BANGLADESH

Dr. Mohiuddin Farooque v. Bangladesh
48 DLR 1996 (High Court Division) 438
Writ Petition No. 92/1996, D/-July 1st, 1996
Kazi Ebadul Hoque and Amirul Kabir Chowdhury JJ.

Constitution of Bangladesh, 1972

Article 102

Petitioner sought enforcement of fundamental right in public interest. Respondents do not challenge such claim of the petitioner. It needs then no consideration whether petitioner is entitled to the enforcement of such fundamental right in his own behalf or in public interest by marketing of such foods. ..... (7)

Articles 31 and 32

If right to life under Articles 31 and 32 of the Constitution means right to protection of health and normal longevity of an ordinary human being endangered by the use or possibility of use of any contaminated foods, etc. then it can be said that fundamental right of right to life of a person has been threatened or endangered.

As right to life guaranteed under Articles 31 and 32 of the Constitution includes protection of health and normal longevity of a man free from threats of man made hazards unless that threat is justified by law. Right to life under the aforesaid Articles of the Constitution being a fundamental right it can be enforced by this court to remove any unjustified threat to the health and longevity of the people as the same are included in the right to life. ..... (18-21)

Cases cited: Munn vs. Illinois (1877) 94 US 113; Francis Coralie vs. Union Territory of Delhi AIR 1981 (SC) 746; AIR 1984 (SC) 802; Olga Tellis vs. Bombay Municipal Corporation AIR 1986 (SC) 180; Vincent vs. Union of India AIR 1987 (SC) 990; Vikram Deo Singh vs. State of Bihar AIR 1988 (SC) 1782; Subash Kumar vs. the State of Bihar AIR 1991 (SC) 420 ref. ..... (9, 11-16)

Judgment

Kazi Ebadul Hoque J:- This Rule was issued at the instance of the petitioner Dr. Mohiuddin Farooque directing the respondents to show cause why they should not be directed not to release the skimmed milk powder imported under LC No. PB/Cash/238/94 dated 7-8-94 by respondent No. 6 as mentioned in radiation test certificate dated 8-1-95 issued by the Bangladesh Atomic Energy Commission's Radiation Testing Laboratory, Chittagong.

2. Facts leading to the issuance of this Rule are as follows: Respondent No. 6, Danish Condensed Milk Bangladesh Limited opened LC dated 7-8-94 for importing 500 metric tons of skimmed milk powder from Datraco BV Netherlands (Holland). Out of 500

metric tons 125 metric tons arrived on 17-10-94, 250 metric tons arrived on 10-11-94 and the remaining 125 metric tons arrived on 19-12-94 at Chittagong port. Earlier two consignments were duly cleared after completion of custom formalities and radiation test made by the Radiation Testing Laboratory, Chittagong. The last consignment had arrived at Chittagong port through MV Lanka Mohapola though the same was shipped from Rotterdam through MV Indira Gandhi. On 20-12-94 one sample of the skimmed powder milk out of the said 125 metric tons was collected and sent for testing to the Radiation Testing Laboratory, in short, RTL Chittagong of the respondent No. 3, Bangladesh Atomic Energy Commission. After testing the said sample in the RTL Chittagong and Health Physics Laboratory of respondent No. 3 in Dhaka, Director, RTL Chittagong issued a certificate of radiation test on 8-1-95 stating that he found 133 Bq radiation per kilogram which was above the minimum approved radiation level of 95 Bq. So, he opined that consignment in question should not be marketed in public interest and requested to take necessary action on emergency basis. Thereafter at the instance of SGS a survey and pre-shipment agency 5 samples from 5 containers containing the said 125 metric tons of skimmed powder milk were taken on 28-1-95 and sent directly to the respondent No. 3 in Dhaka for further test and one out of 5 samples was tested and Chief Health Physics Department, Dhaka of respondent No. 3 sent a letter on 4-2-95 to the SGS informing that radiation level found in the said sample was 15 Bq per kilogram which is below the approved radiation level for Bangladesh. Thereafter on 22-3-95 again 5 samples were collected from the 5 containers. Thereafter on 29-3-95 and 11-4-95 Director RTL Chittagong raised objection against sending of the said samples for further test. Thereafter on 5-4-95 respondent No. 4 Collector of Customs directed the importer respondent No. 6 to send back the aforesaid milk powder to the exporter as the radiation level of the same was above acceptable limit. Thereafter on 20-4-95, Secretary of respondent No. 3 asked respondent No. 4 that the Atomic Energy Commission decided that random sampling from each container of the relevant consignment should be collected in presence of Director, RTL, Chittagong. Thereafter on 19-6-95 the said Secretary informed the respondent No. 2 Secretary, Ministry of Science and Technology to direct the respondent No. 4 to take action as per his earlier letter dated 20-4-95. Thereafter Senior Assistant Secretary of the said Ministry by letter dated 2-7-95 informed the respondent No. 3 that Atomic Energy Commission could take the following steps:

(a) RTL, Chittagong be asked to make radiation test in conformity with their previous test;

(b) On the basis of random sampling detailed test be made and thereafter certificate be granted by the central office.

3. In the meantime on 25-5-95 said exporter M/S Datraco BV filed Other Class Suit No. 49/1995 in the 3rd Court of Assistant Judge, Chittagong impleading respondent Nos. 1, 4 and 6 as defendants praying for declaration that the order of reshipment dated 5-4-95 on the basis of radiation test certificate dated 8-1-95 without re-examination of the goods as per letter dated 20-4-95 of the Bangladesh Atomic Energy Commission, Dhaka was illegal, motivated and without jurisdiction. Plaintiff also prayed for a decree for mandatory injunction directing the respondent No. 4 for re-testing the goods as per letter

dated 20-4-95. Thereafter on 1-7-95 prayer of the said plaintiff for temporary mandatory injunction was rejected by the Assistant Judge. Being aggrieved by the same said plaintiff filed Misc. Appeal No. 195 of 1995 and by order dated 9-9-95 learned District Judge allowed the appeal and directed the respondent Nos. 3, 4 and 6 to retest and re-examine the milk powder in question. In the meantime Chief Metropolitan Magistrate, Chittagong allowed the prayer of the police for seizure of the consignment in question on 19-6-95. Thereafter on 22-7-95 Chief Metropolitan Magistrate allowed the prayer of the police for destruction of the said goods. Thereafter on 2-8-95 Chief Metropolitan Magistrate rescinded his order dated 22-7-95 but maintained the order of seizure dated 19-6-95. In Criminal Motion No. 767 of 1995 Session Judge set aside the order of seizure dated 19-6-95. In pursuance of the aforesaid direction of the learned District Judge, RTL Chittagong on 15-5-95 informed Collector of Customs that sample would be collected on 22-10-95. But on 22-11-95 importer requested for refixing the date for collection of the sample. Thereafter on 4-12-95 samples were collected. After retest RTL Chittagong found level of radiation in the 5 samples collected from one container above the acceptable limit and in the remaining samples below the said limit. On the other hand, Institute of Nuclear Science and Technology, Savar of respondent No. 3 found level of radiation in 10 samples collected from two containers above the acceptable limit and the remaining samples below such limit.

4. Petitioner submitted that as Secretary General of Bangladesh Environmental Lawyers Association (BELA) he filed the Writ Petition in public interest as consumption of imported food item containing radiation level above the acceptable limit and injurious to public health is a threat to the life of the people of the country including himself who are potential consumers of such goods. Under Article 18(1) of the Constitution State is bound to take measures to raise the level of nutrition and improvement of public health and under Article 21 (2) persons in the service of the Republic have a duty to strive to serve the people. But activities of the Government officers and officers of the Atomic Energy Commission in dealing with the consignment in question injurious to public health have threatened life of the people. He therefore contended that under Articles 31 and 32 of the Constitution right to life is a fundamental right and the actions of those officers in not compelling importer respondent No. 6 to send back imported milk powder in question injurious to public health has violated the aforesaid fundamental right to life and, as such, the respondents should be directed to take measures for sending back the said milk powder to the exporter.

5. Though the Rule was served on all the respondents except respondent Nos. 3 and 6 no other respondents appeared to contest the Rule.

6. Learned Advocate for the respondent No. 6 submitted that after retesting in Chittagong and Savar Laboratories of the respondent Nos. 3 in compliance of the order of the learned District judge radiation level in the entire consignment was not found above the acceptable limit and, as such, entire consignment of the imported powder milk cannot be directed to be sent back. He further submitted that since the suit filed by the exporter is still pending this court in exercise of its writ jurisdiction should not enter into the determination of question of fact which should be left to the court below in which the suit is pending.

7. In this Rule petitioner seeks enforcement of fundamental right under Articles 31 and 32 of the Constitution on the allegation that right to life of the people of country including himself who are the potential consumers of the condensed milk prepared using the imported milk powder is under threat. Petitioner claimed that he sought enforcement of the aforesaid fundamental right in public interest. Respondents do not challenge such claim of the petitioner. So we need not consider as to whether petitioner is entitled to the enforcement of such fundamental right in his own behalf or in public interest.

8. Let us see what is the meaning of right to life under Articles 31 and 32 of the Constitution of Bangladesh and whether such right has been threatened as alleged by him and whether he is entitled to the relief sought for or to any other relief.

Articles 31 and 32 of the Constitution are as follows:

> "31. To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.
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> 32. No person shall be deprived of life or personal liberty save in accordance with law."

9. Under Article 31 of the Constitution no action detrimental to life, liberty, body, reputation or property of any person can be taken except in accordance with law and a person including a citizen is entitled to protection of law and entitled to be treated in accordance with law for the preservation and protection of life, liberty, etc. Under Article 32 no person shall be deprived of his life or personal liberty save in accordance with law. Under both the above Articles, life cannot be endangered except in accordance with law. So right to life is a fundamental right subject to law of the land. Since right to life has not been interpreted in our domain we are to see what is the meaning of right to life. In the absence of any such interpretation from our domain we may see what meaning was given by the superior courts of other countries to right to life. Fifth Amendment of the Constitution of the United States of America declares: "No person shall be deprived of his life, liberty or property without due process of law". Fourteenth Amendment also imposes similar limitation on the state. In the case of Munn vs. Illinois (1977) 94 US 113 in his dissenting judgment Field J. interpreted "life" under the aforesaid provisions of the US Constitution as follows: "Something more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with outer world."

10. Article 21 of the Constitution of India provides: "No person shall be deprived of his life or personal liberty except according to procedure established by law". Indian Supreme Court interpreted the right to life under the aforesaid Article 21 of the Indian Constitution similar to our Article 32 in several cases.

11. In the case of *Francis Coralie vs. Union Territory of Delhi* reported in AIR 1981 (SC) 746, right to life under Article 21 of the Indian Constitution has been interpreted in the following words:

> "But the question which arises is whether the right to life is limited only to protection of limb or faculty or does it go further and embraces something more. We think that the right to life includes the right to life with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings."

12. In the case of Bandhua Mukti Morcha vs. Union of India reported in AIR 1984 (SC) 802, Supreme Court of India while interpreting Article 21 of the Indian Constitution further extended the meaning of right to life as made in the earlier case in the following words:

> " ..... It must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief."

13. In the case of *Olga Tellis vs. Bombay Municipal Corporation* reported in *AIR 1986 SC 180* Supreme Court of India while interpreting Article 21 of the Indian Constitution further extended the meaning of right to life in the following words:

> "The sweep of right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood, because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That which above alone makes it possible to live, leave aside what makes life liveable, must be deemed to be an integral component of right to life."

14. In the case of *Vincent vs. Union of India* reported in *AIR 1987 (SC) 990* learned Judge delivering the judgment in that case quoted with approval interpretation of right to life made by the Indian Supreme Court in the *Bandua Mukti Morcha* case and held:

> "A healthy body is the very foundation for all human activities. ..... In a welfare state, therefore, it is the obligation of the State to ensure the creation and the sustaining of conditions congenial to good health..... Maintenance and improvement of public health have a rank high as these are indispensable to the very physical existence of the community and on the betterment of these depends the building of the society of which the Constitution makers envisaged."

15. In the case of *Vikram Deo Singh vs. State of Bihar* reported in *AIR 1988 SC 1782* it was further held:

> "We live in an age when this court has demonstrated, while interpreting Article 21 of the Constitution, that every person is entitled to quality of life consistent with his human personality. The right to life with human dignity is the fundamental right of every Indian citizen."

16. In the case of *Subash Kumar vs. the State of Bihar* reported in *AIR 1991 SC 420* it was further held:

> "Right to live is a fundamental right under Article 21 of the Constitution and it includes the right to enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life."

17. From the above decisions it appears that right to life is not only limited to the protection of life and limbs but extends to the protection of health and strength of workers, their means of livelihood, enjoyment of pollution-free water and air, bare necessaries of life, facilities for education, development of children, maternity benefit, free movement, maintenance and improvement of public health by creating and sustaining conditions congenial to good health and ensuring quality of life consistent with human dignity.

18. In the instant case before us the question is whether alleged contaminated imported milk powder endangers or may endanger life of the petitioner and other people living in the country violating the fundamental right of right to life. If right to life under Articles 31 and 32 of the Constitution means right to protection of health and normal longevity of an ordinary human being endangered by the use or possibility of use of any contaminated foods, etc. then it can be said that fundamental right of right to life of a person has been threatened or endangered.

19. Fundamental Principle of State Policy under Article 18(1) of the Constitution provides:

> "18(1) The State shall regard the raising of the level of nutrition and the improvement of public health as among its primary duties, and in particular shall adopt effective measures to prevent the consumption, except for medical purpose or for such other purposes as may be prescribed by law, of alcoholic and other intoxicating drinks and of drugs which are injurious to health."

20. Though the aforesaid provision cannot be enforced by the court it can be seen for interpreting the meaning of right of life under Articles 31 and 32 of the Constitution. A man has natural right to the enjoyment of healthy life and longevity up to normal expectation of life of an ordinary human being. Enjoyment of a healthy life and normal expectation of longevity is threatened by disease, natural calamities and human actions. When a person is grievously hurt or injured by another his life and longevity are threatened. Similarly, when a man consumes food, drink, etc. injurious to health he suffers ailments and his life and normal expectation of longevity are threatened. Natural right of a man to live free from all the man made hazards of life has been guaranteed under the aforesaid Articles 31 and 32 subject to law of the land. Use of contaminated food, drink, etc be it imported or locally produced, undoubtedly affects health and threatens life and longevity of the people. In a country like ours where most of the people are illiterate they are unable to distinguish between contaminated and contamination free food, drinks, etc. In such circumstances marketing of contaminated food items is a potential danger to the health of the people ultimately affecting their life and longevity, as most of the people are unable to avoid such food. Even for an educated person it is difficult to distinguish between contaminated and contamination-free food, drink, etc. No one has any right to endanger the life of the people which includes their health and normal longevity of an ordinary healthy person by marketing in the country any food item injurious to health of the people. We are, therefore, of the view that right to life under Articles 31 and 32 of the Constitution not only means protection of life and limbs necessary for full enjoyment of life but also includes, amongst others, protection of health and normal longevity of an ordinary human being.

21. It is the primary obligation of the State to raise the level of nutrition and the improvement of public health by preventing use of contaminated food, drink, etc. Though that obligation under Article 18(1) of the Constitution cannot be enforced state is bound to protect the health and longevity of the people living in the country as right to life guaranteed under Articles 31 and 32 of the Constitution includes protection of health and normal longevity of a man free from threats of man-made hazards unless that threat is justified by law. Right to life under the aforesaid Articles of the Constitution being a fundamental right it can be enforced by this court to remove any unjustified threat to the health and longevity of the people as the same are included in the right to life.

22. In exercise of powers conferred by sub-section (1) of section 3 of the Imports and Exports (Control) Act 1950, Import Policy Order 1993-95 was published in the Bangladesh Gazette dated 6-10-93. Clause (a) of Article 10(11) of the said order provides that test of radioactivity level of certain imported food items including milk food or milk product is mandatory and in the said article detailed provisions have been made for collection of samples, and conducting test of such food items. Clause (O) of the said Article 10(11) provides that acceptable limit of radioactivity of milk powder, milk food and milk products are 95 Bq of CS-137 per kilogram. Clause (e) of said Article 10(11) provides that if on test of the sample, taken from the consignment, by Bangladesh Atomic Energy Commission it is found that the consignment contains radioactivity level above the acceptable limit the consignment shall not be released and the concerned exporter/supplier shall be bound to take it back at his own expense.

23. Before publication of the Import Policy Order 1993-95 on 22-7-93 the Nuclear Safety and Radiation Control Act 1993 (Act No. XXI of 1993) was enacted. Section 3(Ka) of the said Act provides that Bangladesh Atomic Energy Commission may make rules and policy and give orders and directions for effectuating such rules and policy for nuclear Safety and Radiation Control and disposal of radiated wastes. Section 3(ja) of the said Act provides that the Commission shall determine the acceptable limit of radiation in the air, food and drink used by men and animals or on any other materials used in any other way. Sub-section (3) of section 6 of the said Act provides that unless otherwise proved in a court of law report or test result sent by the laboratories maintained or approved by the Commission shall be accepted as evidence. Thus it appears that Government is conscious about the threat to life of the people of this country by the use of food items having radiation level above acceptable limit and to prevent import or use of such food items above law and policy order have been made.

24. Grievance of the petitioner is that due to the action and inaction of the Government functionaries in spite of detection of high level of radioactivity in the imported milk powder in question the same has not yet been sent back to the exporter though the exporter was bound under the terms and conditions of the letter of credit to take back the same after detection of radioactivity level above the acceptable limit of 95 Bq.

25. It has already been noticed that on 8-1-95 Director, RTL, Chittagong in his certificate stated that radioactivity level in the sample of milk powder examined was 133 Bq per kilogram which is much above acceptable limit of 95 Bq per kilogram and, as such, he requested not to market the milk powder in question so that the same did not come within the reach of the people. Before granting the said certificate the said officer on 31-11-94 informed the respondent No. 4 that certificate could not be granted before completion of the test of the sample in question in the different laboratories of the respondent No. 3. Thereafter on 5-1-95 the said officer received a letter from the Director, Bangladesh Atomic Energy Commission, Dhaka informing him that no certificate can be issued for releasing the said milk powder as radiation level was above the permissible limit of 95 Bq per kilogram and with the said letter a copy of the test result conducted by Mr. Fazlay Karim Mia on 31-12-94 stating that radiation level was 15.6+17.7(1) Bq per kilogram of 137 Cs. The very officer Mr. Fazlay Karim Mia on 4-2-95 sent a letter to SGS (Bangladesh) limited stating that on examination of one sample of milk powder he found radiation level of 15 Bq in 137 Cs which is below the acceptable limit. In spite of the same respondent No. 4 on 5-4-95 directed the importer respondent No. 6 to send back the imported milk powder to the exporter on the basis of the certificate dated 8-1-95 earlier issued by the Director, RTL, Chittagong who issued the same on the basis of the letter dated 5-1-95 sent by the Director, Atomic Energy Commission, Dhaka. But thereafter on 20-4-95 the secretary of respondent No. 3 requested respondent No. 4 to collect random samples in presence of the Director RTL, Chittagong for testing the same at Chittagong and at the Institute of Nuclear Science and Technology, Savar. He did not rest there and also requested the Secretary, Ministry of Science and Technology to direct the respondent No. 4 to take action on the basis of his letter dated 20-4-95 and thereafter on 2-7-95 Senior Assistant Secretary directed the respondent No. 3 for collecting random samples and for testing the same. It is not understood under what authority the said officers took

decision for re-testing the fresh samples for the imported milk powder in question after certificate was issued by the Director, RTL, Chittagong with the approval of the Director of the respondent No. 3 on the basis of further test held by Mr. Fazlay Karim Mia, Chief Scientific Officer of respondent No. 3. It is curious to note that Mr. Fazlay Karim Mia subsequently on 4-2-95 informed the SGS (Bangladesh) Limited that after testing one sample of milk powder he found radiation level per kilogram at 15 Bq which is contrary to his earlier test result dated 31-12-94. These activities of the officers of the respondent Nos. 1-4 rightly created an apprehension in the mind of the petitioner that attempts were being made to release the milk powder in question though no such certificate was officially issued by the respondent No. 3 and sent to the respondent No. 4 as required under Import Policy Order 1993-95.

26. The riddle created by such contradictory test reports can be solved if we examine the test reports sent by the Secretary of respondent No. 3 to the District Judge, Chittagong on 21-1-96 (Annexure IV) after examining 50 sets of samples. It appears from the said reports that out of 50 sets of samples, 25 sets were tested at RTL Chittagong and remaining 25 sets were tested at the Institute of Nuclear Science and Technology, Savar separately. It appears from the text report of RTL, Chittagong dated 5-12-95 annexed to that letter that 5 samples were collected from each of the 5 containers and in total 25 samples thus collected from 5 containers were examined by the RTL, Chittagong and the said laboratory found radioactivity level in 5 samples collected from container No. GSTU 621695(O) of Estonia origin between 126 to 166 Bq per kilogram and radioactivity level in the remaining 20 samples collected from 4 other containers was found below the acceptable limit. It further appears from test report dated 14-1-96 of the Institute of Nuclear Science and Technology Savar that it also examined 25 samples collected from 5 containers in the above manner and it found radioactivity level in 5 samples collected from container No. GSTU 708944(3) of Estonia origin between 124 to 177 Bq per kilogram and in the 5 samples collected from container No. GSTU 621695(O) of Estonia origin between 244 to 362 Bq per kilogram and found radioactivity level in the remaining 15 samples collected from the remaining 3 containers below the acceptable limit.

27. It has been asserted by respondent No. 6 in his affidavit-in-opposition that first sample collected on 20-12-94 and tested by the RTL, Chittagong was taken from container No. GSTU 621695(O). But there is no statement from which container sample tested by Mr. Fazlay Karim Mia at the instance of SGS was taken. From the above admission of the respondent No. 6 and the last test result it appears that Director RTL, Chittagong on both occasions found radiation level in the sample collected from container No. GSTU 621695(O) above the acceptable limit and the same was confirmed by the test report dated 31-12-94 of the said Mr. Fazlay Karim Mia and test result dated 14-1-96 of the Institute of Nuclear Science and Technology, Savar. So it can safely be concluded that test report mentioned by Mr. Fazlay Karim Mia in his letter dated 4-2-94 must have been on the basis of the sample collected from one of the 3 other containers in which radiation level was found below the acceptable limit in the final tests made by both the RTL, Chittagong and INST, Savar.

28. It has already been noticed that exporter of the milk powder in question filed Other Class Suit No. 49 of 1995 in the 3rd court of the Assistant Judge, Chittagong on 28-5-95 praying for two reliefs already noted above. Out of two reliefs prayer for mandatory injunction for re-examination of the goods in question on the basis of letter dated 20-4-95 of the secretary of the respondent No. 3 has already been indirectly granted by allowing the prayer for temporary mandatory injunction by the District Judge in Misc. Appeal No. 195 of 1995 on 9-9-95. Now the remaining prayer for declaration of letter dated 5-4-95 issued by the respondent No. 3 for sending back the imported milk powder in question as illegal and without jurisdiction is pending decision in that suit. In that view of the matter we do not think it advisable to give any direction to the respondent to send back the milk powder in question, as the same is subjudice before a subordinate court.

29. It appears that expiry date of milk powder of Lithuania Origin is 1-8-96 and that of Estonia origin are 13-9-96 and 14-9-96. In the supplementary affidavit filed on behalf of the respondent No. 6 it has been stated that if condensed milk is prepared using milk powder within expiry date then life of the condensed milk is extended. Since we have left the matter to be decided by the court below this question may be raised there.

30. Article 10(11) of the Import Policy Order 1993-95 made detailed previsions for test of radioactivity level of imported food items including milk powder and also for sending back the food items containing radioactivity level above the acceptable limit. It appears that respondent No. 4 who is the defendant No. 1 in the said suit contested the prayer for temporary injunction but it is not known whether the suit is also being contested or not by filing written statement. None appeared in this Rule to represent the respondent No. 4 as well as the Government respondent Nos. 1 and 2. Only respondent No. 3 appeared and filed affidavit-in-opposition.

31. We have already indicated that we are not deciding this Rule on merit, as the relief sought by the petitioner in this Rule is subjudice before the court below. But we have found that right to life is an important fundamental right guaranteed under Articles 31 and 32 of the Constitution. We have also found that Government by enacting the aforesaid Act XXI of 1993 and also publication of Import Policy Order 1993-95 imposed restriction on the import of food items including milk powder containing radioactivity level above 95 Bq per kilogram injurious to public health to protect life of the people of this country from the hazards likely to be created by consumption of such injurious food items. But actions taken by the officers of the Government and Atomic Energy Commission created confusion and situation leading to litigations.

32. On consideration of the materials on record we have noticed the anomaly in the collection of the samples of the imported milk powder for radioactivity test. Nothing has been produced before us to show that either the Collector of Customs or the Atomic Energy Commission can arrange collection of sample/samples repeatedly and make several tests. It has also been found that after collection of sample the same is tested by the RTL, Chittagong which is a laboratory of the respondent No. 3 Bangladesh Atomic Energy Commission and if radioactivity level is found by the said laboratory above acceptable limit then it sends the remaining quantity of the sample tested by RTL for further test in other laboratories maintained by respondent No. 3. But no rule and

regulation or instruction of the Atomic Energy Commission made under the provisions of Act XXI of 1993 has been produced before us to show whether there is any provision for further test collecting fresh samples. It appears from office Memo 7288 dated 7.2.88 issued by the assistant Secretary, Ministry of Commerce that only one sample should be collected for examination of radio activity level of milk food and milk products, etc. imported from the same source and country under the same brand name by one ship under the same LC though under different invoices and bills of lading. Sub-Clause (03) of Clause (d) of Article 10(11) of the Imported Policy Order 1993-95 also provided for collection of samples of different food items in respect of which radioactivity level is to be tested and on arrival of the ship carrying such items in presence of the importer's representative, master of the ship or representative of the port authority as the case might be, samples of such food items are collected for testing radioactivity level. There is nothing in the said provision or anywhere also that samples can be collected more than once. It appears from the said provision that sample so collected shall be handed over to the officer of the Bangladesh Atomic Energy Commission for test and the laboratory of Bangladesh Atomic Energy Commission shall within 24 hours send the test report to the sample room of the Collector of Customs from where the sample was received. Though there is no mention in the said provision about Radiation Test Laboratory (RTL) Chittagong it appears that such a laboratory was in the view of the makers of the Import Policy Order from the time limit of 24 hours fixed for sending the test report.

33. In the above facts, circumstances and law we are of the view that to avoid confusion, anomaly and litigations and to ensure enforcement of the fundamental right of right to life some directions should be given to the respondent Nos. 1 to 4 for better implementation of the Import Policy Order for the control of imported food items injurious to public health in respect of collection of samples and testing the same for determination of radioactivity level so that in future injurious food items can not enter into the country to adversely affect the health of the people jeopardizing their life, longevity and normal life expectancy by the consumption of such injurious food items. We shudder to think that the exporter who assured that milk powder in question was within the acceptable limit of radioactivity level as per certificate issued by the SGS could contain a portion having radioactivity level much above the acceptable limit and in the final test made in the two laboratories of respondent No. 3 radioactivity level in the samples collected from two out of five containers could be found much above the acceptable limit. Had the sample been collected from one of the remaining three containers at the very inception and tested then high radioactivity level in the two containers could not be detected and such contaminated food items would have entered into the market and affected the health, life and longevity of the people. Nobody knows how many such injurious food items have been imported in this country taking advantage of the existing system of collection and testing of one sample only. So in the fitness of things it is necessary to formulate foolproof method of collection of samples and testing the same so that contaminated food, etc. injurious to health cannot enter into the country.

34. Till such fool proof effective methods are evolved by the authorities we direct the respondent No. 4 Collector of Customs to collect more than one samples if the cargo in question subject to test is brought in through more than one containers (i.e. one sample

from each of the containers containing the cargo in question) and to send the same for test to the Director, RTL, Chittagong and not to send any sample/samples to the Atomic Energy Commission, Dhaka for further test in any other laboratory under it after receipt of the report of test from the Director RTL. We also direct the respondent No. 3, Bangladesh Atomic Energy Commission not to receive any sample or samples for test direct from the Collector of Customs unless sent through the Director, RTL so long contrary rules, regulations or instructions are not made or issued by the Commission in exercise of its powers under section 3 and 16 of Act XXI of 1993.

35. Respondent-Government and Collector of Customs who are defendant Nos. 1 and 2 in the said suit are directed to contest the said suit by filing written statement, if not already filed, and take all steps for production of evidence and relevant materials before the court below to enable it to adjudicate the matter in accordance with law and evidence so that the plaintiff can not obtain an *exparte* decree by the default of the said defendants.

36. Court below will be at liberty to decide the case in accordance with law and evidence adduced before it free from the opinion expressed and observation made in this judgment.

In the result, the Rule is made absolute in part without any order as to costs with the above directions to the respondent Nos. 1 to 4. Let a copy of the judgment be sent to the respondent Nos. 1 to 4.

Dr. Mohiuddin Farooque v. Bangladesh
49 DLR 1997 (Appellate Division) 1
Civil Appeal No. 24 of 1995; D/- 25th of July 1996
A.T.M. Afzal, C J.; Mustafa Kamal, Latifur Rahman, Mohammad Abdur Rouf and Bimalendu Bikash Roy Chowdhury, JJ.

Constitution of Bangladesh, 1972

Article-102

'Any person aggrieved' and 'Sufficient interest'

> *The expression 'any person aggrieved' approximates the test of or if the same is capsulized, amounts to, what is broadly called, ''insufficient interest'. Any person other than an officious intervener or a wayfarer without any interest in the cause beyond the interest of the general people of the country having sufficient interest in the matter in dispute is qualified to be a person aggrieved and can maintain an action for judicial redress of public injury arising from breach of some public duty or for violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. The real test of 'sufficient interest', of course, essentially depends on the co-relation between the matter brought before the Court and the person who is bringing it.* **[Per A. T. M. Afzal, C.J;]**
>
> **(Para-8)**

‘Any person aggrieved’

The expression ‘any person aggrieved’ is not confined to individual affected persons only but it extends to the people in general, as a collective and consolidated personality. If an applicant bona fide espouses a public cause in the public interest he acquires the competency to claim a hearing from the Court. **[Per Mustafa Kamal, J.]**

(Paras-48 and 51)

The appellant as an environmental association of lawyers is ‘a person aggrieved’ be cause the cause it bona fide exposes, both in respect of fundamental rights and constitutional remedies, is a cause of an indeterminate number of people in respect of a subject-matter of great public concern. **[Per Mustafa Kamal, J.]**

(Para-53)

Beneficial and meaningful interpretation of the language of the Constitution

The language used by the framers of the Constitution must be given a meaningful interpretation with the evolution and growth of the society. An obligation is cast upon the Constitutional Court, which is the apex Court of the country, to interpret the Constitution in a manner in which social, economic and political justice can be advanced for the welfare of the state and the citizens. **[Per Latifur Rahman, J.]**

(Para-74)

Locus standi

When a person a approaches the Court for redress of a public wrong or public injury, though he may not have any personal interest, must be deemed to have ‘sufficient interest’ in the matter if he acts bona fide and not for his personal gain or private profits or for any oblique considerations. In such a case he has locus standi to move the High Court Division under Article 102 of the Constitution. **[Per Latifur Rahman, J.]**

(Para-78)

“Person Aggrieved”

The expression ‘person aggrieved’ means not only any person who is personally aggrieved but also one whose heart bleeds for his less fortunate fellow-beings for a wrong done by the Government or a local authority in not fulfilling its constitutional or statutory obligations. It does not, however, extend to a person who is an interloper and interferes with things which do not concern him. This approach is in keeping with the constitutional principles that are being evolved in the recent times in different countries of the world. **[Per B. B. Roy Choudhury, J.]**

(Para-98)

Article-31 and 32

Although we do not have any provision like article 48-A of the Indian Constitution for protection and improvement of environment, articles 31 and 32 of our Constitution protect right to life as fundamental right. It encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water,

sanitation without which life can hardly be enjoyed. Any act or omission contrary thereto will be violative of the said right to life. **(Per B. B. Roy Choudhury, J)**

(Para-102)

Bangladesh Sangbad Patra Parishad Case 43 DLR (AD) 126; In the case of Kazi Mukhlesur Rahman, 26 DLR (SC) 44; S.P. Gupta and others, AIR 1982 (SC) 149; Sierra Club Vs. Morton, 401 O.S. 907 (1971) (No. 70-34); 45 S. Cal. L. Rev. 450 (1972); Ex parte Sidebotham (1880) 14 Ch. D. 458; (1887) 19 QBD 174; Durayappah Vs. Fernando, (1967) 2AC337; Md. Giasuddin Bhuiyan Vs. Bangladesh 1 (1981) BCR (AD) 81; [1990] 1 All. E.R. 754; Muntizma Committee Vs. Director Katchi Ahadies, Sindh, PLD 1992 (Karachi) 54; R. Vs. Commissioner of Police, *ex parte* Blackburn. (1968) 2 QB 118; Blackburn Vs. Attorney General (1971) 1 WLR 1037; R Vs. Police commissioner, *ex parte* Blackburn (1973) QB 241; R Vs. GLC ex parte Blackburn (1976) 1 WLR 550; 1RC Vs. National Federation of Self Employed and Small Business Ltd. [1981] 2 All ER 93; R. V. Secretary of State, *ex parte* Rose Theatre Trust Co. [1990] 1 All. E. R. 754 (766); Mian Fazal Din Vs. The Lahore Improvement Trust, 21 DLR (SC) 225; Benazir Bhutto Vs. Federation of Pakistan, PLD 1988 (SC) 416; Shehla Zia Vs. WAPDA. PLD 1994 (SC) 693; The South Asian Environmental Law Reporter, Vol. 13, September, 1994, Colombo, Sri Lanka, PP 113-145; S.P. Gupta and others Vs. Union of India and others, better known as the Judge's Case (1981) AIR Supreme Court 344; Fertiliser Corporation Kamagar Union Vs. Union of India, (1981) AIR (SC) 344; The Devil's Disciple, (1897), Act II; World Commission on Environment and Development; Our Common Future: World Commission on Environment and Development Published by Oxford University Press in 1987; Virender Gaur Vs. State of Haryana, (1995) 2 SCC 577 (580); Constitution at Law of Bangladesh-Mahmudul Islam; - Cited.

