum is relatively under Article 73 of the Constitution of India, as the executive power of the Union extends to matters on which Parliament is competent to legislate under Article 246 of the Constitution. Furthermore, the impugned Office Memoranda do not have the effect of supplanting or even diluting the mandate of the Notification of 2006. On the contrary, they are in consonance with and in furtherance of the Notification of 2006 and supplement it. The requirement of prior Environmental Clearance is not diluted by these Office Memoranda since they do not permit commencement of project prior to grant of Environmental Clearance. It is further the contention of the Project Proponents that the situations which are not specifically contemplated under the Notification of 2006 are dealt with by the Office Memoranda. In other words, the Office Memoranda supply the gaps in the Notification of 2006 and further the cause of the Notification. The Office Memoranda do not pose any fetters on the powers conferred on the State or Central Government under the Act of 1986 or the Notification of 2006. They, in fact, direct enforcement of Section 15 and 19 of the Act of 1986 to prosecute the violators.

46. The Project Proponents - Respondents have also contended that they have acted in furtherance to the Office Memoranda, followed the requisite procedure and have invested huge amounts and as such the Tribunal should permit the grant of Environmental Clearance to these projects and dismiss the application of the Applicants.

47. Some of the Respondents have taken up the plea of deeming fiction as contained in Para 8(iii) of the Notification of 2006 to contend that the Environmental Clearance would be deemed to have been granted to them as their applications were not disposed off within the specified time. Some of the Respondents have also contended that the Notification of 2006 is not applicable to their projects which are for building residential complexes.

Still, some of the Respondents have further contended that the Notification of 2006 is invalid and is liable to be set aside on the ground of discrimination, vagueness etc. Respondent no. 9 having raised this plea in its application, had reserved its right to challenge the validity and correctness of Notification 2006, however, till the matter was reserved for judgment, neither any such effort was made by such Respondent nor actual application was filed challenging the Notification of 2006. Thus, we do not propose to go into the challenge to the Notification of 2006 in these petitions of the Respondents. Respondent no. 9 has even relied upon the said Notification of 2006 to contend that the Office Memoranda are valid, issued by the Competent Authority in exercise of its powers and are supplementing the Notification of 2006. In these circumstances it is neither necessary nor required by the Tribunal to examine the correctness or otherwise of Notification of 2006.

48. According to the MoEF, the Office Memoranda have been issued in exercise of the powers conferred upon the Ministry and are hence, executive instructions. According to the Ministry, they supplement the Notification of 2006.

49. The State of Tamil Nadu and Tamil Nadu Pollution Control Board have not taken any specific stand in their replies in relation to the validity of Office Memoranda but have stated that the other private Respondents being violators, they have taken action against them as per the directives of the MoEF in the impugned Office Memoranda. The private Respondents have violated the conditions of the Notification of 2006 and they have taken action against them under Section 19 and 25 of the Act of 1986. SEIAA has taken up the stand that because of violations of the Office Memoranda, they have taken action against the private Respondents (Project Proponents) and have de-listed their projects from the grant of Environmental Clearance. During the course of inspection these authorities have taken photographs and submitted inspection reports to the Tribunal. It is stated that tenure of SEIAA had ended on 3rd April, 2015 and is

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under process of being re-constituted.

50. As evidenced from the facts averred and the stand taken by respective parties, the entire controversy revolves around the validity, enforcement and consequences of the impugned Office Memoranda afore-referred. To put it precisely, the stand of the MoEF and the private Respondents 3 to 9 is that the Office Memoranda dated 12th December, 2012 and 27th June, 2013 have been issued by the Ministry in exercise of its Executive Power under Article 73 of the Constitution of India. These Office Memoranda are having the force of law and are merely explanatory or supplementary to the Notification of 2006. These Office Memoranda provide and facilitate grant of Environmental Clearance through the same process as contemplated under Notification of 2006 to the projects which have already commenced construction without obtaining prior Environmental Clearance. It is contended that Office Memoranda further the cause of the Notification of 2006 and the provisions of law. The Office Memoranda are neither violative nor are in contradiction to the Act of 1986, the Rules framed thereunder, or the Notification of 2006.

51. Some of the private Respondents have also contended that the Office Memoranda have been issued in conformity with Section 3 and 5 of the Act of 1986, that issuance of such Memoranda is aided by the 'doctrine of implied or necessary powers' and that they are also entitled to the grant of Environmental Clearance as a result of 'deeming fiction' under Para 8 of the Notification of 2006.

Further, the contention of the private Respondents in particular is that they had started the projects after taking clearance as well as different permissions from various authorities and in accordance with law. At some stage of the construction, they had also filed applications for obtaining Environmental Clearance from the concerned authorities. The Terms of Reference of the building permission from CMDA even prescribed that Environmental Clearance should be taken before grant of Completion Certificate. The constructions carried out by them, though without obtaining Environmental Clearance, were for *bona fide* reasons and keeping in view the fact that not only the Project Proponents but even third parties had heavily invested in these projects. For the above reasons, they claimed to be entitled to the benefit of the Office Memoranda and consequently for protection to their construction projects.

On the contrary, the submission of the Applicants is that the impugned Office Memoranda issued by the Ministry are merely administrative orders and are in violation of the provisions of the Act of 1986, the Rules framed thereunder and in particular, the Notification of 2006. The Office Memoranda not only dilute the provisions of the Notification of 2006 but completely upset the scheme of environmental protection as contemplated under the environmental laws. On their plain reading, they are *ultra vires* the Notification of 2006 and the Ministry had no jurisdiction to issue such Office Memoranda. These Office Memoranda are not supplementing but are supplanting the Notification of 2006. Such exercise of powers is impermissible in law. Further, the contention of the Applicants is that while some of the private Respondents did not even apply for Environmental Clearance and went on to raise the construction of their respective projects being fully aware and being put to notice that they were not entitled to carry on such construction work, the other Project Proponents completely ignored and/or violated their legal obligations and applied for grant of Environmental Clearance at a stage when their respective projects were reaching structural completion. In law, none of the private Respondents could have undertaken any activity, much less construction activity, of their projects, except the preparation of the site etc, prior to grant of Environmental Clearance. All these Respondents have violated the law and raised constructions illegally and in an unauthorised manner. It is the case of the Applicant that the plea of *bona fide* belief in raising construction is a sham. Not only the private Respondents started construction but even violated their own undertaking given to the SEIAA by continuing with the

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construction, in fact, with a greater vigour to complete their projects and render all environmental restrictions and laws otiose. The plea of investment by third parties is equally unfounded and *mala fide*. They have invested amounts and even mislead the public at large for making investments being fully aware of the fact that the entire construction is illegal and unauthorised. These constructions have resulted in serious adverse environmental impacts and are prejudicial to the ecology and biodiversity of the area in question.

52. Applicants have seriously contended that neither a deeming fiction nor the doctrine of necessity applies to the facts and circumstances of the case. There was no compliance to the provisions of Section 3 and 5 of the Act of 1986 and thus, these cannot be directions issued under the stated provisions. In fact, that is not even the case of MoEF, the issuing authority. Thus, the application should be allowed and the Respondents should be held liable for violation of law, raising unauthorised and illegal construction and degrading and damaging the environment and ecology, in addition to the principal prayer that the Office Memoranda be quashed.

53. In order to analytically examine the correctness and merit of the rival contentions raised, it would be appropriate for us to formulate the issues that fall for consideration of the Tribunal. Precisely, they can be stated as under:

1. Whether the Office Memoranda dated 12th December, 2012 and 27th June, 2013 have been issued by the MoEF in exercise of its statutory, executive or administrative power and the effect thereof?
2. Are the above Office Memoranda *ultra vires*, violative and in any manner in derogation of or destructive to the Notification of 2006, provisions of the Act of 1986 or Rules framed thereunder?

   Do the impugned Office Memoranda supplement or supplant the Notification of 2006? If so, the consequences thereof.
3. Whether this Tribunal has no jurisdiction to quash both the impugned Office Memoranda?
4. Are the private Respondents entitled to claim any benefit on the strength of deeming provisions as contained in Para 8(iii) of the Notification of 2006 and if so, to what effect?
5. Whether the provisions of Notification of 2006 requiring Environmental Clearance prior to commencement of construction are mandatory or directory and consequences thereof?
6. What is the status of structures raised by and the conduct of the private Respondents and its effect in law (statutory provisions relating to environment)?
7. What are the environmental impacts of the projects in question upon environment, ecology and biodiversity?
8. What relief, if any, any of the parties to the present proceedings are entitled to?
9. What directions, if any, need to be issued by the Tribunal in the peculiar facts and circumstances of the present case?

DISCUSSION ON ISSUES

Discussion on Issue Nos. 1 and 2.

1. Whether the Office Memoranda dated 12th December, 2012 and 27th June, 2013 have been issued by the MoEF in exercise of its statutory, executive or administrative power and the effect thereof?
2. Are the above Office Memoranda *ultra vires*, violative and in any manner in derogation of or destructive to the Notification of 2006, provisions of the Act of 1986 or Rules framed thereunder?

   Do the impugned Office Memoranda supplement or supplant the Notification of 2006? If so, the consequences thereof.

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54. The decision on these issues would in fact be a linchpin of the entire judgment. If the Office Memoranda dated 12th December, 2012 and 27th June, 2013 are held to be valid and issued in exercise of the Executive Powers of the MoEF, then different consequences in law and on facts would follow. While a completely different set of consequences would ensue if a contrary view is taken.

55. According to the MoEF, these Office Memoranda are issued in exercise of its Executive Power. Some private Respondents supported this stand while others contend that these are the directions issued by the Ministry in terms of Section 3 and 5 of the Act of 1986. However, the MoEF and private Respondents commonly contend that these Office Memoranda are supplemental to and are intended to further the cause of the Notification of 2006.

In opposition to this, the Applicants contend that these Office Memoranda have been issued in exercise of the Administrative Power of the MoEF. They are *ultra vires* and violative of the Notification of 2006. They supplant the Notification of 2006 and defeat the very purpose of obtaining prior Environmental Clearance for commencement of the projects of a like nature, as contemplated under the Notification of 2006.

56. Now, we may notice the historical background to the issuance of these impugned Office Memoranda. The Indian Parliament enacted the Act of 1986 to provide for the protection and improvement of the environment and for matters connected therewith. This law is enacted in furtherance to the decisions taken at the United Nations Conference on Human Environment held at Stockholm in June, 1972, to which India was a party. The object of the Act was to protect and improve environment and for prevention of hazards to human beings, other living creatures, plants and property. The term 'environment' in terms of Section 2(a) was defined to include 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. In exercise of the powers conferred by Sections 6 and 25 of the Act of 1986, the Central Government made the Environment (Protection) Rules, 1986 (for short 'Rules of 1986'). Further, in exercise of the powers vested in the Central Government under Sub Section 1 and Clause (v) of Sub-section (2) of Section 3 of the Act of 1986, read with clause (d) of sub-rule (3) of Rule 5 of the Rules of 1986, the Central Government issued the Environment Impact Assessment Notification dated 27th January, 1994. This Notification requires any person who desire to undertake any new projects in any part of India or the expansion or modernisation of any existing industry or project listed in Schedule I to make an application to the MoEF in the proforma specified in Schedule II of the said Notification. Schedule I provides the list of the projects that requires Environmental Clearance from the Central Government. Under entry 18, all tourism projects between 200 metres and 500 metres of High Water Line and at locations with an elevation of more than 1000 metres with investment of more than Rs. 5 crores required Environmental Clearance. Similarly, under entry No. 21, Highway Projects except projects relating to improvement work including widening and strengthening of roads with marginal land acquisition along the existing alignments, provided it does not pass through ecologically sensitive areas such as National Parks, Sanctuaries, Tiger Reserves, Reserve Forests also required Environmental Clearance. Except these two entries, the construction projects of any other nature were not included in any entry of this Schedule. The Notification of 1994 in contradistinction to the Notification of 2006 had not specifically used the word 'prior Environmental Clearance'. The Notification of 1994 was issued by the Ministry after inviting objection from the public within 60 days from the date of publication of the Notification. Taking notice of lacunas, shortfalls and other practical aspects and difficulties while keeping in mind the interest of environment, the MoEF again issued a draft Notification dated 15th September, 2005 inviting objection and suggestions from

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all the persons likely to be affected by this draft Notification within a period of 60 days. The significance of this Notification was that the Union Cabinet had approved the National Environmental Policy on 18th May, 2006 proposing restrictions and prohibitions to be imposed on new projects and activities and even on expansion or modernisation of existing projects or activities with reference to their potential environmental impacts which stated that the project and activity should not be undertaken unless prior Environmental Clearance has been granted in accordance with the objectives of the policy. After examining the objections and suggestions received, the Central Government on 14th September, 2006 issued a final Notification referred herein as the Notification of 2006 (supra). Clause 2 of this Notification required obtaining of prior Environmental Clearance from the concerned regulatory authority depending upon the nature of the project. Clause 2 of the said Notification reads as under:

> "Requirements of prior Environmental Clearance (EC):— The following projects or activities shall require prior environmental clearance from the concerned regulatory authority, which shall hereinafter referred to be as the Central Government in the Ministry of Environment and Forests for matters falling under Category 'A' in the Schedule and at State level the State Environment Impact Assessment Authority (SEIAA) for matters falling under Category 'B' in the said Schedule, before any construction work, or preparation of land by the project management except for securing the land, is started on the project or activity:
>
> (i) All new projects or activities listed in the Schedule to this notification;
>
> (ii) Expansion and modernization of existing projects or activities listed in the Schedule to this notification with addition of capacity beyond the limits specified for the concerned sector, that is, projects or activities which cross the threshold limits given in the Schedule, after expansion or modernization;
>
> (iii) Any change in product - mix in an existing manufacturing unit included in Schedule beyond the specified range."

57. Clause 4 of the Notification of 2006 contemplates that all projects and activities be broadly categorized into two categories - Category 'A' and Category 'B', based on the spatial extent of potential impacts on human health and natural and manmade resources. Clause 4(iii) prescribes that all the projects or activities included as Category 'B' in the Schedule, including expansion and modernization of existing projects or activities would require prior Environmental Clearance from SEIAA and prior Environmental Clearance is required even if there is a change in product mix except in the expansion carved out therein. Upon submission of the application for Environmental Clearance by the Project Proponent, the Expert Appraisal Committee is to follow four steps procedure i.e. Screening, Scoping, Public Consultation and Appraisal of the application. Environmental Clearance is to be applied for in the prescribed Form 1 under Appendix 1 and Form 1A in accordance with Appendix II to the Notification of 2006. Such application is to be filed for grant of prior Environmental Clearance before commencing any construction activity or preparation of land at the site by the Project Proponent in terms of Clause 6 of the Notification of 2006. It has to be noticed here that Form 1 and 1A require a lot of information to be supplied in relation to the project, land area and activity that is proposed to be commenced by the Project Proponent. Such information *inter alia* includes details of alternative site examination and whether the project requires Clearance under different laws including Forest (Conservation) Act, 1980, Wild Life (Protection) Act, 1972, Coastal Regulation Zone Notification, 2011, if any forest land is involved.

58. It also *inter alia* requires the information with regard to permanent or temporary change in the land use, land cover or topography, including increase in intensity of land use, pre-construction investigations like bore house, soil testing.

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Underground works, including mining or tunnelling, reclamation works, impoundment, daming, culvating, realignment and other changes to the hydrology of the watercourses or the aquifers, loss of native species or genetic diversity, details of vulnerable groups of people which could be affected by the Project, municipal details of municipal waste, sewage sludge, densely populated or build up areas, environmental sensitivity, information with regard to a risk of accidents during construction or operation of the projects which could affect human health and risk of contamination of land and water from releases of pollutants into ground water or coastal areas are also required to be furnished. The Notification of 2006 further spells out how the Screening, Scoping, Public Consultation and Appraisal are to be carried out by the authorities concerned. Further, the Terms of Reference (for short ToR') that are to be prepared on the basis of the information furnished in Form 1 and 1-A would become the very basis for consideration of the project of the Project Proponent. The Notification of 2006 states that ToR are to be conveyed to the Project Proponent by the Expert Appraisal Committee or the SEAC as the case may be, upon which an EIA report is to be submitted after holding public consultation. The nominated agency has to submit its report to the regulatory authority stating whether owing to the local situation and dealing with the objections raised, in its opinion, the project should be recommended for Environmental Clearance or not. The agency has to further appraise whether the project site is proper or not. This entire process is required to be completed prior to grant of Environmental Clearance. Para 8 of the Notification of 2006 deals with the grant or rejection of 'prior Environmental Clearance'. Authorities are required to deal with the applications for grant of prior Environmental Clearance expeditiously and in any case within the time stipulated under the sub-clauses of Para 8. In terms of Para 8(iii), if the decision of the regulatory authority is not communicated to the Applicant within the period specified in subclauses (i) or (ii) of Para 8, the Applicant may proceed as if the Environment Clearance sought for has been granted or denied by the regulatory authority in terms of the final recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee, as the case may be. Therefore, the Project Proponent under the Notification of 2006 can commence its construction or activity only after the grant of Environmental Clearance. This Clearance is to be for a specific period, i.e. the validity period. The projects are supposed to be monitored by the authorities even post Environmental Clearance. This is the scheme and requirements of the Notification of 2006 that superseded the Notification of 1994. 59. On 16th November, 2010, the MoEF for the first time issued an Office Memorandum. Since the impugned Office Memoranda, including this Office Memorandum, have a significant bearing on the matters in issue before us, it will be appropriate to reproduce this Memorandum at this stage:

No. J-11013/41/2006-IA.II(I)
Government of India
Ministry of Environment & Forests

Paryavaran Bhavan,
C.G.O. Complex, Lodi Road,
New Delhi-110003
Telefax: 24362434
Dated the 16th November, 2010

Office Memorandum

Sub: 1. Consideration of proposals involving violation of the Environment (Protection) Act, 1986 or Environment Impact Assessment (EIA) Notification, 2006/the CRZ Notification, 1991, there under-Regarding.
2. Corporate Environment Policy-Regarding.

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The Environment Impact Assessment (EIA) Notification, 2006 requires all new projects or activities and or expansion and modernization of those existing projects or activities listed in the schedule to the said Notification with capacity beyond the threshold limits prescribed there under, to obtain prior environmental clearance under the provisions thereof.

2. Instances have come to the notice of the Ministry of Environment & Forests where substantial physical progress relating to construction of the project has been made at site and significant investments have been made for setting up of new projects as also for the expansion components of various existing projects such as thermal power plants, integrated steel plants, mining projects etc. without obtaining a requisite prior environmental clearance as is mandated under the EIA Notification, 2006.

3. As per the existing practice being followed in the Ministry for considering such violation cases as and when these are submitted for environmental clearance, while environmental clearance is granted to deserving projects prospectively, based on their merit, in accordance with the recommendation of the Expert Appraisal Committees, simultaneously the concerned State Governments, under the powers delegate to them under the Environment (Protection) Act, 1986 are requested to initiate action against such units for the period these units have operated in violation of the said Act as per the procedure laid down.

4. The matter has been considered in the Ministry and it has been decided to follow the following procedure henceforth to deal with such cases of violations:

(i) All such cases of violation which are submitted to the Ministry of Environment & Forests/SEIAAs for environmental clearance would be referred to the respective Expert Appraisal Committee (EAC)/SEACs for their consideration based on merit of the proposal. After the EAC/SEAC have made its recommendations on the project, the proposal will be processed on file for obtaining the approval of the Competent Authority.

(ii) After the Competent Authority has approved the proposal for grant of environmental clearance, MoEF/SEIAA will send a communication to the Project Proponent informing that although the proposal has been approved by the Competent Authority, formal environmental clearance will be issued to the project only after the matter relating to the violations have been put up to the Board of Directors of the Company or to the Managing Committee/CEO of the Society, Trust, partnership/individually owned concern for consideration of its environment related policy/plan of action as also a written commitment in the form of a formal resolution to the submitted to MoEF/SEIAA to ensure that violations of the Environment (Protection) Act etc. will not be repeated. For the purpose, a time limit of 90 days will be given to the Project Proponent. In the mean time, the project will be delisted. In the eventuality of not having any response from the Project Proponent within the prescribed limit of 90 days, it will be presumed that it is no longer interested in pursuing the project further and the project fill will be closed, where after the procedure for obtaining environmental clearance will have to be initiated de-novo by such Project Proponents.

(iii) The respective State Government will be informed of the violation case for their initiating legal action against the Company as per the procedure prescribed.

(iv) The details of the Project Proponents and a copy of the commitment etc. mentioned at para 4(ii) above will be put on the website of MoEF/SEIAA for information of al/stakeholders.

This issues with the approval of the Competent Authority.

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60. In para 2 of the above Office Memorandum, it was noticed that instances have come up to the MoEF where substantial physical progress relating to construction of the project has been made at site and significant investments have been made for setting up of new projects and also for the expansion of the components of various existing projects without obtaining mandated prior Environmental Clearance. Though, this Office Memorandum specifically notices that the Notification of 2006 mandates prior Environmental Clearance, however, the decision was taken that henceforth, all such cases of violation which are submitted to the Ministry would be referred to the EAC/SEAC and depending upon their recommendations, the proposals would be finally dealt with; provided other requirements of the Office Memorandum were satisfied. This Office Memorandum came to be superseded by another Office Memorandum of 12th December, 2012. Again, it was noticed in this Office Memorandum that all projects and activities beyond the threshold limits prescribed thereunder are required to obtain prior Environmental Clearance under the provisions of the Notification of 2006 or Notification of 2011 relating to Coastal Zone Regulation. Again, it noticed that the projects have been started without compliance to these requirements and in some cases, the applications have been pending before the Ministry/the authorities concerned, in terms of the Office Memorandum of 16th November, 2010. The Office Memorandum dated 12th December, 2012 reads as under:

"No. J-11013/41/2006-IAII(I)

Government of India
Ministry of Environment & Forests

Paryavaran Bhavan,
C.G.O. Complex, Lodi Road,
New Delhi-110003
E-mail: pb. rastogi@nic.in
Telefax: 011-24362434
Dated 12th December, 2012

OFFICE MEMORANDUM

Subject: Consideration of proposals for TORs/Environment Clearance/CRZ Clearance involving violation of the Environment (Protection) Act, 19861 Environment Impact Assessment (EIA) Notification, 2006/Coastal Regulation Zone (CRZ) Notification, 2011 - reg.

1. The Environment Impact Assessment Notification (EIA), 2006 and its amendments thereafter require all new projects or activities and/or expansion and modernization of existing projects or activities listed in the schedule to the said Notification with capacity beyond threshold limits prescribed thereunder, to obtain prior Environment Clearance under the provisions thereof. Similarly, CRZ Notification, 2011 imposes certain restrictions on the setting up and expansion of industries, operations or processes and the like in the CRZ.
2. Instances have come to the notice of this Ministry where without obtaining the required clearance under the aforesaid Environment Impact Assessment Notification, 2006 and/or CRZ Notification, 2011, the construction/physical operation activities relating to the projects have been started at the sites. Such activities amount to violations under the Environment (Protection) Act, 1986/EIA Notification, 2006 CRZ Notification, 2011 (henceforth referred to as violations).
3. The cases for granting Environment Clearance/CRZ Clearance for such projects are at present being dealt with in terms of OM of even number dated 16.11.2010. Now, it has been decided in that in supersession of this OM, the

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procedure henceforth stated in this OM will be followed while dealing with such cases.

4. The violations could come to the notice of the Ministry at various stages of processing of the proposals, i.e.:
   i. Processing the case in the Ministry before referring the same to the Expert Appraisal Committee (EAC) for TOR/Environment Clearance/CRZ Clearance;
   ii. During the deliberations in the EAC meeting and recorded as such in the minutes of the meeting; and;
   iii. Processing the case in the Ministry after the receipt of recommendations of the EAC but before granting TOR/Environment Clearance CRZ Clearance.
5. As soon as any case of violation comes/is brought to the notice of the Ministry EAC, the Ministry EAC will proceed to verify the veracity of the complaint through the concerned Regional Office of MoEF/State Government/CZMA. Of course, such a verification will not be required in case the Project Proponent does not contest the allegation of violation. Once the Ministry EAC is satisfied that it is a violation case, before proceeding any further in the matter, the following will need to be ensured in the matter:
   i. The matter relating to the violation will need to be put up by the Project Proponent to the Board of Directors of its Company or to the Managing Committee/CEO of the Society, Trust, partnership/individually owned concern for consideration of its environment related policy/plan of action as also a written commitment in the form of a formal resolution to be submitted to MoEF to ensure that violations will not be repeated. For this purpose, a time limit of 60 days will be given to the Project Proponent. In the meantime, the project will be delisted. In the eventuality of not having any response from the Project Proponent within the prescribed limit of 60 days, it will be presumed that it is no longer interested in pursuing the project further and the project file will be closed, whereafter the procedure will have to be initiated de novo by such Project Proponents.
   ii. The State Government concerned will need to initiate credible action on the violation by invoking powers under Section 19 of the Environment (Protection) Act, 1986 for taking necessary legal action under Section 15 of the Act for the period for which the violation has taken place and evidence provided to MoEF of the credible action taken.
   iii. The details of the Project Proponent and a copy of the commitment, etc., mentioned at (i) above will be put on the website of MoEF for information of all stakeholders.
6. Once action as per para 5 above has been taken, the concerned case will be dealt with and processed as per the prescribed procedure for dealing with cases for grant of TORs/Environment Clearance CRZ Clearance and appropriate recommendation made by the EAC/decision taken by the Ministry as per the merit of the case.
7. It may be clarified that the consideration of proposals for giving TORs Environment clearance/CRZ clearance for violation cases will not be a matter of right for the Project Proponent. In cases of serious violations, the Ministry reserves the right to outrightly reject such proposals and not consider the same at all.
8. The aforesaid procedure, as stated in para 4 to 7 above will apply mutatis mutandis to the cases handled at the State level by the State Environment Impact Assessment Authorities (SEIAAs)/State Level Expert Appraisal Committees (SEACs).

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9. This issues with the approval of the competent authority."

This Office Memorandum deals with situations where violations have been committed by the Project Proponent and they have come to the notice of the MoEF at various stages of construction. It requires the Ministry to verify veracity of the complaint through the concerned regional office and once the Ministry is satisfied that it is a case of violation, then before proceeding any further, the steps contemplated under para 5 to 7 of this Office Memorandum would be taken. The two significant features of this Office Memorandum are that the Project Proponent is to file an undertaking to ensure that violations are not repeated and secondly it will not be a matter of right to the Project Proponent to claim Environmental Clearance and the MoEF can outrightly reject the proposal if it found the violations to be serious. Lastly, that the procedure under para 4 to 7, would apply *mutatis mutandis* to the cases handled by SEIAAs or SEACs. This was considered to be in conformity with the Notification of 2006.

61. Still another Office Memorandum was issued on 27th June, 2013 inserting sub-para 4 in para 5 of the Office Memorandum dated 12th December, 2012 which reads as under:

"3. In view of the above, it has been decided to insert the following as sub-para (iv) below sub-para (iii) of para 5 of the aforesaid OM dated 12.12.2012:

"(iv) Directions under Section 5 of the Environment (Protection) Act, 1986 will be issued by MoEF to the Project Proponent in respect of the violations and compliance of Project Proponent obtained to such directions especially with regard to:

(a) In case the project is at construction stage and the violation is on account of carrying out construction without valid EC/CRZ Clearance or in contravention of the conditions stated in the EC/CRZ Clearance, the construction activities will need to be suspended at the existing level till EC/CRZ Clearance is obtained or the required amendment to EC/CRZ Clearance is obtained.

(b) In case the project is in operation and the violation is on account of enhanced production beyond the capacity stated in the EC/CRZ Clearance, the production will need to be restricted to the capacity stated in the EC/CRZ Clearance till EC/CRZ Clearance is obtained for enhanced capacity. In case of operation without a valid EC/CRZ Clearance, the production will need to stop till the required EC/CRZ Clearance is obtained.

(c) In case the violation is on account of carrying out modernization of existing project and/or change in product-mix in an existing manufacturing unit, the status quo as existing prior to such modernization and/or change in product-mix will be maintained till the required EC/CRZ Clearance is obtained for the modernization and/or change in product-mix.

In case of any violation to aforesaid directions, legal action as per the provisions of the Environment (Protection) Act, 1986 will be taken against the Project Proponent and the case of TOR/EC/CRZ Clearance summarily rejected.

This issues with the approval of the competent authority."

62. Under the terms of Office Memorandum dated 12th December, 2012, the Ministry took upon itself the obligation for issuing directions under Section 5 of the Act of 1986 in each case, but subject to requirements of the impugned Office Memorandum. It may be noticed that such statutory power is specifically vested in the MoEF and the Office Memorandum could confer upon it no wider powers than the statutorily provided powers.

63. In this background thus, now we have to deal with the question as to in exercise of which power, executive, administrative and/or statutory, the impugned Office Memoranda have been issued by the MoEF?

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64. Since the Office Memorandum of 16th November, 2010 stood superseded by the Office Memorandum of 12th December, 2012 which was further amended by the Office Memorandum of 27th June, 2013, the challenge in the present application, is thus, confined to later two Office Memoranda only. A bare reading of the above Office Memoranda clearly shows that the provisions of law under which the said two Office Memoranda have been issued are conspicuous by its very absence in the Office Memoranda. Of course, according to the stand taken by the MoEF, they have been in the exercise of its executive powers. As already noticed, this stand is partially supported by the private Respondents (Project Proponents) who have further added that these Office Memoranda are within the ambit of directions as contemplated under Section 3 and 5 of the Act of 1986. Refuting such contentions, the Applicant has submitted that it is an exercise of administrative power *simplicitor*.

65. There are three organs of the Government: the Legislature, the Executive and the Judiciary. Legislature enacts the laws, judiciary interprets the law and declares what the law is and the executive administers the law. In the present case, we are really not concerned with the scope of legislative and judicial powers. We have to only deal with the ambit and scope of executive or administrative powers exercisable by the Executive, under which the Office Memoranda have been issued. The Executive performs validated functions viz. to investigate, to prosecute, to prepare and to adopt schemes, issues and cancel licences. The Executive can also perform some delegated, legislative functions in relation to making rules, regulations, bylaws and fixation of prices etc. It may still exercise quasi-judicial powers to resolve disputes or fix penalties etc. Such functions have become the chief weapons in its administrative armoury. Functions performed by the Executive authorities can be classified into two different heads but the distinction among these is a very fine one. To state it with precision is very difficult. This distinction gets even finer when it comes to executive and administrative functions *simplicitor*. Even in the same proceedings, it is difficult that one act may be executive while other act or series thereof may be purely administrative yet such classification is essential for varied reasons. When the executive authority exercises quasi-judicial functions, it must follow the principle of natural justice. While this requirement need not be satisfied in the case of executive functions, though, different requirements like publication, laying on the table of the house may have to be complied with. In case of a pure administrative action, even this would not be necessary. Administrative function can be delegated and administrative decision can be challenged as being unreasonable. Thus, it is proper to determine under what type of function an action is taken by the authorities and in furtherance to exercise of what power. There could be circumstances where even a single function may be partly legislative, partly executive, partly judicial and even partly administrative. This difficulty in construing what kind of function it is, can be overcome by analysing the function and determining its character in each case. For instance, the function of the Wage Board may be held to be legislative if future role of conduct is to be prescribed. It may be held to be judicial if the dispute is as to the relative rights of the parties as they rest on past or present circumstances. But, if there are neither present rights asserted, nor a future rule of conduct prescribed, but merely a fact ascertained, necessary for the practical effectuation of admitted rights, it can be said to be an administrative act (*Australian Boot Trade Employees' Federation* v. *Whybrow & Co.*, (1910) 10 CLR 266 (317), *Express Newspaper (P) Ltd.* v. *Union of India*, AIR 1958 SC 578 (610).

66. The legislature enacts the legislation and that which the administration applies is administrative. Another way to look at it is by putting emphasis on the extent and applicability of law. Whereas legislative power is power to make rule for the subjects in general and for their prospective application, administrative power is applicable to such law to specific cases and to particular situations. Administration again would

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normally indicate as to how the power should be exercised. Smith in 'Judicial Review of Administrative Action', (1980), states with elaboration the legal consequences that flow from the fundamental distinction between legislative and administrative actions:

1. "If an order is legislative in character, it has to be published in a certain manner, but it is not necessary if it is of an administrative nature.
2. If an order is legislative in character, the court will not issue a writ of certiorari to quash it, but if an order is an administrative order and the authority was required to act judicially, the court can quash it by issuing writ of certiorari.
3. Generally, subordinate legislation cannot be held invalid for unreasonableness, unless its unreasonableness is evidence of malafide or otherwise shows the abuse of power. But in case of unreasonable administrative order, the aggrieved party is entitled to a legal remedy.
4. Only in most exceptional circumstances can legislative power be sub delegated but administrative powers can be sub-delegated
5. Duty to give reasons applies to administrative orders but not to legislative orders."

67. The Supreme Court in the case of *Union of India (UOI)* v. *Cynamide India Ltd. etc.*, (1987) 2 SCC 720, summed up this fine distinction between legislative and administrative functions while observing that it was 'difficult in theory and impossible in practice', still, held that a legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases and an administrative act is the making and issuance of a specific direction or the application of a general rule to a particular case in accordance with the requirements of policy'; while questioning that it was a broad distinction, not necessarily always true. Sometimes administration and administrative adjudication may also be of general application and legislation of particular application only.

68. In the case of *Rai Sahib Ram Jawaya Kapur* v. *The State of Punjab*, AIR 1955 SC 549, the Court observed that it may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily, the executive power connotes the residue of governmental functions that remains after legislative and judicial functions are taken away. Referring to various judgments, Justice C.K. Thakkar in his book '*Administrative Law*', 2nd Edition, 2012, refers to the ingredients of administrative functions as follows:

1. "An administrative order is generally based on governmental policy or expediency.
2. In administrative decisions, there is no legal obligation to adopt a judicial approach to the questions to be decided, and decisions are usually subjective rather than objective.
3. An administrative authority is not bound by the rules of evidence and procedure unless the relevant statute specifically imposes such an obligation.
4. An administrative authority can take a decision in exercise of a statutory power or even in the absence of a statutory provision, provided such a decision or act does not contravene provision of law.
5. Administrative functions may be delegated and sub-delegated unless there is a specific bar or prohibition in the statute.
6. While taking a decision, an administrative authority may not only consider the evidence adduced by the parties to the dispute, but may also use its discretion.
7. An administrative authority is not always bound by the principles of natural justice unless the statute casts such duty on the authority, either expressly or by necessary implication or if it is required to act judicially.
8. An administrative order may be held to be invalid on ground of

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unreasonableness.

9. An administrative action will not become a quasi-judicial action merely because it has to be performed after forming an opinion as to the existence of an objective fact.

10. The prerogative writ of certiorari and prohibition are not always available against administrative actions."

69. In the case of *Automotive Tyre Manufacturers Association* v. *The Designated Authority*, (2011) 2 SCC 258, the Supreme Court elucidated the factors for determining whether the function was administrative, quasi-judicial or otherwise. These factors are: the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. Besides this, it is a generally accepted principle of functioning of administrative authorities that guidelines should be provided for the rust exercise thereof and to prevent abuse of power and to ensure that it does not become a "new despotism". Various judgments of the Supreme Court, after enunciating the principles that control the application of these concepts, illustratively stated the cases of administrative function. For instances an order of preventive detention, an order setting up a Commission of enquiry, an order making or refusing to make a reference under the Industrial Dispute Act, 1947, an order granting or refusing sanction to prosecute public servant, an order of externment, power to issue licence or permit or even withdrawal from prosecution. Having examined the dimensions of the administrative actions of the State, now we will revert to the executive powers of the State. Subject to the provisions of the Constitution, the executive power of the Union extends to all matters in respect to which the Parliament has power to make laws, while the executive powers of the State extends to all matters in respect to which the State Legislature has power to make laws. This executive power of the Union or of the State, broadly speaking, is co-extensive and co-terminus with its respective legislative power (*G.V. Ramanaiah* v. *The Superintendent of Central Jail, Rajahmundry*, (1974) 3 SCC 531). Ordinarily, the executive power connotes the residue of Governmental functions that remain after legislative and judicial functions are taken away. The executive functions comprises both determination of policy as well as carrying it into execution (*Wharton's Law Lexicon*, 15th Edition, 2009). Since the governmental functions have increased, it is essential and inevitable for the Government to issue administrative instructions for the determination of policy and its uniform application. It is also a settled principle that these administrative instructions or regulations which have no statutory force, do not give rise to any legal right and can hardly be enforced in a Court of law against the administration. This is also not an absolute rule and is subject to certain exceptions. Administrative instructions in some cases confer a justifiable right in favour of an aggrieved party. The Executive power of the State is again of a very wide magnitude. In performance of the executive functions, public authorities issue orders which are not far from having a legislative colour and make decisions affecting the personal and proprietary rights of individuals which are quasi-judicial in character. In addition to these quasi-judicial and quasi-legislative functions, the executive has also been empowered by statute to exercise functions which are legislative and judicial in character, and in certain instances, powers are exercised which appear to partake at the same moment legislative, executive and judicial characteristics. The Supreme Court in the case of *Jayantilal Amritlal* v. *F.N. Rana*, AIR 1964 SC 648, held that even this generic executive power of the State emanates from the provisions under our Constitution. Chapter I of Part V of the Constitution refers itself to the Executive of the Union of India. Article 53(1) of the Constitution states that executive power of the Union shall be vested in the President and shall be exercised by him either directly or

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through officers subordinate to him in accordance with this Constitution. Article 73 mandates that subject to the provisions of the Constitution, the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement. In terms of Article 77, all executive action of the Government of India shall be expressed to be taken in the name of the President. Further, Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in Rules. Once an order or instrument is authenticated in the prescribed manner, then it shall not be called in question on the ground that it is not an order or instrument made or executed by the President. The executive power of the State on the one hand is co-extensive with the respective legislative power, while, it can supplement the statute on the other hand. The executive power would take within its ambit the power of subordinate or delegated legislation. For instance, under an Act, the Central Government is empowered to frame regulations for effective implementation of an Act. This power can be exercised to supplement the provisions of the Act, i.e., the principle legislation or even for filling the gaps which appear in the main statute. However, the executive instructions or powers cannot be used beyond the power conferred by the main statute. The exercise of an executive power must have a source in law and should serve the ends of the principle Act. The executive power, where it is exercised generally with reference to Article 53 of the Constitution of India, must adhere to the constitutionally prescribed procedure.

70. Having dealt with the distinction between Legislative, Executive and Administrative Functions, generally, now, we would proceed to examine the specific contentions with reference to the impugned Office Memoranda.

71. First of all, we would deal with the contention whether the impugned Office Memoranda can be said to be issued under Section 5 of the Act of 1986? This question has to be answered in the negative for varied reasons. Firstly, it is not the case of the MoEF which has issued these Office Memoranda that they have been issued in exercise of the statutory powers vested in them under the provisions of Section 5 of the Act of 1986. Normally it is possible for a Court or a Tribunal to attach certain weightage to the author of the documentation in this regard. However, that cannot be the sole consideration in answering such a question. The Tribunal has to analyse the order or document on its own merit. It is true that Section 3 empowers the Central Government to take measures to protect and improve the quality of the environment and that such measures can be in respect of all or any of the matters stated under Clause (i) to (xiv) of Sub-section (2) of Section 3 of the Act of 1986. However, none of the matters stated therein cover the impugned Office Memoranda in question. Furthermore, these Office Memoranda cannot be said to form the measures taken for protecting or improving the quality of the environment. Similarly, Section 5 of the Act of 1986 empowers the Central Government to issue directions to any person, officer or any authority. Such directions could be issued in exercise of its powers, performance of its functions of the Central Government notwithstanding anything contained in any other law but subject to the provisions of this Act of 1986. These directions include the power to direct the closure, prohibition or regulation of any industry, operation or process. It can also direct stoppage or regulation of the supply of electricity or water or any other service. Under Rule 4 of the Rules of 1986, it is required that these directions shall be in writing, shall specify the nature of action to be taken and the time within which it shall be complied with etc. In terms of Sub-rule 3(a) of Rule 4, a notice of not less than 15 days is required to be served upon the person to whom the directions is proposed to be issued, clearly notifying such direction to him and giving him an opportunity to file objections, if any. In terms of Sub-Rule 3(b) and 4, it is required of the authority which proposes to issue direction for the stoppage or

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regulation of industrial operation or process or disconnect amenities like water and electricity etc. to issue notice to the occupier to file objections and upon receipt of such objections to decide the same within 45 days thereof. Thus, right of hearing and compliance to principle of natural justice is mandatory except in terms of proviso to Sub-Rule 3(b) and Rule 5 wherein compliance to the principle of natural justice and hearing can be dispensed with by the Central Government, where it is of the opinion that there is likelihood of grave injury to the environment and it is not expedient to provide an opportunity to file objections against the proposed direction. The directions passed under Section 5 have to be in strict compliance to the procedure laid down under the Rules of 1986 and by considering all relevant factors as stated therein. It is nobody's case, not even that of the private Respondents, that such compliance to the Rules has been made by the MoEF. The measures and the directions as contemplated under the Act of 1986 can only be taken after following the prescribed procedure and for the purposes as contemplated in law. From the record, it is clear that neither of these ingredients are satisfied in the cases in hand. Nobody intended to invoke these provisions and none complied with the requirements of law. A bare reading of the impugned Office Memoranda clearly shows that they are beyond the purview and scope of either Section 3 or Section 5 of the Act of 1986. Some of the Respondents have even taken the argument that if the Office Memoranda are treated to be directions or measures issued under Section 5 of the Act of 1986, then an appeal would lie before the Tribunal in terms of Section 16(g) of the NGT Act, 2010 and which would in any case be barred by time as of today. Since we are of the considered view that these Office Memoranda have not been issued by the Ministry in exercise of its powers under Section 3 or 5 of the Act of 1986, the question of limitation as contemplated under Section 16 of the NGT Act would not at all arise. These Office Memoranda apparently do not show or make reference to the power in exercise of which they have been issued. They specifically mention the statutory requirement in terms of the Notification of 2006 to obtain *prior Environmental Clearance* before the commencement of any project or activity (emphasis supplied). What seems to have provoked the authorities to issue these Office Memoranda from time to time are the instances which have been brought to the notice of the Ministry, where, without obtaining required Clearances under the Notification of 2006, construction and/or physical operation/activities of the project had been started at the sites which amount to violation of the Act of 1986 and the Notification of 2006. These violations have come to the notice of the Ministry at different stages. These Office Memoranda presumably are intended to provide solution to this problem and save the proposed projects if they comply with the procedure prescribed under the Law. Rules of 1986 have been framed by the Central Government in exercise of its powers vested under Sections 6 and 25 of the Act of 1986 with a primary intention of carrying out purpose of the Act of 1986. The Notification of 2006 has been issued under the provisions of the Act of 1986 and the Rules of 1986, again with the object of imposing certain restrictions and prohibitions on new projects or activities or expansion or modernisation of existing projects or activities for protecting the environment. Thus, it is evident that the Notification of 2006 is in the nature of a subordinate, delegated legislation and is a statutory document having the force of law and is enacted to serve the ends of the provisions of a Parliamentary enactment i.e. the Act of 1986. The Office Memoranda do not refer to the source of their power under the provisions of any Act, Rules, or Notification. They even do not satisfy the basic ingredients of an order or instrument having been issued in compliance to the prescribed procedure under Articles 53, 73 and/or 77 of the Constitution. They have neither been issued nor authenticated by a person authorized by the President of India and in any case, they have not even been issued in the name of the President of India. The contention raised on behalf of MoEF and some of the private Respondents that the issuance of impugned Office Memoranda

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is in exercise of the executive power, is therefore, not tenable. No documents have been placed on record to show that the ingredients of issuance of an executive order or exercise of executive power by the Union are satisfied in the present case.

72. It needs to be noticed at this stage that reference has also been made to Article 73 of the Constitution of India to contend that these Office Memoranda squarely fall within the executive power of the Union of India. This contention merits rejection. Even on the bare reading of Article 73 of the Constitution, the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. The executive powers of the Union is co-extensive and co-terminus with legislative powers of the Parliament. In other words, exercise of executive power should have a direct reference to law under which it is being exercised. Certainly, it does not imply that the executive power of the State/Union cannot be exercised where the legislature has not enacted any law or that such power would be restricted only to that field, as held by the Supreme Court in the case of *Ram Jawaya Kapur* (supra). It is a settled principle of Constitutional jurisprudence that the entries in the Lists are merely fields of legislation. They identify the fields where the Union and the State Legislature or either of them would have the power to enact laws, individually or concurrently. Thus, every power exercisable by the Union or the State under the Constitution should be identifiable to the fields specified in the respective Lists or to any other law framed by the Competent Legislature.

73. We have already noticed that within the dimensions of the executive power, compliance to the constitutionally provided procedure would be a *sine qua non*, for it to have the force of law. In the case of *Gulf Goans Hotels Company Ltd.* v. *Union of India (UOI)*, (2014) 10 SCC 673, where the Supreme Court was dealing with the cases of demolition of properties in furtherance to the orders of demolition by the State authorities, it was held that a government policy to acquire the "force of law", need to confirm to a certain form possessed by other laws in force and encapsulate a mandate and disclose a specific purpose. In terms of Article 77, all executive action of the Government of India shall be expressed to be taken in the name of the President, as this Article provides the form in which the Executive must make and authenticate its orders and decision. The burden of showing compliance with this requirement would be on the Government and it is also essential that what is claimed to be a law must be notified or made public in order to bind the citizens. It may be noticed that this compliance in a given case could be substantial compliance as opposed to strict or absolute compliance. In fact, in the case of *State of Uttaranchal* v. *Sunil Kumar Vaish*, (2011) 8 SCC 670, the Supreme Court even held that unless an order is expressed in the name of the President or the Governor and is authenticated in the manner prescribed by the Rules, the same cannot be treated as an order on behalf of the Government. Similar approach was also adopted in the case of *Shanti Sports Club* v. *Union of India*, AIR 2010 SC 433. The Supreme Court had earlier also taken the similar view in the case of *Harla* v. *The State of Rajasthan*, AIR 1951 SC 467,

> "We hold that, in the absence of some specific law or custom to the contrary, a mere resolution of a Council of Ministers in the Jaipur State without further publication or promulgation would not be sufficient to make a law operative".

On the one hand, the impugned Office Memoranda do not specify the above essential ingredients for exercise of executive power. Thus, these Office Memoranda do not have any force of law to be treated as integral part of the Notification of 2006. While on the other hand, they lack purpose, are not supplementary to or even furthering the cause of the Notification of 2006. This aspect we shall discuss in detail shortly.

74. We have deliberated at some length above what is an administrative action and its illustrations. That which the legislature enacts is legislative' and that which the

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administration applies is 'administrative'. Thus, an Act of Parliament is legislative' but an order of deportation based on such Act is 'administrative'. An administrative power is applicable to specific cases and particular situations. The executive functions comprise both, determination of policy as well as carrying it into execution. The other relevant considerations being, nature of power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. If we apply these tests in context of the orders already held to be administrative orders (supra) then, it would appear that the impugned Office Memoranda in substance are administrative orders. The impugned Office Memoranda have been issued under the umbrella of framing policy or taking policy decisions by the State. It is contended that these Office Memoranda are intended to implement the Notification of 2006. In exercise of its power under the Office Memoranda, Ministry has to take decisions in regard to examining each case and refer the same to the regulatory authority keeping in mind the stage at which the applications for grant of Environmental Clearance are moved. These Office Memoranda provide benefit to the class of the project or activity owners who have started construction in violation of the law i.e., without obtaining prior Environmental Clearance. They do not deal with any subject in general but are applicable to specific case and particular situations. Decisions of the authorities in furtherance to these Office Memoranda are bound to be subjective in contradistinction to being objective decisions.

75. The impugned Office Memoranda by and large satisfy the tests and ingredients of an administrative order. They admittedly have not been issued in exercise of subordinate or delegated legislation. Indisputably, they have also not been issued under Sections 3 and 5 of the Act of the 1986. Apparently, they are not in compliance with the Constitutional requirements and other ingredients of exercise of executive power *simplicitor*. The obvious result thereto would be that these Office Memoranda have been issued by the Ministry in exercise of its administrative power and have to be construed as administrative orders alone.

76. Having held that the Office Memoranda are orders issued by the Ministry in exercise of its administrative powers *simplicitor*, we would now proceed to examine the legality and correctness of these administrative orders. We may clarify that for discussion on this issue, it would not be of much relevance whether these Office Memoranda have been issued by the authorities in exercise of their administrative or executive powers.

77. The Office Memorandum dated 12th December, 2012 and as amended by Office Memorandum dated 27th June, 2013 as already noticed have been issued as consequences of certain instances brought to the notice of the Ministry, that projects and activities have been started at site without obtaining prior Environmental Clearance. These Office Memoranda intend to provide the procedure which has to be followed while dealing with such cases. In these Memoranda it is specifically noticed that obtaining prior Environmental Clearance before commencement of a project or activities is mandatory and that the Applicants have violated the law and these violations have come to the notice of the Ministry at various stages of processing the proposals. They further contemplate that these applications have to be proceeded in accordance with the procedure prescribed under these Office Memoranda. The stages referred to in the impugned Office Memoranda are: processing the case in the Ministry before referring to the Expert Appraisal Committee for ToR/Environmental Clearance/CRZ Clearance; during deliberations in the EAC meeting and during processing the case in the Ministry after receipt of the recommendations of the EAC, but before granting ToR/Environmental Clearance/CRZ Clearance. The authorities are expected to verify the veracity of the complaint unless Project Proponent does not

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contest the allegations of violations. Before proceeding any further in the matter, the Project Proponent is required to submit a written commitment in the form of a resolution to ensure that violations will not be repeated. For this purpose, 60 days time limit has been given to the Project Proponent. The project would be de-listed in the meantime and in the event of default, it will be presumed that the Project Proponent is no longer interested in pursuing the project further and the project file will be closed. The State Government will then be required to initiate credible action under Section 19 of the Act of 1986 for taking legal action under Section 15 of the Act of 1986 in relation to the violations. Upon completion of such action, the concerned case will be dealt and proceeded with as per the prescribed procedure in dealing with the cases of ToR/Environmental Clearance/CRZ Clearance and appropriate recommendations to be made by EAC and decision to be taken by the Ministry on merits of the case. A kind of proviso is added to the Office Memorandum of 12th December, 2012 that in case of serious violations, the Ministry reserves the right to outrightly reject such proposal and not consider the same at all. The procedure prescribed under the Office Memorandum of 12th December, 2012 is to apply to cases pending before the SEIAAs and SEACs as well. Office Memorandum dated 27th June, 2013 terms the procedure under the Office Memorandum of 12th December, 2012 as 'guidelines' wherein it was provided that in cases of violation, the Project Proponent needs to be restrained, through appropriate directions under Section 5 of the Act of 1986 from carrying out any construction or operation activity without obtaining required Clearance. Vide the Office Memorandum of 27th June, 2013, sub para (iv) below sub para (iii) of para 5 of Office Memorandum dated 12th December, 2012, was inserted whereby the MoEF took on to itself the responsibility of issuing directions under Section 5 of the Act of 1986 for suspending the construction work if the project is operational, till grant of Clearance and if there is violation then, to take action as per the provisions of the Act of 1986. First and foremost, what these Office Memoranda seek to do is to condone the violations of law. These Office Memoranda deal only with the violators of law who have started the construction of their projects without obtaining prior Environmental Clearance, thus, in complete violation to the provisions of Act of 1986 and the Notification of 2006. The Office Memoranda which are stated to be guidelines as per their contents thus, have the effect of rendering an offence under law otiose, which is impermissible.

78. The Notification of 2006, under Para 2 mandates that certain project or activities which are listed in the Schedule shall require *prior Environmental Clearance* (emphasis supplied) from the concerned regulatory authorities, irrespective of whether they fall under Category 'A' or category 'B', as the case may be. Furthermore, Para 6 requires that *application seeking prior Environmental Clearance shall be made by the Project Proponent*, before commencing any construction activity or preparation of the land at the site by the Applicant (emphasis supplied). The Notification of 2006, a statutory document having the force of law has used the words '*prior Environmental Clearance*' 34 times and in addition thereto the expression 'prior' has been used six times to emphasise the need for obtaining Environmental Clearance prior to the commencement of any project activity. In other words, the Notification mandates the requirement of 'prior Environmental Clearance' without exception. However the entire mandate of prior Environmental Clearance has not only been diluted but completely rendered infructuous or ineffective by issuance of these impugned Office Memoranda. Therefore, the Office Memoranda stated to be 'guidelines', are potently destructive of the Notification of 2006. The Notification of 2006 requires application for prior Environmental Clearance to be submitted in Form 1 and supplementary Form 1A, if applicable, under Appendix I and II respectively. These forms require information, details and scientific analysis in relation to the project and site, prior to commencement of any activity of the project or even preparation of land. We have in

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some detail above, noticed the requirements which are impossible of compliance once the project has been completed or substantial construction activity has been undertaken at the site in question. The impugned Office Memoranda do not even take note of this aspect and suffer from the infirmity of non-application of mind. Furthermore, the impugned Office Memoranda also offend the doctrine of "*Expressio unius est exclusion alterius*". Since the law provides performance of acts in a particular manner, the impugned Office Memoranda under the garb of 'guidelines', cannot be permitted to alter the same completely; being prejudicial to the principal law.

79. The impugned Office Memoranda do not even advert themselves to how the interest of the environment would be protected in cases where the projects have substantially progressed. It does not even refer as to how detrimental effects on environment would be taken care of, if the Project Proponent is permitted to file an application and claim Environmental Clearance after the project is at a very advanced stage of completion.

80. The impugned orders have been titled as 'Office Memorandum' and content of the orders captioned as 'guidelines' but in fact, are Office Memoranda which directly vary the substantive law in force. This has been adopted by the Ministry as a via-media to bypass the statutory requirements of law or for truncating the prescribed process of environmental protection, in terms of Notification of 2006. These Office Memoranda not only substantially amend or alter its application but even frustrate the requirements of the existing law. The impugned Office Memoranda vest in the authorities an unguided and unfettered discretion, both in regard to processing of application and in condonation of violation already committed by the Project Proponent. It is a very pertinent defect in terms of administrative law jurisprudence. An unguided and unreasonable discretion is bound to result in arbitrary exercise of powers. The MoEF being the controlling Ministry, all the expert bodies under it would be duty bound to carry out its directives even if it is unreasonable and unjustifiable. The expression 'serious violations', which will entitle the Ministry to outrightly reject an application, has neither been defined nor explained in the Office Memoranda. It is left in the absolute discretion of the Ministry as to which cases would be permitted as cases of serious violations and exclude others. The foundation of these Office Memoranda being that projects which are already under way and even have substantially progressed, can file an application for grant of Environmental Clearance, which has to be considered in accordance with these Office Memoranda, is an approach which is completely prohibited in terms of the Notification of 2006. The reservation of such unguided and absolute right by the Ministry in itself would necessarily have an element of discrimination and arbitrariness. The Office Memoranda do not spell out any rational or proper differential criteria for condonation or otherwise of the violations stated to have been committed by the Project Proponent.

81. The MoEF has issued three Office Memoranda dated 16th November, 2010, 12th December, 2012 and 27th June, 2013. All these Office Memoranda have the same feature, that is, instances of project commencement and their construction without obtaining Environmental Clearance, have been brought to the notice of the Ministry. There is no reason, much less a plausible justification recorded in any of these Office Memoranda, as to why such violations have been continued year after year. If the intention was to make it a one-time settlement, to serve the economic and public interest, then MoEF ought not to have issued any further extension to the Office Memorandum of 2010. Repetitive condonation of violation of law would only aim at encouraging violators to flout the law repeatedly. At this stage, we may also deal with the submission made on behalf of the Respondents that issuance of these Office Memoranda was justifiable on the basis of the doctrine of necessity or implied power. This submission is entirely ill-founded. Firstly, we fail to understand as to why the Ministry should take a step for condoning violation of law which was not within its

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jurisdiction and secondly why should it prescribe a methodology contrary to law. Doctrine of necessity does not operate on the axis of illegality and violations. Even if the doctrine of necessity could have any application on the facts of the present case then, the necessity could be at best a onetime scheme rather than providing a regulatory and parallel mechanism in violation of the law in force, which would negate the substantive provisions of the law in fact. It is a settled canon of law that Government cannot issue directions which would encourage violation of law on the one hand and frustrate the object of law on the other. Mandatory principle of proper governance and even the law is that the authorities must enforce the law and ensure that the public respects the law. This is the fundamental essence of the Rule of Law. Even on this count, the Office Memoranda would amount to improper use of power, whether administrative or executive.

82. Upon proper analysis of the language of these Office Memoranda and the law (referred herein after), these Office Memoranda whether they be issued as administrative orders or issued in exercise of executive power, are not clarificatory or supplementary to the Notification of 2006. On the contrary, under no uncertain terms, they are supplanting the Notification of 2006 and are in complete derogation to the laws in force.

83. The Office Memoranda have been issued without proper application of mind, where casualty is the Notification of 2006 and the environment. The authorities have not even ventured to examine that these Office Memoranda which allegedly take recourse to the Notification of 2006 are incapable of complying with the procedure of Screening, Scoping, Public Consultation and Appraisal even substantially. For instance, site selection itself is a part of this process and if the construction has already been completed substantially or otherwise, this criteria and other relevant considerations would be rendered irrelevant. Similarly the purpose of public hearing is to hear objections of the public at large in relation to all facets of the proposed project including site selection, its impact on environment, on their way of life and what directions are required to be issued to protect the environment and adjacent inhabitation or agricultural activities if any before any activity of the project is undertaken. All these requirements would be rendered otiose and irrelevant. Thus, even if the two most important aspects of the Notification of 2006 would not be complied with still the Office Memoranda would contemplate issuance of Environmental Clearance to these projects. This brings to the surface that the Ministry has not exercised its jurisdiction, even if vested in it, in accordance with law. The above are the few patent and serious infirmities in the Office Memoranda. An attempt is made to save them and their legality under the shelter of exercise of executive power. Certainly, the executive power of the Government is very wide. We have already dealt with the executive power by the State at some length above. Even if these instructions or orders are deemed to have been issued in exercise of executive power, even then, they have to be supplemental to and not to supplant, the law.

84. In the case of *Union of India (UOI)* v. *K.P. Joseph*, AIR 1978 SC 303, dealing with the question whether Respondent No. 1 in that case was entitled to the benefit of ex-military personnel on re-employment, in view of the administrative instructions that had been issued in absence of rules framed under Article 309 of the Constitution, the Supreme Court while confirming the judgment of the High Court of Mysore held as under:

> "9. Generally speaking, an administrative Order confers no justiciable right, but this rule, like all other general rules, is subject to exceptions. This Court has held in *Sant Ram Sharma* v. *State of Rajasthan*, (1968) II LLJ 830 SC that although Government cannot supersede statutory rules by administrative instructions, yet, if the rules framed under Article 309 of the Constitution are silent on any particular

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point, the Government can fill up gaps and supplement the rules and issue instructions not inconsistent with the rules already framed and these instructions will govern the conditions of service."

85. The Supreme Court had also taken a similar view in the case of *Sant Ram Sharma* v. *State of Rajasthan*, AIR 1967 SC 1910, where the Court clearly held that Government cannot amend or supersede statutory rules by administrative instructions, but, if the rules are silent on any particular point, the Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed. Similarly, in the case of *M. Srinivasa Prasad* v. *The Comptroller and Auditor General of India*, (2007) 10 SCC 246, the Supreme Court held that if the statutory rules in force are absent or are silent on an particular aspect, then, executive orders can fill up such lacunas. The administrative instructions would normally have no force of law and would relate to matters procedural in nature, without affecting substantive rights or obligations.

86. The executive instructions too cannot go beyond the executive power, which can also not be beyond the statutory provisions under which they are exercised. Furthermore, such instructions should not be vague or uncertain and must provide proper guidelines. By executive instructions, the authority issuing them cannot open new heads. The executive instructions within these confines should be issued only when there are no statutory provisions on the subject. They would also be issued to supplement statutory provisions, to ensure their proper application. In the case of *Indra Sawhney etc.* v. *Union of India, etc.*, 1992 Supp (3) SCC 217, Supreme Court mandated that such propositions are unexceptionable and executive instructions which go contrary to statutory provisions or the rules under Article 309 or any other statutory rules, shall not be operative to the extent they are contrary to the statutory provisions or rules. In the case of *M.C. Mehta* v. *Union of India (UOI)*, (Supra), not only that the Court reiterated these principles but even questioned MoEF's intent to legalise the commencement or continuance of mining activity without compliance to the stipulations of the Notification of 2006. However, it was observed that in any case, a statutory notification cannot be notified by issuance of circular. Such actions demonstrate non-sensitivity of MoEF to the principles of sustainable development and the object behind the issuance of the notification.

These principles would be equally applicable to the exercise of administrative power either by issuance of guidelines or Office Memoranda. A Bench of this Tribunal while dealing somewhat similar situation in the case of *Himmat Singh Shekhawat* v. *State of Rajasthan*, 2015 All (I) NGT Reporter (1) (Delhi) 44 held as under:

"58. This power to issue guidelines is not a general power but is a specific power with inbuilt limitations. The limitations are that, such guidelines would alone be for the purposes of categorizing upon scrutiny of applications, projects that would fall under Category B1' and 'B2' respectively with specific exclusion of the projects specified under Item 8(b) of the Schedule. Restrictive power to issue guidelines, is further illustrated, by the fact that Clause 2 of the Notification of 2006 does not contemplate any such categorization except projects falling under Category 'A' and 'B' only. The purpose appears to be that the power of State Level Appraisal Committees to bifurcate projects into 'B1' and 'B2' categories respectively should not be unguided and unchecked. Prescription of such guidelines could be done by issuance of appropriate Office Memorandum or orders as the power to issue such guidelines has been vested in MoEF under the statutory provisions. But the greater part of such Office Order or Office Memorandum should be such that it would not vary the content or be contrary to the statutory provisions which are in place by virtue of enacting such provisions either by primarily legislative or delegated legislative power.

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59. It is a settled principle that legislature can only delegate to an outside body subordinate or ancillary legislative power for carrying out a policy of the act. The body to whom such power is delegated is required to act strictly within the framework of such delegated powers. Such power is incidental to the exercise of all powers in as much as it is necessary to delegate for the proper discharge of all the public duties. It is because the body constituted should act in the manner indicated in law and should exercise its discretion by following the procedure therein itself or by such delegation as is permissible. Unlike the situation the judges are not allowed to surrender their judgments to others. The legislature and executive can delegate powers within the framework of law. It is an axiom of Constitutional law that representative legislative bodies are given the legislative powers because the representative Government vested in the persons chosen to exercise the power of voting taxes and enacting laws which is the most important and sacred trust known to civil Government. The Delegation has its own restrictions. For instance, the legislature cannot delegate its functions of laying down legislative policy in respect of a measure and its formulation as a rule of conduct. A memorandum which is nothing but administrative order or instruction cannot amend or supersede the Statutory Rules adding something therein which would specifically alter the content and character of the Notification itself. It has been consistently reiterated with approval by the Hon'ble Supreme Court that administrative practice/administrative order cannot supersede or override the statutory rule of Notification and it is stated to be a well settled proposition of law.

The delegated power is primarily for carrying out the purposes of the Act and this power could hardly be exercised to bring into existence a substantive right or obligation or disabilities not contemplated by the provisions of the Act or the primary Notification. A Constitution Bench of the Hon'ble Supreme Court in the case of *Sant Ram* v. *State of Rajasthan*, AIR 1965 SC 1910, while dealing with the scope of executive instructions held that instructions can be issued only to supplement the statutory rules and not to supplant it. Such instructions should be subservient to the statutory provisions. They would have a binding effect provided the same has been issued to fill up the gaps between the statutory provisions and are not inconsistent with the said provisions. (Reference in regard to the above can be made *In Re: The Delhi Laws Act, 1912*, AIR 1951 SC 332, *P.D. Aggarwal* v. *State of U.P.*, (1987) 3 SCC 622, *Ram Sharma* v. *State of Rajasthan*, (1968) I ILLJ 830 SC, *Mahender Lal Jaine* v. *State of Uttar Pradesh*, (1963) Supp. 1 SCR 912, *Naga People's Movement of Human Rights* v. *Union of India*, AIR 1998 SC 431).

60. In the case before the Tribunal, specific challenge has been raised to the Office Memorandum dated 24th December, 2013 on the ground that it violates the above stated principles, in as much as by an Office Memorandum, guidelines for 'B1', 'B2' categories cannot be provided and thus, it runs contra to the statutory provisions. We may also notice here that vide this memorandum, besides providing guidelines for categorization of B1', 'B2' projects under Clause (iii) of paragraph 2, MoEF has taken a decision that river sand mining project with mine lease area of less than 5 hectares may not be considered for grant of Environmental Clearance and river sand mining projects with mining lease areas of equal or more than 5 hectares but less than 25 hectares will be categorized 'B2', that too subject to the restrictions stated in that Office Memorandum. Though, the Applicants have primarily raised a challenge in regard to the former only, but bare reading of the Notification has brought before us the question in regard to the latter as well. Dealing with the former challenge afore-noticed, it is clear that Clause 7 of the Notification of 2006 provides for further categorization of projects falling under Category 'B' into 'B1' and 'B2'. Though Clause 2 of the said Notification does not contemplate any classification other than 'A' and 'B', but, there is no challenge raised before us to

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the Notification of 2006 and we see no reason to go into that aspect. The Notification of 2006 *ex facie* permits classification of Category 'B' projects and that discretion has been vested in State Level Expert Appraisal Committee, which, upon scrutiny of the applications has to take the decision. This discretion vested in the Committee is ought to be controlled by the issuance of guidelines by MoEF. MoEF had issued two guidelines, one on 24th June, 2013 and the other on 24th December, 2013 in relation to further classification and criteria which is to be adopted in that regard. Since the Office Memorandum dated 24th June, 2013, only relates to brick earth and ordinary earth and as per that Office Memorandum, such projects where the excavation area was less than 5 hectares were to be categorized as 'B2' projects, subject to the guidelines stated therein they were to be screened in accordance with the Notification of 2006. Under Paragraph 4(b) of this Memorandum, restrictions were laid down prohibiting any excavation of brick earth or ordinary earth within one km of national parks and wild life sanctuaries as well as it intended to elaborate the cluster situation. If the periphery of one borrow area is less than 500 m from the periphery of another borrow area and the total borrow area equals or exceeds 5 hectares, the activity shall become Category 'B1' project in terms of the Notification of 2006 and such activity will be permitted only if the Environmental Clearance has been obtained in respect of the cluster. If we examine these two Office Memoranda in the light of the well settled legal principles that we have referred above, partially both these Office Memoranda cannot stand scrutiny of law. As far as guidelines or instructions in relation to classification of projects falling under Category 'B' into B1' and 'B2' is concerned, the exercise of such power would be saved on the strength of Clause 7(1) of the Notification of 2006 because it is an Office Memorandum which provides guidelines for exercise of discretion by the State Level Expert Committee for such categorization. Thus, it is an exercise of executive power contemplated under the Notification of 2006. Hence the contention of the Applicant on that behalf cannot be accepted and deserves to be rejected. However, in so far as the Office Memorandum dated 24th June, 2013 placing a prohibition under paragraph 4(b)(i) is concerned, it apparently is beyond the scope of such guidelines. Prohibition of carrying on of mining activity or excavation activity which is otherwise permitted by the Notification of 2006 cannot be done by an Office Order, because it would apparently run contra to the provisions of Notification of 2006. In other words, such restriction is not only beyond the scope of the power vested in MoEF but in fact imposition of absolute restriction in exercise of delegated power is not permissible. Similarly, the Office Memorandum dated 24th December, 2013 in so far as it declares that river sand mining of a lease area of less than 5 hectares would not be considered for grant of Environmental Clearance is again violative of the above settled principles. No such restriction has been placed under the Notification of 2006 or under the provisions of the Act and the Rules of 1986. The executive therefore, cannot take away the right which is impermissible under the principle or subordinate legislation. Of course, part of the same Paragraph 2(iii), in so far as it categorizes 'B2' projects, covering the mine lease area equal to or more than 5 hectares but less than 25 hectares is concerned, the same cannot be faulted in view of the fact that it only provides a criteria or a guiding factor for determining the categorization of projects. It neither vests any substantive right, nor any obligation in relation to any matter that is not squarely or effectively covered under the Notification. This only furthers the cause of fair classification of projects, which is the primary purpose of the Notification. For these reasons, we quash paragraph 4(b)(i) of the Office Memorandum dated 24th June 2013 and part of paragraph 2(iii) in so far as it prohibits grant of Environmental Clearance to the mine area of less than 5 hectares as being violative of the Notification of 2006 and the Rules of 1986. The MoEF has no jurisdiction in exercise of its executive power to

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issue such prohibitions, impose restrictions and/or create substantive rights and obligations. It *ex facie* is not only in excess of powers conferred upon them, but, is also in violation of the Notification of 2006. As already noticed, this Notification has been issued by MoEF in exercise of powers conferred upon it under Clause 5 of sub section 2 of section 3 of the Act of 1986 read with sub rule 4 of rule 5 of the Rules of 1986. Vide this Notification, the Central Government substituted item no. 1(a) and entries relating thereto. A Clause stating that the projects relating to non-coal mine lease and where the mining area was less than 50 hectares equal or more than 5 hectares was to be treated as Category 'B' projects, in addition to that, the minor mineral lease projects, where the mine lease area was less than 50 hectares, were also to be treated as Category 'B' projects, also, the general conditions with provisos were also substituted. It is significant to note here that the Notification of 2006 had been amended by the Central Government by issuing a Notification dated 1st December, 2009 in exercise of its delegated legislative powers. While issuing this Notification, the Central Government had followed the procedure prescribed under Sub Rule 2 and 3 of Rule 5 of Rules of 1986. It had invited objections from the public and considered those objections as is evident from the very recital of the Notification where it recorded "and where as all objection and suggestions received in response to above mentioned draft Notification have been duly considered by the Central Government……." and then it published the final Notification. Vide the Notification dated 1st December, 2009, the Central Government had substituted item no. 1(a) and the entries relating thereto of the Schedule to the Notification of 2006 besides making other amendments as well in different entries. However, while making further amendments vide Notification dated 9th September, 2013, the Central Government did not follow the prescribed procedure under Rule 5. On the contrary it substantially altered, and in fact substituted, as well as made additions of a substantial nature in Clause 4 and Clause 5 of the Notification of 2006, where, for the first time, it added minor mineral mine leases of less than 50 hectares, and also added 'general conditions to apply except for the projects where the area was less than 5 hectares in relation to minor mineral lease' and provisos thereto. The period for applying for renewal of mine lease of one year was changed to two years under the Notification dated 9th September, 2013."

87. There could be a case of executive instructions being derogatory to the principal statute or a statutory notification, still there could be cases of executive instructions being *ultra vires* or violative of the statutory notification and still further there could be cases of conflict between the two. In either of them, the Court have not tilted in favour of sustaining such executive instructions. In the case of *D.D.A.* v. *Joginder S. Monga*, (2004) 2 SCC 297, the Supreme Court held that only in a case where a conflict arises between a statute and an executive instruction, indisputably, the former will prevail over the latter. Executive instructions can supplement a statute, but they cannot run contrary to statutory provisions or whittle down their effect. In other words, executive instruction which is in conflict of and which whittles down the effect of the main Act would be liable to be struck down. When an executive instruction is beyond the power of the authority issuing the same, it would be *ultra vires* and whenever the instruction is found to be beyond the inherent jurisdiction, it would be wholly void. The delegatee can act only within the scope of delegation. The limitations are all with regard to the substance, procedure and form.

88. Another contention raised on behalf of the Respondent while relying upon the judgment of Supreme Court in the case of *Vineet Narain* v. *Union of India (UOI)*, (1998) 1 SCC 226 and other cases, is that executive instructions are enforceable if they do not change the essentials of law. This contention cannot be accepted for reasons that are recorded in this part of the Judgment. By whatever nomenclature it is addressed, whether as executive instructions, policy decision or merely Office

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Memoranda issued in exercise of administrative power, their infirmities and lacunas of law would not alter. Favour of constitutionality is to be construed for such executive instructions. It is also the contention that these instructions do not dilute the effect of law but make it more rigorous. Furthermore, it being a policy decision of the MoEF, the Tribunal should not interfere in it. We are also unable to appreciate as to how these Office Memoranda fill up the gaps in the Notification of 2006. An instrument which provides for disobedience of law and indiscriminately condones the violations of the substantive law in force, it cannot be termed as an instrument made to fill up the gaps. It would be an administrative order contrary to the statutory provisions. In fact, issuance of such kind of orders received judicial causticism and was deprecated by the Supreme Court in the case of *M.C. Mehta* (supra).

89. The impugned Office Memoranda are not only in conflict with the Notification of 2006, but in fact run contra thereto. What is not only intended but in fact is prohibited to be done, is being permitted by the impugned Office Memoranda. They have been issued without reference to any power or source of law and are neither pronounced nor authenticated in the name of the prescribed executive authority. Besides this, we have already noticed in great detail the various infirmities and defects from which these Office Memoranda suffer in fact and in law. This being the position of law in relation to issuance of executive instructions in exercise of executive power or delegated legislation, these Office Memoranda having been issued in exercise of administrative power, in any case, cannot withstand the legal scrutiny and resultantly, would be liable to be quashed.

Discussion on Issue No. 3:

3. Whether this Tribunal has no jurisdiction to quash both the impugned Office Memoranda?

90. Except the intervener Applicants namely M/s SPR and RG Constructions and M/s Dugar, none of the Respondents have raised any objection to the jurisdiction of the Tribunal and competence of the Tribunal to deal with impugned Office Memoranda in accordance with law. According to these Project Proponents, this Tribunal has no power or jurisdiction to quash the Office Memoranda; they having been issued in exercise of the Executive Power of the Union and forming a part of a policy decision. In support of their contention, they relied upon the judgment of the Supreme Court in the case of *Madras Bar Association* v. *Union of India*, (2014) 10 SCC 1 and *Union of India (UOI)* v. *R. Gandhi, President, Madras Bar Association*, (2010) 11 SCC 1. On the other hand, the Applicants have primarily contended in the main application that the impugned Office Memoranda are administrative orders and would be subject to merit review by the Tribunal and such a situation would not alter even if it was in exercise of Executive Power of the Union/State. 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 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

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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.

In fact, such an argument that this Tribunal would not have jurisdiction to examine legality and correctness of such Office Memorandum is without substance and in fact should not detain us any further, in view of the judgment of the five Member Bench of this Tribunal in the case of *Wilfred J.* v. *Ministry of Environment & Forests*, 2014 ALL (I) NGT REPORTER (2) (DELHI) 137, where this Tribunal was concerned with a question whether this Tribunal being a creation of a statute is not vested with the powers of judicial review, so as to examine the constitutional validity/vires of such instruments as it would be tantamount to enlarging the jurisdiction of this Tribunal. We may notice that the Tribunal deliberated on the issue at some length and also did a comparative study of the various Acts like Central Administrative Tribunal (CAT), TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL (TDSAT), Armed Forces Tribunal on the one hand and Act of 2010 on other hand. After referring to various judgments on the subject, Tribunal following the principles laid down by the Constitutional Bench of the Supreme Court in *L. Chandra Kumar* v. *Union of India*, (1997) 3 SCC 261 held as under:

> "85. The Courts and Tribunals that are engaged in judicial functions dispensing justice to the public at large are expected to have powers which are necessary to perform its basic functions. As already noticed, unless there is a specific exclusion, such normal powers stated to be inherent in its functioning. The Supreme Court in the case of *Grindlays Bank Ltd.* v. *Central Government Industrial Tribunal*, AIR 1981 SC 606 while dealing with the powers of the Tribunal in relation to setting aside *ex parte* award in absence of any such power and the award which has become enforceable as a result of its being published rejecting the contention that the Tribunal had become *functus officio*, Court held as under:
>
> > "We are of the opinion that the Tribunal had the power to pass the impugned order if it thought fit in the interest of justice. It is true that there is no express provision in the Act or the rules framed thereunder giving the Tribunal jurisdiction to do so. But it is a well-known rule of statutory construction that a Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. In a case of this nature, we are of the view that the Tribunal should be considered as invested with such incidental or ancillary powers unless there is any indication in the statute to the contrary. We do not find any such statutory prohibition. On the other hand, there are indications to the contrary."
>
> 86. From the above, it is clear that ancillary or incidentally powers which are necessary to discharge its functions effectively for the purpose of doing justice between the parties should be considered to be endowed. If the power of judicial review in its limited scope is not expected to be endowed upon the Tribunal then majority of the cases wherein Orders, Circulars, Notifications issued in exercise of subordinate legislation are challenged could not be fully and completely decided by the Tribunal, though they exclusively fall in the domain of the Tribunal.
>
> 87. Another very important aspect that cannot be overlooked by the Tribunal is that Article 226 of the Constitution of India is a discretionary jurisdiction to be exercised by the High Courts. It does not give an absolute right to a person. For variety of reasons, the High Court may decline to entertain a petition in exercise of its powers

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under Article 226 of the Constitution, while the NGT Act gives a statutory right to an Applicant, aggrieved person or any person to approach the Tribunal in all matters relating to Acts specified in Schedule I of the NGT Act. It is not a discretionary jurisdiction like under Article 226 of the Constitution of India.

88. On a comparative analysis of various provisions of the different Acts afore-stated, it is evident that power, jurisdiction, judicial independence, exclusion of jurisdiction and other determinative factors prescribed under the NGT Act are of wide connotation and are free of restrictions. Sections 14, 15 and 16 read co-jointly give three different jurisdictions to the Tribunal over all disputes and appeals relating to various fields of environment. The jurisdiction is exercisable in relation to the matters arising from any or all of the Scheduled Acts. Examined objectively, the provisions of the NGT Act are more akin to the provisions of the CAT Act, in contradistinction to the provisions of the TDSAT. The various features and aspects of the NGT Act that we have discussed above would bring the case before the Tribunal within the ambit of *L. Chandra Kumar case* (supra), as opposed to the case being covered by *BSNL case* (supra). We have already dealt above, in some elaboration, the aspect as to how the cases relied upon by the Respondents do not apply to the facts of the present case, keeping in view the provisions and the legislative scheme of the referred Acts and various judicial pronouncements. At the cost of repetition, we may record here that the language of the various provisions of the NGT Act by necessary implication gives power of judicial review to the Tribunal. There is no specific or even by necessary implication exclusion of such power indicated in any of the provisions. Furthermore, in the scheme of various environmental acts and if the object and purpose of such acts are to be achieved then the power of judicial review would have to be read into the provisions of the NGT Act. If the notifications issued under any of the Scheduled Acts, by virtue of the powers vested by subordinate or delegated legislation, are *ultra vires* the Act itself or are unconstitutional as they violate Articles 14 or 19 of the Constitution of India, then it has to be construed that the Tribunal is vested with the power of examining such notifications so as to completely and comprehensively decide the disputes, applications, appeals before it. Of course, the powers of the High Courts and the Supreme Court under Articles 226 and 32 of the Constitution of India have not been excluded under the provisions of the NGT Act, thus ensuring that the Tribunal performs supplemental functions and does not supplant the Higher Courts.

89. The Supreme Court in the case of *K.S. Venkatraman and Co.* v. *State of Madras*, (1966) 2 SCR 229, has stated the proposition that an authority or Tribunal constituted under an Act cannot, unless expressly so authorised, question the validity of the Act or any provisions thereof under which it is constituted. This is a sound principle and has been followed consistently. To put it in other words, a Tribunal or an authority constituted under an Act can even examine the validity of the provisions of the Act which created it, provided it is so expressly authorized by the Act itself. This Tribunal is not travelling into that realm of law, but is concerned with the validity of the notifications issued under the Acts other than the Act that created the National Green Tribunal. For this proposition, we have referred to various judgments above.

95. Reverting to the present case the CRZ Notification dated 19th February, 1991, which has been amended on 3rd of October, 2001, was issued in exercise of the powers conferred under Section 3(1) and Section (2)(v) of the Act of 1986 and Rule 5(3)(d) of the Rules of 1986, in declaring coastal stretches as coastal regulation zone and for regulating activities in the coastal regulation zone. The legislature has delegated legislative power to the Central Government to take all measures as it deems necessary or expedient for the purposes of protecting and improving quality of the environment and preventing controlling and abating environmental pollution.

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This is a very wide power, which has been vested in the Central Government by delegated legislation under these provisions. In the exercise of its powers and with the object of satisfying the stated purpose, the Notification of 2011 has been issued under the power of delegated/subordinate legislation. Thus, there cannot be any doubt that the Notification of 2011 in the case before us, is a piece of delegated legislation and its legality, correctness or otherwise can be questioned only on the limited grounds afore-stated.

96. To bring out this distinction illustratively and more clearly, we may refer to the power of the MoEF (Central Government) to issue Environmental Clearance in terms of the provisions of the Act of 1986 read with the Regulations of 2006. The order granting or refusing Environmental Clearance to a Project Proponent, is not an act of subordinate or delegated legislation but clearly is an executive act. The Central Government in exercise of its executive powers, passes an order whether or not a given project should be granted Environmental Clearance for commencing its operation. In passing such orders, the Central Government does not act in furtherance to the powers vested in it by virtue of delegated legislation. It is merely an executive act relatable to the statutory powers vested in the Central Government. The CRZ Notification issued by the Central Government is therefore an act of delegated legislation while passing of an order of Environmental Clearance is an executive order. This view finds support from the judgment of the Delhi High Court in the case of *Utkarsh Mandal* v. *Union of India*, Writ Petition (civil) no. 9340/2009 which held that "grant of environmental clearance is an executive order which involves application of mind by the executive."

91. It is to be noticed at this stage that a Civil Appeal had been preferred before the Supreme Court of India against this Judgment in Civil Appeal No. 7884-7885 of 2014 titled as *Vizhinjam International Seaport Ltd.* v. *Wilfred J.* Hon'ble Supreme Court vide its order dated 21st January, 2015, stayed all further proceedings before the Tribunal in that case but specifically allowed Tribunal to continue its exercise of such powers. Order of the Hon'ble Supreme Court is reproduced below:

"Counter affidavit, if any, be filed by the Respondents within four weeks' time. Rejoinder affidavit, if any, in two weeks' time thereafter.

In the meantime, both the sides are permitted to file additional affidavit(s).

All further proceedings, qua the appellant(s) are stayed in Appeal Nos. 17 of 2014, 88 of 2014, 14 of 2014 and Original Application No. 74 of 2014 till further orders.

We clarify that the National Green Tribunal shall continue to exercise its powers in terms of Sections 14, 16 and 18 of the National Green Tribunal Act, 2010 in other cases."

92. We may also refer to another larger Bench Judgment of the Tribunal in the case of *Himmat Singh Shekhawat* v. *State of Rajasthan* (supra), where the Tribunal was dealing with a case challenging the validity of the Office Memoranda dated 9th September, 2013 and 24th December, 2013 issued by MoEF and other similar Office Memoranda issued the State of Rajasthan as well as other states as being violative of the provisions of the Act of 1986 and being in teeth of the Judgment of the Supreme Court in the case of *Deepak Kumar* v. *State of Haryana*, (2012) 4 SCC 629.

As stated above, the Tribunal had quashed the Notifications which were in violation to the Notification of 2006 and in teeth of the Judgment of the Supreme Court. It was held that the Notification of 2006 being a statutory law cannot be diluted, varied and frustrated in the name of supplying of gaps and/or framing the policy in interest of a group of people.

The Notification or orders whether issued by the principle or delegated authority, the principle that delegated legislation cannot be beyond the principle legislation

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equally applies to both. As discussed above, the body to whom the power is delegated is required to act strictly within the framework of such delegated powers. It is incidental to the exercise of all powers in as much as it is necessary to delegate for the proper discharge of all the public duties. It is because the body constituted should act in the manner indicated in law and should exercise its discretion by following the procedure therein itself, it has to be ensured by the delegate authority that it exercises such power for carrying out the purpose and object of the Act and does not interferes with or offends the substantive provisions of the Act. The discipline and protocol prescribed in a statutory instrument ought not to be altered much less defeated.

93. In light of the above stated principles, now we would revert to the judgments of the Supreme Court relied upon by the Respondent nos. 7 and 8. Firstly, we are unable to comprehend as to how the said Respondents can derive any advantage from the two cited judgments. In the first case of *Union of India (UOI)* v. *R. Gandhi, President, Madras Bar Association* (supra) (2010 case), the Supreme Court was concerned with the constitutional validity of the provisions of the Company's Act, 1956. The Supreme Court stated that the legislature is presumed not to legislate contrary to the rule of law and therefore knows that where disputes are to be adjudicated by a judicial body other than Courts, its standard should approximately be the same as to what is expected of the main stream judiciary. Rule of law is possible only where there is an independent and impartial judiciary to render justice. Further, the Supreme Court while declining to declare the Act and constitution of the National Company Law Tribunal as unconstitutional in Para 120 directed the defects in parts 1B and 1C of the Act relating to appointment and functioning of the Tribunal to be corrected/amended and then be made operational. The Supreme Court affirmed the view of the High Court that the constitution of the two Tribunals and vesting in them the powers of judicial review was not unconstitutional. However, it was subject to the observations made by the Supreme Court in paragraph 120 of the judgment.

Coming to the second case of *Madras Bar Association* v. *Union of India (UOI)* (supra) (2014 case), where the Supreme Court was concerned with the question whether provisions of the National Tax Tribunal (NTT) Act, 2005 were *ultra vires* to provisions of Constitution including the 'doctrine of separation of power'. The Supreme Court held that since Sections 5, 6, 7, 8 and 13 of the NTT Act have already been held as illegal and unconstitutional, therefore the remaining provisions of the Act are automatically rendered otiose to the extent indicated in paras 136 and 137 of the Judgment. The Hon'ble Apex Court made the following conclusions:

> "134. (i) Parliament has the power to enact legislation, and to vest adjudicatory functions, earlier vested in the High Court, with an alternative court/tribunal. Exercise of such power by the Parliament would not per se violate the "basic structure" of the Constitution.
>
> 135. (ii) Recognized constitutional conventions pertaining to the Westminster model, do not debar the legislating authority from enacting legislation to vest adjudicatory functions, earlier vested in a superior court, with an alternative court/tribunal. Exercise of such power by the Parliament would per se not violate any constitutional convention.
>
> 136. (iii) The "basic structure" of the Constitution will stand violated, if while enacting legislation pertaining to transfer of judicial power, Parliament does not ensure, that the newly created court/tribunal, conforms with the salient characteristics and standards, of the court sought to be substituted.
>
> 137. (iv) Constitutional conventions, pertaining to constitutions styled on the Westminster model, will also stand breached, if while enacting legislation, pertaining to transfer of judicial power, conventions and salient characteristics of the court sought to be replaced, are not incorporated in the court/tribunal sought to

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be created.

138. (v) The prayer made in Writ Petition (C) No. 621 of 2007 is declined. Company Secretaries are held ineligible, for representing a party to an appeal before the NTT.

139. (vi) Examined on the touchstone of conclusions (iii) and (iv) above, Sections 5, 6, 7, 8 and 13 of the NTT Act (to the extent indicated hereinabove), are held to be unconstitutional. Since the aforesaid provisions, constitute the edifice of the NTT Act, and without these provisions the remaining provisions are rendered ineffective and inconsequential, the entire enactment is declared unconstitutional."

From the above dictum of the Supreme Court, it is clear that the Parliament has power to enact legislations and to vest adjudicatory functions in the Tribunals which were earlier vested in the High Court. *Per se*, this would not be violative of the basic structure of the Constitution, once the framers of law take care and ensure that the statutorily created courts/tribunals conform to the salient characteristics and standards of the courts under the mainstream justice dispensation system, i.e. judiciary. If they are breached, it would generate the results of violation of doctrine of basic structure of the Constitution.

94. Before the Tribunal, no contention of this dimension has been raised. As already stated, the Tribunal has been created by a statute with all requisite safeguards and has been vested with complete adjudicatory powers as required under the mainstream justice delivery system in our country. The impugned Office Memoranda have been issued in exercise of administrative power which is presumably exercised in furtherance to the powers vested in the Ministry under the Act of 1986 and/or Notification of 2006. These Office Memoranda have been issued for the purposes of 'implementation of Acts mentioned in the Schedule' (emphasis supplied). Thus, we see no reason for accepting the contention that this Tribunal has no jurisdiction to examine the legality or correctness of these Office Memoranda. Furthermore, except these two Respondents, none of the other parties to the *lis* has even touched upon this objection.

Discussion on Issue No. 4

4. Are the private Respondents entitled to claim any benefit on the strength of deeming provisions as contained in Para 8(iii) of the Notification of 2006 and if so, to what effect?

95. The submission on behalf of Respondent no. 7, 8 and 9 that they would be deemed to have been granted Environmental Clearance in relation to their projects on the strength of Para 8, of the Notification of 2006, can be bifurcated into two distinct classes. The first being with reference to the projects of Respondent no. 7 and 8 where the contention is that they had applied for obtaining Environmental Clearance for their project and the same had been recommended by the SEAC in its meeting dated 17th June, 2014 and 30th September, 2013 respectively. Despite such recommendation being in their favour, the SEIAA did not grant or refuse Environmental Clearance within 45 days of such recommendation as per Para 8(i) of the Notification of 2006. Therefore, as per Respondent 7 and 8 since the period of 45 days has lapsed, therefore, they would be entitled to the 'deemed sanction' of Environmental Clearance in terms of Para 8 of the Notification of 2006, the regulatory authority having failed to take any final view on the Project Proponent's application. It is their case that the 'deemed sanction' would follow in terms of Para 8(iii) and the view expressed by the SEAC would be deemed to have been accepted by the regulatory authority and therefore, the Applicant is entitled to be conveyed the said order in terms thereof.

The second class of contention would be with reference to the contention of Respondent no. 9 that it had applied for obtaining Environmental Clearance for its project in the year 2012, which application was re-filed in the year 2013. The SEIAA had failed to act within the time limit provided in Clause 8(i) of the Notification of

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2006, i.e. 105 days. This failure on the part of the SEIAA would result in grant of Environmental Clearance in favour of the Project Proponent on the principle of 'deeming fiction'. It is the case of Respondent no. 9 that SEIAA had only responded after two years by communicating that the operation of the impugned Office Memoranda has been stayed by the National Green Tribunal and therefore their application for Environmental Clearance has been delisted till further order by the Tribunal.

96. Contrary to the above, the Applicant contends that there is nothing in Para 8 of the Notification of 2006, which is remotely suggestive of any deeming fiction. It is a provision that merely prescribes a period within which certain acts are required to be done without specifying any consequences thereof. Furthermore, none of the Respondents have filed applications with all the relevant documents as required under law. They have not even filed their applications for Environmental Clearance complete in all respects. They have played a fraud with law and in any case misrepresented facts before SEIAA. Even after filing the application for Environmental Clearance, they have violated their undertakings to SEIAA and carried on with the constructions of their projects. This firstly would disentitle them from claiming any relief on the premise of 'deeming fiction' contained under Para 8 of the Notification of 2006, and in any case their acts and deeds would vitiate their entire application for grant of Environmental Clearance. The effect of 'deeming fiction' would thus never accrue in their favour. Once the provisions of the Notification of 2006 are not strictly complied with, the question of invoking 'deeming fiction' in terms of Para 8 of the Notification of 2006 would not even arise as these Project Proponents have not complied with the basic ingredients of these provisions.

97. We must make a note of the fact that none of the other parties, including the MoEF or SEIAA had raised the plea of 'deeming fiction' either in their oral or written submissions. Before adverting to the discussion on merits of these contentions, it will be appropriate to refer to Para 8 of the Notification of 2006 which reads as under:

"8. Grant or Rejection of Prior Environmental Clearance (EC):

(i) The regulatory authority shall consider the recommendations of the EAC or SEAC concerned and convey its decision to the Applicant within forty five days of the receipt of the recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned or in other words within one hundred and five days of the receipt of the final Environment Impact Assessment Report, and where Environment Impact Assessment is not required, within one hundred and five days of the receipt of the complete application with requisite documents, except as provided below.

(ii) The regulatory authority shall normally accept the recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned. In cases where it disagrees with the recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned, the regulatory authority shall request reconsideration by the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned within forty five days of the receipt of the recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned while stating the reasons for the disagreement. An intimation of this decision shall be simultaneously conveyed to the Applicant. The Expert Appraisal Committee or State Level Expert Appraisal Committee concerned, in turn, shall consider the observations of the regulatory authority and furnish its views on the same within a further period of sixty days. The decision of the regulatory authority after considering the views of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned shall be final

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and conveyed to the Applicant by the regulatory authority concerned within the next thirty days.

(iii) In the event that the decision of the regulatory authority is not communicated to the Applicant within the period specified in sub-paragraphs (i) or (ii) above, as applicable, the Applicant may proceed as if the environment clearance sought for has been granted or denied by the regulatory authority in terms of the final recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned."

98. First and foremost we have to examine what is a deeming fiction, when it operates and what are its ingredients? The expressions 'deemed' and 'deeming fiction' have been described in *P. Ramanatha Aiyar's Law Lexicon* 3rd edition, 2012 as follows:

"Deemed: The word 'deemed' is used to impose an artificial construction of a word or phrase in a statute that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is impossible. *St. Aubyn (L.M.)* v. *A.G.*, 1952 AC 15

Deeming fiction: A supposition of law that a thing is true without inquiring whether it be so or not, that it may have the effect of truth so far as it is consistent with justice.

The word "deemed" is used in various senses. Sometimes, it means "generally regarded". At other time, it signifies 'taken prima facie to be', while in other case, it means, 'taken conclusively'. Its various meanings are, - 'to deem' is 'to hold in belief, estimation or opinion'; to judge; adjudge; decide; considered to be; to have or to be of an opinion; to esteem; to suppose, to think, decide or believe on considerations."

99. Deeming fiction in a provision of a statute is indicative of the intention of the framers of law that they expect compliance to the requirements of the provision in a prescribed time frame. In some cases, it may prescribe proper consequences of default while in others it may be just require compliance *simplicitor*. When such words are used in a statute, they would provide the meaning for some matters or things and the way in which it is to be adopted. Furthermore, every provision of a statute is brought into by legislature with a particular object in mind; no word used by the legislature is therefore futile. Normally, such words should be interpreted with the aid of examining the whole scheme of an enactment, like the Notification of 2006 in the present case. Therefore, impact of the expression used under paragraph 8 should be examined and interpreted in light of the entire scheme of the Notification of 2006. The concept of 'deeming fiction' should be understood and interpreted by applying the principle of strict construction. Every requirement preceding the stage from which 'deeming fiction' operates must be specified in all respects and the principle of substantial compliance would have no application for determining the controversy in issue. A Bench of this Tribunal in the case of *Laxmi Suiting* v. *State of Rajasthan*, 2014 ALL (I) NGT REPORTER (2) DELHI 1, while dealing with the essentials and ingredients of 'deeming fiction' contained in Section 25(7) of the Water (Prevention and Control of Pollution) Act, 1974 (for short Water Act') held as under:

"33. A deeming provision creates a legal fiction. When a statute enacts that something shall be deemed to have been done, which in fact and in truth has not been done, the court is entitled and bound to ascertain for what purpose and between what persons the statutory fiction is to be resorted to. After ascertaining the purpose, full effect must be given to the statutory fiction and it should be carried out to its logical conclusion and to that end, it would be proper and even necessary to assume all those facts on which alone the fiction can operate. In other

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words, the facts and requirements of the fiction must be satisfied. It has, in fact, also been held by some courts that the word 'deemed' when used in a statute establishes a conclusive or rebuttal presumption, depending upon the context.

34. Another legal principle of construing the legal fiction is that the law cannot be extended beyond its purpose. The Supreme Court, in the case of *Bengal Immunity Co. Ltd.* v. *State of Bihar* (AIR 1955 SC 661) stated that the legal fictions are created only for some definite purpose. A legal fiction is to be limited to that purpose for which it was created and should not be extended beyond that legitimate field. This approach was reiterated by the Supreme Court of India in the case of *Union of India* v. *Sampat Raj Dugar* (AIR 1992 SC 1417), wherein while dealing with Clause 5(3)(ii) of the Import (Control) Order, held that fiction created was for the proper implementation of the Import and Export (Control) Act, 1947 and to hold the licensee responsible for anything and everything that happens from the time of import till the goods are cleared through Customs and it was also held that the fiction cannot be employed to attribute ownership of imported goods to the importer in a case where he abandons them i.e. in a situation where the importer does not pay or receive the documents of title. Reference can also be made to the case of *Rajkumar Khurana* v. *State of NCT of Delhi* [(2009) 6 SCC 72].

35. Section 25(7) is intended to provide for the deemed fiction only where the law is complied with. The obvious reason for providing the deeming fiction under Section 25 of the Water Act is to ensure that the Board does not unduly withhold the application of an industry or a unit which has acted in accordance with the law and has moved the application for establishment/operation complete in all respects to the Board. The intention of the framers of law is to balance the relationship between the industry and the Board. It is not intended to give any undue or unlawful advantage to either of the two. The Board must not be able to frustrate the establishment of a project merely by delaying its decision on the application. It is also not intended to give any right to the industry to start its operation without obtaining consent of the Board or even making an application for that purpose. On the principle aforestated, it will not be permissible to stretch the provisions of Section 25 of the Water Act to give protection to the class of persons who are polluters and are even covered under the specified category contemplated under Section 25(5) supra.

36. In view of the above discussion, we are of the considered view that the Applicants are not entitled to the benefit or advantage of the deeming fiction of law contemplated under Section 25(7) of the Water Act inter alia but specifically for the following reasons:

(i) The Applicants did not submit applications, as contemplated under Section 25 (2) of the Water Act, complete in all respects to the Board."

In the above backdrop, let us now examine as to what is the object and essential features contained in Para 8 of the Notification of 2006. The Notification of 2006 has been issued by the Ministry in exercise of the statutory powers vested in it under Section 3 of the Act of 1986 and Rule 5 of the Rules of 1986. The Notification has been issued for the purposes of effectively ensuring environmental protection and for implementing the provisions contained in the Principal Act. The purpose is to ensure that the project and the activities as stated in the Schedule to the Notification of 2006 only and only commence construction after the Project Proponent has obtained the Environmental Clearance and that is why Para 2 of the Notification of 2006 requires prior Environmental Clearance from the regulatory authority. The whole scheme of the Notification of 2006 does not postulate any relaxation of this mandatory requirement. Thus, there is unquestionable and undisputable legal obligation upon the Project Proponent to seek prior Environmental Clearance before the commencement of any

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activity in relation to the project in question. Such obligation is to be complied with as per Form 1 or supplementary Form 1A, as the case may be, to be submitted to the concerned regulatory authority. Form 1 has various columns which would be incapable of being filled and it will be impracticable, if not impossible, for an applicant to furnish the requisite data supported by appropriate analysis, as contemplated in the various columns of Form 1. Still further, the requirement on the part of the Project Proponent would be to have a complete EIA report on the basis of ToR which again is relatable to the application (Form 1) submitted by the Project Proponent. The authorities are neither required under any law nor under any memorandum of practice to conduct any inspection to verify the contents of the application or the physical situation existing on the site. The averments in the application are normally taken to be correct. It is evident from the record before us that Project Proponents have violated the law and because of their intentional violation and illegal acts of the private Respondents, compliance to the provisions of Notification of the 2006, has been rendered impracticable. The provisions of Para 8(i) to 8(iii) would come into play only when an Applicant complies with his statutory obligations and satisfies the essential requirements of this provision strictly. Indisputably these private Respondents have not done so. Until and unless a complete, comprehensive application in accordance with Form 1 and supplementary Form 1A as per Appendix I and II of the Notification of 2006 respectively, complete in all respects, is submitted, nothing contained in these provisions would come into play much less than it would enable the Project Proponents to claim any advantage or benefit on the plea of deemed fiction.

100. There is a definite process required to be followed, i.e., Screening, Scoping and Appraisal, in addition to Public Consultation, which would lead to passing of an order granting or refusing Environmental Clearance in terms of the Notification of 2006, in cases where SEAC has recommended grant or refusal of Environmental Clearance. The matter then has to be placed before the regulatory authority, i.e. SEIAA, which is empowered to alter such recommendation of SEAC, agree with the same or take completely contra view. However, where it proposes to disagree with the recommendations of SEAC, the SEAC would be required to give its views within 60 days from the date when the file was returned to it by SEIAA for reconsideration and intimation would also be given to the Project Proponent before it takes the final view. It is only when the requirements of Para 8(i) and (ii) have been complied with that any 'deeming fiction' in terms of Para 8(iii) can come into play. After the view of SEAC is considered by the regulatory authority, then it would convey its decision within next 30 days to the Project Proponent. It is only if the decision of the regulatory authority is not intimated that the Project Proponent may proceed as if the Environmental Clearance sought for has been granted or denied by the regulatory authority in terms of the final recommendations of the EAC or the SEAC as the case may be. The word 'deemed' has to be construed differently with reference to the provisions of the Act where it is so used. When a statute enacts that something shall be deemed to have been done, which in fact and in reality was not done, the court is entitled and in fact bound to ascertain for what purposes and between what persons such statutory fiction is to be resorted to and full effect must then be given to the statutory fiction and it should be carried to its logical conclusion. It has been time and again emphasized in various judgments of various courts, including that of the Supreme Court, that the Court has to ascertain the purpose of the legal fiction, as the term 'deemed' has been used for manifold purposes (Refer: *The State of Bombay* v. *Pandurang Vinayak Chaphalkar*, AIR 1953 SC 244 and *B.B. Chibber* v. *Anand Lok Cooperative GRP Housing Society Ltd.*, AIR 2001 Delhi 348). These Principles were also reiterated by the Supreme Court in the case of *Aneeta Hada* v. *Godfather Travels and Tours Pvt. Ltd.*, (2012) 5 SCC 661, where the Court held as under:

"29. In *The Bengal Immunity Company Ltd.* v. *State of Bihar*, AIR 1955 SC 661, the

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majority in the Constitution Bench have opined that legal fictions are created only for some definite purpose."

101. 'Deeming fiction' as an established concept of law, has to be construed strictly and completely according to the facts and circumstances of a case. The dimension of its application would depend upon the language of the provisions where 'deeming fiction' is contained, its purpose and the object sought to be achieved under those provisions and the attendant circumstances of a particular case. It is neither possible nor permissible to prescribe a strait-jacket formula for applicability of this fiction in law. Upon a bare reading of Para 8(i) of the Notification 2006, it is evident that it does not contain any 'deeming fiction'. On the contrary, it only prescribes a time period within which the application for grant of Environmental Clearance should be decided and order is to be communicated to the Project Proponent. This clause does not provide for any consequences if the said decision was not taken within the prescribed time.

102. Para 8(i) provides that the regulatory authority has to convey its decision to the Applicant within 45 days of the receipt of the recommendation of the EAC or SEAC, as the case may be, or convey its decision within 105 days of the receipt of the final Environment Impact Assessment report. In case where Environment Impact Assessment is not required, then, within 105 days of the receipt of the *complete application with requisite document* (emphasis supplied). Para 8(ii) further provides that the regulatory authority shall normally accept the recommendation of the EAC or SEAC but wherever it decides to disagree with such recommendations, regulatory authority shall request reconsideration by the EAC or SEAC as the case may be, within 45 days of the receipt of the recommendations made to it, along with reason for its disagreement. Such intimation of decision is also to be conveyed to the Applicant.

103. EAC or SEAC as the case may be, in turn, shall consider the observations of the regulatory authority and furnish its views on the same within a further period of 60 days. Whereupon, the regulatory authority, after considering the view as furnished by the EAC or SEAC as the case may be, should take its decision, which shall be final and which would be conveyed to the Applicant within the next 30 days. In other words this entire exercise has to be completed within 135 days. Both these Paras i.e. 8(i) and 8 (ii) do not provide for any consequences of default. It is Para 8(iii) of the Notification of 2006, which provides for a kind of deeming fiction. In terms of this Para, if the decision of the regulatory authority is not communicated to the Applicant within the period specified in Para 8(i) & (ii), the Applicant may proceed as if the Environmental Clearance sought for has been granted or denied by the regulatory authority in terms of the final recommendations of the EAC or SEAC as the case may be. For the provision of Para 8(iii) to become effective the following conditions are required to be satisfied:—

(1) The application submitted by the Applicant to the SEIAA or the MoEF as the case may be, should be complete in all respects along with requisite documents.

(2) All the requisite proceedings contemplated under the Notification of 2006 must be completed, i.e. preparation of Terms of Reference (ToR) and submission of final EIA report.

(3) There should be unambiguous recommendation by the SEAC or EAC, for granting or refusing to grant the Environmental Clearance. After submission of the final EIA report (wherever required) and upon completing the procedure prescribed under Clause 8(ii), the matter should remain pending and the Applicant uninformed of the order, for the period of 105 days or 135 days, as the case may be.

104. It is only thereafter that the deeming fiction contained in Para 8(iii) can operate, but even then the clear mandate of the Legislature is that the Environmental

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Clearance to a Project should not be deemed to have been granted to the Project Proponent. It will only be the recommendation of the EAC or SEAC that would enable the Applicant to proceed with his project in terms of the said recommendations. The limited operation of the deeming fiction under Para 8, is only the final recommendation of the EAC or the SEAC, as the case may be, that would operate by fiction of law as the order of the regulatory authority. It is because of the default on the part of the regulatory authority to pass the final order that results in invoking the principle of 'deeming fiction' as contemplated under Para 8(iii) of the Notification of 2006.

105. The Project Proponent has to mandatorily comply with the requirements of Para 8(i) and 8(ii) strictly. The principle of substantial compliance and/or inability on the part of the Applicant to file an application, complete in all respects, would not be a relevant consideration for invoking deeming fiction under Para 8(iii) of the 2006 Notification. Like in economics, other things must remain the same for application of any principle of economics. Similarly, filling up details of Form-A completely and accurately is as essential before consideration of an application for grant of Environmental Clearance.

106. Now, let us examine whether any of the three Project Proponents, claiming advantage of the principle of 'deeming fiction' have satisfied the above stated requirements of law or not. It must be noticed here that any Applicant who seeks benefit under the law of deeming fiction has to satisfy the twin requirements of firstly doing the acts/activities which are lawful and secondly, he must comply with requirements of the provisions *stricto sensu*. In the present case all the three Project Proponents i.e. Respondent nos. 7, 8 & 9 have commenced construction activity of their Projects without even submitting the application for grant of Environmental Clearance. The Project Proponents have obviously not submitted an application complete in all respects and with requisite documents. We have already noticed that there are large numbers of columns in Form 1 and supplementary Form 1A under the Notification of 2006, which these Project Proponents have not and in fact could not have filled appropriately in the corresponding forms to be accompanied with the application for Environmental Clearance. These columns require them to submit data and analysis reports, which it was not possible for them to provide, having already raised huge constructions. Furthermore, all the three Project Proponents were sent different letters from SEIAA, asking them for additional documents and information in respect of their projects which their respective applications lacked. In this regard reference could be made to letters dated 22nd August, 2013, 28th April, 2014, 20th June, 2014, 19th May, 2014 and 17th June, 2014 to SPR & RG, letters dated 21st June, 2013, 08th August, 2013 and 10th September, 2013 to M/s Dugar Housing and letter dated 21st May, 2013 to SAS Realtors Ltd. In the letters addressed by SEIAA to these Project Proponents acknowledging receipt of their application for Environmental Clearance, it had clearly indicated that this does not vest any right in the Project Proponent and they should not start or carry on any construction activity until and unless Environmental Clearance was granted to them. The Project Proponents were permitted only to clear the site and raise temporary structures for accommodation of labour along with basic facilities, as temporary arrangements. The Project Proponents violated the requirements of law and the undertaking given by them to SEIAA at the time of submission of application for Environmental Clearance. The Notification of 2006 contemplates prior Environmental Clearance to any structure or project activity. The Project Proponents having violated the law cannot be permitted to take advantage of their own wrong under the shelter of 'deeming fiction'. The conduct of these Project Proponents and serious violation of law committed by them *inter alia* disables them from claiming the benefit of 'deeming fiction' under Para 8 of the Notification of 2006 in the facts and circumstances of the case. Furthermore, it is not the case of anybody before us that SEAC had recommended the grant of Environmental Clearance to

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Project Proponents unconditionally. The recommendation was conditional and it was not grant of Environmental Clearance in fact and in substance. The Project Proponent was to first satisfy the regulatory authority that it had fulfilled the conditions that had been imposed in the recommendation of the concerned authority. In other words, it was not a case of clear recommendation for grant of Environmental Clearance which could have become operative upon expiry of the prescribed period. In the case of *SPR & RG Construction Private Limited* (Respondent No. 7) the SEAC in its meeting on 30th September, 2013 decided to recommend proposal only for grant of standard ToR and to conduct EIA study in addition to compliance to the conditions which were to be incorporated in the ToR. One out of them related to NOC from Chief Controller of Explosives, adequacy feasibility and functionality of STP to be verified by the Tamil Nadu Pollution Control Board.

However, in its meeting on 17th June, 2014, the proposal of Respondent no. 7 was recommended for issue of Environmental Clearance, but only after considering the conditions imposed on the project. These conditions were as follows:—

1. "Project land area excluding landscape area not less than 15% shall be earmarked for green belt development.
2. The adequacy and feasibility of the STP proposed for the project shall be verified by Tamil Nadu Pollution Control Board as per the ToR condition.
3. Design of the rain water harvesting facility shall be done based on soil lithology study and the same shall be consulted with any Academic Institution.
4. Plan of solid waste management including disposal, in tie-up with local NGO shall be furnished.
5. Revised Budget Allocation (0.5% of the project outlay) & detailed work plan for the CSR Activities shall be furnished in an AFFIDAVIT Form."

107. There is nothing on record to show and is not even the case of the Project Proponent that the above conditions have been complied with and the Authorities referred herein further confirm noncompliance thereto. Thus, there was no unambiguous and unequivocal grant of Environmental Clearance recommendation to the Regulatory Authority by the SEAC.

From the above discussion it is clear that none of the Project Proponents satisfied the basic essentials or requirements of Para 8 of the Notification of 2006. Non-compliance to law, intentional violation of law and further, the illegal conduct of the Project Proponent would disentitle them from getting any relief under Para 8 of the Notification of 2006.

Discussion on Issue No. 5

5. Whether the provisions of Notification of 2006 are mandatory or directory and consequences thereof?

108. Years back, Lord Campbell in *Liverpool Borough Bank* v. *Turner*, (1861) 30 LJ Ch 379 said, "no universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be considered". These observations have stood the tests of time and even today the process of judicial interpretation has not favoured the enunciation of any universal rule or strait jacket formula. This question has to be decided with reference to the intent of the Legislature, and not the language in which the intention is clothed. In some cases, the courts have also taken the view that such intent can be derived from the nature and design of the statute and the consequences which would flow from construing it in the one way or the other. It will depend upon the findings of the court on these aspects that would finally determine whether the provision is mandatory or directory. The use of the words 'as nearly as may be' in contrast to the words 'at least' will *prima facie*

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indicate a directory requirement, negative words indicate a mandatory requirement, 'may' indicate a directory requirement and 'shall' a mandatory requirement. Illustratively it could be explained by taking an example of a set of service rules which provide that adverse remarks shall be communicated to the civil servant concerned, ordinarily within seven months. The object of communicating the adverse remarks is to give an opportunity to the civil servant to improve his performance to make up the deficiency noticed in his work and to give him an opportunity to represent against the remarks, in case he disputes them, to the reviewing authority. In light of this object and having regard to the part adverse remarks play in the service career, the rules on a proper construction will require: (i) communication of the remarks to the civil servant concerned; (ii) communication within a reasonable time; and (iii) communication ordinarily within seven months. The first two requirements will be construed as mandatory and non-compliance of either of them will make the remarks as also any adverse action on their basis, invalid. The third requirement will be treated as directory and its non-compliance alone will not make the remarks invalid if the first two requirements are satisfied [Refer: Principles of Statutory Interpretation by Justice G.P. Singh, 13th Edition (2012)].

In either of these requirements, discretion or discretionary power hardly has a role to play. Even if a provision is being construed as directory, it has to be remembered that it leaves the donee of the powers, free to use or not to use it, at his discretion. A mandatory provision eliminates the element of discretion. A mandatory provision requires complete compliance. Noncompliance or disobedience thereto may render action invalid or nullity. In contradistinction thereto failure to obey directory provision or its disobedience would not render the action a nullity. Another way to examine this distinction is that even noncompliance is capable of being waived and consequences thereof. The Hon'ble Supreme Court in the case of *State of U.P.* v. *Baburam Upadhyay*, AIR 1961 SC 751, culled out the criteria for deciding *inter alia* whether a statutory provision is to be taken as mandatory or directory. They are:—

(a) "the nature and the design of the statute, and

(b) the consequences which follow from construing it the one way or the other,

(c) the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions,

(d) the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and,

(e) above all, whether the object of the legislation will be defeated or furthered."

109. However, subsequently, the Hon'ble Supreme Court in the case of *May George* v. *Special Tahsildar*, (2010) 13 SCC 98, expanded these principles and added the following:

(a) While determining whether a provision is mandatory or directory, somewhat on similar lines as afore-noticed, the Court has to examine the context in which the provision is used and the purpose it seeks to achieve;

(b) To find out the intent of the legislature, it may also be necessary to examine serious general inconveniences or injustices which may be caused to persons affected by the application of such provision;

(c) Whether the provisions are enabling the State to do some things and/or whether they prescribe the methodology or formalities for doing certain things;

(d) As a factor to determine legislative intent, the court may also consider, inter alia, the nature and design of the statute and the consequences which would flow from construing it, one way or the other;

(e) It is also permissible to examine the impact of other provisions in the same

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statute and the consequences of non-compliance of such provisions;

(f) Physiology of the provisions is not by itself a determinative factor. The use of the words 'shall' or 'may', respectively would ordinarily indicate imperative or directory character, but not always.

(g) The test to be applied is whether non-compliance with the provision would render the entire proceedings invalid or not.

(h) The Court has to give due weight age to whether the interpretation intended to be given by the Court would further the purpose of law or if this purpose could be defeated by terming it mandatory or otherwise.

110. Sutherland *Statutory Construction*, Rev. Third Edn., 1943 (pg 640), mentions that "no statutory provisions are intended by the legislature to be disregarded". Therefore, each word in a statute has a referral meaning and it must be given its true interpretation and import.

111. In terms of interpretation of statutes, question whether a particular provision is mandatory or directory and the distinction between the two arises when a statute uses a language which imposes a duty and where a breach of that requirement renders an action void. In general parlance, in case of mandatory provisions, the act done in breach of the duty imposed is void, while in case of directory provision act done does not become void (although some other consequences may follow). *[Rani Drigraj Kuer* v. *Raja Amar Krishna Narain Singh*, AIR 1960 SC 444].

112. In an often quoted passage LORD CAMPBELL said, "no universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered [*Craies on Statute Law*, 5th edition, at p. 242 and quoted in *Liverpool Borough Bank* v. *Turner*, (1861) 30 LJ Ch 379]. This view came to be approved by the Supreme Court in the case of *State of UP* v. *Manbodhan Lal Shrivastava*, AIR 1957 SC 912, wherein the court quoted Crawford on 'Statutory Construction' -art. 261 at p. 516, "The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other...." Maxwell on Interpretation of Statutes quotes Lord Penzance in the case of *Howard* v. *Bodington*, (1877) 2 P.D. 203 (211) - "I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look into the subject matter; consider the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory."

113. If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory whereas if by holding it mandatory, serious general inconvenience will be created to innocent persons without very much furthering the object of the enactment, the same will be construed as directory [*Delhi Airtech Services Pvt. Ltd.* v. *State of U.P.*, (2011) 9 SCC 354].

114. In Re: Presidential Poll case [AIR 1974 SC 1682], the Seven Judge Bench of the Hon'ble Supreme Court observed:

"13. In determining the question whether a provision is mandatory or directory, the subject matter, the importance of the provision, the relation of that provision to the general object intended to be secured by the Act will decide whether the provision is directory or mandatory. It is the duty of the courts to get at the real intention of the legislature by carefully attending the whole scope of the provision to be

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construed. The key to the opening of every law is the reason and spirit of the law, it is the *animus impotentia*, the intention of the law maker expressed in the law itself, taken as a whole."

115. In the case of welfare statutes, the general rule of interpretation is that provisions should get that interpretation which would achieve the object of the enactment. Such statutes are to receive liberal construction but the same could not to be extended beyond the statutory scheme [*Ponni Sugars and Chemicals Ltd.* v. *Cauvery Sugar and Chemicals Ltd.*, 2001 (2) MLJ 832; *Maruti Udyog Ltd.* v. *Ram Lal*, (2005) 2 SCC 638; *National Insurance Company Ltd.* v. *Arumugham*, 2006 (2) MLJ 564]. It is also a settled law that interpretation of a statute depends upon the text and the context thereof and the object with which the statute was made [*Pratap Singh* v. *State of Jharkhand*, (2005) 3 SCC 551].

