

**BEFORE THE NATIONAL GREEN TRIBUNAL  
PRINCIPAL BENCH, NEW DELHI  
I.A. NO. 304 OF 2024  
IN  
ORIGINAL APPLICATION NO. 702 OF 2022**

**IN THE MATTER OF:**

DEEPAK KUMAR &amp; ANR.

.... Applicants

Versus

STATE OF UTTARAKHAND &amp; ORS.

....Respondents

**IN THE MATTER OF:**

PANKAJ KUMAR

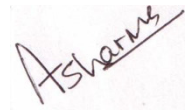
... Applicant

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Filed By:


**AJIT SHARMA**

Counsel for Original Applicant  
320 CK Daphtary Chambers  
Supreme Court of India  
New Delhi-110001

Place: New Delhi  
Dated: 22.09.2024

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**IN THE MATTER OF:**

PANKAJ KUMAR ... Applicant

**REPLY ON BEHALF OF THE ORIGINAL APPLICANT TO I.A. NO.  
304/ 2024 ALONG WITH AFFIDAVIT**

To

HON'BLE CHAIRPERSON AND HIS LORDSHIP'S COMPANION  
MEMBERS OF THE NATIONAL GREEN TRIBUNAL AT NEW DELHI

The Applicant

**Most respectfully sheweth:**

1. That the Applicant has filed the present Original Application, inter alia, praying for quashing of permissions granted by the State of Uttarakhand to permit operation of stone crushers and screening plants within the boundaries of "Doon Valley" as originally demarcated in the MoEF Notification dt. 01.02.1989 (the "**1989 Notification**"). These permissions have been granted pursuant to the amended notification dt. 06.02.2020, which it is submitted is manifestly arbitrary as it has been published in haste by following the procedure prescribed in Rule 5(4) of the EPA Rules, 1986 and since it gives no reasons to apply the general pan-India CPCB

Guidelines, 2016 to an ecologically fragile area such as the Doon Valley. Furthermore, Rule 5(1) itself requires that various parameters be taken into account prior to issuing a notification under Section 3 of the EPA, 1986, which parameters have not been considered.

2. That the aforesaid application, albeit filed belatedly, questions the maintainability of the present Original Application on the ground that this Hon'ble Tribunal has no jurisdiction to, inter alia, quash the impugned notification dt. 06.01.2020. Since the issue raised is purely a legal question the following submissions are made to support the maintainability of the present Original Application:

**A. NGT's original jurisdiction can be sourced to Sections 14 & 15 r/w 20, which do not restrict or limit NGT's jurisdiction so as to exclude the power to quash a government notification.**

- a. Section 14 of the NGT Act, 2010 itself places no fetters on the power of the NGT to quash a government notification. The invocation of NGT's original jurisdiction is contingent only upon (i) /is should raise a substantial question relating to environment, and (ii) such question should arise out of implementation of a Schedule 1 enactment.
- b. The use of the word 'including' within brackets in Section 14 implies that powers of the NGT extend beyond mere enforcement of recognized legal rights.
- c. The above-mentioned Original Application, inter-alia, assails the MoEF Notification dt. 06.01.2020, which is issued u/s 3 of the Environment

(Protection) Act, 1986, a Schedule 1 enactment under the NGT act, 2010.

As such, this Hon'ble Tribunal has jurisdiction since a "substantial question relating to environment" has arisen in the context of a challenge to the impugned notification.

- d. Section 2(1)(c) broadly defines "*environment*" to include land, air and water and their inter-relationship with humans and other living beings. Similarly, Section 2(1)(m) defines "*substantial question relating to environment*" to include instances where environmental consequences arise out of a specific activity or a source of pollution. In the present case, the grant of permission to operate a large number of stone crushers in the ecologically fragile Doon Valley has obvious adverse environmental consequences, including drastic increase in air pollution and river bed material mining.
- e. Therefore, it is submitted that the present Original Application meets the requirements of Section 14 to invoke the jurisdiction of this Hon'ble Tribunal. Once invoked, the power of the Tribunal extends to passing any order, decision or award for restitution of the environment [*see Section 15(1)(c)*] and after applying the three core principles enunciated in Section 20. It is submitted that there is no explicit or implicit limitation on the power of the NGT in the NGT Act, 2010 to pass an order, decision or award quashing a government notification.

**B. Apex Court has held in a catena of judgments that NGT has wide jurisdiction to pass orders to safeguard environment, a right sourced to Article 21. Therefore, an interpretation which confers jurisdiction upon NGT should be favoured over one which takes away its jurisdiction.**

- a. In Mantri Techzone Pvt. Ltd. vs. Forward Foundation & Ors. [2019 4 S.C.R. 995], the Hon'ble Supreme Court of India held that the NGT has been enacted to safeguard right to clean and healthy environment guaranteed by Article 21. As such, the Hon'ble Court held, that NGT has 'special jurisdiction' to safeguard fundamental rights. As a corollary, the Tribunal therefore has the power to adjudicate the plea assailing a government notification on the ground that it violates fundamental right to clean and healthy environment. The Hon'ble Court held as follows in Mantri Techzone (supra):

"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 specialized 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 Section 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 Section 15(1)(b) & (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 jeopardized, 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 Lal v. Chairman, Employees' State Insurance Corpn.* (2007) 4 SCC 579, 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 specialized 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.



46. Further, Section 18 of the Act recognizes the right to file applications each under Sections 14 as well as 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, 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.

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, Planning Act, Karnataka Municipal Corporations Act, 1976 ("KMC Act"); and the Revised Master Plan of Bengaluru, 2015 ("RMP"). A Central legislation enacted under Entry 13 of List I Schedule VII 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 & water bodies in contradiction with zoning regulations under these statutes or the RMP."

(emphasis added)

A true copy of Mantri Techzone Pvt. Ltd. vs. Forward Foundation & Ors. [2019 4 S.C.R. 995] is annexed herewith as **Annexure R-1(Pg 18-56)**.

- b. It is thus clear from above that an interpretation that favours jurisdiction should be preferred over an interpretation that takes away such jurisdiction.
- c. Mantri Techzone (*supra*) was cited with approval in The Director General, NHAI vs. Aam Aadmi Lokmanch & Ors. [2020 6 S.C.R. 1050] and again in paragraph 21.1 of Municipal Corporation of Greater Mumbai vs. Ankita Sinha [(2022) 13 SCC 401] wherein the apex Court held that the Tribunal has power to suo moto invoke its jurisdiction to pass orders, inter alia, which hold the government accountable for failing to uphold environmental interests (*refer to para 26.4*). The Hon'ble Court held as follows:

"17.3 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.

21.6 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.) and Ors.<sup>17</sup> 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.”

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.

26.4 ... 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."

A true copy of Municipal Corporation of Greater Mumbai vs. Ankita Sinha [(2022) 13 SCC 401] is annexed herewith as **Annexure R-2 (Pg 57-84).**

- d. The Hon'ble Court further held that NGT has the power to mould relief and pass appropriate relief, even where such relief may not be specifically prayed for by the parties. (*refer to para 16.5*)
- e. In Bhopal Gas Peedith Mahila Udyog Sangathan vs. Union of India [(2012) 8 SCC 326], the Supreme Court of India vide a judicial order directed transfer of all pending and fresh cases covered by the NGT Act and pending before the High Courts to the NGT since impliedly the NGT had wide powers to pass any such orders that the High Courts would have the powers to pass. A true copy of Bhopal Gas Peedith Mahila Udyog Sangathan vs. Union of India [(2012) 8 SCC 326] is annexed herewith as **Annexure R-3 (Pg 85 – 99).**

3. **Reliance upon Tamil Nadu Pollution Control Board vs. Sterlite Industries (I) Ltd. [2019 SCC OnLine SC 221] is misplaced.**

- a. The reliance upon the judgment of the Supreme Court of India in Sterlite Industries (*supra*) is misplaced since that judgment pertained to exercise of appellate jurisdiction by the NGT u/s 16 of the NGT Act, 2010 as opposed to the present case, which invokes original jurisdiction of the Tribunal u/s 14 & 15. This becomes amply clear from not only the facts of the said case but also from the exposition of law laid down by the Supreme Court of India wherein it has been held that:

“42. ... It is clear, therefore, that under the NGT Act, the Tribunal exercising appellate jurisdiction cannot strike down rules or regulations made under this Act.”

A true copy of Tamil Nadu Pollution Control Board vs. Sterlite Industries Ltd. [(2019) 19 SC 479] is annexed herewith as **Annexure R-4 (Pg 100-136)**.

- b. Thus the apex court held that the Tribunal cannot strike down rules or regulations in exercise of its appellate powers. However, there is no discussion in the said judgment as to whether an order quashing rule or regulation could be passed in exercise of Tribunal's original jurisdiction.

4. **Supreme Court of India in L. Chandra Kumar v. Union of India and Ors., (1997) 3 SCC 261 has held that Tribunal has the power of judicial review.**

- a. The Tribunal's power of judicial review is subject only to the exception that such power does not extend to adjudicating a challenge to the vires of the parent statute of the said Tribunal. In para 93, Hon'ble Supreme Court of India held as follows:

"93. Before moving on to other aspects, we may summarise our conclusions on the jurisdictional powers of these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set-up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very

Act to be unconstitutional. In such cases alone, the High Court concerned may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned.”

A true copy of L. Chandra Kumar v. Union of India and Ors., (1997) 3 SCC 261 is annexed herewith as **Annexure R-5(Pg 137-172)**.

- b. It is further submitted that although L. Chadrakumar (*supra*) dealt with a tribunal constituted under Article 323A of the Constitution of India, the National Green Tribunal has been enacted with a higher purpose to safeguard guaranteed fundamental rights [*see para 21.3 of Ankita Sinha (supra)*] and as such it is necessarily implied that such a tribunal has the power of judicial review in order to safeguard fundamental rights.

5. **Large number of precedents exist where this Hon'ble Tribunal has quashed government notifications.**

a. This Hon'ble Tribunal has in the following decisions quashed government notifications in exercise of its original jurisdiction:

a. S.P. Muthuraman vs. Union of India [OA 37/2015, judgement dated 07.07.2015] and it is annexed as **ANNEXURE-R/6 (Pg 172 to 373)**;

b. Naresh Zargar vs. State of Madhya Pradesh [Order dated 4.5.2016 in O.A.No.34 of 2016] and it is annexed as **ANNEXURE-R/7 (Pg 374 to 387)**;

c. Himmat Singh Shekhawat Vs. State of Rajasthan & Ors. [O.A. 123/2014 decided on 13.01.2015] and it is annexed as **ANNEXURE-R/8 (Pg 388 to 481)**; and

d. Satender Pandey vs. MoEF & Ors. [O.A. No. 186/2016, order dt. 13.09.2018] and it is annexed as **ANNEXURE-R/9 (Pg 482 to 498)**.

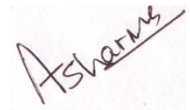
6. **Arguendo, it is submitted that this Hon'ble Tribunal has the power to mould relief to safeguard the interest of environment.**

a. In Ankita Sinha (*supra*) the Hon'ble Supreme Court of India held specifically that this Hon'ble Tribunal has the power to mould reliefs prayed for and to grant appropriate relief even though such relief may not have been prayed for by a party. Given that this is the scope of this Hon'ble Tribunal's powers, it is submitted that, without prejudice to above submissions, this Hon'ble



Tribunal has the power to halt operation of stone crusher in Doon Valley and to direct the MoEF to reconsider the impugned notification dt. 06.01.2020 and pass such other order as this Hon'ble Tribunal may deem fit in the facts and circumstances of the case.

Filed By:



**AJIT SHARMA**

Counsel for Original Applicant  
320 CK Daphtary Chambers  
Supreme Court of India  
New Delhi-110001

Place: New Delhi  
Dated: 22.09.2024

**IN THE NATIONAL GREEN TRIBUNAL  
PRINCIPAL BENCH, NEW DELHI**

**I.A. NO. 304/ 2024**

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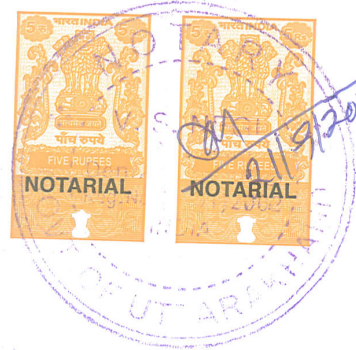
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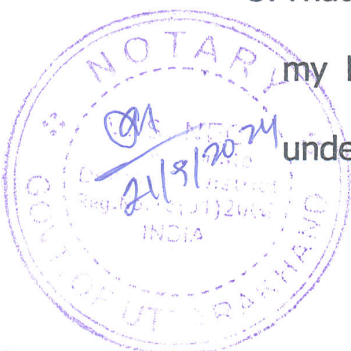
**AFFIDAVIT**

I, Deepak Kumar, S/o Pavan Kumar, R/o 70 Devlok Colony, Shimla Bypass, Dehradun, Uttarakhand do hereby solemnly affirm and state as under:-

1. That I am the Applicant in the above-mentioned Original Application and as such I am fully acquainted with the facts and circumstances of the instant case and as thus competent to swear this affidavit.
2. That I further state that the contents of the accompanying Reply have been thoroughly read and understood by me and I declare that the Reply has been prepared on my instructions.
3. That the contents of the accompanying Reply are all true to my knowledge. The same has been read over to me and understood by me to be true.



*(Jatinder Singh)*



*दीपक कुमार*

4. That the annexures to the accompanying Reply are true copies of their respective originals.

दीपक कुमार  
**DEPONENT**

**Verification:-**

I, the deponent above named, do hereby verify and state that the contents of the foregoing paragraphs of the above affidavit are true to the best of my knowledge and belief and that no part of it is false and nothing material has been concealed therefrom. Verified by me at Dehradun on this 21<sup>st</sup> day of September 2024.

दीपक कुमार  
**DEPONENT**

Identified by  
[Signature]  
(Jatinder Singh)



Deepak Kumar  
Jatinder Singh  
21/9/2024  
R/o 11/3 Benu Nax  
gas  
Dehradun  
21/9/2024

[2019] 4 S.C.R. 995

MANTRI TECHZONE PVT. LTD.

A

v.

FORWARD FOUNDATION AND ORS.

(Civil Appeal No.5016 of 2016)

MARCH 05, 2019

B

**[A.K. SIKRI, S. ABDUL NAZEER AND M.R. SHAH, JJ.]**

*National Green Tribunal Act, 2010 – s. 14, 15, 16, 18 and 22 – Wetlands (Conservation of Management) Rules, 2010 – Karnataka Town and Country Planning Act, 1961 – Applicants filed application before National Green Tribunal (NGT) contending that ecologically sensitive land was allotted by the Karnataka Industrial Area Development Board (KIADB) to respondents nos.9 & 10 for setting up of Software Technology Park, Commercial and Residential Complex, hotel and Multi-level Car Parks – It was further contended that the Revenue Map in respect of properties referred in the Land Lease Agreements had multiple Rajakaluves (Storm Water Drains) – It was alleged that the said Project was encroaching on two Rajakaluves – It was also alleged that respondents had obtained NOC by concealing material facts and commenced construction over the ecologically sensitive area of the lake catchment area and valley, with utter disregard to the statutory compliances – Tribunal constituted the committee to inspect the projects in question and submit the report – Further, Tribunal directed Respondent No.9 to pay penalty of Rs.117.35 crores and Respondent No. 10 to pay penalty of Rs. 22.5 crores for environmental and ecological restoration – In appeal before the Supreme Court, appellants contended that original application was not maintainable as it did not satisfy requirements of s.14(1) and 14(3) of the Act and it was barred by limitation as it was not filed within six months from date on which cause of action arose – Held: The Jurisdiction of the Tribunal is provided u/ss. 14, 15 and 16 of the Act – s.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 – Also, s.15(1)(c) of the Act is an entire island of power and jurisdiction r/w. s.20 of the Act – Whenever the environment and*

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- A *ecology are being compromised and jeopardized, the tribunal can apply s.20 for taking restorative measures in the interest of the environment – 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 – Further, an interpretation that is in favour*
- B *of conferring jurisdiction to the Tribunal should be preferred rather than one taking away jurisdiction – Insofar as limitation is concerned, the original application filed was not an application u/s. 14 of the Act, it was a petition u/s. 15 of the Act and thus it could be filed within 5 years from the date on which the cause for such*
- C *compensation on relief first arose – Also, 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 valid and*
- D *sustainable.*

- National Green Tribunal Act, 2010 – s.22 – Code of Civil Procedure, 1908 – s.100 – Held:s. 22 provides for an appeal to the Supreme Court on the grounds specified in s.100 of the CPC – U/s.100 CPC, an appeal can be filed only on the ground that the case*
- E *involves a substantial question of law as may be framed by the Appellate Court – The scope of appeal u/s. 22, therefore, is restricted to substantial question of law arising from the judgment of the Tribunal.*

- National Green Tribunal Act, 2010 – s.22 – Appellants sought a factual review through the methodology of re-appreciation of factual matrix by Supreme Court u/s.22 of the NGT Act – Held: It is 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*
- F *to seek re-appreciation of the factual matrix of the entire matter – The appellants cannot seek to re-argue their entire case to seek wholesale re-appreciation of evidence and the factual matrix that has been considered by the Tribunal is ex facie impermissible u/s. 22 – There cannot be fresh appreciation or re-appreciation of facts and evidence in a statutory appeal under this provision.*

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MANTRI TECHZONE PVT. LTD. v. FORWARD FOUNDATION 997

*National Green Tribunal Act, 2010 – ss. 14 and 15 – Held: s.15 of the Act provides power & jurisdiction, independent of s.14 thereof – Further, s.14(3) juxtaposed with s.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. s. 14 and s.15 of the Act) independently – The limitation provided in s.14 is a period of 6 months from the date on which the cause of action first arose and whereas in s.15 it is 5 years – Therefore, the legislative intent is clear to keep s.14 and s.15 as self-contained jurisdictions.*

**Dismissing C.A.No.5016 of 2016 and C.A.No.8002-8003 of 2016, the Court**

**HELD: 1.** The first question raised by the appellants is in relation to the maintainability of the application before the Tribunal. 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 specialized 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. [Paras 39 and 40] [1025-D-F]

**2.** The jurisdiction of the Tribunal is provided under Sections 14, 15 and 16 of the National Green Tribunal Act, 2010. 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. [Para 41] [1025-F-G]

**3.** 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

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 1026-A-B]

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 D and jeopardized, the Tribunal can apply Section 20 for taking  
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 [Para 43] [1026-C-D]

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 Tribunal specifically to address environmental concerns. The  
 F 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] [1026-D-F]

6. Section 15 of the Act provides power & jurisdiction,  
 G 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

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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 Section 14 and 15 as self contained jurisdictions. [Para 45] [1026-F-H]

7. Further, Section 18 of the Act recognizes the right to file applications each under Sections 14 as well as 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, 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. [Para 46] [1027-A-C]

8. 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, Planning Act, Karnataka Municipal Corporations Act, 1976 (“KMC Act”); and the Revised Master Plan of Bengaluru, 2015 (“RMP”). A Central legislation enacted under Entry 13 of List I Schedule VII 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 & water bodies in contradiction with zoning regulations under these statutes or the RMP. [Para 47] [1027-C-E]

9. The second question raised by the appellants is that the petition is barred by time. According to appellants, environmental clearance was granted to the respondent No. 9 on 17.02.2012 for which notice was published in the leading newspaper on 12.03.2012 and 14.03.2012. Modified building plan was approved on 30.08.2012, which was followed up to 10.08.2014. Similar

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A events had taken place in regard to the project of respondent  
 No. 10 who had been granted environmental clearance on  
 30.09.2013. 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,  
 B 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. [Para 48] [1027-F-H]

C 10. The OA No. 222 of 2014 filed before the Tribunal 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 12.06.2013 and the Ministry of Environment, Forest and  
 Climate Change ("MoEF") Monitoring Committee Report dated  
 D 14.08.2013 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  
 E 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  
 F cause for such compensation or relief first arose.  
 [Para 49] [1028-A-D]

G 11. 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. [Para 50]  
 [1028-D-E]

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12. The Tribunal has pointed out on the basis of the Committee report of August 2015, that the appellant had encroached 3 acres 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. 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. [Para 52] [1028-G-H; 1029-A-B]

13. 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. [Para 54] [1030-F-G]

*Kishore Lal v. Chairman, Employees' State Insurance Corpn.* (2007) 4 SCC 579 : [2007] 6 SCR 139 ; *Sir Chunilal V. Mehta and Sons, Ltd. v. Century Spinning and Manufacturing* [1962] 3 Suppl. SCR 549 – relied on.

**Case Law Reference**

[1962] 3 Suppl. SCR 549                      relied on                      Para 37  
[2007] 6 SCR 139                                  relied on                      Para 44

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5016 of 2016

From the Judgment and Order dated 04.05.2016 of the National Green Tribunal, Principal Bench, New Delhi in Original Application No. 222 of 2014

With

Civil Appeal Nos. 8002-8003, 12326, 9227, 10995, 10993, 10994, 10992, 12157, 12152, 12156, 12158, 12160, 12159 of 2016, 4923-4924, 1343, 14966 of 2017, 2246 of 2018.

- A Udaya Holla, Adv. General, Shashi Kiran Shetty, Maninder Singh, Dharuv Mehta, Mukul Rohatgi, Neeraj Kishan Kaul, R. Venkataramani, Sajjan Poovayya, Ms. Kiran Suri, Basavaprabhu S. Patil, Sr. Advs., 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 S., Ravi Bharuka,
- B 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, M/S. Devasa & Co., Priyadarshi Banerjee,
- C Pratibhanu Singh Kharola, Saransh Jain, Meka V. Ramakrishna, Madhavam Sharma, Ms. Sriparna Dutta Choudhury, Udayaditya Banerjee, Mahesh Agrwal, Ankur Saigal, Sarans Jain, Ms. Tanvi Manchanda, Nithin P., Ms. Priyanka M.P., E. C. Agrawala, Devashish Bharuka, S.J. Amith, Ms. Rithika Gambir, A. Shwarya Kumar, Dr. (Mrs. ) Vipin Gupta, Parikshit P. Angadi, Chinmay Deshpande, Geet
- D Ahuja, Parikshit Angadi, Anup Kumar, O. P. Bhadani, Rajesh Mahale, Anand Sanjay M. Nuli, Dharm Singh, Sandeep Grover, Ms. Pankhuri Bhardwaj, Pai Amit, Advs. for the appearing parties.

The Judgment of the Court was delivered by

- E **S. ABDUL NAZEER, J.** 1. These appeals have been preferred under Section 22 of the National Green Tribunal Act, 2010 (for brevity 'NGT Act') challenging the judgment and order dated 07.05.2015 and 04.05.2016 respectively passed by the Principal Bench of the National Green Tribunal, New Delhi (for short 'the Tribunal').
- F 2. The appellants in Civil Appeal Nos. 5016 of 2016 and 8002-8003 of 2016 are respondent Nos. 9 and 10 in the Original Application No. 222 of 2014 (hereinafter referred to as 'the respondent Nos. 9 and 10'). The said Application was filed by respondent Nos.1 to 3 herein (hereinafter referred to as 'the applicants'). Respondent Nos. 4 to 7 in these appeals are the State of Karnataka and other authorities. They
- G were arrayed as respondent Nos. 1 to 4 in the application. Respondent Nos. 12 and 13 herein were subsequently impleaded in the application (for short 'the impleaded respondents').
- H 3. The State of Karnataka has filed Civil Appeal Nos. 4923-4924 of 2017, challenging the general condition and direction No.(1) contained

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in the order of the Tribunal dated 04.05.2016. The other appeals have been filed by different entities, who were not parties before the Tribunal challenging the order of the Tribunal dated 04.05.2016 insofar as it directs a buffer/green zone of 75 meters in respect of lakes, 50 meters in respect of primary Rajakaluves, 35 meters in case of secondary Rajakaluves and 25 meters 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 O.A. No.222 of 2014 by contending that ecologically sensitive land was allotted by the Karnataka Industrial Area Development Board (for short 'the KIADB') to respondent Nos. 9 and 10 vide Notifications dated 23.04.2004 and 07.05.2004 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 the '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 rain water into Bellandur Lake. The project will thus encroach two Rajakaluves of 1.38 acres and 1.23 acres 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 the appellant No.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 the Bellandur Lake and the Agara Lake. 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 11.11.2011, it was recorded that the project proposes car parking facility for 14,438 cars in that environmentally sensitive area.

A 6. It was alleged that NOC was issued covering an area of 17,404 sq. mtrs. whereas the built up area, as noted by SEAC, is 13,50,454.98 sq. mtrs. Respondent No.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.

B Respondent No.9 had approached the Karnataka State Pollution Control Board (for short 'the KSPCB') for obtaining clearance, which was granted on 04.09.2012 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. It is further contended that the grant of consent by the KSPCB to respondent No.9 also contained a condition

C with regard to obtaining Environmental Clearance from the Competent Authority and no construction was to commence until such clearance was granted.

7. Applicants further contended that respondent No.9 violated the conditions and commenced construction of the project. There was also

D 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 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

E '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. Respondent Nos. 9 and 10

F 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 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

G are also severely affected. The construction over the wetland between the two lakes is in violation of Wetlands (Conservation of Management) Rules, 2010 (for short 'Rules of 2010').

8. It was submitted that SEIAA in its meeting dated 29.09.2012, decided to close the file pertaining to respondent No. 10 due to non-

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submission of requisite information and the application thereof was rejected in November, 2012. Despite the rejection, respondent No.10 commenced construction on the project in full swing. A

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 water bodies in the 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. The applicants also relied on the Report of the Committee under the Chairmanship of Hon'ble Mr. 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 water bodies in the urban areas. The applicants claim to have obtained monitoring report of the project by respondent No.5, Ministry of Environment and Forests, through RTI on 21.08.2013. The report dated 14.08.2013 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 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. B  
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10. The Lake Development Authority (for short 'the LDA'), after inspection in the catchment area of the Bellandur Lake submitted its report dated 12.06.2013 which confirms that the project will have disastrous impact, including deleterious effect on the Bellandur Lake. This report was brought to the notice of KIADB. The LDA has also opined that the land should be classified and maintained as sensitive area. The KIADB called upon respondent No. 9 to comply with the rules of Ecology and Environment Department and to obtain necessary approval from KSPCB and LDA. Despite all this, respondent Nos. 9 G

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- A 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 rely upon the Revised Master Plan, 2013 issued by BDA which 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.
- B It was also pleaded that respondent No. 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 No.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
- C water scarcity as the requirement of the 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 the BWSSB supplies to the entire Agaram Ward. The construction of respective projects by respondent Nos.9 and 10 respectively, besides having commenced without permission from the authorities and being in violation of the conditions imposed for
- D 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 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
- E of Bangalore, particularly the areas located near the water bodies.

11. Respondent No.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
- F 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 78<sup>th</sup> High Level Committee meeting held on 21.06.2000 and after examining the proposal, it was approved by the Government on 06.07.2000. Before the State High Level Committee, it had informed
- G that its requirement was 110 acres of land, 25 MW of power from the Karnataka Power Transmission Corporation Limited (for short the 'KPTCL'), and four lakh litres of water per day from BWSSB. The lands for the project were initially notified vide Notification dated 10.02.2004. Subsequently, the lands were allotted vide letter dated

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28.06.2007 for which Lease-cum-Sale Agreement was signed on 30.06.2007. Considering the overall development of the State of Bangalore, this 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 mtrs. The Project was conceived as a zero waste discharge project. The project is located one and a half kms. away from the southern-side of the 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 No. 10 and another developer is also developing a project on the western side. It has obtained sanction plan on 04.07.2007 which was renewed from time to time.

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12. Respondent No. 9 claims that it has obtained NOC from Airport Authority of India on 09.04.2010. Bharat Sanchar Nigam Ltd, vide its communication dated 16.04.2010, granted clearance for the project construction. BWSSB, vide its communication dated 26.04.2011 issued NOC for portion of the proposed construction to be built. The Bangalore Electricity Supply Company 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 17.04.2012. The Director General of Police has issued NOC and KSPCB vide order dated 04.09.2012 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 17.09.2012, the same was published in the leading newspapers “Kannada Prabha” and “The Indian Express” on 12.03.2012 and 14.03.2014 respectively.

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13. It submitted a modified the building plan which was approved by KIADB vide its letter dated 30.08.2012, which was valid up to 10.08.2014. 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,

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- A 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.
- B 14. Respondent No.10 pleaded that the applicants raised multifarious proceedings against it which is an abuse of the process of law and *mala fide*. It had submitted a revised proposal in respect of its project in question and to obtain fresh clearance on 31.08.2007 with an investment of Rs. 179.22 crores. The State High Level Committee had cleared the project which was communicated to it on 25.01.2008. Its
- C properties are located in between Bellandur Lake and Agara Lake but there are no primary storm water drains and secondary storm water drains that exist in its properties. It has clearances from various authorities, including Environmental Clearance and consent for establishment.
- D 15. KIADB stated that after possession of the land was handed over to respondent Nos. 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 04.07.2007, and the modified building drawings were approved on 26.04.2011 and 30.08.2012 with
- E specific conditions. In its meeting held on 16.07.2013, it was resolved to inform respondent No. 9 to fully comply with the Ecology and Environment Rules and to obtain approvals from the LDA and KSPCB. LDA vide its letter dated 24.09.2013, had informed KIADB that the construction activity in the catchment area in the Bellandur Lake could drastically impact the Lake with deleterious effects and asked it to stop
- F construction activity of respondent Nos. 9 and 10. However, the validity of the building drawings was again extended up to 10.08.2014. 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
- G 21.12.2013 to keep in abeyance the approval accorded and even the re-validations of plans. This was also informed to respondent No.9. The Board took a decision which was communicated to respondent No.9 on 02.01.2014, wherein it asked the respondent No.9 to stop all construction activities on the allotted lands. The said communication was challenged by respondent No. 9 and on the stop-work notice, stay was granted by
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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 21.01.2014. The proposal submitted by respondent Nos. 9 and 10 had been approved by the State Government. The land allotted to respondent Nos. 9 and 10 does not consist of any Rajakaluves.

16. The 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 the Bellandur Lake and the Agara Lake on 12.06.2013 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 06.07.2013 and even requested it to stop the construction activity and to re-classify the land as non-SEZ area. It was thereafter on 31.08.2013, that respondent No. 9 wrote a letter for according approval for the proposed development projects. However, vide its letter dated 23.09.2013, 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 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 water bodies 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 the 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:

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- A 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 the NGT Act, 2010?
- B 3. Whether the present application is barred by the principle of *res judicata* and/or constructive *res judicata*?
- C 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 Petitions 36567-74 of 2013, before the Hon'ble High Court of Karnataka? and
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?
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18. The Tribunal by its order dated 07.05.2015 at Annexure A-2, disposed of the applications with the following directions:

- E 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:
- F 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.
- G e) Sr. Scientist (Ecology) from the Indian Institute of Sciences, Bangalore.
- f) Dr. Siddharth Kaul, former Advisor to MoEF.

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g) A Senior Officer from the National Institute of Hydrology, A  
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 B  
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 water  
bodies with particular reference to lakes.

4) The Committee shall submit whether the projects in question C  
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 D  
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 E  
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. F

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, G  
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.

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A 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<sup>th</sup> July, 2007 and 22<sup>nd</sup> 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.

B in terms of letters dated 11<sup>th</sup> October, 2013 and 3<sup>rd</sup> January, 2013, issued by the Karnataka Industrial Area Development Board to respondent Nos. 9 and 10 respectively.

C 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.

D 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 3<sup>rd</sup> party interests or part with the possession of the property in question or any part thereof, in favour of any person.

E 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.

F 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.

G 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.

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15) We make it clear that the said respondents would not be entitled to pass on the amount in terms of direction 14, on to 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. A

19. Feeling aggrieved by the said order, respondent Nos. 9 and 10 filed Civil Appeal Nos. 4829 and 4823 of 2015 before this Court. This Court by its Order dated 20<sup>th</sup> May, 2015 passed the following order: B

“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 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. C

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. D

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 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. E F

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.” G

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A 20. In relation to Issue No.5, an opportunity of hearing was granted to the respondents. The Tribunal passed order dated 06.04.2016 on these applications as under:

**“M.A. No. 603 of 2015 and M.A. No. 596 of 2015**

B These Applications have been filed on behalf of the Respondent 9 & 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.

C 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.

D With the above directions the M.A. No. 603 of 2015 and M.A. 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. The Tribunal after hearing the parties passed an order dated 04.05.2016 as under:

**“General Conditions or directions:**

E 1. In view of our discussion in the main Judgment, we are of the considered view that the fixation of distance from water bodies (lakes and Rajkalewas) suffers from the inbuilt contradiction, legal infirmity and is without any scientific justification. The RMP – 2015 provides 50m from middle of the Rajkalewas as buffer zone in the case of primary Rajkalewas, 25m in the case of secondary Rajkulewas and 15m in the tertiary Rajkulewas in contradiction to the 30m in the case of lake which is certainly much bigger water body and its utility as a water body/wetland is well known certainly part of wet land. Thus, we direct that the distance in the case of Respondents Nos. 9 and 10 from Rajkulewas, Waterbodies and wetlands shall be maintained as below:-

(i) In the case of Lakes, 75m from the periphery of water body to be maintained as green belt and buffer zone for all the existing water bodies i.e. lakes/wetlands.

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(ii) 50m from the edge of the primary Rajkulewas. A

(iii) 35m from the edges in the case of secondary Rajkulewas

(iv) 25m 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. B

All the offending constructions raised by Respondents Nos. 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. C

All authorities particularly Lake development Authority shall carry out this operation in respect of all the water bodies/ lakes of Bangalore. D

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 by CPCB/MoEF. E

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 ground water 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 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: F

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 G

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A identification of source of supply of water and this should be a pre-requisite 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.

B 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:**

C In addition to the above directions which should be equally part of EC condition in respect of respondents nos. 9 & 10, following specific conditions shall apply to respondent no. 9:

D i. Reclaimed area of the lake to the extent of 3 acres 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 No. 9 to the concerned Authorities 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.

E 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.

F iii. Several irrigation canals or tertiary rajkalewas taking off from the Agara tank were passing through the area of respondent No. 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 the Agara lake and the Belandur Lake, respondent No. 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.

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- iv. The cumulative quantity of earth excavated for the construction of project is around 4 lakhs cubic meters in the depth range of 0 to 9 meters. 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 SIEAA shall be prepared. In any case the plan should ensure that no muck/sediment flows into Rajkalewas and/or Belandur lake. A  
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- v. The Kharab land identified by Revenue Dept. admeasuring 1 acre 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 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. D
- 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. E
10. Though, at the time of hearing prior to passing the Judgment, we had heard the parties on all aspects but still we have provided re-hearing 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 No. 9 calls for no variation and the Respondent No. 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 No. 10 has not commenced any actual construction activity but has carried out various preparatory steps F  
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A 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 No. 10 and the fact that the remedial measures can more effectively be taken by the Respondent No.10, we reduce environmental compensation payable by Respondent No. 10 to Rs. 13.5 crores (3% of the stated project cost instead of 5% as imposed in the original judgment).

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**General Directions:**

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1. We direct SEIAA, Karnataka to issue amended order granting Environmental Clearance within four weeks from today incorporating all the conditions stated in this judgement 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.

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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.

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4. We hereby direct the State of Karnataka to submit a proposal to the MoEF for demarcating wetlands in terms of Wetland Rules 2010 as revised from time to time. Such proposal shall be submitted by the State within four weeks from today and the MoEF shall consider the same in accordance with law and grant its approval or otherwise within four weeks thereafter. After such approval is

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granted by MoEF, the State would issue notification notifying such areas immediately thereafter in accordance with Rules and law. A

5. Both the Respondents Nos. 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. B

6. There is a serious discrepancy even in regard to the measurement of land as far as Respondent No. 9 is concerned. Admittedly the Respondent has been allotted and is in possession of land admeasuring 63.94 acres, though Environmental Clearance has been granted for 2,92,636.03 Sq. Meters which is equivalent to 72.22 acres. 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 No. 9 to submit a fresh layout plan and the entire project may be revised in accordance with law. C D

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. E

8. The amount of environmental compensation will be deposited prior to issuance of amended Environmental Clearance.

With the above directions, the Original Application No. 222 of 2014 and Misc. Applications Nos. 596/2016 and 603/2016 are finally disposed of while leaving the parties to bear their own costs.” F

22. Appearing for the appellants in C.A. 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 ‘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 28.06.2007, the land was allotted to the appellant by the KIADB. The SEIAA granted environmental clearance which was G

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- A followed by public notice concerning clearance on 14.03.2012. 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 Section 14(1) and (3) of the NGT Act and the original application
- B does not spell out the cause of action relevant for the purpose of 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
- C maintainable.

23. Further the application is barred by limitation. Though environmental clearance was granted on 17.02.2012 and it was published in two leading newspapers on 12.03.2012 and 14.03.2012, modified plan was approved by the KIADB on 30.08.2012, the application ought to
- D 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
- E 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 the NGT is substantially higher as compared to buffer zone which is required to be maintained as per the Revised Master Plan, 2015 issued on 22.06.2007. This is contrary to the Karnataka Town and Country Planning Act, 1961
- F (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
- G that the construction work of the project has caused environmental wrong. No wrong or injury either to Bellandur lake water body 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.

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26. Shri Maninder Singh, learned senior counsel appearing for the appellants, in C.A. 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. 30.09.2013. Hence, imposing penalty/compensation is entirely unsustainable.

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27. Learned Advocate General, Shri Udaya Holla, appearing for the appellant-State of Karnataka in C.A.Nos.4923-4924 of 2017, has submitted that the State of Karnataka is also aggrieved by the order of the NGT to the extent of setting aside the buffer zone in respect of water bodies and drains specified in 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 the 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 the NGT to that extent is liable to be set aside.

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28. 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 meters buffer zone around the lakes and a buffer zone of 50 meters, 25 meters and 15 meters from the primary, secondary and tertiary drains, respectively to be measured from the centre of the drain. Vide the impugned judgment, the NGT has revised these buffer zones and has directed that the buffer zone be maintained for 75 meters around the lake and 50, 35 and 25 meters respectively from the primary, secondary and tertiary drain, respectively. Variation of buffer zone, as directed by the 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.

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29. On the other hand, Shri Sajan Poovayya, learned senior counsel, appearing for the applicants, has fairly submitted that the applications

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- A were filed only against the appellants in C.A Nos. 5016 of 2016 and 8002-8003 of 2016 (respondent Nos. 9 & 10). He has no objection to set aside the order in so far 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 the NGT in paragraph (1) of the order dated 04.05.2016 except the directions issued against respondent Nos. 9 and 10. In view of the above, it is not necessary to examine the contentions of the learned Advocate General in Civil Appeal Nos. 4923-4924 of 2017. It is also not necessary to consider the contentions urged in the other civil appeals except the appeals filed by respondents Nos. 9 and 10.
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- C 30. Shri Poovayya has strongly opposed the submissions made by the learned senior counsel appearing for the appellants in C.A. No. 5016 of 2016 and C.A. Nos. 8002-8003 of 2016. It is submitted that the Tribunal is a specialized 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 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 jeopardized, 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.
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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 KIAD Act, Planning Act, Revised Master Plan of Bangalore, 2015 and Karnataka Municipal Corporation Act, 1976 (for short 'KMC Act'). Therefore, the Tribunal while providing for restoration of environment in an area can specify buffer zone around specific lakes and water bodies in contravention with zoning regulation.

32. Regarding limitation, he has submitted that the application filed by respondents 1 to 3 was not an application simplicitor 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 12.06.2013 and the Ministry of Environment Forest and Climate Change Monitoring Committee report dated 14.08.2013 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 fulfillment 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 'the CPC'). Under Section 100 of the 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.

34. We have carefully considered the submissions of the learned counsel of the parties and perused the materials placed on record.

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A 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:

B “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):

C 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 sufficiency cause from preferring the appeal.”

D 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 fulfillment 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.

E 37. Section 22 provides for an appeal to the Supreme Court on the grounds specified in Section 100 of the 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 **Sir Chunilal V. Mehta and Sons, Ltd. v. Century Spinning and Manufacturing**, 1962 Supp. (3) SCR 549. This Court has laid down the test as under:

G “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

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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 seek re-appreciation of the factual matrix of the entire matter. The appellants cannot seek to re-argue their entire case to seek wholesale re-appreciation 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 re-appreciation 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 specialized 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

- A other environmental damage arising under the enactments specified in Schedule I. Further, under Section 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 Section 15(1)(b) & (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.
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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 jeopardized, the Tribunal can apply Section 20 for taking restorative measures in the interest of the environment.
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- D 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 Lal v. Chairman, Employees' State Insurance Corpn.** (2007) 4 SCC 579, 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 specialized 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.
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45. Section 15 of the Act provides power & 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 Section 14 and 15 as self contained jurisdictions.
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46. Further, Section 18 of the Act recognizes the right to file applications each under Sections 14 as well as 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, 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.

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, Planning Act, Karnataka Municipal Corporations Act, 1976 (“KMC Act”); and the Revised Master Plan of Bengaluru, 2015 (“RMP”). A Central legislation enacted under Entry 13 of List I Schedule VII 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 & water bodies in contradiction with zoning regulations under these statutes or the RMP.

48. The second question raised by the appellants is that the petition is barred by time. According to appellants, environmental clearance was granted to the respondent No. 9 on 17.02.2012 for which notice was published in the leading newspaper on 12.03.2012 and 14.03.2012. Modified building plan was approved on 30.08.2012, which was followed up to 10.08.2014. Similar events had taken place in regard to the project of respondent No. 10 who had been granted environmental clearance on 30.09.2013. 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.

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A 49. The 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 12.06.2013 and the Ministry of Environment, Forest and Climate Change ("MoEF") Monitoring Committee Report dated 14.08.2013 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.

D 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.

E 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 11.01.2012 of the Chairman of the 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.

G 52.. The Tribunal has pointed out on the basis of the Committee report of August 2015, that the appellant had encroached 3 acres 10 guntas of Bellandur Lake and a boundary wall has been raised around

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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. That is why, the Tribunal has observed as under:

“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 13<sup>th</sup> November, 2000 and 23<sup>rd</sup> 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

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- A 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.”
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53. In paragraph 81, the Tribunal has observed as under:

- “81.....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.”
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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.
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55. We are also of the view that it is impermissible for the appellants to seek a factual review through the methodology of re-appreciation of factual matrix by this Court under Section 22 of the NGT Act.
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56. Shri R. Venkataramani, learned senior counsel has also raised a subsidiary issue relating to *res judicata*. According to him, respondent

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Nos. 12 and 13 filed Writ Petition Nos.3656-57/2013 seeking similar A  
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 paragraphs 47 to 51 B  
of the order. There was no dispute in so far 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 C  
of fact that there is no commonality of a cause of action or likelihood of  
a conflict between the judgments. The prayers and the geneses 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 D  
proceedings are neither substantial nor materially identical.

58. After elaborately considering this question, the Tribunal has  
concluded as under:

“51.....For these reasons, we find no merit in this contention of E  
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 F  
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 G  
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

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- A 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.”
- B

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 the respondent Nos. 9 and 10 do not satisfy the basic ingredients to attract the application of *res judicata* or constructive *res judicata*.
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60. The State of Karnataka is aggrieved by the following offending portion of the order dated 04.05.2016:

- “1. In view of our discussion in the main Judgment, we are of the considered view that the fixation of distance from water bodies (lakes and Rajkulewas) suffers from the inbuilt contradiction, legal infirmity and is without any scientific justification. The RMP – 2015 provides 50m from middle of the Rajkulewas as buffer zone in the case of primary Rajkulewas, 25m in the case of secondary Rajkulewas and 15m in the tertiary Rajkulewas in contradiction to the 30m in the case of lake which is certainly much bigger water body and its utility as a water body/wetland is well known certainly part of wet land. Thus, we direct that the distance in the case of Respondents Nos. 9 and 10 from Rajkulewas, Waterbodies and wetlands shall be maintained as below:-
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- F (i) In the case of Lakes, 75m from the periphery of water body to be maintained as green belt and buffer zone for all the existing water bodies i.e. lakes/wetlands.
- (ii) 50m from the edge of the primary Rajkulewas.
- G (iii) 35m from the edges in the case of secondary Rajkulewas
- (iv) 25m 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.
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All the offending constructions raised by Respondents Nos. 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 water bodies/ lakes of Bangalore.”

61. We have already noticed that Shri Poovayya has no objection to set aside the aforesaid impugned portion of the order in so far as the appellants in all the appeals except the appeals filed by respondent Nos. 9 and 10. The aforesaid portion of the order contains not only general directions but also certain directions against respondent Nos. 9 and 10. Therefore, only that portion of the order which does not pertain to respondent Nos. 9 and 10 needs to be quashed.

62. In the light of the above discussion, we pass the following order:

- i) Civil Appeal No. 5016 of 2016 and Civil Appeal Nos. 8002-8003 of 2016 filed by the appellants/respondent nos. 9 and 10 are hereby dismissed. The impugned judgment and order in so far as appellants/respondent Nos. 9 and 10 are concerned is sustained.
- ii) All the other appeals are hereby allowed and the direction/condition No. (1) in the order dated 4.5.2016 is hereby set aside except the direction issued against respondent Nos. 9 and 10.

63. There will be no order as to costs.

MANU/SC/0815/2021

**Equivalent/Neutral Citation:** AIR2021SC5147, 2021(6)ALLMR827, 2021(11)FLT922, 2021 INSC 624, 2021(5)KLT626, 2021(12)SCALE184, (2022)13SCC401, [2021]10SCR1

**IN THE SUPREME COURT OF INDIA**

Civil Appeal Nos. 12122-12123 of 2018, Civil Appeal Nos. 86/2019, 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 (Dairy No. 11655/2021)), Civil Appeal No. 6277-6278 of 2021 (Arising out of SLP (C) No. 16449-16450 of 2021 (Dairy No. 13789/2021)), Civil Appeal No. 6279 of 2021 (Arising out of SLP (C) No. 16451 of 2021 (Dairy No. 13811/2021)), Civil Appeal No. 6280-6281 of 2021 (Arising out of SLP (C) No. 16452-16453 of 2021 (Dairy 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 (Dairy 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) and Civil Appeal No. 6286 of 2021 (Arising out of SLP (C) No. 16454 of 2021 (Dairy No. 19534/2021))

**Decided On:** 07.10.2021Municipal Corporation of Greater Mumbai **Vs.** Ankita Sinha and Ors.**Hon'ble Judges/Coram:***A.M. Khanwilkar, Hrishikesh Roy and C.T. Ravikumar, JJ.***Counsels:**

*For Appellant/Petitioner/Plaintiff: E.M.S. Anam, AOR, V. Giri, Sr. Adv., Abhilash M.R., Sayooj Mohandas M., Amith Krishnan, M. Thangathuraj, Advs., Sandeep Singh, AOR, Ashish Wad, Tamali Wad, Pimple Sharad, Sukriti Jaggi, Sidharth Mahajan, Advs., J.S. Wad and Co., AOR, A. Karthik, AOR, Enoch David, Simon Joel, Smrithi Suresh, Saaketh Kasibhatla, Arsh Khan, Advs., Krishnan Venugopal, Sr. Adv., Mahesh Agarwal, Rohan Talwar, Shivendra Singh, Advs., E.C. Agrawala, AOR, Usha Nandini V., AOR, S. Thananjayan, AOR, K. Sakthivel, Promila, Aaina Verma, Jaswanti, Advs., Rashi Bansal, AOR, Seshatalpa Sai Bandaru, AOR, Sajan Poovayya, Sr. Adv., A.K. Shrivastava, Shivam Sinha, Priyansha Indra Sharma, Chetan Saxena, Sharan Balakrishnan, Pratibhanu Singh, Rahul Jajoo, Advs. and Arpit Shukla, AOR*

*For Respondents/Defendant: Gurmeet Singh Makker, AOR Md. Shahid Anwar, AOR, C.K. Sasi, AOR, Mukesh Verma, Adv., Yash Pal Dhingra, AOR, S.J. Amith, Adv., Purushottam Sharma Tripathi, AOR, Mukesh Kumar Singh, Adv., Tahir Ashraf Siddiqui, AOR, Jogy Scaria, AOR, Beena Victor, M. Priya, Ravi Lomod, Advs., K. Parameshwar, AOR, Jobi Jose Kondody, Aex M. Scaria, Advs., Usha Nandini V., AOR, Biju P. Raman, Saritha Thomas, Advs., James P. Thomas, AOR, Bobby Thomas, Adv., Sanjay Parikh, Sr. Adv., Abhimanue Shrestha, AOR, Satwik Parikh, Divyansh Khurana, Advs., Zulfiker Ali P.S., AOR, Faisal M. Aboobaker, Lakshmi Sree P., Sadiya Shakeel, Advs., Nidhesh Gupta, Sr. Adv., Vanshdeep Dalmia, Adv., Nishtha Kumar, AOR, Harish Vasudevan, Japneet Kaur, Vriti Gujral, Pallavi Singh, Advs., Anand Grover, Sr. Adv., Astha Sharma, AOR, Mantika Haryani, Simranjeet Singh Rekhi, Advs., Suvidutt M.S., AOR, Anu B., Dhanya C. and Vijayalakshmi Raju, Advs.*

**Case Category:**

APPEAL AGAINST ORDERS OF STATUTORY BODIES - TRIBUNALS

**Case Note:**

**Environment - Scope of Suo Moto Jurisdiction - National Green Tribunal (NGT) - Discharge of functions under the National Green Tribunal Act, 2010 (NGT Act) - Deonar Dumping site - Non-compliance of provisions of the Solid Waste Management Rules, 2016 - Whether the National Green Tribunal (NGT) has the power to exercise SuoMotu jurisdiction in discharge of its functions under the National Green Tribunal Act, 2010 (NGT Act)**

**Facts:**

In the Suo Moto action by NGT pursuant to published article about damage to the environment and public health being cause by dumping site in non-compliance of solid waste rules. Steps were taken for inspection of the concerned site. Municipal Corporation of Greater Mumbai (MCGM) was asked to compensate to the tune of Rs. 5 crores. Power of NGT being Tribunal was questioned as to whether in such capacity NGT can take action SuoMotu or has the power of judicial review.

**Held, while dismissing the Appeal:**

i. 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.[30]

ii. In circumstances where adverse environmental impact may be egregious, but the community affected is unable to effectively get the machinery into action, a forum created specifically to address such concerns should surely be expected to move with expediency, and of its own accord.[34]

iii. 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. [35]

iv. When the Registry of the NGT does indeed receive a communication or letter, including matters published in media, it may cause to initiate suomotu 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 suomotu 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.[37]

v. The NGT is vested with suomotu power in discharge of its functions under the NGT Act.[40]

**JUDGMENT****Hrishikesh Roy, J.**

Estragon: Let's go.

Vladimir: We can't.

Estragon: Why not?

Vladimir: We're waiting for Godot.<sup>1</sup>**1.** Leave granted in the Special Leave Petitions.**2.** 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").**3.** 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.**4.** 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.**5.** 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.**6.** 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 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.

**7.** 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.

**8.** 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.

**9.** 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.

**10.1.** 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* MANU/SC/1004/2013 : (2013) 15 SCC 341 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) conferred limited powers and the submission thus is that the Tribunal does not have any inherent powers.

**10.2.** Similarly, Justice S.H. Kapadia (as his Lordship then was) in *Transcore v. Union of India* MANU/SC/5319/2006 : (2008) 1 SCC 125, 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.

**10.3.** 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* MANU/SC/0969/2011 : (2011) 9 SCC 541, 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.

**11.1.** 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 and Ors.* MANU/SC/1217/2017 : (2018) 11 SCC 734 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*, MANU/SC/1041/2015 : (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.

**11.2.** 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.

**12.1.** 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 and Article 32 of the Constitution of India. In the relied upon judgment *Tamil Nadu Pollution Control Board v. Sterlite Industries (I) Ltd.*, MANU/SC/0223/2019 : (2019) 19 SCC 479 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, MANU/SC/0048/1964 : (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, MANU/SC/1264/2013 : (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, ] 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.

**12.2.** 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

**13.1.** 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 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.

**13.2.** 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 Article 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 Article 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.

**13.3.** 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.

**13.4.** 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 Article 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 Article 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 of India*, MANU/SC/0261/1997 : 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.<sup>2</sup>

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.

**13.5.** 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

**14.1.** 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 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 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.

**14.2.** 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.

**14.3.** 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.

**14.4.** 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.

**14.5.** 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.

**14.6.** 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

**15.1.** 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 judgment, 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 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."

**15.2.** 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.

**15.3.** 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* MANU/SC/0083/1955 : 1955 (2) SCR 603 : AIF 1955 SC 661,

...the office of all judges is to make such construction as shall 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.

**15.4.** 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.

**15.5.** 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'.<sup>11</sup>

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.<sup>3</sup>



**15.6.** 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 procedural impediment or so to say incapacity. The precedents of this Court, suggest a construction which fulfills the object of the Act.<sup>4</sup> 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-

**16.1.** 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 Code of Civil Procedure 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.

**16.2.** 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.

**16.3.** 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.

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

**16.5.** 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.

**16.6.** 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.

**16.7.** 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

**17.1.** 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 MANU/SC/0686/1996 : (1996) 5 SCC 647; M.C. Mehta v. UOI MANU/SC/0175/1997 : (1997) 2 SCC 353 etc.]

**17.2.** 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.

**17.3.** 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.

**17.4.** 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 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.

**18.** 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.

**19.1.** 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* MANU/SC/0642/2012 : (2012) 8 SCC 326, 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.

**19.2.** 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

**20.** 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.

**21.1.** Explaining the purpose for constituting the special court to deal with environmental issues, in *Mantri Techzone (P) Ltd. v. Forward Foundation* MANU/SC/0315/2019 : (2019) 18 SCC 494, Justice S. Abdul Nazeer writing for the three Judge Bench, made the following pertinent observations on the status of the NGT:

**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.

**21.2.** 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.

**21.3.** 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.

**21.4.** Such being the wide contour of the NGT's powers, the exposition in *Rajeev Suri v. DDA* 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.

**21.5.** 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 crystallized by the statute, the role of the NGT is clearly discernible.

**21.6.** 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.) and Ors.* MANU/SC/0032/1999 : (1999) 2 SCC 718 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.

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.

## VII. UNIQUENESS OF NGT vis-à-vis OTHER TRIBUNALS

**22.1.** 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.

**22.2.** 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 Dimas Students Union* MANU/SC/0877/2019 : (2019) 8 SCC 177, 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*, MANU/SC/0268/1970 : (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.

**22.3.** 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.

**23.** 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.<sup>5</sup>

## VIII. THE SUI GENERIS ROLE OF NGT

**24.1.** 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* MANU/SC/0596/1998 : (1999) 2 SCC 131, wherein Justice S. Saghir Ahmad spoke thus for a Division Bench,

**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 arbitrate is entrusted acts sui generis, that is, on its own and not under any law.

**24.2.** In *DG NHA v. Aam Aadmi Lokmanch*, Justice S. Ravindra Bhat commenting on

the sui generis role of the NGT, so appropriately stated as follows:

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

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

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

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

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

## IX. AUTHORITY WITH SELF-ACTIVATING CAPABILITY

**25.1.** 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.

**25.2.** 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.

**25.3.** 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.

**25.4.** 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.



**25.5.** 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.

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

**25.7.** 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 and Anr. v. Shamlal Murari and Anr. MANU/SC/0494/1975 : (1976) 1 SCC 719 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.

**25.8.** 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

**26.1.** Tracing the origin of the Precautionary Principle, Scott Lafranchi in his treatise<sup>6</sup> 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. 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.

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

**26.3.** As earlier seen, Section 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.

**26.4.** 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, prevent and attack the causes of environmental degradation"<sup>7</sup>. 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.

**26.5.** 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 non-adversarial. 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.

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

## XI. ENVIRONMENTAL JUSTICE AND ENVIRONMENTAL EQUITY

**27.1.** 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.<sup>8</sup> 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.

**27.2.** 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.<sup>9</sup>

**27.3.** 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," whereas the people who reside there do little or nothing to harm their community.<sup>10</sup>

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.

**27.4.** 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.<sup>9</sup>

**27.5.** 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."<sup>12</sup> 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

**28.1.** 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<sup>13</sup>, 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.<sup>14</sup>

**28.2.** 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.<sup>15</sup> 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.<sup>16</sup>

**28.3.** 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'<sup>17</sup> by this Court is a well recognized testament for this. It would thus be appropriate to state that much of the principles, institutions and 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.<sup>18</sup>

**28.4.** 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.<sup>19</sup> 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.<sup>20</sup>

**28.5.** 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.<sup>21</sup>

**28.6.** 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.

**28.7.** 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* MANU/SC/0015/2021 : (2021) 4 SCC 309 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 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.

**28.8.** 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.<sup>22</sup>

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:

**29.** 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.

**30.** 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.

**31.** 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<sup>23</sup> with many countries declaring climate emergencies and many others being urged to follow suit<sup>24</sup>.

**32.** 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.

**33.** 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.

**34.** In circumstances where adverse environmental impact may be egregious, but the community affected is unable to effectively get the machinery into action, a forum 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".<sup>25</sup> 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.

**35.** 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.

**36.** 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.

**37.** 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.

**38.** 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 procedural 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.

**39.** 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.

**40.** 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.

**41.** 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 heard separately on merits. Indeed, if the case(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.

<sup>1</sup>Beckett, S. (1954). Waiting for Godot: Tragicomedy in 2 Acts

<sup>2</sup>Chapter II, 186th Law Commission Report

<sup>3</sup>MANU/USSC/0240/1935 : 293 U.S. 388 (1935) (dissenting)

<sup>4</sup>Sarah Mathew v. Institute of Cardio Vascular Diseases MANU/SC/1210/2013 : (2014) 2 SCC 62, New India Assurance Co. Ltd. v. Nusli Neville Wadia MANU/SC/0166/2008 : (2008) 3 SCC 279

<sup>5</sup>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

<sup>6</sup>Scott LaFranchi, Surveying the Precautionary Principle's Ongoing Global Development: The Evolution of an Emergent Environmental Management Tool, 32 B.C. Env'tl. Aff. L. Rev. 679 (2005)

<sup>7</sup>Vellore Citizens (supra), S. Jagannathan v. Union of India MANU/SC/0188/1997 : (1997) 2 SCC 87, Karnataka Industrial Areas Development Board v. C. Kenchappa and Ors. MANU/SC/8159/2006 : (2006) 6 SCC 371

<sup>8</sup>Schlosberg D., Defining Environmental Justice: Theories, Movements, and Nature (Oxford University Press 2009)

<sup>9</sup>Schiffer, L.J., & Dowling, T.J. (1997). Reflections On The Role Of The Courts In Environmental Law. Environmental Law, 27(2), 327-342

<sup>10</sup>Jeff Todd, A "Sense of Equity" in Environmental Justice Litigation, 44 HARV. ENVTL. L. REV. 169, 193 (2020)

<sup>11</sup>47 Columbia Law Review 527

<sup>12</sup>Ibid

<sup>13</sup>Rural Litigation And Entitlement Kendra and Ors. v. State Of U.P. and Ors. MANU/SC/0043/1985 : AIR 1985 SC 652, Charan Lal Sahu v. Union of India MANU/SC/0285/1990 : (1990) 1 SCC 613, Virender Gaur v. State of Haryana MANU/SC/0629/1995 : (1995) 2 SCC 577

<sup>14</sup>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 Env'tl. L. 20(2002)

<sup>15</sup>Maheshwara Swamy, N. Law Relating to Environmental Pollution and Protection. India, Thompson Reuters, Vol.I, Ed. 5

<sup>16</sup>(1991) 1 SCC 74

<sup>17</sup>M.C. Mehta v. Union of India, MANU/SC/0092/1986 : 1987 SCC (1) 395

<sup>18</sup>Rajamani, Lavanya. 2007. Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability. Journal of Environmental Law

<sup>19</sup>Supra, Note 5

<sup>20</sup>M.C. Mehta v. Union of India MANU/SC/0291/1986 : (1986) 2 SCC 176, Indiar Council for Environmental-Legal Action v. Union of India MANU/SC/1112/1996 : (1996) 3 SCC 212, A.P. Pollution Control Board v. M.V. Nayudu MANU/SC/0032/1999 : (1999) 2 SCC 718, A.P. Pollution Control Board II v. M.V. Nayudu MANU/SC/2953/2000 : (2001) 2 SCC 62

<sup>21</sup>Justice T.S. Doabia, Environmental & Pollution Laws in India, 3rd Ed., Vol 2 (2017)

<sup>22</sup>Domenico Amirante, Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India, 29 Pace Envtl. L. Rev. 441 (2012)

<sup>23</sup>Indian Network for Climate Change Assessment, Climate Change and India: A 4X4 Assessment-A sectoral and regional analysis for 2030s, Ministry of Environment and Forests, Government of India, 16 November 2010

<sup>24</sup>Secretary-General's Remarks at the Climate Ambition Summit. United Nations. United Nations, December 12, 2020

<sup>25</sup>Supra Note 6

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**IN THE SUPREME COURT OF INDIA**

Writ Petition (Civil) No. 50 of 1998

**Decided On:** 09.08.2012

Bhopal Gas Peedith Mahila Udyog Sangathan and Ors. **Vs.** Union of India (UOI) and Ors.