Judgement:

A. T. M. Afzal, C.J: We all agreed that the appeal shall be allowed and the writ petition be remitted to the High Court Division for hearing on merit. For writing out the judgement, I requested brother Mustafa Kamal, J. who was the author of the decision in the Bangladesh Sangbad Patra Parishad case 43 BLD (AD) 126 which, we felt, was wrongly applied by the High Court Division in the present case. I thought I would have nothing more to contribute except putting a signature to the common judgement. The euphoria, however, became short-lived when I found two extra judgements written by my brothers, Latifur Rahman and Bimalendu Bikash Roy Choudhury, JJ. over and above the exhaustive judgement prepared by Mustafa Kamal, J. I had to go through all these Judgements and have no option now but to write few lines to justify my participation.

2. Facts of the case and the relevant decisions have been noticed fully in the main judgement. I shall therefore avoid repetition.

3. As to the core question in this appeal, whether the expression 'any person aggrieved' occurring in article 102(1) and (2)(a) of the Constitution should be liberated from the traditional an restrictive meaning so far attributed to it in the sense that to get a hearing the person must bring a legal and personal cause only, I should think it will be too late in the day to try and give an answer to the question in the negative. Reasons why? Brother

Mustafa Kamal, J. in particular has elaborately set them out in his judgement in the historical and constitutional perspective with which I agree entirely.

4. The liberalized view as expounded by my brother is an update, if I may say so, of the liberalization agenda which was undertaken in the case of Kazi Mukhlesur Rahman, 26 DLR (SC) 44. It is a matter of some pride that quite early in our Constitutional Journey the question of *locus standi* was given a liberal contour in that decision by this Court at a time when the Blackburn cases were just being decided in England which established the principle of "sufficient interest" for a standing and the doctrine of public interest litigation or class action was yet to take roots in the Indian Jurisdiction. The springboard for the liberalization move was the momentous statement made in that case:

> "It appears to us that the question of *locus standi* does not involve the Court's jurisdiction to hear a person but of the competency of the person to claim a hearing, so that the question is one of discretion which the court exercises upon due consideration of the facts and circumstance of each case".

5. The appellant in that case was found to be a person aggrieved not because he brought any personal grievance before the Court but because, to quote from the judgement itself, "we heard him in view of the constitutional issue of grave importance raised in the instant case involving an international treaty affecting the territory of Bangladesh and his complaint as to an impending threat to his certain fundamental rights guaranteed by the constitution, namely, to move freely throughout the territory of Bangladesh, to reside and settle in any place therein as well as his right of franchise. Evidently, these rights attached to a citizen are not local. They pervade and extend to every inch of the territory of Bangladesh stretching up to the continental shelf."

6. Two principles were established in that case,-1) that when there is a threat to a fundamental right of the citizens any one of them can invoke the jurisdiction under article 102 of the Constitution, that any citizen from any part of the country can become a petitioner and 2) that if a constitutional issue of grave importance is raised (in that case it was an international treaty affecting territory of Bangladesh) a petitioner qualifies himself to be a person aggrieved.

7. In the Bangladesh Sangbad Patra Parishad case 43 DLR (AD) 126 although it has been found that the Parishad could not maintain the writ petition in a representative capacity on behalf of its members and approval was given to the decision in the case of Dada Match Workers Union 29 DLR 188 holding that a trade Union cannot maintain an application under article 102 of the Constitution asking for relief for its members, the principles enunciated in Kazi Mukhlesur Rahman's case were not departed from. It was observed that the Parishad was not espousing the cause of a downtrodden and deprived section of the community unable to spend money to establish its fundamental right and enforce its constitutional remedy. The indication was thus broadly given that in case of a violation of any fundamental right of the citizens affecting particularly the weak, downtrodden or deprived section of the community or that if there is a public cause involving public wrong or public injury, any member of the public or an organisation, whether being a sufferer himself/itself or not may become a person aggrieved if it is for

the realization of any of the objectives and purposes of the Constitution. In this connection our attention has been drawn to the case of Retired Government Employees, 46 DLR 426 in which the High Court Division held that the petitioner – Bangladesh Retired Government Employees Welfare Association was a person aggrieved within the meaning of clauses (1) (2) of article 102 of the Constitution since the Association has an interest in ventilating the common grievance of all its members who are retired Government Employees. For fulfilling the constitutional promise of economic Justice, the Court can look upon the case of the retired Government employees differently from that of the media magnates and there comes the question of discretion of the Court to hear their representative or not. However, we reserve our final opinion in this matter as, we are told, an appeal is pending before us against the judgement of the High Court Division in that case.

8. The liberal interpretation given to the expression 'any person aggrieved' in the judgements of my learned brothers, in my opinion, approximates the test of or if the same is capsulized, amounts to, what is broadly called, 'sufficient interest'. Any person other than an officious intervener or a wayfarer without any interest or concern beyond what belongs to any of the 120 million people of the country or a person with an oblique motive, having sufficient interest in the matter in dispute is qualified to be a person aggrieved and can maintain an action for judicial redress of public injury arising from breach of public duty or for violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. Now what is 'sufficient interest' will essentially depend on the co-relation between the matter brought before the court and the person who is bringing it. It is not possible to lay down any strait-jacket formula for determining sufficient interest which may be applicable in all cases. Of necessity the question has to be decided in the facts of each case as already pointed out in the case of Kazi Mukhlasur Rahman. This topic has been eloquently summed up by the Indian Supreme Court in the case of S. P. Gupta and others, AIR 1982 SC 149 and I fully subscribe to that statement. It reads:

> "What is sufficient interest to give standing to a member of the public would have to be determined by the Court in each individual case. It is not possible for the Court to lay down any hard and fast rule or any strait-jacket formula for the purpose of defining or delimiting 'sufficient interest'. It has necessarily to be left to the discretion of the Court. The reason is that in a modern complex society which is seeking to bring about transformation of its social and economic structure and trying to reach social justice to the vulnerable section of the people by crating new social, collective 'diffuse' rights and interests imposing new public duties on the State and other public authorities infinite number of situations are bound to arise which cannot be imprisoned in a rigid mould or a procrustean formula. The Judge who has the correct social perspective and who is on the same wavelength as the Constitution will be able to decide, without any difficulty and in consonance with the constitutional objectives, whether a member of the public moving the court in a particular case has sufficient interest to initiate the action."

9. A person pleading sufficient interest may be able to cross, what is called, the threshold stage on the averments made in the writ petition but it will always remain open for a prospective respondent to contest the said claim on facts and also to assail the bona fides of even the appropriateness in a particular case of the petitioner for seeking a relief invoking the constitutional jurisdiction of the High Court Division under article 102 of the Constitution. For example, sanding was denied to the Bangladesh Sangbad Patra Parishad to represent its opulent members, namely, the newspaper owners who were directly affected by the Wage Board Award but even then none of them moved personally, but the consideration would have been different if any organization representing a weaker section of the society had come to complain about a breach of any fundamental right of its members or any public wrong done to the members generally in breach of any provision of the constitution or law. The Court will have to decide in each case, particularly when objection is taken, not only the extent of sufficiency of interest but also the fitness of the person for invoking the discretionary jurisdiction under article 102 of the Constitution. Ordinarily, it is the affected party which is to come to the Court for remedy. The Court in considering the question of standing in a particular case, if the affected party is not before it, will enquire as to why the affected party is not coming before it and if it finds no satisfactory reason for non-appearance of the affected party, it may refuse to entertain the application.

10. As regards the *locus standi* of the appellant in the present case, I agree with my learned brothers that the High Court Division wrongly decided the issue upon wrongly relying on the Sangbad Patra Parishad case which has got no application to the facts of the present case. Facts of the appellant's case have been elaborately noticed in the judgement of Mustafa Kamal, J. and I may state briefly that the appellant is the Secretary General of the Bangladesh Environmental Lawyers Association (BELA) and the said organisation in the field of environment and ecology. In the writ petition that activities of FAP, FAP-20 and the FPCO have been impugned on the ground, *inter alia*, that the said activities would adversely affect more than a million human lives and natural resources and the natural habitat of man and other flora and fauna and that they aroused wide attention for being allegedly anti-environment and anti-people project. The appellant stated in the writ petition that as an environmentally concerned and active organisation, BELA conducted investigations at various times in 1992-93 in the FAP-20 areas. The appellant alleged that no proper environmental impact assessment had been under taken in relation of FAP projects even though the European Parliament declared in its resolution of 24 June 1993 that there was urgent need of changing the FAPs' classification within the World Bank project scheme from category 'B' to category 'A' requiring full environmental assessment for projects which appear to have significant adverse effect on the environment.

11. A group of environmental lawyers possessed of pertinent, bona fide and well-recognized attributes and purposes in the environment and having a provable, sincere, dedicated and established status is asking for a judicial review of certain activities under a flood action plan undertaken with foreign assistance on the ground, *inter alia*, of an alleged environmental degradation and ecological imbalance and violation of several laws in certain areas of the district of Tangail. The question is: does it have sufficient interest in the matter for a

standing under Article 102?

12. It is very interesting that Justice Douglas of the U.S. Supreme Court in his minority opinion went so far as to say in Sierra Club Vs. Morton, 401 U.S. 907 (1971) (No. 70-34) that contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for the their own preservation. The learned Judge further said: Ecology reflects the land ethic; and Aldo Leopold wrote in A Sand County Almanac 204 (1949), "The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively, the land." That, as I see it, is the issue of "standing" in the present case and controversy.

13. Justice Douglas referred to a stimulating essay, "Should trees Have Standing? Towards Legal Rights for Natural Objects" by Prof. Christopher D. Stone, 45 S. Cal. L. Rev. 450 (1972). Prof. Stone concluded his essay with a stirring note:

> "How far we are from such a state of affairs, where the law treats "environmental objects" as holders of legal rights, I cannot say. But there is certainly intriguing language in one of Justice Black's last dissents, regarding the Texas highway Department's plan to run a six-lane expressway through a San Antonio Park. Complaining of the Court's refusal to stay the plan, Black observed that "after today's decision, the people of San Antonio and the birds and animals that make their home in the park will share their quiet retreat with an ugly, smelly stream of traffic ... Trees, shrubs, and flowers will be mown down. Elsewhere he speaks of the "burial of public parks", of segments of a highway which "devour park-land," and of the park's heartland. Was he at the end of his great career, on the verge of saying just saying –that "nature has 'rights' on its own account"? Would it be so hard to do?"

14. It is said that any ecological disaster is an economic disaster. Environment and ecology are now matters of universal concern. The World Commission on Environment and Development in its landmark report, "Our Common future', made it clear that the environment, natural resources and life-support systems of our planet have continued to deteriorate, while global risks like those of climate change and ozone depletion have become more immediate and acute. Yet all the environmental deterioration and risks we have experienced to date have occurred at levels of population and human activity that are much less than they will be in the period ahead. And the underlying conditions that have produced this dilemma remain as dominant driving forces that are shaping our future and threatening our survival (from Statement by the Secretary General., UNCED, at the opening of the Earth summit at Rio de Janeiro, Brazil, 3 June 1992).

15. The RIO Declaration on Environment and Development containing 27 principles include, among other, it may be noted for the present purpose:

Principle 3: The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

Principle 10: Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have

appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. State shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceeding, including redress and remedy, shall be provided.

Principle 10 above seems to be the theoretical foundation for all that has been vindicated in the writ petition and also provides a ground for standing.

16. In the year of the Earth Summit, the Govt. announced the Environment Policy, 1992 in which the Govt. recognized, among others, that "since global and regional environment pollution and degradation affect the nature, environment and resource base of Bangladesh, it is essential to have co-ordinate vigilance and undertake necessary action programme to address such issues." In the meantime, The Environment Conservation Act, 1995 (Act No. 1 of 1995) has been promulgated to provide for the conservation, improvement of quality of environment and control and mitigation of the environmental pollution.

17. In this context of engaging concern for the conservation of environment, irrespective of the locality where it is threatened, I am of the view that a national organization like the appellant, which claims to have studied and made research on the disputed project, can and should be attributed a threshold standing as having sufficient interest in the matter, and thereby regarded as a person aggrieved to maintain the writ petition subject to the objection or objections as may be raised by the respondents if a Rule is issued ultimately.

Mustafa Kamal, J: The burning issue of *locus standi* which has become a focal point of attention for South Asian Superior Courts in the dying decades of the twentieth century in preparation for the twenty-first is the only question that has been raised and is to be resolved in this appeal by leave by the petitioner appellant whose Writ Petition No. 998 of 1994 was summarily rejected by a Division Bench of the High Court Division by its judgement and order dated 18-08-94 on the ground that the appellant is not "any person aggrieved" within the meaning of Article 102 of the Constitution, basing its reasoning upon a decision of this Court in the case of Bangladesh Sangbadpatra Parishad, represented by its Secretary General Vs. Government of the People's Republic of Bangladesh, 43DLR(AD) 126, hereinafter referred to as Sangbadpatra Parishad Case.

19. Dr. Mohiuddin Farooque, Secretary General, Bangladesh Environmental Lawyers Association, shortly BELA, filed the writ petition both under Article 102(1) and Article 102(2)(a) of the Constitution praying for issuance of a *Rule Nisi* upon the respondents to show cause as to why all the activities and implementation of FAP-20 undertaken in the District of Tangail should not be declared to have been taken without lawful authority and to be of no legal effect.

20. The cause which the appellant espoused in the writ petition is the apprehended environmental ill-effect of a Flood Control Plan affecting the life, property, livelihood,

vocation and environmental security of more than a million people in the district of Tangail.

21. It was alleged that following the two consecutive severe floods of 1987 and 1988 in Bangladesh studies were made in the light of which the Government of Bangladesh established a list of 11 guiding principles on flood control. At a meeting between the Government of Bangladesh and some donors in July, 1989 it was agreed that an action plan will be undertaken as a first step towards long-term flood control. The World Bank took the responsibility to co-ordinate the work. On December 11, 1989 a document entitled "Bangladesh – Action Plan for Flood Control" was placed before the meeting of foreign donors and lenders in London and the flood Action Plan, hereinafter referred to as the FAP, was born. The Ministry of Irrigation, Water Development and Flood Control created the Flood Plan Co-ordination Organisation, shortly FPCO, to manage the activities under the FAP. The multi-million dollar first phase of the FAP has been under taken initially for 5 years (1990-1995), but the pilot projects under it are to continue beyond 1997. The FAP consists of 26 components of which 11 are main components and 15 are supporting studies which include pilot projects. About 16 donors are funding the various components, within the first two years the FAP aroused wide attention for being allegedly anti environment, anti-people, discreet, non-transparent and defiant of participatory governance in violation of the 11 guiding principles. These projects of nation-wide impact and significance have never been discussed in the Jatiya Sangsad. Neither the FAP nor the FPCO has been given any legal standing for lawful functioning to ensure accountability. The FAP has become the most controversial programme ever undertaken on this land.

22. The FAP (Component-20), namely, Compartmentalization Pilot Project, shortly FAP20, is one of the 15 supporting studies of the FAP which was approved on 28-09-89 before even the FAP was approved in December, 1989 and was formally commissioned on 21-10-91. It is being funded by the Government of Netherlands and Kreditanstalt fure Wideraufban of Germany amounting to around US$ 27.9 million. It is aimed at experimenting the concept of "compartmentalisation" which has never been tested anywhere on earth and at "controlled flooding" in two areas of the districts of Tangail and Sirajganj. "Compartmentalisation" means surrounding of specific areas by embankments with gated or ungated opening through which in and outflow of flood water can be controlled. Inside the compartment, a system of channels and khals has the function of transporting the water to the sub-compartments. FAP-20 is distinct from other FAP projects in concept and objectives. This concept is to be tested in Tangail in order to produce criteria, guidelines, manuals and a training and demonstration programme for duplicating elsewhere in Bangladesh. The writ petition of FAP-20 relates to the part of the FAP projects being implemented in Tangail Sadar, Delduar and Bashail Thanas of the district of Tangail encircling an area of 13,169 hectares including the Tangail town, within which another 17 sub compartments will be created. It will encompass 12 Unions, 176 villages, 45,252 households (1991 census) and 32 beels. The site is at the direct confluence of the rivers Dhaleswari, Lohajang, Elanjani and Pungli off the river Jamuna. The FAP-20 was framed under the authority of respondent No. 1, the Ministry of Irrigation, Water Development and Flood Control, and was subsequently entrusted to respondent No. 2, the Chief Engineer of the FPCO, on behalf of respondent No. 1,

although respondent No. 3 the Bangladesh Water Development Board has been vested by the Bangladesh Water and Power Development Boards Order, 1972, P. O. No. 59 of 1972, the statutory right of control over the flow of water in all rivers and channels of Bangladesh and the statutory responsibility to prepare a comprehensive plan for the control of flood in, and the development and utilisation of water resources, of Bangladesh. It is the petitioner appellant's contention that FAP-20 is likely to adversely affect and uproot about 3 lakhs of people within the project are and the extent of adverse impact outside the project area may encompass more than a million human lives, natural resources and the natural habitat of man and other flora and fauna. Although the total impact area is large, only 210 hectares of land were being acquired without complying with the legal provisions. The project's impact area includes two mosques, namely, the Attia Mosque (the picture of which appears on Tk. 10/-note) and the Kadim Hamdani Mosque which are on the list of archaeological resources and which are protected against misuse, destruction, damage etc. under the Antiquities Act, 1968 in the spirit of Article 24 of the Constitution. It is the further case of the petitioner appellant that the project is being implemented in violation of the Embankment and Drainage Act, 1952, the Acquisition and Requisition of Immovable Property Ordinance, 1982, the Bangladesh Water and Power Development Boards Order, 1972, the fundamental right to life, property and profession of lakhs of people within and outside the project area, the Water Resources Planning Act, 1992 (Act No. XII of 1992) and the India-Bangladesh Joint Rivers Commission created by the Statute of 1972.

23. As to the locus standi of the petitioner appellant it was stated that the appellant is the Secretary-General of Bangladesh Environmental Lawyers Association, shortly BELA, an Association registered under the Societies Registration Act, 1860. He has been authorised by a resolution of the Executive Committee of BELA dated 16-06-94 to represent the Association and move the High Court Division under Article 102 of the Constitution and to do all other acts and things in connection therewith, BELA has been active since 1991 as one of the leading organisations in the field of environment, ecology and relevant matters of public interest. It has studied policies, surveyed and examined legal, quasi-legal issues, institutional aspects and traditional issues on environment and ecology and actively participated in many government, non government and independent national and regional/international activities and has gained widespread recognition both at home and a board. BELA being an Association of Lawyers has been raising the legality of the FAP activities on all available occasions, specially as an invited panel speaker in the Second Conference on the Flood Action Plan held at Dhaka in March, 1992, BELA's questioning of the legality of FAP and FPCO evoked derogatory remarks from certain quarters. BELA also received written complaints from a number of aggrieved people from Tangail District seeking legal assistance and other supports after having been frustrated in pursuing their own remedies with the FAP-20 authorities, human rights organisations etc. The media has also repeatedly published the adverse environmental and ecological impact of FAP-20. As an environmentally concerned and active organisation BELA responded to the complaints of the local people and conducted investigations at various times in 1992-93 in the FAP-20 areas. During the local inspection it was found that a significant number of people of the project area were against the project. They alleged

that they had no participation in the project and that they were not willing to be the subject of an experiment risking their lives and livelihood. The petitioner-appellant annexed copies of evidence of local complaints as Annexure-F series.

24. Dr. Mohiuddin Farooque, learned Advocate appearing with the leave of the Court, has himself argued the appeal on behalf of the petitioner- appellant. He submits that the words "any person aggrieved" occurring in Article 102 of the Constitution have to be read in the context of the entire Constitution, not isolatedly. Article 102 is an institutional vehicle for ventilating the rights and duties under the Constitution and not a mere procedural device. Article 38 of the Constitution confers on every citizen the right to form association and BELA has been registered as an association under the Societies Registration Act. 1860 with the aims and objects *inter alia* to organise legal measures to protect environmentally sensitive and fragile ecosystems. BELA devoted its time, energy and resources in studying the FAP project ever since its inception, meeting local people, listening to their grievances and carrying a lot of research on their behalf to find out the legal and constitutional infraction that FAP-20 has committed. In view of its dedicated commitment to prevent environmental degradation it has acquired a standing in its own right to represent the legal issues involved in the project in the writ jurisdiction. It can claim a legal relationship with the Court in pursuance of its declared aims objects as the right to form an association also embraces the right to pursue the association's lawful objects as well. Dr. Farooque then referred to Article 21(1) of the Constitution which is as follows:

> "21. (1) It is the duty of every citizen to observe the Constitution and the laws, to maintain discipline, to perform public duties and to protect public property".

25. He submits that if one has to require to do a thing, that is standing. He has to have an opportunity to do so. An association of lawyers dedicated to the protection of a healthy environment has a concern when it perceives and studies an environmental hazard which calls for prevention of rectification. As a concerned group it is very much a "person aggrieved" and it must have an opportunity to put its concern at rest by approaching the Court for redress. The denial of *locus standi* to such a group will be not only an unconstitutional bar to the performance of public duty but also a judicial condemnation of the association's dedicated efforts to perform its public duty. Besides, the preamble of the Constitution, which is a pledge taken by the people of Bangladesh, declares that it shall be a fundamental aim of the State to realise a society in which amongst others " the rule of law", fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens". Dr. Farooque quotes from the Bar Council Rules of Professional Etiquette for Lawyers and submits that the lawyers in general and the present association of lawyers in particular are committed to realise the rule of law in the country through Law Courts. The Preamble gives the association a standing. The Preamble and Article 8 also proclaim "the principles of absolute trust and faith in the Almighty Allah" as a Fundamental principle of the Constitution and as a fundamental Principle of State Policy. Absolute trust and faith in the Almighty Allah necessarily mean the duty to protect His creation and environment. The appellant is aggrieved, because Allah's creations and environment are in mortal danger of extinction and degradation. He

then refers to Article 102 (4) of the Constitution which provides that the High Court Division will not grant an interim order until it is satisfied, upon hearing the Attorney General, that the interim order is not likely to have the effect of being otherwise harmful to the "public interest". Under Article 106 of the Constitution, the President may refer a question of "public importance" for the opinion of the Appellate Division. If the President, the Appellate Division, the High Court Division and the Attorney General can refer, assist, consider and decide issues of "public interest" and "public importance", then there is no reason why conversely an association of lawyers cannot feel aggrieved on an issue of public interest and why they cannot agitate the same before the Court. The Constitution cannot be so interpreted as to bestow the concern of "public interest" and "public importance" upon only the executive and judicial organs of the State. The vast multitude outside have also a say on matters of public interest and public importance. He further submits that the words "any person" in Article 102 should be read disjunctively from the word "aggrieved". If so read the appellant is "any person", because in Law Lexicon, "any" means all, each, every, some amongst many. The Constitution uses the words "any person aggrieved" both in Articles 102(1) and 102 (2) (a), but the Bangla version of Article 102 (1) is "†Kvb ms¶zä e¨w³" whereas the Bangla version of Article 102 (2) (a) is "†h †Kvb ms¶zä e¨w³i"Under the proviso to Article 153 (3), the Bangla version will prevail over the English version and the omission of the word "‡h" in Article 102 (1) is not without significance. It means in effect that those whose fundamental rights are being violated need not themselves invoke the jurisdiction under Article 102 (1). Provided the persons aggrieved do not object, others espousing their cause can also invoke the jurisdiction under Article 102 (1). The appellant is espousing the cause of violation of Fundamental Rights of a large segment of the population in respect of their right to life, property and vocation. It is a †Kvb ms¶zä e¨w³ within the meaning of Article 102 (1). In e½xq kã‡Kvl, the word ms¶zä means wePwjZ, DwØMœ, Akvwš—, e¨vKzjZv, †¶vwfZ| It is, therefore, a concern which is enough to attract the word "aggrieved". Dr. Farooque also submits that the beneficiaries of this writ petition are not the members of BELA but the people, including the generation yet to be born for whom the present generation holds the environment as an inter-generational trust. BELA therefore represents not only the present generation but also the generation yet unborn. Every generation has a responsibility to the next to preserve that rhythm and harmony that their inherited environment bequeathed to them. BELA's performance of their obligation is therefore for ensurance of the protection of the right for the generation to come.

26. In reply Mr. A. W. Bhuiyan, learned Additional Attorney General appearing on behalf of Government – respondent Nos. 1, 5 and 6 dourly maintains his submission that the appellant is not a person aggrieved. His submission echoes the traditional view of *locus standi* which found the first classical exposition in the hands of James, L.J. ..in Exparte Sidebotham (1880) 14Ch. D. 458, defining "person aggrieved" as one "who has suffered a legal grievance, a man against whom a decision has been pronounce which has wrongly deprived him of something or wrongly refused him something or wrongly affected his title to something", a definition which was approved by Lord Esher, M.R. in *Re Reed Bowen and Co. (1887) 19QBD 174*, and repeated in numerous cases thereafter including the case of *Durayappah Vs. Fernando, (1967) 2A C337*. He found in our own

case of *Md. Giasuddin Bhuiyan Vs. Bangladesh, 1 (1981) BCR (AD) 81* a proper reflection of the traditional view and he relies upon the previously – cited Sangbadpatra Parishad Case as well as upon the case of R V Secretary of State for the Environment, ex parte Rose Theatre Trust Co (QBD) [1990] 1A 11 ER 754 and Muntizma Committee vs. Director Katchi Ahadies, Sindh, PLD 1992 (Karachi) 54. BELA as a registered Association, he submits, has the right to pursue its aims and objects through seminars, discussions etc., but it cannot maintain a writ petition unless its own interests are affected. The writ petition does not disclose that the appellant as an association has suffered any injury by FAP –20 activities. The words "any person aggrieved", if interpreted in the manner urged by the appellant, will be nothing short of legislation and an impermissible rewriting of the Constitution by the Court, he submits.

27. Mr. Tofailur Rahman, learned Advocate appearing for respondent Nos. 2-4 adopts the arguments of the learned Additional Attorney General and submits additional Attorney General and submits additionally that a liberalization of locus standi will open the floodgates to litigation which is least desirable.

28. Having heard the learned Advocates of all sides most extensively we have to mention initially that what is now known as "public interest law" assumed wide currency in the United States in the 1960s. These words convey and sum up the activities of lawyers representing clients and interests still unrepresented or under-represented in the American legal system. With the financial assistance from the Office of Economic Opportunity (OEO) of the Federal Government of the United States, a group of lawyers mobilized law students and social action groups to articulate in the legal arena the diffused interest of several million unorganised people in the lower socio-economic strata to force a change in the system of priorities procedures and policies for the benefit of those who were till then kept outside of it. The result today in the United States is an astounding enlargement of the frontiers of locus standi and the development of a wide-ranging "public interest litigation" embracing the rights and plights of minorities, race and gender relations, ethnic groups, governmental lawlessness, environmental pollution, public health, product safety' consumer protection, social exploitation etc.

29. The wind of charge swept imperceptibly through the shores of England, the mother country of writs in a series of cases, known as the Blackburn cases in the 1970s. Mr. Raymond Blackburn, once a Member of Parliament, came to the Court with four successive cases with issues not of his own but involving the general public. In each of these cases-(1) R. Vs. Commissioner of Police, ex parte Blackburn, (1968) 2QB118, (2) Blackburn Vs. Attorney General (1971) 1WLR1037, (3) R. Vs. Police Commissioner, ex parte Blackburn (1973) QB241 and (4) R. Vs. GLC exparte Blackburn (1976) 1WLR 550, it came to be established that any one having a "sufficient interest" in the matter in hand acquires locus standi. These decisions were formalised by the Rules of the Supreme Court, Order 53 Rule 3(5), providing that the applicant must have a "sufficient interest" in the matter to which the application relates. Section 31 of the Supreme Court Act, 1981 which was enacted pursuant to the Law Commission's Report on Remedies in Administrative Law (1976) reproduced in statutory form the provisions of Order 53. What is "sufficient interest" came to be ex pounded by five separate judgments by five

Law Lords in 1 RC V. National Federation of Self-Employed and Small Business Ltd. [1981] 2A11 ER 93, which was summarised by Schiemann, J. in R.V. Secretary of State, ex parte Rose Theatre Trust Co. [1990] 1 A11ER 754(766).

30. In Bangladesh and unnoticed but quiet revolution took place on the question of locus standi after the introduction of the Constitution of the people's Republic of Bangladesh in 1972 in the case of Kazi Mukhlesur Rahman Vs. Bangladesh, 26 DLR (SC) 44, decided on September 3, 1974 and hereinafter referred to as Kazi Mukhlesur Rahman's Case. The appellant challenged the Delhi Treaty signed on the 16th May, 1974 by the Prime Ministers of the Government of Bangladesh and the Republic of India providing therein inter alia that India will retain the southern half of south Berubari Union No. 12 and the adjacent enclaves and in exchange Bangladesh will retain the Dahagram and Angarpota enclaves. The ground of challenge was that the agreement involved cession of Bangladesh territory and was entered into without lawful authority by the executive head of government. The High Court Division summarily dismissed the writ petition holding that the appellant had no locus standi. At the hearing of the certificated appeal before the Appellate Division it was urged by the appellant that since the remedies available under Article 102(2) of our Constitution are discretionary, the words "any person aggrieved" should be construed liberally and given a wide meaning, although in the and circumstances of a particular case the court may regard the personal interest pleaded by a petitioner as being slight or too remote. Reliance was placed by the appellant upon the case of Main Fazal Din Vs. The Lahore Improvement Trust, 21DLR (SC) 225 in which Hamidur Rahman, C.J. had occasion to say that the right considered sufficient for maintaining a proceeding of this nature is not necessarily a right in the strict juristic sense but it is enough if the applicant discloses that he has a personal interest in the matter which involves loss of some personal benefit or advantage or the curtailment of a privilege or liberty of franchise. Upon considering several American and Indian decision of the time and a lone Australian decision, the Appellate Division held as follows:

> "It appears to us that the question of *locus standi* does not involve the Court's jurisdiction to hear a person But of the competency of the person to claim a hearing, so that the question is one of discretion which the Court exercises upon due consideration of the facts and circumstances of each case".