116. In light of the above stated principles, now, we may examine the provisions of the Act of 1986 and the Notification of 2006. The Act of 1986 has been enacted for the protection and improvement of environment and the prevention of hazard to human beings, other living creatures, plants and property. In light of the fact that the Article 21 of the Constitution of India includes the right to decent and clean environment, any of the provisions of the Act of 1986, in relation thereof, are a mandate of the Legislature. They do not provide discretion to a person to obey or not to obey the law and does not in any way permit dilution of the prescribed standards which are required to be adhered to by the person, who wishes to carry on any project or activity of any nature in the notified areas. The Notification of 2006 has been enacted to carry on the object and purpose of Act of 1986 effectively. The Notification as already noticed, applies not only to new projects but also to projects which propose to expand or even modernize the existing projects and are required to strictly comply with the environment standards prescribed under the Act of 1986 and the notification of 2006. We have also noticed above that the expression 'prior' appears as many as 40 times in the Notification of 2006. The expression 'shall' appears in all the relevant clauses where the Project Proponent is required to make the application and follow the prescribed procedure to obtain the Environmental Clearance prior to the commencement of any constructions work or preparation of land, except for securing the land.

117. The Notification of 2006 not only mandates an Applicant or Project Proponent to strictly comply with the provisions, but even requires the authorities to perform their prescribed functions and thus comply with the provisions within the time stipulated under those paragraphs of the Notification of 2006. It furthermore provides the consequences of non-compliance by the authorities within the period statutorily prescribed. In terms of Para 3, it is not only the consequences of failure to comply on the part of the authorities that are prescribed, but it even specifies the rights that accrue to the Project Proponent. These private rights are definite in character and are of serious consequences. The required compliance has been stated with exactitude in the Notification of 2006, which provides a schedule stating category-wise those projects which require an Environmental Clearance and even the Form which a Project Proponent is required to furnish with complete details at the time of applying for Environmental Clearance.

118. If the application is not in Form 1 and does not provide complete details and documentation in support thereof in terms of the Schedule to the Notification of 2006, the authorities have the right to decline to entertain such an application.

119. Sections 3 and 5 of the Act of 1986 empowers the Central Government to take measures to protect and improve the environment and to issue directions of very wide magnitude, including directions in relation to closure, prohibition or regulation of any industry, operation or process. It can in all event also direct disconnection of electricity

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or water supply of such industry or operation or process. In exercise of its powers under Sections 6 and 25 of the 1986 Act, the Central Government has framed the Rules of 1986. The Notification of 2006 has been issued in terms of Rule 3(2) of the Act of 1986 as well as Rule 5(3) of the Rules of 1986. In other words, these later enactments are integral part of the Act of 1986, their character being statutory and language of these provisions makes it obligatory upon every Project Proponent to obtain Environmental Clearance and comply with other environmental laws without default. Section 15 of the Act of 1986 provides penalty for contravention of the provisions of the Act of 1986, the Rules, orders and the directions passed thereunder. Interestingly, Section 15 of the Act of 1986 makes both noncompliance and contravention of the provisions of these enactments punishable. In other words, every default or violation and even noncompliance of the provisions has been made punishable. This necessarily implies the mandatory character of these provisions and statutory obligation on the part of the Project Proponent to comply with them.

120. We are unable to find any merit in the contention raised on behalf of the Project Proponent that the provisions of the Notification of 2006 are procedural. In our considered opinion, the provisions of this enactment are substantive and mandatory. These provisions do not admit of any substantial non-compliance or vest discretion with the authorities in relation to procedure prescribed under the Notification. They are couched in a language that is purely mandatory in character and is founded on the Precautionary Principle which is one of the statutory principles to be applied by the Tribunal in terms of Section 20 of the Act of 2010. If compliance is not made to the provisions of these enactments, it will totally frustrate the Precautionary Principle and thus the precautionary principle can adversely impact the environment, protection of which is the sole object of the Act of 1986.

Thus, in view of the above discussion, it is clear that the requirements of the Notification of 2006 are mandatory in character. Their default or non-compliance is liable to be punished. The intention of the Legislature is to protect the environment for which words of specific nature like ‘prior’ and ‘shall’ have been used. The impact of non-compliance of these provisions would be of serious consequence, not only on environment but upon the society at large. All these enactments are unambiguous and framed in no uncertain terms and this conveys that projects commenced without obtaining Environmental Clearance would invite the penalty postulated under the Act of 1986.

Thus, we have no hesitation in holding that the provisions of Notification 2006 are mandatory and not procedural *simplicitor*.

Discussion on Issue No. 6

6. What is the status of structures raised by and conduct of the private Respondents and its effect upon the statutory provisions relating to environment?

121. The Applicants have contended that all the Project Proponents, (private Respondents) have violated the law and their acts before the statutory authorities and even before the Tribunal are full of falsehood i.e. *falsus in uno, falsus in omnibus*. It is their case that the private Respondents under the garb of a *bona fide* belief that Environmental Clearance is to be obtained before obtaining the Completion Certificate, have in fact, camouflaged compliance to the entire requirements of environmental laws. They, in fact, have frustrated the very object and purpose of the Act of 1986, Rules of 1986 and the Notification of 2006. These Respondents, because of their illegal and unauthorised actions and activities undoubtedly and in fact undisputedly, have commenced construction activities and even completed substantial section of their projects, even prior to submitting their application seeking Environmental Clearance to SEIAA. What was required was that all these private Respondents must have first

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obtained Environmental Clearance prior to commencement of any construction activity at the site in question. As already noticed, the Notification of 2006 contemplates submission of various analysis data at a stage prior to commencement of any construction or activity of the project for which application is moved. When, these Respondents submitted applications for grant of Environmental Clearance, the competent authorities while acknowledging the receipt thereof had clearly commanded them not to continue with any construction activity unless the Environmental Clearance was granted. They had also called upon them to submit an undertaking to the respective authorities that they would not carry on any construction activity, which in fact they did. Despite, the above instructions, they continued the construction activity in an illegal and unauthorised way. The continuance of construction activity which was commenced thereto was itself illegal, constructed in totally unauthorised manner and was in complete violation of law. They failed to comply with the law at the threshold and violated the rules, the directions issued by the authorities at subsequent stages and their own undertakings. Consequently, they have not only rendered themselves liable for the penal action as contemplated under Section 15 of the Act of 1986 but even the constructions raised by them are in total violation of the laws in force. Now, we may look at the stages of construction and the apparent violation by different Project Proponents and their present status. In the case of Mr. Y. Pondurai (Respondent No. 3), the construction of the project started without even applying for grant of Environmental Clearance. The Project Proponent started the work of construction in full swing merely after getting the approval from the Government Housing and Urban Development Department of the State of Tamil Nadu in the year 2013. This Project Proponent submitted an application to SEIAA only on 21st February, 2014 and in the meanwhile continued with construction of the project despite a clear direction from the authorities as well as his own undertaking that he would not carry out any construction till the grant of Environmental Clearance. A Letter of Apology was also submitted by the Project Proponent on 21st March, 2014 and even then the Project Proponent continued with construction and raised substantial construction. A Show Cause Notice was issued to the Project Proponent by the TNPCB on 12th July, 2014 for carrying out construction work without obtaining Environmental Clearance. Again on 26th November, 2014, SEIAA informed Project Proponent not to continue the construction until Environment Clearance is obtained. Despite this, upon inspection of the site by TNPCB on 2nd April, 2015, it was noticed that construction work of 9 floors was over and interior works is under progress. For its repeated violation, TNPCB issued a Stop Work Notice to Project Proponent on 4th April, 2015 as construction activities were continuing without obtaining EC. The Project Proponent had again assured the authorities that he was not carrying on any construction activity. However, when on 14th April, 2015, SEIAA inspected the work site, it was noticed that civil works of all blocks was completed and no work was being carried out at the time of inspection. This project is a commercial complex consisting construction of a main block - 2 basement + Ground floor + 10 floors; Service Block - Basement - Ground Floor + 2 floors and MLCP Block - 2 basement + Ground Floor + 4 Floors. On careful analysis of above two inspection reports it becomes clear that one floor was constructed by Project Proponent even after 2nd April, 2015, i.e. even after furnishing the above undertaking and issuance of Stop Work Notice. The photographs that were filed by the Project Proponent at the time of submission of applications itself show that the construction work was not completed and it was only in progress, in fact, large construction work remained to be completed. However, when the site in question was inspected by officers of TNPCB and SEIAA on 2nd April, 2015, it came to notice that not only the entire construction work had been completed but even the finishing work of the building has also been completed. Furthermore, comparing the photographs taken on both these different occasions clearly demonstrate that the Project Proponent has

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raised the construction by violating the law, his own undertaking, apology letter and direction of the authorities concerned and have even completed the entire construction of the project. This construction is clearly illegal and unauthorised in the eyes of law. Cases of all the other Respondents are also on the similar lines. We have discussed them in detail in paragraphs 14 to 43 of the Judgment. As such, there is no need for repeating those facts.

122. What we need to notice here is that the compliance to the laws in force, submission of applications for grant of Environmental Clearance complete in all respects with necessary documents are the conditions precedent of consideration of such application by the competent authorities. It is imperative that the activity for which the Environmental Clearance is sought must be an activity started completely in consonance with law. Even the approval of the drawings and principal approval of the construction of the project from CMDA was subject to compliance with the laws in force. We do not agree to the argument propounded by the Project Proponents that the grant of principal approval *ipso facto* had the effect of granting other permissions to start construction without complying with other laws and permissions from the other authorities, particularly in face of the fact that a clause of this principal approval required the Project Proponent to obtain Environmental Clearance. All these Project Proponents are deemed to be in knowledge of the laws relating to construction of such projects i.e. Act of 1986, Rules of 1986 and Notification of 2006. The Project Proponents are persons in the business of building projects, having huge means and perspicacity. They cannot be even expected to take up the plea that they were not aware of the provisions of environmental laws. It is in fact unfortunate that these Project Proponents have not only violated the laws and their own undertaking but in that process even made other innocent people invest their money into the project, being fully aware that the construction raised is completely illegal and unauthorised. The Constructions have been raised in complete and flagrant violation of law. This renders them liable to be prosecuted against in terms of Section 15 of the Act of 1986. The authorities have taken action against some of them, but that does not in any way by necessary implication or otherwise have the effect of regularising the construction that has been raised illegally, in an unauthorised manner and in violation of the principles of law. We must notice that these constructions are bound to have adverse effect on environment, ecology and biodiversity in the areas where they are located. Some of the environmental degradation and deterioration would be irreversible while other would be correctable to some extent either by demolition or by taking curative measures which we will hereafter discuss. Their illegal acts and unacceptable conduct has even rendered compliance to the provisions of the Notification of 2006 impracticable if not impossible.

123. Another plea advanced on behalf of the Applicants before the Tribunal is that the Office Memoranda are clearly in derogation and not in support of the substantive law, the attempt to condone violation would lead to compounding of offences and permitting what provisions of Notification of 2006 and Act of 1986 restricts. The legislature in its wisdom has statutorily introduced the Precautionary Principle in terms of section 20 of the NGT Act, effect of which would stand wiped out in substance by these Office Memoranda. The contention of the Applicants is that the Office Memoranda are neither remedial nor solution to a problem. It is not one time settlement for the category of the persons who might have under some bonafide impression or mistake commenced the activity of the project without obtaining environmental clearance. Office Memoranda in their operation and effect are continuous and do not propose to cover a given situation. The Office Memoranda were issued right from the year 2010 and were amended from time to time, lastly in 2013. The Office Memorandum of 27th June, 2013 *ex facie* is a law in itself as it operates as the procedure for all future times giving substantive rights to parties and runs contra

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to the statutory provision and procedure established under substantive law. On the plain reading of the Notification of 2006, it is manifestly clear that it is the procedure prescribed therein besides being mandatory in character is also *sui-generis*. Once the law prescribes things to be done in a particular way then they must be done in that way alone or not at all. In *Barium Chemicals Ltd.* v. *Company Law Board*, AIR 1967 SC 295, the Hon'ble Supreme Court held "As a general rule, if the, statute directs that certain acts shall be done in a specified manner or by certain persons, their performance in any other manner than that specified or by any other person than one of those named is impliedly prohibited."

124. From such matters or procedure to be performed differently the law must specifically contemplate that it is impermissible to draw such inferences by implication. Nothing has been brought to our notice neither in the Act of 1986, Rules of 1986 and the Notification of 2006 which in express terms or even by necessary implications permits the mandated provisions to be waived and in any case in the manner that would not prejudicially effect the environment and ecology.

125. On behalf of some of the Project Proponents, another argument is advanced to contend that the various authorities understood or interpreted the law to suggest that obtaining of Environmental Clearance prior commencement of project activity was not a condition precedent. The planning permission granted to the Project Proponents also contemplated that Environmental Clearance should be obtained by these Respondents prior to issuance of completion certificate. These Office Memoranda are therefore by themselves and on interpretation of law with the aid of doctrine of *contemporanea expositio* would operate in favour of the Project Proponents for continuing default, if any, on their part. The Project Proponents have relied upon the judgment of the Hon'ble Supreme Court in *K.P. Vargheese* v. *Income Tax Officer, Ernakulam*, (1981) 4 SCC 173 in support of their contentions.

126. We are unable to find any merit in these submissions. The doctrine means that a construction which has been long adopted and publically acted upon will not be lightly disturbed by the courts.

127. The rationale behind the same is that judges who lived at/or about that time when the statutes were made, were best able to judge intentions of the makers at that time but where the wording of the statutes are plain, then its *contemporanea* interpretation cannot override the plain meaning of the words used in the statutes. The Courts do not apply this doctrine where the statute is comparatively modern. The Doctrine historically is founded on the principles that have been evolved by interpretation of ancient statutes or other documents that it has received from the *contemporanea* authority. The meaning publically given by the *contemporanea* or local usage is presumed to be true one even where the language has terminological or popularly a different meaning. It is obvious that the language of the statues must be understood in the sense in which it was understood when it was passed. (Ref: *Interpretation of Statutes* by P.M. Bakshi, 2013 Reprint edition and *Maxwell on Interpretation of Statues* 2013, 19th Impression)

128. *Contemporanea expositio as* a rule for interpretation, cannot aid where there is no question of interpretation or giving a meaning to the language of a provision is concerned. It cannot be called in aid where an Office Memorandum creates a new procedure or parallel law in conflict with the substantive law. This Doctrine applies only to the construction of ambiguous language in the other statutes where one thing to take recourse to the practice and meaning given to the provisions generally and/or very particularly by the temporary authorities. In the case of *K.P. Verghese* v. *Income Tax Officer, Ernakulam* (supra), the Hon'ble Supreme Court held that "it will settle that meaning prescribed by the authorities showing the notification is good guide to *Contemparian expositio* of the position of law." For application of this doctrine the

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meaning of statute has to be in doubt. If the language of the provisions admit of no ambiguity or doubt, the question of resorting to this doctrine would hardly arise. In our considered view, the Notification of 2006, does not admit of any ambiguity or doubt. We have already in some elaboration dealt with the provisions of the notification of 2006 that clearly contemplates obtaining of prior Environmental Clearance before commencement of any activity of the project. The Office Memoranda have the effect of wiping out the 40-times used expression, 'prior Environmental Clearance' in the Notification of 2006 and the very purpose of this Notification to protect the environment. The contention of the Project Proponents that impugned Orders are clarificatory in providing what the Notification of 2006 lacks or does not provide for and that the intention behind the issuance of Office Memoranda, is to remove the ambiguity or to provide resolution to the difficulties faced in implementing the Notification of 2006, does not have any merit, as even the stand of all the authorities i.e. MoEF, SEIAA and Pollution Control Board is that prior grant of Environmental Clearance before commencement of the project activity is mandated by the Notification. Particularly, author of the Office Memoranda in its affidavit has averred '*it is true that neither the act nor the EIA Notification, 2006 grant any relaxation on the requirements of the obtaining of prior Environmental Clearance before any construction work is commenced or any project scheduled therein*.....'. This is also completely substantiated by the opening language of the impugned Office Memoranda where it is said that it was obligatory upon the Project Proponents to obtain prior Environmental Clearance. SEIAA had categorically proscribed the Project Proponents from carrying on any construction activity till Environmental Clearance was granted and had asked them not to repeat the violation. This being the stand of the authorities, the impugned Office Memoranda do not clarify any linguistic or interpreted doubt in the notification 2006 and Act of 1986 but establish a new procedure contrary to the substantive law. It is abundantly clear that principle of *contemporanea expositio* cannot be said to have universal application, each case must be considered on its own facts and executive instruction is entitled to respect but it is not beyond the pale of judicial review. One of the examples cited more often than not is that rules made under the statutes are legitimate aid to the construction of statutes as *contemporanea expositio*. Such Office Memoranda which create a substantive right and obligation by themselves which patently are contrary to the substantive law cannot even be otherwise legitimized with the aid of this doctrine. The fundamental principle of construction is that rules made or directions issued under the statutes must be treated as exactly as if they were in the Act and are of the same effect as it contained in the Act, they cannot be contrary to the fundamental provisions of a statutory notification. Another settled norm is that maxim and precedents are not to be applied mechanically and they are of assistance only in so far as they furnish guidance by compendiously summing up principles based on the rules of common sense and logic (Ref: *Rohit Pulp and Paper Mills Ltd.* v. *Collector of Central Excise, Baroda*, AIR 1991 SC 754).

In our considered opinion the Project Proponents cannot derive any benefit or advance its case with reference to doctrine of *contemporanea expositio*.

129. Equally, without merit is the other limb of the contention raised on behalf of the Project Proponents. The authorities issuing the planning permission to the Project Proponents had required the Project Proponents to obtain environmental clearance prior to the grant of completion certificate by the said authority. With reference to this term, the contention is that the Project Proponents were under a *bonafide* belief that they could start the construction without obtaining the Environmental Clearance which they were expected to obtain prior to grant of completion certificate only. This submission is fallacious at the face of it. Every person is expected to know the law. Ignorance of law cannot be a plea. The Project Proponents are not persons who can be presumed to be in ignorant of law, they are into this business for years and the

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Notification of 2006 came into the existence in the year 2006. All the projects in question commenced in the year 2010 and subsequent thereto. The mandatory character of the notification of 2006 obliged the Project Proponents of any project or activity to obtain prior Environmental Clearance before starting construction. They not only failed to do so but even started huge construction and moved the applications for grant of Environmental Clearance at much subsequent stage. The terms and conditions of the planning permissions required the Project Proponents to comply with all the requirements of law including obtaining of Environmental Clearance for their respective projects. The terms and conditions of the planning permission clearly postulated that they would not even be granted completion certificate if they had not obtained the Environmental Clearance. Reading of the clause of the planning permission by the Project Proponents to take advantage of it is blatantly contrary to the very purpose of the said condition. The terms and conditions of the planning permissions are firstly to be read together, and secondly no document of this nature can be read to construe that it intends to cause waiver of any other requirement of law. All laws are to operate in their respective fields for obtaining the object of rule of law and not in favour of avoidance or dis-obedience to other laws in force. Therefore, we find no merit even in this submission of the Project Proponents.

Discussion on Issue No. 7:

7. The environmental impacts of the projects in question upon environment, ecology and biodiversity.

130. We have already held that comprehensive and definite compliance to the provisions of the Notification of 2006 have been made redundant by the unauthorised actions of the private Respondents as well as by the impugned Office Memoranda issued by the MoEF. Collection of certain data, scientific analysis, pre-construction environmental impacts of the project and other information which are pre-requisite for the submission of the application in Form 1 or supplementary Form I-A of the Appendix II under the Notification of 2006, can neither be collected nor be provided as the projects have already come up substantially or otherwise have completed construction work extensively. Not only the environmental impacts of the projects cannot be examined fairly but even the matters like site selection and public hearing cannot be deliberated upon, thus frustrating the very object of public hearing. The provisions of the Act of 1986, Rules of 1986 and the Notification of 2006 are statutory documents having the force of law. Providing a mechanism in exercise of administrative or executive power in complete deviation or disregard to the law in force, would be contrary to the basic rule of law. Besides it being in derogation to the environmental jurisprudence, it would also have adverse impacts upon environment and ecology of the area. There is greater need for compliance to the statutory provisions. Such compliance would be essential in the interest of the environment. Therefore, we have to examine the various aspects of such non-compliance law and if there can be any tolerance to the breach of the statutory provisions. If so, its extent and impacts on matters of technical and environmental significance that would flow from such breaches or defaults. Let us now examine the requirements of law with reference to environment.

131. 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.

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132. An application seeking prior Environmental Clearance for building construction project is required to be made in the prescribed Form 1 and supplementary Form 1A, after the identification of prospective site for the project to which the application relates, before commencing any construction activity or preparation of land, at the site by the Applicant. The Applicant is required to submit along with the application, in addition to Form 1 and the supplementary Form 1A, a copy of the conceptual plan of the project.

133. Apart from profile of the Project Proponent, name and contact address, implementing organization, organizational chart, project consultants etc., are to be mentioned clearly. After providing details of land (plot/survey numbers, village, tehsil, district, state and area of the land), goal and objectives of the proposed project, significance of the project both at local and regional level, relevance of the project in light of the existing developmental plans of the region are required to be mentioned. Background information and overall scenario of the proposed activity in the Indian context, procedures adopted for selection, criteria for selection of the site for the proposed activity, such as environmental, socio-economic, minimization of impacts, ecological sensitivity, impact of existing activities on the proposed activity, etc. is required to be spelt out. Resources and manpower requirements have to be detailed apart from time frame for project initiation, implementation and completion in following manner:

- Total site area
- Total built up area (provide area details) and total activity area
- Source of water and consumption
- Source of power and requirement
- Connectivity to the city centre, utilities and transportation networks community facilities
- Parking requirements
- Type of building material to be used
- Environmental liability of the site
- Existing structure/type of material - demolition debris, etc. 134. A map of the study area showing 500 meters from the boundary of the project area, delineating the major topographical features such as land use, drainage, location of habitats, major constructions including roads, railways, pipelines, and industries, if any in the area is required to be enclosed. A map covering aerial distance of 15 km from the boundary of the proposed project area delineating environmentally sensitive areas as specified in Form I of the Notification of 2006 is also to be annexed. In the same map, the details of environmentally sensitive areas present within a radial distance of 1 km from the project boundary are to be specifically shown. Land use map of the study area is also required to be furnished.

135. Based on the examination of the relevant details, project specific Terms of Reference (TOR) are provided for the EIA studies. While awarding TOR for EIA studies, the points that are of concern include:

a. Likely alterations to the existing land use of the area;
b. Impact on the geomorphology vis-à-vis land disturbance resulting in soil erosion, subsidence & instability of the area;
c. Impact on the natural drainage systems, including wetlands;
d. Impact of the land use changes occurring due to the proposed project on the runoff characteristics vis-à-vis flooding or water logging of the area
e. Impacts of the proposed project on the ground water vis-à- vis pollution of land & aquifers;

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f. Likely threats to the biodiversity, especially vegetation pattern and displacement of terrestrial and aquatic fauna;

g. Impact on the atmospheric concentration of gases and generation of dust, smoke, odorous fumes or other hazardous gases;

h. Likely impact on the transport system in the area, including the parking space for vehicles;

i. Impact on the noise levels and vibrations in the area;

j. Likely impact on the social structure of local communities, and likely disturbance to sacred sites or other cultural values.

136. It may be kept in mind that, prior to the grant of EC, concept of sustainable development and precautionary principles were the leading factors governing the environmental jurisprudence. The application of these Principles assumes that the impacts of any development on the environment and human health are difficult to predict with certainty, therefore, prudence requires that before embarking on the development project, we explore the possible alternatives to the project. Needless to say that exploring alternatives also includes exploring all the harmful actions which the project may cause, including such damages which may be completely irreversible. Equally important component of these Principles is, to place the burden of proof on the Project Proponents to highlight that the impact of the activity on the environment and the health of the people would be minimal and/or all precautionary measures have been adopted. While exploring alternatives with regard to siting the project and the technology of the project, exploring alternatives also includes "not taking up of the project as one of the alternatives".

137. The very purpose of awarding project specific TOR for EIA studies is that it is expected that the report furnishes balanced and credible information for environmental safeguard apart from other essential environmental studies and most importantly contains the appropriate environmental management plan/s along with budgetary provisions that form integral part of the project cost.

138. This EIA report is subjected to appraisal by the Experts, prior to the grant of Environmental Clearance depending upon the nature and location specificity of the project. TOR assists the EIA consultant, prior to execution of project, to prepare an effective and user friendly report with relevant project specific data, which are easily implementable.

139. A typical EIA report, as per Environmental Impact Assessment Guidance Manual for Building, Construction, Townships and Area Development Project of MoEF, 2010, includes:

1. Description of the project site, geology, topography, climate, transport and connectivity, demographic aspects, socio, cultural and economic aspects, villages, settlements are also to be given. Historical data on climate conditions such as wind pattern, history of cyclones, storm surges, earth quake etc., is also looked into. Detailed layout plan of proposed project development, communication facilities, access/approach roads, landscape, sewage disposal facilities, and waste disposal etc. is also given. Layout plan for proposed development of built up areas with covered construction such as DG Set rooms, Administrative buildings, Utilities such as Main and Stand-by Power, Water supply installations etc. is furnished. Most importantly, requirement of natural resources and their sources are to be detailed out.
2. The environmental impacts of construction and operation are established during the early phases of site selection and planning. Planning, site selection and design form an important stage in the development of these projects and will determine their environmental impact(s). Environmental data to be considered in relation to such development pertaining to (a) land (b) ground water, surface

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water (c) air (d) biological environment (e) noise (f) socio economic environment. The first feature which influences the development of a new project is the existing land use pattern of the neighbourhood of the project, whether the proposed development conforms to the development for that area or not. Study of land use pattern, habitation, cropping pattern, forest cover, environmentally sensitive places etc., provides the first insight to the likely impacts of the project. Geographical latitude and microclimatic factors such as solar access and wind loads also have major impact.

3. Identification of Project activities, including construction phase, which may affect surface water or groundwater have a direct relation to the estimated water intake requirements and identification of the source of water to be used. Description of water availability and sourcing plays a critical role in impact assessment. Baseline water quality from all sources such as ground water or municipal supply or surface water helps in proper assessment.
4. Climatological data, air and noise level pollution similarly plays an important role in assessing the likely environmental impacts and requires anti-pollution measures to be adopted.
5. Baseline information on the flora and fauna of the study area along with a description of the existing terrestrial, wetland and aquatic vegetation determines the environmental sensitivity and the need for environmental protection measures.
6. Details of solid wastes from construction sector can be categorized into two phases i.e. during construction & during operation. Details of the construction or demolition waste, i.e., massive and inert waste; Municipal waste, i.e., biodegradable and recyclable waste and hazardous & e-waste provide steps that are required to be adopted for its management.
7. Main anticipated impacts from building construction, which need to be addressed, are
   - Impact on the natural drainage system and soil erosion.
   - Loss of productive soil and impact on natural drainage pattern.
   - Study of the problem of landslides and assessment of soil erosion potential
   - Impact on air and noise quality during the construction and operation phase - the existing surrounding features of the study area and impact on them from various sources such as machinery, transportation, etc.
   - Impact of construction and operational phases on the surface and ground water on account of the building construction
   - Waste water generation its treatment and utilization
   - Impact of project during construction and operational phases on the biological environment
   - Predicted impact on the communities
   - Impact of the project during construction and operational phases for generation of waste
   - Energy requirements and infrastructure requirements needed for the activity
   - Steps to be taken to integrate the needs of other stakeholders into the location and design of access infrastructure, to reduce and manage overall environmental impacts
8. Another important consideration pertains to requirements of building construction material and technologies to be used. Any project with proper TOR and EIA report would provide details of:
   - Types of materials used in each component part of the building and landscape (envelope, superstructure, openings, roads and surrounding landscape)

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- Plans and sections of buildings showing use of new technologies and nonconventional methods
- Plans and sections of building using new construction techniques

9. Similarly, it will also deal with energy conservation aspects in terms of:
   - Use of alternate renewable resources such as solar/wind power etc.
   - Options considered for supplying the power required for the Project and the environmental implications, including opportunities to increase the energy efficiency of the Project
   - Details of U & R values
   - Details of the renewable energy systems (sizing and design), building costs and integration

140. It is reported that approximately 50 percent of the energy use in buildings is devoted for producing an artificial indoor climate through heating, cooling, ventilation, and lighting. Water conservation and efficiency programs have begun to lead to substantial decrease in the use of water within buildings. Studies have shown that water-efficient appliances and fixtures can reduce consumption by up to 30 percent or more. As demand of water increases with urban growth, the economic impact of water conservation and efficiency will increase proportionately. Water efficiency not only can lead to substantial water savings, but it can also reduce the requirement for expansion of water treatment facilities. The building industry is slowly beginning to recycle its waste but there is a need to achieve significant waste reductions through more reuse of building material and adaptation, as opposed to demolition. Conventional buildings often fail to consider the interrelationship among building site, design elements, energy and resource constraints, building systems, and building function. Green buildings, through an integrated design approach, take into consideration the effect these factors have on one another. Climate and building orientation, design factors such as day lighting opportunities, and building envelope and system choices, as well as economic guidelines and occupant activities, are all factors that need to be considered in an integrated approach. Application of new building concepts can yield for savings during the construction process. Measures that are relatively easy to implement can result in savings to natural resources in the following areas:

- Lower energy costs, by monitoring usage, installing energy-efficient lamps and fixtures, and using occupancy sensors to control lighting fixtures;
- Lower water costs, by monitoring consumption and reusing storm water and/or construction waste-water where possible;
- Lower site-clearing costs, by minimizing site disruption and movement of earth and installation of artificial systems;
- Lower landfill dumping fees and associated hauling charges, through reuse and recycling of construction and demolition debris;
- Lower materials costs, with more careful purchase and reuse of resources and materials;
- Possible earnings from sale of reusable items removed during building demolition.

141. Therefore, any project with proper filling of Form I would be awarded TOR specific to the project and thereby would have EIA report that deals with environmental concerns specific to the project prior to its execution along with the necessary management plan/s and budgetary provisions.

142. In view of the above, if the project execution is carried out at any stage prior to grant of EC, it would be detrimental to the environment as at the very outset even primary baseline information for filling up Form 1 and Form 1A would not be available for providing project specific TOR for the EIA studies and thus the EIA study would become irrelevant thereby making the appraisal of EIA report only a formality. In the

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whole process, even imposition of general and specific conditions in EC pertaining to construction phase of the project would be irrelevant. It is extremely important to note here that the major impacts of any building construction project (alteration to topography, water drawl, air pollution, etc.) are during the construction stage or are directly relatable to the construction of the project itself (provision of parking space, fire safety, rain water harvesting and recycling, storm water, construction methodology, enhancing energy efficiency, etc.). Lastly and most importantly, if the project layout plan requires certain changes in the layout plan on account of likely environmental concerns (such as fire safety, day lighting, seismic hazards, water conservation measures, number of basements, etc.), it would be practically impossible to do so.

143. The above discussion clearly demonstrates the intent of the framers of the law that the compliances under the Notification of 2006 will hardly have an application post-construction or after completion of projects or activities. The prescribed parameters, the documentation and data to be provided along with Form 1, in no uncertain terms oblige the Applicant not to commence any activity unless it has obtained the Environmental Clearance. The post-grant of Environmental Clearance will neither be in the interest of the environment nor would it serve the purpose of the Act of 1986 and/or the Notification of 2006. The primary data required to be submitted relates to pre-project situation and circumstances. Of course, it will also depend upon the nature of the project activity or development activity that the Project Proponent proposes to establish. The impact of building construction and the resultant concretization, particularly basement construction on the groundwater levels and flow directions can be a matter of serious concern. The manner in which the basements are being constructed, its impact on the groundwater table, in what manner how much groundwater is proposed to be extracted, would also be a relevant consideration. EIA Report prepared *ex-post-facto*, i.e. on completion of the project, would suffer from lack of due diligence and would foreclose the options for exploring alternatives. This will go against the fundamentals of the Precautionary Principle and Sustainable Development. Similarly, it will be very tedious and very difficult, if not impossible, to appropriately consider various components of the biodiversity at the site and alternative steps that should be taken by the Project Proponent to protect any rare, endangered and threatened species at the site in question. In absence of such assessment, the opportunity of protecting the local ecology gets defeated and hence the goals of sustainable development. The cumulative effect of the above discussion would be that the illegal and indiscriminate development activity that has been carried out by the Project Proponents is bound to have serious impacts on environment, ecology and biodiversity and a very comprehensive and stringent study would be required to dilute or mitigate adverse environmental impacts of the projects in question.

Issue Nos. 8 and 9

8. What relief, if any, are any of the parties to the present proceedings entitled to?

9. What directions, if any, need to be issued by this Tribunal in the peculiar facts and circumstances of the present case?

144. In this main application, as well as in the applications filed on behalf of the Project Proponents/Respondents, we are concerned with the rival reliefs claimed by the respective parties. On the one hand, the Applicants pray for setting aside of the impugned Office Memoranda, issuance of directions to the Respondents to initiate prosecution and even to pass such other orders and directions as would be necessary for the facts and circumstances of the case. While on the other hand, the Project Proponents/Respondents pray for saving of the impugned Office Memoranda passed and constructions raised by them, as well as that delisting of their application by

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SEIAA was not called for and that SEIAA be directed to consider their application on merits. It is also the contention of the Project Proponents that the relief claimed by them that they being mostly residential complexes are category 'B' projects and hence they are not required to obtain the Environmental Clearance. In view of the above discussion, we have answered the issues in favour of the Applicant and against the Respondents and having held that the Office Memoranda dated 12th December, 2012 and 27th June, 2013 are liable to be quashed, the Project Proponents through their own conduct, raising illegal and unauthorized constructions, without obtaining prior Environmental Clearance and having specifically violated the provisions of the Notification of 2006 and the directions issued to them by the authorities, are not entitled to any relief claimed by them.

145. After discussing the above mentioned issues we feel that still there are two questions remaining to be dealt with by the Tribunal. First, whether the Notification of 2006 applies to the residential complexes in terms of Schedule-I to the Notification of 2006. Secondly, the construction of the projects having been completed, where 3rd party interest have already been created, what are the appropriate directions that should be issued by the Tribunal in the interest of environment and ecology and for restoration and restitution of the same within the ambit and scope of Section 15 of the NGT Act, 2010.

146. The contention of some of the Project Proponents is that their projects are residential projects and therefore the Notification of 2006 is not applicable to them, thus, it is not necessary for them to obtain Environmental Clearance. Some of them, particularly Respondent No. 9, has contended that these are category 'B' projects and therefore, no public consultation or EIA report is required. Therefore, their projects need to be cleared. The Applicants are developing multi-storey residential building. It is the case of this Project Proponent that the project does not fall within the ambit of Entry 8(a) and 8(b) of the Schedule of Notification of 2006. It only applies to industrial or commercial buildings. Furthermore, there is no valid basis for laying down the threshold limitation of 20,000 sq. mts in the Schedule. The reliance is placed upon the judgment of the Delhi High Court in the case of *Delhi Pollution Control Committee* v. *Splendor Landbase Ltd.*, LPA 895 of 2010 decided on 23rd January, 2012. While dealing with these contentions of private Respondents, we have already noticed that there is no specific challenge raised by these Respondents to the Notification of 2006. No such challenge was raised even during the course of the arguments. On the contrary, they have relied upon the impugned Memoranda issued in furtherance to the Notification of 2006.

147. The Notification of 2006 has a mandatory character and its requirements have to be satisfied in consonance with the provisions made therein. Prior Environmental Clearance from the regulatory authority is the condition precedent before any construction work or preparation of land by the Project Proponent is carried out except for securing the land. The project and activities as already stated above have been categorized into two categories; category 'A' and category 'B'. All the projects and activities which have been specified in the Schedule to the Notification of 2006 required Environmental Clearance. In these cases, we are concerned with Entry 8(a) and 8(b) of the Schedule to the Notification that reads as follows:

(1)	(2)	(3)	(4)	(5)
"8		Building or Construction projects or Area Development projects and Townships.		
8(a)	Building and Construction projects		>20000 sq.mtrs and < 1,50,000 sq. mtrs. o	The term "built up area" for the purpose of this notification the built up or covered area on all floors

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			built up area	put together, including its basement and other service areas, which are proposed in the building or construction projects. Note 1.- The projects or activities shall not include industrial shed, school, college, hostel for educational institution, but such buildings shall ensure sustainable environmental management, solid and liquid waste management, rain water harvesting and may use recycled materials such as fly ash bricks. Note 2.- "General Conditions" shall not apply.
8(b)	Townships and Area Development Projects		Covering an area of > 50 ha and or built up area > 1,50,000 sq. mtrs.	A project of Township and Area Development Projects covered under this item shall require an Environment Assessment report and be appraised as Category 'B1' Project. Note.- "General Conditions" shall not apply.

148. The entry has been intentionally termed very widely by the framers. Any Building and Construction Project which has the built up area or covered area of more than 20,000 sq meters or less than 1,50,000 sq. meters would fall under Item 8(a) and Township and Area Development projects covering an area of more than 50 hectares and/or built up areas of more than 1,50,000 sq. meters would fall under Item 8(b). Both of these would be Category 'B' projects. These projects would be dealt with for grant or refusal of Environmental Clearance as per the procedure prescribed under the Notification of 2006. If we examine the scheme of the Notification of 2006 and its relevant provisions, particularly, Paragraphs 2, 6, 7 and 8, it is clear that the expression 'project and activity' are of very wide magnitude and would cover all kind of projects and activities. The definition of environment under Section 2(a) of the Act of 1986 read with definition of the same term under Section 2(c) of the NGT Act would clearly show that the 'projects' or 'activities' are not synonymous terms. What may not be covered specifically under the term 'project' may squarely fall within the ambit of 'activity'. These expressions, having not been specifically made exclusive, would be treated to be more generic and would apply to all kinds of projects and activities. Entry 8(a) talks of building and construction project only with reference to area and extent of construction. They do not even remotely suggest that such building or construction projects should be carried out for an industrial or any allied activity. Whether the complex is being constructed exclusively for residential purpose and/or for mixed use, it will not alter the situation, if otherwise, it meets the threshold requirement of the area of construction. There is no occasion before the Tribunal to

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give undue narrow construction to these expressions which have been intentionally worded very widely by the framers of law. On the Rule of 'Plain Construction', these terms would include residential buildings or projects and the Notification of 2006 would be applicable to all the projects in question. The reliance placed by the private Respondents upon the judgment of the Delhi High Court in the case of *Delhi Pollution Control Committee* (supra), in our considered opinion, is misplaced. In that case, Delhi High Court was concerned with Section 25 of the Water Act. It is not necessary for us to discuss the judgment of High Court in any greater detail, primarily for two reasons, firstly, judgment relates to the provisions of the Water Act, in particular Section 25, the provisions of which are not *pari materia* to the provisions of the Act of 1986 and the Notification of 2006. These provisions are completely different from each other and have different parameters to satisfy. Second and most importantly, the High Court itself in paragraph 25 of the Judgment noticed that the reasoning given by the Learned Single Judge to expand the scope of Section 25(a) of the Water Act object of which was different, i.e., control of water pollution, in its wider magnitude, '*ignores*' (emphasis supplied) that the Act of 1986 deals with this larger issue in the context of 'environment' which has been defined therein to include water, air, land and interrelationship which exists among them and human beings and other living creatures, plants, micro-organism and property. The said Act of 1986 and Rules framed thereunder are wide enough to cover exploitation of water and the impact thereof on the environment. Then the Supreme Court proceeded to hold that the Water Act would not apply to building, housing and residential apartment units as they may not be discharging trade effluents covered under the provision of that Act.

149. It is also not necessary for us to deal with the applicability of the Water Act to such buildings, as that question does not arise before us, hence we leave the question open. However, we have no doubt in stating that the said judgment of the High Court is of no avail to the private Respondents in the present case.

150. A Bench of this Tribunal had the occasion to examine the scope of the Entries in the Schedule to the Notification of 2006 particularly, Entry 8(a), 8(b) and 7(f) in the case of *Vikrant Kumar Tongad* v. *Delhi Tourism and Transportation Corporation*, 2015 ALL (I) NGT Reporter (1) (Delhi) 244, the Tribunal held as under:

> "31. If an activity is allowed to go ahead, there may be irreparable damage to the environment and if it is stopped, there may be irreparable damage to economic interest. In case of doubt, however, protection of environment would have precedence over the economic interest. Precautionary principle requires anticipatory action to be taken to prevent harm. The harm can be prevented even on a reasonable suspicion. It is not always necessary that there should be direct evidence of harm to the environment [*Vellore Citizens Welfare Forum* v. *Union of India*, (1996) 5 SCC 647].
>
> 32. The applicability of 'Principle of Liberal Construction' to socio-welfare legislation like the Act of 1986, thus, could be justified either with reference to the 'doctrine of reasonable construction' and/or even on 'constructive intuition'. In the case of *Haat Supreme Wastech Pvt. Ltd.* v. *State of Haryana*, 2013 ALL (I) NGT REPORTER (2) (DELHI) 140, the Tribunal, while dealing with interpretation of the Regulations of 2006 along with the Schedule and while deciding whether the bio-medical waste disposal plants required Environmental Clearance or not, answered the question in affirmative, that, such plants are covered under Entry 7(d) and while answering so, applied the doctrine of 'reasonable construction' as well as 'constructive intuition'. Doctrine of 'reasonable construction' is intended to provide a balance between development and the environment. The Tribunal held that there was no occasion for the Tribunal to take the scope of Entry 7(d) as unduly restrictive or limited and it gave the entry a wide meaning. It was also held that the Environmental Clearance would help in ensuring a critical analysis of the suitability of the location of the bio-

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medical waste disposal plant and its surroundings and a more stringent observation of parameters and standards by the Project Proponent on the one hand and limiting its impact on public health on the other.

33. 'Development' with all its grammatical variations, means the carrying out of building, engineering, mining or other operations in, on, over or under land or the making of any material change in any building or land and includes re-development. It could also be an activity, action, or alteration that changes underdeveloped property into developed property (*Ref: Wharton's Law Lexicon*, 15th Edn., 2012, *Black's Law Dictionary* 9th Edn., 2009). Reading of Clause 2 of the Regulations of 2006 and the Schedule attached thereto, particularly in light of the above principles, clearly demonstrates that an expression of very wide magnitude has been deliberately used by the framers. They are intended to cover all projects and activities, in so far as they squarely fall within the ambit and scope of the Clause. There does not appear to be any interest for the Tribunal to give it a narrower or a restricted meaning or interpretation. In the case of *Kehar Singh* v. *State of Haryana*, 2013 ALL (I) NGT REPORTER (2) (DELHI) 140, the Tribunal had specifically held that there should exist a nexus between the act complained of and environment and that there could be departure from the rule of literal construction, so as to avoid the statute becoming meaningless or futile. In case of a social or beneficial legislation, the Tribunal should adopt a liberal or purposive construction as opposed to the rule of literal construction. The words used therein are required to be given a liberal and expanded meaning. The object and purpose of the Act of 1986 and the Schedule of Regulations of 2006 thereto was held to be of utmost relevance. In the case of present kind, if no checks and balances are provided and expert minds does not examine and assess the impacts of such projects or activities relating to development, consequences can be very devastating, particularly environmentally. Normally, the damage done to environment and ecology is very difficult to be redeemed or remedied. Thus, a safer approach has to be adopted to subject such projects to examination by Expert Bodies, by giving wider meaning to the expressions used, rather than to frustrate the object and purpose of the Regulations of 2006, causing irretrievable ecological and environmental damage.

34. There can hardly be any escape from the fact that Entries 8(a) and 8(b) are worded somewhat ambiguously. They lack certainty and definiteness. This was also noticed by the Hon'ble Supreme Court in the case of *In Re: Construction of Park at Noida Near Okhla Bird Sanctuary* v. *Union of India (UOI)*, (2011) 1 SCC 744, where the Court felt the need that the Entries could be described with greater precision and clarity and the definition of 'built-up area' with facilities open to the sky needs to be freed from its present ambiguity and vagueness. Despite the above judgment of the Hon'ble Supreme Court, Entry 8(a) and 8(b) were neither amended nor altered to provide clarity or certainty. However, the expression 'built up area' under the head 'conditions if any' in column (5) of the Schedule to the Regulations of 2006, was amended vide Notification dated 4th April, 2011. *Dehors* the ambiguities in these Entries, an interpretation that would frustrate the object and implementation of the relevant laws, would not be permissible. Township and Area Development project' is an expression which would take within its ambit the projects which may be specific in relation to an activity or may be, they are general Area Development projects, which would include construction and allied activities. 'Area Development' project is distinct from 'Building and Construction' project, which by its very language, is specific and distinct. Entries 8(a) and 8(b) of the Schedule to the Regulations of 2006 have been a matter of adjudication and interpretation before the Hon'ble Supreme Court in the case of *In Re: Construction of Park at Noida Near Okhla Bird Sanctuary* v. *Union of India (UOI)*, (supra). In that case, Hon'ble Supreme Court was concerned with the construction of a park in

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Noida near the Okhla Bird Sanctuary. The Hon'ble Supreme Court provided a distinction between a Township project' and Building and Construction project' and held that a Township project' was different, both quantitatively and qualitatively from a mere 'Building and Construction project'. Further, that an Area Development project may be connected with the Township Development project and may be its first stage when grounds are cleared, roads and pathways are laid out and provisions are made for drainage, sewage, electricity and telephone lines and the whole range of other *civic infrastructure*, or an area development project may be completely independent of any township development project as in the case of creating an artificial lake, or an urban forest or setting up a zoological or botanical park or a recreational, amusement or a theme park. The Hon'ble Supreme Court principally held that a zoological or botanical park or a recreational park etc. would fall within the category of Entry 8(b) but, if it does not specify the threshold marker of minimum area, then it may have to be excluded from operation of the mandatory condition of seeking prior Environmental Clearance. The Court held as under:

> "66. The illustration given by Mr. Bhushan may be correct to an extent. Constructions with built up area in excess of 1, 50,000 sq mtrs. would be huge by any standard and in that case the project by virtue of sheer magnitude would qualify as township development project. *To that limited extent* there may be a quantitative correlation between items 8(a) and 8(b). But it must be realized *that the converse of the illustration given by Mr. Bhushan may not be true*. For example, a project which is by its nature and character *an "Area Development project" would not become a "Building and Construction project*" simply because it falls short of the threshold mark under item 8(b) but comes within the area specified in item 8(a). The essential difference between items 8(a) and 8(b) lies not only in the different magnitudes but in the difference in the nature and character of the projects enumerated there under.
>
> 67. In light of the above discussion it is difficult to see the project in question as a "Building and Construction project". Applying the test of 'Dominant Purpose or Dominant Nature' of the project or the *"Common Parlance" test, i.e. how a common person using it and enjoying its facilities would view it, the project can only be categorized under item 8(b) of the schedule as a Township and Area Development project*". But under that category it does not come up to the threshold marker inasmuch as the total area of the project (33.43 hectares) is less than 50 hectares and its built-up area even if the hard landscaped area and the covered areas are put together comes to 1,05,544.49 square metres, i.e., much below the threshold marker of 1,50,000 square metres."

35. Besides dealing with the scope and dimensions of Entries 8(a) and 8(b) of the Schedule afore-stated, the Hon'ble Supreme Court, while referring to the findings given by the CEC in its report, that the Project was located at a distance of 50 mtrs. from the Okhla Bird Sanctuary and that in all probability, the project site would have fallen in the Eco-Sensitive Zone had a timely decision in this regard being taken by the State Government/MoEF, permitted continuation of the project, and held as under:

> "74. The report of the CEC succinctly sums up the situation. Though everyone, excepting the Project Proponents, views the construction of the project practically adjoining the bird sanctuary as a potential hazard to the sensitive and fragile ecological balance of the Sanctuary there is no law to stop it. This unhappy and anomalous situation has arisen simply because despite directions by this Court the authorities in the Central and the State Governments have so far not been able to evolve a principle to notify the buffer zones around Sanctuaries and National Parks to protect the sensitive and delicate ecological balance required

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for the sanctuaries. But the absence of a statute will not preclude this Court from examining the project's effects on the environment with particular reference to the Okhla Bird Sanctuary. For, in the jurisprudence developed by this Court Environment is not merely a statutory issue. Environment is one of the facets of the right to life guaranteed under Article 21 of the Constitution"

36. The above dictum of the Supreme Court clearly laid down a fine distinction between Entries 8(a) and 8(b) of the Schedule to the Regulations of 2006 on one hand, while on the other hand held that mere absence of law cannot be a ground for degrading the environment, as environment is one of the facets of 'Right to Life' as envisaged under Article 21 of the Constitution of India.

37. Thus, this Tribunal has to examine the ambit and scope of Entry 8(b) while keeping in mind the Scheme and Object of the Act of 1986, the Rules of 1986, the Regulations of 2006 along with its Schedule and most importantly right to clean environment as an integral concept of our Constitutional Scheme. The project in question is construction of a 'Signature Bridge' over River Yamuna, connecting eastern and western ends of the city of Delhi and to ensure fast and smooth flow of traffic in that part of the city. This certainly is an Area Development project falling within Entry 8(b) of Schedule to the Regulations of 2006. There is also no dispute that the total constructed area of the 'Signature Project' is 1,55,260 sq. mtrs., which is higher than the threshold marker of 1,50,000 sq. mtrs. This project cannot fall within Entry 7(f) of the Schedule to the Regulations of 2006, as it is neither a national nor a city highway and not even any part thereof.

38. Having held that the project in question is covered under Entry 8(b) of the Schedule to the Regulations of 2006, now we have to consider what relief can be granted to the Applicant in the facts and circumstances of the case. Admittedly, particularly according to the Project Proponent, various other departments have granted them clearances and/or have already issued No Objection Certificates for construction of the said project. MoEF vide its letter dated 14th March, 2007 had informed the Project Proponent that 'bridges' are not covered under the Regulations of 2006 and as such, no prior Environment Clearance was required for commencement of the project. It is in the backdrop of these circumstances that the construction of the project commenced in the year 2007. As of today, more than 80 per cent of the bridge has already been completed. Huge public funds have been spent on this project. It is intended to serve public purpose and is in public interest, namely free and fast flow of traffic between east and west Delhi. Apparently, we cannot attribute any fault or breach of legal duty to the Project Proponent (Respondent No. 1). We do not think it is a case where we should either direct stoppage of project work or direct demolition thereof."

151. These Entries thus need to be construed liberally and given a wider meaning. As already stated above, on their plain reading the projects of whatever nature they may be, but so far as they are covering an area of more than the threshold limit specified in these Entries, they would be covered under the Schedule for which it would be mandatory to obtain prior Environmental Clearance. The contention that the Notification of 2006 and the Schedule would not apply to such projects thus, cannot be accepted. The projects whether residential or multi-purpose would squarely fall within the ambit and scope of the Entries in the Schedule particularly when neither the language of the Notification of 2006 nor the Entries anywhere suggests that the framers intended to exclude such building projects.

152. To obtain Environmental Clearance prior to commencement of any activity or project is the mandate of law. This language has to be given its proper and purposive meaning. It is undoubtedly mandatory. When the law mandates prior approval, it

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ought not to be averred as post activity approval or *ex-post facto* permission. In such cases, courts have to consider whether any remedial measures can be imposed or certain harsher directions are called for. The Supreme Court in the case of *A.P. Pollution Control Board* v. *Prof. M.V. Nayudu (Retd.)*, (2001) 2 SCC 62 was concerned with the interpretation of Section 25 of the Water Act which requires that no person shall, without the previous consent of the State Board, establish or take any steps to establish any industry, operation or process, or any treatment and disposal system or an extension or addition thereto, which is likely to discharge sewage or trade effluent into a stream or well or sewer or on land etc. The Supreme Court held that it was a condition precedent not only for operating the unit but even for establishment of an industry. While considering the aspect that on the basis of material before it, it would not be a fit case for directing no objection from the Pollution Control Board and that even it was not possible to hold that the safeguards suggested by the appellant Board will be adequate, in the light of the Reports. The Supreme Court held that plea of principle of 'promissory estoppel' would not be applicable and grant of permission by other authorities would not accrue to the benefit of the industry in relation to grant of NOC. It will be useful to refer to the relevant paragraphs of the judgment of the Supreme Court:

> "54. On point a(ii), it referred to the definition of 'pollution' in Section 2(c) of the Water Act, Section 2(f) which defines 'sewage effluent' and Section 2(k) which defines 'trade effluent' and observed that the 'pollution potential' of the industry was to be assessed. After referring to the effluents-Commercial Castor oil, Bleaching earth, Activated carbon. Nickel catalyst, Hyflo supercel, Sulphuric Acid, Caustic Soda, Methanol, Calcium Oxide, Alum - in all 1463 MTs per month and noticed that the monthly requirement of Hydrogen was 76 500 NM. As the industry is coal based, large quantity coal is required. It would produce huge quantities of BSS, HCO, HSA, Methyl, Fatty acids, Epoxidise, Glyceren etc. Hydroxy Stearic Acid, methyl Hydroxy Stearic Acid and methanol are serious health hazardous. Items in part II list of Schedule I to the 'Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989' are the raw materials and RW2 (Dr. G.S. Siddhu) in his evidence agreed that these are hazardous (toxic) chemicals. The solid effluents generated every day are (i) spent bleaching earth 1250 Kgs, (ii) spent bleaching carbon 250 kgs, (iii) spent nickel catalyst '15 kgs. and (iv) sodium sulphate 3820 Kgs. (12-HSA) and 170 kgs. (from CME). Monthly turn out of effluents will be 400 MT. Every day 55 kgs. of nickel is consumed. Every day, 27,830 litres of water are to be used and normally the effluent will carry all these hazardous substances, including nickel. 'As it is, said that the water used could be reused for cultivation of lands in the premises of the industry, the toxic chemicals which get lodged in the surface layers of the soil will flow down in storm run offs or percolate into the ground water, to ultimately reach the water body of the two reservoirs. The NEAA further stated that Dr. Santappa in his evidence as RW-1 made admissions regarding gaseous effluents-fly ash, S02 CO2 Oxides of Nitrogen, Oxides of Sulphur and suspended particulate matter. The solid and liquid effluents could reach the lakes through seepage. The factory cannot be located in the catchment area because run-offs due to rain will carry hazardous material along surface and through seepage. The NEAA adverted to the 'Drainage Basic Analysis' by the Central Ground Water Board, to the effect that the Basin "has moderate run-off and moderately high permeability of the terrain. As such the amount of infiltration is considerably high". The said Report shows that rainfall in 796 mm (heaviest being 1326 mm) and there is every likelihood of the solids being "transported down along the gradient". The said Report of Central Ground Water Board, referred to "dolerite dykes" in the vicinity and the possibility of flow even more. Having regard to the location of the dyke and the speed and angle, the polluted water could reach

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Himayat Sagar which is hardly 2 m bgl. since the dam height is 1763.50 feet. Satellite maps of NSRA were also examined and relied for this purpose. Among the substances stored are nickel, sulphuric acid, HCA, which are well-known 'hazardous' substances.

57. The NEAA, then took up issue (b) as to the likelihood of the industry affecting the sensitive catchment area. It referred to the Expert Committee Report of the HMWSSB and its recommendations which led to the issuance of the GO 192 dated 31.3.94 and GO 111 dated 8.3.96. The NEAA concluded that the "establishment of any chemical industry, carries with it, the imminent dangers of the chemicals or chemical effluents polluting the water of Himayat Sagar and Osman Sagar".

62. In the light of the above exhaust he scientific Reports of the National Environmental Appellate Authority, New Delhi the Department of Chemical Technology, Bombay University and the National Geophysical Research Institute, Hyderabad - it cannot be said that the two lakes will not be endangered. The package of the IICT - which did not deal with the elimination of effluent effects, the opinion of Dr. Santappa, the view of Director of Industries, and the view of the Government of Andhra Pradesh must be held to be base on insufficient data and not scientifically accurate.

63. It is no doubt stated by the 7th Respondent that it is prepared to adopt the safety measures suggested by the appellant Board on 1.7.97 and also those suggested by Dr. Bhowmick, by trying to see that during storage of raw materials and after release of the hazardous liquids, they are put in containers and removed.

64. In respect of these drinking water reservoirs which cater to the needs of about 70 or 80 lakhs population, we cannot rely upon a bare assurance that care will be taken in the storage of serious hazardous materials. Nor can we rely on an assurance that these hazardous substances would be effectively removed without spillage. It is, in our view, not humanly possible for any department to keep track whether the pollutants are not spilled over. This is exactly where the 'precautionary principle' comes into play. The chance of an accident, within such close proximity of the reservoirs cannot be ruled out, as pointed out in the Reports. Thus, we are led to the inference that there is a very great risk that these highly hazardous material could seep into the earth and reach the tanks, after passing through the dolerite dykes, as pointed by the National Geophysical Research Institute, Our inference from facts and the reports is that of a reasonable person, as pointed out in the main judgment in *A.P. Pollution Board* v. *Prof. M.V. Nayudu*.

65. On the basis of the scientific material now obtained by this Court from three highly reputed sources, this is certainly not a fit case for directing grant of NOC by the Pollution Control Board. It is not also possible to hold that the safeguards suggested by the appellant Board-pursuant to the direction of the Government dated 3.7.97, will be adequate, in the light of the Reports. We therefore hold that in the facts of this case, the Board could not be directed to suggest safeguards and there is every likelihood that safeguards could fail either due to accident, as stated in the report, or due to human error. We, therefore, hold on point 3 against the 7th Respondent-industry.

66. This point deals with the principle of promissory estoppel applied by the appellate authority, on the ground that once building permission and permission for change of land use were granted, the appellant Board could not refuse NOC, The learned Additional Solicitor General, Sri R.N. Trivedi referred to the amendment to Section 25(1) in this connection.

67. Under Section 25(1) of the Water (Prevention and Control of Pollution) Act, 1974 as it original stood, Subsection (1) thereof read as follows:

Section 25(1): Subject to the provisions of this section, no person shall, without

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the previous consent of the State Board, bring into use any new or altered outlet for the discharge of sewage or trade effluent into a stream or well or begin to make any new discharge of sewage or trade effluent into a stream or well".

By Central Act 53/1988, the sub-section was amended and reads as follows:

Section 25(1): Subject to the provisions of this section, no person shall, without the previous consent of the State Board - (a) establish or take any steps to establish any industry, operation or process, or any treatment and disposal system or any extension or addition thereto, which is likely to discharge sewage or trade effluent into a stream or well or sewer or on land (such discharge being hereafter in this section referred to as discharge of sewage) or (b) bring into use any new or altered outlet for the discharge of sewage, or (c) bring to make any new discharge or sewage"

After the amendment, the prohibition now extends even to 'establishment' of the industry of taking of steps for that process and therefore before consent of the Pollution Board is obtained, neither can the industry be established nor any steps can be taken to establish it.

68. The learned Additional Solicitor General of India, Sri Trivedi is right in contending that the 7th Respondent industry ought not to have taken steps to obtain approval of plans by the Gram Panchayat, nor for conversion of land use by the Collector, nor should it have proceeded with civil work in a installation of machinery. The action of the industry being contrary to the provisions of the Act, no equities can be claimed.

69. The learned Appellate Authority erred in thinking that because of the approval of plan by the Panchayat, or conversion of land use by the Collector or grant of letter of intent by the Central Government, a case for applying principle of "promissory estoppel" applied to the facts of this case. There could be no estoppel against the statute. The industry could not therefore seek an NOC after violating the policy decision of the Government. Point 4 is decided against the 7th Respondent accordingly."

153. Wherever anyone violates the law and flouts the directions issued by the regulatory authority and other concerned authorities, commences construction without even applying for Environmental Clearance and completes the project or activity extensively, two fold consequences would follow. First, that it would render itself liable for imposition of penalties for contravention of the Act, Rules, Orders and directions in terms of Section 15 of the Act of 1986. The other, for issuance of directions in regard to the demolition or grant of consent subject to such conditions as may be considered appropriate by the authorities or the Tribunal. Tribunal exercising its appellate power and Original jurisdiction in terms of Section 14 and 16 of the Act of 2010, has the powers of merit and judicial review and is competent to issue such directions as it may deem necessary in terms of the said provisions including Section 18 of the NGT Act, 2010. The Court and Tribunals, particularly, in such cases of *fait accompli* have adopted a more practical approach which would permit the remaining work of the project to be completed while providing stringent safeguards in the interest of the environment as well as issuing orders which would vest the Project Proponent with civil consequences. In the case of *Sterlite Industries (India) Ltd.* v. *Union of India (UOI)*, (2013) 4 SCC 575, Supreme Court held that the appellant company was liable to pay compensation of Rs. 100 crores for polluting the environment and operating its industry without renewal of consent by the Board. In this case, industry had obtained consent to operate from the Board prior and subsequent to the period when it operated without consent of the Board. After passing of the judgment of the Supreme Court in this very case, the Tribunal directed the industry to take precautionary measures as well as directed the Pollution Control Board to impose more stringent

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conditions while permitting the industry to operate (*Sterlite Industries (India) Ltd.* v. *Tamil Nadu Pollution Control Board*, 2013 ALL (I) NGT REPORTER (DELHI) 368).

154. Further, in the case of *Sarang Yadvadkar* v. *The Commissioner, Pune Municipal Corporation*, 2013 ALL (I) NGT REPORTER (DELHI) 299, the Tribunal had passed remedial and prohibitory directions in the project underway. The Corporation was constructing elevated road in the floodplain. Major part of the project had already been constructed. The Tribunal directed partial demolition of the raised structure and further directed the Corporation to construct the bridge on pillar so that there was no obstruction to the free flow of water and the course of the river was not adversely affected. This order of the Tribunal was challenged before the Supreme Court in Civil Appeal No. 3445 of 2015 and was dismissed by the Supreme Court vide its orders dated 12th February, 2015.

155. In somewhat similar situations like the one in hand, the Tribunal in the case of *Forward Foundation* v. *State of Karnataka*, Original Application No. 222 of 2014 decided on 7th May, 2015, where the Project Proponents had raised the construction on the wet lands and the Rajakaluves (storm water drains), affecting the same, without obtaining prior Environmental Clearance. The Tribunal while appointing a special Committee referred to it various questions relating to environment and ecology and prohibited the Project Proponents from creating any third-party interests. The Tribunal further imposed 5 per cent of the project cost as environmental compensation on Project Proponent for degrading and damaging the environment and ecology of the area in question and had required the Committee to submit a report to the Tribunal. The Project Proponent in this case, had preferred a statutory appeal before the Supreme Court and *inter alia* took up the plea that they were not heard on merits and imposition of penalties was not proper. The Supreme Court vide its order dated 20th May, 2015 passed in the case of *Core Mind Software and Services Pvt Ltd.* v. *Forward Foundation*, Civil Appeal No. 4829/2015, granted liberty to them without setting aside the judgment and various directions issued by the Tribunal and also to approach the Tribunal for recalling of Order and in the meanwhile stayed the direction pertaining to payment of compensation. The order of the Supreme Court reads as under:

"ORDER

> One of the main contentions raised by the appellants in these appeals is that though the Tribunal had heard the matter only on preliminary issues and no arguments on merit were advanced, final judgment decides the merits of the disputes as well and above all a penalty of Rs. 117.35 crores against original Respondent No. 9 (the appellant in C.A. No. 4832 of 2015) and Rs. 22.5 crores against Original Respondent No. 10 (the appellant in C.A. No. 4829/2015) is imposed.
>
> On the aforesaid averment, we feel that it would be more appropriate for the appellant to file an application before the Tribunal with the prayer to recall the order on merits and decide the matter afresh after hearing the counsel for the parties, as the Tribunal knows better as to what transpired at the time of hearing.
>
> With the aforesaid liberty granted to the petitioners, the appeals are disposed of. Certain preliminary issues are decided against the appellants which are also the subject matter of challenge. However, it is not necessary to deal with the same at this stage. We make it clear that in case the said application is decided against the appellants or if ultimately on merits, it would be open to the appellants to challenge those orders by filing the appeal and in that appeal all the issues which are decided in the impugned judgment can also be raised.
>
> The counsel for the appellants state that they would file the requisite application within one week. Till the said application is decided by the Tribunal, there shall be stay of the direction pertaining the payment of aforesaid penalty.

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Mr. Raj Panjwani points out that the Tribunal has allowed the appellants to proceed with the construction only on the payment of the aforesaid fine/penalty. We leave it to the Tribunal to pass whatever orders it deems fit in this behalf, after hearing the parties."

156. The Applicants filed an application before the Tribunal upon which notice was issued, whereby the Tribunal while continuing the stay on the condition of payment of compensation, directed the Committee to file its report before the next date of hearing in terms of the judgment.

157. From the above judgments of the Supreme Court and the Tribunal, it is clear that in cases of the present kind, it would not be advisable to direct complete demolition of such properties. The Project Proponents claim to have invested huge amounts in raising these projects where it had obtained permission from other authorities and most importantly interest of 3rd party have been created in these properties. The Tribunal has to take a balanced approach while applying the principle of sustainable development and precautionary principle. Even in the case of *A.P. Pollution Control Board* (supra), the Supreme Court, laid great emphasis on the precautionary principle on the premise that it is always not possible to judge the environmental damage.

158. The Precautionary Principle may lose its material relevancy where the projects have been completed and even irreversible damage to the environment and ecology has been caused. The situation may be different when invoking this principle in cases of partially completed projects, it would become necessary to take remedial steps for protection of environment without any further delay. At this stage, it may still be possible to take steps while any further delay would render it absolutely impracticable. Precautionary Principle is a proactive method of dealing with the likely environmental damage. The purpose always should be to avert major environmental problem before the most serious consequences and side effects would become obvious. To put it simply, Precautionary Principle is a tool for making better health and environmental decisions. It aims to prevent at the outset rather than manage it after the fact. In some cases, this principle may have to be applied with greater rigor particularly when the faults or acts of omission, commission are attributable to the Project Proponent.

The ambit and scope of the directions that can be issued under the Act of 1986 can be of very wide magnitude including power to direct closure, prohibition or regulation of any industry, operation or process and stoppage or regulation of supply of electricity or water or any other services of such projects. The principle of sustainable development by necessary implication requires due compliance to the doctrine of balancing and precautionary principle.

159. In appropriate cases, the Courts and Tribunals have to issue directions in light of the facts and circumstances of the case. The powers of the higher judiciary under Article 226 and 32 of the Constitution are very wide and distinct. The Tribunal has limited powers but there is no legislative or other impediment in exercise of power for issuance of appropriate directions by the Tribunal in the interest of justice. Most of the environmental legislations couched the authorities with power to formulate program and planning as well as to issue directions for protecting the environment and preventing its degradation. These directions would be case centric and not general in nature. Reference can be made to judgment of the Supreme Court in the case of *M.C. Mehta* v. *Union of India*, JT 1987 (1) SC 1, *Vineet Narain* v. *Union of India (UOI)*, JT 1997 (10) SC 247 and *University of Kerala* v. *Council, Principals', Colleges, Kerala*, JT 2009 (14) SC 283.

160. In light of the above, even if the structures of the Project Proponents are to be protected and no harsh directions are passed in that behalf, still the Tribunal would be required to pass appropriate directions to prevent further damage to the environment

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on the one hand and control the already caused degradation and destruction of the environment and ecology by these projects on the other hand. Furthermore, they cannot escape the liability of having flouted the law by raising substantial construction without obtaining prior Environmental Clearance as well as by flouting the directions issued by the authorities from time to time. The penalties can be imposed for such disobedience or noncompliance. The authorities have already initiated action against three of the Project Proponents and have taken proceedings in the Court of competent jurisdiction under Act of 1986. However, no action has been taken against other four Project Proponents as of now. Penalties can be imposed for violation in due course upon full trial. What requires immediate attention is the direction that Tribunal should pass for mitigating as well as preventing further harm. As far as further remedial measures, alterations, demolition or variation in the existing structure in the interest of environment and ecology which is required to be taken to preserve the environment are to be suggested by the Committee that we propose to constitute. However, as far as damage that has already been caused to the environment and ecology by the illegal and unauthorized action of the Project Proponents, they are required to pay compensation for its restoration and restitution in terms of Section 15 of Act of 2010. Needless to notice here that in this case, the Project Proponents were heard at great length on facts and merits of the case.

161. We may specifically notice here that all the Project Proponents had filed contentions and documents in support of their respective case. They addressed the Tribunal at length on factual matrix of the case as well as on law. Various contentions and claims raised by the Project Proponents before the Tribunal have been deliberated in detail.

162. In all cases, SEIAA has passed an order directing delisting of applications for Environmental Clearance which is sought to be questioned by the Project Proponents. We do not find any fault on the part of SEIAA and other official Respondents in delisting the applications for obtaining Environmental Clearance. Just one reason is enough to de-list and to reject these applications which is, that they started construction of their respective projects without obtaining Environmental Clearance and in some cases without even applying for grant of Environmental Clearance. All of them violated the direction of SEIAA as well as their own undertaking and apology to SEIAA that they would not raise any construction till grant of Environmental Clearance. There is more than ample evidence on record that such violations have been committed. Projects are squarely covered under the Notification of 2006 and, therefore, we find no infirmity in the order of SEIAA in delisting applications of Project Proponents for grant of Environmental Clearance.

163. In view of the above detailed discussion, we pass the following order and directions:

1) We hold and declare the Office Memoranda dated 12th December, 2012 and 27th June, 2013 as *ultra vires* the provisions of the Act of 1986 and the Notification of 2006. They suffer from the infirmity of lack of inherent jurisdiction and authority. Resultantly, we quash both these Office Memoranda.

2) Consequently, the above Office Memoranda are held to be ineffective and we prohibit the MoEF and the SEIAA in the entire country from giving effect to these Office Memoranda in any manner, whatsoever.

3) We hold and declare that the resolution/orders passed by the SEIAA, de-listing the applications of the Project Proponents, do not suffer from any legal infirmity. These orders are in conformity with the provisions of the Act of 1986 and the Notification of 2006 and do not call for interference.

4) We hereby constitute a Committee of the following Members:

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a) Member Secretary of SEIAA, Tamil Nadu.
b) Member Secretary, Tamil Nadu Pollution Control Board.
c) Professor from Department of Civil Engineering, Environmental Branch, IIT Bombay.
d) Representative not below the rank of Director from the Ministry of Environment and Forest (to be nominated in three days from the date of pronouncement of this judgment).
e) Representative of the Chennai Metropolitan Development Authority.

5) Member Secretary of the Tamil Nadu Pollution Control Board shall be the Nodal Officer of the Committee for compliance of the directions contained in this judgment.

6) The above Committee shall inspect all the projects in question and submit a comprehensive report to the Tribunal. This comprehensive report shall relate to the illegal and unauthorized acts and activities carried out by the Respondents. It shall deal with the ecological and environmental damage done by these projects. It would further deal with the installation of STP's and other antipollution devices by the Project Proponents, including the proposed point of discharge of sewage and any other untreated waste. The Expert Committee would also state in regard to the source of water during operation phase and otherwise, use of energy efficient devices, ecologically and environmentally sensitive areas and details of alteration of and its effect on the natural topography, the natural drainage system etc. The Committee shall also examine the adequacy of rainwater harvesting system and parking area and if at all they have been provided. The report shall also deal with the mechanism provided for collection and disposal of municipal solid waste at the project site.

7) The Committee shall further report if the conditions stated in the planning permission and other permissions granted by various authorities have been strictly complied with or not.

8) The Committee shall also report to the Tribunal if the suggestions made by the SEIAA in its meetings adequately takes care of environment and ecology in relation to these projects.

9) What measures and steps, including demolition, if any, or raising of additional structures are required to be taken in the interest of environment and ecology?

10) All the Project Proponents shall pay environmental compensation of 5 per cent of their project value for restoration and restitution of the environment and ecology as well as towards their liability arising from impacts of the illegal and unauthorized constructions carried out by them. They shall deposit this amount at the first instance, which shall be subject to further adjustment. Liability of each of the Respondents is as follows:

Mr. Y. Pondurai.: Rs. 7.4125 crores.
M/s Ruby Manoharan Property Developers Pvt. Ltd.: Rs. 1.8495 crores.
M/s Jones Foundations Pvt. Ltd.: Rs. 7 crores.
M/s SSM Builders and Promoters: Rs. 36 crores.
M/s SPR and RG Construction Pvt. Ltd.: Rs. 12.5505 crores.
M/s Dugar Housing Ltd.: Rs. 6.8795 crores.
M/s SAS Realtors Pvt. Ltd.: Rs. 4.5 crores.

11) The compensation shall be payable to the Tamil Nadu Pollution Control Board within three weeks from the date of the pronouncement of this judgment. The amounts shall be kept in a separate account and shall be utilised by the Boards for the above stated purpose and subject to further orders of the Tribunal.

12) The above environmental compensation is being imposed on account of the

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intentional defaults and the conduct attributable only to the Project Proponents. We direct that the Project Proponents shall not pass on this compensation to the purchasers/prospective purchasers, as an element of sale.

13) After submission of the report by the Expert Committee, the Tribunal would pass further directions for consideration of the matter by SEIAA in accordance with law.

14) All the project proponents are hereby prohibited from raising any further constructions, creating third party interest and/or giving possession to the purchasers/prospective purchasers without specific orders of the Tribunal, after submission of the report by the Expert Committee.

The report shall be submitted to the Registry of the Tribunal within a period of 45 days from the date of pronouncement of this judgment. Thereupon, the Registry would place the matter before this Tribunal for further appropriate orders and directions.

Liberty to the parties to move the Tribunal for any further directions and/or clarifications, if they so desire.

164. The above Appeal and Applications are accordingly disposed of. However, in the facts and circumstances of the case, we leave the parties to bear their own cost.

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2016 SCC OnLine NGT 4213

Partly reversed in *Goel Ganga Developers (India) (P) Ltd.* v. *Union of India*, (2018) 18 SCC 257

In the National Green Tribunal
(Western Zone) Bench, Pune
(BEFORE DR. JAWAD RAHIM, J.M. AND DR. AJAY A. DESHPANDE, E.M.)

In the Matter of:

Mr. Tanaji Balasaheb Gambhire, Age : Adult, Occupation : Service R/o. Flat No. 16, CTS-296, Laxmi Apartment, Near Shivaji Maratha High School, Whiter House Lane, Shukrawar Peth, Pune - 411 002. ... Applicant;

Versus

1. The Union of India, Through the Ministry of Environment & Forest, Government of India, Paryavaran Bhawan, CGO Complex, Lodhi Road, New Delhi-110 003.
2. The Principal Secretary, Environment Department, Government of Maharashtra, 15 th Floor, New Administrative Building, Mantralaya, Mumbai - 400 032.
3. State Level Environment Impact Assessment Authority Through Member Secretary 15 th Floor, New Administrative Building Mantralaya, Mumbai - 400 032.
4. Maharashtra Pollution Control Board Through its Member Secretary, Kalptaru Point, 3 rd Floor, Near Sion Circle, Opp. Cine Planet Cinema, Sion (E), Mumbai.
5. Maharashtra Pollution Control Board Through its Regional Officer, SRO-1 Jog Centre, 3 rd Floor, Mumbai-Pune Road, Wakadewadi, Pune - 411 003.
6. Pune Municipal Commissioner PMC Building, Shivajinagar, Pune - 411 005.
7. City Engineer Pune Municipal Corporation, PMC Building, Shivajinagar, Pune - 411 005.
8. District Collector - Pune President - District Environment Committee, Pune.
9. M/s. Goel Ganga Developers India Pvt. Ltd. 3 rd Floor, San Mahu Complex, Opp. Poona Club, 5, Bund Garden, Pune - 411 001 ... Respondents.

Application No. 184/2015 (WZ) [M.A. No.77/2016, M.A. No.194/2016, M.A. No.186/2016]

Decided on September 27, 2016

Counsel for Applicant(s):

Mr. Shriram P. Pingle, Advocate

Counsel for Respondent(s):

Mr. S.S. Sanyal, Advocate a/w Mrs. Supriya Dangare, Advocate for Respondent Nos. 4 and 5

Mr. P.S. Suryavanshi, Adv. for Respondent Nos.6 &7

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Mr. S.V. Mishra, Senior Advocate a/w Mr. Sachin S. Bhalerao, Advocate for Respondent No. 9

ORDER / JUDGMENT

1. This Application, numbered as 184/2015 invoking jurisdiction of this Tribunal, is under Section 14 and 15 of the National Green Tribunal Act, 2010 (for short 'NGT Act'). The Applicant Tanaji Balasaheb Gambhire has sought certain directions against the 9 th Respondent - Project Proponent (PP) M/s Goel Ganga Developers India Private Limited who is said to have envisaged construction venture to construct a commercial and residential complex.

2. In the Application, the Applicant has sought following directions:

A. Direct the Respondents to demolish the illegal structures at the site in question and restore the area to its original position.

B. Direct the State Level Impact Assessment Authority and the Maharashtra State Pollution Control Board to initiate appropriate action against the project proponent for violation of the provisions of EIA notification, 2006 and other applicable laws.

C. Direct Respondent No.2 to take appropriate action against the State Level Impact Assessment Authority for granting environment clearance in violation of the provisions of EIA Notification, 2006.

D. Direct the State Level Impact Assessment Authority and the Maharashtra State Pollution Control Board to disclose all such projects which have been granted post facto clearance or have been constructed without taking prior environment clearance.

E. Having regard to the damage to the public health, property and environment, principles of sustainable development and polluter pays principles and direct the Respondent No.9 to deposit a heavy amount of compensation to the environment relief fund.

3. In support of the reliefs so sought, he has averred factual and legal aspects to which we shall refer briefly now.

a. The 9 th Respondent obtained Environmental Clearnace (for short 'EC') for its project at Survery Nos.35 to 40 in Village Vadgaon Budruk, Sinhagad Road, Pune. The project conceived and approved by said EC is to construct 12 buildings with stilt, basment plus 11 floors vertically for 552 flats, 50 shops and 34 offices. The total plot area is 79,100 sq.mts while the total built-up area is to 57,658.42 sq.mtrs.

b. The EC was obtained by the 9 th Respondent-PP on 4 th April, 2008 and thereafter, PP has commenced construction activity. The Applicant has not brought in question the EC dated 4 th April, 2008 but has other serious grievances.

c. The Applicant would contend that after the project of 9 th Respondent-PP has sufficiently progressed, the Member Secretray of Maharashtra Pollution Control Board (MPCB) caused inspection of the construction activity on 31 st August, 2015 and thereafter, granted a personal hearing to the Respondent No.9-PP in respect of MPCB findings. The Minutes of the Meeting held on 31 st August, 2015 show that the Regional Officer of the MPCB had reported non compliance of the terms on which EC was granted to the 9 th Respondent. In that, there is clear statement that though the EC was for construction of 12 buildings but the Respondent No.9-PP has built 15 buildings and increased number of flats from 552 to 738 as also the number of shops was increased from 84 to 111.

d. The Minutes of the Meeting further show that the representative of PP had accepted the non compliance to the conditions of EC in increasing the

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construction of number of buildings, number of flats, offices and shops.

e. The Minutes of the Meeting would also record that consent for additional building of Ground plus 30 Floor was not taken though the civil work of its construction was in progress.

4. The Applicant relies on such material information recorded in the Meeting to contend that there was clear finding on inspection by the competent authority i.e. MPCB that the Respondent No.9-PP had not complied with the conditions of the EC granted. Reference is also made to the fact that MPCB having noticed such non-compliance had directed the Respondent No.9-PP to voluntarily stop construction activity till modified EC is obtained. Consequently, having noticed deliberate violation of the conditions of EC and non-compliance of its voluntary closure directions, MPCB had issued direction not only for stopping further construction activity but directed disconnection of electricity to the project by its Order dated 30 th September, 2015.

5. The Applicant further points out that despite such lapses on the part of the Respondent No.9-PP, it managed to get the Occupancy Certificate for part of the project which is complete and has virtually occupied it. This, according to the Applicant, is in total violation of the legal mandate that mandatory consent of operate should be obtained before the project activity is undertaken.

6. Amongst other issues raised he points out to the fact that building plan for construction activity of the project was revised by Respondent No.9-PP nine times. This, according to him, illustrates the significant modification in the scale of construction in terms of area, plinth area and floor heights, besides change in lay-out scheme. Refering to condition No.5 of the EC. It is alleged that the scope of the project in terms of built up area has changed. Moreover, the project lay-out as well as number of buildings also has substantially changed. Thus, the Respondent No.9-PP was obliged to obtain modified EC before undertaking such activity which is in total deviation to the original EC. Citing numerous statistical data, the Applicant would further claim that the construction activity carried out by the Repsondent-9 PP has grossly exceeded the scope of the project as approved by EC in terms of built up area and configuration of project.

7. Based on these facts, he would contend that the project activity is not as per the proposal which was considered and approved by Ministry of Environment and Forest while granting the original EC on 4 th April, 2008 and therefore there is gross violation of EC condition.

8. The other contention urged by the Applicant is to indicate failure on the part of the Statutory Authorities like Pune Municipal Corporation (PMC), State Level Environment Impact Assessment Authority (SEIAA), Department of Environment, State of Maharashtra (DoE) in discharge of its statutory functions. In this regard, he contends that Pune Municipal Corporation (for short 'PMC') was well aware of such violations but granted Completion Certificate. Reference was made to page-36 of the Rejoinder where it is stated that violation of noncompliance of EC was well within the knowledge of the concerned officer of PMC. He then refers to the action taken by Deputy Engineer of Building Construction Department of PMC who having realised the blanket violation of EC then, had directed Respondent No.9-PP on 20.2.2015 not to continue construction activity without obtaining amended EC. It is alleged, despite such clear direction of the Deputy Engineer, the Respondent No.9-PP continued construction as per its revised approved lay-out by PMC which depended totally on the validity of the EC. Thus, he contends that grant of revised lay-out plan by PMC itself is not tenable and consequently the construction activity being illegal needs to be restrained.

9. In this regard he would refer to the order passed by PMC imposing fine of Rs. 1,57,00,000/- for illegal occupancy of part of the project building which Respondent

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No.9-PP without remorse has accepted and deposited on 23 rd October, 2015.

10. The Applicant has further alleged total inaction on the part of SEAC and SEIAA and to substantiate his contention refers to the material on record which shows that SEAC sub-committee visited the project site on 29 th February, 2014 with an object to verify compliance of the 2008 EC conditions. During such visit, it noticed non-compliance of the EC by Respondent No.9-PP but conveniently failed to record that Respondent No.9-PP had increased the project activity in terms of buildings, built-up area, etc. The report of SEAC Committee is described as cursory, casual, unscientific and against realities. It is only later that SEIAA on the basis of query/complaint of Applicant, on 3 rd August, 2015 took action and in this regard proposed directions were issued under provisions of Section 5 of Environment (Protection) Act, 1986, by State Department of Environment (DOE) in August 2015 and thereafter, no follow up action was taken in terms of the directions. SEIAA which is competent to take independent decision and action against the violators of EC conditions and Project Proponents has failed to initiate any action. What he tries to say is that SEIAA, being specialised body, should have used its conferred power to take action rather than referring or depending on the action taken by Department of Environment. Thus, he contends that SEAC, SEIAA and DOE have jointly and severally failed to discharge its statutory function in taking appropriate legal permissible action against Respondent No.9-PP restraining such illegal activity for non-compliance thereby enabling the Respondent No.9-PP to further violate the EC mandate. He would contend that by keeping the proceedings before it, SEIAA has virtually allowed the Project Proponent to proceed with the illegal construction thereby wandering DoE direction issued on 3 rd August, 2015.

11. On above set of facts, he has sought certain reliefs as recorded by us in the para supra.

12. On admission of this Application, Notice was caused to all the Respondents who are total nine in numbers. Amongst them Union of India through Ministry of Environment and Forest -1 st Respondent, The Principal Secretary, Environment Department -2 nd Respondent, State Level Environment Impact Assessment Authority - 3 rd Respondent, Maharashtra Pollution Control Board - 3 rd Respondent, Regional Officer, Maharashtra Pollution Control Board - 5 th Respondent, Pune Municipal Corporation - 6 th Respondent, City Engineer, Pune Municipal Corporation - 7 th Respondent, District Collector, Pune - 8 th Respondent, M/s. Goel Ganga Developers India Pvt. Ltd. - 9 th Respondent. Amongst all, initially the Respondent No.9-PP resisted the proceedings but we have noticed a very strange conduct of the Secretary of Department of Environment falling in line with the Respondent No.9-PP as could be seen from the conduct.

13. The record would show that all the Respondents have responded to the Notice in this Application as recorded by us on 23 rd December, 2015. Certain observations made in the preamble of that Order at paragraph Nos.1 and 2, would itself show that this Tribunal had taken a note 06 the manner in which the Respondents reacted to initiation of the action by the Applicant. In para No 2-3 at page-2 of the Order and the last para on the same page, we have summarised what we noticed. Ultimately being convinced that the Applicant had made out prima facie case for grant of interim relief, lest, the Respondent No.9-PP emboldened by the inaction on the part of Statutory Authorities as likely to proceed with the construction activity which was shown by the Applicant to be legally impermissible if restrained, orders were passed against Respondent-9 PP. We had also simultaneously directed PMC to ensure that no further construction of whatsoever nature is carried out and called for report from it regarding what is the status of construction at the site within 10 days. As is expected, Respondent No.9-PP entered contest and sought vacating the Interim Order but when confronted with certain factual aspects, made a statement that no construction activity is going on and it has stopped the construction. We feel it will be worth to record that

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we have taken into consideration contention urged on behalf of the Respondent No.9-PP to seek vacating of the order but we opined that let the pleadings be completed to allow all stakeholders who virtually prosecute and defend action through this Application. We also see from proceeding, considering the urgency, this Application was initially heard on merit in part. This is exactly what the Respondent No.9-PP also submitted on 16 th March, 2016 persuading us to expedite the hearing.

14. We have thus heard substantially the learned Counsel for the Applicant, Respondent Nos.1 to 8 and the learned Senior Counsel Mr. Mishra assisted by Mr. Sachin Bhalerao for the Respondent No.9-PP.

15. We have given our careful consideration to all the legal and factual contentions urged by learned Advocates. While the learned Counsel for the Applicant relies mainly on the original EC dated 4 th April, 2008 and present factual aspect showing there is marked difference in the project itself and the project has virtually changed from what it was originally conceived in terms of increase of number of buildings, plinth area, shops and other commercial activities. We have summarized the contentions of the Applicant and would like to repeat it as the same is relied upon by the Applicant.

16. Now, we need to refer to contentions of Mr. Mishra, the learned Senior Counsel for Respondent No.9-PP who in his persuasive eloquence asserted that project as conceived itself was legally permissible and during construction activity they have ensured there is absolutely no violation of any statutory regulations. He would contend that present construction activity, in terms of the FSI i.e BUA, is within the legally permissible limit and thus, refers to the numerical numbers by which the extent is measured. The affidavit filed in this case by Mr. Atul Jaiprakash Goel representing Respondent No.9-PP contains a statement in para-14 to the fact that EC dated 4 th April, 2008 issued by MoEF was to allow construction activity comprising of the utilization of the F.S.I (Floor Space Index)/BUA, to the extent of 57,658.42 sq.mtrs., based on the conceptual plan prepared by Respondent No.9. He further states that granting of permission to utilize FSI to the extent of 57,658.42 sq.mtrs was will within the EC limits.

17. On the basis of such statement, Mr. Mishra would submit that at any stretch of imagination, the contention of the Applicant cannot be sustained because he is trying to allege violation when the constructed structure is well within sanctioned FSI/BUA of 57,658.42 sq.mtrs.

18. He would further rely on an order passed by Secretary, Department of Environment on 31 st May, 2016 No.C.A.-2015/CR-6/TC-3 which is produced before this Tribunal after this case was reserved for judgment on 23 rd May 2016. Relying on it, he would submit that SEIAA who had issued direction on 30 th August, 2015 to stop construction activity had referred the matter to Department of Environment for considering explanation of Respondent No.9-PP and pass appropriate order. He submitted that such an exercise by DOE/SEIAA was in terms of the Order passed by this Tribunal on 23 rd February, 2016 in M.A. No.21/2016 to the following effect:

> "*Heard. Perused record.*
>
> *Service of Notice is waived on behalf of MoEF&CC. Replies have been filed by Respondent Nos. 2, 3, 4, 5, 6, 7 & 9. Law Officer appearing on behalf of Respondent No. 8 submits that reply filed by Respondent No. 5 MPCB is adopted as the reply of Respondent No. 8. Rejoinder dated 22nd February, 2016 to the reply of Respondent No. 9 is tendered. Copies of the rejoinder have been furnished to the Respondents.*
>
> *M.A. No.21/2016*
>
> *This Application has been moved for a mandate not to issue ex-post facto environmental clearance to Project Proponent Respondent No. 9. Learned Counsel appearing on behalf of Authorities Respondent Nos.2 and 3 makes a statement that they will be dealing with the application moved by Respondent No. 9 for grant of*

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environmental clearance strictly in accordance with law. In view of the statement made, we do not wish to interfere in the process of law.

Learned Counsel appearing for the Applicant submits that the Application be disposed of in terms of the statement made by the concerned Authorities Respondent Nos.2 and 3. Accordingly, this Applications stands disposed of with no order as to costs.

M.A. No.21/2016 thus stands disposed of.

E.A. No. 5/2016

As regards Execution Application No. 5/2016, learned counsel appearing on behalf of Applicant seeks liberty to carry out amendment in the Application so as to bring into focus the violation of the interim order dated 23rd December 2015, in relation to specific building construction and remedy available under the National Green Tribunal Act, 2010, before this Tribunal. Liberty granted to the Applicant to make necessary amendment in E.A.. Amendment shall be made within a week. Copies of the amended Application shall be furnished to the learned counsel appearing on behalf of Respondents. Respondents may file replies to the amended Application within a week thereafter. Advance copies of the replies be furnished to the Applicant who may file re-joinder thereto, if any, within three (3) days thereafter.

List this case for further consideration on 16th March 2016."

19. Thus he contends that this Tribunal itself had directed the SEIAA to consider request of the Respondent No.9-PP for modification of the EC and thus SEIAA being competent authority in that process thought fit to refer the case of the Respondent No.9-PP to Environment Department to take a decision about the violation before considering the request of the Respondent No.9-PP for modification of the EC to allow a larger construction activity.

20. He would submit that extent of 57,658.42 sq.mtrs structure cannot be described as being in excess of the permissible limit of the EC dated 4 th April, 2008.

21. With reference to what transpired later, he would submit that Respondent No.9-PP having satisfied the PMC has received the Completion Certificate in respect of part of the building that itself is sufficient to establish its project is assessed as valid, permitting grant of Completion Certificate.

22. At this juncture, we would emphasise that the Applicant had seriously challenged the order passed by Secretary, Environment Department on 31 st May, 2016 describing the order as a result of direct collusion between the officer concerned and Respondent No.9-PP to defeat any order that would be passed in this proceedings. He had through his Counsel sought opportunity to file an affidavit against the affidavit of the Respondent No.9-PP who wanted this Tribunal to take note of the order dated 31 st May, 2016.

23. We have perused the proceedings with reference to the relevant date on which the arguments were heard on merit and date of posting of case reserved for judgment. The application was heard on merit on 23 rd May, 2016 and reserved for judgment. During such period the order dated 31 st May, 2016 has been passed by the Officer referred to above. Besides, the Learned Counsel Mr. Misra on behalf of project proponent requested us to take on record the order dated 31 st May, 2016 before passing the Judgment. We took notice of the said order. In these circumstances the Learned Counsel for the applicant took opportunity to file counter to the affidavit filed by the project proponent producing the order dated 31 st May, 2016. It is quite evident that the officer concerned who has passed the order in question is representing the respondent no. 2 in this case. Thus, he is deemed to have knowledge of all the stages which this case has passed and the fact that the case was reserved for judgment by the Tribunal. It is in this context the order dated 31 st May, 2016 passed during the

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period case is pending final decision generates questionable circumstances. Further, it is seen that this order i.e. 31 st May, 2016 has been passed several months after the DoE issued directions to the project proponent to stop constructions activity on the basis that the project activity is contravening the conditions of EC dated 4 th April, 2008. In these circumstances we have heard the case again on merit with reference to order passed by Principal Secretary, DoE dated 31 st May, 2016 as desired by the project proponent himself.

24. We had allowed sufficient opportunity to Respondent No.9-PP and also Department of Environment and PMC represented by Mr. D.M.Gupte, learned Counsel respectively.

25. It is material to incorporate the relevant portion of the order dated 31 st May, 2016 passed by - Secretary DoE, Government of Maharashtra for clarity which reads thus:

> *We also refer to the clarification issued by the MoEF, G.O.I. by amendment in EIA Notification 2006 dtd. 4-4-2011, wherein the BUA was defined. Prior to the amendment in EIA Notification 2006 dtd. 4-4-2011 there was an ambiguity in definition of BUA. The EC granted by the MoEF, GOI vide letter dtd. 4-4-2008 for construction of total BUA 57658.42 sq.m. at site was prior to clarification issued by the MoEF, GOI dtd. 4-4-2011 and on the basis of the conceptual plan. Therefore, the same will apply prospectively and not with the retro-prospective effect.*
>
> *Therefore, it reveals that even though you have constructed 18 buildings at site instead of 12 buildings by changing configuration of buildings, the total BUA (ie.FSI) constructed at site is 48617.14 sq.m. which is within E.C. limit. It also reveals from the inspection report of the Pune Municipal Corporation dtd. 2-1-2016 that the actual construction carried out at site is 99416.72 sq.m. at plot No.1 and 2 (i.e. FSI-48617.14 sq.m. + Non-FSI - 50799.58 sq.m.) but the FSI constructed at site is 48617.14 sq.m. which is less than the total BUA admeasuring 57658.42 sq.m. permitted in the previous EC granted by the MoEF, GOI dtd. 4-4-2008. Hence, it is hereby concluded that there is no case of violation as prescribed in the EIA Notification, 2006 and accordingly the Proposed Directions issued vide above referred (1) is hereby withdrawn."*

26. From the extracted portion of the order it is clear that Secretary, DOE as virtually declared the activity of the Respondent No.9-PP has wholly legal, permissible and in support thereof has virtually granted a clean chit and certified the project as of now to be well within the permissible limits. It is material to note that the officer concerned has referred to FSI and BUA being same synonym of one aspect. How far this assertion in the order of the officer is legal and factually correct. Hence it needs to be dealt with in detail for the reason, the decision as to whether the construction activity of the Respondent No.9-PP is legal or contravenes any of the environment clearance depend upon clear definition of FSI and BUA in terms of its extent. We had thus called upon PMC to file a statement explaining the distinction between the extent of area covered under BUA (built-up area). We are dismayed at the fact that neither the PMC nor the Environment Department has seriously examined what is F.S.I and BUA. Thus, we gave one more opportunity to which PMC responded through its affidavit dated 17 th August, 2016 to which we shall refer.

27. The Deputy Engineer, PMC report which has been relied by Principal Secretary, DOE contains the present level of construction, the comparison of the F.S.I and Non F.S.I area gives startling factual information. It needs reference and as is extracted herein:

PMC report. Dy. Engineer (BP) dated. 19-12-2015.	PMC Report dt. 17-08-2016
Total BUA (i.e. FSI) = 48617.14 sq.m.	Built-up Area

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	Plot	F.S.I.	Non F.S.I
	1 2	48424.66 630.55	46088.47 4858.57

28. We shall now refer to what the term Built-up area and Floor Spacing Index (F.S.I.) would mean in the domain of assessment of permissibility of the project activity with reference to the environment clearance certificate granted. It would be therefore pertinent to refer to the provisions of Development Building Rules of PMC and the project activity approved by the EC of 2008.

29. The Environment Clearance dated 4 th April 2008, has clear project description which unambiguously set the project limits.

The project proponent is proposing for construction of group housing project at S.No. 35 to 40. Village Vadgaon Budruk, Singhad Road, Pune, Maharashtra at a cost of Rs.10,737.14 lakh. The project involves construction of 12 building with Stilt, basement plus 11 floors for 502 flats, 50 shops and 34 offices. The total plot area is 79,100.0 sq.m. Total built up area as indicated is 57,658.42 sq. m. Total water requirement will be 745 KLD and 400 KLD of waste water will be generated from the buildings which will be treated in Sewage Treatment Plant. The treated wastewater will be used for landscaping, DG set cooling and Horticulture purpose. The solid waste generated from the buildings will be 1500 kg./day and disposed as per the MSW Rules, 2000. The parking space is proposed for parking of 1072 cars. (Emphasis provided)

30. It is manifest from the above referred EC that while granting the EC, the authority had appraised the project with certain configuration and more pertinently, the Total Built up area. There is no reference to the term FSI area i.e. floor space index area. There is no ambiguity in the contents of EC and therefore, what can be seen from the plain reading of the EC is that the EC granted is circumscribed by the project description including its configuration and the Total built up area.

31. The term built up area has been well established in the parlance of Civil Engineering and Town Planning. The MRTP Act, which regulate Regional and Town Planning in the state, authorise Municipal Corporation to have its own Rules, and PMC has notified the development control rules under the MRTP act in order to regulate the development activities in the corporation area. In order to clarify the existing position and the understanding of the terms, Built-up area and F.S.I., it would be pertinent to refer to the 'Development Control Rules of the PMC, Pune, 1982'. Undoubtedly, both Respondent No.9-PP and PMC are required to comply with the Environment Clearance Regulations in terms of the building permissions granted by PMC to Respondent No.9-PP under the powers conferred upon PMC by the above said rules. The said Rules define 'built up area' and FAR/FSI and the relevant definitions from these rules are abstracted below :

2.1.3 : Built up area - Area covered immediately above the plinth level by the building or external area of upper floor whichever is more accepting the areas covered by Rule 15.4.2.

2.39 : Floor area Ratio (F.A.R.) - The quotient obtained by dividing the total covered area (plinth area) on all floors excluding exempted areas as given in Rule No.15.4.2 by the area of the plot.

$$F.A.R. = \frac{\text{Total covered area on all floors.}}{\text{Plot area.}}$$

Note : The term F.A.R. is synonymous with floor Space Index (F.S.I.)

32. From these definitions it is manifestly clear that the terms "built up area" and

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FSI/FAR are distinct and have different interpretation altogether. This would further negate the contention of Respondent No.9-PP that the term "built up area" was not clarified until the clarification issued by MoEF on 4 th April, 2011. There could be ambiguity in calculation of built up area as per earlier Environment Clearance Regulations, but this cannot be stretched under any circumstances to take a plea that the built up area and FSI are synonymous and interchangeable terminologies. We cannot accept but reject in totality the submissions made by PMC and the Respondent No.9-PP in this regard.

33. Though, much has been claimed by Respondent No.9-PP regarding the clarificatory notification of MoEF dated 4 th April 2011, wherein the term built up area has been clarified, we do not find any confusion or contradiction in definition of terms BUA and FSI. The Respondent No.9-PP is a major developer and must be well versed with these terminologies.

34. From the material referred to above, it leaves no scope for doubt that F.S.I. and BUA are two terms which apply with a distinction defining different extent of area.

35. It will shake the conscious of all concerned when we see a deliberate attempt on the part of DoE, SEAC and SEIAA to confuse the issue virtually falling in line with misleading statements of Respondent No.9-PP and Deputy Engineer, PMC. It is astonishing that both Respondent No.9-PP and Deputy Engineer, PMC refer to BUA as F.S.I. Despite such clear distinction in definitions and interpretations of BUA and FSI, they had attempted to mislead DoE, SEAC and SEIAA in believing that BUA and F.S.I are same. We expect an officer conferred with professional duty as 06 an engineer in the Department of Building Permission of PMC to be very meticulous in at least understanding the terms which make lot of difference to the fact of construction. We least expected 06 him as to know the distinction between BUA and FSI, as administration of Corporation would depend upon his professional advice and technical expertise to take action against the erring parties who contravene the mandate of law for safeguarding the interest of citizens which the Corporation is required to protect. We are also constrained to observe that the higher authorities of Building permission department had closed their eyes even when such incorrect affidavits are filed before the Tribunal and such misleading reports are sent to state authorities like DoE, SEAC and SEIAA.

36. Therefore, un-hesitatingly we could observe that the report dated 19 th December, 2015 of the Deputy Engineer is a compromised statement to paint a wrong picture of the project firstly to suppress deviation and secondly to create ambiguity in definition of the terms of F.S.I. and BUA to help Respondent No.9-PP to obtain orders from the other authorities. This is unveiled from the affidavit filed by PMC dated 17 th August, 2016 in pursuance to our Order dated 2 nd August, 2016. The details mentioned therein are as follows:

	Built-up Area	
Plot	F.S.I.	Non F.S.I
1	48424.66	46088.47
2	630.55	4858.57

37. We have also taken a judicial note of the fact that considering such complexity in Environment issues, MoEF had constituted Multi-disciplinary SEAC/SEIAA and had authorised it to take action against violation. SEAC and SEIAA have the necessary experience and expertise to identify violations independently by expert advice and application of mind, based on inputs from field authorities. What we observe here is that Principal Secretary of DoE just relied upon a report filed by junior most official of PMC and without any independent appraisal PS, DoE has held that construction of 18 buildings at site instead of 12 buildings, is allowed within the allowable BUA as per Environment Clearance. We do not find any environment impact appraisal or reasoning

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for such a finding. When openly excavation of the soil and damage to underground water is being impating the environment. No independent assessment or appraised is done.

38. We are, therefore clear in our mind that Applicant has substantiated that the original project conceived by Respondent No.9-PP had to confine to what was sanctioned under the EC dated 4 th April, 2008 and any extra construction or increase in building, plinth commercial structures, shops and flats should have support of modified EC. As of now, since no modified EC has been granted, the extent of project activity cannot increase beyond the limit circumscribed by EC dated 4 th April, 2008. Any such activity or construction beyond permissible limits cannot be saved by jugglery of words, misinterpreting against the statutory definition of F.S.I. and BUA.

39. We are further satisfied that the Principal Secretary, Environment Department who has authored the order dated 31 st May, 2016 has lot to explain for the reason the ultimate declaration made by him in the order declaring construction activity of Respondent No.9-PP to be in permissible limit of F.S.I. is result of his mis-interpretation of the terms F.S.I. and BUA and reflects non-application of mind.

40. The prime issue that arises for consideration in this case is as to whether the construction activity of Respondent No.9-PP, is exceeding the sanction accorded by the EC. Could the Respondent No.9-PP proceed with construction without obtaining modified EC. The answer is obviously No.

41. For the reasons aforesaid, we answer the above issue in the negative hold that the construction activity of Respondent No.9-PP to the extent it exceeds the permissible limits as per EC cannot be saved and shall stop, subject to the grant of modified EC by competent authority.

42. From the extracted portion of the order dated 31 st May, 2016 of Principal Secretary, Environment Department, it is seen that he has declared construction of 18 buildings on the site instead of 12 buildings is permissible which, according to him, only a changes on configuration of buildings. This opinion undoubtedly is based on his erroneous conclusion that total BUA which is nothing but F.S.I. consumed i.e. 48617.14 sq.mts which is within the EC limit as against the actual construction activity which has exceeded over 100000 sq.mtrs BUA. Hence we set aside that order/communication dated 31 st May, 2016.

43. Besides, another issue which confronts us based on these violations is what should be the consequence of such violation. Un-hesitatingly, it can be held that the consequences of such contravention and illegal construction will be adverse on the environment and ultimately it will lead to several incidental causes of action. That will follow if the Respondent No.9-PP is allowed to continue the illegal activity as has been done by order dated 31 st May, 2016. The complexity in environmental issues therefore requires a meticulous examination and dispassionately conclusion and finding.

44. Apart from the legal issues, we further notice that if not illegality in the order of PS DoE in question, it is certainly impropriety because the officer is deemed to have been informed of the fact that this Tribunal is seized of the matter and has reserved the case for judgment on 23.5.2016 after giving full opportunity to Department which the officer in question represents as Respondent No.2. Hence, he cannot plead ignorance of the fact that the case was posted for judgment in the circumstances he should have allowed adjudication by the Tribunal to take final decision on the main issue about the violation of the EC conditions based on the alleged enlarged construction activity. We also do not find merit in contention of learned Sr. counsel Shri. Mishra that such an order is line with the liberty given to SEIAA by Tribunal on 23.2.2016 to deal the application of PP for expansion of project on merit because the order in question is not related to EC but a decision of the proceedings of proposed directions under Environment (Protection) Act, 1986, which were issued by

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department in August 2015.

45. With these findings, it is now necessary to consider the reliefs sought by the Applicant in this Application. He has sought demolition of the illegal structures and other consequential reliefs. Learned counsel appearing for the Applicant has strenuously argued that all these violations have been done by the repsonent-9 PP in total connivance with the authorities mainly the PMC and DoE. He has even cited a visit report of SEAC expert committee to suggest the gross inadequacy in the visit report the committee.

46. It is now a matter of record that the construction of the project in question is near completion and even the occupancy certificate is granted partially. We need to consider the fact that the project in question is primarily a residential project and many individuals have invested their money in the project for meeting need for residential accommodation by having a house in city like Pune. Any order to demolish structure would also adversely affect them. The Respondent-9 has already created 3 rd party rights. Though the Respondent-9 has blatantly violated the conditions of EC, we also note the total lack of supervision and enforcement at PMC level has resulted in such illegal activity.

47. The Tribunal is expected to apart on the principles of Sustainable Development and Polluter pays principle. We are conscious of the fact that Polluter pays Principle shall not be construed as 'pay and pollute principle', and the payment has therefore to be exemplary and deterrent in order to pass a clear message that environmental compliance is supreme and the party which is non-complying the environmental standards shall be at economic disadvantage.

48. In this regard, we would like to refer to approach taken by the Hon'ble Principal Bench of National Green Tribunal, New Delhi in Original Application No.24/2011 "*Samir Mehta* v. *Union of India*" Where the Bench has noted that :

> "*The Supreme Court of India, in the case of* Sterlite Industries India Ltd. *v.* Union of India (2013) 4 SCC 575 *had held that where the industry had violated the provisions of the Water (Prevention and Control of Pollution) Act, 1974 and had operated without obtaining consent, it was liable to pay damages of Rs.100 crores for the default period. The Court applied the Rule of Strict Liability but did not strictly compute the damages with exactitude. It only enforced the liability on general principle for awarding of damages for non-compliance to the law in force. In fact, any other approach would run contra to the Principle of Strict Liability. This judgment has been followed by the Tribunal in a large number of cases. Reference can be made to the cases of* S.P. Muthuraman 2015 All (I) NGT Reporter (2) (Delhi) 170, Krishan Kant Singh *v.* National Ganga River Basin Authority (2014) ALL (I) NGT Reporter 3 (Delhi) 1 *and* M.C. Mehta *v.* Kamal Nath, (2002) 3 SCC 653 : AIR 2002 SC 1515. *Thus, we are of the considered view that the determined damages of Rs.100 crores should be paid by and recovered from Respondents No. 5, 7 and 11, jointly and severally while Respondent No.6 is held liable to pay Rs. 5 crores as environmental compensation for dumping of the cargo in the sea and then failing to take any precautionary or preventive measures. The consignment of 60054 MT of coal has caused marine pollution and continues to be a cause and concern for environmental pollution. The Respondents are defaulting entities which have not complied with law and have adopted a most careless and reckless attitude in relation to protecting the marine environment*."

49. We also refer to the judgment of Hon'ble Principal Bench in the matter of Krishnlal Gera Vrs. State of Haryana (Appeal No.22 of 2015 dated 25 th August 2015) wherein the Tribunal has dealt with a matter regarding construction activities without the necessary prior environmental clearance. In para 58 and 59 of the judgment after discussing the legal framework, the Tribunal has imposed environmental compensation

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cost of 5 % (percent) of the total cost for restoration and restitution of the environment, in addition to payment of Rs.5 crores for violating the Law and starting and completing the project without obtaining environmental clearance, on the project proponent. These directions were issued in consonance with the dictum of Hon'ble Supreme Court.

"*Since the Project Proponent may not be directed to demolish the structure at this stage, but, shall strictly comply with the directions that we propose to pass in the present case. The scope and ambit of such directions has to be in terms of the Act of 1986 circumscribed by the statutory jurisdiction of this Tribunal. Upon detailed discussion of the laws in force, the Tribunal in the case of* S.P. Muthuraman *(supra) has clearly held that such directions can be issued by the Tribunal*."

50. The Principal Bench in "Appeal No.7/2015 in the matter of *Jalbiradari* v. *MoEF*" pronounced on 31 st May 2016, has also considered the legal consequences in case of quashing the environmental clearance for construction project, particularly with regard to the "fate accompli" situation.

16. ----------The inevitable consequence could be the Tribunal has dealt with quashing of the Environmental Clearance and set the project at in or they be directed to maintain status quo as on the date of determination. The Tribunal has dealt with large number of cases filing under the category "fate-accompli situation". There are large numbers of projects which have started their construction activity or other activities without even complying Environmental Clearance and the projects were largely completed and then either Environmental Clearance was granted or their cases for granting Environmental Clearance were delisted. In those cases following the principle of Sustainable Development and Polluter Pays Principal, the Tribunal imposed Environmental Compensation on the project proponent for degrading/damaging the environment for starting the project without complying with the provisions of law and for violating the orders and directions. The works of those projects were stopped and a Committee was appointed to revisit for grant/consideration of the Environmental Clearance and fresh Environmental Clearance orders were issued. Even where demolition was required the same was directed. All these cases have been decided by the larger bench of the Tribunal and clearly state the binding precedent. References can be mad made to S.P. Muthuraman *v.* Union of India, 2015 All (I) NGT Reporter (2) (Delhi) 170; Krishan Lal Gera *v.* State of Haryana, *Appeal No. 22 of 2015 (pronounced on 25th August, 2015) &* Forward Foundation *v.* State of Karnataka, *O.A. No. 222 of 2014 (pronounced on 7th May, 2015). In these judgments, various judgments of the Hon'ble Supreme Court have been considered by the Bench. The purpose and object of the law including CRZ Notification, Environmental Clearance is to strictly regulate the development so as to prevent causing of damage of the nature and ecology. The cases are not the cases of irreparable or irreversible situations. Largely, the 90 per cent of the projects were has already been completed except some other parts of the project. There can be proper regulations on these projects, as otherwise it will only lead to colossal waste of public funds. It will result in dual disadvantage, firstly, wastage of public funds and secondly, and more importantly the demolition of the project itself would generate so much of waste and other materials that this will become a huge environmental hazard itself. The cases are not one, which are incapable of reprisal or re- appreciation. Damage to the environment and ecology to some extent has already been caused. It will be more useful to take remedial and restorative steps. They have acted in breach of the law and carried on with their activity in an unauthorized and illegal manner.----------*

51. We are also inclined to adopt the approach taken by the Bench in the interest of

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justice and fair play and based on the facts and circumstances of the case. The construction activity is not a prohibited activity in the subject, but a regulated activity. We also take a judicial note of the fact that the demolition of structures in question would also result in further environmental damage and generation of construction waste. Other option which could have been explored is asking the government to take over the additional construction and use it for public purpose but as noted above, already third party rights have been created, may be partially.

52. The purpose and object of the law including Environmental Clearance is to strictly regulate the development so as to prevent causing of damage of the environment and ecology. Though in the present case substantial damage has been caused to the environment and ecology, it will be more useful to take remedial and restorative steps.

53. The Respondent-9 is a defaulting entity which has not complied with law and has adopted a most careless and reckless attitude in relation to protecting the environment. The other Respondents, particularly the PMC and DoE have been the either the mute spectator or have not performed their statutory duties. However, we would note with appreciation that it is only MPCB that has acted on the complaints of the Applicants and have diligently taken legal actions besides bringing on record the non-compliances by Respondent-9 PP.

54. For the aforesaid reasons, the Applicant succeeds in his legal pursuit to challenge the noncompliance of EC conditions by the Respondent-9 and obtain certain directions. Hence the Application is allowed and we issue following directions:

1. The Respondent No.9-PP shall pay environmental compensation cost of Rs.100 crores or 5 % (Five percent) of the total cost of project to be assessed by SEAC whichever is less for restoration and restitution of environment damages and degradation caused by the project proponent by carrying out the construction activities without the necessary prior environmental clearance within a period of one month. In addition to this, it shall also pay a sum of Rs. 5 crores for contravening mandatory provision of several Environment Laws in carrying out the construction activities in addition to and exceeding limit of the available environment clearance and for not obtaining the consent from the Board.
2. In view of our finding that there has been manifest, deliberate or otherwise suppression of facts of illegality in the project activity of Respondent No.9-PP by the officer of PMC, we impose fine of Rs.5 Lakhs upon the PMC and direct Commissioner PMC to take appropriate action against the erring officers. The amount of Rs. 5 Lakh shall be paid within one month.
3. We direct the Chief Secretary, State of Maharashtra and the competent authority to take notice of the conduct of the officers concerned who have misled the Department of Environment in the matter relating to interpretation of F.S.I. and BUA in terms of which order dated 31 st May, 2016 has been issued in particular the Principal Secretary, Department of Environment who has authored the order dated 31 st May, 2016
4. PMC, DoE and SEIAA are directed to pay cost of Rs. 1 lakh each to the Applicant within 4 weeks.

55. The Application alongwith connected Misc. Applications and Execution Application is therefore disposed accordingly.

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(2017) 9 Supreme Court Cases 499

(BEFORE MADAN B. LOKUR AND DEEPAK GUPTA, JJ.)

Writ Petition (C) No. 114 of 2014

COMMON CAUSE .. Petitioner;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

With

Writ Petition (C) No. 194 of 2014

PRAFULLA SAMANTRA AND ANOTHER .. Petitioners;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Writ Petitions (C) No. 114 of 2014 with No. 194 of 2014, decided on August 2, 2017

A. **Mines and Minerals — Illegal mining — Ambit of expression "illegal mining" — Held, illegal mining does not only mean mining outside lease area — Illegality can take place even inside lease area — Purpose of MMDR Act is to ensure scientific mining, balanced utilisation of natural resources and protection and preservation of environment by adhering to statutory provisions — Non-adherence would attract penalty and termination of lease — Adherence to statutory provisions necessarily implies adherence to provisions of Environment (Protection) Act, 1986, laws pertaining to air and water pollution and Forest Conservation Act, 1980 besides adherence to mining statutes — Submission against interpreting "illegal mining" with such wide ambit on ground that definition of "illegal mining" was inserted vide R. 2(ii-a), Mineral Concession Rules, 1960, by Noti. dt. 26-7-2012 and thus present case not covered, not tenable**

— Mineral Concession Rules, 1960 — Rr. 2(ii-a), 22, 22-A, 27 and 37 — Mines and Minerals (Development and Regulation) Act, 1957 — Ss. 21, 4-A, 2, 3, 4, 5, 6, 8, 10, 12, 13, 18 and 23-C — Mineral Conservation and Development Rules, 1988 — Rr. 9, 10, 13, 31, 37, 38 and 41 — Environment (Protection) Act, 1986 — S. 3 — Forest (Conservation) Act, 1980 — S. 2 — Words and Phrases — "Illegal mining" (Paras 84 and 128 to 130)

B. **Mines and Minerals — Illegal mining — Suspension of illegal mining leases in Odisha — Directions issued**

— IAs Nos. 45 (filed by Zenith Mining), 47 (filed by *K*) and IA No. 66 (filed by *J*) dismissed as they did not have forest clearance (FC) or environmental clearance (EC) or both

— *S* (IA No. 9) actually had a working lease and has wrongly been included as a non-operational lease — Thus said IA also dismissed but as infructuous — However, State Government directed to ensure about valid statutory clearances

— All other IAs disposed of in terms of present order — Clarified that only after compliance with statutory requirements and full payment of compensation and other dues, mining leaseholders can restart their mining operations —

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And this should be deposited on or before 31-12-2017 — State Government directed to decide pending show-cause notices if not already decided by 31-12-2017 (Paras 16, 222 to 225, 227 and 232)

C. **Mines and Minerals — Illegal mining — Violation of S. 6, MMDR Act, that is, relating to entitlement of maximum area for each person — Thus this illegality also relating to benami holders — CEC not finding any such illegality in respect of 2 of 7 mining leases, accepted as nothing contrary shown — For other leases, matter directed to be listed after two weeks for fixing of dates of hearing — Mines and Minerals (Development and Regulation) Act, 1957, S. 6 (Paras 192, 193, 197 and 226)**

D. **Mines and Minerals — Illegal mining — Illegal mining in State of Odisha — Procedure for transfer of lease under R. 37, MCR — Alleged violation of — Fresh look by new Committee, required — Directions**

— Matter adjourned for setting up of new Committee to identify lapses and recommend preventive measures — Validity of constitution of earlier committee was disputed and resultant litigation pending in High Court — Mineral Concession Rules, 1960, R. 37 (Paras 198 to 200, 202, 205, 228 and 229)

E. **Mines and Minerals — Illegal mining — Illegal mining in State of Odisha — Judicial notice taken of rampant mining and huge sums of money involved**

— Judicial notice taken of illegal and rampant mining in State of Odisha causing untold misery to the tribals in area — Over-extraction of 2155 lakhs MT of iron ore and manganese ore — Rs 17,516 crores worth mineral ore produced without environmental clearance (EC) or in excess of EC — And the above figures do not include mining without forest clearance (Paras 1, 25, 26 and 48)

F. **Mines and Minerals — Illegal mining — Facts found by Justice M.B. Shah Commission under Commissions of Inquiry Act, 1952, held, reliable for present purpose — It cannot be said that mining leaseholders were not given opportunity of hearing before Commission or the Commission did not follow the procedure**

— Even otherwise First Report being a fact-finding report there is no question of giving any notice to leaseholders or their cross-examination — Public Accountability, Vigilance and Prevention of Corruption — Inquiries/Commission of Inquiry — Commissions of Inquiry Act, 1952 — Ss. 8-B and 8-C — Procedure of notice and cross-examination under (Paras 33, 34, 43 and 45)

G. **Mines and Minerals — Illegal mining — Illegal mining in Odisha — CEC report — Credibility and relevance**

— CEC reports highlighted gravity of situation — Contention that CEC exceeded its limit by reporting on issues other than environment and forest, not tenable — Directions of Court to CEC indicate that CEC was expected to report on all aspects of illegal mining — Credibility of CEC report

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cannot be doubted, though its recommendations are subject to satisfaction of Court (Paras 51 to 58 and 60)

H. **Mines and Minerals — Rehabilitation and Regeneration — Projects for tribal welfare and area development — Special Purpose Vehicle (SPV) for affected districts of Odisha — Huge amounts already available — Large amounts to be made available due to present order — Utilisation of funds and accountability — Directions**

— Chief Secretary, Odisha (Chairman, SPV) directed to provide audited accounts and ensure that amounts are utilised for benefit of tribals in affected districts — While taking up said projects, a bottom up planning and participatory approach should be followed (Paras 215, 217, 219, 220 and 231)

The probe into illegal mining in State of Odisha had started due to an IA filed against illegal mining in the State in a pending writ petition, that is, *T.N. Godavarman*, WP (C) No. 202 of 1995. Reports of Central Empowered Committee (CEC) appointed by Court and inquiries made under the Commissions of Inquiry Act, 1952 revealed that all kinds of illegalities were committed by the mining leaseholders in the State of Odisha. The Court, therefore, suspended the illegal mining leases in the State of Odisha. The Court however, permitted them to approach appropriate authorities for necessary approvals and clearances and thereafter approach the Court for modification of interim order against them. Some of the IAs in present matter were thus filed by mining leaseholders for modification of said interim order. The present case also clarified about the grounds on which illegality can be said to have been committed by mining leaseholders under various statutes and rules made thereunder and the remedial measures.