**Hon'ble Judges/Coram:**

*S.H. Kapadia, CJI, A.K. Patnaik and Swatanter Kumar, JJ.*

**Counsels:**

*For Appellant/Petitioner/Plaintiff: Sanjay Parikh, Aagney Sail, Mamta Saxena, A.N. Singh, Bushra Parveen, Naveen R. Nath, Karuna Nundy and Anupam Lal Das, Advs.*

*For Respondents/Defendant: Mohan Parasaran, ASG., Vijay Hansaria, Raju Ramachandran, Sr. Advs., S. Wasim A. Qadri, Rekha Pandey, Sunita Sharma, M. Khairati, D.S. Mahra, Anil Katiyar, B. Krishna Prasad, C.D. Singh, Sunny Choudhary, Abhimanyu, Ayusha Kumar, Madhu Sikri, Rishi, S. Chandra Shekhar, Advs.*

**Case Note:**

**Constitution - Jurisdiction - Article 32 of Constitution of India, 1950 - Court directed Respondents creation of Bhopal Memorial Hospital and Research Centre ('BMHRC') and Bhopal Memorial Hospital Trust (BMHT/Trust') which was constituted for purposes of healthcare of affected gas victims in Writ Petition as a public interest litigation under Article 32 of Constitution - Further Court with various other directions directed Central Government to take steps for winding up Trust and taking over management of hospital after being found co-ordination and smooth functioning of was lacking - Hence, this Petition - Whether, matter should be kept pending before this Court or should it be transferred to an appropriate forum, including High Court, for a more effective and purposeful management of institutions - Held, it was found that day-to-day directions were passed by a jurisdictional High Court - Such Court would be in a better position to appreciate requirements of gas affected victims as well as to exercise better control over functioning of said Committees and organizations - Further Monitoring Committee had been constituted by Court with a definite object and specifically assigned functions and terms of reference - There was no justification, much less any need, for expanding scope of its functioning or bringing private hospitals/clinics within jurisdiction of this Empowered Monitoring Committee - BMHT had been constituted under Deed of Trust and was to remain irrevocable for all times and Trust Deed was to be construed and had effect in accordance with Indian laws as per terms and conditions of Trust - It was observed that directions should be in aid of various orders passed by Court and not in derogation thereto - Moreover provisions and scheme of National Green Tribunal Act, 2010 ('NGT Act') stated that environmental issues and matters covered under NGT Act should be instituted and litigated before - However as it did not involve any complex or other environmental issues and primarily required**



**administrative supervision for proper execution of orders of Courts, it would appropriate to transfer case to High Court of Madhya Pradesh - Thus matter should be heard and supervisory jurisdiction be exercised by High Court to better serve ends of justice - Petition disposed of.**

### **Ratio Decidendi**

**"Petition shall be entertained by Court who has jurisdiction as per its cause of action."**

### **Case Category:**

LETTER PETITION AND PIL MATTER

### **ORDER**

### **Swatanter Kumar, J.**

**1 .** Unlike natural calamities that are beyond human control, avoidable disasters resulting from human error/negligence prove more tragic and completely imbalance the inter-generational equity and cause irretrievable damage to the health and environment for generations to come. Such tragedy may occur from pure negligence, contributory negligence or even failure to take necessary precautions in carrying on certain industrial activities. More often than not, the affected parties have to face avoidable damage and adversity that results from such disasters. The magnitude and extent of adverse impact on the financial soundness, social health and upbringing of younger generation, including progenies, may have been beyond human expectations. In such situations and where the laws are silent or are inadequate, the courts have unexceptionally stepped in to bridge the gaps, to provide for appropriate directions and guidelines to ensure that fundamentals of Article 21 of the Constitution of India (for short "the Constitution") are not violated.

**2 .** The Bhopal Gas Tragedy is a glaring example of such imbalances and adverse impacts, where by court's intervention, poor and destitute have been provided relief and rehabilitation.

**3 .** The Bhopal Gas Leak Disaster occurred on the intervening night of the 2<sup>nd</sup>/3<sup>rd</sup> of December, 1984. Data reflecting the exact number of affected persons was not available initially. Earlier, it was felt that only a small number of persons were adversely affected in terms of health or otherwise by the leakage of toxic gases from the Union Carbide Unit at Bhopal. However, the Scientific Commission for Continuing Studies on Effects of Bhopal Gas Leakage on Life Systems (for short the 'Scientific Commission') released a Report titled '*The Bhopal Gas Disaster: Effects on Life Systems*' in July, 1987 which suggested otherwise. This Report stated that for the estimated population of 2,00,000 exposed to the toxic gases in the severely and moderately affected areas of Bhopal and the variety of long-term problems anticipated in the crisis period, the number of exposees covered so far by the Indian Council of Medical Research (for short the 'ICMR') through the epidemiological surveys constitute less than 20 per cent of the population. With the passage of time, this figure of the affected population has swollen to nearly 5,00,000. By the same Scientific Commission, it was also found that in general, the output of the epidemiological project so far had not equalled the magnitude of the tasks assigned to them, presumably due to lack of resources, trained staff as well as physical inputs. An opportunity for mounting such a massive long-term longitudinal study on a population exposed to a one-time acute chemical stress may not present itself again and

hence it would be a pity if that opportunity was missed. Various steps were recommended by the Scientific Commission, from time to time, to tackle the two main aspects of this disaster. Firstly, health care of the affected victims and secondly, research work with the object to deal with the acute problems arising from this disaster on the one hand and to suggest preventive steps on the other.

**4.** Writ Petition (Civil) No. 50 of 1998 was filed by the Bhopal Gas Peedith Mahila Udyog Sanghathan as a public interest litigation under Article 32 of the Constitution. This petition was founded on the rights available to the victims of the Bhopal Gas Disaster under Article 21 of the Constitution and it was prayed that they were entitled to receive free and proper medical assistance from the Respondents, the Union of India and the State of Madhya Pradesh. It was also prayed that the Respondents be directed to take effective steps in that regard which inter alia included providing of free medicines and preparing a detailed plan of medical rehabilitation that ensured the availability of basic medical facilities to the gas victims. Lastly, it was also prayed that the ICMR be directed to resume and conduct research studies and to make public the reports published by it so as to provide the basic ground for issuance of appropriate directions by this Court.

**5.** This Court has been passing various directions right from the filing of this petition and has directed certain effective and positive steps to be taken by the Union of India as well as the State of Madhya Pradesh to ensure providing of appropriate medical treatment to the gas victims. It is no use referring to the different orders passed by this Court from time to time in detail. However, we will be referring to some of the important orders in brief which have a bearing on the issue now pending before this Court and for passing of the final directions.

**6.** To begin with, the ICMR had undertaken certain research works immediately after the Bhopal Disaster and appropriate steps had been taken, as claimed by the State and the Central Government, to deal with the medical problems of the gas victims. However, it appears from the record and has been averred before us that after 1994, the ICMR allegedly took an irrational decision to disband all Bhopal Gas Disaster related medical research. This abandoning of research work has been seriously criticised in the present petition. Certain appeals had been filed against the order of the High Court of Madhya Pradesh which came to be registered as Civil Appeal Nos. 3187-3188 of 1988, which were subsequently clubbed with Writ Petition (Civil) No. 50 of 1998. I.A. Nos. 32-35, 36-37 in Civil Appeal Nos. 3187-3188 of 1988 titled "*Union Carbide Corporation Ltd. v. Union of India*" were filed for seeking different directions, upon which and vide order dated 15th May, 1988, this Court directed creation of the Bhopal Memorial Hospital and Research Centre (for short 'BMHRC') and the Bhopal Memorial Hospital Trust (for short 'BMHT/the Trust') which was constituted for the purposes of healthcare of the affected gas victims. This hospital initially was to run for a period of eight years which term was extended from time to time and then finally, vide order dated 2<sup>nd</sup> May, 2006, the term was extended till completion of its object. Further, vide order dated 17<sup>th</sup> July, 2007, this Court also sought report from the ICMR on various toxic effects of the leaked gas.

**7.** This Court also, by order dated 17<sup>th</sup> September, 2004 passed in Writ Petition (Civil) No. 50 of 1998, ordered the constitution of two expert committees being the 'Monitoring Committee' and the 'Advisory Committee'. The latter was formed by ICMR under the Chairmanship of Director General of ICMR and its terms of reference were as follows:

- (i) To examine the treatment practices currently followed by medical personnel in the hospitals/clinics run by the Government for the Bhopal Gas victims for

the various ailments suffered by them.

(ii) To recommend/advise on the appropriate line of treatment to be offered to the Bhopal gas victims.

(iii) To recommend/advise on the structure and content of the research to be undertaken in order to improve the quality of the treatment being offered to the Bhopal Gas victims.

**8.** The Advisory Committee has been submitting its reports from time to time and it was assured by the State Government that the said Committee will be provided with all facilities and technical inputs. Then, the ICMR conducted its research investigation in the form of 24 major research projects ranging from epidemiology to molecular biology implemented by 15 National Institutes. Vide letter dated 17<sup>th</sup> February, 2004, from the Director General of ICMR to the Government of Madhya Pradesh it was indicated that with respect to future needs for research, ICMR would facilitate the Madhya Pradesh State Government by constituting a Committee of experts which would look into the work carried out between 1985 to 1994 as well as the subsequent research by the Centre for Rehabilitation Studies under the Bhopal Gas Tragedy Relief and Rehabilitation Department (for short, the 'BGTRRD'), Bhopal from 1995 till date, so as to provide guidelines for future research. On 24<sup>th</sup> June, 2010, the Union Cabinet passed a resolution directing the ICMR to establish a new permanent research centre at Bhopal which was done on 11<sup>th</sup> October, 2010, namely, the National Institute of Research in Environment Health (for short the 'NIREH'). The research work is being continued by the ICMR, while it submits its report to this Court from time to time. The vision document was duly prepared by the NIREH.

**9.** In the background of this vision document, it is stated that after the Methyl Isocyanate (MIC) gas episode at Bhopal, various research programmes were conducted by the ICMR to monitor the research programme and also to undertake long term epidemiological studies to record the morbidity and mortality of the cohort of gas exposed and control population.

**10.** In order to ensure smooth running of the BMHT, a corpus had been created which was provided with funds and contributions that were invested from time to time and the total corpus, as of now, constitutes Rs. 436.47 crores. Out of this amount, Rs. 226.61 crores has been invested in RBI Bonds in Banks, Rs. 196.54 crores in FDRs in Banks, Rs. 11.65 crores in the short term deposits in Flexi/Quantum in Banks and Rs. 1.67 crores is the bank balance.

**11.** During the pendency of this petition, various directions had been passed by this Court to ensure smooth working of the Trust in both the fields of health care and research work. We may refer to some significant orders passed by this Court.

**12.** The surveys conducted by the ICMR, including the epidemiological survey in 1994, showed multi-organ symptoms amongst the persons exposed and there was tremendous increase in symptoms exhibited by the affected persons. There was even shortage of medicines and various representations were made requesting improvement thereof. Vide order dated 17<sup>th</sup> September, 2004, the Court had spelt out the terms and conditions for the Monitoring Committee and the Advisory Committee. It related to procedural matters, functioning and terms of reference of the respective Committees. The paramount functions of the Monitoring Committee were to monitor suitability, availability and maintenance of medical equipments, deployment of adequate and competent medical

personnel, more specifically the treatment offered at the hospitals and the functioning of these hospitals run by the Government for the Bhopal Gas victims, purchase and availability of medicines to the affected persons etc. Similarly, the Advisory Committee, while determining its own rules of procedure, was to examine the treatment practices currently followed by the medical personnel in the hospitals run by the Government for these victims in relation to various ailments suffered by them. Further, this Committee was to recommend and advice on the appropriate line of treatment to be offered to the Bhopal gas victims. It was further to recommend and advise on the kind of medical equipments and medicines required to be procured to improve the quality of treatment being offered to the victims as well as to initiate and recommend community health initiatives in health education and community participation for prevention and care.

**13.** Then vide order dated 17<sup>th</sup> July, 2007, the Court directed the State of Madhya Pradesh to take necessary steps for computerising the records of the hospital so that the details of the patients and/or their ailments were made permanent record to ensure their proper treatment in future. One of the factors which invited the attention of the Court at that time was that the patients who were not the victims of the gas tragedy had also started coming to the hospital, which led to passing of an order wherein the Court required the Monitoring Committee to submit a report if the treatment facilities afforded to such patients were adversely affecting the treatment of the gas victims.

**14.** Various reports were submitted by the two Committees afore-mentioned which were considered from time to time by this Court. Vide order dated 15<sup>th</sup> November, 2007, the Court had called upon the State of Madhya Pradesh to provide answers to the questions which were raised by the Monitoring Committee which was overseeing the functions of the hospital and the research work. Report was also sought from the ICMR on various toxic effects of the gas.

**15.** Thereafter, because of certain events, the Chairman of BMHT resigned. The co-ordination and smooth functioning of these units was found to be lacking and many applications in this regard were filed before the Court. As already noticed, the Court had directed setting up of a hospital for treatment of Bhopal Gas victims vide its order dated 15<sup>th</sup> May, 1988 in furtherance to which the hospital was established and even the Trust was registered on 11<sup>th</sup> August, 1988. There existed uncertainty in the decision making process. The Attorney General for India made a statement that the Union of India had decided to take over the BMHRC and run it through Department of Biotechnology and Department of Atomic Energy. In furtherance to this statement, the Court disposed of I.A. No. 58-59 of 2009 and vide its order dated 19<sup>th</sup> July, 2010, the Court directed the Central Government to take steps for winding up the Trust and taking over the management of the hospital.

**16.** Thereafter, certain IAs came to be filed before this Court. In these IAs, different parties had prayed for issuance of different directions in relation to the working, management and control of BMHRC. IA Nos. 62-63 of 2011 in Civil Appeal Nos. 3167-3188 of 1988 have been filed with the prayer that the Union of India be directed to take charge of the corpus funds of the erstwhile BMHT through its Department of Biotechnology and Department of Atomic Energy and transfer the accounts of BMHT to the new management. It was also prayed that the management of the erstwhile BMHT be relieved of all its responsibilities pertaining to management of the corpus and new authorised signatories be appointed for its accounts. One of the Petitioners in the main petition filed an application being IA No. 14 of 2012, primarily relying upon the letter written by Dr. Sathyamala, (Member, Advisory Committee) to Dr. P.M. Bhargava,

(Member, Advisory Committee and Chairperson of the Task Force). It was prayed that the same be taken on record and the Advisory Committee be directed to submit minutes of its meetings dated 13<sup>th</sup> August, 2009, 22<sup>nd</sup> September, 2010 and 10<sup>th</sup> December, 2011. Petitioner Nos. 1 and 3 have filed IA No. 16 of 2012 wherein they have prayed for issuance of certain directions. In this application, it has been stated that the Monitoring Committee in its reports dated 10<sup>th</sup> June, 2005, 31<sup>st</sup> October, 2005, 12<sup>th</sup> July, 2006, 20<sup>th</sup> December 2006, 7<sup>th</sup> August, 2007 and 27<sup>th</sup> May, 2008 have consistently recommended computerization of the hospital records and issuance of 'health booklets' to the gas victims. It is averred that recommendations of the Advisory Committee have not been complied with by the State Government, the ICMR and even the Union of India. They have also made a suggestion for issuance of 'smart cards' to the gas affected victims besides issuance of proper health booklets. The NIREH, as established by the ICMR, though was a welcome step, according to these applicants much is desired of the functioning of NIREH. The allegation is that the decision makers at the ICMR are doing everything on their part to ensure that the crucial issues affecting the life and health of the gas victims remain unaddressed at a macro level. All the concentration presently is on building the infrastructure for the NIREH. On this premise, the applicants have prayed that the orders of the Court should be complied with by the State of Madhya Pradesh as well as the ICMR for issuance of 'health booklets' and 'smart cards' to the affected persons. They also prayed for adoption of a common referral system among various medical units under BMHRC and under the BGTRRD so that the gas victims are referred to the appropriate centres for proper diagnosis, investigation and treatment in terms of the nature and degree of injury suffered by each one of them and also in terms of therapeutic requirements. They also prayed that NIREH be directed to set up completely computerized and centrally networked Central Registry, to maintain proper medical records of all gas victims, to streamline and intensify epidemiological studies among the gas-affected population and to prepare treatment protocol for treating each category of ailment that the gas victims are suffering, such as respiratory diseases, eye-related diseases, gastro-intestinal diseases, neurological diseases, renal failure, urological problems, gynaecological problems, mental disorders, etc.

**17.** In other IAs/ replies filed on behalf of different parties, it has been pointed out that the Monitoring Committee should have the jurisdiction over all hospitals, including non-governmental hospitals and clinics in Bhopal. They should also be vested with powers of recommending penal action against the persons who are found to be defaulting in carrying out the appropriate treatment or following the directions of the Monitoring Committee from time to time. It has also been prayed that the research work could be carried out by private laboratories or private research units besides the research work being carried on by the ICMR and/or its established unit. It was also brought out from the record before the Court that there is no co-ordination between the various functionaries dealing with this tragedy and, in fact, the views of the Advisory Committee are not given due weightage by the implementing agencies, thereby adding to the suffering and agony of the affected parties.

**18.** No doubt, the BMHT was established for providing medical treatment and care to the gas victims. Both the Monitoring Committee and the Advisory Committee, appointed by this Court, had different earmarked areas of their respective operation, though their aim was common. The Advisory Committee was required to advise as per its expertise on matters which the implementing agencies, i.e., the Trust as well as the State Government, were expected to perform. On the other hand, the Monitoring Committee was required to oversee the functioning of the research work as well as the timely providing of medical care and treatment to the gas affected victims. Functions of each



of these bodies were sufficiently and unambiguously spelt out in different orders of this Court. After submission of the reports by the respective Committees, this Court had also passed various directions for the better and improved performance of these units, so as to ensure better medical care and requisite treatment to the gas victims.

**19.** As we have already noticed, with the passage of time this disaster has attained wider dimensions and greater concerns, which require discharge of higher responsibilities by all the agencies. In terms of Article 21 of the Constitution, all the gas victims are entitled to greater extent of multi-dimensional health care, as their sufferings are in no way, directly or indirectly, attributable to them. It was, primarily and undoubtedly, the negligence on the part of the Union Carbide Ltd. that resulted in leakage of the MIC gas, causing irreversible damage to the health of not only the persons affected but even the children who were still to be born.

**20.** The first and foremost question that arises for consideration of this Court is as to whether this matter should be kept pending before this Court or should it be transferred to an appropriate forum, including the High Court, for a more effective and purposeful management of these institutions and to ensure that they satisfactorily serve the purpose of 'public service and benefit' for which they have been constituted. Various applications filed before this Court and reports submitted by the Committees, as afore-referred, are to provide requisite help to the gas victims, as it is not possible for the poor victims to approach this Court for issuance of appropriate directions from time to time. This Court has already ordered providing of basic requirements and constitution of Advisory Committee and the Monitoring Committee. While the management of BMHT was taken over by the Union of India, through Ministry of Health and Family Welfare, the hospital was to run under the direct control of Department of Bio-Technology and Department of Atomic Energy and subsequently, the hospital was also placed under the control of the Ministry.

**21.** In our considered opinion, it will be appropriate that day-to-day directions are passed by a jurisdictional High Court. Such Court would be in a better position to appreciate the requirements of the gas affected victims as well as to exercise better control over the functioning of the said Committees and organizations. Such direct control would improve the functioning of these units and their inter and intra co-ordination resulting in better mutual performance. Therefore, we consider it not only desirable but also in the interest of all concerned that this matter should henceforth be dealt with by the High Court of Madhya Pradesh, Bench at Jabalpur.

**22.** In addition to the directions issued by this Court from time to time, it is also necessary for this Court to pass some further directions to provide clarity and precision and also to ensure effective implementation of the various orders which shall remain an integral part of this wide scheme sought to be enforced for the betterment of the gas victims. As far as the argument that there should be privatization of the research work and the Monitoring Committee should be empowered to have control over all hospitals where the gas victims may go for treatment, including private hospitals and clinics of Bhopal is concerned, the same is without any substance. We are of the considered opinion that it would neither serve the ends of justice nor the interest of the gas victims. On the contrary, there would be multi-differential research without any substantive result. Furthermore, the Monitoring Committee has been constituted by this Court vide its order dated 17th September, 2004, with a definite object and specifically assigned functions and terms of reference. There is no justification, much less any need, for expanding the scope of its functioning or bringing the private hospitals/clinics within the jurisdiction of this Empowered Monitoring Committee. Both these prayers,

thus, need to be declined, which we do hereby decline.

**23.** Certainly, there are certain other matters which require attention of this Court. Matters in relation to better co-ordination between the functioning of the authorities, issuance of 'Health Booklets' and 'Smart Cards' to the gas victims, computerization of medical records of the hospitals, taking over of corpus of the BMHT, management of the Trust and certain matters where the State of Madhya Pradesh has failed to effectively accept the recommendations of the Committees, are some of the matters where we would have to issue certain further directions. From the record before us, it appears that the meeting of the Monitoring Committee was held on 29<sup>th</sup> March, 2011. In this meeting, the Committee proposed that further powers be vested in it for improving the quality of medical care available to the Bhopal gas victims. The proposal of the Committee reads as under:

The Monitoring Committee for Medical Rehabilitation of Bhopal Gas Victims proposes to have the following powers to be vested upon it by the Hon'ble Supreme Court for improving the quality of medical care available to the Bhopal Gas Victims.

- 1.** Powers to take up matters on the basis of complaints made by any individual gas victim or representatives of organization of gas victims. Such complaints may be against any individual official of the department of Bhopal Gas Tragedy Relief and Rehabilitation or any employee in the hospital and other health care centers meant for medical care of gas victims or employed by any agency that is working under the Department of Bhopal Gas Tragedy Relief and Rehabilitation.
- 2.** Powers to direct the concerned department of the State government to ensure facilities such as sufficient office space with furniture and furnishings, office staff including one secretary and one doctor to act as coordinating officer and one each of Hindi and English stenographer-cum typist and one peon and for transportation of members one vehicle with seating capacity for at least five persons.
- 3.** There should be provision of payment of honorarium to members of the committee and also to other persons who are assigned some specific job by the Committee. It is proposed that Rs. 1,000/- per meeting or hospital inspection may be granted.
- 4.** Powers in respect of the following matters namely:
  - (i) Requisitioning any official document or inspect any official records that the Monitoring Committee finds relevant.
  - (ii) To ask concern institutions and/or officers for their examination and record their view.
  - (iii) This Committee should have the facilities of collection of sample of medicine etc as may be required from time to time for detailed examination for this drug controller may be requested for these. Collection samples of medicines, food and other items that may be necessary for assessment of quality of medical care provided at the health care facility. Drug controller may be requested to depute drug inspector for



collecting sample etc. to complete the process of inquiry wherever it may be necessary.

**5.** Powers to recommend penal action against any officer who without any reasonable cause has failed to implement the recommendations of the Monitoring Committee within the time limit prescribed.

**6.** Powers to award studies to selected agencies (that could include non government agencies) is may be required from time to time for proper assessment of the quality of care provided at different health care facilities within the jurisdiction of the Monitoring Committee.

**7 .** Powers to engage the services of experts in different fields for assessment of quality of care for implementations of recommendations made by the Monitoring Committee.

**8 .** Powers to call for public hearing for recording and redress of grievances and creating awareness about the activities of the Monitoring Committee among the Bhopal Victims.

The Monitoring Committee for Medical Rehabilitation of Bhopal Gas Victims shall have jurisdiction over all the hospitals, clinic, day care centres and other health care units and centers meant for the medical rehabilitation of the Bhopal Gas Victims including those run by the Department of Bhopal Gas Tragedy Relief and Rehabilitation.

The foregoing power and functions of the Authority shall be subject to the supervision and control of the Hon'ble Supreme Court. The direction of the Hon'ble Supreme Court dated 10.01.2011 would be taken into consideration by the Monitoring Committee.

**24.** These recommendations of the Monitoring Committee have been answered by the State by filing an independent reply. In this reply, it has been stated that the recommendation with regard to jurisdiction over all hospitals and clinics is contrary to the terms of the order of this Court dated 17th September, 2004. The power to receive complaints from the affected parties has already been permitted. The Monitoring Committee is also empowered to conduct hearing and collect evidence by requisitioning of the records and examination of the officers from various departments and the hospital. The State also has no objection to the Committee collecting the samples of medicines in accordance with the provisions of the Drug and Cosmetics Act, 1940 and the Drug and Cosmetics Rules, 1945. It is also the stand of the State Government that they have implemented most of the directions issued by the Monitoring Committee.

**25.** Another aspect that has been brought to the notice of this Court is that adequate space for office of the Monitoring Committee is not available. This makes it difficult for the public to gain accessibility to the small space that has been provided by the State to the said Committee. This is hampering its functioning in accordance with the orders of this Court.

**26.** It is commonly conceded before us that the corpus money stands completely transferred to the Ministry of Health and Family Welfare, Department of Health Research (for short 'DHR') and they have also taken over the management of BMHRC.

**27.** Thus, it is necessary for us to deal with the various prayers made in the above

application and the background leading to the filing of such application in its correct perspective. We have to take a balanced approach which would further the cause of accurate research and better medical care in favour of the gas victims. The Union of India has already passed a resolution directing the ICMR to establish a permanent research centre at Bhopal which, as already noticed, has already been established in the name of NIREH. This itself is sufficiently indicative of the intent of the Government of India to provide and procure necessary machinery for research related works as well as to further the process of getting much needed scientific manpower and research, which can contribute in research activities relating to gas affected persons.

**28.** The Advisory Committee is performing its advisory function continuously. Definite replies had been filed on behalf of the State of Madhya Pradesh and the Government of India ensuring their full cooperation and complete implementation of the recommendations of these Committees, so as to provide adequate medical facilities to the affected persons and the completion of the research work.

**29.** As already noticed, suggestions made by the Monitoring Committee in its Report dated 29th March, 2011 have been broadly accepted by the State of Madhya Pradesh, except for two of such proposals. The reservation of the State Government on the issue of assistance of non-governmental organisation and experts from outside in assessing the quality of care and research work, appears to be for valid and good reasons. We wish to make it clear that the recommendations of the Empowered Monitoring Committee, as afore-mentioned, shall not be deemed to have been accepted by this Court, except where directions in that behalf have been specifically passed by this Court in the operative part of this order.

**30.** Vide letter dated 12<sup>th</sup> April, 2012, the ICMR while making a reference to the order of this Court dated 19<sup>th</sup> July, 2010 had informed that the administrative control of BMHRC, after winding up of BMHT, had been transferred to the DHR, Ministry of Health and Family Welfare, Government of India and all other matters, including administrative, financial and legal, pertaining to BMHRC would be dealt with by the DHR. All documents were also admitted to have been transferred, except the corpus of the Trust. It was suggested that the Corpus of BMHT with accumulated interest along with original documents/receipts be transferred to the Secretary, DHR-cum-DG, ICMR and it was also stated that BMHT had been wound up as per the directions of this Court with effect from 19th July, 2010.

**31.** The BMHT had been constituted under the Deed of Trust dated 11<sup>th</sup> August, 1998. Since then, it had carried on its activities under the guidance of the Monitoring Committee, the Advisory Committee and as per the orders of this Court. The BMHT was to remain irrevocable for all times and the Trust Deed was to be construed and have effect in accordance with the Indian laws as per the terms and conditions of the Trust.

**32.** In terms of the clauses of this Deed, initially the Trust was to stand possessed of the Trust property and income thereof. This possession was to remain both during and after termination of the said period of eight years for the purposes and objects stated therein, which primarily were related to providing for infrastructure of the hospital and grant of medical aid to the poor, without distinction of race, caste or creed to the gas affected victims.

**33.** The accounts of the Trust had been audited and the chartered accountants submitted their Report dated 15<sup>th</sup> July, 2011 pointing out no irregularity or objections to the accounts of BMHT. This Report was submitted to the Members of the Governing

Body of the BMHT. In the opinion of the Chartered Accountants, the balance sheet of the state of affairs of BMHT upto 19<sup>th</sup> July, 2010 along with accounts giving the required information, gave the true and fair view and was in complete conformity with the accounting principles generally accepted in India. Similar remarks have been made in regard to the Income and Expenditure Account wherein an excess of income over expenditure can be seen for the said period.

**34.** It would still be in the interest of BMHT itself, particularly when the management and the corpus of the BMHT have been transferred to the Union of India that the Government agency, besides regularly inspecting the accounts of the BMHT, also gave their final report for the period ending July 2010. The Auditor General of the State of Madhya Pradesh would be the appropriate authority to inspect the accounts of the BMHT regularly even when the management and corpus thereof is transferred to the Union of India.

**35.** Having noticed in detail the factual aspect of this case, the suggestions made by various applicants, recommendations of the expert bodies and keeping in mind the very object for which the present Public Interest Litigation was instituted, we are of the considered view that issuance of certain specific directions are inevitably called for. These orders would be to ensure proper progress and implementation of the 'Relief and Rehabilitation programme' for the penurious gas victims as well as to ensure that the research work is result-oriented and continued with exactitude. We make it clear that these directions shall be in aid of the various orders passed by this Court from time to time in the present petition and not in derogation thereto. In other words, all orders passed by this Court with specific reference to the orders mentioned above, shall be read mutatis mutandis to these directions and shall remain in force. The orders-cum-directions are:

1) This Public Interest Litigation (Writ Petition (Civil) No. 50 of 1998) shall stand transferred to the jurisdictional Bench of Madhya Pradesh High Court for better and effective control in this case. All applications filed henceforth shall be dealt with and disposed of by the concerned Bench of the High Court, in line with the various orders passed by this Court, so as to ensure proper functioning of the 'Relief and Rehabilitation Programme', working of the expert bodies and utmost medical care and treatment to the gas victims.

2) We request the Chief Justice of the Madhya Pradesh High Court to ensure that the case is dealt with by a Bench presided over by the Chief Justice himself or a Bench presided over by the senior most Judge of that Court or any other appropriate Bench in accordance with the High Court Rules of that Court or any special legislation governing the subject in that behalf.

3) Since the space already provided appears to be insufficient, the State of Madhya Pradesh is hereby directed to ensure provision of proper and adequate office space for the Monitoring Committee and the Advisory Committee, to perform their functions effectively. The space so provided should be accessible to public so that the gas victims can conveniently approach the Monitoring Committee for redressal of their grievances and difficulties.

4) We also direct the State Government to provide proper infrastructure to the Committees in the independent office space provided to it. The members would also be entitled to receive Rs. 1,000/- honorarium for each effective meeting. However, no honorarium shall be payable on a day when the meeting is

adjourned or no effective business is performed in the meeting of the Committee.

5) The Monitoring Committee has already been authorised and it is hereby clarified that it would hear the complaints and, if necessary, can even call for the records from the concerned hospital or department, record the statements of Government servants or employees of the hospital and make its recommendations to the Government for taking appropriate steps. If no action is taken by the State Government even upon a reminder thereof, the Committee would be well within its jurisdiction to approach the High Court for appropriate directions. We make it clear that the Empowered Monitoring Committee shall have no penal jurisdiction. It shall discharge its functions strictly within the framework of the powers vested and functions awarded to it under the orders of this Court. Such suggestions of the Monitoring Committee shall be primarily recommendatory and reformatory in their nature and content.

6) The Empowered Monitoring Committee shall have complete jurisdiction to oversee the proper functioning of the hospital, i.e., BMHRC as well as other Government hospitals dealing with the gas victims. This jurisdiction shall be limited to the problems relateable to the gas victims and/or the problems arising directly from the incident or even the problems allied thereto. We make it clear that the Empowered Monitoring Committee shall have no jurisdiction over the private hospitals, nursing homes and clinics in Bhopal. However, it does not absolve the State of Madhya Pradesh and the Medical Council of India from discharging its responsibilities towards the gas victims who are being treated in private hospitals, nursing homes or clinics. We do expect these authorities to hear the grievances of the complainants as well as to ensure maintenance of due standards of treatment in these hospitals, nursing homes or clinics.

7) We direct the ICMR as well as NIREH to ensure that the research work is carried on with exactitude and expeditiousness and further to ensure disbursement of its complete benefit to the gas victims. We do not permit the research work to be carried out by any private/non-governmental institution, except the ICMR and NIREH.

8) The Government of India has already resolved to establish the NIREH and carry on the research work, for which it has been provided due infrastructure. Thus, we see no reason why the research work should not progress at the requisite pace in all fields while providing benefits for proper care and treatment of patients in the various hospitals in Bhopal. We further issue a clear direction to the Union of India and the State of Madhya Pradesh to render all assistance, financial or otherwise, to ensure that there is no impediment in the carrying on of the research work by the specialized institutions.

9) The Monitoring Committee must operationalize medical surveillance, computerization of medical information, publication of 'health booklets' etc. The Monitoring Committee shall also ensure that the 'health booklets' and 'smart cards' are provided to each gas victim irrespective of where such victim is being treated. This direction shall apply to all the hospitals run by the Government or otherwise, in Bhopal. We direct the State Government to provide assistance in all respects to the Empowered Monitoring Committee and take appropriate action against the erring officer/officials in the event of default.

We also direct complete computerization of the medical information in the Government as well as non-government hospital/clinics, which should be completed within a period of three months from today.

10) We are informed that there are large number of vacancies of doctors and supporting staff in the hospitals and allied departments. In the BGTRRD, 80 per cent posts of specialists and 30 per cent of doctors are lying vacant. Some posts are also lying vacant in the Fourth Grade staff. Thus, we direct the concerned authorities to take appropriate steps in all respects not only to fill up these vacancies but also to provide such infrastructure and facilities that the doctors are not compelled to or prefer to resign from BMHRC employment and its various departments, due to inadequate facilities.

11) The Union of India, the State Government and the ICMR should even consider the proposal for providing autonomy to BMHRC and even make it a teaching institution so as to provide attractive terms, studies and job satisfaction therein. This will not only help in providing better opportunities of employment but would better serve the purpose of providing care and treatment of high quality to the gas victims.

12) It is indisputable that huge toxic materials/waste is still lying in and around the factory of Union Carbide Corporation (I) Ltd. in Bhopal. Its very existence is hazardous to health. It needs to be disposed of at the earliest and in a scientific manner. Thus, we direct the Union of India and the State of Madhya Pradesh to take immediate steps for disposal of this toxic waste lying in and around the Union Carbide factory, Bhopal, on the recommendations of the Empowered Monitoring Committee, Advisory Committee and the NIREH within six months from today. The disposal should be strictly in a scientific manner which may cause no further damage to human health and environment in Bhopal. We direct a collective meeting of these organizations to be held along with the Secretary to the Government of India and the Chief Secretary of the State of Madhya Pradesh within one month from today to finalize the entire scheme of disposal of the toxic wastes. The above direction is without prejudice to the appropriate orders or directions being issued by the court of competent jurisdiction.

13) The Advisory Committee, the Monitoring and the NIREH shall continue to file their respective quarterly reports before the High Court of Madhya Pradesh. These reports shall be dealt with and appropriate directions be passed by the High Court in accordance with law.

14) We have already noticed that the management of BMHT has already been vested in the Ministry of Health and Family Welfare, Government of India and the working of BMHT has come to an end. We, thus, direct that the Union of India and the State of Madhya Pradesh shall take appropriate steps to ensure the dissolution of the Trust in accordance with law. The BMHT was initially formed for a period of eight years and then was constituted for an indefinite period under the orders of this Court. In the facts and circumstances of the case and the subsequent events, we direct that BMHT shall stand dissolved. All concerned to take steps in accordance with law, under which it was created and/or registered.

15) The corpus of BMHT has already been ordered to be transferred to the Government of India and would remain under the control of the Ministry of



Health and Family Welfare. If any other steps are required to be taken, they shall immediately be taken by the concerned Ministry. We further issue a clear direction that all the Fixed Deposit Receipts, RBI Bonds, Short Term Deposits and the bank balance of the BMHT, Bhopal, shall stand transferred and be under the control of the said Ministry. If any steps even in this regard are required to be taken, we direct all concerned to take appropriate steps.

16) Accounts of BMHRC and the allied departments, as far as they are subject matter of the present writ petition, shall be audited by the Principal Accountant General (Audit), Madhya Pradesh. It shall also examine the accounts and the audit report dated 15th July, 2011 submitted by M/s. V.K. Verma and Company within three months from today.

17) We also direct the State Government and the Monitoring Committee to evolve a methodology of common referral system amongst the various medical units under the erstwhile BMHRC and BGTRRD to ensure that the gas victims are referred to appropriate centres for proper diagnosis and treatment in terms of the nature and degree of injury suffered by each one of them.

18) We also direct that the Monitoring Committee, with the aid of the Advisory Committee, NIREH and the specialized doctors of BMHRC, issues a standardised protocol for treating each category of ailment that the gas victims may be suffering from. This shall be done expeditiously. It will be highly appreciated if the Committee also prescribes scientific categorization of patients and injuries.

19) Lastly, we direct all concerned in the Union of India, State of Madhya Pradesh, Empowered Monitoring Committee, Advisory Committee, ICMR, NIREH, BMHRC and all other Government or non-government departments/ agencies involved in the implementation of Relief and Rehabilitation Programme and research activity, to carry out the above directions expeditiously and without demur and default.

We grant liberty to the applicants and/or the Petitioners or any other affected person to move the High Court of Madhya Pradesh, Bench at Jabalpur, in the event of violation, non-compliance or default of any of the above directions or any other orders passed by this Court.

**36.** Before we part with this matter, we consider it our duty to place on record our appreciation for the able assistance rendered by the Learned Counsel appearing for the respective parties and the functions performed by the various Chairpersons and Committees constituted under the orders of the Court, including the Bhopal Memorial Hospital Trust.

**37.** This writ petition is transferred to the High Court of Madhya Pradesh in the above terms. All applications are disposed of accordingly.

**38.** 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 1 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 the 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 the NGT. This will help in rendering expeditious and specialized justice in the field of environment to all concerned.

**39.** 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 specialized tribunal, that is the NGT, created under the provisions of the NGT Act. The Courts may be well advised to direct transfer of such cases to the NGT in its discretion, as it will be in the fitness of administration of justice.

**40.** Normally, we would have even transferred this case to NGT. However, as it does not involve any complex or other environmental issues and primarily requires administrative supervision for proper execution of the orders of the Courts, we have considered it appropriate to transfer this case to the High Court of Madhya Pradesh. We may notice that the supervisory work concerns itself with regard to the proper functioning of the various Committees, which were constituted under the orders of the Court, to ensure proper running of the hospital established by the government and health care facilities available to the Bhopal Gas victims. Thus, the matter should be heard and supervisory jurisdiction be exercised by the High Court to better serve the ends of justice.

**41.** The Registry is directed to transmit the records of the Writ Petition No. 50/1998 to the Madhya Pradesh High Court, Bench at Jabalpur, forthwith and also send copies of this order to all concerned quarters of the Union of India, the State of Madhya Pradesh, the Monitoring Committee, the Advisory Committee, ICMR, BMHRC and the NIREH for compliance of these directions without delay and default.

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MANU/SC/0223/2019

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**IN THE SUPREME COURT OF INDIA**

Civil Appeal Nos. 4763-4764, 8773-8774, 9542-9543 of 2013, 5782 of 2014, 1552-1554, 23 and 1582 of 2019

**Decided On:** 18.02.2019

Tamil Nadu Pollution Control Board **Vs.** Sterlite Industries (I) Ltd. and Ors.

**Hon'ble Judges/Coram:**

*Rohinton Fali Nariman and Navin Sinha, JJ.*

**Counsels:**

*For Appearing Parties: Balaji Srinivasan, AAG, C.S. Vaidyanathan, K.V. Viswanathan, Guru Krishnakumar, C. Aryama Sundaram, R. Raizada, Sr. Advs., M. Yogesh Kanna, Siddhant Kohli, Vrinda Bhandari, Ravi Raghunath, Venkatraman, Akshay Nagarajan, G. Sivabalamurugan, G. Ananda Selvam, Vasantha Kumar, Karuppiyah, Vivek Bharathi, Vinod Khanna B., R. Nedumaran, Beno Bencigar, Parijat Kishore, Santosh Kumar Tripathi, Rohini Musa, Abhishek Gupta, Zafar Inayat, Arjun Singh, Deepak Goel, Ashutosh Kumar Sharma, Rajeev Dubey, Kamendra Mishra, Rachna Gupta, Nikhil Nayyar, K.V. Bharathi Upadhyaya and Vaiko, Advs. and Party-in-Person*

**Case Category:**

APPEAL AGAINST ORDERS OF STATUTORY BODIES - TRIBUNALS

**Case Note:**

**Environment - Maintainability of appeal - Section 16(a) of National Green Tribunal Act, 2010 - Present appeals arose out of orders that had been passed by National Green Tribunal ["NGT"] submitting that, appeal before NGT was not maintainable and hence, order was without jurisdiction - Whether NGT's order was clearly outside its statutory powers conferred by the Water Act, the Air Act, and the NGT Act.**

**Facts:**

**The Respondent, Sterlite Industries (India) Ltd./Vedanta Ltd., was operating a copper smelter plant at the State Industries Promotion Corporation of Tamil Nadu Ltd. (SIPCOT). Respondent received a No-Objection Certificate ["NOC"] from the Tamil Nadu Pollution Control Board ["TNPCB"] for the production of blister copper and sulphuric acid. The TNPCB granted its consent under the Air (Prevention and Control of Pollution) Act, 1981 ["Air Act"] and Water (Prevention and Control of Pollution) Act, 1974 ["Water Act"] on 22.05.1995. After obtaining the requisite permissions, the consent to operate the plant was issued by the TNPCB. Production commenced. The residents of nearby areas started complaining of irritation, throat infection, severe cough, breathing problem, nausea etc. due to emissions from Sterlite Industries. Reports were obtained after inspection of the premises by the TNPCB. Based on these reports, the TNPCB issued a show-cause notice and directed closure of the unit under Section 31A of the Air Act on 29.03.2013. This order was**

stayed by the NGT on 31.05.2013, allowing the Respondent to commence production subject to certain conditions. Against this, the TNPCB filed Civil Appeal which will be disposed of by the judgment delivered in this case. Finally, the NGT set aside the TNPCB order, against which, Civil Appeal were filed, which again will be disposed of by this judgment. Appellants herein raised the issue of maintainability of the Respondent's appeal before the NGT, stating that an appeal should have been filed first before the appellate authority under the Air Act/the National Green Tribunal Act, 2010 ["NGT Act"]. This ground of maintainability was decided against the Appellants by the impugned order dated 08.08.2013. Both the Respondent as well as the Appellants made their detailed comments on the Committee's report. The NGT then heard final arguments and dictated the impugned order on 15.12.2018, in which it substantially accepted the Committee's recommendations. In doing so, it set aside the six impugned orders in the composite appeal. One major bone of contention of both the State of Tamil Nadu as well as the TNPCB in this case is that the appeal before the NGT is not maintainable and hence, the order is without jurisdiction.

#### **Held, while disposing of the appeals**

1. An appeal is a creature of statute and an appellate tribunal has to act strictly within the domain prescribed by statute. It An appeal would lie from an order or decision of the appellate authority under Section 28 of the Water Act to the NGT only Under Section 33B(a) of the Water Act read with Section 16(a) of the NGT Act. Similarly, an appeal would lie from an order or decision of the appellate authority under Section 31 of the Air Act to the NGT only Under Section 31B of the Air Act read with Section 16(f) of the NGT Act. Obviously, since no order or decision had been made by the appellate authority under either the Water Act or the Air Act, any direct appeal against an original order to the NGT would be incompetent. NGT's jurisdiction being strictly circumscribed by Section 33B of the Water Act, read with Section 31B of the Air Act, read with Section 16(a) and (f) of the NGT Act, would make it clear that it is only orders or decisions of the appellate authority that are appealable, and not original orders. On the facts of the present case, it is clear that an appeal was pending before the appellate authority, when the NGT set aside the original order dated 09.04.2018. This being the case, the NGT's order being clearly outside its statutory powers conferred by the Water Act, the Air Act, and the NGT Act, would be an order passed without jurisdiction.[31]

2. So far as the order dated 8th August, 2013 is concerned, It is seen how the NGT stated that the doctrine of necessity would take over if an appellate authority under the Act is not properly constituted so that no appeal can then be effectively preferred. This, again, is an argument that cannot be countenanced. If an appellate authority is either not yet constituted, or not properly constituted, a leapfrog appeal to the NGT cannot be countenanced. NGT is only conferred appellate jurisdiction from an order passed in exercise of first appeal. Where there is no such order, the NGT has no jurisdiction.[45]

3. Respondent's plant has been shut down since 9th April, 2018. Since impugned judgments of the NGT is set aside on the ground of maintainability, the order dated 22nd January, 2019 passed by the TNPCB, being a

consequential order, is also set aside. The Respondents are relegated to the position that the six orders impugned before the NGT, dealt with by the impugned judgment dated 15.12.2018, and the order dated 29.03.2013, dealt with by the final judgment dated 08.08.2013, are alive and operative. Given the fact that NGT judgments involved in these appeals are set aside on the ground of maintainability, it will be open for the Respondents to file a writ petition in the High Court against all the aforesaid orders. If such writ petition is filed, it will be open for the Respondent to apply for interim reliefs considering that their plant has been shut down since 09.04.2018. Also, since their plant has been so shut down for a long period, and they are exporting a product which is an important import substitute, the Respondent may apply to the Chief Justice of the High Court for expeditious hearing of the writ petition, which will be disposed of on merits notwithstanding the availability of an alternative remedy in the case of challenge to the 09.04.2018 order of the TNPCB. The appeals are disposed of accordingly.[45]

## JUDGMENT

**Rohinton Fali Nariman, J.**

**1.** The present appeals arise out of orders that have been passed by the National Green Tribunal ["**NGT**"] dated 31.05.2013, 08.08.2013, and 15.12.2018. The brief facts necessary to appreciate the controversy raised in the present case are as follows.

**2.** The Respondent, Sterlite Industries (India) Ltd./Vedanta Ltd., was operating a copper smelter plant at the State Industries Promotion Corporation of Tamil Nadu Ltd. (SIPCOT) Industrial Complex at Thoothukudi, Tamil Nadu. On 01.08.1994, the Respondent received a No-Objection Certificate ["**NOC**"] from the Tamil Nadu Pollution Control Board ["**TNPCB**"] for the production of blister copper and sulphuric acid. The environmental clearance to the project by the Ministry of Environment, Forest, and Climate Change ["**MoEF**"] followed on 16.01.1995. On 17.05.1995, the State MoEF also granted environmental clearance to the Respondent. The TNPCB granted its consent under the Air (Prevention and Control of Pollution) Act, 1981 ["**Air Act**"] and Water (Prevention and Control of Pollution) Act, 1974 ["**Water Act**"] on 22.05.1995. After obtaining the requisite permissions, the consent to operate the plant was issued on 14.10.1996 by the TNPCB. Production commenced on 01.01.1997. However, the environmental clearances that were granted were challenged before the Madras High Court in Writ Petition Nos. 15501-15503/1996, 5769/1997, and 16961/1998. On 20.05.1999, the TNPCB granted its consent for production of two more products, namely, phosphoric acid and hydrofluorosilicic acid. On 21.09.2004, a Supreme Court Monitoring Committee was constituted to verify the compliance status of hazardous waste management. It recommended to the MoEF that the environmental clearance for the proposed expansion should not be granted, and if granted, should be revoked. On 19.04.2005, the TNPCB issued consent to operate, subject to fulfillment of various conditions for the expanded capacity. Meanwhile, the Madras High Court, on 28.09.2010, allowed the various writ petitions that had been filed and quashed the environmental clearances granted to the Respondent and directed the TNPCB to close down the plant.

**3.** Meanwhile, on 23.03.2013, the residents of nearby areas started complaining of irritation, throat infection, severe cough, breathing problem, nausea etc. due to emissions from Sterlite Industries. Reports were obtained after inspection of the

premises by the TNPCB. Based on these reports, the TNPCB issued a show-cause notice dated 24.03.2013 and directed closure of the unit Under Section 31A of the Air Act on 29.03.2013. This order was stayed by the NGT on 31.05.2013, allowing the Respondent to commence production subject to certain conditions. Against this, the TNPCB filed Civil Appeal Nos. 4763-4764 of 2013, which will be disposed of by the judgment delivered in this case. Finally, on 08.08.2013, the NGT set aside the TNPCB order dated 29.03.2013, against which, Civil Appeal Nos. 8773-8774 of 2013 were filed, which again will be disposed of by this judgment. It is important to note that the Appellants herein raised the issue of maintainability of the Respondent's appeal before the NGT, stating that an appeal should have been filed first before the appellate authority under the Air Act/the National Green Tribunal Act, 2010 ["**NGT Act**"]. This ground of maintainability was decided against the Appellants by the impugned order dated 08.08.2013.

4. Owing to various interim orders passed by the NGT, the Respondent continued to operate its plant. On 13.04.2016, the TNPCB granted consent to operate the plant for one year subject to certain conditions. Post inspection of the unit of the Respondent in March 2017, the TNPCB issued a show-cause notice dated 14.03.2017 for violations under the Air Act and the Water Act which, apparently, was not pursued. On 06.09.2017, an inspection report by the TNPCB was made, and an order passed on 07.09.2017, granting renewal of consent to operate only till 31.03.2018 subject to various conditions. Meanwhile, a protest had been organized in March 2018 by some persons against the proposed expansion sought by the Respondent. The Respondent, therefore, had to file Writ Petition No. 7313 of 2018 before the Madurai Bench of the Madras High Court for police protection. This Writ Petition was disposed of by an order dated 04.04.2018 with a direction to consider the Respondent's application. On 09.04.2018, the TNPCB refused renewal of consent to operate to the Respondent's unit based on non-compliance with certain conditions that were laid down under the Air Act and the Water Act. On 12.04.2018, the Respondent filed Appeal Nos. 36-37 of 2018 before the appellate authority Under Section 28 of the Water Act. In these appeals, various orders were passed, until, on 06.06.2018, the following order was passed:

APPLICATIONS 28 & 29/2018, APPLICATIONS 30 & 31/2018 AND APPEALS 36 & 37/2018:

Heard.

In view of the Government Order passed by the Government of Tamilnadu in G.O. Ms. No: 72, Environment & Forests (EC-3) Department Dated: 28.5.2018, directing the Tamilnadu Pollution Control Board to close the plant permanently, we feel it is not appropriate to hear the Appeals and decide the issue at this juncture.

Hence the Appeals and applications are adjourned to 10.7.2018.

On 10.07.2018, the matter was further adjourned as follows:

APPLICATIONS 28 & 29/2018, APPLICATIONS 30 & 31/2018 AND APPEALS 36 & 37/2018:

In view of the remarks made in the adjudication proceedings on 6.6.2018 and as the position is same now, the Appeals and Applications are adjourned to 21.8.2018.

Finally, on 18.12.2018, i.e., three days after the impugned order was passed by the NGT on 15.12.2018, an order passed by the appellate authority was as follows:

APPLICATIONS 28, 29, 30 & 31/2018 AND APPEALS 36 & 37/2018:

Ms. Janani, counsel for the Appellant and Mr. V. Vasanthakumar, counsel for the Respondent-Board are present. None is present on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interveners.

Counsel for the Appellant seeks permission to withdraw the Appeals. She has also filed a memo to that effect.

In view of the order passed by the Hon'ble National Green Tribunal, Principal Bench, New Delhi on 15.12.2018 in Appeal No. 87 of 2018 setting aside the impugned order dated 9.4.2018 which is subject matter of these appeals pending before this Appellate Authority, the Appeals have become infructuous and hence they are closed.

**5.** On 12.04.2018, an order was passed by the TNPCB Under Section 33A of the Water Act and Section 31A of the Air Act directing that the Respondent's unit shall not resume production without obtaining prior approval/renewal or consent from the TNPCB. This was followed by two orders, both dated 23.05.2018, again issued under the same Sections, this time to close down the Respondent's unit and disconnect power supply to it. Finally, on 28.05.2018, an order was issued by the Government of Tamil Nadu Under Section 18(1)(b) of the Water Act stating:

It is brought to the notice of the Government that Tamil Nadu Pollution Control Board did not renew the Consent to Operate to M/s. Vedanta Limited, Copper Smelter Plant, SIPCOT Industrial Complex, Thoothukudi District in its order dated 9.4.2018. Subsequently, on 23.5.2018, Tamil Nadu Pollution Control Board has also issued directions for closure and disconnection of power supply to the Unit. The power supply has been disconnected on 24.5.2018.

**2.** Under Article 48-A of the Constitution, "the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country".

**3.** Under Sections, 18(1)(b) of the Water Act, 1974 in the larger public interest, the Government endorse the closure direction of the Tamil Nadu Pollution Control Board and also direct the Tamil Nadu Pollution Control Board to seal the unit and close the plant permanently.

**6.** On the same date, the TNPCB issued a letter to the District Collector, inter alia, directing him to seal the Respondent's unit. These six orders became the subject matter of a composite Appeal No. 87 of 2018 Under Section 16 of the NGT Act.

**7.** A writ petition was filed by the Respondent before the Madurai Bench of the Madras High Court on 18.06.2018 so that the Respondent could access its unit to maintain its plant. This was dismissed as withdrawn on 09.07.2018.

**8.** The Appellants then took up a plea of maintainability of the composite appeal. As this was not being disposed of by the NGT, this Court, by its order dated 17.08.2018, directed the NGT to render its final findings, both on maintainability as well as on merits. On 20.08.2018, the NGT constituted a Committee to go into the material



produced by the parties to the Civil Appeal and to visit the site. This Committee was ultimately headed by Justice Tarun Agarwala, former Chief Justice of the Meghalaya High Court, together with two experts, one being a representative of the Central Pollution Control Board ["CPCB"] and another a representative of the MoEF. Aggrieved by this order, the Appellants knocked on the doors of this Court. This Court disposed of this appeal on 10.09.2018, by stating:

By our order dated 17.08.2018, we had made it clear that the NGT may continue to hear the matter both on merits as well as on maintainability and finally decide the matter on both counts.

Since our order is not referred to in the order dated 20.08.2018 passed by the NGT, we need only to state that once the Committee's report is given to the Tribunal, it will proceed to decide the matter in accordance with our order dated 17.08.2018.

xxx xxx xxx

A review petition that was filed against this order was dismissed.

**9.** The Committee constituted by the NGT then inspected the site on various dates in September/October, 2018, and heard all concerned parties as well as intervenors. It then came out with a detailed Enquiry Report dated 20.11.2018, in which it concluded as follows:

On the basis of the site visit, public hearing and after hearing the Appellant Company, State of Tamil Nadu, Tamil Nadu Pollution Control Board, and the intervenors and, upon consideration of the issues raised, the Committee is of the opinion:

**1 .** The impugned orders cannot be sustained as it is against the principles of natural justice.

No notice or opportunity of hearing was given to the Appellant.

**2 .** The grounds mentioned in the impugned orders are not that grievous to justify permanent closure of the factory.

**3 .** Other issues raised also does not justify the closure of the factory even if the Appellant was found to be violating the conditions/norms/directions.

**4 .** In the event the Hon'ble Tribunal is of the opinion that the factory should commence production, the committee is of the opinion that the following directions may be issued.

a) As per condition No. 44 of the Consent Order dated 19-04-2005, the Appellant should be directed to monitor ground water quality including heavy metals such as Arsenic, Cadmium, Silver, Copper, Fluoride, etc. in and around the factory premises and nearby villages once a month and such report should be furnished to the TNPCB.

b) The sampling of the above should be taken in the presence of an official from TNPCB.

c) In addition to the above, the sampling of effluent/emission and solid waste should also be done by a monitoring group to be constituted by TNPCB comprising a representative of the District Collector, an official of TNPCB, NGOs and academicians as per condition No. 43 of Consent Order dated 19-04-2005.

d) Both the reports should be sent by TNPCB to CPCB for analysis. Recommendations made by CPCB should be followed.

e) Copper slag dumped at all the eleven sites including the Uppar River should be removed. If copper slag has been used for landfill purposes, then the excess amount of the slag over and above the level of ground would be removed and thereafter the landfill should be compacted with one feet of soil, so that the copper slag is not blown away by the strong winds.

f) The dead stock of copper slag lying in the dump yard inside the factory premises which has solidified should be removed in a time bound manner. Thereafter, the bottom of the dump yard and the side walls should be covered with HDPE liner. Further, the Company should ensure that the generation and disposal of copper slag is maintained in the ratio of 1:1 and that the Company at best, can retain 10 days generation of copper slag in its dump yard.

g) The dead stock of gypsum lying in the dump yard inside the factory premises which has solidified should be removed in a time bound manner. Thereafter, the bottom of the dump yard and the side walls should be covered with HDPE liner. Further, the Company should ensure that the generation and disposal of gypsum is maintained in the ratio of 1:1 and that the Company at best, can retain 10 days generation of gypsum in its dump yard.

h) The Company before disposing copper slag, gypsum (or) any other waste product will seek previous permission from the TNPCB.

i) Application of the Company for obtaining valid authorization for disposal of hazardous waste under Hazardous & Other Wastes (Management, & Transboundary Movement) Rules, 2016 should be disposed of by the TNPCB in a time bound manner.

j) Even though there is no requirement of analyzing the air samples through an accredited laboratory nonetheless a direction should be issued to the Appellant that they will conduct a periodical survey for ambient air quality/noise level/stack emission through accredited laboratories of MoEF & CC/NABL and furnish such report to the TNPCB.

k) The Appellant company should be directed that they shall develop a green belt of 25 metres width around the battery



limits of its factory by planting native and high foliage tree and also in and around the factory.

l) The State of Tamil Nadu/TNPCB should collect data from their primary health centres and Govt. Hospitals to monitor the various ailments that are being complaint of by the inhabitants living in and around the factory premises.

m) The State Government should specify the module to the Appellant for conducting the proper and designed health monitoring study.

n) The direction No. (iii) on "Source Apportionment Study" and direction No. (ix) on "conducting a study on health hazards" passed by the NGT in its judgment dated 8/8/2013 in Appeal 58 of 2013 should be carried out by the Tamil Nadu State Government and TNPCB. Such reports should be furnished to NGT in a time-bound manner.

o) The Appellant should be directed to start the construction of gypsum pond immediately and complete the same in a time bound manner as per the conditions laid down in the guidelines given by CPCB in October, 2014.

p) The Appellant shall undertake a fresh detailed hydrogeological study for determining aquifer vulnerability and migration of leachate from the existing phosphogypsum pond through a reputed organization approved by the TNPCB as per condition No. 15 of the Consent Order dated 19/04/2005.

q) Direction should be given to the TNPCB as well as to the Appellant to take independent ground water samples from the same points for the purpose of finding out groundwater pollution if any. Such reports should then be compared by the CPCB. Recommendations made by CPCB should be followed.

r) Directions/Regulation may be framed for import of high grade copper ore.

s) Irrespective of the norms, stack height in any case be increased in order to remove the ambiguity and the grievance of inhabitants of the people of the Tuticorin with regard to emission of SO<sub>2</sub>.

t) Till such time, the stack height is not increased, the production of copper as well as sulphuric acid should be restricted/reduced to match the existing stack height.

u) The transportation of copper ore concentrate from the port to the factory premises should be done in a closed conveyance or through a pipe conveyor system.

v) Self-monitoring mechanism needs to be prepared by the Appellant for the periodic monitoring of Ambient Air

Quality/Stack emissions/Fugitive emissions/ground water quality/surface water quality/soil quality/slag analysis through third party and report shall be furnished to the concerned regulatory agencies.

w) All the monitoring data, compliance reports of CTE/CTO/EC and environmental statement shall be uploaded on the website of the Company.

x) TNPCB should be directed to commission "Regional Environmental Impact Assessment Study" in and around Tuticorin District by engaging a reputed national agency.

y) CPCB recommendations as contained in the order of NGT, dated 20.08.2018 to be complied with.

Both the Respondent as well as the Appellants made their detailed comments on the Committee's report. The NGT then heard final arguments and dictated the impugned order on 15.12.2018, in which it substantially accepted the Committee's recommendations. In doing so, it set aside the six impugned orders in the composite appeal. One major bone of contention of both the State of Tamil Nadu as well as the TNPCB in this case is that the appeal before the NGT is not maintainable and hence, the order dated 15.12.2018 is without jurisdiction.

**10.** As a postscript to this order, the TNPCB looked into the matter again, and issued yet another rejection letter dated 22.01.2019, by which the Respondent's application seeking renewal of consent to operate was rejected, stating that the conditions of various previous consents over the last 20 years had not been followed.

**11.** We have heard wide-ranging arguments from learned Counsel appearing on behalf of all the parties as well as the intervenors, on maintainability as well as on merits. Since we will be deciding this case on maintainability alone, we have not ventured to state anything on the merits of the case.

**12.** Shri C.S. Vaidyanathan, learned Senior Advocate appearing on behalf of the TNPCB, showed us various provisions of the Water Act, Air Act, and the NGT Act and argued that the six impugned orders before the NGT were orders which could not have been corrected by the NGT. Insofar as the first order dated 09.04.2018 was concerned, an appeal was pending before the appellate authority, as a result of which, the NGT, when it set aside the said order, could not have done so. Similarly, the orders dated 12.04.2018, 23.05.2018, and 28.05.2018, made Under Section 33A of the Water Act and Section 31A of the Air Act, were composite orders issued. As orders Under Section 31A of the Air Act were not appealable to the NGT either under the Air Act or Under Section 16 of the NGT Act, the Tribunal acted without jurisdiction in interfering with these orders. Further, the order dated 28.05.2018, issued by the Government of Tamil Nadu Under Section 18 of the Water Act, was certainly not an appealable order under either the Water Act or the NGT Act, and could only have been corrected in judicial review in a writ petition filed Under Article 226 of the Constitution of India or in a suit before a Civil Court. According to him, therefore, the setting aside of such an order was also completely without jurisdiction. Shri K.V. Viswanathan, learned Senior Advocate appearing on behalf of the State of Tamil Nadu, added to these submissions. He cited some of our judgments as well as statutes and judgments of the English Courts to show that once an appeal is available to an appellate authority, after which an appeal lies to the NGT, a party cannot leapfrog directly to the NGT. Apart from this, the learned Senior

Advocate also argued, based on the scheme of the Water Act, Air Act, and NGT Act, that all the appeals filed before the NGT were incompetent. Shri Guru Krishnakumar, learned Senior Advocate appearing on behalf of the TNPCB, also went on to criticize the order passed by the NGT dated 08.08.2013 on maintainability. According to him, no doctrine of necessity could be imported if an appellate tribunal was not constituted, as a result of which an appeal could not be argued before the appellate authority. Consequently, a leapfrog appeal would not be maintainable before the NGT. According to the learned Senior Advocate, this order also had to be set aside for the reason that even assuming that the appellate authority was not constituted on the date on which an appeal could have been preferred to it, the NGT, being a second appellate tribunal, would not have jurisdiction, and that either a suit or a writ petition Under Article 226 would have to be filed against the original order.