31. Locus standi was granted to the appellant even though he was not a resident of the southern half of South Berubari Union No. 12 or adjacent enclaves involved in the Delhi Treaty because he had raised a constitutional issue of grave importance involving an international treaty affecting the territory of Bangladesh and posing an impending threat to his fundamental rights under Article 36 of the Constitution and his right of franchise. These rights, attached to a citizen, are not local. They pervade and extend to every inch of the territory of Bangladesh stretching upto the continental shelf.

32. This Court, therefore, settled seven general principles in *Kazi Mukhlesur Rahman's* case, vix. (1) The High Court Division does not suffer from any lack of jurisdiction under Article 102 to hear a person. (2) The High Court Division will grant *locus standi* to a person who agitates a question affecting a constitutional issue of grave importance, posing a threat to his fundamental rights which pervade and extend to the entire territory

of Bangladesh. (3) If a fundamental right is involved, the impugned matter need not affect a purely personal right of the applicant touching him alone. It is enough if he shares that right in common with others. (4) In interpreting the words, "any person aggrieved", consideration of "Fundamental Rights" in Part III of the Constitution is a relevant one. (5) It is the competency of the person to claim a hearing which is at the heart of the interpretation of the words "any person aggrieved." (6) It is a question of exercise of discretion by the High Court Division as to whether it will treat that person as a person aggrieved or not. (7) The High Court Division will exercise that jurisdiction upon due consideration of the facts and circumstances of each case.

33. 8 years thereafter we find an echo of some of the above principles in the Indian Supreme Court case of *S.P. Gupta and other Vs. President of India, AIR 1982 (SC) 149*, at paragraph 19A:-

> "What is sufficient interest to give standing to a member of the public would have to be determined by the Court in each individual case. It is not possible for the Court to lay down any hard and fast rule or any strait-jacket formula for the purpose of defining or delimiting 'sufficient interest'. It has necessarily to be left to the discretion of the Court. The reason is that in a modern complex society which it seeking to bring about transformation of its social and economic structure and trying to reach social justice to the vulnerable section of the people by creating new social, collective 'diffuse rights and interests imposing new public duties on the State and other public authorities infinite number of situations are bound to arise which cannot be imprisoned in a rigid mould or a procrustean formula. The Judge who has the correct social perspective and who is on the same wave-length as the Constitution will be able to decide, without any difficulty and in consonance with the constitutional objectives, whether a member of the public moving the Court in a particular case has sufficient interest to initiate the action."

34. What happened after Kazi Mukhlesur Rahman's case in Bangladesh was a long period of slumber and inertia owing not to a lack of public spirit on the part of the lawyers and the Bench but owing to frequent interruptions with the working of the Constitution and owing to intermittent de-clothing of the constitutional jurisdiction of the Superior Courts.

35. While a recurring constitutional atrophy continued to thwart the process of progressive interpretation of the Constitution in Bangladesh, significant developments were taking place in neighbouring India. In its report of Legal Services the Rajasthan Law Reform Committee (1975) observed that public interest litigation "can prove to be the glory of our legal and judicial system if it is cautiously and sparingly used after careful study and research". In the same spirit the Bhagwati Committee of Gujarat on Legal Aid (1971) regretted the present style of functioning of the private bar based on the market principle of supply and demand and called for the creation of a public sector in the legal profession. A similar proposal was made by the Krishna Iyer Committee on Procedural Justice to the People (1973) by suggesting formation of lawyer's-co-operatives "which should take up causes which concern the public at large." In a series of epoch-making decisions, far too many to cite, the Indian Supreme Court evolved a new

philosophy of jurisprudence, breaking away from the right-duty pattern of Anglo Saxon jurisprudence and broadening the ambit of access to justice by adopting the doctrine of participatory justice with public interest litigation as a prime strategic toll in its hands. It recognised public-spirited individuals, class action, persons in a representative capacity, associations, registered or unregistered, an individual environmental lawyer or a conglomerate of lawyers --- in fact anyone acting bona fide and espousing the causes of the poor and the disadvantaged who are neither aware of their rights nor the capacity to approach the courts, to have "sufficient interest" to maintain an application under Article 32 and 226 of the Indian Constitution. The subject matters were many and various, under-trial or convicted prisoners, women in distress, children in jails and juvenile organisations, bonded and migrant labourers, unorganised labour, slum and pavement dwellers, untouchables, scheduled tribes, landless agricultural labour, victims of extra-judicial executions, degradation of environmental and so on. Like the United States, these cases are also called Public Interest Litigation, but in India, the jurisprudence has extended to procedure as well, treating even a letter as a writ petition. The growth has been a continuous process in which induction of special inquiry by the Court, fact-finding commissions, schematic remedies and post-decision monitoring came to be used as implementation tools.

36. Sri Lanka found difficulty in adopting the new Indian jurisprudence because of the constraints in Articles 17 of Sri Lankan Constitution, providing that "Every person shall be entitled to apply to the Supreme Court, as provided by article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which *such person is entitled* under the provisions of this Chapter." (Italics supplied). Article 126 permits "any person" to apply to the Supreme Court by himself or through an attorney-at-law on his behalf, to seek redress of infringement or impending infringement of the fundamental rights "relating to such person." The Sri Lankan Supreme Court has consistently refused to permit third parties to file actions for violation of fundamental rights. Seventeenth amendment to the Sri Lankan Constitution which has been gazettes, but is not known to us to have been formally passed, seeks to confer on third party interventionists a constitutionally entrenched status. The proposed amendment, Article 17(1), runs as follows:

> "Where a person aggrieved is unable or incapable of making an application under Article 126 by reason of physical or social or economic disability, or similar cause, a body of persons shall be entitled to make an application under Article 126 on behalf of such person, if the application is in the public interest and the aggrieved person raises no objection to such application."

37. But even without the proposed amendment, the Supreme Court of Sri Lanka has of late been extending the scope of standing. Thus it has granted standing to a member of parliament seeking issuance of letters of appointment to 53 persons who were selected to the public service on the basis of competitive examinations but whose letters of appointment were not being issued at the intervention of a Trade Union to which the selected persons did not belong. Standing has also been granted in several cases to The Environmental Foundation Ltd. (EFL), a public interest law firm dealing with

environmental issues, to compel administrative agencies to adhere to basic environmental norms.

38. In Pakistan, in the case of Benazir Bhutto Vs. Federation of Pakistan, PLD 1988(SC) 416, referring to Article 184(3) of the Constitution of Pakistan (1973), Muhammad Haleem, C.J. observed that " the plain language of Article 184(3) shows that it is open ended. The Article does not say as to who shall have the right to move the Supreme Court nor does it say by what proceedings the Supreme Court may be so moved or whether it is confined to the enforcement of the Fundamental Rights of an individual which are infracted or extends to the enforcement of the rights of a group as a class of persons whose rights are violated." It was held that the power under Article 184(3) cannot be said to be exercisable only at the instance of an "aggrieved party" in the context of adversary proceedings. The procedure available in public interest litigation can be made use of. The Supreme Court will regulate the proceedings of group or class actions from "case to case". In the case of Shehla Zia vs. WAPDA, PLD 1994(SC) 693, it was held that the Supreme Court in a public interest litigation may grant relief to the extent of stopping the functioning of such units which create pollution and environmental degradation. The procedure in Pakistan has now extended to letters and telegrams, as in India.

39. Coming now to our situation, the Sangbadpatra Parishad case was no authority for the proposition that an environmental lawyers association is not a person aggrieved when it espouses the causes of a large number of people on an environmental issue. The High Court Division's reliance on this decision was misplaced, to say the least, because the ratio decidendi of the said case was that an association of newspaper owners and news organizations, espousing not the causes of the down trodden and the poor who have no access to justice, but the cause of its members who are opulent enough to seek redress on their own cannot in a representative capacity be a person aggrieved, when the association's own interests are not in issue. That case was not an authority even for the proposition that an association can never be a person aggrieved if it espouses the causes of its members in a representative capacity. The Sangbadpatra Parishad case was decided on the facts of that case and that is how it should be read.

40. We now proceed to say how we interpret Article 102 as a whole. We do not give much importance to the dictionary meaning or punctuation of the words "any person aggrieved". Article 102 of our Constitution is not an isolated island standing above or beyond the sea-level of the other provisions of the constitution. It is a part of the over all scheme, objectives and purposes of the Constitution. And its interpretation is inextricably linked with the (i) emergence of Bangladesh and framing of its Constitution, (ii) the Preamble and Article 7, (iii) Fundamental Principles of State Policy, (iv) Fundamental Rights and (v) the other provisions of the Constitution.

41. As to (i) above, it is wrong to view our Constitution as just a replica with local adaptations of a Constitution of the West minister model among the Commonwealth countries of Anglo-Saxon legal tradition. This Constitution of ours is not the outcome of a negotiated settlement with a former colonial power. It was not drawn upon the consent, concurrence or approval of any external sovereign power. Nor is it the last of an oft-replaced and oft-substituted Constitution after several Constitutions were tried and failed,

although as many as 13 amendments have so far been made to it. It is the fruit of a historic war of independence, achieved with the lives and sacrifice of a telling number of people for a common cause making it a class part from other Constitutions of comparable description. It is a Constitution in which the people feature as the dominant actor. It was the people of Bangladesh who in exercise of their own-self proclaimed native power made a clean break from the past unshackling the bondage of a past statehood and adopted a Constitution of its own choosing. The Constitution, historically and in real terms, is a manifestation of what is called "the People's Power" The people of Bangladesh, therefore, are central, as opposed to ornamental, to the framing of the Constitution.

42. As for (ii) the Preamble and Article 7, the Preamble of our Constitution stands on a different footing from that of other Constitutions by the very fact of the essence of its birth which is different from others. It is in our Constitution a real and positive declaration of pledges, adopted, enacted and given to themselves by the people not by way of a presentation from skilful draftsmen but as reflecting the ethos of their historic war of independence. Among other pledges the high ideals of absolute trust and faith in the Almighty Allah, a pledge to secure for al citizens a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social and the affirmation of the sacred duty to safeguard, protect and defend the Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh are salutary in indicating the course or path that the people wish to tread in the days to come. Article 7 of the Constitution bestows the powers of the Republic with the people and the exercise of the people's power on behalf of the people shall be affected only under and by the authority of, the Constitution. Article 7 does not contain empty phrases. It means that all the legislative, executive and judicial powers conferred and the Parliament, the Executive and the judiciary respectively are constitutionally the powers of the people themselves are the various functionaries and institutions created by the Constitution exercise not their own indigenous and native powers but the powers of the people on terms expressed by the Constitution. The people, again, are the repository of all power under Article 7.

43. As for (iii) in Part II of the Constitution, containing Fundamental Principles of State Policy, Article 8(2) provides that the principles set out in this Part "shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh". It is constitutionally impermissible to leave out of consideration Part II of our Constitution when an interpretation of Article 102 needs guidance.

44. As for (iv), Part III of the Constitution bestows Fundamental Rights on the citizens and other residents of Bangladesh. Article 44(1) guarantees the right to move the High Court Division in accordance with Article 102(1) for the enforcement of these rights. Article 102(1) is therefore a mechanism for the enforcement of Fundamental Rights which can be enjoyed by an individual alone in so far as his individual rights are concerned, but which can also be shared by an individual in common with others when the rights pervade and extend to the entire population and territory. Article 102(1) especially cannot be divorced from part III of the Constitution.

45. As for (v), the other provisions of the Constitution which will vary from case to case may also come to play a role in interpreting Article 102 of the Constitution.

46. Article 102 therefore is an instrumentality and a mechanism, containing both substantive and procedural provisions, by means of which the people as a collective personality, and not merely as a conglomerate of individuals, have devised for themselves a method and manner to realise the objectives purposes, policies, rights and duties which they have set out for themselves and which they have strewn over the fabric of the Constitution.

47. With the power of the people looming large behind the constitutional horizon it is difficult to conceive of Article 102 as a vehicle or mechanism for realising exclusively individual rights upon individual complaints. The Supreme Court being vehicle, a medium or mechanism devised by the Constitution for the exercise of the judicial power of the people on behalf of the people, the people will always remain the focal point of concern of the Supreme Court while disposing of justice or propounding any judicial theory or interpreting any provision of the Constitution. Viewed in this context interpreting the words "any person aggrieved" meaning only and exclusively individuals and excluding the consideration of people as a collective and consolidated personality will be stand taken against the Constitution. There is no question of enlarging locus standi or legislation by Court. The enlargement is writ large on the face of the Constitution. In a capitalist laissez faire concept of private ownership of the instruments and means of production and distribution, individual rights carry the only weight and the judiciary exists primarily to protect the capitalist rights of the individuals, but in our Constitution Article 13, a Fundamental Principle of State Policy, provides that the people shall own or control the instruments and means of production and distribution under three forms, namely, (a) state ownership, that is, ownership by the State on behalf of the people: (b) co-operative ownership, that is, ownership by co-operatives on behalf of the members and (c) private ownership, that is, ownership by individuals. When there is a State ownership on behalf of the people of the instruments and means of production and distribution the concept of exclusive personal wrong or injury is hardly appropriate. The High Court Division cannot under the circumstances adhere to the traditional concept that to invoke its jurisdiction under Article 102 only a person who has suffered a legal grievance or injury or an adverse decision or a wrongful deprivation or wrongful refusal of his title to something is a person aggrieved.

48. This is not to say that Article 102 has nationalised each person's cause as every other person's cause. The traditional view remains true, valid and effective till today in so far as individual rights and individual infraction thereof are concerned. But when a public injury or public wrong or infraction of a fundamental right affecting an indeterminate number of people is involved it is not necessary, in the scheme of our Constitution, that the multitude of individuals who have been collectively wronged or injured or whose collective fundamental rights have been invaded are to invoke the jurisdiction under Article 102 in a multitude of individual writ petitions, each representing his own portion of concern. In so far as it concerns public wrong or public injury or invasion of fundamental rights of an indeterminate number of people, any member of the public,

being a citizen, suffering the common injury or common invasion in common with others or any citizen or an indigenous association, as distinguished from a local component of a foreign organisation, espousing that particular cause is a person aggrieved and has the right to invoke the jurisdiction under Article 102.

49. It is, therefore, the cause that the citizen-applicant or the indigenous and native association espouses which will determine whether the applicant has the competency to claim a hearing or not. If he espouses a purely individual cause, he is a person aggrieved if his own interests are affected. If he espouses a public cause involving public wrong or public injury, he need not be personally affected. The public wrong or injury is very much a primary concern of the Supreme Court which in the scheme of our Constitution is a constitutional vehicle for exercising the judicial power of the people.

50. The High Court Division will exercise some rules of caution in each case. It will see that the applicant is in fact espousing a public cause, that his interest in the subject matter is real and not in the interest of generating some publicity for himself or to create mere public sensation, that he is acting bona fide, that he is not a busybody or an interloper, that it is in the public interest to grant him standing and that he is not acting for a collateral purpose to achieve a dubious goal, including serving a foreign interest.

51. This writ petition is concerned with an environmental issue. In our Constitution there is no specific fundamental right dealing with environment, nor does it find a place in the Fundamental Principle of State Policy. The Indian Constitution was also originally bereft of any reference to environment. By the Constitution (Forty-second Amendment) Act, 1976, Article 48-A was introduced as a new Directive Principle of State Policy as follows:

> 48-A. Protection and improvement of environment and safeguarding of forests and wildlife. The state shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country."

52. In our country, however, the Bangladesh Water Development Board, a state controlled statutory corporation created under P.O No.59 of 1972, has the responsibility to prepare a comprehensive plan for the control of flood in, and the development and utilization of water resources, of Bangladesh (Article 9 (1)). This Board shall also have control over the flow of water in all rivers and channels of Bangladesh (Article 14 (a)). Being a public sector subject, flood control and control of river and channel flows are matters of public concern. If we take the averments of the appellants in the writ petition on their face value, and do not entertain any contrary assertions thereto at this stage, it is obvious that the association-appellant as an environmental association of lawyers is a person aggrieved, because the cause it espouses, both in respect of fundamental rights and constitutional remedies, is a cause of an indeterminate number of people in respect of a subject matter of public concern and it appears, on the face of the writ petition itself, that it has devoted its time, energy and resources to the alleged ill-effects of FAP-20, it is acting bona fide and that it does not seek to serve and oblique purpose. It has taken great pains to establish that it is not a busybody. Subject to what emerges after the respondents state their case at the hearing of the writ petition the appellant be denied entry at the

threshold stage and the averments made in the writ petition.

53. We have given reasons of our own why the appellant is a person aggrieved, but we have to say specifically that we do not accept Dr. Farooque's submission that the association represents not only the present generation but also the generation yet unborn. This claim is based on a case of Philippines Supreme Court, Juan Antonio Oposa and others Vs. Hon'ble Fulgencio S. Factoran and another in which the twin concepts of "intergenerational responsibility" and "inter-generational justice" were agitated by the plaintiff minors represented by their respective parents to prevent the misappropriation or impairment of Philippine rain forest. The minors asserted that they "represent their generation as well as generation yet unborn". The minor' locus standi was allowed because "the right to a balanced and healthful ecology" was a fundamental right and several laws declaring the policy of the State to conservation of the country's forest "not only for the present generation but for the future generation as well" were guaranteed. (South Asian Environmental Law Reporter, Vol. 13, September 1994, Colombo, Sri Lanka, pp. 113-145). Our Constitution does not contain any analogous provision.

54. As to the apprehension of floodgate, the people as a whole are no doubt a flood and the Constitution is the sluice gate through which the people control its own entry. Our Courts will be prudent enough to recognise the people when the people appear through an applicant as also those who masquerade under the name of the people. Taking up the people's causes at the expense of his own is a rare phenomenon, not a commonplace occurrence.

55. We hold therefore that the association appellant was wrongly held by the High Court Division not to be a "person aggrieved" in the facts and circumstances of the case and we hold further that the appellant is any person aggrieved" within the meaning of both Article 102(1) and Article 102(2) (a) of the Constitution.

56. The appeal is allowed and Writ Petition No. 998 of 1994 is remanded to the High Court Division for hearing on merit. There will be no order as to costs.

Latifur Rahman, J: Agreement with the main judgement of my learned brother Mustafa Kamal, J. I like to add few words of my own as a question of great public importance is involved in this case.

57. Dr. Mohiuddin Farooque, Secretary General, Bangladesh Environmental Lawyers Association filed Writ Petition No. 998 of 1994 before the High Court Division. The said writ petition was summarily rejected by the High Court Division. In the said application, the petitioner stated that Bangladesh Environmental Lawyers Association, briefly, "BELA, an Association registered under the Societies Registration Act, 1860, with the Office of the Registrar of Societies, Government of Bangladesh, bearing Registration No. 1457(17) dated 18-2-92, has been authorised by a resolution of the Executing Committee of "BELA" on 16-06-94 to move the High Court Division of the Supreme Court under Article 102 of the Constitution of the People's Republic of Bangladesh.

58. Dr. Mohiuddin Farooque appearing-in-person submits that "BELA" has been active since 1991 as one of the leading organisations working in the field of environment,

ecology and the relevant matter of public interest connected with the environmental problems. In the writ petition, it has been stated that "BELA" is satisfied that if Flood Action Plan, briefly, FAP-20 is undertaken by the respondents in some areas of the District of Tangail it would damage the soil, destroy the natural habitat of fisheries and other flood plain, flora and fauna, create drainage problem, threaten human health, worsen sanitation and drinking water supplies and will in fact cause degradation to environment inflicting far reach hazardous effects on human health.

59. I will confine myself to the question of locus standi of the appellant to file the writ petition under Article 102 of the Constitution as leave was granted on the question of standing alone.

60. Article 102(1) and (2)(a) of the Constitution read "on the application of "any person aggrieve. ..."

61. From the language used in Article 102(1) of our Constitution, 'any person aggrieved' may move the High Court Division for enforcement of fundamental right conferred by Part III of the Constitution. Under Article 102(2)(a), the High Court Division may make an order on the application of 'any person aggrieved' in the nature of mandamus, prohibition and certiorari except for an application for habeas corpus or quo-warranto.

62. A reading of Articles 32 and 226 of the Indian Constitution shows that nowhere it has been said as to who can move the Supreme Court and the High Courts of India for enforcement of fundamental rights and for any other purpose. The sole object of Article 32 of the Indian Constitution is the enforcement of fundamental right of a person who possesses it. Where no fundamental right has been infringed that person cannot move the Supreme Court of India. In Article 32 and 226 of the Indian Constitution only the authority and power of the Supreme Court and High Courts of India to issue certain writs have been granted. Article 32 of the Indian Constitution provides, inter alia, that the right to move the High Court for enforcement of the fundamental right is itself a fundamental right and empowers the court to issue directions or writs. The corresponding provision for the High Courts in Article 226 is wider than Article 32 as it empowers High Court to exercise their writ jurisdiction for the enforcement of fundamental right and for "any other purpose", which will include violation of any legal rights.

63. Article 184(3) of the Constitution of Pakistan gives authority to the Supreme Court of Pakistan for enforcement of any of the fundamental rights conferred by Chapter I of Part II of the Constitution if the Court considers that a question of public importance has arisen and this article as no reference as to the person who can move such an application. In Article 199 conferring jurisdiction to the High Courts of Pakistan, expression used is "aggrieved party". A little comparison will show that the language used in our Constitution in Article 102 is completely different from Articles 32 and 226 of the Constitution of India. So in deciding the true meaning of the expression 'any person aggrieved', we shall have to depend primarily on the language used in our Constitution along with other provisions, scheme and objectives of the Constitution itself.

64. Dr. Mohiuddin Farooque submits that narrow rules about locus standi of a person personally aggrieved should be given a liberal construction as the primary object of this as association is to keep the environment and ecology of the country free from pollution and as such it has sufficient and genuine interest in moving the application under Article 102 of the Constitution.

65. The concept of Public Interest Litigation has had its origin in the United States a country long recognised as being the greatest laboratory for the constitutions of the world. Over the years this process passed through several changes, as it evolved through a series of far reaching judgements handed down by the highest court of America. This concept, as it is known in the U.S.A., has acquired a specific meaning and is connected with a particular kind of development which is peculiarly American.

66. If we look to the evolution and gradual development of the question on locus standi then we find that during the 19th Century the English Courts were reluctant to let a person come before the courts, unless he had a particular grievance of his own which has been infringed. The 20th Century has, however, seen a remarkable development in this area of the public law in England. There has been change in the attitude of the courts. Now in most such cases an ordinary individual can come to court if he has a sufficient interest. The test of sufficient interest is really left with the discretion of the court as the court is the final authority to determine the same in the fact of each case.

67. In this appeal, the doctrine of locus standi and the judicial approach to the question of standing has been elaborately argued by the learned Advocate of the parties.

68. The traditional rule to locus standi is that judicial remedy is available only to a person who is personally aggrieved. This principle is based on the theory that the remedies and rights are correlative and therefore only a person whose own right is violated is entitled to seek remedy. In case of private individual and private law this principle can be applied with some strictness, but in public law this doctrine cannot be applied with the same strictness as that will tantamount to ignoring the good and well being of citizens, more particularly from the view point of public good for whom the State and the Constitution exist.

69. 'BELA' is actively working in the field of environmental problems of the Bangladesh. It is to be kept in mind that "BELA" has got no direct personal interest in the matter. Strictly speaking it is not an aggrieved person if, we just give a grammatical construction to the phrase "aggrieved person" which means person personally aggrieved. In our Constitution nowhere the expression aggrieved person has been defined. An expression appearing in the Constitution must get its light and sustenance from the different provisions of the Constitution and from the scheme and objective of the Constitution itself.

70. In our constitution, preamble provides that the people of Bangladesh proclaimed Independence on the 26th day of March, 1971 and through a historic was for national independence established independent, sovereign Bangladesh. The preamble of our Constitution envisages a socialistic society free from all kinds of exploitation. In other

words, the Constitution contemplates a society based on securing all possible benefits to its people, namely, democratic, social, political and equality of justice in accordance with law. The constitution is the supreme embodiment of the will of the people of Bangladesh and as such all actions must be taken for the welfare of the people. For whose benefits all powers of the Republic vest in the people and the exercise of such power shall be affected through the supremacy of the Constitution. If justice is not easily and equally accessible to every citizen there then can hardly be a Rule of Law. It access to justice is limited to the right, the more advantaged and more powerful sections of society, then the poor and the deprived will have no stake in the rule of law and they will be more readily available to turn against it. Ready and equal access to justice is a sine qua non for the maintenance of the Rule of Law. Where there is a written constitution and an independent judiciary and the wrongs suffered by any section of the people are capable of being raised and ventilated publicly in a Court of law there is bound to be greater respect for the Rule of Law. The preamble of our Constitution really contemplates a society where there will be unflinching respect for the Rule of Law and the welfare of the citizens.

Article 7(1) of our Constitution reads as follows:-

> "7 (1) All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, any by the authority of, this Constitution."

This supremacy of the Constitution is a special and unique feature in our Constitution. Neither in the Constitution of India nor in the Constitution of Pakistan there is reassertion of the supremacy of the Constitution. This is a substantive provision which contemplates exercise of all powers in the republic through the authority of the Constitution.

71. Part II of our Constitution relates to fundamental principles of State Policy. Article 8 (2) provides that these principles are not enforceable in any court but nevertheless are fundamental to the governess of the country and it shall be the duty of the State to apply the principle in making the laws. The principles, primarily being social and economic rights, oblige the state, amongst other themselves, to secure a social order for the promotion of welfare of the people, to secure a right to work, to educate, to ensure equitable distribution of resources and to decentralize power to set up local Government Institutions composed of people from different categories of people as unit of self governance. A Constitution of a country is a document of social evolution and it is dynamic in nature. It should encompass in itself the growing demands, needs of people and change of time. A Constitution cannot be morbid at all. The language used by the framers of the Constitution must be given a meaningful interpretation with the evolution and growth of our society. An obligation is cast on the Constitutional Court which is the apex court of the Country to interpret the Constitution in a manner in which social, economic and political justice can be advanced for the welfare of the state and it's citizens. Mr. Mahmudul Islam, author of "Constitutional law of Bangladesh" opined in this book as follows:-

> "An expression occurring in the Constitution cannot be interpreted out of context or only by reference to the decisions of foreign jurisdiction where the constitutional dispensation is different from ours."

The author dealing with the Constitution of Bangladesh has very aptly said that the meaning of the expression "aggrieved person" must be understood keeping in view of the pronounced scheme and objectives of the Constitution. The Constitution is a living document and therefore the interpretation should be liberal to meet the needs of the time and demands of the people. By referring to the various provisions of the Constitution of Bangladesh, I find that it ensure liberties and socio-economic justice exhorted for a purposeful application to all categories of the population.

72. I must refer the case of Kazi Moklesur Rahman v. Bangladesh and another, 26 DLR (SC) 44. This is perhaps the first case on the question of locus standi in our jurisdiction. The petitioner challenged the Delhi Treaty by which India will retain the southern half of south Berubari Union No. 12 and the adjacent enclaves and in exchange Bangladesh will retain "Dahagram and Angarpota enclaves. The petitioner challenged the agreement as it involved cessation of the territory of Bangladesh. The writ petition was dismissed summarily by the High Court Division. The Supreme Court dismissed the appeal holding that the application before the High Court Division was premature and observed that the appellant had the competency to claim a hearing. In that case, the primary consideration was the impending threat of violation of fundamental rights under section 36 of the Constitution (Freedom of movement) and the petitioner's right to franchise. In the concluding portion of paragraph 18 of that decision it has been observed that "complaint as to an impending threat to his certain fundamental rights guaranteed by the constitution, namely, to move freely throughout the territory of Bangladesh to reside and settle in any place therein as well as his right of franchise. Evidently these right attached to a citizen are not local. They pervade and extend to every inch of the territory of Bangladesh stretching up to the continental shelf." The underlining is by me. Of course, that decision is no authority for the proposition that a person whose own fundamental right has not been infringed has a right to move the court for espousing the cause of other persons whose fundamental rights have been violated. That was a case which decided the question of impending threat of certain fundamental rights of a citizen himself, as fundamental rights are not limited to a local area but pervades through out the entire territory of Bangladesh. The appellant was heard because of his impending threat of violation of fundamental rights as well as for the exceptional and extra-ordinary constitutional issue of international treaty involved in the case. The petition under Article 102 being competent, the court had no lack of jurisdiction to hear the matter in the facts, circumstances and issues involved in that case. The light I get in the case of Mukhlesur Rahman does not lead me any further to decide the issue specifically raised and argued in the present case.

73. In the case of Miss Benarzir Bhutto Vs. Federation of Pakistan reported in PLD 1988 (SC) 416, while interpreting Articles 184(3) and 199 of the Constitution of Pakistan, the Supreme Court held that the exercise of power of Supreme Court under Article 184(3) is not dependent only at the instance of the aggrieved party. Their Lordships held as follows:

> "Traditional rule of locus standi can be dispensed with and procedure available in public interest litigation can be made use of, if it is brought to the Court by the

person acting bona fide Provisions of Art. 184(3), therefore, have provided abundant scope for the enforcement of the Fundamental Rights of an individual or a group or class of persons in the event of their infraction and it would be for the Supreme Court to lay down the contours generally in order to regulate the proceedings of group or class actions from case to case."

74. The Constitution of Bangladesh recognises the welfare of the people in unambiguous terms if, we take a traditional restive rule and remain contended with it then the same will be disastrous for the welfare of a poor, uneducated society like ours in the context of social and economic unequal. Time has come when this court must act according to the needs of doing social justice to the large segment of population. This court must liberally construe the question of standing. The relaxation of the strict rules of locus standi can be expanded in two way – First, representative standing and citizen standing. The former relates to the standing in a matter pertaining to a legal wrong or injury caused or threatened to be caused to a person or class of person who by reason of properly helplessness or disability or economic inability cannot move the court for relief. The later relates to standing in a matter in which breach of public duty results in violation of collective right of the public at large. In this case, the appellant is not moving this application as people of the locality being poor and economically crippled cannot file the application before the court, but by this action of the respondents a public wrong or public injury is causing damage to environment and human health in Bangladesh in which specific field 'BELA' is actively associated. This, I find that this organisation has got sufficient interest in the matter and the question of standing must be liberally construed in the context of our Constitutional scheme and objectives as indicated above.