Held :

Expression "illegal mining" — Ambit

The overall purpose and objective of the MMDR Act as well as the Rules framed thereunder is to ensure that mining operations are carried out in a scientific manner with a high degree of responsibility including responsibility in protecting and preserving the environment and the flora of the area. Through this process, the holder of a mining lease is obliged to adhere to the standards laid down under the Environment (Protection) Act, 1986 or the EPA as well as the laws pertaining to air and water pollution and also by necessary implication, the provisions of the Forest (Conservation) Act, 1980. Exploitation of the natural resources is ruled out. If the holder of a mining lease does not adhere to the provisions of the statutes or the rules or the terms and conditions of the mining lease, that person is liable to incur penalties under Section 21 of the MMDR Act. In addition thereto, Section 4-A of the MMDR Act which provides for the termination of a mining lease is applicable. This provides that where the Central Government, after consultation with the State Government is of the opinion that it is expedient in the interest of regulation of mines and mineral development, preservation of natural environment, prevention of pollution, etc. then the Central Government may request the State Government to prematurely terminate a mining lease. (Para 84)

It was wrongly submitted that a mining operation only outside the mining lease area would constitute "illegal mining". That is because the definition of "illegal mining" in Rule 2(*ii-a*) of the MCR was inserted by a Notification dated 26-7-2012

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while the present case is concerned with an earlier period. That apart, as mentioned above, the holder of a mining lease is required to adhere to the terms of the mining scheme, the mining plan and the mining lease as well as the statutes such as the EPA, the FCA, the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981. If any mining operation is conducted in violation of any of these requirements, then that mining operation is illegal or unlawful. Any extraction of a mineral through an illegal or unlawful mining operation would become illegally or unlawfully extracted mineral. (Paras 128 and 129)

Mining operations outside a leased area are obviously illegal or unlawful mining. Illegal mining takes within its fold excess extraction of a mineral over the permissible limit even within the mining lease area which is held under lawful authority, if that excess extraction is contrary to the mining scheme, the mining plan, the mining lease or a statutory requirement. Even otherwise, it is not possible to accept such narrow interpretation since the matter is about a natural resource which is intended for the benefit of everyone and not only for the benefit of the mining leaseholders. (Para 130)

Frightening facts and figures — Judicial notice of illegal and rampant mining in State of Odisha causing untold misery to the tribals in the area

The facts revealed during the hearing of these writ petitions filed under Article 32 of the Constitution suggest a mining scandal of enormous proportions and one involving megabucks. The lessees in the districts of Keonjhar, Sundergarh and Mayurbhanj in Odisha have rapaciously mined iron ore and manganese ore, apparently destroyed the environment and forests and perhaps caused untold misery to the tribals in the area. Steps taken by the lessees to ameliorate the hardships of the tribals, is perhaps not more than a drop in the ocean—also too little, too late. (Para 1)

There are some frightening figures mentioned by CEC in its final report. According to CEC, excess mining without environmental clearance or beyond what was authorised by the environmental clearance is 2130.988 lakhs MT of iron ore and 24.129 lakhs MT of manganese ore making a total of 2155.117 lakhs MT of iron ore and manganese ore. This does not include extraction of ore without forest clearance. These figures give an indication of the extent of excess or illegal or unlawful mining carried out. In terms of rupees, according to CEC the total notional value of minerals produced without an environmental clearance or in excess of the environmental clearance, at the weighted average price of minerals as proposed by the Indian Bureau of Mines comes to about Rs 17,091.24 crores for iron ore and about Rs 484.92 crores for manganese ore making a total of Rs 17,576.16 crores. Again, this does not include mining without forest clearance. Therefore, these can be referred to as megabucks and rapacious mining. (Paras 25 and 26)

Common Cause v. *Union of India*, IA No. 35 in IA No. 17 in WP (C) No. 114 of 2014, order dated 16-1-2015 (SC); *Common Cause* v. *Union of India*, WP (C) No. 114 of 2014, order dated 7-10-2015 (SC); *Common Cause* v. *Union of India*, (2016) 11 SCC 455, *referred to*

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Significant observations of Commission about miserable condition of tribals

The Commission made certain significant observations as follows:

(*a*) The tribals in the area have been displaced or stay in pathetic and miserable conditions in same area. There is rampant air pollution with the trees having the colour of minerals making it clear that tribals are forced to breathe polluted air and drink polluted water.

(*b*) Streams and ground water is polluted and there is hardly any facility of drinking water. Women have been seen fetching water from dirty nalas.

(*c*) Mining companies and beneficiation plants are drawing water from rivers and nearby water resources are getting depleted at a fast rate. River Baitrani has been seriously affected by this activity.

(*d*) Basic facilities such as medical facilities, shelter/residence, education facilities are absent. Roads have a heavy flow of traffic and on one road of the area about 7000 trucks passed during night time.

(*e*) The labour is not being paid adequate wages beyond the minimum wages even though the income of the mine owners runs into billions of rupees. (Para 48)

Facts found by Justice M.B. Shah Commission under Commissions of Inquiry Act, 1952, reliable for present purpose

The First Report of Justice M.B. Shah Commission under Commissions of Inquiry Act, 1952 is relevant for the purpose of the present judgment and order. A resume of the procedure followed will indicate that full opportunity was given to the leaseholders to have their say. [Ed.: For said resume, see paras 35 to 42.] (Paras 33 and 34)

The First Report is generally a limited fact-finding enquiry on the basis of information supplied by the mining leaseholders. Therefore, there is absolutely no question of any notice being issued to any mining leaseholder under Section 8-B or the right of cross-examination being granted to any mining leaseholder under Section 8-C, Commissions of Inquiry Act, 1952. The Commission made adequate efforts to collect the facts and this collation in the First Report was possible with the assistance of the mining leaseholders and the government authorities. Therefore, the procedure adopted by the Commission in collecting facts was neither irregular nor illegal. Any mining leaseholder who wanted to be heard was given an opportunity of being heard and was fully aware of what the Commission was attempting to achieve and if any particular mining leaseholder chose not to associate with it, it was at his or her own peril. All the mining leaseholders were fully aware of what was going on, if not personally then certainly through their list of counsel running into 18 pages or their representatives individually or their Federation. (Para 43)

There is no challenge to the reports of the Justice Shah Commission. However, the present judgment can confine itself to some limited facts adverted to by CEC in its final report. The reports of the Commission are not necessary for conclusions of the present judgment. (Para 45)

Goa Foundation v. *Union of India*, (2014) 6 SCC 590, *relied on*

CEC Report — Credibility and relevance

The gravity of the situation is apparent from the report of CEC and the Commission also seems to support it. (Para 51)

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The contention that in giving the Report dated 16-10-2014 CEC has exceeded its remit is not tenable. Though in *T.N. Godavarman Thirumulpad*, IA No. 3721 in 3629 in WP (C) No. 202 of 1995, order dated 13-1-2014 (SC), the Court stated that the report of CEC should not cover cases other than forest and environmental issues, subsequent orders have been completely overlooked by the respondent leaseholders inasmuch as on 21-4-2014 CEC was specifically directed to make a list of such lessees who are operating the leases in violation of the law. The various orders of the Court make it clear that the jurisdiction of CEC was not limited and it was expected to give a detailed report on all aspects of illegal mining or mining being carried out without any lawful authority in whatever manner. The initial objection raised on behalf of the leaseholders is therefore rejected. (Paras 52 to 54)

T.N. Godavarman Thirumulpad v. *Union of India*, (2014) 14 SCC 160, *relied on*

T.N. Godavarman Thirumulpad v. *Union of India*, IA No. 3721 in 3629 in WP (C) No. 202 of 1995, order dated 13-1-2014 (SC), *clarified*

CEC constituted in *T.N. Godavarman Thirumulpad (50)*, (2013) 8 SCC 198 is now an established body which renders extremely valuable advice to the Supreme Court and provides factual material on the basis of which the Court can make some recommendations and pass appropriate orders. (Para 55)

T.N. Godavarman Thirumulpad (50) v. *Union of India*, (2013) 8 SCC 198; *T.N. Godavarman Thirumulpad* v. *Union of India*, (2013) 8 SCC 204, *relied on*

The credibility of CEC cannot be doubted though its recommendations are subject to the satisfaction of the Supreme Court. In the present cases, CEC as a fact-finding body has functioned impartially and it is only on the conclusions arrived at by CEC on the basis of the facts gathered that there can be some debate and discussion. Anyone may disagree with the views of CEC and there is no need to make heavy weather about this at all. (Para 56)

Samaj Parivartana Samudaya v. *State of Karnataka*, (2013) 8 SCC 154, *relied on*

In its Final Report dated 16-10-2014, CEC has stated that it held meetings with the Chief Secretary and other senior officials of the State of Odisha and others on six dates. It also heard the leaseholders and others on seven dates and it held meetings with three of the leaseholders, that is, Jindal Steel and Power Ltd. (JSPL), Sarda Mines Pvt. Ltd. (SMPL) and Essel Mining and Industries Ltd. (Essel) on 10-9-2014. CEC visited the site of the mining lease of SMPL from 4-3-2014 to 7-3-2014 and had site visits of a number of other lessees from 12-7-2014 to 16-7-2014. The report of CEC dealt with leasewise and yearwise details of production of iron ore and manganese ore, permissible production and production without environmental clearance/beyond environmental clearance. Separately, CEC has dealt with the facts concerning SMPL and JSPL pursuant to a meeting held with them on 11-9-2014. (Paras 57, 58 and 60)

Projects for tribal welfare and area development — special purpose vehicle (SPV) — Directions

A scheme for setting up a special purpose vehicle (SPV) for tribal welfare and area development works has been implemented by the State of Odisha. (Para 215)

T.N. Godavarman Thirumulpad v. *Union of India*, IAs Nos. 2746-48 in WP (C) No. 202 of 1995, order dated 27-1-2014 (SC); *T.N. Godavarman Thirumulpad* v. *Union of India*, IAs Nos. 2746-48 in WP (C) No. 202 of 1995, order dated 28-4-2014 (SC), *referred to*

T.N. Godavarman Thirumulpad (104) v. *Union of India*, (2008) 2 SCC 222, *cited*

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Some of the salient features of the scheme are as follows: The SPV will undertake specific tribal welfare and area development works so as to ensure inclusive growth of the mineral bearing areas. These will include works/projects related to livelihood intervention, health, water supply and sanitation, education, special programmes for development of women and children, entrepreneurial development of local people, communication and infrastructure projects and agro silvi-horticultural based livelihood projects through identified agencies/ Government Departments. While taking up such projects/works a bottom up planning and participatory approach will be followed. (Para 217)

Some of the mining leaseholders offered to deposit and in fact did deposit an amount of Rs 237.05 crores for utilisation by the SPV for carrying out welfare works and activities in the districts of Keonjhar, Sundergarh and Mayurbhanj in Odisha. There are huge amounts available with the special purpose vehicle for tribal welfare and area development works but nothing is known about the utilisation of the funds. Further, as a result of present order very large amounts will again be made available to the State of Odisha. These amounts should also be kept with the special purpose vehicle. (Para 219)

To ensure that the amounts are utilised for the benefit of tribals in the affected districts and for area development works, the Chief Secretary of Odisha, ex-officio Chairman of SPV is directed to file an affidavit stating the work done as well as provided the audited accounts of the receipt and expenditure of the SPV from its inception. The Chief Secretary of Odisha should file said affidavit within a period of six weeks and in any case on or before 30-9-2017. The Registry will list these petitions along with the affidavit immediately after its receipt for consideration. (Paras 220 and 231)

Minimum area for which mining lease may be granted — Violation of and benami holders

There have been several amendments to S. 6 relating to the maximum area for which a mining lease may be granted to a person. (Paras 189 to 192)

In this background, CEC examined the case of seven mining leaseholders. (Para 193)

As far as Bonai Industrial Company Ltd. and Feegrade & Co. Pvt. Ltd. are concerned, CEC has concluded that they have not violated Section 6 of the MMDR Act. That being the position, and nothing having been shown to the contrary, the recommendation of CEC in this regard is accepted. With regard to remaining 5 companies hearing on the matter was required, thus, postponed. (Para 197)

The Court would hear Jindal Steel and Power Ltd., Sarda Mines Private Ltd., Rungta Group of Companies and Essel Mining and Industries Ltd. on the applications filed by them. For this purpose matter to be listed again after two weeks so that a convenient date of hearing can be fixed. (Para 226)

Procedure for transfer of lease — Alleged violation of — Fresh look by new committee, required — Directions

CEC has discussed the possible violation of Rule 37 of the MCR. In this context, it was noted that there were several mining leaseholders who had entered into raising contracts which were actually a transfer of the lease as postulated by Rule 37 of the MCR. (Para 198)

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On this basis the State of Odisha constituted a Committee on 8-7-2011 to carry out a study of the financial transactions between the mining leaseholders and the raising contractors to determine whether there is a prima facie violation of Rule 37 of the MCR. (Para 199)

The Committee concluded that eight mining leaseholders violated Rule 37 of the MCR. (Para 200)

The Central Government in revision under Section 30, MMDR Act and Rule 55, MCR set aside the order constituting the Committee. Writ petitions thereagainst filed by the State of Odisha are pending in the High Court. (Para 202)

It will be appropriate if in fact a fresh look is given to the matter. Thus the Court would like to hear the eight mining leaseholders concerned on the question of appointing an appropriate committee in respect of the applicability of Rule 37 of the Mineral Concession Rules to them. The Court would hear all the parties with regard to setting up of an Expert Committee presided over by a retired Judge of the Supreme Court to identify the lapses that have occurred over the years that have enabled rampant illegal and unlawful mining in Odisha and to recommend preventive measures not only to the State of Odisha but generally to all other States where mining activities are proceeding on a large scale. (Paras 205, 228 and 229)

State of Rajasthan v. *Gotan Lime Stone Khanij Udyog (P) Ltd.*, (2016) 4 SCC 469, *relied on*

Common Cause v. *Union of India*, WP (C) No. 114 of 2014, order dated 28-4-2017 (SC), *referred to*

IA pursuant to liberty granted

Pursuant to the liberty granted to move for modification of the interim order dated 16-5-2014 suspending the illegal mining leases, 17 interim applications for modification were received. (Para 16)

Common Cause v. *Union of India*, (2014) 14 SCC 155; *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590, *referred to*

IAs Nos. 45 (filed by Zenith Mining) and 47 (filed by *K*) are dismissed since their lease has not been extended or has been determined and they do not have any environmental clearance or forest clearance. (Para 222)

IA No. 66 (filed by *J*) is also dismissed since there is no forest clearance available. (Para 223)

S (IA No. 9) actually had a working lease and has wrongly been included as a non-operational lease. Accordingly, IA No. 9 (filed by *S*) is also dismissed but as being infructuous. However, it is made clear that the State Government should ensure that the lessee *S* in fact has valid statutory clearances. (Para 224)

Pending show-cause notices issued by the State Government should be decided by 31-12-2017 (if not already decided) after hearing the notices concerned. (Para 225)

The amounts determined as due from all the mining leaseholders should be deposited by them on or before 31-12-2017. Subject to and only after compliance with statutory requirements and full payment of compensation and other dues, the mining leaseholders can restart their mining operations. (Para 227)

All other pending IAs are disposed of in terms of orders in present case. (Para 232)

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I. **Mines and Minerals — Judicial Intervention — Illegal mining in State of Odisha — Prayer for CBI inquiry — Instead of CBI inquiry, expert committee to be set up under guidance of retired Supreme Court Judge to identify lapses and suggest measures for corrective steps that can be taken for future and for other States (Paras 47, 49, 50, 229, 213 and 214)**

Held :

Justice M.B. Shah Commission under the Commissions of Inquiry Act, 1952 suggests that Central Bureau of Investigation (CBI) may be directed to investigate into allegations of corruption made against politicians, bureaucrats and others. This however, would be considered at the appropriate stage. (Para 47)

Commission felt that the Vigilance Commission was unlikely to conduct an impartial and independent enquiry for arriving at just and proper findings because of external pressures. Accordingly, it would be more appropriate if the Central Bureau of Investigation (CBI) conducts a detailed enquiry into all cases that have been registered between 2008 and 2011. (Para 49)

It was also noted that the Railways have issued demand notices to the extent of Rs 1874 crores. The latest position with regard to these notices is not available. It was also noted that notices have been issued in 146 cases to various leaseholders for recovery of mined ore as per Section 21(5) of the MMDR Act for recovery of more than Rs 59,000 crores! (According to CEC the figure exceeds Rs 61,000 crores)!! (Paras 49 and 50)

For the present, no direction is passed with regard to any investigation by CBI. What is of immediate concern is to learn lessons from the past so that rapacious mining operations are not repeated in any other part of the country. This can be achieved through the identification of lapses and finding solutions to the problems that are faced. Undoubtedly, there have been very serious lapses that have enabled large-scale mining activities to be carried out without forest clearance or environment clearance and eventually the persons responsible for this will need to be booked but the violation of the laws and policy need to be prevented in other parts of the country. The rule of law needs to be established. Therefore, it would be appropriate if an Expert Committee is set up under the guidance of a retired Judge of the Supreme Court to identify the lapses that have occurred over the years enabling rampant illegal or unlawful mining in Odisha and measures to prevent this from happening in other parts of the country. (Paras 229 and 213)

There is no doubt that the recommendations of the Commission can form a platform for the study but it is also necessary to use technology for maintenance of registers, records and data through computers, satellite imagery, videography and other technology tools so that the natural wealth of our country is not rapaciously exploited for the benefit of a few to the detriment of a large number, many of whom are tribals inhabiting the land for several generations. (Para 114)

J. **Environment Law — Environmental Clearance/NOC/Environment Impact Assessment — EIA Notification — EIA 1994 — Applicability to mining leases — Following aspects, clarified**

— (i) statutory basis of environmental clearance (EC) for mining activities, (See para 86)

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— (ii) Meaning of EC, (See para 87)

— (iii) When prior approval of EC required, (See paras 88, 89 and 96) — Requirement of environmental clearance (EC) if pollution load is to exceed due to expansion or modernisation of any activity or if new project listed in Sch. I is undertaken

— (iv) When prior EC not required, (See paras 91 and 96)

— (v) Base year for computing extent of modernisation and expansion for calculation of pollution load, that is, 1993-1994, (See paras 93, 94 and 96)

— (vi) renewal of mining leases, (See paras 100 to 108) (Paras 86 to 108)

Held :

Having regard to to object of the MMDR Act, an Environment Impact Notification dated 27-1-1994 (EIA 1994) was issued by the Central Government in exercise of powers conferred by Section 3(1) and Section 3(2)(*v*) of the EPA read with Rule 5(3)(*d*) of the Environment (Protection) Rules, 1986. It is a prohibitory Notification and directs that on and from the date of its publication in the Official Gazette:

(*i*) expansion or modernisation of any activity (if pollution load is to exceed the existing one); and

(*ii*) a new project listed in Schedule I to the notification, shall not be undertaken unless it has been accorded environmental clearance (EC) by the Central Government in accordance with the procedure specified in the Notification. (Para 86)

The Notification provides, among other things, that in case of mining operations, site clearance shall be granted for a sanctioned capacity and shall be valid for a period of five years from commencing mining operations. What this means is that on receipt of an EC a mining leaseholder can extract a mineral only from a specified site, up to the sanctioned capacity and only for a period of five years from the date of the grant of an EC. This is regardless of the quantum of extraction permissible in the mining plan or the mining lease and regardless of the duration of the mining lease. Consequently, a mining leaseholder would necessarily have to obtain a fresh EC every five years and can also apply for an increase in the sanctioned capacity. There is no concept of a retrospective EC and its validity effectively starts only from the day it is granted. Thus, the EC takes precedence over the mining lease or to put it conversely, the mining operations under a mining lease are dependent on and "subordinate" to the EC. (Para 87)

On 4-5-1994 an Explanatory Note was added to EIA 1994. As per its First Note, if any proposed expansion or modernisation activity results in an increase in the pollution load, then a prior EC is required. The project proponent should approach the State Pollution Control Board concerned (for short SPCB) for certifying whether the proposed expansion or modernisation is likely to exceed the existing pollution load or not. If the pollution load is not likely to be exceeded, the project proponent will not be required to seek an EC but a copy of such a certificate from SPCB will require to be submitted to the Impact Assessment Agency which can review the certificate. (Paras 88 and 89)

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Eighth Note of Explanatory Note dated 4-5-1994 to EIA 1994, makes it clear that existing mining projects that have a no-objection certificate from SPCB before 27-1-1994 will not be required to obtain an EC from the Impact Assessment Agency. Of course, this is subject to the substantive portion of EIA 1994 and the 1st Note. However, if the existing mining project does not have a no-objection certificate from SPCB, then an EC will be required under EIA 1994. (Para 91)

A reading of EIA 1994 read with the 1st Note implies that the base year for computing extent of expansion and modernisation or increase of annual production and its impact on existing pollution load is the immediately preceding year, that is, 1993-1994. This is obvious from the opening sentence of the 1st Note, that is, a project proponent is required to seek environmental clearance for a proposed expansion/modernisation activity if the resultant pollution load is to exceed the *existing levels*. In its report, CEC also has taken 1993-1994 as the base year. (Para 93)

Circular dated 28-10-2014 cannot be interpreted to mean that production even prior to 1993-1994 could be taken as the base year. The *existing levels* mentioned in the 1st Note clearly have reference to the immediately preceding year and not to a preceding year in a comparatively remote past. Further, a very high annual production in any one year is not reflective of a consistent pattern of production — it could very well be a freak year and that freak year certainly cannot be a basic standard or the norm to measure expansion. Then if the interpretation sought to be given is accepted, there would be an absence of consistency and a lack of uniformity with different mining leaseholders having different base years. This is hardly conducive to good governance. Finally, EIA 1994 was intended to prevent the existing environmental load from increasing based on the existing data of the immediate past and not data of a few years gone by. The only exception that could be made in this regard would be if there is no production during 1993-94. In that event, the immediately preceding year would be relevant and that is the only reasonable interpretation for the use of the words "or its preceding years". (Para 94)

On a composite reading of EIA 1994, it is clear that:

(*i*) A no-objection certificate from SPCB was necessary for continuing mining operations;

(*ii*) An expansion or modernisation activity required an EC unless the pollution load was not exceeded beyond the existing levels;

(*iii*) The base year for determining the pollution load and therefore the proposed expansion would be with reference to 1993-94;

(*iv*) Whether an expansion or modernisation would lead to exceeding the existing pollution load or not would require a certificate from SPCB which could be reviewed by the IAA;

(*v*) New projects require an EC; and

(*vi*) Existing projects do not require an EC unless there is an expansion or modernisation for the duration (if any) of the validity of the certificate from SPCB. (Para 96)

Nothing more needs to be stated on this subject since CEC has proceeded to discuss the issue of mining in excess of the EC or in excess of the mining plan only

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from the year 2000-01 onwards. The prior period may, therefore, be ignored and it is the period from 2000-01 onwards which is actually relevant for the present discussion. (Para 96)

Circular dated 14-5-2002 indicates that several units had come up in violation of EIA 1994. The MoEF had taken the view that such units may be permitted to apply for an EC by 31-3-1999 which was then extended to 30-6-2001 by Circulars dated 5-11-1998 and 27-12-2000, respectively. By the Circular dated 14-5-2002 the deadline for applying for an EC was extended up to 31-3-2003 as a last and final opportunity to obtain an ex post facto EC in respect of units which had commenced mining operations without obtaining a prior EC in violation of EIA 1994. (Paras 98 and 99)

M.C. Mehta v. *Union of India*, (2004) 12 SCC 118, *referred to*

As to whether EC was required particularly in respect of pre-EIA 1994 mining leases and operations it was wrongly submitted that it was not obligatory for the mining leaseholders, who did not expand their mining operations, to obtain an EC and in any event the period for obtaining an EC was extended till 31-3-2003 with ex post facto approval. (Paras 100 and 102)

With regard to EIA 1994 and Circular dated 14-5-2002, the intention of the MoEF was not to legalise the continuance of mining activity without complying with the requisite stipulations. If that were unfortunately so, then it would demonstrate a lack of sensitivity of the MoEF to the principles of sustainable development and the object behind issuing EIA 1994. EIA 1994 would apply to the renewal of a mining lease that came up for consideration post 27-1-1994. For the renewal of a mining lease, an EC was required by the mining leaseholder. EIA 1994 is mandatory. It is applicable to all mining operations—expansion of production or even increase in lease area, modernisation of the extraction process, new mining projects and renewal of mining leases. A mining leaseholder is obliged to adhere to the terms and conditions of a mining lease and the applicable laws and the mere fact that a mining plan has been approved does not entitle a mining leaseholder to commence mining operations. Although the two clarificatory Circulars issued by MoEF on 28-10-2004 and 25-4-2005 extended the date to apply for EC and although it gave the possibility of getting an ex post facto EC, that cannot be treated as a signal to the mining leaseholders that obtaining an EC was not mandatory or that if it was not obtained, the default was retrospectively condonable. Compliance with the MMDR Act and the Rules framed thereunder are important for the protection and preservation of the environment. The obligation of everyone to abide by the law cannot be overlooked. That the MoEF took a soft approach cannot be an escapist excuse for non-compliance with the law or EIA 1994. (Paras 103 to 108)

M.C. Mehta v. *Union of India*, (2004) 12 SCC 118, *relied on*

K. **Environment Law — Environmental Clearance/NOC/Environment Impact Assessment — EIA Notification — EIA 2006 and EIA 1994 — Applicability to mining leases — Concept of ex post facto environmental clearance (EC) or retrospective EC, held, completely alien to environmental jurisprudence not only under EIA 1994 but also under EIA 2006**

— No doubt EC obtained earlier would continue under certain circumstances — But a prior EC would be required (a) if there is over-extraction

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beyond permissible limits or (b) if there is renewal of mining lease even if there is no over-extraction — And for this a mining plan is subordinate to EC, meaning that, mining would be illegal even if permitted by mining plan if such mining plan does not conform to conditions of EC or if a prior EC has not been obtained where required — And an EC will come into force not earlier than the date of its grant

Held :

The EIA 2006 Notification dated 14-9-2006 required prior EC for projects or activities mentioned in the Schedule to it both for major as well as minor minerals if the leased area is 5 ha or more. Several mining leaseholders, in compliance with EIA 2006, applied for and were granted an EC. (Para 109)

Circular dated 2-7-2007 clarified as follows:

(*i*) Mining leases, where no EC was required under EIA 1994 would continue to operate without an EC;

(*ii*) If there was an increase in the lease area or enhancement of production, an EC was required by the mining leaseholder;

(*iii*) All projects would require an EC at the time of renewal of the mining lease even if there was no increase in the lease area or enhancement of production. (Paras 111 and 112)

There is no confusion, vagueness or uncertainty in the application of EIA 1994 and EIA 2006 insofar as mining operations were commenced on mining leases before 27-1-1994 (or even thereafter). Post EIA 2006, every mining leaseholder having a lease area of 5 ha or more and undertaking mining operations in respect of major minerals (with which we are concerned) was obliged to get an EC in terms of EIA 2006. (Para 115)

A mining plan is subordinate to an EC. Having an approved mining plan does not imply that a mining leaseholder can commence mining operations. That being so, a modified mining plan without a revised or amended EC, is of no consequence. Allegedly, under the shield of a modified mining plan, illegal or unlawful mining in the form of mining without an EC, mining by over-reaching EIA 1994 and EIA 2006 was being carried out. (Para 117)

In a Letter dated 29-10-2010 addressed to the Controller General, Indian Bureau of Mines it was made clear that all modifications of mining plans shall be effective prospectively only and earlier instances of irregular mining shall not be regularised through a modification of the mining plan. (Para 118)

In respect of overproduction, a High Level Committee (called the Hoda Committee) on the National Mineral Policy noted in its Report dated 22-12-2006 that the permissible variation in production as per the Indian Bureau of Mines is ±10% but according to the Letter dated 12-12-2011 issued by the Ministry of Mines, the reasonable variation limit could be ±20%. The fact that in some cases the variation exceeded 20% was a cause for concern which necessitated strict and punitive action. (Paras 120 and 121)

For the purposes of renewal of the mining lease, an application is required to be made by the mining leaseholders and the deemed renewal clause under Rule 24-A of the MCR will come into operation only after an application for renewal is

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made in Form J in Schedule I of the MCR. Under Rule 26 of the MCR, the State Government may refuse to renew the mining lease. In view of EIA 1994, it is quite clear that the renewal of a mining lease would require a prior EC. Circular dated 28-10-2004 issued by MoEF stated that in view of the decision in *M.C. Mehta*, (2004) 12 SCC 118 all mining projects of major minerals of more than 5 ha lease area that had not yet obtained an EC would have to do so at the time of renewal of the lease. (Paras 122 and 123)

M.C. Mehta v. *Union of India*, (2004) 12 SCC 118, *relied on*

The grant of an EC cannot be taken as a mechanical exercise. It can only be granted after due diligence and reasonable care since damage to the environment can have a long-term impact. EIA 1994 is therefore very clear that if expansion or modernisation of any mining activity exceeds the existing pollution load, a prior EC is necessary and even for the renewal of a mining lease where there is no expansion or modernisation of any activity, a prior EC is necessary. Such importance having been given to an EC, the grant of an ex post facto environmental clearance would be detrimental to the environment and could lead to irreparable degradation of the environment. The concept of an ex post facto or a retrospective EC is completely alien to environmental jurisprudence including EIA 1994 and EIA 2006. An EC will come into force not earlier than the date of its grant. (Para 125)

L. **Mines and Minerals — Encroachment — Joint survey — Directions to State of Odisha and CEC — Mining outside sanctioned mining areas, held, illegal — Directions issued for proper identification of nature and extent of encroachment of 82 leaseholders — As Joint Survey had been conducted by State of Odisha only in respect of 39 leases, authorities directed to complete survey of remaining 43 leases — CEC directed to present such report before Court on or before 31-12-2017 — Mines and Minerals (Development and Regulation) Act, 1957, S. 4**

Held :

Section 4(1) of the MMDR Act makes it clear that no person can carry out any mining operations except under and in accordance with the terms and conditions of a mining lease granted under the MMDR Act and the Rules made thereunder. Obviously therefore, any person carrying on mining operations without a mining lease, is indulging in illegal or unlawful mining. This would also necessarily imply that if a mining lease is granted to a person who carries out mining operations outside the boundaries of the mining lease, the mineral extracted would be the result of illegal or unlawful mining. (Para 131)

CEC stated that in 82 mining leases for iron ore and manganese ore there were encroachments in the form of illegal mining pits, illegal overburdened dumps, etc. (Para 132)

In respect of these 82 mining leases, the State of Odisha appointed a Committee on the suggestion of the Commission, to survey and identify the exact extent and location of the sanctioned lease area, lease area under occupation of the mining leaseholder and the area under encroachment/illegal mining. The Committee or the Joint Survey consisted of officers of the Revenue Department, Forest Department and Mining Department of the State of Odisha who carried out a field survey in respect of 39 mining leases. The findings of the field survey or the Joint

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Survey were verified by a team comprising of the Director, Mines, Chief Engineer, ORSAC and the Additional Secretary, F & E Department of the Government of Odisha. (Para 133)

It is mentioned in the report of CEC that the Joint Survey for each of the 39 mining leases is technically sound and reliable. However, the fact is that a joint survey has not been conducted in respect of remaining 43 mining leases. (Para 134)

For completing the record and taking the report of CEC to its logical conclusion, it would be appropriate if a fresh Joint Survey is conducted by officers concerned of the Government of Odisha from the Revenue Department, the Forest Department, the Mining Department and any other department that may be deemed necessary. The Forest Survey of India, the MoEF, the Indian Bureau of Mines and the Geological Survey of India should also be associated in the Joint Survey. In our opinion, it would also be appropriate if CEC is also associated in the Joint Survey and the best and latest technology should be made use of including satellite imagery and thereafter a report is submitted in the Supreme Court on or before 31-12-2017 after hearing the 82 lessees identified by the Commission. (Para 135)

M. **Mines and Minerals — Illegal mining — Over extraction — Permissible limits — 20% variation in extraction over and above mining plan as per R. 22(5), MCR — Scope of, explained — Clarified that this does not permit mining leaseholder to extract entire permissible quantity for 5 years plus 20% over extraction in a single year and thereafter extract miniscule amounts over the remaining 4 years — Mining in excess of permissible limits would amount to illegal or unlawful mining or mining without lawful authority — Mineral Concession Rules, 1960, R. 22(5) (Paras 136 and 140)**

Held :

A side issue raised by the learned counsel for the mining leaseholders in this regard was the necessity (if any) of adhering to the annual plan or calendar plan of mining. It was contended that a mining leaseholder could mine in excess of the annual plan. While it is so, this submission must be tempered and appreciated in the proper context. A mining plan is valid for a period of five years but there could be a 20% variation in extraction over and above the mining plan. This is the maximum that is stated to be reasonably permissible according to the Ministry of Mines. In terms of Rule 22(5) of the MCR a mining plan shall incorporate a tentative scheme of mining and annual programme and plan for excavation from year-to-year for five years. At best, there could be a variation in extraction of 20% in each given year but this would be subject to the overall mining plan limit of a variation of 20% over five years. What this means is that a mining leaseholder cannot extract the five year quantity (with a variation of 20%) in one or two years only. The extraction has to be staggered and continued over a period of five years. If any other interpretation is given, it would lead to an absurd situation where a mining leaseholder could extract the entire permissible quantity under the mining plan plus 20% in one year and extract miniscule amounts over the remaining four years, and this could be done without any reference to the EC. The submission in this regard simply cannot be accepted. (Para 136)

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While mining in excess of permissible limits under the mining plan or the EC or FC on leased area may not amount to mining on land occupied without lawful authority, it would certainly amount to illegal or unlawful mining or mining without authority of law. This is the correct interpretation of Section 21(5), MMDR Act. (Para 140)

N. **Mines and Minerals — Mines and Minerals (Development and Regulation) Act, 1957 — S. 21(5) — Compensation for illegal mining — When attracted — S. 21(5) is attracted when any person, without lawful authority extracts any mineral from any land — State Government is entitled to recover said illegally extracted mineral or price thereof — Word "any land" not confined to violations outside lease area — It includes violations within mining lease area (Para 151)**

Held :

Section 21(5) of the MMDR Act is applicable when any person raises, without any lawful authority, any mineral from *any land*. In that event, the State Government is entitled to recover from such person the mineral so raised or where the mineral has already been disposed of, the price thereof as compensation. The words "any land" are not confined to the mining lease area. As far as the mining lease area is concerned, extraction of a mineral over and above what is permissible under the mining plan or under the EC undoubtedly attracts the provisions of Section 21(5) of the MMDR Act being extraction without lawful authority. It would also attract Section 21(1) of the MMDR Act. In any event, Section 21(5) of the Act is certainly attracted and is not limited to a violation committed by a person only outside the mining lease area — it includes a violation committed even within the mining lease area. This is also because the MMDR Act is intended, among other things, to penalise illegal or unlawful mining on any land including mining lease land and also preserve and protect the environment. Action under the EPA or the MCR could be the primary action required to be taken with reference to the MCR and Rule 2(*ii-a*) thereof read with the Explanation but that cannot preclude compensation to the State under Section 21(5) of the MMDR Act. The MCR cannot be read to govern the MMDR Act. (Para 151)

Karnataka Rare Earth v. *Deptt. of Mines & Geology*, (2004) 2 SCC 783, *relied on*

Khemka & Co. (Agencies) (P) Ltd. v. *State of Maharashtra*, (1975) 2 SCC 22 : 1975 SCC (Tax) 227, *distinguished*

Director of Public Prosecutions v. *Schildkamp*, 1971 AC 1 : (1970) 2 WLR 279 : (1969) 3 All ER 1640 (HL), *referred to*

Black's Law Dictionary, 7th Edn., p. 1421; Justice Singh, G.P.: *Principles of Statutory Interpretation* (8th Edn., 2001, p. 147), *referred to*

O. **Mines and Minerals — Mines and Minerals (Development and Regulation) Act, 1957 — S. 21(5) — Compensation for illegal mining — Quantum — There can be no compromise on quantum of compensation — S. 21(5) contemplates 100% recovery — State should not forego what is its due in order to fill coffers of defaulting lessees (Paras 153 and 154)**

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Held :

100% recovery should be made under the provisions of Section 21(5) of the MMDR. Submission that only 30% of the value of the illegally mined ore should be recovered cannot be accepted. (Para 153)

There can be no compromise on the quantum of compensation that should be recovered from any defaulting lessee. It simply does not stand to reason why the State should be compelled to forego what is its due from the exploitation of a natural resource and on the contrary be a party in filling the coffers of defaulting lessees in an ill-gotten manner. (Para 154)

P. **Mines and Minerals — Mines and Minerals (Development and Regulation) Act, 1957 — S. 21(5) — Compensation for illegal mining — Calculation — Base year and period of application — For said calculation, base year of 1993-1994, held, reasonable in present cases — Although some might lose and some might benefit, each leaseholder is given benefit of calculation only from year 2000-2001 and would not be penalised for period prior thereto (Paras 155 to 157)**

Held :

The issue now is with regard to the calculations made by CEC with regard to the production of iron ore and manganese ore without or in excess of the EC and/or the mining plan. The figures were not disputed (except by JSPL and SMPL). Therefore, only the application of the figures requires consideration. (Para 155)

For the said calculation, the base year of 1993-94 is most appropriate. Some lessees might lose in the process while some of them might benefit but that cannot be avoided. In any event, each mining leaseholder is being given the benefit of calculations only from 2000-2001 and is not being "penalised" for the period prior thereto. The mining leaseholders should be grateful for this since the penalty is levied from the date of EIA 1994. The cut-off from 2000-2001 (without interest) is undoubtedly reasonable and there can hardly be any grievance in this regard. The mining leaseholders cannot have their cake and eat it too, along with the icing on top. (Para 156)

Thus the compensation should be payable from 2000-2001 onwards at 100% of the price of the mineral. (Para 157)

Q. **Environment Law — Forests, Wildlife and Zoos — Mining and Industry in Forest Area — Mining in forest areas (in State of Odisha) — Permissibility of — Preconditions, stated, (a) prior approval of Central Government under S. 2, FCA, and (b) payment of net present value (NPV) as directed in *T.N. Godavarman Thirumulpad*, (2010) 15 SCC 177 considering peculiar circumstances prevailing in State of Odisha — (c) However, from 7-1-1998 any mining activity in any forest or DLC forest (forest identified by District Level Committee) is completely illegal and price of mineral extracted is recoverable under S. 21 of MMDR Act until forest clearance (FC) is obtained from Central Government, and 100% of price of iron ore or manganese ore mined without S. 2 approval should be recovered — However, clarified that a leaseholder is only liable to pay 100% price of illegally extracted ore**

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for non-compliance with either FC or EC or both — For not having both FC and EC clearances, leaseholder would not be required to pay 200% — However, this has to be distinguished from NPV — Even if NPV has been paid earlier, additional NPV is neither adjustable not refundable since that falls in a different category altogether — Further, clarified that a violation of FCA is condonable on payment of penal compensatory afforestation charges, and mining leaseholders would be entitled to temporary working permit (Paras 164 to 188)

Held :

After the commencement of the FCA no fresh breaking up of forest land or no fresh clearing of the forest on any such land could be permitted by the State Government or any authority without the approval of the Central Government. However, in respect of broken up land, if the State Government permits the lessee to remove any discovered mineral, it cannot be said that there has been a violation of Section 2 of the FCA particularly since there is no breaking up of any fresh forest land. However, this does not mean that renewal of lease can be claimed as a matter of right. The primary purpose of the FCA is to prevent deforestation and ecological imbalance as a result of deforestation. Therefore, the primary duty under the FCA was to the community and the obligation to society must predominate over the obligation to the individuals. (Paras 164 and 165)

Ambica Quarry Works v. *State of Gujarat*, (1987) 1 SCC 213; *Rural Litigation and Entitlement Kendra* v. *State of U.P.*, 1989 Supp (1) SCC 504, *relied on*

State of Bihar v. *Banshi Ram Modi*, (1985) 3 SCC 643, *distinguished*

Therefore, compliance with Section 2 of the FCA is necessary as a condition precedent even for the renewal of a mining lease. (Para 166)

The definition of the word "forest" for the purposes of the FCA came up for consideration in *T.N. Godavarman Thirumulpad*, (1997) 2 SCC 267. In this context, it was held that "forest" must be understood according to its dictionary meaning and it would cover all statutorily recognised forests, whether designated, reserved, protected or otherwise. The Supreme Court further directed each State Government to constitute within one month an Expert Committee, inter alia, to identify areas which are "forest" irrespective of whether they are so notified, recognised or classified under any law and irrespective of the ownership of the land of such forest. Pursuant to the directions given by the Supreme Court, the State of Odisha constituted District Level Committees (DLC) for identification of forest lands. After the identification process, appropriate affidavits were filed by the State of Odisha in the Supreme Court in 1997-98, the last being dated 6-1-1998. (Paras 167 to 170)

The Court in *T.N. Godavarman Thirumulpad*, (2010) 15 SCC 177 accepted the recommended by CEC that given the peculiar circumstances prevailing in the State of Odisha, mining operations in the entire DLC lands included in the mining leases may be allowed to continue on payment of the net present value (NPV) subject to the fulfilment of other statutory requirements and rules being complied with. (Para 174)

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Consequently, the State of Odisha appears to have implemented the recommendations regarding recovery of NPV and realised an amount of about Rs 1750 crores as additional NPV. (Para 175)

T.N. Godavarman Thirumulpad v. *Union of India*, IAs Nos. 2746-48 in WP (C) No. 202 of 1995, order dated 6-11-2009 (SC); *T.N. Godavarman Thirumulpad* v. *Union of India*, (1997) 2 SCC 267; *T.N. Godavarman Thirumulpad* v. *Union of India*, (2010) 15 SCC 177; *T.N. Godavarman Thirumulpad* v. *Union of India*, (1997) 3 SCC 312, *referred to*

In addition to the above, the mining leaseholders have subsequently deposited an amount under the heading of penal compensatory afforestation which was introduced through guidelines issued by the MoEF on 3-2-1999. (Para 176)

Given the fact that the defaulting mining leaseholders have been asked to pay and have paid additional NPV as well as an amount towards penal compensatory afforestation, it must be assumed that the violation of the FCA has been condoned to a limited extent, more particularly since in its order dated 7-5-2010 the Court permitted the State of Odisha to accept such recommendations of CEC made in the report dated 26-4-2010 as are acceptable to it. (Para 179)

This still leaves open the question of violation of the order passed by the Supreme Court on 12-12-1996 followed by the order dated 4-3-1997, namely, that mining must cease forthwith in forest areas. In regard to this violation, the only benefit (at best) that can be granted to the mining leaseholders is till 6-1-1998 when the affidavit was filed in IAs Nos. 2746-48 of 2009 in *T.N. Godavarman Thirumulpad*, (2014) 6 SCC 167. With effect from 7-1-1998 any mining activity in forest and DLC lands would clearly be completely illegal and unauthorised and the benefit that the mining leaseholders have derived from this illegal mining would be subject to Section 21(5) of the MMDR Act. Therefore, the price of the iron ore and manganese ore mined by the mining leaseholders from 7-1-1998 is payable until forest clearance under Section 2 of the FC Act is obtained by the mining leaseholders. (Para 180)

T.N. Godavarman Thirumulpad v. *Union of India*, (1997) 2 SCC 267; *T.N. Godavarman Thirumulpad* v. *Union of India*, (1997) 3 SCC 312; *T.N. Godavarman Thirumulpad* v. *Union of India*, (2014) 6 SCC 167; *T.N. Godavarman Thirumulpad* v. *Union of India*, (2014) 6 SCC 167, 172 (footnote 1), *referred to*

7-1-1998 has been fixed as the cut-off date despite the orders dated 12-12-1996 and 4-3-1997 only for the reason that it is possible that some mining leaseholders were not aware that they were inadvertently conducting mining operations on DLC lands which were identified by the State of Odisha as forest lands on the directions of the Court. For the purposes of Section 21(5) of the MMDR Act, they are entitled to the benefit of doubt along with the other mining leaseholders. (Para 183)

Therefore, the suggestion of CEC that only a part of the notional value (in this case 70%) of the iron ore and manganese ore produced by the mining leaseholders should be recovered is not acceptable. Section 21(5) of the MMDR Act should be given full effect and the recovery should be to the extent of 100%. (Para 185)

Mineral extracted either without an EC or without an FC or without both would attract the provisions of Section 21(5) of the MMDR Act and 100% of the price of the illegally or unlawfully mined mineral must be compensated by the mining leaseholder. To the extent of the overlap or the common period, obviously only one set of compensation is payable by the mining leaseholder

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to the State of Odisha. However, whatever payment has already been made by the mining leaseholders towards NPV, additional NPV or penal compensatory afforestation is neither adjustable nor refundable since that falls in a different category altogether. (Para 186)

A violation of the FCA is condonable on payment of penal compensatory afforestation charges. This obviously would not apply to illegal or unlawful mining under Section 21(5) of the MMDR Act, but the mining leaseholders would be entitled to the benefit of any temporary working permission granted. (Para 187)

T.N. Godavarman Thirumulpad v. *Union of India*, (2011) 15 SCC 658; *T.N. Godavarman Thirumulpad* v. *Union of India*, (2011) 15 SCC 681, *relied on*

To avoid any misunderstanding, confusion or ambiguity, it is clarified as follows:

(*1*) A mining project that has commenced prior to 27-1-1994 and has obtained a no-objection certificate from SPCB prior to that date is permitted to continue its mining operations without obtaining an EC from the Impact Assessment Agency. However, this is subject to any expansion (including an increase in the lease area) or modernisation activity after 27-1-1994 which would result in an increase in the pollution load. In that event, a prior EC is required. However, if the pollution load is not expected to increase despite the proposed expansion (including an increase in the lease area) or modernisation activity, a certificate to this effect is absolutely necessary from SPCB, which would be reviewed by the Impact Assessment Agency.

(*2*) The renewal of a mining lease after 27-1-1994 will require an EC even if there is no expansion or modernisation activity or any increase in the pollution load.

(*3*) For considering the pollution load the base year would be 1993-94, which is to say that if the annual production after 27-1-1994 exceeds the annual production of 1993-94, it would be treated as an expansion requiring an EC.

(*4*) There is no doubt that a new mining project after 27-1-1994 would require a prior EC.

(*5*) Any iron ore or manganese ore extracted contrary to EIA 1994 or EIA 2006 would constitute illegal or unlawful mining (as understood and interpreted by us) and compensation at 100% of the price of the mineral should be recovered from 2000-2001 onwards in terms of Section 21(5) of the MMDR Act, if the extracted mineral has been disposed of. In addition, any rent, royalty or tax for the period that such mining activity was carried out outside the mining lease area should be recovered.

(*6*) With effect from 14-9-2006 all mining projects having a lease area of 5 ha or more are required to have an EC. The extraction of any mineral in such a case without an EC would amount to illegal or unlawful mining attracting the provisions of Section 21(5) of the MMDR Act.

(*7*) For a mining lease of iron ore or manganese ore of less than 5 ha area, the provisions of EIA 1994 will continue to apply subject to EIA 2006.

(*8*) Any mining activity carried on after 7-1-1998 without an FC amounts to illegal or unlawful mining in terms of the provisions of Section 21(5) of

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MMDR Act attracting 100% recovery of the price of the extracted mineral that is disposed of.

(*9*) In the event of any overlap, that is, illegal or unlawful mining without an FC or without an EC or without both would attract only 100% compensation and not 200% compensation. In other words, only one set of compensation would be payable by the mining leaseholder.

(*10*) No mining leaseholder will be entitled to the benefit of any payments made towards NPV or additional NPV or penal compensatory afforestation. (Para 188)

R. **Environment Law — General Principles of Environmental Law — Precautionary Principle/Sustainable Development/Inter-Generational Equity Principle — Instances re Areas/Industries — Mining policy — Judicial interference — Scope of — Held, Court cannot interfere with mining policy or lay down limits on extent of mining activity that should be permitted by the State Government or Central Government — Therefore, prayers on basis of principles of intergenerational equity, not tenable — But considering that National Mineral Policy, 2008 is only in pen and paper and also obsolete (that is, 10 years old), Central Government directed to revisit said policy and announce a fresh, more effective, meaningful and implementable policy (Paras 207 to 211 and 230)**

Held :

The petitioner sought to impress the need to consider intergenerational equity and if possible to place a limit on the extent of mining in the State of Odisha by referring to an article titled: "Intergenerational equity: a legal framework for global environment change" by Edith Brown Weiss. He laid emphasis on three principles that form the basis of intergenerational equity, that is, the principle of "conservation of options", the principle of "conservation of quality" and the principle of "conservation of access". (Paras 207 to 210)

The Court cannot lay down limits on the extent of mining activities that should be permitted by the State of Odisha or by the Union of India. Nevertheless, it does appear that there is no effective check on mining operations nor is there any effective mining policy. The National Mineral Policy, 2008 (effective from March 2008) seems to be only on paper and is not being enforced perhaps due to the involvement of very powerful vested interests or a failure of nerve. The National Mineral Policy, 2008 is almost a decade old and a variety of changes have taken place since then, including (unfortunately) the advent of rapacious mining in several parts of the country. Therefore, it is high time that the Union of India revisits the National Mineral Policy, 2008 and announces a fresh and more effective, meaningful and implementable policy. The Union of India is directed to have a fresh look at the National Mineral Policy, 2008 which is almost a decade old, particularly with regard to conservation and mineral development. The exercise should be completed by 31-12-2017. (Paras 211 and 230)

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Advocates who appeared in this case :

Ashok Desai, Rakesh Dwivedi and Gopal Subramanium, Senior Advocates ([Prashant Bhushan, Advocate) for the appearing parties.

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

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5. IA No. 35 in IA No. 17 in WP (C) No. 114 of 2014, order dated 16-1-2015 (SC), *Common Cause* v. *Union of India* 528*d-e*
6. (2014) 14 SCC 160, *T.N. Godavarman Thirumulpad* v. *Union of India* 525*d-e*, 537*g-h*
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21. (2008) 2 SCC 222, *T.N. Godavarman Thirumulpad (104)* v. *Union of India* 575*b*
22. (2004) 12 SCC 118, *M.C. Mehta* v. *Union of India* 547*b*, 547*f*, 547*f-g*, 547*g*, 548*c*, 548*f-g*, 549*b-c*, 549*c*, 549*c-d*, 549*e*, 550*b-c*, 551*c-d*, 552*g-h*, 553*a*, 553*e*
23. (2004) 2 SCC 783, *Karnataka Rare Earth* v. *Deptt. of Mines & Geology* 558*g*, 559*a*, 559*g-h*
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27. 1989 Supp (1) SCC 504, *Rural Litigation and Entitlement Kendra* v. *State of U.P.* 563*e-f*
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29. (1985) 3 SCC 643, *State of Bihar* v. *Banshi Ram Modi* 562*e*, 563*d*
30. (1975) 2 SCC 22 : 1975 SCC (Tax) 227, *Khemka & Co. (Agencies) (P) Ltd.* v. *State of Maharashtra* 558*a*, 559*g-h*
31. 1971 AC 1 : (1970) 2 WLR 279 : (1969) 3 All ER 1640 (HL), *Director of Public Prosecutions* v. *Schildkamp* 559*d-e*

The Judgment of the Court was delivered by

MADAN B. LOKUR, J.— The facts revealed during the hearing of these writ petitions filed under Article 32 of the Constitution suggest a mining scandal of enormous proportions and one involving megabucks. The lessees in the districts of Keonjhar, Sundergarh and Mayurbhanj in Odisha have rapaciously mined iron ore and manganese ore, apparently destroyed the environment and forests and perhaps caused untold misery to the tribals in the area. However, to be fair to the lessees, they did the detail steps taken to ameliorate the hardships of the tribals, but it appears to us that their contribution is perhaps not more than a drop in the ocean — also too little, too late.

Facts leading up to the report of the Central Empowered Committee

2. Rabi Das, the editor of a daily newspaper called *Ama Rajdhani* filed IAs Nos. 2746-48 of 2009 in a pending writ petition being *T.N. Godavarman* v. *Union of India*[1]. He prayed, inter alia, for the following directions from this Court:

> "(*a*) Issue a direction to the Central Empowered Committee to conduct an exhaustive fact-finding study of the illegal mining in Keonjhar, Sundargarh and other districts of Orissa;
>
> (*b*) Direct appointment of a "Commission" to investigate and study the modalities of the illegal machinations, fix responsibility on individuals (in Government and outside it) and recommend remedial measures to be immediately implemented by the Government of India and the Government of Orissa;
>
> (*c*) Direct the respondents to take effective and appropriate action to ensure closure/stoppage of all the illegal mining activities in the areas concerned and direct prosecution and punish all those found guilty of this illegal mining in violation of the Mines and Minerals (Development and Regulation) Act, 1957; the Forest (Conservation) Act, 1980 and other relevant laws."

3. The applications were taken up for consideration on 6-11-2009[2] when notice was issued to the Central Empowered Committee (for short "CEC") to file its report/response within six weeks.

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1 WP (C) No. 202 of 1995

2 *T.N. Godavarman Thirumulpad* v. *Union of India*, IAs Nos. 2746-48 in WP (C) No. 202 of 1995, order dated 6-11-2009 (SC), wherein it was directed:

"Taken on board. Issue notice to CEC to file its report/response within six weeks."

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4. On 26-4-2010 CEC submitted an interim report which was noted by this Court and taken on record. The report was of a general nature but contained quite a few recommendations. Some of the recommendations presently relevant are as follows:

> "(*b*) Even otherwise Rule 24-A(6), MCR, 1960 does not authorise the lessee to operate a mine without the statutory clearances/approvals. Therefore, in respect of a mine covered under the "deemed extension" clause, the mining operations should be permitted to be undertaken in the non-forest area of the mining lease only if (*i*) it has the requisite environmental clearance; (*ii*) it has the consent to operate from the State Pollution Control Board under the Air and Water Acts; (*iii*) Mining Plan is duly approved by the competent authority; and (*iv*) the NPV for the entire forest falling within the mining lease is deposited in the Compensatory Afforestation Fund.
>
> The mining in the forest land included in the mining lease should be permissible only if, in addition to the above, the approval under the FC Act/ TWP has been obtained;
>
> (*c*) No forest land can be leased/assigned without first obtaining the approval under the FC Act. Therefore, the forest area approved under the FC Act should not be lesser than the total forest area included in the mining leases approved under the MMDR Act, 1957. Both necessarily have to be the same. In view of the above, this Hon'ble Court while permitting grant of Temporary Working Permission to the mines in Orissa and Goa has made it one of the preconditions that the NPV will be paid for the entire forest area included in the mining leases. Similarly, all the mining leaseholders in Orissa should be directed to pay the NPV for the entire forest area, included in the mining lease;
>
> (*d*) In Orissa, substantial areas included in the mining leases as non-forest land have subsequently been identified as DLC forest (deemed forest/forest like areas) by the Expert Committee constituted by the State Government pursuant to this Hon'ble Court's order dated 12-12-1996[3]. While processing and/or approving the proposals under the FC Act in many cases such areas have been treated as non-forest land. It is recommended that (*i*) the NPV for the entire DLC area included in the mining lease, after deducting the NPV already paid, should be deposited by the leaseholder concerned, and (*ii*) the mining operations in the unbroken DLC land (virgin land) should be permissible only if the permission under the FC Act has been obtained/is obtained for such area. Keeping in view the peculiar circumstances as were existing in Orissa and subject to the above, the mining operations in the broken DLC land may be allowed to be continued provided the other statutory requirements and Rules are otherwise being complied with."

3 *T.N. Godavarman Thirumulpad* v. *Union of India*, (1997) 2 SCC 267

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The report concluded by recording as follows:

> "(*a*) an attempt has been made for the first time by CEC to comply and analyse the status of all the mining leases in a State and to suggest effective and remedial measures—something made possible because of the unstinted cooperation extended by the senior functionaries of the Forest and Mines Departments of the State Government; and
>
> (*b*) the above recommendations if accepted and implemented will, besides ensuring that mining is done in compliance with the statutory provisions, result in recovery of additional amount towards the NPV, etc. running into hundreds of crores of rupees. It would be appropriate that a part of this additional amount, say 50% is used through an SPV for undertaking specific tribal welfare and area development works so as to ensure inclusive growth of the mineral bearing areas. CEC proposes to file detailed schemes in this regard for seeking permission of this Hon'ble Court provided the State of Orissa as well as the MoEF endorse the course of action proposed above."

The significance of the second conclusion will be discussed by us a little later.

5. Notice was issued on the report returnable on 7-5-2010. On the adjourned date[4], the following order was passed by this Court: (*T.N. Godavarman case*[4], SCC p. 179, paras 14-15)

> "*14*. CEC has filed its report. The State would like to file its response.
>
> *15*. Six weeks' time is granted for the same. The recommendations of CEC which are acceptable to the State Government can be complied with."

It may be mentioned that some of the recommendations made by CEC have been accepted and implemented by the State of Odisha.

6. The issue of mining in Odisha again came up for consideration on 16-9-2013[5] and this Court passed the following order:

> "We call for a report from the Central Empowered Committee within a period of six weeks. We direct that the parties of the State Government of Odisha and the Central Government will cooperate with the Central Empowered Committee to enquire into the matter and furnish a report.
>
> The matter be listed on a Monday after six weeks."

7. With reference to the order passed on 16-9-2013[5] CEC conducted an inquiry and some information was sought from M/s Sarda Mines (P) Ltd. (for short "SMPL"). This was objected to by SMPL who filed an application which was taken up for consideration on 9-12-2013. The following order[6] was passed on that day: (*T.N. Godavarman case*[6], SCC p. 172, paras 23-25)

> "*23*. By our order dated 16-9-2013[5], we had called for a report from the Central Empowered Committee within a period of six weeks. It is stated

4 *T.N. Godavarman Thirumulpad* v. *Union of India*, (2010) 15 SCC 177
5 *T.N. Godavarman Thirumulpad* v. *Union of India*, (2014) 6 SCC 167, 172 (footnote 1)
6 *T.N. Godavarman Thirumulpad* v. *Union of India*, (2014) 6 SCC 167

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on behalf of the Central Empowered Committee that the report could not be ready as part of the information called for has not been furnished by the State Government.

24. Mr Venugopal, learned Senior Counsel for the applicant M/s Sarda Mines (P) Ltd. in IA No. 3721 submits that since some of the matters are pending before the High Court, a prayer has been made for not furnishing the required information to the Central Empowered Committee.

25. List this matter in the second week of January 2014. In the meantime, the Central Empowered Committee may not submit its final report."

8. The matter was again taken up on 13-1-2014[7] and this Court passed the following order:

"We have heard the learned counsel for the parties.

We have also perused the letter dated 17-10-2013 of the Member Secretary, Central Empowered Committee sent to the Chief Secretary, Government of Odisha along with its annexures and in particular, the statement of details of information and documents sought by the Central Empowered Committee for the meeting convened on 30-10-2013, which cover forest and environmental issues.

We, accordingly, modify the order dated 9-12-2013[6] and direct the Central Empowered Committee to submit its final report on the queries made by the State Government with regard to the details of the documents sought for in the letter dated 17-10-2013 within a period of six weeks.

The report will not cover cases other than forest and environmental issues.

The lessees and others from whom information is sought for will cooperate, if they do not cooperate the Central Empowered Committee will give its report.

A copy of the interim report of 26-4-2010 will be furnished to the learned counsel appearing for the State of Odisha.

This matter be listed on 20-1-2014 for consideration of the recommendations made by the Central Empowered Committee in the said report dated 26-4-2010."

Thereafter and partly based on reports given by Justice M.B. Shah, a retired Judge of this Court, holding a commission under the Commissions of Inquiry Act, 1952 a writ petition being WP (C) No. 114 of 2014 was filed by Common Cause. Several prayers were made in the writ petition, and some of the more significant prayers read as follows:

"(*a*) Issue a writ of mandamus or any other appropriate writ directing the Union of India and the Government of Odisha to immediately stop

7 *T.N. Godavarman Thirumulpad* v. *Union of India*, IA No. 3721 in 3629 in WP (C) No. 202 of 1995, order dated 13-1-2014 (SC)

6 *T.N. Godavarman Thirumulpad* v. *Union of India*, (2014) 6 SCC 167

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forthwith all illegal mining in the State of Odisha and to terminate all leases that are found to be involved in illegal mining and mining in violation of the provisions of the Forest (Conservation) Act, 1980, the environment laws and other laws.

(*b*) Issue a writ of mandamus or any other appropriate writ directing the Union of India and the Government of Odisha to take action against all the violators involved either directly or indirectly in illegal mining including those named in the report of Justice Shah Commission.

(*c*) Issue a writ of mandamus or any other appropriate writ directing a thorough investigation by SIT or CBI under the supervision of this Hon'ble Court, as is recommended by the Justice Shah Commission into illegal mining in Odisha and collusion between private companies/individuals and public officials of the State/Central Governments.

* * *

(*e*) Issue a writ of mandamus or any other appropriate writ directing the respondents to recover the illegally accumulated wealth through illegal mining and related activity, as per Section 21(5) of the MMDR Act, 1957 [Mines and Minerals (Development and Regulation) Act, 1957] and launch prosecutions under Section 21(1) of the MMDR Act, 1957, and direct that the money recovered would be used for the welfare of local communities, tribals and villagers."

9. The writ petition was taken up for consideration on 21-4-2014[8] when the following order was passed: (*T.N. Godavarman case*[8], SCC p. 161, paras 1-4)

"*1*. We have heard the preliminary objections with regard to the writ petition and we are not convinced that the writ petition is not maintainable. Issue notice.

2. As the State of Odisha, Union of India and CEC have already been served with the notices, no further notices be issued to them. Notice, however, be issued to Respondents 4 and 5 returnable within four weeks.

3. It appears from the averments in para 14 of the writ petition that several lessees are operating without clearances under the Environment (Protection) Act, 1986 and the Forest (Conservation) Act, 1980, and without renewal by the Government. Hence, an interim order needs to be passed in respect of these lessees who are operating the leases in violation of the law.

4. For consideration of the interim order that should be passed, only this writ petition be listed on next Monday, 28-4-2014, as first item. It will be open for all parties and intervenors/proposed intervenors to file their respective affidavits. CEC, in the meanwhile, will make out a list of such lessees who are operating the leases in violation of the law. This list be prepared by CEC without reference to the Shah Commission's Report. Liberty is given to the parties to produce their papers before CEC. The

8 *T.N. Godavarman Thirumulpad* v. *Union of India*, (2014) 14 SCC 160

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State of Odisha and the Union of India will cooperate with CEC to prepare the list."

Report of the Central Empowered Committee

10. CEC gave its final report on 25-4-2014 which was considered by this Court and a detailed interim order was passed on 16-5-2014[9]. The sum and substance of the final report dated 25-4-2014 and the interim order is that in the districts of Odisha that we are concerned with, namely, Keonjhar, Sundergarh and Mayurbhanj, the total number of leases granted for mining iron and manganese ore are 187. Of these, 102 leaseholders did not have requisite environmental clearance [under the Environment (Protection) Act, 1986] or approval under the Forest (Conservation) Act, 1980 or approved mining plan and/or consent to operate under the provisions of the Air (Prevention and Control of Pollution) Act, 1981 or the Water (Prevention and Control of Pollution) Act, 1974. This Court directed that mining operations in these 102 mining leases shall remain suspended but it will be open to such leaseholders to move the authorities concerned for necessary clearances, approvals or consents and

> "as and when the mining lessees are able to obtain all the clearances/approval/consent they may move this Court for modification of this interim order in relation to their cases". (*Common Cause case*[9], SCC p. 157, para 4)

11. This Court also found that 29 out of 187 mining leases had been determined or rejected or had lapsed. It was directed that mining operations in these 29 mining leases will also remain suspended but it would be open to all these lessees concerned to move the authorities for necessary relief and as and when they get the appropriate relief, they could move this Court for modification of the interim order.

12. This Court also found that 53 iron ore/manganese ore mining leases were operational and that they had necessary approvals under the Forest (Conservation) Act, 1980, consent to operate granted by the Odisha State Pollution Control Board and also approved mining plans. (There is no specific mention about environmental clearance.) In addition 3 mining leases were located in forest as well as non-forest land, but mining operations were being conducted in non-forest areas of the mining lease as the leaseholders did not have approvals under the Forest (Conservation) Act, 1980. Therefore a total of 56 iron ore/manganese ore mining leases were operating in the State of Odisha.

13. As far as the break-up of the 56 operational mining leases is concerned, it was found that 14 mining leases were operating on first renewal basis in accordance with the deeming provisions of Section 8(2) of the Mines and Minerals (Development and Regulation) Act, 1957 (for short "the MMDR Act") read with Rule 24-A(6) of the Mineral Concession Rules, 1960 (for short "the MCR") and 16 mining leases were operating since lease deeds for grant of renewal had been executed in their favour. The remaining 26 mining

9 *Common Cause* v. *Union of India*, (2014) 14 SCC 155

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leases were operating on second and subsequent renewal basis with the renewal applications pending a final decision with the State Government.

14. In respect of the 14 first renewal mining leases, this Court permitted them to continue their operations for the time being in view of the deemed renewal provisions. This Court also permitted 16 mining leases to continue to operate since they had lease deeds executed in their favour. With regard to the remaining 26 mining leases operating on second and subsequent renewal applications, this Court drew attention to the decision rendered on 21-4-2014 in *Goa Foundation* v. *Union of India*[10] wherein it was held that the provision for a second or subsequent deemed renewal was not available in view of Section 8(3) of the MMDR Act. Consequently, these 26 leaseholders were restrained from operating until express orders were passed by the State Government under Section 8(3) of the MMDR Act. Six months' time was granted to the State Government to take a final decision on the renewal applications. This Court left it open to the mining leaseholders to apply for modification of the interim order dated 16-5-2014[9] on obtaining necessary clearances.

15. During the hearing of these petitions, we were informed that the balance 26 mining leases are now operational in view of the amendment to Section 8(3) of the MMDR Act with effect from 12-1-2015. However, we are not aware whether these 26 mining leases have the necessary statutory clearances.

16. We may also mention that pursuant to the liberty granted to move for modification of the interim order of 16-5-2014[9] we have received 17 interim applications for modification. Through a chart handed over to us in Court on 3-5-2017 we have been informed that in respect of two of the 17 applications, that is, Zenith Mining (IA No. 45) and Kavita Agrawal (IA No. 47), the lease has not been extended or has been determined and they do not have any environmental clearance or forest clearance. In respect of J.N. Pattnaik (IA No. 66), there is no forest clearance available. We were also informed that S.A. Karim (IA No. 9) actually had a working lease and had wrongly been included as a non-operational lease.

17. Be that as it may, the learned counsel for the leaseholders drew our attention to the record of proceedings of 16-5-2014 and particularly the following paragraph appearing therein:

> "We have passed interim order in a separate sheet. The Central Empowered Committee will give a final report on the writ petition by the end of July 2014 and the matter will be listed in the first week of August 2014 before the Green Bench."

We are mentioning this in the context of the order passed on 13-1-2014[7] adverted to above to the effect that "The Report will not cover cases other than forest and environmental issues."

10 (2014) 6 SCC 590
9 *Common Cause* v. *Union of India*, (2014) 14 SCC 155
7 *T.N. Godavarman Thirumulpad* v. *Union of India*, IA No. 3721 in 3629 in WP (C) No. 202 of 1995, order dated 13-1-2014 (SC)

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18. In its final report, CEC has dealt with the following ten topics:

In this final report CEC dealt with the following ten topics:

"*I*. Production of iron ore and manganese ore without/in excess of the environmental clearance/Mining Plan/consent to operate.

II. Mining leases operated in violation of the Forest (Conservation) Act, 1980.

III. Illegal mining outside the sanctioned mining lease areas.

IV. Mining leases acquired in violation of Section 6 of the MMDR Act, 1957.

V. Violation of Rule 37 of the Mineral Concession Rules, 1960 by the lessees.

VI. Illegalities involved in the mining leases of Essel Mining & Industries Ltd.

VII. Illegalities involved in the mining lease of Sharda Mines (P) Ltd.

VIII. Massive illegal mining in Uliburu Forest land.

IX. Inordinate delays in taking decisions by the State Government regarding renewal of the mining leases.

X. Other issues."

19. By an order dated 16-1-2015[11] objections to the final report were permitted and we have since received quite a few objections. When the matter was taken up for consideration by this Court on 7-10-2015 and pursuant

11 *Common Cause* v. *Union of India*, IA No. 35 in IA No. 17 in WP (C) No. 114 of 2014, order dated 16-1-2015 (SC), wherein it was directed:

"*IA No. 35 in IA No. 17 of 2014 in WP (C) No. 114 of 2014*

1. Dr Rajeev Dhavan, learned Senior Counsel for the applicant Orissa Mining Corporation Ltd. (Respondent 4), on instructions, seeks permission of this Court to withdraw the application for directions (IA No. 17 of 2014) with liberty to approach the High Court. Permission sought for is granted. The application for directions (IA No. 17 of 2014) is disposed of as withdrawn with liberty to the applicant to approach the High Court. Accordingly, IA No. 35 of 2014 in IA No. 17 of 2014 is allowed. We clarify that we have not expressed any opinion on the prayers made in IA No. 17 of 2014.

IAs Nos. 31-32 of 2014 in WP (C) No. 114 of 2014

2. Issue notice. Shri Prashant Bhushan, learned counsel for the petitioner and Shri A.D.N. Rao, learned Amicus Curiae on behalf of the Central Empowered Committee, accept notice. Objections, if any, may be filed within six weeks' time from today. Whosoever wants to file objections to the report of the Central Empowered Committee filed in Writ Petition (C) No. 114 of 2014, he/they may do so within eight weeks' time from today. List the matter after eight weeks."

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to the order[12] passed on that date, the learned Amicus filed a statement dated 30-10-2015 in a tabular form dealing with each IA filed in respect of the observations and recommendations made by CEC. Thereafter, when the matter was again taken up for consideration the learned Amicus filed a note dated 15-3-2016 wherein the following four issues were flagged:

> "(*i*) Leases lapsed under Section 4-A(4) of the Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter referred to as the MMDR Act, 1957) (11 leases);
>
> (*ii*) Violation of Rule 24 of the Minerals (Other than Atomic and Hydrocarbons Energy Minerals) Concession Rules, 2016 (hereinafter referred to as MCR, 2016) and Rule 37 of the Mineral Concession Rules, 1960 (hereinafter referred to as the MCR, 1960) (9 leases);
>
> (*iii*) Illegal mining in forest lands (20 leases); and
>
> (*iv*) Iron ore produced without/in excess of the environmental clearance (each of the operating leases involved)."

20. Insofar as the first issue is concerned, it is common ground that that issue has been fully, conclusively and exhaustively dealt with by this Court by a judgment and order dated 4-4-2016 (*Common Cause* v. *Union of India*[13]). Therefore, the first issue does not survive for consideration by us.

21. As far as the remaining three issues are concerned, these overlap with Topics I, II and V dealt with by CEC. Detailed submissions were made before us by the learned counsel for all the appearing parties on these issues as well as by the learned Amicus and the learned Attorney General. We propose to deal with them in this judgment and order.

22. We may mention that submissions were also made on Topics III and IV identified by CEC, that is, illegal mining outside the sanctioned mining lease areas and mining leases acquired in violation of Section 6 of the MMDR Act. We will consider these issues as well.

23. As far as Topics VI and VII identified by CEC are concerned, we would like to hear the parties in detail in respect of these issues.

---

12 *Common Cause* v. *Union of India*, WP (C) No. 114 of 2014, order dated 7-10-2015 (SC), wherein it was directed:

"*Order in all the applications except IAs Nos. 57 and 59*

For disposal of all the applications that are listed before us today, we need the assistance of Mr A.D.N. Rao, learned Amicus Curiae, in preparing a tabular form, inter alia indicating the number of application(s), the nature of relief(s) sought in the application(s) and the remarks of the Central Empowered Committee (for short "the Committee"), if any, on those reliefs. Since there are a large number of applications pending before us for urgent orders, we request the Committee to devote its time and prepare the tabular form as desired by us and submit the same before us within three weeks' time from today. After preparing the said table, Shri Rao, learned Amicus Curiae would supply a copy of the same to all the learned counsel, who have filed the applications before this Court. List the matter on 5-11-2015."

13 (2016) 11 SCC 455

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24. No challenges or submissions were made on Topics VIII, IX and X and therefore we accept the report of CEC on these topics.

25. At this stage, we may mention some rather frightening figures mentioned by CEC in its final report. According to CEC, excess mining without environmental clearance or beyond what was authorised by the environmental clearance is 2130.988 lakhs MT of iron ore and 24.129 lakhs MT of manganese ore making a total of 2155.117 lakhs MT of iron and manganese ore. This does not include extraction of ore without forest clearance. These figures give an indication of the extent of excess or illegal or unlawful mining carried out.

26. In terms of rupees, according to CEC the total notional value of minerals produced without an environmental clearance or in excess of the environmental clearance, at the weighted average price of minerals as proposed by the Indian Bureau of Mines comes to about Rs 17,091.24 crores for iron ore and about Rs 484.92 crores for manganese ore making a total of Rs 17,576.16 crores. Again, this does not include mining without forest clearance. It is for this reason that we have referred to the megabucks and rapacious mining.

Justice M.B. Shah Commission of Inquiry

27. Apparently, and it appears quite independently of all these developments, the Central Government issued a Notification on 22-11-2010 under the Commissions of Inquiry Act, 1952 whereby it appointed Justice M.B. Shah, a retired judge of this Court to conduct an inquiry on the following Terms of Reference:

> "**2.** (*i*) to inquire into and determine the nature and extent of mining and trade and transportation, done illegally or without lawful authority, of iron ore and manganese ore, and the losses therefrom; and to identify, as far as possible, the persons, firms, companies and others that are engaged in such mining, trade and transportation of iron ore and manganese ore, done illegally or without lawful authority;
>
> (*ii*) to inquire into and determine the extent to which the management, regulatory and monitoring systems have failed to deter, prevent, detect and punish offences relating to mining, storage, transportation, trade and export of such ore, done illegally or without lawful authority, and the persons responsible for the same;
>
> (*iii*) to inquire into the tampering of official records, including records relating to land and boundaries, to facilitate illegal mining and identify, as far as possible, the person responsible for such tampering; and
>
> (*iv*) to inquire into the overall impact of such mining, trade, transportation and export, done illegally or without lawful authority, in terms of destruction of forest wealth, damage to the environment, prejudice to the livelihood and other rights of tribal people, forest dwellers and other persons in the mined areas, and the financial losses caused to the Central and the State Governments.
>
> **3.** The Commission shall also recommend remedial measures to prevent such mining, trade, transportation and export done illegally or without lawful authority."

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28. In the Preamble to the notification appointing the Commission, it was noted that there were reports that mining, raising, transportation and export of iron ore and manganese ore illegally or without lawful authority was being carried on in various States in one or more of the following forms:

"(*a*) mining without a licence;

(*b*) mining outside the lease area;

(*c*) undertaking mining in a lease area without taking approval of the State Government concerned for transfer of concession;

(*d*) raising of minerals without lawful authority;

(*e*) raising of minerals without paying royalty in accordance with the quantities and grade;

(*f*) mining in contravention of a mining plan;

(*g*) transportation of raised mineral without lawful authority;

(*h*) mining and transportation of raised mineral in contravention of applicable Central and State Acts and Rules thereunder;

(*i*) conducting of multiple trade transactions to obfuscate the origin and source of minerals in order to facilitate their disposal;

(*j*) tampering with land records and obliteration of inter-State boundaries with a view to conceal mining outside lease areas;

(*k*) forging or misusing valid transportation permits and using forged transport permits and other documents to raise, transport, trade and export minerals;"

It is in the above context that the Terms of Reference were framed.

29. On 1-7-2013 the Commission gave the First Report on Illegal Mining of Iron and Manganese Ores in the State of Odisha. The report contains an executive summary and very briefly the Commission stated that:

(*i*) All modes of illegal mining, as stated in the Notification dated 22-11-2010 of the Central Government are being committed in the State of Odisha;

(*ii*) There is a complete disregard and contempt for law and lawful authorities on the part of many of the emerging breed of entrepreneurs;

(*iii*) It appears that the law has been made helpless because of its systematic non-implementation. The executive summary states that the following are discussed in the report:

"(A) Information regarding mining leases should be placed on website to make mining operations more transparent and to display the information for each lease on the departmental/State website with various conditions which are required to be adhered to by the lessee.

(B) Misuse of Rule 24-A(6) of the MCR, 1960 [Mineral Concession Rules, 1960] which provides for deemed extension of lease. Application for renewal of mining lease is not decided for one or other pretexts, may be, there is lack of coordination among various departments which are required to decide renewal application. There is gross misuse of deemed refusal and deemed extension of both the

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provisions of renewal of leases (before 27-9-1994 and after) under Rule 24-A of the MCR, 1960. This casual and negative approach has caused dearly to the State exchequer in the form of hundred crores of stamp duty and others.

* * *

(C) Violation of the provisions of the Forest (Conservation) Act, 1980, Rules and guidelines and directions issued by the Hon'ble Supreme Court of India.

* * *

(D) Violation of the provisions of the Environment (Protection) Act, 1986.

* * *

(E) Misuse of Rules 10 and 12 of the MCDR, 1988 [Mineral Conservation and Development Rules, 1988] which provides for modification and review of mining plan only for a specific purpose, namely,

(*i*) safe and scientific mining;

(*ii*) conservation of minerals;

(*iii*) the protection of environment; and

(*iv*) in case of modification, explanation for the same.

* * *

(F) *Encroachment*:

On the basis of Google Image, the survey report prepared by the State Government by DGPS method, it was found that in 82 mining leases, there was encroachment. Out of the said leases, re-survey was ordered for 37 leases."

30. Soon thereafter, the Commission gave its Second Report on Illegal Mining of Iron and Manganese Ores in the State of Odisha, sometime in October 2013. This report dealt with specific leaseholders and violations committed by them. It is not necessary for us to delve into those specific details.

31. It was submitted before us by the learned counsel for the mining leaseholders that the reports given by the Commission were not acceptable on the ground that a notice had not been given to the leaseholders under Section 8-B or Section 8-C of the Commissions of Inquiry Act, 1952. It was submitted that under these circumstances the reports given by the Commission were vitiated and therefore the foundation of the writ petition filed by Common Cause was taken away. We are not in agreement with the learned counsel for the mining leaseholders.

32. The First Report given by the Commission was a general, overall perspective on the subject while the Second Report went into specific details of several mining leaseholders — but we are not concerned with those specifics. Therefore, whether notices were or were not issued to the leaseholders who were the subject-matter of discussion in the Second Report is of no consequence.

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33. What we are really perturbed about is the facts stated by the Commission in the First Report. So far as this is concerned, we are of the view that no irregularity or illegality has been committed so as to vitiate the First Report. Notwithstanding this, we are not relying upon any of the facts determined by the Commission for the purposes of our judgment and order.

34. The procedure followed by the Commission has been mentioned in Volume I Part II of the First Report, but it is not necessary for us to recount each and every detail. Suffice it to say that a resume of the procedure followed will indicate that full opportunity was given to the leaseholders to have their say.

Resume of the procedure followed by the Commission

35. In March 2011 the Commission sent the first questionnaire to the Secretary concerned of the Government of Odisha seeking the following information regarding each leaseholder:

> "(*i*) the name of the lessee;
>
> (*ii*) area of the lease;
>
> (*iii*) date of the execution of the lease deed;
>
> (*iv*) present status (renewal, mining plan, mining scheme) approval date;
>
> (*v*) production and export particulars from the year 2008-09 up to January 2011; etc."

36. On 20-4-2011 the Commission sent the second questionnaire to the said Secretary concerned seeking further information in a form consisting of 14 questions and 4 tables.

37. Thereafter, between 24-8-2011 and 26-8-2011 the Commission issued the first notice to various mining lessees in Odisha seeking information on affidavit as per Pro formas A and B enclosed with the notice. In Pro forma A the leaseholder was asked to submit details which included the details of environmental clearance, forest clearance and renewal of lease and whether the leased mine was in operation or not. In Pro forma B the leaseholder was asked to submit details which included the details of dispatch, domestic consumption and export in million tonnes of iron ore and manganese ore from 2006-07 to 2010-11.

38. The Commission visited Odisha from 7-12-2011 to 14-12-2011, from 3-10-2012 to 11-10-2012 and from 31-10-2010 to 8-11-2012. The purpose of the visits was to collect information and seek explanations and gather facts from the Departments concerned of the Government of India and the Government of Odisha. During the visits, the Commission received as many as 140 complaints alleging illegal mining. Accordingly, a public hearing was held in Keonjhar and Bhubaneshwar on 11-12-2011 and 12-12-2011.

39. On 21-12-2012 and 12-1-2013 several Senior Counsel were given a personal hearing by the Commission including a personal hearing to the Federation of Indian Mining Industries (for short "FIMI"). Following the submissions made, a fresh notice was issued to the leaseholders from 28-1-2013

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seeking information in Pro formas A to H. In terms of the fresh notice, the leaseholder was required to verify the facts stated therein (which were collected by the Commission) and if found incorrect then to state the correct facts. The fresh notice specifically mentioned that:

"(*i*) The lessee shall come fully prepared to answer, related to this matter and submit all related records.

(*ii*) Explain the production from the leased area without having approval under the FC Act, 1980.

(*iii*) Explain the production during the deemed extension period without having approval under EIA Notification dated 27-1-1994 and amendments thereon.

(*iv*) Explain the excess production in violation of EIA Notification dated 27-1-1994 and amendments thereon under the EP Act, 1986."

40. The report mentions the various dates of hearing given to the learned counsel for the leaseholders, the State of Odisha, FIMI, Federation of Indian Chambers of Commerce and Industry (FICCI) and the Ministry of Environment and Forests of the Government of India (for short "MoEF") which are as follows:

"Hearing No.	*Date*	*Place*
1.	21-12-2012	Office of the Commission, Ahmedabad.
2.	12-1-2013	–do–
3.	18-2-2013	–do–
4.	27-2-2013	Circuit House, Bhubaneshwar (Odisha).
5.	28-2-2013	–do–
6.	1-3-2013	–do–
7.	2-3-2013	–do–
8.	4-3-2013	–do–
9.	16-3-2013	Circuit House, Annexe, Ahmedabad.
10.	20-3-2013	–do–
11.	23-3-2013	Office of the Commission, Ahmedabad.
12.	2-4-2013	Circuit House, Annexe, Ahmedabad.
13.	3-4-2013	–do–
14.	4-4-2013	–do–
15.	12-4-2013	Office of the Commission, Ahmedabad.
16.	13-4-2013	–do–
17.	21-4-2013	Gujarat University Convention Centre, Nr. Helmet Cross Road, 132 ft. Ring Road, Ahmedabad.
18.	24-5-2013	Office of the Commission, Ahmedabad.
19.	25-5-2013	–do–"

41. The number of learned counsel and representatives who were heard by the Commission and with whom interactions took place are mentioned in Annexure A to Vol. I of the First Report. The list of learned counsel runs into 18 pp. — from p. 33 to p. 50 of Vol. I of the First Report. Some individual lawyers

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appeared for several leaseholders but the fact of the matter is that everybody who wanted to be heard was given a hearing.

42. The function of the Commission as stated in the First Report, at the present stage, is best described in the words of the Commission itself. It is stated as follows:

> "*9*. The function of the Commission, at this stage, is only to inquire, assess the data collected and to submit the report on the said basis. On that basis, some remedial measures are suggested by the Commission for controlling illegal mining and violation of the Acts and/or Rules. For that, there is no question of issuing notices to the lessees.
>
> For collecting the data and assessing it, the principles of natural justice are fully complied with, as stated above. On the basis of the data submitted by the lessees and the submissions made by the learned counsel for them, the report is submitted."

It is further clarified on p. 198 of Vol. I of the First Report that with regard to individual mining leases in which there is a violation of the provisions of the Forest (Conservation) Act, 1980 and/or conditions of environmental clearance, etc. a report would be submitted later on.

43. It is therefore abundantly clear that the First Report is generally a limited fact-finding enquiry on the basis of information supplied by the mining leaseholders. Therefore, there is absolutely no question of any notice being issued to any mining leaseholder under Section 8-B or the right of cross-examination being granted to any mining leaseholder under Section 8-C of the Commissions of Inquiry Act, 1952. We are satisfied that the Commission made adequate efforts to collect the facts and this collation in the First Report was possible with the assistance of the mining leaseholders and their learned counsel and representatives as well as the government authorities and FIMI and FICCI. Under these circumstances, no leaseholder can seriously contend that the procedure adopted by the Commission in collecting facts was either irregular or not in accordance with law. As mentioned above, any mining leaseholder who wanted to be heard was given an opportunity of being heard and was fully aware of what the Commission was attempting to achieve and if any particular mining leaseholder chose not to associate with it, it was at his or her own peril. Lack of knowledge of the proceedings before the Commission cannot be appreciated and we are quite satisfied that all the mining leaseholders were fully aware of what was going on, if not personally then certainly through their list of learned counsel running into 18 pages or their representatives individually or their Federation.

44. In *Goa Foundation*[10] there was a challenge to the report of the Justice Shah Commission in respect of its conclusions pertaining to the State of Goa. This was dealt with by this Court in paras 11 to 14 of its decision. This Court declined to quash the report in view of the statement made by the learned

10 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590

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Advocate General of Goa. But, this Court took the view that: (SCC p. 601, para 14)

> "*14.* … We will, however, examine the legal and environmental issues raised in the Report of the Justice Shah Commission and on the basis of our findings on these issues consider granting the reliefs prayed for in the writ petition filed by Goa Foundation and the reliefs prayed for in the writ petitions filed by the mining lessees, which have been transferred to this Court."

45. In the present petitions before us, there is no challenge to the reports of the Justice Shah Commission. However, we propose (as in *Goa Foundation*[10]) to confine ourselves to some limited facts adverted to by CEC in its final report. We do not propose to base any of our conclusions on the reports of the Commission.

46. The learned counsel for the petitioners insisted that the illegal or unlawful mining activity carried on in the State of Odisha as noted by the Commission deserves to be investigated by the Central Bureau of Investigation. Reference in this regard was made to the passage in Part III of Vol. I of the First Report of the Commission to the following effect:

> "Since this is one of the biggest illegal mining ever observed by the Commission, it is strongly felt that this is a fit case to handover to Central Bureau of Investigation, for further investigation and follow-up action."

47. Similarly, on p. 125 of Chapter II of Vol. I of the Report, it is stated as follows:

> "8. Terms of Reference No. 8 provides that 'The Commission may take the services of any investigating agency of the Central Government in order to effectively address its terms of reference.'
>
> The Commission, therefore, suggests that Central Bureau of Investigation (CBI) may be directed to investigate into allegations of corruption made against politicians, bureaucrats and others."

We will consider this at the appropriate stage.

48. Suffice it to say for the time being that the Commission made certain significant observations in Chapter II of the Report to the effect that:

> (*a*) That the tribals in the area have been displaced or stay in pathetic and miserable conditions in same area. There is rampant air pollution with the trees having the colour of minerals making it clear that tribals are forced to breathe polluted air and drink polluted water.
>
> (*b*) Streams and ground water is polluted and there is hardly any facility of drinking water. Women have been seen fetching water from dirty nalas.
>
> (*c*) Mining companies and beneficiation plants are drawing water from rivers and nearby water resources are getting depleted at a fast rate. River Baitrani has been seriously affected by this activity.

10 *Goa Foundation* v. *Union of India*, (2014) 6 SCC 590

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(*d*) Basic facilities such as medical facilities, shelter/residence, education facilities are absent. Roads have a heavy flow of traffic and on one road of the area about 7000 trucks passed during night time.

(*e*) The labour is not being paid adequate wages beyond the minimum wages even though the income of the mine owners runs into billions of rupees.

49. Adverting to corruption in the area due to illegal mining activities, the Commission felt that the Vigilance Commission was unlikely to conduct an impartial and independent enquiry for arriving at just and proper findings because of external pressures. Accordingly, it would be more appropriate if the Central Bureau of Investigation (CBI) conducts a detailed enquiry into all cases that have been registered between 2008 and 2011. It was also noted that the Railways have issued demand notices to the extent of Rs 1874 crores. The latest position with regard to these notices is not available.

50. It was also noted that notices have been issued in 146 cases to various leaseholders for recovery of mined ore as per Section 21(5) of the MMDR Act. In the Koira circle, notices have been issued to 55 lessees for more than Rs 13,000 crores; in Joda circle, notices have been issued to 72 lessees for recovery of more than Rs 44,000 crores; in Keonjhar circle, notices have been issued to 4 lessees for recovery of about Rs 1065 crores; in Koraput circle, notices have been issued to three lessees for the recovery of about Rs 44 lakhs; and in Bolangir circle, notice has been issued to 1 lessee for the recovery of about Rs 29.5 crores. In Baripada circle, notices have been issued to 11 lessees for recovery of more than Rs 467 crores. In other words notices have been issued to the lessees for recovery of more than Rs 59,000 crores! (According to CEC the figure exceeds Rs 61,000 crores)!!

51. We have adverted to the reports of the Commission, without relying on them, only to highlight the gravity of the situation and nothing more. The gravity of the situation is also apparent from the report of CEC and the Commission seems to support it.

Initial contention

52. The initial contention urged on behalf of the respondent leaseholders was that in giving the Report dated 16-10-2014 CEC has exceeded its remit. In this context, reference was made to the order of 13-1-2014[7] in which it is stated that "The Report will not cover cases other than forest and environmental issues".

53. We are of the opinion that this objection deserves immediate rejection. The subsequent orders passed by this Court have been completely overlooked by the learned counsel inasmuch as on 21-4-2014[8] it was specifically noted by this Court that "CEC, in the meanwhile, will make out a list of such lessees who are operating the leases in violation of the law". Similarly, in the

7 *T.N. Godavarman Thirumulpad* v. *Union of India*, IA No. 3721 in 3629 in WP (C) No. 202 of 1995, order dated 13-1-2014 (SC)

8 *T.N. Godavarman Thirumulpad* v. *Union of India*, (2014) 14 SCC 160

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record of proceedings of 16-5-2014 it was noted that "The Central Empowered Committee will give a final report on the writ petition by the end of July 2014. ..."

54. From a reading of the orders and the proceedings that have been held in this regard from time to time, it is quite obvious to us that the jurisdiction of CEC was not limited and it was expected to give a detailed report on all aspects of illegal mining or mining being carried out without any lawful authority in whatever manner. The initial objection raised on behalf of the leaseholders is therefore rejected.

Central Empowered Committee

55. The Central Empowered Committee or CEC was first constituted by this Court by an order dated 9-5-2002 [*T.N. Godavarman Thirumulpad (50)* v. *Union of India*[14]] as an interim body. Thereafter, it was constituted by a Notification dated 17-9-2002 issued under Section 3(3) of the Environment (Protection) Act, 1986 (for short "the EPA"). It has continued functioning and assisting this Court for more than a decade and even though it has been criticised on a couple of occasions, it is now an established body which renders extremely valuable advice to this Court and provides factual material on the basis of which this Court can make some recommendations and pass appropriate orders.[14, 15]

56. The details of the functioning of CEC have been discussed by this Court in *Samaj Parivartana Samudaya* v. *State of Karnataka*[16]. In that decision, questions were raised about the credibility of CEC and while rejecting the submissions, it was made clear that the recommendations made by CEC are subject to the satisfaction of this Court. We need say nothing more except that during the course of hearing of the present petitions, some of the conclusions arrived at by CEC were disputed by the petitioners and even by the learned Amicus and some were supported by the learned counsel for the mining leaseholders, the learned Attorney General and the learned counsel for the State of Odisha. It is therefore quite clear that in the present cases, CEC as a fact-finding body has functioned impartially and it is only on the conclusions arrived at by CEC on the basis of the facts gathered that there can be some debate and discussion. Anyone may disagree with the views of CEC and there is no need to make heavy weather about this at all.

57. Insofar as the Report given by CEC on 16-10-2014 (the final report) is concerned, before going into the details thereof, we may mention that CEC has stated that it held meetings with the Chief Secretary and other senior officials of the State of Odisha and others on six dates. It also heard the leaseholders and others on seven dates and it held meetings with three of the leaseholders, that is, Jindal Steel and Power Ltd. (JSPL), Sarda Mines Pvt. Ltd. (SMPL) and Essel Mining and Industries Ltd. (Essel) on 10-9-2014. CEC visited the site of the mining lease of SMPL from 4-3-2014 to 7-3-2014 and had site visits of a number of other lessees from 12-7-2014 to 16-7-2014.

14 (2013) 8 SCC 198
15 *T.N. Godavarman Thirumulpad* v. *Union of India*, (2013) 8 SCC 204
16 (2013) 8 SCC 154

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58. As far as the facts collected by CEC are concerned, there is no dispute with regard to their correctness. CEC has recorded that there are 187 iron ore and manganese ore mining leases in the State of Odisha. On the basis of the material and information collected, a statement was prepared showing leasewise and yearwise details of production of iron ore and manganese ore, permissible production and production without environmental clearance/ beyond environmental clearance. The details in this regard have been given as Annexure R-14 to the final report.

59. Regarding the correctness of the information, CEC has this to say:

> "24. A copy of the abovesaid statement prepared by CEC was made available, through the Director, Mines and Geology, Government of Odisha and also through the Federation of Indian Mining Industries (FIMI), to the lessees of each of the mining leases to enable them to verify the production and other details as given in the statement. During the hearings held before CEC between 5-8-2014 and 12-8-2014 and also in the representations filed before CEC a large number of lessees stated that the yearwise production details are not correctly reflected in the statement. Some of them also stated that the environmental clearance details are not properly reflected in the statement. Therefore, it was decided that (*a*) the State Government will reconcile the annual production and other details with the respective lessees, and (*b*) the copies of the environmental clearances may also be filed before CEC by those lessees who are disputing the environmental clearances details provided by the State. Accordingly a meeting was convened by the Director, Mines & Geology (DMG) with the lessees on 14-8-2014 and during which the annual production and other details were reconciled. The reconciled leasewise and yearwise production and other details provided to CEC by the State of Odisha may be seen in the statement enclosed at Annexure R-11 to this Report. The figures modified in the said statement, after reconciliations, are shown in bold print."

60. CEC noted that the Director, Mines and Geology of the Government of Odisha had informed CEC that each leaseholder with the exception of SMPL and JSPL agreed with the reconciled production details. On facts, therefore, there is no dispute with regard to the contents of the report of CEC, although the conclusions might be disputed. Separately, CEC has dealt with the facts concerning SMPL and JSPL pursuant to a meeting held with them on 11-9-2014.

Statutory provisions

61. The grant of a mining lease is governed by the provisions of the Mines and Minerals (Development and Regulation) Act, 1957 (or the MMDR Act), the Mineral Concession Rules, 1960 (or the MCR) and the Mineral Conservation and Development Rules, 1988 (or the MCDR).

62. Section 4(1) of the MMDR Act provides that no person shall undertake any mining operation in any area except under and in accordance with the terms and conditions of a mining lease granted under the MMDR Act and the

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Rules made thereunder. A "mining operation" is defined in Section 3(*d*) of the MMDR Act as meaning any operation undertaken for the purpose of winning any mineral. Section 4(2) of the MMDR Act provides that no mining lease shall be granted otherwise than in accordance with the provisions of the said Act and the Rules made thereunder.

63. Section 5(2) of the MMDR Act provides for certain restrictions on the grant of a mining lease. It provides that the State Government shall not grant a mining lease unless it is satisfied that the applicant has a mining plan duly approved by the Central Government or the State Government in respect of the mine concerned and for the development of mineral deposits in the area concerned.

64. Section 10 of the MMDR Act provides for the procedure for obtaining a mining lease and sub-section (1) thereof provides that an application is required to be made for a mining lease in respect of any land in which the mineral vests in the Government and the application shall be made to the State Government in the prescribed form and along with the prescribed fee.

65. Section 12 of the MMDR Act requires the State Government to maintain a set of registers. Among the registers that the State Government is required to maintain are a register of applications for mining leases and a register of mining leases. Every such register shall be open to inspection by any person on payment of such fee as the State Government may fix.

66. Section 13 of the MMDR Act provides for the rule-making power of the Central Government in respect of minerals. The MCR are framed in exercise of power conferred by Section 13 of the MMDR Act.

67. Section 18 of the MMDR Act makes it the duty of the Central Government to take all such steps as may be necessary for the conservation and systematic development of minerals in India and for the protection of the environment by preventing or controlling any pollution which may be caused by mining operations. The MCDR are framed in exercise of power conferred by Section 18 of the MMDR Act.

68. The distinction between the MCR and the MCDR is that the MCR deal, inter alia, with the grant of a mining lease and not commencement of mining operations. However, the MCDR deal, inter alia, with the commencement of mining operations and protection of the environment by preventing and controlling pollution which might be caused by mining operations.

69. Section 21 of the MMDR Act deals with penalties and sub-section (1) thereof provides that whoever contravenes the provisions of sub-section (1) or sub-section (1-A) of Section 4 shall be punished with imprisonment for a term which may extend to two years or with fine which may extend to Rs 25,000 or with both. Sub-section (5) of Section 21 of the MMDR Act provides that whenever any person raises without any lawful authority, any mineral from any land, the State Government may recover from such person the minerals so raised or where such mineral has been disposed of the price thereof. In addition thereto the State Government may also recover from such person rent, royalty

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or tax, as the case may be for the period during which the land was occupied by such person without any lawful authority.

Mineral Concession Rules, 1960

70. As far as the MCR are concerned, Rule 22 is of some importance and this provides for an application to be made for the grant of a mining lease in respect of land in which the mineral vests in the Government. An application for the grant of a mining lease is required to be made by an applicant to the State Government in Form I to the MCR. Sub-rule (5) of Rule 22 deals with a mining plan and it requires that a mining plan shall incorporate, amongst other things, a tentative scheme of mining and annual programme and plan for excavation for year-to-year for five years.

71. Rule 22-A of the MCR makes it clear that mining operations shall be undertaken only in accordance with the duly approved mining plan. Therefore, a mining plan is of considerable importance for a mining leaseholder and is in essence sacrosanct. A mining scheme and a mining plan are a sine qua non for the grant of a mining lease.

72. Rule 27 of the MCR deals with the conditions that every mining lease is subject to. One of the conditions is that the lessee shall comply with the MCDR.

73. The format of a mining lease is given in Form K to the MCR and this is relatable to Rule 31 of the MCR which provides that on an application for the grant of a mining lease, if an order has been made for the grant of such lease, a lease deed in Form K or in a form as near thereto as circumstances of each case may require, shall be executed within six weeks of the order, or within such extended period as the State Government may allow.

74. Part VII of Form K deals with the covenants of the lessee/lessees. Clause 10 thereof requires the lessee to keep records and accounts regarding production and employees, etc. The lessee is required, inter alia, to maintain a record of the quantity and quality of the mineral released from the leased land, the prices and all other particulars of all sales of the mineral and such other facts, particulars and circumstances, as the Central Government or the State Government may require.

75. Clause 11-C is of some importance and it requires that the lessee shall take measures for the protection of the environment like planting of trees, reclamation of land, use of pollution control devices and such other measures as may be prescribed by the Central Government or the State Government from time to time at the expense of the lessee.

76. Rule 37 of the MCR deals with the transfer of a lease and provides, inter alia, that a mining lessee shall not without the previous consent in writing of the State Government or the Central Government, as the case may be, assign, sublet, mortgage, or in any other manner, transfer the mining lease, or any right, title or interest therein. The lessee shall not enter into or make any bona fide arrangement, contract or understanding whereby the lessee will or may directly or indirectly be financed to a substantial extent in respect of its operations or undertakings or be substantially controlled by any person or body of persons.

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Sub-rule (3) of Rule 37 of the MCR enables a State Government to determine any lease if the mining lessee has committed a breach of Rule 37 of the MCR or has transferred any lease or any right, title or interest therein otherwise than in accordance with sub-rule (2) of Rule 37 of the MCR.

Mineral Conservation and Development Rules, 1988

77. The MCDR promulgated under Section 18 of the MMDR Act and referred to in Rule 27 of the MCR are also of some significance. Rule 9 of the MCDR prescribes that no person shall commence mining operations in any area except in accordance with a mining plan approved under Clause (*b*) of sub-section (2) of Section 5 of the MMDR Act.

78. The mining plan may be modified in terms of Rule 10 of the MCDR in the interest of safe and scientific mining, conservation of minerals or for protection of the environment. However, the application for modifications shall set forth the intended modifications and explain the reasons for such modifications. The mining plan cannot be modified just for the asking.

79. Rule 13 of the MCDR provides that mining operations are required to be carried out by every holder of a mining lease in accordance with the approved mining plan. If the mining operations are not so carried out, the mining operations may be suspended by the Regional Controller of Mines in the Indian Bureau of Mines or another authorised officer.

80. From our point of view, Chapter V of the MCDR dealing with "Environment" is of significance. In this Chapter, Rule 31 of the MCDR provides that every holder of a mining lease shall take all possible precautions for the protection of the environment and control of pollution while conducting any mining operations in the area.

81. Rule 37 of the MCDR requires certain precautions to be taken against air pollution and obliges the mining leaseholder to keep air pollution under control and within permissible limits specified under various environmental laws including the Air (Prevention and Control of Pollution) Act, 1981 and the Environment (Protection) Act, 1986.

82. Rule 38 of the MCDR requires the holder of a mining lease to take all possible precautions to prevent or reduce the passage of toxic and objectionable liquid effluents from the mine into surface water bodies, ground water aquifer and usable lands to a minimum. It also mandates effluents to be suitably treated, if required, to conform to the standards laid down in this regard. In other words, the provisions of the Water (Prevention and Control of Pollution) Act, 1974 are required to be adhered to by the mining leaseholder.

83. Rule 41 of the MCDR requires every holder of a mining lease to carry out mining operations in such a manner as to cause least damage to the flora of the area and the nearby areas. Every holder of a mining lease is required to take immediate measures for planting not less than twice the number of trees destroyed by reason of any mining operations and to look after them during the subsistence of the lease after which these trees shall be handed over to the State Forest Department or any other appropriate authority. The holder of a mining

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lease is also required to restore, to the extent possible, other flora destroyed by the mining operations.

84. Briefly therefore, the overall purpose and objective of the MMDR Act as well as the Rules framed thereunder is to ensure that mining operations are carried out in a scientific manner with a high degree of responsibility including responsibility in protecting and preserving the environment and the flora of the area. Through this process, the holder of a mining lease is obliged to adhere to the standards laid down under the Environment (Protection) Act, 1986 or the EPA as well as the laws pertaining to air and water pollution and also by necessary implication, the provisions of the Forest (Conservation) Act, 1980 (for short "the FC Act"). Exploitation of the natural resources is ruled out. If the holder of a mining lease does not adhere to the provisions of the statutes or the rules or the terms and conditions of the mining lease, that person is liable to incur penalties under Section 21 of the MMDR Act. In addition thereto, Section 4-A of the MMDR Act which provides for the termination of a mining lease is applicable. This provides that where the Central Government, after consultation with the State Government is of the opinion that it is expedient in the interest of regulation of mines and mineral development, preservation of natural environment, prevention of pollution, etc. then the Central Government may request the State Government to prematurely terminate a mining lease.

Environment Impact Assessment Notification of 27-1-1994

85. As can be seen from the statutory scheme adverted to above, protection and preservation of the environment is a significant and integral component of a mining plan, a mining lease and mining operations — and rightly so.

86. Keeping this in mind, an Environment Impact Assessment Notification dated 27-1-1994 was issued by the Central Government in exercise of powers conferred by Section 3(1) and Section 3(2)(*v*) of the EPA read with Rule 5(3)(*d*) of the Environment (Protection) Rules, 1986. The Environment Impact Assessment Notification dated 27-1-1994 (for short "EIA 1994") is a prohibitory notification and directs that on and from the date of its publication in the Official Gazette:

> (*i*) expansion or modernisation of any activity (if pollution load is to exceed the existing one); and
>
> (*ii*) a new project listed in Schedule I to the notification;

shall not be undertaken unless it has been accorded environmental clearance (for short EC) by the Central Government in accordance with the procedure specified in the Notification.

87. The Notification provides, among other things, that in case of mining operations, site clearance shall be granted for a sanctioned capacity and shall be valid for a period of five years from commencing mining operations. What this means is that on receipt of an EC a mining leaseholder can extract a mineral only from a specified site, up to the sanctioned capacity and only for a period of five years from the date of the grant of an EC. This is regardless of the quantum of extraction permissible in the mining plan or the mining lease and regardless

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of the duration of the mining lease. Consequently, a mining leaseholder would necessarily have to obtain a fresh EC every five years and can also apply for an increase in the sanctioned capacity. There is no concept of a retrospective EC and its validity effectively starts only from the day it is granted. Thus, the EC takes precedence over the mining lease or to put it conversely, the mining operations under a mining lease are dependent on and "subordinate" to the EC.

88. On 4-5-1994 an Explanatory Note was added to EIA 1994. We are concerned with the 1st Note which deals with the expansion and modernisation of existing projects. This reads as follows:

> "**1.** ***Expansion and modernisation of existing projects***.—A project proponent is required to seek environmental clearance for a proposed expansion/modernisation activity if the resultant pollution load is to exceed the existing levels. The words "pollution load" will in this context cover emissions, liquid effluents and solid or semi-solid wastes generated. A project proponent may approach the State Pollution Control Board (SPCB) concerned for certifying whether the proposed modernisation/expansion activity as listed in Schedule I to the notification is likely to exceed the existing pollution load or not. If it is certified that no increase is likely to occur in the existing pollution load due to the proposed expansion or modernisation, the project proponent will not be required to seek environmental clearance, but a copy of such certificate issued by the SPCB will have to be submitted to the Impact Assessment Agency (IAA) for information. The IAA will however, reserve the right to review such cases in the public interest if material facts justifying the need for such review come to light."

89. The Note is significant and from its bare reading it is clear that if any proposed expansion or modernisation activity results in an increase in the pollution load, then a prior EC is required. The project proponent should approach the State Pollution Control Board concerned (for short "SPCB") for certifying whether the proposed expansion or modernisation is likely to exceed the existing pollution load or not. If the pollution load is not likely to be exceeded, the project proponent will not be required to seek an EC but a copy of such a certificate from SPCB will require to be submitted to the Impact Assessment Agency which can review the certificate.

90. What is the requirement, if any, under EIA 1994 with regard to an existing mining lease where there is no proposal for expansion or modernisation? Does such a mining leaseholder require an EC to continue mining operations? This is answered in the 8th Note which is also of some importance and this reads as follows:

> "**8.** ***Exemption for projects already initiated***.—For projects listed in Schedule I to the notification in respect of which required land has been acquired and all relevant clearances of the State Government including NOC from the respective State Pollution Control Boards have been obtained before 27-1-1994, a project proponent will not be required to seek environmental clearance from the IAA. However those units who have not as yet commenced production will inform the IAA."

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91. The above Note makes it clear that existing mining projects that have a no-objection certificate from SPCB before 27-1-1994 will not be required to obtain an EC from the Impact Assessment Agency. Of course, this is subject to the substantive portion of EIA 1994 and the 1st Note. However, if the existing mining project does not have a no-objection certificate from SPCB, then an EC will be required under EIA 1994.

92. Two questions immediately arise from a reading of the 1st and the 8th Note. The first question is: What is the base year for considering the pollution load while proposing any expansion activity? The second question is: What is the duration for which an EC is not necessary for an ongoing project which does not propose any expansion, or to put it differently, what is the validity period for a no-objection certificate from SPCB?

93. In our opinion, as far as the first question is concerned, a reading of EIA 1994 read with the 1st Note implies that the base year would need to be the immediately preceding year, that is, 1993-94. This is obvious from the opening sentence of the 1st Note, that is,

> "A project proponent is required to seek environmental clearance for a proposed expansion/modernisation activity if the resultant pollution load is to exceed the *existing levels*." (emphasis supplied)

In its report, CEC has taken 1993-94 as the base year and we see no error in this. Even the MoEF in its Circular dated 28-10-2004 stated with regard to the expansion in production:

> "If the annual production of any year from 1994-95 onwards exceeds the annual production of 1993-94 or its preceding years (even if approved by IBM), it would constitute expansion."

If that expansion results in an increase in the pollution load over the existing levels, then an EC is mandated.

94. It was contended on behalf of the mining leaseholders that in terms of the Circular of 28-10-2004 the annual production even prior to 1993-94 could be considered for ascertaining if there was an expansion or not. We cannot accept this submission for a variety of reasons. For one, the *existing levels* mentioned in the 1st Note clearly have reference to the immediately preceding year and not to a preceding year in a comparatively remote past. Secondly, a very high annual production in any one year is not reflective of a consistent pattern of production — it could very well be a freak year and that freak year certainly cannot be a basic standard or the norm to measure expansion. Then if the interpretation sought to be given is accepted, there would be an absence of consistency and a lack of uniformity with different mining leaseholders having different base years. This is hardly conducive to good governance. Finally, EIA 1994 was intended to prevent the existing environmental load from increasing based on the existing data of the immediate past and not data of a few years gone by. We may add that the only exception that could be made in this regard would be if there is no production during 1993-94. In that event, the immediately

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preceding year would be relevant and that is the only reasonable interpretation that we see for the use of the words "or its preceding years".

95. On the question of the duration or exemption period from an EC in respect of a project that has commenced prior to 27-1-1994 the substantive portion of EIA 1994 and the 8th Note grant an exemption from the requirement of obtaining an EC if there is no expansion and the existing pollution load is not exceeded. In any event, a no-objection certificate from SPCB is necessary for continuing the mining operations. Consequently, even if any mining leaseholder does not have an EC or does not require an EC for continuing mining operations (but has a no-objection certificate from SPCB), the absence of an EC would not have an adverse impact on the mining leaseholder unless of course, there was an expansion in the mining operations without any certificate from SPCB. In addition to this, the validity period (if any) of the certificate from SPCB is important — we have not been made aware whether there is such a validity period or not.

96. The contention of the learned counsel for the mining leaseholders that EIA 1994 was rather vague, uncertain and ambiguous cannot be accepted. In our opinion, on a composite reading of EIA 1994, it is clear that:

(*i*) A no-objection certificate from SPCB was necessary for continuing mining operations;

(*ii*) An expansion or modernisation activity required an EC unless the pollution load was not exceeded beyond the existing levels;

(*iii*) The base year for determining the pollution load and therefore the proposed expansion would be with reference to 1993-94;

(*iv*) Whether an expansion or modernisation would lead to exceeding the existing pollution load or not would require a certificate from SPCB which could be reviewed by the IAA;

(*v*) New projects require an EC; and

(*vi*) Existing projects do not require an EC unless there is an expansion or modernisation for the duration (if any) of the validity of the certificate from SPCB.

We need not say anything more on this subject since CEC has proceeded to discuss the issue of mining in excess of the EC or in excess of the mining plan only from the year 2000-01 onwards. The prior period may, therefore, be ignored and it is the period from 2000-01 onwards which is actually relevant for the present discussion.

97. It was submitted by the learned counsel for the mining leaseholders that the MoEF had caused some confusion with regard to the requirement of an EC at the time of renewal of a mining lease. In this connection, reference was made to a Press Note of July 1994 and a Letter dated 19-6-1997 of the MoEF to the Chief Conservator of Forests in the MoEF.

98. The learned counsel for the mining leaseholders sought to buttress their submission that EIA 1994 was vague and ambiguous by mentioning two Circulars issued by the MoEF on 5-11-1998 and 27-12-2000 extending

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the period for obtaining an EC for new units. However, these circulars are apparently not on our record (which goes into 148 volumes) and therefore we cannot make any comment about them. These circulars were mentioned to also contend that even for new units the absence of an EC would not have an adverse impact on them, since the period for obtaining an EC was extended from time to time. A reference was also made to a Circular dated 14-5-2002 which later on became the subject of consideration by this Court in *M.C. Mehta* v. *Union of India*[17]. A reading of the Circular of 14-5-2002 indicates that several units had come up in violation of EIA 1994. The MoEF had taken the view that such units may be permitted to apply for an EC by 31-3-1999 which was then extended to 30-6-2001 by Circulars dated 5-11-1998 and 27-12-2000, respectively.

99. By the Circular dated 14-5-2002 the deadline for applying for an EC was extended up to 31-3-2003 as a last and final opportunity to obtain an ex post facto EC in respect of units which had commenced mining operations without obtaining a prior EC in violation of EIA 1994. The Circular also stated that:

> "... Suitable directions shall be issued by all States/UTs under the Environment (Protection) Act to units to stop construction activities/operations of all such units that fail to apply for environmental clearance by 31-3-2003. Units which fail to comply with these directions shall be proceeded against forthwith under the relevant provisions of the Environment (Protection) Act, 1986 without making reference to this Ministry."

100. It was submitted that in view of these ambiguous and unclear signals emanating from the MoEF which resulted in confusion being worse confounded, the mining leaseholders were not clear whether or not they were required to obtain an EC particularly in respect of pre-EIA 1994 mining leases and operations.

101. As mentioned above, these dates and the text of the circulars were emphasised by the learned counsel for the leaseholders to contend that it was not obligatory for the mining leaseholders, who did not expand their mining operations, to obtain an EC and in any event the period for obtaining an EC was extended till 31-3-2003 with ex post facto approval. In this context, reliance was placed on *M.C. Mehta*[17] referred to above.

102. We are not in agreement with the contention of the learned counsel for the mining leaseholders on the interpretation given to the various circulars for the reasons given above and must also correctly appreciate the decision of this Court in *M.C. Mehta*[17].

103. In *M.C. Mehta*[17] the issue that arose for consideration was whether mining activity in the Aravalli Hills causes environmental degradation and what directions are required to be issued. While considering this issue, this Court also considered EIA 1994 and the Circular dated 14-5-2002. In doing so, this Court categorically held in para 37 of the Report that the intention of the MoEF was not to legalise the continuance of mining activity without complying with the requisite stipulations. If that were unfortunately so, then it would demonstrate

17 (2004) 12 SCC 118

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a lack of sensitivity of the MoEF to the principles of sustainable development and the object behind issuing EIA 1994. This Court said: (SCC p. 161)

> "*37.* … It does not appear that MoEF intended to legalise the commencement or continuance of mining activity without compliance of stipulations of the notification. In any case, a statutory notification cannot be notified [modified] by issue of circular. Further, if MoEF intended to apply this circular also to mining activity commenced and continued in violation of this notification, it would also show total non-sensitivity of MoEF to the principles of sustainable development and the object behind the issue of notification. The circular has no applicability to the mining activity."