**13.** As against these arguments, Shri C.A. Sundaram, learned Senior Advocate appearing on behalf of the Respondents in all three appeals, sought to sustain the order of the NGT in these three appeals. The learned Senior Advocate painstakingly took us through all the orders that were impugned before the NGT, together with the relevant provisions of the Air Act, the Water Act, and the NGT Act. According to the learned Senior Advocate, so far as the order dated 09.04.2018 is concerned, thanks to a government affidavit filed, the appeal before the appellate authority had become infructuous, as a result of which, a direct appeal to the NGT would obviously become maintainable. Insofar as the combined orders Under Sections 33A and 31A of the Water Act and the Air Act, respectively, are concerned, according to him, an express appeal is provided to the NGT against orders passed Under Section 33A of the Water Act, and even if there is no appeal provided Under Section 31A of the Air Act, yet, as four out of five items in these orders dealt with the Water Act, the order could be stated to be substantially an order under the Water Act, and therefore, appealable as such. He added that, in any case, such orders could be corrected Under Section 14 of the NGT Act to avoid piecemeal litigation. Further, in any case, according to the learned Senior Advocate, a direction made Under Section 31A of the Air Act is undoubtedly equivalent to an order made Under Section 31 of the Air Act, and therefore, would be expressly appealable Under Section 16 of the NGT Act. Another without prejudice argument was made, that assuming all other arguments failed, these matters are only procedural, and therefore, appeals must necessarily land up before the expert tribunal which is so constituted as an expert tribunal to deal with all matters relating to the environment. For this, he referred to and relied strongly upon Sections 14, 15, 29, and 33 of the NGT Act. Insofar as the attack made upon the order dated 28.05.2018 of the Government of Tamil Nadu Under Section 18 of the Water Act is concerned, Shri Sundaram argued that on a proper construction of Section 18 read with the other provisions of the Water Act, only a general order, dealing with general matters, could be passed under the said Section, and not an order to shut down one particular industry. Since the Section 18 order purports to deal with only one particular industry, it is non est and liable to be ignored. An alternate argument made is that even though the order states that it is made Under Section 18, it can otherwise be traced to Section 29 of the Water Act as an order made in revision, and would, therefore, be appealable as such. The learned Senior Advocate then argued that, in any case, this is an order by which a direction has been made by the State Government to the TNPCB and, therefore, does not directly affect his client. He also argued that when this order was challenged before the NGT, the defence of the Government and the TNPCB would be that this is an order which, though binding on the TNPCB, would also impact the Respondent. This being the case, the NGT could always go into whether such a defence is a valid defence, and could, therefore, decide the matter. He also went on to state that the NGT is an expert body constituted specifically under a special Act, which is far better equipped than the High Court Under

Article 226 exercising its powers in the writ jurisdiction, and therefore, all matters dealing with the environment should necessarily be decided by the NGT alone. He also relied upon our judgment in **L. Chandra Kumar v. Union of India and Ors.**, MANU/SC/0261/1997 : (1997) 3 SCC 261 [**L. Chandra Kumar**], in which it has been made clear that Tribunals can exercise powers of judicial review and that, therefore, being the equivalent of a High Court, the NGT could, in exercise of its powers of judicial review, have interfered with the State Government's orders passed Under Section 18 of the Water Act.

**14.** Having heard learned Counsel for all parties, it is important first to advert to the provisions of the three Acts in question.

**15.** The relevant Sections of the Water Act are as follows:

**18. Powers to give directions.**--(1) In the performance of its functions under this Act--

(a) the Central Board shall be bound by such directions in writing as the Central Government may give to it; and

(b) every State Board shall be bound by such directions in writing as the Central Board or the State Government may give to it:

Provided that where a direction given by the State Government is inconsistent with the direction given by the Central Board, the matter shall be referred to the Central Government for its decision.

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**25. Restrictions on new outlets and new discharges.**--(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) begin to make any new discharge of sewage:

Provided that a person in the process of taking any steps to establish any industry, operation or process immediately before the commencement of the Water (Prevention and Control of Pollution) Amendment Act, 1988, for which no consent was necessary prior to such commencement, may continue to do so for a period of three months from such commencement or, if he has made an application for such consent, within the said period of three months, till the disposal of such application.

(2) An application for consent of the State Board Under Sub-section (1) shall be made in such form, contain such particulars and shall be accompanied by such fees as may be prescribed.

(3) The State Board may make such inquiry as it may deem fit in respect of the application for consent referred to in Sub-section (1) and in making any such inquiry shall follow such procedure as may be prescribed.

(4) The State Board may--

(a) grant its consent referred to in Sub-section (1), subject to such conditions as it may impose, being--

(i) in cases referred to in Clauses (a) and (b) of Sub-section (1) of Section 25, conditions as to the point of discharge of sewage or as to the use of that outlet or any other outlet for discharge of sewage;

(ii) in the case of a new discharge, conditions as to the nature and composition, temperature, volume or rate of discharge of the effluent from the land or premises from which the discharge or new discharge is to be made; and

(iii) that the consent will be valid only for such period as may be specified in the order,

and any such conditions imposed shall be binding on any person establishing or taking any steps to establish any industry, operation or process, or treatment and disposal system or extension or addition thereto, or using the new or altered outlet, or discharging the effluent from the land or premises aforesaid; or

(b) refuse such consent for reasons to be recorded in writing.

(5) Where, without the consent of the State Board, any industry, operation or process, or any treatment and disposal system or any extension or addition thereto, is established, or any steps for such establishment have been taken or a new or altered outlet is brought into use for the discharge of sewage or a new discharge of sewage is made, the State Board may serve on the person who has established or taken steps to establish any industry, operation or process, or any treatment and disposal system or any extension or addition thereto, or using the outlet, or making the discharge, as the case may be, a notice imposing any such conditions as it might have imposed on an application for its consent in respect of such establishment, such outlet or discharge.

(6) Every State Board shall maintain a register containing particulars of the conditions imposed under this Section and so much of the register as relates to any outlet, or to any effluent, from any land or premises shall be open to inspection at all reasonable hours by any person interested in, or affected by such outlet, land or premises, as the case may be, or by any person authorised by him in this behalf and the conditions so contained in such register shall be conclusive proof that the consent was granted subject to such conditions.

(7) The consent referred to in Sub-section (1) shall, unless given or refused earlier, be deemed to have been given unconditionally on the expiry of a period of four months of the making of an application in this behalf complete in all respects to the State Board.



(8) For the purposes of this Section and Sections 27 and 30,--

(a) the expression "new or altered outlet" means any outlet which is wholly or partly constructed on or after the commencement of this Act or which (whether so constructed or not) is substantially altered after such commencement;

(b) the expression "new discharge" means a discharge which is not, as respects the nature and composition, temperature, volume, and rate of discharge of the effluent substantially a continuation of a discharge made within the preceding twelve months (whether by the same or a different outlet), so however that a discharge which is in other respects a continuation of previous discharge made as aforesaid shall not be deemed to be a new discharge by reason of any reduction of the temperature or volume or rate of discharge of the effluent as compared with the previous discharge.

**26. Provision regarding existing discharge of sewage or trade effluent.**--Where immediately before the commencement of this Act any person was discharging any sewage or trade effluent into a stream or well or sewer or on land, the provisions of Section 25 shall, so far as may be, apply in relation to such person as they apply in relation to the person referred to in that Section subject to the modification that the application for consent to be made Under Sub-section (2) of that Section shall be made on or before such date as may be specified by the State Government by notification in this behalf in the Official Gazette.

**27. Refusal or withdrawal of consent by State Board.**--(1) A State Board shall not grant its consent Under Sub-section (4) of Section 25 for the establishment of any industry, operation or process, or treatment and disposal system or extension or addition thereto, or to the bringing into use of a new or altered outlet unless the industry, operation or process, or treatment and disposal system or extension or addition thereto, or the outlet is so established as to comply with any conditions imposed by the Board to enable it to exercise its right to take samples of the effluent.

(2) A State Board may from time to time review--

(a) any condition imposed Under Section 25 or Section 26 and may serve on the person to whom a consent Under Section 25 or Section 26 is granted a notice making any reasonable variation of or revoking any such condition;

(b) the refusal of any consent referred to in Sub-section (1) of Section 25 or Section 26 or the grant of such consent without any condition, and may make such orders as it deems fit.

(3) Any condition imposed Under Section 25 or Section 26 shall be subject to any variation made Under Sub-section (2) and shall continue in force until revoked under that Sub-section.

**28. Appeals.**--(1) Any person aggrieved by an order made by the State Board Under Section 25, Section 26 or Section 27 may, within thirty days from the date on which the order is communicated to him, prefer an appeal to such

authority (hereinafter referred to as the appellate authority) as the State Government may think fit to constitute:

Provided that the appellate authority may entertain the appeal after the expiry of the said period of thirty days if such authority is satisfied that the Appellant was prevented by sufficient cause from filing the appeal in time.

(2) An appellate authority shall consist of a single person or three persons, as the State Government may think fit, to be appointed by that Government.

(3) The form and manner in which an appeal may be preferred Under Sub-section (1), the fees payable for such appeal and the procedure to be followed by the appellate authority shall be such as may be prescribed.

(4) On receipt of an appeal preferred Under Sub-section (1), the appellate authority shall, after giving the Appellant and the State Board an opportunity of being heard, dispose of the appeal as expeditiously as possible.

(5) If the appellate authority determines that any condition imposed, or the variation of any condition, as the case may be, was unreasonable, then,--

(a) where the appeal is in respect of the unreasonableness of any condition imposed, such authority may direct either that the condition shall be treated as annulled or that there shall be substituted for it such condition as appears to it to be reasonable;

(b) where the appeal is in respect of the unreasonableness of any variation of a condition, such authority may direct either that the condition shall be treated as continuing in force unvaried or that it shall be varied in such manner as appears to it to be reasonable.

**29. Revision.**--(1) The State Government may at any time either of its own motion or on an application made to it in this behalf, call for the records of any case where an order has been made by the State Board Under Section 25, Section 26 or Section 27 for the purpose of satisfying itself as to the legality or propriety of any such order and may pass such order in relation thereto as it may think fit:

Provided that the State Government shall not pass any order under this Sub-section without affording the State Board and the person who may be affected by such order a reasonable opportunity of being heard in the matter.

(2) The State Government shall not revise any order made Under Section 25, Section 26 or Section 27 where an appeal against that order lies to the appellate authority, but has not been preferred or where an appeal has been preferred such appeal is pending before the appellate authority.

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**33A. Power to give directions.**--Notwithstanding anything contained in any other law, but subject to the provisions of this Act, and to any directions that the Central Government may give in this behalf, a Board may, in the exercise of its powers and performance of its functions under this Act, issue any directions



in writing to any person, officer or authority, and such person, officer or authority shall be bound to comply with such directions.

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

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

(b) the stoppage or Regulation of supply of electricity, water or any other service.

**33B. Appeal to National Green Tribunal.**--Any person aggrieved by,--

(a) an order or decision of the appellate authority Under Section 28, made on or after the commencement of the National Green Tribunal Act, 2010; or

(b) an order passed by the State Government Under Section 29, on or after the commencement of the National Green Tribunal Act, 2010; or

(c) directions issued Under Section 33-A by a Board, on or after the commencement of the National Green Tribunal Act, 2010,

may file an appeal to the National Green Tribunal established Under Section 3 of the National Green Tribunal Act, 2010, in accordance with the provisions of that Act.

**16.** The relevant Sections of the Air Act are as follows:

**21. Restrictions on use of certain industrial plants.**--(1) Subject to the provisions of this section, no person shall, without the previous consent of the State Board, establish or operate any industrial plant in an air pollution control area:

Provided that a person operating any industrial plant in any air pollution control area immediately before the commencement of Section 9 of the Air (Prevention and Control of Pollution) Amendment Act, 1987, for which no consent was necessary prior to such commencement, may continue to do so for a period of three months from such commencement or, if he has made an application for such consent within the said period of three months, till the disposal of such application.

(2) An application for consent of the State Board Under Sub-section (1) shall be accompanied by such fees as may be prescribed and shall be made in the prescribed form and shall contain the particulars of the industrial plant and such other particulars as may be prescribed:

Provided that where any person, immediately before the declaration of any area as an air pollution control area, operates in such area any industrial plant such person shall make the application under this Sub-section within such period (being not less than three months from the date of such declaration) as may be prescribed and where such person makes such application, he shall be deemed to be operating such

industrial plant with the consent of the State Board until the consent applied for has been refused.

(3) The State Board may make such inquiry as it may deem fit in respect of the application for consent referred to in Sub-section (1) and in making any such inquiry, shall follow such procedure as may be prescribed.

(4) Within a period of four months after the receipt of the application for consent referred to in Sub-section (1), the State Board shall, by order in writing and for reasons to be recorded in the order, grant the consent applied for subject to such conditions and for such period as may be specified in the order, or refuse such consent:

Provided that it shall be open to the State Board to cancel such consent before the expiry of the period for which it is granted or refuse further consent after such expiry if the conditions subject to which such consent has been granted are not fulfilled:

Provided further that before cancelling a consent or refusing a further consent under the first proviso, a reasonable opportunity of being heard shall be given to the person concerned.

(5) Every person to whom consent has been granted by the State Board Under Sub-section (4), shall comply with the following conditions, namely:-

(i) the control equipment of such specifications as the State Board may approve in this behalf shall be installed and operated in the premises where the industry is carried on or proposed to be carried on;

(ii) the existing control equipment, if any, shall be altered or replaced in accordance with the directions of the State Board;

(iii) the control equipment referred to in Clause (i) or Clause (ii) shall be kept at all times in good running condition;

(iv) chimney, wherever necessary, of such specifications as the State Board may approve in this behalf shall be erected or re-erected in such premises;

(v) such other conditions as the State Board may specify in this behalf; and

(vi) the conditions referred to in Clauses (i), (ii) and (iv) shall be complied with within such period as the State Board may specify in this behalf:

Provided that in the case of a person operating any industrial plant in an air pollution control area immediately before the date of declaration of such area as an air pollution control area, the period so specified shall not be less than six months:

Provided further that--

(a) after the installation of any control equipment in

accordance with the specifications under Clause (i), or

(b) after the alteration or replacement of any control equipment in accordance with the directions of the State Board under Clause (ii), or

(c) after the erection or re-erection of any chimney under Clause (iv),

no control equipment or chimney shall be altered or replaced or, as the case may be, erected or re-erected except with the prior approval of the State Board.

(6) If due to any technological improvement or otherwise the State Board is of the opinion that all or any of the conditions referred to in Sub-section (5) require or requires variation (including the change of any control equipment, either in whole or in part), the State Board shall, after giving the person to whom consent has been granted an opportunity of being heard, vary all or any of such conditions and thereupon such person shall be bound to comply with the conditions as so varied.

(7) Where a person to whom consent has been granted by the State Board Under Sub-section (4) transfers his interest in the industry to any other person, such consent shall be deemed to have been granted to such other person and he shall be bound to comply with all the conditions subject to which it was granted as if the consent was granted to him originally.

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**31. Appeals.**--(1) Any person aggrieved by an order made by the State Board under this Act may, within thirty days from the date on which the order is communicated to him, prefer an appeal to such authority (hereinafter referred to as the Appellate Authority) as the State Government may think fit to constitute:

Provided that the Appellate Authority may entertain the appeal after the expiry of the said period of thirty days if such authority is satisfied that the Appellant was prevented by sufficient cause from filing the appeal in time.

(2) The Appellate Authority shall consist of a single person or three persons as the State Government may think fit to be appointed by the State Government.

(3) The form and the manner in which an appeal may be preferred Under Sub-section (1), the fees payable for such appeal and the procedure to be followed by the Appellate Authority shall be such as may be prescribed.

(4) On receipt of an appeal preferred Under Sub-section (1), the Appellate Authority shall, after giving the Appellant and the State Board an opportunity of being heard, dispose of the appeal as expeditiously as possible.

**31A. Power to give directions.**--Notwithstanding anything contained in any other law, but subject to the provisions of this Act and to any directions that the Central Government may give in this behalf a Board may, in the exercise of its powers and performance of its functions under this Act, issue any directions

in writing to any person, officer or authority, and such person, officer or authority shall be bound to comply with such directions.

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

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

(b) the stoppage or Regulation of supply of electricity, water or any other service.

**31B. Appeal to National Green Tribunal.**--Any person aggrieved by an order or decision of the Appellate Authority Under Section 31, made on or after the commencement of the National Green Tribunal Act, 2010, may file an appeal to the National Green Tribunal established Under Section 3 of the National Green Tribunal Act, 2010, in accordance with the provisions of that Act.

**17.** The relevant Sections of the NGT Act are as follows:

**2. Definitions.**--(1) In this Act, unless the context otherwise requires,--

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(m) "substantial question relating to environment" shall include an instance where,--

(i) there is a direct violation of a specific statutory environmental obligation by a person by which,--

(A) the community at large other than an individual or group of individuals is affected or likely to be affected by the environmental consequences; or

(B) the gravity of damage to the environment or property is substantial; or

(C) the damage to public health is broadly measurable;

(ii) the environmental consequences relate to a specific activity or a point source of pollution;

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**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.

**15. Relief, compensation and restitution.**---(1) The Tribunal may, by an order, provide,--

(a) relief and compensation to the victims of pollution and other environmental damage arising under the enactments specified in the Schedule I (including accident occurring while handling any hazardous substance);

(b) for restitution of property damaged;

(c) for restitution of the environment for such area or areas,

as the Tribunal may think fit.

(2) The relief and compensation and restitution of property and environment referred to in Clauses (a), (b) and (c) of Sub-section (1) shall be in addition to the relief paid or payable under the Public Liability Insurance Act, 1991 (6 of 1991).

(3) No application for grant of any compensation or relief or restitution of property or environment under this Section shall be entertained by the Tribunal unless it is made within a period of five years from the date on which the cause for such compensation or relief 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.

(4) The Tribunal may, having regard to the damage to public health, property and environment, divide the compensation or relief payable under separate heads specified in Schedule II so as to provide compensation or relief to the claimants and for restitution of the damaged property or environment, as it may think fit.

(5) Every claimant of the compensation or relief under this Act shall intimate to the Tribunal about the application filed to, or, as the case may be, compensation or relief received from, any other court or authority.

**16. Tribunal to have appellate jurisdiction.**---Any person aggrieved by,--

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

(b) an order passed, on or after the commencement of the National

Green Tribunal Act, 2010, by the State Government Under Section 29 of the Water (Prevention and Control of Pollution) Act, 1974 (6 of 1974);

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

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

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

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

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

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

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

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

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

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

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**29. Bar of jurisdiction.**--(1) With effect from the date of establishment of the



Tribunal under this Act, no civil court shall have jurisdiction to entertain any appeal in respect of any matter, which the Tribunal is empowered to determine under its appellate jurisdiction.

(2) No civil court shall have jurisdiction to settle dispute or entertain any question relating to any claim for granting any relief or compensation or restitution of property damaged or environment damaged which may be adjudicated upon by the Tribunal, and no injunction in respect of any action taken or to be taken by or before the Tribunal in respect of the settlement of such dispute or any such claim for granting any relief or compensation or restitution of property damaged or environment damaged shall be granted by the civil court."

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**33. Act to have overriding effect.**--The provisions of this Act, shall have effect notwithstanding anything inconsistent contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

**18.** It is important now to advert to both the orders dated 08.08.2013 and 15.12.2018, insofar as they deal with the maintainability of the appeals before them.

**19.** By the judgment of the NGT dated 08.08.2013, the NGT disposed of the plea on maintainability as follows:

**62.** Another aspect that would support the view that we are taking is the doctrine of necessity. Wherever in the facts and circumstances of the case, it is absolutely inevitable for a person to exercise another right available to it under the statute and where it is unable to exercise the preliminary right of appeal because of non-existence or non-proper constitution of the appellate authority and for its effective and efficacious exercise of right, it becomes necessary for the Appellant-company to invoke another remedy, then the same would be permitted unless it was so specifically barred by law governing the subject and the rights of the parties. It was upon the Appellant-company, particularly keeping in view the emergent situation created by issuance of the order dated 29<sup>th</sup> March, 2013, to avail of its right to appeal without any undue delay and as was rightly done by it within two days of the passing of the order. The unit of the Appellant-company had been directed to be shut down and the Appellant-company obviously could not have taken recourse to the remedy Under Section 31 of the Air Act as the authority itself was not properly constituted and was not functional. Besides the aid of the doctrine of necessity, the Appellant-company has also placed its reliance on Section 31B of the Air Act. An appeal against the order passed by the appellate authority in exercise of its powers Under Section 31 of the Air Act lies to the NGT in terms of Section 31B of the Air Act. In other words, the appellate order passed by the proper authority Under Section 31 of the Air Act is appealable to the NGT in terms of Section 31B. Thus, the NGT is the appellate authority of the appellate authority constituted Under Section 31 of the Air Act by the State Government. The Appellant-company has itself given up its right of first appeal before the appellate authority in view of the peculiar facts and circumstances of the case. The Respondents have placed reliance upon the judgment of the Supreme Court in *Manohar Lal v. Union of India*, (2010) 11 SCC 557 where the Court had taken



the view that no higher authority in the hierarchy or an appellate or revisional authority can exercise the power of the statutory authority nor the superior authority can mortgage its wisdom and direct the statutory authority to act in a particular manner. Firstly this judgment on facts and law has no application to the present case. Secondly, the non-constitution of the authority itself would bring the present case outside the application of the judgment of the Supreme Court in the case of *Manohar Lal* (supra).

**63.** We are unable to contribute ourselves to the contention raised that a direction passed Under Section 31A of the Air Act is not covered under the expression 'order' used in Section 31 of the Air Act. Any direction essentially would contain an element of order as it requires and calls upon the parties to comply with the same. 'Direction' itself means an order; an instruction how to proceed, like the judge's direction to the jury, while 'Order' is defined as a command, direction or instruction. This is how the *Black's Law Dictionary*, 9<sup>th</sup> Edition, refers to these two expressions. In other words, they can be used as synonyms. They are not conflicting terms and one can be read into the other. Thus, we find no substance in this contention raised on behalf of the Respondents.

**64.** An appellate authority, which is constituted under the statute, is completely distinct and different from an administrative authority constituted otherwise even to deal with adjudicatory proceedings. In the case of an appellate authority, it must satisfy the existence *de facto* and must function *de jure*, in accordance with law. If the appellate authority itself was not in conformity with the notification, it cannot be said that it could function in accordance with law without constitution of the three Member appellate authority. The cumulative effect of this discussion is that the objection in regard to maintainability is without any substance and is liable to be rejected. In view of this finding, it is not necessary for us to examine whether this could be treated as a petition Under Section 14 of the National Green Tribunal Act (for short 'the NGT Act') even if it was not maintainable in view of the objection taken by the Respondent in regard to maintainability of the present appeal.

**20.** Insofar as the judgment dated 15.12.2018 is concerned, the NGT, on maintainability, held as follows:

**44.** It is undisputed that this Tribunal is an Appellate Authority as far as orders of closure under the Air Act and the Water Act are concerned. The impugned orders dated 12.04.2018, 23.05.2018 and 28.05.2018 are such orders. Mere fact that an appeal against the order declining renewal of Consent to Operate is provided for and was filed cannot be in the facts and circumstances of the present case, be a bar to exercise of powers of the Appellate Authority by this Tribunal. As already noted, the Appellate Authority has declined to proceed with the matter. The grounds in the impugned orders dated 09.04.2018, 12.04.2018, 23.05.2018 and 28.05.2018 are identical. If the appeals are held to be not maintainable, the Appellant will be without any remedy against the order of closure. Order of the Appellate Authority is also appealable before this Tribunal Under Section 16(f) of the NGT Act, 2010. We, thus, do not find any merit in this case in the objections of the Respondent.

**45.** Mere fact that the State of Tamil Nadu also endorsed the order of the TNPCB and that order of the State is not appealable to this Tribunal, does not

deviate from the legal position that order of TNPCB is appealable to this Tribunal. Moreover, order of the State of Tamil Nadu is not a policy matter but mere endorsement of order of the TNPCB.

**46.** The judgments relied upon by the Respondents are distinguishable. Unlike *Educanti Kistamma v. Deokar's Distillery* [(2003) 5 SCC 669], this is not a case where the first order has not been challenged. Challenge before us is to the first order as well as subsequent orders. Basis for all the orders is common.

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**48.** The order of the Government of Tamil Nadu issued Under Section 18(1)(b) of the Water Act also cannot be said to be an independent order but relied on and endorsing the views of the TNPCB which is under challenge and that are not sufficient for ordering closure or refusal to grant even consent. If there are no other materials for the Government of Tamil Nadu to arrive at conclusion of closure on the ground of irreversible pollution being caused to the environment allowing the unit to function, then it cannot be said to be a policy decision to close down the industry permanently and if any order was passed based on the order by the Pollution Control Board, without independent application of mind and arbitrarily, then that can also be incidentally considered by the Tribunal for the purpose of deciding the question of legality of that order. So, under the present circumstances, it is not a case of this Tribunal entertaining the appeals where there is inherent lack of jurisdiction to entertain the same.

**49.** In the present proceedings, as already noted, the Appellate Authority having declined to proceed with the matter and the order of closure being appealable before this Tribunal, there is no ground to reject the appeal on the ground of maintainability so as to deprive the Appellant any judicial remedy in the matter.

### **(I) Re: Order dated 09.04.2018**

**21.** This order is an order which rejected renewal of consent to operate, and therefore, is traceable to Section 27 of the Water Act and Section 21 of the Air Act. There is no doubt whatsoever that an appeal against an order made Under Section 27 of the Water Act is appealable to the appellate authority Under Section 28 of the said Act. Under Section 33B(a) of the said Act, if a person is aggrieved by an order or decision of the appellate authority Under Section 28, it is then appealable to the NGT. This is made clear also by Section 16(a) of the NGT Act. Equally, an order refusing consent Under Section 21 of the Air Act is appealable to the appellate authority Under Section 31 of the Air Act, and thereafter, from the said appellate authority's order, to the NGT, Under Section 31B of the Air Act and Section 16(f) of the NGT Act.

**22.** As has been stated hereinabove, it is clear that an appeal to the appellate authority under the Air Act and the Water Act was, in fact, preferred, being Appeal Nos. 36-37 of 2018. While these appeals were pending before the appellate authority, the composite Appeal No. 87 of 2018 was filed on 22.06.2018 before the NGT *inter alia* against the order of refusal of consent to operate dated 09.04.2018. Shri Sundaram, however, argued before us that the order dated 06.06.2018 made by the appellate authority, which we have set out hereinabove, makes it clear that the appeals could not be heard since the State Government had passed an order dated 28.05.2018 directing the TNPCB to close down the plant permanently. What is missed by Shri Sundaram is the fact that the said order expressly states that the appeals could not be decided *at this juncture*

and were hence adjourned to 10.07.2018. The said appeals on 10.07.2018 were further adjourned, and it is only on 18.12.2018 that they were finally withdrawn as being infructuous in view of the fact that the NGT had passed its order on 15.12.2018 in which it had set aside the order dated 09.04.2018.

**23.** What becomes clear from the above narration of facts is the fact that while an appeal was still pending before the appellate authority, the NGT took up a matter directly against the original order dated 09.04.2018 which was challenged before the appellate authority even before the appellate authority could decide the same. However, Shri Sundaram referred to Section 28(4) of the Air Act and Section 31(4) of the Water Act to argue that appeals to the appellate authority must be decided expeditiously, and if they were not so decided, an appeal would lie to the NGT against a decision by the appellate authority not to decide the matter before it expeditiously. This argument must also be negated as, in point of fact, no appeal was preferred from any orders of the appellate authority adjourning the proceedings. As we have seen, an appeal was directly filed from the order of the TNPCB dated 09.04.2018.

**24.** At this point, it is important to advert to a few judgments of this Court. In **Kundur Rudrappa v. Mysore Revenue Appellate Tribunal and Ors**, MANU/SC/0528/1975 : (1975) 2 SCC 411, this Court, while dealing with Section 64 of the Motor Vehicles Act, 1939, stated:

**4.** The point that arises for consideration is whether any appeal lay Under Section 64 of the Act to the State Transport Appellate Tribunal against the issue of a permit in pursuance of an earlier resolution of the Regional Transport Authority granting the permit. It is only necessary to read Section 64(1)(a) which is material for the purpose of this appeal:

**64.** (1)(a) Any person aggrieved by the refusal of the State or a Regional Transport Authority to grant a permit, or by any condition attached to a permit granted to him

...

may within the prescribed time and in the prescribed manner, appeal to the State Transport Appellate Tribunal constituted Under Sub-section (2), who shall, after giving such person and the original authority an opportunity of being heard, give a decision thereon which shall be final.

We are not required to consider the other clauses of Section 64(1) which are admittedly not relevant. Section 64 has to be read with Rule 178 of the Rules which prescribes the procedure for appeal to the various authorities.

**5.** Appeal is a creature of the statute. There is no dispute that Section 64 of the Act is the only Section creating rights of appeal against the grant of permit and other matters with which we are not concerned here. There is no appeal provided for Under Section 64 against an order issuing a permit in pursuance of the order granting the permit. Issuance of the permit is only a ministerial act necessarily following the grant of the permit. The appeals before the State Transport Appellate Tribunal and the further appeal to the Mysore Revenue Appellate Tribunal are, therefore, not competent Under Section 64 of the Act and both the tribunals had no jurisdiction to entertain the appeals and to interfere with the order of the Regional Transport Authority granting the permit

which had already been affirmed in appeal by the State Transport Appellate Tribunal and further in second appeal by the Mysore Revenue Appellate Tribunal. There was, therefore, a clear error of jurisdiction on the part of both the Tribunals in interfering with the grant of the permit to the Appellant. The High Court was, therefore, not right in dismissing the writ application of the Appellant which ought to have been allowed.

**25.** Similarly, in a concurring judgment of Sinha, J., in **Cellular Operators Association of India and Ors. v. Union of India and Ors.**, MANU/SC/1368/2002 : (2003) 3 SCC 186, the learned Judge observed:

**27.** TDSAT was required to exercise its jurisdiction in terms of Section 14-A of the Act. TDSAT itself is an expert body and its jurisdiction is wide having regard to Sub-section (7) of Section 14-A thereof. Its jurisdiction extends to examining the legality, propriety or correctness of a direction/order or decision of the authority in terms of Sub-section (2) of Section 14 as also the dispute made in an application Under Sub-section (1) thereof. The approach of the learned TDSAT, being on the premise that its jurisdiction is limited or akin to the power of judicial review is, therefore, wholly unsustainable. The extent of jurisdiction of a court or a tribunal depends upon the relevant statute. TDSAT is a creature of a statute. Its jurisdiction is also conferred by a statute. The purpose of creation of TDSAT has expressly been stated by Parliament in the amending Act of 2000. TDSAT, thus, failed to take into consideration the amplitude of its jurisdiction and thus misdirected itself in law.

**26.** In **B. Himmatlal Agrawal v. Competition Commission of India** Civil Appeal No. 5029/2018 [decided on 18.05.2018], this Court, while dealing with Section 53B of the Competition Act, 2002 held:

**7.** The aforesaid provision, thus, confers a right upon any of the aggrieved parties mentioned therein to prefer an appeal to the Appellate Tribunal. This statutory provision does not impose any condition of pre-deposit for entertaining the appeal. Therefore, right to file the appeal and have the said appeal decided on merits, if it is filed within the period of limitation, is conferred by the statute and that cannot be taken away by imposing the condition of deposit of an amount leading to dismissal of the main appeal itself if the said condition is not satisfied. Position would have been different if the provision of appeal itself contained a condition of pre-deposit of certain amount. That is not so. Sub-section (3) of Section 53B specifically cast a duty upon the Appellate Tribunal to pass order on appeal, as it thinks fit i.e. either confirming, modifying or setting aside the direction, decision or order appealed against. It is to be done after giving an opportunity of hearing to the parties to the appeal. It, thus, clearly implies that appeal has to be decided on merits. The Appellate Tribunal, which is the creature of a statute, has to act within the domain prescribed by the law/statutory provision. This provision nowhere stipulates that the Appellate Tribunal can direct the Appellant to deposit a certain amount as a condition precedent for hearing the appeal. In fact, that was not even done in the instant case. It is stated at the cost of repetition that the condition of deposit of 10% of the penalty was imposed insofar as stay of penalty order passed by the CCI is concerned. Therefore, at the most, stay could have been vacated. The Appellate Tribunal, thus, had no jurisdiction to dismiss the appeal itself.

**27. In Raja Soap Factory v. S.P. Shantharaj**, MANU/SC/0231/1965 : (1965) 2 SCR 800, the Plaintiffs instituted an action in the nature of passing off against the Defendants in the High Court of Mysore, stating that they are exclusive owners of a particular trade mark. This Court found that exercise of jurisdiction by the High Court of Mysore is governed by Mysore Act 5 of 1962. Holding that the said High Court does not exercise any original jurisdiction, this Court held:

The High Court of Mysore is by its constitution primarily a court exercising appellate jurisdiction: it is competent to exercise original jurisdiction only in those matters in respect of which by special Acts it has been specifically invested with jurisdiction. The High Court is competent to exercise original jurisdiction Under Section 105 of the Trade and Merchandise Marks Act 43 of 1958 if it is invested with the ordinary original civil jurisdiction of a District Court, and not otherwise, and the High Court of Mysore not being invested by any statute of under its constitution with that jurisdiction was incompetent to entertain a passing off action.

But it was urged that in a State the High Court is at the apex of the hierarchy of civil courts and has all the powers which the subordinate courts may exercise, and it is competent to entertain all actions as a Court of original jurisdiction which may lie in any court in the State. For this exalted claim, there is no warrant in our jurisprudence. Jurisdiction of a court means the extent of the authority of a court to administer justice prescribed with reference to the subject-matter, pecuniary value and local limits. Barring cases in which jurisdiction is expressly conferred upon it by special statutes, e.g. the Companies Act; the Banking Companies Act, the High Court of Mysore exercises appellate jurisdiction alone. As a court of appeal it undoubtedly stands at the apex within the State, but on that account it does not stand invested with original jurisdiction in matters not expressly declared within its cognizance.

(at page 802)

**28. In Northern Plastics Ltd. v. Hindustan Photo Films Mfg. Co. Ltd. and Ors.**, MANU/SC/1151/1997 : (1997) 4 SCC 452, Section 129-D of the Customs Act, 1962 was referred to, under which, the Board of Excise and Customs may direct a Collector to apply to the Appellate Tribunal for determination of points which arise out of an order or decision. In repelling an argument that even without such direction, the Union of India may file an appeal directly, this Court held:

**10.** ... The aforesaid provisions of the Act leave no room for doubt that they represent a complete scheme or code for challenging the orders passed by the Collector (Customs) in exercise of his statutory powers.

..... So far as departmental authorities themselves are concerned including the Collector of Customs no direct right of appeal is conferred on the Collector to prefer appeal against his own order before the CEGAT. However there is sufficient safeguard made available to the Revenue by the Act for placing in challenge erroneous orders of adjudication as passed by the Collector of Customs by moving the Central Board of Excise and Customs Under Section 129-D(1) for a direction to the Collector to apply to the CEGAT for determination of such point arising out of the decision or order as may be specified by the Board of Revenue in this connection....

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**12.** ... But even if it is so, the statutory procedure laid down by Parliament in its wisdom for enabling the challenge to the adjudication order of the Collector of Customs by way of appeals or revisions as per the aforesaid relevant statutory provisions, to which we have made a mention, has got to be followed in such an eventuality. Bypassing the said statutory procedure a direct frog leap to CEGAT is contra-indicated by the statutory scheme of the Act. If such direct appeals are permitted the very scheme of Section 129-D(1) would get stultified. It must, therefore, be held that direct appeal filed by the Union of India through Industries Ministry to CEGAT Under Section 129-A(1) was clearly incompetent. It may be added that the Union of India could have used the mode set out in Section 129-D, but it did not do so.

**29.** In **Manohar Lal v. Ugrasen**, MANU/SC/0415/2010 : (2010) 11 SCC 557, one of the questions involved, Under Sub-paragraph 2(a) of the judgment, was as follows:

**2.** In these appeals, three substantial questions of law for consideration of this Court are involved. They are, namely:

(a) As to whether the State Government, a revisional authority under the statute, could take upon itself the task of a lower statutory authority?

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After reviewing a number of cases, this Court then concluded:

**23.** Therefore, the law on the question can be summarised to the effect that no higher authority in the hierarchy or an appellate or revisional authority can exercise the power of the statutory authority nor can the superior authority mortgage its wisdom and direct the statutory authority to act in a particular manner. If the appellate or revisional authority takes upon itself the task of the statutory authority and passes an order, it remains unenforceable for the reason that it cannot be termed to be an order passed under the Act.

**30.** In **Arcot Textile Mills Ltd. v. Regional Provident Fund Commissioner** MANU/SC/1120/2013 : (2013) 16 SCC 1, appeals lay to the Tribunal constituted under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, Under Section 7-I of the Act. Whereas appeals lay against orders passed Under Section 7-A of the Act, which provided for determination of monies due from employers, no appeal lay against orders made Under Section 7-Q of the said Act, which spoke of interest payable by the employer. This Court held:

**20.** On a scrutiny of Section 7-I, we notice that the language is clear and unambiguous and it does not provide for an appeal against the determination made Under Section 7-Q. It is well settled in law that right of appeal is a creature of statute, for the right of appeal inheres in no one and, therefore, for maintainability of an appeal there must be authority of law. This being the position a provision providing for appeal should neither be construed too strictly nor too liberally, for if given either of these extreme interpretations, it is bound to adversely affect the legislative object as well as hamper the proceedings before the appropriate forum. Needless to say, a right of appeal cannot be assumed to exist unless expressly provided for by the statute and a remedy of appeal must be legitimately traceable to the statutory provisions. If the express words employed in a provision do not provide an appeal from a particular order, the court is bound to follow the express words. To put it

otherwise, an appeal for its maintainability must have the clear authority of law and that explains why the right of appeal is described as a creature of statute. (See *Ganga Bai v. Vijay Kumar* [ MANU/SC/0020/1974 : (1974) 2 SCC 393], *Gujarat Agro Industries Co. Ltd. v. Municipal Corporation of the City of Ahmedabad* [ MANU/SC/0300/1999 : (1999) 4 SCC 468], *State of Haryana v. Maruti Udyog Ltd.* [ MANU/SC/0556/2000 : (2000) 7 SCC 348], *Super Cassettes Industries Ltd. v. State of U.P.* [ MANU/SC/1677/2009 : (2009) 10 SCC 531: (2009) 4 SCC (Civ) 280], *Raj Kumar Shivhare v. Directorate of Enforcement* [ MANU/SC/0249/2010 : (2010) 4 SCC 772: (2010) 3 SCC (Civ) 712], *Competition Commission of India v. SAIL* [ MANU/SC/0690/2010 : (2010) 10 SCC 744].)

In paragraph 21, this Court further went on to hold that in case an order Under Section 7-A speaks of delay in payment as well as interest, a composite order passed would be amenable to appeal Under Section 7-I, as interest is only parasitic on the principal sum due Under Section 7-A. However, if an independent order is passed Under Section 7-Q for interest alone, the same was held to be not appealable.

**31.** From the above authorities, it is clear that an appeal is a creature of statute and an appellate tribunal has to act strictly within the domain prescribed by statute. It is obvious that an appeal would lie from an order or decision of the appellate authority Under Section 28 of the Water Act to the NGT only Under Section 33B(a) of the Water Act read with Section 16(a) of the NGT Act. Similarly, an appeal would lie from an order or decision of the appellate authority Under Section 31 of the Air Act to the NGT only Under Section 31B of the Air Act read with Section 16(f) of the NGT Act. Obviously, since no order or decision had been made by the appellate authority under either the Water Act or the Air Act, any direct appeal against an original order to the NGT would be incompetent. NGT's jurisdiction being strictly circumscribed by Section 33B of the Water Act, read with Section 31B of the Air Act, read with Section 16(a) and (f) of the NGT Act, would make it clear that it is only orders or decisions of the appellate authority that are appealable, and not original orders. On the facts of the present case, it is clear that an appeal was pending before the appellate authority when the NGT set aside the original order dated 09.04.2018. This being the case, the NGT's order being clearly outside its statutory powers conferred by the Water Act, the Air Act, and the NGT Act, would be an order passed without jurisdiction.

**32.** In fact, in the United Kingdom, there are several Acts under which a leapfrog appeal is permitted if a point of law of general public importance is involved. Thus, the Administration of Justice Act, 1969 states that such a leapfrog appeal directly to the Supreme Court may be filed on grant of certificate by the Trial Judge in the following terms:

## **12. Grant of certificate by trial judge.**

(1) Where on the application of any of the parties to any proceedings to which this Section applies the judge is satisfied--

(a) that the relevant conditions are fulfilled in relation to his decision in those proceedings or that the conditions in Sub-section (3A) ("the alternative conditions") are satisfied in relation to those proceedings, and

(b) that a sufficient case for an appeal to the Supreme Court under this Part of this Act has been made out to justify an



application for leave to bring such an appeal,...

(c).....

the judge, subject to the following provisions of this Part of this Act, may grant a certificate to that effect.

(2) This Section applies to any civil proceedings in the High Court which are either--

(a) proceedings before a single judge of the High Court (including a person acting as such a judge Under Section 3 of the Judicature Act 1925), or

(b).....

(c) proceedings before a Divisional Court.

(3) Subject to any Order in Council made under the following provisions of this section, for the purposes of this Section the relevant conditions, in relation to a decision of the judge in any proceedings, are that a point of law of general public importance is involved in that decision and that that point of law either--

(a) relates wholly or mainly to the construction of an enactment or of a statutory instrument, and has been fully argued in the proceedings and fully considered in the judgment of the judge in the proceedings, or

(b) is one in respect of which the judge is bound by a decision of the Court of Appeal or of the Supreme Court in previous proceedings, and was fully considered in the judgments given by the Court of Appeal or the Supreme Court (as the case may be) in those previous proceedings.

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**33.** To similar effect are Sections of the Tribunals, Courts and Enforcement Act, 2007, and the Employment Tribunals Act, 1996. Such appeals in the U.K. are referred to as "leapfrog appeals" [see **S Franes Ltd. v. The Cavendish Hotel (London) Ltd**, MANU/UKWQ/0112/2017 : [2018] UKSC 62 (at paragraph 7)].

**34.** It is, therefore, clear that no such provisions, as are contained in the U.K. Acts, being present in any of the Acts that we are concerned with, such leapfrog appeals to the NGT would necessarily be without jurisdiction.

## **(II) Re: Orders passed Under Section 33A of the Water Act and Section 31A of the Air Act**

**35.** We have referred to the orders dated 12.04.2018, 23.05.2018, and 28.05.2018 passed by the TNPCB Under Sections 33A and 31A of the Water Act and Air Act respectively. At this juncture, it is important to state that Section 33B of the Water Act and Section 31B of the Air Act were both enacted on 18.10.2010, which is the very date on which the NGT Act came into force. What is important to note is that whereas Section 33B(c) of the Water Act read with Section 16(c) of the NGT Act make it clear

that directions issued Under Section 33A of the Water Act are appealable to the NGT, directions issued Under Section 31A of the Air Act are not so appealable. In fact, the statutory scheme is that directions given Under Section 31A of the Air Act are not appealable. This being the case, all the aforesaid orders, being composite orders issued under both the Water Act and the Air Act, it will not be possible to split the aforesaid orders and say that so far as they affect water pollution, they are appealable to the NGT, but so far as they affect air pollution, a suit or a writ petition would lie against such orders. Shri Sundaram's argument that these orders being substantially relatable to the Water Act would, therefore, not hold, as such orders are composite orders made both under the Water Act and the Air Act. Equally disingenuous is the reference to Section 14 of the NGT Act which only refers to the original jurisdiction of the NGT and not to its appellate jurisdiction. Also, to state generally that the subject matter of environment lies with the NGT, is an argument of despair that must be dismissed for the reason that as held by us hereinabove, an appeal being a creature of statute, a statute either confers a right of appeal or it does not. In the present case, we have seen that so far as directions issued Under Section 31A of the Air Act are concerned, there is no right of appeal conferred by the Air Act read with the NGT Act. The ingenious argument made by Shri Sundaram that, in any case, a "direction" Under Section 31A of the Air Act is nothing but an "order", and would, therefore, be appealable as such Under Section 31B of the Air Act read with Section 16(f) of the NGT Act would drive a coach-and-four through the statutory scheme that has just been adverted to. We have seen how all the appellate proceedings to the NGT, whether under the Air Act, the Water Act, or the NGT Act have been brought into force on the same date. Whereas the identical power to give directions by the Board under the Water Act is appealable to the NGT, the same power to give directions by the Board under the Air Act is not so appealable. The absence of any mention of Section 31A in Section 31B of the Air Act, given the statutory scheme as aforesaid, makes it clear that even this argument must be rejected. Also, "directions" that are issued Under Section 31A of the Air Act are of a different quality from "orders" referred to in Section 31 of the same Act. Directions are issued in the exercise of powers and performance of functions under the Act and are not quasi-judicial in nature, whereas orders that are appealed against Under Section 31 are quasi-judicial orders made, *inter alia*, Under Section 21 of the Air Act. For this reason also, we cannot accept the aforesaid argument of Shri Sundaram. However, Shri Sundaram argued, with particular reference to the explanation to Section 31A of the Air Act that "directions" partake of the nature of "orders" when closure of any particular industry or stoppage of supply of electricity *qua* any single industry is made, and therefore, such directions are appealable as orders Under Section 31 of the Air Act. This argument is also of no avail as Section 33A of the Water Act contains an identical explanation to that contained in Section 31A of the Air Act. Despite this, the legislative scheme, as stated hereinabove, is that so far as directions under the Water Act are concerned, they are appealable, but so far as directions under the Air Act are concerned, they are not appealable. Hence, reference made to P. Ramanatha Aiyer's Law Lexicon and Black's Law Dictionary, which state that in certain circumstances, orders are also directions and vice versa, would not apply to the present case, given the express statutory scheme. In this connection, Shri Sundaram cited **Kanhiya Lal Omar v. R.K. Trivedi**, MANU/SC/0170/1985 : (1985) 4 SCC 678, and relied upon paragraph 17, where this Court held, referring to Article 324(1) of the Constitution of India, that a "direction" may be equated with a specific or a general order. The context of Article 324 being wholly different, it is obvious that this authority also has no application, given the statutory scheme in the present case.

**36.** Shri Sundaram then cited **Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupeshkumar Sheth**, MANU/SC/0055/1984 : (1984) 4 SCC 27. In this judgment, the High Court had struck down Regulation 104 of

the Maharashtra Secondary and Higher Secondary Boards Regulations, 1977, by which, no re-evaluation of an answer book given in an examination can be undertaken. In setting aside the High Court judgment, this Court stated that the process of re-evaluation of answer papers is extremely time consuming, would involve several thousand man-hours, and is bound to throw the entire system out of gear. Further, it is in public interest that the results of public examinations, when published, should have some finality attached to them [see paragraph 27]. It is in this context that this Court held:

**29.** ... It is equally important that the Court should also, as far as possible, avoid any decision or interpretation of a statutory provision, Rule or bye-law which would bring about the result of rendering the system unworkable in practice. ....

To bodily lift the aforesaid sentence and apply it to the fact situation here would be a huge leap which we are not prepared to make. Further, given the statutory scheme as aforesaid, it is not possible for us to provide an appeal where there is none in the guise of making an appellate system workable in practice.

**37.** Shri Sundaram then relied upon this Court's judgments in **Galada Power & Telecommunication Ltd. v. United India Insurance Co. Ltd.**, MANU/SC/0935/2016 : (2016) 14 SCC 161 and **Allokam Peddabbayya v. Allahabad Bank**, MANU/SC/0700/2017 : (2017) 8 SCC 272 for the proposition that the right of appeal is a statutory right, and like all other statutory rights, it can be waived, unless its waiver is detrimental to public interest. The question in these appeals is not whether an Appellant may waive a statutory right of appeal. The question is whether the NGT, which is only invested with the jurisdiction of entertaining an appeal from an order of an appellate authority, is jurisdictionally capable of entertaining an appeal directly from the original authority. It is clear, as has been held by us, that the NGT possesses no such jurisdiction.

**38.** One further argument was made that these matters are only procedural, and therefore, substantially, an appeal to the NGT would be maintainable. It is well settled that the right to appeal is not a procedural matter but a substantive one. In **Garikapati Veeraya v. N. Subbiah Choudhury**, MANU/SC/0008/1957 : 1957 SCR 488, this Court held:

From the decisions cited above the following principles clearly emerge:

(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the

law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.

(at pp. 514-515)

This argument must, therefore, be rejected.

### (III) Re: Order passed Under Section 18 of the Water Act

**39.** So far as the order dated 28.05.2018 is concerned, this order is expressly stated to be made Under Section 18 of the Water Act. There is no doubt whatsoever that such an order is not appealable to the NGT either under the Water Act or under the NGT Act. However, Shri Sundaram has argued that Section 18 is referable to orders generally made, and falls under Chapter IV of the Water Act, which deals with powers and functions of Boards, as opposed to the Sections that follow in Chapter V, which deals with prevention and control of water pollution, which orders are made against individuals and individual industries. On the assumption that Shri Sundaram is correct in this argument, it is clear that such order can only be set aside in a suit by a Civil Court, or Under Article 226 of the Constitution of India by a High Court. It is not possible to agree with the argument of Shri Sundaram that such orders can be ignored, being *non est*. It is settled that an administrative order, when made, does not bear the brand of invalidity on its forehead, as has been held in **Smith v. East Elloe Rural District Council**, MANU/UKHL/0005/1956 : [1956] 1 All E.R. 855 (at page 871), which has been followed by this Court in **State of Punjab v. Gurdev Singh**, MANU/SC/0612/1991 : (1991) 4 SCC 1 (at page 6); **Tayabhai M. Bagasarwalla v. Hind Rubber Industries (P) Ltd.**, MANU/SC/0280/1997 : (1997) 3 SCC 443 (at page 455); **Pune Municipal Corporation v. State of Maharashtra**, MANU/SC/7170/2007 : (2007) 5 SCC 211 (at page 225); **Krishnadevi Malchand Kamathia v. Bombay Environmental Action Group**, MANU/SC/0085/2011 : (2011) 3 SCC 363 (at page 369); and **Kandla Port v. Hargovind Jasraj**, MANU/SC/0080/2013 : (2013) 3 SCC 182 (at page 193). Therefore, this order can only be set aside either in a suit, or by the High Court in the exercise of judicial review. Faced with this, Shri Sundaram then argued that though the said order states that it is traceable to Section 18 of the Water Act, it can, in fact, be traced to Section 29 of the same Act. Section 29 deals with the revisional power, in which the State Government is to pass a quasi-judicial order after hearing both the State Board and the person who is affected. Quite obviously, this order is not a quasi-judicial order as the State Government has not found it necessary to hear either the State Board, or any person affected by such order. Further, such order does not purport to be an order which either affirms or sets aside any order made Under Sections 25, 26, or 27 of the Water Act. This argument of despair, therefore, must also be rejected.

**40.** Shri Sundaram then argued that this Court in **L. Chandra Kumar** (supra) made it clear that Tribunals that are set up, generally have the power of judicial review, save and except a challenge to the vires of the legislation under which such Tribunals are themselves set up. For this, he relied strongly upon paragraphs 90 and 93 of the judgment in **L. Chandra Kumar** (supra). It is important to notice that **L. Chandra Kumar** (supra) pertained to a Tribunal that was set up Under Article 323A of the Constitution of India. Under Article 323A(2)(d), the Administrative Tribunal so set up

would be able to exercise the jurisdiction of all courts except the jurisdiction of the Supreme Court Under Article 136 of the Constitution. This would mean that the Administrative Tribunal so set up could exercise the jurisdiction of all High Courts when it came to the matters specified in Article 323A. This is further made clear by a conjoint reading of Section 14 and Section 28 of the Administrative Tribunals Act, 1985, which read as follows:

**14. Jurisdiction, powers and authority of the Central Administrative Tribunal.--**(1) Save as otherwise expressly provided in this Act, the Central Administrative Tribunal shall exercise, on and from the appointed day, all the jurisdiction, powers and authority exercisable immediately before that day by all courts (except the Supreme Court) in relation to--

(a) recruitment, and matters concerning recruitment, to any All-India Service or to any civil service of the Union or a civil post under the Union or to a post connected with defence or in the defence services, being, in either case, a post filled by a civilian;

(b) all service matters concerning--

(i) a member of any All-India Service; or

(ii) a person not being a member of an All-India Service or a person referred to in Clause (c) appointed to any civil service of the Union or any civil post under the Union; or

(iii) a civilian not being a member of an All-India Service or a person referred to in Clause (c) appointed to any defence services or a post connected with defence,

and pertaining to the service of such member, person or civilian, in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation or society owned or controlled by the Government;

(c) all service matters pertaining to service in connection with the affairs of the Union concerning a person appointed to any service or post referred to in Sub-clause (ii) or Sub-clause (iii) of Clause (b), being a person whose services have been placed by a State Government or any local or other authority or any corporation or society or other body, at the disposal of the Central Government for such appointment.

*Explanation.--*For the removal of doubts, it is hereby declared that references to "Union" in this Sub-section shall be construed as including references also to a Union Territory.

(2) The Central Government may, by notification, apply with effect from such date as may be specified in the notification the provisions of Sub-section (3) to local or other authorities within the territory of India or under the control of the Government of India and to corporations or societies owned or controlled by Government, not being a local or other authority or corporation or society controlled or owned by a State Government:



Provided that if the Central Government considers it expedient so to do for the purpose of facilitating transition to the scheme as envisaged by this Act, different dates may be so specified under this Sub-section in respect of different classes of, or different categories under any class of, local or other authorities or corporations or societies.

(3) Save as otherwise expressly provided in this Act, the Central Administrative Tribunal shall also exercise, on and from the date with effect from which the provisions of this Sub-section apply to any local or other authority or corporation or society, all the jurisdiction, powers and authority exercisable immediately before that date by all courts (except the Supreme Court) in relation to--

(a) recruitment, and matters concerning recruitment, to any service or post in connection with the affairs of such local or other authority or corporation or society; and

(b) all service matters concerning a person other than a person referred to in Clause (a) or Clause (b) of Sub-section (1) appointed to any service or post in connection with the affairs of such local or other authority or corporation or society and pertaining to the service of such person in connection with such affairs.

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**28. Exclusion of jurisdiction of courts except the Supreme Court Under Article 136 of the Constitution.**--On and from the date from which any jurisdiction, powers and authority becomes exercisable under this Act by a Tribunal in relation to recruitment and matters concerning recruitment to any Service or post or service matters concerning members of any Service or persons appointed to any Service or post, no court except--

(a) the Supreme Court; or

(b) any Industrial Tribunal, Labour Court or other authority under the Industrial Disputes Act, 1947 or any other corresponding law for the time being in force,

shall have, or be entitled to exercise any jurisdiction, powers or authority in relation to such recruitment or matters concerning such recruitment or matters concerning such recruitment or such service matters.

Article 323B of the Constitution of India also provides for Tribunals for certain other matters which are specified by Sub-clause (2) thereof. Suffice it to say that the NGT is not a Tribunal set up either Under Article 323A or Article 323B 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 (supra). Thus, a conjoint reading of Section 14 and Section 29 of the NGT Act must be contrasted with a conjoint reading of Section 14 and Section 28 of the Administrative Tribunals Act, 1985.

**41.** It is in the context of Article 323A and the Administrative Tribunals Act, 1985 that this Court in **L. Chandra Kumar** (supra) has observed in paragraph 93 as follows:



**93.** Before moving on to other aspects, we may summarise our conclusions on the jurisdictional powers of these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set-up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the High Court concerned may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned.

**42.** In **Bharat Sanchar Nigam Limited v. Telecom Regulatory Authority of India and Ors.**, MANU/SC/1264/2013 : (2014) 3 SCC 222 [**BSNL**], this Court had to construe the appellate power that is contained in Section 14 of the Telecom Regulatory Authority of India Act, 1997, by which, the TDSAT was conferred with the power to hear and dispose of appeals against any direction, decision, or order of the TRAI. In this context, after distinguishing the judgment in **L. Chandra Kumar** (supra), this Court held:

**108.** Before the 2000 Amendment, the applications were required to be filed Under Section 15 which also contained detailed procedure for deciding the same. While Sub-section (2) of Section 15 used the word "orders", Sub-sections (3) and (4) thereof used the word "decision". In terms of Sub-section (5), the orders and directions of TRAI were treated as binding on the service providers, Government and all other persons concerned. Section 18 provided for an appeal against any decision or order of TRAI. Such an appeal could be filed before the High Court. The Amendment made in 2000 is intended to vest the original jurisdiction of TRAI in TDSAT and the same is achieved by Section 14(a). The appellate jurisdiction exercisable by the High Court is also vested in TDSAT by virtue of Section 14(b) but this does not include decision made by TRAI. Section 14-N provides for transfer to all appeals pending before the High Court to TDSAT and in terms of Clause (b) of Sub-section (2), TDSAT was required to proceed to deal with the appeal from the stage which was reached before such transfer or from any earlier stage or de novo as considered appropriate by it. Since the High Court while hearing appeal did not have the power of judicial review of subordinate legislation, the transferee adjudicatory forum i.e. TDSAT cannot exercise that power Under Section 14(b).

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**114.** ... From the above-extracted portion of the order it is evident that the Bench, which decided the matter, felt that the view taken by TDSAT would encourage rampant violation of the orders without any penal consequence and the entire scheme of the TRAI Act would become unworkable. The word "directions" used in Section 29 of the TRAI Act was interpreted to include orders and Regulations in the context of the factual matrix of that case and the apprehension of the Court that Section 29 would otherwise become unworkable, but the same cannot be read as laying down a proposition of law that the words "direction", "decision" or "order" used in Section 14(b) would include Regulations framed Under Section 36, which are in the nature of subordinate legislation.

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**123.** In *Union of India v. Madras Bar Assn.* [ MANU/SC/0378/2010 : (2010) 11 SCC 1] and *State of Gujarat v. Gujarat Revenue Tribunal Bar Assn.* [ MANU/SC/0901/2012 : (2012) 10 SCC 353: (2012) 4 SCC (Civ) 1229: (2013) 1 SCC (Cri.) 35: (2013) 1 SCC (L & S) 56: (2012) 10 Scale 285], this Court applied the principles laid down in *L. Chandra Kumar case* [*L. Chandra Kumar v. Union of India*, MANU/SC/0261/1997 : (1997) 3 SCC 261: 1997 SCC (L & S) 577] and reiterated the importance of tribunals created for resolution of disputes but these judgments too have no bearing on the decision of the question formulated before us.

**124.** In the result, the question framed by the Court is answered in the following terms: in exercise of the power vested in it Under Section 14(b) of the TRAI Act, TDSAT does not have the jurisdiction to entertain the challenge to the Regulations framed by TRAI Under Section 36 of the TRAI Act.

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 **Re: Special Reference**, (1965) 1 SCR 413, made in the following words:

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].

(at page 499)

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** (supra), 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 17.07.2014 in **Wilfred v. Ministry of Environment and Forests** 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.

**43.** Shri Sundaram then argued that, in any case, this order is an order made by the State Government against the TNPCB, and is therefore, a direction to the TNPCB and not a direction to his client. If this were so, and the order had no effect on his client, there would have been no necessity to file an appeal before the NGT against such order. We have seen, however, that this order has been challenged on merits by the Respondent before the NGT. To then say that this order which is challenged would be defended on certain grounds, as a result of which, the NGT then gets vested with the jurisdiction to decide the same, is again to put the cart before the horse. It is clear that no appeal is provided against orders made Under Section 18 of the Water Act, and the attempt to bring the NGT in by the backdoor, as it were, would, therefore, have to be rejected. Also, to argue that as against a writ court acting Under Article 226 of the Constitution of India, the NGT is an expert body set up only to deal with environmental matters, again does not answer the specific issue before this Court. As we have held earlier, an appeal being a creature of statute, an order passed Under Section 18 of the Water Act is either appealable or it is not. If it is not, no general argument as to the NGT being an expert body set up to hear environmental matters can be of any help.

**44.** Equally, so far as the order dated 08.08.2013 is concerned, we have seen how the NGT stated that the doctrine of necessity would take over if an appellate authority under the Act is not properly constituted so that no appeal can then be effectively preferred. This, again, is an argument that cannot be countenanced. If an appellate authority is either not yet constituted, or not properly constituted, a leapfrog appeal to the NGT cannot be countenanced. As has been held by us *supra*, the NGT is only conferred appellate jurisdiction from an order passed in exercise of first appeal. Where there is no such order, the NGT has no jurisdiction.