75. I also honestly feel that there is a positive duty on the judiciary to advance and secure the protection of the Fundamental rights of its people as found in our Constitution. Strictly it may be correct to say that only a person whose rights are infringed has a right to make an application to assert his right be it fundamental or otherwise. But it is important to note that there is a constitutional duty on the judiciary to secure and advanced the fundamental rights of its people in view of our Constitutional mandate. In such an event this court is under a duty to act and inquire into allegations of infringement of rights even though technically a perfect application in terms of Article 102 of the Constitution is not before the court. Independence of judiciary and its separation from the executive ensures proper functioning of the Courts. The Court is required to protect and enforce fundamental rights guaranteed to the people, it interprets and protects the Constitution, "enforces the constitutional limitations on the power of the government, decides disputes between the State and it's citizen and between citizen and citizen. Presently, I am concerned with the protection of the rights of the people and will restrict to the same. The people have been guaranteed life, liberty, equality, security, freedom from needs, wants, illiteracy and ignorance, dignity of man and socio-economic and political justice. Any law, action and order made and passed in violation of fundamental right is void. It is the duty of the Court to so declare. The Court thus adopts the role of the Protector of fundamental rights guaranteed to the people. We can thus see how judiciary upholds, protects, and defends the Constitution and effectively enforces the fundamental rights guaranteed by the Constitution itself. The judiciary defends the constitution and

attains the pivotal enviable position as the guardian of the people and also the conscience of the people. In the area of economic regulation, control and planning the judiciary has used law as an instrument for the eradication of poverty, inequality and exploitation and strengthened the hands of the State in widening the gamut of its welfare activities. The terms 'welfare State', 'mixed economy', 'socialist republic' etc. have been given the judiciary vast scope for social engineering. Effective access to justice can thus be seen as the most basic requirement, the most basic "human rights" of a system which purports to guarantee legal rights. The types of cases which were considered at the early stages of development of the rule of locus standi are those where there is a specific legal injury either to the applicant or to some other person or persons for whose benefit the action is brought arising from violation of some constitutional or legal right or legally protected interest. Apart from such cases, there is a category of cases where the State or a public authority may act in violation of a constitutional or statutory obligation, or fail to carry out such obligation resulting in injury to public interest or public injury as distinguished from private injury. Who then in such cases can complain of against such act or omission of the State or public authority? Can any member of the public sue for legal redress? Or is such right or standing limited only to a certain class of persons? Or is there no one who can complain? Must the public injury go unredressed?

76. Thus I hold that a person approaching the court for redress of a public wrong of public injury has sufficient interest (not a personal interest) in the proceedings and is acting bonafide and not for his personal gain or private profits, without any political motivation or other oblique consideration has locus standi to move the High Court Division under Article 102 of the Constitution of Bangladesh.

77. The learned Additional Attorney General appearing for the Government put much stress on the case of Bangladesh Sangbadpatra Parishad v. Bangladesh reported in 43 DLR (AD)-126. Relying on this case, the High Court Division dismissed the petition summarily holding that the said association has no locus standi to file the writ petition. It is to be stated here in uncertain terms that the learned Judges of the High Court Division wrongly relied upon the reported decision of this Division. In that case, public interest litigation was not at all involved. In that decision we held that the newspaper owners had no difficulty in challenging the award themselves without filing the writ petition which is in the nature of a representative suit. The observation that was made in that case must be understood in the facts and circumstance of that case and that case does not at all help the learned Additional Attorney General in deciding the question of locus standi as raised and argued in the present case involving the principles of 'probono publico.'

78. Dr. Mohiuddin Farooque has cited a large number of decisions from Indian jurisdiction to show how the question of locus standi has been considered in the High Courts of India including the Supreme Court for evolution and development of public interest litigation in India. He has cited various decisions from other countries as well in his written argument to show that public interest litigation is a new jurisprudence which the courts in other jurisdictions are evolving. I will not refer to all those cases as the language of Article 102 of our Constitution is not in Perimeteria with the language of those Constitutions.

79. If we look to the cases recently disposed of by the Supreme Court of India then we find that there is a trend of judicial activism to protect environment through public litigation in environmental cases. In Bangladesh such cases are just knocking at the door of the court for environmental policy making and the court is being involved in this cause. There is a trend to liberalise the rules of standing through out the world in spite of the traditional view of the locus standi. The Supreme Court of India initially took the view that when any member of a public or social organisation so espouse the case of the poor and the down-trodden, such member should be permitted to move the Court even by merely writing a letter without incurring expenditure of his own. In such a case, the letter was regarded as an appropriate proceeding failing within the purview of Article 32 of the Constitution. This was thus the beginning of the exercise of a new jurisdiction in India, known as epistolary jurisdiction.

80. In the case of S.P. Gupta and others V. Union of India and others, better known as the Judges' Case, (1981) AIR Supreme Court –344. Chief Justice Bagwati, after a consideration of the American and English authorises in the field of locus standi formulated his conclusion in this way: "We would therefore hold that any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. This is absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realisation of the constitutional objective".

81. Chief Justice Bagwati who is the real exponent of Public interest litigation in India has more appropriately termed "Social Action Litigation" rather than public interest litigation. Bagwati has also expressed the view that the substance of Social action Litigation is much wider than that of the Public interest Litigation of the United States.

82. In the case of Fertilizer Corporation Kamagar Union v. Union of India (1981) AIR (SC) 344, Krishna Iyer said as follows:

> "Restrictive rules about standing are in general inimical to a healthy system of growth of administrative law. If a plaintiff with a good cause is turned away merely because he is not sufficiently affected personally that could mean that some government agency is left free to violate the law. Such situation would be extremely unhealthy and contrary to the public interest. Litigants are likely to spend their time and money unless they have some real interest at stake; and in some cases where they wish to sue merely out of public spirit; to discourage them and thwart their good intentions would be most frustrating and completely demoralizing."

83. The operation of Public interest Litigation should not be restricted to the violation of the defined Fundamental Rights alone. In this modern age of technology, scientific advancement, economic progress and industrial growth the socio-economic rights are under phenomenal change. New rights are emerging which call for collective protection and therefore we must act to protect all the constitutional, fundamental and statutory rights as contemplated within the force corners of our Constitution.

84. In conclusion, I hold that the appellant may not have any direct personal interest but it has sufficient and genuine interest in the matter complained of and it has come before the court as a group of public spirited young lawyers to see that the public wrong or public injury is remedied and not merely as a busy body perhaps with a view to gain cheap popularity and publicity.

85. Before parting with the case, I want to mention specifically that any application filed by an individual, group of individuals, associations and social activists must be carefully scrutinized by the court itself to see as to whether the petitioner has got sufficient and genuine interest in the proceeding to focus a public wrong or public injury.

Mohammad Abdur Rouf, J: I have had the privilege of going through the main judgement written by my learned brother Mustafa Kamal, J. As well as the supplements made thereto by my Lord the Chief Justice and my learned brothers Latifur Rahman and B. B. Roy Choudhury JJ. I agree with the decision concurring with the views expressed by Mustafa Kamal, J. as to the meaning of the term "any person aggrieved" provided in Clauses 1 and 2(a) of Article 102 of the Constitution of the People's Republic of Bangladesh.

Bimalendu Bikash Roy Choudhury, J. I have had the advantage of going through the judgement delivered by my learned brother Mustafa Kamal, J. and the supplement made thereto by my learned brother Latifur Rahman, J. While agreeing with the decision and the reasoning ably given by them in support thereof I feel inclined to add a few words of my own.

88. This appeal presents an occasion this Court to consider for the first time whether a group of social workers can make a writ petition on behalf of the public under clauses (1) and (2)(a) of article 102 of our Constitution.

89. Article 102 of the Constitution empowers the High Court Division to issue to a person performing any function in connection with the affairs of the Republic or of a local authority, directions or orders for the enforcement of any of the fundamental rights or of any other statutory rights. In order to seek remedy under clauses (1) and (2) (a) of this article with which we are concerned in this appeal an applicant must be a "person aggrieved". The expression "person aggrieved" has not been defined in the Constitution; nor has it been mentioned therein that the applicant must be a personally aggrieved person. As a logical sequel a question comes up: Who is an "aggrieved person" and what are the qualifications requisite for such a status? Over the years there has been a tendency to construe this expression very restrictively to mean a person who has a personal or individual right in the subject matter of the application which right has either been infringed or threatened to be infringed. In the absence of any definition can such a cast-iron meaning be given to the said expression? The answer would perhaps be a clear 'No'. The expression "person aggrieved" is an elastic concept. For example, there has been a departure from the traditional view to some extent in Fazal Din v. Lahore Improvement Trust, 21 DLR (SC) 225. The Supreme Court of Pakistan observed:

> "..... the right considered sufficient for maintaining a proceeding of this nature is not necessarily a right in the strict juristic sense but is enough if the applicant discloses that he had a personal interest in the performance of the legal duty which if not performed or performed in a manner not permitted by law would result in the loss of some personal benefit or advantage or the curtailment of a privilege or liberty of franchise."

Again, in Kazi Mukhlesur Rahman Vs. Bangladesh 26 DLR (SC) 44 this Court took a liberal view as to the meaning of the said expression. It has been stated therein:

> "The fact that the appellant is not a resident of South Berubari Union No. 12 or of the adjacent enclaves involved in the Delhi Treaty need not stand in the way of his claim to be heard in this case. We heard him in view of the constitutional issue of grave importance raised in the instant case involving an international treaty affecting the territory of Bangladesh and his complaint as to an impending threat to his certain fundamental rights guaranteed by the constitution, namely, to move freely throughout the territory of Bangladesh, to reside and settle in any place therein as well as his right to franchise. Evidently, these rights at attached to citizen are not local. They pervade and extend to every inch of the territory of Bangladesh stretching up to the continental shelf".

90. A review of the authorities of this Court, however, indicates that no exhaustive or definitive meaning could have yet been given to the said expression and the courts some times lapsed into the traditional view which originated from the old English decisions. But law does not remain static. It loses its rigidity with the gradual change of the social order to meet the demands of the change.

91. Julian Huxley pointed out in his Essay on "Economic Man and Social Man" long back in poignant words:

> "Many of our old ideas must be retranslated so to speak, into a new language. The democratic idea of freedom, for instance, must lose its nineteenth century meaning of individual liberty in the economic sphere and become adjusted to new conceptions of social duties and responsibilities. When a big employer talks about his democratic right to individual freedom, meaning thereby a claim to socially irresponsible control over a huge industrial concern, and over the lives of tens thousands of human-beings whom it happens to employ, he is talking in a dying language".

Lord Denning echoed the same idea in the following words:

> "Law does not stand still. It moves continually. Once this is recognised, then the task of the Judge is put on a higher plane. He must consciously seek to mould the law so as to serve the needs of the time, must not be a mere mechanic, a mere working ma son, laying brick on brick, without thought to the overall design. He must be an architect- thinking of the structure as a whole building for society a system of law which is strong, durable and just".

A constitution is framed not for a temporary period. It is designed for all time to come. The interpretation of constitutional expressions has necessarily to receive a progressive construction in the light of the scheme and the objectives enshrined in the Constitution.

92. To begin with the Preamble to the Constitution of our country: It appears that the fundamental aim of the State is to realise through the democratic process a socialist society, free from exploitation a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens.

Part II of it embodies the Fundamental Principles of State Policy. Article 8(2) man dates that the principles set out in this part shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws, but shall not be judicially enforceable. Among other things, article 11 is to the effect that the Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed. Article 14 states that it shall be a fundamental responsibility of the State to emancipate the toiling masses the peasants and workers and through planned economic growth, a constant increase of productive forces and a steady improvement in the material and cultural standard of living of the people, with a view to securing to its citizens the provisions of the basic necessities of life, including food, clothing, shelter, education and medical care; the right to social security, that is to say, to public assistance in cases of undeserved want arising from unemployment, illness or disablement, or suffered by widows or orphans or in old age, or in other such cases. Articles 16, 17, 18 and 19 likewise impose a duty upon the State to adopt effective measures for rural development and agricultural revolution, free and compulsory education, raising the level of public health and morality and ensuring equality of opportunity to all citizens. Under article 21(1) it is obligatory for all citizens to perform public duties and to protect public property.

93. They are not merely programmes for socio-economic development of the people, but much deeper in content. They firmly recognise human sensitivity for fellow- citizens and State responsibility for protection of human rights enshrined in article 1 of the Universal Declaration of Human Rights (to which Bangladesh is a signatory) that "all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood".

> Indeed, this principle is resounded in the following sage saying of George Bernard Shaw:
>
> "The worst sin towards our fellow creatures is not to hate them, but to be indifferent to them; that's the essence of inhumanity". (The Devil's Disciple, (1897), Act II).

94. Part III of the Constitution has given corresponding Fundamental Rights to the citizens. Articles 27, 31 and 32 are of particular interest. All citizens are equal before law and are entitled to equal protection of law in accordance with article 27. Article 31 gives right to a citizen to enjoy the protection of law and to be treated in accordance with law.

In particular it guarantees that no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. Article 32 commands that no person shall be deprived of life or personal liberty save in accordance with law. Under article 44(1) the right to move the High Court Division under article 102(1) is itself a fundamental right.

95. In order to ensure that the mandates of the Constitution are obeyed the High Court Division of the Supreme Court is vested with the power of judicial review under article 102 which is contained in Part VI of the Constitution. The power is wide enough to reach any person or place where there is injustice.

96. In this backdrop the meaning of the expression "person aggrieved" occurring in the aforesaid clauses (1) and (2) (a) of article 102 is to be understood and not in an isolated manner. It cannot be conceived that its interpretation should be purged of the sprit of the Constitution as clearly indicated in the Preamble and other provisions of our Constitution, as discussed above. It is unthinkable that the framers of the Constitution had in their mind that the grievances of millions of our people should go undressed, merely because they are unable to reach the doors of the court owing to abject poverty, illiteracy, ignorance and disadvantaged condition. It could never have been the intention of the framers of the Constitution to outclass them. In such .....harrowing conditions of our people in general of socially conscious and public-spirited persons are not allowed to approach the court on behalf of the public a section for enforcement of their rights the very scheme of the Constitution will be frustrated. The inescapable conclusion, therefore, is that the expression "person aggrieved" means not only any person who is personally aggrieved but also one whose heart bleeds for his less fortunate fellow-beings for a wrong done by the Government or a local authority in not fulfilling its constitutional or statutory obligations. It does not, however, extend to a person who is an interloper and interferes with things which do not concern him. This approach is in keeping with the constitutional principles that are being evolved in the recent times in different countries.

97. In the instant case the appellant Dr. Mohiuddin Farooque who happens to be the Secretary- General of Bangladesh Environmental Lawyers Association, briefly BELA, moved a writ petition before the High Court Division both under clauses (1) and (2) (a) of article 102 of the Constitution praying for issuance of a Rule Nisi upon the respondents to show cause why the formation and activities of FAP, FAP-20 and FPCO should not be declared to be mala fide and illegal, and have been under taken without lawful authority on the ground that the said project would adversely affect and injure more than a million people in the district of Tangail by way of displacement, damage to the soil, destruction of natural habitat of fishes, flora and fauna and creating a drainage problem, threatening human health and worsening sanitation and drinking water supplies. These it was alleged, would create environmental hazards and ecological imbalance. BELA which is a registered society and committed to the protection of people from environmental ill-effects thus espoused the cause of the members of the public.

98. As to the ill-effects of environment it would be useful to quote the following passage from the book Top Soil and Civilisation by Tom Dale and Vernon Gill Carter, both highly experienced ecologists:

"Man, whether civilised or savage, is a child of nature-he is not the master of nature, He must conform his action to certain natural laws if he is to maintain his dominance over his environment. When he tries to circumvent the laws of nature, he usually destroys the natural environment that sustains him. And when his environment deteriorates rapidly, his civilisation de clines.....

The writers of history have seldom noted the importance of land use. They seem not to have recognised that the destinies of most of man's empires and civilisations were determined largely by the way land was used. While recognising the influence of environment on history, they fail to note that man usually changed or de spoiled his environment.

How did civilised man despoil this favourable environment? He did it mainly by depleting or destroying the natural resources. He cut down or burned most of the usable timber from forested hill sides and valleys. He overgrazed and denuded the grasslands that fed his livestock. He killed most of the wildlife and much of the fish and other water life. He permitted erosion to rob his farm land of its productive top soil. He allowed eroded soil to clog the streams and fill his reservoirs, irrigation canal and harbours with silt. In many cases, the used and wasted most of the easily mined metals or other needed minerals. Then his civilisation declined amidst the de spoliation of his own creation or he moved to new land. There have been from ten to thirty different civilisations that have followed this road to ruin (the number depending on who classifies the civilisations)".

99. The report of the "World Commission on Environment and Development" constitution by the United Nations warned the governmental agencies about the importance of maintaining ecological balance in chapter 12 entitled "Towards Common Action: Proposals for Institutional and Legal Change" thus:

"Environmental Protection and sustainable development must be an integral part of the mandated of all agencies of governments, of international organisations, and of major private sector institutions. These must be made responsible and accountable for ensuring that their policies, programmes, and budgets encourage and support activities that are economically and ecologically sustainable both in the short and longer terms." (See the book Our Common Future: World Commission on Environmental and Development published by Oxford University Press in 1987).

100. In the case of Virender Gaur V. State of Haryana, (1995) 2 SCC 577 (580) the Supreme Court of India observed:

"The word 'environment' is of broad spectrum which brings within its ambit "hygienic atmosphere and ecological balance".

It is therefore not only the duty of the State but also the duty of every citizen to maintain hygienic environment. The State, in particular has duty in that behalf and to shed its extravagant unbridled sovereign power and to forge in its policy to maintain ecological balance and hygienic environment".

101. Although we do not have any provision like article 48-A of the Indian Constitution for protection and improvement of environment, articles 31 and 32 of our Constitution protect right to life as fundamental right. It encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life can hardly be enjoyed. Any act or omission contrary thereto will be violative of the said right of life.

102. In the face of the statements in the writ petition BELA is concerned with the protection of the people of this country from the ill-effects of environmental hazards and ecological imbalance. It has genuine interest in seeing that the law is enforced and the people likely to be affected by the proposed project are saved. This interest is sufficient enough to bring the appellant within the meaning of the expression "person aggrieved". The appellant should be given **locus standi** to maintain the writ petition on their behalf.

Dr. Mohiuddin Farooque with **Sekandar Ali Mondol v. Bangladesh**
50 DLR 1998 (High Court Division) 84
Writ Petition No. 998 of 1994 with Writ Petition No. 1576 of 1994
Heard on: 28-7-1997, 5-8-1997 and 6-8-1997, Judgment on: 28-8-1997
Kazi Ebadul Hoque and A K Badrul Huq JJ.

Constitution of Bangladesh, 1972 Article 102

Judicial review of the administrative action should be made where there is necessity for judicial action and obligation. Such action must be taken in public interest. The purpose of judicial review is to ensure that the citizen of the country receives protection of law and the administrative action comply with the norms of procedure set for it by laws of the land.

In the facts and circumstances and having regard to the provisions of law, we propose to give some directions to the respondents for strict compliance of the same in the greater public interest: The respondents, thus, are directed (a) to comply with the provisions and procedures contained in sections 28, 30 and 31 of The Embankment and Drainage Act, 1952 (East Bengal Act I of 1953). (b) to comply with provisions contained in Article 11(1)(c) of Bangladesh Water and Power Development Boards Order, 1972 (President's Order No. 59 of 1972) for re-settlement and re-housing of persons actually displaced from their residences by the execution of the scheme, that is, implementation of 'FAP-20' Project, (c) to secure the archaeological structure (site) of the 'Attia Mosque' and 'Kadim Hamdani Mosque' falling within the 'FAP-20' Project area from any damage, disfigurement, defacement and injury by the project activities, and (d) to ensure that no serious damage to the environment and ecology is caused by 'FAP-20' activities.

49 DLR (AD) 1-1997 BLD (AD) 1: Dr. Mohiuddin Farooque v. Bangladesh and others, 48 DLR 438; Shehla Zia v. WAPDA, PLD 1994 (SC) 693; SADE Smith's "Constitutional and Administrative Law" Fourth Edition, Page 562. ref.

A. K. BADRUL HUQ J : The two petitioners of Writ Petition Nos. 998 of 1994 and 1576 of 1994 by two applications under Article 102 of the Constitution, called in question the activities and implementation of 'FAP-20', undertaken in the District of Tangail apprehending environmental ill effect of a Flood Control Plan affecting the life, property, livelihood, vocation and environmental security of more than a million of people of the District whereupon two separate Rules were issued calling upon the respondents to show cause as to why all the activities and implementation of 'FAP-20', undertaken in the District of Tangail should not be declared to have been undertaken without lawful authority and of no legal effect and/or such other order or further orders passed as to this court may seem fit and proper.

2. In the two Rules, similar facts and common questions of law having been involved, those were heard analogously and are being disposed of by this single Judgment.

3. In Writ Petition No. 998 of 1994, the petitioner is Dr. Mohiuddin Farooque, Secretary General, "Bangladesh Environmental Lawyers Association", briefly, "BELA", a group of environmental lawyers. "BELA" was registered under the Societies Registration Act, 1860. The petitioner has been authorised by a resolution of the Executive Committee of "BELA" to represent the same and move the High Court Division of the Supreme Court of Bangladesh under Article 102 of the Constitution. Petitioner claims that "BELA" has been active since the year 1991 as one of the leading organisations with documented and well recognised expertise and achievement in the field of environment, ecology and relevant matters of public interest and "BELA" has developed itself into an active and effective institution on environmental regulatory framework with wide spread recognition. Writ Petition No. 998 of 1994 has been initiated *pro bono publico*. Initially, the petition was summarily rejected by the High Court Division on the ground of *locus standi*. The Appellate Division has sent the matter to the High Court Division for hearing on merit after setting aside the said order of rejection holding that the petitioner has locus standi to file and maintain the writ petition.

4. In Writ Petition No. 1576 of 1994, the petitioner is Sekandar Ali Mondol, a farmer, living in the village of Khaladbari under Police Station Tangail Sadar in the District of Tangail for generations and owns small piece of ancestral land, part of which he uses as homestead and part for cultivation for subsistence and cash earning of his family. The petitioner's land is under the process of acquisition under 'FAP-20' project.

5. Facts leading to the issuance of the two Rules are summarised as under:

(a) The two consecutive severe floods of 1987 and 1988 in Bangladesh aroused national and international concern on the water resources issue in particular and the question of environmental management in general for the country. Studies were made and as a result of studies, a list of 11 Guiding Principles of Flood Control has been formulated. In July, 1989 in Washington D.C, a meeting of the Government of Bangladesh and some donors was held and it was agreed that an Action Plan would be undertaken as a first step for long term Flood Control Programme in Bangladesh. On 11 December, 1989, a document entitled "Bangladesh-Action Plan for Flood Control" was placed before the meeting of the

foreign donors in London and 'Flood Action Plan', hereinafter referred to as 'FAP' was born. World Bank took up the responsibility to co-ordinate the activities. To manage the activities under the 'FAP', the 'Flood Plan Co-ordination Organisation,' hereinafter referred to as 'FPCO' was created by the respondent No. 1, the Ministry of Irrigation, Water Development and Flood Control, briefly, 'MIWDFC'. 'FAP' consists of 26 components of which 11 are main components consisting of regional and project oriented activities and 15 are supporting studies which include Pilot Project. 'FAP' has been undertaken initially for 5 years, 1991-1995 but Pilot Project under it will continue beyond 1997. 'FAP-20' is one of the 15 supporting studies in which the concept of Flood Control through Compartmentalisation is to be tested and hence, project is called 'Compartmentalisation Pilot Project', briefly, 'CPP'.

(b) Within the First two years, the 'FAP' aroused wide attention for being allegedly anti-environment and anti-people project. 'FAP' is being accused of not only for its discrete activities but also for defying the process and requirements of participatory governance manifested in the letters and spirit of the Constitution, the law of the land and 11 Guiding Principles of Flood Control. The 'FAP', instead of being the largest environmental management programme of the country, the same has become the most controversial programme ever undertaken in this land for committing various illegalities, violation of laws and posing ecological threats. The 'FAP-20' Project is being implemented in Tangail Sadar, Delduar and Bashail Police Stations of the District of Tangail encircling an area of 13,169 hectares including Tangail Town and encompassing 176 villages of 12 Unions, 45,252 households according to 1991 census, 32 beels and 46 canals. The project site is under the direct confluence of the rivers Dhaleswari, Lohajang, Elanjani and Pongli estuaries of the river Jamuna. 'FAP-20' is likely to adversely affect and uproot about 3 lacs of people within the project area and the extent of adverse impact outside the project area may encompass more than a million human lives, the natural resources and natural habitats of men and other flora and fauna. The total impact area, although large, only 210 hectares of land are being acquired without complying with the requirements of law. The experimental project impact area includes two Mosques, namely, "the Attia Mosque" the picture of which appears on Taka 10- note and "Khadem Hamdani Mosque" which are in the list of archaeological resources and are protected against misuse, restriction, damage etc. under the Antiquities Act, 1968 in the spirit of Article 24 of the Constitution.

(c) There was no people's participation except some show meetings which were managed through manipulation. The local people were not at all afforded any opportunity to submit their objections and, thus, the aggrieved people have been deprived of their legal rights and legitimate compensation and also to protect their lives, professions and properties. The 'FAP-20' has been undertaken violating the laws of the land including the National Environment Policy, 1992. Scope of the so-called land acquisition matters, if lawfully applied, only relate to a small number of people and lands i.e. 210 hectares compared to the total physical and ecological area to be affected due to various direct, indirect and casual impact of

the project. The fate of the greater section of the people whose lands and other belongings, rights and legitimate interest would be adversely affected, both within and outside the project area, have been left out of any consideration. By undertaking the experimental 'FAP-20' Project, the respondents have ultimately infringed and would, further, inevitably infringe the Fundamental Rights to life, property and profession of lacs of people within and outside the project area.

(d) The Bangladesh Water Development Board, briefly, 'BWDB' has been vested by the Bangladesh Water and Power Development Boards Order, 1972 (President's Order No. 59 of 1972), the statutory right of control over the flow of Water in all rivers and canals of Bangladesh and the statutory responsibility to prepare a comprehensive plan for the control of flood and the development and utilisation of Water Resources of Bangladesh. Since, 'FPCO' is neither under 'BWDB' nor created by it, nor created in the exercise of any authority of any law of the land, the same got not legal authority to plan, design or to undertake any project falling within the domain of the 'BWDB' or other statutory agencies and, as such all the activities co-ordinated by and conducted under 'FPCO' are illegal and unlawful. The 'FPCO' was created by the then regime of 1989 by passing all legal and institutional framework sanctioned by the law of the land, and the 'BWDB'. The 'FPCO', therefore, illegally encroached upon the public statutory domain of other agencies responsible for sustainable Water Management Policy and Planning of Flood Control. The fate of the legal rights and interest of the people of Bangladesh is being arbitrarily decided by the respondents in total disregard of the law and the legal system. Local people's resistance and objection have been severely undermined and instead, oppressive and deceitful measures had been adopted by the respondents.

(e) The 'FAP-20' activities are contrary to the various provisions of law of the land and violative of the Fundamental rights enumerated in Part-III of the Constitution. The affected people of the 'FAP-20' project area are entitled to the protection under Articles 28(1), 23, 31, 32 and 40 and 42 of the Constitution. It is emphasised that the 'FAP-20' project is being implemented in gross violation of the provisions contained in The Conservation of Fish Act, 1950, (E.B. Act No. XVIII of 1950), The Embankment and Drainage Act, 1952, (East Bengal Act I of 1953), The Antiquities Act, 1968, The Acquisition and Requisition of Immovable Property Ordinance, 1982 (Ordinance No. II of 1982) and The Environment Conservation Act, 1995.

6. Respondent No. 1, Ministry of Irrigation, Water Development and Flood Control, Government of Bangladesh, in spite of service of notice upon it, did neither appear nor did oppose the Rule.

7. Respondent Nos. 2-4, the Chief Engineer, Flood Plan Co-ordination Organisation, The Chairman, Bangladesh Water Development Board and the Project Director, Flood Action Plan Component-20, Compartmentalisation Pilot Project, respectively entered appearance in both the Rules and opposed the Rules by filing two affidavits-in-opposition. The statements made in the two affidavits are almost common.

8. In the affidavits-in-opposition, it is stated that 'FAP' is a very ambitious programme undertaken by the Government of Bangladesh with the assistance of the Foreign countries and agencies. The programme is very important for the developmental work and the same will have far reaching effect in the developmental programme of Bangladesh. 'Compartmentalisation Pilot Project,' 'CPP', has completed an elaborate Environmental Impact Assessment, shortly 'EIA'. 'EIA' for 'CPP' shows that project will have more positive impact compared to negative one. The only negative impacted environmental issue will be a slight loss of seasonal wet-lands and its habitats. To compensate, the project is implementing a Community Wetland Conservation Programme in 3 Beel areas, namely, Jugini, Bara and Garindha Beels. It is stated, further, that since a long time, a good many Water Development Projects have been implemented in the country and no where there is any allegation of any damage to any ecological site due to interventions caused by the project and there is no chance of any damage on any archaeological resources in the project area due to implementation and physical interventions under the projects.

9. Further statements are that 'CPP' is not constructing new embankments except retirements at places and re-sectioning at other places. The destruction of fish by hindering their access to the swamping grounds does not hold true.

10. In the affidavits-in-opposition it is asserted that the planning, designing and implementation of physical interventions under 'FAP-20' are being done by Bangladesh Water Development Board while 'FPCO' is only acting as a monitor of the project activities on behalf of the Ministry maintaining liaison with the donors on behalf of the Government. It is pleaded that in all stages of project formulation, all groups of people concerned and affected by the project have been consulted and their participation have been ensured. There had been many meetings attended by Union Parishad Chairman, Journalists, Elite, Professionals and concerned Government officials. Moreover, 3 seminars were held at Tangail wherein Members of the Parliament of the locality participated and expressed their views regarding the project. Views of the elected representatives from the local level upto the National level have been taken. All possible groups of people likely to be affected as a result of implementation of the Project, such as, fishermen, landless people and women have been consulted before starting any sort of physical intervention in the project and their participation in many activities of the project have been ensured.

11. Further assertions made in the affidavits-in-opposition are, that the local people welcomed the project. Many local News Papers published opinion of the local people concerning the project which indicates the positive attitude of the people towards the project. It is also asserted that the project is arranging to pay compensation to those land owners who lost their lands, and, in many cases, the contractors have implemented works on having consent from the affected land owners. The land acquisition procedure for 'FAP-20' is strictly in conformity with the existing legal procedure of the country and the project is not following anything in the matter of land acquisition which contravenes the existing legal procedure. It is pleaded that considerable propositions in the name of mitigation measure are there in the 'FAP-20' project to mitigate the needs and suffering of all people affected by the execution of 'FAP-20', be it displacement of people or any other inconvenience that may arise as a result of execution of the project.

12. Dr. Mohiuddin Farooque, learned Advocate appearing in person in Writ Petition No. 998 of 1994 and on behalf of the petitioner of Writ Petition No. 1576 of 1994 not only challenges the formation and activities of 'FAP-20' and 'FPCO', adversely affecting and injuring more than a million people in the District of Tangail by way of displacement, damage to soil, destruction of natural habitat, of fishes, flora and fauna and creation of drainage problem threatening human health and worsening sanitation and drinking water supplies and causing environmental hazards and ecological imbalance but also alleges the violation of Article 23, 24, 28, 31, 32, 40 and 42 of the Constitution and the laws, such as, the Bangladesh Water and Power Development Boards Order, 1972 (President's Order No. 59 of 1972), The Embankment and Drainage Act, 1952 (East Bengal Act I of 1953), The Protection and Conservation of Fish Act, 1950, The Antiquities Act, 1968 and the Acquisition and Requisition of Immovable Property Ordinance (Ordinance No. II of 1982) and other laws.

13. Dr. Mohiuddin Farooque, first, directed his efforts to assail the formation of 'FPCO'. He submitted that 'FPCO' is neither created under the authority of Bangladesh Water and Power Development Boards Order, 1972, nor created in the exercise of any authority of any law of the land and 'FPCO' got no authority and legal status to plan, design and undertaken any project falling within the domain of 'BWDB' and other statutory agencies and the same, thus, encroached upon the public statutory domain of other agencies responsible for sustainable Water Management Policy and Flood Control.

14. In repelling the said submission, Mr. Tofailur Rahman, learned Advocate for the respondents, contended that the planning, designing and physical interventions under 'FAP-20' are being done by 'BWDB' while 'FPCO' is only acting as a monitor of the project activities on behalf of the Ministry of Irrigation, Water Resources and Flood Control.

15. To appreciate the contentions raised from both the sides, it is necessary to extract Article 9 of Bangladesh Water and Power Development Boards Order, 1972.