104. Adverting to the MMDR Act, this Court expressed the view in para 52 of the Report that the approval of a mining plan does not imply that a mining leaseholder can commence mining operations. The mining leaseholder is nevertheless obliged to comply with statutory provisions including the EPA and other laws. It was said: (*M.C. Mehta case*[17], SCC p. 169)

> "*52.* The grant of permission for mining and approving mining plans and the scheme by the Ministry of Mines, Government of India by itself does not mean that mining operation can commence. It cannot be accepted that by approving mining plan and scheme by the Ministry of Mines, the Central Government is deemed to have approved mining and it can commence forthwith on such approval. … A mining leaseholder is also required to comply with other statutory provisions such as the Environment (Protection) Act, 1986; the Air (Prevention and Control of Pollution) Act, 1981; the Water (Prevention and Control of Pollution) Act, 1974 and the Forest (Conservation) Act, 1980. Mere approval of the mining plan by the Government of India, Ministry of Mines would not absolve the leaseholder from complying with the other provisions."

105. This Court also considered the question of the applicability of EIA 1994 to the renewal of an existing mining lease. It was held that the said notification would apply to the renewal of a mining lease that came up for consideration post 27-1-1994. In other words, for the renewal of a mining lease, an EC was required by the mining leaseholder. It was held in para 77 of the Report: (*M.C. Mehta case*[17], SCC p. 180)

> "*77.* We are unable to accept the contention that the notification dated 27-1-1994 would not apply to leases which come up for consideration for renewal after issue of the notification. The notification mandates that the mining operation shall not be undertaken in any part of India unless environmental clearance by the Central Government has been accorded. The clearance under the notification is valid for a period of five years. In none of the leases the requirements of the notification were complied with either at the stage of initial grant of the mining lease or at the stage

17 *M.C. Mehta* v. *Union of India*, (2004) 12 SCC 118

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of renewal. Some of the leases were fresh leases granted after issue of the notification. Some were cases of renewal. No mining operation can commence without obtaining environmental impact assessment in terms of the notification."

106. It is clear from the decision rendered by this Court that EIA 1994 is mandatory in character; that it is applicable to all mining operations—expansion of production or even increase in lease area, modernisation of the extraction process, new mining projects and renewal of mining leases. A mining leaseholder is obliged to adhere to the terms and conditions of a mining lease and the applicable laws and the mere fact that a mining plan has been approved does not entitle a mining leaseholder to commence mining operations. In *M.C. Mehta*[17] this Court concluded that EIA 1994 is clearly applicable to the renewal of a mining lease.

107. Subsequent to the decision in *M.C. Mehta*[17] two clarificatory Circulars were issued by MoEF on 28-10-2004 and 25-4-2005. These were adverted to by the learned counsel for the mining leaseholders but in our opinion they are not relevant except to the extent that they make it explicit that following the decision of this Court in *M.C. Mehta*[17], an EC is required to be obtained before the renewal of a mining lease and that the term "expansion" would include an increase in production or the lease area or both.

108. It was submitted on behalf of the mining leaseholders that the possibility of getting an ex post facto EC was a signal to the mining leaseholders that obtaining an EC was not mandatory or that if it was not obtained, the default was retrospectively condonable. We do not agree. We have referred to various provisions of the MMDR Act and the Rules framed thereunder to indicate the statutory importance given to the protection and preservation of the environment. This was also emphasised in *M.C. Mehta*[17] in which it was also stated that: (SCC p. 161, para 37)

> "*37.* ... It does not appear that MoEF intended to legalise the commencement or continuance of mining activity without compliance of stipulations of the notification."

It appears to us that the MoEF was, in a sense, cajoling the mining leaseholders to comply with the law and EIA 1994 rather than use the stick. That the mining leaseholders chose to misconstrue the soft implementation as a licence to not abide by the requirements of the law is unfortunate and was an act of omission or commission by them at their own peril. We cannot attribute insensitivity to the MoEF or even to the mining leaseholders to environment protection and preservation, but at the same time we cannot overlook the obligation of everyone to abide by the law. That the MoEF took a soft approach cannot be an escapist excuse for non-compliance with the law or EIA 1994.

17 *M.C. Mehta* v. *Union of India*, (2004) 12 SCC 118

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Environment Impact Assessment Notification of 14-9-2006

109. On 14-9-2006 another EIA Notification was issued by the MoEF. This notification (for short EIA 2006) required prior EC for projects or activities mentioned in the Schedule to it both for major as well as minor minerals if the leased area is 5 ha or more. We were informed that several mining leaseholders, in compliance with EIA 2006, applied for and were granted an EC.

110. It was submitted by the learned counsel for the mining leaseholders that the confusion, vagueness and uncertainty caused by EIA 1994 and subsequent circulars and other communications did not end with the issuance of EIA 2006. Reference was made to a Circular dated 13-10-2006 which deals with interim operational guidelines till 13-9-2007 in respect of applications made under EIA 1994. We do not see the relevance of this circular (which really dealt with transitional issues) not only for the reason given in *M.C. Mehta*[17] that circulars cannot override statutory notifications but also because it deals with the procedure for considering applications made under EIA 1994.

111. Reference was also made to a Circular dated 2-7-2007. The passage relied upon reads as follows:

> "It is clarified that all such mining projects which did not require environmental clearance under the EIA Notification, 1994 would continue to operate without obtaining environmental clearance till the mining lease falls due for renewal, if there is no increase in lease area and/or there is no enhancement of production. In the event of any increase in lease area and or production, such projects would need to obtain prior environmental clearance. Further, all such projects which have been operating without any environmental clearance would obtain environmental clearance at the time of their lease renewal even if there is no increase either in terms of lease area or production."

112. The aforesaid Circular relates to three categories that is:

(*i*) Mining leases, where no EC was required under EIA 1994 would continue to operate without an EC;

(*ii*) If there was an increase in the lease area or enhancement of production, an EC was required by the mining leaseholder;

(*iii*) All projects would require an EC at the time of renewal of the mining lease even if there was no increase in the lease area or enhancement of production.

113. Reference was also made to an Office Memorandum dated 19-8-2010. However a reading of this document brings out that it basically relates to construction at site but makes it clear that no activity relating to any project covered under EIA 2006 including civil construction could be undertaken without obtaining a prior EC except fencing of the site to protect it from getting encroached and construction of temporary sheds for the guards.

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114. Reference was also made to Office Memorandums dated 16-11-2010 and 12-12-2012 but having gone through them we find them of little relevance as they deal with procedural issues only.

115. All that we need to say on this subject is that there is no confusion, vagueness or uncertainty in the application of EIA 1994 and EIA 2006 insofar as mining operations were commenced on mining leases before 27-1-1994 (or even thereafter). Post EIA 2006, every mining leaseholder having a lease area of 5 ha or more and undertaking mining operations in respect of major minerals (with which we are concerned) was obliged to get an EC in terms of EIA 2006.

116. An attempt was then made by the learned counsel for the mining leaseholders to get out of the rigours of EIA 1994 and EIA 2006 by contending that some of them had modified the mining plan (with approval) and that therefore they had extracted iron ore or manganese ore, as the case may be, in terms of the mining plan but not necessarily in terms of the EC that had been obtained, if at all.

117. We have already held that a mining plan is subordinate to the EC and in *M.C. Mehta*[17] it was held by this Court that having an approved mining plan does not imply that a mining leaseholder can commence mining operations. That being so, a modified mining plan without a revised or amended EC, is of no consequence. What the contention of the learned counsel suggests to us is that under the shield of a modified mining plan, illegal or unlawful mining in the form of mining without an EC, mining by over-reaching EIA 1994 and EIA 2006 was being carried out.

118. The contention apart, the subterfuge of obtaining a modified mining plan to get over the adverse effects of excess and illegal or unlawful production of iron ore or manganese ore was deprecated by the Ministry of Mines of the Government of India. In a Letter dated 29-10-2010 addressed to the Controller General, Indian Bureau of Mines it was pointed out that the State Governments had expressed a concern that the Indian Bureau of Mines (IBM) had been modifying mining plans for allowing an increase in production of ore without adequate intimation to the State Governments. A concern was raised that such a revision was often being used to increase production of ore, which is sometimes not accounted for in mining operations in the mining lease concerned. It was made clear that all modifications of mining plans shall be effective prospectively only and earlier instances of irregular mining shall not be regularised through a modification of the mining plan.

119. In a subsequent Letter dated 12-12-2011 addressed to the Chief Secretary in the Government of Orissa the said Ministry of Mines noted that there were violations of the actual production limit laid down in the mining plan and that the State Government had finally taken steps to curb illegal mining in respect of overproduction of minerals. There was a reference to suggest (and we take it to be so) that 20% deviation from the mining plan (in terms of overproduction) would be reasonable and permissible. However, it appears from a reading of the communication that illegal mining was going on

17 *M.C. Mehta* v. *Union of India*, (2004) 12 SCC 118

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beyond the 20% deviation limit and that appropriate steps were needed to curb these violations. The learned counsel for the petitioners submitted that such egregious violations must be firmly dealt with by cancellation or termination of the mining lease and a soft approach is not called for.

120. In this context, it is worth noting that a High Level Committee (called the Hoda Committee) on the National Mineral Policy noted in its Report dated 22-12-2006 in para 3.47 as follows:

> "3.47 An EMP [Environment Management Plan] has to be prepared under the MCDR and got approved by IBM. However, this EMP is not acceptable to the MoEF. The miner has to prepare two EMPs separately —one for IBM and another for MoEF. The Committee suggests that IBM and MoEF should prepare guidelines for a composite EMP so that IBM can approve the same in consultation with MoEF's field offices. This will eliminate anomalous situations where increase of even a few tonnes in production requires project authorities to get a fresh EMP approved from the MoEF although the IBM allows a grace of ±10%, keeping in view the fluctuations in the market situation and process complexities. If a single EMP is accepted in principle such anomalies can be resolved in advance. The Committee feels the MoEF should also have a cushion of ±10% in production while giving EIA clearance."

121. The above passage indicates that the permissible variation in production as per the Indian Bureau of Mines is ±10% but according to the Letter dated 12-12-2011 issued by the Ministry of Mines, the reasonable variation limit could be ±20%. It is not clear why there was a shift in the variation, but as rightly pointed out by the learned counsel for the petitioners, the fact that in some cases the variation exceeded 20% was a cause for concern which necessitated strict and punitive action.

122. A submission was made by the learned counsel for the mining leaseholders to the effect that since many of them had been granted the first deemed statutory renewal of the mining lease under Rule 24-A of the MCR, the requirements of EIA 1994 would not be applicable. We were shown various amendments made to Rule 24-A of the MCR from time to time particularly the amendments made on 10-2-1987, 7-1-1993, 27-9-1994, 17-1-2000, 18-7-2014 and 8-10-2014. In our opinion, none of these are of any consequence, the reason being that for the purposes of renewal of the mining lease, an application is required to be made by the mining leaseholders and the deemed renewal clause under Rule 24-A of the MCR will come into operation only after an application for renewal is made in Form J in Schedule I of the MCR. Under Rule 26 of the MCR, the State Government may refuse to renew the mining lease. That apart, the position in environmental jurisprudence with regard to the renewal of a mining lease has been made explicit by this Court in *M.C. Mehta*[17]. Even otherwise, in view of EIA 1994, it is quite clear that the renewal of a mining lease would require a prior EC.

17 *M.C. Mehta* v. *Union of India*, (2004) 12 SCC 118

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123. We may also draw attention in this regard to a Circular dated 28-10-2004 issued by the MoEF wherein it was stated that in view of the decision in *M.C. Mehta*[17] all mining projects of major minerals of more than 5 ha lease area that had not yet obtained an EC would have to do so at the time of renewal of the lease.

124. Finally, it was submitted that whenever an EC is granted, it would have retrospective effect from the date of the application for grant of an EC. In this context, it was pointed out that there were enormous delays in granting an EC and that the Hoda Committee had noted with reference to EIA 2006 that if all goes well, the grant of an EC takes about 232 days whereas the international norm is that an EC is granted within six months or 180 days. According to the additional affidavit filed by some mining leaseholders, the period of 232 days mentioned by the Hoda Committee was actually a conservative estimate and that in fact it takes anything up to 390 days for the grant of an EC. It was submitted that the position was even worse under EIA 1994 since the MoEF rarely showed any urgency in the grant of an EC. Examples were cited before us to show that in some instances the grant of an EC took more than two years. Taking all this into consideration it was submitted that it would be more appropriate that the EC is given retrospective effect from the date of the application.

125. We are not in agreement with the learned counsel for the mining leaseholders. There is no doubt that the grant of an EC cannot be taken as a mechanical exercise. It can only be granted after due diligence and reasonable care since damage to the environment can have a long-term impact. EIA 1994 is therefore very clear that if expansion or modernisation of any mining activity exceeds the existing pollution load, a prior EC is necessary and as already held by this Court in *M.C. Mehta*[17] even for the renewal of a mining lease where there is no expansion or modernisation of any activity, a prior EC is necessary. Such importance having been given to an EC, the grant of an ex post facto environmental clearance would be detrimental to the environment and could lead to irreparable degradation of the environment. The concept of an ex post facto or a retrospective EC is completely alien to environmental jurisprudence including EIA 1994 and EIA 2006. We make it clear that an EC will come into force not earlier than the date of its grant.

Illegal mining

126. A question raised by the learned counsel for the mining leaseholders concerned is the interpretation of the expression "illegal mining". Reliance was placed on the report of CEC which refers to Rule 2(*ii-a*) of the MCR to conclude that the violation of any rule within the mining lease area would not come within the definition of "illegal mining" except where there has been a violation of the Rules framed under Section 23-C of the MMDR Act. According to CEC:

> "*17*. Illegal mining has been defined as mining operations undertaken by any person in any area without holding a mining lease. It does not

17 *M.C. Mehta* v. *Union of India*, (2004) 12 SCC 118

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include violation of any rules within the mining lease area except the Rules made under Section 23-C of the MMDR Act, 1957. The mining lease area shall be considered as an area held with lawful authority by the lessee [refer Rule 2(*ii-a*), MCR, 1960]."

127. As can be seen from the above, there is a difference of opinion between CEC and the Commission on what is illegal mining or mining without lawful authority and we will give our views on the subject.

128. According to the lessees a mining operation only outside the mining lease area would constitute "illegal mining" making illegal mining lease centric. We are unable to accept this narrow interpretation given by CEC and relied upon by the learned counsel for the mining leaseholders.

129. The simple reason for not accepting this interpretation is that Rule 2(*ii-a*) of the MCR was inserted by a Notification dated 26-7-2012 while we are concerned with an earlier period. That apart, as mentioned above, the holder of a mining lease is required to adhere to the terms of the mining scheme, the mining plan and the mining lease as well as the statutes such as the EPA, the FCA, the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981. If any mining operation is conducted in violation of any of these requirements, then that mining operation is illegal or unlawful. Any extraction of a mineral through an illegal or unlawful mining operation would become illegally or unlawfully extracted mineral.

130. It is not, as suggested by the learned counsel, that illegal mining is confined only to mining operations outside a leased area. Such an activity is obviously illegal or unlawful mining. Illegal mining takes within its fold excess extraction of a mineral over the permissible limit even within the mining lease area which is held under lawful authority, if that excess extraction is contrary to the mining scheme, the mining plan, the mining lease or a statutory requirement. Even otherwise, it is not possible for us to accept the narrow interpretation sought to be canvassed by the learned counsel for the mining leaseholders particularly since we are dealing with a natural resource which is intended for the benefit of everyone and not only for the benefit of the mining leaseholders.

Encroachments

131. Section 4(1) of the MMDR Act makes it clear that no person can carry out any mining operations except under and in accordance with the terms and conditions of a mining lease granted under the MMDR Act and the Rules made thereunder. Obviously therefore, any person carrying on mining operations without a mining lease, is indulging in illegal or unlawful mining. This would also necessarily imply that if a mining lease is granted to a person who carries out mining operations outside the boundaries of the mining lease, the mineral extracted would be the result of illegal or unlawful mining.

132. In its report, CEC has dealt with illegal mining outside the sanctioned mining areas. It is stated that 82 mining leases for iron ore and manganese

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ore were identified by the Commission where there were encroachments in the form of illegal mining pits, illegal overburdened dumps, etc.

133. In respect of these 82 mining leases, the State of Odisha appointed a Committee on the suggestion of the Commission, to survey and identify the exact extent and location of the sanctioned lease area, lease area under occupation of the mining leaseholder and the area under encroachment/illegal mining. The Committee or the Joint Survey consisted of officers of the Revenue Department, Forest Department and Mining Department of the State of Odisha who carried out a field survey in respect of 39 mining leases. The findings of the field survey or the Joint Survey were verified by a team comprising of the Director, Mines, Chief Engineer, ORSAC and the Additional Secretary, F & E Department of the Government of Odisha.

134. It is mentioned in the report of CEC that the Joint Survey for each of the 39 mining leases is technically sound and reliable. However, in respect of some of the leases, it would be desirable for the State Government to take another look at the results of the field survey. Unfortunately, CEC has not identified these mining leases that require another look. Be that as it may, the fact is that a joint survey has not been conducted in respect of 43 mining leases.

135. We are of the view that for completing the record and taking the report of CEC to its logical conclusion, it would be appropriate if a fresh Joint Survey is conducted by officers concerned of the Government of Odisha from the Revenue Department, the Forest Department, the Mining Department and any other department that may be deemed necessary. The Forest Survey of India, the MoEF, the Indian Bureau of Mines and the Geological Survey of India should also be associated in the Joint Survey. In our opinion, it would also be appropriate if CEC is also associated in the Joint Survey and the best and latest technology should be made use of including satellite imagery and thereafter a report is submitted in this Court on or before 31-12-2017 after hearing the 82 lessees identified by the Commission.

Adherence to the mining plan

136. A side issue raised by the learned counsel for the mining leaseholders in this regard was the necessity (if any) of adhering to the annual plan or calendar plan of mining. It was contended that a mining leaseholder could mine in excess of the annual plan. While it is so, this submission must be tempered and appreciated in the proper context. A mining plan is valid for a period of five years but there could be a 20% variation in extraction over and above the mining plan. This is the maximum that is stated to be reasonably permissible according to the Ministry of Mines. In terms of Rule 22(5) of the MCR a mining plan shall incorporate a tentative scheme of mining and annual programme and plan for excavation from year-to-year for five years. At best, there could be a variation in extraction of 20% in each given year but this would be subject to the overall mining plan limit of a variation of 20% over five years. What this means is that a mining leaseholder cannot extract the five year quantity (with a variation of 20%) in one or two years only. The extraction has to be staggered and continued over a period of five years. If any other interpretation is given,

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it would lead to an absurd situation where a mining leaseholder could extract the entire permissible quantity under the mining plan plus 20% in one year and extract miniscule amounts over the remaining four years, and this could be done without any reference to the EC. The submission of the learned counsel in this regard simply cannot be accepted.

137. In the Letter dated 12-12-2011 sent by the Secretary in the Ministry of Mines of the Government of India to the Chief Secretary of the Government of Odisha (adverted to above) concerning violation of annual production limit laid down in the approved mining plan, it was stated, inter alia, that an analysis of production and violations in 104 mining leases for bulk minerals in the last ten years was undertaken by the Indian Bureau of Mines. It was noted that in 71 cases there was excess ore produced beyond the reasonable variation limit of 20%. It was noted that this was partly due to the failure of the State machinery to restrict the movement of minerals.

138. In a further Letter dated 5-9-2012 it was reiterated that any violation of the mining plan or the mining scheme noticed by the State Government should be immediately brought to the notice of the Indian Bureau of Mines to initiate suitable action. It was reiterated that transit passes to such mines should not be issued by the State Government so as to stop any additional outgo. It was added:

> "Needless to say any revision on the limits of production is subjected to statutory clearances under Environment and Forest laws. Having said that, the State Mining and Geology officials should not also lose focus on taking stringent action against any instances of illegal mining, undertaken outside the leased area, and passed off as excess production."

It is quite clear from the correspondence placed before us that as far as the Union of India is concerned, any violation of the requirements of the law has to be firmly dealt with.

139. With reference to the interpretation of Section 21(5) of the MMDR Act (which we shall soon consider) it was stated as follows:

> "Section 21(5) of the MMDR Act is clearly applicable on such land which is occupied without lawful authority. It is clarified that in the context of the MMDR Act, 1957, violations pertaining to mining operations within the mining lease area are to be dealt with only in terms of the provisions of the Mineral Conservation and Development Rules, 1988. The State Governments have clear powers to tackle any offences related to mining outside the mining lease area in terms of Section 23-C of the MMDR Act, 1957. However, the interpretation that a land granted under a mining lease by the State Government can be held to be occupied without lawful authority on the grounds of violation of provisions of any other law of the land is not appropriate and such interpretation may not stand in the court of law. Such Act or Rules, including the Environment (Protection) Act, 1986, or the Forest (Conservation) Act, 1980, etc. clearly provide penalties for violations under those laws. This aspect may be clarified to the State Accountant General also."

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140. All that we need say for the present is that the interpretation given in the aforesaid Letter to Section 21(5) of the MMDR Act is not fully correct. While mining in excess of permissible limits under the mining plan or the EC or FC on leased area may not amount to mining on land occupied without lawful authority, it would certainly amount to illegal or unlawful mining or mining without authority of law.

Section 21 of the MMDR Act

141. The discussion on illegal or unlawful mining takes us to the question of the consequence of illegal or unlawful mining and the interpretation of Section 21(1) and Section 21(5) of the MMDR Act.

142. Section 21(1) of the MMDR Act is clearly relatable to a penal offence and applies if any one contravenes the provisions of Section 4(1) of the MMDR Act. Section 4(1) of the MMDR Act prohibits the undertaking of any mining operation in any area except under and in accordance with the terms and conditions of a mining lease and the Rules made thereunder. Therefore, when a person carries out a mining operation in any area other than a leased area or violates the terms of a mining lease, which incorporates the mining plan and which requires adherence to the law of the land, that person becomes liable for prosecution under Section 21(1) of the MMDR Act. In the event of a conviction, he or she shall be punishable with imprisonment for a term which may extend to five years and with fine which may extend to Rs 5 lakhs per hectare of the area.

143. As far as Section 21(5) of the MMDR Act is concerned, according to CEC the provision is applicable only if a person indulges in illegal mining outside the mining lease area. Consequently, Section 21(5) of the MMDR Act is not attracted even if the mineral raised within the mining lease area is without an EC or beyond the quantity prescribed by the EC or beyond the quantity permitted in the mining plan. In such a situation, the provisions of the EPA or the MCR come into play. This interpretation is supported by the learned counsel for the mining leaseholders who affirm that Section 21(5) of the MMDR Act is mining lease area centric. In other words, according to CEC and the learned counsel, for the purposes of Section 21(5) of the MMDR Act illegal mining is mining outside the mining lease area and Section 21(5) of the MMDR Act has to be understood in that light.

144. Reference was also made to the Explanation to Rule 2(*ii-a*) of the MCR where it is stated that for the purposes of this clause, the violation of any rules, other than the Rules made under Section 23-C of the MMDR Act, within the mining lease area by a holder of a mining lease shall not include illegal mining. In other words, it was submitted that Section 21(5) of the MMDR Act is required to be understood in the context of Rule 2(*ii-a*) of the MCR.

145. It was submitted by Shri Ashok Desai learned Senior Counsel for one of the intervenors, that the penalty postulated by Section 21(5) of the MMDR Act though an imposition of a pecuniary liability, is punishment for the commission of an offence. By referring to *Khemka & Co. (Agencies) (P)*

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Ltd. v. *State of Maharashtra*[18] it was contended that the liability sought to be imposed by Section 21(5) of the MMDR Act is not a liability that is created by a clear, unambiguous and express enactment.

146. As far as the Union of India is concerned, in its affidavit filed on 20-1-2017 by Shri Sudhakar Shukla, Economic Advisor in the Government of India, Ministry of Mines, it is submitted (and this submission is supported by the learned Attorney General in his oral submissions) that Section 21(5) of the MMDR Act is in two parts. The first part refers to the raising of minerals without any lawful authority from *any land*. The second part is in addition to what is recoverable under the first part. The addition is to the effect that when a person raises a mineral from any area not in his or her lawful authority, that person is also liable to pay the rent, royalty or tax for the period during which the land was occupied without lawful authority.

147. It is further submitted that "illegal mining" as defined in Rule 2(*ii-a*) of the MCR is also required to be read in the context of Rule 26(4) and Rule 27(4-A) of the MCR which deal with the refusal to renew a mining lease if the mining leaseholder is convicted of illegal mining and the determination of a mining lease in the event the mining leaseholder is convicted of illegal mining. It is submitted that the definition of "illegal mining" in the MCR must be strictly construed and limited to the provisions of the MCR and cannot apply to the provisions of Section 21(5) of the MMDR Act.

148. In conclusion, it is reiterated by the Union of India on affidavit as follows:

> "*55*. That considering all the above, the Ministry would like to submit that the provisions of sub-section (5) of Section 21 would apply to all minerals raised without any lawful authority, be it forest clearances or environment clearances or any other such legal requirements.
>
> *56*. That penalties would arise under Section 21(5) of the MMDR Act, 1957, in respect of any form of mining activity without lawful authority. Mining outside lease area would on the face of it amount to mining without lawful authority and would attract the provisions of Section 21(5); and, in addition, *all forms of mining without lawful authority including that in breach of the limits imposed by the environmental clearance carried out within the lease area would also invite penalties under Section 21(5).*" (emphasis supplied)

149. On behalf of the State of Odisha, it was submitted by Shri Rakesh Dwivedi learned Senior Counsel by relying upon *Karnataka Rare Earth* v. *Deptt. of Mines & Geology*[19] that what is sought to be achieved by Section 21(5) of the MMDR Act is to recover the price of the mineral that has been illegally or unlawfully or unauthorisedly raised with an intention to compensate the State for the loss of the mineral owned by it, the loss having been caused by a person who is not authorised by law to raise that mineral. There is no element of penalty

18 (1975) 2 SCC 22 : 1975 SCC (Tax) 227
19 (2004) 2 SCC 783

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involved in this and the recovery of the mineral or its price is not a penal action but is merely compensatory. This is what this Court had to say in *Karnataka Rare Earth*[19]: (SCC pp. 791-92, paras 12-15)

"*12*. Is sub-section (5) of Section 21 a penal enactment? Can the demand of mineral or its price thereunder be called a penal action or levy of penalty?

13. A penal statute or penal law is a law that defines an offence and prescribes its corresponding fine, penalty or punishment. (*Black's Law Dictionary*, 7th Edn., p. 1421.) Penalty is a liability composed (sic imposed) as a punishment on the party committing the breach. The very use of the term "penal" is suggestive of punishment and may also include any extraordinary liability to which the law subjects a wrongdoer in favour of the person wronged, not limited to the damages suffered. (*See* Aiyar, P. Ramanatha: *The Law Lexicon*, 2nd Edn., p. 1431.)

14. In support of the submission that the demand for the price of mineral raised and exported is in the nature of penalty, the learned counsel for the appellants has relied on the marginal note of Section 21. According to Justice Singh, G.P.: *Principles of Statutory Interpretation* (8th Edn., 2001, at p. 147), though the opinion is not uniform but the weight of authority is in favour of the view that the marginal note appended to a section cannot be used for construing the section. There is no justification for restricting the section by the marginal note nor does the marginal note control the meaning of the body of the section if the language employed therein is clear and spells out its own meaning. In *Director of Public Prosecutions* v. *Schildkamp*[20] Lord Reid opined that a sidenote is a poor guide to the scope of a section for it can do no more than indicate the main subject with which the section deals and Lord Upjohn opined that a sidenote being a brief précis of the section forms a most unsure guide to the construction of the enacting section and very rarely it might throw some light on the intentions of Parliament just as a punctuation mark.

15. We are clearly of the opinion that the marginal note "penalties" cannot be pressed into service for giving such colour to the meaning of sub-section (5) as it cannot have in law. The recovery of price of the mineral is intended to compensate the State for the loss of the mineral owned by it and caused by a person who has been held to be not entitled in law to raise the same. There is no element of penalty involved and the recovery of price is not a penal action. It is just compensatory."

150. We are in agreement with the view expressed by the learned Attorney General and Shri Dwivedi as also the view expressed in *Karnataka Rare Earth*[19]. The decision in *Khemka & Co.*[18] is not at all apposite. There is no ambiguity in Section 21(5) of the MMDR Act or in its application. We are also

19 *Karnataka Rare Earth* v. *Deptt. of Mines & Geology*, (2004) 2 SCC 783
20 1971 AC 1 : (1970) 2 WLR 279 : (1969) 3 All ER 1640 (HL)
18 *Khemka & Co. (Agencies) (P) Ltd.* v. *State of Maharashtra*, (1975) 2 SCC 22 : 1975 SCC (Tax) 227

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of the opinion that though Section 21(1) of the MMDR Act might be in the realm of criminal liability, Section 21(5) of the MMDR Act is certainly not within that realm.

151. In our opinion, Section 21(5) of the MMDR Act is applicable when any person raises, without any lawful authority, any mineral from *any land*. In that event, the State Government is entitled to recover from such person the mineral so raised or where the mineral has already been disposed of, the price thereof as compensation. The words "any land" are not confined to the mining lease area. As far as the mining lease area is concerned, extraction of a mineral over and above what is permissible under the mining plan or under the EC undoubtedly attracts the provisions of Section 21(5) of the MMDR Act being extraction without lawful authority. It would also attract Section 21(1) of the MMDR Act. In any event, Section 21(5) of the Act is certainly attracted and is not limited to a violation committed by a person only outside the mining lease area — it includes a violation committed even within the mining lease area. This is also because the MMDR Act is intended, among other things, to penalise illegal or unlawful mining on any land including mining lease land and also preserve and protect the environment. Action under the EPA or the MCR could be the primary action required to be taken with reference to the MCR and Rule 2(*ii-a*) thereof read with the Explanation but that cannot preclude compensation to the State under Section 21(5) of the MMDR Act. The MCR cannot be read to govern the MMDR Act.

152. What is the significance of this discussion? It was submitted that CEC has taken the following view:

> "… it may be appropriate that 30% of the notional value of the iron and manganese produced by each of the lessees without/in excess of the environmental clearances may be directed to be recovered from the lessees concerned and with the explicit understanding the lessees as well as the officers concerned will continue to be liable for action under the provisions of the respective Acts."

153. The learned counsel for the petitioners and the learned Amicus were of the opinion that the provisions of Section 21(5) of the MMDR Act require that the entire price of the illegally mined ore should be recovered from each defaulting lessee. Similarly, in its affidavit, the Union of India differs with the recommendation of CEC. According to the affidavit of the Union of India this would be contrary to the statutory scheme and in fact 100% recovery should be made under the provisions of Section 21(5) of the MMDR. We may note that only to this extent, the learned Attorney General differed with the view expressed by the Union of India and submitted that the recommendation of CEC to recover only 30% of the value of the illegally mined ore should be accepted.

154. In our opinion, there can be no compromise on the quantum of compensation that should be recovered from any defaulting lessee — it should be 100%. If there has been illegal mining, the defaulting lessee must bear the consequences of the illegality and not be benefited by pocketing 70% of the illegally mined ore. It simply does not stand to reason why the State should be

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compelled to forego what is its due from the exploitation of a natural resource and on the contrary be a party in filling the coffers of defaulting lessees in an ill-gotten manner.

Calculations on merits

155. The issue now is with regard to the calculations made by CEC with regard to the production of iron ore and manganese ore without or in excess of the EC and/or the mining plan. As already mentioned above, the figures were not disputed (except by JSPL and SMPL). Therefore, only the application of the figures requires consideration and so we do not need to examine each individual case. However, to understand and appreciate the manner in which CEC has arrived at its figures, we may state that this has been specifically mentioned by CEC in its report. The basis of the calculations is as follows:

> "(*a*) the production during the year 1993-94 has been considered as the permissible production during each year till the mining lease did not have the environmental clearance;
>
> (*b*) the permissible production for the year in which the environmental clearance was obtained for the first time has been considered on pro rata basis of (*a*) the prescribed annual production, and (*b*) the date of the grant of the environmental clearance. For this purpose the environmental clearance granted on or before 15th of a month has been considered valid for the entire month. Where the environmental clearance has been granted after 15th of a month it has been considered valid from the subsequent month. For example if the environmental clearance for a mining lease has been granted say on 10-10-2008 for an annual production of say 12 lakhs MT then in that case the permissible production for the mining lease for the year 2008-09 would be taken as 6 lakhs MT (12 × 6/12 lakh MT) and 12 lakhs MT per annum in the subsequent year; and
>
> (*c*) wherever a mining lease having environmental clearance has been granted revised environmental clearance for a higher production the permissible annual production for the year, during which the revised environmental clearance has been granted, has been considered on pro rata basis of the quantities prescribed in the earlier environmental clearance and the revised environmental clearance. For example if the mining lease was having environmental clearance for annual production of 12 lakhs MT and say on 28-9-2009 it has been granted revised environmental clearance for annual production of say 24 lakhs MT then in that case the permissible production for the year 2009-10 would be taken as 18 lakhs MT (12 × 6/12 + 24 × 6/12) and 24 lakhs MT per annum in subsequent years."

156. A submission made by the mining leaseholders was that the maximum production in any year up to 1993-94 should be considered as the base for making the calculations. Such a contention was also urged before CEC and was rejected. We have examined this contention independently and are of the view that the base year of 1993-94 is most appropriate — we have already given our reasons for this. Some lessees might lose in the process while some of them

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might benefit but that cannot be avoided. In any event, each mining leaseholder is being given the benefit of calculations only from 2000-01 and is not being "penalised" for the period prior thereto. We think the mining leaseholders should be grateful for this since it was submitted by the learned counsel for the petitioners and the learned Amicus that the penalty should be levied from the date of EIA 1994. In our opinion, the cut-off from 2000-2001 (without interest) is undoubtedly reasonable and there can hardly be any grievance in this regard. The mining leaseholders cannot have their cake and eat it too, along with the icing on top.

157. Since the recommendation made by CEC in this regard is not totally unreasonable, we accept that the compensation should be payable from 2000-2001 onwards at 100% of the price of the mineral, as rationalised by CEC.

Violation of the Forest (Conservation) Act, 1980

158. Before dealing with the violations of Section 2 of the Forest (Conservation) Act, 1980 (for short "the FCA"), it is necessary to give a brief background.

159. The FCA came into operation initially through the Forest (Conservation) Ordinance, 1980 with effect from 25-10-1980. The said Ordinance was repealed and subsequently the FCA came into effect on 25-12-1980.

160. Section 2 of the FCA provides that no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing, inter alia, that any forest land or any portion thereof may be used for non-forest purposes.

161. The interpretation of Section 2 of the FCA first came up for consideration in *State of Bihar* v. *Banshi Ram Modi*[21]. In that case, Banshi Ram Modi was granted a mining lease for mining and winning mica. During the course of mining operations, feldspar and quartz were discovered. Modi then applied to the Central Government to include these minerals in the lease. The State Government agreed to do so but did not obtain the previous approval of the Central Government for the inclusion of the two minerals in the original lease.

162. The Central Government took the view that since its previous approval had not been obtained for inclusion of feldspar and quartz in the mining lease, Modi could not be permitted to mine these two minerals. This led Modi to approach the High Court with the contention that he was not breaking up or clearing any forest land other than the land on which mining operations were already being carried on. The High Court allowed the writ petition but feeling aggrieved, the State of Bihar preferred an appeal in this Court.

163. The question before this Court was a narrow one, namely, whether prior approval of the Central Government is necessary in respect of a mining lease, granted for winning a certain mineral prior to the coming into force of the FCA, if the lessee applies to the State Government after the FCA came into force for permission to win and carry any new mineral from the broken up area?

21 (1985) 3 SCC 643

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164. While answering this question in the negative, it was held that after the commencement of the FCA no fresh breaking up of forest land or no fresh clearing of the forest on any such land could be permitted by the State Government or any authority without the approval of the Central Government. However, in respect of broken up land, it was held that if the State Government permits the lessee to remove any discovered mineral, it cannot be said that there has been a violation of Section 2 of the FCA particularly since there is no breaking up of any fresh forest land.

165. Subsequently in *Ambica Quarry Works* v. *State of Gujarat*[22] when the lease of the mining holder came up for renewal, the FCA had already come into force. Since the Forest Department of the State of Gujarat refused to give a no-objection certificate, the application for renewal of the lease was rejected. The question that arose for consideration was whether, after coming into force of the FCA, the mining leaseholder was entitled to renewal of the mining lease. While answering the question in the negative this Court held that the renewal of a lease cannot be claimed as a matter of right. The primary purpose of the FCA was to prevent deforestation and ecological imbalance as a result of deforestation. Therefore, the primary duty under the FCA was to the community and the obligation to society must predominate over the obligation to the individuals. While distinguishing *Banshi Ram Modi*[21] this Court held that renewal of the lease would lead to further deforestation or at least it would not help in reclaiming the area where deforestation had already taken place. The primary purpose of the FCA is to prevent further deforestation and any interpretation must subserve that purpose and implement the FCA. Under the circumstances, it was held, considering the scheme of the FCA that refusal to renew the lease without prior approval of the Central Government was not unjustified.

166. This view was reiterated in *Rural Litigation and Entitlement Kendra* v. *State of U.P.*[23] It was held that the FCA does not permit mining in a forest area. Reiterating the view expressed in *Ambica Quarry Works*[22], it was observed that compliance with Section 2 of the FCA is necessary as a condition precedent even for the renewal of a mining lease. This Court went so far as to hold that if any decree or order has already been obtained by any of the mining leaseholders, from any court relating to renewal of their lease, the same shall stand vacated and similarly, any appeal or other proceeding taken to obtain a renewal or against any order or decree granting renewal shall also become non est.

167. The definition of the word "forest" for the purposes of the FCA came up for consideration in *T.N. Godavarman Thirumulpad* v. *Union of India*[3]. In its decision of 12-12-1996[3] this Court observed that during the course of hearing

22 (1987) 1 SCC 213
21 *State of Bihar* v. *Banshi Ram Modi*, (1985) 3 SCC 643
23 1989 Supp (1) SCC 504
3 (1997) 2 SCC 267

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it appeared that there is a misconception about the true scope of the FCA and the meaning of the word "forest" used therein. Consequently, there is also a misconception about the need for prior approval of the Central Government as mandated by Section 2 of the FCA in respect of certain activities in a forest area, which activities are more often of a commercial nature.

168. In this context, it was held that "forest" must be understood according to its dictionary meaning and it would cover all statutorily recognised forests, whether designated, reserved, protected or otherwise. It was further held that "forest" would also include any area recorded as a forest in the government records irrespective of the ownership. With this in mind, this Court directed that prior approval of the Central Government is required for any non-forest activity within the area of any "forest". In accordance with Section 2 of the FCA all ongoing activity within any forest in any State throughout the country, without prior approval of the Central Government must cease forthwith. This particular direction given by this Court is of immense significance.

169. This Court further directed each State Government to constitute within one month an Expert Committee, inter alia, to identify areas which are "forest" irrespective of whether they are so notified, recognised or classified under any law and irrespective of the ownership of the land of such forest.

170. Pursuant to the directions given by this Court, the State of Odisha constituted District Level Committees (for short "DLC") for identification of forest lands. After the identification process, appropriate affidavits were filed by the State of Odisha in this Court in 1997-98, the last being dated 6-1-1998.

171. In the meanwhile, in *T.N. Godavarman Thirumulpad* v. *Union of India*[24] this Court passed certain directions on 4-3-1997 with regard to what was categorised as mining matters. The directions given by this Court are as follows: (SCC p. 315, para 9)

> "*9*. We direct that—
>
> (*1*) where the lessee has not forwarded the particulars for seeking permission under the FCA, he may do so immediately;
>
> (*2*) the State Government shall forward all complete pending applications within a period of 2 weeks from today to the Central Government for requisite decisions;
>
> (*3*) applications received (or completed) hereafter would be forwarded within two weeks of their being so made.
>
> (*4*) the Central Government shall dispose of all such applications within six weeks of their being received. Where the grant of final clearance is delayed, the Central Government may consider the grant of working permissions as per existing practice."

172. It was also made clear that the order passed by this Court including the earlier order dated 12-12-1996[3] shall be obeyed and carried out by the Central

24 (1997) 3 SCC 312
3 *T.N. Godavarman Thirumulpad* v. *Union of India*, (1997) 2 SCC 267

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Government and the State Governments notwithstanding any order or direction passed by a court including a High Court or Tribunal to the contrary.

173. From the above, it is explicit that in terms of the orders passed by this Court, there was a complete ban on non-forest activity on forest lands with effect from 12-12-1996. The only issue that remained was identification of all such lands by the District Level Committees and as mentioned above this exercise was completed by the State of Odisha on or about 6-1-1998. The lands identified by DLC are compendiously referred to as DLC lands.

174. In this background in IAs Nos. 2746-48 of 2009 in *T.N. Godavarman Thirumulpad*[2] CEC was directed to submit a report which it did on 26-4-2010. It was recommended by CEC that given the peculiar circumstances prevailing in the State of Odisha, mining operations in the entire DLC lands included in the mining leases, may be allowed to continue on payment of the net present value (NPV) subject to the fulfilment of other statutory requirements and rules being complied with.

175. By an order dated 7-5-2010[4] this Court directed that the recommendation of CEC acceptable to the State Government could be complied with. Consequently, the State of Odisha appears to have implemented the recommendations regarding recovery of NPV and realised an amount of about Rs 1750 crores as additional NPV.

176. We have been informed that in addition to the above, the mining leaseholders have subsequently deposited an amount under the heading of penal compensatory afforestation which was introduced through guidelines issued by the MoEF on 3-2-1999. The guidelines in this regard were communicated by the Assistant Inspector General of Forest to the Chief Secretary of all the States and Union Territories and the relevant portion thereof reads as follows:

> "4.3.1 Cases have come to the notice of the Central Government in which permission for diversion of forest land was accorded by the State Government concerned in anticipation of approval of the Central Government under the Act and/or where work has been carried out in forest area without proper authority. Such anticipatory action is neither proper nor permissible under the Act which clearly provides for prior approval of the Central Government in all cases. Proposals seeking ex post facto approval of the Central Government under the Act are normally not entertained. The Central Government will not accord approval under the Act unless exceptional circumstances justify condonation. However, penal compensatory afforestation would be insisted upon by the MoEF on all such cases of condonation.
>
> 4.3.2 The penal compensatory afforestation will be imposed over the area worked/used in violation. However, where the entire area has been

2 *T.N. Godavarman Thirumulpad* v. *Union of India*, IAs Nos. 2746-48 in WP (C) No. 202 of 1995, order dated 6-11-2009 (SC)

4 *T.N. Godavarman Thirumulpad* v. *Union of India*, (2010) 15 SCC 177

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deforested due to anticipatory action of the State Government, the penal compensatory afforestation will be imposed over the total lease area."

177. It was submitted by the learned counsel for the lessees that since additional NPV as well as an amount towards penal compensatory afforestation has been paid by the defaulting mining leaseholders, the violation of Section 2 of the FCA stands condoned or in any event the illegal or unlawful mining in forest lands stands regularised.

178. CEC did not accept this submission made on behalf of the mining leaseholders on the ground that no retrospective forest clearance has been granted and even otherwise there is no provision to condone or regularise the violation of Section 2 of the FCA.

179. We are of the opinion that the view expressed by CEC in this regard is partially correct. Given the fact that the defaulting mining leaseholders have been asked to pay and have paid additional NPV as well as an amount towards penal compensatory afforestation, it must be assumed that the violation of the FCA has been condoned to a limited extent, more particularly since in its order dated 7-5-2010[4] this Court permitted the State of Odisha to accept such recommendations of CEC made in the report dated 26-4-2010 as are acceptable to it. The relevant recommendations made by CEC read as follows:

"(*c*) No forest land can be leased/assigned without first obtaining the approval under the FC Act. Therefore, the forest area approved under the FC Act should not be lesser than the total forest area included in the mining leases approved under the MMDR Act, 1957. Both necessarily have to be the same. In view of the above, this Hon'ble Court while permitting grant of temporary working permission to the mines in Orissa and Goa has made it one of the preconditions that the NPV will be paid for the entire forest area included in the mining leases. Similarly, all the mining leaseholders in Orissa should be directed to pay the NPV for the entire forest area, included in the mining leases;

(*d*) In Orissa, substantial areas included in the mining leases as non-forest land have subsequently been identified as DLC forest (deemed forest/forest-like areas) by the Expert Committee constituted by the State Government pursuant to this Hon'ble Court's order dated 12-12-1996[3]. While processing and/or approving the proposals under the FC Act in many cases such areas have been treated as non-forest land. It is recommended that (*i*) the NPV for the entire DLC area included in the mining lease, after deducting the NPV already paid, should be deposited by the leaseholder concerned, and (*ii*) the mining operations in the unbroken DLC land (virgin land) should be permissible only if the permission under the FC Act has been obtained/is obtained for such area. Keeping in view the peculiar circumstances as were existing in Orissa and subject to the above, the mining operations in the broken DLC land may be allowed to be continued

4 *T.N. Godavarman Thirumulpad* v. *Union of India*, (2010) 15 SCC 177
3 *T.N. Godavarman Thirumulpad* v. *Union of India*, (1997) 2 SCC 267

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provided the other statutory requirements and rules are otherwise being complied with."

180. This still leaves open the question of violation of the order passed by this Court on 12-12-1996[3] followed by the order dated 4-3-1997[24], namely, that mining must cease forthwith in forest areas. In regard to this violation, the only benefit (at best) that can be granted to the mining leaseholders that we are concerned with, is till 6-1-1998 when the affidavit was filed in this Court in IAs Nos. 2746-48 of 2009 in *T.N. Godavarman*[6]. With effect from 7-1-1998 any mining activity in forest and DLC lands would clearly be completely illegal and unauthorised and the benefit that the mining leaseholders have derived from this illegal mining would be subject to Section 21(5) of the MMDR Act. Therefore, the price of the iron ore and manganese ore mined by the mining leaseholders from 7-1-1998 is payable until forest clearance under Section 2 of the FC Act is obtained by the mining leaseholders.

181. The report of CEC dated 16-10-2014 deals with 51 mining leases. It has been recorded by CEC that of them 15 mining leases have been found not involved in undertaking mining operations in violation of the FCA. There are 16 mining leases that have violated the provisions of the FCA between 25-10-1980 and 1999-2000 and the State Government in some of the cases has already issued a show-cause notice to the mining leaseholders. It is further stated that most of the violations pertain to the period prior to 12-12-1996. CEC has not made any particular recommendation in regard to these 16 mining leases nor do we, except to direct the State Government to promptly take a decision on the show-cause notice preferably within a period of four months and in any case before 31-12-2017.

182. CEC has also dealt with 18 other mining leaseholders (other than M/s Essel Mining and Industries Ltd. relating to the Kasia Iron Ore Mines and Jilling-Langlotta Iron & Manganese Ore Mines). With regard to these 18 mining leaseholders, the view taken by us above would hold good and clearly they are liable to compensate the State for the entire price of the iron ore and manganese ore illegally mined with effect from 7-1-1998 until the forest clearance was obtained by the mining leaseholder concerned.

183. We have fixed 7-1-1998 as the cut-off date despite the orders dated 12-12-1996[3] and 4-3-1997[24] only for the reason that it is possible that some mining leaseholders (we do not know how many) were not aware that they were inadvertently conducting mining operations on DLC lands which were identified by the State of Odisha as forest lands on the directions of this Court. For the purposes of Section 21(5) of the MMDR Act, they are entitled to the benefit of doubt and along with them, the other mining leaseholders before us.

3 *T.N. Godavarman Thirumulpad* v. *Union of India*, (1997) 2 SCC 267
24 *T.N. Godavarman Thirumulpad* v. *Union of India*, (1997) 3 SCC 312
6 *T.N. Godavarman Thirumulpad* v. *Union of India*, (2014) 6 SCC 167

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184. CEC in this regard has observed as follows:

> "It will be seen that in the above cases the mining operations have been done in the forest land in violation of the Forest (Conservation) Act, 1980 and consequently also in violation of this Hon'ble Court order dated 12-12-1996[3]. CEC recommends that 70% of the notional value of the iron ore and manganese produced by the lessees by undertaking mining operations in the forest land in violation of the Forest (Conservation) Act, 1980 may be directed to be recovered from the respective lessees. Wherever the mineral production is both from the forest land as well as non-forest land then in such cases the notional value of the production from the forest land may be calculated on pro rata basis of the extent of the forest land and non-forest land involved. The notional value of the mineral, time-limit for payment of the compensation, use of the amount received as compensation and other conditions as decided by this Hon'ble Court in respect of the production without/in excess of the environmental clearance may be directed to be followed on pari-passu basis."

185. For the reasons that we have already expressed above, we are not in agreement with CEC that only a part of the notional value (in this case 70%) of the iron ore and manganese ore produced by the mining leaseholders should be recovered. We are of the view that Section 21(5) of the MMDR Act should be given full effect and so we reiterate that the recovery should be to the extent of 100%.

186. There may be some overlap in the period when mining operations were conducted by the mining leaseholders without an EC and/or an FC. We make it clear that mineral extracted either without an EC or without an FC or without both would attract the provisions of Section 21(5) of the MMDR Act and 100% of the price of the illegally or unlawfully mined mineral must be compensated by the mining leaseholder. To the extent of the overlap or the common period, obviously only one set of compensation is payable by the mining leaseholder to the State of Odisha. We order accordingly. However, we make it clear that whatever payment has already been made by the mining leaseholders towards NPV, additional NPV or penal compensatory afforestation is neither adjustable nor refundable since that falls in a different category altogether.

187. We may note that this Court has held in *T.N. Godavarman Thirumulpad* v. *Union of India*[25, 26] that a violation of the FCA is condonable on payment of penal compensatory afforestation charges. This obviously would not apply to illegal or unlawful mining under Section 21(5) of the MMDR Act, but we make it clear that the mining leaseholders would be entitled to the benefit of any temporary working permission granted.

3 *T.N. Godavarman Thirumulpad* v. *Union of India*, (1997) 2 SCC 267
25 (2011) 15 SCC 658
26 (2011) 15 SCC 681

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Conclusions on the issues of mining without an EC or FC or both

188. To avoid any misunderstanding, confusion or ambiguity, we make the following very clear:

(*1*) A mining project that has commenced prior to 27-1-1994 and has obtained a no-objection certificate from SPCB prior to that date is permitted to continue its mining operations without obtaining an EC from the Impact Assessment Agency. However, this is subject to any expansion (including an increase in the lease area) or modernisation activity after 27-1-1994 which would result in an increase in the pollution load. In that event, a prior EC is required. However, if the pollution load is not expected to increase despite the proposed expansion (including an increase in the lease area) or modernisation activity, a certificate to this effect is absolutely necessary from SPCB, which would be reviewed by the Impact Assessment Agency.

(*2*) The renewal of a mining lease after 27-1-1994 will require an EC even if there is no expansion or modernisation activity or any increase in the pollution load.

(*3*) For considering the pollution load the base year would be 1993-94, which is to say that if the annual production after 27-1-1994 exceeds the annual production of 1993-94, it would be treated as an expansion requiring an EC.

(*4*) There is no doubt that a new mining project after 27-1-1994 would require a prior EC.

(*5*) Any iron ore or manganese ore extracted contrary to EIA 1994 or EIA 2006 would constitute illegal or unlawful mining (as understood and interpreted by us) and compensation at 100% of the price of the mineral should be recovered from 2000-2001 onwards in terms of Section 21(5) of the MMDR Act, if the extracted mineral has been disposed of. In addition, any rent, royalty or tax for the period that such mining activity was carried out outside the mining lease area should be recovered.

(*6*) With effect from 14-9-2006 all mining projects having a lease area of 5 ha or more are required to have an EC. The extraction of any mineral in such a case without an EC would amount to illegal or unlawful mining attracting the provisions of Section 21(5) of the MMDR Act.

(*7*) For a mining lease of iron ore or manganese ore of less than 5 ha area, the provisions of EIA 1994 will continue to apply subject to EIA 2006.

(*8*) Any mining activity carried on after 7-1-1998 without an FC amounts to illegal or unlawful mining in terms of the provisions of Section 21(5) of the MMDR Act attracting 100% recovery of the price of the extracted mineral that is disposed of.

(*9*) In the event of any overlap, that is, illegal or unlawful mining without an FC or without an EC or without both would attract only 100% compensation and not 200% compensation. In other words, only one set of compensation would be payable by the mining leaseholder.

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(*10*) No mining leaseholder will be entitled to the benefit of any payments made towards NPV or additional NPV or penal compensatory afforestation.

Violation of Section 6 of the MMDR Act

189. We have examined the report of CEC with regard to the alleged violation of Section 6 of the MMDR Act and find that there have been several amendments to Section 6 relating to the maximum area for which a mining lease may be granted to a person. The following is the result of the amendments:

1. From 1-6-1958 to 11-9-1972—maximum lease area 10 sq miles.

2. From 12-9-1972 to 9-2-1987—maximum lease area 10 sq km or 1000 ha in any one State.

3. From 10-2-1987 to 17-12-1999—maximum lease area 10 sq km or 1000 ha in any part of the country.

4. From 18-12-1999 till date—maximum lease area 10 sq km or 1000 ha in one State.

190. While the word "person" has not been defined in the MMDR Act, a reading of Section 5 thereof indicates that the State Government shall not grant a mining lease to any person unless such person is an Indian national or a company as defined in the Companies Act, 1956 and subsequently in the Companies Act of 2013.

191. Sub-section (2) of Section 6 of the MMDR Act provides that a person acquiring by, or in the name of, another person a mining lease which is intended for him/her shall be deemed to be acquiring it himself/herself.

192. For the purposes of determining the total area that can be acquired for mining operations, Section 6(3) of the MMDR Act provides that the area held under a mining lease by a person as a member of a cooperative society, company or other corporation or a Hindu Undivided Family or a partner of a firm shall be deducted from the area referred to so that the sum total of the area held by such person under a mining lease only as such member or partner or individually may not in any case exceed the total area specified.

193. In this background, CEC examined the case of seven mining leaseholders. They are:

1. Essel Mining and Industries Limited
2. Rungta Mines Limited
3. Rungta Sons Pvt. Limited
4. Bonai Industrial Company Limited
5. Feegrade & Co. Pvt. Limited
6. M/s Mangilal Rungta
7. Jindal Steel & Power Limited

194. As far as Essel Mining and Industries Ltd. is concerned we propose to deal with this mining leaseholder on another occasion since even CEC has placed this mining leaseholder in a special category.

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195. Similarly, so far as Rungta Mines Ltd., Rungta Sons Pvt. Ltd. and M/s Mangilal Rungta are concerned, although CEC has come to the conclusion that these persons have not acquired mining leases in violation of Section 6 of the MMDR Act, there are some critical observations made by the Commission with regard to the "Rungta Group". The learned counsel for the petitioner submitted that the view of CEC in this regard needs reconsideration. Since the "Rungta Group" was not heard by us, we propose to hear the above Rungta companies to ascertain, inter alia, whether there has been any violation of the provisions of Section 6 of the MMDR Act.

196. As far as Jindal Steel & Power Ltd. is concerned, we propose to hear this company on another occasion since the suggestion of CEC is that it is the benami holder of Sarda Mines Pvt. Ltd. If it is so held to be a benami holder of Sarda Mines Pvt. Ltd. then there is a violation of Section 6 of the MMDR Act. However, CEC has refrained from making any observations or recommendation in this regard. Accordingly, we propose to hear Jindal Steel & Power Ltd. on a later occasion on this limited issue.

197. As far as Bonai Industrial Company Ltd. and Feegrade & Co. Pvt. Ltd. are concerned, CEC has concluded that they have not violated Section 6 of the MMDR Act. That being the position, and nothing having been shown to the contrary, we accept the recommendation of CEC in this regard.

Violation of Rule 37 of the Mineral Concession Rules, 1960

198. CEC has discussed the possible violation of Rule 37 of the MCR. In this context, it was noted that there were several mining leaseholders who had entered into raising contracts which were actually a transfer of the lease as postulated by Rule 37 of the MCR.

199. On this basis the State of Odisha constituted a Committee on 8-7-2011 to carry out a study of the financial transactions between the mining leaseholders and the raising contractors to determine whether there is a prima facie violation of Rule 37 of the MCR.

200. On an examination of the material before it the Committee concluded that eight mining leaseholders violated Rule 37 of the MCR. These mining leaseholders are as under:

(*i*) R.P. Sao, Guali Iron Ore Mines, Keonjhar

(*ii*) Indrani Patnaik, Unchabali Iron Ore Mines, Keonjhar

(*iii*) M/s K.J.S. Ahluwalia, Nuagaon Iron Ore Mines, Keonjhar

(*iv*) M/s Aryan Mining & Trading Corporation Pvt. Ltd., Narayanposhi Iron Ore Mines, Sundergarh

(*v*) M/s Mideast Integrated Steel Ltd., Roida, Sidhamatha Iron Ore Mines, Keonjhar

(*vi*) Kavita Agrawal, Kusumdihi Manganese Mines, Sundergarh

(*vii*) Mala Roy & Others, Jalabari Iron Ore Mines, Keonjhar

(*viii*) M/s Sharda Mines (P) Ltd., Thakurani Iron Ores Mines, Keonjhar

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201. Pursuant to the report of the Committee, a show-cause notice was issued to these mining leaseholders by the State of Odisha. Six of the mining leaseholders (other than M/s Aryan Mining & Trading Corporation Pvt. Ltd. (for short Aryan) and Kavita Agrawal (Kusumdihi Manganese Mines) challenged the show-cause notice and the decision of the Committee by filing revision petitions under Section 30 of the MMDR Act read with Rule 55 of the MCR before the Central Government. The challenge to the show-cause notice was on the ground that persons who were not government servants could not have been included in the Committee and also that the Committee was not notified in the Official Gazette as required by Section 26(2) of the MMDR Act.

202. The Central Government set aside the order constituting the Committee and the State of Odisha has challenged the orders of the Central Government before the Orissa High Court through writ petitions. We are told that the writ petitions filed by the State of Odisha are pending in the High Court.

203. As far as Aryan is concerned, we were informed that the matter was pending with the State of Odisha and a request was made to us to permit the State of Odisha to pass a final order on the submissions made by Aryan. On 28-4-2017[27] we had permitted the State of Odisha to pass final orders but we are not aware whether any orders have since been passed.

204. As far as Kavita Agrawal is concerned, her lease was terminated by the State of Odisha and the Central Government also dismissed her revision petition on 28-4-2014. The said mining leaseholder has since filed a writ petition which is pending in the Orissa High Court.

205. During the course of hearing it was proposed by the learned counsel appearing for some of the mining leaseholders that it might be appropriate if the raising contracts between these eight mining leaseholders and the raising contractors are given a fresh look. This suggestion was not acceptable to one of the mining leaseholders. However, we are of the opinion that the suggestion is reasonable and it will be appropriate if in fact a fresh look is given to the raising contracts entered into by the mining leaseholders and the raising contractors. We are also of the opinion that such an order ought to be passed with the consent of the mining leaseholders since any delay in disposal of the issue would not really subserve the interests of anybody including the mining leaseholders.

206. Accordingly, for considering the appointment of an appropriate committee in respect of the eight mining leaseholders mentioned above, we

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27 *Common Cause* v. *Union of India*, WP (C) No. 114 of 2014, order dated 28-4-2017 (SC), wherein it was directed:

"It has been pointed out by Mr Rakesh Dwivedi, learned Senior Counsel appearing for the State of Odisha and Mr Arvind Datar, learned Senior Counsel appearing for Aryan Mining and Trading Corporation that the proceedings pursuant to the show-cause notice under Rule 37 of the Mineral Concession Rules are complete and both of them say that a final order may be passed pursuant to the show-cause notice. We permit the authorities to pass the order. Arguments heard in part. List the matters on 2-5-2017 as part-heard matters."

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would like to hear the learned counsel for the parties. We make it clear that the proposed committee will be entitled to lift the corporate veil, the importance of which in cases such as the present, has been emphasised in *State of Rajasthan* v. *Gotan Lime Stone Khanij Udyog (P) Ltd.*[28]

Intergenerational equity

207. Mr Prashant Bhushan, learned counsel for the petitioner sought to impress upon us the need to consider intergenerational equity and if possible to place a limit on the extent of mining in the State of Odisha by referring to an article titled: "Intergenerational equity: a legal framework for global environment change" by Edith Brown Weiss. He laid emphasis on three principles that form the basis of intergenerational equity.

208. The first principle relied on is called the principle of "conservation of options". This requires each generation to conserve the diversity of the natural and cultural resource base in such a manner that the options available to future generations are not restricted. It was submitted that the extent of mining activities being carried on in Odisha indicate that the entire iron ore will perhaps be fully extracted within a period of 30 years and nothing would be available for future generations. Therefore some sort of a limit would have to be placed on the mining operations.

209. The second principle relied on is the principle of "conservation of quality". This was with reference to the submission that future generations should not be subjected to a quality of the planet worse than what it is today. In other words, future generations are also entitled to quality enjoyment of the diversity in the natural and cultural resource base.

210. The third principle relied upon was the principle of "conservation of access" which is to say that future generations have an equitable right to access the diversity of the natural and cultural resource base as is available to the present generation.

211. There is no doubt considerable substance in the submission particularly if this is considered in the light of intergenerational rights and obligations which have been dealt with in the said article. However, it is really not for this Court to lay down limits on the extent of mining activities that should be permitted by the State of Odisha or by the Union of India. Nevertheless, this is an aspect that needs serious consideration by the policy and decision-makers in our country in the governance structure. At present, keeping in mind the indiscriminate mining operations in Odisha, it does appear that there is no effective check on mining operations nor is there any effective mining policy. The National Mineral Policy, 2008 (effective from March 2008) seems to be only on paper and is not being enforced perhaps due to the involvement of very powerful vested interests or a failure of nerve. We are of the opinion that the National Mineral Policy, 2008 is almost a decade old and a variety of changes have taken place since then, including (unfortunately) the advent of rapacious mining in several parts of the country. Therefore, it is

28 (2016) 4 SCC 469

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high time that the Union of India revisits the National Mineral Policy, 2008 and announces a fresh and more effective, meaningful and implementable policy within the next few months and in any event before 31-12-2017. We are constrained to pass this direction in view of the facts disclosed in these petitions and in judgments delivered by this Court with regard to mining in Goa and Karnataka.

Inquiry by the Central Bureau of Investigation

212. It was emphasised by Shri Prashant Bhushan that because of the rampant illegal or unlawful mining being carried out in Odisha, there should be an enquiry by the Central Bureau of Investigation (for short "CBI") to ascertain and determine the persons involved either in turning a Nelson's eye to rampant illegal or unlawful mining or being conspirators in the activity and the extent of the illegal or unlawful mining. It was submitted that the Justice Shah Commission had very strongly recommended an inquiry conducted by CBI and criminal elements being brought to book for the despoliation of the land.

213. For the present, we do not propose to direct an investigation or inquiry by CBI for the reason that what is of immediate concern is to learn lessons from the past so that rapacious mining operations are not repeated in any other part of the country. This can be achieved through the identification of lapses and finding solutions to the problems that are faced. Undoubtedly, there have been very serious lapses that have enabled large-scale mining activities to be carried out without forest clearance or environment clearance and eventually the persons responsible for this will need to be booked but as mentioned above, the violation of the laws and policy need to be prevented in other parts of the country. The rule of law needs to be established. We are therefore of the view that it would be appropriate if an Expert Committee is set up under the guidance of a retired Judge of this Court to identify the lapses that have occurred over the years enabling rampant illegal or unlawful mining in Odisha and measures to prevent this from happening in other parts of the country.

214. There is no doubt that the recommendations of the Commission can form a platform for the study but it is also necessary to use technology for maintenance of registers, records and data through computers, satellite imagery, videography and other technology tools so that the natural wealth of our country is not rapaciously exploited for the benefit of a few to the detriment of a large number, many of whom are tribals inhabiting the land for several generations.

Utilisation of funds by the special purpose vehicle

215. In IAs Nos. 2746-48 of 2009 filed by Rabi Das, an order was passed on 27-1-2014[29] relating to the preparation of a scheme by CEC for setting up a special purpose vehicle (SPV) for tribal welfare and area development works. The relevant extract of the order reads thus:

> "50% of the additional amounts of net present value (NPV) recovered by the State of Odisha from the mining lessees will be used by the

29 *T.N. Godavarman Thirumulpad* v. *Union of India*, IAs Nos. 2746-48 in WP (C) No. 202 of 1995, order dated 27-1-2014 (SC)

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State of Odisha through a special purpose vehicle (SPV) for undertaking specific tribal welfare and area development works so as to ensure inclusive growth of the mineral bearing areas. The State of Odisha will accordingly file within four weeks from today, a comprehensive plan for the development of tribals out of the aforesaid funds, taking into consideration their requirements of health, education, communication, recreation, livelihood and cultural lifestyle as indicated in this Court's judgment in *T.N. Godavarman Thirumulpad (104)* v. *Union of India*[30]."

216. Subsequently on 28-4-2014[31] this Court accepted the scheme prepared by the Government of Odisha in consultation with the Central Empowered Committee. The scheme was captioned "Setting up of special purpose vehicle (SPV) for undertaking specific tribal welfare and area development works so as to ensure inclusive growth of mineral bearing areas in the State of Odisha". This Court then passed the following order on 28-4-2014[31]:

"Pursuant to orders passed by this Court on 27-1-2014[29], the Government of Odisha in consultation with the Central Empowered Committee has prepared a scheme captioned "Setting up of special purpose vehicle (SPV) for undertaking specific tribal welfare and area development works so as to ensure inclusive growth of mineral bearing areas in the State of Odisha.

The Central Empowered Committee has submitted a report dated 9-4-2014 and has recommended that the scheme prepared by the Government of Odisha may be approved by this Court and the ad hoc CAMPA may be directed to transfer to the SPV 50% of the additional amount of the NPV recovered from the mining leaseholders by the State of Odisha for undertaking tribal welfare and development works.

We have perused the scheme prepared by the State Government of Odisha and the recommendation of the Central Empowered Committee and we approve the scheme and direct ad hoc CAMPA to transfer to the SPV 50% of the additional amount of the NPV within a month for undertaking tribal welfare development works.

The interlocutory applications be listed in the month of July 2014."

217. Some of the salient features of the scheme are as follows:

5. The SPV will undertake specific tribal welfare and area development works so as to ensure inclusive growth of the mineral bearing areas. These will include works/projects related to livelihood intervention, health, water supply and sanitation, education, special programmes for development of women and children, entrepreneurial development of local people, communication and infrastructure projects and agro

30 (2008) 2 SCC 222

31 *T.N. Godavarman Thirumulpad* v. *Union of India*, IAs Nos. 2746-48 in WP (C) No. 202 of 1995, order dated 28-4-2014 (SC)

29 *T.N. Godavarman Thirumulpad* v. *Union of India*, IAs Nos. 2746-48 in WP (C) No. 202 of 1995, order dated 27-1-2014 (SC)

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silvi-horticultural based livelihood projects through identified agencies/ Government Departments. While taking up such projects/works a bottom up planning and participatory approach will be followed.

* * *

9. The general superintendence of the affairs will be vested in its Board of Directors including (*a*) to receive grants/funds and have custody of the same; (*b*) to approve Annual Budget estimates and sanction the expenditure within the limits of the budget; (*c*) to enter into any agreement for and on behalf of the SPV; (*d*) institute and defend legal proceedings; (*e*) to consider and approve the annual report, audit report, annual accounts and the financial estimates of the SPV; (*f*) to prescribe procedure to be followed for implementation of the projects/works and for maintenance of accounts; and (*g*) to undertake any other ancillary activities/works for the furtherance of the objective of the SPV.

(*a*) The funds made available to the SPV will be utilised only for the purpose for which the SPV has been set up and will not be used for any other purpose or transferred to any other authority; and

(*b*) The composition of the Board of Directors of the SPV, as provided in the present scheme, will be modified only after obtaining permission from the Hon'ble Supreme Court.

10. The accounts of the SPV will be internally audited annually by the Chartered Accountant firms empanelled with the CAG/Principal Accountant General, Odisha. The audit of the accounts of the SPV, receipts as well as expenditure, will be done annually by the office of the Principal Accountant General, Odisha.

11. The State Government has, earlier, registered a society, namely, Society for Inclusive Development of Mineral Bearing Areas of Odisha, which has been registered vide Registration No. 23354/74 of 2011-12 under the Societies Registration Act, 1860 to act as SPV for the purpose. It is now proposed to wind up the said Society and to replace it with "Odisha Mineral Bearing Areas Development Corporation" to be set up under Section 25 of the Companies Act.

218. It appears that the scheme has been implemented with the Chief Secretary of Odisha as the ex-officio Chairman of the SPV. There are several other members and directors of the SPV. There is no further information available with this Court with regard to the implementation of the scheme.

219. During the course of hearing, some of the mining leaseholders represented by Shri Gopal Subramanium, Senior Advocate offered to deposit and in fact did deposit an amount of Rs 237.05 crores for utilisation by the SPV for carrying out welfare works and activities in the districts of Keonjhar, Sundergarh and Mayurbhanj in Odisha. The deposit was made by way of a cheque on 6-4-2017 and was without prejudice to the rights and contentions of the lessees. In terms of our directions, the Registry has encashed the cheque and

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kept the amount in a short-term fixed deposit. We have mentioned this only to point out that there are huge amounts available with the special purpose vehicle for tribal welfare and area development works and we have absolutely no idea about the utilisation of the funds or whether they are in fact being used for tribal welfare and area development works. We also expect that as a result of the orders that we are passing today, very large amounts will again be made available to the State of Odisha. These amounts should also be kept with the special purpose vehicle.

220. To ensure that the amounts are utilised for the benefit of tribals in the affected districts and for area development works, we would like the Chief Secretary of Odisha to file an affidavit stating the work done as well as providing the audited accounts of the receipt and expenditure of the SPV from its inception.

Conclusion

221. In view of the findings above, we dispose of the writ petitions to the extent of the directions that we have already given.

222. IAs Nos. 45 (filed by Zenith Mining) and 47 (filed by Kavita Agrawal) are dismissed since their lease has not been extended or has been determined and they do not have any environmental clearance or forest clearance.

223. IA No. 66 (filed by J.N. Pattnaik) is also dismissed since there is no forest clearance available.

224. We have been informed that S.A. Karim (IA No. 9) actually had a working lease and has wrongly been included as a non-operational lease. Accordingly, IA No. 9 (filed by S.A. Karim) is also dismissed but as being infructuous. However, it is made clear that the State Government should ensure that the lessee S.A. Karim in fact has valid statutory clearances.

225. Pending show-cause notices issued by the State Government should be decided by 31-12-2017 (if not already decided) after hearing the noticees concerned.

226. We would like to hear Jindal Steel and Power Ltd., Sarda Mines Private Ltd., Rungta Group of Companies and Essel Mining and Industries Ltd. on the applications filed by them. For this purpose list the matter again after two weeks so that a convenient date of hearing can be fixed.

227. The amounts determined as due from all the mining leaseholders should be deposited by them on or before 31-12-2017. Subject to and only after compliance with statutory requirements and full payment of compensation and other dues, the mining leaseholders can restart their mining operations.

228. We would also like to hear the eight mining leaseholders concerned on the question of appointing an appropriate committee in respect of the applicability of Rule 37 of the Mineral Concession Rules to them.

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229. We would also like to hear the learned counsel for all the parties with regard to setting up of an Expert Committee presided over by a retired Judge of this Court to identify the lapses that have occurred over the years that have enabled rampant illegal and unlawful mining in Odisha and to recommend preventive measures not only to the State of Odisha but generally to all other States where mining activities are proceeding on a large scale. For the present, we pass no direction with regard to any investigation by CBI.

230. We direct the Union of India to have a fresh look at the National Mineral Policy, 2008 which is almost a decade old, particularly with regard to conservation and mineral development. The exercise should be completed by 31-12-2017.

231. The Chief Secretary of Odisha should file an affidavit as indicated by us within a period of six weeks and in any case on or before 30-9-2017. The Registry will list these petitions along with the affidavit immediately after its receipt for our consideration.

232. All other pending IAs are disposed of in terms of our orders.

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(2018) 18 Supreme Court Cases 257

(BEFORE MADAN B. LOKUR AND DEEPAK GUPTA, JJ.)

GOEL GANGA DEVELOPERS INDIA PRIVATE LIMITED .. Appellant;

Versus

UNION OF INDIA THROUGH SECRETARY MINISTRY OF ENVIRONMENT AND FORESTS AND OTHERS .. Respondents.

Civil Appeals No. 10854 of 2016 with Nos. 10901 of 2016 and 5157-58 of 2018†, decided on August 10, 2018

A. **Environment Law — Environmental Clearance/NoC/Environment Impact Assessment (EIA) — Specific Clearances — Development Projects — Environment Impact Assessment (EIA) Notification, 2006 — Construction in violation of the environmental clearance (EC), as in the present case, in violation of the clearance granted under Noti. dt. 4-4-2011 — Establishment and Effect of — "Built-up area" under Notis. dt. 4-4-2011 and 14-9-2006 — Concept of floor space index (FSI)/floor area ratio (FAR) — Non-relevance of, for computation of "built-up area" for which EC is granted**

— Imposition of damages of Rs 100 crores or 10% of project cost, whichever was higher, for violation of environmental clearance in addition to Rs 5 crore damages imposed by NGT, instead of directing demolition — Detailed coercive directions issued to ensure deposit of these damages within six months

— Held, the concept of FSI or non-FSI may be relevant for the purposes of building plans under municipal laws and regulations but it has no linkage or connectivity with the grant of EC and both will have an equally deleterious effect on the environment — When EC is granted for a particular construction it includes both FSI and non-FSI areas — Held, the built-up area under the Noti. dt. 14-9-2006 means all constructed area which is not open to the sky and the built-up area under the Noti. dt. 4-4-2011 means all covered area including basement and service areas

— EC dt. 4-4-2008 was granted to the project proponent for construction of built-up area 57,658.42 sq m, whereas the total construction raised by it was 1,00,002.25 sq m — Rejecting the contention of project proponent that while calculating the built-up area the constructions mentioned in Rr. 15.4.1.1(a), (b) and (c), 17.7.3 and 15.4.2 of the Pune Municipal Corporation Development Control Rules, 1982 were to be excluded, held, the construction raised by the project proponent was in violation of the environmental clearance granted to it — However, considering that the project proponent had already taken money and a large number of flats and shops had already been

† Arising from the Judgment and Order in *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4213 [National Green Tribunal, (Western Zone) Pune Bench, Application No. 184 of 2015 (WZ), dt. 27-9-2016] and *Tanaji Balasaheb Gambhire* v. *Union of India* [National Green Tribunal, (Western Zone) Pune Bench, Review Application No. 35 of 2016, dt. 8-1-2018]

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occupied and persons belonging to the middle class had invested their life's earnings, demolition not ordered/directed — However, inter alia, damages of Rs 100 crores or 10% of the project cost, whichever was higher, in addition to Rs 5 crores as levied by NGT, imposed on the project proponent — Words and Phrases — "Built-up area" — Pune Municipal Corporation Development Control Rules, 1982, Rr. 15.4.1.1(a), (b) & (c), 17.7.3 and 15.4.2 (Paras 14, 17, 53, 58.2, 66.1, 66.2 and 66.9)

B. **Environment Law — National Green Tribunal Act, 2010 — S. 19(4)(f) — Review petition — Who can hear and where — Held, the powers of review which NGT exercises are akin to those of a civil court — In terms of Or. 47 R. 5 CPC, a review petition should normally be heard by the same Bench which passed the original order**

— Further, this normal rule should not be disturbed unless it is virtually impossible for the original Bench to hear the matter or the members of the Bench themselves opt not to hear the matter — Further, under sub-rule (2) of R. 22 of 2011 Rules the matter should ordinarily be heard at the same place of sitting where it was originally decided, however, this is not a mandatory direction — National Green Tribunal (Practices and Procedure) Rules, 2011 — Rr. 22(2) and 22(3) — Civil Procedure Code, 1908 — Or. 47 R. 5 — Practice and Procedure — Review (Paras 36, 38 and 40)

C. **Environment Law — National Green Tribunal Act, 2010 — S. 19(4)(f) — Exercise of power of review — Impermissibility of, when appeal already pending**

— Statutory appeal was pending in the Supreme Court against the original order when the respondent's review application, inter alia, praying for demolition of the illegal structures and enhancement of compensation, was taken up for hearing by NGT — In the present case, held, project proponent/appellant had not only challenged original order of NGT on the ground that he had not violated EC but also on the ground that the damages awarded were highly excessive — Therefore, the Bench hearing the review application erred in holding that review application was maintainable — Civil Procedure Code, 1908 — Or. 47 R. 1(2) — Practice and Procedure — Review (Paras 7, 45 and 47)

D. **Environment Law — Polluter Pays Principle and Remedial/Compensatory/Punitive Measures — Remedial action/Reclamation/Rehabilitation measures/Compensation/Disgorgement of gains of wrongdoer — Damages for carrying out construction in violation of environmental clearance (EC) — Quantification of — Carbon footprint as basis**

— Rejecting the contention that damages should be assessed on the basis of "carbon footprint", held, the courts cannot introduce a new concept of assessing and levying damages unless expert evidence in this behalf is led or there are some well-established principles — However, in a case where expert evidence is led or on the basis of empirical data it is established that by applying the principles of carbon footprint damages can be assessed, court may rely upon

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such data — Evidence Act, 1872 — S. 45 — Words and Phrases — "Carbon footprint" (Paras 59 to 63)

E. **Environment Law — Environment (Protection) Rules, 1986 — Rr. 3 to 5 — EIA Notifications issued under — Cannot be varied/abrogated by officials of MoEF — Environment (Protection) Act, 1986, S. 4**

F. **Public Accountability, Vigilance and Prevention of Corruption — Corruption/Abuse of Power — Environmental Clearance/NoC — Improper grant of — Fine imposed upon the PMC and direction given by NGT to PMC to take appropriate action against the erring officials, and directions to enquire into conduct of other officials concerned, also upheld**

The project proponent i.e. M/s Goel Ganga Developers India Pvt. Ltd., purchased 79,100 sq m or 7.91 ha of land comprised in six Survey Nos. 35, 36, 37, 38, 39 and 40 in Vadgaon, Pune. These survey numbers were amalgamated in accordance with the rules and the plot became one plot of 79,100 sq m.

The project proponent applied for environmental clearance (EC) for the project and in the proposal dated 27-6-2007, he had shown that he would be erecting/constructing 12 buildings having 552 flats, 50 shops and 34 offices. The 12 buildings were to have stilts with basement and 11 floors. The total built-up area was indicated as 57,658.42 sq m. EC was granted to the project proponent on 4-4-2008.

The original applicant filed an application before the National Green Tribunal ("NGT", for short) claiming that the project proponent i.e. M/s Goel Ganga Developers India Pvt. Ltd., had raised construction in violation of the environmental clearance ("EC", for short) granted for the project and also in violation of the various municipal laws.

The case of the project proponent was that the term "built-up area" is synonymous with "floor space index" or FSI and that the constructed area, which is exempted from FSI area, or is a non-FSI area, is not a part of the "built-up area". The project proponent contended that while calculating the built-up area, the constructions mentioned in Rules 15.4.1.1(*a*), (*b*) and (*c*) and Rule 17.7.3 of the Pune Municipal Corporation Development Control Rules, 1982 ("DCR", for short), in addition to the areas specifically exempted under Rule 15.4.2 are to be excluded. It was contended that if the built-up area is calculated in accordance with DCR then the project proponent has till date not constructed the built-up area of 57,658.42 sq m, which it was permitted to construct under the EC granted to it on 4-4-2008. The stand of the Union of India and the original applicant was that built-up area means all area which is covered regardless of the area being FSI or non-FSI in terms of the EIA Notification of 2006.

The issues involved in this appeal were:

1. Whether the project proponent i.e. M/s Goel Ganga Developers India Pvt. Ltd., had raised construction in violation of the environmental clearance.

2. Whether NGT could have entertained a review application/reviewed its order dated 27-9-2016, when an appeal against the same was already pending before the Supreme Court?

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Held :

Under the notification of 2006, all constructed area, which is covered and not open to the sky has to be treated as "built-up area". There is no exception for non-FSI area. (Para 16)

Indeed, the concept of FSI or non-FSI has no concern or connection with grant of EC. The same may be relevant for the purposes of building plans under municipal laws and regulations but it has no linkage or connectivity with the grant of EC. When EC is to be granted, the authority which has to grant such clearance is only required to ensure that the project does not violate environmental norms. While projects and activities, as mentioned in the notification, may be allowed to go on, the authority while granting permission should ensure that the adverse impact on the environment is kept to the minimum. Therefore, the authority granting EC may lay down conditions which the project proponent must comply with. While doing so, such authority is not concerned whether the area to be constructed is FSI area or non-FSI area. Both will have an equally deleterious effect on the environment. (Para 17)

Notification dated 4-4-2011

It is not at all necessary to decide whether the Notification dated 4-4-2011 issued by the Ministry of Environment and Forests is clarificatory or is in substitution of the original notification of 2006. There is no ambiguity with regard to the definition of "built-up area" even under the notification of 2006 and it covers all constructed area not open to the sky. The notification of 2011 only provides that the built-up area or covered area shall be the area of all floors put together including basement(s) and other service areas. (Para 19)

Clarification dated 7-7-2017

The Notification dated 14-9-2006 was issued by the Central Government and published in the gazette after inviting objections from the public. The first clarification with regard to this notification was issued on 4-4-2011. These two decisions of the Central Government which were notified as per the provisions of law could not have been set at naught by the Joint Director even if it was issued with the approval of a higher authority. Since such decision has not been notified in the gazette, the statutory Notification dated 14-9-2006 and its subsequent clarification dated 4-4-2011 could not have been virtually set aside by the office memorandum dated 7-7-2017 issued by the Joint Director, Ministry of Environment, Forests and Climate Change. (Para 22)

Common Cause v. *Union of India*, (2017) 9 SCC 499, *relied on*

Environmental clearance (EC) for expansion of the project in question granted to it by the State Level Environment Impact Assessment Authority (SEIAA) on 20-11-2017

SEIAA has laid down general conditions for pre-construction phase and the first condition itself clearly shows that the non-FSI area constructed by the project proponent under first EC of 4-4-2008 has not been taken into consideration. (Para 27)

In case the total construction raised by the project proponent is taken as 1,00,002.25 sq m and if the area of the proposed construction is added then the project will fall in B-1 category and, therefore, SEIAA had no authority to grant EC by treating the project as falling under Category B-2. Furthermore, the EC

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dated 20-11-2017 is also illegal as the same has been granted on the presumption of the order dated 31-5-2016 passed by the Principal Secretary, Environment Department, State of Maharashtra holding that the construction of 18 buildings instead of 12 buildings is permissible. (Para 28)

Allegations made by the original applicant against various officials

The law is well settled that no person can be condemned unheard. It would, therefore, not be fair to deal with allegations made against individuals who are not parties to the petition and who have had no chance to reply to the allegations levelled against them. (Para 30)

However, as far as their official capacity is concerned, NGT was fully justified in coming to the conclusion that certain officials of PMC were going out of their way to help the project proponent and therefore, directions given by NGT in its order dated 27-9-2016 in this regard, upheld. (Para 31)

Prima facie, the Principal Secretary, Environment Department, Government of Maharashtra has not acted in a fair and transparent manner. The allegations made by the original applicant cannot be lightly brushed aside. His actions need to be looked into and, therefore, direction given by NGT directing the Chief Secretary to the State of Maharashtra to take notice of the conduct of the officers concerned, upheld. (Paras 32 and 66.8)

Challenge to the order dt. 8-1-2018 passed in Tanaji Balasaheb Gambhire, 2018 SCC OnLine NGT 302

Section 19(4)(*f*) of the National Green Tribunal Act, 2010 provides that the Tribunal shall have the same powers as are vested in civil courts while trying a suit in respect of matters relating to review of its decisions. Therefore, the power of review vested with NGT is akin to the power vested with the civil court. As such, the principles which govern the exercise of review jurisdiction before a civil court will apply with equal force to NGT. (Para 34)

A review petition should normally be heard by the same Bench which originally decided the matter. A review petition should not be heard by any other Bench unless it is impossible or totally impracticable for the earlier Bench to hear the matter. In a review petition, like in the present case, where the review petitioner contends that certain arguments raised by him have not been considered then it is only the Judges who originally heard the matter who can decide whether such point was urged or not. (Para 38)

Any judicial authority including NGT which is presided over by a judicial member who may be a retired Judge of the Supreme Court or of a High Court is expected to deal with all contentions raised before it. There is a presumption that judicial authorities must have dealt with all the contentions raised before them. (Para 39)

According to sub-rule (2), the matter should ordinarily be heard at the same place of sitting where it was originally decided. However, this is not a mandatory direction because sub-rule (2) itself contemplates that the matter shall "ordinarily" be heard at the same place. In tribunals like NGT where members may be transferred from one Bench to another or may be attending a Bench on circuit then problems can sometimes arise. These issues can be easily resolved by resorting to

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the latest technology and if necessary, the arguments in such cases can be heard by videoconferencing. (Para 40)

Northern India Caterers (India) Ltd. v. *Lt. Governor of Delhi*, (1980) 2 SCC 167 : 1980 SCC (Tax) 222, *referred to*

In terms of Order 47 Rule 5 CPC, a review should normally be heard by the same Bench which passed the original order. (Para 43)

Malthesh Gudda Pooja v. *State of Karnataka*, (2011) 15 SCC 330 : (2014) 2 SCC (Civ) 473, *relied on*

Malthesh Gudda Pooja v. *State of Karnataka*, 2009 SCC OnLine Kar 919; *Malthesh Gudda Pooja* v. *State of Karnataka*, 2009 SCC OnLine Kar 918, *referred to*

As far as the facts of this case are concerned, the original applicant could have raised all issues which he raised in the review application even by filing a counter-affidavit in the appeal filed by the project proponent or by challenging the original order in the Supreme Court as he has done now. In this context, once the Supreme Court was seized of the matter and all issues were being urged, NGT should not have proceeded to hear the review application. (Para 45)

The project proponent had not only challenged the original order of NGT on the ground that he had not violated the EC but also on the ground that the damages awarded were highly excessive. Therefore, the question that what should be the extent of damages was specifically before the Supreme Court. (Para 47)

Tanaji Balasaheb Gambhire v. *Union of India*, 2016 SCC OnLine NGT 4217; *Tanaji Gambhire* v. *Union of India*, 2017 SCC OnLine NGT 1954, *referred to*

On 23-5-2016, the project proponent filed reply to the affidavit dated 18-5-2016 filed by the original applicant in which they raised objections that such affidavit was not filed on 18-5-2016 and the copy of the same was handed over to them on 20-5-2016 and the original applicant had no permission to file such an affidavit. All these disputed issues as to whether such an affidavit was filed with the permission of the Court or it was referred to in the first hearing or in the second hearing could only be decided by the Bench which had heard the matter. (Para 51)

Tanaji Balasaheb Gambhire v. *Union of India*, 2016 SCC OnLine NGT 4201; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4204; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4205; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4206; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4219; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4203; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4207; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4208; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2015 SCC OnLine NGT 838; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 1330; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4209; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4215; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4210; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4211; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4202; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4212; *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4214, *referred to*

Is demolition the only answer?

Now there are 807 flats and 117 shops which are either constructed or under construction. Keeping in view the interest of these third parties who were not parties before NGT, in the peculiar facts and circumstances of the case, demolition is not the answer. This would put innocent people at loss. (Para 53)

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The project proponent cannot be permitted to build nothing more than 807 flats, 117 shops/offices, cultural centre and clubhouse. (Para 54)

The project proponent who has violated law with impunity cannot be allowed to go scot-free. This Court has in a number of cases awarded 5% of the project cost as damages. This is the general law. However, in the present case damages should be higher keeping in view the totally intransigent and unapologetic behaviour of the project proponent. He has manoeuvred and manipulated officials and authorities. Instead of 12 buildings, he has constructed 18; from 552 flats the number of flats has gone up to 807 and now two more buildings having 454 flats are proposed. The project proponent contends that he has made smaller flats and, therefore, the number of flats has increased. He could not have done this without getting fresh EC. With the increase in the number of flats the number of persons, residing therein is bound to increase. This will impact the amount of water requirement, the amount of parking space, the amount of open area, etc. Therefore, in the present case, we are clearly of the view that the project proponent should be and is directed to pay damages of Rs 100 crores or 10% of the project cost whichever is more. We also make it clear that while calculating the project cost the entire cost of the land based on the circle rate of the area in the year 2014 shall be added. (Para 64)

The base year has been fixed as 2014 since the original EC expired in 2014 and most of the illegal construction took place after 2014. In addition thereto, if the project proponent has taken advantage of transfer of development rights (for short "TDR") with reference to this project or is entitled to any TDR, the benefit of the same shall be forfeited and if he has already taken the benefit then the same shall either be recovered from him or be adjusted against its future projects. The project proponent shall also pay a sum of Rs 5 crores as damages, in addition to the above for contravening mandatory provisions of environmental laws. (Paras 64 and 66.9)

The project proponent is granted six months' time to deposit the amount of damages imposed above in the Registry of the Supreme Court. In case the project proponent does not deposit the amount within six months then all the assets of the project proponent as well as its Directors shall be attached and the amount of damages shall be recovered by sale of those assets. It is further directed that in case this amount is not deposited within the period of six months then the licence/registration/permission granted to the project proponent to develop any "real estate project" within the meaning of the Real Estate (Regulation and Development) Act, 2016 shall be cancelled and the project proponent and its Directors shall not be granted permission to develop any "real estate project" under the Real Estate (Regulation and Development) Act, 2016 without permission of the Court. (Para 66.13)

Whether the original applicant is entitled to special damages?

This litigation is obviously not a public interest litigation. Therefore, the claim of the original applicant to award him special damages cannot be accepted. (Para 57)

Tanaji Balasaheb Gambhire v. *Union of India*, 2016 SCC OnLine NGT 4213, *partly reversed*

Tanaji Balasaheb Gambhire v. *Union of India*, 2018 SCC OnLine NGT 302, *reversed*

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Advocates who appeared in this case :

A.N.S. Nadkarni, Additional Solicitor General, Ranjit Kumar, R.P. Bhatt, Kavin Gulati and Jayant Bhushan, Senior Advocates (Venkita Subramoniam T.R., Rahat Bansal, Braj K. Mishra, Vijay Kumar, Rohit Gupta, Ms Aparna Jha, Ms Kriti Sondhi, Shriram P. Pingle, Ms Rashmi Dhongde, Nitin Lonkar, Ms Sonali Suryavanshi, Nilesh Bhandari, Ashok Jain, Gurmeet Singh Makker, Divya Prakash Pande, Salvador Santosh Rebello, Niraj Kumar, Rahul Garg, Ridhi Kackkar, Ranjesh Kr. Sinha, Gaurav Rawal, Mukesh Verma, Pawan Kr. Shukla, Ms Vasudha Zutshi, Yash Pal Dhingra, Kunal Cheema, Nishant Ramakantrao Katneshwarkar, Ninad Laud, Kush Chaturvedi, Ms Anshula Grover, Anjuman Tripathy, Somay Kapoor, Ms Priyashree Sharma, Parth Singh Chaudhary and Aman Verma, Advocates) for the appearing parties.

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The Judgment of the Court was delivered by

DEEPAK GUPTA, J.— Applications for intervention/impleadment are allowed. Application for amendment of grounds of appeal in Civil Appeal No. 10854 of 2016 is allowed.

2. These matters are being decided by one judgment since they all arise out of one original application filed by Shri Tanaji Balasaheb Gambhire (hereinafter referred to as "the original applicant") before the National Green Tribunal ("NGT", for short) being Application No. 184 of 2015.

3. The original applicant filed an application before NGT claiming that the project proponent i.e. M/s Goel Ganga Developers India Pvt. Ltd., had raised construction in violation of the environmental clearance ("EC", for short) granted for the project and also in violation of the various municipal laws. It was prayed that the illegal structures be demolished; the State Level Environment Impact Assessment Authority (SEIAA) and the Maharashtra State Pollution Control Board be directed to initiate appropriate action against the project proponent for violation of the Environment Impact Assessment (EIA) Notification, 2006; the Union of India be directed to take action against SEIAA; and lastly, it was prayed that the project proponent be directed to pay/deposit a heavy amount of compensation in the environment relief fund. NGT vide its order dated 27-9-2016[1] allowed the application in the following terms: (*Tanaji Balasaheb case*[1], SCC OnLine NGT para 54)

> "*54.* For the aforesaid reasons, the applicant succeeds in his legal pursuit to challenge the non-compliance of EC conditions by Respondent 9 and obtain certain directions. Hence the Application is allowed and we issue following directions:
>
> 1. Respondent 9-PP shall pay environmental compensation cost of Rs 100 crores or 5% (five per cent) of the total cost of project to be assessed by SEAC whichever is less for restoration and restitution of environment damages and degradation caused by the project proponent by carrying out the construction activities without the necessary prior environmental clearance within a period of one month. In addition

1 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4213

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to this, it shall also pay a sum of Rs 5 crores for contravening mandatory provision of several Environmental Laws in carrying out the construction activities in addition to and exceeding limit of the available environment clearance and for not obtaining the consent from the Board.

2. In view of our finding that there has been manifest, deliberate or otherwise suppression of facts of illegality in the project activity of Respondent 9-PP by the officer of PMC, we impose fine of Rs 5 lakhs upon the PMC and direct Commissioner PMC to take appropriate action against the erring officers. The amount of Rs 5 lakhs shall be paid within one month.

3. We direct the Chief Secretary, State of Maharashtra and the competent authority to take notice of the conduct of the officers concerned who have misled the Department of Environment in the matter relating to interpretation of FSI and BUA in terms of which order dated 31-5-2016 has been issued in particular the Principal Secretary, Department of Environment who has authored the order dated 31-5-2016.

4. PMC, DoE and SEIAA are directed to pay cost of Rs 1 lakh each to the applicant within 4 weeks."

4. Aggrieved by the aforesaid order of NGT, the project proponent filed Civil Appeal No. 10854 of 2016. Pune Municipal Corporation ("PMC", for short) also challenged the said order insofar as it adversely affects PMC by filing Civil Appeal No. 10901 of 2016.

5. Review application being Application No. 35 of 2016 was filed by the original applicant before NGT. This application was partly allowed on 8-1-2018[2] and Direction 1 in the original order dated 27-9-2016[1] was modified and substituted as under: (*Tanaji Balasaheb case*[1], SCC OnLine NGT para 54)

"*54.* …'1. Respondent 9-PP shall pay environmental compensation cost of Rs 100 crores or 5% (five per cent) of the total cost of project to be assessed by SEAC, whichever is less, for restoration and restitution of environment damage and degradation caused by the project proponent by carrying out the construction activities without the necessary prior environmental clearance within a period of one month. In addition to this, it shall also pay a sum of Rs 5 crores for contravening mandatory provision of several environment laws in carrying out the construction activities in addition to and exceeding limit of the available environment clearance and for not obtaining the consent from the Board.' "

6. Thereafter, the project proponent filed IA No. 8000 of 2018 for permission to amend its appeal permitting it to challenge the order passed in review application dated 8-1-2018[2], which we have allowed.

2 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2018 SCC OnLine NGT 302
1 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4213

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7. Appeal being Diary No. 3911 of 2018 was filed by the original applicant challenging the original order dated 27-9-2016[1] as well as the order dated 8-1-2018[2] passed in review application praying that demolition of the illegal structures be ordered and the compensation be enhanced to Rs 500 crores.

The factual matrix

8. The facts briefly stated are that the project proponent purchased 79,100 sq m or 7.91 ha of land comprised in six Survey Nos. 35, 36, 37, 38, 39 and 40 in Vadgaon, Pune. These survey numbers were amalgamated in accordance with the rules and the plot became one plot of 79,100 sq m. From the documents placed on record, it is apparent that as per the Development Control Plan for the city of Pune, 3 roads of the width of 36 m, 30 m and 18 m bisected this plot into two which for the sake of convenience were referred to as Plot No. 1 and Plot No. 2. As per the Development Plan, there are certain statutory reservations in addition to the roads and some land has to be left out or reserved for schools, cultural centres, open areas, etc. The remaining area is referred to as the "balance plot area" which in this case works out to 46,993.79 sq m. Out of this "balance plot area" 15% is to be reserved for amenity space and another 10% area is to be compulsorily left out as open space leaving "net plot area" of 41,455.21 sq m. Prima facie these calculations do not appear to be correct. However, this will not impact the merits of the case. Be that as it may, the undisputed fact is that FSI has to be calculated on the "net plot area". We may, at this stage, point out that the aforesaid figures are based on the written submissions submitted on behalf of the Union of India by the learned Additional Solicitor General and these figures have not been disputed before us.

9. On 12-3-2007, the project proponent applied for sanction of layout and building proposal plan on an area of 15,141.70 sq m, originally depicted as Plot No. 3 and the sanctioned FSI was 15,313.16 sq m. Thereafter, on 5-9-2007, revised layout plan was submitted for an area measuring 28,233.23 sq m and the sanctioned FSI was 39,526.54 sq m. The project proponent applied for EC for the project and in the proposal dated 27-6-2007, he had shown that he would be erecting/constructing 12 buildings having 552 flats, 50 shops and 34 offices. The 12 buildings were to have stilts with basement and 11 floors. The total built-up area was indicated as 57,658.42 sq m. The EC was granted to the project proponent on 4-4-2008. Paras 2 and 3 of the communication granting EC read as under:

> "2. The project proponent is proposing for construction of group housing project at Sl. Nos. 35 to 40, Village Vadgaon Budruk, Singhad Road, Pune, Maharashtra at a cost of Rs 10,737.14 lakhs. The project involves construction of 12 buildings with stilt, basement plus 11 floors for 552 flats, 50 shops and 34 offices. The total plot area is 79,100.00 sq m. Total built-up area as indicated is 57,658.42 sq m. Total water requirement will be 745 KLD and 400 KLD of waste water will be generated from

1 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4213
2 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2018 SCC OnLine NGT 302

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the buildings which will be treated in sewage treatment plant. The treated waste water will be used for landscaping, DG set cooling and horticulture purpose. The solid waste generated from the buildings will be 1500 kg/day and disposed as per the MSW Rules, 2000. The parking space is proposed for parking of 1072 cars.

3. EAC after due consideration of the relevant documents submitted by the project proponent and additional clarifications furnished in response to its observations have recommended the grant of environmental clearance for the project mentioned above subject to compliance with EMP and other stipulated conditions. Accordingly, the Ministry hereby accords necessary environmental clearance for the project under Category 8(*a*) of the EIA Notification, 2006 subject to the strict compliance with the specific and general conditions mentioned below:"

10. EC was granted, subject to certain conditions. We may refer to certain relevant conditions which read as under:

"*Part A—Specific conditions*

I. Construction phase

* * *

v. Permission to draw and use groundwater for construction work shall be obtained from competent authority prior to construction/operation of the project.

* * *

5. In the case of any change(s) in the scope of the project, the project would require a fresh appraisal by this Ministry."

Concept of "built-up area" under the Notification dated 14-9-2006

11. It is not disputed that EC was granted for built-up area of 57,658.42 sq m. The main dispute is with regard to the interpretation of the term "built-up area". The case of the project proponent is that the term "built-up area" is synonymous with "floor space index" or FSI and that the constructed area, which is exempted from FSI area or is a non-FSI area is not a part of the "built-up area". On the other hand, the submission made by the original applicant as well as by the learned Additional Solicitor General appearing for the Ministry of Environment, Forests and Climate Change is that the built-up area will cover all constructed area and the concept of FSI area or non-FSI area is totally alien to environmental laws.

12. The learned Senior Counsel for the project proponent has drawn our attention to the Development Control Rules for Pune Municipal Corporation, Pune, 1982 ("DCR", for short). Under DCR, no building can be constructed without grant of building permission/commencement certificate by Pune Municipal Corporation. There is a detailed procedure for obtaining the building permission/commencement certificate wherein layout plans, building plans, etc. have to be submitted. The main emphasis was on Rule 2.13 of DCR, which defines "built-up area" as follows:

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"**2.13.** ***Built-up area***.—Area covered immediately above the plinth level by the building or external area of any upper floor whichever is more excepting the areas covered by Rule 15.4.2."

Rule 2.39 defines "floor area ratio" as follows:

"**2.39.** ***Floor area ratio (FAR)***.—The quotient obtained by dividing the total covered area (plinth area) on all floors excluding exempted areas as given in Rule 15.4.2 by the area of the plot.

$$\text{FAR} = \frac{\text{Total converted area on all floors}}{\text{Plot area}}$$

Note.—The term FAR is synonymous with floor space index (FSI)."

13. Strong reliance is placed on Rule 15.4.2, which reads as under:

"**15.4.2.** In addition to Rules 15.4.1.1(*a*), (*b*) and (*c*) and 17.7.3, the following shall not be included in covered area or FAR and built-up area calculations:

(*a*) A basement or cellar space under a building constructed on stilts and used as parking space, and air conditioning plant rooms used as accessory to the principal use;

(*b*) Electric cabin or substation, watchman's booth of maximum size of 1.6 sq m with minimum width or diameter of 1.2 m, pump house, garage shaft, space required for location of fire hydrants, electric fittings and water tanks;

(*c*) Projection as specifically exempted under these Rules;

(*d*) Staircase room and/or lift rooms above the topmost storey, architectural features, chimneys, elevated tanks of dimensions as permissible under these Rules;

Note.—The shaft provided for lift shall be taken for covered area calculations only on one floor up to the minimum required as per these Rules;

(*e*) One room admeasuring 2 m × 3 m on the ground floor of cooperative housing societies or apartment owners/cooperative societies buildings and other multi-storeyed buildings as office-cum-letter box room;

(*f*) Rockery, well and well structures, plant, nursery, water pool, swimming pool, (if uncovered) platform round a tree, tank fountain, bench, chabutra with open top and unenclosed sides by walls, ramps, compound wall, gate, slide, swing, overhead water tank on top buildings;

(*g*) (*Deleted*);

(*h*) Sanitary block subject to provision of Rule 15.4.1(*a*) and built-up area not more than 4 sq m."

14. The contention of the learned Senior Counsel appearing for the project proponent is that while calculating the built-up area the constructions mentioned in Rules 15.4.1.1(*a*), (*b*) and (*c*) and Rule 17.7.3 in addition to the

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areas specifically exempted under Rule 15.4.2 are to be excluded. He submits that if the built-up area is calculated in accordance with DCR then the project proponent has till date not constructed the built-up area of 57,658.42 sq m, which it was permitted to construct under the EC granted to it on 4-4-2008.

15. On the other hand, the stand of the Union of India and the original applicant is that built-up area means all area which is covered regardless of the area being FSI or non-FSI in terms of the EIA Notification of 2006. The building/construction projects are covered by Item 8 of the schedule to the EIA Notification dated 14-9-2006. Construction of a project which is covered under the schedule can be commenced only after obtaining EC in terms of Para 2 of the said notification. The schedule itself categorises the various projects and activities into two categories being "Category A" and "Category B". "Category A" projects require clearance by the Central Government in the Ministry of Environment, Forests and Climate Change on the recommendation of the Expert Appraisal Committee to be constituted by the Central Government whereas those activities which form "Category B" of the schedule including modernisation and expansion of such projects require EC from the State/Union Territory Environment Impact Assessment Authority (SEIAA) and such authority is required to base its decision on the recommendation of the State/Union Territory Level Expert Appraisal Committee (SEAC). There is further division of "Category B" into B-1 and B-2. B-1 projects require Environmental Impact Assessment (EIA) Report to be prepared and scoping to be done whereas B-2 projects do not require any Environmental Impact Assessment Report. Item 8 of the schedule, with which we are concerned, reads as follows:

"(1)	(2)	(3)	(4)	(5)
8			***Building/Construction projects/Area development projects and townships***	
(*a*)	Building and construction projects		≥20,000 sq m and <1,50,000 sq m of built-up area#	#(built-up area for covered construction; in the case of facilities open to the sky, it will be the activity area)
(*b*)	Townships and area development projects		Covering an area ≥50 ha and or built-up area ≥1,50,000 sq m ++	++All projects under Item 8(*b*) shall be appraised as Category B-1."

16. From a bare perusal of the two hashtags (#) in Columns 4 and 5 of Item 8(*a*), it is apparent that what is shown under Column 5 is actually a continuation of Column 4 and basically it describes or defines "built-up area" to mean covered construction and if the facilities are open to the sky, it will be taken to be the activity area. This by itself clearly shows that under the notification of 2006, all constructed area, which is covered and not open to the sky has to be treated as "built-up area". There is no exception for non-FSI area.

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17. Indeed, the concept of FSI or non-FSI has no concern or connection with grant of EC. The same may be relevant for the purposes of building plans under municipal laws and regulations but it has no linkage or connectivity with the grant of EC. When EC is to be granted, the authority which has to grant such clearance is only required to ensure that the project does not violate environmental norms. While projects and activities, as mentioned in the notification, may be allowed to go on, the authority while granting permission should ensure that the adverse impact on the environment is kept to the minimum. Therefore, the authority granting EC may lay down conditions which the project proponent must comply with. While doing so, such authority is not concerned whether the area to be constructed is FSI area or non-FSI area. Both will have an equally deleterious effect on the environment. Construction implies usage of a lot of materials like sand, gravel, steel, glass, marble, etc., all of which will impact the environment. Merely because under the municipal laws some of this construction is excluded while calculating the FSI is no ground to exclude it while granting the EC. Therefore, when EC is granted for a particular construction it includes both FSI and non-FSI areas. As far as environmental laws are concerned, all covered construction, which is not open to the sky is to be treated as built-up area in terms of the EIA Notification dated 14-9-2006.

Notification of 4-4-2011

18. Our attention has been drawn to the Notification dated 4-4-2011 issued by the Ministry of Environment and Forests. By means of this notification, the words of Column 5 against Item 8(*a*) have been replaced and substituted as under:

> "The built-up area for the purpose of this Notification is defined as 'the built-up or covered area on all the floors put together including basement(s) and other service areas, which are proposed in the building/construction projects'."

This notification clearly defines "built-up area" as all constructed area including basement and service areas without any exception.

19. The learned Senior Counsel appearing for the project proponent has submitted that this notification is only prospective in nature and, therefore, will not affect the notification of 2006. On the other hand, it has been submitted by the original applicant that this is only a clarificatory notification and as such it will come into force with effect from 2006. In our opinion, it is not at all necessary to decide whether this notification is clarificatory or is in substitution of the original notification of 2006. We say this because as held by us above, there is no ambiguity with regard to the definition of "built-up area" even under the notification of 2006 and it covers all constructed area not open to the sky. The notification of 2011 only provides that the built-up area or covered area shall be the area of all floors put together including basement(s) and other service areas. We may again re-emphasise that this definition also is in consonance with the concept of grant of EC for construction as explained

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above and it is obvious that the concept of FSI or non-FSI area is alien to environmental laws.

Clarification dated 7-7-2017

20. Strong reliance has been placed by the project proponent on the office memorandum dated 7-7-2017 issued by Dr Ashish Kumar, Joint Director, Ministry of Environment, Forests and Climate Change. The said office memorandum reads as follows:

F. No. 22-35/2017-IA.III
Government of India
Ministry of Environment, Forests and Climate Change
(Impact Assessment Division)
******

Indira Paryavaran Bhawan
Jor Bag Road, Aliganj,
New Delhi - 110 003
Dated 7-7-2017

OFFICE MEMORANDUM

Sub.: Clarification on the date of applicability of Notification No. S.O.(E) 695 dated 4-4-2011 issued by MoEF & CC defining "built-up area" of the project.

The Ministry is in receipt of a reference dated 3-4-2017 from Confederation of Real Estate Developers Association of India (CREDAI) seeking clarification on the abovementioned subject. CREDAI has requested that the definition of built-up area (BUA) given vide Notification No. S.O. 695(E) dated 4-4-2011 should have prospective effect.

2. The matter has been examined in the Ministry. BUA defined in Notification No. S.O. 1533 (E) dated 14-9-2006 mentions at Item 8(*a*) Columns 4 and 5 "built-up area for covered construction, in the case of facilities open to sky, it will be the activity area".

3. The Ministry has further defined BUA vide its Notification No. S.O. 695 (E) dated 4-4-2011 which reads as, "the built-up or covered area on all the floors put together including its basement and other service areas, which are proposed in the building or construction project".

4. The definition provided in the Ministry's notification will have its effect from the prospective date of the notification only. The projects which are not covered in the period of above notifications should be assessed as per the definition of built-up area provided in the building bye-laws or Development Control Regulation (DCR) of the local authorities in the States.

5. This issues with approval of competent authority.

sd/-
(Dr Ashish Kumar)
Joint Director Ph: 011-24695474
Email: ashish.k@nic.in

All States/UTs/SIEAAs/MoEF & CC Divisions

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21. It is urged on the basis of the aforesaid memorandum that prior to the Notification dated 4-4-2011, the built-up area had to be calculated and assessed as per the building bye-laws or the Development Control Regulations of the local authorities in the States. On behalf of the original applicant, it has been urged that this memorandum is meaningless and that it has been issued when the matter was pending before NGT, at the instance of one of the Directors of the project proponent, Shri Atul Goel, who was Joint Secretary of Confederation of Real Estate Developers Association of India (CREDAI), Pune.

22. Without going into this aspect of the matter, we are clearly of the view that such an office memorandum could not and should not have been issued. The Notification dated 14-9-2006 is a statutory notification issued in terms of Rule 5(3) of the Environment (Protection) Rules, 1986 which provides that before such a notification is issued, the Central Government has to give notice of its intention of issuing a notification and objections to the same are invited. No doubt the Central Government is empowered in public interest to dispense with the requirement of notice but this obviously has to be done in exceptional cases. The Notification dated 14-9-2006 was issued by the Central Government and published in the gazette after inviting objections from the public. The first clarification with regard to this notification was issued on 4-4-2011 to which we have adverted above. These two decisions of the Central Government which were notified as per the provisions of law could not have been set at naught by the Joint Director even if it was issued with the approval of a higher authority. We are of the view that since such decision has not been notified in the gazette, the statutory Notification dated 14-9-2006 and its subsequent clarification dated 4-4-2011 could not have been virtually set aside by this office memorandum.

23. We are also of the view that the so-called office memorandum is not at all clarificatory in nature. As held by us above, the notification of 2006 with regard to "built-up area" was absolutely clear and needed no clarification. We fail to understand how the concept of built-up area as understood in the building bye-laws or DCR could be introduced into the notification of 2006 by this office memorandum which virtually made the notification of 2006 totally redundant. Therefore, we quash the office memorandum dated 7-7-2017.

24. This is not the first time that we have noticed such clarificatory communications being issued by the officials of the Ministry of Environment, Forests and Climate Change, which virtually have the effect of nullifying the statutory provisions and notifications. We have adverted to some of these communications in our judgment in *Common Cause* v. *Union of India*[3]. We expect the officials of the Ministry of Environment, Forests and Climate Change to take a stand which prevents the environment and ecology from being damaged, rather than issuing clarifications which actually help the project proponents to flout the law and harm the environment.

3 (2017) 9 SCC 499

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25. In view of the above, we are clearly of the view that the EC granted to the project proponent on 4-4-2008 was for constructing a total built-up area of 57,658.42 sq m and this would include all covered construction not open to the sky. No artificial division on the basis of FSI and non-FSI area can be made. Therefore, NGT was fully justified in coming to the conclusion that the construction raised by the project proponent was in total violation of the EC granted to it.

Environmental clearance dated 20-11-2017

26. The project proponent has drawn our attention to the EC for expansion of the project in question granted to it by the State Level Environment Impact Assessment Authority (SEIAA) on 20-11-2017. We may note that this clearance indicates that the existing construction comprises of 738 flats and 115 shops which have been completed, 69 flats and 2 shops which are under construction, meaning thereby that 807 flats and 117 shops are already in existence and in addition thereto 454 more flats and cultural centre are sought to be constructed. This will take the total number of flats to 1261 and number of shops to 117. We may also notice that SEIAA has laid down general conditions for pre-construction phase and the first condition is as follows:

> "(1) This environmental clearance (EC) is issued for total built-up area of 1,47,219.45 m^2 as approved by local planning authority. It is noted that the total proposed construction area is 1,47,219.45 m^2 which includes the area of previous EC (dated 4-4-2008) 57,658.42 m^2 and the proposed expansion area of 89,561.03 sq m. However, the above area of 1,47,219.45 sq m is notional as the non-FSI area component of the previous EC is not included in 1,47,219.45 m^2. After considering the non-FSI area of the previous EC, the total built-up area becomes 1,81,230.94 m^2. SEIAA has also taken note of the clarification issued by MoEF and CC vide office memorandum dated 7-7-2017, stating the definition of built-up area will be assessed as per the building bye-laws or DCR of the local authorities in the States."

27. The aforementioned condition itself clearly shows that the non-FSI area constructed by the project proponent under first EC of 4-4-2008 has not been taken into consideration. The project proponent has raised construction in Plot No. 1 of an FSI area measuring 48,424.66 sq m, and non-FSI area measuring 46,088.47 sq m. Therefore, the total construction raised in Plot No. 1 is 94,513.13 sq m. In Plot No. 2, the construction raised on an FSI area is 630.55 sq m and on the non-FSI area is 4,858.57 sq m and, therefore, the total construction already raised in Plot No. 2 is 5489.12 sq m. The total construction raised by the project proponent is 1,00,002.25 sq m against the built-up area of 57,658.42 sq m mentioned in the EC of 4-4-2008. This could not have been ignored by SEIAA.

28. In case the total construction raised by the project proponent is taken as 1,00,002.25 sq m and if the area of the proposed construction is added then the project will fall in B-1 category and, therefore, SEIAA had no authority to

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grant EC by treating the project as falling under Category B-2. Furthermore, the EC dated 20-11-2017 is also illegal as the same has been granted on the presumption of the order dated 31-5-2016 passed by the Principal Secretary, Environment Department, State of Maharashtra holding that the construction of 18 buildings instead of 12 buildings is permissible. The EC completely lost sight of the fact that the order dated 31-5-2016 was quashed and set aside by NGT in its order dated 27-9-2016[1]. We may note that the official who passed the order on 31-5-2016 was the same official, who held the office of Member-Secretary of SEIAA, which granted environmental clearance on 20-11-2017. Therefore, the EC dated 20-11-2017 was beyond the authority of SEIAA and was granted under a totally false assumption and the same is therefore quashed and set aside.

Allegations made by the original applicant against various officials

29. NGT in its order dated 27-9-2016[1], has found that there was suppression of facts by the officers of PMC. NGT also directed the Chief Secretary to the State of Maharashtra to take notice of the conduct of the officers who were misleading the Department of Environment. Costs were imposed on PMC, Department of Environment and SEIAA. This has been challenged before us by PMC.

30. The original applicant, both in his original application filed before NGT and in appeal filed before us as well as in other proceedings, has made serious allegations against individual officers of PMC as well as SEIAA and specially the Principal Secretary, Environment Department, Government of Maharashtra. However, for reasons best known to the original applicant, none of these individuals has been made a party in personal capacity in these proceedings. The law is well settled that no person can be condemned unheard. It would, therefore, not be fair on our part, to deal with allegations made against individuals who are not parties to the petition and who have had no chance to reply to the allegations levelled against them. Therefore, we refrain from commenting on the conduct of the officials in their individual capacity.

31. However, as far as their official capacity is concerned, we are of the view that NGT was fully justified in coming to the conclusion that certain officials of PMC were going out of their way to help the project proponent and we, therefore, uphold the directions given by NGT in its order dated 27-9-2016[1] in this regard. In view of what we have discussed above, it is more than apparent that despite notifications of 2006 and 2011 being clear and unambiguous, the officials of PMC have given an interpretation which was tailor-made to suit the project proponent. This was being done even before the clarification of 7-7-2017 was issued. This clearly indicates that some officials of PMC were espousing the case of the project proponent at the cost of the environment.

32. We may also observe that prima facie we are of the view that the Principal Secretary, Environment Department, Government of Maharashtra

1 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4213

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has not acted in a fair and transparent manner. The allegations made by the original applicant cannot be lightly brushed aside. In the original order dated 27-9-2016[1], NGT held as follows: (*Tanaji Balaseheb case*[1], SCC OnLine NGT para 42)

> "42. From the extracted portion of the order dated 31-5-2016 of Principal Secretary, Environment Department, it is seen that he has declared construction of 18 buildings on the site instead of 12 buildings is permissible which, according to him, only a changes on configuration of buildings. This opinion undoubtedly is based on his erroneous conclusion that total BUA which is nothing but FSI consumed i.e. 48,617.14 sq m which is within the EC limit as against the actual construction activity which has exceeded over 1,00,000 sq m BUA. Hence, we set aside that order/communication dated 31-5-2016."

The official holding the post of Principal Secretary must have been aware of these directions because he was a party to the proceedings before NGT. Despite that, while granting fresh EC on 20-11-2017, this official noticed that reference to the Environment Department for verification of files was withdrawn vide letter dated 31-5-2016 and the matter has been considered afresh. When the letter dated 31-5-2016 had been quashed the obvious result would be that action had to be taken in accordance with the earlier directions in the 27th meeting of SEAC III (Non-MMR) held from 10-3-2015 to 13-3-2015 and the 87th meeting of SEIAA held on 10-8-2015 to 12-8-2015. This was not done. His actions need to be looked into and, therefore, we uphold the direction given by NGT directing the Chief Secretary to the State of Maharashtra to take notice of the conduct of the officers concerned. We further direct the Chief Secretary to file detailed report in respect of the conduct of the then Principal Secretary, Department of Environment to NGT within 3 months which will thereafter pass appropriate directions in the matter.