**45.** In conclusion, we are cognizant of the fact that the Respondent's plant has been shut down since 09.04.2018. Since we have set aside the impugned judgments of the NGT on the ground of maintainability, the order dated 22.01.2019 passed by the TNPCB, being a consequential order, is also set aside. The Respondents are relegated to the position that the six orders impugned before the NGT, dealt with by the impugned judgment dated 15.12.2018, and the order dated 29.03.2013, dealt with by the final judgment dated 08.08.2013, are alive and operative. Given the fact that we are setting aside the NGT judgments involved in these appeals on the ground of maintainability, we state that it will be open for the Respondents to file a writ petition in the High Court against all the aforesaid orders. If such writ petition is filed, it will be open for the Respondent to apply for interim reliefs considering that their plant has been shut down since 09.04.2018. Also, since their plant has been so shut down for a long period, and they are exporting a product which is an important import substitute, the Respondent may apply to the Chief Justice of the High Court for expeditious hearing of the writ petition, which will be disposed of on merits notwithstanding the availability of an alternative remedy in the case of challenge to the 09.04.2018 order of the TNPCB. The appeals are disposed of accordingly.

MANU/SC/0261/1997

**Equivalent/ Neutral Citation:** AIR1997SC1125, 1997(1)BLJR735, (1997)1CALLT55(SC), 83(1997)CLT815(SC), (1998)1CompLJ385(SC), 1997(69)ECR401(SC), 1997(92)ELT318(S.C.), 1997GLH(1)692, 1997 INSC 288, [1997]228ITR725(SC), JT1997(3)SC589, 1997LabIC1069, 1997(2)LLN482(SC), 1997-2-LW414, 1997(2)MhLJ198(SC), 1997(1)MPLJ621, 1997(I)OLR(SC)408, 1997(1)PLJR84, 1997(3)SCALE40, (1997)3SCC261, (1997)SCC(LS)577, [1997]2SCR1186, 1997(2)SCT423(SC), 1998(2)SLJ124(SC), 1997(2)SLR1(SC), [1997]105STC618(SC), (1997)1UPLBEC712

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 481 of 1980 etc.

**Decided On:** 18.03.1997L. Chandra Kumar **Vs.** Union of India (UOI) and Ors.**Hon'ble Judges/Coram:**

*A.M. Ahmadi, C.J.I., M.M. Punchhi, K. Ramaswamy, S.P. Bharucha, Saiyed Saghir Ahmad, K. Venkataswami and K.T. Thomas, JJ.*

**Counsels:**

*For Appearing Parties: V.R. Reddy, K.N. Bhat, Advs., Altaf Ahmad, Additional Solicitor Generals, Rama Jois and Shankar Ghosh, Advs*

**Case Note:**

**Held:** Judicial Review - Power of judicial review over legislative action vested in High Courts and Supreme Court under Articles 226 and 32 of the Constitution is integral to our constitutional scheme and an essential feature comprising the basic structure of Constitution. ".....To express our opinion on the issue whether the power of judicial review vested in the High Courts and in the Supreme Court under Articles 226/227 and 32 is part of the basic structure of the Constitution, we must first attempt to understand what constitutes the basic structure of the Constitution. The Doctrine of basic structure was evolved in Kesavananda Bharati's case. However, as already mentioned, that case did not lay down that the specific and particular features mentioned in that judgment alone would constitute the basic structure of our Constitution. Indeed, in the judgments of Shelat & Grover, JJ., Hegde & Mukherjee, JJ. and Jaganmohan Reddy, J., there are specific observations to the effect that their list of essential features comprising the basic structure of the Constitution are illustrative and are not intended to be exhaustive. In Indira Gandhi's case, Chandrachud, J. held that the proper approach for a Judge who is confronted with the question whether a particular facet of the Constitution is part of the basic structure, is to examine, in each individual case, the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of our Constitution as a fundamental instrument for the governance of the country. (supra at pp. 751-752). This approach was specifically adopted by Bhagwati, J. in Minerva Mill's case (supra at pp. 651-672) and is not regarded as the definitive test in this field of Constitutional Law.

"....We find that the various factors mentioned in the test evolved by Chandrachud, J. have already been considered by decisions of various Benches of this Court that have been referred to in the course of our analysis. From their conclusions, many of which have been extracted by us in toto, it appears that this Court has always considered the power of judicial review vested in the High Courts and in this Court under Articles 226 and 32 respectively, enabling legislative action to be subjected to the scrutiny of superior courts, to be integral to our constitutional scheme."

**2. Interpretation of Constitution--Powers of the Judges of High Court & Supreme Court--The power of High Courts and the Supreme Court to test the constitutional validity of legislation and to interpret the constitution can never be ousted or excluded. ".....The Judges of the superior Courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations. It is equally their duty to oversee that the judicial decisions rendered by those who man the subordinate Courts and Tribunals do not fall foul of strict standards of legal correctness and judicial independence. The constitutional safeguards which ensure the independence of the Judges of the superior judiciary are not available to the Judges of the subordinate judiciary or to those who man Tribunals created by ordinary legislations. Consequently, Judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging the functions of constitutional interpretation. We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Article 226 and in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded."**

**3. Judicial superintendence--Powers vested in High Courts to exercise judicial superintendence over the decisions of all courts and tribunals in their jurisdiction, are a part of the basic structure of the Constitution and divesting of the same to be avoided. The subordinate judiciary or Tribunals not to exercise power of judicial review of legislative action to the exclusion of High Courts & Supreme Court, ".....We also hold that the power vested in the High Courts to exercise judicial superintendence over the decisions of all Courts and Tribunals within their respective jurisdiction is also part of the basic structure of the Constitution. This is because a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation, is equally to be avoided.**

**"...However, it is important to emphasise that though the subordinate judiciary or Tribunals created under ordinary legislations cannot exercise the power of judicial review of legislative action to the exclusion of the High Courts and the Supreme Court, there is no constitutional prohibition against their performing a supplemental--as opposed to a substitutional--role in this respect."**

**4. Tribunals--Jurisdictional Powers--Competence to test the constitutional validity of a statutory provision/rule--The Tribunals constituted either under Article 323A or under Article 323B of the Constitution competent to test the constitutional validity of statutory provisions and rules, but debarred to entertain any question regarding the vires of their parent statutes--Even in matters where the vires of statutory provisions are questioned the function of the Tribunals is only supplementary and appeals against their orders to lie before the Division Bench of High Courts--Order to come into effect prospectively. ".....If the power under Article 32 of the Constitution, which has been described as the "heart" and "soul" of the Constitution, can additionally conferred upon "any other court", there is no reason why the same situation cannot subsist in respect of the jurisdiction conferred upon the High Courts under Article 226 of the Constitution. So long as the jurisdiction of the High Courts under Articles 226/227 and that of**



this Court under Article 32 is retained, there is no reason why the power to test the validity of legislations against the provisions of the Constitution cannot be conferred upon Administrative Tribunals created under the Act or upon Tribunals created under Article 323B of the Constitution."

".....we may summarise our conclusions on the jurisdictional powers of these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set-up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the concerned High Court may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal."

"The directions issued by us in respect of making the decisions of Tribunals amenable to scrutiny before a Division Bench of the respective High Courts will, however, come into effect prospectively i.e. will apply to decisions rendered hereafter. To maintain the sanctity of judicial proceedings, we have invoked the doctrine of prospective over-ruling so as not to disturb the procedure in relation to decisions already rendered."

**5. Tribunals--Malfunctioning--An independent agency should be set up for the administration of all the Tribunals and till such agency is set up the Tribunals should be under a single nodal Ministry to oversee their working.**

"....We are of the view that, until a wholly independent agency for the administration of all such Tribunals can be set-up, it is desirable that all such Tribunals should be, as far as possible, under a single nodal Ministry which will be in a position to oversee the working of these Tribunals. For a number of reasons that Ministry should appropriately be the Ministry of Law. It would be open for the Ministry, in its turn, to appoint an independent supervisory body to oversee the working of the Tribunals. This will ensure that if the President or Chairperson of the Tribunal is for some reason unable to take sufficient interest in the working of the Tribunal, the entire system will not languish and the ultimate consumer of justice will not suffer. The creation of a single umbrella organisation will, in our view, remove many of the ills of the present system. If the need arises, there can be separate umbrella organisations at the Central and the State levels. Such a supervisory authority must try to ensure that the independence of the members of all such Tribunals is maintained."



**6. Setting up of Tribunals--Under our constitutional scheme constitution of various Tribunals is permitted. "....That the various Tribunals have not performed upto expectations is a self-evident and widely acknowledged truth. However, to draw an inference that their unsatisfactory performance points to their being founded on a fundamentally unsound principle would not be correct. The reasons for which the Tribunals were constituted still persist; indeed, those reasons have become even more pronounced in our times. We have already indicated that our constitutional scheme permits the setting up of such Tribunals. However, drastic measures may have to be resorted to in order to elevate their standards to ensure that they stand up to constitutional scrutiny in the discharge of the power of judicial review conferred upon them."**

**7. Tribunals--Power to hear matters involving constitutional issues--Tribunals competent to handle matters involving constitutional issues but such matters not to be handled by a single Member Bench and should be referred to a Bench consisting of at least two members one of whom being a Judicial Member. "....To hold that the Tribunals have no power to handle matters involving constitutional issues would not serve the purpose for which they were constituted. On the other hand, to hold that all such decisions will be subject to the jurisdiction of the High Courts under Articles 226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the Tribunal concerned falls will serve two purposes. While saving the power of judicial review of legislative action vested in the High Courts under Article 226/227 of the Constitution, it will ensure that frivolous claims are filtered out through the process of adjudication in the Tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter."**

**"We wish to make it clear that where a question involving the interpretation of a statutory provision or rule in relation to the Constitution arises for the consideration of a single Member Bench of the Administrative Tribunal, the proviso to Section 5(6) will automatically apply and the Chairman or the Member concerned shall refer the matter to a Bench consisting of at least two Members, one of whom must be a judicial Member. This will ensure that question involving the vires of a statutory provision or rule will never arise for adjudication before a single Member Bench or a Bench which does not consist of a Judicial Member. So construed, Section 5(6) will no longer be susceptible to charges of unconstitutionality."**

**8. Appeals--Appeals against the orders of the Tribunals to lie before the Division Bench of High Courts. "....We may add here that under the existing system, direct appeals have been provided from the decisions of all Tribunals to the Supreme Court under Article 136 of the Constitution. In view of our above-mentioned observations, this situation will also stand modified. In the view that we have taken, no appeal from the decision of a Tribunal will directly lie before the Supreme Court under Article 136 of the Constitution; but instead, the aggrieved party will be entitled to move the High Court under Articles 226/227 of the Constitution and from the decision of the Division Bench of the High Court the aggrieved party could move this Court under Article 136 of the Constitution."**

**".....we hold that all decisions of Tribunals, whether created pursuant to Article 323A or Article 323B of the Constitution, will be subject to the High Court's writ jurisdiction under Articles 226/227 of the Constitution, before a Division Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls."**

**9. Administrative Tribunals--Appointment of administrative Members--The Tribunal not to consist of only judicial members, administrative members being officers having grass-roots experience, to be selected from amongst those who have some background to deal such cases. ".....In the case of Administrative Tribunals, it has been pointed out that the administrative members who have been appointed have little or no experience in adjudicating such disputes."**

**".....It is stated that in the short tenures that these Administrative Members are on the Tribunal, they are unable to attain enough experience in adjudication and in cases where they do acquire the ability, it is invariably on the eve of the expiry of their tenures. For these reasons, it has been urged that the appointment of Administrative Members to Administrative Tribunals be stopped. We find it difficult to accept such a contention. It must be remembered that the setting-up of these Tribunals is founded on the premise that specialist bodies comprising both trained administrators and those with judicial experience would, by virtue of their specialised knowledge, be better equipped to dispense speedy and efficient justice. It was expected that a judicious mix of judicial members and those with grass-roots experience would best serve this purpose. To hold that the Tribunal should consist only of judicial members would attack the primary basis of the theory pursuant to which they have been constituted. Since the Selection Committee is now headed by a Judge of the Supreme Court, nominated by the Chief Justice of India, we have reason to believe that the Committee would take care to ensure that administrative members are chosen from amongst those who have some background to deal with such cases."**

**10. Exclusion of the Jurisdiction of High Courts--Article 323A clause 2(d); Article 323B clause 3(d); Sec. 28 of Administrative Tribunal Act, 1985 and Clauses in other legislations stipulating exclusion of the jurisdiction of High Courts held to be unconstitutional. "..... In view of the reasoning adopted by us, we hold that clause 2(d) of Article 323A and clause 3(d) of Article 323B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323A and 323B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Article 226/227 and upon the Supreme Court under Article 32 of the Constitution is part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other Courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution.**

**The Tribunals created under Article 323A and Article 323B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the concerned Tribunal falls. The Tribunals will, nevertheless, continue to act like Courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal. Section 5(6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated."**

**ORDER**

**A.M. Ahmadi, C.J.**

**1.** The special leave petitions, civil appeals and writ petitions which together constitute the present batch of matters before us owe their origin to separate decisions of different High Courts and several provisions in different enactments which have been made the subject of challenge. Between them, they raise several distinct questions of law; they have, however been grouped together as all of them involve the consideration of the following broad issues:

(1) Whether the power conferred upon Parliament or the State Legislatures, as the case may be, by Sub-clause (d) of Clause (2) of Article 323A or by Sub-clause (d) of Clause (3) of Article 323B of the Constitution, totally exclude the jurisdiction of 'all courts', except that of the Supreme Court under Article 136, in respect of disputes and complaints referred to in Clause (1) of Article 323A or with regard to all or any of the matters specified in Clause (2) of Article 323B, runs counter to the power of judicial review conferred on the High Courts under Articles 226/227 and on the Supreme Court under Article 32 of the Constitution?

(2) Whether the Tribunals, constituted either under Article 323A or under Article 323B of the Constitution, possess the competence to test the constitutional validity of a statutory provision/rule?

(3) Whether these Tribunals, as they are functioning at present, can be said to be effective substitutes for the High Courts in discharging the power of judicial review? If not, what are the changes required to make them conform to their founding objectives?

**2.** We shall confine ourselves to the larger issues raised in this batch of matters without advertng to the specific facts of each of the matters; we shall, however, selectively refer to some of the impugned decisions and the provisions involved to the extent we find it necessary to do so in order to appreciate the policy- conflicts in, and to draw the parameters of, the controversy before us. The broad principles enunciated in this judgment will, at a later time, be applied by a Division Bench to resolve the disputes involved in each of the individual cases.

**3.** The present controversy has been referred to us by an order of a Division Bench of this Court, reported in MANU/SC/0227/1995 : (1995)ILLJ640SC , which concluded that the decision rendered by a five-Judge Constitution Bench of this Court in S.P. Sampath Kumar v. Union of India MANU/SC/0851/1987 : (1987)ILLJ128SC , needs to be comprehensively reconsidered. The order of the Division Bench, dated December 2, 1994, was rendered after it had considered the arguments in the first matter before us, C.A. No. 481 of 1989, where the challenge is to the validity of Section 5(6) of the Administrative Tribunals Act, 1985. After analysing the relevant constitutional provisions and the circumstances which led to the decision in Sampath Kumar's case, the referring Bench reached the conclusion that on account of the divergent views expressed by this Court in a series of cases decided after Sampath Kumar's case, the resulting situation warranted a "fresh look by a larger Bench over all the issues adjudicated by this Court in Sampath Kumar's case including the question whether the Tribunal can at all have an Administrative Member on its Bench, if it were to have the power of even deciding constitutional validity of a statute or (Article) 309 rule, as conceded in Chopra's case". The "post- Sampath Kumar cases" which caused the Division Bench to refer the present matter to us are as follows: J.B. Chopra v. Union of India MANU/SC/0459/1986 : (1987)ILLJ255SC ; M.B. Majumdar v. Union of India MANU/SC/0404/1990 : (1991)ILLJ585bSC ; Amuya Chandra Kalita v. Union of India MANU/SC/0503/1991 : (1990)ILLJ523SC ; R.K. Jain v. Union of India MANU/SC/0291/1993 : [1993] 4 SCC 119 and Dr. Mahabal Ram v. Indian Council of Agricultural Research MANU/SC/0638/1994 : (1991)ILLJ112SC .

4. Before we record the contentions of the learned Counsel who appeared before us, we must set out the legal and historical background relevant to the present case.

5. Part XIVA of the Constitution was inserted through Section 46 of the Constitution (42nd Amendment) Act, 1976 with effect from March 1, 1977. It comprises two provisions, Articles 323A and 323B, which have, for the sake of convenience, been fully extracted hereunder:

#### PART XIVA TRIBUNALS

323-A. Administrative tribunals.-- 323-B. Tribunals for other

(1) Parliament may, by law, matters. --

(1) The appropriate provide for the adjudication or  
Legislature may, by law, provide trial by  
administrative Tribunals for the adjuration  
or trial by of disputes and complaints with tribunals of  
any disputes, respect to recruitment and complaints,  
or offences with conditions of service of persons respect<> to all or any of the appointed to public  
services andbr matters specified in Clause

(2) posts in connection with the with respect  
to which such affairs of the Union or of any  
Legislature has power to make State or of any  
local or other laws. authority within the territory  
of India or under the control of the Government,  
of India or of any corporation owned or controlled  
by the Government.

(2) A law made under Clause (1) (2) (2) The matters  
referred may -- to in Clause (1) are the following, namely:

(a) provide for the (a) levy, assessment, establishment,  
of an collection and administrative tribunal for  
enforcement of any tax; the union and a separate administrative  
tribunal for each State or for two or more States;

(b) specify the jurisdiction, (b) foreign exchange, import powers (including the and  
export across customs powers to punish for frontiers; contempt) and authority  
which may be exercised by each of the said tribunals; (c) provide for the procedure  
(c) industrial and labour (including provisions as to disputes; limitation and rules  
of evidence) to be followed by the said tribunals; (d) *exclude the jurisdiction of all*  
(d) *land reforms by way of courts, except the jurisdiction acquisition by the State of*  
*the Supreme Court under any estate as defined in Article 136, with respect to Article*  
*31A or of any the disputes or complaints rights therein or the referred to in Clause*  
*(1);* extinguishment or modification of any such rights or by way of ceiling on  
agricultural land or in any other way; (e) provide for the transfer to (e) ceiling on  
urban property; each such administrative tribunal of any cases pending before any  
court or other authority immediately before the establishment of such tribunal as  
would have been within the jurisdiction of such tribunal if the causes of action on  
which such suits or proceedings are based had arisen after such establishment; (f)  
repeal or amend any order (f) elections to either House made by the president of  
Parliament or the under Clause (3) of Article House or either House of 37ID; the  
Legislature of a State, but excluding the matters referred to in Article 329 and  
Article 329A; (g) contain such supplemental, (g) production, procurement,  
incidental and supply and distribution of consequential provisions foodstuffs  
(including (including provisions as to edible oilseeds and oils) fee) as Parliament  
may and such other goods as deem necessary for the President may, by effective  
functioning of, and public notification, declare for the speedy disposal of to be  
essential goods for cases by, and the purpose of this article enforcement of the  
orders and control of prices of, such tribunals. such goods; (3) The provisions of  
this Article (h) offences against laws with shall have effect respect to any of the  
notwithstanding anything in matters specified in Sub- any other provision of this  
clauses (a) to (g) and fees Constitution or in any other in respect of any of those  
law for the time being in matters; force. (i) any matter incidental to any of the

matters specified in Sub-clauses (a) to (h). (3) A law made under Clause (1) may-- (a) provide for the establishment of a hierarchy of tribunals; (b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals ; (c) provide for the procedure (including provisions as to limitation and rules of evidence ) to be followed by the said tribunals ; (d) *exclude the jurisdiction of all courts except the jurisdiction of the Supreme Court under Article 136 with respect to all or any of the matters falling within the jurisdiction of the said tribunals*; (e) provide for the transfer to each such tribunal of any cases pending before any court or any other authority immediately before the establishment of such tribunal as would have been within the jurisdiction of such tribunal if the causes of action on which such suits or proceedings are based had arisen after such establishment; (f) contain such supplemental, incidental and consequential provisions (including provisions as to fees) as the appropriate Legislature may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such tribunals. (4) The provisions of this article shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force. *Explanation.* - In this article, "appropriate legislature", in relation to any matter, means Parliament or, as the case may be, a State Legislature competent to make laws with respect to such matter in accordance with the provisions of Part XI.

(Emphasis added)

**6.** We may now examine the manner in which these constitutional provisions have been sought to be implemented, the problems that have consequently arisen, and the manner in which Courts have sought to resolve them. Such an analysis will have to consider the working of the two provisions separately.

#### Article 323A

**7.** In pursuance of the power conferred upon it by Clause (1) of Article 323A of the Constitution, Parliament enacted the Administrative Tribunals Act, 1985 (Act 13 of 1985) [hereinafter referred to as "the Act"]. The Statement of Objects and Reasons of the Act indicates that it was in the express terms of Article 323A of the Constitution and was being enacted because a large number of cases relating to service matters were pending before various Courts; it was expected that "the setting up of such Administrative Tribunals to deal exclusively with service matters would go a long way in not only reducing the burden of the various courts and thereby giving them more time to deal with other cases expeditiously but would also provide to the persons covered by the Administrative Tribunals speedy relief in respect of their grievances."

**8.** Pursuant to the provisions of the Act, the Central Administrative Tribunal, with five Benches, was established on November 1, 1985. However, even before the Tribunal had been established, several writ petitions had been filed in various High Courts as well as this Court challenging the constitutional validity of Article 323A of the Constitution as also the provisions of the Act; the principal violation complained of being the exclusion of the jurisdiction of this Court under Article 32 of the Constitution and of that of the High Courts under Article 226 of the Constitution. Through an interim order dated October 31, 1985, reported as *S.P. Sampath Kumar v. Union of India* MANU/SC/0044/1985 : (1985)4SCC458, this Court directed the carrying out of certain measures with a view to ensuring the functioning of the Tribunal along constitutionally-sound principles. Pursuant to an undertaking given to this Court at the interim stage by the erstwhile Attorney General, An amending Act (Act 19 of 1986) was enacted to bring about the changes prescribed in the aforesaid interim order.



**9 .** When Sampath Kumar's case was finally heard, these changes had already been incorporated in the body and text of the Act. The Court took the view that most of the original grounds of challenge-which included a challenge to the constitutional validity of Article 323A - did not survive and restricted its focus to testing only the constitutional validity of the provision of the Act. In its final decision, the Court held that though judicial review is a basic feature of the constitution, the vesting of the power of judicial review in an alternative institutional mechanism, after taking it away from the High Courts, would not do violence to the basic structure so long as it was ensured that the alternative mechanism was an effective and real substitute for the High Court. Using this theory of effective alternative institutional mechanisms as its foundation, the Court proceeded to analyse the provisions of the Act in order to ascertain whether they passed constitutional muster. The Court came to the conclusion that the Act, as it stood at that time, did not measure up to the requirements of an effective substitute and, to that end, suggested several amendments to the provisions governing the form and content of the Tribunal. The suggested amendments were given the force of law by an amending Act (Act 51 of 1987) after the conclusion of the case and the Act has since remained unaltered.

**10.** We may now analyse the scheme and the salient features of the Act as it stands at the present time, inclusive as it is of the changes suggested in Sampath Kumar's case. The Act contains 37 Sections which are housed in five Chapters. Chapter I ("Preliminary") contains three Sections; Section 3 is the definition clause.

**11.** Chapter II ("Establishment of Tribunals and Benches thereof") contains Sections 4 - 13. Section 4 empowers the Central Government to establish : (1) a Central Administrative Tribunal with Benches at separate places; (2) an Administrative Tribunal for a State which makes a request in this behalf; and (3) a Joint Administrative Tribunal for two or more States which enter into an agreement for the purpose. Section 5 states that each Tribunal shall consist of a chairman and such number of Vice-Chairmen and Judicial and Administrative Members as may be deemed necessary by the appropriate Government. Sub-section (2) of Section 5 requires every Bench to ordinarily consist of one Judicial Member and one Administrative Member. Sub-section (6) of Section 5, which enables the Tribunal to function through Single Member Benches is the focus of some controversy, as will subsequently emerge, and is fully extracted as under:

Section 5(6) - Notwithstanding anything contained in the foregoing provisions of this section, it shall be competent for the Chairman or any other Member authorised by the Chairman in this behalf to function as a Bench consisting of a single Member and exercise the jurisdiction powers and authority of the Tribunal in respect of such classes of cases or such matters pertaining to such classes of cases as the Chairman may by general or special order specify:

Provided that if at any stage of the hearing of any such case or matter it appears to the Chairman or such Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members the case or matter may be transferred by the chairman or, as the case may be, referred to him for transfer to such Bench as the Chairman may deem fit.

**12.** Section 6 deals with the qualifications of the personnel of the Tribunal. Since the first few sub-sections of Section 6 are required to be considered subsequently, they may be reproduced hereunder:

**6.** Qualifications for appointment of Chairman, Vice- Chairman or other Members. -

(1) A person shall not be qualified for appointment as the Chairman unless he-



(a) is, or has been, a Judge of a High Court; or

(b) has, for at least two years, held the office of Vice-Chairman;

(c) ..

(2) A person shall not be qualified for appointment as the Vice-Chairman unless he-

(a) is, or has been, or is qualified to be a Judge of a High Court; or

(b) has, for at least two years, held the post of a Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of a Secretary to the Government of India; or

(bb) has for at least five years, held the post of an Additional Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of an Additional Secretary to the Government of India; or

(c) has, for a period of not less than three years, held office as a Judicial Member or an Administrative Member.

(3) A person shall not be qualified for appointment as a Judicial Member unless he-

(a) is, or has been, or is qualified to be, a Judge of a High Court; or

(b) has been a member of the Indian Legal Service and has held a post in Grade I of that Service for at least three years.

(3-A) A person shall not be qualified for appointment as an Administrative Member unless he--

(a) has, for at least two years, held the post of an Additional Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of an Additional Secretary to the Government of India; or

(b) has, for at least three years, held the post of a joint Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of a Joint Secretary to the Government of India.

and shall, in either case, have adequate administrative experience.

**13.** Sub-sections (4), (5) and (6) of Section 6 provide that all the Members of the Central Administrative Tribunal, the State Administrative Tribunals and the Joint Administrative Tribunals shall be appointed by the President; in the case of the State Administrative Tribunals and the Joint Administrative Tribunals, the President is required to consult the concerned Governor(s). Sub-section (7) stipulates that the Chief Justice of India is also to be consulted in the appointment of the Chairman, Vice-Chairman and Members of all Tribunals under the Act.

**14.** Section 8 prescribes the terms of office of the personnel of the Tribunal as being for a duration of five years from the date of entering into office; there is also provision for reappointment for another term of five years. The maximum age limit permissible for the

Chairman and the Vice-Chairman is 65 years and for that of any other Member is 62 years. Section 10 stipulates that the salaries, terms and conditions of all Members of the Tribunal are to be determined by the central Government; such terms are, however, not to be varied to the disadvantage of any Member after his appointment.

**15.** Chapter III ("Jurisdiction, powers and authority of Tribunals") consists of Sections 14 - 18. Sections 14, 15 and 16 deal with the jurisdiction, powers and authority of the Central Administrative Tribunal, the State Administrative Tribunals and the Joint Administrative Tribunals respectively. These provisions make it clear that except for the jurisdiction of this Court, the Tribunals under the Act will possess the jurisdiction and powers of every other Court in the country in respect of all service-related matters. Section 17 provides that the Tribunals under the Act will have the same powers in respect of contempt as are enjoyed by the High Courts.

**16.** Chapter IV ("Procedure") comprises Section 19 - 27. Section 21 specifies strict limitation periods and does not vest the Tribunals under the Act with the power to condone delay.

**17.** Chapter V ("Miscellaneous"), the final Chapter of the Act, comprising Sections 28 - 37, vests the Tribunals under the Act with ancillary powers to aid them in the effective adjudication of disputes. Section 28, the "exclusions of Jurisdiction" clause reads as follows:

28. Exclusion of Jurisdiction of courts.-- On and from the date from which any jurisdiction, powers and authority becomes exercisable under this Act by a Tribunal in relation to recruitment and matters concerning recruitment to any Service or post or service matters concerning members of any Service or persons appointed to any Service or post, no court except--

(a) the Supreme Court; or

(b) any Industrial Tribunal, Labour Court or other authority constituted under the Industrial Disputes Act, 1947 or any other corresponding law for the time being in force,

Shall have, or be entitled to exercise any jurisdiction, powers or authority in relation to such recruitment or matters concerning such recruitment or such service matters.

**18.** A facet which is of vital relevance to the controversy before us, and consequently needs to be emphasised, is that Section 28, when originally enacted, was in the express terms of Clause (2) (d) of Article 323A of the Constitution and the only exception made in it was in respect of the jurisdiction of this Court under Article 136 of the Constitution. However, before the final hearing in Sampath Kumar's case the provision was further amended to also save the jurisdiction of this Court under Article 32 of the Constitution; this aspect has been noted in the judgment of Mishra, J. in Sampath Kumar's case (at para 14). Since the Court in Sampath Kumar's case had restricted its focus to the provisions of the Act, it expressed itself to be satisfied with the position that the power of judicial review of the Apex Court had not been tampered with by the provisions of the Act and did not venture to address the larger issue of whether Clause (2)(d) of Article 323A of the Constitution also required a similar amendment.

**19.** Section 29 provides for the transfer to the Tribunals under the Act, of all service matters pending in every existing form before their establishment. The only exception carved out is in respect of appeals pending before High Courts. Section 35 vests the Central Government with rule-making powers and Section 36 empowers the appropriate

Government to make rules to implement the provisions of the Act and the matters specified in it. By virtue of Section 37, the rules made by the Central Government are required to be laid before Parliament and, in the case of rules made by State Governments, before the concerned State Legislature (s).

**20.** The Act and its provisions will be analysed in the course of this judgment. However, a preliminary appraisal of the framework of the Act would indicate that it was intended to provide a self-contained, almost wholly exclusive (the exceptions being specified in Section 28) forum for adjudication of all service related matters. The Tribunals created under the Act were intended to perform a substitution role as opposed to - and this distinction is of crucial significance-a supplemental role with regard to the High Courts.

**21.** According to the information provided to us by Mr. K.N. Bhat, the learned Additional Solicitor General, apart from the Central Administrative Tribunal which was established on 1.11.1985, eight States have set up State Administrative Tribunals, all of which are presently functioning. The States, along with the date of establishment of the particular State Administrative Tribunals, are as follows: Andhra Pradesh (1.11.1989), Himachal Pradesh (1.9.1986), Karnataka (6.10.1986), Madhya Pradesh (2.8.1988), Maharashtra (8.7.1989), Orissa (14.7.1986), Tamil Nadu (12.12.1988) and west Bengal (16.1.1995).

**22.** We may now analyse the "post-Sam path Kumar cases" which find mention in the order of the referring Bench. In J.B. Chopra's case, a division Bench of this Court has occasion to consider one of the specific questions that has now arisen for our consideration, viz., whether the Central Administrative Tribunal constituted under the Act has the authority and the jurisdiction to strike down a rule framed by the President of India under the proviso to Article 309 of the Constitution as being violative of Articles 14 and 16(1) of the Constitution. When the matter came up before the Division Bench, the issue was still being considered by the Constitution Bench in Sampath Kumar's case. The Division Bench, therefore, deferred its judgment till the final pronouncement of the decision in Sampath Kumar's case. Thereafter, it analysed the Constitution Bench's decision to arrive at the conclusion that "the Administrative Tribunal being a substitute of the High Court had the necessary jurisdiction, power and authority to adjudicate upon all disputes relating to service matters including the power to deal with all question pertaining to the constitutional validity or otherwise of such laws as offending Article 14 and 16(1) of the Constitution."

**23.** An aspect which needs to be emphasised is that the Constitution Bench in Sampath Kumar's case had not specifically addressed the issue whether the Tribunals under the Act would have the power to strike down statutory provisions or rules as being constitutionally invalid. However, the Division Bench in J.B. Chopras' case felt that this proposition would follow as a direct and logical consequence of the reasoning employed in Sampath Kumar's case.

**24.** In M.B. Majumdar's case, a Division Bench of this Court had to confront the contention, based on the premise that in Sampath Kumar's case this Court had equated the Tribunals established under the Act with High Courts, that the Members of the Central Administrative Tribunals must be paid the same salaries as were payable to Judges of the High Court. The Court, after analysing the text of Article 323A of the Constitution, the provisions of the Act, and the decision in Sampath Kumar's case, rejected the contention that the Tribunals were the equals of the High Courts in respect of their service conditions. The Court clarified that in Sampath Kumar's case, the Tribunals under the Act had been equated with High Courts only to the extent that the former were to act as substitutes for the latter in adjudicating service matters; the Tribunals could not, therefore, seek parity for all other purposes.

**25.** In Amulya Chandra's case, a Division Bench of this Court had to consider the question whether a dispute before the central Administrative Tribunal could be decided by a single Administrative Member. The Court took note of Sub-section (2) of Section 5 of the Act

which, as we have seen, stipulates that a Bench of a Tribunal under the Act should ordinarily consist of a Judicial Member and an Administrative Member, as also the relevant observations in Sampath Kumar's case, to conclude that under the scheme of Act, all cases should be heard by a Bench of two Members. It appears that the attention of the Court was not drawn towards Sub-section (6) of Section 5 which, as we have noticed, enables a single Member of a Tribunal under the Act to hear and decide cases.

**26.** The same issue arose for consideration before another Bench of this Court in Dr. Mahabal Ram's case. The Court took note of the decision in Amulya Chandra's case and, since the vires of Sub-section (6) of Section 5 of the Act was not under challenge, held that Sub-sections (2) and (6) of Section 5 are to be harmoniously construed in the following manner (supra at p. 404):

..There is no doubt that what has been said in Sampath Kumar's case would require safeguarding the interest of litigants in the matter of disposal of their disputes in a judicious way. Where complex questions of law would be involved the dispute would require serious consideration and thorough examination. There would, however, be many cases before the Tribunal where very often no constitutional issues or even legal points would be involved..

We are prepared to safeguard the interests of claimants who go before the Tribunal by Holding that while allocating work to the Single Member - whether Judicial or administrative - in terms of Sub-section (6), the Chairman should keep in view the nature of the litigation and where questions of law and for interpretation of constitutional provisions are involved they should not be assigned to a Single Member. In fact, the proviso itself indicates Parliament's concern to safeguard the interest of claimants by casting an obligation on the Chairman and Members who hear the cases to refer to a regular bench of two members such cases which in their opinion require to be heard by a bench of two Members. We would like to add that it would be open to either party appearing before a Single Member to suggest to the Member hearing the matter that it should go to a bench of two Members. The Member should ordinarily allow (he matter to go to a bench of two Members when so requested. This would sufficiently protect the interests of the claimants and even of the administrative system whose litigation may be before the Single Member for disposal..

The vires of Sub-section (6) has not been under challenge and, therefore, both the provisions in Section 5 have to be construed keeping the legislative intention in view. We are of the view that what we have indicated above brings out the true legislative intention and the prescription in Sub-section (2) and the exemption in Sub-section (6) are rationalised.

**27.** In R.K. Jain v. Union of India MANU/SC/0291/1993 : 1993(65)ELT305(SC) , a Division Bench of this Court consisting of three of us (Ahmadi, CJI, Punchhi and Ramaswamy, JJ.) had occasion to deal with complaints concerning the functioning of the Customs, Excise and Gold Control Appellate Tribunal, which was set up by exercising the power conferred by Article 323B. In his leading judgment, Ramaswamy, J. analysed the relevant constitutional provisions, the Decisions in Sampath Kumar, J.B. Chopra and M.B. Majumdar to hold that the Tribunals created under Articles 323A and 323B could not be held to be substitutes of High Courts for the purpose of exercising jurisdiction under Articles 226 and 227 of the Constitution. Having had the benefit of more than five years' experience of the working of these alternative institutional mechanisms, anguish was expressed over their ineffectiveness in exercising the high power of judicial review. It was recorded that their performance had left much to be desired. Thereafter, it was noted that the sole remedy provided, that of an appeal to this Court under Article 136 of the Constitution, had proved to be prohibitively costly while also being inconvenient on account of the distances involved. It was suggested that an expert body like the Law Commission of India should study the feasibility of providing an appeal to a Bench of two Judges of the concerned High

Court from the orders of such Tribunals and also analyse the working of the Tribunals since their establishment, the possibility of inducting members of the Bar to man such Tribunals etc. It was hoped that recommendations of such an expert body would be immediately adopted by the Government of India and remedial steps would be initiated to overcome the difficulties faced by the Tribunals, making them capable of dispensing effective, inexpensive and satisfactory justice.

**28.** In a separate but concurring judgment, Ahmadi, J.(as he then was) speaking for himself and Punchhi, J., endorsed the recommendations in the following words:

..The time is ripe for taking stock of the working of the various Tribunals set up in the country after the insertion of Articles 323A and 323B in the Constitution. A sound justice delivery system is a sine qua non for the efficient governance of a country wedded to the rule of law. An independent and impartial justice delivery system in which the litigating public has faith and confidence alone can deliver the goods. After the incorporation of these two articles, Acts have been enacted whereunder tribunals have been constituted for dispensation of justice. Sufficient time has passed and experience gained in these last few years for taking stock of the situation with a view to finding out if they have served the purpose and objectives for which they were constituted. Complaints have been heard in regard to the functioning of other tribunals as well and it is time that a body like the Law Commission of India has a comprehensive look-in with a view to suggesting measures for their improved functioning. That body can also suggest changes in the different statutes and evolve a model on the basis whereof tribunals may be constituted or reconstituted with a view to ensuring greater independence. An intensive and extensive study needs to be undertaken by the Law Commission in regard to the Constitution of tribunals under various statutes with a view to ensuring their independence so that the public confidence in such tribunals may increase and the quality of their performance may improve. We strongly recommend to the Law Commission of India to undertake such an exercise on priority basis. A copy of this judgment may be forwarded by the Registrar of this Court to the Member Secretary of the Commission for immediate action.

**29.** During the hearing, we requested the learned Additional Solicitor General of India, Mr. K.N. Bhat, to inform us of the measures undertaken to implement the directions issued by this Court in R.K. Jain's case. We were told that the Law Commission had in fact initiated a performance-analysis on the lines suggested in the judgment; however, when the Division Bench issued its order indicating that Sampath Kumar's case might have to be reviewed by a larger Bench, further progress on the study was halted.

**30.** We may now apply ourselves to analysing the decision which has been impugned in one of the matters before us, C.A. No. 169 of 1994. The judgment, Sakinala Harinath and Ors. v. State of A.P., rendered by a full Bench of the Andhra Pradesh High Court, has declared Article 323A(2)(d) of the Constitution to be unconstitutional to the extent it empowers Parliament to exclude the jurisdiction of the High Courts under Article 226 of the Constitution; additionally, Section 28 of the Act has also been held to be unconstitutional to the extent it divests the High Courts of jurisdiction under Article 226 in relation to service matters.

**31.** The Judgment of the Court, delivered by M.N. Rao, J. has in an elaborate manner, viewed the central issues before us against the backdrop of several landmark decisions delivered by Constitution Benches of this Court as also the leading authorities in the comparative constitutional law. The judgment has embarked on a wide-ranging quest, extending to the American, Australian and British jurisdictions, to ascertain the true import of the concepts of 'judicial power', 'judicial review' and other related aspects. The judgment has also analysed a contention based on Article 371D of the Constitution, but, since that



aspect is not relevant to the main controversy before us, we shall avoid its discussion.

**32.** The Judgment of the Andhra Pradesh High Court has, after analyzing various provisions of our Constitution, held that under our constitutional scheme the Supreme Court and the High Courts are the sole repositories of the power of judicial review. Such power, being inclusive of the power to pronounce upon the validity of statutes, actions taken and orders passed by individuals and bodies falling within the ambit of the expression "State" in Article 12 of the Constitution, has only been entrusted to the constitutional courts, i.e., the High Courts and this Court. For this proposition, support has been drawn from the rulings of this Court in *Kesavananda Bharati v. State of Kerala* MANU/SC/0445/1973 : AIR1973SC1461 , Special Reference No. 1 of 1964, [1965] 1 SCR 413; *Indira Nehru Gandhi v. Raj Narain* MANU/SC/0491/1975 : [1975]3SCR854a ; *Minerva Mills Ltd. v. Union of India* MANU/SC/0075/1980 : [1981]1SCR206 , *Kihoto Hollohan v. Zachillu and Ors.* MANU/SC/0753/1992 : [1992]1SCR686 and certain other decisions, all of which have been extensively analysed and profusely quoted from.

**33.** Analysing the decision in Sampath Kumar's case against this back-drop, it is noted that the theory of alternative institutional mechanisms established in Sampath Kumar's case is in defiance of the proposition laid down in *Kesavananda Bharati's* case, Special reference case and *Indira Gandhi's* case, that the Constitutional Courts alone are competent to exercise the power of judicial review to pronounce upon the constitutional validity of statutory provisions and rules. The High Court, therefore, felt that the decision in Sampath Kumar's case, being per incuriam, was not binding upon it. The High Court also pointed out that, in any event, the issue of constitutionality of Article 323A(2)(d) was neither challenged nor upheld in Sampath Kumar's case and it could not be said to be an authority on that aspect.

**34.** Thereafter, emphasising the importance of service matters which affect the functioning of civil servants, who are an integral part of a sound governmental system, the High Court held that service matters which involve testing the constitutionality of provisions or rules, being matters of grave import, could not be left to be decided by statutorily created adjudicatory bodies, which would be susceptible to executive influences and pressures. It was emphasised that in respect of constitutional Courts, the Framers of our Constitution had incorporated special prescriptions to ensure that they would be immune from precisely such pressures. The High Court also cited reasons for holding that the sole remedy provided, that of an appeal under Article 136 to this Court, was not capable of being a real safeguard. It was also pointed out that even the saving of the jurisdiction of this Court under Article 32 of the Constitution would not help improve matters. It was, therefore, concluded that although judicial power can be vested in a Court or Tribunal, the power of judicial review of the High Court under Article 226 could not be excluded even by a constitutional Amendment.

Article 323B.

**35.** This provision of the Constitution empowers Parliament or the State Legislatures, as the case may be, to enact laws providing for the adjudication or trial by Tribunals of disputes, complaints or offences with respect to a wide variety of matters which have been specified in the nine Sub-clause of Clause (2) of Article 323B. The matters specified cover a wide canvas including inter alia disputes relating to tax cases, foreign exchange matters, industrial and labour cases, ceiling on urban property, election to State Legislatures and Parliament, essential goods and their distribution, criminal offences etc. Clause (3) enables the concerned Legislature to provide for the establishment of a hierarchy of Tribunals and to lay down their jurisdiction, the procedure to be followed by them in their functioning, etc. Sub-clause (d) of Clause (3) empowers the concerned Legislature to exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under Article 136 of the Constitution, with respect to all or any of matters falling within the jurisdiction of the Tribunals. The constitutional provision, therefore, invests Parliament of the State



Legislatures, as the case may be, with powers to divest the traditional courts of a considerable portion of their judicial work.

**36.** According to the information provided to us by Mr. K.N. Bhat, the learned Additional Solicitor General, until the present date, only four Tribunals have been created under Article 323B pursuant to legislations enacted by the Legislatures of three States. The first of these was the West Bengal Taxation Tribunal which was set up in 1989 under the West Bengal Taxation Tribunal Act, 1987. Similarly, the Rajasthan Taxation Tribunal was set up in 1995 under the Rajasthan Taxation Tribunal Act, 1995. The State of Tamil Nadu has set up two Tribunals by utilising the power conferred upon it by Article 323B. The first of these was the Tamil Nadu Land Reforms Special Appellate Tribunal which was established on 1.11.1990 under the Tamil Nadu Land Reforms (Fixation of Ceiling of Land) Amendment Act, 1985 to deal with all matters relating to land reforms arising under the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961. Later, the Tamil Nadu Taxation Special Tribunal was established on 22.12.1995 under the Tamil Nadu Taxation Special Tribunal Act, 1992 to deal with cases arising under the Tamil Nadu General Sales Tax Act and Additional Sales Tax Act.

**37.** Certain problems have arisen in the functioning of these Tribunals especially in respect of the manner in which they exclude the jurisdiction of their respective High Courts. This aspect can be illustrated by briefly adverting to the broad facts of two of the matters before us. C.A. No. 1532-33 of 1993 arises as a result of conflicting orders issued by the West Bengal Taxation Tribunal and the Calcutta High Court. Certain petitioners had challenged the constitutional validity of some provisions in three legislations enacted by the West Bengal Legislature before the West Bengal Taxation Tribunal. After examining the matter and hearing the arguments advanced in response by the State of West Bengal, the West Bengal Taxation Tribunal, by this order dated 9.10.1991, upheld the constitutional validity of the impugned provisions. Thereafter, the constitutional validity of the same provisions was challenged in a Writ Petition before the Calcutta High Court. During the proceedings, the State of West Bengal raised the preliminary objection that by virtue of Section 14 of the West Bengal Taxation Tribunal Act, 1987, which excluded the jurisdiction of the High Court in all matters within the jurisdiction of the Taxation Tribunal, the Calcutta High Court had no jurisdiction to entertain the writ petition. However, the High Court proceeded with the case and, by its judgment dated 25.11.1992, declared the impugned provisions to be unconstitutional. These developments have resulted in an interesting situation, where the same provisions have alternately been held to be constitutional and unconstitutional by two different forums, each of which considered itself to be empowered to exercise jurisdiction.

**38.** S.L.P. No. 17768 of 1991 seeks to challenge a judgment of the Madras High Court which has held that the establishment of the Tamil Nadu Land Reforms Special Appellate Tribunal will not affect the powers of the Madras High Court to issue writs. This decision is based on the reasoning that the Legislature of the State had no power "to infringe upon the High Courts' powers to issue writs under Article 226 of the Constitution and to exercise its powers of superintendence under Article 227 of the Constitution."

**39.** It is against these circumstances that we must now test the propositions put forth for our consideration.

Submissions of Counsel.

**40.** We have heard the submission of several learned senior counsel who appeared for the various parties before us. Mr. Rama Jois and Mr. Shanti Bhushan, through their respective arguments, urged us to review the decision in Sampath Kumar's case and to hold Article 323A(2)(d) and Article 323B(3)(d) of the Constitution to be unconstitutional to the extent they allow Tribunals created under the Act to exclusively exercise the jurisdiction vested in the High Courts under Articles 226 and 227 of the Constitution. On the other hand, Mr.

Bhat, the learned Additional Solicitor General, Mr. P.P. Rao, and Mr. K.K. Venugopal urged us to uphold the validity of the impugned constitutional provisions and to allow such Tribunals to exercise the jurisdiction under Article 226 of the Constitution. We have also heard arguments advanced on behalf of the Registrar of the Principal Bench of the Central Administrative Tribunal, who was represented before us by Mr. Kapil Sibal. Mr. V.R. Reddy, the learned Additional Solicitor General, urged us to set aside the judgment of the Madras High Court which affects the jurisdiction of the Tamil Nadu Land Reforms Special Appellate Tribunal. Certain other counsel have also addressed us in support of the main arguments advanced.

**41.** Mr. Rama Jois, learned Counsel for the petitioner in W.P. No. 918 of 1992, contended as follows: (i) Section 5(6) of the Act, insofar as it allows a single Member Bench of a Tribunal to test the constitutional validity of a statutory provision, is unconstitutional. This proposition flows from the decisions in Sampath Kumar's case, Amulya Chandra's case and Dr. Mahabal Ram's case. In Sampath Kumar's case, this Court had required a Bench of a Tribunal to ordinarily consist of a Judicial Member and an Administrative Member. Consequently, Section 5(2) of the Act was accordingly amended; however, since Section 5(6) was not amended simultaneously, the import of the observations in Sampath Kumar's case can still be frustrated. Even if the theory of alternative institutional mechanisms adopted in Sampath Kumar's case, is presumed to be correct, Section 5(6) of the Act will have to be struck down as a single Member Bench of a Tribunal cannot be considered to be a substitute for the exercise of the power of a High Court under Article 226 of the Constitution; (ii) The impugned provisions of the Constitution, insofar as they exclude the jurisdiction of the Supreme Court and the High Courts under Articles 32 and of the Constitution, are unconstitutional. This is for the reason that: (a) Parliament cannot, in exercise of its constituent power, confer power on Parliament and the State Legislatures to exclude the constitutional jurisdiction conferred on the High Courts as the power to amend the Constitution cannot be conferred on the Legislatures; and (b) These provisions violate the basic structure of the Constitution insofar as they take away the power of judicial review vested in the Supreme Court under Article 32 of the Constitution and the High Courts under Articles 226 and 227 the Constitution. While the Tribunals constituted under Articles 323A and 323B can be vested with the power of judicial review over administrative action, the power of judicial review of legislative action cannot be conferred upon them. This proposition flows from Kesavananda Bharati's case where it was held that under our constitutional scheme, only the constitutional courts have been vested with the power of judicial review of legislative action; (iii) While the provisions of the Act do not purport to affect the sacrosanct jurisdiction of the Supreme Court under Article 32 of the Constitution, Articles 323A and 323B allow Parliament to pursue such a course in future and are therefore liable to be struck down; (iv) The decision in Sampath Kumar's case was founded on the hope that the Tribunals would be effective substitutes for the High Courts. This position is neither factually nor legally correct on account of the following differences between High Courts and these Tribunals: (a) High Courts enjoy vast powers as a consequence of their being Courts of record under Article 215 of the Constitution and also process the power to issue Certificates of Appeal under Articles 132 and 133 of the Constitution in cases where they feel that a decision of this Court is required. This is not so for Tribunals; (b) the qualifications for appointment of a High Court Judge and the constitutional safeguards provided ensure the independence of and efficiency of the Judges who man the High Courts. The conditions prescribed for Members of Tribunals are not comparable; (c) While the jurisdiction of the High Courts is constitutionally protected, a Tribunal can be abolished by simply repealing its parent statute; (d) While the expenditure of the High Courts is charged to the Consolidated Fund of the States, the Tribunals are dependent upon the appropriate Government for the grant of funds for meeting their expenses. These and other differences give rise to a situation whereby the Tribunals, being deprived of constitutional safeguards for ensuring their independence, are incapable of being effective substitutes for the High Courts; (v) Under our constitutional scheme, every High Court has, by virtue of Articles 226

and 227 of the Constitution, the power to issue prerogative writs or orders to all authorities and instrumentalities of the State which function within its territorial jurisdiction. In such a situation, no authority or Tribunal located within the territorial jurisdiction of a High Court can disregard the law declared by it. The impugned constitutional provisions, insofar as they seek to divest the High Courts of their power of superintendence over all Tribunals and Courts situated within their territorial jurisdiction, violate the basic structure of the constitution, and (vi) In view of the afore-stated propositions, the decision in Sampath Kumar's case requires a comprehensive reconsideration.

**42.** Mr. Shanti Bhushan, appearing for the respondent in C.A. No. 1532-33/96, advanced the following submissions: (i) The 42nd Amendment to the Constitution, which introduced the impugned constitutional provisions, must be viewed in its historical context. The 42nd Amendment, being motivated by a feeling of distrust towards the established judicial institutions, sought, in letter and spirit, to divest constitutional courts of their jurisdiction. The aim was to vest such constitutional jurisdiction in creatures whose establishment and functioning could be controlled by the executive. Such an intent is manifest in the plain words of Articles 323A and 323B which oust the jurisdiction vested in this Court and the High Courts under Articles 32, 226 and 227 of the Constitution; (ii) The validity of the impugned provisions has to be determined irrespective of the manner in which the power conferred by them has been exercised. In Sampath Kumar's case, this Court restricted its enquiry to the Act, which did not oust the jurisdiction under Article 32, and did not explore the larger issue of the constitutionality of Article 323A(2)(d), which in express terms permits Parliament to oust the jurisdiction of the Supreme Court. This was not correct approach as the constitutionality of a provision ought not to be judged only against the manner in which power is sought to be exercised under it. The correct test is to square the provision against the constitutional scheme and then pronounce upon its compatibility. The vice in Article 323A(2)(d) is that it permits Parliament to enact, at a future date, a law to exclude the jurisdiction of this Court under Article 32. Being possessed of such potential for unleashing constitutional mischief in the future, its vires cannot be sustained; (iii) The power of judicial review vested in this Court under Article 32 and the High Court under Article 226 is part of the basic structure of the Constitution. The relevant portions of the decisions in *Kesavananda Bharati's case*, *Fertiliser Corporation Kamgar Union v. Union of India* MANU/SC/0010/1980 : (1981)ILLJ193SC and *Delhi Judicial Service Association v. State of Gujarat* MANU/SC/0473/1991 : AIR1991SC2150 highlight the importance accorded to Article 32 of the Constitution; (iv) The theory of alternative institutional mechanisms advocated in Sampath Kumar's case ignores the fact that judicial review vested in the High Courts consists not only of the power conferred upon the High Courts but also of the High Courts themselves as institutions endowed with glorious judicial traditions. The High Courts had been in existence since the 19th century and were possessed of a hoary past enabling them to win the confidence of the people. It is this which prompted the Framers of our Constitution to vest such constitutional jurisdiction in them. A Tribunal, being a new creation of the executive, would not be able to recreate a similar tradition and environment overnight. Consequently, the alternative mechanisms would not, in the absence of an atmosphere conducive to the building of traditions, be able to act as effective alternatives to High Courts for the exercise of constitutional Jurisdiction. In *Pratibha Bonnerjea v. Union of India* MANU/SC/0181/1996 : AIR1996SC693, this Court has analysed the special constitutional status of Judges of High Courts and explained how they are distinct from other tiers of the judiciary.

**43.** Mr. A.K. Ganguli, appearing for the second and third respondents in C.A. 1532-33/93, adopted the arguments of Mr. Rama Jois and Mr. Bhushan. In addition, he cited certain authorities in support of his contention that the power to interpret the provisions of the Constitution is one which has been solely vested in the constitutional courts and cannot be bestowed on newly created quasi-judicial bodies which are susceptible to executive influences.

**44.** Mr. K.N. Bhat, the learned Additional Solicitor General of India represented the Union of India which is a party in C.A. No. 169 of 1994 and C.A. No. 481 of 1989. His contentions are as follows: (i) Clause 2(d) of Article 323A and Clause 3(d) of Article 323B ought not to be struck down on the ground that they exclude the jurisdiction of this Court under Article 32 of the Constitution. On account of several decisions of this Court, it is a well-established proposition in law that the jurisdiction of this Court under Article 32 of the Constitution is sacrosanct and is indisputably a part of the basic structure of the Constitution. This position had been clearly enunciated well before the 42nd Amendment to the Constitution was conceived. Therefore, Parliament must be deemed to have been aware of such a position and it must be concluded that the jurisdiction under Article 32 was not intended to be affected. However, the jurisdiction of the High Courts under Article 226 was sought to be removed by creating alternative institutional mechanisms. The theory enunciated in Sampath Kumar's case is based on sound considerations and does not require any reconsideration; (ii) Alternatively, Articles 323A and 323B do not seek to exclude the supervisory jurisdiction of the High Courts over all Tribunals situated within their territorial jurisdiction. Viewed from this perspective, the High Courts would still be vested with Constitutional powers to exercise corrective or supervisory jurisdiction; (iii) Since the decisions of this Court in Amulya Chandra's case and Dr. Mahabal Ram's case had clearly held that matters relating to the vires of a provision are to be dealt with by a Bench consisting of a judicial member and these guidelines will be followed in future, there is no vice of unconstitutionality in Section 5(6).

**45.** Mr. P.P. Rao, learned Counsel for the State of Andhra Pradesh in C.A. No. 196 of 1994 and the connected special leave petitions, put forth the following submissions: (i) The matter before us involves a very serious, live problem which needs to be decided by adopting a pragmatic, cooperative approach instead of by a dogmatic, adversarial process. It is a fact that the Administrative Tribunals which were conceived as substitutes for the High Courts have not lived upto expectations and have instead, proved to be inadequate and ineffective in several ways. However, the striking down of the impugned constitutional provisions would, instead of remedying the problem, contribute to its worsening. The problem of pendency in High Courts which has been a cause for concern for several decades, has been focused upon by several expert committees and commissions. The problem of enormous increase in the volume of fresh institution coupled with massive areas has necessitated the seeking of realistic solutions in order to prevent High Courts from becoming incapable of discharging their functions. The consistent view of these expert committees has been that the only manner in which the situation can be saved is by transferring some of the jurisdiction of the High Courts, in relatively less important areas, to specially constituted Tribunals which would act as substitutes for the High Courts. In Sampath Kumar's case, this Court was required to test the constitutional validity of providing for such a substitute to the High Court in the shape of Administrative Tribunals. While deciding the case, this Court had actually monitored the amendments to the Act by a series of orders and directions given from time to time as the learned Attorney General had offered to effect the necessary amendments to the Act to remove its defects. After the necessary amendments were made to the Act, this Court was satisfied that there was no need to strike, it down as it was of the view that the Act would provide an effective alternative forum to the High Courts for the resolution of service disputes. However, the actual functioning of the Tribunals during the last decade has brought forth several deficiencies which need to be removed. The remedy, however, lies not in striking down the constitutional provisions involved but in allowing the Union of India to further amend the Act so as to ensure that the Tribunals become effective alternative form; (ii) Article 323A(2) (d) does not violate the basic structure of the Constitution. The relevant observations in Keshvananda Bharati's case, show that there is an inherent distinction between the individual provisions of the Constitution and the basic features of the Constitution. While the basic features of the Constitution cannot be changed even by amending the Constitution each and every provision of the Constitution can be amended under Article 368. The



majority judgments in Keshavananda Bharti's case emphatically state that the concept of separation of powers is a basic feature of the Constitution. It, therefore, follows that the powers of judicial review, which is a necessary concomitant of the independence of the judiciary, is also a basic feature of our Constitution. However, it does not follow that specific provisions such as Article 32 or Article 226 are by themselves part of the basic structure of the Constitution. In this regard, the history of Article 31, which contained a Fundamental Right to Property and was shifted from Part III to Chapter IV of Part XII can be cited by way of an example; (iii) the essence of the power of judicial review is that it must always remain with the judiciary and must not be surrendered to the executive or the legislature. Since the impugned provisions save the jurisdiction of this Court under Article 136, thereby allowing the judiciary to have the final say in every form of adjudication, it cannot be said that the basic feature of judicial review had been violated. The constitutional bar is against the conferment of judicial power on agencies outside the judiciary. However, if within the judicial set-up, arrangements are made in the interests of bolter administration of justice to limit the jurisdiction under Article 32 and 226 of the Constitution, there can be no grievance. In fact, it is in the interest of better administration of justice that this Court has developed a practice, even in the case of violation of Fundamental Rights, of requiring parties to approach the concerned High Court under Article 226 instead of directly approaching this Court under Article 32 of the Constitution. This, undoubtedly, has the effect of limiting the jurisdiction of this Court under Article 32 but, being necessary for proper administration of justice, cannot be challenged as unconstitutional. Service matters, which are essentially in the nature of in-house disputes, being of lesser significance than those involving Fundamental Rights, can also be transferred to Tribunals on the same reasoning; (iv) By virtue of Order XXVII-A, Rule 1A, ordinary civil courts are empowered to adjudicate upon questions of vires of statutory rules and instruments. In view of this situation, there is no constitutional difficulty in empowering Tribunals to have similar powers; (v) Alternatively, in case we are inclined to take view that the power of judicial review of legislative enactments cannot in any event be conferred on any other Court or Tribunal, we may use the doctrine of reading down to save the impugned constitutional provisions. So construed, the High Courts would continue to have jurisdiction to decide the vires of an Act even in the area of service disputes and would, therefore, perform a supervisory role over Tribunals in respect of matters involving constitutional questions.

**46.** Mr. K.K. Venugopal, representing the State of West Bengal in S.L.P. No. 1063 of 1996 and C.A. No. 1532-33 of 1993, began by reiterating the contention that the impugned provisions do not seek to oust the jurisdiction of this Court under Article 32 which is a basic feature of the Constitution. His alternative contention was that since the provisions do not exclude the jurisdiction under Article 136 and since Article 32(3) itself conceives of the delegation of that jurisdiction, the ouster of the jurisdiction under Article 32 was not unconstitutional. This submission was based on the reasoning that, in the absence of any specific constitutional prohibition, both Parliament and the State legislatures were vested with sufficient legislation powers to effect changes in the original jurisdiction of this Court as well as the High Courts. He then stated that in the event that we are not inclined to hold in accordance with either of the earlier contentions, the doctrine of severability should be applied to excise the words "under Article 136" from the provisions and thus save them from the vice of unconstitutionality. Thereafter, he endeavoured to impress upon us the jurisprudential soundness of the theory of alternative institutional mechanism propounded in Sampath Kumar's case. He then contended that the shortfalls in the Constitution of the Tribunals, the selection of their personnel, the methods of their appointment etc. are a consequence of legislative and executive errors of judgment; these shortfalls cannot affect the constitutionality of the parent constitutional provisions. He concluded by declaring that these constitutional amendments were lawfully incorporated by the representatives of the people in exercise of the constituent power of Parliament to remedy the existing problem of inefficacious delivery of justice in the High Courts. He counseled us not to substitute our decision for that of the policy evolved by Parliament in exercise of its constituent power and

urged us to suggest suitable amendments, as was done in Sampath Kumar's case, to make up for the shortfalls in the existing system.