16. Article 9 runs as follows:

> "9.(1) The Water Board shall prepare, for the approval of the Government a comprehensive plan for the control of flood in, and the development and utilisation of Water resources of Bangladesh.
>
> (2) The Board shall have power to take up any work as contemplated in clause (3) or any other work that may be transferred to it by the Government and to realise levy thereof subject to the approval of the Government.
>
> (3) The Board may frame a scheme or schemes for the whole of Bangladesh or any of the following matters, namely:
>
> (a) construction of dams, barrages, reservoirs and other original works; irrigation, embankment and drainage, bulk water supply to communities and recreational use of water resources;
>
> (b) flood control including water-shed management;

(c) prevention of salinity, water congestion and reclamation of land;

(d) except within the limits of sea-ports, maintenance, improvement and extension of channels for inland water transport, including dredging of channels, but excluding all such operations as may be assigned by the Government to any other agency;

(e) regulation of channels to concentrate river flow for more efficient movement of water, silt and sand, excluding all such operations as, in the opinion of the Government, may be carried out by any other agency".

17. Sub-article (1) of the said article 9 provides that Water Board shall, for the approval of the Government, prepare comprehensive plan for the control of flood in and the development and utilisation of water resources of Bangladesh. Sub-article (2) enjoins that the Board shall have power to take up any work as contemplated in clause 3 or any other work that may be transferred to it by the Government. Sub-article (3) states that Board may frame scheme or schemes for construction of dams, barrages, reservoirs and other original works, irrigation, embankment and drainage, bulk water supply to communities, flood control including water shed management. Prevention of salinity, water congestion, reclamation of land, maintenance, improvement and extension of channels for inland water transport, including dredging of channels and regulation of channels to concentrate river flow for more efficient movement of water, silt and sand excluding all such operations as in the opinion of the Government, be may carried out by any other agencies.

18. On reading of the above provisions, it is evidently clear that Water Board is a State controlled statutory corporation and the controlling authority of the Water Board is the Government, that is, the Ministry of Irrigation, Water Resources and Flood Control, respondent No. 1. Water Board, since, is under the control of the said Ministry and 'FPCO' is stated to be only acting as a monitor of the project activities on behalf of the said Ministry, it cannot be said that the 'FPCO' got no authority to plan, design and undertake the project falling within the domain of Water Board. It is significant to note that Water Board is not challenging the authority of 'FPCO'. Who, then, are the two petitioners to challenge the authority of 'FPCO'? Thus, we have no manner of hesitation to hold that the petitioners got no right or any legal authority to challenge the authority of 'FPCO'. The contention rose, though, may be attractive, does not appear to have any substance.

19. The next contention raised by Dr. Farooque is that the 'CPP' has been unlawfully planned and designed by the respondents without adapting appropriate institutional framework prescribed by law and the implementation of the said project under taken in the name of 'FAP-20' is against public interest and also, undertaken in total disregard of the Guidelines of 'FAP' and 'FPCO'. It is also urged that the participation of the people within the project area have not at all been ensured in implementing the project and the Pilot Project is absolutely illegal and without lawful authority.

20. It is canvassed, further, from the side of the petitioners that the 'FAP-20' is likely to affect adversely and uproot a large number of people within the project area and the extent of adverse impact outside the project area will encompass human lives, natural resources and

the natural habitats of human and other beings. Contention has also been advanced that the affected people were not afforded any opportunity of being heard and the objections and protests raised by the people have been totally ignored by the respondents who were duty bound to take into consideration the fate of the people, directly, indirectly and casually affected by the implementation of 'FAP-20' and, thus, the Fundamental Rights Guaranteed under Article 31, 32, 40 and 42 had been grossly violated.

21. In reply to the said contentions raised from the side of the petitioners, Mr. Tofailur Rahman, learned Advocate submitted that the idea of 'FAP' has been conceived by people having highest degree of competence in the relevant field and suitability of that idea is being judged through 15 supporting studies and 'CPP' is one of those studies which will help in judging environmental suitability of the idea of 'FAP' and 'FAP-20' is aimed at experimenting the concept of Compartmentalisation and the project will give maximum benefits to the farmers of the project area and the same will have far reaching affect in the economic development of the country. It is the further contention of Mr. Tofailur Rahman that the people's participation in undertaking and implementing the Pilot Project has been ensured and the people of the locality welcomed the project and no Fundamental Right guaranteed under the Constitution has been violated.

22. Since, the violation of Fundamental Rights guaranteed under Article 31, 32, 40 and 42 of the Constitution has been seriously alleged by the petitioners, it would be profitable to quote Article 31, 32 40 and 42 of the Constitution.

23. Article 31 of the Constitution reads as under:

> "31. To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law".

24. Article 32 runs as follows:

> "32. No person shall be deprived of life or personal liberty save in accordance with law".

25. Article 40 is as follows:

> "40. Subject to any restrictions imposed by law, every citizen possessing such qualifications, if any, as may be prescribed by law in relation to his profession, occupation, trade or business shall have the right to enter upon any lawful profession or occupation and to conduct any lawful trade or business".

26. Article 42(1) is to the following terms:

> "42. (1) Subject to any restrictions imposed by law, every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property, and no property shall be compulsorily acquired, nationalised or requisitioned save by authority of law".

27. Article 31 gives right to a citizen to enjoy the protection of law and to be treated in accordance with law. It gives the guarantee that no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. Article 32 mandates that no person shall be deprived of life or personal liberty save in accordance with law. Article 40 gives every citizen right to enter upon any lawful profession or occupation and to conduct lawful trade or business. Article 42 commands that every citizen shall have the right to acquire, hold, transfer or otherwise dispose of the property and no property shall be compulsorily acquired, nationalised or requisitioned save by authority of law. The question of violation of fundamental right raised by the petitioners will be considered after deciding other points rose.

28. People's participation and their commitment in all developmental activities has been enshrined in the Guiding principles of 'FAP', Bangladesh Action Plan for Flood Control published by 'FPCO' in March,1993 and the National Environment Policy of 1992.

29. In Principle No.11 of Guiding Principles of 'FAP', maximum possible popular participation by the beneficiaries was suggested to be ensured in planning, implementation, operation, and maintenance of flood protection infrastructures and facilities. In the Guidelines for people's participation on Bangladesh Action Plan for Flood Control published by 'FPCO' it is stated that to ensure sustainable Flood Control, Drainage and Water Development, it is essential that local people "participate" in full range of Programme activities including needs assessment, project identification, design and construction, operation and maintenance, monitoring and evaluation. The National Environment Policy, 1992 states that in the context of environment, the Government recognises that the active participation of all the people at all level is essential to harness and properly utilise all kinds of national resources and to attain the goal of environmental development and improvement.

30. It is the contention from the side of the petitioners that instead of people's participation, the 'FAP-20' is being implemented on the face of the people's protest without attempting to redress people's grievances. This contention was resisted by the respondents with the assertion that the people have been consulted and there has been people's participation in implementing the project. The petitioners had annexed applications addressed to the Water Development Authority by the villagers of Rasulpur village and also to the Deputy Commissioner, Tangail on behalf of local people of Tangail for stopping the activities of 'FAP-20' alleging that the people of the locality would be affected by way of displacement, damage to the soil and creation of environmental hazards. The petitioners have also annexed some paper cuttings showing staging of demonstration, procession and holding of meetings by thousands of males and females. The letters and paper cuttings are Annexure-F series. The respondents, on the other hand, annexed some paper cuttings in the affidavits-in-opposition of the Writ petition No. 1576 of 1994 evidencing people's participation and people's support for the project but no paper had been annexed in the affidavit-in-opposition filed in Writ Petition No. 998 of 1994. The respondents, also, annexed a copy embodying expression of reaction of the people of the District of Tangail in view of a Legal Notice issued by "Bangladesh Environmental Lawyers Association" asking to stop the activities of 'FAP-20' and the same was signed by Chairman, Tangail Pourashava, President of Awami League, Tangail District Unit and also the Secretary of District Unit of Jatiya party and some

other persons holding the offices of President and Secretary of various organisations and associations of the District of Tangail. The respondents also annexed some papers showing holding of meetings and seminars for people's participation in 'FAP-20' project.

31. The assertions by the petitioners as to the non-participation of the people of the locality in the implementation of project and the counter assertion by the respondents as to participation of the people in the implementation of the project, thus, have become a disputed question of fact and this court will not embark upon an investigation of the same in writ jurisdiction. Judicial review is generally not available for ascertaining facts but for a review of law emanating from accepted facts. Moreover, Guidelines do not have the force of law and no legal right is created on the basis of Guidelines and no right, also, can be enforced on the basis of Guidelines in the courts of law.

32. Dr. Mohiuddin Farooque next addressed us raising the contention that all activities envisaged and being carried out by the 'FPCO' through the 'FAP' are subject to the provisions of The Embankment and Drainage Act, 1952 and 'FAP-20' has not followed the prescribed provisions of law contained in the said Act. No objection was recorded, no Notification in the official gazette has been published and no compensation has been assessed as enjoined in section 28, 30 and 31 of the said Act of 1952.

33. Mr. Tofailur Rahman, on the other hand, only, submitted that whether provisions of The Embankment and Drainage Act, 1952 have been complied with or not is a disputed question of fact and the High Court Division cannot enter upon such a disputed question of fact.

34. The East Bengal Embankment and Drainage Act, 1952 was enacted to consolidate the laws relating to embankment and drainage and to make better provision for the construction, maintenance, management, removal and control of embankments and water-courses for the better drainage of land and for their protection from floods, erosion and other damage by water.

35. It will be useful to look to the relevant provisions of law embodied in the Act of 1952. Relevant portion of section 5 is quoted below:

> "5. Except as otherwise provided in this Act, all plots or parcels of land which, before the commencement of this Act, have been used for the purpose of obtaining earth or other materials for the repair of any public embankment, water-course or embanked tow-path as aforesaid, or which by agreement have been substituted for such lands, shall be deemed to be at the disposal of the Provincial Government or the Authority for such compensation for the use of removal of such earth or other materials. The Engineer may cause all such plots or parcels of land to be ascertained, surveyed and demarcated".

36. Relevant portions of section 7(4) and (5) are extracted below:

> "7. Subject to the provisions of Part III, whenever it shall appear to the Engineer that any of the following acts should be done or works (including any work of repair) executed, that is to say:

(1) .....
(2) .....
(3) .....
(4) that the line of any public embankment should be changed or lengthened, or that any public embankment should be renewed, or that a new embankment should be constructed in place of any public embankment, or that any embankment should be constructed for the protection of any lands or for the improvement of any water-course, or that a sluice in any public embankment should be made; that any sluice or water-course should be made, or that any water-course should be altered for the improvement of the public health, or for the protection of any village or cultivable land;

(5) that any sluice or water-course should be made or that any water-course should be altered for the improvement of the public health, or for protection of any village or cultivable land;

(6) .....he shall prepare or cause to be prepared estimates of the cost of such works, including such works, including such proportion of the establishment charges as may be chargeable to the works in accordance with the prescribed rules or as may be specifically directed by the Provincial Government as the Authority, together with such plans and specifications of the same as may be required. He shall also prepare or cause to be prepared from the Survey Map of the district, a map showing the boundaries of the lands likely to be benefited or affected by the said acts and works and he shall issue a general notice of his intention to execute or cause to be executed such works".

Section 8 reads thus:

" 8. Such general notice shall be in the prescribed form stating, as far as possible, the prescribed particulars of all lands which are likely to be affected by the proposed work and to be chargeable in respect of the expenses of executing the same and shall be published in the prescribed manner. A copy of the said estimates, specifications and plans together with a copy of the maps aforesaid, shall be deposited in the office of the Engineer and shall be open to the inspection of the person interested who shall be allowed to take copies thereof and to file objections, if any, against the execution of the proposed work, within thirty days from the date of the publication of such notice".

37. Section 9 is as follows:

"9. The Engineer shall, on the day appointed for the hearing, or on any subsequent day to which the hearing may be adjourned, hold an enquiry and hear the objections of any persons who may appear, recording such evidence as may be necessary".

38. Section 27 runs thus:

"27. Whenever, in the course of proceedings under this Act, save as hereinafter provided, it appears that land is required for any of the purposes thereof, proceedings shall be forthwith taken for the acquisition of such land in accordance with the provisions of the Land Acquisition Act, 1894, or other law for the time being in force for the acquisition of land for public purpose".

39. Section 28 reads thus:

"28. Subject to the provisions of section 5, whenever any land other than land required or taken by the Engineer, or any right of fishery, right of drainage, right to the use of water or other right of property, shall have been injuriously affected by any act done or any work executed under the due exercise of the powers or provisions of this Act, the person in whom such property or right is vested may prefer a claim by petition to the Deputy Commissioner for compensation :

provided that the refusal to execute any work for which application is made shall not be deemed to be an act on account of which a claim for compensation can be preferred under this section".

40. Section 30 states thus:

"30. When any such claim is made, proceeding shall be taken for determining the amount of compensation, if any, which should be made and the person to whom the same should be payable, as far as possible, in accordance with the provisions of the Land Acquisition Act. 1894, or other law for the time being in force for the acquisition of land for public purpose".

41. Section 31 is quoted under:

"31. In every such case which is referred to the judge and assessors or to arbitrators for the purpose of determining whether any, and if so, what amount of compensation should be awarded, the judge and assessors or the arbitrators-

(i) shall take into consideration -

(a) the market-value of the property or right injuriously affected at the time when the act was done or the work executed,

(b) the damage sustained by the claimant by reason of such act or work injuriously affecting the property or right,

(c) the consequent diminution of the market-value of the property or right injuriously affected when the act was done or the work executed, and

(d) whether any person has derived, or will derive, benefit from the act or work in respect of which the compensation is claimed or from any work connected therewith, in which case they shall set off the estimated value of such benefit, if any, against the compensation which would otherwise be decreed to such person; but

(ii) shall not take into consideration-

(a) the degree of urgency which has led to the act or work being done or executed, and

(b) any damage sustained by the claimant, which if caused by a private person, would not in any suit instituted against such person justify a decree for damages".

42. Part-III of the Act of 1952 prescribes procedure in cases of imminent danger to life or property.

43. 'Authority' in the Act of 1952 is defined in section 3(a) of the said Act which is as follows:

> "3(a) "authority" means East Pakistan Water and Power Development Authority established under section 3 of the East Pakistan Water and power Development Authority Ordinance, 1958".

44. The East Pakistan Water and Power Development Authority Ordinance, 1958 has been replaced by the Bangladesh Water and Power Development Boards Order, 1972 (President's Order No. 59 of 1972). So, the authority as defined in section 3(a) of the Act of 1952 as it stands now is Bangladesh Water and Power Development Board.

45. From a reading of the above provisions contained in the Act of 1952, it appears that the prescribed laws in implementing and carrying out the activities of 'FAP-20' project have not been followed. No notice had been published, no objection had been recorded, no procedure for hearing of objection had been followed, no procedure has been made for putting forward the claim of compensation for damages for the loss of properties and deprivation of enjoyment of fishery as required under section 28 of the said Act. Procedure contained in section 30 and 31 of the Act has not been followed. In both the writ petitions, there is clear assertion that the provisions embodied in The Embankment and Drainage Act of 1952 had not at all been followed. This assertion has not been controverted by the respondents in the affidavit-in-opposition. There was no assertion that the provisions and procedure of law contained in the Act of 1952 had been followed. Only there is a statement that the land acquisition procedure for 'FAP-20' is strictly in conformity with the existing legal procedure of the country like other developmental project and the project is not following anything in the matter of land acquisition which contravenes the existing legal procedure. The respondents in the affidavit-in-opposition against Writ Petition No. 1576 of 1994 only annexed Annexure-1 series showing initiation of acquisition proceeding under Ordinance No. II of 1982 with respect to 1.36 acres of land belonging to Yousuf Ali and others. No paper had been annexed in the affidavit-in-opposition nor had any paper been produced before this Court showing fulfilment of requirements of law embodied in the Act of 1952. So, it is manifestly clear that the provisions and procedure of law embodied in The Embankment and Drainage Act of 1952 had not, at all, been followed. It is worth noting that the above provisions are aimed at assisting citizens to realise their rights, including the right to property guaranteed under the Constitution and those provisions and procedure are, as such, mandatory.

46. Referring to Article 11(1)(c) of Bangladesh Water and Power Development Boards Order, 1972, argument has been advanced that the said Article, though, requires that every scheme prepared under clause 3 of Article 9 shall be submitted for approval to the

Government with a statement of proposal by the Board for the re-settlement or re-housing, if necessary, of persons likely to be displaced by the execution of the scheme, no scheme for re-settlement or re-housing of the persons likely to be displaced by the execution of the scheme has been made in 'FAP-20' project. It was argued that there is every possibility that by the implementation of the project, people of the locality will be displaced and a scheme for re-settlement or re-housing of those personal likely to be displaced is a requirement of law.

47. In reply, it is contended from the side of the respondents that an important and considerable provisions in the name of mitigation measure has been incorporated in 'FAP-20' to mitigate the needs and sufferings of all people affected by the execution of 'FAP-20' in the event of any displacement of people or any other inconvenience that may arise as a result of execution of project.

48. In order to appreciate the contentions raised, it is appropriate to quote the relevant provision of law contained in Art. 11 (1) (c) of the Boards order, 1972 which runs thus:

> "11 (1) Every Scheme prepared under clause (3) of Article 9 or clause (3) of Article 10 shall be submitted, for approval, to the Government with the following information:-
> (a).....
> (b).....
> (c) a statement of proposal by the Board for the re-settlement or re-housing if necessary of persons likely to be displaced by the execution of the scheme".

Article 10 is not relevant for the present purpose. Article 9 has been extracted above and the same, thus, is not quoted here.

49. The respondents in the affidavit-in-opposition filed in Writ Petition No. 1576 of 1994 annexed 1 page photocopy of page no-49 of Revised Technical Assistance Project Perform (TAPP) of 'FPCO', Ministry of Irrigation, Water Development and Flood Control. It is pointed out here that nothing can be gathered or understood about the said Assistance Project. In the affidavit-in-opposition, nowhere it is stated that before going for implementation of 'FAP-20' project or even during the implementation stage, the provisions contained in Article 11 of the said Order of 1972 had been complied with and a statement of proposal by the Board for re-settling or re-housing of persons likely to be displaced by the execution of the scheme enjoined in Article 9(1) and (3) of the Order of 1972 has been submitted to the Government. Bangladesh Water Development Board got the responsibility and duty also to prepare a comprehensive plan for the re-settlement and re-housing of persons likely to be displaced by the execution of the project at which the Water Board does not appear to have done. The provision embodied in Article 11, therefore, does not appear to have been followed in implementing 'FAP-20' project.

50. The petitioners next challenged the compatibility of the 'FAP-20' project. It is argued that the respondent's attempt to experiment with the people's lives and properties under 'FAP-20' without following appropriate, compulsory and mandatory provisions for adequate accountability would lead to a denial of the rights of the people. It is further urged that the respondents got no legal right to conduct experiment in the name of 'FAP-20' risking the

lives and properties of lacs of people including significant changes in the environment and ecology. The Evaluation report, 1993 of FAP, Bangladesh Country Report for United Nations Conference on Environment and Development (UNCED) Brazil, 1992, the speech made by Mr. Saifur Rahman, former Finance Minister of Government of Bangladesh in the Third Conference of Flood Action Plan in 1993 held in Dhaka and some other documents had been referred to in this context.

51. The 'FAP-20' project is an experimental project for developing controlled flooding mechanism. Annexure-N is Evaluation report, 1993 of Flood Action Plan, Bangladesh. The extract of Civil Engineering aspect of the said report is as follows:

> "Because 'FAP-20' is a Pilot Project, because experience with current practice in Water Management Projects indicate a low level of design, implementation and maintenance, and because specially the poor are vulnerable to the effects of possibly unreliable water works, it is entirely appropriate to demand high standards in 'FAP-20' technical experiments.
>
> It appears that 'FAP-20' makes no use of certain aspects of modern planning and design such as risk analysis, sensitivity analysis, integration of operation and maintenance in the design and documentation system. If applications of these aspects of modern planning and design should have been impossible, it would a priori seem irresponsible to move on the implementation."

52. Annexure-L is a Resolution of European Parliament being No-Doc/EN/RE/230/230343 dated 23rd June, 1993 adopted on 24th June, 1993.

53. Resolution No.5 is hereunder:

> "5. Criticises the fact that the preliminary studies have not sufficiently taken into account the full extent of the harm caused by previous attempts to control floods by constructing embankments and the positive role of annual river flooding for soil enrichment, navigation, ground water exchange, bio-diversity and wetlands, agricultural production and floodplain fisheries".

54. Resolution No.7 reads thus:

> "7. Stresses the urgency of changing the FAP's classification within the world Bank's Project Scheme from category B to category A, requiring full environmental assessment for projects which appeared to have significant adverse effect on the environment".

55. Resolution No. 8 runs as follows:

> "8. Calls for EC involvement in the 'FAP' only on the following conditions:
>
> (a) an adequate institutional framework for the FAP should be guaranteed, in which flexibility, an interdisciplinary approach, improved information and an improved learning capacity are key components,

(b) the full involvement of local communities in project planning, implementation and management in agreement with the World Bank's own explicit point of view,

(c) a far-reaching interdisciplinary approach, taking effective account of the implications for the environment and for fisheries in addition to economic and technical aspects,

(d) the social and economic rights of any people to be resettled must be fully respected;"

56. Resolution No. 11 is quoted hereunder:

"11. Stresses that, for the protection of Urban areas, construction could be started only on condition that there is a provision that maintenance will be carried out adequately".

57. Annexure-O is a paper cutting of the speech of Mr. Saifur Rahman, the former Finance Minister, published in the Bangladesh Observer on 18 May, 1993 in the Third Conference on the Flood Action Plan, 1993 held in Dhaka. The Finance Minister in his speech in the Conference questioned the feasibility of the gigantic Flood Action Plan and suggested regional approach in tackling the problem of cataclysmic flooding. The Minister further criticised the multi-million dollar 'FAP' programme for its continued concentration and studies. He favoured giving due consideration to environment and all other related issues which might affect the people in the Flood Action Plan.

58. Reference may also be made to a speech delivered by Ms. Matia Chowdhury, Food and Agriculture Minister, Government of Bangladesh on 19 August, 1997 in an International Workshop on "South Asian Meeting on Flood, ecology and culture: In the context of livelihood struggles of rural communities' held at Bishnapur, a quiet village under Delduar Police Station in the District of Tangail.

The Food and Agriculture Minister speaking in the workshop as Chief Guest said that the debate with the donor is whether the Government would endorse the ready made prescription of the donor to go for building more and more embankments or they would agree to the proposal of the Government for dredging the rivers. The Minister further said the Government considers dredging of rivers and re-excavation of water bodies as the ultimate solution of flooding and the Prime Minister herself is trying to make the funding agency understand the multifarious benefits of the strategy. The Minister in this regard also quoted former Finance Minister as saying that the raising of embankment on the river Manu had endangered the life of the neighbourhood.

59. In this context, the Bangladesh Country Report for United Nations Conference on Environment and Development (UNCED), Brazil, 1992, published by Ministry of Environment and Forest, Government of Bangladesh in the month of October, 1991 may also, be looked into. Some extracts of the Report are given below:

"Embankments have been employed as one possible solution to controlling floods, and several thousands of kilometres have been built in Bangladesh. The aim of most of these embankments is to modify the water regime to reduce crop losses, allow more

intensive land use and, in recent times, the cultivation of higher yielding rice varieties which require some measure of water control.

However, these structures have adversely affected the utilisation of resources in other sectors. Embankments can cause severe environmental problems such as (i) impede the reproductive cycle of many aquatic species and thus reduce productivity of inland and to some degree marine fisheries, (ii) induce water logging as tidal rivers silt up after they have been embanked, (iii) induce changes in river morphology, such as increasing scour rates in the embanked areas and consequently increasing deposition rates downstream. Some tidal rivers and creeks in the Khulna area have silted up following construction of embankments (polders) on adjoining land leading to perennial water logging of land inside the polders. Such water logging could induce iron toxicity in soils, and, in some areas, sulphur accumulation leading to extreme soil acidity".

"Displacement of Inland Capture Fishery

Despite the importance of fisheries in terms of nutrition, employment, and its contribution as an open-access resource, Bangladesh's inland fisheries have been displaced and disrupted by agriculture, flood control, road embankments, and other land uses. As a result of these interventions, inland capture landings have been declining at a steady rate since 1983. This economic loss has been offset at the national level by increased marine catches and shrimp culture exports. However, the decline in the inland capture fisheries has significant nutritional consequences for many people, since capture fisheries are a major open-access resource for the poorer segments of the population and often the only source of protein, essential minerals and vitamins. A large number of children in poor families become blind every year because of improper and inadequate diet".

Relevant portion of the Report is Annexure-G1.

60. Annexure-G is recommendation of the Open Forum on "FAP' organised by the Institution of Engineers of Bangladesh.

Recommendation Nos.2 and 3 run as under:

"2. Since flooding often results from drainage congestion, canal and river digging/dredging should be examined more favourably,

3. The performance of past flood control and drainage projects should be reviewed thoroughly. Social and environmental impacts of these projects are to be assessed scientifically".

61. Annexure-G4 is a Report of the National Conservation Strategy of Bangladesh published by Ministry of Environment and Forest, Government of Bangladesh. In the said Report, 5.9.2.2 is on "Flood Control and Drainage Projects" which are extracted below:

"i. Operation and Maintenance: Flood control and drainage projects have accounted for about half of the total funds spent on water development projects since 1960. Despite this, the benefits have been less than planned and projected. There are a number of

reasons for this, including cost and time overruns (due to a number of factors eg. land acquisition) and problems in the operation and maintenance of projects. There is a tendency to see projects as being finished when the physical works are complete. Insufficient attention is paid to ensuring adequate water control. Problems in the operation and maintenance of projects have also been common. There has been few in-depth evaluation of flood control and drainage projects to assess the operational and other problems involved and to find the best ways to overcome these".

62. From the above stated materials on record and also the extract of speech made by the former Finance Minister and the present Food and Agriculture Minister, it seems that the compatibility/viability/feasibility of 'FAP-20' is not above question. Previous experience manifested that huge structural projects in the water sector were executed and then left without adequate provisions for their maintenance and the target achievements, hence, remained too far from realisation. Since 1960, a huge fund had been spent on water development project like flood control and drainage project. Despite this, the benefits have been much less than planned and projected. Embankment alignments were sometimes poorly planned leading to failure and frequent retirements. The multiple use of embankments was rarely taken into consideration at the planning stage. Drainage project suffer from severe drainage congestion due to faulty hydrological assessments and the absence of an adequate drainage network and the lack of proper maintenance after the construction of embankments. A common symptom of drainage problem is public cut and these are often so serious that they compromise scheme viability. In this context, it should not be lost sight of that most of the period, since the later part of the year 1958, except for a short interregnum from the year 1972-75, the country was virtually under military rule, sometimes open, sometimes concealed and bureaucracy ruling supreme and the people or their representatives having no say in the planning or implementation of developmental programmes, specially those for controlling flood problems. Since, there is democratic Government from the year 1991, it is expected that people friendly developmental schemes, specially for controlling flood problem, would be undertaken and implemented in accordance with the laws of the land. To formulate policy is the affairs and business of the Government and Court cannot have any say in the matter. Court can only see whether in the matter of implementation of any scheme, the laws of the land has been violated or not.

63. It is submitted from the side of the petitioners that the natural and ecological changes that would entail due to 'FAP-20' project will threaten and endanger two national archaeological resources namely, the "Attia Mosque" and the "Kadim Hamdani Mosque" which are in the list of archaeological resources and protected against misuse, destruction, damage, alteration, defacement, mutilation etc. under the Antiquities Act, 1968 in the spirit of Article 24 of the Constitution.

64. In reply, referring to the relevant paragraph of the affidavit-in-opposition, the learned Advocate for the respondents submitted that there is no chance of any damage to any archaeological resources in the project area due to implementation of physical intervention under the project.

65. Article 24 of the Constitution enshrines that state shall adopt measures for the protection against disfigurement, damage or removal of all monuments, objects or places

of special artistic or historical importance or interest. The protection guaranteed under Article 24 of the Constitution to protect the said Attia Mosque and Kadim Hamdani Mosque must be ensured and no damage, whatsoever, must not be done to the said two historical Mosques.

66. It is vigorously canvassed from the side of the petitioners that 'FAP-20' project has raised severe obvious criticisms regarding its environmental and ecological soundness and also committed serious breaches of laws and the same cannot be described as a Developmental project. It is further urged that 'FAP-20' activities is detrimental to the life and property of lacs of people and would deprive the affected people of their "Right to Life" by destroying the natural habitat which are protected under Article 31 and 32 of the Constitution and the Government also got no right to conduct experiment on people's life, property and profession in the name of a project. The question is whether state has a right to conduct experiment on people's life, property and profession disregarding the existing laws of the land.

67. The right or power of a sovereign state to appropriate private property to particular use for the purpose of promoting the general welfare is called, in America, "Eminent Domain". State necessity or need for taking the particular property of a citizen is the very foundation for the exertion of the power of "Eminent Domain". The term "Eminent Domain" was coined by Hugo Grotius in his Treatise "De Jure Belliet Pacis" in 1625. Cooley in Constitutional Limitation Volume-II page-1110 states:

> "The definition implies that the purpose for which it may be exercised must not be a mere private purpose. The right of Eminent Domain does not imply a right in the sovereign power to take the property of one citizen and transfer it to another even for a full compensation where the public interest will in no way be promoted by such a transfer".

The said doctrine was adopted in the famous "Declaration of Rights of Man" after the French Revolution that "the individual could be dispossessed of his property if the public interest so required. This declaration even speaks in precise terms of "the public need".

Law provides for paying just compensation for taking the property of a citizen for state necessity or need in the exercise of power of "Eminent Domain". In United States of America v. Iska W. Carmack 329 U.S. 230-248 (91 Law Edition) of United States Supreme Court Report Page 209 it is clearly posited that the Fifth Amendment postulates that private property cannot be taken for public use without just compensation. The Supreme Court of United States thus:

> "The Fifth Amendment to the Constitution says "…nor shall private property be taken for public use, without just compensation". This is a tacit recognition of a pre-existing power to take private property for public use, rather than a grant of new power. It imposes on the Federal Government the obligation to pay just compensation when it takes another's property for public use in accordance with the federal sovereign power to appropriate it. Accordingly, when the Federal Government thus takes for a federal public use the independently held and controlled property of a state or of a local

subdivision, the Federal Government recognises its obligation to pay just compensation for it and it is conceded in this case that the Federal Government must pay just compensation for the land condemned".

68. It must be borne in mind that the "Eminent Domain" is restricted or limited by the constitutional fiats like Fundamental Rights guaranteed under the Constitution. 'FAP-20' is an experimental project for controlling flood. In the event of undertaking of such experimental project, payment of adequate and Just compensation to all the persons affected directly or indirectly or casually, are to be ensured and all risks, damages, injuries etc. must be covered. Sufficient guarantee must be integrated with the project from the initial stage and genuine people's participation of the affected people must be ensured and that must not be a public show. "Eminent Domain" does not authorise the state to act in contravention of the laws of the land in planning and implementing the project. Strict adherence to the legal requirement must be ensured so that people within and outside the project area do not suffer unlawfully. No person shall be deprived of his property except under the law of the land; otherwise it would be subversive of the Fundamental principles of a democratic Government and also contrary to the provisions and spirit of the Constitution.

69. It is significant to note here that the project called "Jamuna Multipurpose Bridge Project" has drawn detailed procedure for re-settlement of the displaced and affected persons and perceived the same as a developmental programme from the inception of the project. "Jamuna Multipurpose Bridge Authority" had chalked out "Revised Re-settlement Action Plan", shortly, 'RRAP'. But in 'FAP-20' project, no plan by the authority for re-settlement/ re-housing of displaced and affected parsons directly or indirectly or casually appears to have been under-taken. The people under the 'FAP-20' project got the fundamental right as enshrined under Article 31 of the Constitution to enjoy the equal protection of law and to be treated in accordance with law. It need be stated again that no property can be acquired and no people can be adversely affected in the name of developmental project, here the 'FAP-20' project, without taking adequate measures against the adverse consequences as well as the environmental and ecological damage.