***Challenge to the order dated 8-1-2018 passed in Tanaji Balasaheb Gambhire* v. *Union of India*[2]**

33. This order has been challenged both by the project proponent by amending the appeal and by the original applicant by filing a separate appeal.

34. Section 19(4)(*f*) of the National Green Tribunal Act, 2010 provides that the Tribunal shall have the same powers as are vested in civil courts while trying a suit in respect of matters relating to review of its decisions. Therefore, the power of review vested with NGT is akin to the power vested with the civil court. As such, the principles which govern the exercise of review jurisdiction before a civil court will apply with equal force to NGT.

35. Rule 22(2) of the National Green Tribunal (Practices and Procedure) Rules, 2011 provides that a review application shall ordinarily be heard by the Tribunal at the same place of sitting which has passed the order unless the Chairperson may, for reasons to be recorded in writing, direct it to be heard by

1 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4213
2 2018 SCC OnLine NGT 302

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the Tribunal sitting at any other place. Sub-rule (3) of Rule 22 provides that ordinarily review application shall be disposed of by circulation.

36. Since the powers of review which NGT exercises are akin to those of a civil court, it would be pertinent to refer to the relevant portions of Order 47 of the Civil Procedure Code, 1908, which read as follows:

> "**1.** ***Application for review of judgment.***—(1) Any person considering himself aggrieved—
>
> (*a*) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
>
> (*b*) by a decree or order from which no appeal is allowed, or
>
> (*c*) by a decision on a reference from a Court of Small Causes,
>
> and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.
>
> (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.
>
> * * *
>
> **5.** ***Application for review in court consisting of two or more Judges.***— Where the Judge or Judges, or any one of the Judges, who passed the decree or made the order, a review of which is applied for, continues or continue attached to the court at the time when the application for a review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the court shall hear the same."

37. The project proponent has urged various grounds to challenge the order passed in the review application. The first ground is that whereas the original order was passed by a Bench comprising of Dr Justice Jawad Rahim and Dr Ajay A. Deshpande, the review application was heard and decided by a Bench comprising of Justice U.D. Salvi and Dr Nagin Nanda. It has been urged that Dr Justice Jawad Rahim continues to be a Judicial Member of NGT and, in fact, was sitting in the Western Bench at Pune on 8-1-2018 when the impugned judgment[2] in review was pronounced by NGT.

38. We are clearly of the view that a review petition should normally be heard by the same Bench which originally decided the matter. A review

2 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2018 SCC OnLine NGT 302

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petition should not be heard by any other Bench unless it is impossible or totally impracticable for the earlier Bench to hear the matter. In a review petition, like in the present case, where the review petitioner contends that certain arguments raised by him have not been considered then it is only the Judges who originally heard the matter who can decide whether such point was urged or not. In the present case, the review application was based mainly on the contention that the affidavit dated 18-5-2016 was not taken into consideration by the Bench.

39. It is well known that parties raise various contentions in their pleadings or in their evidence. On many occasions when arguments are heard many of the pleas are not urged. Any judicial authority including NGT which is presided over by a judicial member who may be a retired Judge of this Court or of a High Court is expected to deal with all contentions raised before it. There is a presumption that judicial authorities must have dealt with all the contentions raised before them. If a party urges that some of the contentions urged by it have not been taken into consideration then it has to file a review application and it is but obvious that such review application should be heard by the same Bench which had originally heard the matter.

40. Sub-rule (3) of Rule 22 of the National Green Tribunal (Practices and Procedure) Rules, 2011 clearly lays down that a review application shall be disposed of by circulation. If the review application is to be disposed of by circulation then there is no problem in the matter being circulated before the very same Bench which had earlier heard the matter. This can be done even at a place which may be different from the original place of hearing. It is only if the Bench decides to give oral hearing in the review application and notice is issued to the opposite party that sub-rule (2) of Rule 22 will come into operation. According to sub-rule (2), the matter should ordinarily be heard at the same place of sitting where it was originally decided. However, this is not a mandatory direction because sub-rule (2) itself contemplates that the matter shall "ordinarily" be heard at the same place. In tribunals like NGT where members may be transferred from one Bench to another or may be attending a Bench on circuit then problems can sometimes arise. These issues can be easily resolved by resorting to the latest technology and if necessary, the arguments in such cases can be heard by videoconferencing. The normal rule that the same Bench should hear the review application should not be disturbed unless it is virtually impossible for the original Bench to hear the matter or the members of the Bench themselves opt not to hear the matter.

41. In this behalf, we must remind ourselves that the power of review is a power to be sparingly used. As pithily put by V.R. Krishna Iyer, J., "A plea for review, unless the first judicial view is manifestly distorted, is like asking for the moon"[4]. The power of review is not like appellate power. It is to be exercised only when there is an error apparent on the face of the record. Therefore, judicial discipline requires that a review application should be heard by the same Bench. Otherwise, it will become an intra-court appeal to another

4 *Northern India Caterers (India) Ltd.* v. *Lt. Governor of Delhi*, (1980) 2 SCC 167, p. 173, para 14 : 1980 SCC (Tax) 222

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Bench before the same court or tribunal. This would totally undermine judicial discipline and judicial consistency.

42. We may refer to the judgment of this Court in *Malthesh Gudda Pooja* v. *State of Karnataka*[5]. In that case, a writ appeal was disposed[6] of by a Division Bench comprising of Hon'ble V. Gopala Gowda and L. Narayana Swamy, JJ., at the Dharwad Circuit Bench of the Karnataka High Court. Thereafter, a review petition was filed before a Bench comprising of Hon'ble K. Sreedhar Rao and Ravi Malimath, JJ. An objection was raised that the review petition should be heard by the same Judges who had originally heard the matter but this objection was overruled and the review petition was allowed[7] and the appeal was ordered to be listed afresh before the Division Bench. This appeal was listed before the Dharwad Circuit Bench consisting of Hon'ble D.V. Shailendra Kumar and N. Ananda, JJ. This Bench held that the order of review passed was a nullity since the Judges who had heard the review should not have heard the same especially when the Judges of the original Bench were available. The matter came to this Court and this Court after referring to Order 47 Rule 5 CPC and Rule 5 of the High Court of Karnataka Rules, 1959 and taking note of the fact that the Chief Justice of the Karnataka High Court had passed an order that the review petition be listed as per roster held as follows: (SCC pp. 341-42, paras 18-20)

> "*18.* Order 47 Rule 5 of the Code and Chapter 3 Rule 5 of the High Court Rules require, and in fact mandate that if the Judges who made the order in regard to which review is sought continue to be the Judges of the Court, they should hear the application for review and not any other Judges unless precluded by death, retirement or absence from the Court for a period of six months from the date of the application. An application for review is not an appeal or a revision to a superior court but a request to the same court to recall or reconsider its decision on the limited grounds prescribed for review. The reason for requiring the same Judges to hear the application for review is simple. Judges who decided the matter would have heard it at length, applied their mind and would know best, the facts and legal position in the context of which the decision was rendered. They will be able to appreciate the point in issue, when the grounds for review are raised. If the matter should go before another Bench, the Judges constituting that Bench will be looking at the matter for the first time and will have to familiarise themselves about the entire case to know whether the grounds for review exist. Further, when it goes before some other Bench, there is always a chance that the members of the new Bench may be influenced by their own perspectives, which need not necessarily be that of the Bench which decided the case.

5 (2011) 15 SCC 330 : (2014) 2 SCC (Civ) 473
6 *Malthesh Gudda Pooja* v. *State of Karnataka*, 2009 SCC OnLine Kar 919
7 *Malthesh Gudda Pooja* v. *State of Karnataka*, 2009 SCC OnLine Kar 918

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19. Benjamin Cardozo's celebrated statement in *The Nature of Judicial Process* (pp. 12-13) is relevant in this context:

> 'There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognise and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions … In this mental background every problem finds its setting. We may try to see things as objectively as we please. Nonetheless, we can never see them with any eye except our own.'

20. Necessarily, therefore, when a Bench other than the Bench which rendered the judgment, is required to consider an application for review, there is every likelihood of some tendency on the part of a different Bench to look at the matter slightly differently from the manner in which the authors of the judgment looked at it. Therefore the rule of consistency and finality of decisions, makes it necessary that subject to circumstances which may make it impossible or impractical for the original Bench to hear it, the review applications should be considered by the Judge or Judges who heard and decided the matter or if one of them is not available, at least by a Bench consisting of the other Judge. It is only where both Judges are not available (due to the reasons mentioned above) the applications for review will have to be placed before some other Bench as there is no alternative. But when the Judges or at least one of them, who rendered the judgment, continues to be members or member of the court and available to perform normal duties, all efforts should be made to place it before them. The said requirement should not be routinely dispensed with."

43. A perusal of the above judgment leaves no manner of doubt that this Court has held that in terms of Order 47 Rule 5 CPC, a review should normally be heard by the same Bench which passed the original order. We may reiterate the reasons given by this Court. These are:

43.1. The Judges who heard the matter originally have applied their mind and would know best the facts and legal position;

43.2. They will be in the best position to appreciate the matter in issue when a review is filed;

43.3. If the matter goes before another Bench that Bench will have to virtually hear the matter afresh;

43.4. Most importantly, when the matter goes to a new Bench the members of the new Bench may go by their own perspective and philosophy which may be totally different to that of the Bench which originally heard the matter.

44. We may again re-emphasise that judicial discipline, judicial traditions and consistency in pronouncements require that the Bench which heard the matter originally should hear the review petition unless it is virtually impractical for the original Bench to hear the matter, or where the members of the original Bench recuse.

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45. Another ground raised is that the statutory appeal was already pending in this Court against the original order when the review application was taken up for hearing. It is contended, on the basis of Order 47 Rule 1(2) CPC, that review application should not have been taken up for hearing because the original applicant could have before this Court taken up all the points which he had taken in his review application. It is also contended that this is not a case where there is an error apparent on record and as such the power of review could not have been exercised. As far as the facts of this case are concerned, we are clearly of the view that the original applicant could have raised all issues which he raised in review application even by filing a counter-affidavit in the appeal filed by the project proponent or by challenging the original order in this Court as he has done now. In this context, once this Court was seized of the matter and all issues were being urged, NGT should not have proceeded to hear the review application.

46. We may add that on 21-12-2016[8], the review application itself was listed before the Bench of Dr Justice Jawad Rahim and Dr Ajay A. Deshpande, which adjourned the matter to 25-1-2017 to hear it regarding maintainability of the review application in view of the statutory appeal provided under the National Green Tribunal Act, 2010. However, the matter got listed before the other Bench and on 25-7-2017[9], the said Bench considered this objection raised by the project proponent in terms of Order 47 Rule 1 CPC and the Bench held as follows: (*Tanaji Gambhire case*[9], SCC OnLine NGT)

> "Having perused the record, we find that the appellant is seeking quashing of the order of compensation in totality and the review applicant is seeking enhancement of the compensation granted by the Tribunal. We do not see any commonality in the grounds resorted to by the applicant and appellant in the said appeal. Exception to sub-clause (2) of Order 47 Rule 1 of the Code of Civil Procedure, therefore, does not come to the help of Respondent 9. We are, therefore, of the considered opinion that the review application is maintainable. Plea of non-maintainability of the review application is rejected."

47. We are of the view that the aforesaid finding is incorrect. The project proponent had not only challenged the original order of NGT on the ground that he had not violated the EC but also on the ground that the damages awarded were highly excessive. Therefore, the question that what should be the extent of damages was specifically before this Court. We are, therefore, clearly of the opinion that the Bench hearing the review application erred in holding that the review application was maintainable despite the appeal pending before this Court.

48. We may also note that the Bench which heard the review has rejected all other grounds of review mainly on the ground that there is no error apparent on the face of the record but has only dealt with the issue of enhancement

8 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4217
9 *Tanaji Gambhire* v. *Union of India*, 2017 SCC OnLine NGT 1954

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of damages to be imposed on the basis of "carbon footprint" relying on the affidavit dated 18-5-2016. The Bench noted that this affidavit had not been taken into consideration by the earlier Bench. How could the latter Bench hearing the review application know whether any reference was made to this affidavit at the time of original hearing or not? In fact, the project proponent urges that this affidavit was never filed on 18-5-2016.

49. Here, it would be pertinent to mention that according to the original applicant he was given oral permission by the Bench to file such an affidavit on 23-2-2016. We have perused the order dated 23-2-2016[10] and find that it makes no mention of any such request being made. If there is no such request then the question of issuing an oral direction to file such an affidavit does not arise. We may also add that after 23-2-2016, the matter was listed on numerous occasions i.e. 16-3-2016[11], 5-4-2016[12], 18-4-2016[13], 22-4-2016[14], 2-5-2016[15] and 5-5-2016[16] before NGT. In none of the orders there is any reference to carbon footprint or to any affidavit to be filed by the original applicant. If an oral permission had been given, obviously the original applicant would have either filed an application or would have made a request that he wants to file such an affidavit.

50. The affidavit in question is dated 18-5-2016 and it is alleged that it was filed on 18-5-2016. The matter was listed for hearing on 19-5-2016[17] on which date also there is no reference to any such affidavit. It would be pertinent to note that in between the project proponent had filed an MA No. 389 of 2016 before the Principal Bench stating that an interim order dated 23-12-2015[18] had been passed against it and the matter was not being heard and, therefore, it may be heard by a Bench presided over by Dr Justice Jawad Rahim, who apparently was holding Court in the Pune Bench at that time and the Principal Bench allowed the same on 2-5-2016[19] directing that the matter be listed before the Bench presided over by Dr Justice Jawad Rahim. On 19-5-2016, the original applicant sought time stating that he had filed review application against the order dated 2-5-2016[19] before the Principal Bench praying that the matter should be heard by the earlier Bench presided over by Justice U.D. Salvi and, therefore, the matter could not be heard by Dr Justice Jawad Rahim on that day and was further adjourned to 23-5-2016. There is no reference to carbon footprint in the order dated 19-5-2016[17]. On 23-5-2016[20], the matter was heard by the Bench presided over by Dr Justice Jawad Rahim and the orders reserved.

10 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4201
11 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4204
12 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4205
13 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4206
14 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4219
15 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4203
16 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4207
17 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4208
18 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2015 SCC OnLine NGT 838
19 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 1330
20 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4209

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In this order also there is no reference to the affidavit with regard to carbon footprint. If the filing of the affidavit would have been brought to the notice of the Bench, it would have recorded in the order that some fresh affidavit had been filed. Subsequently, the project proponent, who is the contesting respondent, filed an application on 20-7-2016 praying that in the meantime he had obtained permission of the Environment Department and SEIAA to which we have adverted hereinabove.

51. The original applicant sought time to file counter-affidavit. The matter was adjourned[21] to 28-7-2016 for rehearing deleting the same from reserved list since there were subsequent developments. On 28-7-2016[22], the matter was got adjourned to 2-8-2016 on which date[23] some execution application for implementation of the interim orders was taken up and direction was issued to PMC. The matter was again taken up on 8-8-2016[24], 19-8-2016[25] and 24-8-2016[26] when the hearing was closed and judgment was pronounced through videoconferencing on 27-9-2016[1]. In none of these orders any mention was made for carbon footprint or to the affidavit on the basis of which the review application was filed. On 23-5-2016, the project proponent filed reply to the affidavit dated 18-5-2016 filed by the original applicant in which they raised objections that such affidavit was not filed on 18-5-2016 and the copy of the same was handed over to them on 20-5-2016 and the original applicant had no permission to file such an affidavit. All these disputed issues as to whether such an affidavit was filed with the permission of the Court or it was referred to in the first hearing or in the second hearing could only be decided by the Bench which had heard the matter on 23-5-2016[20] or on 24-8-2016[26] on which dates the original application was reserved for orders.

52. We are of the considered view that the review application should have been heard by a Bench headed by Dr Justice Jawad Rahim who was admittedly available and in fact continues to be a member of NGT. Therefore, we are constrained to set aside the order passed in *Tanaji Balasaheb Gambhire* v. *Union of India*[2] dated 8-1-2018.

Is demolition the only answer?

53. The next issue which arises is that what we should do with the construction. A large number of flats are already occupied and a large number of persons have paid money for occupying these flats. The learned counsel appearing for those persons who have purchased the flats urged that the flats should not be demolished otherwise they shall be put to great monetary loss.

21 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4215
22 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4210
23 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4211
24 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4202
25 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4212
26 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4214
1 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4213
20 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4209
2 2018 SCC OnLine NGT 302

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As pointed out above, now there are 807 flats and 117 shops which are either constructed or under construction. These flats are 1, 1.5 and 2 BHK flats and small shops and offices. The project proponent has already taken money from these persons and a large number of flats and shops have already been occupied and even where the remaining flats and shops are not occupied, persons belonging to the middle class have invested their life's earnings in this project. Keeping in view the interest of these third parties who were not parties before NGT, we are of the view that in the peculiar facts and circumstances of the case, demolition is not the answer. This would put innocent people at loss. Normally, this Court is loath to legalise illegal constructions but in the present case we have no option but to do so.

54. We hasten to clarify that the project proponent cannot be permitted to build any more flats. What we are permitting him to do is to only complete construction of 807 flats, 117 shops/offices and cultural centre including the clubhouse. We make it clear that he shall not be allowed to build the two buildings in which he was to construct 454 tenements, and will obviously have to return the money with interest @ 9% p.a. to the individual(s) who have invested in the same. There is no equity in favour of these persons since the plan to raise this construction was submitted only after 2014 when the validity of the earlier EC had already ended. Therefore, though we uphold the order of NGT dated 27-9-2016[1] that demolition is not the answer in the peculiar facts of the case, we also make it clear that the project proponent cannot be permitted to build nothing more than 807 flats, 117 shops/offices, cultural centre and clubhouse.

Whether the original applicant is entitled to special damages?

55. On behalf of the original applicant various issues were raised before us which had not been raised before NGT and find no mention either in the original order or even in the order under review. We are not considering those issues. It was urged that the project proponent has reduced the area of cultural centre. This averment is not correct as pointed out by the Senior Counsel appearing for the Union of India. The development plan is not only for the area under the project but covers a much larger area where more than one builder and projects may be involved. It is not the responsibility of only one builder to provide the entire community services and these have to be provided pro rata by all developers of projects in the area. It was also alleged that the builder had built 3 basements which are illegal.

56. On the other hand, it was contended by the learned Senior Counsel for the project proponent that one of the basements has already been blocked and the other two basements shall also not be put in use and would be completely blocked off. We make it clear that PMC and SEIAA will ensure that the project proponent blocks the basements in such a manner that they can never be put to any use. Another argument raised by the original applicant was that the project proponent had stated that though he would not use any groundwater, however, it has utilised the groundwater and violated the condition of the EC. Reliance

1 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4213

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is placed on certain photographs showing water being pumped. On the other hand, on behalf of the project proponent it has been urged that this water was being pumped out from the excavated area when the building was built and the water level had risen. We cannot decide this disputed question of fact in these proceedings.

57. We may also point out that in this case the original applicant has tried to project the case as if he is filing the case in the public interest and has prayed for certain general directions. He has also claimed special damages for himself. The main grievance of the original applicant is with regard to the violation of the EC and according to him these violations started in the year 2009. The original applicant had applied for a flat in the project in question and had issued notice to the project proponent on 21-10-2011 about deficiency in service. This notice was replied to on 17-11-2011. Thereafter, the original applicant filed Consumer Complaint No. 95 of 2012 on 22-2-2012. This complaint was decided on 20-11-2014. Thereafter, the order of the District Consumer Disputes Redressal Forum was challenged before the State Consumer Disputes Redressal Commission both by the project proponent and original applicant in February 2015. It appears that thereafter there were complaints and counter-complaints filed by the parties against each other and the project proponent filed a civil suit for defamation against the original applicant on 2-12-2015 and it was only thereafter on 7-12-2015 an application was filed in NGT by the original applicant. We are highlighting these facts only to emphasise the fact that this litigation is obviously not a public interest litigation. Therefore, the claim of the original applicant to award him special damages cannot be accepted.

Quantification of damages

58. We need to decide and re-assess the issue of damages since the original applicant has also challenged the original order of NGT. While assessing the damages we may note certain facts:

58.1. The EC was granted on 4-4-2008 but construction commenced after issuance of consent to establish dated 20-6-2009 and the EC would be valid for a period of 5 years from the date of such consent i.e. up to 19-6-2014;

58.2. The EC dated 4-4-2008 was granted for construction of built-up area of 57,658.42 sq m, whereas admittedly, as of now the constructed built-up area is 1,00,002.25 sq m. Therefore, there is clear-cut violation of the terms of the EC;

58.3. Any construction raised after 19-6-2014 is without any EC especially since we have held that EC granted on 20-11-2017 is invalid.

Carbon footprint

59. The main case of the original applicant is that the damages should be assessed on a scientific basis by calculating the damage caused to the environment by the project proponent on the basis of "carbon footprint". In the

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absence of detailed submissions, we find ourselves totally unequipped to go into this aspect of the matter.

60. In the original application filed by the original applicant before NGT, there is no reference to carbon footprint. Even when evidence was initially led, no reference was made to the same. The concept of carbon footprint was introduced by the original applicant only in his affidavit dated 18-5-2016. In fact, according to the project proponent, this affidavit was not even filed on 18-5-2016. It appears to us that there is no order of NGT specifically permitting the original applicant to file such an affidavit. The submission of the original applicant is that he was orally permitted to file the same. These disputed questions would have been only decided by the Original Bench and, therefore, we have already set aside the order passed in *Tanaji Balasaheb Gambhire* v. *Union of India*[2] dated 8-1-2018.

61. The courts cannot introduce a new concept of assessing and levying damages unless expert evidence in this behalf is led or there are some well-established principles. We find that no such principles have been accepted or established in the present case. When there are no pleadings in this regard we fail to understand how the concept of carbon footprint can be introduced after evidence has been closed, at the stage of arguments. We cannot assess the impact in actual terms and, therefore, we can only impose damages or costs on principles which have been well settled by law.

62. We may also note that the method to which the original applicant referred to is not part of any law, rule or executive instructions. This method is no doubt used to compensate and impose damages on nations but we cannot apply this method while imposing damages on a person who violates the EC. We may also add that the calculation made by the original applicant in his affidavit dated 18-5-2016 filed before NGT are based on assumptions some of which we have not found to be correct, namely — (*1*) use of groundwater; (*2*) reduction of cultural centre space; (*3*) construction of basements, etc.

63. We may make it clear that we are not laying down the law that damages cannot be assessed on the basis of carbon footprint. In a case where expert evidence in this behalf is led or on the basis of empirical data it is established that by applying the principles of carbon footprint damages can be assessed, the Court may, in the facts and circumstances of the case, rely upon such data but, in the present case, there is no such reliable material.

64. Having held so we are definitely of the view that the project proponent who has violated law with impunity cannot be allowed to go scot-free. This Court has in a number of cases awarded 5% of the project cost as damages. This is the general law. However, in the present case we feel that damages should be higher keeping in view the totally intransigent and unapologetic behaviour of the project proponent. He has manoeuvred and manipulated officials and authorities. Instead of 12 buildings, he has constructed 18; from 552 flats the number of flats has gone up to 807 and now two more buildings having 454 flats are proposed. The project proponent contends that he has made smaller flats

2 2018 SCC OnLine NGT 302

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and, therefore, the number of flats has increased. He could not have done this without getting fresh EC. With the increase in the number of flats the number of persons residing therein is bound to increase. This will impact the amount of water requirement, the amount of parking space, the amount of open area, etc. Therefore, in the present case, we are clearly of the view that the project proponent should be and is directed to pay damages of Rs 100 crores or 10% of the project cost, whichever is more. We also make it clear that while calculating the project cost the entire cost of the land based on the circle rate of the area in the year 2014 shall be added. The cost of construction shall be calculated on the basis of the schedule of rates approved by the Public Works Department (PWD) of the State of Maharashtra for the year 2014. In case the PWD of Maharashtra has not approved any such rates then the Central Public Works Department rates for similar construction shall be applicable. We have fixed the base year as 2014 since the original EC expired in 2014 and most of the illegal construction took place after 2014. In addition thereto, if the project proponent has taken advantage of transfer of development rights (for short "TDR") with reference to this project or is entitled to any TDR, the benefit of the same shall be forfeited and if he has already taken the benefit then the same shall either be recovered from him or be adjusted against its future projects. The project proponent shall also pay a sum of Rs 5 crores as damages, in addition to the above for contravening mandatory provisions of environmental laws.

65. Normally, this Court is not inclined to grant ex post facto EC. However, in the peculiar facts of this case, we direct that once the project proponent deposits the amount of damages as directed by us then the project proponent may approach the appropriate authority for grant of EC. The authority may impose such conditions for grant of EC as it deems necessary.

Findings and directions

66. We summarise our findings and directions as follows:

66.1. That built-up area under the notification of 14-9-2006 means all constructed area which is not open to the sky.

66.2. Built-up area under the Notification of 4-4-2011 means all covered area including basement and service areas.

66.3. The communication dated 7-7-2017 is totally illegal and accordingly quashed.

66.4. The original application cannot be treated as a public interest litigation.

66.5. We are not taking note of the allegations levelled against the individuals who have not been arrayed as parties.

66.6. That the order dated 27-9-2016[1] of NGT is upheld except insofar as Direction 1 is concerned.

66.7. The order in review application passed by NGT on 8-1-2018[2] is held to be totally illegal and is accordingly set aside.

1 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4213
2 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2018 SCC OnLine NGT 302

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Page 32 Wednesday, October 27, 2021
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66.8. We uphold the original order dated 27-9-2016[1] holding that the construction raised by the project proponent was in violation of the environmental clearance granted to it on 4-4-2008. We uphold the fine imposed upon PMC and the direction given to PMC to take appropriate action against the erring officials. We also uphold the direction given to the Chief Secretary to the State of Maharashtra and in addition, direct that the Chief Secretary to the State of Maharashtra shall look into the conduct of the official holding the post of Principal Secretary (Environment) to the Government of Maharashtra on 27-9-2016 and will submit his report to NGT within three months from today.

66.9. We impose damages of Rs 100 crores or 10% of the project cost, whichever is higher, on the project proponent and in addition thereto, project proponent will pay Rs 5 crores as levied by NGT in its order dated 27-9-2016[1].

66.10. Project proponent shall not be permitted to raise construction of two buildings having 454 tenements.

66.11. We direct that the project proponent shall only be permitted to complete construction of a total 807 flats, 117 shops/offices and cultural centre including clubhouse.

66.12. The project proponent will only be permitted to seek environmental clearance for completion of the project subject to payment of costs in the aforesaid terms and it may be granted ex post facto environmental clearance in the peculiar facts of the case, on such terms and conditions as the environmental authority deems fit and proper.

66.13. The project proponent is granted six months' time to deposit the amount of damages imposed in terms of Direction 66.9 supra in the Registry of this Court. In case the project proponent does not deposit the amount within six months then all the assets of the project proponent i.e. M/s Goel Ganga Developers India Pvt. Ltd. as well as its Directors shall be attached and the amount of damages shall be recovered by sale of those assets. It is further directed that in case this amount is not deposited within the period of six months then the licence/registration/permission granted to M/s Goel Ganga Developers India Pvt. Ltd. to develop any "real estate project" within the meaning of the Real Estate (Regulation and Development) Act, 2016 shall be cancelled and the project proponent i.e. M/s Goel Ganga Developers India Pvt. Ltd. and its Directors shall not be granted permission to develop any "real estate project" under the Real Estate (Regulation and Development) Act, 2016 without permission of this Court.

66.14. The matter be listed on 22-10-2018 for issuing appropriate directions as to how the amount of damages are to be utilised;

67. All the appeals are disposed of in the aforesaid terms. Pending application(s), if any, shall also stand disposed of.

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1 *Tanaji Balasaheb Gambhire* v. *Union of India*, 2016 SCC OnLine NGT 4213

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3-Judge Bench
2019
March 5

(2019) 18 Supreme Court Cases 494

(BEFORE DR A.K. SIKRI, S. ABDUL NAZEER AND M.R. SHAH, JJ.)

MANTRI TECHZONE PRIVATE LIMITED . . Appellant;

Versus

FORWARD FOUNDATION AND OTHERS . . Respondents.

Civil Appeals No. 5016 of 2016† with Nos. 8002-8003, 9227, 10992-95, 12152, 12156-60, 12326 of 2016, 1343, 4923-24 and 14966 of 2017 and 2246 of 2018, decided on March 5, 2019

A. **Environment Law — Polluter Pays Principle and Remedial/Compensatory/Punitive Measures — Nature and Scope — Power of NGT to direct Remedial/Compensatory/Punitive Measures**

— NGT's power to grant and give directions for relief, compensation and restitution under NGT Act, 2010 — Scope of — Overriding effect of NGT Act, 2010 over State legislation in cases of conflict — Extent of

— Held, NGT while directing restoration of environment can specify buffer zones around specific lakes and water bodies in contradiction to zoning regulations under the State Municipal Corporation Act or Master Plan framed under town planning laws, as NGT Act has overriding effect — NGT Act being a Central Act enacted under Sch. VII List I Entry 13 of the Constitution shall have overriding effect over State legislation — Therefore, specific directions of NGT relating to penalty (on basis of pollution pays principle) and environmental restoration (liability being on project proponents, who had caused damage to water bodies), affirmed even if NGT's direction relating to buffer zones (no construction zones of various lengths specified for water body types concerned) was different from zoning regulations of State Government

— But general direction of NGT relating to all buffer zones not relating to project proponents and differing from State zoning regulations, set aside — Thus Direction/Condition (1) in order dt. 4-5-2016 in *Forward Foundation*, 2016 SCC OnLine NGT 1409, set aside except directions issued against R-9 & R-10

— Constitution of India — Sch. VII List I Entry 13 — Water/River/Coastal Pollution — Water Conservation/Preservation, Development Projects and Interlinking of Rivers — Primacy of environmental laws over town planning laws — Wetlands (Conservation and Management) Rules, 2010 — Local Government, Municipalities and Panchayats — Town Planning — Ecology/Environmental clearance — Layout/Master/Zonal Plan — Primacy of environmental laws over — National Green Tribunal Act, 2010, Ss. 33, 14, 15, 20 and 22 (Paras 39 to 47 and 60 to 63)

[**Ed.**: Project proponents are Respondents 9 and 10 in Original Application No. 222 of 2014 and appellants in in Civil Appeals Nos. 5016 and 8002-03 of 2016.]

† Arising from the Judgment and Order in *Forward Foundation* v. *State of Karnataka*, 2015 SCC OnLine NGT 5 (National Green Tribunal, Principal Bench at New Delhi, Original Application No. 222 of 2014, dt. 7-5-2015) and *Forward Foundation* v. *State of Karnataka*, 2016 SCC OnLine NGT 1409 (National Green Tribunal, Principal Bench at New Delhi, Original Application No. 222 of 2014, dt. 4-5-2016)

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B. **Environment Law — National Green Tribunal Act, 2010 — S. 22 — Appeal to Supreme Court under — Scope**

— Held, appeal under S. 22 has to be read subject to conditions provided therein — Thus appeal restricted to substantial question of law arising from judgment of NGT — Merely because remedy of appeal is provided, it does not ipso facto permit appellants to agitate their appeal to seek re-appreciation of factual matrix of entire matter — Civil Procedure Code, 1908, S. 100 (Paras 35 to 38 and 55)

C. **Environment Law — National Green Tribunal Act, 2010 — S. 22 — Appeal to Supreme Court under — Whether raises substantial question(s) of law — Test**

— It has to be tested whether the question (i) is of general public importance, (ii) directly and substantially affects rights of parties and (iii) is an open question or is not free from difficulty or calls for discussion of alternative views — If question is settled by highest court or plea raised is palpably absurd, it would not be substantial question — Civil Procedure Code, 1908, S. 100 (Paras 35 to 38)

D. **Environment Law — National Green Tribunal Act, 2010 — S. 15 r/w Ss. 20, 33, 14 and 22 — Limitation of 6 months under S. 14 or 5 yrs under S. 15 — As matter related to environmental degradation and its restoration, limitation of 5 yrs under S. 15, held, would apply — A broad construction should apply to such beneficial legislation — Application before Tribunal not barred by limitation**

— Considering specific prayer of applicants before NGT, evidence supported by data, findings arrived at by NGT, and jurisdiction of NGT it is not an application under S. 14 simpliciter — It was a petition under S. 15 — Non-mention of or erroneous mention of provision of law, not a bar to pass appropriate orders, if NGT had jurisdiction in respect of same — Directions issued by NGT against both project proponents in present case did not suffer from any perversity — General Principles of Environmental Law — Polluter Pays Principle and Remedial/Compensatory/Punitive Measures — Nature and Scope — Limitation period for approaching NGT — Reckoning of (Paras 48 to 55)

E. **Environment Law — National Green Tribunal Act, 2010 — S. 15 r/w Ss. 20 and 33 — Application before Tribunal, when not barred by res judicata due to earlier writ petition**

— Parties, not common — Issues not directly and substantially same, writ petition related to land acquisition, present application related to environment, ecology and their restoration — No commonality of cause of action of likelihood of conflict between judgments — Prayer and genesis entirely different in their scope and relief — Practice and Procedure — Res Judicata (Paras 56 to 59)

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The present appeals were filed under Section 22 of the National Green Tribunal Act, 2010 (the NGT Act, 2010) against the judgment of restoration and penalty of the Tribunal.

Disposing of the appeals, the Supreme Court

Held :

Appeal to Supreme Court

The proper test for determining whether a question of law raised in the case is substantial would be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by the Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law. (Para 37)

Chunilal V. Mehta & Sons Ltd. v. *Century Spg. & Mfg. Co. Ltd.*, 1962 Supp (3) SCR 549 : AIR 1962 SC 1314, *relied on*

Further, merely because the remedy of appeal is provided against the decision of the Tribunal on a substantial question of law alone, that does not ipso facto permit the appellants to agitate their appeal to seek reappreciation of the factual matrix of the entire matter. The appellants cannot seek to re-argue their entire case to seek wholesale reappreciation of evidence and the factual matrix that has been considered by the Tribunal is ex facie impermissible under Section 22 of the NGT Act, 2010. There cannot be fresh appreciation or reappreciation of facts and evidence in a statutory appeal under this provision. (Paras 36 to 38)

Jurisdiction of Tribunal

The first question is in relation to the maintainability of the application before the Tribunal. (Para 39)

The Tribunal has been established under a constitutional mandate provided in Schedule VII List I Entry 13 of the Constitution, 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 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. (Para 40)

The jurisdiction of the Tribunal is provided under Sections 14, 15 and 16 of the NGT Act, 2010. (Para 41)

The principles of sustainable development, precautionary principle and polluter pays, propounded by this Court by way of multiple judicial pronouncements, have now been embedded as a bedrock of environmental jurisprudence under the NGT Act. Therefore, wherever the environment and ecology are being compromised and jeopardised, the Tribunal can apply Section 20 of the NGT Act, 2010 for taking restorative measures in the interest of the environment. (Para 43)

The NGT Act being a beneficial legislation, the power bestowed upon the Tribunal would not be read narrowly. An interpretation which furthers the interests of environment must be given a broader reading. The existence of the Tribunal

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without its broad restorative powers under Section 15(1)(*c*) read with Section 20 of the NGT Act, 2010, would render it ineffective and toothless, and shall betray the legislative intent in setting up a specialised Tribunal specifically to address environmental concerns. The Tribunal, specially constituted with Judicial Members as well as with experts in the field of environment, has a legal obligation to provide for preventive and restorative measures in the interest of the environment. (Para 44)

Kishore Lal v. *ESI Corpn.*, (2007) 4 SCC 579 : (2007) 2 SCC (L&S) 1, *relied on*

Section 15 of the NGT Act, 2010 provides power and jurisdiction, independent of Section 14 thereof. Further, Section 14(3) juxtaposed with Section 15(3) of the NGT Act, 2010, are separate provisions for filing distinct applications before the Tribunal with distinct periods of limitation, thereby amply demonstrating that jurisdiction of the Tribunal flows from these sections (i.e. Sections 14 and 15 of the NGT Act, 2010) independently. The limitation provided in Section 14 is a period of 6 months from the date on which the cause of action first arose and whereas in Section 15 it is 5 years. Therefore, the legislative intent is clear to keep Section 14 and 15 as self-contained jurisdictions. (Para 45)

Further, Section 18 of the NGT Act, 2010 recognises the right to file applications each under Section 14 as well as Section 15. Therefore, it cannot be argued that Section 14 provides jurisdiction to the Tribunal while Section 15 merely supplements the same with powers. 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. (Para 46)

Section 33 of the NGT Act, 2010 provides an overriding effect to the provisions of the Act over anything inconsistent contained in any other law or in any instrument having effect by virtue of law other than this Act. This gives the Tribunal overriding powers over anything inconsistent contained in the KIAD Act, the Planning Act, the Karnataka Municipal Corporations Act, 1976; and the Revised Master Plan of Bengaluru, 2015 (RMP). A Central legislation enacted under Entry 13 of Schedule VII List I of the Constitution will have the overriding effect over State legislations. The corollary is that the Tribunal while providing for restoration of environment in an area, can specify buffer zones around specific lakes and waterbodies in contradiction with zoning regulations under these statutes or RMP. (Para 47)

The State of Karnataka is aggrieved by the Direction/Condition (1) of the order dated 4-5-2016 of the Tribunal in *Forward Foundation*, 2016 SCC OnLine NGT 1409. The applicants have no objection to set aside the aforesaid impugned portion of the order insofar as the appellants in all the appeals except the appeals filed by Respondents 9 and 10 are concerned. The aforesaid portion of the order contains not only general directions but also certain directions against Respondents 9 and 10. Therefore, only that portion of the order which does not pertain to Respondents 9 and 10 needs to be quashed. Civil Appeals Nos. 5016 and 8002-03 of 2016 filed by appellant-Respondents 9 and 10 are dismissed. The impugned judgment and order insofar as appellant-Respondents 9 and 10 are concerned is sustained. All the other appeals are allowed and Direction/Condition (1) in the order dated 4-5-2016 is set aside except the direction issued against Respondents 9 and 10. (Paras 60 to 62)

Forward Foundation v. *State of Karnataka*, 2016 SCC OnLine NGT 1409, *partly reversed*

Core Mind Software & Services (P) Ltd. v. *Forward Foundation*, 2015 SCC OnLine SC 1778, *referred to*

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Limitation

OA No. 222 of 2014 was not an application simpliciter under Section 14 of the NGT Act, 2010. It was an application where a specific prayer has been made with reference to Lake Development Authority's (LDA) Report dated 12-6-2013 and the Ministry of Environment, Forests and Climate Change (MoEF) Monitoring Committee Report dated 14-8-2013 for restoration of ecologically sensitive land and for maintaining the sensitive in its natural condition so that the ecological balance of the area is not disturbed. It is clear from the documentary evidence supported by data, that the project proponents have committed breaches and the implementation of the project is bound to have serious adverse impact on the ecology, hydrology and the environment in the catchment area of Bellandur Lake. The environmental degradation as established from the documents would give rise to an independent cause of action. Therefore, this was a petition under Section 15 of the NGT Act, 2010 and thus it could be filed within 5 years from the date on which the cause for such compensation or relief first arose. (Para 49)

In fact, in the original application before the Tribunal there was no mention of the provision under which it was being filed. Non-mention of or erroneous mention of the provision of law would not be of any relevance, if the court had the requisite jurisdiction to pass an order. It would be a mere irregularity and would not vitiate the application or the judicial order of the Tribunal. (Para 50)

The Tribunal has pointed out on the basis of the Committee Report of August 2015, that the appellant had encroached 3 ac 10 guntas of Bellandur Lake and a boundary wall has been raised around the said land. The Tribunal has also found that the project proponents have violated the Master Plan. They have not obtained the mandatory clearance from the Sensitive Zone Committee constituted by the Government of Karnataka. It is also clear from the materials on record that there are several other violations by the project proponents. The Tribunal has discussed all these issues from para 52 onwards. It is also clear from the materials on record that there is a definite possibility of environment, ecology, lakes and wetland being adversely affected by these projects. (Paras 52 and 51)

Forward Foundation v. *State of Karnataka*, 2015 SCC OnLine NGT 5, *affirmed*

The findings arrived at by the Tribunal are not only based on the documents that were available on record but also on the pleadings that were made by the parties buttressed by the Committee report and the inspection note of the expert members. The directions passed and the penalty imposed by the Tribunal on both project proponents are valid and sustainable and do not suffer from any perversity. (Para 54)

Forward Foundation v. *State of Karnataka*, 2015 SCC OnLine NGT 5, *affirmed*

It is impermissible for the appellants to seek a factual review through the methodology of reappreciation of factual matrix by the Supreme Court under Section 22 of the NGT Act, 2010. (Para 55)

Forward Foundation v. *State of Karnataka*, 2016 SCC OnLine NGT 637, *referred to*

SS-D/62061/S

Advocates who appeared in this case :

Udaya Holla, Advocate General, Shashi Kiran Shetty, Maninder Singh, Dhruv Mehta, Mukul Rohatgi, Neeraj Kishan Kaul, R. Venkataramani, Sajan Poovayya, Ms Kiran Suri and Basavaprabhu S. Patil, Senior Advocates [Mahesh Thakur, Ms Anuparna Bordoloi, Savyasachi Sahai, Ms Vipasha Singh, Gaurav Goel, V.N. Raghupathy, M/s Devasa & Co., Devashish Bharuka, Justine George, Prabhas Bajaj, Ms Kanika

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S., Ravi Bharuka, Ms Sarushree, Satish Kumar, Gaurav Agrawal, George Thomas, Anurag Gharote, A.S. Bhasme, Abid Ali Beeran P., Nishanth Patil, Rohit Prasad, Ananth Suresh, S.K. Kulkarni, M. Gireesh Kumar, Ankur S. Kulkarni, Shekhar G. Devasa, Bhuvanendra K.V., S. Mahesh, Manish Tiwari, Luv Kumar, Praveen Vignesh, Priyadarshi Banerjee, Pratibhanu Singh Kharola, Saransh Jain, Meka V. Ramakrishna, Madhavam Sharma, Ms Sriparna Dutta Choudhury, Udayaditya Banerjee, Mahesh Agrawal, Ankur Saigal, Ms Tanvi Manchanda, Nithin P., Ms Priyanka M.P., E.C. Agrawala, S.J. Amith, Ms Rithika Gambir, A. Shwarya Kumar, Dr (Ms) Vipin Gupta, Parikshit P. Angadi, Chinmay Deshpande, Geet Ahuja, Parikshit Angadi, Anup Kumar, O.P. Bhadani, Rajesh Mahale, Anand Sanjay M. Nuli, Dharm Singh, Sandeep Grover, Ms Pankhuri Bhardwaj and Pai Amit, Advocates] for the appearing parties.

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

1. 2016 SCC OnLine NGT 1409, *Forward Foundation* v. *State of Karnataka* **(partly reversed)** 499*e*, 499*g*, 509*a*, 514*e*, 522*e-f*, 523*e-f*
2. 2016 SCC OnLine NGT 637, *Forward Foundation* v. *State of Karnataka* 508*e*
3. 2015 SCC OnLine SC 1778, *Core Mind Software & Services (P) Ltd.* v. *Forward Foundation* 507*f-g*
4. 2015 SCC OnLine NGT 5, *Forward Foundation* v. *State of Karnataka* 499*e*, 505*e-f*, 508*c*, 520*a-b*, 521*a*, 522*a*
5. (2007) 4 SCC 579 : (2007) 2 SCC (L&S) 1, *Kishore Lal* v. *ESI Corpn.* 518*a*
6. 1962 Supp (3) SCR 549 : AIR 1962 SC 1314, *Chunilal V. Mehta & Sons Ltd.* v. *Century Spg. & Mfg. Co. Ltd.* 516*e-f*

The Judgment of the Court was delivered by

S. ABDUL NAZEER, J.— These appeals have been preferred under Section 22 of the National Green Tribunal Act, 2010 (for brevity "the NGT Act") challenging the judgment and order dated 7-5-2015[1] and 4-5-2016[2] respectively passed by the Principal Bench of the National Green Tribunal, New Delhi (for short "the Tribunal").

2. The appellants in Civil Appeals Nos. 5016 of 2016 and 8002-03 of 2016 are Respondents 9 and 10 in Original Application No. 222 of 2014 (hereinafter referred to as "Respondents 9 and 10"). The said application was filed by Respondents 1 to 3 herein (hereinafter referred to as "the applicants"). Respondents 4 to 7 in these appeals are the State of Karnataka and other authorities. They were arrayed as Respondents 1 to 4 in the application. Respondents 12 and 13 herein were subsequently impleaded in the application (for short "the impleaded respondents").

3. The State of Karnataka has filed Civil Appeals Nos. 4923-24 of 2017, challenging the general condition and Direction (1) contained in the order of the Tribunal dated 4-5-2016[2]. The other appeals have been filed by different entities, who were not parties before the Tribunal challenging the order of the Tribunal dated 4-5-2016[2] insofar as it directs a buffer/green zone of 75 m in respect of lakes, 50 m in respect of primary Rajakaluves, 35 m in

1 *Forward Foundation* v. *State of Karnataka*, 2015 SCC OnLine NGT 5
2 *Forward Foundation* v. *State of Karnataka*, 2016 SCC OnLine NGT 1409

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case of secondary Rajakaluves and 25 m in case of tertiary Rajakaluves with retrospective effect. According to them, they are adversely affected by the aforesaid condition in the impugned order.

4. The applicants filed OA No. 222 of 2014 by contending that ecologically sensitive land was allotted by the Karnataka Industrial Area Development Board (for short "KIADB") to Respondents 9 and 10 vide Notifications dated 23-4-2004 and 7-5-2004 respectively for setting up of software technology park, commercial and residential complex, hotel and multi-level car parks. The Master Plan formulated by the Bangalore Development Authority (for short "BDA"), identifies the allotted land as "residential sensitive", though the same land was identified in the Draft Master Plan as "protected zone". It was further contended that the revenue map in respect of properties as referred in the land lease agreements has multiple Rajakaluves (storm water drains). The development projects in question sit right on the catchment and wetland area which feeds the Rajakaluves, which in turn drains rainwater into Bellandur Lake. The project will thus encroach two Rajakaluves of 1.38 ac and 1.23 ac each.

5. The satellite digital images of the area from the year 2000 to 2012 show encroachment upon these Rajakaluves, as well as the manner in which they are covered by the construction. The State Level Expert Appraisal Committee (for short "SEAC"), which was to assist the State Level Environment Impact Assessment Authority (for short "SEIAA"), held its meetings on various dates to examine the project. It had required Appellant 9 to submit a revised NOC from the Bangalore Water Supply and Sewerage Board (for short "BWSSB") for the project in question. It was also observed that the project lies between Bellandur Lake and Agara Lake. Respondent 9 was also directed to take protective measures to spare the buffer zone around Rajakaluves and also to commit that no construction would be carried out in the buffer zone. In the meeting of 11-11-2011, it was recorded that the project proposes car parking facility for 14,438 cars in that environmentally sensitive area.

6. It was alleged that NOC was issued covering an area of 17,404 sq m whereas the built-up area, as noted by SEAC, is 13,50,454.98 sq m. Respondent 9 obtained NOC from BWSSB by concealing material facts and by misrepresenting that NOC is required only for residential units which form a very minuscule part of the total project. Respondent 9 had approached the Karnataka State Pollution Control Board (for short "KSPCB") for obtaining clearance, which was granted on 4-9-2012 subject to the fulfilment of the conditions stated in the consent order which included leaving the buffer zone all along the valley and towards the lake. It is further contended that the grant of consent by KSPCB to Respondent 9 also contained a condition with regard to obtaining environmental clearance from the competent authority and no construction was to commence until such clearance was granted.

7. The applicants further contended that Respondent 9 violated the conditions and commenced construction of the project. There was also violation of the stipulations stated in the approval of SEAC in relation to buffer zone and construction over Rajakaluves. The construction had been commenced over

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the ecologically sensitive area of the lake catchment area and valley, with utter disregard to the statutory compliances. Referring to these blatant irregularities, the applicant submitted that the conversion of land from "protected zone" to "residential sensitive area" is violative of the law. The project is right in the midst of a fragile wetland area which ought not to have been disturbed by the development activity. The fragile environment of the catchment area has been exposed to grave and irreparable damage. It has severely disturbed and damaged the Rajakaluves. Respondents 9 and 10 started to level the land by filling it with debris, thus causing damage to the drains. The conditions with regard to no disturbance to the storm water drains, natural valleys and buffer area in and around the Rajakaluves have been violated. It has in turn, affected the groundwater table and borewells which are the only source of water for thousands of households. Fishing and agriculture which depends on Bellandur Lake are also severely affected. The construction over the wetland between the two lakes is in violation of the Wetlands (Conservation of Management) Rules, 2010 (for short "the 2010 Rules").

8. It was submitted that SEIAA in its meeting dated 29-9-2012, decided to close the file pertaining to Respondent 10 due to non-submission of requisite information and the application thereof was rejected in November 2012. Despite the rejection, Respondent 10 commenced construction on the project in full swing.

9. The applicants also relied upon the findings of the Joint Legislative Committee, constituted under the Chairmanship of Shri A.T. Ramaswamy in the month of July 2005, which stated that there were 262 waterbodies in Bangalore City in 1961 which drastically came down because of trespass and encroachments. It was also affirmed that about 840 km of Rajakaluves have been encroached upon in several places and have become sewage channels. The applicants also relied on the report of the Committee under the Chairmanship of Hon'ble Justice N.K. Patil suggesting immediate remedial action in order to remove encroachments on the lake area and the Rajakaluves and preservation of the lakes in and around Bangalore City. It was further contended that other Expert Committees, including Lakshman Rau Expert Committee had also submitted proposals for preservation, restoration or otherwise of the existing tanks in Bangalore metropolitan area which recommended to maintain good water surface in Bellandur tank and to ensure that the water in the tank is not polluted. The Central Government in August 2013 had issued an advisory on conservation and restoration of waterbodies in the urban areas. The applicants claim to have obtained monitoring report of the project by Respondent 5, Ministry of Environment and Forests, through RTI on 21-8-2013. The report dated 14-8-2013 revealed that the project proponents are in clear breach of their undertaking to carry out all precautionary measures to ensure that Bellandur Lake is not affected by the construction and operational phase of the project. This approach is particularly with regard to the major alteration in natural sloping pattern of the project site and natural hydrology of the area.

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10. The Lake Development Authority (for short "LDA"), after inspection in the catchment area of Bellandur Lake submitted its report dated 12-6-2013 which confirms that the project will have disastrous impact, including deleterious effect on Bellandur Lake. This report was brought to the notice of KIADB. LDA has also opined that the land should be classified and maintained as sensitive area. KIADB called upon Respondent 9 to comply with the rules of Ecology and Environment Department and to obtain necessary approval from KSPCB and LDA. Despite all this, Respondents 9 and 10 have continued with their illegal constructions and have caused damage to the ecology and the environment by irreparably jeopardising the ecological balance in this sensitive area. The applicants rely upon the Revised Master Plan, 2013 issued by BDA which specifically provides that 30 m buffer zone is to be created around the lakes and 50 m buffer zone to be created on either side of the Rajakaluves. It was also pleaded that Respondent 9 had obtained the NOC from BWSSB only with regard to residential units and not for the entire project and that the environmental clearance obtained by Respondent 9 is based upon the partial NOC issued by BWSSB which itself is a misrepresentation. It was contended that the projects are bound to create water scarcity as the requirement of the project of Respondent 9 alone is approximately 4.5 million litres per day i.e. 135 million litres per month, which is more than what BWSSB supplies to the entire Agaram Ward. The construction of respective projects by Respondents 9 and 10 respectively, besides having commenced without permission from the authorities and being in violation of the conditions imposed for grant of permission/consent, is bound to damage the environment, resulting in change in the topography of the area, posing potential threat of extinction of Bellandur Lake, causing traffic congestion, shortening and wiping out the wetlands, extinction of Rajakaluves and causing serious and potential threat of flooding and massive scarcity of water in the city of Bangalore, particularly the areas located near the waterbodies.

11. Respondent 9 in its objections contended that it was incorporated with the objective of establishing an information technology park and R&D Centre with facilities such as residential complexes, parks, education centres and other allied infrastructure within a single compound. It had submitted the proposal to establish such information technology park and other facilities to the State Government and requested for allotment of land for the project. Its proposal was considered in 78th High-Level Committee meeting held on 21-6-2000 and after examining the proposal, it was approved by the Government on 6-7-2000. Before the State High-Level Committee, it had informed that its requirement was 110 ac of land, 25 MW of power from the Karnataka Power Transmission Corpn. Ltd. (for short "KPTCL"), and four lakh litres of water per day from BWSSB. The lands for the project were initially notified vide Notification dated 10-2-2004. Subsequently, the lands were allotted vide letter dated 28-6-2007 for which lease-cum-sale agreement was signed on 30-6-2007. Considering the overall development of the State of Bangalore, this respondent proposed a Mixed Use Development Project consisting of an information

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technology park, residential apartments, retail, hotel and office buildings with a total built-up area of 13,50,454.98 sq m. The Project was conceived as a zero waste discharge project. The Project is located one-and-a-half kilometres away from the southern side of Bellandur Lake. Towards the north, adjacent to the Project, lies vast stretches of lands belonging to the Defence and towards the east, lies the project of Respondent 10 and another developer is also developing a project on the western side. It has obtained sanction plan on 4-7-2007 which was renewed from time to time.

12. Respondent 9 claims that it has obtained NOC from Airport Authority of India on 9-4-2010. Bharat Sanchar Nigam Ltd., vide its communication dated 16-4-2010, granted clearance for the project construction. BWSSB, vide its communication dated 26-4-2011 issued NOC for portion of the proposed construction to be built. Bangalore Electricity Supply Co. Ltd. also granted NOC for arranging power supply to the proposed residential and commercial building in its favour. Environmental clearance was granted by SEIAA vide communication dated 17-4-2012. The Director General of Police has issued NOC and KSPCB vide order dated 4-9-2012 accorded its consent for construction of the said Project subject to the conditions stated therein. It was further stated that after grant of the environmental clearance on 17-9-2012, the same was published in the leading newspapers *Kannada Prabha* and *The Indian Express* on 12-3-2012 and 14-3-2014 respectively.

13. It submitted a modified building plan which was approved by KIADB vide its letter dated 30-8-2012, which was valid up to 10-8-2014. It started the construction of the Project in November 2012, taking all precautions as per terms and conditions of the orders issued by the competent authorities. It was also submitted that it has raised the constructions in accordance with the plans and conditions of the environmental clearance and consent orders and that it has not violated any of the conditions and has not caused any adverse impact on the ecology and environment of the area. It has denied the contention that its construction activity has blocked the Rajakaluves and has adversely affected the lake. It has already spent a sum of Rs 306.73 crores on the Project towards procurement of men and materials, machinery, infrastructure, medical and sanitary facilities, etc. and that it has availed financial assistance from various banks and financial institutions towards the construction and execution of the project and that various contracts have been signed with the third parties. It is specifically pleaded that the petition is barred by time and suffers from defects and laches.

14. Respondent 10 pleaded that the applicants raised multifarious proceedings against it which is an abuse of the process of law and mala fides. It had submitted a revised proposal in respect of its project in question and to obtain fresh clearance on 31-8-2007 with an investment of Rs 179.22 crores. The State High-Level Committee had cleared the project which was communicated to it on 25-1-2008. Its properties are located in between Bellandur Lake and Agara Lake but there are no primary storm water drains

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and secondary storm water drains that exist in its properties. It has clearances from various authorities, including Environmental Clearance and consent for establishment.

15. KIADB stated that after possession of the land was handed over to Respondents 9 and 10, one year time was granted for the implementation of the Project which was extended from time to time. The building drawings were approved on 4-7-2007, and the modified building drawings were approved on 26-4-2011 and 30-8-2012 with specific conditions. In its meeting held on 16-7-2013, it was resolved to inform Respondents 9 to fully comply with the Ecology and Environment Rules and to obtain approvals from LDA and KSPCB. LDA vide its letter dated 24-9-2013, had informed KIADB that the construction activity in the catchment area in Bellandur Lake could drastically impact the lake with deleterious effects and asked it to stop construction activity of Respondents 9 and 10. However, the validity of the building drawings was again extended up to 10-8-2014. The Lokayukta on 17-12-2013 had written a letter in respect of complaint filed by the South-East Forum for Sustainable Development where it had been averred that the decision had been taken by the Board on 21-12-2013 to keep in abeyance the approval accorded and even the re-validations of plans. This was also informed to Respondent 9. The Board took a decision which was communicated to Respondent 9 on 2-1-2014, wherein it asked Respondent 9 to stop all construction activities on the allotted lands. The said communication was challenged by Respondent 9 and on the stop-work notice, stay was granted by the High Court of Karnataka. The stop-work notice dated 23-12-2013 issued by Bruhat Bengaluru Mahanagara Palike (for short "BBMP") was also stayed vide order dated 21-1-2014. The proposal submitted by Respondents 9 and 10 had been approved by the State Government. The land allotted to Respondents 9 and 10 does not consist of any Rajakaluves.

16. LDA took a stand that it was not at all aware of the project initiated by KIADB. It came to know about the entire project only when certain newspaper reports surfaced during the month of June 2013 and till that time it was in the dark. After the complaints, it inspected Bellandur Lake and Agara Lake on 12-6-2013 and prepared an inspection report. In the report, it was noticed that large-scale construction activities were going on in the catchment area of Bellandur Lake and that there was a change in the land use, which in turn has directly affected the catchment of Bellandur Lake. The wetland area of Agara Lake had also shrunk, which originally formed the irrigation area for the adjoining agricultural lands. Therefore, it had questioned the decision of KIADB vide letter dated 6-7-2013 and even requested it to stop the construction activity and to re-classify the land as non-SEZ area. It was thereafter on 31-8-2013, that Respondent 9 wrote a letter for according approval for the proposed development projects. However, vide its letter dated 23-9-2013, LDA informed KIADB that it had no authority to grant or deny construction projects, but it also communicated its objections to KIADB mentioning that construction activity

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would be in contravention of the directions of the Supreme Court. Despite these warnings, KIADB granted approval to the extension of the building drawings of the project in favour of the project proponents with certain conditions, like ensuring that all natural valleys, valley zone, irrigation tanks and existing roads leading to villages in the said land should not be disturbed. Further, the natural sloping pattern of the project site was not to be altered and the lakes and other waterbodies within and/or at the vicinity of the project area should be protected and conserved. Despite the objections, the plans were approved and approvals were extended from time to time. It has taken a categorical stand that the projects as approved by KIADB would have adverse impact on Bellandur and Agara Lakes.

17. On the basis of the pleadings of the parties, the Tribunal framed the following questions for consideration and determination:

17.1. Whether the application filed by the applicants and supported by Respondents 11 and 12, is barred by time and thus, not maintainable?

17.2. Whether the petition as framed and reliefs claimed therein, disclose a cause of action over which this Tribunal has jurisdiction to entertain and decide the application under the provisions of the NGT Act, 2010?

17.3. Whether the present application is barred by the principle of res judicata and/or constructive res judicata?

17.4. Whether the application filed by the applicants should not be entertained or it is not maintainable before the Tribunal, in view of the pendency of Writ Petitions Nos. 36567-74 of 2013, before the Hon'ble High Court of Karnataka? and

17.5. What relief, if any, are the applicants entitled to? Should or not the Tribunal, in the interest of environment and ecology issue any directions and if so, to what effect?

18. The Tribunal by its order dated 7-5-2015[1] at Annexure A-2, disposed of the applications with the following directions: (*Forward Foundation case*[1], SCC Online NGT para 85)

> "*85.* ... (1) We decline to pass any direction or order to stop further progress and/or demolition of the project or any part thereof at this stage. However, we constitute the following Committee to inspect the projects in question and submit a report to the Tribunal inter alia but specifically on the issues stated hereinafter:
>
> (*a*) Advisor in the Ministry of Environment and Forest dealing with the subject of wetlands.
>
> (*b*) CEO of the Lake Development Authority, Karnataka State.
>
> (*c*) Chief Town Planner of BBMP, Bangalore.
>
> (*d*) Chairman of SEAC which recommended the grant of environmental clearance to the projects in question.

1 *Forward Foundation* v. *State of Karnataka*, 2015 SCC OnLine NGT 5

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(*e*) Sr. Scientist (Ecology) from the Indian Institute of Sciences, Bangalore.

(*f*) Dr Siddharth Kaul, former Advisor to MoEF.

(*g*) A senior officer from the National Institute of Hydrology, Roorkee.

(2) Member-Secretary of the Karnataka State Pollution Control Board shall act as the Convener of the Committee and would submit the final report to the Tribunal.

(3) The Committee shall inspect not only the sites where the projects in question are located but even other areas of Bangalore which the Committee in its wisdom may consider appropriate, in order to examine the interconnectivity of lakes and impact of such activities upon the waterbodies, with particular reference to lakes.

(4) The Committee shall submit whether the projects in question have encroached upon or are constructed on the wetlands and Rajakaluves. If so, are there any adverse environmental and ecological impact of these projects on the lake particularly, Bellandur Lake and Agara Lake, as well the Rajakaluves. The report should specify if any Rajakaluves have been covered by the construction activities of Respondents 9 and 10 or by any of the projects in the area in question.

(5) Committee should submit in its report if these projects have any adverse impacts upon the surrounding ecology and environment, with particular reference to lakes and wetlands. If yes, then whether any part of the project is required to be demolished. If so, details thereof along with reasons.

(6) The Committee shall substantially notice if any of the conditions of the environmental clearance order in each case of Respondents 9 and 10 have been violated. If so, to what extent and suggest remedial measures in that behalf to restore the ecology of the area.

(7) The Committee would also recommend what should be the buffer zone around the lake(s) and interconnecting passages and wetlands. The Committee shall also report whether activities of multipurpose projects which have serious repercussions on traffic, air pollution, environment and allied subjects should be permitted any further or not, particularly, in wetlands and catchment areas of waterbodies.

(8) Recommendations should be made with regard to the steps and measures that should be taken for restoration of lakes, particularly, in the city of Bangalore.

(9) The Committee shall also find out that whether the construction of the projects is in accordance with the sanctioned drawings and bye-laws in accordance with the letters dated 4-7-2007 and 22-4-2008 respectively. Further, the Committee would also report whether both Respondents 9 and 10 have installed ETP/STP and have taken full measures for recycling of used water for washing and flushing, etc., in terms of letters

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dated 11-10-2013 and 3-1-2013, issued by the Karnataka Industrial Area Development Board to Respondents 9 and 10 respectively.

(10) In the event, the Committee is of the opinion that the adverse impacts noticed are redeemable, then what directions need to be issued in that behalf and the cost involved for achieving the said conservation and restoration of lakes and waterbodies.

(11) Till the submission of the report by the Committee and directions passed by the Tribunal in that regard, both Respondents 9 and 10 are hereby restrained from creating any third party interests or part with the possession of the property in question or any part thereof, in favour of any person.

(12) The Committee shall submit its report to MoEF and to this Tribunal as expeditiously as possible and in any case not later than three months from today. During that period we restrain MoEF, SEIAA and/or any public authority from sanctioning any construction project on the wetlands and catchment areas of the waterbodies in the city of Bangalore.

(13) The Committee shall report if the project proponents are proposing to discharge their trade or domestic effluents into the lake or any of the waterbodies in and around of the area in question.

(14) For the reasons stated in the judgment Respondent 9 is liable and shall pay a sum of Rs 117.35 crores, while Respondent 10 shall pay a sum of Rs 22.5 crores respectively being 5% of the project value, within two weeks from today. The said amount would be paid to KSPCB, which shall maintain a separate account for the same and would spend this amount for environmental and ecological restoration, restitution and other measures to be taken to rectify the damage resulting from default and non-compliance to law by the project proponent in that area, after taking approval of the Tribunal.

(15) We make it clear that the said respondents would not be entitled to pass on the amount in terms of Direction 14, onto the purchasers because this liability accrues as a result of their own intentional defaults, disobedience of law in force and carrying on project activities and construction illegally and unauthorisedly."

19. Feeling aggrieved by the said order, Respondents 9 and 10 filed Civil Appeals Nos. 4829 and 4832 of 2015 before this Court. This Court by its order dated 20-5-2015[3] passed the following order: [*Core Mind Software & Services (P) Ltd. case*[3], SCC OnLine SC paras 2-5]

"2. One of the main contentions raised by the appellants in these appeals is that though the Tribunal had heard the matter only on preliminary issues and no arguments on merit were advanced, final judgment decides the merits of the disputes as well and above all a penalty of Rs 117.35 crores against the original Respondent 9 (the appellant in CA No. 4832 of

3 *Core Mind Software & Services (P) Ltd.* v. *Forward Foundation*, 2015 SCC OnLine SC 1778

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2015) and Rs 22.5 crores against original Respondent 10 (the appellant in CA No. 4829/2015) is imposed.

3. On the aforesaid averment, we feel that it would be more appropriate for the appellant to file an application before the Tribunal with the prayer to recall the order on merits and decide the matter afresh after hearing the counsel for the parties, as the Tribunal knows better as to what transpired at the time of hearing.

4. With the aforesaid liberty granted to the petitioners, the appeals are disposed of. Certain preliminary issues are decided against the appellants which are also the subject-matter of challenge. However, it is not necessary to deal with the same at this stage. We make it clear that in case the said application is decided against the appellants or if ultimately on merits, it would be open to the appellants to challenge those orders by filing the appeal and in that appeal all the issues which are decided in the impugned judgment[1] can also be raised.

5. The counsel for the appellants state that they would file the requisite application within one week. Till the said application is decided by the Tribunal, there shall be stay of the direction pertaining the payment of aforesaid penalty. Mr Raj Panjwani points out that the Tribunal has allowed the appellants to proceed with the construction only on the payment of the aforesaid fine/penalty. We leave it to the Tribunal to pass whatever orders it deems fit in this behalf, after hearing the parties."

20. In relation to Issue 5, an opportunity of hearing was granted to the respondents. The Tribunal passed order dated 6-4-2016[4] on these applications as under: (*Forward Foundation case*[4], SCC OnLine NGT)

"***MA No. 603 of 2015 and MA No. 596 of 2015***

These applications have been filed on behalf of Respondents 9 and 10 respectively. It is not necessary for us to refer to any details in view of the directions that we propose to issue in this case.

Without prejudice to the rights and contentions of the parties and subject to just exception we would hear the parties in terms of the order of the Hon'ble Supreme Court of India primarily on the question of imposition of environmental compensation and merits attached in relation thereto. Parties are given liberty to address their submissions on that behalf.

With the above directions MA No. 603 of 2015 and MA No. 596 of 2015 stand disposed of without any order as to cost."

21. It is evident from the above orders that the Tribunal had granted opportunity to the parties to address it "limited question", as aforementioned.

1 *Forward Foundation* v. *State of Karnataka*, 2015 SCC OnLine NGT 5
4 *Forward Foundation* v. *State of Karnataka*, 2016 SCC OnLine NGT 637

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The Tribunal after hearing the parties passed an order dated 4-5-2016[2] as under: (*Forward Foundation case*[2], SCC OnLine NGT)

a

"***General conditions or directions***

1. In view of our discussion in the main judgment, we are of the considered view that the fixation of distance from waterbodies (lakes and Rajkalewas) suffers from the inbuilt contradiction, legal infirmity and is without any scientific justification. The RMP 2015 provides 50 m from middle of the Rajkalewas as buffer zone in the case of primary Rajkalewas,
b 25 m in the case of secondary Rajkulewas and 15 m in the tertiary Rajkulewas in contradiction to 30 m in the case of lake which is certainly much bigger waterbody and its utility as a waterbody/wetland is well known certainly part of wet land. Thus, we direct that the distance in the case of Respondents 9 and 10 from Rajkulewas, waterbodies and wetlands shall be maintained as below—

c

(*i*) In the case of *lakes*, 75 m from the periphery of waterbody to be maintained as green belt and buffer zone for all the existing waterbodies i.e. lakes/wetlands.

(*ii*) 50 m from the edge of the primary Rajkulewas.

(*iii*) 35 m from the edges in the case of secondary Rajkulewas.

d (*iv*) 25 m from the edges in the case of tertiary Rajkulewas.

This buffer/green zone would be treated as no construction zone for all intent and purposes. This is absolutely essential for the purposes of sustainable development particularly keeping in mind the ecology and environment of the areas in question.

e All the offending constructions raised by Respondents 9 and 10 of any kind including boundary wall shall be demolished which falls within such areas. Wherever necessary dredging operations are required, the same should be carried out to restore the original capacity of the water spread area and/or wetlands. Not only the existing construction would be removed but also none of these respondents — project proponent would be permitted to raise any construction in this zone.

f All authorities particularly Lake Development Authority shall carry out this operation in respect of all the waterbodies/lakes of Bangalore.

2. The capacity of the existing STPs to treat sewage is 729 MLD, whereas another 500 MLD sewage is proposed to be treated in 10 upcoming STPs. In this context, all the STPs operating in the area whether Government or privately owned, should meet the revised standards notified
g by CPCB/MoEF.

3. Bangalore City receives treated potable water of 1360 MLD from River Cauvery whereas the requirement is for another 750 MLD and the entire area falls in critical zone in terms of groundwater exploitation. Information reveals that only one million litre per month of STP treated water is used by builders for construction purposes. For this reason, the

h

2 *Forward Foundation* v. *State of Karnataka*, 2016 SCC OnLine NGT 1409

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BWSSB issues partial NOC to various residential and commercial projects in respect of supply of potable water. In this context, following directions need to be issued:

(*i*) At the time of grant of EC, the water requirement for the construction phase and operation phase should be considered separately. Due consideration should also be given for identification of source of supply of water and this should be a prerequisite for grant of EC.

(*ii*) All the project proponents should necessarily use only treated sewage water for construction purpose and this should be reflected in EC as a condition for construction phase.

(*iii*) Wherever the quality of treated sewage water does not conform to the quality needed for construction, necessary upgradation in STP should be undertaken immediately.

Specific conditions/directions for Respondent 9

In addition to the above directions which should be equally part of EC condition in respect of Respondents 9 and 10, following specific conditions shall apply to Respondent 9:

(*i*) Reclaimed area of the lake to the extent of 3 ac 10 guntas in Survey No. 43 should be restored to its original condition at the cost of project proponent. The possession of this area should be restored by Respondent 9 to the authorities concerned immediately. In addition, a buffer zone of 75 m should be provided between the lake and the project area and this should be maintained as green area.

(*ii*) In the remaining area, where primary Rajkalewa is abutting the project area, 50 m buffer zone on the side of the project area from the edge of the Rajkalewa should be maintained as green belt.

(*iii*) Several irrigation canals or tertiary Rajkalewas taking off from the Agara tank were passing through the area of Respondent 9, and serve the dual purpose of irrigating paddy fields and disposal of surface run off (storm water drains) during rainy season. However on account of the activities of the project, these drains have been totally obliterated. For the purpose of proper disposal of storm runoff from the entire area falling between Agara Lake and Belandur Lake, Respondent 9 must provide required number of storm water drains based on proper hydrological study. These storm drains should have a buffer zone of 15 m on either bank maintained as green belt.

(*iv*) The cumulative quantity of earth excavated for the construction of project is around 4 lakhs cubic metres in the depth range of 0 to 9 m. This has created huge hillock like structure obstructing the natural flow pattern of surface runoff from Agara Lake side to Balendur Lake side or primary Rajkalewas. For this purpose, during construction phase garland drain should be constructed around the existing dumping site for safe disposal of runoff to the Rajkalewas. For the disposal of excavated material, a proper muck disposal plan duly approved by

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SEIAA shall be prepared. In any case the plan should ensure that no muck/sediment flows into Rajkalewas and/or Belandur Lake.

(*v*) The kharab land identified by Revenue Department admeasuring 1 ac 2 guntas should be demarcated and maintained separately as green belt.

(*vi*) The entire green belt created under the directions of this Tribunal should not to be considered as part of green belt of the project as part of EC condition and will be over and above the green belt as indicated in the EC.

(*vii*) In view of the heavy traffic load in the adjoining Sarjapur Road, a proper study on the basis of traffic density, foot falls expected, etc., a proper plan needs to be prepared and the concept of service road exclusively for the project needs to be worked out and additional parking space created within the project area and incorporated as a part of the overall project layout, within a period of 3 months.

* * *

10. Though, at the time of hearing prior to passing of the judgment, we had heard the parties on all aspects but still we have provided rehearing to the parties on all issues with emphasis on imposition of environmental compensation including the quantum. Upon hearing, we are of the considered view that environmental compensation imposed upon Respondent 9 calls for no variation and Respondent 9 should be called upon to pay the said amount of Rs 117.35 crores determined under the judgment prior to commencement of any project activity at the site. Respondent 10 has not commenced any actual construction activity but has carried out various preparatory steps including excavation and deposition of huge earth by creating a hillock at the premises in question and a site office.

Thus, considering cumulative effect on environment and ecology due to various breaches in that behalf by Respondent 10 and the fact that the remedial measures can more effectively be taken by Respondent 10, we reduce environmental compensation payable by Respondent 10 to Rs 13.5 crores (3% of the stated project cost instead of 5% as imposed in the original judgment).

General directions

1. We direct SEIAA, Karnataka to issue amended order granting environmental clearance within four weeks from today incorporating all the conditions stated in this judgment and such other conditions as it may deem appropriate in light of this judgment and inspection note of the expert members. The project proponents would be permitted to commence activity only after issuance of amended environmental clearance order.

2. SEIAA Karnataka and MoEF shall ensure regular supervision and monitoring of the project and during the construction and even upon completion to ensure that activity is carried out strictly in accordance with the conditions of the order granting environmental clearance, this judgment, notification of 2006 and other laws in force.

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3. The distances in respect of buffer zone specified in this judgment shall be made applicable to all the projects and all the authorities concerned are directed to incorporate such conditions in the projects to whom environmental clearance and other permissions are now granted not only around Belandur Lake, Rajkulewas, Agara Lake, but also all other lakes/wetlands in the city of Bengaluru.

4. We hereby direct the State of Karnataka to submit a proposal to MoEF for demarcating wetlands in terms of the Wetland Rules, 2010 as revised from time to time. Such proposal shall be submitted by the State within four weeks from today and MoEF shall consider the same in accordance with law and grant its approval or otherwise within four weeks thereafter. After such approval is granted by MoEF, the State would issue notification notifying such areas immediately thereafter in accordance with Rules and law.

5. Both Respondents 9 and 10 shall ensure that debris or any construction material that has been dumped into the Rajkulewas, or on their banks and on the buffer zone of wetlands should be removed within four weeks from today. In the event they fail to do so, the same shall be removed by the Lake Development Authority along with the State Administration and recover charges thereof from the said respondents.

6. There is a serious discrepancy even in regard to the measurement of land as far as Respondent 9 is concerned. Admittedly the respondent has been allotted and is in possession of land admeasuring 63.94 ac, though environmental clearance has been granted for 2,92,636.03 sq m which is equivalent to 72.22 ac. For this reason alone, environmental clearance cannot be given effect to. While issuing the amended environmental clearance, SEIAA Karnataka shall take into consideration all these aspects and, if necessary, would require Respondent 9 to submit a fresh layout plant and the entire project may be revised in accordance with law.

7. Both the respondents (project proponents) shall submit an appropriate plan in view of the conditions imposed in this judgment and the amended environmental clearance that would be issued.

8. The amount of environmental compensation will be deposited prior to issuance of amended environmental clearance.

With the above directions, Original Application No. 222 of 2014 and Miscellaneous Applications Nos. 596 of 2016 and 603 of 2016 are finally disposed of while leaving the parties to bear their own costs." (emphasis in original)

22. Appearing for the appellants in CA No. 5016 of 2016, Shri Mukul Rohatgi, learned Senior Counsel, has submitted that the State Government in exercise of the power conferred under the Karnataka Industrial Areas Development Act (for short "the KIAD Act") declared the land in question as an industrial area. Thereafter, the land in question has been acquired by the State Government in the year 2004. Following the acquisition, on 28-6-2007, the land was allotted to the appellant by KIADB. SEIAA granted environmental clearance which was followed by public notice concerning clearance on 14-3-2012.

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Neither the allotment of land nor the environmental clearance was challenged before the Tribunal. Thus, none of the statutory decisions or processes, are the cause of action for the purpose of the application. The averments made in the original application does not satisfy or meet the requirements of Sections 14(1) and (3) of the NGT Act and the original application does not spell out the cause of action relevant for the purpose of the said provision. Since the statutory processes and clearances could not have been challenged for being hit by Section 14(3), the construction activities which were the alleged cause of action could not have been challenged. Therefore, the Tribunal ought to have held that the application was not maintainable.

23. Further, the application is barred by limitation. Though environmental clearance was granted on 17-2-2012 and it was published in two leading newspapers on 12-3-2012 and 14-3-2012, modified plan was approved by KIADB on 30-8-2012, the application ought to have been filed within six months from the date on which cause of action for the dispute first arose in terms of Section 14 of the NGT Act. The present application has been filed in March 2014 which was much beyond the prescribed period of limitation. No application seeking condonation of delay has been filed accompanying the application. Hence, the Tribunal ought to have dismissed the application on the ground that as it is barred by time.

24. It was also argued that buffer zone laid down by NGT is substantially higher as compared to buffer zone which is required to be maintained as per the Revised Master Plan, 2015 issued on 22-6-2007. This is contrary to the Karnataka Town and Country Planning Act, 1961 (for short "the Planning Act").

25. Shri Neeraj Kishan Kaul and Shri R. Venkataramani, learned Senior Counsel appearing for the appellants, in this case have also made similar submissions. It was argued that the direction imposing penalty/compensation is illegal on the ground that the applicants did not allege that the construction work of the project has caused environmental wrong. No wrong or injury either to Bellandur Lake waterbody or to Bellandur Lake area, has been alleged and established. As such, there is no question of any enquiry relating to imposition of penalty or any compensation.

26. Shri Maninder Singh, learned Senior Counsel appearing for the appellants, in CAs Nos. 5016 and 10995 of 2016, while supporting the submissions made by Shri Rohatgi, has submitted that the appellant has obtained sanction and approvals for the project from the competent authorities. It could not start construction despite grant of all the permissions, including environmental clearance as early as possible i.e. 30-9-2013. Hence, imposing penalty/compensation is entirely unsustainable.

27. The learned Advocate General, Shri Udaya Holla, appearing for the appellant State of Karnataka in CAs Nos. 4923-24 of 2017, has submitted that the State of Karnataka is also aggrieved by the order of NGT to the extent of setting aside the buffer zone in respect of waterbodies and drains specified in

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the Revised Master Plan, 2015, and enlargement of the buffer zone in respect of lakes and Rajakaluves. It is also aggrieved by the order of NGT directing the authorities to demolish all the offending constructions raised/built in the buffer zone, which will result in demolition of 95% of the buildings in Bengaluru. It is submitted that the Revised Master Plan is statutory in nature and NGT has no power, competence or jurisdiction to consider the validity or vires of any statutory provision/regulation. Therefore, the order of NGT to that extent is liable to be set aside.

28. The learned Senior Counsel appearing for the appellants in other cases, have also supported the arguments of the learned Advocate General. It was contended that the Revised Master Plan provides for a 30 m buffer zone around the lakes and a buffer zone of 50 m, 25 m and 15 m from the primary, secondary and tertiary drains, respectively to be measured from the centre of the drain. Vide the impugned judgment, NGT has revised these buffer zones and has directed that the buffer zone be maintained for 75 m around the lake and 50, 35 and 25 m respectively from the primary, secondary and tertiary drain, respectively. Variation of buffer zone, as directed by NGT is without any legal and scientific basis and has the effect of amending the Revised Master Plan, 2015, without there being any challenge to the same or any relief sought with respect to the said Revised Master Plan.

29. On the other hand, Shri Sajan Poovayya, learned Senior Counsel, appearing for the applicants, has fairly submitted that the applications were filed only against the appellants in CAs Nos. 5016 and 8002-03 of 2016 (Respondents 9 and 10). He has no objection to set aside the order insofar as the appellants in other appeals including the State of Karnataka are concerned. He has also no objection to set aside the general conditions and directions of NGT in para 1 of the order dated 4-5-2016[2] except the directions issued against Respondents 9 and 10. In view of the above, it is not necessary to examine the contentions of the learned Advocate General in Civil Appeals Nos. 4923-24 of 2017. It is also not necessary to consider the contentions urged in the other civil appeals except the appeals filed by Respondents 9 and 10.

30. Shri Poovayya has strongly opposed the submissions made by the learned Senior Counsel appearing for the appellants in CA No. 5016 of 2016 and CAs Nos. 8002-03 of 2016. It is submitted that the Tribunal is a specialised 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 environment. The jurisdiction of the Tribunal is provided under Sections 14, 15 and 16 of the NGT Act. Section 14 provides for the jurisdiction over all civil cases where a substantial question relating to environment is involved. However, such question should arise out of implementation of the enactments specified in Schedule I. The Tribunal has the jurisdiction under Section 15(1)(*a*) of the NGT Act to provide relief

2 *Forward Foundation* v. *State of Karnataka*, 2016 SCC OnLine NGT 1409

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and compensation to the victims of pollution and other environmental damage arising under the enactments specified in Schedule I. Under Sections 15(1)(*b*) and 15(1)(*c*), the Tribunal can provide for restitution of property damaged and for restitution of the environment for such area or areas, as the Tribunal may think fit. Sections 15(1)(*b*) and 15(1)(*c*) have not been made relatable to enactment specified in Schedule I of the Act. Section 15(1)(*c*) is an entire island of power and jurisdiction read with Section 21 of the Act. He submits that whenever ecology is being compromised and jeopardised, the Tribunal can apply Section 20 for taking restorative measures in the interest of environment. The limitation provided in Section 14 is period of six months from the date on which cause of action first arose whereas in Section 15 it is five years. Therefore, the petition is not barred by time.

31. He has further submitted that the provisions of Section 33 shall have the effect notwithstanding anything inconsistent contained in any other law for the time being in force. This gives the Tribunal overriding powers over anything inconsistently contained in the KIAD Act, Planning Act, Revised Master Plan of Bangalore, 2015 and Karnataka Municipal Corporation Act, 1976 (for short "the KMC Act"). Therefore, the Tribunal while providing for restoration of environment in an area can specify buffer zone around specific lakes and waterbodies in contravention with zoning regulation.

32. Regarding limitation, he has submitted that the application filed by Respondents 1 to 3 was not an application simpliciter under Section 14 of the Act. It was an application where a specific prayer has been made with reference to Lake Development Authority's report dated 12-6-2013 and the Ministry of Environment, Forests and Climate Change Monitoring Committee Report dated 14-8-2013 for restoration of ecologically sensitive land and for maintaining sensitive area in its natural condition so that ecological balance of the area is not disturbed. Therefore, the petition was under Section 15 of the Act and it can be filed within five years from the date on which the cause for such compensation or relief first arose.

33. It was further submitted that right to appeal under Section 22 is not a vested right unless provided by statute. Exercise of appellate jurisdiction without the fulfilment of statutory mandate would be without jurisdiction. Section 22 of the Act provides for an appeal on the ground specified in Section 100 of the Code of Civil Procedure, 1908 (for short "CPC"). Under Section 100 CPC, an appeal can be filed only on the ground that the case involves a substantial question of law as may be framed by the appellate court. In the instant case, the appeal does not involve any substantial question of law hence it has to be dismissed in limine. He has taken us through various materials placed on record in order to substantiate that the direction passed and penalty imposed by the Tribunal upon to project proponents are sustainable. He prays for dismissal of the appeals.

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34. We have carefully considered the submissions of the learned counsel of the parties and perused the materials placed on record.

35. Before considering the other contentions of the learned counsel for the parties, let us first consider the scope of enquiry in appeals filed under Section 22, which is as under:

> "**22.** ***Appeal to Supreme Court.***—Any person aggrieved by any award, decision or order of the tribunal, may, file an appeal to the Supreme Court, within ninety days from the date of communication of the award, decision or order of the Tribunal, to him, on any one or more of the grounds specified in Section 100 of the Code of Civil Procedure, 1908 (5 of 1908):
>
> Provided that the Supreme Court may entertain any appeal after the expiry of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal."

36. It is settled that there is no vested right of appeal unless the statute so provides. Further, if a statute provides for a condition subject to which the appropriate appellate court can exercise jurisdiction, the court is under an obligation to satisfy itself whether the condition prescribed is fulfilled. Exercise of appellate jurisdiction without the fulfilment of statutory mandate would be without jurisdiction. Therefore, the right of appeal provided under Section 22 is to be read subject to the conditions provided therein.

37. Section 22 provides for an appeal to the Supreme Court on the grounds specified in Section 100 CPC. Under Section 100 CPC, an appeal can be filed only on the ground that the case involves a substantial question of law as may be framed by the appellate court. The scope of appeal under Section 22, therefore, is restricted to substantial question of law arising from the judgment of the Tribunal. The test to determine whether the question is substantial question of law or not was laid down by a Constitution Bench of this Court in *Chunilal V. Mehta & Sons Ltd.* v. *Century Spg. & Mfg. Co. Ltd.*[5] This Court has laid down the test as under: (AIR p. 1318, para 6)

> "*6.* … The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

38. It is equally settled that merely because the remedy of appeal is provided against the decision of the Tribunal on a substantial question of law alone, that does not ipso facto permit the appellants to agitate their appeal to

5 1962 Supp (3) SCR 549 : AIR 1962 SC 1314

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seek reappreciation of the factual matrix of the entire matter. The appellants cannot seek to re-argue their entire case to seek wholesale reappreciation of evidence and the factual matrix that has been considered by the Tribunal is ex facie impermissible under Section 22. There cannot be fresh appreciation or reappreciation of facts and evidence in a statutory appeal under this provision.

39. The first question raised by the learned counsel is in relation to the maintainability of the application before the Tribunal.

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 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.

41. The jurisdiction of the Tribunal is provided under Sections 14, 15 and 16 of the Act. Section 14 provides the jurisdiction over all civil cases where a substantial question relating to environment (including enforcement of any legal right relating to environment) is involved. However, such question should arise out of implementation of the enactments specified in Schedule I.

42. The Tribunal has also jurisdiction under Section 15(1)(*a*) of the Act to provide relief and compensation to the victims of pollution and other environmental damage arising under the enactments specified in Schedule I. Further, under Sections 15(1)(*b*) and 15(1)(*c*), the Tribunal can provide for restitution of property damaged and for restitution of the environment for such area or areas as the Tribunal may think fit. It is noteworthy that Sections 15(1)(*b*) and (*c*) have not been made relatable to Schedule I enactments of the Act. Rightly so, this grants a glimpse into the wide range of powers that the Tribunal has been cloaked with respect to restoration of the environment.

43. Section 15(1)(*c*) of the Act is an entire island of power and jurisdiction read with Section 20 of the Act. The principles of sustainable development, precautionary principle and polluter pays, propounded by this Court by way of multiple judicial pronouncements, have now been embedded as a bedrock of environmental jurisprudence under the NGT Act. Therefore, wherever the environment and ecology are being compromised and jeopardised, the Tribunal can apply Section 20 for taking restorative measures in the interest of the environment.

44. The NGT Act being a beneficial legislation, the power bestowed upon the Tribunal would not be read narrowly. An interpretation which furthers the interests of environment must be given a broader reading. (See *Kishore*

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Lal v. *ESI Corpn.*[6], para 17.) The existence of the Tribunal without its broad restorative powers under Section 15(1)(*c*) read with Section 20 of the Act, would render it ineffective and toothless, and shall betray the legislative intent in setting up a specialised Tribunal specifically to address environmental concerns. The Tribunal, specially constituted with Judicial Members as well as with experts in the field of environment, has a legal obligation to provide for preventive and restorative measures in the interest of the environment.

45. Section 15 of the Act provides power and jurisdiction, independent of Section 14 thereof. Further, Section 14(3) juxtaposed with Section 15(3) of the Act, are separate provisions for filing distinct applications before the Tribunal with distinct periods of limitation, thereby amply demonstrating that jurisdiction of the Tribunal flows from these sections (i.e. Sections 14 and 15 of the Act) independently. The limitation provided in Section 14 is a period of 6 months from the date on which the cause of action first arose and whereas in Section 15 it is 5 years. Therefore, the legislative intent is clear to keep Sections 14 and 15 as self-contained jurisdictions.

46. Further, Section 18 of the Act recognises the right to file applications each under Section 14 as well as Section 15. Therefore, it cannot be argued that Section 14 provides jurisdiction to the Tribunal while Section 15 merely supplements the same with powers. 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, leave 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.

47. Section 33 of the Act provides an overriding effect to the provisions of the Act over anything inconsistent contained in any other law or in any instrument having effect by virtue of law other than this Act. This gives the Tribunal overriding powers over anything inconsistent contained in the KIAD Act, the Planning Act, the Karnataka Municipal Corporations Act, 1976 (the KMC Act); and the Revised Master Plan of Bengaluru, 2015 (RMP). A Central legislation enacted under Entry 13 of Schedule VII List I of the Constitution of India will have the overriding effect over State legislations. The corollary is that the Tribunal while providing for restoration of environment in an area, can specify buffer zones around specific lakes and waterbodies in contradiction with zoning regulations under these statutes or RMP.

48. The second question raised by the appellants is that the petition is barred by time. According to the appellants, environmental clearance was granted to Respondent 9 on 17-2-2012 for which notice was published in the leading newspaper on 12-3-2012 and 14-3-2012. Modified building plan was approved on 30-8-2012, which was followed up to 10-8-2014. Similar events had taken place in regard to the project of Respondent 10 who had been

6 (2007) 4 SCC 579 : (2007) 2 SCC (L&S) 1

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granted environmental clearance on 30-9-2013. The application had to be filed within a period of six months from the date on which cause of action for such dispute has first arisen in terms of Section 14 of the NGT Act. Admittedly, the present application has been filed in March 2014 and according to them, it is much beyond the prescribed period of limitation. Also, there is no application for condonation of delay accompanying the main application. Therefore, the Tribunal will not have jurisdiction to condone the delay.

49. OA No. 222 of 2014 was not an application simpliciter under Section 14 of the Act. It was an application where a specific prayer has been made with reference to Lake Development Authority's (LDA) Report dated 12-6-2013 and the Ministry of Environment, Forests and Climate Change (MoEF) Monitoring Committee Report dated 14-8-2013 for restoration of ecologically sensitive land and for maintaining the sensitive in its natural condition so that the ecological balance of the area is not disturbed. It is clear from the documentary evidence supported by data, that the project proponents have committed breaches and the implementation of the project is bound to have serious adverse impact on the ecology, hydrology and the environment in the catchment area of Bellandur Lake. The environmental degradation as established from the documents would give rise to an independent cause of action. Therefore, this was a petition under Section 15 of the Act and thus it could be filed within 5 years from the date on which the cause for such compensation or relief first arose.

50. In fact, in the original application before the Tribunal there was no mention of the provision under which it was being filed. It is well-settled principle of law that non-mention of or erroneous mention of the provision of law would not be of any relevance, if the court had the requisite jurisdiction to pass an order. It would be a mere irregularity and would not vitiate the application or the judicial order of the Tribunal.

51. Shri R. Venkataramani, learned Senior Counsel, appearing for the appellant in CA No. 5016 of 2016 has submitted that the constructions had not commenced before the grant of environment clearance. The inspection report dated 11-1-2012 of the Chairman of KSPCB observes that "no construction" had commenced on the date of inspection. This report cannot be overlooked on the basis of some dumping of debris which could not be attributed to the appellant. He has pointed out the report of the Committee appointed by the Tribunal in the month of August 2015, wherein it was stated that "it started construction after obtaining clearance". In this regard he has also taken us through various documents placed on record and submits that there is absolutely no justification in imposing monitoring penalty/compensation without assessment of impact.

52. The Tribunal has pointed out on the basis of the Committee report of August 2015, that the appellant had encroached 3 ac 10 guntas of Bellandur Lake and a boundary wall has been raised around the said land. The Tribunal has also found that the project proponents have violated the Master Plan. They have not obtained the mandatory clearance from the Sensitive Zone Committee

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constituted by the Government of Karnataka. It is also clear from the materials on record that there are several other violations by the project proponents. The Tribunal has discussed all these issues from para 52 onwards. It is also clear from the materials on record that there is a definite possibility of environment, ecology, lakes and wetland being adversely affected by these projects. That is why, the Tribunal has observed[1] as under: (*Forward Foundation case*[1], SCC OnLine NGT para 72)

> "*72.* In light of the above scope of the project and records before the Tribunal and the defaults on the part of the project proponents, the cumulative adverse effects of the activities undertaken by the respondents before us can be summed up as under:
>
> (1) The construction of both the projects had started prior to the grant to environmental clearance.
>
> (2) The EIA Notification of 2006 requires that without grant of environmental clearance, no project can commence its activity. This restriction applies not only to operationalisation of the project but even for the purposes of establishment.
>
> (3) Revenue map images shows multiple Rajakaluves flowing through the project(s) in question. The images further show encroachment on Rajakaluves.
>
> (4) Digital images of the land available on Google satellite images showing encroachment on two major Rajakaluves.
>
> (5) Google satellite images retrieved from Google archives clearly reflect two distinct features. Firstly, change in the wetland area between the period of 13-11-2000 and 23-11-2010. Secondly, it reveals the excavation work carried out by Respondents 9 and 10 commenced prior to obtaining environmental clearance.
>
> (6) Restriction in regard to extraction of groundwater was not strictly complied with as permission of Central Ground Water Authority was not obtained before construction.
>
> (7) The conditions with regard to the natural slopping pattern of the project site to remain unaltered and natural hydrology of the area to be maintained as it is, to ensure natural flow of storm water as well as in relation to lakes and other waterbodies within and/or at the vicinity of the project area to be protected and conserved. The inspection report by MoEF clearly notes that Conditions (xxxix) and (xl) in the environmental clearance of Respondent 9 cannot be complied with as it will necessarily result in some alteration of the natural slopping pattern of the project site and the natural hydrology of the area. It noted that the project area is located in the catchment area of the Bellandur Lake and the project authorities have informed that they will take all precautionary measures to ensure that the lake will not be affected by project activities either during construction or operation phase."

1 *Forward Foundation* v. *State of Karnataka*, 2015 SCC OnLine NGT 5

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53. In para 81, the Tribunal has observed as under: (*Forward Foundation case*[1], SCC OnLine NGT para 81)

> "*81.* ... Another very important aspect which cannot be overlooked by the Tribunal is with regard to Respondents 9 and 10 carrying on their project activity fully knowing that they were incapable of or it was not possible for them to comply with Conditions (xxxix) and (xl) (or alike conditions) in the order granting the environmental clearance. This has even been noticed by MoEF in its monitoring report dated 14-8-2013. These respondents never applied for variation or amendment of these conditions and continued with their construction activities. This renders these respondents entirely liable for environmental and ecological damage and the restoration and restitution thereof."

54. In our view, the findings arrived at by the Tribunal are not only based on the documents that were available on record but also on the pleadings that were made by the parties buttressed by the Committee's report and the inspection note of the expert members. Therefore, the directions passed and the penalty imposed by the Tribunal on both project proponents are valid and sustainable and do not suffer from any perversity.

55. We are also of the view that it is impermissible for the appellants to seek a factual review through the methodology of reappreciation of factual matrix by this Court under Section 22 of the NGT Act.

56. Shri R. Venkataramani, learned Senior Counsel has also raised a subsidiary issue relating to res judicata. According to him, Respondents 12 and 13 filed Writ Petitions Nos. 3656-57 of 2013 seeking similar reliefs in a representative capacity. The issues raised therein are same as those canvassed in the application before the Tribunal. The reliefs sought for are essentially the same. Hence, the applications are barred by the principle of res judicata.

57. The Tribunal has answered this issue in paras 47 to 51 of the order. There was no dispute insofar as filing of the writ petitions is concerned. However, the parties are not common nor the issues in application and the writ petitions are directly and substantially the same. After examination of the pleadings, the Tribunal has recorded a finding of fact that there is no commonality of a cause of action or likelihood of a conflict between the judgments. The prayers and the genesis of the respective proceedings are entirely distinct and different in their scope and relief. The issues before the Tribunal would essentially relate to environment ecology and its restoration while the proceedings before the High Court relate to entirely different issues with acquisition of land, its allotment and transfer to the third party. These issues in both the proceedings are neither substantial nor materially identical.

1 *Forward Foundation* v. *State of Karnataka*, 2015 SCC OnLine NGT 5

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58. After elaborately considering this question, the Tribunal has concluded as under: (*Forward Foundation case*[1], SCC OnLine NGT para 51)

> "*51.* ... For these reasons, we find no merit in this contention of Respondents 9 and 10. The purpose of the doctrine of res judicata is to provide finality and conclusiveness to the judicial decisions as well as to avoid multiplicity of litigation. In the present case, the question of reagitating the issues or agitating similar issues in two different proceedings does not arise. The ambit and scope of jurisdiction is clearly decipherable. The jurisdictions of the Hon'ble High Court of Karnataka and this Tribunal are operating in distinct fields and have no commonality insofar as the issues which are raised directly and substantially in these petitions, as well as the reliefs that have been prayed for before the Hon'ble High Court and the Tribunal are concerned. There is no commonality in parties before the Tribunal and the High Court. The "cause of action" in both proceedings is different and distinct. The matters substantially and materially in issue in one proceedings are not the same in the other proceeding. There is hardly any likelihood of conflicting judgments being pronounced by the Tribunal on the one hand and the High Court on the other. Therefore, we are of the considered view that the present applications are neither hit by the principles of *res judicata* nor *constructive res judicata*. We also hold that culmination of proceedings before the Tribunal into a final judgment would not offend the principle of "judicial propriety", because of the writ petitions pending before the Hon'ble High Court of Karnataka."

59. We do not find any error in the aforesaid conclusion of the Tribunal. We are of the view that the Tribunal was justified in holding that the objections taken by Respondents 9 and 10 do not satisfy the basic ingredients to attract the application of res judicata or constructive res judicata.

60. The State of Karnataka is aggrieved by the following offending portion of the order dated 4-5-2016[2]: (*Forward Foundation case*[2], SCC OnLine NGT)

> "*1.* In view of our discussion in the main judgment, we are of the considered view that the fixation of distance from waterbodies (lakes and Rajkalewas) suffers from the inbuilt contradiction, legal infirmity and is without any scientific justification. The RMP 2015 provides 50 m from middle of the Rajkalewas as buffer zone in the case of primary Rajkalewas, 25 m in the case of secondary Rajkulewas and 15 m in the tertiary Rajkulewas in contradiction to the 30 m in the case of lake which is certainly much bigger waterbody and its utility as a waterbody/wetland is well known certainly part of wet land. Thus, we direct that the distance in the case of Respondents 9 and 10 from Rajkulewas, waterbodies and wetlands shall be maintained as below—
>
> > (*i*) In the case of *lakes*, 75 m from the periphery of waterbody to be maintained as green belt and buffer zone for all the existing waterbodies i.e. lakes/wetlands.

1 *Forward Foundation* v. *State of Karnataka*, 2015 SCC OnLine NGT 5
2 *Forward Foundation* v. *State of Karnataka*, 2016 SCC OnLine NGT 1409

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(*ii*) 50 m from the edge of the primary Rajkulewas.

(*iii*) 35 m from the edges in the case of secondary Rajkulewas.

(*iv*) 25 m from the edges in the case of tertiary Rajkulewas.

This buffer/green zone would be treated as no construction zone for all intent and purposes. This is absolutely essential for the purposes of sustainable development particularly keeping in mind the ecology and environment of the areas in question.

All the offending constructions raised by Respondents 9 and 10 of any kind including boundary wall shall be demolished which falls within such areas. Wherever necessary dredging operations are required, the same should be carried out to restore the original capacity of the water spread area and/or wetlands. Not only the existing construction would be removed but also none of these respondents — project proponent would be permitted to raise any construction in this zone.

All authorities particularly Lake Development Authority shall carry out this operation in respect of all the waterbodies/lakes of Bangalore." (emphasis in original)

61. We have already noticed that Shri Poovayya has no objection to set aside the aforesaid impugned portion of the order insofar as the appellants in all the appeals except the appeals filed by Respondents 9 and 10 are concerned. The aforesaid portion of the order contains not only general directions but also certain directions against Respondents 9 and 10. Therefore, only that portion of the order which does not pertain to Respondents 9 and 10 needs to be quashed.

62. In the light of the above discussion, we pass the following order:

62.1. Civil Appeal No. 5016 of 2016 and Civil Appeals Nos. 8002-03 of 2016 filed by the appellant-Respondents 9 and 10 are hereby dismissed. The impugned judgment and order insofar as the appellant-Respondents 9 and 10 are concerned is sustained.

62.2. All the other appeals are hereby allowed and Direction/Condition (1) in the order dated 4-5-2016[2] is hereby set aside except the direction issued against Respondents 9 and 10.

63. There will be no order as to costs.

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2 *Forward Foundation* v. *State of Karnataka*, 2016 SCC OnLine NGT 1409

Item Nos. 03

BEFORE THE NATIONAL GREEN TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
(Through Video Conferencing)

Original Application No. 61/2014 (WZ)
(M.A. No. 24/2015)

Cavelossim Villagers Forum — Applicant(s)

Versus

Village Panchayat of Cavelossim — Respondent(s)

Date of hearing: 24.04.2019

CORAM: **HON'BLE MR. JUSTICE ADARSH KUMAR GOEL, CHAIRPERSON**
HON'BLE MR. JUSTICE K. RAMAKRISHNAN, JUDICIAL MEMBER
HON'BLE DR. NAGIN NANDA, EXPERT MEMBER

For Applicant(s): Mr. N.DA Costa Frias, Ms. Faria M. Mesquita, Advocate

For Respondent (s): Mr. Krishnan Venugopal, Sr. Advocate, Mr. Ninad Laud, Mr. Nitin Sawant, Mr. Kaushik Mishra, Mr. Shivshankar Swaminathan, Mr. Ivo D'Costa, Advocates for Respondent no. 8
Mr. Anu Tiwari, Mr. Shaurya Garg, Advocates

ORDER

1. This application filed by Cavelossim Villagers Forum has a grievance against illegal construction activities adversely affecting the natural water bodies/*nallas*/channels/paddy fields. The application was filed on 23.05.2014. It is stated that a big project of construction of building has been undertaken by M/s Balaji Concepts, Margao, Goa by destroying natural water bodies at Khandi-bandoi, Cavelossim, Salcete, Goa. Construction has been undertaken without due

permission from the concerned authorities. Water access has been blocked due to illegal dumping of mud in violation of the Goa Irrigation Act, 1973 and Land Revenue Code. The construction is within 100 mtrs of the River Sal. The applicant has relied upon the inspection report dated 21.03.2014 by the Assistant Engineer, Water Resources Department. The applicant has also filed revenue record, Google image, copy of complaint lodged and photographs.

2. In the inspection report dated 21.03.2014, it is stated as follows:

> *"It is found that in Survey No. 90/5 a nallah is diverted to a length of about 20 mts and the bank of the same are constructed with R.C.C. walls with extra steel reinforcement to cover the nallah with concrete slab from top. An another nallah in Survey No. 90/5 was filled with mud by stopping the free flow of water. The pond in Survey No. 91/1 is encroached by filling mud, is shifted close to nallah and R.C.C. columns are erected to construct the building. A letter No. WRD/SDI/WD II/F.45/590/2013-14, Dt. 18/02/2014 was sent to Balaji Concept requesting to stop all the construction activities in the above said affected area by destroying original water bodies and nallahs which will prevent free flow of water in rainy season and stagnation of water in the paddy fields at upstream side thus leading to breeding of mosquitos and to restore all the water bodies in their existing form within 15 days or to face action.*
>
> *A joint inspection was held on 13.03.2014 at the site of Balaji Concept at Khandi Bandoi along with Shri. Gonsalo Rodrigues, Technical Assistant, Vinod Kapoor, Gaurish Kandeparker, site Engineer of M/s. Balaji*

Concepts, the Members of Cavelossim Villagers forum and its President, the Sarpanch of V.P. Cavelossim and its Panchayat Members. It is found that neither the construction activities of the project of Balaji Concept are stopped nor the illegal structures in the water bodies of the said area are rectified or removed by the builders in Sy. No. 90/5, 90/6 & 90/1 in response to the letter No. WRD/SDI/WDII/F.45/590/2013-14 dt: 18.02.2014. Only a nallah in Sy. No. 91/5 which was filled with mud is restored but with changes from its original alignment at the middle to allow their construction of structures conveniently. Secondly location of the pond in Survey No. 91/1 is not restored. The work of construction of banks of the Nallah with R.C.C. is still carried on vigorously in defiance of the request."

3. The Village Panchayat of Cavelossim, respondent No. 1 has filed a reply justifying the grant of construction license under the Panchayat Act. On the issue of damage to the water channels, it is stated that the notice was duly issued on 28.05.2014 to the project proponent, respondent No. 8. The project proponent in reply dated 30.05.2014, produced various permissions, including permission granted by the Executive Engineer of the Water Resources Department, vide letter dated 23.05.2014, approving the proposal as follows:

"*With reference to your proposal submitted vide your letter referred above, the proposal has been scrutinized by this office and this office does not have any objection to the said modification as suggested from the water resource point of view in your property subjected to the following conditions;*

1. *The area of pondages/water bodies in the survey numbers should be maintained as per the drawings approved and should not be reduced.*
2. *Proper connectivity should be ensured to all the nallas/drains entering in to the property to discharge storm water/any discharges into the river Sal.*
3. *Proper slopes and cross sections should be maintained as per approved drawings for the nallas/drains.*
4. *Other necessary permissions if any should be obtained by the applicant.*
5. *Seven (7) drawing copies showing lay outcross sections are approved and returned back."*

4. The applicant also filed an additional affidavit dated 28.10.2014 to the effect that on 24.06.2014, officials of Goa Agricultural Department and Goa State Biodiversity Board carried out a joint inspection. The report of the joint inspection was furnished under the RTI Act, 2005 by the Goa Coastal Zone Management Authority (GCZMA). The said report *inter-alia* states as follows:

> "*GE image 02-2013: A significant portion of the NDZ (0-100m) has been filled and reclaimed with mud. This activity is tantamount to a major violation of CRZ 2011 laws.*
>
> *Several buildings are identified beyond the NDZ. A waterbody is seen between the buildings (beyond NDZ).*
>
> *GE image 12-2013: The water body has been filled up and buildings are seen within it. This aspect has been confirmed in the field.*
>
> *Field inspection showed clear violations of CRZ 2011 notification: a large part of the mandatory NDZ along the river side is filled with mud. The entire area is*

strewn with construction material as debris is dumped here. New boulders and new metal was also observed. An antecedent waterlogged stretch along the river is being reclaimed gradually (see GE image 02-2013).

Also, a road runs parallel and close to the river; a water tanker was seen parked along the river. Some hutments are present along the river bank. Reclamation is confirmed in the field. The mud road (used by trucks?) is again a CRZ violation.

A mangrove creek, elongated in shape, is noted. This saline water body is connected to the river through a functional sluice gate."

5. The project proponent, respondent no. 8 filed a counter affidavit to the amendment application. The project proponent has also filed an application to dismiss the application being M.A No. 17 of 2015 in pursuance of the order of the High Court of Bombay at Goa dated 19.01.2015 to which reference will be made later, raising the plea of limitation. It is stated that the applicant made a complaint on 02.09.2013 seeking inspection of illegal activities and in view of the said application, cause of the applicant accrued on that date. The said information was withheld while filing the application. During the course of hearing, written submissions have also been filed on behalf of the project proponent giving factual background as well as the submissions on the issue of limitation. It is pointed out that the project commenced on 12.12.2010 after construction licence was granted by the Panchayat.

6. We note that against interim order of the Tribunal, the matter was carried to the Bombay High Court by the project proponent by way of

W.P No. 594 of 2015 and decided in a group of matters in *Windsor Reality Pvt. Ltd. v. Ministry of Environment and Forest* and connected matters, *2016 SCC Online Bom 5613* decided on 09.06.2016. The High Court considered the issue of locus and limitation in the light of two judgements of the National Green Tribunal in *Rana Sen Gupta v. U.O.I & Ors, Appeal No. 54/2012 and Goa Foundation v. Secretary, MoEF, M.A No. 49/2013 in Application No. 26/2012.* In *Goa Foundation (Supra),* it was held that cause of action arises from the date of knowledge and the date of inaction of the authorities while in *Rana Sen Gupta (Supra),* the view taken is that the applicant therein did not have the locus not being the an aggrieved party. The High Court held that *prima facie,* cause of action is the starting point of limitation and not the date of knowledge. If date of knowledge is cause of action, complaints can be filed even after ten to twenty years. At the same time, the issue of violation of environment law needs to be looked into through the forum where such question to be raised remains a question. Accordingly, the High Court remanded the matter for fresh decision which is as follows:

> *"36. Taking an overall view of the matter and considering the importance of the issues which are raised by the Petitioners and original Applicant and also the fact that impugned order does not address the issue in its proper perspective, we set aside the impugned order and remand the matter to the Tribunal to decide afresh on merits and in accordance with law. During the pendency of the said Misc.Application, further proceedings in the main Application are stayed. Tribunal shall also frame a preliminary issue on the*

question of limitation and locus after giving an opportunity to both sides and lay down the concept of "aggrieved person" and also on the point whether NGT can entertain an application which is in the nature of PIL which is otherwise maintainable in the High Court and Supreme Court of India. We direct the NGT to decide all these issues within a period of three months."

7. The applicant carried the matter to the Hon'ble Supreme Court by way of *SLP Civil No. 34831/2016* which has been disposed of on 26.10.2018 with the direction that the Tribunal may pass appropriate orders in terms of para No. 36 of the judgement of the High Court.

8. Accordingly, we have heard the learned counsel for the parties and proceed to deal with the matter.

9. Following questions arise for consideration:

   i. Whether the application is within limitation and whether the applicant has locus to file the petition and is an 'aggrieved person' for the purpose.

   ii. Whether the NGT can entertain the application in the nature of PIL which is maintainable before the High Court and the Hon'ble Supreme Court.

   iii. Order required to be passed on merits.

10. Our consideration and findings are as follows:

Re (i): Whether the application is within limitation and whether the applicant has locus to file the petition and is an 'aggrieved person' for the purpose.

11. Shri. Krishnan Venugopal, learned senior counsel for the project proponent submitted that limitation under Section 14 (3) of the NGT Act, 2010 is six months from the date of cause of action when the dispute first arose. Delay can be condoned not exceeding sixty days. It was submitted that the limitation commences when the cause of action first arises and there is no scope for the concept of continuing cause of action. Reliance has been placed on *Khatri Hotels (P) Ltd v. Union of India (2011) 9 SCC 12,* wherein question considered was in the context of Article 58 of the Schedule to Limitation Act, 1963 laying down that limitation for a suit for declaration commences when the right to suit first accrues. It was held that successive violation of right will not give rise to fresh cause of action. In *Popat Bahiru Govardhane v. Land Acquisition Officer (2013) SCC 10 SCC 765*, the question for consideration was in the context of Section 28 A of the Land Acquisition Act, 1984. It was held that Law of Limitation is to be applied with all its vigour. In *N.C Dhoundial v. Union of India (2004) 2 SCC 579*, the issue of limitation in the context of Section 36 of the Protection of Human Rights Act came up for consideration. The violation alleged was wrongful detention and date of detention was held to be the point of commencement of limitation.

12. Learned counsel also referred to the judgement of the Bombay High Court referred to above, wherein *prima facie* observations have been made. No laws has been laid down while remanding the matter. Reference has also been made to two orders of this Tribunal being *Aradhana Bhargava v. MoEF 2013 SCC Online NGT 84* and *Graminee Environment Development Foundation v. balaji Infrastructure Ltd. and Ors 2017 SCC Online NGT 1098*. In *Aradhana Bhargava (Supra),* it was held that the applicants had knowledge of the project and did not take the remedy for a long period and thus, the application was barred by limitation. In *Graminee Environment Development Foundation (Supra),* the cause of action started in December, 2008 and the application was filed in the year 2016 which was held to be barred by limitation.

13. Learned counsel for the applicant submitted that the present application is within limitation. Cause of action did not arise merely from sanction of the project or commencement of construction but on arising of 'substantial question of environment' in terms of Section 14 of the NGT Act, 2010. On inspection in December, 2013 and in March, 2014 violations came to light. Representation of 02.09.2013 was general. On that basis alone, the applicant could not involve jurisdiction of the NGT. The judgements relied upon are distinguishable and do not stand against the applicant.

14. It is undisputed that the matter is governed by limitation laid down under Section 14(3) of the NGT Act, 2010. The limitation is six months from the date the cause of action first arose which can be extended up to sixty days. No doubt, the starting point of limitation is the cause of action and not the knowledge but cause of action is a bundle of facts on which it is based. In the said bundle of facts, there may be series of facts. Merely because one part of the fact comes into existence may not be enough if further facts on which the cause is based are of a later date.[1] In *The Forward Foundation v. State of Karnataka & Ors*[2]., it was held:

> *"24. The expression 'cause of action' as normally understood in civil jurisprudence has to be examined with some distinction, while construing it in relation to the provisions of the NGT Act. Such 'cause of action' should essentially have nexus with the matters relating to environment. It should raise a substantial question of environment relating to the implementation of the statutes specified in Schedule I of the NGT Act. A 'cause of action' might arise during the chain of events, in establishment of a project but would not be construed as a 'cause of action' under the provisions of the Section 14 of the NGT Act, 2010 unless it has a direct nexus to environment or it gives rise to a substantial environmental dispute. For example, acquisition of land simplicitor or issuance of notification under the provisions of the land acquisition laws, would not be an event that would trigger the period of limitation under the provisions of the NGT Act, 'being cause of action first arose'. A dispute giving rise to a 'cause of action' must essentially be an environmental*

[1] Kehar Singh v. State of Haryana, 2013 SCC OnLine NGT 52
[2] 2015 ALL (i) NGT REPORTER (2) (DELHI) 81

dispute and should relate to either one or more of the Acts stated in Schedule I to the NGT Act, 2010. If such dispute leading to 'cause of action' is alien to the question of environment or does not raise substantial question relating of environment, it would be incapable of triggering prescribed period of limitation under the NGT Act, 2010. [Ref: Liverpool and London S.P. and I Asson. Ltd. v. M.V. Sea Success I and Anr., (2004) 9 SCC 512, J. Mehta v. Union of India, 2013 ALL (I) NGT REPORTER (2) Delhi, 106, Kehar Singh v. State of Haryana, 2013 ALL (I) NGT REPORTER (DELHI) 556, Goa Foundation v. Union of India, 2013 ALL (I) NGT REPORTER DELHI 234].

Furthermore, the 'cause of action' has to be complete. For a dispute to culminate into a cause of action, actionable under Section 14 of the NGT Act, 2010, it has to be a 'composite cause of action' meaning that, it must combine all the ingredients spelled out under Section 14(1) and (2) of the NGT Act, 2010. It must satisfy all the legal requirements i.e. there must be a dispute. There should be a substantial question relating to environment or enforcement of any legal right relating to environment and such question should arise out of the implementation of the enactments specified in Schedule I. Action before the Tribunal must be taken within the prescribed period of limitation triggering from the date when all such ingredients are satisfied along with other legal requirements. Accrual of 'cause of action' as afore-stated would have to be considered as to when it first arose.

25. In contradistinction to 'cause of action first arose', there could be 'continuing cause of action', 'recurring cause of action' or 'successive cause of action'. These diverse connotations with reference to cause of action are not

synonymous. They certainly have a distinct and different meaning in law, 'Cause of action first arose' would refer to a definite point of time when requisite ingredients constituting that 'cause of action' were complete, providing applicant right to invoke the jurisdiction of the Court or the Tribunal. The 'Right to Sue' or 'right to take action' would be subsequent to an accrual of such right. The concept of continuing wrong which would be the foundation of continuous cause of action has been accepted by the Hon'ble Supreme Court in the case of Bal Krishna Savalram Pujari & Ors. v. Sh. Dayaneshwar Maharaj Sansthan & Ors., AIR 1959 SC 798.

28. The settled position of law is that in law of limitation, it is only the injury alone that is relevant and not the consequences of the injury. If the wrongful act causes the injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. In other words distinction must be made between continuance of legal injury and the continuance of its injurious effects. Where a wrongful act produces a state of affairs, every moment continuance of which is a new tort, a fresh cause of action for continuance lies. Wherever a suit is based on multiple cause of action, period of limitation will began to run from the date when the right to sue first accrues and successive violation of the right may not give rise to a fresh cause of action. [Ref: Khatri Hotels Private Limited and Anr. v. Union of India (UOI) and Anr., (2011) 9 SCC 126, Bal Krishna Savalram Pujari & Ors. v. Sh. Dayaneshwar Maharaj Sansthan & Ors, AIR 1959 SC 798, G.C. Sharma v. Municipal Corporation of Delhi, (1979) ILR 2 Delhi 771, Kuchibotha Kanakamma and Anr. v Tadepalli Ptanga Rao and Ors., AIR 1957 AP 419].