**47.** Mr. Kiran K. Shah, the petitioner in W.P. No. 789 of 1990, who is a lawyer practicing before the Ahmedabad Bench of the Central Administrative Tribunal, sought to apprise us of the practical problems faced by advocates in presenting their cases before the Central Administrative Tribunal and of several complaints regarding the discharge of their official duties.

**48.** The Registrar of the Principle Bench of the Central Administrative Tribunal, who is the Second respondent in C.A. No. 481 of 1989, was represented before us by Mr. Kapil Sibal. The case of the Registrar is that the Tribunals, as they are functioning at present, are not effective substitutes for the High Courts. However, the creation of alternative institutional mechanisms is not violative of the basic structure so long as it is as efficacious as the constitutional courts. He urged us to discontinue the appointment of Administrative Members to the Tribunals and to ensure that the Members of the Tribunals have security of tenure, which is a necessary pre-requisite for securing their independence.

**49.** Mr. V.R. Reddy, the learned Additional Solicitor General of India, drew our attention towards the judgment of the Madras High Court which is the subject of challenge in S.L.P. No. 17768 of 1991. Mr. Reddy endeavoured to convince us that the amendments incorporated in the legislation which created the Tamil Nadu Land Reforms Special Appellate Tribunal after the decision in Sampath Kumar's case have the effect of making it a proper and effective substitute for the High Courts. He also submitted that the functioning of the Land Reforms Tribunal was essential for the effective resolution of disputes in that branch of law.

**50.** We may now address the main issues which have been identified at the beginning of this judgment as being central to the adjudication of this batch of matters. This would involve an appreciation of the power of judicial review and an understanding of the manner and the instrumentalities through which it is to be exercised.

**51.** The underlying theme of the impugned judgment of the A.P. High Court rendered by M.N. Rao, J. is that the power of judicial review is one of the basic features of our Constitution and that aspect of the power which enables courts to test the constitutional validity of statutory provisions is vested exclusively in the constitutional courts, i.e., the High Courts and the Supreme Courts. In this regard, the position in American Constitutional Law in respect of Courts created under Article III of the Constitution of the United States has been analysed to state that the functions of Article III Courts (constitutional courts) cannot be performed by other legislative courts established by the Congress in exercise of its legislative power. The following decisions of the U.S. Supreme Court have been cited for support : National Mugal Insurance Co. of the District of Columbia v. Tidewater Transfer Co. 93 L. Ed. 1156 337 US 582, Thomas S. William v. United States 77 L. Ed. 1372 289 US 553, Cooper v. Aaron 3 L. Ed. 2d 5 358 US 1, Northern Pipeline Construction Co. v. Marathon Pipeline Co. and United States 73 L. Ed. 2d 59 458 US 50.

**52.** We may briefly advert to the position in American Constitutional Law to the extent that it is relevant for our purpose. As pointed out by Henry J. Abraham, an acclaimed American Constitutional Law scholar, judicial review in the United States comprises the power of any court to hold unconstitutional and hence unenforceable any law, any official action based upon a law or any other action by a public official that it deems to be in conflict with the Basic Law, in the United States, its Constitution. It further stated that in the United States, the highly significant power of judicial review is possessed, theoretically, by every court of record, no matter how high or low on the judicial ladder. Though it occurs only infrequently, it is quite possible for a Judge in a low-level court of one of the 50 States to declare a Federal Law unconstitutional.



**53.** The position can be better appreciated by analysing the text of Section 1 of Article III of the U.S. Constitution:

Article III, Section 1 - The Judicial Power of the United States, shall be vested in one Supreme Court, *and in such inferior Courts as the Congress may from time to time ordain and establish*. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good behavior, and shall, at stated times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

(Emphasis added)

**54.** The judgment of the A.P. High Court is, therefore, correct in asserting that the judicial power vested in Article III of the U.S. Constitution can only be exercised by courts created under Section 1 of Article III. However, what must be emphasised is the fact that Article III itself contemplates the conferment of such judicial power by the U.S. Congress upon inferior courts so long as the independence of the Judges is ensured in terms of Section 1 to Article III. The proposition which emerges from this analysis is that in the United States, though the concept of judicial power has been accorded great constitutional protection, there is no blanket prohibition on the conferment of judicial power upon courts other than the U.S. Supreme Court.

**55.** Henry J. Abraham's definition of judicial review in the American context is, subject to a few modifications, equally applicable to concept as it is understood in Indian Constitutional Law. Broadly speaking, judicial review in India comprises three aspects: judicial review of legislative action, judicial review of judicial decisions and judicial review of administrative action. We are, for the present, concerned only with understanding the first two aspects.

**56.** In the modern era, the origin of the power of judicial review of legislative action may well be traced to the classic enunciation of the principle by Chief, Justice John Marshall of the U.S. Supreme Court in *Marbury v. Mad* 1 Cr 137 (1803):

*It is emphatically the province and duty of the judicial department to say what the law is.* Those who apply the rule to particular cases, must of necessity expound and interpret that rule..A law repugnant to the Constitution is void.. Courts as well as other departments are bound by that instrument.

(Emphasis added)

The assumption of such a power unto itself by the U.S. Supreme Court was never seriously challenged and, over the years, it has exercised this power in numerous cases despite the persisting criticism that such an exercise was undemocratic. Indeed, when the Framers of our Constitution set about their monumental task, they were well aware that the principle that courts possess the power to invalidate duly enacted legislations had already acquired a history of nearly a century and a half.

**57.** At a very early stage of the history of this Court, when it was doubted whether it was justified in exercising such a power, Patanjali Sastri, CJ, While emphatically laying down the foundation of the principle held as follows *State of Madras v. V.G. Row* MANU/SC/0013/1952 : 1952CriLJ966 :

*..[O]ur Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution, unlike as in America where the Supreme Court has assumed extensive powers of reviewing legislative acts under cover of the widely interpreted "due process" clause in the Fifth and Fourteenth Amendments. If, then, the courts, in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a*

crusader's spirit, but in *discharge of a duty plainly laid upon them by the constitution*. This is especially true as regards the "fundamental rights", as to which this Courts has been assigned the role of a sentinel on the *qui vive*. While the Court naturally attaches great weight to the legislative judgment, *it cannot desert its own duty to determine finally the constitutionality of an impugned statute*.

(Emphasis added)

**58.** Over the years, this Court has had many an opportunity to express its views on the power of judicial review of legislative action. What follows is an analysis of the leading pronouncements on the issue.

**59.** While delivering a separate but concurring judgment in the five-Judge Constitution Bench Decision in *Bidi Supply Co. v, The Union of India and Ors.* MANU/SC/0040/1956 : [1956]29ITR717(SC) , Bose, J. made the following observations which are apposite to the Present context:

The heart and core of democracy lies in the judicial process, and that means independent and fearless judges free from executive control brought up in judicial traditions and training to judicial ways of working and thinking. The main bulwarks of liberty of freedom lie there and it is clear to me that uncontrolled powers of discrimination in matters that seriously affect the lives and properties of people cannot be left to executive or quasi executive bodies even if they exercise quasi judicial functions because they are then invested with an authority that even Parliament does not possess. Under the Constitution, Acts, of Parliament are subjected to judicial review particularly when they are said to infringe fundamental rights, therefore, if under the Constitution Parliament itself has not uncontrolled freedom, of action, it is evident that it cannot invest lesser authorities with that power.

**60.** Special Reference No. 1 of 1964, was a case where a seven-Judge Constitution Bench of this Court had to express itself on the thorny issue of Parliamentary privileges. While doing so, the Court was required to consider the manner in which our Constitution has envisaged a balance of power between the three wings of Government and it was in this context that Gajendragadkar, CJ made the following observations:

..[W]hether or not there is distinct and rigid separation of powers under the Indian Constitution, *there is no doubt that the Constitution has entrusted to the Judicature in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights of the citizens. When a statute is challenged on the ground that it has been passed by a Legislature without authority, or has otherwise unconstitutionally trespassed on fundamental rights, it is for the courts to determine the dispute and decide whether the law passed by the legislature is valid or not.* Just as the legislatures are conferred legislative functions, and the functions and authority of the executive lie within the domain of executive authority, so the jurisdiction and authority of the Judicature in this country lie within the domain of adjudication. If the validity of any law is challenged before the courts, it is never suggested that the material question as to whether legislative authority has been exceeded or fundamental rights have been contravened, can be decided by the legislatures themselves. *Adjudication of such a dispute is entrusted solely and exclusively to the Judicature of this country.*

(Emphasis added)

**61.** It is interesting to note that the origins of the power of judicial review of legislative action have not been attributed to one source alone. While Sastri, C.J. found the power mentioned expressly in the text of the Constitution, Gajendragadkar, C.J. preferred to trace

it to the manner in which the Constitution has separated powers between the three wings of Government.

**62.** In *Kesvananda Bharati's* case, a 13 - Judge Constitution Bench, by a majority of 7:6, held that though, by virtue of Article 368, Parliament is empowered to amend to Constitution, that power cannot be exercised so as to damage the basic features of the Constitution or to destroy its basic structure. The identification of the features which constitute the basic structure of our Constitution has been the subject-matter of great debate in Indian Constitutional Law. The difficulty is compounded by the fact that even the judgments for the majority are not unanimously agreed on this aspect. [There were five judgments for the majority, delivered by Sikri, C.J., Shelat & Grover, JJ. Hegde & Mukherjee, JJ. Jaganmohan Reddy, J. and Khanna, J. While Khanna, J. did not attempt to catalogue the basic features, the identification of the basic features by the other Judges are specified in the following paragraphs of the Court's judgments : Sikri, C.J. (para 292), Shelat and Grover, JJ. (para 582), Hegde and Mukherjee, JJ. (paras 632, 661) and Jaganmohan Reddy, J. (paras 1159, 1161)]. The aspect of judicial review does not find elaborate mention in all the majority judgments. Khanna, J. did, however, squarely address the issue (at para 1529):

..The power of judicial review is, however, confined not merely to deciding whether in making the impugned laws the Central or State Legislatures have acted within the four corners of the legislative lists earmarked for them; *the courts also deal with the question as to whether the laws are made in conformity with and not in violation of the other provisions of the Constitution.*..As long as some fundamental rights exist and are a part of the Constitution, the power of judicial review has also to be exercised with a view to see that the guarantees afforded by those rights are not contravened.. *Judicial review has thus become an integral part of our constitutional system and a power has been vested in the High Courts and the Supreme Court to decide about the constitutional validity of provisions of statutes.* If the provisions of the statute are found to be violative of any article of the Constitution, which is touchstone for the validity of all laws, the Supreme Court and the High Courts are empowered to strike down the said provisions.

(Emphasis added)

**63.** Shelat & Grover, JJ., while reaching the same conclusion in respect of Articles 32 & 226, however, adopted a different approach to the issue (at para 577):

There is ample evidence in the Constitution itself to indicate that it creates a system of checks and balances by reason of which powers are so distributed that none of the three organs it sets up can become so pre-dominant as to disable the others from exercising and discharging powers and functions entrusted to them. Though the Constitution does not lay down the principle of separation of powers in all its rigidity as is the case in the United States Constitution but it envisages such a separation to a degree as was found in *Ranasinghe's case* (supra). *The judicial review provided expressly in our Constitution by means of Articles 226 and 32 is one of the features upon which hinges the system of checks and balances.*

(Emphasis added)

**64.** In *Indira Nehru Gandhi v. Raj Narain*, five-Judge Constitution Bench had to, inter alia, test the Constitutional validity of provisions which ousted the jurisdiction of all Courts including the Supreme Court, in election matters. Consequently, the Court was required to express its opinion on the concept of judicial review. Though all five Judges delivered concurring judgments to strike down the offending provision, their views on the issue of judicial review are replete with variations. Ray, C.J., was of the view that the concept of judicial review, while a distinctive feature of American Constitutional Law, is not founded on

any specific Article in our Constitution. He observed that judicial review can and has been excluded in several matters; in election matters, judicial review is not a compulsion. He, however, held that our Constitution recognises a division of the three main functions of Government and that judicial power, which is vested in the judiciary cannot be passed to or shared by the Executive or the Legislature. (Paras 32, 43, 46, 52). Khanna, J. took the view that it is not necessary, within a democratic set up, that disputes relating to the validity of elections be settled by Courts of Law; he, however, felt that even so the legislature could not be permitted to declare that the validity of a particular election would act be challenged before any forum and would be valid despite the existence of disputes. (Para 207). Mathew, J. held that whereas in the United States of America and in Australia, the judicial power is vested exclusively in Courts, there is no such exclusive vesting of judicial power in the Supreme Court of India and the Courts subordinate to it. Therefore, the Parliament could, by passing a law within its competence, vest judicial power in any authority for deciding a dispute. (Paras 322 and 323). Beg, J. held that the power of Courts to test the legality of ordinary laws and constitutional amendments against the norms laid down in the Constitution flows from the 'supremacy of the Constitution' which is a basic feature of the Constitution. (Para 622). Chandrachud, J. felt that the contention that judicial review is a part of the basic structure and that any attempt to exclude the jurisdiction of courts in respect of election matters was unconstitutional, was too broadly stated. He pointed out that the Constitution, as originally enacted, expressly excluded judicial review in a large number of important matters. The examples of Articles 136(2) and 226(4) [exclusion of review in laws relating to armed forces], Article 262(2) [exclusion of review in river disputes] Article 103(1) [exclusion of review in disqualification of Members of Parliament], Article 329(a) [exclusion of review in laws relating to delimitation of constituencies and related matters], were cited for support. Based on this analysis, Chandrachud, J. came to the conclusion that since the Constitution, as originally enacted, did not consider that judicial power must intervene in the interests of purity of elections, judicial review cannot be considered to be a part of the basic structure in so far as legislative elections are concerned.

**65.** The foregoing analysis reveals that the Judges in Indira Gandhi's case, all of whom had been party to Kesavananda Bharati's case, did not adopt similar approaches to the concept of judicial review. While Beg, J. clearly expressed his view that judicial review was a part of the basic structure of the Constitution, Ray, CJ and Mathew, J. pointed out that unlike in the American context, judicial power had not been expressly vested in the judiciary by the Constitution of India. Khanna, J. did not express himself on this aspect, but in view of his emphatic observations in Kesavananda Bharati's case, his views on the subject can be understood to have been made clear. Chandrachud, J. pointed out that the Constitution itself excludes judicial review in a number of matters and felt that in election matters, judicial review is not a necessary requirement.

**66.** In *Minerva Mills v. Union of India*, a five-Judge Constitution Bench of this Court had to consider the validity of certain provisions of the Constitution (42nd Amendment) Act, 1976 which inter alia, excluded judicial review. The judgment for the majority, delivered by Chandrachud, CJ for four Judges, contained the following observations(at p. 644, para 21):

..Our Constitution is founded on a nice balance of power among the three wings of the State, namely, the Executive, the Legislature and the Judiciary. *It is the function of the Judges, nay their duty, to pronounce upon the validity of laws.* If courts are totally deprived of that power, the fundamental rights conferred upon the people will become a mere adornment because rights without remedies are as writ in water. A controlled Constitution will then become uncontrolled.

(Emphasis supplied)

**67.** The majority judgment held the impugned provisions to be unconstitutional. While



giving reasons in support, Chandrachud, CJ stated as follows:

..It is for the courts to decide whether restrictions are reasonable and whether they are in the interest of the particular subject. Apart from other basic dissimilarities, Article 31-C takes away the power of judicial review to an extent which destroys even the semblance of a comparison between its provisions and those of Clauses (2) to (6) of Article 19. Human ingenuity, limitless though it may be, has yet not devised a system by which the liberty of the people can be protected except through the intervention of courts of law.

**68.** It may, however, be noted that the majority in *Minerva Mills* did not hold that the concept of judicial review was, by itself, part of the basic structure of the Constitution. The judgment of Chandrachud, CJ in the *Minerva Mill's* case must be viewed in the context of his judgment in *Indira Gandhi's* case where he had stated that the Constitution, as originally enacted, excluded judicial review in several important matters.

**69.** In his minority judgment in *Minerva Mill's* case, Bhagwati, J. held as follows:

..The Constitution has, therefore, created an independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review to determine the legality of executive action and the validity of legislation passed by the legislature. It is the solemn duty of the judiciary under the Constitution to keep the different organs of the State such as the executive and the legislature within the limits of the power conferred upon them by the Constitution. *This power of judicial review is conferred on the judiciary by Articles 32 and 226 of the Constitution..The judiciary is the interpreter of the Constitution and to the judiciary is assigned the delicate task to determine what is the power conferred on each branch of government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations.* That is the essence of the rule of law, which *inter alia* requires that "the exercise of powers by the government whether it be the legislature or the executive or any other authority, be conditioned by the Constitution and the law". *The power of judicial review is an integral part of our constitutional system the power of judicial review..is unquestionably..part of the basic structure of the Constitution. Of course, when I say this I should not be taken to suggest that effective alternative institutional mechanisms or arrangements for judicial review cannot be made by Parliament.*

(Emphasis added)

**70.** The A.P. High Court has, through the judgment of M.N. Rao, J., pointed out that the theory of alternative institutional mechanisms enunciated by Bhagwati, J. in his minority judgment in *Minerva Mill's* case was not supported by or even mentioned in the majority judgment. In fact, such a theory finds no prior mention in the earlier decisions of this Court and, in the opinion of the A.P. High Court, did not represent the correct legal position. It is to be noted that in *Sampath Kumar's* case, both Bhagwati, CJ and Misra, J. in their separate judgment have relied on the observations in the minority judgment of Bhagwati, J. in *Minerva Mill's* case to lay the foundation of the theory of alternative institutional mechanisms.

**71.** We may, at this stage, take note of the decision in *Fertiliser Corporation Kamgar Union v. Union of India* MANU/SC/0010/1980 : (1981)ILLJ193SC, where Chandrachud, C. appears to have somewhat revised the view adopted by him in *Indira Gandhi's* case. In that case, speaking for the majority, Chandrachud, CJ held that "the jurisdiction conferred on the Supreme Court by Article 32 is an important and integral part of the basic structure of the

Constitution." (at para 11).

**72.** In *Kihoto Hollohan v. Zachillu and Ors.*, a five-Judge Constitution Bench had to, inter alia, consider the validity of Paragraph 7 of the Tenth Schedule to the Constitution which excluded judicial review. The judgment for the minority, delivered by Verma, J. struck down the provision on the ground that it violated the rule of law which is a basic feature of the Constitution requiring that decisions be subject to judicial review by an independent outside authority. (Paras 181-182). Though the majority judgment delivered by Venkatachaliah, J. also struck down the offending provision, the reasoning employed was different. The judgment for the majority contains an observation to the effect that, in the opinion of the judges in the majority, it was not necessary for them to express themselves on the question whether judicial review is part of the basic structure of the Constitution. (Para 120).

**73.** We may now analyse certain other authorities for the proposition that the jurisdiction conferred upon the High Courts and the Supreme-Court under Article 226 and 32 of the Constitution respectively, is part of the basic structure of the Constitution. While expressing his views on the significance of draft Article 25, which corresponds to the present Article 32 of the Constitution, Dr. B.R. Ambedkar, the Chairman of the Drafting Committee of the Constituent Assembly stated as follows (CAD, Vol. VII, p. 953):

If I was asked to name any particular Article in this Constitution as *the most important* - an Article without which this Constitution would be a nullity--I could not refer to any other Article except this one. *It is the very soul of the Constitution and the very heart of it* and I am glad that the House has realised its importance.

(Emphasis added)

**74.** This statement of Dr. Ambedkar has been specifically reiterated in several judgments of this Court to emphasise the unique significance attributed to Article 32 in our constitutional scheme. [See for instance, *Khanna, J.* in *Kesavananda Bharati's case* (p. 818), *Bhagwati, J.* in *Minerva Mills* (p. 678), *Chandrachud, CJ* *Fertiliser Kamgar* (para 11), *R. Misra, J.* in *Sampath Kumar* (p. 137)].

**75.** In the Special Reference Case, While addressing this issue, Gajendragadhkar, CJ stated as follows (*supra* at pp. 493- 494):

*If the power of the High Courts under Article 226 and the authority of this Court under Article 32 are not subject to any exceptions, then it would be futile to contend that a citizen cannot move the High Courts or this Court to invoke their jurisdiction even in cases where his fundamental rights have been violated. The existence of judicial power in that behalf must necessarily and inevitably postulate the existence of a right in the citizen to move the Court in that behalf; otherwise the power conferred on the High Courts and this Court would be rendered virtually meaningless. Let it not be forgotten that the judicial power conferred on the High Courts and this Court is meant for the protection of the citizens' fundamental rights, and so, in the existence of the said judicial power itself is necessarily involved the right of the citizen to appeal to the said power in a proper case.*

(Emphasis added)

**76.** To express our opinion on the issue whether the power of judicial review vested in the High Courts and into the Supreme Court under Articles 226/227 and 32 is part of the basic structure of the Constitution, we must first attempt to understand what constitutes the basic structure of the Constitution. The Doctrine of basic structure was evolved in *Kesvananda Bharati's case*. However, as already mentioned, that case did not lay down that the specific and particular features mentioned in that judgment alone would constitute the basic structure of our Constitution. Indeed, in the judgments of *Shelat & Grover, JJ.*, *Hegde &*



Mukherjee, JJ. and Jaganmohan Reddy, J., there are specific observations to the effect that their list of essential features comprising the basic structure of the Constitution are illustrative and are not intended to be exhaustive. In *Indira Gandhi's case*, Chandrachud, J. held that the proper approach for a Judge who is confronted with the question whether a particular facet of the Constitution is part of the basic structure, is to examine, in each individual case, the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of our Constitution as a fundamental instrument for the governance of the country, (supra at pp. 751-752). This approach was specifically adopted by Bhagwati, J. in *Minerva Mills's case* (supra at pp. 671-672) and is not regarded as the definitive test in this field of Constitutional Law.

**77.** We find that the various factors mentioned in the test evolved by Chandrachud, J. have already been considered by decisions of various Benches of this Court that have been referred to in the course of our analysis. From their conclusions, many of which have been extracted by us in toto, it appears that this Court has always considered the power of judicial review vested in the High Courts and in this Court under Articles 226 and 32 respectively, enabling legislative action to be subjected to the scrutiny of superior courts, to be integral to our constitutional scheme. While several judgments have made specific references to this aspect [Gajendragadkar, CJ in *Special Reference case*, Beg, J. and Khanna, J. in *Kesavananda Bharti's case*, Chandrachud, CJ and Bhagwati, J. in *Minerva Mills*, Chandrachud, CJ in *Fertiliser Kamgar*, K.N. Singh, J. in *Delhi Judicial Service Association*, etc.] the rest have made general observations highlighting the significance of this feature.

**78.** The legitimacy of the power of Courts within constitutional democracies to review legislative action has been questioned since the time it was first conceived. The Constitution of India, being alive to such criticism, has, while conferring such power upon the higher judiciary, incorporated important safeguards. An analysis of the manner in which the Framers of our Constitution incorporated provisions relating to the judiciary would indicate that they were very greatly concerned with securing the independence of the judiciary. These attempts were directed at ensuring that the judiciary would be capable of effectively discharging its wide powers of judicial review. While the Constitution confers the power to strike down laws upon the High Courts and the Supreme Court, it also contains elaborate provisions dealing with the tenure, salaries, allowances, retirement age of Judges as well as the mechanism for selecting Judges to the superior courts. The inclusion of such elaborate provisions appears to have been occasioned by the belief that, armed by such provisions, the superior courts would be insulated from any executive or legislative attempts to interfere with the making of their decisions. The Judges of the superior courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations. It is equally their duty to oversee that the judicial decisions rendered by those who man the subordinate courts and tribunals do not fall foul of strict standards of legal correctness and judicial independence. The constitutional safeguards which ensure the independence of the Judges of the superior judiciary, are not available to the Judges of the subordinate judiciary or to those who man Tribunals created by ordinary legislations. Consequently, Judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation. We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Articles 226 and in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded.

**79.** We also hold that the power vested in the High Courts to exercise judicial

superintendence over the decisions of all Courts and Tribunals within their respective jurisdictions is also part of the basic structure of the Constitution. This is because a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation, is equally to be avoided.

**80.** However, it is important to emphasise that though the subordinate judiciary or Tribunals created under ordinary legislations cannot exercise the power of judicial review of legislative action to the exclusion of the High Courts and the Supreme Court, there is no constitutional prohibition against their performing a supplemental--as opposed to a substitution - role in this respect. That such a situation is contemplated within the constitutional scheme becomes evident when one analyses Clause (3) of Article 32 of the Constitution which reads as under:

*32. Remedies for enforcement of rights conferred by this Part.--(1)..*

*(2) ..*

*(3) Without prejudice to the powers conferred on the Supreme Court by Clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under Clause (2).*

*(Emphasis supplied)*

**81.** If the power under Article 32 of the Constitution, which has been described as the "heart" and "soul" of the Constitution, can be additionally conferred upon "any other court", there is no reason why the same situation cannot subsist in respect of the jurisdiction conferred upon the High Courts under Article 226 of the Constitution. So long as the jurisdiction of the High Courts under Articles 226/227 and that of this Court under Article 32 is retained, there is no reason why the power to test the validity of legislations against the provisions of the Constitution cannot be conferred upon Administrative Tribunals created under the Act or upon Tribunals created under Article 323B of the Constitution. It is to be remembered that, apart from the authorisation that flows from Articles 232A and 323B, both Parliament and the State Legislatures possess legislative competence to effect changes in the original jurisdiction of the Supreme Court and the High Courts.

This power is available to Parliament under Entries 77, 78, 79 and 95 of List I and to the State Legislatures under Entry 65 of List II; Entry 46 of List III can also be availed of both by Parliament and the State Legislatures for this purpose.

**82.** There are pressing reasons why we are anxious to preserve the conferment of such a power on these Tribunals. When the Framers of our Constitution bestowed the powers of judicial review of legislative action upon the High Courts and the Supreme Court, they ensured that other constitutional safeguards were created to assist them in effectively discharging this onerous burden. The expectation was that this power would be required to be used only occasionally. However, in the five decades that have ensued since Independence, the quantity of litigation before the High Courts has exploded in an unprecedented manner. The decision in Sampath Kumar's case was rendered against such a backdrop. We are conscious of the fact that when a Constitution Bench of this Court in Sampath Kumar's case adopted the theory of alternative institutional mechanisms, it was attempting to remedy an alarming practical situation and the approach selected by it appeared to be most appropriate to meet the exigencies of the time. Nearly a decade later, we are now in a position to review the theoretical and practical results that have arisen as a consequence of the adoption of such an approach.

**83.** We must, at this stage, focus upon the factual position which occasioned the adoption of the theory of alternative institutional mechanisms in Sampath Kumar's case. In his

leading judgment, R. Misra, J. refers to the fact that since independence, the population explosion and the increase in litigation had greatly increased the burden of pendency in the High Courts. Reference was made to studies conducted towards relieving the High Courts of their increased load. In this regard, the recommendations of the Shah Committee for setting up independent Tribunals as also the suggestion of the Administrative Reforms Commission that Civil Service Tribunals be set up, were noted. Reference was also made to the decision in *K.K. Dutta v. Union of India* MANU/SC/0429/1980 : (1980)IILLJ182SC, where this Court had, while emphasising the need for speedy resolution of service disputes, proposed the establishment of Service Tribunals.

**84.** The problem of clearing the backlogs of High Courts, which has reached colossal proportions in our times is, nevertheless, one that has been the focus of study for close to a half century. Over time, several Expert Committees and Commissions have analysed the intricacies involved and have made suggestions, not all of which have been consistent. Of the several studies that have been conducted in this regard, as many as twelve have been undertaken by the Law Commission of India (hereinafter referred to as "the LCI") or similar high level Committees appointed by the Central Government, and are particularly noteworthy.

**85.** An appraisal of the daunting task which confronts the High Courts can be made by referring to the assessment undertaken by the LCI in its 124th Report which was released sometime after the judgment in Sampath Kumar's case. The Report was delivered in 1988, nine years ago, and some changes have occurred since, but the broad perspective which emerges is still, by and large, true:

..The High Courts enjoy civil as well as criminal, ordinary as well as extraordinary, and general as well as special jurisdiction. The source of the jurisdiction is the Constitution and the various statutes as well as letters patent and other instruments constituting the High Courts. The High Courts in the country enjoy an original jurisdiction in respect of testamentary, matrimonial and guardianship matters. Original jurisdiction is conferred on the High Courts under the Representation of the People Act, 1951, Companies Act, 1956, and several other special statutes. The High Courts, being courts of record, have the power to punish for its contempt as well as contempt of its subordinate courts. The High Courts enjoy extraordinary jurisdiction under Articles 226 and 227 of the Constitution enabling it to issue prerogative writs, such as, the one in the nature of habeas corpus, mandamus, prohibition, QUO warrant and certiorari. Over and above this, the High Courts of Bombay, Calcutta, Delhi, Himachal Pradesh, Jammu and Kashmir and Madras also exercise ordinary original civil jurisdiction. The High Courts also enjoy advisory jurisdiction, as evidenced by Section 256 of the Indian Companies Act, 1956, Section 27 of the Wealth Tax Act, 1957, Section 26 of Gift Tax Act, 1958, and Section 18 of Companies (Profits) Surtax Act, 1964. Similarly, there are parallel provisions conferring advisory jurisdiction on the High Courts, such as Section 130 of Customs Act, 1962, and Section 354 of Central Excises and Salt Act, 1944. The High Courts have also enjoyed jurisdiction under the Indian Divorce Act, 1869, and the Parsi Marriage and Divorce Act, 1936. Different types of litigation coming before the High Court in exercise of its wide jurisdiction bear different names. The vast area of jurisdiction can be appreciated by reference to those names, viz., (a) first appeals; (b) appeals under the letters patent; (c) second appeals; (d) revision petitions; (e) criminal appeals; (f) criminal revisions; (g) civil and criminal references; (h) writ petitions; (i) writ appeals; (j) references under direct and indirect tax laws; (k) matters arising under the Sales Tax Act; (l) election petitions under the Representation of the People Act; (m) petitions under the Companies Act, Banking Companies Act and other special Acts and (n) wherever the High Court has original jurisdiction, suits and other proceedings in exercise of that jurisdiction.

This varied jurisdiction has to some extent been responsible for a very heavy institution of matters in the High Courts.

**86.** After analysing the situation existing in the High Courts at length, the LCI made specific recommendations towards the establishment of specialist Tribunals thereby lending force to the approach adopted in Sampath Kumar's case. The LCI noted the erstwhile international judicial trend which pointed towards generalist courts yielding their place to specialist Tribunals. Describing the pendency in the High Courts as "catastrophic, crisis ridden, almost unmanageable, imposing ..an immeasurable burden on the system", the LCI stated that the prevailing view in Indian Jurisprudence that the jurisdiction enjoyed by the High Court is a holy cow required a review. It, therefore, recommended the trimming of the jurisdiction of the High Courts by setting up specialist courts/Tribunals while simultaneously eliminating the jurisdiction of the High Courts.

**87.** It is important to realise that though the theory of alternative institutional mechanisms was propounded in Sampath Kumar's case in respect of the Administrative Tribunals, the concept itself--that of creating alternative modes of dispute resolution which would relieve High Courts of their burden while simultaneously providing specialised justice-is not new. In fact, the issue of having a specialised Tax Court has been discussed for several decades; though the Report of the High Court Arrears Committee (1972) dismissed it as "ill-conceived", the LCI, in its 115th Report (1986) revived the recommendation of setting up separate Central Tax Courts. Similarly, other Reports of the LCI have suggested the setting up of 'Gram Nyayalayas' (1986) LCI, 114th Report, Industrial/Labour Tribunals 1987 LCI, 122nd Report and Education Tribunals (1987) [LCI, 123rd Report .

**88.** In R.K. Jain's case, this Court had, in order to understand how the theory of alternative institutional mechanisms had functioned in practice, recommended that the LCI or a similar expert body should conduct a survey of the functioning of these Tribunals. It was hoped that such a study, conducted after gauging the working of the Tribunals over a sizeable period of more than five years would provide an answer to the questions posed by the critics of the theory. Unfortunately, we do not have the benefit of such a study. We may, however, advert to the Report of the Arrears Committee (1989-90), popularly known as the Malimath Committee Report, which has elaborately dealt with the aspect. The observations contained in the Report, to this extent they contain a review of the functioning of the Tribunals over a period of three years or so after their institution, will be useful for our purpose. Chapter VIII of the second volume of the Report, "Alternative Modes and Forums for Dispute Resolution", deals with the issue at length. After forwarding its specific recommendations on the feasibility of setting up 'Gram Nyayalayas', Industrial Tribunals and Educational Tribunals, the Committee has dealt with the issue of Tribunals set up under Articles 323A and 323B of the Constitution. The relevant observations in this regard, being of considerable significance to our analysis, are extracted in full as under:

#### *Functioning of Tribunals*

**8.63** Several tribunals are functioning in the country. *Not all of them, however, have inspired confidence in the public mind.* The reasons are not far to seek. *The foremost is the lack of competence, objectivity and judicial approach. The next is their constitution, the power and method of appointment of personnel thereto, the inferior status and the casual method of working. The last is their actual composition; men of calibre are not willing to be appointed as presiding officers in view of the uncertainty of tenure, unsatisfactory conditions of service, executive subordination in matters of administration and political interference in judicial functioning.* For these and other reasons, the quality of justice is stated to have suffered and the cause of expedition is not found to have been served by the establishment of such tribunals.



**8.64** Even the experiment of setting up of the Administrative Tribunals under the Administrative Tribunals Act, 1985, has not been widely welcomed. Its members have been selected from all kinds of services including the Indian Police Service. The decision of the State Administrative Tribunals are not appealable except under Article 136 of the Constitution. On account of the heavy cost and remoteness of the forum, there is virtual negation of the right of appeal. This has led to denial of justice in many cases and consequential dissatisfaction. There appears to be a move in some of the State where they have been established for their abolition.

*Tribunals--Test for Including High Court's Jurisdiction*

**8.65** A Tribunal which substitutes the High Court as an alternative institutional mechanism for judicial review must be no less efficacious than the High Court. *Such a tribunal must inspire confidence and public esteem that it is a highly competent and expert mechanism with judicial approach and objectivity. What is needed in a tribunal, which is intended to supplant the High Court, is legal training and experience, and judicial acumen, equipment and approach.* When such a tribunal is composed of personnel drawn from the judiciary as well as from services or from amongst experts in the field, any weightage in favour of the service members or expert members and value- discounting the judicial members would render the tribunal less effective and efficacious than the High Court. The Act setting up such a tribunal would itself have to be declared as void under such circumstances. The same would not at all be conducive to judicial independence and may even tend, directly or indirectly, to influence their decision making process, especially when the Government is a litigant in most of the cases coming before such tribunal. See *S.P. Sampath Kumar v. Union of India* reported in MANU/SC/0851/1987 : (1987)ILLJ128SC . The protagonists of specialist tribunals, who simultaneously with their establishment want exclusion of the Writ jurisdiction of the High Courts in regard to matters entrusted for adjudication to such tribunals, ought not to overlook these vital and important aspects. *It must not be forgotten that what is permissible to be supplant by another equally effective and efficacious institutional mechanism is the High Courts and not the judicial review itself.*

Tribunals are not an end in themselves but a means to an end; even if the laudable objectives of speedy justice, uniformity of approach, predictability of decisions and specialist justice are to be achieved, the frame work of the tribunal intended to be set up to attain them must still retain its basic judicial character and inspire public confidence. Any scheme of decentralisation of administration of justice providing for an alternative institutional mechanism in substitution of the High Courts must pass the aforesaid test in order to be constitutionally valid.

**8.66** The overall picture regarding the tribunalisation of justice in our country is not satisfactory and encouraging. There is a need for a fresh look and review and a serious consideration before the experiment is extended to new areas of fields, *especially if the constitutional jurisdiction of the High Courts is to be simultaneously ousted.* Not many tribunals satisfying the aforesaid tests can possibly be established.

(Emphasis added)

**8 9 .** Having expressed itself in this manner, the Malimath Committee specifically recommended that the theory of alternative institutional mechanisms be abandoned. Instead, it recommended that institutional changes be carried out within the High Courts, dividing them into separate divisions for different branches of law, as is being done in England. It stated that appointing more Judges to man the separate divisions while using the existing infrastructure would be a better way of remedying the problem of pendency in the High Courts.

**90.** In the years that have passed since the Report of the Malimath Committee was delivered, the pendency in the High Courts has substantially increased and we are of the view that its recommendation is not suited to our present context. That the various Tribunals have not performed upto expectations is a self-evident and widely acknowledged truth. However, to draw an inference that their unsatisfactory performance points to their being founded on a fundamentally unsound principle would not be correct. The reasons for which the Tribunals were constituted still persist; indeed, those reasons have become even more pronounced in our times. We have already indicated that our constitutional scheme permits the setting up of such Tribunals. However, drastic measures may have to be resorted to in order to elevate their standards to ensure that they stand up to constitutional scrutiny in the discharge of the power of judicial review conferred upon them.

**91.** We may first address the issue of exclusion of the power of judicial review of the High Courts. We have already held that in respect of the power of judicial review, the jurisdiction of the High Courts under Article 226/227 cannot wholly be excluded. It has been contended before us that the Tribunals should not be allowed to adjudicate upon matters where the vires of legislations is questioned, and that they should restrict themselves to handling matters where constitutional issues are not raised. We cannot bring ourselves to agree to this proposition as that may result in splitting up proceedings and may cause avoidable delay. If such a view were to be adopted, it would be open for litigants to raise constitutional issues, many of which may be quite frivolous, to directly approach the High Courts and thus subvert the jurisdiction of the Tribunals. Moreover, even in these special branches of law, some areas do involve the consideration of constitutional questions on a regular basis; for instance, in service law matters, a large majority of cases involve an interpretation of Articles 14, 15 and 16 of the Constitution. To hold that the Tribunals have no power to handle matters involving constitutional issues would not serve the purpose for which they were constituted. On the other hand, to hold that all such decisions will be subject to the jurisdiction of the High Courts under Articles 226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the Tribunal concerned falls will serve two purposes. While saving the power of judicial review of legislative action vested in the High Courts under Article 226/227 of the Constitution, it will ensure that frivolous claims are filtered out through the process of adjudication in the Tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter.

**92.** It has also been contended before us that even in dealing with cases which are properly before the Tribunals, the manner in which justice is dispensed by them leaves much to be desired. Moreover, the remedy provided in the parent statutes, by way of an appeal by special leave under Article 136 of the Constitution, is too costly and inaccessible for it to be real and effective. Furthermore, the result of providing such a remedy is that the docket of the Supreme Court is crowded with decisions of Tribunals that are challenged on relatively trivial grounds and it is forced to perform the role of a First Appellate Court. We have already emphasised the necessity for ensuring that the High Courts are able to exercise judicial superintendence over the decisions of Tribunals under Article 227 of the Constitution. In R.K. Jain's case, after taking note of these facts, it was suggested that the possibility of an appeal from the Tribunals on questions of law to a Division Bench of a High Court within whose territorial jurisdiction the Tribunal falls, be pursued. It appears that no follow-up action has been taken pursuant to the suggestion. Such a measure would have improved matters considerably. Having regard to both the afore-stated contentions, we hold that all decisions of Tribunals, whether created pursuant to Article 323A or Article 323B of the Constitution, will be subject to the High Court's writ jurisdiction under Articles 226/227 of the Constitution, before a Division Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls.

**93.** We may add here that under the existing system, direct appeals have been provided



from the decisions of all Tribunals to the Supreme Court under Article 136 of the Constitution. In view of our above-mentioned observations, this situation will also stand modified. In the view that we have taken, no appeal from the decision of a Tribunal will directly lie before the Supreme Court under Article 136 of the Constitution; but instead, the aggrieved party will be entitled to move the High Court under Articles 226/227 of the Constitution and from the decision of the Division Bench of the High Court the aggrieved party could move this Court under Article 136 of the Constitution.

**94.** Before moving on to other aspects, we may summarise our conclusions on the jurisdictional powers of these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional setup, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the concerned High Court may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal.

**95.** The directions issued by us in respect of making the decisions of Tribunals amenable to scrutiny before a Division Bench of the respective High Courts will, however, come into effect prospectively i.e. will apply to decisions rendered hereafter. To maintain the sanctity of judicial proceedings, we have invoked the doctrine of prospective over-ruling so as not to disturb the procedure in relation to decisions already rendered.

**96.** We are also required to address the issue of the competence of those who man the Tribunals and the question of who is to exercise administrative supervision over them. It has been urged that only those who have had judicial experience should be appointed to such Tribunals. In the case of Administrative Tribunals, it has been pointed out that the administrative members who have been appointed have little or no experience in adjudicating such disputes; the Malimath Committee has noted that at times, IPS Officers have been appointed to these Tribunals. It is stated that in the short tenures that these Administrative Members are on the Tribunal, they are unable to attain enough experience in adjudication and in cases where they do acquire the ability, it is invariably on the eve of the expiry of their tenures. For these reasons, it has been urged that the appointment of Administrative Members to Administrative Tribunals be stopped. We find it difficult to accept such a contention. It must be remembered that the setting-up of these Tribunals is founded on the premise that specialist bodies comprising both trained administrators and those with judicial experience would, by virtue of their specialised knowledge, be better equipped to dispense speedy and efficient justice. It was expected that a judicious mix of judicial members and those with grass-roots experience would best serve this purpose. To hold that the Tribunal should consist only of judicial members would attack the primary basis of the theory pursuant to which they have been constituted. Since the Selection Committee is now headed by a Judge of the Supreme Court, nominated by the Chief Justice of India, we have

reason to believe that the Committee would take care to ensure that administrative members are chosen from amongst those who have some background to deal with such cases.

**97.** It has been brought to our notice that one reason why these Tribunals have been functioning inefficiently is because there is no authority charged with supervising and fulfilling their administrative requirements. To this end, it is suggested that the Tribunals be made subject to the supervisory jurisdiction of the High Courts within whose territorial jurisdiction they fall. We are, however, of the view that this may not be the best way of solving the problem. We do not think that our constitutional scheme requires that all adjudicatory bodies which fall within the territorial jurisdiction of the High Courts should be subject to their supervisory jurisdiction. If the idea is to divest the High Courts of their onerous burdens, then adding to their supervisory functions cannot, in any manner, be of assistance to them. The situation at present is that different Tribunals constituted under different enactments are administered by different administrative departments of the Central and the State Governments. The problem is compounded by the fact that some Tribunals have been created pursuant to Central Legislations and some others have been created by State Legislations. However, even in the case of Tribunals created by Parliamentary legislations, there is no uniformity in administration. We are of the view that, until a wholly independent agency for the administration of all such Tribunals can be set-up, it is desirable that all such Tribunals should be, as far as possible, under a single nodal Ministry which will be in a position to oversee the working of these Tribunals. For a number of reasons that Ministry should appropriately be the Ministry of Law. It would be open for the Ministry, in its turn, to appoint an independent supervisory body to oversee the working of the Tribunals. This will ensure that if the President or Chairperson of the Tribunal is for some reason unable to take sufficient interest in the working of the Tribunal, the entire system will not languish and the ultimate consumer of justice will not suffer. The creation of a single umbrella organisation will, in our view, remove many of the ills of the present system. If the need arises, there can be separate umbrella organisations at the Central and the State levels. Such a supervisory authority must try to ensure that the independence of the members of all such Tribunals is maintained. To that extent, the procedure for the selection of the members of the Tribunals, the manner in which funds are allocated for the functioning of the Tribunals and all other consequential details will have to be clearly spelt out.

**98.** The suggestions that we have made in respect of appointments to Tribunals and the supervision of their administrative function need to be considered in detail by those entrusted with the duty of formulating the policy in this respect. That body will also have to take into consideration the comments of experts bodies like the LCI and the Malimath Committee in this regard. We, therefore, recommend that the Union of India initiate action in this behalf and after consulting all concerned, place all these Tribunals under one single nodal department, preferably the Legal Department.

**99.** Since we have analysed the issue of the constitutional validity of Section 5(6) of the Act at length, we may now pronounce our opinion on this aspect. Though the vires of the provision was not in question in Dr. Mahabab Ram's case, we believe that the approach adopted in that case, the relevant portion of which has been extracted in the first part of this judgment, is correct since it harmoniously resolves the manner in which Sections 5(2) and 5(6) can operate together. We wish to make it clear that where a question involving the interpretation of a statutory provision or rule in relation to the Constitution arises for the consideration of a single Member Bench of the Administrative Tribunal, the proviso to Section 5(6) will automatically apply and the Chairman or the Member concerned shall refer the matter to a Bench consisting of at least two Members, one of whom must be a Judicial Member. This will ensure that questions involving the vires of a statutory provision or rule will never arise for adjudication before a single Member Bench or a Bench which does not

consist of a Judicial Member. So construed, Section 5(6) will no longer be susceptible to charges of unconstitutionality.

100. In view of the reasoning adopted by us, we hold that Clause 2(d) of Article 323A and Clause 3(d) of Article 323B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323A and 323B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is part of the inviolable basic structure of our Constitution.

While this jurisdiction cannot be ousted, other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution.

The Tribunals created under Article 323A and Article 323B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the concerned Tribunal falls. The Tribunals will, nevertheless, continue to act like Courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal. Section 5(6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated.

**101.** All these matters may now be listed before a Division Bench to enable them to be decided upon their individual facts in the light of the observations contained in this judgment.

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**BEFORE THE NATIONAL GREEN TRIBUNAL  
PRINCIPAL BENCH  
NEW DELHI**

**ORIGINAL APPLICATION NO. 37 OF 2015  
(M.A. NO. 291, 293 & 294 OF 2015)**

**AND**

**ORIGINAL APPLICATION NO. 213 OF 2014  
(MA 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 – 627 357  
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 – 600 003

.....Respondents

AND

**IN THE MATTER OF:**

Manoj Mishra  
Convener, Yamuna Jiye Abhiyaan,  
178-F, Pocket-4,  
Mayur Vihar, Phase-I,  
Delhi-110 091.

.....Applicant

Versus

Union of India  
Through the Secretary,  
Ministry of Environment, Forest & Climate Change,  
Indira Paryavaran Bhawan,  
Jor Bagh Road,  
New Delhi- 110 003.

.....Respondent

**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 Srinivas

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

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

**JUDGMENT**

**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)**

**Hon'ble Mr. Bikram Singh Sajwan (Expert Member)**

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**Reserved on: 29<sup>th</sup> April, 2015**

**Pronounced on: 7<sup>th</sup> July, 2015**

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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?

**JUSTICE 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 14<sup>th</sup> 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 16<sup>th</sup> November, 2010 for consideration of proposals involving violation of the Act of 1986 and the Notification of 2006. On 12<sup>th</sup> December, 2012, the Ministry of Environment, Forest and Climate Change (for short 'MoEF') issued another Office Memorandum, superseding the Office Memorandum of 16<sup>th</sup> 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

12<sup>th</sup> December, 2012 and would delist the project in the meanwhile. Other detailed consequences were also provided in the Office Memorandum dated 12<sup>th</sup> December, 2012. The Office Memorandum dated 12<sup>th</sup> December, 2012 was further amended by the Office Memorandum dated 27<sup>th</sup> June, 2013, which *inter alia*, also provided as under:

"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 16<sup>th</sup> November, 2010, 12<sup>th</sup> December, 2012 and 27<sup>th</sup> 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 12<sup>th</sup> December, 2012 and 27<sup>th</sup> 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 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) and Ors.*, (2011) 7 SCC 338 and *M.C. Mehta v. Union of India (UOI) and Ors.*, (2004) 12 SCC 118, to contend that the 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 14<sup>th</sup> 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 12<sup>th</sup> February, 2015 and 1<sup>st</sup> 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 1<sup>st</sup> 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 the Registrar dated 16<sup>th</sup> 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 16<sup>th</sup> 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 31<sup>st</sup> December, 2013. The construction was started even prior thereto on receipt of the recommendation from the Government. The application to SEIAA was filed on 21<sup>st</sup> February, 2014. On 28<sup>th</sup> February, 2014, SEIAA informed the Project Proponent that no activity should be carried on prior to grant of Environmental Clearance. SEIAA on 11<sup>th</sup> March, 2014 asked for photographs of the site to consider the application. On 21<sup>st</sup> March, 2014, the photographs of the project and an apology along with undertaking were submitted by the Project Proponent to the SEIAA. SEIAA on 1<sup>st</sup> April, 2014 wrote to Additional Secretary for initiation of prosecution against the said Respondent. The Applicant heavily relies upon this letter of 1<sup>st</sup> 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 – 600 017., 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 22<sup>nd</sup> April, 2014, the Principal Secretary, FAC wrote to the Principal Secretary, SEIAA, bringing to his notice the Notification issued by the Ministry dated 28<sup>th</sup> 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 28<sup>th</sup> 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 taken by the State Government. On 5<sup>th</sup> 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 12<sup>th</sup> July, 2014 by the TNPCB, reply to which was submitted by the Project Proponent on 23<sup>rd</sup> July, 2014.

11. On 26<sup>th</sup> 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 2<sup>nd</sup> April, 2015, stating that the civil construction work in all blocks had been completed, however, outer and interior works were being carried on. On 4<sup>th</sup> 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 14<sup>th</sup> April, 2015, it was noticed that civil work of all the blocks were completed.

12. Vide letter dated 26<sup>th</sup> November, 2014, the Project Proponent had been informed not to carry on any construction activity. Photographs on record taken on 21<sup>st</sup> 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 14<sup>th</sup> 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 21<sup>st</sup> February, 2014 for Environmental Clearance, after obtaining planning permission. In the meeting dated 11<sup>th</sup> March, 2014, SEIAA had asked him to furnish additional documents to which he replied on 21<sup>st</sup> March, 2014, but in the meanwhile the Project Proponent had commenced construction activity investing huge sums of money. However, in his letter dated 4<sup>th</sup> 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 21<sup>st</sup> 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 12<sup>th</sup> July, 2014 continued it till 2<sup>nd</sup> 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 21<sup>st</sup> February, 2014 seeking the Environmental Clearance for the Project. The Project Proponent was required to file additional documents which he had filed on 21<sup>st</sup> March, 2014. Construction had been started by the Project Proponent on receipt of the recommendation from the Government and after the Planning Permission had been issued. We may notice here that the Applicant however, submitted while referring to the letter of the Project Proponent dated 4<sup>th</sup> 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 2<sup>nd</sup> November, 2012. The condition No. 2 of the letter dated 31<sup>st</sup> 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 20<sup>th</sup> 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 25<sup>th</sup> February, 2011 to 28<sup>th</sup> 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 28<sup>th</sup> January, 2011, which fact is not admitted by SEIAA. The Project Proponent then moved fresh

application on 12<sup>th</sup> June, 2013 dated 10<sup>th</sup> 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 20<sup>th</sup> February, 2013, 25<sup>th</sup> April, 2013 and 21<sup>st</sup> 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 28<sup>th</sup> January, 2011. SEIAA on 12<sup>th</sup> June, 2013 acknowledged this application and passed an order that no activity should be undertaken unless Environmental Clearance was granted. On 1<sup>st</sup> July, 2013, the Project Proponent submitted photographs with the letter of apology, pursuant to the Board meeting of Project Proponent held on 17<sup>th</sup> 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 22<sup>nd</sup> August, 2013 clearly mentioning that if the additional particulars were not submitted by 10<sup>th</sup> September, 2013, the project would be closed without notice. The Project Proponent did not provide the requisite information within the stipulated time. On 13<sup>th</sup> September, 2013, the Project Proponent submitted some documents with the promise to provide rest of them at a subsequent date. The SEAC on 30<sup>th</sup> September, 2013 prescribed the TOR which was issued by SEIAA on 7<sup>th</sup> October, 2013. The TNPCB conducted an inspection on 10<sup>th</sup> 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 28<sup>th</sup> April, 2014. On 22<sup>nd</sup> 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 19<sup>th</sup> May, 2014 wrote to the Project Proponent to furnish 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 20<sup>th</sup> June, 2014, SEIAA asked for further documents from the Project Proponent. The Project Proponent had written a letter to SEIAA vide its letter dated 23<sup>rd</sup> 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 10<sup>th</sup> November, 2014 required the Project Proponent not to carry out any construction of the project. The 26<sup>th</sup> 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 30<sup>th</sup> 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 11<sup>th</sup> February, 2015 and vide its letter dated 19<sup>th</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> April, 2015. On 4<sup>th</sup> 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 2<sup>nd</sup> April, 2015 to which the Project Proponent responded on 3<sup>rd</sup> 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 28<sup>th</sup> 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 30<sup>th</sup> 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 2<sup>nd</sup> March, 2011 and remained so till 4<sup>th</sup> March, 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 28<sup>th</sup> 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 26<sup>th</sup> September, 2013. Appraisal Committee on 17<sup>th</sup> 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 10<sup>th</sup> 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 14<sup>th</sup> 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 2<sup>nd</sup> 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 15<sup>th</sup> July, 2013 and despite orders, the construction was continued which was stopped only upon inspection as on 4<sup>th</sup> April, 2015. Even on 24<sup>th</sup> 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 12<sup>th</sup> 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 4<sup>th</sup> April, 2012

and after the completion of 3 years of tenure, the same has ended on 3<sup>rd</sup> April, 2015. Its reconstitution is awaited.

18. In relation to **M/s Dugar Housing Ltd. (Respondent No. 8)**, according to the Applicant on 28<sup>th</sup> 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 10<sup>th</sup> 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, Chennai for issuance of Building Permit under the Local Body Act. On 8<sup>th</sup> 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 28<sup>th</sup> 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 17<sup>th</sup> 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 4<sup>th</sup> June, 2013 by the Project Proponent, SEIAA had responded vide letter dated 7<sup>th</sup> 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 21<sup>st</sup> 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 20<sup>th</sup> 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 30<sup>th</sup> July, 2013. Various letters including letter dated 21<sup>st</sup> June, 2013, 8<sup>th</sup> August, 2013 and 10<sup>th</sup> September, 2013 were written by the SEIAA to Project Proponent seeking further information. Finally, vide its letter dated 24<sup>th</sup> September, 2013, SEIAA informed the Project Proponent that SEAC meeting would be held on 30<sup>th</sup> 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 26<sup>th</sup> September, 2013, which claims to have enclosed Board resolution dated 12<sup>th</sup> August, 2013. The Tamil Nadu Pollution Control Board conducted inspection of the site on 20<sup>th</sup> May, 2014 and found that the ground level work had already started which resulted in issuance of a show cause notice dated 21<sup>st</sup> May, 2014. This inspection report contradicts the resolution dated 12<sup>th</sup> 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 16<sup>th</sup> 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 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 2<sup>nd</sup> April, 2015 and stop work notice was issued by the Board on the same day. An inspection had also been conducted on 14<sup>th</sup> April, 2015. The photographs submitted to SEIAA on 26<sup>th</sup> September, 2013 and the photographs taken on 14<sup>th</sup> 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 non-compliance 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 8<sup>th</sup> April, 2015, it was observed that the unit has almost completed the civil construction work and despite issuance of show cause notice dated 21<sup>st</sup> 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 2<sup>nd</sup> March, 2011 to 4<sup>th</sup> 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 12<sup>th</sup> 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 7<sup>th</sup> 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 30<sup>th</sup> 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 28<sup>th</sup> January, 2013 and building permission from Corporation of Chennai dated 28<sup>th</sup> 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 12<sup>th</sup> December, 2012 and 27<sup>th</sup> 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 7<sup>th</sup> 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 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 30<sup>th</sup> 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 12<sup>th</sup> 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 7<sup>th</sup> 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 + 1<sup>st</sup> to 15<sup>th</sup> Floor residential building with 206 Dus (ground floor pt & 1<sup>st</sup> Floor pt departmental store and 12<sup>th</sup> 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 24<sup>th</sup> July, 2012 wrote to the Project Proponent to pay development charges and submit other documents. The CMDA on 4<sup>th</sup> January, 2013 granted planning permit to the project. It needs to be noticed that in the letter dated 24<sup>th</sup> 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 24<sup>th</sup> July, 2012.

24. On 11<sup>th</sup> 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 15<sup>th</sup> May, 2013, SEIAA wrote to the Project Proponent requiring them to file additional documents and submit the requisite technical details for grant of Environmental Clearance. These details, required to be furnished by 3<sup>rd</sup> June, 2013, were not submitted, thereby resulting in issuance of reminder by SEIAA to Project Proponent on 8<sup>th</sup> July, 2013. This letter was responded to by the Project Proponent on 17<sup>th</sup> 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 11<sup>th</sup> January, 2013.

26. The Project Proponent was again informed by SEIAA vide its letter on 22<sup>nd</sup> 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 27<sup>th</sup> 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 29<sup>th</sup> 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 4<sup>th</sup> 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 13<sup>th</sup> September, 2013 responded to the letter dated 4<sup>th</sup> 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 24<sup>th</sup> 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 25<sup>th</sup> 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 44<sup>th</sup> meeting of SEAC on 30<sup>th</sup> 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 7<sup>th</sup> October, 2013. The Project Proponent thereupon vide their letter dated 21<sup>st</sup> February, 2014 informed SEIAA that the required resolution from the Board of

Directors has been passed during the meeting held on 24<sup>th</sup> 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 11<sup>th</sup> 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 22<sup>nd</sup> 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 17<sup>th</sup> July, 2014. The Project Proponent filed an affidavit on 22<sup>nd</sup> July, 2014 stating that they have stopped the construction activity at site as per commitment in the Board Resolution dated 24<sup>th</sup> January, 2014 and shall carry on construction only upon securing the Environmental Clearance. On 3<sup>rd</sup> September, 2014, the Project Proponent requested SEIAA to dispose of its application notwithstanding the order passed by this Tribunal dated 21<sup>st</sup> 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 2<sup>nd</sup> April, 2015 and it was noticed that the construction had been carried on in the past but was found to be stopped at the time of inspection. From the photographs on record which were filed by the Project Proponent before SEIAA on 6<sup>th</sup> March, 2014 and the photographs taken during the course of

inspection on 15<sup>th</sup> 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 4<sup>th</sup> 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 17<sup>th</sup> 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 19<sup>th</sup> June, 2012. Vide their letter dated 24<sup>th</sup> 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

3<sup>rd</sup> January, 2016. After obtaining the Planning Permit, it applied for grant of Environmental Clearance to SEIAA on 11<sup>th</sup> 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 21<sup>st</sup> 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 15<sup>th</sup> 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 12<sup>th</sup> December, 2012 and 27<sup>th</sup> 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 19<sup>th</sup> November, 2014, not to proceed with the project construction. The site was inspected on 15<sup>th</sup> April, 2014 and it was noticed that the civil structural work for all the blocks were completed. In reliance thereto, SEIAA has submitted certain photographs.

30. According to the Tami Nadu Pollution Control Board, they had conducted the inspection on 2<sup>nd</sup> 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 2<sup>nd</sup> April, 2015 that all the construction work had been stopped w.e.f 4<sup>th</sup> 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 19<sup>th</sup> May, 2010. This remained pending and various correspondences were exchanged between the parties. The planning permission according to the Project Proponent was issued on 3<sup>rd</sup> 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 3<sup>rd</sup> February, 2014 which was responded to by SEIAA vide its letter dated 5<sup>th</sup> 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 14<sup>th</sup> 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 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 10<sup>th</sup> 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 27<sup>th</sup> 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 4<sup>th</sup> 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 10<sup>th</sup> 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 2006.