70. The petitioners have alleged that environmental hazard, damage and ecological imbalance will be caused by the activities of 'FAP-20'. In the case of Dr. Mohiuddin Farooque Vs. Bangladesh and others being Civil Appeal No. 24 of 1995 arising out of Judgment and order dated 18.8.1994 passed by the High Court Division in Writ Petition No. 998 of 1994, 49 DLR (AD) 1:1997 BLD (AD) 1, A. T. M. Afzal, C. J. has dwelt at length on the growing concern and global commitment to protect and conserve environment irrespective of the locality where it is threatened. In the same case B. B. Roy Chowdhury, J. observed:

"Articles 31 and 32 of our Constitution protect right to life as Fundamental Right. It encompasses within its ambit, the protection and preservation of environment, ecological balance, free from pollution of air and water, sanitation without which life can hardly be enjoyed. Any act or omission contrary there to will be violative of the said right to life".

71. Life cannot be sustained without its basic necessities such as food and shelter and it cannot, also, be enjoyed fruitfully without and all facilities of health care, education and cultural enjoyment and all the above requirements of life cannot be had without proper means of livelihood. In that context, the question arose whether right to life includes right to livelihood. In the advanced economically developed countries known as "Welfare State", Government provides social security benefits to the citizens who have no means of livelihood due to unemployment and other reasons. The concept of the Laissez Faire of the Nineteenth century arose from a philosophy that general welfare is best promoted when the intervention of the State in economic and social matters is kept to the lowest possible minimum. The rise of the "Welfare State" proceeds from the political philosophy that the greater economic and social good of the greater number requires greater intervention of the Government and the adoption of public measures aimed at general economic and social welfare.

72. Article 21 of the Constitution of India is similar to Article 32 of our Constitution. Article 21 of the Constitution of India enjoins: "No person shall be deprived of his life or personal liberty except according to procedure established by law". The Indian Supreme Court in the case of Olga Tellis and others v. Bombay Municipal Corporation and others, AIR 1986 SC 180, interpreted Article 21 of the Indian Constitution in the following terms :-

> "The sweep of the right to life conferred by Art. 21 is wide and far-reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would made life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life liveable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life".

73. In our jurisdiction, this question as to the meaning of right to life was raised for the first time in the case of Dr. Mohiuddin Farooque v. Bangladesh and others, 48 DLR (High Court Division) 438 to which one of us (Kazi Ebadul Hoque, J.) was a party. In that case after discussing various decisions of different jurisdictions especially of the Supreme Court of India it was held:

> "Right to life is not only limited to the protection of life and limbs but extends to the protection of health and strength of workers, their means of livelihood, enjoyment of pollution-free water and air, bare necessaries of life, facilities for education, development of children, maternity benefit, free movement, maintenance and

improvement of public health by creating and sustaining conditions congenial to good health and ensuring quality of life consistent with human dignity".

74. In that case no question of deprivation of life for want of livelihood was involved. But in the instant cases before us, the question is whether right to life under Articles 31 and 32 of the Constitution would be adversely affected by the deprivation of livelihood of the citizens. It has already been noticed that section 28 of The Embankment and Drainage Act, 1952 provides for payment of compensation for injuriously affecting certain rights of inhabitants upon which their livelihood depends. This provision, thus, recognises right to livelihood of the citizens of the country. In the facts and circumstances of these two cases it is clear that livelihood of some inhabitants of 'FAP-20' project area dependant on fishing would be adversely affected. We, thus, find that life of those persons would, ultimately, be affected due to the deprivation of their such livelihood. So, we are of this view that right to life under Articles 31 and 32 of the Constitution also includes right to livelihood. Since, the afforestated provisions of law has provided for compensating such adverse affect to the livelihood of the inhabitants of the 'FAP-20' project area, there is no question of violation of Fundamental Right.

75. In a Pilot Project, although, positive targets are expected but that would not automatically over-rule the potential of negative consequences or even failure of the project. Admittedly, 'FAP-20' is an experimental project. In the case of Shehla Zia v. WAPDA, PLD 1994 (SC) 693, referred to from the side of the petitioners, high tension electric wires and grid station near and over residences created possibilities of electro-magnetic field injurious to human health. The Supreme Court of Pakistan held:

> "In this background if we consider the problem faced by us in this case, it seems reasonable to take preventive and pre-cautionary measures straight away instead of maintaining status-quo because there is no conclusive finding on the effects of electro-magnetic field on human life. One should not wait for conclusive finding as it may take ages to find out and therefore, measure should be taken to avoid any possible danger and for that reason one should not go to scrap the entire scheme but could make such adjustment, alterations or additions which may ensure safety and security or at least minimise the possible hazards (PP 710-711).

The Compartmentalisation Pilot Project, 'FAP-20', being an experimental project, precautionary measures are needed to be integrated into the project to ensure that no citizen suffers damage from an act of the authority save in accordance with law.

76. Turning now to the question how far the judiciary can intervene in such matter. In S.A.D.E. Smith's "Constitutional and Administrative Law" Fourth Edition, Page 562 as referred to by Dr. Mohiuddin Farooque, it is stated:

> "Action taken by a public authority not only runs the risk of being ultra vires in substance but may in certain cases be ultra vires in form: Certain powers are exercisable only subject to procedural safeguards enshrined in the enabling statute. The relevant Act may require that some person or organisation be consulted before action is taken or an order made. Notice of intention to act may have to be given in a particular

form or by a specified date. What happens if the procedure laid down is not complied with by the authority? First the courts will classify the procedural or formal requirement as mandatory or directory. If a requirement is merely directory then substantial compliance with the procedure laid down will suffice to validate the action; and in some cases even total non-compliance will not affect the validity of what has been done. If a mandatory requirement is not observed then the act or decision will be vitiated by the non-compliance with the statute. This does not mean that the act or decision has no legal effect and can be ignored or treated as void. The House of Lords has stressed that the use of such terms as void and violable has little practical meaning in administrative law where the supervisory jurisdiction of the High Court operates to ensure the proper exercise of powers by public authorities. Non-compliance with a mandatory procedural requirement results in the act or decision being susceptible to being quashed by the High Court which will then make whatever order to the public authority if sees as appropriate to remedy the unlawful action taken".

In this context, we like to quote a passage by his Lordship Mr. A. T. M. Afzal C. J. from a paper under the Heading "Country Statement-Bangladesh" presented at the Regional Symposium on the Role of Judiciary in Promoting the Rule of Law in the Area of Sustainable Development, Colombo, Sri Lanka, 4-6 July, 1997:

> "It is worth noting that many sectoral laws explicitly contain provisions to inform local people about projects and to both invite and resolve objections rose. For example, the 1927 Forest Act requires the inquiry and settlement of all private claims when restrictions are to be imposed when the status of a public forest is changed through re-classifying as a Reserved or Protected Forest. The 1920 Agricultural and Sanitary Improvement Act and the 1952 Embankment and Drainage Act explicitly guarantee the rights of local populations and interest-holding parties in proposed project areas to examine and raise objections to the project being considered. Furthermore, neither legal rights nor interests can be extinguished without appropriate compensation. Many of the adverse local social and environmental impacts induced by development projects could be avoided or minimised if the procedures of law were followed. Some laws contain inter sectoral restrictions on development projects which are neither followed nor enforced. An example of this is the Conservation of Fish Act, 1950 which provides in the schedule a long list of rivers and their segments where no water control measure can be undertaken, so that natural spawning and feeding grounds of fish remain undisturbed. These examples prove that it is a tragedy when public agencies flout their own laws and then chase the people for violating the law to justify the failures of their so called development projects. In such situations, judicial review of administrative action would be effective in upholding rule of law".

77. Judicial review of the administrative action should be made where there is necessity for judicial action and obligation. Such action must be taken in public interest. The purpose of judicial review is to ensure that the citizen of the country receives protection of law and the administrative actions comply with the norms of procedure set for it by laws of the land. Judicial Power is the "safest possible safeguard" against abuse of power by administrative authority and the judiciary cannot be deprived of the said power.

78. It has already been noticed that Article 31 of our Constitution gives the right to protection of law to the life, liberty, property etc., Article 32 ensures that no one can be deprived of life and liberty except in accordance with law and thus protects life from unlawful deprivation. Article 40 gives every citizen right to enter upon lawful profession or occupation and Article 42 protects right to property. The petitioner of each of the writ petitions alleges the violation of the Fundamental Rights guaranteed under Articles 31, 32, 40 and 42 of the Constitution. All the above Fundamental Rights are subject to law involved in the matter. In the event of violation of Fundamental Right or even any violation of the law of the land, this Court under judicial review of the administrative action, can interfere with unlawful action taken by any administrative authority. It has, already, been noticed that 'FAP-20' activities have been undertaken by the respondents in accordance with the law of the land regarding the adoption and approval of the scheme but violations of some provisions of the law of the land in implementing the project is found but the Fundamental Rights stated above do not appear to have been violated.

79. Now, the question is whether this Court will declare the activities and implementation of 'FAP-20' project to be without lawful authority for the alleged violation of some of the provisions of the afforestated laws of the land.

80. From the materials on record it appears that 'FAP-20' project is a developmental project, although experimental, aimed at controlling flood which regularly brings miseries to the people of the flood prone areas of the district of Tangail especially during the rainy season of the year. A substantial amount appears to have been spent and the project work has been started long before and also partially, implemented. Success and not the failure of the project are expected. In the event of any interference into the 'FAP-20' activities, the country will be deprived of the benefits expected to be derived from the implementation of the scheme and also from getting foreign assistance in the developmental work of the country and, in future, donor countries will be apprehensive in coming up with foreign assistance in the wake of natural disaster. At the present stage of the implementation of the project, it will be unpractical to stop the work and to undo the same. But in implementing the project, the respondents, cannot with impunity, violate the provisions of laws of the land referred to and discussed above. We are of this considered view that 'FAP-20' project work should be executed complying with the afforestated requirements of laws of the land.

81. In the facts and circumstances and having regard to the provisions of law, we propose to give some directions to the respondents for strict compliance of the same in the greater public interest:

The respondents, thus, are directed

(a) to comply with the provisions and procedures contained in section 28, 30, and 31 of The Embankment and Drainage Act, 1952 (East Bengal Act I of 1953),

(b) to comply with the provisions contained in Article 11(1)(c) of Bangladesh Water and Power Development Boards Order, 1972 (President's Order No. 59 of 1972) for re-settlement and re-housing of persons actually displaced from their residences by the execution of the scheme, that is, implementation of 'FAP-20' Project,

(c) to secure the archaeological structure (site) of the 'Attia Mosque' and 'Kadim Hamdani Mosque' falling within the 'FAP-20' Project area from any damage, disfigurement, defacement and injury by the project activities, and

(d) to ensure that no serious damage to the environment and ecology is caused by 'FAP-20' activities.

82. Before parting with the matter, we are inclined to observe that the people of Bangladesh live with flood and fight with flood for Centuries. The people of Bangladesh face the painful experience of flood causing colossal damage to crops and properties. Faced with the peculiar geographic and climatic situation, it becomes a difficult task to control flood and other catastrophes that fall on the people of Bangladesh. Flood water comes from outside, no action can be effective until the upstream flow can be checked and controlled. Under the International Law, the upstream states got a tremendous responsibility to play part in regulating and taking integrated approach in tackling flood related hazards and the burden of the load of flood cannot be placed on Bangladesh alone.

83. Before concluding, we express our deep appreciation to Dr. Mohiuddin Farooque and his Organization "Bangladesh Environmental Lawyers Association", "(BELA)" who are championing the cause of the public and the downtrodden people of the community, who as helpless citizens, cannot ventilate their grievances before the courts of law and, also, making efforts to protect and conserve the environment and ecology of the country and "BELA" is coming forward with Public Interest litigation (PIL) before the courts of law.

84. In the result, both the Rules are made absolute-in-part. The respondents are allowed to execute and implement the 'FAP-20' Project activities subject to the strict compliance with the directions made above.

85. Having regard to the facts and circumstances of the case, there will be no order as to costs.

KAZI EBADUL HOQUE, J:

I agree.

Parvin Akhter v. Rajdhani Unnayan Kartipakkha
18 BLD 1998 (High Court Division) 116
Writ Petition No. 2636 of 1996, D/-2-9-1997
Md. Mozammel Hoque and Md. Hasan Ameen. JJ.

Constitution of Bangladesh, 1972

Article-102

Locus standi

The lake is situated just by the side of the residential area of the Gulshan Model Town and this lake is in fact beautifying the area and environmental advantages giving to the

lessees of the area by this lake. So, the petitioner has got the locus standi and she is an aggrieved person in view of the fact that if the lake is filled up, the lessees of the entire Gulshan Model Town will be affected. Since she is one of the lessees and since the entire area will be affected by the action of respondent No. 1, she has no locus standi as an aggrieved person to file the writ petition.

(Para-11)

Dr. Mohiuddin Farooque v. Bangladesh, 17 BLD (1997) (AD) 1-relied upon.

Article-102

The petitioner is moving this application for her personal interest as well as for the interest of all the residents of the Gulshan Model Town who are, in fact, enjoying the greeneries and the Gulshan Lake with its environmental facilities. Since it relates to common interest of all the persons of the Gulshan Model Town Area, the petitioner is an aggrieved person and has got the locus standi to file the writ petition.

(Para-15)

Public Interest Litigation-Environmental benefits

Everybody is willing to have better environmental progress and benefits. But the problem which the petitioner is facing now has not been agitated before the court at any time before hand. There should be a decision to that effect so that in the future the leaseholder of not only the Gulshan Model Town area but also the leaseholders of the other areas of the Metropolitan City may get a protection of the court for saving their greeneries, lake, parks and other environmental benefits.

(Para-18)

Judgement

Md. Mozammel Hoque, J: This Rule was issued calling upon the respondents to show cause as to why their distraction of GREENERIES and the lake for the purpose of constructing a road and residential plots on the land adjoining to plot No. C.E.S. (G)-3, New 41B, Gulshan Model Town, Dhaka, should not be declared to have been made without lawful authority and is of no legal effect.

2. At the very outset it may be mentioned that this is a personal as well as a public interest litigation. Respondent No. 1 is the lessor of the property leased out to the lessee for 99 years on 20-8-1966 by a registered instrument. One Mrs. Sultana Mahmud, wife of Mr. H. Mahmud, was one of the predecessors of the petitioner. As per original plan on the basis of which the said plot as well as other plots were allotted the plots are adjacent to the eastern boundary of the said plot of land, a lake and greeneries making the plot an ideal location for building residential accommodation. The copy of the lease agreement as well as the layout plan dated 9-11-96 have been annexed as Annexure-A and A-1 to the writ petition. Clause 4 of the terms of the lease agreement made it mandatory for the lessee to build a residential house in the demised property within 4 years or such longer period as might be allowed by the lessor and clause 6 provides that such residential house shall be constructed in accordance with such plans, elevations and specification as shall

be approved in writing by the lessor. Accordingly the predecessor of the petitioner Mr. Monjurul Islam submitted a plan for a residential building suggesting the location of the building as the eastern most part of the land, clearly to reap the maximum benefit from the adjacent lake and the greeneries and to enjoy privacy which would be secured therefore. Respondent No. 1 duly approved the plan accepting the lake and greeneries as the major factor for choosing the location of the dwelling house as close to the greeneries and the lake as possible. Accordingly the said predecessor built a big three-storied dwelling house on the location stated with the latest amenities costing crores of Taka. The petitioner accrued the leasehold interest in the said property in August, 1993 deeply induced by the breath taking scenery of the greeneries and the lake, situated so close to the dwelling house, as per the layout plan and accordingly he paid a hand some price for the privilege. Respondent No. 2, in a letter dated 29-12-93, confirmed that their records had been amended to show the petitioner as the current lessee of the said property.

3. The Respondents have now embarked on a project to dismantle the said lake and greeneries and build plots of land for allocation where upto now stands a lake, and construct a road, namely, 130/A for the access to the new plots immediately adjoining to the house where once stood greeneries and vegetation. A copy of the layout plan of plot 41B and its surroundings is annexed with the petition as Annexure-C. The respondents have already embarked in full fledge to fill up the adjoining low land which had so long been a part of the greeneries and lake, by bringing truck loads of earth and soil through their contractors, in order to prepare the land for allocation of plots in due course to the other allottees. It is submitted that if the Respondents plan to construct the said road and residential plots is allowed to go ahead, the petitioner will not only be deprived of the view of the lake and greeneries but the location of the house will be such that the petitioner's right to privacy will be shattered rendering it impossible for the petitioner to reside in the property as it now stands. It is further submitted that the Respondent's plan to damage and destroy environment adjacent to the land and property occupied and enjoyed by the petitioner breaches the fundamental right of the petitioner to hold property without facing any unlawful detrimental action and further tends to breach the right which she became entitled to as the lessee of her predecessor since transfer was based on the layout plan which cannot be altered or changed to the detriment of the petitioner without her consent. It is further submitted that no land is sold or brought in isolation. It's surrounding area and location and so on always determine the value of the property and therefore a seller can not be allowed to sell a property creating a breath taking surrounding giving an impression of its permanency and then upon selling the property, destroy the surrounding for commercial gains. Therefore in this case the seller is bound by the layout plan on the basis of which the original lease was granted.

4. It is further submitted that the first lessee and her successors including the petitioner were induced to buy the property on the basis of the existence of the greeneries and the lake as was represented by the layout plan and on such representation as were made in the layout plan, the property was purchased and the value of the property was determined to a large extent by the fact that the property was situated so close to the greeneries and the Gulshan lake. Respondent No. 1 was well aware that the value of the property was greatly enhanced due to the environmental advantage of its location and therefore to that

extent the environmental it stood formed a part of the property and as such its destruction tantamount to unlawful interference with her right to enjoy the property. Such a breach of action offends fundamental right of the petitioner. It is further submitted that such breach also offends the principle of natural justice by taking such a drastic move without any consultation with the petitioner to alter the surrounding area of the petitioner's home which surrounding was the determinant factor in choosing the location of the dwelling house with the approval of Respondent No. 1 and that the said lease was granted and it was purchased on the representation as made on the basis of the layout plan and the petitioner as well as her predecessor in title acted upon such representation and the Respondent No. 1 now cannot alter the said representation to the detriment of the petitioner particularly because the entire plan of the building and its design was made on the basis of original layout plan and the said plan did not take into consideration the possibility of the original greenery and the lake being converted into building a road and creating new plots by filling the lake. It is further submitted that such an action of the respondents offends petitioner's fundamental right guaranteed under Article 31 and 42 of the Constitution and as such the Respondents should be stopped from doing such an action in the area of Gulshan Model Town and from destroying the greeneries and the lake concerned.

5. On behalf of Respondent No. 1 an affidavit-in-opposition and also a supplementary affidavit-in-opposition have been filed. The deponent has denied the material allegations as made in the writ petition. It is stated that the approved plan was given according to the provisions of Building Construction Act and Rules and the physical location of lake and greeneries adjacent to the said plot did not play a major factor or any factor in the said approval of plan. The petitioner is not authorised to say anything about state of mind of the Respondents. The Building Construction Act and Rules have nothing to do with lake and greeneries. It is stated by the Respondents that they are not aware whether the breath taking scenery of the greeneries and the lake induced the petitioner to purchase the plot at a handsome price. It is further stated that an estimate for the development of plot Nos. 16, 18, 20, 22, 24, 26, 28 and 30 of the Road No. 130 has been prepared in the light of approved layout plan of Gulshan Model Town. After the approval of estimate by the authority, the work was executed by engaging a contractor observing the formalities and norms of RAJUK. Those plots, roads, which are part of the layout plan are outside the schedule of the lease deed between RAJUK and transferor of the present lease. The said lake and the greeneries are not within the said lease deed making said lake and the greeneries part of the lease. There is no legal and contractual obligation under the lease deed to provide the lake and the greeneries. The layout plan, Annexure-C, is not part of the lease deed. It is further stated that the development of the area is within the domain of the Respondents and in discharge of their responsibilities under the Town Improvement Act the Respondents are taking that step. The petitioner has no legal right under the lease deed and/or Transfer of Property Act on the lake or the greeneries which are properties of the Respondents. The rights of the petitioners are confined to the terms of the lease deed in respect of the property converted by the schedule thereto. Respondent No. 1 prepared layout plan and can modify the plan to meet the needs of the time.

6. It is stated that with the passage of time the population of Dhaka City has exploded and increased manifold resulting in serious scarcity of land for constructing residential houses. In order to meet the highly increased demand for land for residential accommodation, Respondent No. 1 made plan to increase the number of residential plots. As such petitioner's complaints of affecting her privacy because of construction of the road and residential plot forgetting that increase of residential plots to meet the high demand of accommodation is a common feature in every capital of the world and that a man living in the city has no exclusive subjective right to privacy of the nature and extent claimed by the petitioner. In fact, the privacy of the petitioner is not affected by the construction of road and residential plot. There is no legal obligation of the Respondents to protect and oversee subjective privacy of the petitioner. The issue of privacy is an issue of Tort and is not relatable to any statutory right of the petitioner and corresponding statutory obligation of the Respondents and as such not a subject to adjudication under Article 102 of the Constitution. It is stated that the Respondent's plan to construct road and residential plots does not damage and destroy environment adjacent to the property of the petitioner and as such does not infringe petitioner's fundamental right.

7. It is further stated by the answering Respondent that the RAJUK had not sold any land to the petitioner or to the transferor of the petitioner. Rather the Respondents had granted lease for 99 years. The lessee is competent to transfer the subsisting leasehold interest to the petitioner who has acquired the residuary of the leasehold interest in the property. The relationship between the Respondents and the petitioner is that of lessor and lessee covered by the provisions of Chapter-V, Sections 105 to 117 of the Transfer of Property Act.

8. Mr. Amir-ul Islam, the learned Advocate appearing for the petitioner, submits that it is admitted position that the present petitioner is a lessee on 99 years lease of the plot in question. This plot with the three storied building is situated on just western bank of the lake, namely, Gulshan Lake. He submits that Gulshan is a residential area and the plots were allotted to the lessees by RAJUK and plan for construction of the buildings were also given by RAJUK according to the Building Construction Act. The greeneries as well as the Gulshan Lake are situated there which has not been denied by the Respondents. If the greeneries and the lake are destroyed, not only the petitioner, but also all the lessees of the area, namely, Gulshan Model Town will be affected in view of the fact that the lake as well as the greeneries are the beautiful sites and it will keep the environmental beauty of the area concerned. Mr. Islam submits that the petitioner as well as other lessees actually got lease of their plots of the aforesaid areas inasmuch as it is an aristocratic area having greeneries and the lake near it. If the Gulshan Lake is destroyed and if the lake is filled up and the new plots are allotted to other persons, not only the petitioner, but also the other lessees who are living there by constructing their buildings will be affected and prejudiced in view of the fact that the environmental situation will be greatly changed. It is submitted that not only in this country, but in the whole world environmental policies are being followed and the people at large are trying to protect the environmental beauties and nature only for a peaceful habitation of the human beings. Similarly the present petitioner as well as all other lessees of the Gulshan area will have a right to protect the greeneries and environmental sites of the area and thereby they will be

highly prejudiced and affected if the beautiful lake namely, Gulshan Lake is filled up and the plots are allotted to some other persons. It will not only damage the beauty of the area, but also it will affect the environmental situation of the Model Town. He submits that the RAJUK, Respondent No. 1 has admitted a position that they are constructing a new road, namely, Road No. 130A of the Gulshan area and they are going to fill up some portion of the lake by earth and several persons will be allotted the several plots. So, it is admitted by RAJUK that it was going to extend the residential area of the Gulshan Model Town by filling the low land of the lake and new plots will be created in future.

9. Mr. Amir-ul Islam has produced before the Court the Dhaka Metropolitan Master Plan, Volume-II Urban Area Plan (1995-2005). He has shown the development plan of Gulshan, Banani, Baridhara and Badda. The future plan has been incorporated in this Metropolitan Development Plan. So, Mr. Amir-ul Islam submits that when this Metropolitan Master Plan is going to be implemented and further development will take place with regard to Gulshan, Banani, Baridhara and Badda, at that time the RAJUK was taking step to fill up and destroy the Gulshan Lake and construct and build plots for leasing out the same to other persons. This is contrary to the development project of the Government.

10. Mr. Hasan Arif, the learned Advocate appearing for Respondent No. 1, submits that the present petitioner is not the owner of the property, rather she is a lessee only for one plot of Gulshan Model Town. She is not an aggrieved person and she has no locus-standi to file this writ petition. He further submits that Respondent No. 1 being the lessor is at liberty to extend, change, modify and alter the residential area according to its own need and the present petitioner is not in any way an aggrieved person and she cannot stop the further extension of the residential area of Gulshan Model Town. He submits that low lands of the lake is going to be filled up with earth and the same would be allotted to the different persons in view of the fact that there is tremendous growth of population in the city of Dhaka and that is why Respondent No. 1 is taking such step for extension of the area. He further submits that the lease deed does not contain any provision that the greeneries and the lake will be kept in tact to the desire of the lessees. He submits that even if the greeneries and the lake is going to be affected, that will not cause any harm to the present petitioner and as such this writ petition is absolutely a malafide. The learned Advocate further submits that a road will be extended and several plots will be created for allotment. So, he admits that Respondent No. 1 is going to fill up a portion of the Gulshan Lake by earth for making plots and the road will be constructed there. So, he admits that by the side of the house of the present petitioner which exists just on the bank of the lake several other plots will be constructed by filling up the lake and plots will be distributed to some other persons.

11. As regard locus-standi as well as aggrieved person Mr. Amir-ul Islam submits that at the very out set he submitted before the Court that this is a personal interest as well as public interest litigation. Mainly the lake is situated just by the side of the residential area of the Gulshan Model Town and this lake is in fact beautifying the area as well as the environmental advantages are being given to the lessees of the area by this lake. So, the present petitioner has got the locus standi and she is an aggrieved person in view of the

fact that if the lake is filled up, the lessees of the entire Gulshan Model Town will be affected. Since she is one of the lessees and since the entire area will be affected by the action of the Respondent No. 1, she has got locus-standi as well as she is an aggrieved person to file this writ petition. In this connection, Mr. Amirul Islam has referred to the case of Dr. Mohiuddin Farooque v. Bangladesh, BLD 1997 (A.D), I, (January Issue). It was a public interest litigation where the point of aggrieved person and locus-standi has been raised in that case before the Appellate Division of the Supreme Court of Bangladesh. In the Judgement of the aforesaid case the learned Chief Justice Mr. Justice A. T. M. Afzal observed that the expression 'any person aggrieved' approximates the test of or if the same is capsulised, amounts to, what is broadly called, 'sufficient interest'. Any person other than an officious intervener or a wayfarer without any interest in the cause beyond the interest of the general people of the country having sufficient interest in the matter in dispute is qualified to be a person aggrieved and can maintain an action for judicial redress of public injury arising from breach of some public duty or for violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. The real rest of 'sufficient interest', of course, essentially depends on the co-relation between the matter brought before the court and the person who is bringing it.

12. In that Judgement, his lordship Mr. Justice Mustafa Kamal observed that the expression 'any person aggrieved' is not confined to individually affected persons only but it extends to the people in general, as a collective and consolidated personality. If an applicant bonafide exposes a public cause in the public interest he acquires competency to claim a hearing from the Court. The appellant as an environmental association of lawyers is 'a person aggrieved' because the cause it bonafide exposes, both in respect of fundamental rights and constitutional remedies, is a cause of an indeterminate number of people in respect of a subject-matter of great public concern.

13. His lordship Mr. Justice Latifur Rahman observed that the language used by the framers of the Constitution must be given a meaningful interpretation with the evolution and growth of the society. An obligation is cast upon the Constitutional Court, which is the apex Court of the Country, to interpret the Constitution in a manner in which social, economic and political justice can be advanced for the welfare of the state and the citizens. When a person approaches the Court for redress of a public wrong or public injury, though he may not have any personal interest, he must be deemed to have 'sufficient interest' in the matter if he acts bonafide and not for his personal gain or private profits or for any oblique considerations. In such a case he has locus standi to move the High Court Division under Article 102 of the Constitution.

14. His lordship Mr. Justice B.B. Roy Chowdhury observed that the expression 'person aggrieved' means not only any person who is personally aggrieved but also one whose heart bleeds for his less fortunate fellow-beings for a wrong done by the Government or a local authority into fulfilling its constitutional or statutory obligations. It does not, however, extend to a person who is an interloper and interferes with things which do not concern him. This approach is in keeping with the constitutional principles that are being evolved in the recent times in different countries of the world.

15. The principle enunciated by their lordships of the Appellate Division in the aforesaid case may be applicable in the facts and circumstances of the present case inasmuch as the present petitioner is moving this application under Article 102 of the Constitution for her personal interest as well as for the interest of all the residents of the Gulshan Model Town who are in fact enjoying the greeneries and the Gulshan Lake on environmental facilities. Since it relates to common interest of all the persons of the Gulshan Model Town Area, we are of the view that the present petitioner is an aggrieved person and has got the locus-standi to file the present writ petition.

16. Mr. Amir-ul Islam submits that the petitioner and all the residents of the area have got the lease hold interest in the property and it is in fact a permanent lease and in the area the lease holders are living by constructing their own buildings. The benefits, interest and convenience of the greeneries and the lake are in fact attached with their leasehold rights inasmuch as there is nothing in the lease agreement that the lessor will have the right to use the lake and other greeneries in any manner whatsoever or even they have the right to fill up the same and make any construction there. In absence of such assertion in the lease deeds of the inhabitants of the area, Mr. Islam submits, this benefit of greeneries and Gulshan Lake between attached with their leasehold right they are entitled to have the benefit and enjoy the same inasmuch as the same are protected under the fundamental rights guaranteed in the Constitution as the leasehold right are being guaranteed under the fundamental right of the Constitution. Mr. Amir-ul Islam further submits that for environmental purpose this Gulshan Lake and greeneries must be protected.

17. He submits that Government authority may be changed after five years or so, and when a new Governmental authority will come, interested persons may try to take advantage of the area and may influence the RAJUK to fill up the lake for their personal interest that they get plots in their own names. In order to protect the greeneries and the lake from such future invasion by the interested quarters there must be a direction and/or injunction and/or prohibitory order upon the RAJUK about the destruction of the greeneries and the lake so that in future if any question comes up to fill up the lake and destroy the greeneries the RAJUK may take a stand to the effect that it can not be done against the judgement of the Supreme Court and thereby Rajuk will be able to protect the greeneries and the lake and to save the environmental benefit of the lessees of the aforesaid Gulshan Model Town. We find force in the above contention of Mr. Amir-ul Islam. In view of the fact that the leaseholders are really entitled to have the benefit of the greeneries and the lake for the environmental purpose and in view of the fact that in future such greeneries and the beneficial environment of the lake may be protected, we are of the view that a decision to that effect should be given by this Court so that in future there may not be any invasion by any interested quarter for destroying the greeneries and the lake.

18. In this connection it may be mentioned that everybody is willing to have better environmental progress and benefits. But the problem which is facing now in the instant writ petition has not been agitated before Court at any time before hand. The aforesaid judgement of the Appellate Division was on a different purpose of environmental matter, but with regard to this Capital City of Dhaka we are not aware of any Judgement of any

Court for protecting the greeneries, natural beauty, lake and other environmental benefit of the people. In this view of the matter, we find that there should be a decision to that effect so that in future the leaseholder of not only Gulshan Model Town area, but also the leaseholders of the other area of the Metropolitan City may get a protection of the Court for saving their greeneries, lake, parks and other environmental benefits.

19. Mr. Hasan Arif submits that since there is no stipulation like that in the lease deed and since the lessor, namely, RAJUK can use its properties in any manner whatsoever cannot be accepted in view of the fact that the RAJUK may be the lessor of the properties, but at the same time RAJUK must maintain the greeneries, natural beauties, lake and parks for the benefit of the lessees which are in fact part and parcel of their leasehold right. In this view of the matter we do not find any substance in the contention of Mr. Hasan Arif.