29. A cause of action which is complete in all respects gives the applicant a right to sue. An applicant has a right to bring an action upon a single cause of action while claiming different reliefs. Rule 14 of the National Green Tribunal (Practise and Procedure) Rules, 2011, shows the clear intent of the framers of the Rules that multiple reliefs can be claimed in an application provided they are consequential to one another and are based upon a single cause of action. Different causes of action, thus, may result in institution of different applications and therefore, there is exclusion of the concept of the 'joinder of causes of action' under the Rules of 2011. The multiple cause of action again would be of two kinds. One, which arise simultaneously and other, which arise at a different or successive point of time. In first kind, cause of action accrues at the time of completion of the wrong or injury. In latter, it may give rise to cause of action or if the statutes so provide when the 'cause of action first arose' even if the wrong was repeated. Where the injury or wrong is complete at different times and may be of similar and different nature, then every subsequent wrong depending upon the facts of the case may gives rise to a fresh cause of action.

To this general rule, there could be exceptions. In particular such exceptions could be carved out by the legislature itself. In a statute, where framers of law use the phraseology like 'cause of action first arose' in contradistinction to 'cause of action' simplicitor. Accrual of right to sue means accrual of cause of action for suit. The expressions 'when right to sue first arose' or 'cause of action first arose' connotes date when right to sue first accrued, although cause of action may have arisen even on subsequent occasions. Such expressions are noticed in Articles 58 of the Limitation Act, 1963. We may illustrate this

by giving an example with regard to the laws that we are dealing here. When an order granting or refusing Environmental Clearance is passed, right to bring an action accrues in favour of an aggrieved person. An aggrieved person may not challenge the order granting Environmental Clearance, however, if on subsequent event there is a breach or non-implementation of the terms and conditions of the Environmental Clearance order, it would give right to bring a fresh action and would be a complete and composite recurring cause of action providing a fresh period of limitation. It is also for the reason that the cause of action accruing from the breach of the conditions of the consent order is no way dependent upon the initial grant or refusal of the consent. Such an event would be a complete cause of action in itself giving rise to fresh right to sue. Thus, where the legislature specifically requires the action to be brought within the prescribed period of limitation computed from the date when the cause of action 'first arose', it would by necessary implication exclude the extension of limitation or fresh limitation being counted from every continuing wrong, so far, it relates to the same wrong or breach and necessarily not a recurring cause of action.

30. Now, we would deal with the concept of recurring cause of action. The word 'recurring' means, something happening again and again and not that which occurs only once. Such recurrence could be frequent or periodical. The recurring wrong could have new elements in addition to or in substitution of the first wrong or when 'cause of action first arose'. It could even have the same features but its recurrence is complete and composite. The recurring cause of action would not stand excluded by the expression 'cause of action first arose'. In some situation, it could even be a complete, distinct cause of action hardly having nexus to the

first breach or wrong, thus, not inviting the implicit consequences of the expression 'cause of action first arose'. The Supreme Court clarified the distinction between continuing and recurring cause of action with some finesse in the case of M. R. Gupta v. Union of India and others, (1995) 5 SCC 628, the Court held that:

> *"The appellant's grievance that his pay fixation was not in accordance with the rules, was the assertion of a continuing wrong against him which gave rise to a recurring cause of action each time he was paid a salary which was not computed in accordance with the rules. So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that it the appellant's claim is found correct on merits. He would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant's claim, if any, for recovery of arrears calculated on the basis of difference in the pay which has become time barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified. Similarly, any other consequential relief claimed by him, such as, promotion etc. would also be subject to the defence of laches etc. to disentitle him to those reliefs. The pay fixation can be made only on the basis of the situation existing on 1.8.1978 without taking into account any other consequential relief which may be barred by his laches and the bar of limitation. It is to this limited*

extent of proper pay fixation the application cannot be treated as time barred since it is based on a recurring cause of action. The Tribunal misdirected itself when it treated the appellant's claim as 'one time action' meaning thereby that it was not a continuing wrong based on a recurring cause of action. The claim to be paid the correct salary computed on the basis of proper pay fixation, is a right which subsists during the entire tenure of service and can be exercised at the time of each payment of the salary when the employee is entitled to salary computed correctly in accordance with the rules. This right of a Government servant to be paid the correct salary throughout his tenure according to computation made in accordance with rules, is akin to the right of redemption which is an incident of a subsisting mortgage and subsists so long as the mortgage itself subsists, unless the equity of redemption is extinguished. It is settled that the right of redemption is of this kind. (See Thota China Subba Rao and Ors. v. Mattapalli, Raju and Ors. AIR (1950) F C1."

31. The Continuing cause of action would refer to the same act or transaction or series of such acts or transactions. The recurring cause of action would have an element of fresh cause which by itself would provide the applicant the right to sue. It may have even be de hors the first cause of action or the first wrong by which the right to sue accrues. Commission of breach or infringement may give recurring and fresh cause of action with each of such infringement like infringement of a trademark. Every rejection of a right in law could be termed as a recurring cause of action. [Ref: Ex. Sep. Roop Singh v. Union of India and Ors., 2006 (91) DRJ 324,

M/s. Bengal Waterproof Limited v. M/s. Bombay Waterproof Manufacturing Company and Another, (1997) 1 SCC 99].

32. The principle that emerges from the above discussion is that the 'cause of action' satisfying the ingredients for an action which might arise subsequently to an earlier event give result in accrual of fresh right to sue and hence reckoning of fresh period of limitation. A recurring or continuous cause of action may give rise to a fresh cause of action resulting in fresh accrual of right to sue. In such cases, a subsequent wrong or injury would be independent of the first wrong or injury and a subsequent, composite and complete cause of action would not be hit by the expression 'cause of action first arose' as it is independent accrual of right to sue. In other words, a recurring cause of action is a distinct and completed occurrence made of a fact or blend of composite facts giving rise to a fresh legal injury, fresh right to sue and triggering a fresh lease of limitation. It would not materially alter the character of the preposition that it has a reference to an event which had occurred earlier and was a complete cause of action in itself. In that sense, recurring cause of action which is complete in itself and satisfies the requisite ingredients would trigger a fresh period of limitation. To such composite and complete cause of action that has arisen subsequently, the phraseology of the 'cause of action first arose' would not effect in computing the period of limitation. The concept of cause of action first arose must essentially relate to the same event or series of events which have a direct linkage and arise from the same event. To put it simply, it would be act or series of acts which arise from the same event, may be at different stages. This expression would not de bar a composite and complete cause of action that has arisen subsequently. To illustratively demonstrate, we may refer to the challenge to the grant of Environmental

Clearance. When an appellant challenges the grant of Environmental Clearance, it cannot challenge its legality at one stage and its impacts at a subsequent stage. But, if the order granting Environmental Clearance is amended at a subsequent stage, then the appellant can challenge the subsequent amendments at a later stage, it being a complete and composite cause of action that has subsequently arisen and would not be hit by the concept of cause of action first arose."

15. The above observations fully deal with the issue. Limitation commences not merely from first step in the matter but from continuing facts which show substantial question of environment on account of violation of relevant environmental laws.

16. In the present case it is seen that the cause of action for the applicant is based *inter-alia* on:

i. A report dated 21.03.2014 of the Water Resources Department stating that construction activity was destroying the original water body and will prevent free flow of water.

ii. Letter dated 23.05.2014 of the Water Resources Department imposing conditions while permitting modification of existing water bodies, particularly, the condition that the area of pondage should not be reduced, connectivity of water bodies may be maintained and slope and cross sections are maintained as per the drawing.

iii. Report dated 24.06.2014 by the GCZMA to the effect that activity of the project proponent is a violation of CRZ, 2011 laws.

17. The application filed on 27.05.2014 cannot thus be held to be barred by limitation merely because on 02.09.2013, the applicant had made a complaint of general nature. The said complaint can hardly be said to be complete cause of action and foundation of the present application. The said complaint is quoted in full as follows:

> *"Sub: Fix date to conduct inspection of M/s Balaji Concepts site at Khandi-Bandoi of Village Cavelossim.*
>
> *Madam,*
>
> *We have noticed that M/s Balaji Concepts is moving several truckloads of mud into its area to fill the waterlogged bodies thereby destroying the existing ponds and water access within its area. It is also notice that most of the areas within its vicinity got water logged and the stagnant water smells due to blockage of water access. Such act of water blockade is illegal and bound to create disastrous consequences.*
>
> *As the water is stagnant due to blockage of water passage in the surrounding areas, it is most likely that several types of mosquitoes may start breeding. This may result in spread of several types of epidemics due to breeding of mosquitoes.*
>
> *It is also noticed that they have blocked the pathways/public access to river which is illegal.*

Hence, you are hereby requested to fix date to conduct inspection of the site of M/s Balaji Concepts immediately and intimate us so as to enable us to attend the said inspection."

18. The cause of action for approaching the Tribunal is a substantial question of environment and not merely a general allegation which may not amount to such substantial question. It may be difficult to say that complaint dated 02.09.2013 without further facts of alleged violation as mentioned in the reports which have been relied upon by the applicant by itself was substantial question of environment. We thus hold that the application is within limitation.

Re (ii): Whether the NGT can entertain the application in the nature of PIL which is maintainable before the High Court and the Hon'ble Supreme Court.

19. As regards the applicant being aggrieved party, learned counsel for the project proponent fairly states that this objection is not being raised in the present application but in other cases. However, learned counsel for the applicant points out that the matter is already dealt with by the Tribunal vide order dated 23.08.2016 in *Sameer Mehta v. U.O.I & Ors., 2016 NGTR (3) PB 1,* giving an interpretation to the expression 'aggrieved person' and observing that the expression has to be seen liberally once a substantial question of environment arises. While jurisdiction of the NGT is *sui generis* in terms of statutory provisions under the NGT Act, 2010,

an order necessary for protection of environment can be passed to enforce principles under Section 20 of the Act i.e. 'Precautionary' principle, 'Sustainable Development' principle and 'Polluter Pays' principle. It may be inevitable to pass orders in the nature of public interest. It may be said to be comparable or otherwise to PIL jurisdiction. Fact remains that jurisdiction under Section 15 read with Section 20 of the Act has to be exercised meaningfully to protect environment. The question is answered accordingly.

Re (iii): Order required to be passed on merits.

20. Coming to the merits, we are informed on behalf of the project proponent that 80% of the project has already completed. Learned counsel for the project proponent also states that water bodies have been filled only to the extent permitted by the Water Resources Department of the State of Goa and there is no violation of the environment norms or conditions subject to which the permission has been granted by the Water Resources Department.

21. We may also note that in the application violation alleged is of Goa State laws, learned counsel for the applicant submits that facts disclose violation of Schedule I laws, including Environment (Protection) Act, 1986.

22. Learned counsel for the applicant relies upon the report of the Water Resources Department of the State of Goa and GCZMA

referred to above and submits that the alleged violations need to be gone into.

23. Since the matter has been pending for the last about five years, having regard to the need for expeditious disposal based on correct and latest factual position, we consider it appropriate to direct furnishing of a joint report by representatives of the MoEF&CC, GCZMA, Goa State Pollution Control Board and Water Resources Department, State of Goa. The GCZMA will be the nodal agency for coordination and compliance. Such factual report dealing with the issue may be furnished within three months by email at ngt.filing@gmail.com. A copy of the order be sent each to the MoEF&CC, GCZMA, Goa State Pollution Control Board and Water Resources Department, State of Goa by email.

24. It will be open to the parties to furnish their respective versions to the GCZMA. It will also be open to the joint Committee to carry out inspection to ascertain status and assess the damage to the environment, if any, and suggest remedial measures.

List for further consideration on 28.08.2019.

Adarsh Kumar Goel, CP

K. Ramakrishnan, JM

1932

Dr. Nagin Nanda, EM

April 24, 2019
Original Application No. 61/2014 (WZ)
(M.A. No. 24/2015)
AK

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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.

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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

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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)

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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

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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

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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*

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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

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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

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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

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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

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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

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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:—

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"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.

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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,

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"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.

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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,

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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,*

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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",

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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

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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

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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

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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

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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.

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[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.

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[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

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[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).

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[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)

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

[43] Supra Note 23.

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Item No. 01 (Pune Bench)

BEFORE THE NATIONAL GREEN TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

(By Video Conferencing)

Original Application No. 34/2020(WZ)

Tanaji Balasaheb Gambhire Applicant

Versus

Union of India & Ors. Respondent(s)

Date of hearing: 24.02.2022

CORAM: HON'BLE MR. JUSTICE ADARSH KUMAR GOEL, CHAIRPERSON
HON'BLE MR. JUSTICE BRIJESH SETHI, JUDICIAL MEMBER
HON'BLE DR. NAGIN NANDA, EXPERT MEMBER
HON'BLE PROF. A. SENTHIL VEL, EXPERT MEMBER
HON'BLE DR. VIJAY KULKARNI, EXPERT MEMBER
HON'BLE DR. AFROZ AHMAD, EXPERT MEMBER

Applicant: Mr. Nitin Lonkar, Advocate

Respondent(s): Ms. Mansi Joshi, Advocate for MPCB
Mr. Rahul Garg, Advocate for PMC
Mr. Aniruddha Kulkarni, Advocate for SEIAA
Mr. Saurabh Kulkarni, Advocate for R - 13

ORDER

1. Grievance in this application is against setting up of construction projects by M/s Padmavati Associates, Pune without requisite Environmental Clearances (EC) and in violation of other environmental norms as per details mentioned in the application. The Tribunal sought a report from a joint Committee comprising SEIAA, State PCB and Municipal Corporation, Pune. The Committee has filed its report dated 24.08.2020 mentioning the violations found.

2. The matter was considered earlier on 17.11.2020 and was deferred to enable the learned Counsel for the parties to address the Tribunal on the issue of limitation first. On 01.12.2021, the application was admitted and notices were issued to the contesting respondents, including SEIAA, Maharashtra, State PCB, Pune Municipal Corporation and the Project Proponent-M/s Padmavati Associates, Pune. The Project Proponent has filed reply on 12.11.2020, followed by additional affidavit filed on 03.03.2021. The applicant has filed a rejoinder on 22.10.2021.

3. We have heard learned Counsel for the parties and perused the pleadings as well as the report of the joint Committee.

4. The report of the joint Committee shows that there are two separate projects i.e. Pristine Prism & Pristine Royal (which are two projects in same complex and thus treated as one) and Pristine Privilege. In first project, there are five buildings with built up area of more than 55,000 sq. mtrs. In the second project, the built up area is 4973.74 sq. mtrs. For the first project, EC is required being more than 20000 sq mts but has not been obtained though *ex-post facto* EC and consent to establish and consent to operate have been sought. For the second project, EC was not required but no consent has been taken under the Water (Prevention and Control of Pollution) Act, 1974 and Air (Prevention and Control of Pollution) Act, 1981. The Committee has given its point-wise observations with reference to the points raised in the application as follows:-

"3. Point wise observations:-

Sr. No.	*Point examined*	*Observations*

1	*The project proponent has not complied with environmental norms by non-obtaining of mandatory prior Environmental Clearance, Consent to Establish, Consent to Operate.*	*As per the aforementioned particular no.2.1,* ***it is clear that the Project Proponent has carried out construction activity for TBA-55862.25 SQM for project Pristine Prism & Pristine Royal without taking prior Environmental Clearance and has also not obtained consent to establish & consent to operate under Water (P & CP) Act 1974 and Air (P & CP) Act, 1981.*** ***PP has now applied forprior Environmental Clearance to MoEFCC, New Delhi on 09.09.2019.*** ***Environment Department, Gov. of Maharashtra, vide letter dated 29.08.2019 issued proposed directions to M/s. Padmavati Associates u/s 5 of the Environmental (P) Act 1986 r. w. EIA Notification-2006 dated 14.09.2006 and to the Commissioner, Pune Municipal Corporation, Pune, on 16.11.2019. In response to this direction, PMC has issued notice to PP on 13.12.2019.*** ***MPC Board has also issued proposed directions u/s. 33 A of Water (P & CP) Act, 1974, 31 A of Air (P & CP) act, 1981 on 03.03.2020.*** *As per the aforementioned particular no.2.2, it is clear that the project Pristine Prism has TBA- 4973.74 Sq.M and is below 20,000 Sq.M. Therefore, it neither attracts prior Environmental Clearance under EIA Notification 2006, nor consent to establish, consent to operate under Water (P & CP) Act 1974 and Air (P & CP) Act, 1981.*
2	*The part of the project is affected by blue line of Mula River and Buildings A, B, C1 & C2 are following under blue flood line of the Mula River.*	***Both the buildings of Pristine Royal are within the zone of Blue and Red flood lines.*** *PMC has informed that the practice of showing Flood Zone by Blue & Red lines on the Development plan started in 2017. It appears that Above said project were completed in 2015 when there was no practice of depicting the river flood zone on the building proposal drawings.*
3	*PP is extracting Huge quantity of ground water from three borewell and not obtained CGWA permission for ground water extraction, not made test of ground water.*	*No bore wells are observed in premises during the visit.*
4	*PP has not provided Solid Waste treatment & OWC units and waste is dumped to PMC yard.*	***PP has installed OWC of capacity 130 KG/D in Pristine Prism and 75 KG/D in Pristine Royal. However, OWC of Pristine Royal is not in operation.***
5	*PP has not provided any energy conservation system for energy savings.*	*In both the projects solar heater system is provided to all the buildings.*

6	*PP has not provided any rainwater harvesting system.*	***The committee cannot corroborate the claim of the provision of the rain water harvesting system as the said chambers could not be opened.***
7	*PP has not provided 10 % recreational open on virgin land*	***It is the opinion of the PMC that the recreation open spaces that are found only on the Podium*** *are as per their circular.*
8	*Not preserved top layer of fertile soil and no soil test.*	*All buildings are already constructed; as such the committee is unable to offer any comments on soil preservation.*
9	*PP has not made tree plantation as per the norms of required trees.*	*Many trees are observed in the project premises and as per the certification of the Tree Authority PMC dated 18.03.*2015, 285 trees are planted. This number appears to be adequate.
10	*PP has provided swimming tank giving additional burden on the ground water.*	***PP has provided two swimming pools in Pristine Prism and in Pristine Royal as per the revised plan that is approved on 03.07.2018.***
11	*PP has installed 6 DG set at project site causing air pollution.*	*PP has installed 160 KVA DG set in M/s. Pristine Prism and 125 KVA in Pristine Royal.*
12	*Huge quantity of sewage water generated, and PP has not provided STP.*	*PP has installed 160 CMD capacities STP in Pristine Prism; however it is not in operation and untreated domestic waste is drained in PMC sewer line. Pristine Royal has no STP.*
13	*PP has not provided fire and safety system at site and there is no approach road for fire engine.*	*PP has obtained final fire NOC from PMC on 13.07.2015 and previously on 17.06.2009.* *The committee has observed that the fire tender can manoeuvre in the premises so as to carry out the rescue operation.*
14	*PP has not provided the ramp slope in the ration of 1:10*	*No ramp for inter floor vehicular movement is observed in the project premises.*
15	*PP has not provided side margins, 15% amenity space, as per DC rules, not provided 10 % open space on virgin land, not provided DP roadwindingarea of 1270 sqm meters and not hand over to PMC, not developed green belt area of 3000 sqm as shown in DP plan.*	***As informed by the PMC, PP has developed project as per the proposal drawings approved by them. All open spaces [front, rear, & side], and the recreation open spaces on the podium are as per the approvals and thereby in conformity with the DC Rules (1987) and their own circular. 15% amenity space is not required as per provisions of DC Rules (1987) No.13.8.The PP has also developed the green area between the river and the D.P. road that passes through the plot.***

5. In the reply of the Project Proponent, apart from plea of limitation it is stated that projects were set up after necessary commencement certificates and occupation certificates have also been issued which are as follows:-

"

a. *Commencement Certificate No. 4407/05, dated 18/03/2006 issued by PMC. (S. No. 6/2 867 at Aundh, Pune - 411007)*

b. *Revised Commencement Certificate No. 2951/06, dated 15/11/2006 issued by PMC. (S. No. 6/2 & 7 at Aundh, Pune - 411007)*

c. *Revised Commencement Certificate No. 1991/ 07, dated 04/10/2007 issued by PMC. (S. No. 6/2 86 7 at Aundh, Pune - 411007)*

d. Revised Commencement Certificate No. 1971/ 09, dated 04/08/2019 issued by PMC. (S. No. 6/2 & 7 at Aundh, Pune - 411007)

e. Revised Commencement Certificate No. 2449/09, dated 04/11/2019 issued by PMC. (S. No. 6/2 & 7 at Aundh, Pune - 411007)

f. Revised Commencement Certificate No. 3099/10, dated 13/12/2019 issued by PMC. (S. No. 6/2 8s 7 at Aundh, Pune - 411007)

g. *Commencement Certificate No. 1006/12, dated 25/06/2012 issued by PMC. (S. No. 6/2 867 at Aundh, Pune - 411007)*

h. Revised Commencement Certificate No. 0046/15, dated 08/04/2015 issued by PMC. (S. No. 6/2 & 7 at Aundh, Pune - 411007)"

6. Explaining the absence of requisite EC, it is stated that at the time of seeking commencement certificate/completion certificate, no such requirement was indicated to the Project Proponent. EC has now been applied on 09.09.2019 for the project where the built up area is more than 20,000 sq. mtrs. If built up area is less, no EC is required.

Consideration of the matter and order

7. We first deal with the issue of limitation. The application has been filed on 29.06.2020. Even according to the Project Proponent, the projects were continuing beyond 30.06.2015 and thus, threshold bar which applies to proceedings filed five years after the accrual of cause of action is not attracted.

8. On merits, there are thus, violations which can been looked into by this Tribunal and have to be remedied either by compliance or by compensation on polluter pays principle. The first violation is failure to obtain prior EC for the project of more than 20,000 sq. mtrs. The Project Proponent has applied for *ex-post facto* EC on 09.09.2019. Explanation that the PP was not informed about the requirement of EC while issuing commencement certificate cannot be accepted as ignorance of law is no excuse. The matter is covered by Alembic 2020 SCC online 347 and Keystone vs. Anil Tharthare (2020) 2 SCC 66. This apart, there are other violations. Part of constructions is in blue and red flood lines of river Mula. According to the Committee, till 2017, this part was not being complied with. Had EC/consent been sought, this could have been got complied. The PP has benefitted itself by this violation. STP has not being provided in the project with more than 20,000 sq. mtrs for atleast some of the buildings. Further, there is no explanation about the source of water for the swimming pools, if not illegal extraction of groundwater. Oral explanation that water is brought by tankers is neither substantiated nor probable. Open areas have been provided only on podium which according to the Committee is in conformity with the DC Rules, ignoring the law laid down in *Municipal Corpn. of Greater Mumbai v. Kohinoor CTNL Infrastructure Co (P) Ltd., (2014) 4 SCC 538* as follows**:**

> ***"27.*** *Having noted these submissions, it is seen that a podium is permissible only on plots admeasuring 1500 sq m or more. So this provision is not applicable to plots smaller than 1500 sq m. As can be seen from DCR 23(1)(a), it speaks of a layout or sub-division of "vacant land" and open spaces. The open spaces "shall as far as possible" be provided in one place. If a layout or sub-division is more than 5000 sq m, open space can be provided in more than one place, but at least one such place "shall be of not less than 1000 sq m". These provisions clearly show that they are mandatory. Besides, under sub-clause (f) of DCR 23 there is a requirement of keeping the recreational open space permanently open to the sky and trees are to be grown in that space as laid down i.e. five trees per hundred square metres of the recreational space within the plot. DCR 2(64) defines "open space" to mean an area forming an integral part of a site left open to the sky. A*

"site" is defined under DCR 2(83) to mean a parcel or piece of land enclosed by definite boundaries. ***These DCRs when read together, very much make it clear that the recreational/amenity space has to be on the land i.e. on ground level and it has got to be 15%, 20% or 25% of the area depending upon its size****.*

28. *As rightly pointed out by the learned Senior Counsel Mr Nariman and Mr Salve, the requirement of recreational space on the podium under DCR 38(34)(iv) is discretionary. Besides, as the abovereferred sub-clause (iii) lays down, podium shall be basically used for parking. Besides, sub-clause (iv) does not contain a non obstante clause to override the requirement under DCR 23 making it mandatory to provide recreational space on the ground floor. That being so,* ***the provision under DCR 38(34) cannot be read in derogation of the requirement under DCR 23 or else it will result into serious erosion in the basic requirements for a good life affecting the guarantee of right to life, under Article 21 of the Constitution of India. We have therefore to read down sub-clause (iv) of DCR 38(34) as inapplicable and not excluding the mandatory provision under DCR 23****.*

29. *It is also relevant to note that the development schemes under DCRs 33(7), 33(9) and 33(10) provide for lesser recreational area/amenity spaces. Thus, under DCRs 33(7) and 33(10) reduction in the amenity open space is permitted to make the project viable, but still minimum 8% of the project area is required to be maintained as amenity open space. Similarly, for the schemes under DCR 33(9) minimum 10% of the plot area is required to be retained as recreational space. In other properties, where there are no such constraints to make the development schemes of rehabilitation or reconstruction of old buildings or slums viable,* ***there is no reason why the amenity open space at the ground level should be read as permissible, to be reduced.*** *The only ground being given is to provide more parking and more accommodation, meaning thereby more construction, concretisation and financial expediency. Such a purpose cannot be read into the provisions as they presently exist, nor is it desirable to do so from the point of view of the requirement of minimum open spaces at the ground level.*

30. *Besides, as pointed out by Mr Divan, the requirement of having trees and open land around them is necessary from an environmental point of view,* ***since there is already excessive concretisation, and a very serious reduction in open spaces at the ground level.*** *It must be noted that the right to a clean and healthy environment is within the ambit of Article 21, as has been noted in Amarnath Shrine, In re in the following words:*

"12. The scheme under the Indian Constitution unambiguously enshrines in itself the right of a citizen to life under Article 21 of the Constitution. The right to life is a right to live with dignity, safety and in a clean environment."

The right to a clean and pollution free environment, is also a right under our common law jurisprudence, as has been held by this Court in Vellore Citizens' Welfare Forum v. Union of India[5] *where this Court held: (SCC p. 660, para 16)*

"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."

> ***31.*** *In the same judgment the Court emphasised the importance of sustainable development, and the need for a balance between development and ecological considerations, in the following words: (Vellore Citizens' Welfare forum case[5], SCC pp. 657-58, para 10)*
>
> *"10. The traditional concept that development and ecology are opposed to each other is no longer acceptable. 'Sustainable Development' is the answer … '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."*
>
> ***32. Therefore, after reflecting upon the legal position, we are clearly of the opinion that having 15%, 20% or 25% of the area (depending upon the size of the layout) as the recreational/amenity area at the ground level is a minimum requirement, and it will have to be read as such****. We therefore, answer Issue (i) by holding that it is not permissible to reduce the minimum recreational area provided under DCR 23 by relying upon DCR 38(34). However, if the developers wish to provide recreational area on the podium, over and above the minimum area mandated by DCR 23 at the ground level, they can certainly provide such additional recreational area."*

9. The report shows that the State PCB has issued notice under Section 31A of the Water Act but the violations alleged and further action taken is not known. The report also shows that STP was not functional and sewage was being discharged into drain. OWC was also not properly functioning. Stabilized waste for use as soil conditioner. Rejects were to be channelised through authorized agency. The report proceeds on the basis that projects not requiring EC do not require consent under the Water and the Air Acts.

10. It is observed in several matters that residential societies are facing the issue of lack of proper sewage and solid waste management system. This requires the concerned authorities to lay down standards for disposal of sewage effluent and existence of sewerage system in housing societies including those not requiring EC to enforce the water and air quality standards and clarify that even if EC is not required, consent mechanism is not dispensed with. MoEF&CC and CPCB may take necessary action in this regard within three months.

11. With regard to the present case, in view of above discussion, we direct a joint Committee of SEIAA, Maharashtra, State PCB and Pune Municipal Corporation to take further remedial action to fix liability for the violations, including assessment and recovery of compensation. The Committee may also prepare plan for restoration out of the compensation, to be recovered from the PP. Compensation assessment and action plan preparation may be done within one month which may be executed in an appropriate manner, including with the association of the Project Proponent, if found viable.

The application is disposed of.

A copy of this order be forwarded to MoEF&CC, CPCB, SEIAA, Maharashtra, State PCB and Pune Municipal Corporation by e-mail for compliance.

Adarsh Kumar Goel, CP

Brijesh Sethi, JM

Dr. Nagin Nanda, EM

Prof. A. Senthil Vel, EM

Dr. Vijay Kulkarni, EM

Dr. Afroz Ahmad, EM

February 24, 2022
Original Application No. 34/2020(WZ)
SN

Item No. 02 (Pune Bench)

BEFORE THE NATIONAL GREEN TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

(By Video Conferencing)

Original Application No. 33/2020 (WZ)

(With report dated 02.03.2022)

Tanaji Balasaheb Gambhire Applicant

Versus

Union of India & Ors. Respondent(s)

Date of hearing: 02.03.2022

CORAM: HON'BLE MR. JUSTICE ADARSH KUMAR GOEL, CHAIRPERSON
HON'BLE MR. JUSTICE SUDHIR AGARWAL, JUDICIAL MEMBER
HON'BLE DR. A. SENTHIL VEL, EXPERT MEMBER
HON'BLE DR. VIJAY KULKARNI, EXPERT MEMBER
HON'BLE DR. AFROZ AHMAD, EXPERT MEMBER

Applicant: Mr. Nitin Lonkar, Advocate

Respondent: Mr. Aniruddha S. Kulkarni, Advocate for SEIAA
Ms. Mansi Joshi, Advocate for MPCB
Mr. Rahul Garg, Advocate for PMC
Mr. Saurabh Kulkarni & Mr. Ninad Laud, Advocates for R-13 (Prayeja City)

ORDER

1. This application has been filed with a grievance that the project proponent (PP) has violated the environmental norms by not obtaining mandatory prior Environmental Clearance, consent to establish, consent to operate, CGWA permission for ground water extraction, non-installation of pollution control devices, non-plantation of tress, non-installation of STP, non-installation of solid waste treatment, OWCS unit, illegal ground water extraction, illegal operation of DG sets at site, not providing 10% recreation space as per norms, absence of soil preservation, absence of soil and ground water test, illegal construction of

basements, not using eco-friendly building material for construction, completing construction without Environmental Clearance, absence of prior consent to establish from the State PCB, non-compliance of show cause notice issued by the Competent Authority, non-implementation of the remedial measures.

2. The Tribunal constituted a joint Committee comprising State Environment Impact Assessment Authority (SEIAA), the Maharashtra State Pollution Control Board and the Municipal Commissioner, Chinchwad/Pune to ascertain facts and give a report to this Tribunal. Report dated 25.08.2020 filed by the Committee, showing violations, calling for remedial action, was considered on 17.11.2020. The Tribunal constituted another joint Committee comprising CPCB, the SEIAA and the State PCB to take remedial action and to file an action taken report. The Tribunal also assessed interim compensation of Rs. 5 crores to be deposited with the State PCB.

3. On Appeal of the Project Proponent, the Hon'ble Supreme Court vide order dated 12.01.2021 in *Civil Appeal No. 4/2021, M/s Prayeja City vs. Union of India & Ors.* set aside the order of this Tribunal and remanded the matter back for opportunity of hearing to the Project Proponent in light of order passed in *Civil Appeal No. 3893 of 2020* titled *M/s Sai Baba Sales Pvt. Ltd. vs. Union of India & Ors.* The PP has filed its reply inter alia raising issue of limitation.

4. Stand of the PP is that the building plan was sanctioned on 30.03.2007, commencement certificate was granted on 07.05.2008, five years before the filing of the application on 29.06.2020. Revised commencement certificate for Phase-II of the project has been granted on 08.10.2015. On 10.07.2017, revised commencement certificate for Phase-

I of the project has been granted. The Project Proponent applied for EC for second project, after revision of the plan, in 2020. SEIAA has recommended grant of EC which covers both the projects.

5. Accepting the statement in the reply on facts to be correct, the second project commenced on 08.10.2015, within five years before the Application was filed before the Tribunal. Both the projects are patently integral. Grant of subsequent EC does not exonerate the PP of consequences of violation in obtaining prior EC, as held inter-alia in *Alembic Pharmaceuticals Ltd. vs. Rohit Prajapati and Ors., 2020 SCC Online SC 347* and *Keystone Realtors (P) Ltd. v. Anil v. Tharthare* reported in *(2020) 2 SCC 66*.

6. Thus, even after considering the viewpoint of the PP, in the light of order of the Hon'ble Supreme Court, the matter will need consideration on merits.

7. Report of the joint Committee filed today is that the construction of the project commenced without prior EC for which Environmental Compensation was liable to be paid assessing compensation at Rs. 16,97,25,000/- or Rs. 7,36,87,500/- in the alternative, to be decided by this Tribunal. The recommendations in the report are as follows:-

> ***"7.0 Recommendations***
>
> *(a)* *<u>For violation of EIA Notification dated 14/09/2006</u>*
>
> *In view of the aforesaid violations of:*
>
> *(i) Starting construction and almost completing the project i.e. Prayeja City-I as per the Layout Sanctioned no. CC/4871/06, dated 30/03/2007 for the total built-up area of 23, 505.98 sq-m; Layout Sanctioned no. CC/0436/08, dated 07/05/2008 for the total built-up area of 31,530.06 sq-m; Layout Sanctioned no. CC/2311/12, dated 08/11/2012 for the total built-up area of 38,761.21 sq- m, and; Layout Sanctioned no.*

CC/1001/17, dated 10/07/2017 for the total built-up area of 56,292.04 sq-m (FSI: 27, 871.63 q-m and Non-FSI: 28,420.41 sq-m) without obtaining prior EC from SEIAA;

the committee recommends that SEIAA, Maharashtra, may proceed for closure or revision of project; taking action under section 15 read with section 19 of the Environment (Protection) Act, 1986; penalty for violations of EIA Notification, 2006; permissibility/demolition of the project; appraisal of the project including Damage Assessment, Remediation Plan and Community Augmentation Plan and their implementation in accordance with the MoEF&CC"s OM dated 28/01/2022 as outlined under para 5.0 (page 12-14) of this report. Damage Assessment, Remediation Plan and Community Augmentation Plan may be derived as per SEIAA Maharashtra"s approach paper dated 30/01/019, as also outlined under para 5.0 (page 7 - 11) of this report.

(b) *<u>For contravening provisions under the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981</u>*

In view of the aforesaid violations of:

(i) Starting construction for the built up area for more than 20,000 sq. m., as at (a) above, and almost completing the project i.e. Prayeja City-I including giving possession w.e.f. 2012 without obtaining CTE/CTO from MPCB as required under the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981;

Rs. 05 Crore OR Rs. 16,97,25,000/- (Rupees Sixteen Crore Ninety Seven Lakhs and Twenty Five Thousand Only) OR Rs. 7,36,87,500/- (Rupees Seven Crore Thirty Six Lakhs Eighty Seven Thousand and Five Hundred Only), as derived under para 6.0 o this report, as deemed fit by the Hon'ble NGT, may also be added in addition to the penalty derived as outlined under para 5.0 (page 12-14) of this report as damages for contravening provisions under the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981.

*(c) PMC may examine the architect certificate vide dated 24/02/2022 including verification of current constructed total built up area, as per the latest Layout Sanction vide CC no. 1001/17, dated 10/07/2017 and may take actions for deviation/changes, if any, w.r.t. the latest Layout Sanctioned granted by PMC.***"**

8. Learned Counsel for the PP submits that since the report has been filed only today, the PP may be given opportunity to file response. We accept the prayer and grant two weeks time for filing response as to why

the compensation assessed by the Committee, as may be revised by the Tribunal after considering the stand of the parties, be not required to be paid by the PP, if the project is not to be demolished for the violations.

List for further consideration on 06.04.2022.

Adarsh Kumar Goel, CP

Sudhir Agarwal, EM

Dr. A. Senthil Vel, JM

Dr. Vijay Kulkarni, EM

Dr. Afroz Ahmad, EM

March 02, 2022
Original Application No. 33/2020 (WZ)
SN

Item No. 01 (Pune Bench)

BEFORE THE NATIONAL GREEN TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

(By Video Conferencing)

Org. Application No. 64/2019(WZ)
(I.A. No. 101/2019, I.A. No. 66/2021 & I.A. No. 18/2022)

Mr. Tanaji Balasaheb Gambhire Applicant

Versus

Union of India Through Secretary & 12 Ors. Respondent(s)

Date of hearing: 23.03.2022

CORAM: HON'BLE MR. JUSTICE ADARSH KUMAR GOEL, CHAIRPERSON
HON'BLE MR. JUSTICE SUDHIR AGARWAL, JUDICIAL MEMBER
HON'BLE PROF. A. SENTHIL VEL, EXPERT MEMBER
HON'BLE DR. VIJAY KULKARNI, EXPERT MEMBER
HON'BLE DR. AFROZ AHMAD, EXPERT MEMBER

Applicant: Mr. Nitin Lonkar, Advocate

Respondent(s): Ms. Manasi Joshi Advocate for MPCB
Mr. Rahul Garg, Advocate for PMC
Mr. Aniruddha S Kulkarni, Advocate for SEIAA
Mr. Saket Mone, Advocate for R-13

ORDER

1. Grievance in this application is against violation of environmental norms in the construction of the housing project "Ekta California & Florida" at Pune. The allegation is summed up in the application as follows:-

> *"project proponent have completed the construction of total BUA 38339.6 Sq. Mtrs till today comprising of 5 residential buildings, 120 flats and further proposed expansion to increase the capacity of project from 38339.6 Sq. Mtrs to 47429.2 Sq. Mtrs. by 9089.6 Sq. Mtrs by 1 new residential building, 70 flats vide sanction no. CC/3774/16 dated 31.03.2017.*
>
> *The project proponent has not complied with environmental norms by non-obtaining of mandatory prior Environment Clearance,*

Consent to Establish, Consent to Operate, CGWA permission for ground water extraction, Non-installation of pollution control devices, Non-plantation of tree, Non-installation of STP, Non-installation of Solid waste treatment & OWCS unit, illegal ground water extraction, illegal operation of DG Sets at site, 10% recreational space of is not developed as per norms, no soil preservation, no soil and ground water test, illegal construction of basements, no use of eco-friendly building material for construction etc."

2. Vide order dated 22.10.2019, the Tribunal required a joint Committee of SEIAA and State PCB to verify facts and furnish a report. Accordingly, the said joint Committee filed its report on 07.01.2020 after site visit on 15.12.2019 in tabular forms as follows:-

Sr. No.	***Point examined***	***Remarks***
1.	*The Project proponent has not complied with environmental norms by non-obtaining of mandatory prior Environmental Clearance, Consent to Establish, Consent to Operate.*	*As per Architect certificate dated 19.11.2019 PP has carried out construction from 2007 for BUA-37930.6 sqm. (FSI-18991.92 sqm. & Non FSI- 18938.68 sqm) without obtaining prior Environmental Clearance as per EIA Notification 2006, non-obtaining consent to Establish, Consent to operate under Water (P &CP) Act 1974 & Air (P & CP) Act, 1981*
2.	*PP has not obtained CGWA permission for ground water extraction*	*There is one bore well in the premises and PP has not obtained CGWA permissions for the extraction ot ground water.*
3.	*PP has not provided pollution control devices, Non installation of STP*	*PP has provided underground STP of capacity 212 KLD Of MBBR however same is unscientific and ill ventilated.*
4.	*PP has not provided Solid Waste treatment & OWC units.*	*PP provided vermicomposting pit for the treatment of organic waste. But same is not in operation.*
5.	*Illegal operations of DG Set at site*	*PP has installed one DG Set of 240 KVA capacity without obtaining consent from MPC Board.*
6.	*10% recreation space is not developed as per norms*	*PP has provided 10 % open area. However it is observed that entire reserved open space is on podium. PP has constructed club house and swimming pool in this podium area*
7.	*No soil preservation, no soil &ground water test, non-provision of solar energy*	*PP unable to give details of soil preservation for the A, B, C, D & E building.*

		For proposed Bldg. No. F Excavation is carried out one year ago. The excavated material is stored on the adjacent amenity plot which is handed over to PMC. For storing excavated material on this plot. Project Proponent has not obtained any permission from local body. *PP representative unable to produce soil & ground water test report.* *PP has not provided solar energy system for energy conservation.*
8.	*Illegal construction of basements*	*PP has not constructed any basement.*

3. Reply has been filed by the Project Proponent, SEIAA and State PCB. The PP has also filed I.A. No. 66/2021 seeking dismissal of the OA and compilation of judgments. Reply of SEIAA and State PCB is on the pattern of the joint Committee report already quoted above.

4. **According to SEIAA**, prior EC was required but was not sought before commencement of the project. However, the PP applied for EC on 08.08.2018 which was found to be a case of violation. EC was sought for total plot area of 26,000 m^2, FSI area of 24940.54 m^2, Non FSI area of 21628.67 m^2 and total BUA of 46,569.21 m^2. Project proponent informed that the total constructed area on site is 44841.72 m^2.

5. **Stand of the MPCB** is that in view of non-compliances noticed by the joint Committee, the State PBC issued directions to stop construction activities on 04.01.2020 till requisite consent and EC are obtained. Compensation has been assessed based on period of violation as per formula adopted by CPCB which works out to Rs. 15,99,09,375/-.

6. **The stand of Pune Municipal Corporation (PMC)** is that commencement certificate was granted on 31.03.2017 subject to requisite

consents/EC. Since EC was not produced, PMC issued stop work order on 11.12.2019.

7. **Stand of Secretary, Urban Development** is also that the project is in violation of the statutory requirements.

8. **Stand of Project Proponent** in I.A. No. 66/2021 is that the application is not maintainable and barred by limitation. Cause of action for the application arose on 17.03.2007 when the plan for construction was sanctioned. The applicant has no *locus standi* to file the application. There is no damage to the environment. Compilation of judgments has been filed on the point of limitation. Affidavit of the PP filed on 21.10.2020 is that the project "Ekta California" has been completed. Wing "F" known as "Florida" ("Ekta Florida") is proposed. Fremont, Palmdale, Oakland, Santa Monica and Santa Clara are also proposed for which occupation certificates have been granted in 2015 and 2016. Club house has been completed in 2016 and commencement certificate has been obtained in 2017. The threshold of 20,000 sq. mtrs. has not been crossed so as to attract the requirement of EC. Built up area was not defined in EIA Notification of 2006 but the same was defined as per DCR. There was vagueness in the concept of built up area which was clarified by notification dated 04.04.2011 to include basement. Consents under Water (Prevention and Control of Pollution) Act, 1974 and Air (Prevention and Control of Pollution) Act, 1981 are not required in view of judgement of the Delhi High Court dated 23.01.2012 in *LPA No. 895 of 2010, DPCC vs. Splendor Landbase*. Additional affidavit has been filed by the PP in response to the joint Committee report on 21.02.2022 denying the allegations found by the joint Committee. It is stated that built up area should be taken as equal to the FSI area only. No consent under the Water

and Air Acts are required. The PP has complied all environmental norms. The PP has relied upon judgment of the Hon'ble Supreme Court dated 09.12.2021 in *Special Leave to Appeal (C) Nos. 11226-11227/2020, Electrosteel Steels Ltd. Vs. Union of India & Ors.* wherein earlier judgment in *Alembic Pharmaceuticals Ltd. v Rohit Prajapati & Ors.*[1] holding that prior EC is mandatory was held to be distinguishable, having regard to the policy of MoEF&CC for ex-post facto EC instead of closure of the project, to give effect to the principle of "Proportionality" laid down in *Lafarge Umiam Mining Private Limited v. Union of India, (2011) 7 SCC 338*. The policy in question is SOP dated 07.07.2021 issued by the MoEF&CC, permitting ex-post facto EC in violation cases, subject to payment of penalty at the rate of 1% of the total project cost, where project has not commenced and an additional of 0.25% of total turnover, where project had already commenced.

9. We have heard learned Counsel for the parties, perused the record and considered rival submissions. From the resume of pleadings and submissions made, questions for consideration are whether the present petition is maintainable and within limitation, whether there is a violation of environmental norms by the PP in question and if there is such violation, the remedial action required.

Maintainability and Limitation

10. It is patent from the report of the joint Committee that the built up area of the project is more than 20,000 sq. mtrs. which calls for EC. The PP has itself applied for EC on 08.02.2018 with the SEIAA, Maharashtra. If there are violations, the petition has to be held to be maintainable.

[1] 2020 SCC OnLine SC 347

Starting point of limitation is not the approval of the plan, as contended by the PP but the violation in going ahead with construction beyond 20,000 sq. mtrs. without requisite EC and consents and violating environmental norms. The judgments on limitation relied upon by the PP are also not applicable in view of the undisputed factual situation of the present case. Thus, the petition is maintainable and is within limitation which is five years from the date of cause of action, under section 15(3) of the NGT Act.

Violations and Remedial action

11. The violations are patent. The project involves construction with built up area more than 20,000 sq. mtrs. As held in Goel Ganga Developers India (P) Ltd. v. Union of India, (2018) 18 SCC 257, FSI and non FSI both are part of built up area. Observations in the said judgment in para 17 are:

> "**Therefore, the authority granting EC may lay down conditions which the project proponent must comply with. While doing so, such authority is not concerned whether the area to be constructed is FSI area or non-FSI area. Both will have an equally deleterious effect on the environment. Construction implies usage of a lot of materials like sand, gravel, steel, glass, marble, etc., all of which will impact the environment. Merely because under the municipal laws some of this construction is excluded while calculating the FSI is no ground to exclude it while granting the EC. Therefore, when EC is granted for a particular construction it includes both FSI and non-FSI areas. As far as environmental laws are concerned, all covered construction, which is not open to the sky is to be treated as built-up area in terms of the EIA Notification dated 14-9-2006."**

12. The judgment of Delhi High Court is not applicable to the present fact situation which is governed by statutory notification dated 14.9.2006, which was not the situation in the case before Delhi High Court.

13. Judgment in Electrosteel Steels Ltd. Vs. Union of India, supra, that ex-post facto EC can be granted does not help the PP. Even if ex post facto EC is granted, PP has to be held accountable for past violations.

14. Penalty of 1% or additional penalty of 0.25% laid down by the MoEF&CC as a condition for granting ex post facto EC is different from compensation for past violations. Such compensation has to be on the principle of restoration considering nature and extent of violations and paying capacity of the PP. Several variables have to be considered as held inter alia in *M.C Mehta & Anr v. Union of India*[2], *Sterlite Industries (India) Ltd. v. Union of India* [3], *Goel Ganga Developers India Pvt. Ltd. v. UoI*[4], *Alembic Pharmaceuticals Ltd. v Rohit Prajapati & Ors.*[5] *and Mantri Techzone Pvt. Ltd. V. Forward Foundation and Ors.*[6]. The standard formula adopted by the CPCB based on standard amount of compensation multiplied by period of violation can apply in absence of relevant data of project cost and cost of restoration. In the present case, the amount of compensation assessed appears to be roughly 10% of the project cost, though worked out by a different formula. The same can be accepted, subject to the compliance being ensured within next three months in respect of payment of compensation, obtaining requisite ex post facto EC and necessary Consents, apart from all other compliances in the light of the joint Committee report. We accept the report of the joint Committee with regard to the violations and require the Project Proponent to remedy the same within three months.

15. Till compliances and payment of compensation assessed, stop work order will remain in force. The PP will not extract any further ground water without requisite consent. The DG set will also not be operated without requisite consents.

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[2] (1987) 1 SCC 395
[3] (2013) 4 SCC 575
[4] (2018) 18 SCC 257
[5] 2020 SCC OnLine SC 347
[6] 2019 SCC online SC 322, Para 43-47

16. If there is further delay, the PP will be liable to pay further compensation, as may be assessed by the PCB.

17. The amount of compensation has to be utilised for restoration of environment as per action plan to be prepared by the State PCB, PMC, DM Pune, in the light of District Environment Plan.

The application is disposed of.

If any grievance survives, it will be open to the aggrieved party to take remedy in accordance with law.

All pending IAs will also stand disposed of.

Adarsh Kumar Goel, CP

Sudhir Agarwal, JM

Prof. A. Senthil Vel, EM

Dr. Vijay Kulkarni, EM

Dr. Afroz Ahmad, EM

March 23, 2022
Org. Application No. 64/2019(WZ)
(I.A. No. 101/2019, I.A. No. 66/2021 & I.A. No. 18/2022)
SN

HIGH COURT OF JUDICATURE AT BOMBAY
1979

IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.504 OF 2012

Naresh Janardhan Mali ..Petitioner
Versus
The State of Maharashtra & Ors. ...Respondents.

Mr. Shaikh Yusuf Ali i/b. S. Mohamedbhai & Co., for respondent No.4.
Mr. Niranjan Pandit, AGP for State.

CORAM: MOHIT S. SHAH, C.J. &
RANJIT MORE, J.
DATED : 12 March 2012.

P.C.

Learned A.G.P., for the State of Maharashtra in the Environment Department on instructions from Mr. S.K. Purkar, Law Officer, Environment Department states that the State Government in Environment Department has not granted any approval to the Slum Rehabilitation Scheme of respondent Nos. 3 and 4. It is further submitted that the impugned order dated 3 January 2012 has been passed by the Slum Rehabilitation Authority on the basis of letter dated 2 December 2011 by the Maharashtra Coastal Zone Management Authority and that even if MCZMA has granted any environment clearance, it does not mean that the environment clearance is not required to be obtained by respondent Nos.3 and 4 from the State Government in the Environment Department. It is further stated that the stop work notice issued by the State Government in the Environment Department on 28 July 2011 (Exhibit F page 37) is still not withdrawn by the State Government.

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HIGH COURT OF JUDICATURE AT BOMBAY
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2. In view of the above submissions, notice to respondent Nos. 2 to 4 returnable on 27 March 2012. Mr. Pandit, A.G.P., waives notice for respondent No.1 and Mr.Shaikh Yusuf Ali waives notice for respondent No.4. Respondent Nos.2 and 3 shall be served by Advocate's notice.

CHIEF JUSTICE

(RANJIT MORE, J.)

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.504 OF 2012

Naresh Janardhan Mali ... Petitioner
Versus
The State of Maharashtra and others ... Respondents

Mr. Niranjan pandit, Assistant Government Pleader for respondent No.1.
Mr. Mukul Taly with Ms. Mallika Taly, Mr.Yusuf Shaikh, Mr.Rakesh Misar i/by M/s. S. Mahomedbhai & Co. for respondent Nos.3 and 4.

CORAM : MOHIT S. SHAH, C.J. &
RANJIT MORE, J.

Thursday, *March 29, 2012*

P.C.

In this petition purporting to be PIL, the petitioner has challenged the letter dated 3 January 2012 (Exhibit `K' at page 49 of the petition) by which the Slum Rehabilitation Authority has withdrawn the stop-work notice dated 3 September 2011.

2. It is the petitioner's contention that respondent Nos.3 and 4 are carrying on the construction of more than 20,000 sq. meters. without getting environmental clearance from the State Government and, therefore, the Slum Rehabilitation Authority which had initially issued stop-work notice dated 3 January 2011 is not justified in withdrawing the same.

3. Our attention is invited to the applications made by respondent Nos.3 and 4 for construction of 28,000 sq.mtrs of built up area.

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HIGH COURT OF JUDICATURE AT BOMBAY

4. The learned counsel for respondent Nos.3 and 4 submits that at present respondent Nos.3 and 4 are only proposing to construct the rehabilitation tenements for resettling 370 slum dwellers out of whom 160 slum dwellers have already been shifted to the transit accommodation and, therefore, respondent Nos.3 and 4 cannot be restrained from proceeding with the project of constructing rehabilitation tenements. The learned counsel for respondent Nos.3 and 4 submits that when about 650 applications for environmental clearance are pending with the State Government, the applicant does not expect to get environmental clearance immediately and that since the CRZ notification requires environmental clearance from the State Government only when the construction is in excess of 20,000 sq.meters, no useful purpose will be served by requiring respondent Nos.3 and 4 not to proceed with the construction of rehabilitation tenements which will be only for construction of about 14,000 sq.mtrs and which would come to about 18,000 sq.mtrs if construction of closed area and area open to the the sky is taken into consideration.

5. Mr. Niranjan Pandit, learned Assistant Government Pleader has submitted that when the project proponent cannot undertake construction project for more than 20,000 sq.meters of built up area without obtaining prior environmental clearance, the project proponent cannot be allowed to commence the construction within the limits of 20,000 sq.meters also without obtaining prior environmental clearance.

6. In order to assure the Court that respondent Nos.3 and 4 will not undertake any construction activity equal to or exceeding the limit of 20,000 sq.meters as prescribed by notification dated 14 September 2006, Mr. Percy S. Chowdhry, Director of respondent No.3 company-developer has filed affidavit dated 29 March 2012 giving the following undertaking:-

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HIGH COURT OF JUDICATURE AT BOMBAY

> "8. I undertake to this Hon'ble Court that I as the Developer will not carry out any construction exceeding the limit i.e. equal to or beyond 20,000 sq.meters, as prescribed by the provisions of Notification No.S.O. 1533 dated September 14, 2006 on the land bearing CTS No.G/626 and G/164 A (Part) of Village Bandra under the Slum Rehabilitation Scheme for Narli Agripada (SRA) Co-operative Housing Society (Prop.) at Ram Krishna Mission Road, Khar (West), Mumbai, without obtaining prior environmental clearance from the State Environment Impact Assessment Authority (SEIAA)."

7. Having heard the learned counsel for the parties and also having regard to the fact that the project in question is for rehabilitation of 370 slum dwellers out of whom 160 slum dwellers have already shifted to the transit accommodation, and also having regard to the fact that a large number of environmental clearance applications are pending with the Government and that environmental clearance is required only when the built up area exceeds 20,000 sq.meters and having regard to the aforesaid undertaking given on behalf of respondent No.3, we are inclined to accept the submissions made on behalf of respondent Nos.3 and 4.

8. We accordingly accept the above undertaking and direct that while calculating the area, respondent Nos.3 and 4 shall take into account notification No. S.O.1533 dated September 14, 2006 under which built up area is to include covered construction and in the case of facilities open to the sky continue to be activity area. As per the current approvals, respondent Nos.3 and 4 have approval for built up area of 18,031.78 sq meters.

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HIGH COURT OF JUDICATURE AT BOMBAY

9. Accordingly, subject to the direction that respondent Nos.3 and 4 shall act in accordance with the aforesaid undertaking and shall not undertake any construction in excess of 20,000 sq.meters without obtaining prior environmental clearance from the Competent Authority of the State Government, the petition is disposed of.

CHIEF JUSTICE

RANJIT MORE, J.

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HIGH COURT OF JUDICATURE AT BOMBAY

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1916 OF 2012

Vardhman Developers Limited. ... Petitioner
Vs.
Union of India & ors. ... Respondents

Mr.Milind Sathe, Senior advocate with Mr.D.H.Mehta i/b Mr.Jitendra J.Shah, for petitioner.
Ms.Navina Kumai, for respondent No.1.
Mr.G.W.Mattos, AGP, for respondent No.2.
Ms Sharmila Modle for respondent No.4-(BMC).
Mr.Pravin Samdhani, Senior advocate with Mr.Mahesh Shah, for respondent No.5.

CORAM : MOHIT S. SHAH, C.J. &
N.M. JAMDAR J.
Tuesday, September 11, 2012.

P.C.:

Learned counsel for the petitioner-developer states that the petitioner has already obtained IOD from the Municipal Corporation of Greater Mumbai and the existing buildings have been demolished with the result that about 84 tenants have already vacated their tenements and the old buildings have been demolished. The petitioner however cannot proceed to construct even the rehabilitation tenements as the petitioner's application for Environmental Impact Assessment made on 15 June 2012 is still pending before respondent No.3.

2. Mr.Sathe learned Senior counsel for the petitioner invites our attention to the order dated 29 March 2012 in Writ Petition No.504 of

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HIGH COURT OF JUDICATURE AT BOMBAY

2012 and submits on the basis thereof that since respondent No.3-State Environmental Impact Assessment Authority has a large number of applications pending before it and the petitioner's application for environmental clearance under EIA Notification dated 14 September 2006 is at Serial no.296, petitioner will have to unnecessarily wait for a long period and in the meantime the petitioner will not be in a position to construct even upto 19,999 sq.metres. Learned counsel further submitted that the permission is required only if the construction is going to be 20,000 sq.metres or in excess thereof. Hence no prejudice will be caused to the respondents if the petitioner is permitted to put up construction upto 19,999 sq.metres, till respondents No.1 and 3 decide the petitioner's application.

3. Issue notice to the respondents returnable on 24 September 2012. Ms.Navina Kumai for respondent No.1, Mr.Mattos for respondent No.2, Ms Modle for respondent No.4 and Mr.Samdhani, learned counsel waive the service of notice on the respondents. Humdust is permitted to respondent No.3.

CHIEF JUSTICE

N.M.JAMDAR, J.

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1916 OF 2012

...

Vardhman Developers Limited ...Petitioner

v/s.

Union of India & Ors. ...Respondents

...

Mr.Milind Sathe, Senior Advocate with Mr.D.H.Mehta i/b Mr.Jitendra J. Shah for petitioner.
Ms.Navina Kumai for respondent no.1.
Mr.G.W.Mattos, AGP for State.
Ms.Sharmila Modle for respondent No.4-(BMC).
Mr.Parag Shah with Mr.Mahesh Shah for respondent No.5.

...

CORAM: MOHIT S. SHAH, C.J. &
N.M. JAMDAR, J.
DATE : 24 September 2012.

P.C.

Rule. Respective counsel waive service of rule.

2. In the facts and circumstances of the case, the matter is taken up for final hearing.

3. The petitioner-company is a developer, which has acquired development rights from respondent No.5-Mazgaon Dholkawala Co.operative Housing Society (proposed) having premises on City Survey No.366(part) and City Survey No.1/367 of Mazgaon Division, `E' Ward in Mumbai. The land admeasures about 13,098.96 sq.meters.

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HIGH COURT OF JUDICATURE AT BOMBAY

4. It is the petitioner's case that part of the above land is reserved for municipal primary school as per the Development Plan. However, some portion of the land was encroached upon by slum dwellers. The other land is occupied by 54 municipal tenants. In view of the above situation, the development agreement has been entered into between respondent No.5-society and the petitioner-developer, and the Municipal Corporation has also agreed to the arrangement under which-

(i) the petitioner will construct municipal school on the land admeasuring 1045 sq.meters and hand over the same to the Municipal Corporation free of costs.

(ii) the petitioner will also construct, free of costs, municipal employees quarters on the land of 1,952.84 sq.meters.

(iii) the Municipal Corporation will also get Rs.51,33,11,059/- over and above the above constructed properties.

(iv) all the municipal tenants/ and eligible slum dwellers will be rehabilitated and will be allotted permanent accommodation free of costs and they will also receive corpus fund each of the commercial occupants Rs.37,500 and each of the residential tenants/eligible slum dwellers Rs.18,750/-.

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HIGH COURT OF JUDICATURE AT BOMBAY
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5. According to the petitioner, the Municipal Corporation has already sanctioned the above proposal and the Municipal Corporation has also issued Intimation of Disapproval (IOD) under section 346 of the Mumbai Municipal Corporation Act on 25 April 2012. In accordance with the said redevelopment agreement, the petitioner has already demolished the existing structures on the land and is also paying compensation in lieu of transit accommodation to tenants and eligible slum dwellers, who are going to be allotted permanent accommodation free of costs.

6. The grievance of the petitioner in this petition is that clause 29 of the IOD provides that the petitioner cannot obtain commencement certificate before obtaining NOC from the Ministry of Environment and Forest. It is submitted that such NOC from Ministry of Environment and Forest is required because the total built up area of the project submitted by the petitioner is 46,200 sq. meters and as per the notification dated 14 September 2006 issued by the Ministry of Environment and Forest, prior environmental clearance is required from the Ministry of Environment and Forest, where the built-up area exceeds 20,000 sq.meters. The State Environmental Impact Assessment Authority, which is appointed for considering such proposal for environmental clearance has a large number of pending applications. The petitioner's application for prior environmental clearance was submitted to the said authority on 15 June 2012. However, the application is still at serial No.296 of the list of applications, from which so far only first ten applications have been considered by respondent No.3-the State

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Environmental Impact Assessment Authority. It is, therefore, submitted that the petitioner does not expect its application to be considered for another 6 to 12 months, which would unnecessarily delay implementation of the project, which would include construction of a municipal school free of costs, and construction of municipal employees quarters, free of costs, to be provided by the petitioner to the Municipal Corporation, and also construction of rehabilitation buildings for 54 municipal tenants and 29 eligible slum dwellers, free of costs. It is submitted that the total built-up area of this part of the project will be hardly about 11,000 sq.meters, which is well below the stipulated limit of 20,000 sq.meters, beyond which the developer cannot construct without obtaining prior environmental clearance.

7. Mr.Sathe, learned Senior Counsel for the petitioner relies upon the order dated 29 March 2012 passed by this Court in Writ Petition No.504 of 2012 and submits that in the said case this Court had permitted the concerned developer to take up construction of area up to 18,031.78 sq.meters, for which the concerned developer had obtained approval from the Municipal Corporation and had observed that having regard to the fact that a large number of environmental clearance applications are pending with the Government and that environmental clearance is required only when the built up area exceeds 20,000 sq.meters and an undertaking being given by the developer not to exceed construction of more than 20,000 sq.meters before getting environmental clearance, can be acted upon so that project for rehabilitation of slum dwellers is not delayed.

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8. The writ petition is opposed by Mr.Mattos, learned AGP appearing for respondent No.2-State of Maharashtra and respondent No.3-State Environmental Impact Assessment Authority. The learned counsel for Municipal Corporation, Gr.Mumbai also submits that since clause 29 of the IOD requires the petitioner to obtain NOC from the State Environment Impact Assessment Authority before applying for commencement certificate, prayer made by the petitioner may not be granted. Mr.Mattos further states the petitioner's grievance about delay in disposal of applications for environmental clearance is not justified, because it was on account of pendency of a large number of applications that the State Government has appointed another committee to expedite consideration of applications for environmental clearance for projects in Mumbai Metropolitan Region. The learned counsel for the Union of India states that she has no instructions in the matter.

9. Before proceeding further, we note that while issuing notice on this petition on 11 September 2012, we had indicated the petitioner's grievance and suggestion that prima facie no prejudice will be caused to any party if the petitioner is permitted to put up construction not exceeding 20,000 sq.meters, because environmental clearance is required only if the project involves construction of built up area exceeding 20,000 sq.meters.

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10. The learned counsel for the respondents have not addressed us on this particular issue of prejudice. As already indicated above, out of 46,200 sq.meters of built-up area for which the petitioner has been granted IOD by the Municipal Corporation about 11,000 sq.meters of the construction is going to be for the benefit of the municipal tenants, eligible slum dwellers and also the Municipal Corporation itself, because the petitioner is required to construct municipal staff quarters as well as municipal school, all free of costs. The learned counsel for the petitioner further states that since these buildings for the municipal school, municipal staff quarters and rehabilitation buildings for 84 families are going to have a separate foundation from the foundation for the free sale component buildings, the foundation for buildings with built up area of 11,000 sq.meters will not have the same impact which will be caused by laying foundation for construction of free sale component buildings for more than 30,000 sq.meters. The learned counsel further states that the petitioner undertakes not to construct built-up area in excess of the built-up area for municipal school, municipal staff quarters and the rehabilitation buildings for 84 families or any further construction on the basis of free FSI available to the developer on account of development of above buildings.

11. The learned counsel further states that the Director of the petitioner-company with an authority of the resolution of the Board of Directors will file an undertaking on the above lines within two weeks from today.

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12. Having heard the learned counsel for parties, we are of the view that since what the petitioner proposes to construct in the first phase is only about 11,000 sq.meters of built-up area and that too only construction of a municipal school buildings, to be provided free of costs to the Municipal Corporation, construction of municipal staff quarters, to be provided free of costs to the Municipal Corporation and rehabilitation building for municipal tenants and eligible slum dwellers, all aggregating to about 84, free of costs, and also payment of pro-rata amount to the Municipal Corporation out of Rs.51.33 crores, no prejudice will be caused to any of the respondent-authorities or to any public interest if the petitioner is permitted to put up above construction of about 11,000 sq.meters in the first phase, before the petitioner's application for prior environmental clearance is considered by respondent No.3-authority. As already indicated above, prior environmental clearance is required only where the proposed construction exceeds 20,000 sq.meters.

13. For the reasons aforesaid, the petition is partly allowed. Respondent No.4 is directed to consider the petitioner's application for grant of commencement certificate only for the construction of municipal school, municipal staff quarters and rehabilitation building for 84 families of municipal tenants/eligible slum dwellers, after the petitioner files an undertaking in terms of the contents of para 10 hereinabove.

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14. It is clarified that this order shall not create any equity in favour of the petitioner when its application for environmental clearance is considered by respondent No.3-Authority. It is also clarified that respondent No.3-Authority shall consider such proposal for environmental clearance on its own merits without being influenced by this order, but as expeditiously as possible.

15. Rule is made absolute to the above extent only.

CHIEF JUSTICE

(N.M. JAMDAR, J.)

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2809 OF 2012

1 Nahur Vivekanand Cooperative Housing
Society Ltd., Mulund (West), Mumbai

2 Silvex Developers Private Limited,
Santacruz (W), Mumbai .... Petitioners

vs

1 Union of India, through the Secretary
Ministry of Environment & Forests, New Delhi

2 State of Maharashtra, through
State Environmental Impact Assessment
Authority, Mantralaya, Mumbai

3 The Secretary,
State Environmental Impact Assessment
Authority, Mantralaya, Mumbai

4 Municipal Corporation of Greater Mumbai .... Respondents

Dr. Milind Sathe, Senior Advocate with Mr. Mukul Taly, Mr. Sheikh Yusuf Ali i/by M/s. S. Mahomedbhai & Co. for the petitioners.

Mr. Y. R. Mishra for respondent no.1.

Mr. Niranjan Pandit, AGP for State.

Ms. Sheela Tambe with Ms. Yamuna Parekh for Respondent No.4-BMC.

Mr. Altaf Khan i/by Anjali Awasthi for the Applicants.

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HIGH COURT OF JUDICATURE AT BOMBAY

CORAM: MOHIT S. SHAH, C.J.
AND ANOOP V. MOHTA, J.

DATE : January 16, 2013

P.C.:

Rule. Respective counsel waive service of Rule.

2 In the facts and circumstances of the case, the writ petition is taken up for final hearing forthwith.

3 Petitioner No.1 is a Cooperative Housing Society of occupants of buildings which were constructed by Maharashtra Housing and Area Development Authority (MHADA). MHADA has permitted the Petitioner No.1-society to redevelop the property under Regulation 33(5) of the Development Control Regulations for Greater Mumbai, 1991. Petitioner No.2 is the developer which has been given the development rights on the above land in Nahur, Mulund (West), Mumbai. The land admeasures 6164 square meters as per the property card.

4 By now, all the eight buildings which were constructed by MHADA have been demolished and 160 members of Petitioner No.1-Society have been shifted to transit accommodation or have been provided compensation by way of fixed rental amount to enable the members to take rented premises on their own as a temporary arrangement till new buildings are constructed by Petitioner No.2-developer. So far the Petitioners have applied for and have been granted building permission for rehabilitation buildings and free-sale buildings. According to the Petitioners, the Petitioners have been granted such permission in the form of IOD by the

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Municipal Corporation to the extent of 9691.92 square meters for the rehabilitation building and 5117.88 square meters for the free sale buildings, including staircase and lift area.

5 It is the Petitioners' case that under the Government of India Notification dated 14 September, 2006, environmental clearance is required to be obtained from the State Level Environmental Impact Assessment Authority (SEIAA or the Authority, for brevity) if the construction proposed to be put up is going to exceed 20,000 square meters. It is submitted that since the land has construction potential of more than 20,000 square meters, the Petitioners have applied for environmental clearance before the SEIAA in August 2012, but for the present, the Petitioners are only going to construct the rehab buildings to the extent of 9691.92 square meters and 5117.88 square meters for the free sale buildings, including staircase and lift areas. Thus, the total built up are proposed to be constructed by the Petitioners would only be 14809.8 square meters. The Petitioners submit that looking to about 300 such Applications for environmental clearance pending before the SEIAA, the Petitioners' application is not likely to be decided for a period of about two to three years. It is, therefore, submitted by learned counsel for the Petitioners that the Respondent Municipal Corporation be directed to consider the Petitioners' application for commencement certificate upto 14809.8 square meters without insisting for environmental clearance from SEIAA.

6 Mr. Niranjan Pandit, learned AGP appearing for the Respondent-Authorities does not admit that the SEIAA is likely to take three years for deciding the Petitioners application of environmental

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HIGH COURT OF JUDICATURE AT BOMBAY

clearance.

7 This aspect was considered by this Court while deciding Writ Petition No.1916/2012-Vardhman Developers Limited v. Union of India & ors decided on 24 September 2012 and this Court had noted the following grievance which was made in the said writ petition :

> "The State Environmental Impact Assessment Authority, which is appointed for considering such proposal for environmental clearance has a large number of pending applications. The petitioner's application for prior environmental clearance was submitted to the said authority on 15 June 2012. However, the application is still at serial No.296 of the list of applications, from which so far only first ten applications have been considered by Respondent No.3-the State Environmental Impact Assessment Authority."

8 Dr. Milind Sathe, learned senior counsel for the Petitioners has therefore submitted that having considered this aspect, this Court has passed orders dated 29 March 2012 and 24 September 2012 directing the Authorities to permit the concerned developers to take up the construction of area not exceeding 20,000 sq. meters for which the concerned developers had obtained approvals from the Municipal Corporation, after getting the undertaking from the developer that the developer shall not exceed construction of 20,000 sq.meters before getting environmental clearance, so that the projects for rehabilitation are not delayed.

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HIGH COURT OF JUDICATURE AT BOMBAY
1999

9 While deciding the aforesaid matters, this Court had also noted the objection of the learned AGP Mr. Niranjan Pandit that when the project proponent cannot undertake construction project for more than 20,000 sq.meters of built up area without obtaining prior environmental clearance, the project proponent cannot be allowed to commence the construction within the limits of 20,000 sq.meters, without obtaining prior environmental clearance. After considering the said submissions, this Court has held that the projects for rehabilitation of slum dwellers or redevelopment projects should not be unnecessarily delayed, even to the extent of construction upto 20,000 sq.meters when the developer is ready to give the undertaking not to exceed the construction beyond 20,000 sq.meters without first obtaining environmental clearance.

10 In the facts of the present case also, we find that 160 families occupying flats constructed by MHADA have moved out and all the buildings in the concerned locality have been demolished. Those families are occupying the transit accommodation of the area only about 200 sq. ft. Once the rehabilitation buildings are constructed, the members will get permanent accommodation to the extent of about 460 sq.ft carpet area. It is, therefore, obvious that members of Petitioner No.1-Society i.e. each of the 160 families is presently required to occupy small area of 200 sq.ft as against the larger areas to the extent of about 460 sq.ft which they would be getting on the construction of rehabilitation buildings, without contributing anything as the developer is required to recover the project cost by constructing free sale buildings.

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11 According to the Petitioners, the developer has already incurred expenditure to the tune of Rs. 21 crores and the developer will not be able to recover any amount unless and until the developer is also allowed to construct and sell the free sale buildings. According to the Petitioners, the Petitioners have already been granted the IOD for constructing 8581.68 sq. meters of built up area plus 1110.24 sq. meters for stair case and lift, totalling 9691.92 sq. meters for rehabilitation buildings. Similarly, the Petitioners have been granted IOD for constructing built up area of 4517.88 sq.meters plus 600 sq. meters for stair case and lift for free sale buildings. Thus the construction proposed to be put up by the Petitioners is not going to exceed 15,000 sq. meters which will be much less than 20,000 sq. meters of built up area which a person can construct without obtaining environmental clearance from SEIAA. When the Petitioners are standing in a long queue and the Petitioners application is not likely to be decided for quite some time, no useful purpose will be served by not permitting the Petitioners to put up any construction even upto 15,000 sq. meters. We, therefore, find considerable substance in the submission of the learned senior counsel for the Petitioners.

12 We also find substance in the submission of Dr. Sathe, learned senior counsel for the Petitioners that the case of residential buildings does not stand on the same footing as other projects like Power Generation Project where parties may not be allowed to put up any construction without getting prior environmental clearance. The proposed construction is to be up on the land which already had MHADA buildings for the last more than 20 years.

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13 Chamber Summons (Lodging) No.20/2013 has been filed by three applicants who are members of Petitioner No.1-society. According to the said applicants, the developer should not have been granted the development rights by Petitioner No.1-society.

14 Dr. Sathe, learned counsel for the Petitioners has opposed the chamber summons and submitted that apart from the fact that the applicants are only three out of 160 members, the applicants had filed various other proceedings challenging the development agreement between Petitioner No.1-society and Petitioner No.2-developer, and challenging NOC granted by MHADA and IOD granted by the Municipal Corporation, but in all those proceedings, the Courts have negatived their contentions. Reliance is placed on judgment dated 10 April 2012 of this Court in Appeal from Order No.378/2012, judgment dated 16 April, 2012 in Writ Petition No.87 of 2012 of this Court and also order dated 8 February 2012 passed by the Cooperative Court, Mumbai below Exhibit “5” in Case No. CC/II/272 of 2011 and also judgment dated 21 February, 2012 of the City Civil Court in Notice of Motion No.358/2012 in L. C. Suit No.568/2012.

15 Having heard the learned counsel for the parties, we are not inclined to allow the chamber summons for joining three members of Petitioner No.1-society when overwhelming majority of the other 157 members out of 160 have decided to go for redevelopment and all the buildings constructed by MHADA have been demolished. The three members cannot be allowed to stall the redevelopment project. In the present Petition, we are only concerned with the limited question as to whether the Petitioners should be allowed to construct upto 15,000 sq.

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HIGH COURT OF JUDICATURE AT BOMBAY

meters without getting environmental clearance.

16 For the reasons already recorded earlier in similar matters, we are inclined to accept the Petitioners submission' that when the Petitioners do not propose to put up construction in excess of 20,000 sq. meters and environmental clearance is required from the State Level Environmental Impact Assessment Authority only when the built up area is to exceed 20,000 sq. meters, no useful purpose will be served by not granting the reliefs as prayed for by the Petitioners. As indicated earlier, the Municipal Corporation has also issued IODs for rehabilitation buildings as well as for free sale buildings. The Municipal Corporation shall, therefore, consider the Petitioners application for commencement certificate on the basis of the amended IODs and such commencement certificate shall not in any case be for construction in excess of 15,000 sq.meters. We record the undertaking being given on behalf of the Petitioners that they will not put up construction in excess of 15,000 sq. meters as the Petitioners have already been granted IODs for construction upto 14809.8 sq. meters.

17 We make it clear that the area for which the Petitioners have been granted IODs as indicated in the affidavit dated 12 December, 2012 of Nance Silva, shall be subject to verification of the area by the concerned Municipal Authorities but the Petitioners' application for commencement certificate shall be considered without requiring the Petitioners to produce the environmental clearance from the State Level Environmental Impact Assessment Authority.

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HIGH COURT OF JUDICATURE AT BOMBAY
2003

18 Before parting with the matter, we cannot help placing on record our concern about the impact of the CRZ Regulations, 2011 and their implementation on development of Mumbai. While there can be no two opinions about the need to preserve ecology, one cannot overlook the fact that Mumbai, the commercial capital of the country, is an island city, already having thousands of structures within 500 meters and 1000 meters of the coast for several decades, even before coming into force of the CRZ Regulations of 1991 which are now replaced by CRZ Regulations of 2011. For regulating the development of Mumbai, therefore, the Ministry of Environment & Forest may consider appropriate regulatory measures which need not necessarily be the regulatory measures applicable to the other coastal areas.

In the last two years, this Court has come across several cases, where the parties have to wait for long for environmental clearances from State Level Environmental Impact Assessment Authority (SEIAA) or Maharashtra Coastal Zone Management Authority (MCZMA) for constructions on lands which were already having residential buildings for several decades. As noted in our order dated 24 September 2012 (quoted in para 7 hereinabove), during three months between 15 June 2012 to 24 September 2012, only 10 out of 300 pending applications were decided by SEIAA.

Similarly, in our order dated 14 June, 2012 in Writ Petition No.1047 of 2012, we had noted that for redeveloping a residential building on land admeasuring only 473 sq. meters (new survey No.1575 of Shivaji Park, Mahim Division) in CRZ II area, in place of old dilapidated and

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cessed building constructed prior to 1 September, 1940, the occupants of the building and the developer had to wait for a long period. In that order, we had quoted from the article in the Economist of 9 June, 2012 (pages 69 to 70) titled "Property in Mumbai-The minimum city" –

> "Rules inhibit new construction near the coast. Because of the thicket of red tape and litigation, only 3% of 15,000 rent-controlled buildings have been redeveloped.".

19 Non-appreciation of the above important aspects has been only retarding the growth of infrastructure as well as residential and commercial buildings in the city of Mumbai. While all such developments have to be properly regulated, it would be in the fitness of things if the State Government takes up the matter with the Government of India in the Ministry of Environment & Forests for evolving a separate regulatory regime for Coastal Zone Management in Mumbai.

20 Since the learned Advocate General was also present in the Court when this petition was heard and decided, the learned Advocate General has agreed to convey the above observations to the appropriate authorities in the State Government.

21 The Petition is accordingly disposed of in the above terms. There shall be no order as to costs.

CHIEF JUSTICE

(ANOOP V. MOHTA, J.)

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION LODGING NO.470 OF 2013

M/s.Saumya Buildcon Pvt. Ltd. ...Petitioner

Versus

Union of India & Ors. ...Respondents

Dr. Milind Sathe, Senior Advocate with Mr. Vishal Kanade and Mr. Hemant Shah i/b. IC Legal and Mira Lalani for petitioner.
Mr. N.D. Sharma with Mr. H.V. Mehta for respondent No.1.
Mr. Niranjan Pandit, AGP for respondent State.
Ms. Sharmila Deshmukh for respondent MCZMA.
Ms. Sharmila Modle for respondent B.M.C.

CORAM : MOHIT S. SHAH, C.J. &
ANOOP V. MOHTA, J.
DATE : 06 March 2013

ORAL JUDGMENT (PER CHIEF JUSTICE)

Rule. Respective counsel waive service of Rule. In the facts and circumstances, the matter is taken up for final hearing today.

2. The petitioner is a developer who had acquired development rights over the land situated and lying at Survey No.777, 778, 779 and 780 (Part) of Worli Division, Mumbai admeasuring 7872.14 sq. meters. The petitioner is in the process of implementing the project as contemplated under Article 33(7) of the Development Control Regulation, 1991.

3. The land belongs to respondent No.4 which had constructed flats for municipal tenants, who have formed a Co-operative Housing Society which is respondent No.6 herein. The petitioner had submitted

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HIGH COURT OF JUDICATURE AT BOMBAY

building plans to the Municipal Corporation for construction of buildings with 99 flats for rehabilitation of the municipal tenants and 9 shops, municipal school building, having ground plus 5 floors and a free sale building having various floors, for parking, club, etc. and first to 33 upper residential floors.

4. When the building plans were submitted in the year 2004 and they were approved, the applicable notification was Environment Impact Notification dated 14 September 2006 which lays down the following requirements for obtaining environmental clearance:-

> "2. **Requirement of prior Environmental Clearance (EC):-**
>
> The following projects or activities shall require prior environmental clearance from the concerned regulatory authority, which shall hereinafter referred to be the Central Government in the Ministry of Environment and Forests for matters falling under Category "A" in the Schedule and at State level the State Environment Impact Assessment Authority (SEIAA) for matters falling under Category "B" in the said Schedule, before any construction work, or preparation of land by the project management except for securing the land, is started on the project or activity:
>
> (i) All new projects or activities listed in the Schedule to this Notification.
>
> (ii) Expansion and modernization of existing projects or activities listed in the Schedule to this notification with addition of capacity beyond the limits specified for the concerned sector, that is, projects or activities which cross the threshold limits given in the Schedule, after expansion or modernization;
>
> (iii) Any change in product – mix in an existing manufacturing unit included in Schedule beyond the specified range."

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(See Paragraph 2 and 7)
LIST OF PROJECTS OR ACTIVITIES REQUIRING PRIOR ENVIRONMENTAL CLEARANCE:

Project or Activity	Category with threshold limit		Conditions if any
	A	B	

1	2	3	4	5
8	Building/Construction projects/Area Development projects and Townships.			
8(a)	Building and Construction project		> 20000 sq.mtrs and < 1m 50,000 sq. mtrs. of built-up area #	# (built up area for covered construction; in the case of facilities open to the sky, it will be the activity area)
8(b)	Townships and Area Development projects		Covering an area > 50 ha and or built up area > 1,50,000 sq. mtrs. ++	++ All projects under Item 8(b) shall be appraised as Category B1.

5. The petitioner also applied to the MCZMA which granted approval by communication dated 14 February 2007 at Exhibit “F”, in the following terms:-

> “Accordingly, the proposal was forwarded to the Ministry of Environment & Forests, Govt. of India for grant of necessary CRZ clearance vide letter No.MCZMA/54, dtd. 16/10/2006. Now, the Ministry of Environment & Forests, Govt. of India (1A-III Division) vide letter dtd.24/1/2007 (copy enclosed) accorded CRZ clearance for the above project, subject to the following conditions:”
> ….....

6. It is necessary to note that as per the criteria laid down in the aforesaid Notification dated 14 September 2006 the proposed construction was to the extent of 15,645.70 sq. meters. It is also necessary to note that as per Environment Impact Notification dated 14 September 2006 in the

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case of facilities open to the sky, it was to be treated as the activity area and not built up area and only covered construction was to be treated as built up area.

7. As per the IOD and the commencement certificate granted by the Municipal Corporation the petitioner proceeded to construct the buildings having 99 flats for rehabilitation of municipal tenants and 9 shops. The construction is almost complete. Similarly, the petitioner also proceeded to construct the Municipal School building of ground plus 5 floors and it is stated that the construction is almost complete.

8. It is necessary to note that when the petitioner was granted the MCZMA clearance in the year 2007 the built up area for the residential building and the shops was 6373.57 sq. meters and the built up area of the Municipal School building was 1045.54 sq. meters. However, by MOEF Notification dated 4 April 2011 the definition "built up area" was substituted as under:-

> "The built up area for the purpose of this Notification is defined as "the built up or covered area on all the floors put together including basement(s) and other service areas, which are proposed in the building/construction projects."

In other words, what was earlier known non-FSI area was not included in the definition of built up area but by the aforesaid Notification dated 4 April 2011 the definition of "built up area" was expanded to include construction of not only covered area, but also basement and other service areas which were earlier not included in the definition of built up area. In view of the above Notification, the built up area of the residential building

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HIGH COURT OF JUDICATURE AT BOMBAY

for 99 flats and 9 shops was re-computed at 8720.51 sq. meters and the built up area of the municipal school was re-computed at 1196.16 sq. meters aggregating to 9916.67 sq. meters as against the previous area aggregating to 7419.06 sq. meters.

9. In view of the above amended Notification the built up area of the proposed sale component building which was earlier computed at 8226.57 sq. meters would now be 14,000 and odd sq. meters and aggregating all the three built up areas of the residential building, 9 shops, municipal school building and the free sale component building the aggregate area would work out to 39,681.13 sq. meters.

10. In view of the above, as the construction area is to exceed 20,000 sq. meters, the petitioner is required to obtain environmental clearance from the State Expert Appraisal Committee (SEAC). The SEAC would forward its recommendation to the State Environment Impact Assessment Authority (SEIAA). The petitioner has accordingly submitted its application to the SEAC in June 2011. However, by the impugned decision dated 16 November 2011 the petitioner has been informed about the following decision :-

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"**Decision:**

The case was discussed on the basis of the presentation made by the proponent. The proponent is requested to **comply** with the following observations:

1. The proponent shall obtain CRZ Clearance as per 4(d) of CRZ Notification 2011 which states that any construction involving more than 20000 m^2 BUA in CRZ-II, prior recommendation of concerned CZMA shall be essential for considering grant of environmental clearance as per EIA Notification 2006 or grant of approval by the relevant planning authority.

2. The proponent shall submit letter from MCGM (Municipal Corporation of Greater Mumbai) with detailed clarification on the following points:

a. Total area of the plot nearing C S No.777, 778 and 780.

b. Plot area on which "Prerna Co-op. Housing Society" is proposed.

3.

c. Remaining plot area and details, if any other scheme, proposed thereon.

4. The draft general guidelines of MCGM dated 16th July 2011, including fire safety norms, for High Rise Building Proposals, shall be complied with.

5. Details of car park arrangement calculations."

11. In the meantime, the petitioner has also been served with stop work notice dated 21 June 2011 from the Secretary, Environment Department of the State Government stating that since the petitioner's project construction is more than 20,000 sq. meters, it was obligatory on the petitioner's part to obtain prior environmental clearance from competent authority as per EIA Notification dated 14 September 2006

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before starting any building construction activity. The notice further stated that since the petitioner had failed to obtain prior environmental clearance before starting construction activities, there is violation of Notification dated 14 September 2006 and, therefore, the petitioner must stop the construction work forthwith. Consequently the Municipal Corporation of Greater Mumbai has also issued stop work notice dated 27 July 2011.

12. According to the petitioner the petitioner has complied with both the stop work notices and the petitioner has filed this petition under Article 226 of the Constitution challenging the above decision dated 16 November 2011 and the aforesaid two stop work notices.

13. Dr.Milind Sathe, learned counsel for the petitioner has urged the following contentions:

(i) That the petitioner's project was approved and the CRZ clearance was granted on 14 February 2007 by MCZMA. The project was for construction with built up area of only 15,645.70 sq. meters in view of the definition of “built up area” then prevailing. In fact, the petitioner has only constructed the residential building for rehabilitation of municipal tenants for 99 flats, 9 shops and the Municipal School building of ground plus 5 floors which is to be handed over to the Municipal Corporation of Greater Mumbai free of costs.

(ii) In any view of the matter, even the built up area of the sale component building added to the above constructions

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would be within 20,000 sq. meters (15,645.70 sq. meters as per the definition of "built up area" when CRZ clearance for the project was granted by MCZMA). The changed definition of built up area as per Notification dated 11 April 2011 cannot apply to a project which was sanctioned prior to 11 April 2011.

(iii) In any view of the matter, even if the changed definition under Notification dated 11 April 2011 were to apply to the petitioner's project, the petitioner has already applied to SEAC for environmental clearance for a project having built up area exceeding 20,000 sq. meters and the petitioner is awaiting the said environmental clearance, but there can be no requirement again to go back to MCZMA for getting CRZ clearance which was already granted earlier on 14 February 2007. The proposed construction at the time of grant of CRZ clearance on 14 February 2007 and the proposed constructions now are for the same construction areas and merely because there is change in the definition of built up area, there is no justification for the State Expert Appraisal Committee to require the petitioner to obtain CRZ clearance again from MCZMA.

(iv) Without prejudice to the above submissions, it is submitted that in any view of the matter since the environmental clearance from State Expert Appraisal Committee and the State Environment Impact Assessment Authority under the EIA Notification dated 14 September,

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2006 is required only when the construction exceeds 20,000 sq. meters, the petitioner is entitled to continue with the construction which would not exceed 20,000 sq. meters.

(v) Reliance is placed on orders dated 16 January 2013 in Writ Petition No.2809 of 2012 and 24 September 2012 in Writ Petition No.1919 of 2012 and other matters in support of the contention that the authorities cannot be permitted to object to the developer proceeding to construct upto 20,000 sq. meters without obtaining environmental clearance which is required to be obtained only when the construction is to exceed 20,000.

14. On the other hand, Ms. Sharmila Deshmukh, learned counsel for MCZMA and Mr. Niranjan Pandit, learned A.G.P., for the State Authorities have opposed the petition and submitted that the notification dated 4 April 2011 of the MOEF is merely clarificatory amendment relating back to the original Notification dated 14 September 2006. As per the amended definition of built up area, even the open construction areas are included in the built up area and since the petitioner's application to the said Expert Appraisal Committee itself indicates that as per the amended definition, the total construction area is going to be 39681.13 sq. meters, the authorities are justified in requiring the appellant to obtain not only environmental clearance, but also CRZ clearance from MCZMA. It is submitted that when the MCZMA had granted clearance on 14 February 2007 it was on the basis of the built up area being less than 20,000 sq. meters. Now that the built up area is going to exceed 20,000 sq. meters fresh CRZ clearance will be required from the MCZMA.

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15. It is further submitted that the petitioner cannot be allowed to put up any construction and that the authorities are justified in issuing the stop work notices as the project is for construction exceeding 20,000 sq. meters of built up area.

16. As regards the decision of the State Expert Appraisal Committee that the petitioner should obtain CRZ clearance as per the CRZ Notification of 2011, when construction area remains the same, two views may be possible on the question whether the petitioner having obtained CRZ clearance from MCZMA with proposal for built up area upto 20,000 sq. meters should again be required to approach MCZMA for CRZ clearance when the built up area as per the amended definition is exceeding 20,000 sq. meters. However, in matters of environment concern, we would prefer to err on the safer side. We, therefore, do not find any fault with the decision of the State Appraisal Committee requiring the petitioner to move the MCZMA for environmental clearance because now the built up area of the project is computed at 39,681.13 sq. meters. We do not accept the petitioner's contention that because the petitioner's project was earlier granted CRZ clearance before 4 April 2011, the clarificatory amendment provided by the said Notification will not apply to the petitioner's project. The amendment dated 4 April 2011 is clarificatory as indicated in the preamble to the Notification itself. The change in the definition of built up area from merely covered area to areas including basement and service areas will significantly increase the construction area. After all, CRZ clearance is all about construction activity in a coastal zone and, therefore, merely because the construction is open to sky would not make it any less the construction than the construction of the covered area. We, therefore, find considerable substance in the submission made

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on behalf of the MCZMA that the Notification dated 4 April 2011 will apply to the pending projects as well, meaning thereby the projects are not already executed.

17. We do, however, find some substance in the last submission made by the learned counsel for the petitioner that even if the petitioner is required to obtain CRZ clearance from MCZMA again on the basis that the built up area of the project will exceed 20,000 sq. meters, the petitioner is entitled to get the same reliefs which this Court has been granting in case of many other parties where similar prayer was made. In **Writ Petition No.1916 of 2012 (Vardhman Developers Limited vs. Union of India & Ors.**) and **Writ Petition No.2809 of 2012 (Nahur Vivekanand Co-operative Housing Society Ltd. & Anr. vs. Union of India & Ors)**. We have rejected a similar contention urged on behalf of the respondent authorities that when the project proponent cannot undertake construction project for more than 20,000 sq. meters of built up area without obtaining prior environmental clearance, the project proponent cannot be allowed to commence the construction within the limits of 20,000 sq. meters, without obtaining prior environmental clearance. This Court has held that when clearances are required only for projects with built up area exceeding 20,000 sq. meters, redevelopment projects for residential buildings should not be unnecessarily delayed even to the extent of construction upto 20,000 sq. meters when the developer is ready to give undertaking not to exceed the construction beyond 20,000 sq. meters without first obtaining environmental clearance. This Court has noted that the Authorities take considerable time for taking a decision on the application for environmental clearance or for CRZ clearance. In the meantime the redevelopment projects are being delayed. This Court has been granting

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relief in such cases on the basis that even if ultimately the authorities were to reject the applications for clearance, there will be no illegality in so far as the developer has made construction upto 20,000 sq. meters.

18. Following the orders in the aforesaid cases i.e. orders dated January 16, 2013 in Writ Petition No.2809 of 2012 and 24 September 2012 in Writ Petition No.1916 of 2012, we are of the view that the respondent authorities are not justified in calling upon the petitioner to stop work even within 20,000 sq. meters of work, particularly when the petitioner has already completed the construction of residential building for rehabilitation of 99 municipal tenants, 9 shops required for the ordinary needs of the residents and municipal school constructed by the petitioner for the benefit of the Municipal Corporation all free of costs. As regards the free sale building also, learned counsel for the petitioner gives an undertaking that the petitioner will construct only a portion of the free sale building to the extent that the aggregate construction of the rehabilitation building for 99 flats, 9 shops, municipal school building and the free sale building will not exceed 20,000 sq. meters, without first obtaining the CRZ clearance from the MCZMA and the environmental clearance from the State Environment Impact Assessment Authority.

19. Accordingly, the petition is partly allowed and the stop work notices dated 21 June 2011 issued by the Secretary, Environment Department, (Exhibit “I”) and 27 July 2011 (Exhibit AA) issued by the Executive Engineer (Building Proposal, City) Municipal E-Ward of the Municipal Corporation of Greater Mumbai shall stand modified to the effect that the petitioner is restrained from putting up any construction in excess of 20,000 sq. meters computed on the basis of the MOEF

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Notification 4 April 2011, including the construction of the rehabilitation building for 99 flats, 9 shops and the municipal school building already constructed or almost constructed. An undertaking to this effect shall be filed by a Director of the petitioner company within two weeks from today and the petitioner shall commence construction only after such an undertaking is filed before this Court.

20. It is clarified that the above direction is given only in respect of the environmental clearance and the CRZ clearance and this judgment does not exempt the petitioner from complying with the other legal requirements in the matter of construction of the buildings in question.

21. It will be open to the petitioner to pursue their application for CRZ clearance before the MCZMA and for environment clearance before the State Expert Appraisal Committee and the State Environment Impact Assessment Authority.

22. Writ Petition accordingly stands disposed of.

CHIEF JUSTICE

ANOOP V. MOHTA, J.

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

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 654 OF 2013

Tridhaatu Ventures LLP … Petitioner

Versus

State of Maharashtra & Ors. … Respondents

...

Dr.Milind Sathe, Senior Advocate with Mr. Saket Mane i/b. Vidhii Partners for the petitioner.

Mr. D.J. Khambata, Advocate General with Ms. Geeta Shastri, AGP for respondent State.

Ms. Sharmila Modle for respondent-BMC.

CORAM: MOHIT S. SHAH, C.J. &
M.S.SANKLECHA, J.

DATE : 9 May 2013

P.C.

Rule.

Heard learned counsel for the parties on the question of interim relief.

2. Under Environment Impact Assessment Notification dated 14 September 2006 a person proposing construction exceeding 20,000 sq. mtrs is required to take environmental clearance from the Ministry of Environment & Forest (MoEF) through the State Environment Impact

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Assessment Authority (SEIAA). The relevant clause in the said Notification reads as under:-

> *" **Requirement of prior Environmental Clearance (EC):-** The following projects or activities shall require prior environmental clearance from the concerned regulatory authority, which shall hereinafter referred to be as the Central government in the Ministry of Environment and Forests for matters falling under Category `A' in the Schedule and at State level the State Environment Impact Assessment Authority (SEIAA) for matters falling under Category `B' in the said Schedule, before any construction work, or preparation of land by the project management except for securing the land, is started on the project or activity:*
>
> *(i) All new projects or activities listed in the Schedule to this notification.*
>
> *(ii) Expansion and modernization of existing projects or activities listed in the Schedule to this notification with addition of capacity beyond the limits specified for the concerned sector, that is, projects or activities which cross the threshold limits given in the Schedule, after expansion or modernization.*
>
> *(iii) Any change in product, mix in an existing manufacturing unit included in Schedule beyond the specified range."*
>
> *(emphasis supplied)*

3. Relevant portion of the Schedule in Clause (2) of the Notification reads as under:-

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2020

Project or activity	Category with threshold limit			Condition if any
	A	B		
8	Building/Construction projects/Area Development projects and Townships			
1	2	3	4	5
8(a)	Building and Construction projects		>20000 sq.mtrs and < 1,50,000 sq.mtrs. of built-up area	The built up area for the purpose of this Notification is defined as "the built up or covered area on all the floors put together including basement(s) and other service area, which are proposed in the building/construction projects.
8(b)	Township and Area Development projects.		Covering an area >50 ha and or built up area >1,50,000 sq.mtrs.++	All projects under item 8(b) shall be appraised as Category B1

4. The petitioner herein submits that it had applied for environmental clearance for a project of 40,000 & odd sq. mtrs., but the petitioner's application has been rejected by the State Expert Appraisal Committee on the ground that there will be violation of the Office Memorandum dated 7 February 2012 of the Ministry of Environment and Forests, which prescribes the minimum width of the road abutting which the proposed building is to be constructed. As per the said Office Memorandum for a building with height of 69 meters i.e. above 60 meters, the width of the road should be minimum 30 meters and desirable 45 meters.

5. The impugned decision dated 1 to 3 January 2013 of SEAC reads as under:-

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Item No.21: Proposed residential cum commercial development project `Sri Swati CHS' at CTS No.275, 27/1 to 276/1 to 16 & 277 village of Borla, Govandi.

The project proposal was discussed on the basis of the presentation made and documents submitted by the proponent, PP claimed that access to the project site is through a road junction having a width above 36 m. Hence, his case will not be affected by OM dated 7 February 2012. However, the Committee observed that the plot actually abuts on to 9.15 m wide road, and PP's contention is not acceptable. The project in its present form is not in accordance with the OM dated 7 February 2012. The PP may recast the project as per the above OM, if he so desires.
In view of the above, the proposal is delisted."

6. Dr. Sathe, learned senior counsel for the petitioner submits that the petitioner has challenged the above OM dated 7 February 2012 as the question of width of the road for proposed construction of the building is governed by Development Control Regulations for Greater Mumbai 1991 and not by any of the provisions of the Environment (Protection) Act, 1986 and Rules made thereunder. Relying upon Regulation 31 prescribing the height of building, it is submitted that the petitioner's case meets with the requirements of Regulation 31(1) and therefore, the State Expert Appraisal Committee had no authority to delist the petitioner's proposal. It is submitted that there is no other objection raised by the Committee except the above objection.

7. Learned counsel for the petitioner further relies upon the order dated 10 April 2013, wherein another Division Bench of this Court had an occasion to examine the challenge to the said OM and the Court made the following observations in the said order dated 10 April 2013:

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> *"5. In both the petitions, the challenge is to the same Office Memorandum dated 7th February, 2012 which purports to incorporate the guidelines regarding height of the buildings. The contention of the petitioners is that apart from the fact that the challenge is to the very authority of the Union of India to issue the Memorandum, in a City like Mumbai, several building projects will be stalled. The learned Senior Counsel appearing for the petitioner in Writ Petition No.1180 of 2012 invited our attention to the minutes of the 111th Meeting of Infrastructure and Miscellaneous Projects and CRZ held on 16/17th April, 2012 of the Ministry of Environment and Forest. In the meeting Item No.4.19 was as regard the impugned memorandum dated 7th February, 2012. After discussion, the Committee members were of the view that guidelines are advisory in nature and may not be considered as mandatory. "*
>
> *(emphasis supplied)*

In the said order the Division Bench also referred to the letter dated 27 April 2012 of the Chief Minister of the State of Maharashtra to the Minister of State for Environment and Forests of Union of India in the following terms:-

> *"6. The learned Government Pleader has placed on record a photocopy of letter dated 27th April, 2012 addressed by the Hon'ble Chief Minister to the Hon'ble Minister of State for Environment and Forests of Union of India, requesting that the Office Memorandum dated 7th February, 2012 should be kept in abeyance. In the said letter, he has stated that in the State like Mumbai most of the construction projects are those of redevelopment of old, cessed, dilapidated buildings. It is also pointed out that there are schemes of Slum Rehabilitation (SRA) in the City of Mumbai. It is pointed out that the restrictions in the guidelines incorporated in Memorandum dated 7th February, 2012 will hamper the progress of the said projects and the construction activities would be*

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brought to stand still. It is pointed out that the width of the roads in most of the States is well below the requisite standards prescribed by the Memorandum."

8. It is submitted by learned counsel for the petitioner that in view of lack of jurisdiction of the authority under the Notification of 2006 and in view of the fact that guidelines contained in OM dated 7 February 2011 are clearly advisory in nature and cannot be treated as mandatory, the petitioner's proposal ought not to have been delisted for non-compliance with the said OM, when the petitioner complies with the DCR 1991 prescribing width of the road.

9. Learned counsel for the petitioner submits that in any view of the matter the petitioner is presently concerned with rehabilitation of 75 members of Sri Swati Co-operative Housing Society. Flats of 78 members of the society were demolished in 2010 for the purpose of redevelopment. The Municipal Corporation has already granted IOD and Commencement Certificate for 4,935 sq. mtrs for three floors, and the petitioner being developer for the said society has submitted plans for total construction of 19,833.41 sq. mtrs. including 4,935 sq. mtrs. already constructed. It is submitted that, however, the Municipal Corporation is not considering the petitioner's application on the ground that the petitioner has not obtained environmental clearance under the aforesaid EIA Notification dated 14 September 2006.

10. Learned counsel submits that the question of obtaining environmental clearance arises only when the petitioner proposes to construct more than 20,000 sq. mtrs. of built up area. The petitioner's proposal for the construction of more than 20,000 sq. mtrs. has been

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delisted of non-compliance of OM dated 7 February 2011, which the petitioner has already challenged in the present petition. However, merely because those contentions will be dealt with later on, that should not be treated as ground for not permitting the petitioner to put up construction of 19,833.41 sq. mtrs. built up areas, which is necessary for accommodating 75 members of `Sri Swati Co-operative Housing Society.'

11. Learned counsel has placed reliance on judgment dated 6 March 2013 in Writ Petition (l) No.470 of 2013 and orders passed in several other matters being orders dated 16 January 2013 and 24 September 2012.

12. On the other hand, learned Advocate General has opposed the grant of any interim relief and has submitted that granting any such permission would amount to violation of Notification dated 14 September 2006, which provides that expansion and modernization of existing project or activities scheduled in the Notification which crosses the threshold limits given in the schedule will require prior environmental clearances. It is submitted that the project of the construction of more than 20,000 sq. mtrs. cannot be divided into two phases and the petitioner cannot be allowed to contend that since the first phase of the project is less than 20,000 sq. mtrs. no prior environmental clearance will be required. Reliance is also placed on the OM dated 19 August 2010 issued by the Government of India in Ministry of Environment & Forests, which provides that no activities relating to any project can be undertaken at site without obtaining prior environmental clearance as is mandated under the EIA Notification,

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2006 except fencing of the site to protect it from getting encroached and construction of temporary sheds for the guards.

13. Learned Advocate General further submitted that environment clearance is required to monitor, control the local construction activities, water/air/noise pollution, traffic congestion and other construction activities affecting human health by various standards, code and rules laid down under the Environment (Protection) Act and Rules which other departments like Municipal Corporation for Greater Mumbai, Maharashtra Pollution Control Board will not be able to monitor. It is submitted that proper infrastructure facilities are required to be provided from inception of the construction activity from the environment point of view.

14. It is brought to our notice that on the basis of IOD and Commencement Certificate granted by the Municipal Corporation, the petitioner has already constructed 4,935 & odd sq. mtrs. of built-up area and photograph indicating the present construction is placed on record.

Learned counsel for the petitioner submitted that further construction upto to 19,000 sq. mtrs. including 4,935 & odd sq. mtrs. built up area will not require any further digging in the earth or laying any further foundation structure. It is, therefore, submitted that apprehension of the respondent-authority that even if the proposed construction in the first phase will be less than 20,000 sq. mtrs, but the foundation structure and other facilities and amenities for bigger project may cause serious damage to the environment will not arise in the facts of the present case.

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15. We have given anxious consideration to the rival submissions on the question of interim relief.

16. In judgment dated 6 March 2013 in Writ Petition (L) No. 470 of 2013, this Court has dealt with a similar controversy and held as under:-

> *"17. We do, however, find some substance in the last submission made by the learned counsel for the petitioner that even if the petitioner is required to obtain CRZ clearance from MCZMA again on the basis that the built up area of the project will exceed 20,000 sq. meters, the petitioner is entitled to get the same reliefs which this Court has been granting in case of many other parties where similar prayer was made. In Writ Petition No.1916 of 2012 (Vardhman Developers Limited vs. Union of India & Ors.) and Writ Petition No.2809 of 2012 (Nahur Vivekanand Cooperative Housing Society Ltd. & Anr. vs. Union of India & Ors). We have rejected a similar contention urged on behalf of the respondent authorities that when the project proponent cannot undertake construction project for more than 20,000 sq. meters of built up area without obtaining prior environmental clearance, the project proponent cannot be allowed to commence the construction within the limits of 20,000 sq. meters, without obtaining prior environmental clearance. This Court has held that when clearances are required only for projects with built up area exceeding 20,000 sq. meters, redevelopment projects for residential buildings should not be unnecessarily delayed even to the extent of construction upto 20,000 sq. meters when the developer is ready to give undertaking not to exceed the construction beyond 20,000 sq. meters without first obtaining environmental clearance. This Court has noted that the Authorities take considerable time for taking a decision on the application for environmental clearance or for CRZ clearance. In the meantime the redevelopment projects are being*

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HIGH COURT OF JUDICATURE AT BOMBAY
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> *delayed. This Court has been granting relief in such cases on the basis that even if ultimately the authorities were to reject the applications for clearance, there will be no illegality in so far as the developer has made construction upto 20,000 sq. meters."*
>
> *(emphasis supplied)*

17. Having heard learned counsel for parties, and in the facts and circumstances of the case and particularly in view of the fact that the width of the road is sufficient as required by the DCR 1991 and as far as OM is concerned, the same is treated as advisory and not mandatory and in the facts of the present case where the petitioner does not propose to make any further digging in the earth or laying any further foundation structure for the purpose of putting up construction upto to 19,000 sq. mtrs. of built-up area including 4935 sq. mtrs already put up by the petitioner, we are inclined to direct the respondent-Municipal Corporation to permit the petitioner to put up construction upto to 19,000 sq. mtrs. including 4935 sq. mtrs. already put up, subject to following conditions:-

(i) that the petitioner as well as the Chairman of 'Sri Swati Co-operative Housing Society' shall file undertakings stating that the petitioner and the society shall not put up any construction exceeding 20,000 sq. mtrs including the existing construction on the site being land CTS No.275, 275/1 to 276/1 to 16 & 277 village of Borla, Govandi.

(ii) that the petitioner will be putting up construction of 19,000 sq. mtrs for the purpose of accommodating 75 or maximum 78 members of `Sri Swati Co-operative Housing Society',

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whose flats have already been demolished in 2010 for the purpose of redevelopment and not for any other purpose.

(iii) that the petitioner shall not do any further digging on the ground for laying foundation and shall only continue with the construction on the existing construction by raising height of the building within the limits permissible as per the DCR 1991 and in accordance with plans which may be sanctioned by the Municipal Corporation.

(iv) that the petitioner will not claim equity on the basis of this order.

17. It is directed accordingly.

CHIEF JUSTICE

M.S. SANKLECHA, J.

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HIGH COURT OF JUDICATURE AT BOMBAY
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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO.852 OF 2013

...

M/s.Vision Developers ...Petitioner

v/s.

Union of India & Ors. ...Respondents

...

Dr.Milind Sathe, Sr.Advocate with Mr.Rampal Kohli for the petitioner.
Mr.G.W.Mattos, AGP for State.
Ms.D.B.Mistry for Union of India.

...

CORAM: MOHIT S. SHAH, C.J. &
R.V. GHUGE, J.
DATE : 21 June 2013

P.C.

Rule.

2. Mr.Mattos, AGP waives service on rule on behalf of respondents Nos. 2 & 3. Ms.Mistry, learned counsel waives service on rule on behalf of respondent No.1.

3. The Petitioner is in the process of developing the property on plot of land bearing CTS No.68A/1 and 68A/2, situated at Jogeshwari, Mumbai. The petitioner is the owner of land admeasuring 17,366.04 sq.mtrs. on the said plot of land. The petitioner proposes to construct six buildings viz.A, B, C, D, E and F, out of which Building A, Building C and Building D were already constructed and completed way back in the year 2000, and in the present petition the petitioner is seeking relief in respect of construction of Building B upto 10th floor and total

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construction upto 10th floor is going to be 19000 sq.mtrs. The Municipal Corporation has granted IOD for entire Building B for 20 floors and the commencement certificate is presently granted upto 6th floor for Wing No.1, 2 and 3 and upto 7th floor (part) and 8th floor(part) for Wing No.4.

4. On 7 September 2012 the petitioner applied for environmental clearance under Government of India Notification dated 14 September 2006 to the Member Secretary of SEAC (Exh.H to the petition).

5. The grievance of the present petitioner is that although the application was made on 7 September 2012 and the SEAC was required to decide the said application within 60 days and the next authority the State Level Environmental Impact Assessment Authority (SEIAA) was required to consider the application within next 45 days, authorities have not considered this application, and consequent delay is causing tremendous prejudice to the petitioner.

6. It is submitted by Dr.Sathe, learned counsel for the petitioner that in view of efflux of above time, the petitioner is deemed to have been granted an environmental clearance, but at this stage the petitioner is not required to press that contention as the petitioner submits that environmental clearance is required only where the project exceeds construction of built-up area of 20,000 sq.mtrs. For the present the petitioner is interested in constructing 19,000 sq.mtrs of built-up area in Building B.

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7. Learned counsel has placed reliance on various orders of this Court including the last order dated 9 May 2013 in Writ Petition No.654 of 2013.

8. Mr.Mattos, learned AGP appearing for respondents Nos. 2 & 3 as well as Ms.Mestry, learned counsel for respondent No.1 have opposed the grant of any interim relief on the ground that no construction can be put up even upto 20,000 sq.mtrs. without obtaining environmental clearance under the above Notification dated 14 September 2006.

9. Same contention , which is now being raised on behalf of respondents Nos. 1 to 3, was also raised by the learned Advocate General in the case of Tridhaatu Ventures LLP (Writ Petition No.654 of 2013) and by order dated 9 May 2013 this Court overruled that objection, as will be clear from submissions noted in paragraph 13 of that order and observations made in paragraph 16 of that order quoting our judgment dated 6 March 2013 in Writ Petition (L) No. 470 of 2013. The said observations are reiterated:

> 16. In judgment dated 6 March 2013 in Writ Petition (L) No. 470 of 2013, this Court has dealt with a similar controversy and held as under:-
>
> > "17. We do, however, find some substance in the last submission made by the learned counsel for the petitioner that even if the petitioner is required to obtain CRZ clearance from MCZMA again on the basis that the built up area of the

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HIGH COURT OF JUDICATURE AT BOMBAY
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project will exceed 20,000 sq. meters, the petitioner is entitled to get the same reliefs which this Court has been granting in case of many other parties where similar prayer was made. In Writ Petition No.1916 of 2012 (Vardhman Developers Limited vs. Union of India & Ors.) and Writ Petition No.2809 of 2012 (Nahur Vivekanand Cooperative Housing Society Ltd. & Anr. vs. Union of India & Ors). We have rejected a similar contention urged on behalf of the respondent authorities that when the project proponent cannot undertake construction project for more than 20,000 sq. meters of built up area without obtaining prior environmental clearance, the project proponent cannot be allowed to commence the construction within the limits of 20,000 sq. meters, without obtaining prior environmental clearance. This Court has held that when clearances are required only for projects with built up area exceeding 20,000 sq.meters, redevelopment projects for residential buildings should not be unnecessarily delayed even to the extent of construction upto 20,000 sq. meters when the developer is ready to give undertaking not to exceed the construction beyond 20,000 sq. meters without first obtaining environmental clearance. This Court has noted that the Authorities take considerable time for taking a decision on the application for environmental clearance or for CRZ clearance. In the meantime the redevelopment projects are being delayed. This Court has been granting relief in such cases on the basis that even if ultimately the authorities were to reject the applications for clearance, there will be no illegality in so far as the developer has made construction upto 20,000 sq. meters."

(emphasis supplied)

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HIGH COURT OF JUDICATURE AT BOMBAY
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10. Following above orders in Writ Petition (L) No.470 of 2013 and Writ Petition No.654 of 2013, we direct the Municipal Corporation to consider the petitioner's application for further commencement certificate for Building B upto 19,000 sq.mtrs. on the petitioner filing an undertaking to this Court stating that the petitioner shall not put up any construction exceeding 19,000 sq.mtrs on the land bearing CTS No.68A/1 and 68A/2. The petitioner shall file such undertaking within one week from today before this Court and before commencement of any construction. Copy of undertaking be served upon learned counsel for respondents Nos. 1 to 3 and also upon the Municipal Corporation.

11. Rule is made absolute accordingly.

CHIEF JUSTICE

(R.V. GHUGE, J.)

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) No.655 OF 2014

Glomore Constructions and Ors. ...Petitioners
Vs.
The Union of India and Ors. ...Respondents

****

Mr.Virag Tulzapurkar, Senior Counsel with Mr. Rafi Patni with Ms. Anjali S. Mohan i/b. Wadia Ghandy & Co. for Petitioners
None for Respondents

****

CORAM : V. M. KANADE &
A.K. MENON, JJ.

DATE : MARCH 24, 2014

P.C.

1. Heard the learned counsel appearing on behalf of the Petitioners. None appears on behalf of the Respondents, though they were served. Two affidavit of services are taken on record.

2. The grievance of the Petitioners is that though the Petitioners propose to construct the buildings, which are less than 20000 sq.mtrs. and though this Court, in number of cases, has held that for construction of buildings, which are below 20000 sq.mtrs., environmental clearance is not required, even then, Respondents State have issued a stop work notice, directing the Petitioners to stop the construction work of the buildings which are in project and are admittedly below 20000 sq.mtrs. It is submitted that the

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HIGH COURT OF JUDICATURE AT BOMBAY

Petitioners have given an undertaking that they shall not carry out construction work of the buildings beyond 20000 sq.mtrs. It is submitted that in view of this, the impugned notice which has been issued by Respondent No.3 may be stayed.

3. This Court in several petitions, has already held that environmental clearance for the purpose of construction of buildings below 20000 sq. mtrs. is not required and the said orders have not been challenged by the Government in the Apex Court. A Notification, accordingly, has been issued by the State Government recently, taking into consideration, the law laid down by this Court. In spite of that, the impugned notice has been issued by Respondent No. 2. Prima facie, therefore, case is made out for grant of ad-interim relief.

4. Ad-interim relief is granted in terms of prayer clauses (j) and (k). Undertaking given by the Petitioners in Ground (M) is accepted. The Petitioners, however, shall file a further undertaking that they shall not carry out any construction beyond 20000 sq.mtrs., within one week. It is clarified that the Petitioners may be permitted to carry out construction of the free sell component of the buildings in the said project.

5. Issue notice to Respondent Nos.1 to 7, returnable on 28.4.2014. Humdust permitted.

[A.K. MENON, J.] **[V. M. KANADE, J.]**

VAISHALI TIKAM

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HIGH COURT OF JUDICATURE AT BOMBAY

WPL/655/2014

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION (L) NO. 655 OF 2014

Glomore Constructions & Ors. .... Petitioners.

V/s

Union of India & Ors. ..... Respondents.

Ms. Anjali Mohan i/b Wadia Ghandy & Co. for the Petitioners.
Mr. Niranjan Pandit, AGP for Respondent No.2.

CORAM: V. M. KANADE &
A.K. MENON, JJ.

DATE: 28th April, 2014

P.C.:-

Stand over to 17/06/2014. Interim order to continue. If any construction is made, that would be subject to result of the Petition and the Petitioners shall not claim any equities.

(A.K. MENON, J.) **(V.M. KANADE, J.)**

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HIGH COURT OF JUDICATURE AT BOMBAY

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1352 OF 2014

Glomore Constructions & Ors. ...Petitioners.
V/s.
The Union of India & Ors. ...Respondents

Ms.Rati Patni i/b Wadia Ghandy & Co. for the Petitioners.

Mr.N. P. Pandit A.G.P. for Respondent No.2 – State.

Ms.Shriya Jadhav i/b Mr.Sachindra B. Shetye for Respondent No.7.

CORAM : S.J. VAZIFDAR &
A.K. MENON, JJ.
DATE : 4TH JULY, 2014.

P.C. :-

1. The petitioners state that the entire project is pending clearance. The petitioners have therefore requested us not to pass any orders today.

2. At the petitioners' request stand over to 11th August, 2014. The interim order to continue subject to further orders in this writ petition.

(A.K. MENON, J.) ***(S.J. VAZIFDAR, J.)***

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HIGH COURT OF JUDICATURE AT BOMBAY
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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1352 OF 2014

Glomore Constructions and Ors. .. Petitioners
-Versus-
Union of India and Ors. .. Respondents

Ms.Rati Patni with Mr.A.Nagalia i/b. Wadia Ghandy & Co. for petitioners
Mr.N.P.Pandit, AGP for State – Respondent No.2.

CORAM : S.J.VAZIFDAR &
A.K.MENON, JJ.

DATE : 11th August 2014.

P.C.

1] We are informed that the entire project is still pending clearance. At petitioner's request S.O. 10th September 2014 for Orders. Interim order to continue subject to further orders in this petition.

(A.K.MENON, J) (S.J.VAZIFDAR, J.)

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1352 OF 2014

Glomore Constructions and Ors. ... Petitioners

Vs

The Union of India and Ors. ... Respondents

Mr.Arnav N. i/b Wadia Ghandy & Co., for the Petitioners.

Mr.Niranjan Pandit, AGP for Respondent No.2.