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 16<sup>th</sup> July, 2014, clearly evidencing that the construction work was continuing even

as on 15<sup>th</sup> 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 26<sup>th</sup> 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 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 2<sup>nd</sup> 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 5<sup>th</sup> January, 2014 and the photographs taken by SEIAA on 15<sup>th</sup> 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 18<sup>th</sup> 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 21<sup>st</sup> 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 21<sup>st</sup> 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 3<sup>rd</sup> 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 2<sup>nd</sup> November, 2012 and revision of this application was sought on 11<sup>th</sup> December, 2012, 27<sup>th</sup> December, 2012 and 7<sup>th</sup> February, 2013. On 11<sup>th</sup> March, 2013, necessary fee for process was demanded by CMDA from the Project Proponent. On 5<sup>th</sup> 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 24<sup>th</sup> 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 13<sup>th</sup> 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 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 1<sup>st</sup> 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 20<sup>th</sup> August, 2013. SEIAA vide its letter dated 19<sup>th</sup> 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 14<sup>th</sup> February, 2014 submitted a Rapid EIA report. On 24<sup>th</sup> 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 19<sup>th</sup> March, 2014, 'letter of commitment and expression of apology' was submitted to SEIAA. The Tamil Nadu

Pollution Control Board on 11<sup>th</sup> July, 2014 conducted an inspection of the project. On the basis of this inspection, the Tamil Nadu Pollution Control Board issued a notice dated 15<sup>th</sup> July, 2014 referring to the whole background, the breaches and violation committed by this Project Proponent and the fact that during inspection on 11<sup>th</sup> 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 22<sup>nd</sup> 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 14<sup>th</sup> 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 25<sup>th</sup> 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 2<sup>nd</sup> April, 2015. Photographs were also taken by SEIAA on 14<sup>th</sup> April, 2015. Photographs submitted by the Project Proponent on 26<sup>th</sup> March, 2014 and the photographs taken on 14<sup>th</sup> 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 2<sup>nd</sup> 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 27<sup>th</sup> July, 2013 and after receiving the letter from the CMDA on 5<sup>th</sup> August, 2013, it had started construction. Submission of documents including rapid Environmental Impact Assessment and issuance of TOR was a genuine basis for the Project Proponent to start construction. Relying upon the dated 12<sup>th</sup> December, 2012, it is stated that the 'letter of commitment and expression of apology' was submitted on 19<sup>th</sup> 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 12<sup>th</sup> December, 2012 as amended on 27<sup>th</sup> 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 21<sup>st</sup> May, 2014 passed by the Southern Zone Bench at Chennai. Thereafter, vide order dated 15<sup>th</sup> December, 2014, the operation of the impugned orders dated 12<sup>th</sup> December, 2012 and 27<sup>th</sup> 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 30<sup>th</sup> March, 2012, in furtherance to which building license was obtained by the Project Proponent from Corporation of Chennai on 23<sup>rd</sup> 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 4<sup>th</sup> July, 2012. No acknowledgement thereof had been placed on record by the Project Proponent. From the letter of the SEIAA dated 13<sup>th</sup> March, 2013, it is clear that the application with documents was of 13<sup>th</sup> 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 13<sup>th</sup> 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 19<sup>th</sup> March, 2013, the Project Proponent was asked to furnish additional documents and additional fee on or before 15<sup>th</sup> 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 25<sup>th</sup> 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 18<sup>th</sup> November, 2014, SEIAA informed the Project Proponent that the project had been de-listed. During the inspection on 14<sup>th</sup> April, 2015, photographs had been taken which if compared with the photographs submitted by the Project Proponent on 6<sup>th</sup> May, 2013 reveal that there was clear violation of the law, Notification of 2006 as well as the 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 13<sup>th</sup> May, 2013. On 21<sup>st</sup> 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 25<sup>th</sup> June, 2013 which was received by the SEIAA on 2<sup>nd</sup> August, 2013. Thereafter, Member Secretary, SEIAA vide letter dated 8<sup>th</sup> August, 2013 requested the State Government to take action for violation of the Notification of 2006. Vide letter dated 10<sup>th</sup> 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 3<sup>rd</sup> 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 26<sup>th</sup> 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 45<sup>th</sup> Meeting held on 29<sup>th</sup> – 30<sup>th</sup> October, 2013. According to SEIAA, the project site was inspected on 14<sup>th</sup> 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 18<sup>th</sup> 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 6<sup>th</sup> 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 14<sup>th</sup> 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 30<sup>th</sup> March, 2012 and Planning Permit from the Chennai Corporation on 23<sup>rd</sup> 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 4<sup>th</sup> July, 2012 but because of the change in the fees payable, the Project Proponent filed a fresh application on 18<sup>th</sup> February, 2013. In compliance to the Office Memorandum dated 12<sup>th</sup> December, 2012, it submitted a 'letter of commitment and an expression of apology' on 25<sup>th</sup> 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 12<sup>th</sup> 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 12<sup>th</sup> 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 12<sup>th</sup> December, 2012 and as amended by Office Memorandum dated 27<sup>th</sup> 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 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 3<sup>rd</sup> April, 2015 and is 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 12<sup>th</sup> December, 2012 and 27<sup>th</sup> 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 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 12<sup>th</sup> December, 2012 and 27<sup>th</sup> 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 12<sup>th</sup> December, 2012 and 27<sup>th</sup> 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.**

54. The decision on these issues would in fact be a linchpin of the entire judgment. If the Office Memoranda dated 12<sup>th</sup> December, 2012 and 27<sup>th</sup> 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 27<sup>th</sup> 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 15<sup>th</sup> September, 2005 inviting objection and suggestions from 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 18<sup>th</sup> 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 14<sup>th</sup> 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. Underground works, including mining or tunnelling, reclamation works, impoundment, daming, culverting, 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 sub-clauses (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 16<sup>th</sup> 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 16<sup>th</sup> 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.**

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 be 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 file 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 all / stakeholders.

This issues with the approval of the Competent Authority.

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 12<sup>th</sup> 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 16<sup>th</sup> November, 2010. The Office Memorandum dated 12<sup>th</sup> 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, 1986/  
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 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).

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 27<sup>th</sup> June, 2013 inserting sub-para 4 in para 5 of the Office Memorandum dated 12<sup>th</sup> 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 12<sup>th</sup> 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?

64. Since the Office Memorandum of 16<sup>th</sup> November, 2010 stood superseded by the Office Memorandum of 12<sup>th</sup> December, 2012 which was further amended by the Office Memorandum of 27<sup>th</sup> 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 *simpliciter*. 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 rule 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 (6IO)).

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 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) and Anr. v. Cynamide India Ltd. and Anr. 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 and Ors. 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', 2<sup>nd</sup> 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 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 and Ors.*, (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 vs. The Superintendent of Central Jail, Rajahmundry and Ors.*, (1974) 3SCC 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, 15<sup>th</sup> 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 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 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 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 and Anr. v. Sunil Kumar Vaish and Ors.*, (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 and Anr. v. Union of India and Ors.*, 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 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 12<sup>th</sup> December, 2012 and as amended by Office Memorandum dated 27<sup>th</sup> 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 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 12<sup>th</sup> 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 12<sup>th</sup> December, 2012 is to apply to cases pending before the SEIAAs and SEACs as well. Office Memorandum dated 27<sup>th</sup> June, 2013 terms the procedure under the Office Memorandum of 12<sup>th</sup> 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 27<sup>th</sup> June, 2013, sub para (iv) below sub para (iii) of para 5 of Office Memorandum dated 12<sup>th</sup> 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 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 16<sup>th</sup> November, 2010, 12<sup>th</sup> December, 2012 and 27<sup>th</sup> 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 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 and Ors.*, 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 and Anr.* (1968) IILLJ 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 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 and Anr.*, 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 and Ors. v. The Comptroller and Auditor General of India and Ors.*, (2007 )10 SCC 246, the Supreme Court held that if the statutory rules in force are absent or are silent on a 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 and others, etc.*, (1992) 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) and Ors.*, (*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 and Ors.*, 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.

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 and Ors. v. State of U.P. and Ors.*, (1987) 3 SCC 622, *Ram Sharma v. State of Rajasthan and Anr.*, (1968) 1 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 24<sup>th</sup> 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 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 24<sup>th</sup> June, 2013 and the other on 24<sup>th</sup> December, 2013 in relation to further classification and criteria which is to be adopted in that regard. Since the Office Memorandum dated 24<sup>th</sup> 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 24<sup>th</sup> 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 24<sup>th</sup> 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 of 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 24<sup>th</sup> 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 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 1<sup>st</sup> 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 1<sup>st</sup> 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 9<sup>th</sup> 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 9<sup>th</sup> 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. and Ors. v. Joginder S. Monga and Ors.*, (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 and Ors. v. Union of India (UOI) and Anr.*, (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 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 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. and Anr. v. Ministry of Environment & Forests and Ors.*, 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 and others*, (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 vs Central Government Industrial Tribunal And Ors.* 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 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 19<sup>th</sup> February, 1991, which has been amended on 3<sup>rd</sup> 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. 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 vs. 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. and Ors.* Hon’ble Supreme Court vide its order dated 21<sup>st</sup> 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 and Ors.* (supra), where the Tribunal was dealing with a case challenging the validity of the Office Memoranda dated 9<sup>th</sup> September, 2013 and 24<sup>th</sup> 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 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) and Ors.* (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 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 17<sup>th</sup> June, 2014

and 30<sup>th</sup> 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 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 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 *M/s Laxmi Suiting v. State of Rajasthan and Ors.*, 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 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 aforesaid, 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 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 and Ors.*, 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 and Ors.* MANU/SC/0083/1955: AIR 1955 SC 661, the 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 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 22<sup>nd</sup> August, 2013, 28<sup>th</sup> April, 2014, 20<sup>th</sup> June, 2014, 19<sup>th</sup> May, 2014 and 17<sup>th</sup> June, 2014 to SPR & RG, letters dated 21<sup>st</sup> June, 2013, 08<sup>th</sup> August, 2013 and 10<sup>th</sup> September, 2013 to M/s Dugar Housing and letter dated 21<sup>st</sup> 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 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 M/s. SPR & RG Construction Private Limited (Respondent No. 7) the SEAC in its meeting on 30<sup>th</sup> 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 17<sup>th</sup> 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 non-compliance 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* 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, 13<sup>th</sup> 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. Non-compliance 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 non-compliance 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 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. and Anr. v. State of U.P. and Anr. (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 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 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 non-compliance and contravention of the provisions of these enactments punishable. In other words, every default or violation and even non-compliance 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 *simpliciter*.

#### **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 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 21<sup>st</sup> 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 21<sup>st</sup> 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 12<sup>th</sup> July, 2014 for carrying out construction work without obtaining Environmental Clearance. Again on 26<sup>th</sup> 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 2<sup>nd</sup> 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 4<sup>th</sup> 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 14<sup>th</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> 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 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 27<sup>th</sup> 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 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 & Ors., 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, 19<sup>th</sup> 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 *Contemporian expositio* of the position of law." For application of this doctrine the 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 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.

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;
- 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 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)
  - 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 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 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 12<sup>th</sup> December, 2012 and 27<sup>th</sup> 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 3<sup>rd</sup> 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 23<sup>rd</sup> 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)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
|-------------|-----------------------------------------|--------------------------------------------------------------------------------------|-----------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>"8"</b>  |                                         | <b>Building or Construction projects or Area Development projects and Townships.</b> |                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| <b>8(a)</b> | Building and Construction projects      |                                                                                      | >20000 sq.mtrs and < 1,50,000 sq. mtrs. of built up area              | <p>The term "built up area" for the purpose of this notification the built up or covered area on all floors put together, including its basement and other service areas, which are proposed in the building or construction projects.</p> <p>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.</p> <p>Note 2.- "General Conditions" shall not apply.</p> |
| <b>8(b)</b> | Townships and Area Development Projects |                                                                                      | Covering an area of > 50 ha and or built up area > 1,50,000 sq. mtrs. | <p>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.</p> <p>Note.- "General Conditions" shall not apply.</p>                                                                                                                                                                                                                                                                                                                                                                                          |

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 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 and Ors.*, 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 and Ors*, 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-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, 15<sup>th</sup> Edn., 2012, Black's Law Dictionary 9<sup>th</sup> 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) & Ors.*, (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 4<sup>th</sup> 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) & Ors.*, (supra). In that case, Hon'ble Supreme Court was concerned with the construction of a park in 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 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 14<sup>th</sup> 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 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 vs. Prof. M.V. Nayudu (Retd.) and Ors.*, (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, SO<sub>2</sub> CO<sub>2</sub> 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 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, Sub-section (1) thereof read as follows:

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

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) and Ors.*, (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 conditions while permitting the industry to operate (*M/s 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 and Ors v. The Commissioner, Pune Municipal Corporation and Ors.*, 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 12<sup>th</sup> February, 2015.

155. In somewhat similar situations like the one in hand, the Tribunal in the case of *Forward Foundation v. State of Karnataka and Ors.*, Original Application No. 222 of 2014 decided on 7<sup>th</sup> 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 20<sup>th</sup> May, 2015 passed in the case of *Core Mind Software and Services Pvt. Ltd. v. Forward Foundation and Ors.*, 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:

“O R D E R

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.

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 3<sup>rd</sup> 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 and another vs. Union of India and others*, JT 1987 (1)SC 1, *Vineet Narain and Ors. vs. Union of India (UOI) and Anr.*, JT 1997 (10)SC 247 and *University of Kerala vs. Council, Principals', Colleges, Kerala and Ors.*, 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 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 non-compliance. 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 12<sup>th</sup> December, 2012 and 27<sup>th</sup> 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:
  - 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 anti-pollution 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 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.

**Justice Swatanter Kumar**  
**Chairperson**

**Justice U.D. Salvi**  
**Judicial Member**

**Dr. D.K. Agrawal**  
**Expert Member**

**Prof. A.R. Yousuf**  
**Expert Member**

**Mr. Bikram Singh Sajwan**  
**Expert Member**

**New Delhi**  
7<sup>th</sup> July, 2015

**BEFORE THE NATIONAL GREEN TRIBUNAL  
PRINCIPAL BENCH  
NEW DELHI**

.....

**ORIGINAL APPLICATION NO. 34/2016**

**IN THE MATTER OF:**

Naresh Zargar  
S/o Late Sh. S.P. Zargar,  
R/o 2235, Shaheed Gulab Singh Ward,  
Indranagar, District Jabalpur, M.P.

.....Petitioner

Versus

1. State of Madhya Pradesh,  
Through its Secretary,  
Department of Mines and Minerals,  
Vallabh Bhawan, Bhopal, M.P.
2. Directorate Geology of Mines,  
(D.G.M.)  
Bhopal, M.P.
3. M.P. State Mining Corporation,  
Through its Managing Director,  
Paryas Bhavan Bhopal, M.P.
4. Ministry of Environment & Forest,  
Through its Secretary,  
New Delhi.
5. State Environment Impact Assessment Authority,  
SEIAA,  
Bhopal.

.....Respondents

**COUNSEL FOR APPLICANT :**

Mr. Avi Singh and Mr. Harmeet Ruprah, Advocates.

**COUNSEL FOR RESPONDENTS :**

Mr. Ashok Bhasin, Sr. Advocate with Mr. V.K. Shukla, Advocate,  
for Respondent No.1, 2 and 5.

Mr. Harsh Parashar, Advocate, for Respondent No.3

Mr. Divya Prakash Pande, Advocate, for Respondent No. 4.

Mr. Amit Singh, Advocate, in M.A. No. 122 of 2016.

**REVIEW APPLICATION NO. 01 OF 2016****IN****ORIGINAL APPLICATION NO. 34/2016****IN THE MATTER OF:**

Ramakant Gautam

.....Applicant

Versus

State of M.P. &amp; Ors.

....Respondents

and

M.P. State Environmental Impact Assessment Authority  
Through its Member Secretary  
Paryavarn Parisar,  
E-5, Arera Colony,  
Bhopal – 462016.

....Review Applicant

**COUNSEL FOR REVIEW APPLICANT:**

Mr. V. K. Shukla, Advocate.

**AND****M.A. NO. 24 OF 2016, M.A. NO. 48 OF 2016 AND M.A. NO. 49  
OF 2016****IN****ORIGINAL APPLICATION NO. 123/2014****IN THE MATTER OF:**

Himmat Singh Shekhawat

.....Applicant

Versus

State of Rajasthan and Ors.

.....Respondents

**COUNSEL FOR APPLICANT:**

Mr. Arvind Soni, Advocate.

**COUNSEL FOR RESPONDENTS:**

Mr. Tushar Mehta, ASG, Mr. Shiv Mangal Sharma, AAG, Mr. Saurabh Rajpal and Mr. Adhiraj Rajawat, Advocates, for Respondent No.4.

Mr. Vikas Malhotra and Mr. M.P. Sahay, Advocates, for Respondent No.5.

Mr. Divya Prakash Pande, Advocate, for Respondent No. 4.

Mr. Amit Singh, Advocate, in M.A. No. 122 of 2016.

**JUDGMENT****PRESENT:**

**Hon'ble Mr. Justice Swatanter Kumar (Chairperson)**

**Hon'ble Mr. Justice M.S. Nambiar (Judicial Member)**

**Hon'ble Mr. Justice Jawad Rahim (Judicial Member)**

**Hon'ble Mr. Justice Sonam Phintso Wangdi (Judicial Member)**

**Hon'ble Dr. D.K. Agrawal (Expert Member)**

**Hon'ble Mr. B.S. Sajwan (Expert Member)**

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**Reserved on: 18<sup>th</sup> February, 2016**

**Pronounced on: 04<sup>th</sup> May, 2016**

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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?

**JUSTICE SWATANTER KUMAR, (CHAIRPERSON)**

By this common judgment, we shall dispose of Original Application No. 34 of 2016 filed by Naresh Zargar under Section 14 read with Section 16 of the National Green Tribunal Act, 2010 (for short 'Act of 2010'), Review Application No. 1 of 2016 filed by Madhya Pradesh State Environment Impact Assessment Authority (for short "MPSEIAA") in Original Application No. 496/2015 which was filed by Ramakant Gautam, seeking extension of time for deciding applications pending before MPSEIAA in terms of the judgment of the Tribunal dated 10<sup>th</sup> December, 2015 and Miscellaneous Application No. 24 of 2016 filed by the State of Rajasthan and SEIAA, Rajasthan, praying that the time for



implementation of directions contained in the judgment of the Tribunal dated 13<sup>th</sup> January, 2015 be extended by a period of 12 months.

2. Miscellaneous Application No. 49 of 2016 in Original Application No. 123 of 2014 has been filed by Mr. Ramesh Meena and Ors praying that the State Environment Assessment Committee (for short "SEAC"), Rajasthan should be directed to deal with the applications filed by them for grant of Environmental Clearance (for short 'EC') and time for that purpose may be extended in the interest of justice.

3. On similar lines, Miscellaneous Application No. 48 of 2016 in Original Application No. 123 of 2014 has been filed on behalf of Mr. Suresh Kumar Agrawal and Ors. Therefore, all these original application, review application and miscellaneous applications, being based on a common premise, can be disposed of together by this judgment.

4. Illegal and unauthorized mining has been a matter of concern for all concerned stakeholders. Besides carrying on illegal and unauthorized mining, various mine lessees/miners had successfully frustrated the laws in force by bringing down the area of the mine lease to less than five hectares, even in adjoining areas with the object and purpose of escaping the requirement of obtaining EC in accordance with the provisions of the Environmental (Protection) Act, 1986 (for short 'Act of 1986') and Environment Clearance Regulations, 2006 (for short 'Notification of 2006'). Keeping in view

the large-scale avoidance of law and serious degradation of environment and ecology, the Supreme Court in the case of *Deepak Kumar v. State of Haryana* (2014) 4 SCC 629 mandated that all mine owners, even if carrying on mining operations below five hectares, would be liable to seek EC from the competent authority. The dictum of the Supreme Court was not followed by various States in its true spirit and substance. While some of the States did not enforce the directions, there are some other States which have issued Notifications/Government Orders to overreach the directions given by the Supreme Court in exercise of their executive powers. These directions/Office Memorandums were contrary to the orders of the Supreme Court and in fact, some of them were even set aside by the Tribunal.

5. Following the judgment of the Supreme Court in *Deepak Kumar's* case (supra), various cases, particularly in relation to the States of Haryana and Rajasthan were decided by the Tribunal where all concerned were mandated to comply with the judgment of the Supreme Court and it was also stated that even the existing units did not have any right to continue to pollute. The Tribunal dealt with all the issues raised before it in the case of *Himmat Singh Shekhawat v. State of Rajasthan* and passed a detailed judgment dated 13<sup>th</sup> January, 2015 in Original Application No. 123 of 2014.

6. In this Judgment the Tribunal held that the existing mining lease holders should have complied with the requirements of obtaining EC from the Competent Authority in accordance with law. They were provided reasonable time of 3 months to make

applications for obtaining the EC, which applications were directed to be disposed of within 6 months from 13<sup>th</sup> January, 2015.

7. These directions were passed even in relation to disposal of the applications of the private respondents or other persons seeking EC, expeditiously and not later than 3 months from the date of the Judgment. The authorities, including SEIAA, were directed to dispose of the applications for obtaining EC for mining purposes within the stipulated period in accordance with law and more particularly in light of the observations and directions stated in the Judgment.

8. Thereafter various Original Applications as well as Miscellaneous Applications were filed by different parties in different proceedings and even independent Original Applications were filed, which were dealt with by the Tribunal vide its different orders. It will be useful to refer to those orders which would have a bearing on the matter in issue before us now.

9. M.A. No. 680 of 2015 was filed in Original Application No. 123 of 2014 by State of Rajasthan seeking extension of time which was granted for a period of 6 months by way of last opportunity vide order dated 15<sup>th</sup> July, 2015. Review Application 18 of 2015 was also filed in Original Application No. 123 of 2014 by State of Madhya Pradesh seeking a review of the Judgment dated 13<sup>th</sup> January, 2015. Vide order dated 24<sup>th</sup> July, 2015 the Tribunal directed MPSEIAA to deal with all the applications and clear the entire backlog within 3 months from the date of the order. It was held that at

that time the mining units which had applied for obtaining EC could continue to operate. Obviously the intention was that all of them would be granted EC within 3 months.

10. M.A. 1065 of 2015, M.A. No. 1104 of 2015 and M.A. No. 1105 of 2015 were filed in Original Application No. 171 of 2013 titled as *National Green Tribunal Bar Association v. MoEF & Ors.* by State of Madhya Pradesh. Vide Judgment dated 10<sup>th</sup> December, 2015 three weeks time was granted to MPSEIAA by way of final opportunity. However, it was made clear that no further time would be given and all effective steps should be taken by the concerned authorities. On the same date, vide Judgment of the Tribunal in the case of *National Green Tribunal Bar Association v. MoEF & Ors.* being Original Application No. 364 of 2015 in relation to State of Karnataka, SEIAA was directed to dispose of the applications that were pending before it as on 1<sup>st</sup> September, 2015 by 31<sup>st</sup> December, 2015. It may be noticed that only 88 applications were stated to be pending at that time. It was also pointed out that applicants who had filed applications for grant of EC without providing complete particulars or documents, and as a result thereof their applications were pending before SEIAA, those applicants were directed to furnish information within 2 weeks from the date of the order.

11. Original Application No. 496 of 2015 titled as *Ramakant Gautam & Ors V. State of Madhya Pradesh & Ors* related to extension of time on behalf of MPSEIAA. This application was disposed of vide order dated 10<sup>th</sup> December, 2015 with the direction to MPSEIAA that all the applications pending before it should be



disposed of by 31<sup>st</sup> December, 2015. The applicants who have not furnished requisite documents were required to furnish them within two weeks from the date of the order. Upon furnishing the information, the applications were required to be disposed of by 31<sup>st</sup> December, 2015. It was further stated that if they failed to furnish the documents and their applications were not disposed of within the stipulated time they would be shut down as per the Judgment.

12. Now we will be comprehensively dealing with the various applications as already noticed in the opening part of this Judgment. From the bare reading of the above order, it is clear that the outer limit for disposal of the applications was 31<sup>st</sup> December, 2015. It was more particularly in relation to the applications that were pending as on 1<sup>st</sup> September, 2015. Some of the applicants as well as the authorities have taken undue advantage of the order passed by the Tribunal on 24<sup>th</sup> July, 2015 in the case of *M.P. State Mining Corporation Vs. Ministry of Environment & Forest & Ors. In Himmat Singh Shekhawat Vs. State of Rajasthan & Ors.* being Review Application No. 18 of 2015 and have continued to operate indefinitely even till date.

13. It is unfortunate that it is to be recorded that this order has been misconstrued by the authorities as well as by the applicants. The purpose of this order was not to grant indefinite period for operation of mines but within the outer limit, i.e., 31<sup>st</sup> December, 2015. Even as on date, the applications have not been disposed of and the mining activity is still going on. As already noticed, some applications are for extension of time while others are for



clarification that mining activity can be carried on even when the EC has not been granted. Strangely, the State of Madhya Pradesh on 14<sup>th</sup> December, 2015, on the basis of an opinion sought, issued a circular to all its collectors in relation to order dated 10<sup>th</sup> December, 2015 stating that applicants who have already moved an application for EC prior to 31<sup>st</sup> December, 2015, their applications would be considered immediately and till decisions the mine owners can operate their mines if their application is errorless.

14. This circular issued by the State of Madhya Pradesh dated 14<sup>th</sup> December, 2015 is contrary to laws in force and the order of the Tribunal. As already noticed, the intention of the Tribunal's order dated 24<sup>th</sup> July, 2015 was to give time not beyond 31<sup>st</sup> December, 2015 but it has been misconstrued by the State of Madhya Pradesh. In fact, this circular is primarily intended to overreach the laws in force and is contrary to the Judgment of the Supreme Court and of the Tribunal. There was no ambiguity in the Judgment of the Tribunal dated 13<sup>th</sup> January, 2015 that no mining activity including that of the existing units would be permitted to go on without taking the ECs. The circular is a clear attempt to overreach the Judgment and in fact act prejudicially to the environment and ecology in the State of Madhya Pradesh. The inbuilt infirmity in this Circular would be that on the one hand SIEAA and other Governmental authorities would not decide the applications pending before them for a long period, while on the other hand, the mining operators would continue mining under the protection of

this Circular. The obvious consequence would be that unregulated, unscientific and unauthorized mining would continue rampantly.

15. Let us look into the statistics given by the State of Madhya Pradesh vide their affidavit dated 19<sup>th</sup> February, 2016. According to this affidavit, as on 31<sup>st</sup> December, 2015, there were 1576 applications of minor minerals and 157 applications of major minerals for grant of EC pending with the MPSEIAA while as on 16<sup>th</sup> February, 2016, there were 1658 applications of minor minerals and 163 applications of major minerals pending for grant of EC before the said authority. It is nowhere stated in this affidavit as to how many applications have been disposed of or whether the applications have been granted or refused by the authorities concerned. This statement only shows increase in pendency of the applications with the authorities. Despite the fact that more than a year has passed, the authorities have taken no effective step to deal with these applications. All it has stated is that the applications are going to be decided. It is unfortunate that on the one hand the State and its authorities are not implementing the directions of the Tribunal as laid down vide Judgment dated 13<sup>th</sup> January, 2015 while on the other hand it is permitting the mining units to continue in an unauthorized and illegal manner which is seriously prejudicial to the environment and ecology.

16. The official and private respondents have violated the orders of the Supreme Court and the Tribunal which has caused damage and degradation of the environment. We would have normally invoked the "Polluter Pays Principle" but for the fact that there is no data

before the Tribunal. There is no information as to what is the extent and period of illegal mining or mining without obtaining the EC and what are its effects on environment. At the same time, we have to direct the concerned respondents to take proper steps without further delay and that they should not permit mining without ECs any further.

17. The Precautionary Principle casts a specific and statutory obligation upon the official respondents to enforce the orders and the law to prevent any further damage or degradation of the environment because of indiscriminate, unregulated and uncontrolled mining.

18. In light of our above discussion, we have no hesitation in quashing the circular dated 14<sup>th</sup> December, 2015 which we do hereby quash and direct the State of Madhya Pradesh and all other concerned States including Rajasthan not to issue such circulars and any other circular in variation and/or in derogation of the orders of the Tribunal.

19. It is stated in the Affidavit filed by the State of Madhya Pradesh on 18<sup>th</sup> February, 2016 that the Central Government vide its Notification dated 15<sup>th</sup> January, 2016 amended its earlier Notification dated 14<sup>th</sup> September, 2006 and constituted District Level Environment Impact Assessment Authority (for short 'DEIAA') and District Level Environment Appraisal Committee (for short 'DEAC') for matters falling under B2 category for mining of minor minerals. Vide the Notification dated 20<sup>th</sup> January, 2016 the

Central Government actually constituted the DEIAA and provided its structure and scope of implementation. The State Government in furtherance thereto issued a Notification dated 25<sup>th</sup> January, 2016 constituting the DEIAA. Copy of this Notification has been placed on record. On 8<sup>th</sup> February, 2016 Dy. Secretary, Urban Development and Environment has issued letters to all the Divisional Commissioners and Collectors in the State for constitution of DEIAA and DEAC. Such letters have also been issued to the regional heads. It is then stated that the applications are going to be decided expeditiously without any further delay. Ministry of Environment, Forests and Climate Change (for short 'MoEF') has also taken the similar stand and it is stated that they would be able to dispose of the applications now at the earliest.

20. All the above applications are primarily intended to seek extension of time either by way of review or clarification and/or on various other grounds. We find that all these applications are without any substance and merit. It is expected of every State Government, SEIAA and MoEF to ensure implementation of all the Directions contained in the Judgment of the Supreme Court and orders of the Tribunal without any further delay.

21. They have been delaying the disposal of the applications on one pretext or the other. This undue delay in disposal of applications seeking EC has twin adverse effects. On the one hand, it leads to illegal and unauthorized mining while on the other hand it causes irreparable damage to the environment and ecology of the area. In addition to this, there is revenue loss to the State which it

should be quite concerned with. We have been granting time again and again, and we have even granted them last and final opportunity but this has taken more than a year for the authorities to wake up and take proper and effective steps in the light of the Judgment of the Tribunal.

22. Therefore, we dispose of this application in relation to minor minerlas with the following directions:-

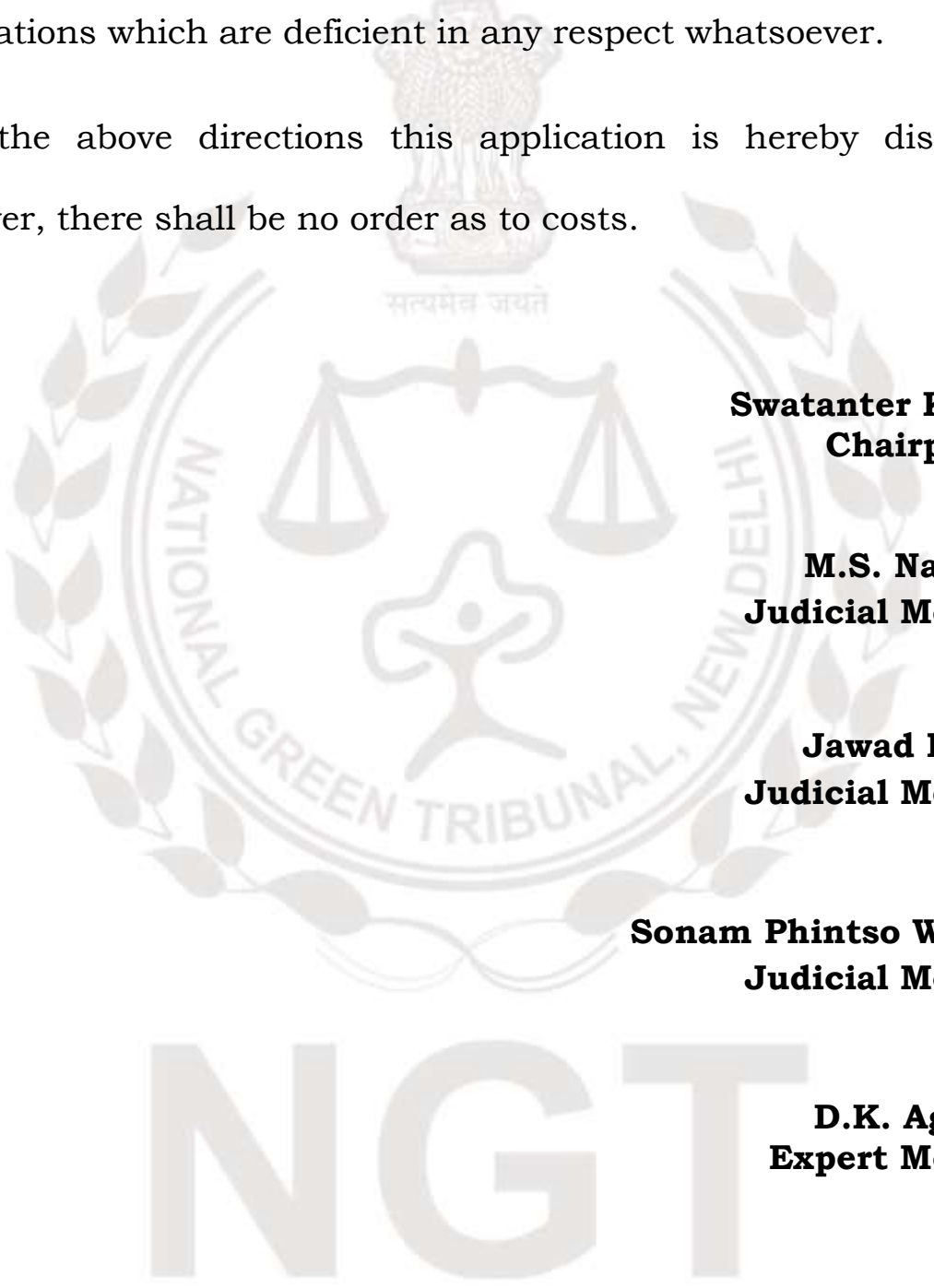
1. We hereby quash and direct the State of Madhya Pradesh and all other concerned States including Rajasthan not to issue such circulars and any other circular in variation and/or in derogation of the orders of the Tribunal.
2. All the district level authorities, DEIAA and DEAC, are directed to dispose of all the applications pending with them by 31<sup>st</sup> May, 2016 positively. We will not grant any extension of time for this purpose hereafter.
3. All the mines owners which of them have not submitted the applications as on 31<sup>st</sup> March, 2016 to SEIAA, DEIAA and DEAC, shall be shut down forthwith and will not be permitted to carry on any mining activity in any manner whatsoever.
4. The applications which are deficient and where the applicants have not submitted all requisite documents, such applicants are hereby granted last opportunity of 1 week (one week) to submit the documents. In the event they fail to submit such document and make applications complete and errorless in all respects then after the stated period of 1 week they shall also be liable to be shut



down without any further notice. If they comply with this direction, they would also be entitled to the advantage up to 31<sup>st</sup> May, 2016.

5. All the State Authorities are directed to upload on their respective websites, details of the applications pending before them as on 31<sup>st</sup> March, 2016. They will also separately classify the applications which are deficient in any respect whatsoever.

With the above directions this application is hereby disposed. However, there shall be no order as to costs.



**Swatanter Kumar**  
**Chairperson**

**M.S. Nambiar**  
**Judicial Member**

**Jawad Rahim**  
**Judicial Member**

**Sonam Phintso Wangdi**  
**Judicial Member**

**D.K. Agrawal**  
**Expert Member**

**B.S. Sajwan**  
**Expert Member**

New Delhi  
4<sup>th</sup> May, 2016

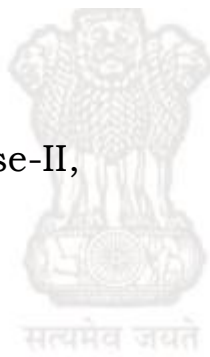
**BEFORE THE NATIONAL GREEN TRIBUNAL  
PRINCIPAL BENCH  
NEW DELHI**

.....

**ORIGINAL APPLICATION NO. 123 OF 2014  
AND  
M.A. NO. 419 of 2014**

**IN THE MATTER OF:**

Himmat Singh Shekhawat,  
98, Rooprajat Township, Phase-II,  
Pal Road, Jodhpur – 342008  
Rajasthan



..... Applicant

Versus

1. State of Rajasthan  
Through Principal Secretary, Mines Department,  
Government of Rajasthan, Secretariat,  
Jaipur – 302001,  
Rajasthan.
2. Director, Mines & Geology Department  
Khanij Bhawan,  
Shashtri Circle, Udaipur - 313001,  
Rajasthan
3. Union of India  
Through the Secretary  
Ministry of Environment and Forests  
Government of India,  
Paryavaran Bhawan, CGO Complex  
Lodhi Road, New Delhi – 110003
4. Secretary, Forest Department  
Government of Rajasthan,  
Secretariat, Jaipur – 302001,  
Rajasthan.
5. Larsen & Toubro Ltd.  
4<sup>th</sup> Floor, SDC Monarch,  
Plot no. D-236,  
Amrapali Marg,  
Jaipur – 302021  
Rajasthan

Through Mr. Vivek Narayan Gokhale,  
Project Director, Larsen and Tourbo Ltd.

6. M/s. Hi-Tech Rock Products & Aggregates Ltd.

(A Company incorporated under the Companies Act, 1956)

Having registered Office at  
Mount Poonamallee Road,  
Manapakkam, P.O. Box 979,  
Chennai – 600089

Through Mr. K. Prasanna Kumar,  
Manager (Mines)  
Hi-Tech Rock Products & Aggregates Ltd.

7. Mr. Prahlad Rai  
R/o Ward No. 10,  
Behind DSP Office,  
Ladnu Road,  
Sujan Garh,  
District Churu, Rajasthan  
Through POA holder – Shri Rohitash.
8. Mr. Jagdish Kumar Jat  
R/o 13, Ramdev Mandir Mohalla,  
P.O. Salasar, Tehsil-Sujangarh,  
District Churu,  
Rajasthan 331507  
Through POA holder – Shri Rohitash
9. Mr. Yogesh Kumar Nyariya  
R/o Krishi Upaj Mandi,  
Shrimadhopur,  
District Sikar, Rajasthan  
Through POA holder – Sh. Shahbuddin Quereshi
10. M Vinita Devi  
R/o Karni Dharma Kanta,  
H-Pratham,  
23-Industrial Area,  
Neemka Thana  
District Sikar, Rajasthan  
Through POA holder – Sh. Shahbuddin Quereshi
11. Ms. Kavita Jain  
R/o Sadar Bazar, Rupangarh,  
Tehsil-Kishangarh  
District Ajmer, Rajasthan  
Through POA Holer – Proprietor,  
M/s. Maruti Mines & Minerals  
Mr. Sarveshwar Agarwal &  
Sh. Sanjay Kumar Jain
12. Ms. Sushila Jain  
R/o Sadar Bazar, Rupangarh,  
Tehsil – Kishangarh  
District Ajmer, Rajasthan

Through POA Holder – Proprietor,  
M/s. Maruti Mines & Minerals  
Mr. Sarveshwar Agarwal &  
Sh. Sanjay Kumar Jain

13. Mr. Virendra Dave  
Bada Bas, Near Laxmi Temple,  
Sojat City,  
Dist, Pali, Rajasthan  
Through POA Holder – Shri. Rajuram Gurjar
14. Mr. Sohanlal Gurjar  
Gurjaro Ka Vas,  
Village Kharchi

.....Respondents

**AND**

**APPEAL NO. 23 OF 2014**

**AND**

**M.As. NO. 469 OF 2014, 470 OF 2014, 471 OF 2014, 473 OF 2014, 479 OF 2014, 480 OF 2014, 488 OF 2014, 489 OF 2014, 512 OF 2014 AND 563 OF 2014**

**IN**

**APPEAL NO. 23 OF 2014**

**IN THE MATTER OF:**

Sunil Acharya  
S/o Shri Chndra Shekhar Acharya,  
245, Ramchandra, Matri Chhaya, Tajgiron Ki Bari,  
Kalika Mata Road, Banswara  
Rajasthan.

..... Applicant

**Versus**

1. Shri Sanjay Bakliwal  
S/o Shri Manak Chandra Bakliwal,  
Director, M/s. R.K. Grenny Marmo Pvt. Ltd.,  
R/o Oswali Mohalla, Madanganj, Kishangarh,  
District Ajmer, Rajasthan-305001
2. Shri Ashok Patni  
S/o Shri Kanwarlal Patni,  
Director, M/s. R.K. Premises Pvt. Ltd.,  
R.K. House, Madanganj, Kishangarh,  
District Ajmer, Rajasthan – 305001
3. Shri V.K. Gheeya  
S/o Late Shri Kamal Prasad Gheeya,  
Director, M/s. Patni Premises Pvt. Ltd.,  
R/o 202, Mahalaxmi Apartment, Post Badgaon,  
Bedla Road, Udaipur, Rajasthan-313001  
Through the Chief Secretary,

Delhi Secretariat, I.P. Estate,  
New Delhi - 110002

4. Shri Vinay Patni  
S/o Shri Suresh Kumar Patni,  
Director, M/s. Patni States Pvt. Ltd.  
Through its Vice Chairman,  
Vikas Bhawan,  
New Delhi - 110002
5. Shri Suresh Patni  
S/o Shri Kanwarlal Patni,  
Director, M/s. Supreme Buildstates Pvt. Ltd.  
R/o R.K. House, Madanganj, Kishangarh,  
District Ajmer, Rajasthan-305001
6. Shri Parmanand Patidar  
S/o Shri Prabhulal Patidar,  
Director, M/s. Elegant Premises Pvt. Ltd.  
R/o 20, Kanchan Deep, Bohra Ganesh Road,  
Udaipur, Rajasthan-313001.
7. Shri Jaideep Shah  
S/o M/s. R.K. Super Cement Product Pvt. Ltd.  
R/o D-8, Lal Bahadur Nagar,  
In front of Hotel Clark, J.L.N. Marg,  
Jaipur, Rajasthan.
8. The Government of Rajasthan  
Through the District Collector and the President,  
District Level Forest Rights Committee,  
Banswara, Rajasthan-327001.
9. The Assistant Engineer,  
Mines and Geology Department,  
Banwara - 327001.
10. The Dy. Forest Conservator,  
Department of Forest,  
Dahod Road,  
Banswara - 327001
11. The Senior Assistant Inspector General of Forest,  
Ministry of Forest Environment House,  
C.G.O. Complex, Lodhi Road,  
New Delhi.

.....Respondents

**AND**  
**ORIGINAL APPLICATION NO. 343/2013**  
**AND**  
**M.A. NO. 442 OF 2014 and M.A. NO. 1093 OF 2013**  
**IN**  
**ORIGINAL APPLICATION NO. 343 OF 2013**



Shri Ranbir Singh  
 S/o Shri Swadesh Singh,  
 Proprietor M/s. New Shiva Stone Crusher,  
 Vill. & P.O. Kandwal, Tehsil Nurpur  
 And Distt. Kangra,  
 Himachal Pradesh.

..... Applicant

Versus

1. State of Himachal Pradesh  
 Through Secretary (Industries) to the Govt. of  
 Himachal Pradesh, Shimla-1.
2. Director Industries to the State of H.P.  
 Udyog Bhawan,  
 Shimla – 1
3. State Geologist to the State of H.P.  
 Udyog Bhawan,  
 Shimla –1
4. Mining Officer,  
 Solan Distt., Solan,  
 Himachal Pradesh
5. Mr. Parshant Joshi  
 5-A, Agar Nagar,  
 Ludhiana.

.....Respondents

**AND**

**ORIGINAL APPLICATION No. 279(T<sub>HC</sub>) of 2013**

**AND**

**M.A. NO. 1120 OF 2013**

**IN**

**ORIGINAL APPLICATION No. 279(T<sub>HC</sub>) of 2013**

1. Smt. Promila  
 W/o Shri Rajesh Kumar,  
 Proprietor M/s. Amarjeet Stone Crusher,  
 Vill. Sainsiwala, P.O. Barotiwala, Tehsil Baddi  
 And Distt. Solan,  
 Himachal Pradesh.
2. Shri Mohan Lal Mehta  
 S/o Shri Hira Nand Mehta,  
 Proprietor M/s. Vishwakarma Hard Stone Crusher,  
 Vill. Khali, P.O. Kumarhatti, Tehsil & Distt. Solan,  
 Himachal Pradesh.

3. Shri Sanjay Singh  
S/o Shri Mohan Singh,  
Proprietor M/s. Shiva Stone Crusher,  
Vill. Kailar, P.O. Saproon, Tehsil & Distt. Solan,  
Himachal Pradesh.

..... Applicants

Versus

4. State of Himachal Pradesh  
Through Secretary (Industries) to the Govt. of  
Himachal Pradesh, Shimla-1.
5. Director Industries to the State of H.P.  
Udyog Bhawan,  
Shimla – 1
6. State Geologist to the State of H.P.  
Udyog Bhawan,  
Shimla – 1
7. Mining Officer,  
Solan Distt., Solan,  
Himachal Pradesh

.....Respondents

**AND**

**M.A. NOs. 529 of 2014 & M.A. NO. 623 OF 2014  
IN  
Original Application No. 171 OF 2013**

**IN THE MATTER OF:**

National Green Tribunal Bar Association  
Versus

..... Applicant

Ministry of Environment & Forests & Ors.

.....Respondents

**AND IN THE MATTER OF:**

Dr. Sarvabhoun Bagali,  
Kachari Road, Opp. Head P.O.,  
Indi, Dist. Bijapur, Karnataka-586209

..... Applicant

Versus

1. State of Karnataka  
Department of Mines and Geology,  
Through its Director,  
No. 49, Khanija Bhavan,  
Race Course Road, Bengaluru,  
Karnataka – 560001

2. Department of Law, Justice & Human Rights,  
Government of Karnataka,  
Through its Principal Secretary,  
Vidhana Soudha, Bangaluru-560001
3. Karnataka State Pollution Control Board  
Through its Member Secretary,  
'Parisara Bhavan', #49, IVth & Vth Floor,  
Church Street, Bengaluru- 560001
4. Department of Industries and Commerce,  
Govt. of Karnataka,  
Through Secretary to the Government,  
No. 49, South Block, Khanija Bhavana,  
Race Course Road, Bengaluru- 560001
5. Karnataka State Environment Impact Assessment  
Authority (SEIAA), Through its Chairman,  
Department of Ecology & Environment,  
Room No. 709, VII Floor, IV Gate,  
M.S. Building, Bengaluru
6. Public Works Department,  
Through its Principal Secretary,  
Karnataka Government Secretariat,  
III Floor, Vikasa Soudha, M.S. Building,  
Dr. Ambedkar Road, Bengaluru- 560001
7. Executive Engineer,  
Public Works Department,  
Bangalore Rural Division,  
PWDD Annexue Building, II Floor  
K.R. Circle, Bengaluru,  
Karnataka – 560001
8. Executive Engineer,  
Public Works Department,  
PWD Division, 23<sup>rd</sup> Sector,  
Navanagar, Bagalkot,  
Bagalkot Distt., Karnataka - 587103.
9. Executive Engineer,  
Public Works Department,  
PWD Division, Kote, Belgaum,  
Belgaum Distt.,  
Karnataka – 590016
10. Executive Engineer,  
Public Works Department,  
PWD Division, Kote, Bellary,  
Bellary Distt.,

Karnataka – 583102

11. Executive Engineer,  
Public Works Department,  
PWD Division, Mangalpet,  
Opp. to S.P. Office, Bidar, Bidar Distt.,  
Karnataka – 585401
12. Executive Engineer,  
Public Works Department,  
PWD Division, Station Road,  
Opp. to State Bank of India, Bijapur,  
Bijapur Distt. Karnataka – 586101
13. Executive Engineer,  
Public Works Department,  
PWD Chamarajnagar Division,  
Kote Road, Chamarajnagar,  
Chamarajnagar Distt., Karnataka – 571313
14. Executive Engineer,  
Public Works Department,  
PWD Chikkaballapur Division,  
Opp. to Govt. Hospital, Chikkaballapur,  
Chikkaballapur Distt., Karnataka - 562101
15. Executive Engineer,  
Public Works Department,  
PWD Chikmagalore Division,  
Near Azad Park, Belur Road, Chikmagalore,  
Chikmagalore Distt., Karnataka – 577101
16. Executive Engineer,  
Public Works Department,  
PWD Chitradurga Division,  
D.C. Circle, Chitradurga  
Chitradurga Distt., Karnataka – 577501
17. Executive Engineer,  
Public Works Department,  
PWD Mangalore Division, Mini Soudha,  
II Floor, Opp. Nehru Ground, Hampanakatte,  
Mangalore, Dakshina Kannada Distt., Karnataka - 575001.
18. Chief Secretary,  
Government of Mizoram  
Civil Secretariat,  
Block-C Aizwal-796001.
19. Chief Secretary,  
Government of Nagaland  
Secretariat,

- Kohima-797001.
20. Chief Secretary,  
Government of NCT of Delhi  
New Secretariat Building, I.P Estate  
New Delhi-110002.
  21. Chief Secretary,  
Government of Orissa,  
General Admn. Dept.  
Orissa Secretariat,  
Bhubaneswar-751001.
  22. Chief Secretary,  
Government of Pondicherry  
No. 1, Beach Road,  
Pondicherry-605001.
  23. Chief Secretary,  
Government of Punjab  
Punjab Civil Secretariat,  
Chandigarh-160001.
  24. Chief Secretary,  
Government of Rajasthan  
Secretariat,  
Jaipur-302005.
  25. Chief Secretary,  
Government of Sikkim  
Tashiling Secretariat,  
Gangtok-737101.
  26. Chief Secretary,  
Government of Tamil Nadu  
Secretariat,  
Chennai-600009.
  27. Chief Secretary,  
Government of Tripura  
Civil Secretariat,  
Agaartala -799001.
  28. Chief Secretary,  
Government of Uttar Pradesh  
Lal Bahadur Shastri Bhavan  
UP Secretariat,  
Lucknow-226001.
  29. Chief Secretary,  
Government of Uttarakhand  
Uttarakhand Secretariat,



4B Shubhash Road  
Dehradun-248001.

30. Chief Secretary,  
Government of West Bengal  
Writers' Building,  
Kolkata -700001.
31. Chief Secretary,  
U.T. of Andaman & Nicobar Islands  
Secretariat, Port Blair  
Andaman – 744101
32. Adviser to Administrator  
U.T. of Chandigarh  
Secretariat, Sector 9  
Chandigarh – 160001
33. Administrator  
U.T. of Dadra & Nagar Haveli  
Secretariat, Silvassa – 396230
34. Administrator  
U.T. of Daman & Diu  
Fort Area, Secretariat  
Moti Daman – 396220
35. Administrator  
U.T. of Lakshadweep  
Secretariat, Kavaratti – 682555
36. State Level Environment Impact Assessment Authority  
Directorate of Environment, State of Uttar Pradesh  
Dr. Bhim Rao Ambedkar Paryavan Parisar,  
Vineet Khand – I, Gomati Nagar  
Lucknow, Uttar Pradesh PIN – 226010
37. Geological Survey of India  
3<sup>rd</sup> Floor, A wing,  
Shastri Bhawan, New Delhi 110001
38. Department of Geology & Mining  
Through Director  
State of Uttar Pradesh,  
Khanij Bhawan 27/8,  
Ram Mohan Rai Marg  
Lucknow – 226001
39. Department of Irrigation  
Through Engineer in Chief  
State of Uttar Pradesh,

New Planning Bhawan Toilibag, 3<sup>rd</sup> Floor  
Lucknow, PIN – 226001  
Uttar Pradesh

40. Central Pollution Control Board  
Through Member Secretary  
Parivesh Bhawan, CBD-Cum Office Complex  
East Arjun Nagar, Delhi – 110032
41. Uttar Pradesh State Pollution Control Board,  
Through the Member Secretary  
Picup Bhawan, 2<sup>nd</sup> Floor, B – block  
Vibhuti Khand, Gomiti Nagar,  
Lucknow – 226010
42. District Magistrate,  
Gautam Budha Nagar,  
Noida, Uttar Pradesh  
PIN 201301
43. Superintendent of Police,  
Gautam Budha Nagar,  
Noida, Uttar Pradesh  
PIN 201301
44. Ministry of Mining  
Shastri Bhawan, New Delhi
45. Vishal Agarwal  
S/o Lt. Sri Nahar Singh  
R/o 12/10, Ashirwad Enclave  
Ballupeer, Dehradun.
46. Vivek Kumar Aggarwal
47. Deepak Gupta
48. Jagannath Mane
49. Ministry of Environment and Forest.
50. Mohit, S/o Sh. Devendra,  
Resident of Mandi, Mailganj  
Tehsil Nagina, District.
51. Mrs. Muntur W/o P. Ismail  
R/o Puliyamthodi House,  
Vazhakkad Post  
Malapurram, Dist.  
Kerala.

52. Lasim C., S/o Basheer  
R/o Kodi thodina House,  
Payangadi Amsom,  
Kondotty Post,  
Malappuram Dist. Kerala
53. Dr. Sarvabhoun Bangali  
Kacheri Road.  
Opp. Head P.O.  
Distt. Bijapur  
Karnataka.
54. Ministry of Water Resources,  
New Delhi
55. Santhakumar A, S/o U. Achuthan  
Secretary, All Kerala Quarry Association,  
Palakkad.
56. K.M. Koyamu, S/o Modi Kattathodi  
Secretary, All Kerala Crusher Owner Association  
State Committee, Malappuram, Kerala
57. Muneer, P.M. S/o Moidu  
Paleri Town, P.O. Kulliyati  
Kerala
58. A.K. Sasi  
Athimattathil House  
Palakkad, P.O.  
Palakkad District  
Kerala

**Counsel for Applicants:**

Mr. Anand Verma, Advocate in OA No.123/2014.  
Mr. Pinaki Mishra, Sr. Advocate with Mr. Rohit Gupta and Mrs. Megha Mehta Agarwal, Advs. in M.A. No. 419/2014 in OA No.123/2014.  
Mr. Raj Panjwani, Sr. Advocate with Mr. Aagney Sail, Advocate in M.A. No. 529/2014 in OA No.171/2013.  
Mr. Rishi Malhotra and Mr. Deepak Kaushal, Advocates in OA No.343/2013 and OA No. 279(THC)/2013.  
Mr. Parikshit Nayak, Advocate in Appeal No. 23/2014

**Counsel for Respondents :**

Mr. Parag P. Tripathi, Sr. Advocate along with Mrs. Megha Mehta Agarwal and Mr. Rohit Gupta, Advocates for Respondent No. 5 – 14 in OA No.123/2014  
Mr. Vikas Malhotra along with Mr. P. Sahay, Advocates for MoEF in OA No.123/2014

Mr. Vikas Malhotra along with Mr. M.P. Sahay, Advocates for Respondent No. 1 in OA No.171/2013  
 Mr. Bikas Kargupta, Advocate for State of West Bengal, Respondent No. 30 in OA No.171/2013  
 Mr. Dev Raj Ashok, Advocate for State of Karnataka in OA No.171/2013  
 Mr. Suryanaryana Singh, Addl, AG along with Ms. Kanupriya Tiwari, Advocates for Respondent No. 1 in OA No. 343/2013  
 Mr. Vikas Malhotra along with Mr. M.P. Sahay, Advocates for MoEF and Applicant in M.A.No.442/2014  
 Mr. A.R. Takkar, Ms. Gurinderjit, Mr. Ankur Sharma, Ms. Nilika Kumar and Mr. Soumil Garg, Advocates for Respondent No. 6 in OA No.343/2013  
 Mr. Suryanaryana Singh along with Ms. Kanupriya Tiwari, Advocates for Respondent No. 1 in OA No. 279(T<sub>HC</sub>)/2013  
 Mr. Vikas Malhotra along with Mr. M.P. Sahay, Advocates for MoEF in OA No. 279(T<sub>HC</sub>)/2013  
 Mr. A.R. Takkar, Ms. Gurinderjit, Mr. Ankur Sharma, Ms. Nilika Kumar and Mr. Soumil Garg, Advocates for Respondent No. 6 in OA No. 279(T<sub>HC</sub>)/2013  
 Mr. Krishanan Venugopal, Sr. Advocate and Mr. Sandip Jha, Advocate in M.A. No. 470-471/2014 in (Appeal No.23/2014(PH))  
 Mr. Sanjeev, Advocate in M.A. No. 473/2014 in (Appeal No.23/2014(PH))  
 Mr. Sunil Prakash Sharma, Advocate in M.A. No. 480/2014 in (Appeal No.23/2014(PH))  
 Ms. Bhavna Sharma, Advocate in M.A. No. 488/2014 in (Appeal No.23/2014(PH))  
 Mr. Vivek Chib along with Mr. Asif Ahmed, Advocates for MoEF (Respondent No. 11) in (Appeal No.23/2014(PH))

### **JUDGMENT**

#### **PRESENT:**

**Hon'ble Mr. Justice Swatanter Kumar (Chairperson)**

**Hon'ble Mr. Justice M.S. Nambiar (Judicial Member)**

**Hon'ble Dr. D.K. Agrawal (Expert Member)**

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**Reserved on 16<sup>th</sup> October, 2014**  
**Pronounced on 13<sup>th</sup> January, 2015**

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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?

#### **JUSTICE SWATANTER KUMAR, (CHAIRPERSON)**

The National Green Tribunal Bar Association filed Original Application No. 171 of 2013 under Sections 14 and 15 read with



Sections 18 (1) and 18 (2) of the National Green Tribunal Act, 2010 (for short 'the NGT Act') stating that rampant illegal sand mining in the Yamuna riverbed was going on in violation of law, without taking prior Environmental Clearance. This activity of sand mining has adversely affected the eco-system and overall ecology of the area. Various incidents of rampant illegal sand mining have been referred to in the petition. It is averred that, despite serious efforts made by some officers, still, the illegal activity was going on. Referring to a recent academic study on environment, which in fact, relates to sand mining, it has been stated that in-stream mining of sand and gravel can reduce water quality, as well as, degrade the channel bed and banks. Mining of these aggregates on the floodplain can affect water table and alter the land-use. The impacts of sand mining from a riverbed are stated to be Habitat and Aesthetic Beauty Degradation, Land use Change, River System Degradation, Floodplain Ponding, Riparian Zone Degradation. The applicant, while relying upon the judgment of the Hon'ble Supreme Court in *Deepak Kumar v. State of Haryana*, (2012) 4 SCC 629, stated that the extraction of alluvial material from within or near a stream bed has a direct impact on the stream's physical habitat characteristics. The Hon'ble Supreme Court in the case of *Deepak Kumar* (supra) observed as follows:-

"These characteristics include bed elevation, substrate composition and stability, in-stream roughness elements, depth, velocity, turbidity, sediment transport, stream discharge and temperature. Altering these habitat characteristics can have deleterious impacts on both in-stream biota and the associated riparian habitat. The demand for sand continues to increase day by day as building and construction of new infrastructures and



expansion of existing ones is continuous thereby placing immense pressure on the supply of the sand resource and hence mining activities are going on legally and illegally without any restrictions. Lack of proper planning and sand management cause disturbance of marine ecosystem and also upset the ability of natural marine processes to replenish the sand.”

In paragraph 29 of the same judgment, the Hon’ble Supreme Court, while emphasising upon the need for seeking Environmental Clearances in relation to mining activity, held as under:

“Leases of minor mineral including their renewal for an area of less than five hectares be granted by the States/Union Territories only after getting environmental clearance from the MoEF”

2. The applicant further submitted that, it is the duty of the said authorities and the State Environmental Impact Assessment Authority (for short, ‘SEIAA’) to ensure that the objective of Environmental Impact Assessment Notification, 2006 (for short, ‘Notification of 2006’) is upheld in letter and spirit and that indiscriminate and rampant mining in the riverbed is not permitted. Such authorities have failed to take or are intentionally not taking any effective steps to prevent this menace. The application was filed with the prayer that the Tribunal should direct the authorities to take appropriate legal action against all sand mining which was being carried on without seeking prior Environmental Clearance or wherever Environment Clearance has been granted, in violation of its conditions. Further, it is also prayed that respondent authorities should formulate proper scheme to prevent illegal mining.

3. It may be noticed here that the applicant has impleaded Ministry of Environment and Forest, Union of India (for short ‘MoEF’) and all

the State Governments, Central Pollution Control Board (for short, 'CPCB') and Pollution Control Board of the States particularly, Uttar Pradesh (for short, 'UPPCB') amongst other authorities of Union and the State Governments.

4. When this application (O.A. No. 171 of 2013) came up for hearing before the Tribunal on 5<sup>th</sup> August, 2013, the Tribunal passed a detailed order directing all concerned to prohibit illegal mining, particularly, on the riverbeds. While issuing notice to the respondents, the Tribunal passed the following directions:

"In the meantime, we restrain any person, company, authority to carry out any mining activity or removal of sand, from riverbeds anywhere in the country without obtaining Environmental Clearance from MoEF/SEIAA and license from the competent authorities.

All the Deputy Commissioners, Superintendent of Police and Mining Authorities of all the respective States are directed to ensure compliance of these directions."

5. On 14<sup>th</sup> August, 2013, when the case again came up for hearing, the Tribunal, issued certain directions and also required the States to submit a status report as to what steps had been taken by them in furtherance to the Judgment of the Hon'ble Supreme Court in the case of *Deepak Kumar* (supra). The Tribunal also invited suggestions in relation to the formation of a Committee of experts which would help in implementation of the directions. The States were required to submit details in relation to illegal mining and how many cases of that kind were caught by the different wings/departments of the States. The States were also required to submit a comprehensive study as to what extent and in what manner mining activity can be permitted.

6. Against the order of the Tribunal dated 5<sup>th</sup> August, 2013, the State of Madhya Pradesh had preferred an appeal before the Hon'ble Supreme Court of India. In that appeal, it was stated that an application had been filed, being M.A. No. 685 of 2013, before the Tribunal, for modification of the order dated 5<sup>th</sup> August, 2013 praying that a District Level Committee shall be constituted to grant permission to carry on mining at the district level and that the Tribunal had not passed any final order in that regard. The Hon'ble Supreme Court vide its order dated 16<sup>th</sup> August, 2013, disposed of the appeal with the following directions:

“Considering the aforesaid submission made by Mr. Tankha instead of entertaining these appeals, we request the National Green Tribunal, Principal Bench, New Delhi to take up IA No. 685 of 2013 and pass orders thereon in accordance with law if possible within a week from today. The appeals stand disposed of in the above terms.”

In the meanwhile, M.A. No. 708 of 2013 had been filed by the Madhya Pradesh State Mining Corporation Limited for impleadment and for being heard in support of M.A. No. 685 of 2013 filed by the State of Madhya Pradesh. In Original Application No. 171 of 2013, vide its order dated 28<sup>th</sup> November, 2013, passed by the Tribunal, M.A. No. 708 of 2013 was allowed, while, M.A. No. 685 of 2013 came to be dismissed. We would be dealing with some of the findings recorded by the Tribunal in this judgment dated 28<sup>th</sup> November, 2013, shortly here in after.

7. Another Original Application No. 279 of 2013(Thc) was filed by Smt. Promila Devi and others praying that the order dated 30<sup>th</sup> August, 2013, passed by the Mining Officer, Solan, Himachal

Pradesh be quashed and set aside. In view of the order dated 5<sup>th</sup> August, 2013, passed by this Tribunal in Original Application No. 171 of 2013, the authority, vide order dated 30<sup>th</sup> August, 2013, restrained the applicants from carrying on any mining activity or removing sand from the riverbed without obtaining Environmental Clearance from MoEF/SEIAA. The applicants were, thus, directed to take the requisite clearance. It is the case of these applicants that they hold mining lease for the land in question and the area is less than 5 hectares. The lease had been granted to the applicant on 29<sup>th</sup> March, 2011, i.e., prior to *Deepak Kumar's* judgment (supra) and as such, the order of the Tribunal dated 5<sup>th</sup> August, 2013, was not applicable to their case. Therefore, the order passed by the Mining Officer, Solan, Himachal Pradesh was liable to be set aside and they should be permitted to carry on with their activity.