20. In the result, this Rule is made absolute and the Respondents are directed not to destroy the greeneries and Gulshan Lake for the purpose of constructing a road and residential plots on the lands adjoining the plot of C.E.S. (G)-3, New 41B of Gulshan Model Town and like other plots and the impugned action of the Respondent No. 1 is hereby declared to have been made without lawful authority and is of no legal effect. The Respondents are further directed not to destroy the greeneries and Gulshan Lake, which are being used for beneficial and environmental purpose by all the lessees of the Gulshan Model Town, by filling up the same for any residential or other purpose at any time in future.

Considering the facts and circumstances of the case we pass no order as to cost.

Professor Nurul Islam v. Bangladesh
52 DLR 2000 (High Court Division) 413
Writ Petition No. 1825 of 1999 with Writ Petition No. 4521 of 1999, D/- 7th February, 2000
Mohammad Fazlul Karim and Md. Abdul Wahab Miah, JJ.

Judgment

Mohammad Fazlul Karim, J:- These two Rules were heard together since both the Rules relate to the same and similar subject matter and are disposed of by this single judgment.

2. In Writ Petition No. 1825 of 1999 Rule Nisi was issued calling upon the respondents to show cause as to why section 3 of the *Tamakjato Shamogri Biponon Niontroner Jonne Pronito Ain* 1988 (ZvgvKRvZ mvgMÖx wecbb wbqš¿‡Yi Rb¨ cÖYxZ AvBb, 1988) should not be enforced properly and as to why the respondents would not be directed to enact law in the light of the Ordinance No. 16 of 1990 for the prohibition of all forms of tobacco advertisements and/or such other or further order or orders passed as to this Court may seem fit and proper.

3. In an application under Article 102 of the Constitution of the People's Republic of Bangladesh, the Petitioner Professor Dr. Nurul Islam, President, ADHUNIK (*Aamra Dhumpan Nibaron Kori*) and a National Professor of Bangladesh has stated, *inter alia*, that at the present moment all the tobacco related companies are advertising their products in different spheres of media such as newspapers, magazines, television, radio, billboards and various kinds of sponsorship of cultural and sports programme. Section 3(1) of *Tamakjato Shamogri Biponon Niyontroner Jonno Pronito Ain* provided for a statutory warning "smoking is dangerous for health" would be printed on packed or canned tobacco based products sold in the market to be easily readable and understood in Bengali on a prominent and distinct space of the said container or packet and similarly section 3(2) of the said Act states "No advertisement of tobacco based products shall be published, broadcasted or displayed without having the said warning in easily readable and understood Bengali, engraved, written or printed on a prominent part of the advertisement. Majority of the tobacco related companies printed the said statutory warning on the packets and containers and also broadcasted and published in their advertisements but they are committing a fraud by not following the law accurately, in breach of section 3(1) of the Statute. Tobacco related companies have often been printing the statutory warning on obscure corners of tobacco packets and containers and published the warning in so small size making it barely readable in breach of the statutory provision. In advertisements with moving images in the movie theatres, broadcast on television the statutory warning is shown so briefly and without any voice which has little or no effect on the viewers of having little effect on them. Similarly in most of the tobacco billboards by the side of the streets and the advertisements in the newspapers and magazines, the statutory warning is so small that it is not even readable thereby defeating/violating the spirit of the Act to make awareness about heinous and dangerous nature of the tobacco based products. It has further been stated that the statutory warning itself does not express fully the extent of the effect of consuming tobacco. It has been accepted not only by the medical researchers but also by the tobacco industry in developed countries, that the tobacco consumption leads to fatal diseases such as cancer, lung and heart diseases causing about 3.5 million deaths each year, thereby there is about 10,000 deaths throughout the world per day. It has been asserted that one million of deaths occur in developing countries such as Bangladesh. Global tobacco epidemic is predicted to claim premature death of some 250 million children and adolescents, at present a third of these occur in developing countries. It has been further asserted that by 2020 it is predicted that the tobacco will become the leading cause of death and disability, killing more than 10 million people annually, 2 million in China alone. Tobacco causes more deaths worldwide than the HIV, Tuberculosis, Maternal Mortality Rate, Motor Vehicle Accident, homicidal and suicidal deaths combined. The petitioners have further stated that the passive smoking also has dangerous effect such as sudden infant death, respiratory illness and middle ear disease in babies and children and lung cancer, heart disease in adults. Children are put at risk because smoking by their parents increase the likelihood that they themselves will in time take up smoking. The petitioner has further asserted that the statutory warning itself must correspond to the extent of tobacco's harms and accordingly the warnings should be prominently displayed on the tobacco packets and advertisements. As smoking in the developed countries is being gradually

marginalized, the international tobacco manufacturers have now targeted the underdeveloped countries like Bangladesh for reviving their fortunes. United States recently banned advertisements of tobacco-based products and such ban is presently operating in forty-six States with immediate effect. Smoking in public places more or less is prohibited in both developed and under-developed countries with effective measures for penalizing the company for any wilful negligence in not disclosing the dangers and consequences of consuming tobacco. The petitioner has further asserted that tobacco advertising is not for brand switching as claimed but it is to attract the non-smokers, specially the children and women. The advertisements are generally attractive in order to induce the young and general non-smokers to smoke. United State's Surgeon General's Report in 1988 concluded that "Cigarettes and other forms of use are addicting. Patterns of tobacco use are regular and compulsive and accompanies tobacco abstinence. The pharmacological and behavioural processes that determine tobacco addiction are similar to those tobacco addiction to drugs such as heroin and cocaine". The petitioner has asserted that in a ranking of the addictiveness of psycho-active drugs, nicotine was determined to be more addictive than heroin, cocaine, alcohol, caffeine and marijuana. The petitioner asserted great majority of rural people who consume tobacco based products are illiterate and completely unaware of the dangers and harmfulness of consuming it. Even if the Statutory Warning is written on distinct space on the packets, it would not make any sense to the illiterate consumers. Hence the Statutory Warning should be readout in the advertisements of tobacco related products on radio, television, cinema and theatres which has tremendous effect of dangers of smoking on the illiterate public including children and women who are simply failing to understand, appreciate and realise the dangers and harmfulness of consuming tobacco products. Even considering the dangers and mischief of consuming tobacco products, merely by enforcing of section 3 of the Act, 1988 would rather be of little use unless manufacturing, consumption and promotion of tobacco related products are prohibited.

4. By way of supplementary affidavit the petitioner has asserted that the World Health Organization (WHO) in its 31st World Health Assembly was seriously concerned at the production and consumption of cigarettes during the last two decades, which has increased at an alarming rate in some of the countries, particularly 10 developing countries. WHO, thus found consumption has accelerated at the extensive promotional drive for the sale of the cigarettes being carried out on radio and television, in newspapers and other news media and through association with sporting and cultural events, which have the effect of inducing and perpetuating smoking habits especially among the youth and the women. The petitioner has further asserted that tobacco smoking is a major cause of chronic bronchitis, emphysema and lung cancer as well as a major risk factor for myocardial infraction, certain pregnancy related and neonatal disorders and a number of other serious health problems having harmful effects for those who are involuntarily exposed to tobacco smoke apart from causing economic and social problems resulting in loss of the lives of at least one million people every year and in illness and suffering for many more, which has prompted the WHO adopting resolutions since 1970 urging the member countries to formulate a national tobacco control strategy for creating and developing effective machinery to coordinate and supervise programmes for control and

prevention of smoking on a planned, continuous and long term basis, to consider steps which can be taken towards causing the non-smokers receive protection to which they are entitled from an environment polluted by tobacco consumption, to adopt comprehensive measures to control tobacco smoking, *inter alia*, for increasing taxation on the sale of cigarettes and restricting as far as possible all forms of publicity for promotion of smoking, to strengthen and to initiate where lacking the smoking control strategies, laying special emphasis on educational approaches particularly, with respect to youth and women on measures to ban, restrict or limit advertising of tobacco products. Bangladesh being a member state of WHO is duty bound to give effect to the said resolution. In news report titled "stop tobacco firms targeting children" published on BBC news stating that faced with declining sales in Europe and North America, the giant tobacco corporations are stepping up their activities in poorer countries. Although smoking is in decline in the industrialized world but the consumption of cigarettes rose by 67% in developing countries between 1970 and 1994 and if present trend continues unchecked tobacco recorded deaths in developing countries will rise from one million a year to seven million a year in 2030. The report of the Scientific Committee on Tobacco and Health prepared by the Department of Health and Social Service of United Kingdom also cautioned a warning to maximum mortality among males and rising mortality among females. Over the past decade there has been increasing recognition regarding underlying smoking behaviour and remarkable intractability to change addiction to the drug nicotine which has been shown to have effect on brain dopamine systems similar to those of drugs like heroine and cocaine.

5. In Writ Petition No. 4521 of 1999 Rule was issued calling upon the respondents to show cause as to why the promotional advertisement activities of the respondent Nos. 9 and 11 through their 'Voyage of Discovery' in order to discover new and potential victims of tobacco products by popularizing the "Gold Leaf" Cigarette or to advertise the same by whatever means with the illegal help, assistance, permission and by aiding and abetting of the other respondents should not be declared to have been made illegal, without lawful authority and of no legal effect. While issuing the Rule this Court was inclined to pass an order of stay directing the respondents not to proceed with the promotional advertisement activities of the respondents Nos. 9-15 through their 'Voyage of Discovery' scheduled to commence from 22nd to 26th November at 15 No. Kailaghat, Chittagong Port and the telecast and publications and advertisement of the same till 28th November, 1999. The petitioners President, Additional Secretary General, Secretary General and other officials of the Bangladesh Anti Drug Federation have stated, *inter alia*, that being conscious persons representing a cross section of the civil society who are genuinely concerned about the outcome and impact of promotional advertising campaign by a foreign vessel "Gold Leaf Yacht" to promote tobacco products during their 'Voyage of Discovery' which arrived at Chittagong Port on 21.11.99 with a motive to capture a potential market and discover potential victims amongst young teenage boys in order to get them hooked/addicted to cigarettes smoking. The petitioners engaged their activity in establishing nexus between smoking and injury to health to smokers as well as passive smokers which kills lives through addiction to make more than heroin. The petitioners have asserted that because of recent landmark cases in U.S.A. i.e. Minnesota's Tobacco

Settlement, the tobacco industry, incurring damages as compensation and thereby making themselves economically unreliable to operate in such jurisdiction. The cigarette manufacturers are making nose diving and plummeting to the bottom of the share market. The multinational tobacco companies have known for a long time since 1960 that nicotine found in tobacco is in fact an addictive drug, extremely harmful to the human health and environment which they kept secret from the innocent consumers and public at large while knowingly these tobacco multinationals have been marketing this poison to the innocent consumers who are mostly young and women. Tobacco based products campaign 'Voyage of Discovery' organized by British American Tobacco Company to promote their product Gold Leaf cigarette world-wide with particular emphasis in Africa and Asia as an alternative and new area of marketing and product by adopting an illuminating new style, method started from London on 17th June, 1999 with a view to promote cigarettes tobacco at least in 17 countries including Bangladesh within 170 days arriving at Chittagong Port on or about 21st November, 1999 at No. 15 Kailaghat. The Voyage as part of its advertising and promotional campaign will conduct a long programme of five days commencing from 22nd November, 1999 allowing about 4000 visitors to the vessel on 24th, 25th and 26th of November, 1999 to view the vessel against tickets, priced at Tk. 100/-. Such exhibition of the vessel, which itself is covered by promotional materials including the message in its sails; do not contain any statutory health warning as required by law in order to carry out any promotional or advertisement of tobacco products. The respondent No. 11 at a Press Conference admitted that the purpose and aim of the said Voyage is to popularize the tobacco product 'Gold Leaf' of the British American Tobacco company by way of alternative advertisement. It has been stated that the tobacco is targeting and developing third world countries like African and Asian taking advantage of social unawareness and illiteracy to campaign for promotion of tobacco related products. The respondent No. 11 has been advertising about the Voyage in Bangladesh in Television and publishing the same as well in news papers for more than one month in violation of the provision of law and as a part of their promotional campaign. The respondents 9-11 have been distributing the advertisement materials and free gifts like cards, calendars, lighters etc. to the members of the public at large often targeting boys in particular in violation of the provision of Juvenile Smoking Act, 1919. The Petitioner has further asserted that as a result of the settlement in Minnesota, USA tobacco industry has been forced to make huge payment to Minnesota State amounting to US$ 6.6 billion over 25 years and imposed comprehensive tobacco unmarketing measures to be effected and founded by the tobacco industry and similar steps are being taken in other states following the said cause of action forcing the tobacco industry to pay huge sum of compensation. The report of the World Health Organization stated that tobacco kills 11000 people per day world wide and by the year 2020 it will cause 17.7% of all deaths in developed countries and 10.9% of all deaths in developing countries. As a pre-emptive measure to fight back such encroachment into their profits the tobacco industry is now engaging in aggressive marketing tactics and hitting soft targets in countries like Bangladesh gearing their promotion to the teenage population. The respondent No. 10 made total misrepresentation regarding the purpose of the vessel which did not come for a simple visit as stated for obtaining permission for berthing but has undertaken in order to popularize the product of British American tobacco by

capturing the young generation of the country below 16 years old who shall become their life long consumers.

6. Mr. Omar Sadat, learned Counsel appearing for the petitioner has taken us through Annexures and the provision of Article 11 of the Constitution enshrining fundamental principles of state policy that the Republic shall be democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed submits that the marketing and consumption of the tobacco not only helps robbing of the dignity but addiction to tobacco has the effect of worsening the worth of a human person and in that view of the matter the State having a responsibility to persuade and protect the dignity and worth of person has a duty to restrict the business of tobacco related products and by phases should close down the production of tobacco and tobacco related products including cigarettes. The learned Counsel has further submitted that the international tobacco manufacturers now having failed to attract a market in the developed countries because of the awareness of the ill-effect of tobacco related products have concentrated upon the illiterate and unaware citizens of developing countries in Asia and Africa and in order to boost their business have targeted the unaware and illiterate citizens in under-developed countries whereby the consumers are to their peril are being affected with disease like cancer, respiratory illness particularly among the babies and children ultimately causing death to them. The learned Counsel has further submitted that the effect of consuming tobacco being fatal disease like cancer, lung and heart diseases and one million of deaths occur in developing countries like Bangladesh, the authority not only has a duty to prevent production of tobacco related products but while marketing the same has a duty to enforce the prevailing law as to statutory restriction that the tobacco is injurious to health inasmuch as the advertisement or marketing of the cigarettes do not contain adequate warning so as to make the consumers aware of the ill effects of consumption of tobacco related products. The learned Counsel has further submitted that the foreign tobacco related products that are being imported into the country and used by the consumers do not contain such statutory warning contemplated by law of the land for which the authority should prohibit importation of cigarettes without statutory warning as contemplated under the Municipal law of Bangladesh. The learned Counsel has further submitted that in view of the legislation as to advertisement that has been allowed to be lapsed not being placed in the Parliament, law similar to that should be promulgated so that there should not be any advertisement either in newspapers or international/national radio, television with the sole object of marketing and promoting cigarette related products which has the effect of attracting the young generation to smoking by consuming tobacco related products.

7. Mr. Obaidur Rahman Mostafa, learned Deputy Attorney-General has however, submitted that the effect of consuming tobacco related products has been made aware to the consumers by way of statutory warning against smoking under the provision of law and as such if the consumers consume the same the respondents can not be made responsible inasmuch as no further restriction is required so as to prevent consumption of cigarettes related products as the manufacturers have the right to continue with their business in manufacturing the tobacco related products and advertisement for its commercial purpose. The learned Deputy Attorney-General has further submitted that the

Ordinance regarding advertisement has been allowed to be lapsed by not placing the same before the Parliament in the interest of the manufacturer of tobacco related products and in view of the statutory warning, any further restriction would effect the business of the manufacturer but when occasion shall arise the Government may restrict the advertisements of cigarette related products in public interest.

8. Ms. Tania Amir, learned Counsel appearing for the petitioners in Writ Petition No. 4521 of 1999 has, however, submitted that the British American Tobacco Company having failed to promote its production in developing countries has undertaken the 'Voyage of Discovery' in order to promote their 'Gold Leaf' cigarette particularly among the illiterate backward people of Africa and Asia as their alternative and new method of advertisement - In view of the specific restriction under the law that any advertisement, promotion of marketing of cigarettes related product without the statutory warning is prohibited under sections 2(2) and 3 of the Ordinance No. 26 of 1988 the respondents is continuing with the 'Voyage of Discovery' by holding visit to the said vessel as promotional move is prohibited under the law and as such the respondents 9 and 11 through 'Voyage of Discovery' allured the potential victims of tobacco product by popularizing 'Gold Leaf' cigarettes to advertise by an alternative way without the statutory warning, has been done illegally and without lawful authority.

9. Mr. Nazmul Huda, learned Counsel appearing for respondents 9 and 11 has however, submitted that although the 'Voyage of Discovery' is designed for promotional activities but has nothing to do with the marketing and commercial activities of the Gold Leaf cigarette and there is no restriction for the 'Voyage of Discovery' to be present in Bangladesh in order to facilitate visits of the visitors. The learned Counsel has further submitted that the presence of 'Voyage of Discovery' for the purpose of allowing visit to the visitors is passive and not harmful and is at best be promotional voyage of product, has nothing to do in attracting the consumers of the tobacco related products namely 'Gold Leaf'. The petitioner has asserted that the smoking of tobacco related products not only affect the smokers themselves but also the surrounding individuals by way of passive smoking particularly affecting the infant's death, respiratory illness and middle ear disease in babies and children and lung cancer and heart disease for the adults. It has further been asserted that after being gradually marginalized in the developed world, the international tobacco products have targeted the underdeveloped countries such as Bangladesh for reviving their fortunes. In the very recent past countries such as United States, bill board advertisements of tobacco based products have been banned in forty-six states with immediate effect. But the said multinational tobacco companies have found their way out for promotion in under-developed countries. In 1988 US Surgeon General's Report stated, *inter alia*:

> "Cigarettes and other forms of tobacco use are addicting. Patterns of tobacco use are regular and compulsive, and a withdrawal syndrome usually accompanies tobacco abstinence. The pharmacological and behavioural processes was that determine tobacco addiction are similar to these that determine tobacco addiction to drugs such as heroin and cocaine."

In the ranking of addictive of psycho-active drugs, nicotine was determined to be more addictive than heroine, cocaine, alcohol, caffeine and marijuana. It is not denying the fact that the general rural people who consume tobacco based products are illiterate and completely unaware of the dangers and harm of consuming it. Although under the *'Tamakjato Shamogri Biponon Niontroner Jonno Pronito Ain*, 1988', allow to promote tobacco based products with a statutory warning written on its packet yet the same has been proved to be a boomerang or without any effect as most of the consumers are illiterate and others are not aware of the fatal effect of consuming the tobacco based products. The Government as well being aware of this situation had promulgated Ordinance No. 16 of 1990 incorporating Section 3(Ka) in this Act of 1988 which provided as follows:

> Ò3K| ZvgvKRvZ mvgMÖxi cÖPvi wbwl×| †iwWI, †Uwjwfkb, msev`cÎ ev Ab¨ †Kvb cÖPvi gva¨‡g ev Ab¨ †Kvb cÖKv‡i ZvgvKRvZ mvgMÖxi †Kvb weÁvcb cÖKvk, cÖPvi ev cÖ`k©b Kiv hvB‡e bv|Ó

But unfortunately the said Ordinance in Bangladesh Gazette Extra-Ordinary published on 25th October, 1990 was not placed before the Parliament and ultimately died a natural death not having been placed as per Article 93(2) of the Constitution. The said Ordinance was designed to incorporate certain provision of Ordinance No. 16 of 1988 in 45 of 1988 providing prohibition of any advertisement of tobacco related products. The Ordinance also contains a statutory warning in a lower side of the packet written in Bengali over the tobacco related products that "smoking is dangerous for health" and the violator shall be dealt in accordance with law. There is a worldwide agitation against the tobacco related products including cigarette and the World Health Organization was seriously concerned with the production and consumption of cigarette during the last two decades which has increased in some other developing countries including Bangladesh. The anxiety was due to accelerated consumption in view of advertisement for sale of cigarettes being carried out on radio and television, newspapers, billboards and other news media including sports and cultural events which have the effect of inducing and perpetrating smoking habits especially affecting the youths, male and female.

It is now an established fact that tobacco smoking is a major cause of chronic bronchitis, emphysema and lung cancer as well as a major factor for myocardial infraction, certain pregnancy related and neonatal disorders etc and accordingly, the World Health Organization has adopted resolutions urging its member countries, since 1970 to which Bangladesh is a member, to formulate a national tobacco control strategy containing measures to create awareness and to develop effective machinery to coordinate and supervise programmes for control and prevention of smoking on a planned, continuous and long term basis; to consider steps which can be taken towards causing the non-smoking receive protection to which they are entitled from an environment free from pollution by tobacco smoke, to adopt comprehensive measures to control tobacco smoking by providing for increased taxation on the sale of cigarettes and restricting all forms of publicity for promotion of smoking; to strengthen and to initiate where lacking the smoking control strategies, laying special emphasis on educational approaches particularly with respect to youth on measures to ban, restrict or limit advertising of

tobacco products, Member States which have not yet implemented smoking control strategies to take measures for non smokers to receive effective protection to which they are entitled from involuntary exposure to tobacco smoke, in enclosed public places, restaurants, public transports and places of work and entertainment, abstention from the use of tobacco so as to protect children and young people from becoming addicted; to print prominent health warnings which might include the statement that tobacco is addictive on cigarette packets and containers of all types of tobacco products. Apart from yearly half-hearted celebration of "No smoking day" on 31st of May each year Bangladesh, a Member State of WHO is morally duty bound to give effect to the aforesaid resolution. Moreover, Article 25(1) of our Constitution casts an obligation upon the State to respect for International Law and the principles enunciated in the United Nations Charter and the WHO resolutions. It has been asserted by the petitioner that the developing countries like England has taken step by distinctly publishing through BBC news titled "Stop tobacco firms targeting children" propagating against the effect of consumption of tobacco related products. Facing a decline in their commercial project in developing countries, the multinational tobacco companies are leaning towards under-developed countries in Asia and Africa to have alternative market of their tobacco products and with that end in view have engaged themselves in undertaking various promotional measures including that of "Voyage of Discovery'. According to WHO study between 1970 and 1994 smoking is in decline in the industrialized developed World, but consumption of cigarettes rose by 67% in developing countries and if the said trend continues unchecked, tobacco related death will rise from one million a year to seven million a year in 2030. It may be mentioned that Dr. Bill O'Neill Scientific Adviser to the British Medical Association has also opined that:

> "To be consistent in promoting an ethical foreign policy we have to play a lead role in curbing international marketing efforts of British tobacco companies who are responding to tighter regulations in the developed world by targeting vulnerable people in developing countries."

We like to mention here about a report of the Scientific Committee on Tobacco and Health prepared by the Department of Health and Social Services of United Kingdom to the effect that tobacco is the most important avoidable cause of chronic ill health and premature death in developed countries where it causes a quarter of all the deaths in middle age with maximum mortality among males and rising morality among females and in developing countries many men now smoke and mortality from tobacco is increasing.

10. Similarly, the British Regional Heart Study reported that men who never smoked having 78% chance of reaching 73 years of age whereas those who start smoking by the age of 20 and never stop have only 42% chance. A U.K. Study of over 10,000 survivors from heart attacks reveal smokers in 30/40 have five times heart attack than non smokers. Similarly the British Medical Bulletin on tobacco and health published in 1996 estimated the number of deaths attributable to smoking in forty developed countries and calculated in 1990 smoking accounted for 35% of all deaths in middle aged males between 35-69 years of age. A survey of United States countries for Disease Control and Prevention

show that smoking has risen in sub-Saharan Africa where cheap brands are available and tobacco companies are using intensive advertising and marketing campaigns, sponsorship of events and cigarette price wars. Over the past decade there has been increasing recognition that underlying smoking behaviour and its remarkable intractability due to smoking, drug, nicotine which has the effect similar to those of drugs such as heroin and cocaine. Dependence on nicotine is established in teenagers smoking cigarettes and there is compelling evidence that adult smoking behaviour is motivated by a need to maintain a preferred level of nicotine intake is leading to the phenomenon of nicotine titration or compensatory smoking in response to lower nicotine yields and the Scientific Committees having looked at the available evidence that tobacco advertising and promotion influence the uptake of smoking by young people and accordingly, recommended open advertising and promotion of tobacco products could no longer be justified and this is briefly what has been agitated for long by the World Health Organization and has adopted resolution. To us ZvgvKRvZ mvgMÖx wecbb (wbqš¿Y) AvBb 1988 (Act 45 of 1988) is designed to control the advertisement and marketing of tobacco based products by way of written warning that 'smoking is dangerous for health' impliedly prohibiting advertisement in any form. The said void was reiterated by Ordinance 16 of 1990 incorporating prohibition of advertisement of tobacco and tobacco related products incorporating section 3A but unfortunately the said amending Ordinance was given a go-bye and was not made a law with the lapse of statutory period. In view of the resolution of the World Health Organization and admitted bad effects as aforesaid in the matter of advertisement, promotion of tobacco based products and the provision in Article 25A of our Constitution, we are of the view that the government should have taken appropriate steps for banning/restricting advertisement and promotion of cigarettes related products by incorporating restrictions as to advertisement etc. as was provided by Ordinance No. 26 of 1990.

11. A similar petition like the present one came up for consideration before a Division Bench, High Court of Kerala in PO No. 24160 of 1998 in the case of *Bamakrishna Vs. State of Kerala and other* reported in *1992(2) KLT 725* wherein highlighting the public health issue of the dangers of smoking and passive smoking in which prayers were made to declare that smoking of tobacco in any form, whether in the form of cigarette, cigar besides or otherwise in public places is illegal, unconstitutional and violative of Article 21 of the Constitution of India alleging, inter alia, that one million Indians die every year from tobacco related diseases. This is more than the number of deaths due to motor accidents, AIDS, alcohol and drug put together said the Indian Medical Association (IMA) and the Indian Academy of Paediatrics (IAP). Cigarette smoking is the major preventable cause of death in America contributing to an estimated 350000 death annually. Epidemiological and experimental evidence has identified cigarette smoking as the primary cause of lung cancer and chronic obstructive pulmonary diseases (COPD) and as a major risk factor for coronary heart disease. Smoking has been associated with other cancer, cere-brovascular and peripheral vascular diseases and peptic ulcer disease. Smokers also suffer more acute respiratory illness. Cigarette smoke consisting of particles disposal in a gas phase and smoke constituents strongly implicated in causing disease are nicotine and tar in the particulate phase and carbon monoxide in the gas

phase. Smokers have a 70% higher mortality rate than non-smoker. Lung cancer has been the leading cause of cancer death in men since 1950 and it passed breast cancer as a leading cause of cancer death in women since 1985. Cigarette smoking is a major independent risk factor for coronary artery disease. Autopsy studies demonstrate more atheromatons changes in smokers than non smokers. Carbon monoxide in cigarette smoke decreases oxygen delivery to endothelial tissues. Smoking also triggers acute ischemia. Cigarette smoking is the primary cause of chronic bronchitis and emphysema, inhaling cigarette smoke impairs/pulmonary clearance mechanisms by paralysing ciliary transport. Smokers have a high prevalence of peptic ulcer disease and a higher case fatality rate. Female smokers weight less than non smokers and have an earlier age of menopause and these factors are associated with osteoporosis. The said illuminating judgment has relied on a good number of data including those of Mr. Lawrence Garfinkel and epidemiologist and the Vice-President of the American Cancer Society who has said that he was at present sceptical of Dr. Hirayama report but was convinced from later studies, including his own, that there was about 30% increasing in developing lung cancer from smoking. Mr. Garfinkel said a study of 1.2 million Americans now being completed should help clarify the degree of risk from all types of cancer and other diseases. Dr. Glantz estimated that one-third of the 50,000 deaths from passive smoking were from cancer. In addition to lung cancer, researchers have linked cancer of the cervix to both mainstream and side stream smoke. Non-smokers involuntarily inhale the smoke of nearby smokers, a phenomenon known as passive smoking (Environmental Smoke Exposure). Wives, children and friends of smokers are a highly risk prone group. Inhalation of side stream smoke by a non-smoker is definitely more harmful to him than to the actual smoker as he inhales more toxin. This is because side stream smoke contains three times more nicotine, than about 50 times more anaemia. The American Academy of Paediatrics estimates that 9 million to 12 million American children under the age of 5 may be exposed to passive smoke. The newer studies strengthened earlier conclusions that passive smoke increased the risk of serious early childhood respiratory illness, particularly bronchitis and pneumonia in infancy. Increased coughing was reported from birth to the mid-teenage years among 13 newer studies of a passive smoking and respiratory symptoms. It has also been found that passive smoke can lead to middle ear infections and other conditions in children. Asthmatic children are particularly at risk and the lung problem in childhood can extend to adulthood. In 1962 and 1963 the Royal College of Physicians in London and the Surgeon General of the United States released landmark reports documenting the casual relation between smoking and lung cancer. Thereafter extensive research has confirmed that smoking affects virtually every organ system. By 1990 the Surgeon General of the United States concluded that smoking represents the most extensively dominant cause of disease ever investigated in the history of biomedical research. Studies have shown increased risk of lung cancer in non-smoking women whose husbands smoked. Passive smoking is associated with an overall 23% increase in the risk of coronary heart disease (CHD) among men and women who had never smoked. It also concluded that passive smoking is a cause of heart disease mortality, acute and chronic heart disease morbidity, retardation of foetus growth, sudden infant death syndrome (SIDS), nasal sinus cancer and induction of asthma in children. Two important studies from the Wolfsan Institute of Preventive Medicine in London

published in 1998 show that marriage to a smoker increased the risk of lung cancer by 26%. Studies have also established strong relation between passive smoking and Ischemic Heart Disease (IHD). Maternal smoking during pregnancy increases risk to foetus and non-smokers chronically exposed to tobacco smoke will suffer hazard. It also contributes to foetus growth retardation. Infants born to mother who smokes weigh on average of 200g less but no shorter gestation than infant of non-smoking mother. Carbon monoxide in smoke may decrease oxygen availability to the foetus and account for the growth retardation. Smoking during pregnancy has also been linked with higher rates of spontaneous abortion, foetal death and neonatal death. Smoking in Bus, Bars and conference rooms with poor ventilation result in high level of smoke exposures with angina, Chronic Obstruction Pulmonary Decease (COPD) or asthma. Dr. Dorald Shopland of the United States National Cancer Institute in the Surgeon General's report said that "there is no question" now that passive smoking is also a cause of heart disease. In recent years Missouri, North Carolina, Tensessee and Wyoming have passed comprehensive laws limiting smoking in public place. The systematic reviews from the Wolfson Institute, the California Environmental Protection Agency and the United States Environmental Protection Agency and various reports released make it clear that exposure to environmental tobacco smoke is a cause of lung cancer, heart disease and other serious illness. Their Lordships further held:

> "Despite the fact that India is a signatory to those regulations it is saddening to note that no significant follow-up action has been taken except banning smoking in public transport and printing a statutory warning on cigarette packets. Even here the action has been half-hearted with the ban on smoking in public places is confined to Delhi and a few other cities and the statutory warning being followed more as a ritual and printed in such small letters that the consumer hardly notices it. Advertisement in the government-controlled mass media has been prohibited but it continues unabated in the print media and private television channels. The Government's lip service is reflected in the absence of any mention about the hazards of tobacco in the Health Ministry's Annual Report except on the occasion of the "World No Tobacco Day" once a year, there has been no sustained campaign to counter the promotional campaign of tobacco and highlight the toll tobacco use takes."

The Judgment further held:

> "Smokers did not only dug their own graves prematurely but also pose a serious threat to the lives of lakh of innocent non-smokers who get themselves exposed to ETS thereby violating their right to life guaranteed under Art 21 of the Constitution of India. A healthy body is the very foundation for all human activities. In a welfare State it is the obligation of the State to ensure the creation and the sustaining of conditions congenial to good health."