CORAM : V.M.KANADE &
REVATI MOHITE DERE, JJ.

DATE : 18th DECEMBER, 2014

P.C. :

1. We are informed that Environment clearance has been granted. Learned Counsel for the petitioners have placed before us the Minutes of the meeting of SEIAA held on 28th and 29th October, 2014, which shows that Environment clearance has been granted to the petitioners. The said order has been communicated to the petitioners by a letter

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dated 11th December, 2014.

2. That being the position, the petition has become infructuous and is accordingly disposed of reserving the rights of the petitioners to apply for restoration in the event according to the petitioners counsel some reliefs still survive in the petition.

REVATI MOHITE DERE, J. ***V.M.KANADE, J.***

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BEFORE THE NATIONAL GREEN TRIBUNAL
PRINCIPAL BENCH AT NEW DELHI,
NEW DELHI

Appeal No. 66 of 2014

In the matter of:

1. Sunil Kumar Chugh,
   Room no. 409/5th floor,
   Om Shiv Shakti C.H.S,
   G.T.B Nagar, Mumbai- 400037

2. Ravindra Khosla
   Bldg no. 15/704
   1st floor, G.T.B Nagar,
   Mumbai- 400037

..... Applicants

Versus

1. Secretary
   Environment Department
   Government of Maharashtra
   Mantralaya, Mumbai- 400032

2. Member- Secretary
   State Level Environment Impact Assessment Authority
   Environment Department,
   Mantralaya, Mumbai- 400032

3. Member- Secretary
   State Level Expert Appraisal Committee
   Environment Department,
   Mantralaya, Mumbai- 400032

4. Chief Executive Officer
   Slum Rehabilitation Authority
   Bandra East, Mumbai – 400051

5. Mssrs. Priyali Builders
   102 Triveni Shalimar CHS Ltd,
   Smd Road, Wadala East,
   Mumbai – 400037

6. The Secretary
   Om Shivshakti CHS (proposed)
   Punjabli Colony, JK Bhasin Marg,

Sion Koliwada, Mumbai – 400022.

……Respondents

Counsel for appellant:
Mr. Aditya Pratap, Advocate for appellant

Counsel for Respondents:
Mr. Vikas Malhotra and Mr. M.P. Sahay Advs.
for respondent No. 1
Ms. Preeti Bhardwaj and Mr. Dhruve Pal Adv.
for Ms. Hemantika, Advs. for respondent no. 2 & 3.
Mr. AnandYagnik and Mr. Abhimanue Shrestha,
Advs. for Respondent no. 4

Present:
Hon'ble Mr. Justice Swatanter Kumar (Chairperson)
Hon'ble Mr. Justice U.D. Salvi (Judicial Member)
Hon'ble Dr. D.K. Agrawal (Expert Member)
Hon'ble Prof. A.R. Yousuf (Expert Member)

JUDGMENT

Per U.D. Salvi J.(Judicial Member)

Reserved on: 12th December, 2014

Pronounced on: 3rd September, 2015

1. **Whether the judgment is allowed to be published on the net?**
2. **Whether the judgment is allowed to be published in the NGT Reporter?**

1. This is an appeal assailing the grant of Environmental Clearance on 25th March, 2014 to a building project of the respondent no. 5-M/s Piyali Builders at CS No. 2 (part) and 89 (part), Salt Pan Division, admeasuring 6535 sq. meters (total plot area), Punjabi Colony, J.K. Bhasin Marg, Sion Koliwada, Mumbai, broadly on two grounds: firstly, having started construction without obtaining Environmental

Clearance and in violation of imperatives prescribed by the Ministry of Environment and Forests (MoEF) vide Office Memoranda dated 12th December, 2012 and 27th June, 2013 and secondly, the project had been constructed in violation of Town Planning laws and Development Control Regulations.

2. Both the appellants claimed to be residents of Mumbai having deep concern about the environment degradation occasioned by the said project coming up in the locality where they reside. Undisputedly, the total built up area of the project ad measures 29150.07 sq. meters (FSI area; 16871.82 sq. meters and Non- FSI area; 12278.25 sq. meters). It is also not disputed that the land developed was encroached by slums and was reserved for Municipal Office as well as a DP road set back; and the respondent no. 5 submitted a proposal to Slum Rehabilitation Authority under Slum rehabilitation scheme to develop the said land to accommodate 324 tenements in 1997; for which respondent no. 5 was required to hand over an area ad measuring 760 sq. meters to the Municipal Corporation for Greater Mumbai (MCGM) towards road setback for the benefit of public at large; and the first Letter Of Intent (LoI) for the built up area of 14608 sq. meters was received by the respondent no. 5 on 18th February, 2002 and this was followed by revised LoI for built up area of 15887 sq. meters on 06th January, 2006 on account of the change in the plan and a commencement certificate was issued to the respondent no. 5 on 7th

September, 2006 in accordance with DC Regulations in force at the relevant time.

3. Pertinently, the Notification No. S.O. 1553 (E) dated 14th September, 2006 requiring prior Environmental Clearance to the building and construction projects having built up area of more than 20,000 sq. meters was issued by the MOEF, Government of India in exercise of its powers under Section 3 of the Environment (Protection) Act, 1986 and the Rules framed there under. Thereafter the Government of Maharashtra vide notification no. TPB/308/897/CR145/08/UD-11 increased the area for eligible rehabilitation tenements from 225 sq. feet to 269 sq. feet due to which an amended LoI dated 13th August, 2006 for an area of 17804 sq. meters was issued and MCGM gave concurrence for a consolidated rehabilitation building along with the Municipal Office on 30th March, 2013.

4. According to the appellant, the Slum Rehabilitation Authority had recorded in clear terms that the proposed built up area of the project exceeded 20,000 sq. meters and thus required Environmental Clearance from MoEF, Government of India and the same will be insisted upon before approval of further CC (Commencement Certificate) to 1st rehabilitation building. Notwithstanding the fact that the Notification of 2006 clearly stated that no construction of any nature shall commence without obtaining prior Environmental Clearance, yet the construction of the project started in full swing and the

authorities including the Environment Department of Government of Maharashtra, failed to take any effective action against such construction despite various complaints lodged by the appellants, both with the Environment Department and the law enforcing agencies. The project proponent applied for the Environmental Clearance to the State Level Environment Impact Assessment Authority after the commencement of the said project i.e. on 21st February, 2011.

5. The Appellant quoted the progress of the proposals for the grant of Environmental Clearance as under:

(a) "Initial discussion about the project vide Minutes of 3rd meeting of State Level Environment Impact Appraisal Committee-2 dated 4-6 October, 2012 ("ANNEXURE A- 8"). In this meeting the following decision was taken:

"1. PP could not produce documents indicating width of the existing road which is proposed as right of way for the proposed project as per the requirement of the OM dated 7th Feb. 2012 issued by MoEF.
2. PP was directed to produce appropriate documents from competent authority indicating the right of way to their property along with its width.
In view of the foregoing observations are addressed and submitted for reconsideration."

(b) Discussion about the project vide Minutes of 10th meeting of State Level Environment Impact Appraisal Committee-2 dated 14-16 March, 2013. (ANNEXURE "A- 9"). *In this meeting the following decision was taken:*

"The project proposal was discussed on the basis of presentation made on compliance points and documents submitted by the proponent. It was noted that the proposal was earlier discussed in the 3rd SEAC II meeting.

During discussion, following point emerged:

1.PP to recast the proposal as per the road width of 27.3m in consonance of Office Memorandum dated 7th Feb, 2012.

In view of above, the proposal is deferred and shall be considered further after the above observation is addressed and submitted for reconsideration."

(c) Final discussion about the project vide Minutes of 18th Meeting of State Level Environment Impact Appraisal Committee-2 dated 19-21 September, 2013 ("ANNEXURE A- 10"). In this meeting the following decision was taken:

"PP informed that they have already constructed about 13,734.03 m2 of rehabilitation component.

Considering the orders of the Hon'ble High Court regarding Construction to be undertaken up to 20,000 m2 and the letter dated 29th June 2013 from Environment department, Committee decided to appraise the project though there is violation subject to the final decision on the same by SEIAA on the same.

The project proposal was discussed on the basis of presentation made on compliance points and documents submitted by the proponent. It was noted that the proposal was earlier discussed in the 3rd and 10th SEAC II meeting. All issues related to environment, including air, water, land, soil, ecology and biodiversity and social aspects were discussed.

During discussion following points emerged:

1. *Parking for rehab portion is hapzardly proposed in the rehab portion, which is to be revised. PP to submit revised layout showing details for parking along with parking statement as per NBC Norms.*
2. *Rain water storage capacity should be based on 2 days utilisation.*
3. *STP for rehab portion shall be constructed first and excess treated water shall be used for construction purposes of sale building.*
4. *PP to submit construction and demolition waste management plan with quantification.*
5. *PP to provide solar PV panels for energy generation and revise energy saving calculations accordingly.*

After deliberation, Committee decided to recommend the proposal for Environmental Clearance to SEIAA, in view of the court orders allowing construction up to 20,000 m2 and the letter dated 29th June 2013 from Environment department subject to compliance of above points."

(d) Final Decision about the project vide Minutes of the 66th Meeting of State Level Environment Impact Assessment Authority dated 27-28 January, 2014

("ANNEXURE A-11"). *In this meeting the following decision was taken:*

"Authority noted that the proposal was considered by SEAC-11 in its 3rd& 10th meeting and recommended it in 18th meeting under screening category 8(a) B2 as per EIA points. (i) parking for rehab portion is haphazardly proposed in the rehab por6tion, which is to be revised, PP to submit revised layout showing details for parking along with parking statement as per NBC Norms. (ii) Rain water storage capacity should be based on 2 days utilisation. (iii) STP for rehab portion shall be constructed first and excess treated water shall be used for construction purposes of sale building, (iv) PP to submit construction and demolition waste management plan with quantification, (v) PP to provide solar PV panels for energy generation and revise energy saving calculations accordingly.

The project proponent has complied with or agreed to comply with the above points. The Authority elaborately discussed the proposals and noted that the refuge area has been provided in the layout design. It was also observed that one podium acts as a refuge area also. The concession given by SRA in their IOA on account of the Rehab nature of the project were also considered. It was also noted that the commencement certificate had been issued prior to the judgment given by Hon'ble Supreme Court in Civil Appeal No. 11150 of 2013 (out of Special Leave petition (Civil) No. 33402/2012) dated 17th December, 2013. After detailed discussion, the SEIAA decided to grant EC to the project."

Based on such a decision taken by the State Level Environment Impact Assessment Authority, the Impugned Environment Clearance was granted vide letter dated 25th March, 2014, without informing or hearing the appellants."

6. The appellants are seeking quashing of the Environmental Clearance dated 25th March, 2014 granted to the project in question with consequent reliefs of stoppage of project work, demolition of the construction carried out till this date, invocation of Polluter Pay Principle for the violation of Environmental Clearance Regulations and such other action against the public officials who abdicated their statutory

powers for according their favours by granting EC in question on following amongst other grounds:

I. Despite a clear perception that the project built up area exceeded 20,000 sq. meters and as such required prior Environmental Clearance, the respondent no. 2 SEIAA and respondent no. 3 SEAC turned a blind eye to the construction carried out by the project proponent to the extent of 13,734 sq. meters.

II. The Slum Rehabilitation Authority had conceived development of three separate buildings on the plot in question under DP Reservation of Municipal Office;

(i) Independent Municipal Office having 5 floors with 10 parking spaces on a separate carved out plot.

(ii) Rehabilitation Building.

(iii) Building for sale.

III. However, the project proponent merged the Municipal Office building with the Rehabilitation Building thereby putting strain on the environment which fact was ignored by the respondent no. 2 and 3.

IV. The appellants despite making complaints and sending notice under Section 19(1)(b) of the Environment (Protection) Act, 1986 was not given a proper opportunity of hearing and the Environment Clearance was granted upon one sided representation made by the project proponent.

V. The project proponent suppressed the fact of commencement of construction of sale building from the respondent no. 3 SEAC and continued with the same.

VI. The construction of the project was raised to such an extent as to render the collection of base line data and making provision for parking spaces as per the National Building Code of India in compliance with SEIAA condition a virtual impossibility. Grant of Environment Clearance to the project after its work had been substantially accomplished is violative of Article 14 of Constitution of India for having discriminated with the one who is required to obtain prior EC before proceeding with the construction work.

VII. Un-wholesome compromising of Town Planning stipulations relating to fire safety and marginal open spaces, recreation ground and parking spaces.

VIII. Responsibility of public servant who permitted construction to be carried out without EC under Section 17 of the EP Act, 1986, particularly, when there is no provision under the Environment (Protection) Act, 1986 to regularise the construction which has come up in violation of environment laws.

IX. 'Precautionary Principle' and 'Polluter Pays Principle', need to be invoked for quashing of EC and imposing compensatory cost on the project proponent for having

carried out construction without obtaining prior EC so as to account for loss to environment.

7. A brief reply dated 17th May, 2014 giving resume of how the proposal for grant of EC to the project in question waded its course through several meetings of SEAC between 4th October, 2012 and 28th January, 2014 leading to the grant of EC in question was filed along with relevant extracts of the minutes of the said meetings by the respondent nos. 1 to 3. The respondent nos. 1 to 3 affirmed that the part construction work of the project not exceeding 20,000 sq meters without obtaining EC is not violative of the provision of EIA Notification, 2006. However, the respondent nos. 1 to 3 submitted that it had issued circular dated 17th January, 2014 in pursuant to the orders passed by the Hon'ble High Court of Bombay in WP (L) 2305/13 dated 18th December, 2013, *M/s Vardman Developers vs. U.O.I and Ors.* involving issues of construction of rehabilitation component below 20,000 sq meters that the construction of rehabilitation component below 20,000 sq. meters may not be considered as violation of EIA notification, 2006 and be read with OM of 12th December, 2012. However, it was added that it is desirable that all such cases of environmental concerns should be addressed at the planning stage. According to respondent nos. 1 to 3, in the given fact situation, the decision of issuing EC to the project after addressing of environmental issues in accordance with law particularly,

orders of the Hon'ble High Court of Bombay and OM dated 12th December, 2012 issued by MoEF has to be clarified by the MoEF.

8. The respondent no. 4- CEO, Slum Rehabilitation Authority vide brief affidavit dated 23rd May, 2014 urged for the dismissal of the present appeal with cost. According to him the land in question owned by the Municipal Corporation of greater Mumbai was fully encroached upon by slum dwellers who were not even having sanitation or basic necessities of life and as such it was first declared as a slum and as per the policy of the Government of Maharashtra Slum Rehabilitation scheme was sanctioned under the DC Regulations 33(10) by the authority; and the appellant being one of the slum dwellers is a beneficiary of the said scheme as a allottee of free permanent accommodation (tenement 409) in rehabilitation building no. 1, and as such has no right to challenge the scheme in the present appeal. The respondent no. 4 further revealed that initial LOI dated 18th February, 2002 issued by the respondent authority was revised/amended from time to time i.e. on 6th January, 2006, 7th February, 2009 and 13th August, 2009 and a part occupation certificate dated 01-10-2013 has been issued to the rehabilitation building and the allottees of the permanent rehabilitation tenements are presently residing there. According to the respondent no. 4, when the LoI was first issued on 18th February, 2002 the permissible Built Up Area

(BUA) was less than 20,000 sq meters and the change in Government policies brought about increase in the area of residential rehabilitation tenements from 20.90 sq. meters to 25 sq meters and *in situ* FSI was increased from 2.5 to 3 with consequent change in the entire planning and therefore revised LoI were issued last being 13th August, 2009 and yet the permissible BUA was still below 20,000 sq meters and did not warrant prior EC from MoEF. It further added that in order to make Slum Rehabilitation scheme viable, no parking for the slum dweller in the rehabilitation building is mandatory as the commencement Certificate was issued on 7th September, 2006. It is only upon the notification dated 4th April 2011 regarding BUA it was made clear that BUA both under FSI and free of FSI areas shall be considered and accordingly, the project proponent was asked to submit NOC from MoEF and accordingly the EC dated 25th March, 2014 for the scheme was obtained. The respondent no. 4 asserted that the respondent no. 5, the project proponent had obtained a requisite sanction/Commencement Certificate from Municipal Council for Greater Mumbai. As regards the Municipal Office, it added, the requisite concurrence from the Municipality was obtained on 30th March, 2013 and there is no violation of the Slum Rehabilitation Scheme as regard to the said issue and the requisite RG as per the parameters set out in Appendix (iv) clause 6.20 has been proposed and there is no violation as regards the RG or provided in the scheme.

9. Refuting the contentions raised by the appellants, respondent no. 5, the project proponent filed a detailed affidavit dated 21st May, 2014 along with the documents in support. Reiterating the facts asserted by the respondent no. 4-Slum Rehabilitation Authority and the revision of LOI's, the respondent no. 5 submitted that the EC Regulations of 2006 came into force on 14th September, 2006 and as such there was no violation of law in commencement of the construction work upon the issuance of commencement certificate to the respondent no. 5 on 7th September, 2006. Inviting our attention to the process stipulated for grant of EC under the EC Regulations, 2006, the respondent no. 5 submitted that the EC in question was duly granted and the appellant was not entitled to extend the scope of the appeal preferred by them under Section 16 read with Section 18 of the NGT Act, 2010 and raise the issues relating to substantial questions relating to environment and seek reliefs consequent thereto. According to respondent no. 5 there is no document placed by the appellants either to show the bonafides and locus standii or the damage caused to the environment due to construction done prior to the grant of Environment Clearance. According to respondent no. 5 the environment Management Plan was in place during construction and all such care was taken by the project proponent to protect the environment to the extent it would be protected.

10. Quoting diary of events leading to the Environment Clearance, the project proponent stated that the authorities had taken an objective decision to grant the Environment Clearance on the basis of the material required to be furnished in form 1(A), conceptual plan power point presentation as required under law. The project proponent further stated that there was increase in total built up area from time to time and LOI were issued accordingly, last one being LOI dated 13th August, 2009 by virtue of which the total built up area of the rehabilitation component was increased from 20.90 sq meters to 25 sq. meters per each Rehab tenement. However, total built up area never exceeded 20,000 sq. meters. According to the respondent no. 5, the Commencement Certificate (CC) was granted on 7th September, 2006 i.e. prior to the Environment Clearance Regulation coming into force and as such they are saved from the rigour of the Environment Clearance Regulations. The respondent no. 5, further contended that there existed a confusion regarding the interpretation of the Category 8(a) under Environment Clearance Regulations, dated 14th September, 2006, particularly, as to whether the built up area referred to therein included non- FSI areas such as balconies, canopies, sills, pump house, common utility, etc. and such confusion prevailed not only amongst the builders but also amongst the authorities including SRA and MCGM; and such confusion vanished only when the notification dated 4th April, 2011 was issued by the MoEF, thereby making the

position clear. The project proponent contended that the delay in obtaining the Environment Clearance before the commencement of the construction cannot be said to be deliberate or ill intended. Quoting Judgments of the Hon'ble High Court of Bombay, particularly with reference to the Judgment of Western Zone Bench, of this Tribunal in cases of *M/s Aadi properties (P) Ltd vs. State Level Environmental Impact & Ors. Appeal No. 73/2013*, the respondent no. 5 submitted that construction not exceeding 20,000 sq. meters under SRA/restoration projects without obtaining Environment Clearance were not considered illegal. On this background the respondent no. 5 further contended that there was no violation of the Environment Clearance Regulations and as such no action was required to be initiated against anyone including the project proponent and the authorities for such alleged violations.

11. The respondent no. 5, the project proponent submitted that the plans for construction were duly approved in accordance with the DC Regulations, then prevailing which did not provide parking to rehabilitation buildings in SRA schemes. According to respondent no. 5, project proponent the National Building Code can be treated as guidelines but not as law having a binding force.

12. The appellant filed rejoinder to the reply of the project proponent dated 22nd May, 2014 on 25th June, 2014. The

appellant in its rejoinder summarised the main contentions of the project proponent as under;

a. *That the Developers were not bound to take Environment Clearance and have done so in a voluntary manner without any obligation under the law:*
b. *That construction of up to 20,000 square meters without Environment Clearance is legal and permitted as per the ruling of the Bombay High Court in the cases of Saumya Buidcon and Vardhaman Developers.*
c. *That the Developers did not have mens rea or an intention to commit the offence under section 15 of the Environment Protection Act, 1986.*
d. *That the National Building Code of India is only advisory and does not have the force of law.*
e. *That since the Environment Clearance, Commencement Certificate and Letter of Intent have been received for the project, it is legal in all respects:*
f. *That SEIAA and SEAC were not bound to hear the complaint filed by the Appellants as public hearing is not mandatory for building and construction projects under Item 8(b).*
g. *SEAC cannot look into parking and Open spaces as they are the exclusive domain of the Municipal Corporation of Greater Mumbai and the Slum Rehabilitation Authority.*
h. *The Parking requirements in Development Control Regulations are not applicable to slum rehabilitation projects.*

13. The appellants made attempts to rebut them with some facts and their exposition of law. Referring to the google earth satellite photographs dated 22nd February, 2007 the appellants submitted that no construction activity had started by that date and the construction work commenced only after 28th February, 2007; on this backdrop the appellants asserted that the project proponent was mandated to obtain prior Environment Clearance for the construction project undertaken by them as per para 2 of EIA Notification, 2006 dated 14th September, 2006. Referring to the amendment in the Category 8(a) of the Environment

Clearance Regulations effected EIA Notification dated 4th April, 2011, the appellant contended that it being a clarifying amendment has/had retrospective effect and therefore, the construction which exceeded 20,000 sq. meters being carried out without Environment Clearance was illegal and the Environment Clearance granted to it deserves to be quashed. Referring to the cases of *M/s. Saumya Buildcon Pvt. Ltd vs. Union of India & Ors. W.P. No. 470/2013 and M/s. Vardhman Developers limited vs. Union of India W.P.(L) No. 2305/2013* cited by the project proponent, the appellants submitted that the decisions in the said cases were given in peculiar circumstances and in no way interpret the provisions of Environment Clearance Regulations, EIA Notification, 2006 requiring prior Environment Clearance for the construction projects and therefore, the Judgments in the cases cannot be treated as judicial precedents having binding effect on other courts. According to the appellants, commencement of construction without obtaining prior Environment Clearance leaves no scope for base line studies and robs the SEAC of the opportunity of objective appraisal of the proposal for Environment Clearance.

14. Admittedly, the project in question is a project of building and construction enumerated entry 8(a) of the schedule to the Environment Clearance Regulations, 2006 and falls in category B as stipulated therein. Going by their own version of events, the construction of the project commenced on 7th

September 2006 and in any event prior to the making of the application for Environment Clearance on 21st February, 2011. Therefore, the question arises as to whether post construction Environment Clearance could have been granted in violation of EC Regulations, 2006. We are therefore, obliged to examine the entire concept and scheme of granting Environmental Clearance to the projects of such kind.

15. Environment Clearance Regulations, 2006 is the product of the exercise of powers conferred by sub-section (1) and clause (V) of sub- section (2) of section 3 of the Environment (Protection) Act, 1986, read with clause (d) of Sub-Rule 3 of Rule 5 of the Environment (Protection) Rules, 1986. Section 3 of the said Act confer powers on the Central Government in order to take all such measures as deemed necessary or expedient for the purposes of protecting and improving the quality of Environment and preventing, controlling and abating Environment pollution; and in particular, to take such measures for 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 sub-section (2) clause (V) of the said section. Thus the purpose of employing such measures for which the powers are conferred under section 3 of the Act is to protect the environment and prevent, control and abate environmental pollution that may arise as a result of any industrial operation or the process.

Keeping this purpose in mind the Central Government in clear terms directed vide Environment Clearance Regulations, 2006 that on or from date of its publication i.e. 14th September, 2006 the required construction of new projects or activities or the expansion or modernisation of existing projects or activities listed in the Schedule to the Notification (Regulations) entailing capacity in addition with change in process and/or technology shall be undertaken in any part of India only after prior Environmental Clearance in accordance with the procedure specified in the Regulation. Such direction had been issued for the purposes of protecting the environment at the place of activity in question from the likely adverse impacts of such activity. A reading of Environment Clearance Regulations 2006 copiously reveals that the required construction of new projects or activities or the expansion and modernisation of existing projects or activities listed in the Schedule has to be undertaken in any part of India only after the prior Environment Clearance. Idea is to regulate such construction in order to avoid its adverse impacts on the environment and its genesis is in precautionary principle governing the approach in handling the delicate and often complex as little understood aspects of environment which includes not only the elemental component like water, air and land but its environment relationship with all living organisms drawing the sustenance there from. We have therefore, no hesitation in holding that

commencement, or continuation of construction activity without obtaining environment clearance is violative of Environment Clearance Regulations 2006 and can attract penal consequences u/s. 15 of the Environment (Protection) Act, 1986.

16. Defending its acts the respondent no. 5 submitted that the commencement of the construction took place prior to the Environment Clearance Regulations 2006coming into force and the term 'built up area' referred to in the column 4 of the entry 8(a) of the Regulation was mis-understood till the amendment to the conditions vide Notification dated 4th April, 2011 came into force.

17. Reliance has been placed by the project proponent on the Commencement Certificate issued on 7th September, 2006 to say that the construction activity commenced some seven days prior to EC Regulations, 2006 coming into force. For a construction of the dimensions as revealed by the respondent no. 5 hardly any material change had occurred within those seven days at the ground level. We have before us two things- firstly, the assertions made by the appellants with reference to Google earth satellite photographs dated 22nd February, 2007 that no construction activity had started at the project area by that date and construction activity commenced only after 22nd February, 2007 and secondly, the increase in area of the rehab tenements from 225 sq. feet to 269 sq. feet pursuant to notification dated 14th May, 2008.

This notification stipulated that the new area would only be applicable to those slum rehabilitation projects which had received commencement certificate but where construction had not started. On this backdrop the respondent no. 5, without giving details of the revised Commencement Certificate merely claims that he started construction on the basis of revised Letter of Intent issued to him in 2009.Moreover, one can be alive to the fact that increase in the area of the rehab tenement component would mean change in structural features such as foundation, plinth and walls. Obviously, this called for revision and amendment to the plans and its consequent approval by the planning authority. Silence is kept by the respondent no. 5 as to when this approval to the amended plans was granted and fresh Commencement Certificate was issued. However, letter dated 06-11-2009 at annexure A-21 to the written submission addressed to the Municipal Corporation Greater Mumbai, Fire Brigade brings forth a fact that the amended plans for U-shaped rehabilitation building/compound; high rise residential accommodation, rehab shops, welfare centre, society office, sale offices and Municipal offices were submitted for approval. Evidently, no approval was granted by them to the plans for construction of rehabilitation component, and obviously, therefore, the construction can said have been commenced well after the Environmental Clearance Regulations 2006 came into force.

18. It is true that the term "built up area" was not defined in the EIA notification 2006. The import of the term "build up area" could be understood from its plain meaning and could have been very well understood, as pointed out by the appellants, from DC Regulations for Greater Mumbai, 1991. What is built or constructed is that which can be called as built up. In common parlance therefore, that term "built up area" would mean total constructed area. If one refers to Development Control Regulations for Greater Mumbai, 1991,we find clear distinction between "built up area" and Floor Space Index (FSI) in following terms:

> ***DCR 2(13): "Built-up area"*** *means the area covered by a building on all floors including cantilevered portion, if any, but excepting the areas excluded specifically under these Regulations.*
> ***DCR 2 (42): "Floor space index (FSI)":*** *means the quotient of the ratio of the combined gross area of all floors, excepting areas* ***specifically exempted*** *under these Regulations, to the total area of the plot, viz. :-*
> ***Floor Space Index (FSI)*** *= Total covered area on all floors/ plot area*

19. DC Regulations 1991 do not afford any specific exception as regard any area for computation of "built-up area" unlike specific exemption of area for computation of FSI specified as in DCR-35. Certain areas or structures permitted in recreational open spaces and areas covered by features permitted in open spaces as well as stair-case rooms, lift rooms above the topmost storey, lift-wells, stair cases and passage thereto, chimneys, elevated tanks are not to be counted towards FSI with certain exceptions as given under DCR-35. From definitions of "built-up area" and "FSI area" one can clearly see that these terms

have independent and distinct meanings and they cannot be substituted or used inter-changeably with one another. No justification or excuse therefore, is available to the respondent no. 5 to contend that there was any room for misunderstanding the meaning of "built-up area" and only "FSI" area could have been the basis of coming to the conclusion whether the Environment Clearance for the project in question was necessary or not. The contention of the appellants that there was clear perception regarding the built-up area of the project exceeding 20,000 sq. meters amongst all stakeholders- project proponent and authorities concerned is meritorious.

20. Assuming that the Amendment of 2011 to the EIA notification, 2006 vide Gazette of India (Extraordinary) Notification S.O. 695(E) was enacted with the object of explaining and clarifying the meaning of the term built up area in the EIA Notification 2006, the applicants argued with reference to Zile Singh case *(Zile Singh V. State of Haryana &Ors. Appeal (Civil) 6638 of 2004)* that the rule against retrospective application of the statute is inapplicable to such legislations which are explanatory and declaratory in nature. The hon'ble Apex Court in Zile Singh case held as under:

> *"It is cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the Legislature to affect existing rights, it is deemed to be prospective only' nova constitution*

futuris formamim poneredebet non praeteritis' _ a new law ought to regulate what is to follow, not the past. (See; Principles of Statutory Interpretation by Justice G.P. Singh, Ninth Edition, 2004 at p.438). It is not necessary that an express provision be made to make a statute retrospective and the presumption against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil of the benefit of the community as a whole. (ibid, p.440) The presumption against retrospective operation is not applicable to declaratory statutes. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless constructed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statue is curative or merely declaratory of the previous law retrospective operation is generally intended. An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect. (ibid, pp. 468-469).

……..

Where a statute is passed for the purpose of supplying an obvious omission in a former statute or to 'explain' a former statute, the subsequent statute has relation back to the time when the prior Act was passed. The rule against retrospectivity is inapplicable to such legislations as are explanatory and declaratory in nature. The classic illustration is the case of Att. Gen. Vs. Pougett ([1816] 2 price 381,392). By a Customs Act of 1873 (53 Geo. 3, c. 33) a duty was imposed upon hides of 9s. 4d., but the Act omitted to state that it was to be 9s. 4d. per cwt., and to remedy this omission another Customs Act (53 Geo. 3, c. 105) was passed later in the same year. Between the passing of these two Acts some hides were exported, and it was contended that they were not liable to pay the duty of 9s. 4d. per cwt., but Thomson C.B., in giving judgment for the Attorney-General, Said: "The Duty in this instance was in fact imposed by the first Act, but the gross mistake of the omission of the weight for which the sum expressed was to have been payable occasioned the amendment made by the subsequent Act, but that had reference to the former statute as soon as it passed, and they must be taken together as if they were one and the same Act." (p.395)

21. Preamble of the said amending notification which is reproduced hereunder makes it abundantly clear that the amending Notification was to provide clarification with regard to the term "built-up area":

> *"And whereas, it has been decided to provide clarification with regard to the term "built-up area" used in the said Notification and also to make various paras of the Notification mutually consistent and to restore the unintent6ional changes, which got into the Notification while making amendment vide S.O. 3067 (E) dated 1st December, 2009, in particular the entry against item No. 7 (f) in the schedule to the EIA Notification, 2006 relating to highway projects and for this purpose to issue suitable amendments in the said Notification."*

obviously therefore, the clarification given necessarily applies to EIA Notification, 2006 with retrospective effect from 14th September, 2006 the date on which EIA came into force.

22. Several judgments of the Hon'ble High Court of Judicature at Bombay namely, copy of order dated 29-03-2012 in *Naresh janardhan Mali vs. The State of Maharashtra and Ors.*, Copy of order dated 24-09-2012 in *Vardhaman Developers ltd. vs. Union of India*, Copy of order dated 16-01-2013 in *Nahur Vivekanand CHS vs. union of India,* copy order dated 06-03-2013 in *Saumiya BuildconPvt. Ltd. Vs. Union of India*, copy of order dated 09-05-2013 in *Tridhatu Ventures LLP Vs. State of Maharashtra*, copy of order dated 21-06-2013 in *Vision Developers v. Union of India*, Copy of order dated 18-12-2013 in *Vardhaman Developers Ltd. Vs. Union of India*, copy of order dated 24-03-2014 in *Glomore Construction Vs. Union of*

India were cited to buttress the claim that the construction without prior Environment Clearance was legally permissible. In answer, Learned Counsel appearing on behalf of the appellants submitted that these judgments cannot be regarded as a law declared and will not be binding upon this Tribunal, more particularly so because the Hon'ble High Court gave permission to construct up to 20,000 sq. meters without Environment Clearance only on a case to case basis and did not expound law with reference to EIA Notification, 2006. It is true that the said Judgments cannot be regarded as a law declared and binding all courts within the territory of India as is the law declared by the Supreme Court under Article 141 of the Constitution. However, if the expounding of the law has been made by the Hon'ble High Court, such exposition of law will certainly have persuasive effect on us. On perusal of these judgments one finds merit in the submission made by the appellants that the Hon'ble High Court dealt with the exigencies of the fact situation on case to case basis and granted permissions to construct up to 20,000 sq. meters without Environmental Clearance. Nowhere we find that the Hon'ble High Court considered the scope and scheme of the EIA notification, 2006 and expounded the law concerning need to have prior EC for the construction as specified in Entry 8(a) of EC Regulation, 2006. Significantly, in Vardhman Developers case the Hon'ble High Court directed the petitioners not to claim any equity on the basis of

the order made and further clarified that no equity shall be created in favour of the petitioner when its application for Environment Clearance is considered by the authority and the authority was to consider such proposals for Environment Clearance on its merits without being influenced by the order. The judgments, therefore, need not persuade us to hold that the respondent no. 5 is without any blame of violating EIA notification, 2006 by undertaking construction and continuing with it before the Environmental Clearance was granted.

23. For answering the present controversy which arises as a result of the commencement of the construction in question prior to the grant of environmental clearance, it is further necessary to know what happens upon the violation of the EC Regulations, 2006 by undertaking construction as aforesaid. This can be better understood by knowing what is achieved as a result of going through the process of appraisal for the grant of Environmental Clearance to the projects of construction like the one in question.

24. Needless to reiterate that the proposal for grant of EC to the project in question listed as Category B in item 8(a) of the Schedule of the EC Regulations, 2006 does not require scoping and can be appraised on the basis of I. Form-1, Form-1A and the conceptual plan-vide7(i) II. Stage (2) EC Regulations, 2006. “Public Consultation” as conceived under para 7(i) III. Stage (3) of EC Regulation, 2006 is also not

needed in respect of such project of building or construction or area development projects (which do not contain any Category 'A' project and activities) and Townships. It is only the appraisal i.e. the detailed scrutiny by the SEAC that needs to be done and the recommendations of SEAC are required to be placed thereafter before the Competent Authority i.e. SEIAA for final decision for grant of Environmental Clearance. EC Regulations, 2006 prescribes procedure for appraisal at Appendix V thereto. Para-3 therein is relevant for the purpose of this case and is therefore, reproduced therein below:

> *"3. Where a public consultation is not mandatory, the appraisal shall be made on the basis of prescribed application in Form-1 and environment impact assessment report, in the case of all projects and activities (other than item 8 of the Schedule), except in case where the said project and activity falls under category 'B2', and in the case of items 8(a) and 8(b) of the Schedule, considering their unique project cycle, the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned shall appraise projects or activities on the basis of Form-1, Form-1A, conceptual plan and the environment impact assessment report [required only for projects listed 8(b)] and make recommendations on the project regarding grant of environment clearance or otherwise and also stipulate the conditions for environmental clearance."*

25. It is seen from the procedure prescribed that the SEAC is mandated to appraise projects or activities of the kind in question on the basis of Form-1, Form-1A and conceptual plan and make recommendations on the project regarding grant of Environmental Clearance or otherwise and also stipulate the conditions for Environmental Clearance. Form-

1 makes or should make available exhaustive information or data in respect of the project proponent and the land in question for scrutiny under the following heads:

I. Basic information (description of the land proposed and the project proponent, need of clearance under: the Forest (Conservation) Act, 1980, the Wildlife (Protection) Act, 1972, CRZ Notification, 1991, Government policy in respect of the site in question, involvement of forest land, tendency of litigations against the project and/or land proposed).

II. Activity:

1. Construction, operation or decommissioning of the project involving actions, which will cause physical changes in the locality (topography, land use, change in water bodies, etc.)

2. Use of natural resources for construction or operation of the project (such as land, water, material or energy, especially any resources which are non-renewable or in short supply.)

3. Use, storage, transport, handling or production of substances or materials, which could be harmful to human health or the environment or raise concerns about actual or perceived risks to human health.

4. Production of solid wastes during construction or operation or decommissioning.

5. Release of pollutants or any hazardous, toxic or noxious substances to air.

6. Generation of noise and vibration, and emissions of light and heat.

7. Risk of contamination of land or water from releases of pollutants into the ground or into sewers, surface water, ground water, coastal waters or the sea.

8. Risk of accidents during construction or operation of the project, which could affect human health or the environment.

9. Factors which should be considered such as consequential development which could lead to environmental effects or the potential for cumulative impacts with other existing or the planned activities in the locality.

III. Environmental sensitivity.

IV. Proposed Terms of Reference/or EIA Studies.

26. Thus all such information helps to understand what could happen as a result of the said project and in conjunction with other existing or planned activities in the locality and this is required to be taken cognizance of by SEAC for the process of the appraisal for making suitable recommendations regarding grant of Environmental Clearance. Form-1A in Appendix II of EC Regulations, 2006 is an exhaustive questionnaire seeking answers to the specific questions in respect of Land Environment, Water Environment, Vegetation, Fauna, Air

Environment, Aesthetics, Socio-Economic Aspects, Building Material, Energy Conservation and Environment Management Plan. Answers to these questions are of material importance for objective appraisal of the proposal for grant of Environmental Clearance. Environment Management Plan which is to be the part of Form-1A is expected to give all mitigation measures for each item wise activity to be undertaken during the construction, operation and the entire life cycle to minimise adverse environmental impacts as a result of the activities of the project and is further expected to delineate the environmental monitoring plan for compliance of various environmental Regulations and must state the steps to be taken in case of emergency such as accidents at the site including fire. Nowhere the EC Regulations, 2006 has made any provision for providing hearing to the beneficiaries of the project of building or construction or area development project (which do not contain any category 'A' project and activities) and Townships. A question as to whether proper opportunity of hearing was given to the appellants or not in the process of granting EC in question, therefore, does not survive.

27. Gap between the commencement of construction (as pleaded by the project proponent as having commenced upon the issuance of Commencement Certificate dated 07-09-2006) and making of the application for grant of EC on 21-02-2011, gives scope for concealment or misrepresentation of certain

facts pertinent to grant of EC, and, therefore, possibility of any mischief in furnishing information/Data as required to be furnished vide Form-1 and Form-1A cannot be ruled out. In other words, collection and availability of wholesome baseline data necessary for objective appraisal of environmental impacts and for prescribing safeguards or corrective measures becomes farcical nay virtual impossibility as contented by the appellants.

28. In the given fact situation we can easily conclude that such Environment Management Plan must have been submitted long after the commencement of actual construction. Environment Management plan, therefore, can be suitably tailored to match the conditions for obtaining EC at the time of making the application, when things get altered due to previous construction and there remains no source of assessing its efficacy or validity with reference to the things obtaining at the time of commencing the construction.

29. On this backdrop, the appellants have chosen to make a specific grievance regarding inadequacy of open/recreational spaces and available parking spaces with reference to DC Regulations and National Building Code of India.

30. Whatever little window that is offered to what happened after submission of an application for grant of Environmental Clearance in the present case is through the minutes of the meeting of SEAC placed before us. From the reading of Minutes of 18th Meeting of the SEAC dated 19th -21st

September, 2013, we can very well gather that Environmental Management Plan was inadequate or in-appropriate as regards parking for rehab portion, rain water storage capacity, STP for rehab portion, construction and demolition, Waste Management, solar PV Panels, and yet the construction of 13,734.03 sq. meters of rehabilitation component had already come up. Nothing more needs to be stated as regard the environmental damage incurred due to the transgressions of EC Regulations, 2006 by undertaking construction prior to grant of Environmental Clearance.

31. Minutes of 66th Meeting of SEAC dated 27th -28th June, 2014 reveals how the final decision for recommendations of the grant of Environmental Clearance to the project was taken. SEAC noted the shortcomings in the project vis-à-vis parking in rehab portion, rain water storage capacity, STP for Rehab portion, solar PV panels and construction and demolition waste management plan as noticed previously and merely recorded that the project proponent has complied with or agreed to comply with the requisition made in respect of the said shortcomings and thereafter proceeded to decide the grant of Environmental Clearance in favour of the project.

32. The record before us-the lay out plan and the Environmental Clearance dated 25th March, 2014 tells us a different story. It is revealed that the green area (RG) provided on the ground is less than 8 per cent of the net plot area i.e. 5775.00 sq meters and as such is not as prescribed by the Slum

Rehabilitation Authority vide clause 6.20, Appendix iv, DCR 33(10). RG area on the ground is only 380.41 square meters i.e. 6.58 per cent of the net plot area. Thus it falls short by 81.59 sq. meters which ought to have been provided in the project.

33. The record reveals that only 91 off street parking spaces are made available in the said project. According to the respondent no. 5 the project proponent, the appellant no. 1 was the slum dweller with no basic amenities, and is now beneficiary of slum rehabilitation scheme who could now enjoy permanent alternative accommodation in a new building with modern amenities and improved environmental conditions as a result of the project in question. It therefore, does not lie in the mouth of appellant no. 1, according to the respondent no. 4 the project proponent, untenable allegations against the project. It is true that the appellant no. 1 is the beneficiary of SRA scheme and was a slum dweller at one point of time. However, this cannot put him to discount to say that he enjoys little lesser rights than any non-slum dweller, particularly, right to healthy living and clean environment. The appellant no.1 being consensual party to the development of the slum under slum rehabilitation scheme does not give any license to the developers to subvert the law and develop the area as he likes particularly, to the detriment of the rights which law confers upon every citizen alike. We therefore, do not wish to countenance the

submission made in that regard on behalf of the project proponent.

34. As regards recreational/open space area it is the case of the respondent no. 5 that reduction in amenity space to 8 per cent was permitted by the respondent no. 4 SRA as per clause 6.20 under Appendix iv of DCR 33(10) and a revised plan however was subsequently submitted wherein additional amenity space above podium level is much in excess to what was required has been provided. In this context our attention is invited to the Judgment of the Hon'ble Apex Court delivered in the case- Municipal Corporation of Greater Mumbai vs. Kohinoor CTNL Infrastructure Co. Pvt. Ltd. and Anr;(2014) 4 SCC 538 by the Learned Counsel appearing on behalf of the appellants. He submitted that availability of open/recreational space at the ground level is necessary to avoid adverse impact on the environment and human health as held by the Hon'ble Apex Court. The Hon'ble Apex Court held that the right to clean and healthy environment is within the ambit of Article 21 and the provisions of DCR 23 requiring recreational open space permanently open to the sky for growing trees are mandatory in the interest of basic requirements for good life and this position cannot be altered by the fact that the development schemes under DCR 33 (7), 33 (9), and 33(10) provide lesser recreational area/amenities spaces. The Hon'ble Apex Court however, held that the recreational area/amenities spaces has to be on the land i.e.

on the ground level the relevant extract from the Judgment are quoted herein below;

> *The right to a clean and healthy environment is within the ambit of Article 21. Furthermore, the right to a clean and pollution free environment, is also a right under our common law jurisprudence. (para 30)*
>
> *The provisions of DCR 23 are mandatory. Besides, under sub-clause (f) of DCR 23 there is a requirement of keeping the recreational open space permanently open to the sky and trees are to be grown in that space as laid down i.e. five trees per hundred square metres of the recreational space within the plot. DCR 2(64) defines "Open Space" to mean an area forming an integral part of a site left open to the sky. A "site" is defined under DCR 2(83) to mean a parcel or piece of land enclosed by definite boundaries. These DCRs when read together very much make it clear that the recreational/amenity space has to e on the land i.e. on ground level and it has got to be 15%, 20% or 25% of the area depending upon its size, as prescribed in DCR 23. The requirement of recreational space on the podium under DCR 38(34)(iv) is discretionary. Besides, as DCR 38(34)(iii) lays down, the podium shall be basically used for parking. Besides, DCR 38(34)(iv) does not contain a non-obstante clause to override the requirement under DCR 23 making it mandatory to provide recreational space on the ground floor. That being so, the provision under DCR 38(34) cannot be read in derogation of the requirement under DCR 23 or else it will result into serious erosion in the basic requirements for a good life affecting the guarantee of right to life under Article 21 of the Constitution of India. Therefore, DCR 38(34)(iv) has to be read down as inapplicable and not excluding the mandatory provision under DCR 23. (Paras 19, 27 and 28)*
>
> *This position is not altered by the fact that the development schemes under DCRs 33(7), 33(9) and 33(10) provide for lesser recreational area/amenity spaces. For development projects under DCR33(7) for reconstruction of cessed buildings, and for the urban renewal schemes under DCR 33(9), and for the slum rehabilitation projects under DCR 33(10), it is permissible to reduce the recreational/amenity open spaces to the limit prescribed in the respective Regulations to facilitate these schemes. Thus, under DCRs 33(7) and 33(10) reduction in the amenity open space is permitted to make the project viable, but still minimum 8% of the project area is required to be maintained as amenity open space. Similarly, for the*

schemes under DCR 33(9) minimum 10% of the plot area is required to be retained as recreational space. However DCRs 33(7), (9) and (10) are not generally applicable, since in other properties, where there are no such constraints to make the development schemes of rehabilitation or reconstruction of old buildings or slums viable, there is no reason why amenity open space at the ground level should be read as permissible, to be reduced. The only ground for reducing this mandatory open space at the ground level being given is that more parking and more accommodation may be provided, meaning thereby more construction, concretisation and financial expediency. Such a purpose cannot be read into the provisions as they presently exist, nor is it desirable to do so from the point of view of the requirement of minimum open spaces at the ground level. Besides, the requirement of having trees and open land around them is necessary from an environmental point of view, since there is already excessive concretisation, and a very serious reduction in open spaces at the ground level. (Paras 20 and 29)

Thus, having 15%, 20% or 25% of the area (depending upon the size of the lay out) as the recreational/amenity area at the ground level is a mandatory minimum requirement, and it will have to be read as such. Hence, it is not permissible to reduce the minimum recreational area provided under DCR 23 by relying upon DCR 38(34). However, if the developers wish to provide recreation area on the podium, over and above the minimum area mandated by DCR 23 at the ground level, they can certainly provide such additional recreational area. (Para 32)

We have therefore no hesitation in holding that respondent no. 5, the project proponent failed to provide minimum space at the ground level as required under law.

35. At this stage it would be worthwhile to consider the importance of Town Planning. Town Planning is the art and science of orderly use of land, setting up of buildings and communication routes in order to:

1. Make right use of the land for the right purpose.

2. Create and promote healthy conditions and environment for all the people, both rich and poor, to work, play or relax.
3. Provide social, economic, cultural and recreational amenities etc. and lastly to preserve the individuality of the town and aesthetics in the design of all elements of town or city plan.

36. Every development though conceived independently has to be in consonance with total and composite planning of the city of which it forms the part. If this is not adhered to, it tends to destroy or frustrate the planning for which it is conceived i.e. creation and promotion of healthy conditions and environment for all the people. If such planning is thrown to winds, there would be uneven and inadequate development, congested transport network, and obviously, its victim would be generally environment and particularly the people or humans who live in it.

37. In the instant case, initially three buildings- rehabilitation building having permissible FSI of 8,850 sq. meters, sale building having permissible FSI of 8,290 sq. meters and Municipal building having permissible FSI of 866.25 sq. meters were planned on the net plot area ad measuring 5,775 sq. meters were planned. Later on with the concurrence of the Municipal Corporation Rehabilitation building and Municipal building were merged together. Thus rehabilitation

building/component and sale building/component are planned to house the following tenements:

Rehabilitation Building	**Sale Building**
Shops :61(25 sq.m each) Residential Flats : 263 Balwadi : 04 Welfare Center : 04 Society Office : 04 Municipal Office :01 (866.25 sq.m)	Shops: 08 Residential Flats: 53

38. To sub-serve the aims and objectives of Town Planning the advisory like National Building Code and the DC Regulations come into play. As per NBC, 2005 annex B (clause10.1) one off street car parking space is recommended per: one residential tenement of 100 sq. meters of (built up) FSI area, every 50 sq.m of area or fraction thereof of the administrative office area for educational institute and public service or for mercantile office, and 100sq.m of area or fraction thereof of Municipal building. Applying these standards to the tenements in rehabilitation and sale building the following picture emerges:

Rehabilitation Building

Shops : 61; If we consider 25 sqm FSI for each shop then total FSI = 1525 sqm

Balwadi: 04; If we consider 25 sqm FSI for each shop then total FSI = 100sqm

Welfare centre: 04; If we consider 25 sqm FSI for each shop then total FSI = 100 sqm

Society Office: 04; If we consider 25 sqm FSI for each shop then total FSI = 100 sqm

Residential facility: Total FSI –FSI of shops + FSI of Balwadi + FSI of welfare center i.e.
8850sqm -1525 sqm-100sqm-100sqm-100sqm = 7025 sqm
Municipal Office: 01 (ad measuring 866.25 sqm)
Considering the Built up (FSI) area of each component of rehabilitation building the parking spaces which are warranted as per NBC, 2005 are as under:
Parking required for residential facility = 7025/100=70.25 or 71 spaces
Parking required for Commercial Facility = 1525/50=30.5 or 31 spaces
Parking required for Balwadi = 100/50=2 spaces
Parking required for Welfare centre= 100/50=2 spaces
Parking required for Society Office = 100/50=2 spaces
Parking required for Municipal Office = 866.25/100=8.66 or 9 spaces

Thus total parking spaces required as per NBC, 2005 for the rehabilitation component comprising of residential tenements shops, Balwadi, Welfare centre, Society Office and Municipal Office are 117 ECS

Sale Building:
Shops: 08; If we consider 25sqm FSI for each shop then total FSI = 200sqm
Residential Facility: Total FSI-FSI of Shops
= 8290sqm – 200sqm = 8090sqm
Parking required for residential facility = 8090/100=80.9 or 81
Parking required for commercial Facility = 200/50 = 2

Thus parking required in sale building = 81+2 = 83 ECS

Interestingly, the project proponent-the respondent no. 5 herein, Minutes of 66th Meeting of SEIAA dated 27th - 28thJanuary, 2014 reveal, agreed to comply with and revise layout and the parking statement as per NBC norms and now after the grant of EC in question contends that there is no obligation on his part to provide parking spaces to the rehabilitation component and comes forth with the provision of 91 parking spaces in sale building/component.

39. As regards the parking spaces, the respondent no. 5, contended that the unamended Regulation 36 of DCR prior to the amendment dated 12-08-2009 did not provide for any parking space for the rehabilitation component and what is claimed by the applicants as regards the parking is on the basis of amendment to the DCR-36 dated 12-08-2009. According to the respondent no. 5, the building plans in respect of rehabilitation component were sanctioned prior to 12-08-2009 and even the Commencement Certificate was issued on 07-09-2006 and; as such as per the DCR then in force one parking space was to be provided for every 04 tenements having carpet area about 35sq.m each and not for any tenement having lesser area. Significantly, it is the case of the respondent no. 5 that the area of rehabilitation tenements was increased from 225 sq. feet to 269 sq. feet vide Government order no. TPR/4308/497/CR/145/08/UD-11 and amended LOI was issued by the respondent no. 5 on 07-02-2009. Obviously, this called for revision and

amendment to the plans and its consequent approval by the planning authority. Silence is kept by the respondent no. 5 as to when this approval to the amenities was granted. As discussed above no approval was granted by the corporation to the amended plans for construction. It therefore, does not lie in the mouth of the respondent no. 5 to say that Commencement Certificate for such amended rehabilitation component was issued and therefore, rigour of amendment to DCR 36 dated 12-08-2009 requiring parking spaces for rehabilitation component could be avoided.

40. Development Control Regulation of Greater Mumbai Table 15- as amended lay down the following norms:

For Rehab Building:
For Residential Facility: One parking space required for redevelopment (residential facility)= 8 tenements having carpet area upto 35 sqm each.
(In addition to this parking spaces for visitors shall be provided to the extent of at least 25 % of the number stipulated above subject to a minimum of one.)

For Commercial facility: one parking for every 80 sqm of areas exceeding 800sqm.

For Educational facility: One parks for 35 sqm carpet area of the administrative office area or public service area.

Welfare centre will use as community centre; assembly and assembly halls or auditorium without fixed seats, one parks space for every 15 sqm of floor area.

For Office facility: one parking space for every 37.5 sqm of office space upto 1500sqm

For Sale Building:
For Residential Facility: (IECS required for 1 tenement with carpet area exceeding 70 sqm)

For Commercial facility: one parking space for every 40 sqm of floor area upto 800m

For Municipal Buildings
One parking space for every 37.5 sqm of office space upto 1500sqm.

Applying these norms the following picture regarding the requirement of parking spaces would emerge:

Parking required for Rehab Building:

For residential facility = 263 no of flats = 263/8=32.8 or 33 spaces

Visitor parking = 33x25/100 = 8.25 or 8 Spaces or 1 space (if considered for minimum 1)

Parking required in residential facility of Rehab. Building = 41spaces or 34 spaces

Parking required for shops in Rehab Centre:

Considering floor area per shop as 25 sqm total floor area for 61 shops = 61x25 = 1525 sqm

Parking required 1 space for 80m²area.

1525/80 = 19.06 or 19 spaces

Parking required for welfare centre, Balwadi & Society Offices

Balwadi: 4; If we consider 25 sq. m FSI for each Balwadi then total FSI = 100sqm

Welfare Centre: 4; If we consider 25 sq. m FSI for each Balwadi then total FSI = 100sqm

Society office: 4; If we consider 25 sqm FSI for each Balwadi then total FSI = 100sqm

Parking required for Balwadi = 100/35= 2.85 or 3 spaces

Parking required for welfare Centre = 100/15=6.66 or 7 spaces

Parking required for Society Office = 100/37.5= 2.66 or 3 spaces

Total parking space required in Rehab. Building = 41+19+3+7+3 = 73 spaces or 34+19+3+7+3 = 66 spaces

Parking required for Sale Building:

Considered flats having carpet area exceeding 70 sqm

For residential facility = 53 no of flats = 53 spaces

For Shops considering 25 sqm area

8 shops = 25x8= 200sqm

Parking required = 200/40= 5 spaces

Total parking required in Sale building = 53+5 = 58 spaces
For Municipal Office:
Parking required = 866/37.5 = 23 spaces
Total Parking required (Rehab +Sale Building) = 73+58= 131 spaces
Total Parking required = 73+58+23 = 154 spaces or 66+58+23 = 147 spaces

41. A town or a city is not static but is an evolving or developing entity. It is for this reason that amendments to the Development Control Regulations are effected from time to time to meet the challenges concerning grant of EC to the project in question. A modest and rational view of the facts and circumstances discussed above persuades us to hold that the project proponent ought to have provided 147 car spaces in the project to avoid congestion with corresponding increase in pollution level.

42. Consequences of commencing construction before the grant of EC are thus self-evident and multi-fold. First and the foremost, it is the denial of realistic base-line data in respect of the Environmental parameters namely land, air, water and the living components of the environment i.e. humans, living creatures, plants and properties. Secondly, the construction activity in such cases also proceeds in un-regulated manner without the environmental safeguards in the place. This can be perceived from various terms and conditions stipulated in para 3 of the EC dated 25th March, 2014 as well as the

Environmental Management Plan referred to in the said EC. A look at the EC conditions reveals that the project proponent was required to keep in place all required sanitary hygienic measures before starting construction activities. Arrangements for safe disposal of waste water and solid waste generated during construction phase, disposal of muck without creating any adverse effects on the neighbouring properties and only at the approved sites, disposal of hazardous waste generated during construction phase, proper use of the diesel generators sets and maintenance of noise emission standards, effluent management and sagacious use of water including ground water during construction phase are some of the things which were expected to be properly regulated during construction phase. Minutes of the 18th Meeting of the SEAC reveal, as informed by the project proponent, the construction of rehabilitation component was carried out to the extent of 13,734 sq. meters and yet the STEP for rehab portion was not done and solar PV panel for energy generation were not in place. Lastly but importantly, there is little space left for making necessary changes in the construction plan for effecting such measures necessary to safeguard the environment from the adverse impacts of the projects so undertaken. The very purpose of regulating the development/construction with certain safeguards in place as envisaged under section 3(2)(v) of the Environment(Protection), 1986 in exercise of which the EC

Regulations 2006 have come into being, is frustrated or is likely to be frustrated.

43. In the instant case, it is evidently clear that the project proponent violated the EC Regulations, 2006 by undertaking construction before the EC was granted and thereby denied the realistic environmental safeguard to be in place. It is also seen that inadequate recreational space and parking space is proposed in the said project. This begs a pertinent question as to whether EC in question needs to be set aside and the construction which includes rehabilitation component/building comprising of 263 flats, 61 shops, 4 tenements of welfare centre, 4 tenements of Balwadi, society office and Municipal office should be exposed to its logical consequence. In our considered opinion when there is some space left for providing certain safeguards and seek re-compense for the violation of EC Regulations, it would be rather harsh to set aside the EC and instead the project proponent needs to be saddled with appropriate measure of compensation and directed to make certain amends in the construction of sale component building, the construction of which has been stopped vide order dated 30th April 2014 to maintain *status quo* so as to provide adequate parking spaces as required, to avoid spilling over of the vehicles on the public streets and cause congestion of traffic leading to adverse impact on the environment.

44. We are aware that it may not be possible to determine compensation on account of violations of EC Regulations with consequential untold damage to the environment and with some exactitude, but that should not be the reason for the project proponent to avoid their liability in that regard.

45. The Hon'ble Supreme Court in the case of *M/s Sterlite Industries (India) Ltd. V. Tamil Nadu PCB &Ors., JT 2013 (4) SC 388*had provided payment of Rs. 100 crores by the company which operated without consent of the Board, though M*/s Sterlite Industries* possessed the consent of the Board prior as well as subsequent to the period for which the compensation was imposed. In the case of *Goa Foundation vs. Union of India &Ors., (2014) 6 SCC 590* the Hon'ble Apex Court directed compensation at the rate of 10 per cent of the project cost to be deposited at the instance. These cases justify imposition of compensation at the modest rate of 5 per cent of estimated cost of the project i.e. 64.18 crores in the present case, which works out to roughly 3 crores. In addition thereto, the project proponent needs to be saddled with the compensation amount computed at the rate of market value of the land/recreational area as on March, 2014 (date of grant of EC) falling deficient than the required area for the project i.e. Rs. 40,000/- per sq. meter- circle rate as published by Department of Registration and Stamps, Government of Maharashtra for the area in question for the

year 2014 multiplied by 81.59 which works out to Rs. 32,63,600/-.

46. As regards the deficient parking spaces, it is just and necessary not to allow construction of the sale building to proceed unless the project proponent makes necessary amends in construction plan of the sale building and makes available adequate number of additional floors of the building for making provision for adequate parking spaces available to both sale and rehabilitation buildings. In our opinion three floors shall be made available from 7th floor onwards, from the area available for construction of residential flats. This will ensure adequate parking spaces in relation to the number of occupants in both rehab building and sale building and ensure that vehicles do not spill out on the public streets resulting in congestion and prevent adverse impacts on the environment as the consequence thereof. We, therefore, dispose of this appeal with following directions:

1. The respondent no. 5 shall pay and remit a sum of Rs. 3 crores to the Authority, specified under sub-section (3) of section 7(A) of the Public Liability Insurance Act, 1991 to be credited to the Environmental Relief Fund within a fortnight.
2. The respondent no. 5 the project proponent shall pay an amount of Rs. 32,63,600/- being market price of the deficient recreational area as on March, 2014 to the Maharashtra Pollution Control Board for incurring

expenses on Environmental and ecological rehabilitation within a fortnight.

3. The respondent no. 5 shall make necessary amends in the construction plan of the sale building, get it approved as per law and make available additional parking spaces on adequate number of floors in sale building commencing from 7th floor upwards and within 32 floors so as to make parking space available for both rehab building and sale building by utilising the floors which otherwise would have been made available to the sale building.
4. Construction of the sale building shall not proceed and no third party interest by way of sale, transfer, assignment, lease or parting with possession of any portion of sale building/component in any manner whatsoever shall be made unless the amounts as directed hereinabove are paid and necessary amends to comply with the directions to provide additional parking spaces as aforesaid are made.
5. The appeal thus stand disposed of with cost of Rs. 1,00,000/- (one Lakh).

……, CP
(Swatanter Kumar)

……, JM
(U.D. Salvi)

……, EM
(Dr. D.K. Agrawal)

……, EM
(Prof. A.R. Yousuf)

ITEM NO.52 COURT NO.1 SECTION XVII

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

Civil Appeal No(s). 7180/2015

M/S PRIYALI BUILDERS & DEVELOPERS Appellant(s)

VERSUS

SUNIL KUMAR CHUGH & ORS. Respondent(s)

(With appln. (s) for permission to file additional documents and stay)

Date : 28/09/2015 This appeal was called on for hearing today.

CORAM :
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE AMITAVA ROY

For Appellant(s) Mr. Harish N Salve, Sr. Adv.
Mr. J.J. Bhatt, Sr. Adv.
Mr. Manish Parkeh, Adv.
Mr. Pratap Venugopal, Adv.
Ms. Surekha Raman, Adv.
Ms. Niharika, Adv.
for M/s. K.J. John & Co.,Advs.

For Respondent(s)

UPON hearing the counsel the Court made the following

O R D E R

Notice.

In the meantime, the operation of the impugned judgment and order dated 03.09.2015 passed by the National Green Tribunal, Principal Bench at New Delhi in Appeal No. 66 of 2014, shall remain stayed.

[Charanjeet Kaur] [Vinod Kulvi]
A.R.-cum-P.S. Asstt. Registrar

Signature Not Verified
Digitally signed by Charanjeet Kaur
Date: 2015.09.28 16:27:33 IST
Reason:

ITEM NO.3+37 COURT NO.1 SECTION XVII

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

Civil Appeal No(s). 1119-1120/2016

SATILILA SEHKARI AWAS SAMITI LTD. Appellant(s)

VERSUS

UNION OF INDIA & ORS ETC. ETC. Respondent(s)

(with appln. (s) for ad-interim ex-parte stay and exemption from filing lengthy list of dates and office report)

WITH C.A. No. 7193-7194/2015
(With appln.(s) for modification of court's order and appln.(s) for stay and Office Report)

C.A. No. 9124-9125/2015
(With appln.(s) for directions and Office Report)

C.A. No. 13844-13845/2015
(With Office Report)

C.A. No. 7191-7192/2015
(With appln.(s) for modification of court's order and appln.(s) for permission to file additional documents and appln.(s) for stay and appln.(s) for clarification of court's order and Office Report)

C.A. No. 9108/2015
(With appln.(s) for may refer to remarks and appln.(s) for stay and Office Report and I.A. No.3 - Appln. For exemption from balance deposit of monies)

C.A. No. 5618/2015
(With Office Report)

C.A. No. 13842-13843/2015
(With Office Report)

C.A.D No. 7588/2016
(with appln. For permission to file appeal and office report

Date : 04/03/2016 These appeals were called on for hearing today.

Signature Not Verified
Digitally signed by
SHASHI SAREEN
Date: 2016.05.16
16:19:45 IST
Reason:

CORAM :
HON'BLE THE CHIEF JUSTICE
HON'BLE MRS. JUSTICE R. BANUMATHI
HON'BLE MR. JUSTICE UDAY UMESH LALIT

For Appellant(s)	**Mr. Rajiv Dutta, Adv.**
(CA 1119-1120/16	**Mr. Satish Mishra, Adv.**
	Mr. Shravan Kumar Yammanur, Adv.
	Mr. Daniel George, Adv.
	Kumar Dushyant Singh,Adv.
(CA 7193-7194/15&	**Dr. A.M.Singhvi, Sr. Adv.**
	Mr. Zaffar Inayat, Adv.
	Ms. Rohini Musa,Adv.
7191-7192/2015)	**Mr. C.A.Sundram, Sr. Adv.**
	MS. Rohini Musa, Adv.
	Mr. Zaffar Inayat, Adv.
(CA 9124-9125/15)	**Mr. S.Guru Krishna Kumar, Sr. Adv.**
	Mr. R. Chandrachud,Adv.
(CA 13844-13845/15	**Mr. Kailash Vasdev, Sr. Adv.**
& 13842-13843/2015)	**Mr. R.Mohan, Adv.**
	Mr. MSM Asaithambi, Adv.
	Mr. C.Kannan, Adv.
	MS. Sripradha K., Adv.
(CA 9108/2015)	**Mr. Jaideep Gupta, Sr. Adv.**
	Mr. K.S.Mahadevan, Adv.
	Mr. Krishna Kumar R.S., Adv.
	Mr. R.Nijay Anand, Adv.
	Mr. Rajesh Kumar,Adv.
(CA 5618/2015)	**Mr. Mohan Parasaran, Sr. Adv.**
	Mr. Rohan Chinan, Adv.
	Mr.Ashwin Kumar D.S., Adv.
	Mr. D. L. Chidananda,Adv.
CAD 7588/16	**Mr. Amit Chadha, Sr. Adv.**
	Mr. Ashwani Kumar, Adv.
For Respondent(s)	**Mr. N.K.Kaul, ASG,**
	Ms. Ritu Bhardwaj, Adv.
	Mr. R.M.Bajaj, Adv.
	Mr. Rahul Pratap, Adv.
	Mr. Niraj Kumar, Adv.
	Mr. N.K.Karhail, Adv.
	Mr. S.N.Terdol, Adv.
	Mr. Rajesh Kumar,Adv.
	Mr. T.V.S. Raghavendra Sreyas,Adv.
	Ms. Gayatri Gulati Syreas, Adv.

Ms. Rohini Musa,Adv.

State of Kerala **Mr. Nikilesh Ramachandran, adv.**
Mr. Pawan Kunud, Adv.

For CPCB **Mr. Vijay Panjwani, Adv.**

UPON hearing the counsel the Court made the following

O R D E R

Civil Appeals No. 9124-9125 of 2015:

Mr. S.Guru Krishna Kumar, learned senior counsel for the petitioner submits that he has instruction to withdraw these petitions. The civil appeals are accordingly dismissed as withdrawn.

Civil Appeal No. D 7588 of 2016:

Mr. Amit Chadha, learned senior counsel for the appellant seeks leave to withdraw this appeal reserving liberty for the appellant to approach the National Green Tribunal for such redress as may be legally permissible. The civil appeal is dismissed with the liberty prayed for. We make it clear that we have not expressed any opinion as to the merits of any of the contentions that may be urged before the National Green Tribunal. We leave it open to the NGT whether any relief can or cannot be granted to the applicant in the peculiar facts and circumstances of the case. No costs.

Civil Appeals No. 1119-1120 of 2016, 7193-7194 of 2015, 13844-13845 of 2015, 7191-7192 of 2015, 9108 of 2015, 5618 of 2015, 13842-13843 of 2015:

Post again on Wednesday i.e. the 6th April, 2016.

Needful be shall be done by learned counsel for the parties in terms of our Order dated 22.01.2016, if already not done. Objections to all the pending I.As. be filed by learned counsel for the opposite.

Mr. Vijay Panjawani, learned counsel for the CPCB shall file a copy of the report submitted by the NGT in this Court with a copy to learned counsel for the opposite. A copy of the said report may be also be uploaded on the web-site.

(SHASHI SAREEN)
AR-CUM-PS

(VEENA KHERA)
COURT MASTER

(Two separate signed orders are placed on the file)

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. D 7588 OF 2016

M/S. ETA PROEPRTIES AND INVESTMENTS PVT. LTD. ... Appellant(s)

Versus

UNION OF INDIA AND ORS. ... Respondent(s)

O R D E R

Mr. Amit Chadha, learned senior counsel for the appellant seeks leave to withdraw this appeal reserving liberty for the appellant to approach the National Green Tribunal for such redress as may be legally permissible. The civil appeal is dismissed with the liberty prayed for. We make it clear that we have not expressed any opinion as to the merits of any of the contentions that may be urged before the National Green Tribunal. We leave it open to the NGT whether any relief can or cannot be granted to the applicant in the peculiar facts and circumstances of the case.

.....CJI.
(T.S.THAKUR)

.....J.
(R.BANUMATHI)

.....J.
(UDAY UMESH LALIT)

New Delhi,
Dated: 4th March, 2016.

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEALS No. 9124-9125 OF 2015

M/S. SSM BUILDERS AND PROMOTORS ... Appellant(s)

Versus

S.P.MUTHURAMAN AND ORS. ... Respondent(s)

O R D E R

Mr. S.Guru Krishna Kumar, learned senior counsel for the appellant submits that he has instruction from the appellant to withdraw these petitions. The civil appeals are accordingly dismissed as withdrawn.

.....CJI.
(T.S.THAKUR)

.....J.
(R.BANUMATHI)

.....J.
(UDAY UMESH LALIT)

New Delhi,
Dated: 4th March , 2016.

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No(s). 5618/2015

SAS REALTORS PVT. LTD. Appellant(s)

VERSUS

S.P. MUTHURAMAN & ORS. Respondent(s)

WITH
C.A. No. 7193-7194/2015

C.A. No. 7191-7192/2015

C.A. No. 9108/2015

C.A. No. 1119-1120/2016

C.A. No. 13844-13845/2015

C.A. No. 13842-13843/2015

C.A. No. 2522/2018

C.A. No. 3309-3312/2018

O R D E R

C.A. Nos. 7193-7194/2015 and C.A. Nos. 7191-7192/2015

Learned counsel for the appellants says that these appeals have become infructuous.

The civil appeals are disposed of on having become infructuous.

C.A. No. 2522/2018

Signature Not Verified
Digitally signed by MEENAKSHI KOHLI
Date: 2019.07.19 15:17:12 IST
Reason:

1. One of the issues raised by the Union of India in this appeal is whether the National Green Tribunal has jurisdiction to strike

down subordinate legislation.

Appeal admitted.

Liberty to file a reply.

Rest of the cases

Subsequent to the order of the National Green Tribunal, a Committee has been constituted in terms of para 163(4). The Committee has also given a report which has been placed before the Tribunal.

Since the correctness or otherwise of the report is already before the Tribunal, we are not inclined to entertain these appeals.

The appeals are accordingly disposed of. However, in the appeal filed by the Union of India being C.A. No. 2522/2018, we will be considering the question whether the National Green Tribunal has jurisdiction to set aside the subordinate legislation.

The appellants may file impleadment / intervention applications in C.A. No. 2522/2018.

….....J.
[MADAN B. LOKUR]

….....J.
[DEEPAK GUPTA]

NEW DELHI;
July 17, 2018.

ITEM NO.20 COURT NO.3 SECTION XVII

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

Civil Appeal No(s). 5618/2015

SAS REALTORS PVT. LTD. Appellant(s)

VERSUS

S.P. MUTHURAMAN & ORS. Respondent(s)

WITH
C.A. No. 7193-7194/2015 (XVII)
(FOR MODIFICATION OF COURT ORDER ON IA 5/2016)

C.A. No. 7191-7192/2015 (XVII)

C.A. No. 9108/2015 (XVII)
(FOR ON IA 3/2016 FOR ON IA 5/2016)

C.A. No. 1119-1120/2016 (XVII)

C.A. No. 13844-13845/2015 (XVII)

C.A. No. 13842-13843/2015 (XVII)

C.A. No. 2522/2018 (XVII)
(FOR STAY APPLICATION ON IA 32145/2018
FOR EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT ON IA 32147/2018
FOR PERMISSION TO FILE LENGTHY LIST OF DATES ON IA 32150/2018
FOR PERMISSION TO FILE ADDITIONAL DOCUMENTS ON IA 32156/2018)

C.A. No. 3309-3312/2018 (XVII)
(IA No.44893/2018-EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT and IA No.44888/2018-STAY APPLICATION and IA No.44891/2018-PERMISSION TO FILE LENGTHY LIST OF DATES and IA No.44894/2018-PERMISSION TO FILE ADDITIONAL DOCUMENTS)

Date : 17-07-2018 These appeals were called on for hearing today.

CORAM : HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE DEEPAK GUPTA

For Appellant(s) Mr. Jogy Scaria, AOR

Mr. Ramesh Babu M. R., AOR

Mr. Mohan Parasaran, Sr. Adv.
Mr. Ashwin Kumar D.S., Adv.

Mr. D. L. Chidananda, AOR

Ms. Rohini Musa, AOR

Mr. Rajesh Kumar, AOR

Mr. Satish Mishra, Adv.
Mr. Kumar Dushyant Singh, AOR

Mr. Kailash Vasdev, Sr. Adv.
Mr. R. Mohan, Adv.
Mr. V. Balaji, Adv.
Mr. M.S.M. Asaithambi, Adv.
Ms. Sripradha Krishnanan, Adv.
Mr. Rakesh K. Sharma, AOR

Mr. Gurmeet Singh Makker, AOR

For Respondent(s) Mr. A.N.S. Nadkarni, ASG
Mr. Divya Prakash Pande, Adv.
Mr. Niraj Kumar, Adv.
Mr. S.S. Rebello, Adv.
Ms. Ridhi Kackkar, Adv.
Mr. Sanjai Kumar Pathak, Adv.
Mr. Ritesh Kumar, Adv.
Mr. Anmol Chandan, Adv.
Mr. Gurmeet Singh Makker, AOR

Mr. T. V. S. Raghavendra Sreyas, AOR
Ms. Gayatri Gulati, Adv.
Ms. Sneh Dhillon, Adv.

Mr. Sanjay Upadhyay, Adv.
Mrs. Lalita Kaushik, AOR
Mr. Prakhar Pandey, Adv.
Ms. Upma Bhattacharjee, Adv.

Ms. Anitha Shenoy, AOR
Ms. Srishthi Agnihotri, Adv.
Ms. Remya Raj, Adv.

CPCB Mr. Vijay Panjwani, AOR

Mr. Rahul Pratap, Adv.

Mr. K. Parameshwar, AOR

Mr. G. Prakash, AOR

Mr. Rakesh K. Sharma, AOR

Ms. Rohini Musa, AOR

Mr. K.S. Mahadevan, Adv.
Mr. Krishna Kumar, Adv.
Mr. Rajesh Kumar, AOR
Ms. Swati Bansal, Adv.

Mr. Avijit Roy, AOR

UPON hearing the counsel the Court made the following

O R D E R

C.A. Nos. 7193-7194/2015 and C.A. Nos. 7191-7192/2015

The civil appeals are disposed of on having become infructuous in terms of the signed order.

C.A. No. 2522/2018

Appeal admitted.

Rest of the cases

The appeals are disposed of in terms of the signed order.

The appellants may file impleadment / intervention applications in C.A. No. 2522/2018.

(MEENAKSHI KOHLI)
COURT MASTER

(KAILASH CHANDER)
COURT MASTER

[Signed order is placed on the file]

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(2022) 8 Supreme Court Cases 156

2J

(BEFORE B.R. GAVAI AND HIMA KOHLI, JJ.)

STATE OF ANDHRA PRADESH .. Appellant;

Versus

RAGHU RAMAKRISHNA RAJU KANUMURU
(MEMBER OF PARLIAMENT) .. Respondent.

Civil Appeals Nos. 4522-24 of 2022†, decided on June 1, 2022

A. **Constitution of India — Arts. 226 and 227 — Law declared by High Court — Binding effect of — Primacy of orders of High Court over those of statutory tribunals in case of conflicting orders**

— Held, law declared by the High Court in the State is binding on authorities and tribunals under its superintendence and they cannot ignore it — Further, tribunals are subordinate to High Court insofar as the territorial jurisdiction of High Court is concerned — Held, in case of conflicting orders passed by statutory tribunals and the High Court, it is the orders passed by the constitutional courts, which would prevail over the orders passed by the statutory tribunals — Courts, Tribunals and Judiciary — Courts, Tribunals and Special Courts — Tribunals (Paras 11 to 15)

B. **Environment Law — National Green Tribunal Act, 2010 — S. 14 — Entertaining a lis by the NGT — Permissibility of, when High Court of competent jurisdiction found already in seisin of the matter with regard to same cause of action**

— In a writ petition, High Court vide its order dt. 16-12-2021, permitted construction activities and other allied activities in relation to the subject project, strictly in accordance with the permission accorded by the concerned Ministry and the existing Master Plan — Proceedings initiated by the NGT after taking cognizance of a letter sent to it by the respondent, a sitting MP and the NGT appointed an Experts Committee on 17-12-2021 which submitted its Report on 29-3-2022, indicating therein no violation in the construction carried out by the appellant — NGT again, vide its order dt. 6-5-2022, appointed a Second Experts Committee and without waiting for its report, by the same order, the NGT stayed further construction on part of the appellant

— Held, law declared by the High Court in the State is binding on authorities and tribunals under its superintendence and they cannot ignore it and, further, the tribunals would be subordinate to High Court insofar as the territorial jurisdiction of High Court is concerned — In case of conflicting orders passed by NGT and the High Court, it is the orders passed by the constitutional courts, which would prevail over the orders passed by the statutory tribunals

† Arising out of Diary No. 16486 of 2022. Arising from the impugned Interim Judgment and Order in *Raghu Ramakrishna RajuKanumuru* v. *State of A.P.*, 2022 SCC OnLine NGT 151 (National Green Tribunal, OA No. 361 of 2021, dt. 6-5-2022) and *Raghu Ramakrishna RajuKanumuru* v. *State of A.P.*, 2022 SCC OnLine NGT 144 (National Green Tribunal, IA No. 117 of 2022, IA No. 118 of 2022 and OA No. 361 of 2021, dt. 20-5-2022) **[Reversed]**

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— Resultantly, prayer of the appellant that when High Court of competent jurisdiction was already in seisin of the matter, the NGT could not have entertained a lis with regard to the same cause of action, held acceptable and, thus, the impugned orders passed by the NGT held not sustainable and set aside — Courts, Tribunals and Judiciary — Courts, Tribunals and Special Courts — Tribunals — Constitution of India, Arts. 226 and 227 (Paras 11 to 21)

Held :

The law declared by the higher court in the State is binding on authorities and tribunals under its superintendence and they cannot ignore it. If the courts command others to act in accordance with the provisions of the Constitution and to abide by the rule of law, it is not possible to countenance violation of the constitutional principle by those who are required to lay down the law. (Para 11)

Insofar as the tribunals are concerned, they would be subordinate to the High Court insofar as the territorial jurisdiction of the High Court is concerned. (Para 12)

Hence, it was not appropriate on the part of the NGT to have continued with the proceedings before it, specifically, when it was pointed that the High Court was also in seisin of the matter and had passed an interim order permitting the construction. The conflicting orders passed by the NGT and the High Court would lead to an anomalous situation, where the authorities would be faced with a difficulty as to which order they are required to follow. There can be no manner of doubt that in such a situation, it is the orders passed by the constitutional courts, which would prevail over the orders passed by the statutory tribunals. (Para 13)

Therefore, the proceedings pending before the NGT are quashed and set aside. (Para 15)

Raghu Ramakrishna RajuKanumuru v. *State of A.P.*, 2022 SCC OnLine NGT 151; *Raghu Ramakrishna RajuKanumuru* v. *State of A.P.*, 2022 SCC OnLine NGT 144, *reversed*

P.V.L.N. Murthy Yadav v. *A.P. Tourism Development Corpn. Ltd.*, 2021 SCC OnLine AP 4442, *referred to*

Priya Gupta v. *Ministry of Health & Family Welfare*, (2013) 11 SCC 404 : (2014) 1 SCC (Civ) 534 : 6 SCEC 194; *East India Commercial Co. Ltd.* v. *Collector of Customs*, AIR 1962 SC 1893; *Official Liquidator* v. *Dayanand*, (2008) 10 SCC 1 : (2009) 1 SCC (L&S) 943; *L. Chandra Kumar* v. *Union of India*, (1995) 1 SCC 400 : 1995 SCC (L&S) 321, *followed*

SK-D/68967/C

Advocates who appeared in this case :

Dr Abhishek Manu Singhvi and S. Niranjan Reddy, Senior Advocates [Mahfooz Ahsan Nazki (Advocate-on-Record), Polanki Gowtham, Shaik Mohamad Haneef, T. Vijaya Bhaskar Reddy, K.V. Girish Chowdary, Ms Rajeswari Mukherjee, Ms Akhila Palem, Abhishek Sharma and Sahil Raveen, Advocates], for the Appellant;

Balaji Srinivasan (Advocate-on-Record), Advocate, for the Respondent.

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

1. 2022 SCC OnLine NGT 151, *Raghu Ramakrishna RajuKanumuru* v. *State of A.P.* **(reversed)** 158*c*, 158*c-d*, 158*g-h*, 159*a*, 159*b*, 159*b-c*, 159*d*, 160*g*
2. 2022 SCC OnLine NGT 144, *Raghu Ramakrishna RajuKanumuru* v. *State of A.P.* **(reversed)** 158*c-d*, 159*c*
3. 2021 SCC OnLine AP 4442, *P.V.L.N. Murthy Yadav* v. *A.P. Tourism Development Corpn. Ltd.* 158*e*, 159*d*, 159*e-f*

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4. (2013) 11 SCC 404 : (2014) 1 SCC (Civ) 534 : 6 SCEC 194, *Priya Gupta* v. *Ministry of Health & Family Welfare* 159*f-g*
5. (2008) 10 SCC 1 : (2009) 1 SCC (L&S) 943, *Official Liquidator* v. *Dayanand* 160*c-d*
6. (1995) 1 SCC 400 : 1995 SCC (L&S) 321, *L. Chandra Kumar* v. *Union of India* 160*d-e*
7. AIR 1962 SC 1893, *East India Commercial Co. Ltd.* v. *Collector of Customs* 160*c-d*

The Judgment of the Court was delivered by

B.R. GAVAI, J.— Permission to file appeal without certified/plain copy of impugned order is granted. Issue notice. Shri Balaji Srinivasan, learned counsel accepts notice on behalf of the sole respondent, and as such, we have heard the matter finally.

2. The appellant challenges the order dated 6-5-2022 passed by the National Green Tribunal, Principal Bench, New Delhi (hereinafter referred to as "NGT") in *Raghu Ramakrishna RajuKanumuru* v. *State of A.P.*[1], vide which it prohibited the appellant from undertaking any further construction. The appellant also challenges the order dated 20-5-2022 passed by the learned NGT in *Raghu Ramakrishna RajuKanumuru* v. *State of A.P.*[2], vide which the application seeking vacation of stay imposed vide order dated 6-5-2022[1] was rejected.

3. The appellant was already running a resort at Rushikonda Hill, near Visakhapatnam. According to the appellant, after obtaining the necessary permission, it has demolished the existing resort and is reconstructing the resort at the same place with additional facilities.

4. A writ petition being WP (PIL) No. 241 of 2021, challenging the said construction, has already been filed before the High Court of Andhra Pradesh at Amaravati. In the said writ petition, the Division Bench of the High Court has passed the following order on 16-12-2021[3]: (*P.V.L.N. Murthy Yadav case*[3], SCC OnLine AP para 4)

> "*4.* In the meanwhile, the construction activities and other allied activities in relation to the subject project, if any undertaken, shall be strictly in accordance with the permission accorded by the Ministry of Environment, Forest and Climate Change, as well as the existing Master Plan."

5. It appears that the aforesaid writ petition before the High Court was filed on 8-12-2021. However, a letter addressed by the respondent was sent on 31-10-2021 to the learned NGT. The respondent is a sitting Member of Parliament from one of the constituencies in the State of Andhra Pradesh. The learned NGT, after taking cognizance of the said letter, initiated the proceedings in *Raghu Ramakrishna RajuKanumuru* v. *State of A.P.*[1] It further appears from the record that the learned NGT had appointed an Experts Committee on 17-12-2021 which submitted its Report on 29-3-2022. A perusal of the

1 2022 SCC OnLine NGT 151
2 2022 SCC OnLine NGT 144
3 *P.V.L.N. Murthy Yadav* v. *A.P. Tourism Development Corpn. Ltd.*, 2021 SCC OnLine AP 4442

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said report would reveal that the said Experts Committee consisting of four experts did not find any violation in the construction that was carried out by the appellant.

6. However, the learned NGT again, vide its order dated 6-5-2022[1], appointed a 2nd Experts Committee. The report of the said 2nd Experts Committee is still awaited. However, without waiting for the said report, by the same order, the learned NGT directed that no further construction to be undertaken.

7. It appears that after the order dated 6-5-2022[1] was passed by the learned NGT, the appellant filed an application for vacating stay on construction as directed in the said interim order dated 6-5-2022[1] passed by the learned NGT. However, the same was also rejected by the learned NGT vide its order dated 20-5-2022[2]. Both these orders are impugned in the present appeals.

8. Dr Abhishek Manu Singhvi, learned Senior Counsel appearing on behalf of the appellant, submitted that when the High Court of competent jurisdiction was already in seisin of the matter, the learned NGT could not have entertained a lis with regard to the same cause of action. He submitted that though this fact was brought to the notice of the learned NGT, the learned NGT refused to vacate the interim order dated 6-5-2022[1], which was in conflict with the order of the High Court dated 16-12-2021[3].

9. Dr Singhvi submitted that NGT is a Tribunal, which is subordinate to the High Court insofar as the territorial jurisdiction of the High Court is concerned. He, therefore, submitted that the very continuation of the proceedings before the learned NGT is not sustainable in law.

10. Shri Balaji Srinivasan, learned counsel appearing on behalf of the respondent, on the contrary, submitted that the appellant has acted in gross breach of the order dated 16-12-2021[3] passed by the High Court of Andhra Pradesh at Amravati. He submitted that the construction is rampantly going on in blatant violation of the order of the High Court. Contempt petition has already been filed before the High Court, wherein the High Court after taking cognizance of the blatant violation, issued notice on 4-5-2022.

11. This Court, in *Priya Gupta* v. *Ministry of Health & Family Welfare*[4], has observed thus: (SCC pp. 414-15, para 12)

> "*12.* The government departments are no exception to the consequences of wilful disobedience of the orders of the Court. Violation of the orders of the Court would be its disobedience and would invite action in accordance with law. The orders passed by this Court are the law of the land in terms of Article 141 of the Constitution of India. No court or tribunal

1 *Raghu Ramakrishna RajuKanumuru* v. *State of A.P.*, 2022 SCC OnLine NGT 151
2 *Raghu Ramakrishna RajuKanumuru* v. *State of A.P.*, 2022 SCC OnLine NGT 144
3 *P.V.L.N. Murthy Yadav* v. *A.P. Tourism Development Corpn. Ltd.*, 2021 SCC OnLine AP 4442
4 (2013) 11 SCC 404 : (2014) 1 SCC (Civ) 534 : 6 SCEC 194

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and for that matter any other authority can ignore the law stated by this Court. Such obedience would also be conducive to their smooth working, otherwise there would be confusion in the administration of law and the respect for law would irretrievably suffer. There can be no hesitation in holding that the law declared by the higher court in the State is binding on authorities and tribunals under its superintendence and they cannot ignore it. This Court also expressed the view that it had become necessary to reiterate that disrespect to the constitutional ethos and breach of discipline have a grave impact on the credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty are important hallmarks of judicial jurisprudence developed in this country, as discipline is sine qua non for effective and efficient functioning of the judicial system. If the courts command others to act in accordance with the provisions of the Constitution and to abide by the rule of law, it is not possible to countenance violation of the constitutional principle by those who are required to lay down the law. (Ref. *East India Commercial Co. Ltd.* v. *Collector of Customs*[5] and *Official Liquidator* v. *Dayanand*[6].)"

12. In any case, no law is necessary to state that insofar as the tribunals are concerned, they would be subordinate to the High Court insofar as the territorial jurisdiction of the High Court is concerned. A reference in this respect was also made to the judgment of the Constitution Bench of this Court in *L. Chandra Kumar* v. *Union of India*[7].

13. We are, therefore, of the considered view that it was not appropriate on the part of the learned NGT to have continued with the proceedings before it, specifically, when it was pointed that the High Court was also in seisin of the matter and had passed an interim order permitting the construction. The conflicting orders passed by the learned NGT and the High Court would lead to an anomalous situation, where the authorities would be faced with a difficulty as to which order they are required to follow. There can be no manner of doubt that in such a situation, it is the orders passed by the constitutional courts, which would be prevailing over the orders passed by the statutory tribunals.

14. In that view of the matter, we are of the considered view that the continuation of the proceedings before the learned NGT for the same cause of action, which is seized with the High Court, would not be in the interest of justice.

15. We, therefore, quash and set aside the proceedings pending before the learned NGT in *Raghu Ramakrishna RajuKanumuru* v. *State of A.P.*[1]

5 AIR 1962 SC 1893
6 (2008) 10 SCC 1 : (2009) 1 SCC (L&S) 943
7 (1995) 1 SCC 400 : 1995 SCC (L&S) 321
1 2022 SCC OnLine NGT 151

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16. We further find that taking into consideration the serious allegations made by the respondent, it will be appropriate that all these facts are placed before the High Court and the High Court considers passing appropriate orders in accordance with law so as to strike a balance between the development and the environmental issues.

17. Needless to state that though development is necessary for economical progress of the nation, it is equally necessary to safeguard the environment so as to preserve pollution free environment and ecology for the future generations to come.

18. We, therefore, find that it will be appropriate that the parties move the High Court for appropriate orders. The respondent would be at liberty to file an application for impleadment before the High Court in the pending proceedings, which would be considered by the High Court in accordance with law.

19. Though, the High Court has permitted construction to proceed in accordance with law, we find that till the High Court takes a fresh call on the said issue, it will be necessary to issue the following direction:

(*a*) Until the High Court considers the issue, the construction will be permitted only on the area where the construction existed earlier and which has been demolished and the flat area.

20. Dr Singhvi, learned Senior Counsel appearing on behalf of the State, on instructions from Shri Mahfooz Ahsan Nazki, stated that the appellant would not claim any equities on account of the construction, which is permitted to be proceeded further.

21. We further clarify that we have not expressed any opinion on the merits of the matter and the parties would be at liberty to raise all the issues available to them before the High Court which shall be considered in accordance with law. Since the learned NGT has already constituted an Experts Committee, the High Court would be at liberty to take into consideration the report of the said Experts Committee or if it finds appropriate may appoint other Committee as it deems fit.

22. The appeals stand disposed of in the above terms. Pending application(s), if any, shall also stand disposed of.

———

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ness of the procedure may defeat the very object of recovery, the special procedure set out in Chapter VA of the Municipal Act — and this applies equally to the special procedure set out in the Government Premises Eviction Act — can be regarded as really and substantially more drastic and prejudicial than the ordinary procedure of a civil suit. We do not think that the two procedures are so substantially and qualitatively disparate as to attract the vice of discrimination.

48. The result is that all the writ petitions fail and are dismissed. The petitioners, in the writ petitions will pay one set of costs so far as the appeals are concerned, they will be posted for final disposal before a Division Bench.

(1974) 2 Supreme Court Cases 453

(*Before Y. V. Chandrachud, P. K. Goswami and R. S. Sarkaria, JJ.*)

M/s. GOJER BROS. (PVT.) LTD. .. .. Appellant;

Versus

SHRI RATAN LAL SINGH .. .. .. Respondent.

Civil Appeal No. 128(N) of 1972†, decided on May 1, 1974

Code of Civil Procedure, 1908 (Act 5 of 1908) — Section 100 — Appellate Court confirming the decree of trial Court by a considered opinion — Doctrine of merger — Case law discussed

Rent Control and Eviction — West Bengal Premises Tenancy Act, 1956 (W. B. Act 12 of 1956) — Section 17-D (as introduced by President's Act 4 of 1968) — Applicability to eviction decree passed before the commencement of the Amending Act but affirmed by the High Court subsequent to it

The predecessor-in-interest of the appellant obtained a decree for eviction on November 24, 1958 against the respondent on the ground of default in accordance with the West Bengal Premises Rent Control Act, 1950. This decree was confirmed in appeal by the subordinate Judge on April 12, 1967 and by the High Court on January 8, 1969. However, the respondent was allowed to vacate the premises by January 31, 1970. The 1950 Act was repealed by Section 40 of the West Bengal Premises Tenancy Act XII of 1956. In between January 8, 1969 and January 31, 1970, the W. B. Act XII of 1956 was amended and Section 17-D was inserted therein with retrospective effect. The new Section 17-D empowered the courts to set aside the decrees passed on account of default. On January 12, 1970, the respondent applied under Section 17-D for setting aside the decree. That application was rejected by the trial Court but a revision against the same was allowed by the High Court. Hence this appeal by the landlord.

The only question which arises for consideration is whether the decree for possession can be said to have been passed against the respondent before the commencement of the "W. B. Premises Tenancy (Amendment) Act, 1968", that is, before August 26, 1967. If it was passed before that date, the respondent would be entitled to claim the benefit of Section 17-D.

HELD:

(i) It is indisputable that a decree for possession was passed by the trial Court

†Appeal by special leave from the Judgment and Order, dated May 31, 1971 of the Calcutta High Court in Civil Rule No. 2519 of 1970; reported at AIR 1971 Cal 439.

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before the commencement of the Act of 1968. The decree of the High Court was passed after the commencement of the said Act. The question is whether the decree of the trial Court can be deemed to have merged in the decree of the High Court. (Para 9)

(ii) The juristic justification of the doctrine of merger may be sought in the principle that there cannot be, at one and the same time, more than one operative order governing the same subject-matter. Therefore the judgment of an inferior court, if subjected to an examination by the superior court, ceases to have existence in the eye of law and is treated as being superseded by the judgment of the superior court. In other words, the judgment of the inferior court loses its identity by its merger with the judgment of the superior court. (Para 11)

An effective and meaningful exercise of the power to set aside the decree for possession postulates a power to set aside an operative decree; for, to set aside the decree of the Court of first instance and to allow the decrees of the appellate courts to remain outstanding would be put an empty exercise of the beneficent power given by the Section. Therefore, the power to set aside the decree for possession must be construed to mean a power to set aside the decree which can be put into execution. The decree which affects the rights of a judgment-debtor is the decree which is capable of execution for it is in that decree that the rights and obligations of the parties are crystallised. In cases where decree of the trial Court is carried in appeal and the appellate Court disposes of the appeal after a contested hearing, the decree to be executed is the decree of the appellate Court and not of the trial Court. (Paras 14 and 16)

(iii) The decree which is capable of execution is, in this case the decree passed by the High Court on January 8, 1969. (Paras 14 to 18)

In the instant case the subject-matter of the suit and the subject-matter of the appeal are identical. The entire decree of the trial Court was taken in appeal to the first appellate Court and then to the High Court. The appellate order also shows that the appeal after being heard on merits, was dismissed with the modification that the respondent should vacate the premises by the end of January, 1970. The decree of the trial Court dated November 24, 1958 merged in the decree of the High Court dated January 8, 1969. Since the decree of the High Court was passed after the commencement of the West Bengal Premises Tenancy (Amendment) Act, 1968, that is to say after August 26, 1967, Section 17-D of the Act of 1956 can have no application and therefore the decree of the High Court, which is the only decree to be executed cannot be set aside under that Section. (Paras 33 and 34)

Jowad Hussain v. Gendan Singh, 53 IA 197, relied on.

Gajadhar Singh v. Kishan Jiwan Lal, AIR 1917 All 163, relied on.

Bhup Indar v. Bijai, 27 IA 209, relied on.

Brij Narain v. Tejbal Bikram, 37 IA 70, relied on.

C. I. T. v. Amritlal Bhogilal & Co., 1959 SCR 713, relied on.

Collector of Customs v. East India Commercial Co. Ltd., (1963) 2 SCR 563, relied on.

Madan Gopal Rungta v. Secretary to the Government of Orissa, (1962) Supp 3 SCR 906, relied on.

U. J. S. Chopra v. State of Bombay, (1955) 2 SCR 94, relied on.

Shankar Ramchandra Abhyankar v. Krishnaji Dattatryaya Bapat, (1969) 2 SCC 74, relied on.

Nagendra Nath Dey v. Suresh Chandra Dey, 59 IA 283, relied on.

Somnath Sahu v. State of Orissa, (1969) 3 SCC 384, relied on.

K. B. Sipahimalani v. Fidahussein Vallibhoy, ILR 1956 Bom 422, disapproved.

State of U. P. v. Mohammad Nooh, 1958 SCR 595, limited.

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Batuk Nath v. Munni Dei, 41 IA 104, referred to.

State of Madras v. Madurai Mills Co., (1967) 1 SCR 732, explained.

Ratan Lal Singh v. Gezer Bros (P.) Ltd., AIR 1971 Cal 439, reversed.

Appeal allowed. S-M/2033/C

Advocates who appeared in this case:

B. Sen and *Somnath Chatterjee*, Senior Advocates, (*B. P. Maheshwari* and *Suresh Sethi*, Advocates, with him), for Appellant;

P. Chatterjee, Senior Advocate (*Sukumar Ghose*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

CHANDRACHUD, J.—In this appeal by special leave from the judgment of a learned single Judge of the High Court of Calcutta, two questions are raised for our consideration on behalf of the appellants who have obtained against the respondent a decree for eviction: (1) whether the decree of the trial Court has merged in the decree of the High Court and (2) whether by reason of Section 17-D of the West Bengal Premises Tenancy Act, 1956 the decree for eviction is incapable of execution.

2. Long, long back on May 19, 1953 Messrs. Hind Estate Private Ltd., the predecessors-in-title of the appellants, filed against the respondent a suit for eviction on the ground of non-payment of rent. On November 24, 1958 the learned Second Munsif, at Alipore, passed a decree for possession in favour of the plaintiffs holding that by reason of defaults in the payment of rent, the respondent was not entitled to the protection of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950. That decree was confirmed in appeal by the learned Subordinate Judge, Fourth Court, Alipore, on April 12, 1967. During the pendency of the appeal, the appellants had purchased the right, title and interest of the plaintiffs in the suit premises and they had also obtained an assignment of the decretal rights in their favour. They were therefore brought on the record of the appeal in place of the original plaintiffs. The respondent filed Second Appeal No. 1255 of 1967 against the decree of the first appellate Court and that appeal, after a contested hearing, was dismissed by a Division Bench of the High Court of Calcutta on January 8, 1969. While dismissing the appeal, the High Court granted to the respondent time to vacate the suit premises till the end of January, 1970 on the respondent giving a written undertaking to the Court that he will handover quiet and peaceful possession of the premises to the appellants on the expiry of the aforesaid period.

3. The West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 was repealed by Section 40 of the West Bengal Premises Tenancy Act, XII of 1956. During the Proclamation of Emergency issued by the President of India on February 20, 1968, Act XII of 1956 was amended by the West Bengal Premises Tenancy (Amendment) Act, President's Act 4 of 1968, which was given retrospective effect from August 26, 1967. After the cessation of the emergency, the West Bengal Legislature passed the West Bengal Premises Tenancy (Amendment) Act, 1969 with a view to re-enacting with modification President's Act 4 of 1968

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4. In between the decree for possession passed by the High Court in the appellants' favour on January 8, 1969 and the expiry of the period allowed to the respondent to vacate the premises, several amendments were made to the West Bengal Premises Tenancy Act, XII of 1956, ("The Act of 1956") by the West Bengal Premises Tenancy (Second Amendment) Act, 1969 ("The Act of 1969") which came into force on November 14, 1969. We are concerned in this appeal with the provisions of Section 17-D which was introduced in the Act of 1956 by the Act of 1969. That section, in so far as material, reads thus :

> 17-D. Power of Court to set aside decrees passed on account of default in the payment of rent.
>
> (1) Where before the commencement of the West Bengal Premises Tenancy (Amendment) Act, 1966, a decree for the recovery of possession of any premises was passed—
>
> (a) * * * * *
>
> (b) in a suit under the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, by reason only of clause (i) of the proviso to sub-section (1) of Section 12 of that Act,
>
> but the possession of such premises had not been recovered from the tenant by the execution of the decree, the tenant may within a period of sixty days from the date of commencement of the West Bengal Premises Tenancy (Second Amendment) Act, 1969, make an application to the Court which passed the decree to set aside the decree.
>
> **Explanation.**—Where the decree was passed in the exercise of appellate jurisdiction, an application under this sub-section shall be made to the Court of first instance.
>
> (2) Where an application has been made under sub-section (1) for setting aside a decree, all proceedings in execution of the decree shall remain stayed until the application is disposed of.

Sub-section (3) of Section 17-D provides that on receipt of an application under sub-section (1) the Court shall cause a notice thereof to be served on the landlord and after hearing such evidence as the parties may adduce, determine the questions referred to in clauses (*a*) and (*b*) of that sub-section. The Court is then required to give to the tenant further time not exceeding sixty days to deposit the amount found due under clauses (*a*) and (*b*) of sub-section (3) together with such costs as the Court may allow. If the tenant deposits the amount within the time granted under sub-section (3), the Court under sub-section (4) has to allow the application of the tenant, set aside the decree for the recovery of possession and dismiss the suit.

5. On January 12, 1970 which was a few days before he had undertaken to vacate the premises, the respondent made an application under Section 17-D asking that the decree for possession passed against him be set aside. By a judgment dated July 15, 1970 the learned Munsif, Second Court, Alipore. dismissed that application on the ground that the decree for possession passed by the trial Court on November 24, 1958, had merged in the decree passed by the High Court on January 8, 1969, that in truth and in substance the operative decree was the one passed by the High Court and as that decree was passed after August 26,

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1967, being the date of the commencement of the West Bengal Premises Tenancy (Amendment) Act, 1968, the application filed by the respondent under Section 17-D of the Act of 1956 was not maintainable.

6. The respondent filed a revision application in the High Court of Calcutta against the judgment of the learned Munsif. By a judgment dated May 31, 1971 a learned single Judge of the High Court allowed the revision application, granted the application filed by the respondent under Section 17-D and directed the dismissal of the suit. The learned Judge has taken the view that in cases where an appellate Court dismisses the appeal, the principle of merger of the decree of the lower Court with that of the appellate Court has no application and therefore the effective decree in the case was the one passed by the trial Court on November 24, 1958 which was before the commencement of the President's Act 4 of 1968. This Court has granted to the appellants special leave to appeal from the judgment of the High Court.

7. It is not in dispute that the decree dated November 24, 1958 for possession of the suit premises was passed by the trial Court in a suit filed by the appellants' predecessors-in-interest under the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, by reason only of clause (i) of the proviso to sub-section (1) of Section 12 of that Act, that is to say, on the ground that the respondent had defaulted in the payment of rent. Clause (*b*) of Section 17-D(1) is therefore complied with.

8. The question which arises for consideration is whether the decree for the recovery of possession can be said to have been passed against the respondent "before the commencement of the West Bengal Premises Tenancy (Amendment) Act, 1968", that is before August 26, 1967. If it was passed before that date the respondent would be entitled to claim the benefit of Section 17-D, in which event the decree passed in the suit has to be set aside and there would be then no outstanding decree to execute.

9. It is indisputable that a decree for possession was in fact passed in favour of the appellants' predecessors-in-interest by the trial Court on November 24, 1958 which was before the commencement of the Act of 1968. But that decree was taken in appeal first to the Court of the Subordinate Judge which confirmed the decree and then to the High Court which, after a contested hearing, dismissed the defendants' appeal and confirmed the decree passed by the Subordinate Judge. The decree of the High Court is dated January 8, 1969 and was passed after, not before, the commencement of the Act of 1968. The question to be considered is whether the decree passed by the trial Court can be deemed to have merged in the decree passed by the High Court.

10. Learned counsel for both the sides have cited before us a large number of decisions bearing on the principle of merger but a few preliminary observations will facilitate a better understanding of those decisions.

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11. The juristic justification of the doctrine of merger may be sought in the principle that there cannot be, at one and the same time, more than one operative order governing the same subject-matter. Therefore the judgment of an inferior court, if subjected to an examination by the superior court, ceases to have existence in the eye of law and is treated as being superseded by the judgment of the superior court. In other words, the judgment of the inferior court loses its identity by its merger with the judgment of the superior court.

12. Stated in this form the principle may appear to be unexceptionable but the problem has many facets. What, if the higher court dismisses the proceeding before it summarily without a speaking order? Does the judgment of the lower court still merge in the unspeaking order of the higher court? What, if the powers of the higher court are invoked in the exercise of its revisional and not appellate jurisdiction? Does a judgment or an order passed in the exercise of a severally restricted jurisdiction like that under Section 115 of the Code of Civil Procedure wipe out of existence a decree or order passed in the exercise of a wider jurisdiction as may be exercised by a court possessed of a suit? Does it make any difference to the application of the doctrine of merger that the higher court has not modified or reversed the judgment of the lower court but has merely affirmed it? These nuances had once raised issues on which conflicting views were expressed by the courts. Over the years, the area of conflict has considerably narrowed down and most of the problems touched by us have been resolved by this Court.

13. It is only proper that we keep ourselves within the bounds of the issue arising in the case. We are not concerned to determine whether a decree passed in a suit can merge with an order passed in the exercise of revisional jurisdiction because the decree of the trial Court in the instant case was challenged first by an appeal filed in the District Court and then in a Second Appeal filed in the High Court. We are also not concerned to determine whether the decree passed by a trial Court can merge in an unspeaking order passed by the higher court while summarily dismissing the proceeding because the High Court has given a considered judgment after a contested hearing. The principle therefore, that there is no decree as such of the appellate court if it dismisses the appeal for default of appearance or for want of prosecution or on the ground that the appeal has abated or is withdrawn or that the appellant has failed to furnish security for costs as provided in Order 41, Rule 10 of the Code of Civil Procedure, can have no application to the instant case. Nor indeed are we concerned with that class of cases in which the suit covers a horizon wider than the appeal, which happens when only a part of the decree passed in the suit is carried in appeal to the higher court. Here, the decree in its entirety was challenged before the appellate Courts.

14. Section 17-D of the Act of 1956 confers power on the Court "to set aside decrees" passed on account of the tenant's default in the payment of rent. This power was conferred evidently in order to give

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further relief to defaulting tenants, as stated in the Statement of Objects and Reasons of the Bill (Calcutta Gazette Extraordinary, dated August 2, 1969). An effective and meaningful exercise of the power to set aside the decree for possession postulates a power to set aside an operative decree ; for, to set aside the decree of the Court of first instance and to allow the decree of the appellate courts to remain outstanding would be but an empty exercise of the beneficent power given by the section. Therefore, the power to set aside the decree for possession must be construed to mean a power to set aside the decree which can be put into execution. The decree which affects the rights of a judgment-debtor is the decree which is capable of execution for it is in that decree that the rights and obligations of the parties are crystallised.

15. Section 17-D in terms speaks of the power of the Court to set aside "a decree for the recovery of possession of any premises" if, "the possession of such premises had not been recovered from the tenant by the execution of the decree". The decree to be set aside is thus that decree which is capable of execution and in execution of which the landlord has not yet obtained possession of the premises. What is important for the purposes of Section 17-D is to find which is the decree capable of execution. The Section enables the judgment-debtor to "make an application to the Court which passed the decree to set aside the decree", provided that where the decree is passed in the exercise of appellate jurisdiction, an application for setting aside the decree may be made to the Court of first instance. By sub-section (2) of Section 17-D, if an application is made for setting aside a decree, "all proceedings in execution of the decree shall remain stayed until the application is disposed of". This provision emphasises what is clear from the other provisions of the Section that the concern of the law is to arm the court with the power to set aside the operative decree by executing which alone the judgment-creditor could obtain real and effective relief.

16. In cases where the decree of the trial Court is carried in appeal and the appellate Court disposes of the appeal after a contested hearing, the decree to be executed is the decree of the appellate Court and not of the trial Court. In *Jowad Hussain* v. *Gendan Singh*[1], the Privy Council while holding that the limitation of three years within which an application for a final decree must be made runs from the date of the decree of the appellate Court, quoted with approval the statement of law contained in the judgment of a learned Judge of the Allahabad High Court to the following effect : "When an appeal has been preferred, it is the decree of the appellate Court which is the final decree in the cause"[2]. The Privy Council also adopted the statement contained in a judgment of Tudball, J. to this effect : "When the Munsif passed the decree it was open to the plaintiff or the defendant to accept that decree or to appeal. If an appeal is preferred, the final decree is the decree of the appellate Court of final jurisdiction. When that decree is passed, it is that decree and only that which can be made final in the cause

1. 53 IA 197 : AIR 1926 PC 63 : 51 MLJ 781.
2. Per Banerji, J. in *Gajadhar Singh* v. *Kishan Jiwan Lal*, ILR 39 All 641 : 42 IC 93 : AIR 1917 All 163.

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between the parties". Thus, when the decree of the Court of first instance is confirmed by the High Court and the latter decree is confirmed by the Privy Council the decree capable of execution is the decree of the Privy Council[3]. In that case the decree passed by a District Judge in 1887 awarded "future mesne profits" to the plaintiff. That decree was reversed by the High Court but was confirmed by the Privy Council on May 11, 1895. When the matter came back in executive proceedings the Privy Council held that the decree which the courts had to execute was the one passed by it in 1895 and since by that decree the District Judge's decree was confirmed, the decree of 1895 clearly carried the mesne profits upto its own date.

17. An application of this very principle yields the result that if the court of appeal confirms, varies or reverses the decree of the lower court, the decree of the appellate court is the only decree that can be amended[4]; or that the limitation for executing a decree runs from the date of the decree capable of execution and that is the decree of the appellate court which supersedes that of the court of first instance[1]; or that if mesne profits are ordered from the date of suit until the expiry of three years after the date of the decree, the decree to be considered is the decree capable of execution so that if the decree of the trial Court is confirmed in appeal, three years will begin to run from the date of the appellate decree[3].

18. The decree, therefore, which Section 17-D empowers the Court to set aside is the decree which is capable of execution which, in this case, is the decree passed by the High Court on January 8, 1969.

19. The fundamental reason of the rule that where there has been an appeal, the decree to be executed is the decree of the appellate court is that in such cases the decree of the trial Court is merged in the decree of the appellate Court. In course of time, this concept which was originally restricted to appellate decrees on the ground that an appeal is a continuation of the suit, came to be gradually extended to other proceedings like revisions and even to proceedings before quasi-judicial and executive authorities.

20. It will now be appropriate to refer to the decisions bearing on the principle of merger.

21. In *C. I. T.* v. *M/s. Amritlal Bhogilal & Co.*[5], the question which arose for decision was whether the order passed by the Income-tax Officer allowing the registration of a firm merged in the order passed by the Appellate Assistant Commissioner in the appeals filed by the firm against the order of assessment. If it did, the Commissioner of Income-tax could not in the exercise of his revisional powers under Section 33B(1) set aside the order of registration passed by the Income-tax Officer. This Court held on the merits of the matter that though the appellate order

3. *Bhup Indar* v. *Bijai*, (1900) 27 IA 209: ILR 23 All 152: 5 CWN 52.
4. *Brij Narain* v. *Tejbal Bikram*, (1910) 37 IA 70: ILR 32 All 295.
5. 1959 SCR 713: AIR 1958 SC 868: 34 ITR 130.

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of the Appellate Assistant Commissioner was the only order which was valid and enforceable in law, what merged in the appellate order was the Income-tax Officer's order under appeal and not his order of registration which was not and could not have become the subject-matter of an appeal before the appellate authority. The position in regard to the doctrine of merger was stated thus by Gajendragadkar, J. who spoke for the Court : (at p. 720)

> There can be no doubt that, if an appeal is provided against an order passed by a tribunal, the decision of the appellate authority is the operative decision in law. If the appellate authority modifies or reverses the decision of the tribunal, it is obvious that it is the appellate decision that is effective and can be enforced. In law the position would be just the same even if the appellate decision merely confirms the decision of the tribunal. As a result of the confirmation or affirmance of the decision of the tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement.

22. *Collector of Customs, Calcutta* v. *East India Commercial Co. Ltd.*[6], is a typical example of that class of cases in which prior to the amendment of Article 226 of the Constitution by the insertion of Clause 1A, the High Courts were faced with the question whether a writ could issue against an authority whose seat was situated beyond the territorial jurisdiction of the High Court. The respondent filed a writ petition in the Calcutta High Court against the decision of the Central Board of Revenue which had dismissed his appeal. A Full Bench of the High Court held that though it had no jurisdiction to issue a writ against the Central Board of Revenue which was permanently located outside its territorial jurisdiction, the Board having merely dismissed the respondent's appeal against the order passed by the Collector of Customs, the real effective order was that of the Collector whose seat was located within the jurisdiction of the High Court and therefore a writ could issue as against him. After referring to the decisions of the High Courts of Allahabad, Nagpur, Pepsu and Rajasthan which had taken the view that the order of the original authority merges in the appellate order even when the appellate authority dismisses the appeal without any modification of the order appealed against, Wanchoo, J. speaking for the Constitutional Bench observed thus : (at pp. 568, 569)

> The question therefore turns on whether the order of the original authority becomes merged in the order of the appellate authority even where the appellate authority merely dismisses the appeal without any modification of the order of the original authority. It is obvious that when an appeal is made, the appellate authority can do one of three things, namely, (i) it may reverse the order under appeal, (ii) it may modify that order, and (iii) it may merely dismiss the appeal and thus confirm the order without any modification. It is not disputed that in the first two cases where the order of the original authority is either reversed or modified it is the order of the appellate authority which is the operative order and if the High Court has no jurisdiction to issue a writ to the appellate authority it cannot issue a writ to the original authority..... It seems to us that on principal it is difficult to draw a distinction between the first two kinds of orders passed by the appellate authority and the third kind of order passed by it. In all these three cases after the appellate authority has disposed of the appeal, the

6. (1963) 2 SCR 563 : AIR 1963 SC 1124 : (1963) 2 SCJ 230.

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operative order is the order of the appellate authority whether it has reversed the original order or modified it or confirmed it.....

It is this principle, viz., that the appellate order is the operative order after the appeal is disposed of, which is in our opinion the basis of the rule that the decree of the lower Court merges in the decree of the appellate Court, and on the same principle it would not be incorrect to say that the order of the original authority is merged in the order of the appellate authority whatsoever its decision — whether of reversal or modification or mere confirmation.

The decision of the High Court was accordingly set aside by this Court.

23. In *Madan Gopal Rungta* v. *Secretary to the Government of Orissa*[7] which also involved a similar question relating to the territorial jurisdiction of the High Court, the appellant, Madan Gopal Rungta, filed an application for review to the Central Government against the order passed by the Government of Orissa rejecting his application for grant of a mineral lease. The judgment of this Court affirming the view of the High Court that it had no jurisdiction to issue a writ against the Central Government is undoubtedly based on the terms of Rule 60 of the Mineral Concession Rules, 1949 under which whenever a matter is brought to the Central Government it is its order which is effective and final ; but it was observed that—

where there is a review petition and the Central Government passes an order on such petition one way or the other it is the Central Government's order that prevails and the State Government's order must in those circumstances merge in the order of the Central Government. (p. 914)

24. The principle that the decree of the trial Court merges in the decree of the appellate court was held to be applicable in *U. J. S. Chopra* v. *State of Bombay*[8] to orders passed in criminal proceedings. In that case the High Court dismissed summarily an appeal filed by an accused against his conviction and sentence. Thereafter, the State of Bombay filed an application in the High Court for enhancement of the sentence. While holding that the summary dismissal of the appeal preferred by the accused did not preclude him from taking advantage of the provisions of Section 439(6) of the Code of Criminal Procedure and showing cause against his conviction when he was subsequently called upon to show cause why the sentence imposed on him should not be enhanced, Bhagwati and Imam, JJ. observed :

A judgment pronounced by the High Court in the exercise of its appellate or revisional jurisdiction after issue of a notice and a full hearing in the presence of both the parties.....would replace the judgment of the lower Court, thus constituting the judgment of the High Court the only final judgment to be executed in accordance with law by the Court below. (pp. 133-134).

Das, J. agreed with the conclusion of the majority as regards the right of the accused to challenge the conviction under Section 439(6) but he went a step further and said that there is a merger or replacement of the judgment of the lower court whenever the High Court disposed of the appeal or revision and that "it makes no difference whether the dismissal is summary or otherwise". (p. 118).

7. (1962) Supp 3 SCR 906 : AIR 1962 SC 1513.
8. (1955)2 SCR 94 : AIR 1955 SC 633.

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25. An interesting question arose in *Shanker Ramchandra Abhyankar* v. *Krishnaji Dattatryaya-Bapat*[9] where after a single Judge had dismissed a Civil Revision Application filed by the tenant under Section 115 of the Code of Civil Procedure, against a decree passed by the District Court, a Division Bench of the Bombay High Court entertained the tenant's writ petition under Articles 226 and 227 of the Constitution against the same decree and allowed it. The Bombay High Court had followed its earlier judgment in *Sipahimalani's case*[10] which had taken the view that an order passed by the lower court does not merge in the order passed by the revisional court because whereas a right of appeal is a vested right and an appeal is a continuation or re-hearing of the suit, a revision is not a continuation or re-hearing of the suit and it is not obligatory upon the revisional court to interfere with the order even if it is improper or illegal. This Court disapproved of that view and held following a judgment of the Privy Council in *Nagendra Nath Dey* v. *Suresh Chandra Dey*[11] that the revisional jurisdiction is a part and parcel of the appellate jurisdiction of the High Court and therefore the principle of merger would apply to orders passed in the exercise of revisional jurisdiction also.