8. On similar lines, however, without challenging any specific orders passed by the State of Himachal Pradesh, another Applicant - Ranbir Singh filed an Original Application No. 343 of 2013, praying that since mining leases of the applicants are not covered under the order of the Tribunal dated 5<sup>th</sup> August, 2013, therefore, their mining activity should not be disrupted by the respondent authorities.

9. Original Application Nos. 279(T<sub>HC</sub>) of 2013 and 343 of 2013 had been listed together for hearing. On 28<sup>th</sup> March, 2014, when these matters came up for hearing, the Tribunal stayed the



operation and effect of the Office Memorandum dated 24<sup>th</sup> December, 2013, issued by the MoEF.

10. One Himmat Singh Shekhawat has filed an Original Application No. 123 of 2014, submitting that, he was the holder of Letter of Intent issued by the State of Rajasthan for excavation of minor mineral, bajri/sand in an area admeasuring 2439 hectares located on the riverbed of Rivers Luni and Mitri. According to him, he fulfilled three conditions for the grant and execution of mining lease, i.e, submission of mining plan duly approved by the competent authority, Environmental Clearance granted by the MoEF and had also submitted an affidavit for financial assurance under Rule 37J of the Rajasthan Minor Mineral Concession Rules, 1986 (for short, Rajasthan Rules of 1986). These Rules came to be amended by way of Rajasthan Minor Mineral Concession (Amendment) Rules, 2012, published on 23<sup>rd</sup> May, 2012, (for short 'Rajasthan Rules of 2012'). The amended Rules provided that mining leases for mineral, 'bajri', shall be granted only by way of auction or tender. On 8<sup>th</sup> January, 2014, the State of Rajasthan issued guidelines as well as a notice on 6<sup>th</sup> May, 2014 for auction of minor minerals. The applicant was aggrieved from the procedure being adopted by the State Government. Thus, he filed this application before the Tribunal, praying that, the guidelines issued by the State of Rajasthan dated 8<sup>th</sup> January, 2014 and the Public Notice dated 6<sup>th</sup> May, 2014, by the State of Rajasthan, should be quashed and as an interim order, its operation should be stayed.



11. Another Applicant, Sunil Acharya, filed an Appeal No. 23 of 2014. He submitted that, he is an eminent citizen and a social activist of Banswara and is concerned with the environment. He was raising challenge to the orders passed by the Government of State of Rajasthan, granting approval on the basis of the applications filed by the non-applicants in regard to grant of mining leases ML No. 9/09 to 24/09 in relation to village Kothara, Tehsil and District Banswara. According to the appellant, the Additional Director, Mines vide his letter dated 22<sup>nd</sup> February, 2012, addressed to the Assistant Mining Engineer, Banswara had directed him to comply point wise with the terms and conditions specified in the letter dated 13<sup>th</sup> February, 2012, issued by the Government of India and to submit a report in this regard to the Head Chief Forest Conservator, Jaipur through the Divisional Forest Officer, Banswara and Chief Forest Conservator, Udaipur. The matter was further examined by the Assistant Mining Engineer, Mines and Geology Department. Thereafter, the District Collector, Banswara, vide his letter dated 29<sup>th</sup> February, 2012, issued a certificate with regard to diversion of 64 hectare of forest land in favour of 16 lease holders for mining of marble in the Banswara district of Rajasthan. It was also stated that the permission granted under the Forest (Conservation) Act, 1980 (for short 'Act of 1980') shall be subject to Environmental Clearance under the Environment (Protection) Act, 1986 (for short 'Act of 1986'). It is stated by the appellant that the non-applicants/respondents no. 1 to 7, in collusion with the

Respondent Nos. 9 and 10, and in violation of the Notification of 2006, made false representations in their applications that the area of mining was less than 5 hectares, i.e., 4 hectares and hence the Notification was not applicable to them. The Respondents No. 1 to 7 were granted different mining leases. The appellant served the notice under Section 80 of Code of Civil Procedure, 1908. The appellant, being aggrieved by the decisions taken by the authorities, vide their orders dated 22<sup>nd</sup> February, 2012, 23<sup>rd</sup> February, 2012 and 29<sup>th</sup> February, 2012, has filed an appeal challenging the correctness of these orders. In the appeal, it was even prayed that temporary injunction may be issued for staying the orders of the authorities dated 22<sup>nd</sup> February, 2012, 23<sup>rd</sup> February, 2012 and 29<sup>th</sup> February, 2012, prohibiting Respondents No. 1 to 7 from carrying on illegal mining operation during the pendency of the appeal.

12. After hearing the Counsel for the parties on 10<sup>th</sup> July, 2014, the Tribunal issued notice on the appeal and passed the following order:

“We have heard Mr. Parikshit Nayak, learned Counsel appearing for the Applicant.

The grievance of the Applicant is that permission is granted to the Respondent Nos. 1 to 7 for carrying out mining operations without obtaining Environment Clearance and it was pursuant to the decision of the Ministry of Environment & Forests. Though, by Office Memorandum dated 24.12.2013, it is provided that EC is not necessary, if the area of mining is less than 5 hectares, the Tribunal has already stayed operation of the said Office Memorandum dated 24.12.2013 by order dated 28.03.2014 in the case of *“(Ranbir Singh Vs. State of H.P. & Ors. Application No. 343/2013)”*.

In such circumstances, if Respondent Nos. 1 to 7 have not obtained the EC and is not having the necessary consent to operate, they are not entitled to carry on mining.

In such circumstances, Issue Notice to the Respondents by registered post/acknowledgment due and Dasti as well. Requisites be filed within three days from today.

In the meanwhile, Respondent Nos. 1 to 7 are restrained from carrying on mining operations, without obtaining EC and obtaining consent from the Rajasthan State Pollution Control Board.”

It may be noticed here that M.A. No. 469 of 2014 was filed by the Respondent No. 5 in Appeal no. 23 of 2014, wherein he prayed for vacation of the order dated 10<sup>th</sup> July, 2014, as their business was being adversely affected. Similarly, M.A. No. 470 of 2014, M.A. No. 473 of 2014, M.A. No. 479 of 2014, M.A. No. 480 of 2014, M.A. No. 488 of 2014 and M.A. No. 489 of 2014 were filed by other respondents in Appeal No. 23 of 2014 with the same prayer as made by the applicant in M.A. No. 469 of 2014.

13. In continuation to the proceedings pending before the Tribunal in all the above five matters, which were being heard together, MoEF placed on record, the Office Memorandum dated 24<sup>th</sup> December, 2013, with an explanatory affidavit. Having noticed certain ambiguities in it, the Tribunal on 28<sup>th</sup> August, 2014, recorded the statement of Dr. V.P. Upadhyay and Dr. P.B. Rastogi from MoEF. This clarification is of serious consequences as far as the matter in issue in the present case is concerned. Thus, it will be useful to refer to the order of the Tribunal passed in this case on 28<sup>th</sup> August, 2014, which reads as under:

“Dr. V.P. Upadhyay, Scientist – ‘F’ (Director) and Dr. P.B. Rastogi, Scientist – ‘F’ (Director) from the Ministry of Environment and Forests are present before the Tribunal.

It is submitted before us that Office Memorandum dated 24th December, 2013 issued by the MoEF intended to stop consideration/grant of Environment Clearance for any river bed mining where area in question is less than 5 hectares. There are certain ambiguities in the said Memorandum. These Officers submit that they are duly authorised by their Ministry to make statement before the Tribunal today.

Joint Statement of both these Officers is being recorded, being authorised representatives of the MoEF, which is also confirmed by the learned counsel appearing for the MoEF.

They make the following statement:-

**Statement**

1. The Office Memorandum dated 24th December, 2013 intends and it is now clarified and reiterated that no Environmental Clearance will be granted for extraction of Minor Minerals (sand mining) from any river bed/ water body where the area is less than 5 hectares.

2. In other words the mining activity of minor minerals (river sand mining) area of less than 5 hectares is not permitted.

3. The surface water level as referred in the Office Memorandum dated 24th December, 2013 would be the normal water level prevalent during the lean season.

4. The minor minerals mining activity in areas other than riverbed (sand mining) would be permitted, provided that Environmental Clearance for the same is taken in accordance with law.

To that extent the Office Memorandum dated 24th December, 2013 is explained and clarified and it will bind the MoEF in accordance with law.

The above statement made on behalf of MoEF has been taken on record.

Learned counsel appearing for the different parties wish to argue the matter.”

14. M.A. No. 442 of 2014, M.A. No. 469 of 2014, M.A. No. 470 of 2014, M.A. No. 473 of 2014, M.A. No. 479 of 2014, M.A. No. 480 of 2014, M.A. No. 488 of 2014 and M.A. No. 489 of 2014 have been filed by different applicants in the above mentioned cases praying for the vacation of the injunction granted or the directions passed



by the Tribunal vide its order dated 5<sup>th</sup> August, 2013, 28<sup>th</sup> March, 2014 and 10<sup>th</sup> July, 2014.

15. As already noticed, vide these orders, the Tribunal had restricted carrying on of any mining activity from the riverbeds anywhere in the country, without obtaining Environmental Clearance from MoEF/SEIAA and license from the competent authority. The Tribunal had also stayed the operation of the Office Memorandum issued by the MoEF on 24<sup>th</sup> December, 2013. Lastly, in the case relating to the State of Rajasthan, similar restraint order was passed and it was also directed that, without obtaining consent from the Rajasthan State Pollution Control Board, the mining activity cannot be permitted to be carried on.

**Discussion on law in force in relation to mining of minor minerals**

16. In order to properly consider various contentions that have been raised in the above Original Applications, Appeal as well as Miscellaneous Applications, it is necessary for us to examine the regime of law, relating to mining of brick earth, ordinary earth and all other minor minerals that has been in force.

17. Entry 54 of List 1 in Schedule VII to the Constitution of India, is an entry that enabled the Parliament of India to acquire power in respect of 'Regulation of mines and minerals development, to the extent to which such regulation and development, under the control of the Union, is declared by the Parliament by law to be expedient in the public interest'. On the other hand, Entry 23 of List 2 of the



same Schedule, read with Article 246(3) of the Constitution of India, confers legislative powers on the State Legislature in respect of 'Regulation of mines and mineral development', but, this power is subject to the provisions of List 1 with respect to the regulation and development under the control of the Union. The Indian Parliament, with the object to amend and consolidate the law relating to the regulation of labour and safety in mines enacted the Mines Act, 1952. Section 2(JJ) of the Mines Act, 1952 defines "minerals" to mean, all substances which can be obtained from the earth by mining, digging, drilling, dredging, hydraulicing, quarrying or by any other operation and includes mineral oils (which, in turn, include natural gas and petroleum). This Act, primarily provided for welfare of the labourers working in mines, inspection and surveying by inspectors, mining operation and management of mines. Mines Rescue Rules also came to be framed under Section 59 of the Act in the year 1984.

18. On 1<sup>st</sup> June, 1958, the law, to provide for the regulation of mines and development of minerals under the control of the Union came into effect and was promulgated as the Mines and Minerals (Development and Regulation) Act, 1957 (for short 'Act of 1957'). This Act provides, *inter alia*, for general restrictions on undertaking prospecting and mining operations, the procedure for obtaining prospecting licences or mining leases in respect of the land in which the minerals vests in the Government, the rule making power for regulating the grant of prospecting licences and mining leases,

special powers of Central Government to undertake prospecting or mining operations in certain cases, and for development of minerals. This Act was amended by the Amendment Act of 1972 by adding Section 4A to the Act of 1957, which provided for premature termination of mining leases and the grant of fresh leases to Government Companies or Corporations owned or controlled by the Government. The word 'regulation' in Entry 54 would not include 'prohibition' and should not be confused with 'restrictions', occurring under Article 19(2) to (6) of the Constitution of India. The Entry was stated to be purposive and keeping in view, the object and purpose of the legislation, the Hon'ble Supreme Court said that the legislative power of regulation and development of mines must dictate the nature of law made in the exercise of that power because public interest demands that power [*K.C. Gajapati Narayan Deo and Ors. v. The State of Orissa*, (1954) 1 SCR 1].

19. With the passage of time and development of law, the Union of India, issued various Notifications and Circulars to impose restrictions and prohibitions on the expansion and modernization of any activity or new projects in respect of mining in major and minor minerals.

20. The Act of 1986 and Environment (Protection) Rules, 1986 (for short 'Rules of 1986') were enacted and came into force on 19<sup>th</sup> November, 1986. The object of this Act of 1986 is to provide for the protection and improvement of environment and for matters connected therewith. Under provisions of the Act and Rules of 1986,

MoEF issued various other Notifications regulating the mining of minor minerals, specifically stating the procedures that were required to be complied by persons intending to carry on such mining activity and for the authorities to regulate the same.

21. It appears that, prior to 1994, there was no specific regime in place in relation to mining activity being carried on in minerals. The Notification issued by MoEF on 27<sup>th</sup> January, 1994, in exercise of the powers vested in it under Sub-Rule 3 of Rule 5 of the Rules of 1986 and Sub Section (1) and Clause (v) of Sub-Section (2) of Section 3 of the Act of 1986, prescribed the requirement and procedure for seeking Environmental Clearance for the projects listed in Schedule I. Schedule I of this Notification did not deal with mining projects of minor minerals. On the contrary, the projects covered under S. No. 20 of Schedule I of this Notification were only “mining projects (major mineral) with leases more than 5 hectares”. This Notification provided as to how the applications have to be moved/considered and that the project should be site specific. It also provided for the constitution of Expert Committees and preparation of Environmental Impact Assessment Report which was to be evaluated and assessed by the Impact Assessment Agency. It is clear that there had been a vacuum in specific law for regulation of and effective control on the minor mineral mining activities. In exercise of its statutory powers afore-indicated, the Central Government on 14<sup>th</sup> September, 2006, issued a Notification, i.e., ‘Environmental Clearance Regulation, 2006’. In terms of this

Notification, the projects as stated in the Schedule to this Notification, required prior Environmental Clearance as per the procedure. The projects have been categorised into two kinds, i.e., Category ‘A’ and Category ‘B’ under Clause 2 of the Notification. Projects under Category ‘A’ were required to take prior Environmental Clearance by MoEF. For Category ‘B’ projects, Environmental Clearance was to be given by SEIAA. In the present case, we are considered with Entry 1(a) of the Schedule to the Notification of 2006 which was substituted vide Notification dated 1<sup>st</sup> December, 2009. This entry reads as under:

| Project of Activity  |                                                                                                                                                                      | Category with threshold limit                                                                                                                                                                      |                                                                                                                                               | Conditions if any                                                                                                                                                                                                                                                               |
|----------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                      |                                                                                                                                                                      | A                                                                                                                                                                                                  | B                                                                                                                                             |                                                                                                                                                                                                                                                                                 |
| 1                    |                                                                                                                                                                      | Mining, extraction of natural resources and power generation (for a specified production capacity)                                                                                                 |                                                                                                                                               |                                                                                                                                                                                                                                                                                 |
| (1)                  | (2)                                                                                                                                                                  | (3)                                                                                                                                                                                                | (4)                                                                                                                                           | (5)                                                                                                                                                                                                                                                                             |
| <sup>18</sup> [1(a)] | (i) Mining of minerals.<br>(ii)Slurry pipe-lines (coal lignite and other ores) passing through national parks/sanctuaries/coral reefs, ecologically sensitive areas. | ≥50 ha of mining lease area in respect of non-coal mine lease<br>>150 ha of mining lease area in respire of coal mine lease<br><br>Asbestos mining irrespective of mining area<br><br>All projects | <50 ha ≥ 5 ha of mining lease area in respect of non-coal mine lease<br><br>≤150 ha ≥5 ha of mining lease area in respect of coal mine lease] | <sup>19</sup> [General conditions shall apply<br>Note: (i) Prior environmental clearance is as well as required at the stage of renewal of mine lease for which application should be made up to one year prior to date of renewal.<br><br>(ii)Mineral prospecting is exempted. |



22. From this Entry in the Schedule to the Notification of 2006, it is clear that projects in respect of non-coal mine leases, where the area is more than 50 hectares would require prior Environmental Clearance from MoEF, while the projects of less than 50 hectares and more than 5 hectares of mining area, would require prior Environmental Clearance from SEIAA. The procedure for taking prior Environmental Clearance under both these categories is more or less the same except that the agency which gives the clearance is different. Clause 7 of the Notification of 2006, specifies the stages through which such projects for grant of Environmental Clearance are required to be passed and processed. They include Screening, Scoping, Public Consultation and Appraisal, upon which, the Expert Appraisal Committee would make a recommendation to the MoEF/SEIAA as the case may be, which would then grant or refuse the Environmental Clearance to the project in question. Under the head 'Screening', this Clause 7 also provides for a further bifurcation of projects falling under category 'B' into 'B(1)' and 'B(2)'. The relevant part of Clause 7, dealing with this aspect, reads as under:

“Stage (1) - Screening:

In case of Category 'B' projects or activities, this stage will entail the scrutiny of an application seeking prior environmental clearance made in Form 1 by the concerned State level Expert Appraisal Committee (SEAC) for determining whether or not the project or activity requires further environmental studies for preparation of an Environmental Impact Assessment (EIA) for its appraisal prior to the grant of environmental clearance depending up on the nature and location specificity of the project . The projects requiring an Environmental Impact Assessment report shall be termed Category 'B1' and



remaining projects shall be termed Category 'B2' and will not require an Environment Impact Assessment report. For categorization of projects into B1 or B2 except item 8 (b), the Ministry of Environment and Forests shall issue appropriate guidelines from time to time."

23. In terms of the above, at the stage of 'Screening', the State Level Expert Appraisal Committee has to determine whether or not the project requires further environmental studies for preparation of an Environmental Impact Assessment report for its appraisal, prior to the grant of Environmental Clearance, depending upon the nature and location specificity of the project. The projects requiring an Environmental Impact Assessment report shall be termed as Category 'B1' and remaining projects shall be termed as Category 'B2', which will not require an Environment Impact Assessment report and for this categorisation, i.e., 'B1' and 'B2', the MoEF retained with itself, powers to issue guidelines from time to time. From the record before the Tribunal, it is evident that prior to the institution of these cases, no guidelines have been prepared or notified by the MoEF, in terms of Stage 1 of Clause 7 of the Notification of 2006. The Notification of 2006 came to be amended by Notification dated 1<sup>st</sup> December, 2009. It made some amendments in different clauses of the Notification of 2006 and deleted some portion appearing in column 5 of Entry 1(a) of the Schedule to the Notification of 2006. In substance, it made no change as far as minor mineral activity was concerned. Note (i) in column 5 stood omitted. Subsequent to the amendment of the Notification of 2006 in 2009, the judgment of the Hon'ble Supreme

Court came to be pronounced in IA No. 12-13 of 2011, in the case of *Deepak Kumar* (supra). In compliance to the direction of the Hon'ble Supreme Court in para 29 of the said judgment, MoEF issued an Office Memorandum dated 18<sup>th</sup> May, 2012, with an intent to implement the said direction of the Hon'ble Supreme Court. MoEF also noticed in the Office Memorandum, direction of the Hon'ble Supreme Court dated 16<sup>th</sup> April, 2012, wherein the applicants before the Hon'ble Supreme Court in the order dated 27<sup>th</sup> February, 2012, who were carrying on mining activity below 5 hectares were given liberty to approach MoEF for permission to carry on mining. These applications were to be disposed of by MoEF within 10 days from the date of the applications. The order of the Hon'ble Supreme Court dated 16<sup>th</sup> April, 2012, reads as under:

“All the same, liberty is granted to the applicants before us to approach the Ministry of Environment and Forests for permission to carry on mining below five hectares and in the event of which Ministry will dispose of all the applications within ten days from the date of receipt of the applications in accordance with law.”

24. In this Office Memorandum, it was decided by MoEF that all the mining projects for minor minerals, including their renewal, irrespective of the size of the lease would, henceforth, require prior Environmental Clearance. Wherever the area was less than 5 hectares, they would be treated as category 'B' projects in terms of Notification of 2006 and should be processed accordingly.

25. On 24<sup>th</sup> June, 2013, MoEF issued another Office Memorandum stating guidelines for consideration of proposals for grant of Environmental Clearance under the Notification of 2006 for

mining of 'brick earth' and 'ordinary earth' having lease area of less than 5 hectares. Referring to the judgment of the Hon'ble Supreme Court in the case of *Deepak Kumar* (supra) and its Office Memorandum dated 18<sup>th</sup> May, 2012, it further considered that the 'brick kiln' manufactures had stated that it was a small scale activity requiring that certain depth should be kept outside the purview of Environmental Clearance. Having considered various aspects, the recommendations of the Expert Committee, constituted by MoEF, were also examined and finally it was directed as follows:

“(a) The activities of borrowing / excavation of 'brick earth' and ordinary earth', upto an area of less than 5 ha, may be categorized under 'B2' Category subject to the following guidelines in terms of the provisions under '7.1 Stage(1)-Screening' of EIA Notification, 2006:

(i) The activity associated with borrowing/excavation of 'brick earth' and 'ordinary earth' for purpose of brick manufacturing, construction of roads, embankments etc. shall not involve blasting.

(ii) The borrowing/excavation activity shall be restricted to a maximum depth of 2 m below general ground level at the site.

(iii) The borrowing/excavation activity shall be restricted to 2 m above the ground water table at the site.

(iv) The borrowing/excavation activity shall not alter the natural drainage pattern of the area.

(v) The borrowed/excavated pit shall be restored by the project proponent for useful purpose(s).

(vi) Appropriate fencing all around the borrowed/excavated pit shall be made to prevent any mishap.

(vii) Measures shall be taken to prevent dust emission by covering of borrowed/excavated earth during transportation.

(viii) Safeguards shall be adopted against health risks on account of breeding of vectors in the water bodies created due to borrowing/excavation of earth.

(ix) Workers / labourers shall be provided with facilities for drinking water and sanitation.

(x) A berm shall be left from the boundary of adjoining field having a width equal to at least half the depth of proposed excavation.

(xi) A minimum distance of 15 m from any civil structure shall be kept from the periphery of any excavation area.

(xii) The concerned SEIAA while considering granting environmental clearance for such activity for brick earth / ordinary earth will prescribe the guidelines as stated at (i) to (xi) above and specify that the clearance so granted shall be liable to be cancelled in case of any violation of above guidelines.

(b) Notwithstanding what has been stated at (a) above, the following will apply:-

(i) No borrowing of earth / excavation of 'brick earth' or 'ordinary earth' shall be permitted in case the area of borrowing/ excavation is within 1 km of boundary of national parks and wild life sanctuaries.

(ii) In case the area of borrowing / excavation is likely to result into a cluster situation i.e. 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 ha, the activity shall become Category '8 I' Project under the EIA Notification, 2006. In such a case, mining operations in any of the borrow areas in the cluster will be allowed only if the environmental clearance has been obtained in respect of the cluster.

This issues with the approval of the Competent Authority.”

26. These directions which were specific only to 'brick earth' and 'ordinary earth' activities for areas less than 5 hectares, as decided to be categorised as 'B(2)' Category projects, subject to the restrictions stated in the memorandum, provided that if the cluster area exceeded 5 hectares, then it would become Category 'B(1)' and would not be treated as Category 'B(2)' projects. It is clear that this Office Memorandum was not dealing with the issues of sand mining or any other minor mineral activity except 'brick earth' and 'ordinary earth'. On 9<sup>th</sup> September, 2013, MoEF, in exercise of its powers under the Act and Rules of 1986, dispensed with the requirement of notice and amended the Notification of 2006. Entry 1(a) was further amended as follows:



| (1)  | (2)                        | (3)                                                                                                                                                                                         | (4)                                                                                                                                                                                                                                                  | (5)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
|------|----------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1(a) | (i)<br>Mining of minerals. | <p>≥50 ha of mining lease Area in respect of non-coal mine lease.</p> <p>≥150 ha of mining lease area in respect of coal mine lease</p> <p>Asbestos mining irrespective of mining area.</p> | <p>&lt;50 ha of mining lease area in respect of minor minerals mine lease; and</p> <p>≤ 50 ha ≥ 5 ha of mining lease area in respect of other non-coal mine lease.</p> <p>≤ 150 ha &gt; 5 ha of mining lease area in respect of coal mine lease.</p> | <p>General Conditions shall apply except for project or activity of less than 5 ha of mining lease area for minor minerals:</p> <p>Provided that the above exception shall not apply for project or activity if the sum total of the mining lease area of the said project or activity and that of existing operating mines and mining projects which were accorded environmental clearance and are located within 500 metres from the periphery of such project or activity equals or exceeds 5 ha.</p> <p><b>Note:</b><br/>(i) Prior</p> |



|  |  |  |  |                                                                                                                                                                                                                                                                                                                                                                   |
|--|--|--|--|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|  |  |  |  | <p>environmental clearance is required at the stage of renewal of mine lease for which an application shall be made up to two years prior to the date due for renewal. Further, a period of two years with effect from the 4th April, 2011 with requisite valid environmental clearance and which have fallen due for renewal on or after 4th November, 2011.</p> |
|--|--|--|--|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

27. During the pendency of the present application and passing of certain orders by the Tribunal requiring the MoEF to clarify its stand in the light of *Deepak Kumar's* judgment (supra) of the Hon'ble Supreme Court, MoEF, on 24<sup>th</sup> December, 2013, issued another memorandum for consideration of proposals for grant of Environmental Clearance regarding categorisation of Category 'B' projects into Category 'B(1)' and 'B(2)'. Mining of minor minerals

had been separately dealt with in this Office Memorandum. This Office Memorandum stated that no river sand mining project with mining lease area of less than 5 hectares may be considered for grant of Environmental Clearance. Such area up to 25 hectares would be Categorised as 'B(2)' and such projects were to be considered, subject to the stipulations stated therein. This Office Memorandum had apparent ambiguities, which, as already noticed, were cleared by the statement of officers of the Ministry made before the Tribunal on 24<sup>th</sup> August, 2014, wherein it was stated that no Environmental Clearance would be granted for extraction of minor minerals from any riverbed and/or water body, where the area is less than 5 hectares. Sand mining, in area other than riverbeds, would be permitted, only if the Project Proponent takes Environmental Clearance.

28. Against the order dated 5<sup>th</sup> August, 2013, the State of Rajasthan and some others have preferred an appeal before the Hon'ble Supreme Court. These appeals came to be dismissed as 9703-9706 of 2013 titled, *Chief Secretary, Government of Rajasthan v National Green Tribunal Bar Association and Others*. While issuing notice, the Hon'ble Supreme Court had stayed the proceedings before this Tribunal in Original Application No. 171 of 2013. However, this order of the Hon'ble Supreme Court came to be varied by the Hon'ble Supreme Court vide its order dated 25<sup>th</sup> November, 2013, which varied the order of stay of all proceedings and passed specific orders in relation to 82 applicants who were holders of Letter of Intent. In relation to those

remaining, including other States, the Hon'ble Supreme Court directed that the matters may go on unless there was a specific stay granted by the Hon'ble Supreme Court in that particular case. The order of the Hon'ble Supreme Court dated 25<sup>th</sup> November, 2013, reads as under:

“Pursuant to orders passed by this Court on 11th November, 2013, the learned Solicitor General has submitted a status note on behalf of the Ministry of Environment and Forests on the applications for environmental clearance in respect of mining lease of bajri in the State of Rajasthan which is pending before the Ministry of Environment and Forests.

From the aforesaid status note it appears that the time period prescribed under Environmental Impact Assessment Notification 2006 for processing the applications of 82 letter of intent holders/project proponents received from the State of Rajasthan will expire some time in February, 2014. Obviously the mining activity with regard to the bajri lease in the State of Rajasthan cannot be totally kept in abeyance till February, 2014.

We, therefore, direct that till the end of February, 2014, the letter of intent holders who have submitted their applications to the Ministry of Environment and Forests for clearance (numbering 82 only) can carry on mining operations in accordance with the Notification dated 21st June, 2012 of the Mines (Act 2) Department, Government of Rajasthan issued under Rule 65A of the Rajasthan Mines and Mineral Concession Rules, 1986.

We make it clear that the orders that will be passed by the Ministry of Environment and Forests on the 82 applications will be in accordance with the Notification, Environmental Impact Assessment 2006 dated 14th September, 2006.

The State of Rajasthan will ensure that this interim order is not violated in any manner.

It has been mentioned by Mr. Raj Panjwani, learned counsel appearing for the National Green Tribunal Bar Association that besides the Rajasthan matters, other matters are pending before the Tribunal. We make it clear that the other matters may go on in the Tribunal if there are no specific orders of this Court staying the proceedings in the particular matter.”

29. It is in furtherance to the above order, that, proceedings before this Tribunal continued in relation to all other States, as well as, beyond those 82 applicants who were specifically covered by the above order of the Hon'ble Supreme Court.

**Stand of the Respective States and Respondents**

30. We may now notice the stand taken by the respective States before the Tribunal in the above case.

State of Rajasthan has taken a common stand in two of these cases (Appeal No. 23 of 2014 and Original Application No. 123 of 2014). It is stated on behalf of the State that, Respondent No. 1, Sanjay Bakliwal, in Appeal No. 23 was granted consent to establish and operate on 26<sup>th</sup> November, 2012. This respondent was granted lease for mining of minor minerals on 23<sup>rd</sup> November, 2012. In furtherance to the judgment of the Hon'ble Supreme Court in the case of *Deepak Kumar* (supra), all the States were directed to consider the recommendations of the Committee which were recorded in the judgment and were directed to frame their rules and their mining policy. Accordingly, the State of Rajasthan amended the State Rules w.e.f. 19<sup>th</sup> June, 2012 by incorporating Chapter IVA for scientific and eco-friendly mining. Under the amended Rules, the mining area allowed for mining of minor minerals is 1 hectare. Obtaining Environmental Clearance, for carrying on river sand mining activity, in an area of less than 5 hectares, was not required. Such requirement was introduced vide Notification dated 9<sup>th</sup> September, 2013. Lease holders carrying on the minor mineral activity were to apply for



Environmental Clearance at the time of renewal as per the Notification of 9<sup>th</sup> September, 2013. This Notification made prior grant of Environmental Clearance mandatory in relation to river sand mining and provided that Environmental Clearance will only be required at the stage of renewal of mining in the cases of existing lease.

31. State of Rajasthan, as noticed above, had amended its rules and particularly introduced Rules 37P, 37Q, 37R, 37S, reference to which would be necessary. Rule 37P provided for grant of short term permits for mining in an area of less than 5 hectares. Association of lessees could, through recognised persons, submit Environment Management Plan to the District Level Environmental Committee for approval. The association was to be formed within three months from declaration of cluster. Under this, various persons would become Members of the association and apply for cluster mining. Even a person falling within a cluster was deemed to be a member of the association. 37R provided for the composition of the District Level Environmental Committee. Environment Management Plan had to be approved by such Committee, which was required to be implemented in terms of Rule 37S. This was to provide environmental safeguards which were to be implemented by the holders of the short term permits and the association. According to Respondent No. 1, the lessee, he had complied with all these requirements and as per Government practise, clusters were formed by the State Government and Environment Management Plan was approved by the District Environmental Committee. However, Respondent No. 1 also submits that, during the



operation of the orders of the Tribunal, he had applied for obtaining Environmental Clearance. The Rajasthan State Pollution Control Board, vide its letter dated 31<sup>st</sup> October, 2013, also directed Respondent No. 1 that if they wished to increase the production after 9<sup>th</sup> September, 2013, they must obtain Environmental Clearance. It is the stand of the Respondents that ToR has been issued by SEIAA and public hearing has been done on 27<sup>th</sup>-28<sup>th</sup> August, 2014 and that they are awaiting grant of Environmental Clearance. According to Respondent No. 1, the Notification dated 9<sup>th</sup> September, 2013, is not applicable to the lease as it operates only prospectively.

32. According to State of Rajasthan, post Notification dated 9<sup>th</sup> September, 2013, issued by the MoEF, they have not granted any mining lease without Environmental Clearance. However, in the period between 27<sup>th</sup> February, 2012 and 9<sup>th</sup> September, 2013, i.e., the bridge period, mining leases for minor minerals were granted to all the private respondents as no Environmental Clearance was required for such activity. Directions contained in the case of *Deepak Kumar* (supra) were followed by requiring clusters to make Environment Management Plan in accordance with the Rules afore-referred. It is further submitted by the State of Rajasthan, that, after the operation of the Office Memorandum issued by MoEF dated 24<sup>th</sup> December, 2013, was stayed by this Tribunal, the State has not given effect to the Office Memorandum dated 24<sup>th</sup> June, 2013 also, which, has in fact, become one of the grievances of the private respondents in OA No. 123 of 2014.

33. As already stated, two applicants, namely, Smt. Promila Devi and Shri Ranbir Singh have filed independent petitions, *inter alia*, praying for quashing of the order dated 31<sup>st</sup> August, 2013, and threat to implement the same against the other by the Mining Officer, Solan, wherein, for not obtaining Environmental Clearance, the mining activity was ordered to be stopped. While in the latter, according to the applicant, he was granted mining lease of sand, stone and bajri which is found in mixed states in Khads and not in any manner on the river bed. The applicant has, therefore, prayed that in both the mines at Mohal Maira Doomal/Maira Batrah, in Tehsil Nurpur, District Kangra, Himachal Pradesh, Mining activity should not be stopped, with reference to the order of the Tribunal dated 5<sup>th</sup> August, 2013. The applicant prayed for vacation of the stay order. According to the applicant, they are not covered by the said order of the Tribunal and therefore, their mining activity should be permitted to be continued.

34. The stand of State of Himachal Pradesh in the case of Ranbir Singh is that the applicant had initially applied for mining of an area which was more than 5 hectares, but, later sought for reduction of the area to less than 5 hectares. Upon the reduced area, supplementary mining lease was executed on 8<sup>th</sup> December, 2013. However, after passing of the order of the Tribunal dated 5<sup>th</sup> August, 2013, the Mining Officer, Kangra has suspended the mining activity as it falls in the Khad/stream, i.e., river bed.

35. The applicant also submits that his mining activity is connected to a stone crusher and, as such, he would suffer serious losses. The matter pertaining to the applicant was also pending before the High Court of Himachal Pradesh in terms of the order of the Hon'ble Supreme Court, in the case of *Nanak Chand Dhiman & Ors. v. Chief Secretary to the Government of Himachal Pradesh, Shimla & ors.*, dated 25<sup>th</sup> July, 2013.

36. In the case of Smt. Promila Devi, it is stated that the Mining Officer, Solan, has suspended the mining activity of the applicant in compliance to the order of the Tribunal dated 5<sup>th</sup> August, 2013. According to the State, the area of petitioner no. 1 does not form part of the river bed, but, that of petitioner nos. 2 and 3 partly or wholly lies in the river bed. As such, since the order of the Tribunal was applicable only to petitioner Nos. 2 and 3, the order passed against petitioner no. 1 was withdrawn vide letter dated 11<sup>th</sup> October, 2013.

37. Under the River/Stream Bed Mining Policy/Guidelines for the State of Himachal Pradesh, 2004 (for short 'Policy of 2004'), it was mandatory for the holder of the mineral concession to prepare Working-cum-Environmental Management Plan. This plan was to be approved by the State Geologist, Himachal Pradesh and not by the MoEF/SEIAA. The MoEF had also issued a Circular on 2<sup>nd</sup> July, 2007 stating that Notification of 2006 shall not be applicable to those leases where neither the production has increased nor area is enhanced, till expiry of lease period.

38. According to the Himachal Pradesh Minor Minerals (Concession) Revised Rules, 1971 (for short 'Rules of 1971'), the State of Himachal Pradesh had reserved to itself, the power to grant mining lease for an area as it may deem fit. In terms of provisions of Rule-13 (1), for setting up of crusher and granting lease for river stream bed mining, an area of 10 hectares or above, was to be given priority and free sale of minor minerals lease up to 5 hectare shall be granted. That means, less than 5 hectare of mining lease could be granted. This Rule does not specifically contemplate issuance of Environmental Clearance.

39. According to the State, none of the petitioners have so far applied for Environmental Clearance, in accordance with the Notification of 2006. Against the order of the High Court of Himachal Pradesh dated 15<sup>th</sup> June, 2012, a Civil Appeal No. 6179/2013 titled '*Nanak Chand Dhiman & Ors. Vs. Chief Secretary of Government of Himachal Pradesh & Ors.*' was filed. The Hon'ble Supreme Court of India had set aside the orders of the High Court dated 15<sup>th</sup> June, 2012 and 14<sup>th</sup> September, 2012 and ordered that the appellant would file an appropriate application for impleadment before the High Court of Himachal Pradesh which will be considered afresh in accordance with law. It may be noticed that as per website of the Himachal Pradesh High Court, Civil Writ PIL No. 9 of 2011 and other applications have been finally disposed of by the High Court, vide its order dated 20<sup>th</sup> March, 2014.



The Hon'ble Supreme Court, while setting aside the order of Himachal Pradesh High Court, which had permitted one year period for the lease holders to obtain Environmental Clearance, though they were operating prior to 27<sup>th</sup> February, 2012 and the mining leases which were executed after 27<sup>th</sup> February, 2012, had directed stoppage of mining operations on the ground that the order was passed without granting opportunity of representation to the lessees who were having a valid lease. The State has taken the stand before the Hon'ble Supreme Court that it has already framed Rules in line with the recommendations of MoEF, placing incidents of getting Environmental Clearance from the authorities concerned. Where the leases were granted prior to 27<sup>th</sup> February, 2012, Environmental Clearance was not warranted as they were being appropriately regulated under the respective mining plans. The Hon'ble Supreme Court, without commenting upon the restrictive contentions, had set aside the High Court orders and granted liberty to the appellants to file appropriate applications before the High Court.

40. Following the directive of the Hon'ble Supreme Court in the case of *Deepak Kumar v. State of Haryana & Ors*, (supra), the State of Himachal Pradesh submits that they have not executed any fresh mining lease after 27<sup>th</sup> February, 2012. Vide Office Memorandum dated 18<sup>th</sup> May, 2012, MoEF, Government of India has brought all the mining leases irrespective of the area under the ambit of Notification of 2006. Except to the exceptions carved out in their Circular dated 2<sup>nd</sup> July, 2007, the mining activity and sanctioning



of mining lease in State of Himachal Pradesh is being granted in accordance with the Rules of 1971.

41. It has also been brought on record that the State of Himachal Pradesh, in furtherance to the directions issued by the Hon'ble Supreme Court in the case of *Deepak Kumar* (supra), has taken necessary steps and safeguards. According to the State, they had already initiated such steps as back as in the year 2004, while framing Policy of 2004. The State has carried-out necessary amendments in the Rules of 1971 vide Notification dated 10<sup>th</sup> June, 2004. It is even averred by the State that the order of the Hon'ble Supreme Court dated 27<sup>th</sup> February, 2012, is not applicable to the current mining leases as the direction would be considered only at the time of renewal, including, grant of Environmental Clearance. In terms of the Policy of 2004, and subject to the satisfaction of the conditions provided therein, mining activity is permitted.

42. Documents have been filed and it was also contended on behalf of the State of Himachal Pradesh that, after order of the Hon'ble Supreme Court in the case of *Deepak Kumar* (supra), the Rules of 1971, as such, have not been amended, but, the State Government has framed the Himachal Pradesh Mineral Policy – 2013 (for short 'Policy of 2013') which has been notified on 24<sup>th</sup> August, 2013, wherein, subject to compliance of conditions, mining activities in the area of less than 5 hectares have been permitted. The river bed mining is permitted, subject to Environmental Clearance. Under this Policy, Sub-Divisional Level Committee has

been constituted, which has to provide recommendatory role for grant of Environmental Clearance. Other minor mineral activity is also allowed in the area of less than 5 hectares, subject to Environmental Clearance. The difficulties posed, which are stated to be peculiar in States like Himachal Pradesh, are that, larger mining areas of more than 5 hectare are hardly available, particularly in the river beds. It is also contended that 95% of the mining areas are privately owned and are less than 5 hectare. Removal of sand from the river bed that gets accumulated from the flow of river, also justifies the grant of mining permission in areas of less than 5 hectares, without obtaining Environmental Clearance for the same.

43. The stand of MoEF, even in these cases, is that the Ministry has already taken a decision on 2<sup>nd</sup> September, 2014 that no Environmental Clearance will be granted for extraction of minor minerals (sand mining) from any river bed where the area is less than 5 hectare in terms of its Office Memorandum dated 24<sup>th</sup> December, 2013. The minor minerals mining activity in areas other than river bed (sand mining) would be permitted, provided, Environmental Clearance is obtained in accordance with law.

44. One Dr. Sarvabhoun Bhagali has filed M.A. No. 529/2014 praying that, there is rampant illegal mining going on in the State of Karnataka, including mining in eco-sensitive areas. According the applicant, through video-conferencing dated 2<sup>nd</sup> January, 2014, the Director of Mines and Geology, had issued instructions that one

year period be given to take Environmental Clearance and during the transit period, mining activity could be continued. It is also stated that Rule 31-R(20) of the Karnataka Minor Mineral Concession (Amendment) Rules, 2013 (for short 'KMMC Rules of 2013') should be construed to declare that no mining activity, including existing leases, can be carried on without obtaining Environmental Clearance. The mine lessees, which have been shown as Respondents No. 7 to 35 have carried on illegal sand mining and they should be asked to furnish the details thereof and of the mining that they have done since 16<sup>th</sup> December, 2013. The amendments to Rule 31-R are contrary to law and are impermissible. The amendments permitting mining without Environmental Clearance and appointment of Regional Environment Management Committee are contrary to the judgment of the Hon'ble Supreme Court in *Deepak Kumar's* case (supra), as well as, the Notification of 2006 issued by MoEF.

45. The State of Karnataka has filed a detailed affidavit taking the stand that after the order of the Hon'ble Supreme Court in the case of *Deepak Kumar* (supra), the Karnataka Minor Minerals Concession Rules, 1994 (for short 'Rules of 1994') have been amended vide Notification dated 16<sup>th</sup> December, 2013, which was duly published in the Gazette. The State of Karnataka claims to have adopted a unique mechanism of disbursing of sand since 2<sup>nd</sup> July, 2011 wherein Public Works Department (for short 'PWD') is given the responsibility of quarrying, storing and sale of sand from blocks

handed over by the concerned District Sand Monitoring Committee but no lease or licence is being issued. According to them, there is a direct control of the State PWD. The State of Karnataka is collecting 'Environmental Protection Fee' of Rs.84,000/- per hectare from all mining leases including minor minerals, except sand, murram and brick earth, since 2009. After amendment, a fee called the 'Environment Management Fee' of Rs.10 per cubic meter of sand sold is being collected. Mining in *patta* lands is prohibited throughout the State. According to the State of Karnataka, Notification dated 16<sup>th</sup> December, 2013, has been issued which constituted the Regional Environmental Committees. However, it is stated that they do not have much significance, as the applicant is to seek Environmental Clearance from SEIAA or MoEF, as the case may be. This was also clarified vide amendment dated 5<sup>th</sup> March, 2014. In the State of Karnataka, 375 persons have been granted permission by SEIAA for carrying on the mining activity. The Karnataka State Pollution Control Board is not issuing any consent to the sand, lime shell and building stone mining/quarrying activity (minor minerals). The Department of Mines and Geology has caught about 18354 cases of illegal mining, including illegal transportation and about 17587 cases have been compounded, as per the provisions of Section 23A of Act of 1957, by collecting compounding penalty of Rs.3495.74 lakhs in total. 702 cases are pending for disposal before jurisdictional courts. According to the State, huge mining activity is being carried on in the State.



Referring to the statistics, it has been stated that from March, 2012 to March 2013, total 6810709 MT of sand, 433431 cubic meter of Ornamental stone and 13023699 MT of building stone and 1790347 MT of other minor minerals like Laterite, Lime Kankar, Lime shell, Murram, Steatite, Ordinary Clay etc. were extracted in the State and royalty of Rs. 747.76 Crores has been realized for that year. According to the State, there are 527 mines of specified minor minerals. In the major part of these mines, the area involved under the lease is less than five hectares. In 202 cases, Environmental Clearance has been granted for specified minor minerals, including, four expansion projects. 169 number of Environmental Clearances were granted for non-specified minor mineral leases by SEIAA.

46. 116 applications are stated to be pending with SEIAA for grant of Environmental Clearance and no consents are being issued by the Karnataka State Pollution Control Board. As far as the contention in relation to the instructions issued through video conference is concerned, such a meeting was held and instructions were issued. However, referring to the amended Rules, it was stated that, in terms of Rule-31R (1C), the Taluk Sand Monitoring Committee is to conduct spot inspection of the sand blocks identified and the blocks to be newly identified and submit report to the District Committee. One year time was granted to obtain Environmental Clearance. During this period, mining was permitted. The minimum extent of permitted area for ordinary sand mining is fixed as 10 acres and all sand blocks less than 10 acres



are to be taken up under cluster method and separate quarrying plan and Environmental Clearance certificate has to be obtained for such blocks. The District Committee was empowered to reserve any blocks for the State or Central Government or other government projects.

47. The PWD was required to invite tenders for extracting the sand for transportation, stocking and loading. To extract sand in the Coastal Regulation Zone in the coastal districts, it is mandatory to obtain Environmental Clearance. The District Committee was further empowered under Rule 31R (1B)(x) to delegate authority to any lower level officer of member department to control illegal sand mining activity.

48. Referring to the Notification of MoEF dated 9<sup>th</sup> September, 2013, categorisation of the projects relating to the minor minerals with an area less than 50 hectares as 'B' Category was also introduced. Six months' time was granted to submit approved quarrying plan in terms of Rule-8(I) for all the existing mines and one year time was granted to obtain approval of Environmental Management Project in terms of Rule-8(Q). The State Administration has also not admitted allegations in relation to illegal mining being carried on without Environmental Clearance. The State Government has also stated that they are taking steps to curb incidents of illegal mining and more coercive steps would be taken in future.

49. According to the State, prior to *Deepak Kumar's* judgment (supra), mining in less than 5 hectare was allowed without Environmental Clearance. The Hon'ble Supreme Court had not dealt with the existing cases of mining in the areas of less than 5 hectares as on the date of passing of the order. Hence, according to the State, order in the case of *Deepak Kumar* (supra) has no application to the leases which existed prior to 27<sup>th</sup> February, 2012, and accordingly, Notifications issued by the MoEF dated 9<sup>th</sup> September, 2013 and 16<sup>th</sup> December, 2013, have no application to these cases. They have also relied upon the Circular issued by the MoEF on 2<sup>nd</sup> July, 2007, stating that, the mining projects, which did not require Environmental Clearance under Notification of 1994, could continue to operate without Environmental Clearance till the mining lease falls due for renewal. The existing mines had to take Environmental Clearance within one year, with effect from, 16<sup>th</sup> December, 2013. Even in terms of the Amended Rule-25(A), no quarrying lease is to be granted or renewed to quarry non-specified minor minerals to the extent, not less than that specified in Schedule-II(A). Under Schedule-II(A), mining of ordinary sand has to have a minimum of 10 acres of area. The schedule gives different areas for different kinds of mining. For instance, for brick and tile clays, the area could be 1 acre, while for marble or crystalline limestone as ornamental stone the area could be 2.20 acres and for limestone under title "Shahabad Stone" it could be 0.20 acre. For all such unspecified minerals, it could be 1 acre.

50. As already noticed, and according to the stand taken by the parties, and more particularly, by the respective states, first and foremost, we have to deal with the legal history of the legislations in relation to extraction of minor minerals.

51. The Act of 1986 was enacted by the Parliament to implement the decision taken at the United Nations Conference on 'Human Environment' at Stockholm in 1972. The preliminary object was to take appropriate steps for protection and improvement of human environment. Environment includes water, air and land and inter-relationship which exists among and between water, air, land and human being and the other living creatures, plants, micro-organism and property. Anything that directly or indirectly pollutes any or all these, are subject to steps and action that could be taken by the concerned authorities, in terms of these laws. Mining of minor minerals in our country is an activity which is carried on at a large scale. Unregulated and illegal mining has serious adverse impacts on the environment and ecology of the State concerned.

52. MoEF, for the first time, issued a notification in exercise of the powers vested in it under Clause-(a) of Sub-Rule-(3) of Rule-(5) of the Rules of 1986 on 27<sup>th</sup> January, 1994. The draft Notification was issued on 28<sup>th</sup> January, 1993, inviting objections. Upon considering the same, final notification, specifying the imposition, restrictions and prohibition on the expansion and modernisation of any activity or new projects which were being undertaken in any part of India, unless Environment Clearance has been accorded by

the Central Government or State Government as per notification, was issued. This notification contemplated that any person who desires to undertake any new project or an expansion or modernisation of the existing industry or project listed in Schedule-I, has to move an application for seeking Environmental Clearance from the MoEF. Schedule-I to this notification, covered mining, amongst others, under Clause-II(a). However, in terms of Schedule-I, the list of projects requiring the Environmental Clearance from the Central Government, covered only mining projects (major minerals) with leases more than 5 hectares which were included under serial no. 20. In other words, there was no regulatory regime in place, as far as Central Government was concerned, in relation to carrying on extraction of minor minerals. However, some of the States, under their respective Rules, did provide regulation of minor minerals.

53. Then, in the year 2006, MoEF notified the Environmental Clearance Regulations, 2006, in exercise of its powers under the same provisions. Schedule to this Notification spells-out the list of projects or activities which require prior Environmental Clearance. Minor minerals were classified into two different categories. (i) where the mining lease area of more than 50 hectares was categorised as category 'A' project, while mining of an area of less than 50 hectare but more than 5 hectare was categorised as Category 'B' projects. Category 'A' projects required Environmental

Clearance from the MoEF, while category 'B' projects could be granted Environmental Clearance by SEIAA.

54. To this notification, certain objections were raised, which came to be clarified vide Circular dated 2<sup>nd</sup> July, 2007, whereby MoEF clarified that, all mining projects which did not require Environmental Clearance under the EIA Notification-1994 would continue to operate without Environmental Clearance till the mining lease falls due for renewal, and if, there is no increase in the lease area or enhancement of production.

55. This came to be amended vide notification dated 1<sup>st</sup> December, 2009, wherein amongst others, the Schedule-I was also amended. This notification made a distinction between non-coal mining lease and coal mining lease. Equal or more than 50 hectare of mining lease are in relation to non-coal mining lease with which we are concerned, required clearance from MoEF while more than or equal to 5 hectare but less than 50 hectare non-coal mine required clearance from SEIAA.

56. Thereafter, on 9<sup>th</sup> September, 2013, a Notification was issued under the relevant provisions of the Act and the Rules of 1986. By this Notification, Clause 4 of the Notification of 2006 was amended, i.e., for mining in respect of minor mineral, where the lease area was less than or equal to 50 hectares and greater than or equal to 5 hectares. In respect of other non-coal mine lease, the projects were to be treated as Category 'B' Projects, thus requiring Environmental Clearance from SEIAA. This Notification had been issued while



dispensing with the requirements of Clause (a) of Sub Rule 3 of Rule 5 in the public interest. In other words, inviting of the objections and dealing with them, in accordance with law, was waived. On 24<sup>th</sup> December, 2013, vide Office Memorandum, the Category 'B' Projects were divided into categories of 'B1' and 'B2' and guidelines in that behalf were issued. It was stated that the Project categorized as 'B1' will require Environmental Impact Assessment Report for appraisal and were to undergo public consultation process (as applicable). Projects categorized as 'B2' will be appraised based on the application in Form-I accompanied with the Pre-feasibility Report. While referring to earlier Office Memorandums in relation to brick earth and ordinary earth which termed some of them as 'B2' Projects, it also referred to the cluster situation and finally provided that river sand mining project with mine lease area of less than 5 hectares may be considered for granting Environmental Clearance on cluster basis. The river sand mining project within mining lease area of equal to or more than 5 hectares but less than 25 hectares were to be considered as B2 projects and were to furnish the required documents, subject to the conditions stated in that memorandum. From the above narrated events relating to issuance of Notifications, Office Memorandums and Circulars etc., it is clear that MoEF had been dealing with the entire situation on ad-hoc basis. Under the Notification of 2006, Clause 2, the Scheduled projects are to be divided only into two categories being category A and category B respectively. It does not contemplate any further

classification. However, Clause 7 of Notification of 2006 which primarily provides for the stages through which the project has to be cleared for grant and/or refusal of Environmental Clearance under 'Screening' states that, in case of Category B projects or activities at the time of scrutiny of application seeking Environmental Clearance, the State Expert Appraisal Committee is called upon to determine whether or not the project or activity requires further environmental study for preparation of an Environmental Impact Assessment for its appraisal prior to grant of Environmental Clearance depending upon the nature, location specificity of the Project. The project requiring Environment Impact Assessment Report shall be termed B1 and remaining projects shall be Category B2 and will not require an Environmental Impact Assessment Report. The Ministry has been empowered to issue guidelines from time to time for categorization of projects into B1 and B2 except item 8(b) of the Schedule i.e. township and area development projects.

57. It needs to be noticed here that, vide Office Memorandum dated 24<sup>th</sup> June, 2013, it was declared that no borrowing of brick earth or ordinary earth shall be permitted in case the area of borrowing excavation is within 1 km from the boundary of national parks and wild life sanctuaries. Another exception to the grant of such permissions was that in case the area of borrowing/excavation is likely to result into a cluster situation i.e. 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 'B 1' in terms of the Notification of 2006 and such operation will be permitted only if the Environmental Clearance has been obtained in respect of the cluster.

Finally the Central Government issued an Office Memorandum dated 24<sup>th</sup> December, 2013 stating it to be guidelines for consideration of proposals for grant of Environmental Clearance. Under this memorandum, they categorized 'B' category projects into two categories, i.e., 'B1' and 'B2' and thus, it amended the notification dated 9<sup>th</sup> September, 2013 to that extent. The Category 'B2' projects, in relation to Brick Earth/ordinary Earth, mining projects where lease area was less than 5 hectares were to be considered as per guidelines of 24<sup>th</sup> June, 2013 for granting Environmental Clearance. The river sand mining project with mining lease area of more than 5 hectares but less than 25 hectares were categorized as 'B2' projects subject to the conditions stated in that Office Memorandum.

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.

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 and Ors. v. State of U.P. and Ors.*, (1987) 3 SCC 622, *Ram Sharma v. State of Rajasthan and Anr.*, (1968) 1 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 24<sup>th</sup> 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 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 24<sup>th</sup> June, 2013 and the other on 24<sup>th</sup> December, 2013 in relation to further classification and criteria which is to be adopted in that regard. Since the Office Memorandum dated 24<sup>th</sup> 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 Memorandums in the light of the well settled legal principles that we have referred above, partially both these Office Memorandums 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 24<sup>th</sup> 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 24<sup>th</sup> 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 of 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 24<sup>th</sup> 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 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 1<sup>st</sup> 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 1<sup>st</sup> 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 9<sup>th</sup> 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 9<sup>th</sup> September, 2013.

61. It is significant to note here that Sub Rule 4 of Rule 5 empowers the Central Government to dispense with the prescribed procedure under Sub Rules 2 and 3 of Rule 5 in public interest. Firstly, the Notification is entirely silent as to what was the public interest which was required to be served by dispensation of the prescribed procedure. Secondly, no material has been placed before us to show what the grounds were for invoking the exception carved out under Sub Rule 4 of Rule 5. Such justification has to be, both in fact and in law. Justification in support thereof, has to be in contradistinction to imperfect justification. The justification should be objective and need based. Public interest is an expression of definite connotation. The Courts, including the Hon'ble Supreme Court of India, have examined this expression in different contexts and fields. However, the essence of the expression has remained unchanged. 'Public interest' has been explained in different contexts differently with reference to the peculiar facts and circumstances of a given case. Usefully reference can be made to the following:

**“Stroud’s Judicial Dictionary, Vol. 4, Fourth Edn.:** A matter of public or general interest does not mean that which is interesting or gratifying curiosity or a love of information or amusement but in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected. In the case of *Babu Ram Verma v. State of Uttar Pradesh through Commissioner and Secretary and others*, 1971 S.L.R. 649, the Allahabad High Court observed:

What is the meaning and scope of "Public interests"? Public interest in common parlance means an act beneficial to the general public. An action taken in public interest necessarily means an action taken for public purpose, public interest and public purpose are well-known terms, which have been used by the framers of our Constitution in Articles 19, 31 and 304(b). It is impossible to precisely define the expression 'public interest' or 'public purpose'. The requirements of public interest vary from case to case. In each case, all the facts and circumstances would require a close examination in order to determine whether the requirements of public interest or public purpose were satisfied.

In *Kalyani Stores v. State of Orissa*, 1966 SCR (1) 865, While discussing the reasonableness of the restriction and the requirement of public interest Shah J., speaking for the Court, made the following observations:-

"Reasonableness of the restriction would have to be adjudged in the light of the purpose for which the restriction is imposed, that is, "as may be required in the public interest". Without entering into an exhaustive categorization of what may be deemed required in the public interest", it may be said that restrictions which may validly be imposed under Article 304 are those which seek to protect public health, safety, morals and property within the territory."

In *Onkar Lal Bajaj and Ors. v. Union of India and Anr.*, (2003) 2 SCC 673, the Apex Court observed:

35. The expression 'public interest' or 'probity in governance' cannot be put in a strait-jacket. 'Public interest' takes into its fold several factors. There cannot be any hard and fast rule to determine what is public interest. The circumstance in each case would determine whether Government action was taken is in public interest or was taken to uphold probity in governance.

In the case of *Meerut Development Authority v. Association of Management Studies and Anr*, (2009) 6 SCC 171, the Supreme Court held as under:

67. The expression "public interest" if it is employed in a given statute is to be understood and interpreted in the light of the entire scheme,

purpose and object of the enactment but in the absence of the same it cannot be pressed into service to confer any right upon a person who otherwise does not possess any such right in law.”

From the above, it is clear that ‘Public Interest’ is an expression of general connotation which has to be interpreted in context of the facts of the case. However, in the present case, justifiable reasons had to be placed on record by MoEF to show that they have exercised their discretion in taking recourse to the exception in accordance with law.

62. It is noteworthy that the Notification dated 9<sup>th</sup> September, 2013 in its recital only records ‘after having dispensed with the requirements of the Notification under Clause (a) of sub rule 3 of the said rule 5 in public interest’. Sub Rule 4 of Rule 5 is an exception to the ‘rule of following the prescribed procedure’. The recourse to an exception of this kind cannot be made in a casual or routine manner. For instance, wherever recourse to emergency clause for acquisition of land is made and objections under Section 5(a) of the Land Acquisition Act are not invited. There, valid and proper reasons have to exist on record. In the case of *Gurinderpal singh and others v. State of Punjab*, Civil Appeal No. 10181 of 2013 (arising from SLP(C) No. 3916 of 2013), the Hon’ble Supreme Court while referring to the judgment of the Hon’ble Supreme Court in the case of *Radhy Shyam v. State of Uttar Pradesh* (2011) 5 SCC 553, reiterated that invocation of emergency clause has to be in cases of real urgency. Even an argument of an action taken in response to a public demand for invoking urgency provision was rejected.

This would clearly demonstrate that invocation of the exceptions have to be on existence of real demanding and exceptional grounds and circumstances. The purpose of the prescribed procedure is to give notice to all the concerned persons, who are likely to be affected by issuance of a restriction, to file objections. Such objections have to be considered by the authorities objectively so as to make the law framed in exercise of subordinate or delegated legislation effective in the public interest and to provide for due safeguards in regard to the imposition of restriction in the interest of environment. The purpose is to provide more comprehensive study and objective application of mind to avoid subjectivity in accordance with Rules/Notifications. Thus, avoidance of the prescribed procedure cannot be in a mechanical process, which is devoid of proper application of mind, reasons and grounds.

The Notification proceeded to make substantive amendments to law taking recourse to the provided exception. However, grounds, reasons and object of dispensing with the prescribed procedure are conspicuous by their absence in the Notification or any record before the Tribunal. Dispensation of prescribed procedure can only be on justifiable grounds and in public interest. Reference can also be made to the dictum of the Hon'ble Supreme Court in the case of *Ram Dhari Jindal Memorial Trust vs. Union of India (UOI) and Ors.* (2012) 11 SCC 370:

“The power of urgency by the Government under Section 17 for a public purpose like Residential Scheme cannot be invoked as a rule but has to be by way of exception. As noted above, no material is available on record that



justifies dispensation of enquiry under Section 5A of the Act. The High Court was clearly wrong in holding that there was sufficient urgency in invoking the provisions of Section 17 of the Act.”

Resultantly, we quash the Notification dated 9<sup>th</sup> September, 2013 in its entirety.

63. The MoEF through Dr. V.P. Upadhayay and Dr. P.B. Rastogi both scientists had made a submission on behalf of the MoEF on 28<sup>th</sup> August, 2014, before the Tribunal to explain an opinion to put the contents of the Office Memorandum dated 24<sup>th</sup> December, 2013 beyond ambiguity.

64. From those submissions, it is clear that no Environmental Clearance would be granted for extraction of minor minerals, sand mining from any riverbed where the area is less than 5 hectares. This will amount to total prohibition of carrying on of minor mineral activity of extraction of sand from riverbed anywhere in the country. Such prohibition, as we have already noticed, cannot be imposed in exercise of executive powers in face of the Notification of 2006 which places no such restriction. Furthermore, it will depend upon geographical and ecological situations in a given case. India is a diverse country with varied geographical, ecological and environmental limitations and situations. If such a direction is required to be imposed then it must be backed by proper data and objective application of mind. For instance, in the State of Himachal Pradesh which is symbolic of all hill States, may find it very difficult to find a mining area equal to or more than 5 hectares on the riverbed. It may be practically difficult to find an area where the area of sand mining is 5 hectares or more. It was



contended before us that if this restriction is to be imposed across the States, then it would be very difficult for the State of Himachal Pradesh to permit any sand mining on the riverbed in its entire State. For extraction of sand and other minor minerals, river/seasonal rivers are the main source in the State of Himachal Pradesh. This argument has to be considered with some merit. Again, neither the Office Memorandum dated 24<sup>th</sup> December, 2013 discusses any of these issues, nor it provides any data which was the foundation for issuing such Office Memorandum. Furthermore, no material in that regard is placed before the Tribunal. Therefore, we find that this restriction is without any basis and is incapable of being imposed through an Office Memorandum. The minor mineral mining activity, other than sand mining, on riverbed was permitted in the sense that for such activity even areas less than 5 hectares could be considered for grant of Environmental Clearance.

65. Now, we revert to the case advanced on behalf of the respective States in relation to the reliefs prayed by the applicant. According to the Applicant in Original Application No. 171/2013, rampant illegal mining is going on in different parts of the country particularly, the States involved in the present petition and there is clear violation of the orders passed by Hon'ble Supreme Court in the case of *Deepak Kumar* (supra) and orders of the Tribunal. As already noticed most of the States have denied that there is any illegal or unauthorized mining which is being carried on, particularly, on the riverbeds. However, this contention of the State Governments does not appear to be absolutely

correct. Besides this, applicant made specific averments and even placed documents to show that illegal and unauthorized sand mining, particularly, in the riverbeds is being carried on in different locations where the area was less or even more than 5 hectares. Certain States have even filed affidavits, which we have referred above, wherein it was stated that large number of cases of illegal mining have been detected and State Governments have taken action against such persons, as well as, huge amount of revenue on account of royalty or otherwise has been recovered. There is apparently some dispute between the State of Himachal Pradesh and Punjab in regard to where and who is carrying on such illegal mining. According to one State, the activity is being carried on in the area of other State, exactly contra is the stand of the other State. Whatever be the correctness of these averments, fact of the matter remains that at the border of Himachal Pradesh and Punjab, illegal mining is going on, causing degradation of environment and ecology as well as loss of the revenue to the concerned State. In furtherance to the order of the Tribunal during the pendency of these applications, it was also noticed by the inspecting team that illegal mining was going on at the border of the two States.

66. According to the State of Himachal Pradesh, though they have not carried out any amendments to their State Rules after the pronouncement of the Judgment of the Hon'ble Supreme Court in the case of *Deepak Kumar* (supra), but they have issued Policy of 2013 which brings it in conformity with the recommendations of MoEF and directions of the Hon'ble Supreme Court in the case of *Deepak Kumar*

(supra). Under this scheme, the removal of over-accumulated sand from the riverbeds even in the area of 1 hectare is allowed. However, this direction was kept in abeyance because of the orders of the Tribunal. In other words, the State of Himachal Pradesh, under its policy, is permitting carrying on of minor mineral activity (sand mining) on the riverbed in areas of 1 hectare, which is obviously less than 5 hectares. As already noticed, an attempt was made on behalf of the State of Himachal Pradesh to justify this policy on the ground of necessity, but fact of the matter remains that this policy and the practice followed by the State of Himachal Pradesh is in direct conflict with the order of the Hon'ble Supreme Court in the case of *Deepak Kumar* (supra) as well as the Office Memorandum issued by MoEF so far.

State of Himachal Pradesh, while granting lease in terms of Rule 14 of Rules of 1971, had also allowed grant of mining lease in relation to any area which is not compact and contiguous, for the reasons to be recorded in writing, in the interest of development of any mineral, if the State Government feels it to be necessary.

67. The State of Karnataka claims to have amended its Rules of 1994 after the passing of the Judgment of the Hon'ble Supreme Court in the case of *Deepak Kumar* (supra). In terms of these Rules, minor minerals mining in area of less than 5 hectares has been permitted, by either cluster mining or mining in the minimum specified area, which is, 10 acres, i.e., less than 5 hectares. In regard to other minor mineral mining even in the areas less than 5 hectares but subject to grant of

Environmental Clearance. The holders of existing mining lease for sand mining, even in the areas less than 5 hectares, have been granted one year to take Environmental Clearance w.e.f. 16<sup>th</sup> December, 2013. Environment Management Plan is to be submitted which has to be approved by a regional authority which has now been given up by the States and consent/Environmental Clearance is to be granted by SEIAA/MoEF only. Reference can be made to the Rules:

**“8Q. Environmental Management Plan for individual or clusters of leases / licenses / working permission/sand tender areas.-**

Every holder of lease / license / working permission shall prepare an Environment Management Plan through recognized qualified person and submit to the Regional Environment Management Committee/State Environment Impact Assessment Authority/Ministry of Environment and Forest as the case may be for approval and the lessees / licensees / permission holders of a cluster shall submit a collective Environment Management Plan through cluster association within a period of three months of formation of cluster association.

Provided that the existing holder of lease/license/working permission having an area less than stipulated shall form the cluster association and submit collective EMP within one year from the commencement of these rules.

However in case of sand, the Environment Management Plan shall be prepared through recognized qualified person and submitted to the Regional Environment Management Committee/ SEIAA/MoEF as the case may be for approval by Deputy Director / Senior Geologist concerned.

Provided, that in respect of plans within its purview, the Regional Environment Management Committee may extend the above period up to a further period of six months by recording the reasons.”



Instructions issued by the State of Karnataka through its Video Conferencing are also not in conformity with law. They had permitted continuation of mining activity without obtaining Environmental Clearance for a period of one year from 16<sup>th</sup> December, 2013. That period of one year is now over. Thus, in any case, nothing would survive for consideration resulting from the said video conference. The obvious result would be whether, Environmental Clearance is required for persons carrying on mining activity in an area of less than 5 hectares, through cluster mining or otherwise?

68. State of Rajasthan has also amended its Rules after the judgment of the Hon'ble Supreme Court in *Deepak Kumar* (supra). Rajasthan Minor Mineral Concession Rules, 1986 were amended by Notification dated 3<sup>rd</sup> May, 2012. Under these Rules, there are three most noticeable aspects. First relates to permission for carrying on mining activity in an area of less than 5 hectares, that too without obtaining the Environmental Clearance from SEIAA/MoEF. It has created District Level Environmental Committees to whom application of Environmental Clearance is to be moved and which has to recommend grant/refusal of such clearances. It has permitted cluster-mining by stating that an Environmental Management Plan could be submitted for such cluster mining and permits could be given for an area of less than 5 hectares. The short-term permit holders of the lease in clusters were required to form an association and file applications along with the Environment Management Plan to the District Committee for approval in terms of Rule 37P. Under proviso to this Rule, the permit



holders of short-term permits within the boundary of the cluster after formation of the association will be deemed to be members of the association. All these three issues are not in conformity with the law in force and the judgment of the Hon'ble Supreme Court. Secondly, they also suffer from the infirmity of imposing obligations on a person who may not be desirous of becoming a member of the association within the cluster boundaries. In our considered view, the 'deeming fiction' contained in proviso to Rule 37Q would not stand the scrutiny of law. It is in fact impractical as well as unsustainable. This would encourage what the Hon'ble Supreme Court has specifically discourage in the case of *Deepak Kumar* (supra) that persons carrying on mining activity should not be permitted by creating smaller segments of the areas of the mining activity and then forming a cluster or even without forming the clusters carrying on the mining activity degrading the environment and ecology of the area. The Rules amended by the State of Rajasthan thus, are not in line with the dictum of the Hon'ble Supreme Court and even the Notifications issued by the MoEF including the Notification of 2006.

69. The Union Parliament is vested with the powers of making laws for regulation and development of mines and minerals so far they are expedient in public interest. Similarly, legislative power is vested in the State but it is subject to the provisions of List I. The Parliament having enacted the Act of 1957, the Rules for regulation that can be framed by the State Legislature under Section 15 of the said Act has to be compliant of the Parliamentary legislation. In other words, whatever

rules are to be framed by the State Government, they should be in conformity with the Act of 1957 as well as with the Act of 1986. In terms of Article 141 of the Constitution, the Judgment of the Hon'ble Supreme Court is the law of the land and is binding on all concerned. The State Government while framing Rules in exercise of powers of delegated legislation has to be conscious of the fact that such legislation is expected to be in conformity with the law of the land as declared by the Hon'ble Supreme Court. The said Rules thus, so framed have to be in conformity with all, the two enactments, i.e., the Act of 1957 and Act of 1986 and Judgment of the Hon'ble Supreme Court. The constitution of District Level Environmental Committee for the purpose of considering and approving the Environment Management Plan in terms of proviso to Rule 37(Q) is another provision that requires consideration. Under the Notification of 2006, the projects whether falling in category 'A', 'B', 'B1' or 'B2' have to be considered for the purposes of grant of Environmental Clearance and other related matters by MoEF/SEIAA. The District Level Committee is neither framed under the provisions of the Act or Rules of 1986 and for that matter, nor under the Notification of 2006. Once the law provides for a particular procedure to be done or undertaken in a particular manner and by a specified authority, then it can be done in that manner alone by that authority and not in any other way. Even in the case of *Deepak Kumar* (supra), the Hon'ble Supreme Court had permitted consideration of Environmental Clearance application only by SEIAA or MoEF. It was contended that such Committees were only

expected to recommend the cases to SEIAA and not to grant or refuse Environmental Clearances. Firstly, this submission is not supported by any of the Rule. The Rules 37P and 37Q clearly requires that an Environmental Management Plan for cluster would be approved by the Committee. In that context, the expression 'approval' cannot be granted, any other meaning except that a final 'decision' in that regard will be taken. Once approval is granted by the District Level Environmental Committee, it is impractical to imagine, how it would be able to decline Environmental Clearance. In other words, it is a machinery created by the Rules which is in derogation to the Principle legislation and the Notification of 2006.

70. At this stage, we may revert to the judgment of the Tribunal dated 28<sup>th</sup> November, 2013, in the case of *National Green Tribunal Bar Association* (supra). In this judgment, the Tribunal specifically rejected the contention of the State of Madhya Pradesh that in view of Rules 42 to 49 and 68 of the Madhya Pradesh Minor Mineral Rules, 1996, the State has given authority to the District Level Environmental Committees to grant lease or license in accordance with the Rules. Amendment of the Rules, by the State Governments, cannot be done so as to entirely wipe out the impact, effect and procedure prescribed in the Central law. The District Level Environmental Committees so constituted have to perform their functions under the Act of 1957 and the Rules framed therein. The Act does not empower the State authorities to grant Environmental Clearance. The Tribunal further held that the appropriate way to read and interpret these Sections

would be that such powers are to be exercised in relation to environment but primarily for the purposes of granting or refusing mining leases or licences. The consideration and grant of Environmental Clearance is statutorily regulated by the Notification of 2006 and the State Government would not be competent to alter or completely give a go-by to the said statutory procedure and methodology, the Environmental Clearance has to be granted in accordance with the Central law. Thus, the contentions raised in the present case on similar lines cannot be accepted by us as well.

71. The Hon'ble Supreme Court had permitted preparation of Mining Plan primarily with the object of providing for reclamation and rehabilitation of the mined out area. It was to deal with progressive mine closure plan and post mined land of use. The Judgment of the Hon'ble Supreme Court had also dealt with cluster mining approach for small size mines. The purpose of adopting cluster approach with reference to small mine leases was to take care of preparation of Environmental Management Plan in clusters of mines, where the mining activity was being carried out in smaller areas. The Hon'ble Supreme Court accepted the recommendation of MoEF in regard to the above. The Hon'ble Supreme Court specifically noticed, what was pointed by the CEC to examine, whether there has been an attempt to flout the Notification of 2006 by breaking of homogenous area into pieces of less than 5 hectares. The Hon'ble Supreme Court upon taking note of the recommendations of MoEF which were passed on technical, scientific and environmental grounds, had directed the State



Governments to implement the recommendations. They were directed to get the Mining Plan prepared as afore-noticed. Besides all these, the Hon'ble Supreme Court had directed that lease of minor minerals, including their renewal, for an area of less than 5 hectares is granted by the said Union Territories/State only after getting Environmental Clearance from the MoEF.

From the above discussion, it is clear that there is apparent contradiction between the Rules framed by the State under the shelter of the Judgment of the Hon'ble Supreme Court in the case of *Deepak Kumar* (supra) on the one hand and the Central Law and Notifications on the other. This has created uncertainty in fact and in law. To put it more plainly, the actions taken by the State Governments post the case of *Deepak Kumar* (supra) has created more problems than it ought to have solved by the Hon'ble Supreme Court in its judgment. Thus, the State Government and MoEF needs to examine the matter collectively, objectively and with an intent to bring uniformity in law. We would issue directions in this regard separately.

72. India is not only a diverse country in relation to culture, language and character, but, it is also materially distinct and different in relation to geography, ecology and environment. Narrow rivers in the mid of the hills, limited riverbed space, snowing peaks and high altitude on the one hand and on the other huge river and riverbed, wide field areas are the indicators of this diversity. It may be difficult to have a uniform policy or law in relation to activities, like mining, particularly minor minerals, which have a very serious impact on the



environment, ecology and river flow. There is a dire need to formulate the laws which may be State specific but do not degrade or damage the environment and ecology. Any damage to the environment and ecology may be happening in one State but its adverse impacts would be seen on the entire nation. Therefore, there is a need for an effective and protective Central Legislation which will not only protect the environment in a particular area but the entire Indian Territory.

73. Another incidental but material issue that would fall for consideration is that whether State Rule providing for mining activity to be carried on in an area of less than 5 hectares would cause environmental concerns, particularly when no Environmental Clearance is obtained for the same.

This has to be answered in the affirmative. Indiscriminate, uncontrolled and unregulated mining activity being carried on in any area, particularly the riverbed, is bound to have an adverse impact on ecology and environment. These adverse impacts can be seen in two different and distinct manners. Firstly, uncontrolled and unregulated mining on the riverbed would adversely affect ground water and if the mining is carried on in excess of the specified depth, then, it would affect the course of the river. Secondly, it would also be a concern in relation to floods and may result in failure of flood protective measures. Mining of minor minerals, including sand mining, not only on the riverbed, but, even on other sites, has to be carried out in a regulated manner and under the effective supervision of the regulatory bodies. The law has created a complete regulatory regime for carrying

on of mining activities and that mechanism should be adhered to as otherwise the obvious consequences thereof would be prejudicial to the environmental interests of the country.

74. Another argument that has been advanced on behalf of the States, as well as, some of the respondents is that the Notification published by MoEF dated 9<sup>th</sup> September, 2013, which makes it compulsory for the minor mineral mining lease holders of area of less than 5 hectares to seek Environmental Clearance is not retrospective and therefore, will not be applicable to the mine leases that were in force as on that date. Firstly, we have already quashed and declared the Notification dated 9<sup>th</sup> September, 2013 as ineffective and inoperative, having not been issued in consonance with the provisions of law. As such, this argument would hardly survive. Since this argument may have some bearing even in relation to the other Office Memorandums issued by MoEF or on other Notifications validly issued by MoEF such as the one dated 1<sup>st</sup> December, 2009 and Office Memorandum of 24<sup>th</sup> June, 2013 and 24<sup>th</sup> December, 2013, we will even proceed to discuss the merits of this submission.

75. The environmental laws are laws enacted for the benefit of public at large. They are socio-beneficial legislation enacted to protect the environment for the benefit of the public at large. It is in discharge of their Constitutional obligation that such laws have been enacted by the Parliament or by other authorities in furtherance to the power of delegated legislation vested in them. These legislations and directives are incapable of being compared to the legislations in the field of

taxation or criminal jurisprudence. These laws have been enacted to protect the Fundamental Rights of the citizens. Thus, the contention that the existing mine holders would not be required to comply with the requirements of environmental laws, cannot be accepted. To illustratively examine this aspect, we may take a hypothetical situation, not far from reality. An industrial unit which had been established and operationalized prior to 1974, 1981 and/or 1986, was granted permission under the laws in force and the unit owner had made heavy investments in making the unit operational. The Water (Prevention and Control of Pollution) Act came into force in 1974, Air (Prevention and Control of Pollution) Act in 1981 and Environment (Protection) Act in 1986. All these Acts deal with existing units as well as the units which are to be established in future. These laws granted time to the existing units to take all anti-pollution measures and obtain the consent of the respective Pollution Control Boards to continue its operations. Failure to do so, could invite penal action including, closure of industry under these Acts. The said Unit should not be permitted to contend that since it was an existing unit, it has earned a right to pollute the environment and cause environmental pollution, putting the life of the others at risk, on the ground that it was an existing unit and was operating in accordance with law. Such a contention, if raised, would have to be noticed only to be rejected. Similarly, these Notifications or Office Memorandums, having been issued under the environmental laws, would equally apply to the existing industries as well. The directions contained in these

Notifications and Office Memorandums which are otherwise valid, would equally operate to the existing mines as well as the newly undertaken mining activities. All that the law would require, is to give them some reasonable time to comply with the requirements of law, wherever a specific time is not provided under the Act or the Notification. Obviously, these laws *stricto sensu* are not retrospective, as they do not abolish or impair any vested rights under the existing laws. However, these laws impose a new obligation without taking away the vested right. In that sense and somewhat loosely, it can be interpreted as being retroactive in nature, as they do not take away the right of the person to carry on business or his industrial unit, but only impose a new obligation to take Environmental Clearance under the environmental laws. The activity is not prohibited, but, compliance to the environmental laws is made mandatory. Examined from that angle, in so far as we have held, the Notification dated 1<sup>st</sup> December, 2009, Office Memorandums dated 18<sup>th</sup> May, 2012, 24<sup>th</sup> June, 2013 and 24<sup>th</sup> December, 2013, except to the extent they have been quashed as above by us, are valid and would be enforceable against even the existing mining lease holders. They cannot be permitted to destroy the environment and ecology for their personal gains on the strength of the contention that they are existing units and these Notifications, Office Memorandums would not apply to them.

State of Karnataka has already given a one year time to the existing mine lease holders to comply with the requirements of obtaining Environmental Clearance. Similarly, the State of Rajasthan



and Himachal Pradesh should also direct the existing mine lease holders to take Environmental Clearance, irrespective of their area of mining. The Hon'ble Supreme Court in the case of *Deepak Kumar* (supra) has clearly directed that the miners possessed of mining area of less than 5 hectares cannot operate without taking Environmental Clearance. This would unexceptionally apply to the new units, but, in our considered view, would also apply to the existing mine lease holders as well; except that they would have to be given time to comply with the requirements of law.

**Sunil Acharya**

76. We have already noticed above that Appeal No. 23/2014 has been filed by Mr. Sunil Acharya – Appellant, on the premise that there has been diversion of 64 hectare forest land for mining of marble near village Kothara, District Banswara. The District Collector vide letter dated 29<sup>th</sup> February, 2012 had issued a certificate with regard to such diversion in favour of 16 lease holders. The Government of India had directed the Assistant Engineer, Mining to comply with the certain conditions in compliance vide letter dated 13<sup>th</sup> February, 2012.

According to the applicant, indiscriminate mining of marble was carried on and, therefore, he prayed that the respondents should be directed to ensure that no mining work is done by respondent nos. 1 to 7 (in whose favour the mining lease has been granted). The private respondents, in fact, stated to have been given 4 hectares of mining area, each with an intent to circumvent the law and avoid seeking Environmental Clearance. According to the applicant, the entire



mining activity was being carried on illegally and in an unauthorised manner.

77. Each of the private respondents had filed independent M.As. like M.A. No. 469/2014 praying that the ex-parte stay granted by the Tribunal on 10<sup>th</sup> July, 2014 be vacated. It is admittedly a case where the forest land has been diverted for carrying on the marble mining activity. The private respondents have also claimed that they have been carrying on the mining operation since 29<sup>th</sup> November, 2012 till its closure on 14<sup>th</sup> July, 2014. Further, according to these private respondents, they have already applied on 24<sup>th</sup> March, 2014 for seeking Environmental Clearance in terms of the Notification dated 9<sup>th</sup> September, 2013.

These private respondents have the permission for diversion of the forest area for carrying on mining activity which is stated to have been granted by the competent authority and still these private respondents claimed to have applied for seeking Environmental Clearance despite the fact that the mining area is less than 5 hectares. If that be so, it is not necessary for us to examine the various controversies raised by the parties in these applications. Though, we have already dealt with the various legal issues that arise in these cases at length above.

78. Be that as it may, Appeal No. 23/2014 as well as M.A. No. 469/2014, M.A. No. 469 of 2014, 470 of 2014, 473 of 2014 479 of 2014, 480 of 2014 488 of 2014, 489 of 2014 can be disposed of merely by a direction to the concerned authorities to consider and dispose of

these applications for grant of Environmental Clearance expeditiously. The mining activity of all these respondents has been prohibited under the orders of the Tribunal, primarily on the ground that they have not received Environmental Clearance. If they have the permission for conversion of forest land and they obtained the Environmental Clearance for carrying on mining activity, in accordance with terms and conditions of the Notification of 2006 and other applicable Notification/Office Memorandums, then, they can obviously carry on their activity of marble mining in accordance with law. If applications are filed as cluster and the total extent of the cluster exceeds 5 hectares, the entire cluster will be taken as a unit for granting Environmental Clearance, subject to all the owners joining the cluster application.

79. Thus, we direct the respondent authorities, particularly SEIAA, to dispose of the applications of all these private respondents seeking Environmental Clearance as expeditiously as possible, in any case not later than three months from today. Thus, Appeal No. 23/2014 and M.A. No. 469/2014, M.A. No. M.A No. 488/2014, 489/2014, 479/2014, 480/2014, 473/2014, 470/2014, 471/2014, and 469/2014 stand disposed of with the above directions. We further direct that till the grant of Environmental Clearance they would not carry out any activity of marble mining

**Himmat Singh**

80. In Original Application No. 123/2014, the challenge has been raised to the guidelines issued by the Government of Rajasthan dated

8<sup>th</sup> January, 2014 and to the Office Memorandum issued by MoEF on 24<sup>th</sup> December, 2013. The challenge, as already referred by us above, is primarily based on the ground that attempt of both these documents is to permit illegal and unauthorised mining activity by directly auctioning and permitting mining in the areas less than 5 hectares or even between 5 to 25 hectares. Such action, being contrary to the very scheme under the Notification of 2006 and order of the Hon'ble Supreme Court in the case of *Deepak Kumar* (supra), the Tribunal had granted an injunction for carrying of mining activities without obtaining proper mining lease, Environmental Clearance and other requisite permissions, in accordance with law.

81. In this application, M.A. No. 419/2014 was filed by various applicants, including the project proponent - Larsen and Toubro Ltd., praying therein that SEIAA be directed to consider the application for Environmental Clearance filed by the applicant in respect of the mining of minor minerals in areas which were owned/ were under the mining lease of the applicants. According to these applicants, they are only carrying on the activity of brick earth and ordinary earth excavation for the purposes of completing the project of construction of railway line of the portion of the Dedicated Freight Corridor from Rewari in Haryana to Iqbalgarh in Gujarat running along a length of 626 kms. on design build lumpsum price basis. The project involves formation in embankment/cuttings, bridges, structures, buildings, ballast on formation and track work, including testing and commissioning. The work comprises of railway track along a length of

626 kms, 110 major bridges, 1229 minor bridges and 20 stations. According to the applicants, they were not covered by the injunction order passed by the Tribunal, in as much as, the areas of lease mine holders were less than 5 hectares and in alternative, all of them had applied for taking Environmental Clearance as they are category 'B2' projects in terms of Office Memorandum dated 24<sup>th</sup> June, 2013. The challenge to the Office Memorandum dated 24<sup>th</sup> December, 2013 is also raised on the ground that though the Office Memorandum refers to the report of the Committee constituted by MoEF vide its Office Memorandum dated 30<sup>th</sup> January, 2013 but that Committee had not made any recommendations in regard to the criteria that should be adopted for categorisation of the projects as 'B1' and 'B2' respectively. Factually, it is correct that the report of the Committee in its recommendations has not made any recommendations in regard to the bifurcation of 'B' category projects into 'B1' and 'B2'. However, there is some discussion in the opening paragraphs of the report in that behalf. Once, Clause 7 of the Notification of 2006 empowers MoEF to issue guidelines on that behalf then such jurisdiction cannot be taken away on the ground that the Committee constituted by the Ministry did or did not make a particular recommendation. Of course, it is always more appropriate to issue Notifications/Office Memorandums which are based and are supported by scientific reason, but, that does not mean the absence thereof would vitiate office memorandums, which, otherwise have been issued in accordance with law and within the framework of the power vested in the MoEF. Therefore, we are

unable to accept the contention of the applicants that this Office Memorandum should be quashed or declared invalid in its entirety on that ground alone.

Therefore, in their application, the only prayer is that their application for grant of Environmental Clearance should be considered expeditiously to avoid any prejudice to the progress of the projects. In view of the limited prayer made in this application, it is not necessary for us to again deliberate much on this application.

82. We dispose of this application with a direction that SEIAA shall consider these applications filed for seeking Environmental Clearance, in accordance with law and observations made in this judgment, expeditiously and in any case within a period of three months from today.

83. In light of the above discussion and particularly keeping in view the persistent conflict between the State Regulations and the Central Notifications, it is imperative for us to issue directions specially to provide for an interim period, during which appropriate steps should be taken to comply with the Judgment of the Hon'ble Supreme Court and to issue Notifications which are necessary in that regard. Therefore, we pass the following order and directions:

- I. For the reasons afore recorded, we hold and declare that the Notification dated 9<sup>th</sup> September, 2013 is invalid and inoperative for non-compliance of the statutorily prescribed procedure under the Environment (Protection) Rules, 1986 and



for absence of any justifiable reason for dispensation of such procedure.

II. We also hold and declare that the Office Memorandums dated 24<sup>th</sup> June, 2013 and 24<sup>th</sup> December, 2013 to the extent afore-indicated are invalid and inoperative being beyond the power of delegated legislation.

III. All the Office Memorandums and Notifications issued by MoEF i.e. 1<sup>st</sup> December, 2009, 18<sup>th</sup> May, 2012 and 24<sup>th</sup> June, 2013 and 24<sup>th</sup> December, 2013(except to the extent afore-stated) are operative and would apply to the lease mine holders irrespective of the fact that whether the area involved is more or less than 5 hectares.

IV. We further hold that the existing mining lease right holders would also have to comply with the requirement of obtaining Environmental Clearance from the competent authorities in accordance with law. However, all of them, if not already granted Environmental Clearance would be entitled to a reasonable period (say three months) to submit their applications for obtaining the same, which shall be disposed of expeditiously and in any case not later than six months from pronouncement of this judgment.

V. All the States and the Ministry of Environment and Forest shall ensure strict compliance to the directions issued by the Hon'ble Supreme Court in the case of *Deepak Kumar* (supra). We direct Secretary, Ministry of Environment and Forest to hold a

meeting with the State of Rajasthan, Himachal Pradesh and Karnataka to bring complete uniformity in application of the above referred Notifications and Office Memorandums including the Notification of 2006.

VI. We direct that in the meeting it shall also discuss and appropriate recommendations be made and placed before the Tribunal, as to whether riverbed mining covering an area of less than 5 hectares can be permitted, if so, the conditions and regulatory measures that need to be adopted in that behalf.

VII. We direct that the District Environmental Committees constituted by the respective State Governments shall not discharge any functions and grant approval as contemplated under the Notification of 2006.

VIII. Secretary, Ministry of Environment and Forest along with such experts and the States afore-referred will also consider the possibility of constituting the branches of SEIAA at the district or at least, division levels, to ensure easy accessibility to encourage the mine holders to take Environmental Clearance expeditiously.

IX. It is stated before us that in large number of cases, particularly in relation of State of Rajasthan, persons carrying on mining activity of minor minerals, non-coal mining and brick earth and ordinary earth have applied for obtaining Environmental Clearances in accordance with the terms and conditions of the Notification of 2006. Let all such applications be dealt with and

orders passed by the concerned authorities at the earliest and in any case not later than six months from today.

X. We direct the respondent authorities, particularly SEIAA, to dispose of the application of all these private respondents who have already filed applications seeking Environmental Clearance as expeditiously as possible, in any case not later than three months from today. Thus, Appeal No. 23/2014 and M.A. No. 469/2014, M.A. No. M.A No. 488/2014, 489/2014, 479/2014, 480/2014, 473/2014, 470/2014, 471/2014 and 469/2014 stand disposed of with the above directions. Till the grant of environmental clearance they would not carry out any activity of marble mining.

XI. We dispose of Original Application No. 123/13 with a direction that SEIAA shall consider the applications filed for seeking Environmental Clearance in accordance with law and observations made in this judgment, expeditiously, and in any case within a period of three months from today.

XII. In the meanwhile, no State shall permit carrying on of sand mining or minor mineral extraction on riverbed or otherwise without the concerned person obtaining Environmental Clearance from the competent authority.

XIII. We direct the Ministry of Environment and Forest to issue comprehensive but self-contained Notification relating to all minor mineral activity on the riverbed or otherwise, to avoid

unnecessary confusion, ambiguities and practical difficulties in implementation of the environmental laws.

XIV. In light of the judgment of the Supreme Court and what has emerged from the various cases that are subject matter of this Judgment, we direct the Ministry of Environment and Forest to formulate a uniform cluster policy in consultation with the States for permitting minor mineral mining activity including, its regulatory regime, in accordance with law.

84. For the reasons afore stated, we dispose of the Original Applications, Appeal and Miscellaneous Applications filed by different parties in all those Original Applications and Appeal, in terms of above directions, while leaving the parties to bear their own costs.

**Justice Swatanter Kumar**  
**Chairperson**

**Justice M.S.Nambiar**  
**Judicial Member**

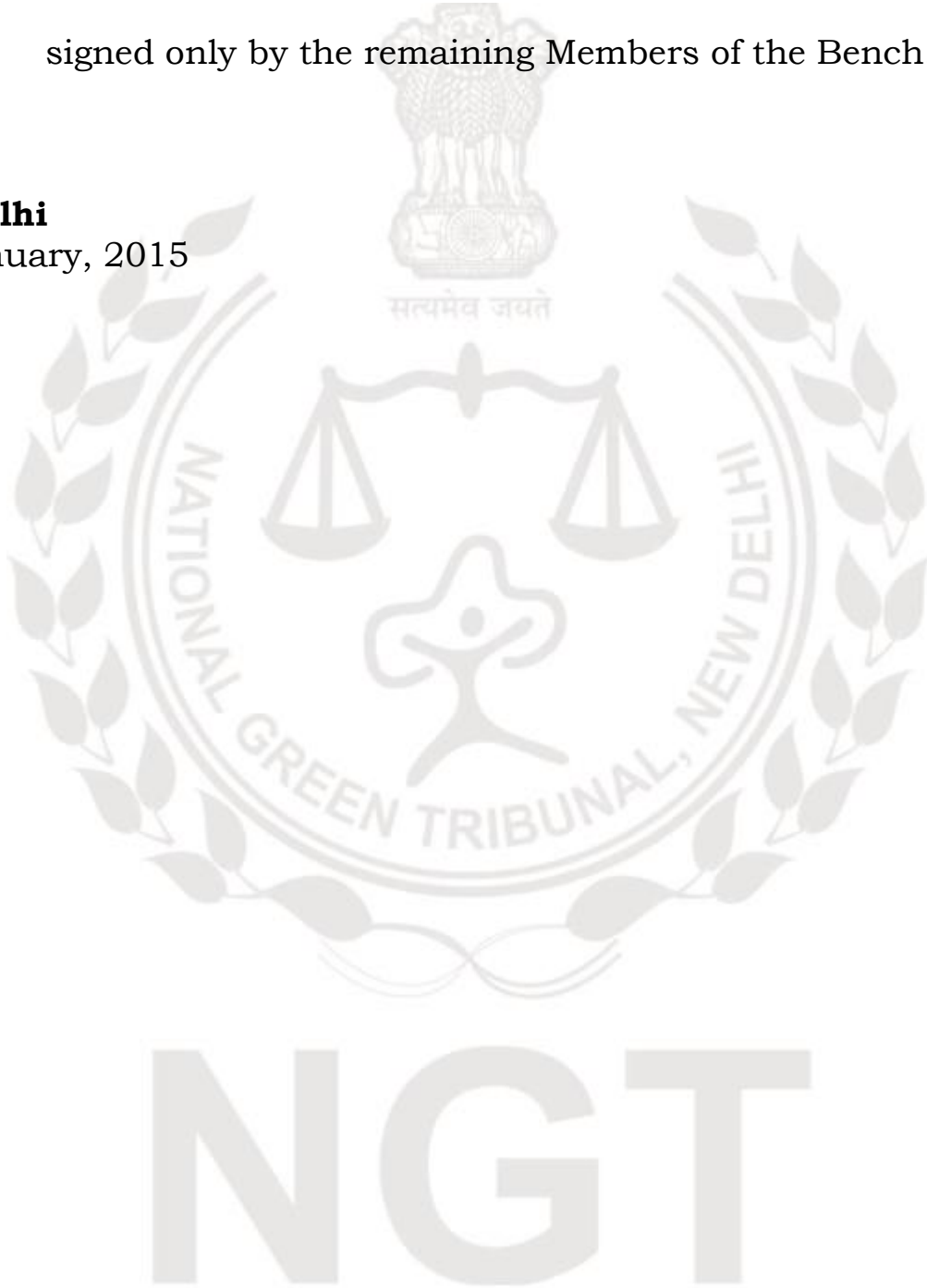
**Dr. D.K. Agrawal**  
**Expert Member**

**Order:** This case was heard by a Bench consisting of Hon'ble Mr. Justice Swatanter Kumar (Chairperson), Hon'ble Mr. Justice M.S. Nambiar (Judicial Member), Hon'ble Dr. D.K. Agrawal (Expert Member) and Hon'ble Dr. R.C.

Trivedi (Expert Member). After the judgment was reserved, but, before its pronouncement, unfortunately, Dr. R.C. Trivedi, Learned Expert Member expired and left for heavenly abode on 26<sup>th</sup> December, 2014. Thus, the present judgment is being signed only by the remaining Members of the Bench.

**New Delhi**

13<sup>th</sup> January, 2015





**BEFORE THE NATIONAL GREEN TRIBUNAL  
PRINCIPAL BENCH, NEW DELHI**

Original Application No. 186/2016  
(M.A. No. 350/2016)  
And  
Original Application No. 200/2016  
And  
Original Application No. 580/2016  
(M.A. No. 1182/2016)  
And  
Original Application No. 102/2017  
And  
Original Application No. 404/2016  
(M.A. No. 758/2016, M.A. No. 920/2016,  
M.A. No. 1122/2016, M.A. No. 12/2017 & M.A. No. 843/2017)  
And  
Original Application No. 405/2016  
And  
Original Application No. 520 of 2016  
(M.A. No. 981/2016, M.A. No. 982/2016 & M.A. No. 384/2017)

**IN THE MATTERS OF:**

Satendra Pandey  
Vs.  
Ministry of Environment, Forest & Climate Change & Anr.  
And  
Rajeev Suri Vs. Union of India  
And  
Badal Singh Vs. Union of India & Ors.  
And  
Nature Club of Rajasthan (NGO) Vs. Union of India & Ors.  
And  
Naresh Zargar Vs. Ministry of Environment & Forest and Anr.  
And  
Rajeev Suri Vs. Union of India & Anr.  
And  
Vikrant Tongad Vs. Union of India

**CORAM : HON'BLE MR. JUSTICE ADARSH KUMAR GOEL, CHAIRPERSON  
HON'BLE DR. JUSTICE JAWAD RAHIM, JUDICIAL MEMBER  
HON'BLE MR. JUSTICE S.P. WANGDI, JUDICIAL MEMBER  
HON'BLE DR. NAGIN NANDA, EXPERT MEMBER**

|                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
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| Present: Applicant: | Mr. Rahul Choudhary and Ms. Meera Gopal,<br>Advs. in Original Application No. 388/2018                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| Respondents         | Mr. Divya Prakash Pande, Adv. for Ministry of<br>Environment, Forest and Climate Change<br>Dr. Abhishek Atrey, Adv. for Ministry of<br>Environment, Forest and Climate Change<br>Mr. Amit Tiwari, Adv. for State of Uttar Pradesh<br>Mr. Ashok Kumar Sharma and Mr. Kshitij<br>Mudgal, Advs.<br>Mr. V.K. Shukla, and Ms. Vijay Lakshmi, Advs.<br>for State of MP, State Environment Impact<br>Assessment Authority & Mining Corporation<br>Mr. Rahul Pratap, Adv. for Ministry of<br>Environment, Forest and Climate Change<br>Mr. Shiv Mangal Sharma, AAG with Mr. Saurabh<br>Rajpal and Mr. Vikramjeet Singh, Advs. for<br>State of Rajasthan |

|  | Date and Remarks                                                                            | Orders of the Tribunal                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
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|  | <p><b>Item Nos. 07 to 14</b></p> <p><b>September 13, 2018</b></p> <p><b>DV &amp; AT</b></p> | <p>1. By this application, the applicant has sought to assail Notifications dated 15.01.2016, 20.01.2016 and 01.07.2016 amending the EIA Notification dated 14.09.2006 on the ground that the procedure for obtaining Environmental Clearance in respect of mining of minor minerals for areas from 0 to 25 ha has been diluted by bringing it within B-2 category projects and exempting such category from Public Consultation, Environment Impact Assessment (EIA) and Environment Management Plan (EMP) which was in contravention of the judgment of the Hon'ble Supreme Court in <i>Deepak Kumar Vs. State of Haryana &amp; Ors.: (2012) 4SCC 629</i> and also of this Tribunal in <i>Original Application No. 123 of 2014</i> dated 13.01.2015.</p> <p>2. The crux of the case of the applicant is that while in <i>Deepak Kumar</i> case (supra) it had been held that all mining leases in respect of its size would require to obtain Environmental Clearance and be subjected to strict regulatory framework as that of all major minerals, the impugned Notifications, more particularly 15.01.2016, exempts the necessity of having EIA and Public Consultation for areas upto 25 ha.</p> <p>3. According to the applicant the impugned Notification dated 15.01.2016 provided exemption of the rigors of the necessity of EIA and EMP even for areas ranging from 5 to 25 ha when in the earlier Notifications it was necessary from 5 to 50 ha. It was contended that the Hon'ble Supreme Court had expressed its concern on</p> |

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|  | <p><b>Item Nos.<br/>07 to 14</b></p> <p><b>September<br/>13, 2018</b></p> <p><b>DV &amp; AT</b></p> | <p>dispensing with the necessity of obtaining Environmental Clearance and the other requirements cognate thereto for areas less than 5 ha in the case of <i>Deepak Kumar</i> (supra).</p> <p>4. Further contention was that B-category as it stood originally, was broken to B-1 and B-2 categories by bringing areas of mining of minerals from 25 ha to 50 ha within B-1 category and 0 to 25 ha as B-2 category. For B-2 category, the authority prescribed for grant of Environmental Clearance is now the District Environment Impact Assessment Authority (DEIAA) which would base its decision on the recommendations of District Expert Appraisal Committee (DEAC).</p> <p>5. Further contentions of the applicant in assailing the Notification dated 15.01.2016 are as follows:</p> <p>a) Form-1M prescribed in the impugned Notification dated 15.01.2016, required to be submitted for mining of minor minerals upto 5 ha under Category B-2 projects provided in Appendix-VII, is generic seeking only basic details pertaining to the lease holder and the mine with perfunctory information on the environmental effect of the project which was in contrast to Form-1 which is required to be filled up for all other categories which is comprehensive seeking detailed information on environmental implications of the project.</p> <p>b) B-2 projects of 0 – 5 ha under individual and cluster category are exempted from requirements of preparing an Environment Impact Assessment</p> |
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|  | <p><b>Item Nos.<br/>07 to 14</b></p> <p><b>September<br/>13, 2018</b></p> <p><b>DV &amp; AT</b></p> | <p>Report (EIA) and Environment Management Plan (EMP) and those greater than 5 ha and less than or equal to 25 ha are exempted from preparing Environment Impact Assessment Report (EIA) both with respect to individual Mine Lease and cluster situation. No such exemption has been provided in para 7 (i) of the EIA Notification, 2006 under Stage (2) - Scoping which stipulates such requirement, but it has been done away with now at Appendix-XI of Notification dated 15.01.2016.</p> <p>c) EIA/EMP is an integral and most critical component of Environmental Clearance as it is only through the EIA that the potential impacts and risks of a project can be assessed and mitigation measures formulated and adopted in the EMP. By exempting EIA/EMP, critical environmental aspects like anticipated environmental impacts, mitigation measures and additional studies involving public consultation, risk assessment, social impact assessment and rehabilitation and resettlement action plans, stand exempted. These requirements provided under Appendix-III, defeats the very purpose of the Notification and the Environment (Protection) Act, 1986.</p> <p>d) The District Level Environment Impact Assessment Authority (DEIAA) and District Level Expert Appraisal Committee (DEAC) comprises mostly of officers/bureaucrats who have no</p> |
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|  | <p><b>Item Nos.<br/>07 to 14</b></p> <p><b>September<br/>13, 2018</b></p> <p><b>DV &amp; AT</b></p> | <p>expertise and scientific knowledge to assess environmental implications, and have been conferred with excessive and uncanalized power devoid of any guidelines. Even the power to appoint the Expert Members vested upon the authorities in the DEIAA and DEAC are unguided whereas there is an extensive elaborations with regard to qualifications, skill sets and competencies for the members of SEAC and SEIAA.</p> <p>6. Based, <i>inter-alia</i>, upon the aforesaid grounds, the applicant seeks a direction for quashing the impugned Notifications.</p> <p>7. Mr. Divya Prakash Pande, Ld. Counsel for MoEF&amp;CC in his arguments, at the outset, raised objection as to the maintainability of the application on the ground of jurisdiction of the Tribunal to grant relief for quashing the impugned notifications. It is contended that the decision of this Court in the case of <i>S.P. Muthuraman v. Union of India</i>, in O.A. No. 676 of 2017 (Earlier O.A. No. 37/2015) whereby the Tribunal has held that it had the jurisdiction to pass such orders has since been challenged before the Hon'ble Supreme Court in Civil Appeal No. 7191-7192 of 2015 and is yet to be decided and, by implication of the orders passed by the Hon'ble Supreme Court, operation of the impugned judgement stands stayed.</p> <p>8. On the merits of the application, it is submitted that Notification dated 15<sup>th</sup> January, 2016 which is sought to</p> |
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|  | <p><b>Item Nos.<br/>07 to 14</b></p> <p><b>September<br/>13, 2018</b></p> <p><b>DV &amp; AT</b></p> | <p>be assailed, had been passed by the MoEF&amp;CC in exercise of its 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. The notification was issued after due deliberations with various stakeholders and the State Governments over the draft notification in respect thereof issued on 22<sup>nd</sup> September, 2015 and, after a committee constituted <i>vide</i> letter dated 3<sup>rd</sup> December, 2015 to examine the comments/suggestions submitted by them, had submitted its report. The impugned Notification provides for DIEAA/DEAC in the districts which also includes appointment of Officers/bureaucrats as experts in the two bodies. The impugned Notification is further justified by the Learned Counsel contending that as the Executive Engineer, Irrigation Department has been made part of the DEAC as he deals with the rivers and canals in the district and, therefore, has the best information and knowledge about sand and gravel deposits in the districts. The Forest Department officials are also part of these committees who have the ability to do value addition in forest areas or areas adjoining the forest having deposits of minor minerals.</p> <p>9. Upon consideration of the fact and circumstances set out in the original application and upon hearing the Ld. Counsel for parties, we find that the impugned Notification dated 15<sup>th</sup> January, 2016 is not consistent with the decision of the Hon'ble Supreme Court in the case of <i>Deepak Kumar (supra)</i>. We find substance in the</p> |
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| <div><div>Item Nos.<br/>07 to 14</div><div>September<br/>13, 2018</div><div>DV &amp; AT</div></div> | <p>submissions of the Ld. Counsel for the applicant that while breaking category B of the mines to B-1 &amp; B-2 may not <i>per se</i> be bad, it certainly dilutes the stringent requirement of lease areas upto 25 ha being exempted from the necessity of submitting EIA and EMP for grant of Environmental Clearance. It is undisputed that the impugned Notification is issued with the object to comply with the directions passed in the case of <i>Deepak Kumar (supra)</i>. This case had arisen as the EIA Notification dated 14<sup>th</sup> September, 2006 was being flouted by breaking homogenous areas into pieces of less than 5 ha in the States of Uttar Pradesh, Rajasthan and Haryana, as the notification then did not require Environmental Clearance for areas less than 5 ha. The Hon'ble Supreme Court after noting the serious deleterious effect of quarrying, mining and removal of sand in-stream and up-stream of rivers to the environment, in paragraphs 9 and 10 (of SCC), held as follows:</p> <p>“9. Extraction of alluvial material from within or near a streambed has a direct impact on the stream's physical habitat characteristics. These characteristics include bed elevation, substrate composition and stability, in-stream roughness elements, depth, velocity, turbidity, sediment transport, stream discharge and temperature. Altering these habitat characteristics can have deleterious impacts on both in-stream biota and the associated riparian habitat. The demand for sand continues to increase day by day as building and construction of new infrastructures and expansion of existing ones is continuous thereby placing immense pressure on the supply of the sand resource and hence mining activities are going on legally and illegally without any restrictions. Lack of proper planning and sand management cause disturbance of marine ecosystem and also upset the ability of natural marine processes to replenish the sand.</p> <p>10. We are expressing our deep concern since we are faced with a situation where the</p> |
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|  | <p><b>Item Nos.<br/>07 to 14</b></p> <p><b>September<br/>13, 2018</b></p> <p><b>DV &amp; AT</b></p> | <p><i>auction notices dated 3-6-2011 and 8-8-2011 have permitted quarrying mining and removal of sand from in-stream and upstream of several rivers, which may have serious environmental impact on ephemeral, seasonal and perennial rivers and river beds and sand extraction may have an adverse effect on bio-diversity as well. Further it may also lead to bed degradation and sedimentation having a negative effect on the aquatic life. The rivers mentioned in the auction notices are on the foothills of the fragile Shivalik hills. Shivalik hills are the source of rivers like Ghaggar, Tangri, Markanda etc. River Ghaggar is a seasonal river which rises up in the outer Himalayas between Yamuna and Satluj and enters Haryana near Pinjore, District Panchkula, which passes through Ambala and Hissar and reaches Bikaner in Rajasthan. River Markanda is also a seasonal river like Ghaggar, which also originates from the lower Shivalik hills and enters Haryana near Ambala. During monsoon, this stream swells up into a raging torrent, notorious for its devastating power, as also, river Yamuna.</i></p> <p><i>11. We find that it is without conducting any study on the possible environmental impact on/in the river beds and elsewhere the auction notices have been issued. We are of the considered view that when we are faced with a situation where extraction of alluvial material within or near a riverbed has an impact on the rivers physical habitat characteristics, like river stability, flood risk, environmental degradation, loss of habitat, decline in biodiversity, it is not an answer to say that the extraction is in blocks of less than 5 hectares, separated by 1 km, because their collective impact may be significant, hence the necessity of a proper environmental assessment plan.”</i></p> <p>10. The Hon’ble Supreme Court also took note of the fact that the MoEF&amp;CC had constituted a Core Group under the Chairmanship of the Secretary (Environment &amp; Forest) to look into the environment aspects associated with mining of the minor minerals <i>vide</i> order dated 24<sup>th</sup> March, 2009 with specific terms and conditions. The Core Group after consideration of various issues including cluster of mine approach for addressing and implementing EMP in case of small mines, submitted a report on 29<sup>th</sup></p> |
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|  | <p><b>Item Nos.<br/>07 to 14</b></p> <p><b>September<br/>13, 2018</b></p> <p><b>DV &amp; AT</b></p> | <p>January, 2010 with the recommendation to permit mining of minor minerals under strict regulatory regime and carried out only under an approved framework of mining plan which should provide for reclamation and rehabilitation of mine areas. For smaller mine lease areas a cluster approach was recommended. It was directed that the States should adopt the recommendations and the model guidelines framed by the Ministry of Mines, namely the Model Rules, 2010.</p> <p>11. In pursuance of the directions, the impugned Notification dated 15<sup>th</sup> January, 2016 was ultimately issued. The MoEF&amp;CC Notification dated 14<sup>th</sup> December, 2006 as it stood earlier prescribed for two categories of projects and activities as Category A and Category B based on the spatial extent of potential impacts, potential impacts on human health and natural and man-made resources. Stage (1)-Screening that provides for Category 'B' projects or activities, entail scrutiny of an application seeking prior Environment Clearance made in Form 1 by the concerned State Level Expert Appraisal Committee (SEAC) for determining whether or not the project or activity requires further environmental studies for preparation of EIA for appraisal prior to grant of Environment Clearance depending upon the nature and location specificity of the project. It further provides that the project requiring EIA report would be termed as Category 'B-1' and remaining projects as Category 'B-2' that would not require EIA report. Discretion to make such categorization was left upon the MoEF&amp;CC and to issue appropriate guidelines from time to time. This</p> |
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|  | <p><b>Item Nos.<br/>07 to 14</b></p> <p><b>September<br/>13, 2018</b></p> <p><b>DV &amp; AT</b></p> | <p>provision was a subject matter of challenge in the case of <i>Himmat Singh Shekhawat v. State of Rajasthan</i>, 2015 ALL (I) NGT Reporter (1) DEL 44 by which it was upheld as having been issued by the Ministry as a Subordinate Legislation. However, the office memorandums dated 24<sup>th</sup> June, 2013 and 24<sup>th</sup> December, 2013 prohibiting grant of Environment Clearance to the mine areas of less than 5 ha was quashed as being in conflict with the aforesaid provision.</p> <p>12. The only contention that require for us to consider in this case is as to whether the Notification dated 15<sup>th</sup> January, 2016 would satisfy the spirit of the directions issued in the case of <i>Deepak Kumar (supra)</i>. As already noted, EIA Notification dated 14<sup>th</sup> September, 2006 under the Schedule provided thereto require all mining lease area of equal to and up to 50 ha to seek Environment Clearance requiring to submit EIA for appraisal from the SEIAA.</p> <p>13. The impugned Notification dated 15<sup>th</sup> January, 2016, however, would clearly indicate that Category B has been split into category B1 and B2 and again, category B2 has been further split into areas of 0-5 ha and 5-25 ha. While 0-5 ha has been exempted from the requirement of EIA/Public Consultation, such exemption has also been provided even for mining areas of 5 ha to 25 ha with the DEAC and the DEIAA as the prescribed authority for evaluation and grant of Environmental Clearance. Category B-1 being mining areas of 25 ha to 50 ha, the authorities prescribed are the SEAC and SEIAA. For falling in excess of 50 ha being Category-A, it is the EAC and the</p> |
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|  | <p><b>Item Nos.<br/>07 to 14</b></p> <p><b>September<br/>13, 2018</b></p> <p><b>DV &amp; AT</b></p> | <p>MoEF&amp;CC.</p> <p>14. The procedure for grant of the Environment Clearance by the DEIAA for areas between 0 to 5 ha falling under Category 'B-2' is found prescribed in paragraphs 6, 7(iii) (a) and 7(iii) (b) of the impugned Notification read with appendices VIII, X and XI. The Schematic Presentation of Requirement of Environment Clearance of Minor Minerals including cluster situation provided in a table to Appendix XI would substantiate indubitably that even for areas between 5 to 25 ha, no EIA and Public Hearing is required and in cluster situation also, the requirement of EIA and Public Hearing have been exempted.</p> <p>15. Introduction of such procedure, in our view, is clearly not consistent with the directions contained in the case of <i>Deepak Kumar (supra)</i> and the spirit behind such direction. By the provision, mining area upto from 5 ha to 25 ha has been completely exempted from the EIA and Public Consultation. For areas of 5 ha and below, apart from the exemption, it has been made only subject to a separate procedure of preparing a District Survey Report (DSR). These provisions quite apparently are more mine-centric rather than striving a balance between mining and environment especially with regard to Form-1M which needs to be made more elaborate incorporating environment related aspects.</p> <p>16. The Sustainable Sand Mining Management Guidelines, 2016 prepared by the MoEF&amp;CC has also deprecated the procedure as will appear from below which</p> |
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| <div>Item Nos.<br/>07 to 14</div> <div>September<br/>13, 2018</div> <div>DV &amp; AT</div> | <p>is contained in the chapter on “The Issues and Management of Mining in Cluster”:-</p> <p>“It is seen that the categorization of mines into 'B1' and 'B2' category in which Category 'B2' leases are being exempted from the requirement of Environment Impact Assessment, Environment Management Plan, and Public Consultation for grant of EC, in many cases now the mining leases are being given for 25 hectares or less. This defeats the purpose and intent of Hon'ble Supreme Court Judgment which orders environment clearance for all mining leases irrespective of size. The environment clearance without Environment Impact Assessment, Environment Management Plan, and Public Consultation does not serve the purpose of environment clearance which is to ensure environmentally sustainable and socially responsible mining. So if a cluster or individual lease size exceeds 5 hectare, the EIA/ EMP should be completed in the process of grant of prior environment clearance.”</p> <p>17. Thus, even according to the Sustainable Sand Mining Management Policy issued by the MoEF&amp;CC by dispensing with Public Hearing, the judgment of the Hon'ble Supreme Court in the case of <i>Deepak Kumar (supra)</i> will stand defeated.</p> <p>18. We also find that parameters for consideration while preparing District Mining Plan (DMP) and District Survey Report (DSR) are only for the purpose of ascertaining whether an area is fit for mining which are quite different from the parameters laid down for EIA. The consideration of the view point of the public by keeping DSR in public domain is not a substitute of Public Hearing for consideration of the view point of the public for EIA.</p> <p>19. With specific reference to mining in cluster, the Report of the Committee of Secretaries, Ministry of Environment, Forest and Climate Change, 2010 recommended as follows:</p> |
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|  | <p><b>Item Nos.<br/>07 to 14</b></p> <p><b>September<br/>13, 2018</b></p> <p><b>DV &amp; AT</b></p> | <p><i>“Considering the nature of occurrence of minor mineral, economic condition of the lessee and the likely difficulties to be faced by Regulatory Authorities in monitoring the environmental impacts and implementation of necessary mitigation measures, it may be desirable to adopt cluster approach in case of smaller mine leases being operated presently.”</i></p> <p>20. This report which is a part of the Sustainable Sand Mining Management Guidelines, 2016 finds reinforcement in the Chapter “The Issues and Management of Mining in Cluster” referred to earlier where it has inter-alia been recommended as under:</p> <p><i>“The Hon'ble Supreme Court, NGT, SEAC/EAC and the Project Proponents have raised issue of cluster in mine lease allotment and environment clearance for the same, so following conditions need to be ensured for cluster of mines:</i></p> <ol style="list-style-type: none"> <li><i>1. To address the concern of adverse impact of minor mineral mining on environment it is proposed that all mining activity including river sand mining (above 5 hectare individual or cluster) will need to prepare Environment Impact Assessment Report and Environment Management Plan before grant of environment clearance. These reports (EIA /EMP) can be prepared by the State or State nominated Agency / the Project Proponent (s).</i></li> <li><i>2. As can be seen from the data provided by the States most of the mining leases for minor minerals are of lease area less than 5 hectare. It is also reported that in hill states getting a stretch in river with area more than 5 hectare is very uncommon. So the size of lease for minor minerals including river sand mining will be determined by the States as per their circumstances.</i></li> <li><i>3. The EIA Notification, 2006 does not provide for cluster EC, it provides for issuance of EC to individual project proponents and the same has also been upheld in the judgment of Hon'ble Supreme Court in Vijay Bansal vs. State of Haryana case. So EC will have to be applied for and issued to the individual project proponent.</i></li> <li><i>4. A cluster shall be formed when the distance between the peripheries of one lease is less than 500 meters from the periphery of other lease in a homogeneous mineral area.</i></li> <li><i>5. The mining of minor minerals is mostly in clusters. The Environment Impact Assessment or Environment Management</i></li> </ol> |
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| <div><div>Item Nos.<br/>07 to 14</div><div>September<br/>13, 2018</div><div>DV &amp; AT</div></div> | <p>Plan are required to be prepared for the entire cluster in order to capture all the possible externalities. These reports shall capture carrying capacity of the cluster, transportation and related issues, replenishment and recharge issues, geo-hydrological study of the cluster area. The Environment Impact Assessment or Environment Management Plan shall be prepared by the State or State nominated Agency or group of project proponents in the Cluster or the project proponent in the cluster.</p> <p>6. The individual lease holders in cluster can use the same Environment Impact Assessment or Environment Management Plan for application for environmental clearance. The cluster Environment Impact Assessment or Environment Management Plan shall be updated as per need keeping in view any significant change.</p> <p>7. There shall be one public consultation for entire cluster after which the final Environment Impact Assessment or Environment Management Plan report for the cluster shall be prepared.</p> <p>8. The details of cluster Environment Impact Assessment or Environment Management Plan shall be reflected in each environmental clearance in that cluster and District Expert Appraisal Committee (DEAC), SEAC, and EAC shall ensure that the mitigative measures emanating from the Environment Impact Assessment or Environment Management Plan study are fully reflected as environmental clearance conditions in the environmental clearance's of individual project proponents in that cluster.</p> <p>9. ....</p> <p>10. ....</p> <p>11. ....”</p> <p>21. Dispensing with the requirement of Public Hearing which forms a part of the Public Consultation under Stage-III of the Environmental Clearance process under EIA Notification, 2006 for areas measuring 0 to 25 ha for individual mine areas and in cluster situation where public hearing has been provided, has resulted in gross dilution of EIA Notification dated 14<sup>th</sup> September, 2006. Such dilution would, in our view, result in its misuse by unscrupulous elements and the situation would revert</p> |
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|  | <p><b>Item Nos.<br/>07 to 14</b></p> <p><b>September<br/>13, 2018</b></p> <p><b>DV &amp; AT</b></p> | <p>back to the lawless state prevailing prior to the decision in the case of <i>Deepak Kumar (supra)</i>. Stringent measures are, therefore, necessary if the rampant exploitation of the minor minerals is to be curbed. This apparently was also the view of the Hon'ble Supreme Court in the case of <i>Deepak Kumar (supra)</i>.</p> <p>22. For all these reasons, we direct that the procedure laid down in the impugned Notification be brought in consonance and in accord with the directions passed in the case of <i>Deepak Kumar (supra)</i> by (i) providing for EIA, EMP and therefore, Public Consultation for all areas from 5 to 25 ha falling under Category B-2 at par with Category B-1 by SEAC/ SIEAA as well as for cluster situation wherever it is not provided; (ii) Form-1M be made more comprehensive for areas of 0 to 5 ha by dispensing with the requirement for Public Consultation to be evaluated by SEAC for recommendation of grant EC by SEIAA instead of DEAC/DEIAA; (iii) if a cluster or an individual lease size exceeds 5 ha the EIA/EMP be made applicable in the process of grant of prior environmental clearance; (iv) EIA and/or EMP be prepared for the entire cluster in terms of recommendation 5 (<i>supra</i>) of the Guidelines for the purpose of recommendations 6, 7 and 8 thereof; (v) revise the procedure to also incorporate procedure with respect to annual rate of replenishment and timeframe for replenishment after mining closure in an area; (vi) the MoEF&amp;CC to prepare guidelines for calculation of the cost of restitution of damage caused to mined-out areas along with the Net Present Value of Ecological Services forgone because of illegal or unscientific mining.</p> |
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| <p><b>Item Nos.<br/>07 to 14</b></p> <p><b>September<br/>13, 2018</b></p> <p><b>DV &amp; AT</b></p> | <p>23. We have permitted retention of 0-5 ha as a category keeping in view that some States grant isolated single lease of 5 ha and less not falling in cluster situation for which stringent requirements in Form-1M will serve the purpose of providing safeguards for protection of the environment and sustainable mining of minor minerals. This is particularly true in smaller and mountainous States as will also appear from condition no. 2 under “The Issues and Management of Mining in Cluster” referred to earlier in para 20 of this order.</p> <p>24. It is reiterated that any attempt to split the lease area for the purpose of avoiding the applicable regulatory regime shall be viewed seriously. This in our view will be in the interest of the environment as deliberated in detail in the case of <i>Deepak Kumar (supra)</i> and would also satisfy the Precautionary Principle and the Principle of Sustainable Development contemplated under Section 20 of the National Green Tribunal Act, 2010.</p> <p>25. The MoEF&amp;CC shall, therefore, take appropriate steps to revise the procedure laid down in the impugned Notification dated 15<sup>th</sup> January, 2016 in terms of the above directions and observations so that it is conformity with the letter and spirit of the directions passed by the Hon’ble Supreme Court in <i>Deepak Kumar (supra)</i>.</p> <p>The applications stand disposed of.</p> <p>....., CP<br/>(Adarsh Kumar Goel)</p> <p>....., JM<br/>(Dr. Jawad Rahim)</p> |
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|  | <div>Item Nos.<br/>07 to 14</div> <div>September<br/>13, 2018</div> <div>DV &amp; AT</div> | <div>.....,JM<br/>(S.P. Wangdi)</div> <div>.....,EM<br/>(Dr. Nagin Nanda)</div> <div>13.09.2018</div> |
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