26. In *Somnath Sahu* v. *State of Orissa*[12] the principle of merger was extended to an executive order dismissing a Government servant. The appellant in that case was dismissed by an order passed by Respondent No. 4, the Indian Aluminium Company Ltd., Calcutta. The appeal filed by the appellant to the State Government was dismissed on January 2, 1962. The appellant thereafter moved the Orissa High Court under Article 226 of the Constitution asking that the order passed by the State Government and Respondent No. 4 be quashed, on the ground that no notice was given to him for any misconduct and no inquiry was held by Respondent No. 4 into the alleged misconduct before passing the order of dismissal. This Court assumed in favour of the appellant that the order passed by Respondent No. 4 was illegal but it held that it had merged in the appellate order of the State Government dated January 2, 1962 and unless the order of the State Government was shown to be defective, the appellant would not be entitled to any relief. Speaking on behalf of the Court, Ramaswami, J. observed :

> There can be no doubt that if an appeal is provided by a statutory rule against an order passed by a Tribunal the decision of the appellate authority is the operative decision in law if the appellate authority modifies or reverses it. In law the position would be just the same even if the appellate decision merely confirms the decision of the Tribunal. As a result of the confirmation or affirmance of the decision of the Tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which is subsisting and is operative and capable of enforcement.

27. The learned Judge of the High Court has referred to some of these decisions in his judgment but he took the view :

> I am of opinion that in cases where the appellate court merely dismisses

9. (1970) 1 SCR 322 : (1969) 2 SCC 74.
10. *K.B. Sipahimalani* v. *Fidahussein Vallibhoy*, ILR 1956 Bom 422, 442 : 58 Bom LR 344.
11. 59 IA 283, 287 : AIR 1932 PC 165 : ILR 60 Cal 1.
12. (1969) 3 SCC 384.

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the appeal, the principle of merger have no application in cases of execution of the original decree except as to limitation and will not affect an executable decree passed by an inferior court, in so far as its execution is concerned. The position would be otherwise if the decree is modified or varied by such appellate authority as, in such event, the original decree will be inexecutable.

This conclusion is clearly opposed to the view taken by this Court in the decisions referred to above and the learned Judge was in error in making a distinction between an appellate judgment whereby an appeal is dismissed and an appellate judgment modifying or reversing the decree of the lower court. This distinction is unsound and is based on no discernible principle.

28. Two more judgments of this Court must be noticed because the learned Judge has derived sustenance to his view from those judgments. Learned counsel for the respondent has also relied on them in support of his submission that in this case there can be no merger of the trial Court's decree in that of the appellate Court.

29. The first of these cases is *The State of U. P.* v. *Mohammad Nooh*[13]. On April 20, 1948 the District Superintendent of Police passed an order of dismissal against the respondent Mohammad Nooh who was a head constable. The respondent filed an appeal to the Deputy Inspector-General of Police which was dismissed on May 7, 1949. He then filed a revision application to the Inspector-General of Police which was also dismissed on April 22, 1950. The respondent then filed a writ petition in the High Court of Allahabad under Article 226 of the Constitution praying that the order of dismissal be set aside. The High Court granted the writ on the ground that the violation of the rules natural justice and fair play rendered the order of dismissal illegal. In an appeal by the State of U. P., this Court held by a majority that Article 226 of the Constitution is not retrospective and the High Court could not exercise its powers under this Article to quash the order of dismissal passed before the commencement of the Constitution.

30. It was contended before this Court on behalf of the respondent Mohammad Nooh that the order of dismissal dated April 20, 1948 had merged in the order passed on appeal on June 7, 1949, that both these orders merged in the order passed by the Inspector-General of Police on April 22, 1950 and since the order last mentioned was passed after the Constitution had come into force, the High Court had jurisdiction to issue the writ under Article 226. This contention was negatived by the Court on two grounds: Firstly, that though departmental authorities holding an inquiry into charges made against an employee have the trappings of courts of law, they cannot be compared with regular courts manned by persons trained in law and therefore the order of dismissal, the order passed in appeal and the order passed in revision "can hardly be equated with any propriety with decree made in a civil suit under the Code of Civil Procedure"; secondly, "that while it is true that a decree of a court of first instance may be said to merge in the decree passed on

13. 1958 SCR 595 : AIR 1958 SC 86 : 1958 SCJ 242.

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appeal therefrom or even in the order passed in revision, it does so only for certain purposes, namely, for the purposes of computing the period of limitation for execution of the decree as in *Batuk Nath* v. *Munni Dei*[14], or for computing the period of limitation for an application for final decree in a mortgage suit as in *Jowad Hussain* v. *Gendan Singh*".

31. The observations last quoted from the judgment of Das, C.J. do lend support to the contention of the respondent that the principle of merger has, at best, a limited application but we are of the view that the observations are evidently made in the context of the peculiar facts of the case and their application ought not to be extended beyond those facts. After making the observations extracted above, Das, C.J. proceeded to say :

> The filing of the appeal or revision may put the decree or order in jeopardy but until it is reversed or modified it remains effective. In that view of the matter the original order of dismissal passed on April 20, 1948, was not suspended by the presentation of appeal by the respondent nor was its operation interrupted when the Deputy Inspector-General of Police simply dismissed the appeal from that order or the Inspector-General simply dismissed the application for revision. The original order of dismissal, if there were no inherent infirmities in it, was operative on its own strength and it did not gain any greater efficacy from the subsequent orders of dismissal of the appeal or the revision except for the specific purposes herein before mentioned. That order of dismissal having been passed before the Constitution and rights having accrued to the appellant State and liabilities having attached to the respondent before the Constitution came into force, the subsequent conferment of jurisdiction and powers on the High Court can have no retrospective operation on such rights and liabilities.

This passage leaves no doubt that the judgment is based on the premise that the original order of dismissal was operative on its own strength and that since that order was passed prior to the Constitution, the High Court had no jurisdiction to set it aside under Article 226. In *Madan Gopal Rungta* v. *Secretary to the Government of Orissa* (supra) a Constitution Bench of this Court held that "the facts in *Mohammad Nooh's case* (supra) were of a special kind" and therefore the reasoning in that case would not apply to the facts of the case before the Constitution Bench to which we have already made a reference. In *Collector of Customs, Calcutta* v. *East India Commercial Co. Ltd.* (supra), the same Constitution Bench reiterated that "*Mohammad Nooh's case* was a special case which stands on its own facts". As observed in that decision, even if the principle of merger were applicable the fact would still have remained that the dismissal of Mohammad Nooh was prior to the Constitution and therefore he was not entitled to take advantage of the provisions of the Constitution.

32. The other decision on which the respondent relies is *State of Madras* v. *Madurai Mills Co., Ltd.*[15]. It was held in that case that the order of assessment dated November 23, 1952, had not merged in the revisional order dated August 21, 1954 passed by the Deputy Com-

14. (1914) 41 IA 104 : AIR 1914 PC 65 : ILR 36 All 1284.

15. (1967) 1 SCR 732 : AIR 1967 SC 681 : 19 STC 144.

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missioner of Commercial Taxes "because the question of exemption on the value of yarn purchased from outside the State of Madras was not the subject-matter of revision". The attention of the Court was drawn to *Amritlal Bhogilal's case* (supra), to which we have already referred, but Ramaswami, J. who spoke for the Court said :

> But the doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by the inferior Tribunal and the other by a superior Tribunal, passed in an appeal or revision, there is a fusion of merger of two orders irrespective of the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular State. In our opinion, the application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction.

These observations cannot justify the view that in the instant case there can be no merger of the decree passed by the trial Court in the decree of the High Court. The Court, in fact, relied on *Amritlal Bhogilal's case* while pointing out that if the subject-matter of the two proceedings is not identical, there can be no merger. Just as in *Amritlal Bhogilal's case* the question of registration of the assessee-firm was not before the appellate authority and therefore there can be no merger of the order of the Income-tax Officer in the appellate order, so in the case of *Madurai Mills* there could be no merger of the assessment order in the revisional order as the question regarding exclusion of the value of yarn purchased from outside the State was not the subject-matter of revision before the Deputy Commissioner of Commercial Taxes.

33. In the instant case the subject-matter of the suit and the subject-matter of the appeal are identical. The entire decree of the trial Court was taken in appeal to the first appellate Court and then to the High Court. The appellate order also shows that the appeal after being heard on merits, was dismissed with the modification that the respondent should vacate the premises by the end of January, 1970. The decree of the High Court dated January 8, 1969, reads thus :

> It is ordered and decreed that the decree of the Court of appeal below be and the same is hereby affirmed and this appeal dismissed subject to this that the defendant appellant, having duly filed the stipulated undertaking, through his learned Advocate, is allowed time till the end of January, 1970, for vacating the disputed premises and delivering up quiet and peaceable possession thereof to the decree-holder respondent on condition that the said defendant appellant deposits in the trial Court, to the credit of the decree-holder respondent, within two months from this date, the outstanding arrears, if any, on account of rents or mesne profits, as the case may be, and also goes on depositing, in the same Court to the same credit, month by month, regularly, according to the English calendar, within the 15th of the next succeeding month according to the same calendar, a sum of Rs.175 (Rupees one hundred and seventy-five) per month, on account of current rents or mesne profits.
>
> And it is further ordered that in the event of the said defendant's failure to make any of the above deposits, this decree shall become executable at once.

34. We are accordingly of the opinion that the decree of the trial Court dated November 24, 1958 merged in the decree of the High Court dated January 8, 1969. Since the decree of the High Court was

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passed after the commencement of the West Bengal Premises Tenancy (Amendment) Act, 1968, that is to say after August 26, 1967, Section 17-D of the Act of 1956 can have no application and therefore the decree of the High Court which is the only decree to be executed cannot be set aside under that Section.

35. We therefore allow the appeal, set aside the judgment of the High Court dated May 31, 1971 and restore that of the Munsif, Second Court, Alipore dated July 15, 1970. The respondent shall pay to the appellants the costs of this appeal and of the revision before the High Court.

(1974) 2 Supreme Court Cases 467

(From Bombay High Court)

[BEFORE P. JAGANMOHAN REDDY, M. H. BEG AND A. ALAGIRISWAMI, JJ.]

JAGDEV DAULATA MAHADIK
AND OTHERS .. .. .. Appellants ;

Versus

GOVINDRAO BALWANTRAO THROUGH LRS.
AND OTHERS .. .. .. Respondents.

Civil Appeals Nos. 1925-1926 of 1967, decided on August 14, 1974

Limitation Act, 1963 — Article 64 — Suit property in joint possession of two brothers, viz. 'G' and 'N' — Creditors of 'N' getting joint family properties attached through Court — Only one half of share belonging to 'N' pnt up for sale — Even before the sale, 'G' filing suit in 1923 against 'N' for partition of joint family property and for separate possession of his half share — Mukhtiyar of 'G' pnrchasing share of 'N' and in 1925 the Mukhtiyar selling that to 'G' by a registered deed — 'G', however, not amending the plaint of his partition suit accordingly — In 1941, final decree in partition suit passed in favonr of 'G' and later in 1943 his share separated by metes and bounds and he got possession — After 'N' died and then in 1932 his widow also expired, his daughter being his legal representative, selling the properties of her father, including those already purchased by 'G', to different persons — 'G' then filing suit in 1952, i.e. after 12 years from date of dispossession — Held — Suit of 'G' not barred by limitation — Limitation Act, 1908 — Article 142

HELD :

From the date 'G' was given possession of his separate property he was also entitled to have separate possession of half share of 'N'. From that date, at any rate, he had title of N's properties. Till then G's possession was that of joint owner with 'N', as such no question of any bar of limitation woud arise during that period. The suits were filed in 1952 and if 'G' was dispossessed after his joint possession was separated and he was given separate possession in respect of specific property the suits would be well within time. (Para 10)

Appeals dismissed B-M/2081/C

The Judgment of the Court was delivered by

JAGANMOHAN REDDY, J.—These appeals arise out of two suits Nos. C. S. 27 of 1952 and C. S. 190 of 1952 on the file of Second Joint Civil Judge (J. D.) Satars. A brief history of the facts leading

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28. We are, therefore, of the view that if the prosecution has been validly instituted, neither any new data nor any added reasons contained in the certificate issued by the Director of the Central Food Laboratory would be sufficient to annul the sanction already obtained with which the prosecution was already instituted. The trial has to proceed with the certificate on record which superseded the report of the Public Analyst.

29. For the aforesaid reasons we allow this appeal and set aside the impugned order of the High Court.

(2000) 6 Supreme Court Cases 359

(BEFORE K.T. THOMAS, D.P. MOHAPATRA AND R.C. LAHOTI, JJ.)

KUNHAYAMMED AND OTHERS . . Appellants;

Versus

STATE OF KERALA AND ANOTHER . . Respondents.

Civil Appeal No. 12309 of 1996†, decided on July 19, 2000

A. Doctrine of merger — Nature and concept of — Restated — Held, it is merely a common law doctrine based on principles of propriety in the hierarchy of judicial system — It postulates merger of the subordinate forum's decision in the decision of the appellate or revisional forum modifying, reversing or affirming such decision — Thereafter only the latter and not the former exists in the eye of law — However, the doctrine is not of universal or unlimited application — Its applicability, has to be determined keeping in view the nature of jurisdiction exercised by the superior forum and the content or subject-matter of the challenge — Nature of Supreme Court's jurisdiction at SLP and post-leave stage clarified — Effect of dismissal at the stage of special leave by non-speaking/ speaking order and dismissal by non-speaking order after grant of special leave considered in detail — Constitution of India, Art. 136 — Effect of grant/dismissal of SLP

B. Constitution of India — Art. 136 — Generally — Nature and scope — Jurisdiction of Supreme Court under Art. 136 is a special jurisdiction of a sweeping nature not fettered by the sweep of Arts. 132 to 135 and is not subject to any limitations except the wisdom and good sense of the Judges — Further held, this jurisdiction is only discretionary

C. Constitution of India — Art. 136 — Generally — Nature and scope — Jurisdiction of Supreme Court under Art. 136, held, consists of two steps: (i) granting special leave to appeal, and (ii) hearing the appeal — Function of Supreme Court while hearing the SLP and effect of dismissal or grant thereof, restated — Effect of pendency of SLP and effect of grant of special leave clarified — Supreme Court Rules, 1966, Or. 16, Rr. 4, 10, 13 and 11

D. Constitution of India — Art. 136 — Effect of grant/dismissal of SLP — Dismissal at the stage of special leave by non-speaking order, held, does

† From the Judgment and Order dated 14-12-1995 of the Kerala High Court in RP No. 14 of 1984

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not constitute res judicata and does not culminate in merger of the impugned decision — Hence, would not by itself preclude the aggrieved party from seeking relief in writ jurisdiction or review jurisdiction of High Court — Merger — Doctrine of, when not applicable — Res judicata — Dismissal of SLP at the stage of grant of leave, held, does not constitute res judicata so as to bar remedy under Art. 226 — Civil Procedure Code, 1908, S. 11 — Applicability to refusal of special leave under Art. 136

E. Constitution of India — Arts. 136 and 141 — Effect of grant/dismissal of SLP — Dismissal by speaking or reasoned order, held, does not culminate in merger of the impugned decision but reasons stated therein, if contain a point of law, would amount to a declaration on a point of law, would attract Art. 141 — Such declaration of law would be binding on all courts and tribunals as well as on the parties — On other points, the order would be binding on the principle of judicial discipline on the parties and on the court/tribunal whose order was impugned — Judicial propriety — Reasons given in decision of superior court binding — Doctrine of merger — Applicability — Words and Phrases — "Merger", "to merge"

F. Constitution of India — Arts. 136 and 141 — Grant/Dismissal of SLP — Phraseology used by Supreme Court — Interpretation of — Disposal of SLP by Supreme Court using the words: "dismissed on merits", held, amounts to dismissal of SLP and not of the appeal — Hence, attracts neither the doctrine of merger nor Art. 141 — Doctrine of merger — Applicability

G. Constitution of India — Art. 136 — Grant/Dismissal of SLP — Dismissal of appeal even by non-speaking order after grant of leave, held, attracts the doctrine of merger irrespective of whether such order was one of reversal, modification or affirmation of the impugned order — Special leave petition — Doctrine of merger — Applicability

H. Constitution of India — Arts. 226 and 136 — Review — Review petition under Art. 226 — Maintainability — Effect of dismissal of SLP or appeal arising out of the SLP or pendency of such appeal or SLP examined — Doctrine of merger and right of review, held, are closely interlinked — Where after grant of special leave, Supreme Court decides the appeal whether by speaking or non-speaking order, the impugned decision of High Court stands merged with Supreme Court's decision and in that event, High Court cannot review its earlier decision — But in case of dismissal of SLP there is no merger and the aggrieved party is not deprived of any statutory right of review, if otherwise available — Further held, pendency of SLP does not bar filing of review petition before High Court except when the appeal itself is decided by Supreme Court — Where review petition is filed first and then SLP, and special leave is granted even then during pendency of the appeal, albeit before disposal thereof, High Court can dispose of the review — Review — High Court's power of — Civil Procedure Code, 1908, Or. 47 R. 1(a) — Words "no appeal has been preferred" — Scope — Held, cover a situation where special leave is not granted — Words and Phrases — "No appeal has been preferred"

I. Constitution of India — Arts. 136 and 226 — Infructuous appeal — SLP filed after filing review petition in High Court against the same decree of High Court — High Court granting review before the disposal of the

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appeal by Supreme Court — In such circumstances, the appeal, held, became infructuous

J. **Constitution of India — Arts. 226 and 136 — Review — Entertainability — Where an appeal is preferred or an SLP has been converted into appeal, High Court's jurisdiction to entertain a review petition, stands ousted — Civil Procedure Code, 1908, Or. 47 R. 1(1)**

K. **Constitution of India — Arts. 226 and 136 — Review — Maintainability — SLP against High Court's decision under S. 8-A of Kerala Private Forests (Vesting and Assignment) Act dismissed on merits by a non-speaking order — Such order, held, did not culminate in merger of the impugned decision — Hence, review petition against the said impugned order, held, maintainable — More so when the review petition was covered by S. 8-C(2) of the Kerala Act — Forests — Kerala Private Forests (Vesting and Assignment) Act, 1971 (26 of 1971), Ss. 8-C(2), 8-A, 8 and 7 (Para 2)**

L. **Constitution of India — Art. 136 — Pleadings/New plea — In appeal against High Court's decision on the question of vesting of a piece of land, plea against constitutionality of S. 8-C(2) of Kerala Private Forests (Vesting and Assignment) Act, 1971 raised at the final hearing without having been raised before High Court or in the petition filed before Supreme Court — In such circumstances, the said plea rejected — Forests — Kerala Private Forests (Vesting and Assignment) Act, 1971 (26 of 1971), S. 8-C(2), 8, 7 and 8-A — Constitutionality of S. 8-C(2)**

In the instant case the Forest Tribunal held that the land in dispute did not vest in the Government under the provisions of the Kerala Private Forests (Vesting and Assignment) Act, 1971. The State's appeal was dismissed by the High Court on 17-12-1982. In the absence of any statutory remedy, the State filed a SLP under Article 136. On 18-7-1983, the Supreme Court passed an order stating: "Special leave petition is dismissed on merits". Thereafter, in January 1984, the State filed an application in the High Court for review of its order dated 17-12-1982. By Amendment Act 36 of 1986, Section 8-C, enabling the Government to file appeal or review in certain cases, was inserted in the Act with retrospective effect from 19-11-1983. On 14-12-1995, overruling the petitioners' objection as to the maintainability of the review petition, the High Court directed the review petition to be posted for hearing on merits. Then the petitioners sought for leave to appeal to the Supreme Court which was later granted on 16-9-1996. At the hearing, the petitioners contended: (*i*) that the High Court's order dated 17-12-1982 having merged into the Supreme Court's order dated 18-7-1983, the former ceased to exist and the petition for review thereof was misconceived, (*ii*) that the Supreme Court's order dated 18-7-1983 amounted to affirmation of the High Court's order dated 17-12-1982 which, therefore, could not be reviewed by the High Court. Dismissing the appeal, the Supreme Court

Held :

The doctrine of merger is neither a doctrine of constitutional law nor a doctrine statutorily recognised. It is a common law doctrine founded on principles of propriety in the hierarchy of justice delivery system. (Para 7)

The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject-matter at a given

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point of time. When a decree or order passed by an inferior court, tribunal or authority is subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before it either way — whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view. [Paras 12 and 44(*i*) & (*iii*)]

CIT v. *Amritlal Bhogilal and Co.*, AIR 1958 SC 868 : (1958) 34 ITR 130; *State of Madras* v. *Madurai Mills Co. Ltd.*, AIR 1967 SC 681 : (1967) 19 STC 144; *Gojer Bros. (P) Ltd.* v. *Ratan Lal Singh*, (1974) 2 SCC 453 : AIR 1974 SC 1380; *S.S. Rathore* v. *State of M.P.*, (1989) 4 SCC 582 : 1990 SCC (L&S) 50 : (1989) 11 ATC 913 : AIR 1990 SC 10, *relied on*

U.J.S. Chopra v. *State of Bombay*, AIR 1955 SC 633 : 1955 Cri LJ 1410, *referred to*

Stage of SLP and post leave stage

The exercise of jurisdiction conferred on the Supreme Court by Article 136 of the Constitution consists of two steps: (*i*) granting special leave to appeal; and (*ii*) hearing the appeal. This distinction is clearly demonstrated by Rules 4, 10, 13 and 11 of Order 16 of the Supreme Court Rules framed in exercise of the power conferred by Article 145 of the Constitution. The legal position in respect of these two stages is as under:

(*1*) While hearing the petition for special leave to appeal, the Court is called upon to see whether the petitioner should be granted such leave or not. While hearing such petition, the Court is not exercising its appellate jurisdiction; it is merely exercising its discretionary jurisdiction to grant or not to grant leave to appeal. The petitioner is still outside the gate of entry.

(*2*) If the petition seeking grant of leave to appeal is dismissed, it is an expression of opinion by the Court that a case for invoking appellate jurisdiction of the Court was not made out;

(*3*) If leave to appeal is granted the appellate jurisdiction of the Court stands invoked; the gate for entry in the appellate arena is opened. The petitioner is in and the respondent may also be called upon to face him, though in an appropriate case, in spite of having granted leave to appeal, the Court may dismiss the appeal without noticing the respondent.

[Paras 14 and 44(*ii*)]

The Supreme Court has already held that the dismissal of a special leave petition in limine by a non-speaking order does not justify any inference that by necessary implication the contentions raised in the special leave petition on the merits of the case have been rejected by the Supreme Court and that such dismissal of the special leave petition will not preclude the party from moving the High Court for seeking relief under Article 226 of the Constitution. What has been stated by the Supreme Court in this regard applies also to a case where a special leave petition having been dismissed by a non-speaking order and the applicant approaches the High Court by moving a petition for review. May be that the Supreme Court was not inclined to exercise its discretionary jurisdiction under Article 136 probably because it felt that it was open to the applicant to

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move the High Court itself. As nothing has been said specifically in the order dismissing the special leave petition one is left merely guessing. Therefore, it would not be just to deprive the aggrieved person of the statutory right of seeking relief in review jurisdiction of the High Court if a case for relief in that jurisdiction could be made out merely because a special leave petition under Article 136 of the Constitution had already stood rejected by the Supreme Court by a non-speaking order. (Paras 17 and 18)

Workmen v. *Board of Trustees of the Cochin Port Trust*, (1978) 3 SCC 119 : 1978 SCC (L&S) 438; *Indian Oil Corpn. Ltd.* v. *State of Bihar*, (1986) 4 SCC 146 : 1986 SCC (L&S) 740 : AIR 1986 SC 1780; *Rup Diamonds* v. *Union of India*, (1989) 2 SCC 356 : AIR 1989 SC 674; *Supreme Court Employees' Welfare Assn.* v. *Union of India*, (1989) 4 SCC 187 : 1989 SCC (L&S) 569; *Yogendra Narayan Chowdhury* v. *Union of India*, (1996) 7 SCC 1 : 1996 SCC (L&S) 362, *relied on*

Western India Match Co. Ltd. v. *Industrial Tribunal*, AIR 1958 Mad 398, 403 : (1958) 2 MLJ 74 : (1958) 2 LLJ 315; *Wilson* v. *Colchester Justices*, (1985) 2 All ER 97 (HL), *referred to*

Sree Narayana Dharmasanghom Trust v. *Swami Prakasananda*, (1997) 6 SCC 78; *State of Maharashtra* v. *Prabhakar Bhikaji Ingle*, (1996) 3 SCC 463 : 1996 SCC (L&S) 749, *overruled*

Similarly, an order dismissing a special leave petition, more so when it is by a non-speaking order, does not result in merger of the order impugned into the order of the Supreme Court. (Para 22)

V.M. Salgaocar & Bros. (P) Ltd. v. *CIT*, (2000) 5 SCC 373 : (2000) 3 Scale 240, *affirmed*

Dismissal of SLP by non-speaking or speaking order: Effect

A petition for leave to appeal to the Supreme Court may be dismissed by a non-speaking order or by a speaking order. Whatever be the phraseology employed in the order of dismissal, if it is a non-speaking order, i.e., it does not assign reasons for dismissing the special leave petition, it would neither attract the doctrine of merger so as to stand substituted in place of the order put in issue before it nor would it be a declaration of law by the Supreme Court under Article 141 of the Constitution for there is no law which has been declared. If the order of dismissal be supported by reasons then also the doctrine of merger would not be attracted because the jurisdiction exercised was not an appellate jurisdiction but merely a discretionary jurisdiction refusing to grant leave to appeal. Still the reasons stated by the Court would attract applicability of Article 141 of the Constitution if there is a law declared by the Supreme Court which obviously would be binding on all the courts and tribunals in India and certainly the parties thereto. The statement contained in the order other than on points of law would be binding on the parties and the court or tribunal, whose order was under challenge on the principle of judicial discipline, the Supreme Court being the Apex Court of the country. No court or tribunal or parties would have the liberty of taking or canvassing any view contrary to the one expressed by the Supreme Court. The order of Supreme Court would mean that it has declared the law and in that light the case was considered not fit for grant of leave. The declaration of law will be governed by Article 141 but still, the case not being one where leave was granted, the doctrine of merger does not apply. The Court sometimes leaves the question of law open. Or it sometimes briefly lays down the principle, may be, contrary to the one laid down by the High Court and yet would dismiss the special leave petition. The reasons given are intended for purposes of Article 141. This is so done because in the event of merely

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dismissing the special leave petition, it is likely that an argument could be advanced in the High Court that the Supreme Court has to be understood as not to have differed in law with the High Court. [Paras 27, 40, 44(*iv*) & (*v*)]

Penu Balakrishna Iyer v. *Ariya M. Ramaswami Iyer*, AIR 1965 SC 195 : (1964) 7 SCR 49; *Abbai Maligai Partnership Firm* v. *K. Santhakumaran*, (1998) 7 SCC 386; *Supreme Court Employees' Welfare Assn.* v. *Union of India*, (1989) 4 SCC 187 : 1989 SCC (L&S) 569, *followed*

Mere pendency of an application seeking leave to appeal does not put in jeopardy the finality of the decree or order sought to be subjected to exercise of appellate jurisdiction by the Supreme Court. It is only if the application is allowed and leave to appeal granted then the finality of the decree or order under challenge is jeopardised as the pendency of appeal reopens the issues decided and the Supreme Court is then scrutinising the correctness of the decision in exercise of its appellate jurisdiction. (Para 28)

Shankar Ramchandra Abhyankar v. *Krishnaji Dattatreya Bapat*, (1969) 2 SCC 74 : AIR 1970 SC 1; *Sushil Kumar Sen* v. *State of Bihar*, (1975) 1 SCC 774 : AIR 1975 SC 1185, *followed*

Gopabandhu Biswal v. *Krishna Chandra Mohanty*, (1998) 4 SCC 447 : 1998 SCC (L&S) 1147, *limited*

Junior Telecom Officers Forum v. *Union of India*, 1993 Supp (4) SCC 693 : 1994 SCC (L&S) 366 : (1994) 26 ATC 367, *distinguished*

Dismissal of SLP by the words "dismissed on merits" would remain a dismissal by a non-speaking order where no reasons have been assigned and no law has been declared by the Supreme Court. The dismissal is not of the appeal but of the special leave petition. Even if the merits have been gone into, they are the merits of the special leave petition only. Neither doctrine of merger nor Article 141 of the Constitution is attracted to such an order. (Para 40)

The issue can be looked at from another angle. The Supreme Court cannot and does not reverse or modify the decree or order appealed against while deciding a petition for special leave to appeal. What is impugned before the Supreme Court can be reversed or modified only after granting leave to appeal and then assuming appellate jurisdiction over it. If the order impugned before the Supreme Court cannot be reversed or modified at the SLP stage obviously that order cannot also be affirmed at the SLP stage. (Para 43)

Leave granted* : *Dismissal by non-speaking order* : *Merger results

It may be that in spite of having granted leave to appeal, the Court may dismiss the appeal on such grounds as may have provided foundation for refusing the grant at the earlier stage. But that will be a dismissal of appeal. The decision of the Supreme Court would result in superseding the decision under appeal attracting doctrine of merger. But if the same reasons had prevailed with the Supreme Court for refusing leave to appeal, the order would not have been an appellate order but only an order refusing to grant leave to appeal. (Para 32)

Once a special leave petition has been granted, the order impugned before the Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed against. It would also not make any difference if the order is a speaking or non-speaking one. [Paras 41 and 44(*vi*)]

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"To merge" means to sink or disappear in something else; to become absorbed or extinguished; to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased; an absorption or swallowing up so as to involve a loss of identity and individuality. (Para 42)

Corpus Juris Secundum, Vol. LVII, pp. 1067-68, *referred to*

Doctrine of merger and review

Held :

The doctrine of merger and the right of review are concepts which are closely interlinked. If the judgment of the High Court has come up to the Supreme Court by way of a special leave, and special leave is granted and the appeal is disposed of with or without reasons, by affirmance or otherwise, the judgment of the High Court merges with that of the Supreme Court. In that event, it is not permissible to move the High Court by review because the judgment of the High Court has merged with the judgment of the Supreme Court. But where the special leave petition is dismissed — there being no merger, the aggrieved party is not deprived of any statutory right of review, if it was available and he can pursue it. It may be that the review court may interfere, or it may not interfere depending upon the law and principles applicable to interference in the review. (Paras 34 and 40)

Where the review is *filed first* and the delay in SLP is condoned and the special leave is ultimately granted and the appeal is pending in the Supreme Court, the position then, under Order 47 Rule 1 CPC is that still the review can be disposed of by the High Court. If the review of a decree is granted before the disposal of the appeal against the decree, the decree appealed against will cease to exist and the appeal would be rendered incompetent. This is because the decree reviewed gets merged in the decree passed on review and the appeal to the superior court preferred against the earlier decree — the one before review — becomes infructuous. (Para 37)

The review can be filed even *after* SLP is dismissed is clear from the language of Order 47 Rule 1(*a*). Thus the words "no appeal" has been preferred in Order 47 Rule 1(*a*) would also mean a situation where special leave is not granted. Till then there is no appeal in the eye of law before the superior court. Therefore, the review can be preferred in the High Court before special leave is granted, but not after it is granted. The reason is obvious. Once special leave is granted the jurisdiction to consider the validity of the High Court's order vests in the Supreme Court and the High Court cannot entertain a review thereafter, unless such a review application was preferred in the High Court before special leave was granted. (Para 38)

Thungabhadra Industries Ltd. v. *Govt. of A.P.*, AIR 1964 SC 1372 : (1964) 5 SCR 174, *relied on*

On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by Rule 1(1) of Order 47 CPC. [Para 44(*vii*)]

In the instant case, the State's SLP against the earlier order of the High Court was found devoid of any merits and hence dismissed. The order is a non-speaking and unreasoned order. All that can be spelled out is that the Supreme Court was not convinced of the need for exercising its appellate jurisdiction. The

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order of the High Court dated 17-12-1982 did not merge in the order dated 18-7-1983 passed by the Supreme Court. So it is available to be reviewed by the High Court. Moreover such a right of review is now statutorily conferred on the High Court by Section 8-C(2) of the Kerala Act. The legislature has taken care to confer the jurisdiction to review on the High Court as to such appellate orders, also against which though an appeal was carried to the Supreme Court, the same was not admitted by it. An appeal would be said to have been admitted by the Supreme Court if leave to appeal was granted. The constitutional validity of Section 8-C(2) has not been challenged. Though the appellant made a feeble attempt at raising such a plea at the time of hearing but unsuccessfully, as such a plea had not earlier been raised before the High Court, also not in the petition filed before the Supreme Court. No fault can be found with the approach of the High Court. (Paras 45 and 46)

Appeal dismissed H-M/22859/C

Advocates who appeared in this case :

T.L.V. Iyer, Senior Advocate (Ramesh Babu M.R. and T.G.N. Nair, Advocates, with him) for the Appellants;

Ashok H. Desai, Attorney General and P. Krishnamoorthy, Senior Advocates (Ms Beena Prakash and G. Prakash, Advocates, with them) for the Respondents.

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17. AIR 1967 SC 681 : (1967) 19 STC 144, *State of Madras* v. *Madurai Mills Co. Ltd.* 369*f-g*
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20. AIR 1958 SC 868 : (1958) 34 ITR 130, *CIT* v. *Amritlal Bhogilal and Co.* 369*b*, 370*d-e*
21. AIR 1958 Mad 398, 403 : (1958) 2 MLJ 74 : (1958) 2 LLJ 315, *Western India Match Co. Ltd.* v. *Industrial Tribunal* 373*a*
22. AIR 1955 SC 633 : 1955 Cri LJ 1410, *U.J.S. Chopra* v. *State of Bombay* 370*b*

The Judgment of the Court was delivered by

R.C. LAHOTI, J.—A question of frequent recurrence and of some significance involving the legal implications and the impact of an order rejecting a petition seeking grant of special leave to appeal under Article 136 of the Constitution of India has arisen for decision in this appeal.

Facts in brief

2. The Kerala Private Forests (Vesting and Assignment) Act, 1971 (Act 26 of 1971), hereinafter referred to as "the Act" for short, was enacted by the State of Kerala to provide for the vesting in the Government of private forests in the State of Kerala and for the assignment thereof to agriculturists and agricultural labourers for cultivation. The Act and the assent of the President on the Act were both published in Kerala Government Gazette (Extraordinary) dated 23-8-1971. The Act was given a retrospective operation by declaring that it shall be deemed to have come into force on the 10th day of May, 1971. We are not concerned with the details of several provisions contained in the Act. For our purpose it would suffice to notice that the disputes — (*i*) whether any land is a private forest or not, or (*ii*) whether any private forest or portion thereof is vested in the Government or not — may be entrusted for decision under Section 8 to a Tribunal constituted under Section 7 of the Act popularly known as the Forest Tribunal. The Government or any person objecting to any decision of the Tribunal may within a period of 60 days from the date of that decision, appeal against such decision to the High Court under Section 8-A of the Act.

3. There is a large family consisting of 71 members which raised a dispute before the Forest Tribunal, Kozhikode which was registered as OA No. 5 of 1981. Land to the tune of 1020 acres was the subject-matter of dispute. By order dated 11-8-1982 the Tribunal held that the land did not vest in the Government. An appeal was preferred by the State of Kerala before the High Court of Kerala which was dismissed on 17-12-1982 by an elaborate order. There was no statutory remedy of appeal, revision or review provided against the order of the High Court. The State of Kerala filed a petition for special leave to appeal under Article 136 of the Constitution registered as SLP (C) No. 8098 of 1983. The petition was dismissed by an order dated 18-7-1983. The order reads as under:

"Special leave petition is dismissed on merits."

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4. By Amendment Act 36 of 1986 published in Kerala Government Gazette (Extraordinary) dated 1-12-1986 Section 8-C amongst others was enacted into the body of the Act giving it a retrospective effect from 19-11-1983. Sub-section (2) of Section 8-C, with which we are concerned, reads as under:

> "8-C. *Power of Government to file appeal or application for review in certain cases.*—(1) * * *
>
> (2) Notwithstanding anything contained in this Act, or in the Limitation Act, 1963 (Central Act 36 of 1963), or in any other law for the time being in force, or in any judgment, decree or order of any court or other authority, the Government, if they are satisfied that any order of the High Court in an appeal under Section 8-A (*including an order against which an appeal to the Supreme Court has not been admitted by that Court*) has been passed on the basis of concessions made before the High Court without the authority in writing of the Government or due to the failure to produce relevant data or other particulars before the High Court or that an appeal against such order could not be filed before the Supreme Court by reason of the delay in applying for and obtaining a certified copy of such order, may, during the period beginning with the commencement of the Kerala Private Forests (Vesting and Assignment) Amendment Act, 1986 and ending on the 31st day of March, 1987, make an application to the High Court for review of such order." (emphasis supplied)

5. In January 1984, the State of Kerala filed an application for review registered as RP No. 14 of 1984 before the High Court of Kerala seeking review of the order dated 17-12-1982 passed by the High Court. On behalf of the respondents before the High Court a preliminary objection was raised as to the maintainability of the review petition which has been heard and disposed of by the order dated 14-12-1995 which is put in issue in this appeal. The High Court has overruled the preliminary objection as to the maintainability of the petition and directed the review petition to be posted for hearing on merits. Feeling aggrieved the petitioners have sought for leave to appeal to this Court which has been granted on 16-9-1996. On 14-3-2000 when this matter came up for hearing before a Bench of two Judges they directed the matter to be referred to a Bench of three Judges having regard to the importance of the question involved.

6. Shri T.L.V. Iyer, the learned Senior Counsel for the appellant has raised two contentions: Firstly, that the order of the High Court dated 17-12-1982 having merged into the order of this Court dated 18-7-1983, the order of the High Court had ceased to exist in the eye of law and therefore an application seeking review of the order dated 17-12-1982 passed by the High Court and before the High Court is entirely misconceived; Secondly, the order dated 18-7-1983 passed by this Court amounts to affirmation of the order dated 17-12-1982 passed by the High Court and therefore the High Court cannot entertain a prayer for review of its order much less disturb the order in exercise of review jurisdiction.

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The doctrine of merger

7. The doctrine of merger is neither a doctrine of constitutional law nor a doctrine statutorily recognised. It is a common law doctrine founded on principles of propriety in the hierarchy of justice delivery system. On more occasions than one this Court had an opportunity of dealing with the doctrine of merger. It would be advisable to trace and set out the judicial opinion of this Court as it has progressed through the times.

8. In *CIT* v. *Amritlal Bhogilal and Co.*[1] this Court held:

> "There can be no doubt that, if an appeal is provided against an order passed by a tribunal, the decision of the appellate authority is the operative decision in law. If the appellate authority modifies or reverses the decision of the tribunal, it is obvious that it is the appellate decision that is effective and can be enforced. In law the position would be just the same even if the appellate decision merely confirms the decision of the tribunal. As a result of the confirmation or affirmance of the decision of the tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement;"

9. However, in the facts and circumstances of the case this Court refused to apply the doctrine of merger. There, an order of registration of a firm was made by the Income Tax Officer. The firm was then assessed as a registered firm. The order of assessment of the assessee was subjected to appeal before the Appellate Commissioner. Later on the order passed by the Income Tax Officer in respect of registration of the firm was sought to be revised by the Commissioner of Income Tax. Question arose whether the Commissioner of Income Tax could have exercised the power of revision. This Court held that though the order of assessment made by the ITO was appealed against before the Appellate Commissioner, the order of registration was not appealable at all and therefore the order granting registration of the firm cannot be said to have been merged in the appellate order of the Appellate Commissioner. While doing so this Court analysed several provisions of the Income Tax Act so as to determine the nature and scope of relevant appellate and revisional powers and held if the subject-matter of the two proceedings is not identical, there can be no merger. In *State of Madras* v. *Madurai Mills Co. Ltd.*[2] this Court held that the doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by the inferior authority and the other by a superior authority, passed in an appeal or revision there is a fusion or merger of two orders irrespective of the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute. The application or the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction.

1 AIR 1958 SC 868 : (1958) 34 ITR 130
2 AIR 1967 SC 681 : (1967) 19 STC 144

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10. In *Gojer Bros. (P) Ltd.* v. *Ratan Lal Singh*[3] this Court made it clear that so far as merger is concerned on principle there is no distinction between an order of reversal or modification or an order of confirmation passed by the appellate authority. In all the three cases the order passed by the lower authority shall merge in the order passed by the appellate authority whatsoever be its decision — whether of reversal or modification or only confirmation. Their Lordships referred to an earlier decision of this Court in *U.J.S. Chopra* v. *State of Bombay*[4] wherein it was held:

> "A judgment pronounced by the High Court in the exercise of its appellate or revisional jurisdiction *after issue of a notice* and *a full hearing in the presence of both the parties* ... would replace the judgment of the lower court, thus constituting the judgment of the High Court the only final judgment to be executed in accordance with law by the court below."

11. In *S.S. Rathore* v. *State of M.P.*[5] a larger Bench of this Court (seven Judges) having reviewed the available decisions of the Supreme Court on the doctrine of merger, held that the distinction made between courts and tribunals as regards the applicability of doctrine of merger is without any legal justification; where a statutory remedy was provided against an adverse order in a service dispute and that remedy was availed, the limitation for filing a suit challenging the adverse order would commence not from the date of the original adverse order but on the date when the order of the higher authority disposing of the statutory remedy was passed. Support was taken from doctrine of merger by referring to *CIT* v. *Amritlal Bhogilal & Co.*[1] and several other decisions of this Court.

12. The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When a decree or order passed by an inferior court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before it either way — whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view.

3 (1974) 2 SCC 453 : AIR 1974 SC 1380
4 AIR 1955 SC 633 : 1955 Cri LJ 1410
5 (1989) 4 SCC 582 : 1990 SCC (L&S) 50 : (1989) 11 ATC 913 : AIR 1990 SC 10

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Stage of SLP and post-leave stage

13. The appellate jurisdiction exercised by the Supreme Court is conferred by Article 132 to 136 of the Constitution. Articles 132, 133 and 134 provide when an appeal thereunder would lie and when not. Article 136 of the Constitution is a special jurisdiction conferred on the Supreme Court which is sweeping in its nature. It is a residuary power in the sense that it confers an appellate jurisdiction on the Supreme Court subject to the special leave being granted in such matters as may not be covered by the preceding articles. It is an overriding provision conferring a special jurisdiction providing for invoking of the appellate jurisdiction of Supreme Court not fettered by the sweep of preceding articles. Article 136 opens with a non-obstante clause and conveys a message that even in the field covered by the preceding articles, jurisdiction conferred by Article 136 is available to be exercised in an appropriate case. It is an untrammelled reservoir of power incapable of being confined to definitional bounds; the discretion conferred on the Supreme Court being subjected to only one limitation, that is, the wisdom and good sense or sense of justice of the Judges. No right of appeal is conferred upon any party; only a discretion is vested in the Supreme Court to interfere by granting leave to an applicant to enter in its appellate jurisdiction not open otherwise and as of right.

14. The exercise of jurisdiction conferred on this Court by Article 136 of the Constitution consists of two steps: (*i*) granting special leave to appeal; and (*ii*) hearing the appeal. This distinction is clearly demonstrated by the provisions of Order 16 of the Supreme Court Rules framed in exercise of the power conferred by Article 145 of the Constitution. Under Rule 4, the petition seeking special leave to appeal filed before the Supreme Court under Article 136 of the Constitution shall be in Form No. 28. No separate application for interim relief need be filed, which can be incorporated in the petition itself. If notice is ordered on the special leave petition, the petitioner should take steps to serve the notice on the respondent. The petition shall be accompanied by a certified copy of the judgment or order appealed from and an affidavit in support of the statement of facts contained in the petition. Under Rule 10 the petition for grant of special leave shall be put up for hearing ex parte unless there be a caveat. The court if it thinks fit, may direct issue of notice to the respondent and adjourn the hearing of the petition. Under Rule 13, the respondent to whom a notice in special leave petition is issued or who had filed a caveat, shall be entitled to oppose the grant of leave or interim orders without filing any written objections. He shall also be at liberty to file his objections only by setting out the grounds in opposition to the questions of law or grounds set out in the SLP. On hearing, the Court may refuse the leave and dismiss the petition for seeking special leave to appeal either ex parte or after issuing notice to the opposite party. Under Rule 11, on the grant of special leave, the petition for special leave shall, subject to the payment of additional court fee, if any, be treated as the petition of appeal and it shall be registered and numbered as such. The appeal shall then be set down for hearing in accordance with the procedure laid

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down thereafter. Thus, a petition seeking grant of special leave to appeal and the appeal itself, though both dealt with by Article 136 of the Constitution, are two clearly distinct stages. In our opinion, the legal position which emerges is as under:

(*1*) While hearing the petition for special leave to appeal, the Court is called upon to see whether the petitioner should be granted such leave or not. While hearing such petition, the Court is not exercising its appellate jurisdiction; it is merely exercising its discretionary jurisdiction to grant or not to grant leave to appeal. The petitioner is still outside the gate of entry though aspiring to enter the appellate arena of the Supreme Court. Whether he enters or not would depend on the fate of his petition for special leave;

(*2*) If the petition seeking grant of leave to appeal is dismissed, it is an expression of opinion by the Court that a case for invoking appellate jurisdiction of the Court was not made out;

(*3*) If leave to appeal is granted the appellate jurisdiction of the Court stands invoked; the gate for entry in the appellate arena is opened. The petitioner is in and the respondent may also be called upon to face him, though in an appropriate case, in spite of having granted leave to appeal, the Court may dismiss the appeal without noticing the respondent.

(*4*) In spite of a petition for special leave to appeal having been filed, the judgment, decree or order against which leave to appeal has been sought for, continues to be final, effective and binding as between the parties. Once leave to appeal has been granted, the finality of the judgment, decree or order appealed against is put in jeopardy though it continues to be binding and effective between the parties unless it is a nullity or unless the Court may pass a specific order staying or suspending the operation or execution of the judgment, decree or order under challenge.

Dismissal at stage of special leave — without reasons — no res judicata, no merger

15. Having so analysed and defined the two stages of the jurisdiction conferred by Article 136, now we proceed to deal with a number of decisions cited at the Bar during the course of hearing and dealing with the legal tenor of an order of the Supreme Court dismissing a special leave petition. In *Workmen* v. *Board of Trustees of the Cochin Port Trust*[6] a three-Judge Bench of this Court has held that dismissal of special leave petition by the Supreme Court by a non-speaking order of dismissal where no reasons were given does not constitute res judicata. All that can be said to have been decided by the Court is that it was not a fit case where special leave should be granted. That may be due to various reasons. During the course of the judgment, their Lordships have observed that dismissal of a special leave petition under Article 136 against the order of a tribunal did not necessarily bar the entertainment of a writ petition under Article 226 against the order of the

6 (1978) 3 SCC 119 : 1978 SCC (L&S) 438

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tribunal. The decision of the Madras High Court in *Western India Match Co. Ltd.* v. *Industrial Tribunal*[7] was cited before their Lordships. The High Court had taken the view that the right to apply for leave to appeal to the Supreme Court under Article 136, if it could be called a "right" at all, cannot be equated to a right to appeal and that a High Court could not refuse to entertain an application under Article 226 of the Constitution on the ground that the aggrieved party could move the Supreme Court under Article 136 of the Constitution. Their Lordships observed that such a broad statement of law is not quite accurate, although substantially it is correct.

16. In *Indian Oil Corpn. Ltd.* v. *State of Bihar*[8] there was a labour dispute adjudicated upon by an award made by the Labour Court. The employer moved the Supreme Court by filing a special leave petition against the award which was dismissed by a non-speaking order in the following terms:

"The special leave petition is dismissed."

17. Thereafter the employer approached the High Court by preferring a petition under Article 226 of the Constitution seeking quashing of the award of the Labour Court. On behalf of the employee the principal contention raised was that in view of the order of the Supreme Court dismissing the special leave petition preferred against the award of the Labour Court it was not legally open to the employer to approach the High Court under Article 226 of the Constitution challenging the very same award. The plea prevailed with the High Court forming an opinion that the doctrine of election was applicable and the employer having chosen the remedy of approaching a superior court and having failed therein he could not thereafter resort to the alternative remedy of approaching the High Court. This decision of the High Court was put in issue before the Supreme Court. This Court held that the view taken by the High Court was not right and that the High Court should have gone into the merits of the writ petition. Referring to two earlier decisions of this Court, it was further held: (SCC pp. 148-50, paras 6 & 8)

> "*[T]he effect of a non-speaking order of dismissal of a special leave petition without anything more indicating the grounds or reasons of its dismissal must, by necessary implication, be taken to be that this Court had decided only that it was not a fit case where special leave should be granted.* This conclusion may have been reached by this Court due to several reasons. When the order passed by this Court was not a speaking one, it is not correct to assume that this Court had necessarily decided implicitly all the questions in relation to the merits of the award, which was under challenge before this Court in the special leave petition. A writ proceeding is a wholly different and distinct proceeding. Questions which can be said to have been decided by this Court expressly, implicitly or even constructively while dismissing the special leave

7 AIR 1958 Mad 398, 403 : (1958) 2 MLJ 74 : (1958) 2 LLJ 315
8 (1986) 4 SCC 146 : 1986 SCC (L&S) 740 : AIR 1986 SC 1780

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petition cannot, of course, be reopened in a subsequent writ proceeding before the High Court. But neither on the principle of res judicata nor on any principle of public policy analogous thereto, would the order of this Court dismissing the special leave petition operate to bar the trial of identical issues in a separate proceeding namely, the writ proceeding before the High Court merely on the basis of an uncertain assumption that the issues must have been decided by this Court at least by implication. *It is not correct or safe to extend the principle of res judicata or constructive res judicata to such an extent so as to found it on mere guesswork.*

* * *

It is not the policy of this Court to entertain special leave petitions and grant leave under Article 136 of the Constitution save in those cases where some substantial question of law of general or public importance is involved or there is manifest injustice resulting from the impugned order or judgment. The dismissal of a special leave petition in limine by a non-speaking order does not therefore justify any inference that by necessary implication the contentions raised in the special leave petition on the merits of the case have been rejected by this Court. It may also be observed that having regard to the very heavy backlog of work in this Court and the necessity to restrict the intake of fresh cases by strictly following the criteria aforementioned, it has very often been the practice of this Court to grant special leave in cases where the party cannot claim effective relief by approaching the High Court concerned under Article 226 of the Constitution. In such cases also the special leave petitions are quite often dismissed only by passing a non-speaking order especially in view of the rulings already given by this Court in the two decisions aforecited, that such dismissal of the special leave petition will not preclude the party from moving the High Court for seeking relief under Article 226 of the Constitution. In such cases it would work extreme hardship and injustice if the High Court were to close its doors to the petitioner and refuse him relief under Article 226 of the Constitution on the sole ground of dismissal of the special leave petition." (emphasis supplied)

18. In our opinion what has been stated by this Court applies also to a case where a special leave petition having been dismissed by a non-speaking order, the applicant approaches the High Court by moving a petition for review. May be that the Supreme Court was not inclined to exercise its discretionary jurisdiction under Article 136 probably because it felt that it was open to the applicant to move the High Court itself. As nothing has been said specifically in the order dismissing the special leave petition one is left merely guessing. We do not think it would be just to deprive the aggrieved person of the statutory right of seeking relief in review jurisdiction of the High Court if a case for relief in that jurisdiction could be made out merely because a special leave petition under Article 136 of the Constitution had already stood rejected by the Supreme Court by a non-speaking order.

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19. In *Rup Diamonds* v. *Union of India*[9] the law declared by this Court is that it cannot be said that the mere rejection of special leave petition could, by itself, be construed as the imprimatur of this Court on the correctness of the decision sought to be appealed against.

20. In *Wilson* v. *Colchester Justices*[10] the House of Lords stated:

> "There are a multitude of reasons why, in a particular case, leave to appeal may be refused by an Appeal Committee. I shall not attempt to embark on an exhaustive list for it would be impossible to do so. One reason may be that the particular case raises no question of general principle but turns on its own facts. Another may be that the facts of the particular case are not suitable as a foundation for determining some question of general principle.
>
> ... Conversely the fact that leave to appeal is given is not of itself an indication that the judgments below are thought to be wrong. It may well be that leave is given in order that the relevant law may be authoritatively restated in clearer terms."

21. In *Supreme Court Employees' Welfare Assn.* v. *Union of India*[11] and *Yogendra Narayan Chowdhury* v. *Union of India*[12] both decisions by two-Judge Benches, this Court has held that a non-speaking order of dismissal of a special leave petition cannot lead to the assumption that it had necessarily decided by implication the correctness of the decision under challenge.

22. We may refer to a recent decision, by a two-Judge Bench, of this Court in *V.M. Salgaocar & Bros. (P) Ltd.* v. *CIT*[13] holding that when a special leave petition is dismissed, this Court does not comment on the correctness or otherwise of the order from which leave to appeal is sought. What the Court means is that it does not consider it to be a fit case for exercising its jurisdiction under Article 136 of the Constitution. That certainly could not be so when appeal is dismissed though by a non-speaking order. Here the doctrine of merger applies. In that case the Supreme Court upholds the decision of the High Court or of the Tribunal. This doctrine of merger does not apply in the case of dismissal of a special leave petition under Article 136. When appeal is dismissed, order of the High Court is merged with that of the Supreme Court. We find ourselves in entire agreement with the law so stated. We are clear in our mind that an order dismissing a special leave petition, more so when it is by a non-speaking order, does not result in merger of the order impugned into the order of the Supreme Court.

23. A few decisions which apparently take a view to the contrary may now be noticed. In *Sree Narayana Dharmasanghom Trust* v. *Swami*

9 (1989) 2 SCC 356 : AIR 1989 SC 674
10 (1985) 2 All ER 97 (HL)
11 (1989) 4 SCC 187 : 1989 SCC (L&S) 569
12 (1996) 7 SCC 1 : 1996 SCC (L&S) 362
13 (2000) 5 SCC 373 : (2000) 3 Scale 240

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Prakasananda[14] it was held that a revisional order of the High Court against which a petition for special leave to appeal was dismissed in limine could not have been reviewed by the High Court subsequent to dismissal of SLP by the Supreme Court. This decision proceeds on the premises, as stated in para 6 of the order, that "it is settled law that even the dismissal of special leave petition in limine operates as a final order between the parties" (SCC p. 81). In our opinion, the order is final in the sense that once a special leave petition is dismissed, whether by a speaking or non-speaking order or whether in limine or on contest, second special leave petition would not lie. However, this statement cannot be stretched and applied to hold that such an order attracts applicability of doctrine of merger and excludes the jurisdiction of the Court or authority passing the order to review the same.

24. In *State of Maharashtra* v. *Prabhakar Bhikaji Ingle*[15] the view taken by a two-Judge Bench of this Court is that the dismissal of special leave petition without a speaking order does not constitute res judicata but the order dealt with in SLP, disposed of by a non-speaking order cannot be subjected to review by the tribunal. In our opinion the law has been too broadly stated through the said observation. Learned Judges have been guided by the consideration of judicial discipline which, as we would shortly deal with, is a principle of great relevance and may be attracted in an appropriate case. But we find it difficult to subscribe to the view, as expressed in this decision, that dismissal of SLP without a speaking order amounts to *confirmation* by the Supreme Court of the order against which leave was sought for and the order had stood merged in the order of the Supreme Court.

Dismissal of SLP by speaking or reasoned order — no merger but rule of discipline and Article 141 attracted

25. The efficacy of an order disposing of a special leave petition under Article 136 of the Constitution came up for the consideration of the Constitution Bench in *Penu Balakrishna Iyer* v. *Ariya M. Ramaswami Iyer*[16] in the context of revocation of a special leave once granted. This Court held that in a given case if the respondent brings to the notice of the Supreme Court facts which would justify the Court in revoking the leave earlier granted by it, the Supreme Court would in the interest of justice not hesitate to adopt that course. It was therefore held that no general rules could be laid down governing the exercise of wide powers conferred on this Court under Article 136; whether the jurisdiction of this Court under Article 136 should be exercised or not and if used, on what terms and conditions, is a matter depending on the facts of each case. If at the stage when special leave is granted the respondent-caveator appears and resists the grant of special leave and the ground urged in support of resisting the grant of special leave is rejected on merits resulting in grant of special leave then it would not be open to the respondent to raise the same point over again at the time of the

14 (1997) 6 SCC 78
15 (1996) 3 SCC 463 : 1996 SCC (L&S) 749
16 AIR 1965 SC 195 : (1964) 7 SCR 49

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final hearing of the appeal. However, if the respondent-caveator does not appear, or having appeared, does not raise a point, or even if he raised a point and the Court does not decide it before grant of special leave, the same point can be raised at the time of final hearing. There would be no technical bar of res judicata. The Constitution Bench thus makes it clear that the order disposing of a special leave petition has finality of a limited nature extending only to the points expressly decided by it.

26. The underlying logic attaching efficacy to an order of the Supreme Court dismissing SLP after hearing counsel for the parties is discernible from a recent three-Judge Bench decision of this Court in *Abbai Maligai Partnership Firm* v. *K. Santhakumaran*[17]. In the matter of eviction proceeding initiated before the Rent Controller, the order passed therein was subjected to appeal and then revision before the High Court. Special leave petitions were preferred before the Supreme Court where the respondents were present on caveat. Both the sides were heard through the Senior Advocates representing them. The special leave petitions were dismissed. The High Court thereafter entertained review petitions which were highly belated and having condoned the delay reversed the orders made earlier in civil revision petitions. The orders in review were challenged by filing appeals under leave granted on special leave petitions. This Court observed that what was done by the learned Single Judge was "subversive of judicial discipline". The facts and circumstances of the case persuaded this Court to form an opinion that the tenants were indulging in vexatious litigations, abusing the process of the Court by approaching the High Court and the very entertainment of review petitions (after condoning a long delay of 221 days) and then reversing the earlier orders was an affront to the order of this Court. However the learned Judges deciding the case have nowhere in the course of their judgment relied on doctrine of merger for taking the view they have done. A careful reading of this decision brings out the correct statement of law and fortifies us in taking the view as under.

27. A petition for leave to appeal to this Court may be dismissed by a non-speaking order or by a speaking order. Whatever be the phraseology employed in the order of dismissal, if it is a non-speaking order, i.e., it does not assign reasons for dismissing the special leave petition, it would neither attract the doctrine of merger so as to stand substituted in place of the order put in issue before it nor would it be a declaration of law by the Supreme Court under Article 141 of the Constitution for there is no law which has been declared. If the order of dismissal be supported by reasons then also the doctrine of merger would not be attracted because the jurisdiction exercised was not an appellate jurisdiction but merely a discretionary jurisdiction refusing to grant leave to appeal. We have already dealt with this aspect earlier. Still the reasons stated by the Court would attract applicability of Article 141 of the Constitution if there is a law declared by the Supreme Court which obviously would be binding on all the courts and tribunals in

17 (1998) 7 SCC 386

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India and certainly the parties thereto. The statement contained in the order other than on points of law would be binding on the parties and the court or tribunal, whose order was under challenge on the principle of judicial discipline, this Court being the Apex Court of the country. No court or tribunal or parties would have the liberty of taking or canvassing any view contrary to the one expressed by this Court. The order of Supreme Court would mean that it has declared the law and in that light the case was considered not fit for grant of leave. The declaration of law will be governed by Article 141 but still, the case not being one where leave was granted, the doctrine of merger does not apply. The Court sometimes leaves the question of law open. Or it sometimes briefly lays down the principle, may be, contrary to the one laid down by the High Court and yet would dismiss the special leave petition. The reasons given are intended for purposes of Article 141. This is so done because in the event of merely dismissing the special leave petition, it is likely that an argument could be advanced in the High Court that the Supreme Court has to be understood as not to have differed in law with the High Court.

28. Incidentally we may notice two other decisions of this Court which though not directly in point, the law laid down wherein would be of some assistance to us. In *Shankar Ramchandra Abhyankar* v. *Krishnaji Dattatreya Bapat*[18] this Court vide para 7 has emphasised three preconditions attracting applicability of doctrine of merger. They are: (*i*) the jurisdiction exercised should be appellate or revisional jurisdiction; (*ii*) the jurisdiction should have been exercised after issue of notice; and (*iii*) after a full hearing in presence of both the parties. Then the appellate or revisional order would replace the judgment of the lower court and constitute the only final judgment. In *Sushil Kumar Sen* v. *State of Bihar*[19] the doctrine of merger usually applicable to orders passed in exercise of appellate or revisional jurisdiction was held to be applicable also to orders passed in exercise of review jurisdiction. This Court held that the effect of allowing an application for review of a decree is to vacate a decree passed. The decree that is subsequently passed on review whether it modifies, reverses or confirms the decree originally passed, is a new decree superseding the original one. The distinction is clear. Entertaining an application for review does not vacate the decree sought to be reviewed. It is only when the application for review has been allowed that the decree under review is vacated. Thereafter the matter is heard afresh and the decree passed therein, whatever be the nature of the new decree, would be a decree superseding the earlier one. The principle or logic flowing from the abovesaid decisions can usefully be utilised for resolving the issue at hand. Mere pendency of an application seeking leave to appeal does not put in jeopardy the finality of the decree or order sought to be subjected to exercise of appellate jurisdiction by the Supreme Court. It is only if the application is allowed and leave to appeal granted then the finality of the

18 (1969) 2 SCC 74 : AIR 1970 SC 1
19 (1975) 1 SCC 774 : AIR 1975 SC 1185

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decree or order under challenge is jeopardised as the pendency of appeal reopens the issues decided and this Court is then scrutinising the correctness of the decision in exercise of its appellate jurisdiction.

29. In *Gopabandhu Biswal* v. *Krishna Chandra Mohanty*[20] there are observations vide para 8 and at a few other places that rejection of a special leave petition against the order of the Administrative Tribunal makes the order of the Tribunal final and binding and the party cannot thereafter go back to the Tribunal to apply for review. However, paras 12 and 13 of the judgment go to show that (*i*) the applications for review before the Tribunal were not within the principle laid down under Order 47 Rule 1 CPC, (*ii*) did not comply with the relevant Rules contained in the Central Administrative Tribunal (Procedure) Rules, 1987, (*iii*) the review applicants were not in the category of persons aggrieved, and (*iv*) the review petitions were filed beyond the period of limitation prescribed and the delay was not explained. Thus the case proceeds on the peculiar facts of its own.

30. In *Junior Telecom Officers Forum* v. *Union of India*[21] also the view taken by a two-Judge Bench of this Court is that the dismissal of the SLP, though in limine, was "on merits" and the Court had declined to interfere with the impugned judgment of the High Court except to a limited extent as noticed therein whereafter the tribunal could not have reopened the matter. The order passed earlier by the Supreme Court is quoted in para 5 of the report. It clearly states that on SLP itself the Court heard counsel of both the sides. While dismissing the special leave petition on merits, this Court had to some extent interfere with the order of the High Court which was put in issue before the Supreme Court. It is clear that the Supreme Court had exercised appellate jurisdiction vested in it under Article 136 of the Constitution and heard both the sides though the leave was not formally granted and the special leave petition was not formally converted into an appeal. Hence this decision rests on the special facts of that case.

31. In *Supreme Court Employees' Welfare Assn. case*[11] this Court held: (SCC Headnote)

> "When Supreme Court gives reasons while dismissing a special leave petition under Article 136 the decision becomes one which attracts Article 141. But when no reason is given and the special leave petition is summarily dismissed, the Court does not lay down any law under Article 141. The effect of a non-speaking order of dismissal of a special leave petition without anything more indicating the grounds or reasons of its dismissal must, by necessary implication, be taken to be that *the Supreme Court had decided only that it was not a fit case where special leave petition should be granted.*" (emphasis supplied)

Leave granted — dismissal without reasons — merger results

32. It may be that in spite of having granted leave to appeal, the Court may dismiss the appeal on such grounds as may have provided foundation

20 (1998) 4 SCC 447 : 1998 SCC (L&S) 1147

21 1993 Supp (4) SCC 693 : 1994 SCC (L&S) 366 : (1994) 26 ATC 367

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for refusing the grant at the earlier stage. But that will be a dismissal of appeal. The decision of this Court would result in superseding the decision under appeal attracting doctrine of merger. But if the same reasons had prevailed with this Court for refusing leave to appeal, the order would not have been an appellate order but only an order refusing to grant leave to appeal.

Doctrine of merger and review

33. This question directly arises in the case before us.

34. The doctrine of merger and the right of review are concepts which are closely interlinked. If the judgment of the High Court has come up to this Court by way of a special leave, and special leave is granted and the appeal is disposed of with or without reasons, by affirmance or otherwise, the judgment of the High Court merges with that of this Court. In that event, it is not permissible to move the High Court by review because the judgment of the High Court has merged with the judgment of this Court. But where the special leave petition is dismissed — there being no merger, the aggrieved party is not deprived of any statutory right of review, if it was available and he can pursue it. It may be that the review court may interfere, or it may not interfere depending upon the law and principles applicable to interference in the review. But the High Court, if it exercises a power of review or deals with a review application on merits — in a case where the High Court's order had not merged with an order passed by this Court after grant of special leave — the High Court could not, in law, be said to be wrong in exercising statutory jurisdiction or power vested in it.

35. It will be useful to refer to Order 47 Rule 1 of the Code of Civil Procedure 1908. It reads as follows:

> "1. *Application for review of judgment.*—(1) Any person considering himself aggrieved—
>
> (*a*) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
>
> (*b*) by a decree or order from which no appeal is allowed, or
>
> (*c*) by a decision on a reference from a Court of Small Causes,
>
> and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.
>
> (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.
>
> *Explanation.*—The fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the

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subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment."

36. For our purpose it is clause (*a*) sub-rule (1) which is relevant. It contemplates a situation where "an appeal is allowed" but "no appeal has been preferred". The Rule came up for consideration of this Court in *Thungabhadra Industries Ltd.* v. *Govt. of A.P.*[22] in the context of Article 136 of the Constitution of India. The applicant had filed an application for review of the order of the High Court refusing to grant a certificate under Article 133 of the Constitution. The applicant also filed an application for special leave to appeal in respect of the same matter under Article 136 along with an application for condonation of delay. The Supreme Court refused to condone the delay and rejected the application under Article 136. When the application for review came up for consideration before the High Court, it was dismissed on the ground that the special leave petition had been dismissed by the Supreme Court. This Court held that the crucial date for determining whether or not the terms of Order 47 Rule 1(1) CPC are satisfied is the date when the application for review is filed. If on that date no appeal has been filed it is competent for the court hearing the petition for review to dispose of the application on the merits notwithstanding the pendency of the appeal, subject only to this, that if before the application for review is finally decided the appeal itself has been disposed of, the jurisdiction of the court hearing the review petition would come to an end. On the date when the application for review was filed the applicant had not filed an appeal to this Court and therefore there was no bar to the petition for review being entertained.

37. Let us assume that the review is *filed first* and the delay in SLP is condoned and the special leave is ultimately granted and the appeal is pending in this Court. The position then, under Order 47 Rule 1 CPC is that still the review can be disposed of by the High Court. If the review of a decree is granted before the disposal of the appeal against the decree, the decree appealed against will cease to exist and the appeal would be rendered incompetent. An appeal cannot be preferred against a decree after a review against the decree has been granted. This is because the decree reviewed gets merged in the decree passed on review and the appeal to the superior court preferred against the earlier decree — the one before review — becomes infructuous.

38. The review can be filed even *after* SLP is dismissed is clear from the language of Order 47 Rule 1(*a*). Thus the words "no appeal" has been preferred in Order 47 Rule 1(*a*) would also mean a situation where special leave is not granted. Till then there is no appeal in the eye of law before the superior court. Therefore, the review can be preferred in the High Court before special leave is granted, but not after it is granted. The reason is obvious. Once special leave is granted the jurisdiction to consider the validity of the High Court's order vests in the Supreme Court and the High Court

22 AIR 1964 SC 1372 : (1964) 5 SCR 174

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cannot entertain a review thereafter, unless such a review application was preferred in the High Court before special leave was granted.

Conclusions

39. We have catalogued and dealt with all the available decisions of this Court brought to our notice on the point at issue. It is clear that as amongst the several two-Judge Bench decisions there is a conflict of opinion and needs to be set at rest. The source of power conferring binding efficacy on decisions of this Court is not uniform in all such decisions. Reference is found having been made to (*i*) Article 141 of the Constitution, (*ii*) doctrine of merger, (*iii*) res judicata, and (*iv*) rule of discipline flowing from this Court being the highest court of the land.

40. A petition seeking grant of special leave to appeal may be rejected for several reasons. For example, it may be rejected (*i*) as barred by time, or (*ii*) being a defective presentation, (*iii*) the petitioner having no locus standi to file the petition, (*iv*) the conduct of the petitioner disentitling him to any indulgence by the court, (*iv*) the question raised by the petitioner for consideration by this Court being not fit for consideration or deserving being dealt with by the Apex Court of the country and so on. The expression often employed by this Court while disposing of such petitions are — "heard and dismissed", "dismissed", "dismissed as barred by time" and so on. May be that at the admission stage itself the opposite party appears on caveat or on notice and offers contest to the maintainability of the petition. The Court may apply its mind to the meritworthiness of the petitioner's prayer seeking leave to file an appeal and having formed an opinion may say "dismissed on merits". Such an order may be passed even ex parte, that is, in the absence of the opposite party. In any case, the dismissal would remain a dismissal by a non-speaking order where no reasons have been assigned and no law has been declared by the Supreme Court. The dismissal is not of the appeal but of the special leave petition. Even if the merits have been gone into, they are the merits of the special leave petition only. In our opinion neither doctrine of merger nor Article 141 of the Constitution is attracted to such an order. Grounds entitling exercise of review jurisdiction conferred by Order 47 Rule 1 CPC or any other statutory provision or allowing review of an order passed in exercise of writ or supervisory jurisdiction of the High Court (where also the principles underlying or emerging from Order 47 Rule 1 CPC act as guidelines) are not necessarily the same on which this Court exercises discretion to grant or not to grant special leave to appeal while disposing of a petition for the purpose. Mere rejection of a special leave petition does not take away the jurisdiction of the court, tribunal or forum whose order forms the subject-matter of petition for special leave to review its own order if grounds for exercise of review jurisdiction are shown to exist. Where the order rejecting an SLP is a speaking order, that is, where reasons have been assigned by this Court for rejecting the petition for special leave and are stated in the order still the order remains the one rejecting prayer for the grant of leave to appeal. The petitioner has been turned away at the threshold without having been allowed to enter in the appellate jurisdiction of this

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Court. Here also the doctrine of merger would not apply. But the law stated or declared by this Court in its order shall attract applicability of Article 141 of the Constitution. The reasons assigned by this Court in its order expressing its adjudication (expressly or by necessary implication) on point of fact or law shall take away the jurisdiction of any other court, tribunal or authority to express any opinion in conflict with or in departure from the view taken by this Court because permitting to do so would be subversive of judicial discipline and an affront to the order of this Court. However this would be so not by reference to the doctrine of merger.

41. Once a special leave petition has been granted, the doors for the exercise of appellate jurisdiction of this Court have been let open. The order impugned before the Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed against. It would also not make any difference if the order is a speaking or non-speaking one. Whenever this Court has felt inclined to apply its mind to the merits of the order put in issue before it though it may be inclined to affirm the same, it is customary with this Court to grant leave to appeal and thereafter dismiss the appeal itself (and not merely the petition for special leave) though at times the orders granting leave to appeal and dismissing the appeal are contained in the same order and at times the orders are quite brief. Nevertheless, the order shows the exercise of appellate jurisdiction and therein the merits of the order impugned having been subjected to judicial scrutiny of this Court.

42. "To merge" means to sink or disappear in something else; to become absorbed or extinguished; to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased; an absorption or swallowing up so as to involve a loss of identity and individuality. (See *Corpus Juris Secundum*, Vol. LVII, pp. 1067-68.)

43. We may look at the issue from another angle. The Supreme Court cannot and does not reverse or modify the decree or order appealed against while deciding a petition for special leave to appeal. What is impugned before the Supreme Court can be reversed or modified only after granting leave to appeal and then assuming appellate jurisdiction over it. If the order impugned before the Supreme Court cannot be reversed or modified at the SLP stage obviously that order cannot also be affirmed at the SLP stage.

44. To sum up, our conclusions are:

(*i*) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

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(*ii*) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. The first stage is upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the special leave petition is converted into an appeal.

(*iii*) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(*iv*) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(*v*) If the order refusing leave to appeal is a speaking order, i.e., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(*vi*) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(*vii*) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule 1 of Order 47 CPC.

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45. Having thus made the law clear, the case at hand poses no problem for solution. The earlier order of the High Court was sought to be subjected to exercise of appellate jurisdiction of the Supreme Court by the State of Kerala wherein it did not succeed. The prayer contained in the petition seeking leave to appeal to this Court was found devoid of any merits and hence dismissed. The order is a non-speaking and unreasoned order. All that can be spelled out is that the Court was not convinced of the need for exercising its appellate jurisdiction. The order of the High Court dated 17-12-1982 did not merge in the order dated 18-7-1983 passed by this Court. So it is available to be reviewed by the High Court. Moreover such a right of review is now statutorily conferred on the High Court by sub-section (2) of Section 8-C of the Kerala Act. The legislature has taken care to confer the jurisdiction to review on the High Court as to such appellate orders, also against which though an appeal was carried to the Supreme Court, the same was not admitted by it. An appeal would be said to have been admitted by the Supreme Court if leave to appeal was granted. The constitutional validity of sub-section (2) of Section 8-C has not been challenged. Though, Shri T.L.V. Iyer, the learned Senior Counsel for the appellant made a feeble attempt at raising such a plea at the time of hearing but unsuccessfully, as such a plea has not so far been raised before the High Court, also not in the petition filed before this Court.

46. No fault can be found with the approach of the High Court. The appeal is dismissed. No order as to the costs.

(2000) 6 Supreme Court Cases 385

(BEFORE S. RAJENDRA BABU AND S.N. PHUKAN, JJ.)

OIL & NATURAL GAS CORPORATION LTD. .. Appellant;

Versus

SBI, OVERSEAS BRANCH, BOMBAY .. Respondent.

Civil Appeal No. 4120 of 2000†, decided on July 21, 2000

A. **Civil Procedure Code, 1908 — Or. 37 R. 3(5) — Summary suit — Leave to defend — Bank guarantee — Held, encashment of, does not depend on adjudication of disputes — An unconditional bank guarantee must be given effect to even where there is a dispute between the parties — Unless there is a plea relating to fraud the court does not have jurisdiction to grant unconditional leave to defend — Contract for construction of undersea pipelines entered into by appellant Corporation and foreign contractor (Italian in this case) — Contractor furnishing through respondent Bank unconditional bank guarantee under which payment was to be made for delay in completion of project — Contract requiring contractor to extend validity of guarantee as necessary — Delays occurring — Appellants assessing liquidated damages and requesting further extension of life of guarantee — Contractor refusing and referring matter**

† From the Judgment and Order dated 27-4-1998 of the Bombay High Court in SFJ No. 730 of 1997

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(2007) 4 Supreme Court Cases 221

(BEFORE C.K. THAKKER AND LOKESHWAR SINGH PANTA, JJ.)

A.V. PAPAYYA SASTRY AND OTHERS . . Appellants;

Versus

GOVT. OF A.P. AND OTHERS . . Respondents.

Civil Appeals Nos. 5097-99 of 2004†, decided on March 7, 2007

A. **Constitution of India — Arts. 226 and 136 — Recall by High Court of its earlier order — Special Officer and Competent Authority under Urban Land (Ceiling and Regulation) Act, 1976 passing order declaring that appellants were "non-surplus landholders" as possession of the land in question had already been handed over to Port Trust Authorities — As the land was required by Port Trust Authorities for construction of quarters for their employees, State authorities were requested to initiate land acquisition proceedings — Notification under S. 4 and declaration under S. 6 of Land Acquisition Act issued — But when Chief Engineer of the Port Trust clarified to Land Acquisition Officer that actual physical possession had not been taken by the Port Trust, State Govt. in exercise of suo motu revisional power under S. 34 of the Ceiling Act set aside the order of the Special Officer and Competent Authority — Appellant landowners filed writ petitions seeking direction of High Court to State authorities to complete land acquisition proceedings and questioned legality of the revisional order — Single Judge of High Court allowed the writ petitions and Division Bench dismissed appeal filed thereagainst — SLPs preferred by State authorities dismissed by Supreme Court — State authorities thereafter filed recall application before High Court stating that fraud was committed and material facts were suppressed by the landowners and that even if Port Trust deemed to be in possession of the land when Ceiling Act came into force, land acquisition proceedings having not been concluded, Port Trust possessed the land for and on behalf of the landowners and land was required to be declared surplus and vacant under the Ceiling Act — Held, High Court rightly allowed the recall application and remanded the case to the authorities to decide the same afresh in accordance with law — Even accepting the submission that after dismissal of SLPs, the recall application could not have been entertained, in the facts and circumstances of the case and in the light of the finding by the High Court that fraud was committed by landowners, High Court's approach and decision was justified — There was no miscarriage of justice for invoking Supreme Court's interference under Art. 136 — Urban Land (Ceiling and Regulation) Act, 1976, S. 34 — Land Acquisition Act, 1894, Ss. 4 and 6**

B. **Fraud — Meaning — Vitiates all judicial acts whether in rem or in personam — Judgment, decree or order obtained by fraud has to be treated as non est and nullity, whether by court of first instance or by the final court — It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings — This is an exception to Art. 141 of the Constitution and doctrine of merger — Constitution of India, Art. 141**

† From the Final Judgment and Order dated 6-3-2002 of the High Court of A.P. at Hyderabad in WAMP No. 1879 of 2001 in WA No. 109 of 1997 and WAMP No. 1880 of 2001 in WA No. 292 of 1998 and CC No. 1008 of 2001

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C. **Constitution of India — Art. 136 — Nature and scope of Supreme Court's jurisdiction under — It is a discretionary and equitable jurisdiction — Court interferes where justice, equity and good conscience requires**

Held :

Even if the counsel for the appellants is right in submitting that after dismissal of SLPs the respondent herein could not have approached the High Court for recalling its earlier order and the High Court could not have entertained such applications, nor the recalling could have been done, in the facts and circumstances of the case and in the light of the finding by the High Court that fraud was committed by the landowners in collusion with the officers of the Port Trust Authorities and the Government, no fault can be found against the approach adopted by the High Court and the decision taken. The High Court, rightly recalled the order, and remanded the case to the authorities to decide the same afresh in accordance with law. (Para 40)

Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one gains at the loss of another. Even the most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. (Para 26)

A judgment, decree or order obtained by playing fraud on the court, tribunal or authority is a nullity and non est in the eye of the law. Such a judgment, decree or order—by the first court or by the final court—has to be treated as nullity by every court, superior or inferior. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings. (Para 22)

The matter can be looked at from a different angle as well. Suppose, a case is decided by a competent court of law after hearing the parties and an order is passed in favour of the plaintiff applicant which is upheld by all the courts including the final court. Let us also think of a case where the Supreme Court does not dismiss special leave petition but after granting leave decides the appeal finally by recording reasons. Such order can truly be said to be a judgment to which Article 141 of the Constitution applies. Likewise, the doctrine of merger also gets attracted. All orders passed by the courts/authorities below, therefore, merge in the judgment of the Supreme Court and after such judgment, it is not open to any party to the judgment to approach any court or authority to review, recall or reconsider the order. (Para 38)

The above principle, however, is subject to exception of fraud. Once it is established that the order was obtained by a successful party by practising or playing fraud, it is vitiated. Such order cannot be held legal, valid or in consonance with law. It is non-existent and non est and cannot be allowed to stand. This is the fundamental principle of law. The principle of "finality of litigation" cannot be stretched to the extent of an absurdity that it can be utilised as an engine of oppression by dishonest and fraudulent litigants. (Paras 39 and 26)

Lazarus Estates Ltd. v. *Beasley*, (1956) 1 All ER 341 : (1956) 1 QB 702 : (1956) 2 WLR 502 (CA); *S.P. Chengalvaraya Naidu* v. *Jagannath*, (1994) 1 SCC 1; *Indian Bank* v. *Satyam Fibres (India) (P) Ltd.*, (1996) 5 SCC 550; *United India Insurance Co. Ltd.* v. *Rajendra Singh*, (2000) 3 SCC 581 : 2000 SCC (Cri) 726; *Kunhayammed* v. *State of Kerala*, (2000) 6 SCC 359; *S. Shanmugavel Nadar* v. *State of T.N.*, (2002) 8 SCC 361, *relied on*

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Smith v. *East Elloe Rural Distt. Council*, 1956 AC 336 : (1956) 1 All ER 855 : (1956) 2 WLR 888 (HL); *Abbai Maligai Partnership Firm* v. *K. Santhakumaran*, (1998) 7 SCC 386, *referred to*

Further, keeping in view totality of facts and attending circumstances including serious allegations of fraud said to have been committed by the landowners in collusion with officers of the respondent Port Trust and the Government, report submitted by the Central Bureau of Investigation (CBI), prima facie showing commission of fraud and initiation of criminal proceedings, etc. if the High Court was pleased to recall the earlier order by issuing directions to the authorities to pass an appropriate order afresh in accordance with law, it cannot be said that there is miscarriage of justice which calls for interference in exercise of discretionary and equitable jurisdiction of the Supreme Court. This is not a fit case which calls for our intervention under Article 136 of the Constitution. (Para 46)

The jurisdiction of the Supreme Court under Article 136 is discretionary and equitable in nature. Clause (1) of the said article confers very wide and extensive powers on the Supreme Court. The article commences with a non obstante clause, "Notwithstanding anything in this Chapter" (i.e. Chapter IV of Part V). These words are of overriding effect and clearly indicate the intention of the framers of the Constitution that it is a special jurisdiction and a residuary power unfettered by any statute or other provisions of Chapter IV of Part V of the Constitution. It is extraordinary in its amplitude. Its limit, when it chases injustice, is the sky. Such power, therefore, may be exercised by the Supreme Court whenever and wherever justice demands intervention by the highest court of the country. Article 136, however, does not confer a right of appeal on any party. It confers discretion on the Supreme Court to grant leave to appeal in appropriate cases. In other words, the Constitution has not made the Supreme Court a regular court of appeal or a court of error. The Supreme Court only intervenes where justice, equity and good conscience require such intervention. (Paras 43 and 44)

Baigana v. *Dy. Collector of Consolidation*, (1978) 2 SCC 461 : 1978 SCC (L&S) 370 : 1978 SCC (Cri) 273 : AIR 1978 SC 944 : (1978) 3 SCR 509, *relied on*

D. **Urban Land (Ceiling and Regulation) Act, 1976 — S. 34 — Exercise of suo motu power of revision by State Govt. — Order of Special Officer and Competent Authority that appellant landowners had no surplus land — When the basis, on which the said officer proceeded to determine surplus land, was found to be non-existent and non est, held, State Govt. was justified in setting aside the order in exercise of the suo motu revisional power (Para 17)**

E. **Urban Land (Ceiling and Regulation) Act, 1976 — Ss. 19 and 10 — Order of Special Officer and Competent Authority declaring that appellant landowners had no surplus land — Validity — Proceedings under Land Acquisition Act initiated for acquiring appellants' land for a public purpose of Port Trust — But appellants stated to have handed over the land to the Port Trust — When land acquisition proceedings had not completed and no award was made, even if land was not in possession of appellants and had been handed over by them to Port Trust Authorities, held, transfer of possession was in violation of Andhra Pradesh Vacant Lands in Urban Areas (Prohibition of Alienation) Act, 1972 and ownership of the landowners continued and, therefore, Special Officer and Competent Authority erred in excluding the land while determining surplus land (Paras 18, 14 and 20)**

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F. **Urban Land (Ceiling and Regulation) Act, 1976 — S. 34 — Exercise of suo motu revisional power by State Govt. — Delay and laches — Even though no period of limitation is prescribed, such power must be exercised within a reasonable period — Having regard to the entire facts and circumstances of the case, subsequent developments and fraud played in obtaining the order under revision, held, exercise of suo motu revisional power after more than 10 years was within a reasonable period (Para 19)**

State of Gujarat v. *Patil Raghav Natha*, (1969) 2 SCC 187, *relied on*

Appeals dismissed with costs R-M/AZ/35896/C

Advocates who appeared in this case :

K.K. Venugopal, Senior Advocate (Ankur, Y. Raja Gopala Rao and Y. Ramesh, Advocates, with him) for the Appellants;

Anoop G. Chaudhari and Ms June Chaudhari, Senior Advocates (Manoj Saxena, Rajnish Kr. Singh, Rahul Shukla, T.V. George, K.V. Viswanathan, K.V. Venkataraman, Ms V. Mohana and Ms N. Annapoorani, Advocates, with them) for the Respondents.

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10. 1956 AC 336 : (1956) 1 All ER 855 : (1956) 2 WLR 888 (HL), *Smith* v. *East Elloe Rural Distt. Council* 233*a*

The Judgment of the Court was delivered by

C.K. THAKKER, J.— All these appeals have been preferred by the appellants against common judgment and order passed in WAMP No. 1879 of 2001 in WA No. 109 of 1997, WAMP No. 1880 of 2001 in WA No. 292 of 1998 and Contempt Case No. 1008 of 2001. By the said order, the High Court recalled common judgment and order passed on 27-4-2000 in Writ Appeals Nos. 109 of 1997 and 292 of 1998. A direction was also issued to the authorities under the Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter referred to as "the Ceiling Act") to complete proceedings within the stipulated period.

2. The case has a long and chequered history starting from early seventies of the last century. The appellants herein are the owners of land bearing Survey Nos. 3/1, 3/2 and 4 admeasuring 18 acres 39 cents of Village Kancharapalem, District Vishakhapatnam. It was their case that Vishakhapatnam Port Trust ("the Port Trust", for short) wanted to acquire

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land for public purpose, namely, for construction of quarters for its employees. The Chairman of the Port Trust, therefore, sent a requisition letter to the District Collector, Vishakhapatnam for acquiring land admeasuring 45 acres 33 cents of Survey Nos. 1, 2, 3 and 4 of Kancharapalem Village. Advance possession of the land of the appellants, bearing Survey Nos. 3/1, 3/2 and 4 admeasuring 18 acres 39 cents was taken over by the Estate Manager of the Port Trust on 29-8-1972 by private negotiations. The State Authorities, thereafter, were requested by the Port Trust Authorities to take appropriate proceedings for acquisition of land under the Land Acquisition Act, 1894. According to the appellants, in the statement recorded on 29-8-1972, Akella Suryanarayana Rao stated that he had handed over possession of the land to the Estate Manager of the Port Trust. Mr Akella also stated that there was a dispute regarding land with tenant Koyya Gurumurthy Reddy under Andhra Pradesh Lands Tenancy Act. It was also the case of the appellants that the Port Trust deposited with the Government the amount of compensation payable to the owners of the land. The land acquisition proposals were approved by the Port Trust as also by the Government of India.

3. It was further case of the appellants that a preliminary notification under sub-section (1) of Section 4 of the Land Acquisition Act was for the first time issued on 10-8-1973 but nothing further was done in the matter. The Ceiling Act came into force in the State of Andhra Pradesh on 17-2-1976. It, inter alia, covered the Vishakhapatnam Urban Agglomeration. The appellants filed their declarations taking the stand that possession of land had already been handed over to the Port Trust Authorities even before the Act came into force and the provisions of the Ceiling Act, therefore, would not apply to such land. In the light of the above factual position and the case of the appellants, the Special Officer and Competent Authority, Urban Land Ceiling, Vishakhapatnam vide his order dated 25-5-1981 in Contempt Case No. 6143 of 1976 declared that the landowners of Survey Nos. 3/1, 3/2 and 4 were "non-surplus landholders". Then the Government again issued notification under sub-section (1) of Section 4 of the Act on 29-8-1981. Urgency clause under Section 17(4) was not invoked since the possession of land was already with the Port Trust Authorities. A declaration under Section 6 was issued on 12-10-1982. No award, however, was passed.

4. According to the appellants, the Chief Engineer of the Port Trust in reply to a query by the Land Acquisition Officer, clarified vide his letter dated 19-12-1985 that actual and physical possession of the land was not taken by the Port Trust as the tenant did not vacate possession of the land. It appears that in view of the above letter that physical possession of land was not with the Port Trust Authorities, the Special Officer and Competent Authority, Urban Land Ceiling, Vishakhapatnam referred the matter to the Commissioner, Land Reforms and Urban Land Ceiling, Government of Andhra Pradesh, Hyderabad in February 1987 to take up the matter under Section 34 of the Ceiling Act in suo motu revision. The Collector, Vishakhapatnam also vide his DO Letter No. 433/78, dated 27-6-1987

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requested the Commissioner to reopen the case and start enquiry. On 21-8-1989, Chairman, Vishakhapatnam Port Trust addressed a letter to the Commissioner, Land Reforms and Urban Land Ceiling, Government of A.P. categorically stating that land admeasuring 18 acres 39 cents of Survey Nos. 3/1, 3/2 and 4 of Kancharapalem Village had already been taken over by the Port Trust and there was no cause to reopen the case under Section 34 of the Ceiling Act. Once again, the Government approved the proposal for acquisition of land and notification under Section 4(1) of the Land Acquisition Act was issued on 17-5-1991.

5. It appears that the proceedings for reopening of the case by invoking Section 34 of the Ceiling Act were initiated. On 20-7-1994, notice was issued to the owners to show cause as to why revisional powers should not be exercised and the order passed by the Special Officer and Competent Authority under the Ceiling Act should not be set aside. It was also stated in the notice that it was brought to the notice of the Government that title to the land was undisputedly with the declarants on the appointed day under the Ceiling Act as the land acquisition proceedings were not concluded by that date. As such land was required to be computed in the holdings of the declarants even if it was admitted by the Port Trust Authorities that they were in possession of the land in 1972. The landowners submitted the reply to the notice.

6. Meanwhile, however, the landowners filed a petition being Writ Petition No. 11754 of 1994 praying therein that the High Court may direct the State Authorities to complete proceedings under the Land Acquisition Act and pass an award. During the pendency of the writ petition the revision was allowed by the State Government under Section 34 of the Ceiling Act on 20-1-1995 and the order passed by the Special Officer and Competent Authority, Urban Land Ceiling, Vishakhapatnam declaring that the appellants had no surplus land had been set aside. The appellants, therefore, filed another petition, being Writ Petition No. 3102 of 1995 questioning the legality of the order passed in revision. The learned Single Judge allowed both the petitions i.e. Writ Petitions Nos. 11754 of 1994 and 3102 of 1995 and by order dated 4-6-1996 directed the authorities to complete land acquisition proceedings and pass award within three months. The learned Single Judge also held that the order under the Ceiling Act was passed by the Special Officer and Competent Authority, Urban Land Ceiling, Vishakhapatnam in 1981 while suo motu revisional powers were exercised in 1994-95 i.e. after thirteen years. Such action was, therefore, illegal, unlawful and unwarranted. Accordingly, the order passed in revision was set aside. Writ appeals filed by the State were dismissed. A direction was issued by the Division Bench to fix market value on the basis of notification under Section 4(1) issued on 17-5-1991. Special Leave Petitions (Civil) Nos. 14860-61 of 2000 filed by the State Authorities were dismissed by this Court on 20-10-2000.

7. The State Authorities, thereafter, filed recall applications on 13-6-2001. In the recall applications, it was stated inter alia that fraud was

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committed by the landowners and material facts were suppressed by them. It was alleged that possession of land was never handed over to the Port Trust Authorities, nor the Port Trust Authorities received such possession of land and yet it was asserted by the owners that possession of land was given to the Port Trust Authorities in 1972 which was not correct. It was only in December 1985 that the correct fact came to the knowledge of the State Authorities from a letter by the Chief Engineer of Port Trust. Hence, the order was taken in suo motu revision under Section 34 of the Ceiling Act. It was further stated that even if the Port Trust Authorities would be deemed to be in possession of land on the day the Ceiling Act came into force, land acquisition proceedings were not concluded and no award was passed. The Port Trust Authorities, in the circumstances, would be in possession of the land for and on behalf of the landowners and the land was required to be declared surplus and vacant under the Ceiling Act.

8. It was further averred that the High Court ordered inquiry by the Central Bureau of Investigation (CBI) and Mr Y. Anil Kumar, IPS, Superintendent of Police, CBI, Vishakhapatnam submitted a detailed report in the High Court when the writ appeals were placed for hearing. Unfortunately, however, the attention of the Court was never invited to the said report which clearly revealed that there was total fraud on the part of the landowners in collusion with the Port Trust officers as also officers acting under the Ceiling Act. It was, therefore, submitted that the order passed by the Division Bench on 27-4-2000 was required to be recalled by directing the authorities under the Ceiling Act to conclude proceedings.

9. The High Court, after hearing the learned counsel for the parties and considering the records and proceedings including the report submitted by CBI, held that the case was of fraud and by suppressing material facts, several orders were passed and actions were taken. In view of correct and true facts and reports which clearly established that the authorities were misled, that proceedings were initiated to revise the order, dated 25-5-1981. The Court, therefore, held that the order dated 27-4-2000 passed by the Division Bench was required to be recalled and recall applications were allowed.

10. The Court therefore passed the following order:

> "Considering all the aspects as stated above, we are of the considered view that the recall petitions have to be allowed. Accordingly, we allow the recall petitions by setting aside the common judgment passed in the aforesaid writ appeals.
>
> We further direct that the proceedings under the ULC Act have to be completed within a period of one month from the date of receipt of this order by the authorities concerned by giving opportunity to the petitioners and the respondents herein to put forward their cases and after final decision is taken by the authorities under the ULC Act, the further proceedings have to be initiated under the Land Acquisition Act depending upon the result under the ULC Act. The proceedings under the

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Land Acquisition Act, if initiated, compensation to be awarded to the respondents herein within a period of three months from the date of order of the authorities under the ULC Act. The Land Acquisition Officer is also directed to consider the legal date of possession of the land taken by the VPT Authorities after conclusion of the enquiry under the ULC Act."

11. The appellants have challenged the aforesaid order of the High Court. On 5-8-2002, notice was issued by this Court. Affidavits and counter-affidavits were filed. On 6-8-2004, leave was granted and hearing was expedited and the matters were placed before us for final hearing.

12. We have heard learned counsel for the parties.

13. Mr K.K. Venugopal, Senior Advocate, appearing for the appellants contended that the High Court committed an error in law in passing the impugned order. It was clear from the evidence on record and various communications that before the proposal was submitted by the Port Trust Authorities for acquisition of land for a public purpose (construction of quarters for its employees), advance possession of land had been taken over by the Port Trust Authorities and landowners were not in possession of the property. The said fact was noted by the Special Officer and Competent Authority, Urban Land Ceiling, Vishakhapatnam and an order was passed in May 1981 that the appellants were "not surplus landowners". In or about 1985, however, there appeared to be encroachment over the land and some officers of the Port Trust, with a view to save their skin, wrote a letter on 19-12-1985 that the possession of land had not been handed over to the Port Trust Authorities since tenants were occupying the land. The said statement was not correct and could not have been considered for initiating proceedings under the Ceiling Act. It was also submitted by the counsel that suo motu power was sought to be exercised after a decade. As per settled law, revisional powers should be exercised within "reasonable time". By no stretch of imagination, more than ten years can be said to be "reasonable time". According to the learned counsel, the learned Single Judge was wholly justified in allowing both the writ petitions filed by the landowners and in issuing directions, namely, (*i*) to complete land acquisition proceedings and pass award; and (*ii*) exercise of revisional powers after about thirteen years was wholly unwarranted. The said order was confirmed by the Division Bench in writ appeals. Special leave petitions were also dismissed by this Court. After dismissal of special leave petitions, neither it was open to the authorities to make an application for recalling earlier orders as has been done in June 2001, nor was it permissible for the court to grant such relief. It was also submitted that the Division Bench, while dealing with writ appeals took note of the fact that the land was "agricultural land" and was having fruit-bearing trees i.e. a garden land. The said finding had not been disturbed even by this Court in SLPs. The Division Bench ought to have taken into account that fact as well. By not doing so, an illegality had been committed and the order deserves to be set aside.

14. The learned counsel for the State Authorities as also the Port Trust Authorities supported the order passed by the High Court and action of

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recalling of the order dated 27-4-2000. It was submitted that the authorities proceeded on the basis that advance possession of the land was given by landowners to the Port Trust Authorities in August 1972. But the statement was not correct and the authorities were misled. The order passed by the Special Officer and Competent Authority under the Ceiling Act declaring that the owners did not possess surplus land was founded on the above statement that the landowners were not in possession of land, which was false. But even otherwise, the order passed by the Special Officer and Competent Authority was not in consonance with law inasmuch as even if the owners were not in possession of land, proceedings under the Land Acquisition Act were not finalised. The legal position is that the ownership of the landowners continued and in the eye of the law, the Port Trust Authorities remained in possession for and on behalf of the landowners. It was, therefore, incumbent on Special Officer and Competent Authority under the Ceiling Act to declare land to be excess and surplus under the Ceiling Act so that appropriate consequential action could be taken. No such action, however, was taken. Moreover, it was made clear by the Chief Engineer, Port Trust vide his letter dated 19-12-1985 that actual and physical possession of land was never taken by the Port Trust Authorities as it remained with tenants and disputes were going on. The matter, therefore, required detailed investigation.

15. CBI made an enquiry and the report was submitted by the Police Inspector which revealed startling facts. From the report, it is clear that fraud was committed by the landowners in collusion with officers of the respondents. Criminal proceedings were also initiated and they are pending. It was, therefore, submitted that the High Court was right in recalling its earlier order.

16. Regarding non-applicability of the provisions of the Ceiling Act as the land being garden land and hence agricultural land under the Ceiling Act, it was submitted that it was never the case of the landowners when proceedings under the Ceiling Act had been initiated that the Act would not apply because the land was used for agriculture. The sole ground put forward by the landowners was that possession of land had already been given to the Port Trust Authorities and hence the Ceiling Act had no application. It was, therefore, submitted that the appeals deserve to be dismissed and the impugned order calls for no interference.

17. Having given anxious consideration to the rival contentions of the parties, in our opinion, no case has been made out by the appellants for interference with the order passed by the High Court allowing the applications and recalling earlier order. The High Court has considered the matter in detail. The case of landowners was that advance possession was taken over by the Port Trust Authorities in August 1972. The subsequent facts and letter by Chief Engineer of the Port Trust in 1985 clearly revealed that it was not so. Possession of land was never with the landowners and was not given to the Port Trust Authorities. From the record it is clear that neither the landowners nor the Port Trust Authorities were in actual or physical possession of land, but it was occupied by tenants and disputes were also

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going on between the tenants and landowners. Therefore, the basis on which the Special Officer and Competent Authority, Urban Land Ceiling proceeded to decide the matter was non-existent and non est.

18. In our opinion, the learned counsel for the respondents are also right in submitting that even if the statement of the landowners and the Port Trust Authorities is believed and it is held that actual and physical possession of land was handed over by the landowners and taken over by the Port Trust Authorities, it does not change the legal position. It was not the case of landowners themselves that proceedings under the Land Acquisition Act were finalised and award was passed. From the record, it is clear that no notification under the Land Acquisition Act was issued in 1972. Such notifications were issued subsequently in the years 1973, 1981, 1991 and 1996. At more than one occasion, notifications were issued only because the proceedings were not finalised and award was not passed. It is also clear that in the writ petitions filed by the landowners in 1994-95, a Single Judge of the High Court directed the authorities to complete land acquisition proceedings by initiating fresh action commencing from issuance of notification under Section 4(1) of the Act and to complete them within a period of three months. In our opinion, therefore, the High Court was right in holding that the provisions of the Act would apply to the land and Special Officer and Competent Authority, Urban Land Ceiling was wholly wrong in excluding the land said to have been in possession of the Port Trust Authorities.

19. We are further of the view that the State Government, in the facts and circumstances of the case, was right in exercising revisional jurisdiction under Section 34 of the Act. Mr Venugopal is indeed right in submitting that even though no period of limitation is prescribed for exercise of revisional jurisdiction by the State Government suo motu, such power must be exercised within a reasonable time (vide *State of Gujarat* v. *Patil Raghav Natha*[1]). But taking into account the facts and circumstances in their entirety and in particular, a letter of Chief Engineer, Vishakhapatnam Port Trust of 19-12-1985, it cannot be said that the power had not been exercised within a reasonable period. It is also pertinent to note that the subsequent development shows as to how some of the officers of the Port Trust were parties to fraud said to have been committed by landowners. In this connection, the respondents are right in inviting our attention to a letter dated 21-8-1989 by the Port Trust Authorities to the Commissioner of Land Reforms stating therein that the Government intended to exercise suo motu power under Section 34 of the Act but there was no necessity to reopen proceedings and suitable directions were required to be issued to District Collector, Vishakhapatnam to pass an award in respect of land sought to be acquired under the Land Acquisition Act. In view of these developments, in our opinion, the High Court was fully justified in recalling the earlier order.

20. The High Court has dealt with the contention regarding fraud said to have been committed by landowners in collusion with officers of the

1 (1969) 2 SCC 187

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respondents. It is stated as to how the High Court ordered CBI enquiry on prima facie satisfaction that there was a fraud and report was submitted by Mr Y. Anil Kumar, IPS, Superintendent of Police, CBI, Vishakhapatnam. In the said report, CBI had stated that possession was never taken over by the Port Trust Authorities and tenancy cases were pending. Even if there was transfer of possession, it was in violation of the Andhra Pradesh Vacant Lands in Urban Areas (Prohibition of Alienation) Act, 1972 which came into force on 5-6-1972. (It may be recalled that according to the landowners as well as the Port Trust Authorities, possession was taken over by the Port Trust by private negotiations on 29-8-1972). CBI, therefore, observed that transfer of possession in favour of the Port Trust did not constitute legal transfer under the 1972 Act. CBI also noted that proceedings under the Andhra Pradesh Tenancy Act were pending.

21. Now, it is well-settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before three centuries, Chief Justice Edward Coke proclaimed:

> "Fraud avoids all judicial acts, ecclesiastical or temporal."

22. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the court, tribunal or authority is a nullity and non est in the eye of the law. Such a judgment, decree or order—by the first court or by the final court—has to be treated as nullity by every court, superior or inferior. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings.

23. In the leading case of *Lazarus Estates Ltd.* v. *Beasley*[2] Lord Denning observed: (All ER p. 345 C)

> "No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud."

24. In *Duchess of Kingstone, Smith's Leading Cases*, 13th Edn., p. 644, explaining the nature of fraud, de Grey, C.J. stated that though a judgment would be res judicata and not impeachable from within, it might be impeachable from without. In other words, though it is not permissible to show that the court was "mistaken", it might be shown that it was "misled". There is an essential distinction between mistake and trickery. The clear implication of the distinction is that an action to set aside a judgment cannot be brought on the ground that it has been decided wrongly, namely, that on the merits, the decision was one which should not have been rendered, but it can be set aside, if the court was imposed upon or tricked into giving the judgment.

25. It has been said: fraud and justice never dwell together (*fraus et jus nunquam cohabitant*); or fraud and deceit ought to benefit none (*fraus et dolus nemini patrocinari debent*).

26. Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue

2 (1956) 1 All ER 341 : (1956) 1 QB 702 : (1956) 2 WLR 502 (CA)

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advantage of another. In fraud one gains at the loss of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. The principle of "finality of litigation" cannot be stretched to the extent of an absurdity that it can be utilised as an engine of oppression by dishonest and fraudulent litigants.

27. In *S.P. Chengalvaraya Naidu* v. *Jagannath*[3] this Court had an occasion to consider the doctrine of fraud and the effect thereof on the judgment obtained by a party. In that case, one *A* by a registered deed, relinquished all his rights in the suit property in favour of *C* who sold the property to *B*. Without disclosing that fact, *A* filed a suit for possession against *B* and obtained preliminary decree. During the pendency of an application for final decree, *B* came to know about the fact of release deed by *A* in favour of *C*. He, therefore, contended that the decree was obtained by playing fraud on the court and was a nullity. The trial court upheld the contention and dismissed the application. The High Court, however, set aside the order of the trial court, observing that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". *B* approached this Court.

28. Allowing the appeal, setting aside the judgment of the High Court and describing the observations of the High Court as "wholly perverse", Kuldip Singh, J. stated: (SCC p. 5, para 5)

> "The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court process a convenient lever to retain the illegal gains indefinitely. *We have no hesitation to say that a person, whose case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.*" (emphasis supplied)

29. The Court proceeded to state: (SCC p. 5, para 6)

> "A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party."

30. The Court concluded: (SCC p. 5, para 5)

> "The principle of 'finality of litigation' cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants."

3 (1994) 1 SCC 1

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31. In *Indian Bank* v. *Satyam Fibres (India) (P) Ltd.*[4] referring to *Lazarus Estates*[2] and *Smith* v. *East Elloe Rural Distt. Council*[5] this Court stated: (SCC pp. 562-63, para 22)

> "*22.* The judiciary in India also possesses inherent power, specially under Section 151 CPC, to recall its judgment or order if it is obtained by fraud on court. In the case of fraud on a party to the suit or proceedings, the court may direct the affected party to file a separate suit for setting aside the decree obtained by fraud. Inherent powers are powers which are resident in all courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the constitution of the tribunals or courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behaviour. *This power is necessary for the orderly administration of the court's business.*" (emphasis supplied)

32. In *United India Insurance Co. Ltd.* v. *Rajendra Singh*[6] by practising fraud upon the Insurance Company, the claimant obtained an award of compensation from the Motor Accident Claims Tribunal. On coming to know of fraud, the Insurance Company applied for recalling of the award. The Tribunal, however, dismissed the petition on the ground that it had no power to review its own award. The High Court confirmed the order. The Company approached this Court.

33. Allowing the appeal and setting aside the orders, this Court stated: (SCC pp. 587-88, paras 15-17)

> "*15.* It is unrealistic to expect the appellant Company to resist a claim at the first instance on the basis of the fraud because the appellant Company had at that stage no knowledge about the fraud allegedly played by the claimants. If the Insurance Company comes to know of any dubious concoction having been made with the sinister object of extracting a claim for compensation, and if by that time the award was already passed, it would not be possible for the Company to file a statutory appeal against the award. Not only because of the bar of limitation to file the appeal but the consideration of the appeal even if the delay could be condoned, would be limited to the issues formulated from the pleadings made till then.
>
> *16.* Therefore, we have no doubt that the remedy to move for recalling the order on the basis of the newly-discovered facts amounting to fraud of high degree, cannot be foreclosed in such a situation. No court or tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim.

4 (1996) 5 SCC 550 : JT 1996 (7) SC 135

2 *Lazarus Estates Ltd.* v. *Beasley*, (1956) 1 All ER 341 : (1956) 1 QB 702 : (1956) 2 WLR 502 (CA)

5 1956 AC 336 : (1956) 1 All ER 855 : (1956) 2 WLR 888 (HL)

6 (2000) 3 SCC 581 : 2000 SCC (Cri) 726 : JT (2000) 3 SC 151

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17. The allegation made by the appellant Insurance Company, that the claimants were not involved in the accident which they described in the claim petitions, cannot be brushed aside without further probe into the matter, for the said allegation has not been specifically denied by the claimants when they were called upon to file objections to the applications for recalling of the awards. The claimants then confined their resistance to the plea that the application for recall is not legally maintainable. Therefore, *we strongly feel that the claim must be allowed to be resisted, on the ground of fraud now alleged by the Insurance Company. If we fail to afford to the Insurance Company an opportunity to substantiate their contentions it might certainly lead to a serious miscarriage of justice*." (emphasis supplied)

34. Mr Venugopal, no doubt, contended that when the order passed by the earlier Division Bench was not interfered with by this Court and SLPs were dismissed, it was not open to the High Court thereafter to entertain recall applications and grant the relief of recalling of earlier orders. According to him, such an exercise of power was unlawful and abuse of process of law.

35. In this connection, our attention has been invited by the learned counsel to a decision of this Court in *Abbai Maligai Partnership Firm* v. *K. Santhakumaran*[7]. In that case, after dismissal of special leave petition by this Court, review petition was entertained by the High Court and earlier judgment was recalled. When the matter reached this Court, setting aside the order passed by the High Court, the Court observed: (SCC pp. 387-88, para 4)

"*4.* The manner in which the learned Single Judge of the High Court exercised the review jurisdiction, after the special leave petitions against the selfsame order had been dismissed by this Court after hearing learned counsel for the parties, to say the least, was not proper. Interference by the learned Single Judge at that stage is subversive of judicial discipline. The High Court was aware that the SLPs against the orders dated 7-1-1987 had already been dismissed by this Court. The High Court, therefore, had no power or jurisdiction to review the selfsame order, which was the subject-matter of challenge in the SLPs in this Court after the challenge had failed. By passing the impugned order on 7-4-1994, judicial propriety has been sacrificed. After the dismissal of the special leave petitions by this Court, on contest, no review petitions could be entertained by the High Court against the same order. The very entertainment of the review petitions, in the facts and circumstances of the case, was an affront to the order of this Court. We express our strong disapproval and hope there would be no occasion in the future when we may have to say so. The jurisdiction exercised by the High Court, under the circumstances, was palpably erroneous. The respondents who approached the High Court after the dismissal of their SLPs by this Court, abused the process of the court and indulged in vexatious

7 (1998) 7 SCC 386 : JT (1998) 6 SC 396

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litigation. *We strongly deprecate the manner in which the review petitions were filed and heard in the High Court after the dismissal of the SLPs by this Court.*" (emphasis supplied)

36. The respondents, on the other hand, placed reliance upon *Kunhayammed* v. *State of Kerala*[8] wherein this Court had an occasion to consider the application of the doctrine of merger to orders passed by this Court while exercising jurisdiction under Article 136 of the Constitution. The Court there observed that exercise of jurisdiction by this Court under Article 136 is in two stages: (*i*) granting of a special leave to appeal; and (*ii*) hearing of appeal. The Court went on to observe that the doctrine of merger does not apply to first stage i.e. at the stage of granting of special leave to appeal. It applies only at the second stage of hearing of appeals. The Court in the light of above position, laid down the following principles: (SCC pp. 383-84, para 44)

"*44.* (*i*) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of the law.

(*ii*) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. The first stage is up to the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the special leave petition is converted into an appeal.

(*iii*) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction in disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(*iv*) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(*v*) If the order refusing leave to appeal is a speaking order i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a

8 (2000) 6 SCC 359 : JT (2000) 9 SC 110

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declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(*vi*) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(*vii*) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule 1 of Order 47 CPC.

37. In *Kunhayammed*[8], *Abbai Maligai*[7] was considered and it was observed that in the facts and circumstances of that case, this Court did not approve the order passed by the High Court. The Court noted that in *Abbai Maligai*[7] this Court did not consider the doctrine of merger. According to the Court, a careful reading of *Abbai Maligai*[7] "brings out the correct statement of law and fortifies us in taking the view" as taken (SCC p. 377, para 26). (See also *S. Shanmugavel Nadar* v. *State of T.N.*[9])

38. The matter can be looked at from a different angle as well. Suppose, a case is decided by a competent court of law after hearing the parties and an order is passed in favour of the plaintiff applicant which is upheld by all the courts including the final court. Let us also think of a case where this Court does not dismiss special leave petition but after granting leave decides the appeal finally by recording reasons. Such order can truly be said to be a judgment to which Article 141 of the Constitution applies. Likewise, the doctrine of merger also gets attracted. All orders passed by the courts/authorities below, therefore, merge in the judgment of this Court and after such judgment, it is not open to any party to the judgment to approach any court or authority to review, recall or reconsider the order.

39. The above principle, however, is subject to exception of fraud. Once it is established that the order was obtained by a successful party by practising or playing fraud, it is vitiated. Such order cannot be held legal, valid or in consonance with law. It is non-existent and non est and cannot be allowed to stand. This is the fundamental principle of law and needs no further elaboration. Therefore, it has been said that a judgment, decree or

8 *Kunhayammed* v. *State of Kerala*, (2000) 6 SCC 359 : JT (2000) 9 SC 110

7 *Abbai Maligai Partnership Firm* v. *K. Santhakumaran*, (1998) 7 SCC 386 : JT (1998) 6 SC 396

9 (2002) 8 SCC 361 : JT (2002) 7 SC 568

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order obtained by fraud has to be treated as a nullity, whether by the court of first instance or by the final court. And it has to be treated as non est by every court, superior or inferior.

40. Hence, the argument of Mr Venugopal cannot be upheld. Even if he is right in submitting that after dismissal of SLPs, the respondent herein could not have approached the High Court for recalling its earlier order passed in April 2000 and the High Court could not have entertained such applications, nor the recalling could have been done, in the facts and circumstances of the case and in the light of the finding by the High Court that fraud was committed by the landowners in collusion with the officers of the Port Trust Authorities and the Government, in our considered view, no fault can be found against the approach adopted by the High Court and the decision taken. The High Court, in our opinion, rightly recalled the order, dated 27-4-2000 and remanded the case to the authorities to decide the same afresh in accordance with law.

41. Mr Venugopal also submitted that the Division Bench of the High Court in an order dated 27-4-2000 observed that the land being a garden land having fruit-bearing trees which had been cultivated by a tenant, it did not fall within the description of "urban land" or "vacant land" within the meaning of Section 2(*o*) or 2(*q*) of the Ceiling Act and the said aspect had not been gone into at all by the State Government. The High Court thereafter considered the provisions of the Ceiling Act and held that the land was agricultural land and required to be excluded from the operation of the Ceiling Act.

42. As to the above, we may only observe that it was never the case of landowners while filling a form under Section 6 of the Act that the provisions of the Act were not applicable to the land in question because the land was used for agriculture or horticulture purposes or that it was having fruit-bearing trees. The exclusion or non-operation of the Act was sought only on the ground that the possession of the land had already been handed over to the Port Trust Authorities in 1972 and hence the land cannot become the subject-matter of the Ceiling Act. In view of the above fact, in our opinion, the High Court was right in passing the impugned order directing the authorities to consider all aspects and pass an appropriate order in accordance with law.

43. Last but not the least, we are exercising jurisdiction under Article 136 of the Constitution. It is discretionary and equitable in nature.* Clause (1) of the said article confers very wide and extensive powers on this Court to grant special leave to appeal against any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in India. The article commences with a non obstante clause, "Notwithstanding

* Article 136(1) of the Constitution of India reads thus:

"136. *Special leave to appeal by the Supreme Court.*—(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

(2) * * *"

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anything in this Chapter" (i.e. Chapter IV of Part V). These words are of overriding effect and clearly indicate the intention of the framers of the Constitution that it is a special jurisdiction and a residuary power unfettered by any statute or other provisions of Chapter IV of Part V of the Constitution. It is extraordinary in its amplitude. Its limit, when it chases injustice, is the sky. Such power, therefore, may be exercised by this Court whenever and wherever justice demands intervention by the highest court of the country.

44. Article 136, however, does not confer a right of appeal on any party. It confers discretion on this Court to grant leave to appeal in appropriate cases. In other words, the Constitution has not made the Supreme Court a regular court of appeal or a court of error. This Court only intervenes where justice, equity and good conscience require such intervention.

45. In *Baigana* v. *Dy. Collector of Consolidation*[10] Krishna Iyer, J. pithily stated: (SCC p. 462, para 1)

> "The Supreme Court is more than a court of appeal. It exercises power only when there is supreme need. It is not the fifth court of appeal but the final court of the nation. Therefore, *even if legal flaws may be electronically detected, we cannot interfere sans manifest injustice or substantial question of public importance*." (emphasis supplied)

(See also V.G. Ramachandran, *Law of Writs*; revised by Justice C.K. Thakker & Mrs M.C. Thakker; 6th Edn; Vol. 2; pp. 1440-1528.)

46. Keeping in view totality of facts and attending circumstances including serious allegations of fraud said to have been committed by the landowners in collusion with officers of the respondent Port Trust and the Government, report submitted by the Central Bureau of Investigation (CBI), prima facie showing commission of fraud and initiation of criminal proceedings, etc. if the High Court was pleased to recall the earlier order by issuing directions to the authorities to pass an appropriate order afresh in accordance with law, it cannot be said that there is miscarriage of justice which calls for interference in exercise of discretionary and equitable jurisdiction of this Court. We, therefore, hold that this is not a fit case which calls for our intervention under Article 136 of the Constitution. We, therefore, decline to do so.

47. Before parting with the matter, we may state that all the observations made by us hereinabove have been made only for the purpose of deciding the legality and validity of the order passed by the High Court. We may clarify that we may not be understood to have expressed any opinion on merits of the matter one way or the other. Therefore, as and when the matter will be considered by the authorities in pursuance of the directions of the High Court, it will be decided on its own merits without being inhibited by the observations made by us in this judgment.

48. For the foregoing reasons, the appeals deserve to be dismissed and are accordingly dismissed with costs.

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10 (1978) 2 SCC 461 : 1978 SCC (L&S) 370 : 1978 SCC (Cri) 273 : AIR 1978 SC 944 : (1978) 3 SCR 509