In considering what relief the Court can grant to the petitioner the Court considered the Public Nuisance (section 268 of Penal Code), making atmosphere noxious to health (section 278 of IPC) and conditional order or removing of nuisance (section 133 IPC) and

disobedience to order duly promulgated by public servant (section 188 IPC). Accordingly, it was held, *inter alia*, that:

> i. "Public smoking of tobacco in any form whether in the form of cigarettes, cigars, bidis or otherwise is illegal, unconstitutional and violation of Article 21 of the Constitution of India. We direct the District Collectors of all the Districts of the State of Kerala who are *suo-moto* impleaded as additional respondents 39 to 52 to promulgate an order under section 133 (a) Cr.P.C. prohibiting public smoking within one month from today and direct the 3rd respondent Director General of Police, Thiruvananthapuram, to issue instructions to his subordinates to take appropriate and immediate measures to prosecute all persons found smoking in public places treating the said act as satisfying the definition of "public nuisance" as defined under section 268 of Indian Penal Code (IPC) in the manner indicated in this judgment by filing a complaint before the competent Magistrate and direct all other respondents to take appropriate action by way of display of "smoking prohibited" boards etc. in their respective offices or campuses.
>
> ii. There will be a further direction to Additional Respondents 39 to 52 to issue appropriate directions to the respective RTOs to strictly enforce the provisions contained in Rule 227(1) (d) and 227 (5) of the Kerala Motor Vehicles Rules. 1989.
>
> iii. Tobacco smoking in public places falls within the mischief of the penal provisions relating to "public nuisance" as contained in the Indian Penal Code and also the definition of "air pollution" as contained in the statutes dealing with the protection and preservation of the environment, in particular the Air (Prevention and Control of Pollution) Act, 1981.
>
> iv. The respondents, repositories of wide statutory powers and enjoined by the statute and Rule to enforce the penal provisions therein are duty bound to require that the invidious practice of smoking in public places, a positive nuisance, is discouraged and offenders visited with prosecution and penalty as mandated by law. Accordingly, the respondents are liable to be compelled by positive directions from this Court to act and take measures to abate the nuisance of public smoking in accordance with law. Directions in the above lines are hereby issued.
>
> v. The continued omission and inaction on the part of the respondents to comply with the constitutional mandate to protect life and to recognize the inviolability of dignity of man and their refusal to countenance the baneful consequences of smoking on the public at large resulted in extreme hardship and injury to the citizens and amounts to a negation of their constitutional guarantee of decent living as provided under Art. 21 of the Constitution of India."

12. A Singaporean Medical Research Team has concluded that smoking lower sperm counts and weakens individual sperm after studying semen samples of fertile and infertile men. Smokers with below average sperm counts were six times more likely to be infertile than non-smokers. If you wand a kid having a good sperm count, won't help if you smoke.

13. Pakistan is also not lagging behind in this respect as is apparent from the decision in the case of *Pakistan Chest Foundation and others v. Government of Pakistan and others* reported in *1997 CLC 1379* arising out of Writ Petition No. 14433 of 1994. The said decision was relied on Article 4 (i) (a) and 199 (i) (a) of the Constitution of Pakistan read with Pakistan Broadcasting Corporation Act of 1973 of a public interest litigation in a constitutional petition seeking ban on commercials appearing on television and broadcasting from Radio Pakistan on behalf of cigarette companies .

14. The petition was on the assertion, *inter alia*, that the cigarette smoking is harmful to health and it endangers human life. Cigarette advertisement on the electronic media have the effect of promoting inducing smoking habit in the people, particularly in the younger generation and also result in endangering human health. In the said decision which was given on a petition by way of public interest litigation on the question of maintainability as to aggrieved person as used in Article 199, it has been held *inter alia*, that:

> "Public interest litigation can be initiated and maintained by a public spirited person or body of persons with regard to public injury, though such a person or a body of persons may not seemingly have been personally hurt by a public injury."

The petitioners are registered Societies whose functions, aims and objects were to work for the health of the people by actively engaging themselves in creating awareness among the masses against diseases and to propagate methods by which diseases and ailments could be prevented by taking precautions. Another petitioner in his individual capacity has also been doing laudable service in working for people's health. It cannot be said that such associations of individuals do not feel aggrieved or feel concerned when any action or inaction on the part of the functionaries of the State or public sector organizations/enterprises, has the effect of endangering human health. Any wrongdoing or invasion of public rights, against the aims and objects of such societies does clothe them with the necessary *locus standi* to move the courts of law.

15. In the said decision the import of Article 4 (2) (a) of the Pakistan Constitution that no action detrimental to the life, liberty, body or property of any person can be taken unless such detrimental action has the backing of some law in existence. Before a detrimental action can be taken there must exist some law which may permit that any action detrimental to life, liberty, body, reputation or property of a person can be taken. In the absence of any existing law no such action can be taken by the State or any functionary of the State or any person connected with the affairs of the Federation or the Province. The decision further went on saying that mere existence of each permissive law is not enough to take detrimental action in the specified fields. The law authorizing invasion of the rights of the citizen must be such that it can validly be passed keeping in view the provisions of the Constitution including the Fundamental Rights. There is no law permitting the cigarette advertisements on the electronic media and such advertisements have the effect of propagating and inducing people, particularly younger generation to adopt smoking habit which result in endangering human life. Thus Cigarette advertisements on TV/Radio are steps which can be termed detrimental to life and body of the people and in that view of the matter Article 4 of the Constitution, particularly sub-article (2) is directly contravened by telecasting/broadcasting of cigarette commercials on

the TV and Radio. The word 'life' as it occurs has the same meaning as in Article 9. The provisions of sub-article 2 (a) in the context of life carry the same meaning and substance as the word life carries appearing in Article 9. The citizens of this country (Pakistan) and particularly the younger generation are entitled to protection of law from being exposed to hazards of cigarette smoking by virtue of the command contained in Article 4 (2) (a) of the Constitution. The Court accordingly issued the following directions:

(a) The Pakistan Television Corporation shall not telecast from its television centres any cigarette related commercial nor shall it show any programme/advertisement which may have the effect of promoting/propagating cigarette smoking among the people. This restraining order shall become operative with effect from 1.4.1997, as the subsisting contracts shall expire on 31.3.1997.

(b) The restraint order contained in the preceding paragraph will, however, not be applicable for a period of three years i.e., till 31.3.2000 in respect of live telecasting of various sports events sponsored by the cigarette companies, provided the actual smoking is not shown therein and is followed by a proper warning. To seek further extension in the aforesaid period of three years for sports live telecasting, the Pakistan Television Corporation may approach High Court with appropriate prayer which will be considered in the then prevailing facts and circumstances.

(c) The Pakistan Broadcasting Corporation shall not relay any advertisement for the purpose of popularizing smoking among the people. The commentaries of sports events without propagating smoking can however, be relayed in view of the statement made by the counsel for the Pakistan Broadcasting Corporation that in the commentaries the only thing said is that the programme is relayed with the co-operation of the particular-cigarette company.

Our Constitution in Article 18 has provided that:

> "18 (1) The State shall regard the raising of the level of nutrition and the improvement of public health as among its primary duties, and in particular shall adopt effective measures to prevent the consumption, except for medical purposes or for such other purposes as may be prescribed by law, of alcoholic and other in toxicating drinks and of drugs which are injurious to health".

16. From the citation and discussion above we have seen the intoxicating and fatal effect of smoking or consumption of tobacco related products and which convincingly proved to be injurious to health but the world has until today knowing fully well that the smoking for consumption of tobacco based products is fatal and injurious giving rise to incurable cancer and lung disease etc. has been carrying on the business of tobacco related products. Our country being a People's Republic aimed at attaining economic and social justice to our people has a duty in which fundamental human right and respect for the dignity and worth of human person shall be guaranteed.

17. Furthermore, Article 19 of the Constitution providing for the State shall endeavour to ensure equal opportunity to all citizens and Article 18 postulating that through uniform maintenance of public health and taking step to do away with the habit of intoxication or consumption of tobacco related products, the State has a duty to all citizen to provide with the right to life as in Article 31 which means right to sound mind and health. Article 31 of the Constitution enshrines "To enjoy the protection of the law and to be treated in accordance with law" is the inalienable right of every citizen, wherever may be, and of every other person for the time being within Bangladesh and in particular no action detrimental to the life, liberty, body, reputation, property shall be taken except in accordance with law. (The underlining is ours)

18. The words 'no action detrimental to the life, liberty, body, reputation or property shall be taken except in accordance with law' is almost the same provision appearing in Article 4 (2) (a) of the Constitution of Pakistan that "no action detrimental to the life, liberty, body, reputation or property of any person can be taken unless such detrimental action has the backing of some law in existence." The word 'life' in Pakistan Constitution is similar to the word 'life' appearing in Article 21 of the Indian Constitution and in Article 21 of our Constitution. Right to life in Article 31 means right to sound mind and health. Similar provision in Article 21 came up for consideration in the said Kerala case wherein it has been held that:

> "The amplitude of the word 'Life' is so wide that the danger and encroachment complained of would impinge upon the fundamental rights of citizens as in the present case. The apex Court has interpreted Article 21 giving wide meaning to 'Life' which includes the quality of life, adequate nutrition, clothing and shelter and cannot be restricted merely to physical existence. The word 'life' in the Constitution has not been used in a limited manner. A wide meaning should be given to the expression 'life' to enable a man not to sustain life but to enjoy it in a full measure. The sweep of right to life conferred by Article 21 of the Constitution is wide and far-reaching as to bring within its scope the right to pollution free and the 'right to decent environment'. Under our Constitutional set up the dignity of man and subject to law the privacy of home shall be inviolable. The Constitution through various Articles in Part III and Part IV guarantees the dignity of the individual and also right to life which if permitted to trample upon will result in negation of these rights and dignity of human personality."

In the case of *Dr. Mohiuddin Farooque v. Bangladesh*, represented by the Secretary, Ministry of Government of the People's Republic of Bangladesh, Bangladesh Secretariat and others reported in 48 DLR 438, the decision was in fact that the respondent No. 6 Danish Condensed Milk Bangladesh Ltd. imported 500 metric tons of skimmed milk powder from Holland and upon clearance of the consignments radiation test was made and found 133 by radiation per kilogram which was above the minimum approved radiation level of 95 Bq and opined that the consignment in question should not be marketed. Dr. Mohiuddin Farooque on behalf of the Environmental Lawyers Association moved this court and this court upon consideration of Articles 18, 21, 31 and 32 made 32 made the Rule absolute and Kazi Ebadul Hoque J. as his Lordship then held, *inter alia*:

"In the case of *Vincent v. Union of India reported* in *AIR 1987 (SC) 990* learned Judge delivering the judgment in that case quoted with approval interpretation of right to life made by the Indian Supreme Court in the Bandua Mukti Morcha case and held:

> "A healthy body is the very foundation for all human activities. It is an obligation of the State to ensure the creation and the sustaining of conditions congenial to good health. Maintenance and improvement of public health have a rank high as these are indispensable to the very physical existence of the community and on the betterment of these depends the building of the society which the Constitution makers envisaged.

In the case of *Subash Kumar v. The State of Bihar* reported in *AIR 1991 SC 420* it was further held:

> "Right to life is a fundamental right under Article 21 of the Constitution and it includes the right to enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life"

> "Though the aforesaid provision cannot be enforced by the court it can be seen for interpreting the meaning of right to life under Articles 31 and 32 of the Constitution. A man has natural right to the enjoyment of healthy life and longevity up to normal expectation of life of an ordinary human being. Enjoyment of a healthy life and normal expectation of longevity is threatened by disease, natural calamities and human actions. When a person is grievously hurt or injured by another his life and a longevity are threatened. Similarly, when a man consumes food, drink, etc. injurious to health he suffers ailments and his life and normal expectation of longevity are threatened. Natural right of a man to live free from all the men made hazards of life has been guaranteed under the aforesaid Article 31 and 32 subject to law of the land. Use of contaminated food, drink, etc. be it imported or locally produced undoubtedly affects health and threatens life and longevity of the people. In a country like ours where most of the people are illiterate they are unable to distinguish between contaminated and contamination free food, drinks, etc. In such circumstances marketing of contaminated food items is a potential danger to the health of the people ultimately affecting their life and longevity as most of the people are unable to avoid such food. Even for an educated person it is difficult to distinguish between contaminated and contamination-free food, drink, etc. No one has any right to endanger the life of the people which includes their health and normal longevity of and ordinary healthy person by marketing in the country any food item injurious to health of the people. We are, therefore, of the view that right to life under Articles 31 and 32 of the Constitution not only means protection of life and limbs necessary for full enjoyment of life but also includes, amongst others, protection of health and normal longevity of an ordinary human being.

> It is the primary obligation of the State to raise the level of nutrition and the improvement of public health by preventing use of contaminated food, drink, etc. Though that obligation under Article 18 (1) of the Constitution cannot be enforced State is bound to protect the health and longevity of the people living in the country as right to life guaranteed under Article 31 and 32 of the Constitution includes protection of health and normal longevity free from threats of man made hazards unless the threat is justified by law. Right to life under the aforesaid articles of the Constitution being a fundamental right it can be enforced by this Court to remove any unjustified threat to the health and longevity of the people as the same are included in the right to life."

In the decision cited above of the High Court of Kerala as well in the line of our above decision in deciding right to life was held:

> "The word 'life' has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception connote to death. Life does not merely a continued drudgery through life. The expression 'life' has a much wider meaning bringing within its sweep some of the finer graces of human civilization which makes life worth living. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally. The amplitude of the word 'life' is so wide that the danger and encroachment rights of citizens as in the present case.

The judgment further held:

> "The sweep of right" to life conferred by Article 21 of the Constitution is wide and far reaching so as to bring within its scope the right to pollution free air and the right to decent environment. Under our Constitutional set up the dignity of man and subject to law the privacy of home shall be inviolable. The Constitution through various Article in Part III and Part IV guarantees the dignity of the individual and also right to life which if permitted to trample upon will result in negation of these rights and dignity of human personality."

It may be mentioned here that in a Workshop named International Workshop on Tobacco and Youth at TIFR on behalf of World Health Organization (WHO) South East Asia (SEA) Region Tobacco Free Initiative held at Tata Institute of Fundamental Research, Mumbai, Indian experts on the subject deliberated and reported the outcome of the workshop 'Tobacco and Youth' which clearly demonstrated that tobacco industry is targeting youth as its further clients. This is to reply Mr. Nazmul Huda's argument. So, there should be no promotion through 'Voyage of Discovery' to create havoc in the country as its target which is generally aimed at encouraging and popularizing smoking habit amongst youths of SEA Region. The data which has been found in Indonesia to be as high as 27% prevalence of tobacco use is as high as 60% in young girls in high mountain ours regions than boys of that area and amongst medical students of Patna, smoking and smokeless tobacco use found to be 80% and in all SEA countries smokers start before the age of 20 years and in some part of Madhya Predesh Jhobua Tribal Region children take to bidi smoking at 8 years. The study brought definite evidence that

there is not only clear violation of rights of child but child labour are exploited in the process of manufacturing bidi but the children suffer from occupational hazards as tobacco is absorbed due to handling. The children suffer from all deleterious effects of tobacco even if they do not consume any tobacco themselves. There is exposure in use of manufactured smokeless tobacco, their substantially health effects on mouth and demonstrating that oral cancer is decreasing in older age groups and it has started increasing in younger age groups. The cigarette smoking during pregnancy causes low birth weight and other adverse reproductive outcomes. Although prevalence of tobacco use in youth is high, almost all of them recognize that sponsorship is just a form of advertisement and all forms of advertisements should be banned. Tobacco use among youth was recognized as a serious problem in an opinion study of Vice Chancellors of Indian Universities and most of them would like to ban it completely in university campuses.

19. Mr. Nazmul Huda learned Counsel for the respondents in Writ Petition No. 4521 of 1999 has strenuously argued that there is no law barring any promotional advertisement of tobacco products and the law cited by the petitioner is not an operative valid law so as to make the 'Voyage of Discovery' promotional activities stopped.

20. It is true that no law is in prevalence to bar the promotional advertisement of tobacco products and for that matter the 'Voyage of Discovery' promoting 'Gold Leaf' of British American Tobacco Co. but we cannot be oblivious to the effect of consumption of tobacco and the effect of promotional advertisement not only among the young but among unaware and illiterate citizens. It is no doubt such promotional advertisement are demonstrating effect to use tobacco in many countries in South Asia and have advocated for banning all forms of tobacco and promotional advertisement of tobacco and tobacco related products and raising of hue and cry awakening the conscience of the various nations is now being seriously heard for totally banning the promotional advertisement of tobacco related products in the interest of prevention of diseases like oral cancer etc. The World nowadays is not oblivious about the effect of tobacco in the society and accordingly has been celebrating 'No smoking day' with sole object to create awareness among the members of public as to the fatal effect of consumption of tobacco related products. It has been ruining bulk of the population particularly the youth, both male and female. Bangladesh is a signatory to the said international convention for the prevention of smoking and subscribing to the idea of injurious effect of smoking. In most of the public places in spite of the fact that there is no restriction of smoking, the people are avoiding smoking in public. This is due to awareness among the conscious citizens about the effect of smoking or consuming the tobacco related products although there is no ban on production of tobacco related products. Tobacco kills 50% of its regular users within 40 years. Bangladesh also cultivates and produces tobacco and the Tobacco Companies invest on the tobacco farming in some districts including northern districts of Bangladesh thereby collecting most of the raw materials out of such production of tobacco leafs. Apart from the direct health complication of tobacco use, the hazards faced by those

engaged in the plucking and curing of tobacco leaves, the environment around the area not only become toxic with nicotine but the hands of the workers get affected by the chemicals in tobacco and sickness is caused when nicotine gets absorbed into the body through the skin giving rise to the symptom of acute headache and vomiting. Considering the disastrous effect of the production we urge upon the respondents including the Government to ban production of tobacco leaves phase by phase, giving subsidy to the farmers to produce other agricultural product, rehabilitate the tobacco workers with other beneficial jobs, imparting vocational training so that they can earn the livelihood, restrict permission/license for setting up tobacco factories, directing the owners to switch over to other products in phases and if necessary by compensating them or even persuading the owners of the tobacco factories not to carry on with the production of tobacco related products beyond a reasonable time by banning such production. The Bidi factories are also to be closed down though phases, not to product Bidi, restricting plucking of tando or other leaves and production of tobacco leaves for manufacturing Bidi. Although one of the contentions of the protagonists of tobacco is that since it makes a significant contribution to the Exchequer by way of taxes it should not be disturbed but ultimately the awareness among the people would demonstrate against production and consumption of tobacco related products in the interest of national health and the public opinion would be mobilized eventually to force banning the production, even if, the State does not take any effective measure in this regard. We have seen in the subcontinent that judiciary as well has risen up to the occasion to denounce the consumption of tobacco related products which has tremendous fatal effect on the youths, both male and female, impairing their right to life, the obvious result is that cigarette smoking is harmful to health and it endangers human life. As quoted above our court in a different context in the case of Dr. Mohiuddin Farooque v. Bangladesh referred to above as to contaminated foods has uttered a warning that "if right to life under Article 31 and 32 of the Constitution means right to protection of health and normal longevity of an ordinary human being endangered by the use or possibility of use of any contaminated foods etc. then it can be said that fundamental right to life of a person has been threatened or endangered and such right of the petitioner is sought to be enforced in public interest." This Court is oath bound to protect the Constitution including the fundamental right of the citizens and is obliged to enforce the same even in the absence of any appropriate legislation and would not hesitate to give direction to the respondents for banning the promotional advertisement in the electronic medias, news paper, etc. to stop cultivation and production of tobacco related products, for the State has a duty to protect the ordinary human being from the ill effects of the use of tobacco related products.

21. The Supreme Court of Pakistan has given extended meaning to the word 'Life' as used in Article 9, in the case of *Ms. Shehla Zia v. WAPDA (PLD) 1994 (SC) 693*. This was the case in which complaint was made to direct WAPDA to construct high tension wires away from the residential areas, because the electromagnetic field created by high

voltage transmission lines endangers human health. Observing that livelihood of any hazard to life by magnetic field effect could not be ignored precautionary measures were directed to be taken by the Supreme Court as the scope of life as used in Article 9 was explained as under:-

> "Article 9 of the Constitution provides that in accordance with law, the word 'Life' is very significant as it covers all facets of human existence. The word 'life' has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally. For the purposes of present controversy suffice to say that a person is entitled to protection of law from being exposed to hazard of Electro magnetic field or any other such hazards which may be due to installation and construction of any grid station, any factory power station or such like installations."

> "A person is entitled to enjoy his personal rights and to be protected from encroachments on such personal rights, freedom and liberty. Any action taken which may create hazards of life will be encroaching upon the present case this is the complaint the petitioners have made. In our view the word 'life' constitutionally is so wide that the danger and encroachment complained of would impinge fundamental right of a citizen. In this view of the matter the petition is maintainable."

Applying the principle of law enunciated in Shehla Zia's case (supra) to the facts and circumstances of the present case, the citizens of the country and particularly the younger generation are entitled to protection of law from being exposed to the hazards of cigarette smoking, by virtue of the command contained in Article 3 of our Constitution.

22. As quoted above our Constitution also in the same line in its Article 11 mentioned the dignity that has been guaranteed under the Constitution both in Part II. The fundamental principles of State policy are the promoting provisions and Part III the Fundamental Rights which are the protecting provision enforceable in law has in the same tone guaranteed the dignity of its citizens and also right to life from being violated by any means including a promotional advertisement or actual consumption of tobacco related products. We have also noticed that though in very small letters one statutory warning being inserted on the packet of the tobacco related products but the same is not readable compared to the other writing on the packet as found in developed countries. This is surely a statutory warning in any cigarette packet and we hope that the respondents shall take care to see that the warning is legibly and distinctly written on cigarette packets. Moreover, a healthy human is the centre of all healthy activities and it is the obligation of the Republic to ensure creation of congenial environment to good health provided in Articles 10 and 11. Maintenance/improvement of public health and to maintain the

dignity of life is the anxious obligation of the State machinery. As we have already observed that the respondent has an obligation under the Constitution and under the law to protect and preserve nutrition with healthy mind of the citizens and should adopt measure for banning production and import of the cigarette related products for commercial purpose and to start with, initially to take step not to allow any further means of production to grow in the country and not to produce any cigarettes based products which has the danger and fatal effect on national life and the environment with the ultimate object to do away with the connected business of manufacturing, producing or marketing of the tobacco related products in the country.

23. World Health Organization's (WHO) report indicates that information media is actively involved in teenagers to tobacco thrall through attractive advertisement on Television, the young generation yearn for a cigarette and fall prey to smoking. It is indeed true that most of the cigarette advertisements glamorises smoking to create attraction among youths for smoking. It is no denying the fact that the glamorous advertisement by cigarette manufacturer certainly allure public in general and youths in particular to take the habit of smoking and the publicity campaigns of Cigarettes by the manufacturers are geared to procure more and more smokers.

24. Similarly, in the electronic media like Radio and Television, we do not find any effective statutory warning on tobacco related products that the tobacco is dangerous for health and the respondents never take care to see that the law is not being abused while promotional advertisements are being made in the Radio/Television etc. Although at least in Television the authority displays a slide containing statutory warning but without any utterances, which in our opinion is definitely an evasive way of violation of the provision of law as to statutory warning. Same is the case with showing slide in Cinema hall while displaying statutory warning, the same is not followed by sound that smoking is dangerous for health.

25. From the above, it is abundantly clear that before a detrimental action can be taken there must be some law which permits that any action detrimental to life, body, liberty or property of a person can be taken. No such law is in existence in Bangladesh. Mere non-existence of such permissive law is not enough to take detrimental actions invading the right to life of a citizen, for the State could not pass such law which are contrary to the fundamental rights of a citizen. There is no law permitting cigarette advertisement on the news media, bill boards or on the electronic medias and such advertisements have the effect of propagating and inducing people, particularly the younger generation to adopt smoking habit which results in endangering human life and environment. Thus, advertisement of cigarette, cigarette related products and bidi on Television /Radio, newspaper, pamphlets, Billboard or through any other means are steps which can be termed detrimental to life and body of the people and in this view of the matter Article 31 of the Constitution is directly contravened by advertisements in any form of Telecasting and Broadcasting of cigarette/bidi commercials on the Television and Radio, Bill boards, etc.

26. In view of the above, the advertisements of cigarette, tobacco related products in the electronic media, newspapers, bill-boards etc. are violative of the aforesaid fundamental rights and Article 44(1) of our Constitution has guaranteed the right to move the High Court Division in accordance with clause(1) of Article 102 for enforcement thereof. The next question is whether this Court can grant appropriate relief under Article 102 of the Constitution for violation of Constitutional provisions. Article 102(1) reads:

> "The High Court Division on the application of any person aggrieved may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution".

27. Article 102(2)(a)(i) also provides that the High Court Division may, if satisfied, that no other equality efficacious remedy is provided by law, on the application of any person aggrieved make an order directing any person performing any function in connection with the affairs of the Republic or of a local authority to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do and declaring that any act done or proceeding taken by a person performing function in connection with the affairs of the Republic or of a local authority has been done and taken without lawful authority and is of no legal effect. This Court could pass any order giving appropriate direction for the enforcement of any of the fundamental rights and as such could also give direction in the nature of *mandamus* etc.

28. In the case of *Dr. Mohiuddin Farooque v. Bangladesh 49DLR (AD) 1* Mustafa Kamal J. as his Lordship then was held:

> "We now proceed to say how we interpret Article 102 as a whole.
>
> We do not give much importance to the dictionary meaning or punctuation of the words "any person aggrieved". Article 102 of our Constitution is not an isolated standing above or beyond the sea-level of the other provisions of the Constitution. It is a part of the over-all scheme, objectives and purpose of the Constitution. And its interpretation is inextricably linked with the (i) emergence of Bangladesh and framing of its Constitution, (ii) the Preamble and Article 7, (iii) Fundamental Principles of State Policy, (iv) Fundamental Rights and (v) the other provisions of the Constitution."
>
> "As for (iii) in Part II of the Constitution containing Fundamental Principles of State Policy, Article 8(2) provides that the principles set out in this Part "shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh." It is constitutionally impermissible to leave out of consideration Part II of our Constitution when an interpretation of Article 102 needs guidance."

"As for (iv), Part III of the Constitution bestows Fundamental Rights on the citizens and other residents of Bangladesh. Article 44(1) guarantees the right to move the High Court Division in accordance with Article 102(1) for the enforcement of these rights. Article 102(1) is, therefore, a mechanism for the enforcement of Fundamental Right which can be enjoyed by an individual alone insofar as his individual rights are concerned, but which can also be shared by an individual in common with others when the rights pervade and extend to the entire population and territory. Article 102(1) especially cannot be divorced from Part III of the Constitution".

"Article 102 therefore is an instrumentality and a mechanism containing both substantive and procedural provisions, by means of which the people as a collective personality, and not merely as a conglomerate of individuals, have devised for themselves a method and manner to realize the objectives, purposes, policies, rights and duties which they have set out for themselves and which they have strewn over the fabric of the Constitution."

29. In the said decision interpreting Part II of our Constitution, Latifur Rahman, J, as his Lordship then was, held:

"A Constitution cannot be morbid at all. The language used by the framers of the Constitution must be given a meaningful interpretation with the evolution and growth of our society. An obligation is cast on the Constitutional Court which is the apex Court of the country to interpret the Constitution in a manner in which social, economic and political justice can be advanced for the welfare of the State and its citizens".

BB Roy Chowdhury, J: while adding few words in the said judgment held:

"Articles 16, 17, 18 and 19 likewise impose a duty upon the State to adopt effective measures for rural development and agricultural revolution, free and compulsory education, raising the level of public health and morality and ensuring equality of opportunity to all citizens."

"Part III of the Constitution has given corresponding Fundamental Rights to the citizens. Article 27, 31 and 32 are of particular interest. All citizens are equal before law and are entitled to equal protection of law and to be treated in accordance with law. In particular, it guarantees that no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. Article 32 commands that no person shall be deprived of life or personal liberty save in accordance with law. Under Article 44(1) the right to move the High Court Division under Article 102(1) is itself a fundamental right".

"In order to ensure that the mandates of the Constitution are observed the High Court Division of the Supreme Court is vested with the power of judicial review under

Article 102 which is contained in Part VI of the Constitution. The power is wide enough to reach any person or place where there is injustice".

30. Law mentioned in Article 152 has been defined as meaning an Act, Ordinance, Order, Rule, Regulation, Bye-laws, Notification or other legal instruction and any custom or usage, having the force of law in Bangladesh.

31. ZvgvKRvZ mvgMÖx wecbb (wbqš¿Y) AvBb, 1988 (Act 45 of 1988) though provided for statutory warning to be inscribed on the Cigarette packet but has not apparently prohibited any advertisements. By subsequent Ordinance No. 16 of 1990 though provided an amendment incorporating section 3(Ka) in Act 45 of the 1988 prohibiting advertisement, but the same was not placed in the Parliament within the specified period and was allowed to be lapsed, presumably the legislature in its wisdom thought that under the whole scheme of Act 45 of 1988 the incorporation of section 34 providing prohibition of advertisements of any form by Ordinance was redundant as the said provision is impliedly incorporated therein and the same is also apparent from reading of section 3(2) thereof. But whatever may be the existing purport of Act 45 of 1988, Article 102(1) of the Constitution provides remedy thereunder if any of the fundamental rights is contravened. Thus, the provisions as to fundamental rights in our Constitution are self executory and any violation of the provisions of Article 31 is subject to judicial review in writ jurisdiction and this Court could remedy the wrong by issuing appropriate declarations and directions for enforcement of any of the fundamental rights conferred by Part III of the Constitution keeping in view the fundamental principles of State policy (para ii) as the same is constitutionally impermissible to leave out of consideration when our interpretation of Article 102 needs a guidance.

32. Although the learned Deputy Attorney General submits that when occasion shall arise the Government may restrict/ban the advertisements of Cigarette or tobacco related products in public interest yet as we have already found that the obvious effect of advertisement in any media is definitely designed to the detriment of right to life of the citizens, particularly the younger generation, is entitled to protection of law from being exposed to the hazards of cigarette smoking being allowed by the advertisements, the related constitutional provisions including Article 31 is self executory. The Parliament as well in its wisdom thought that amendment of Act 45 of 1988 incorporating a ban on advertisement was not necessary and accordingly allowed the Ordinance incorporating section 34 prohibiting advertisement to be lapsed.

33. Accordingly, in view of the Fundamental State Policy enshrined in Article 18 providing for improvement of the quality of public health, nutrition and to take effective measures to prevent consumption of intoxicating measures to prevent consumption of intoxicating, tobacco related products and the provision in Article 11 providing for the dignity and worth of human person which though are not judicially enforceable yet those are the inviolable Fundamental Principles of State Policy, fundamental to the governance of Bangladesh, shall be applied by the State in the making of law and shall be a guide to the interpretation of the Constitution and laws of the country together with the enforceable right to life as discussed above and for the preservation of environment

maintaining ecological balance, we hereby direct the respondents and the authorities performing the functions in connection with the affairs of the Republic that advertisement in any form of Cigarette, Bidi, tobacco related products must not be continued in any manner in Newspapers, Magazine, Signboards or in any electronic media like Television/Radio beyond the period of the existing contract/agreement with the manufacturers or their agents. The said authorities are duty bound also to see that any other authority, private or public do not flout this direction in any manner both under the provision of the Constitution and the law of the land.

34. In the result, the Rules are made absolute without any order as to costs with the following directions:

(a) The Government shall take steps phase by phase to stop production of tobacco leaves in tobacco growing Districts of Bangladesh, giving subsidy to the farmers, if possible and necessary to produce other agricultural products instead of tobacco and for rehabilitation of the tobacco workers engaged in tobacco production, if possible with alternative beneficial jobs.

(b) The Government shall restrict issuance of licence for setting up tobacco industry or Bidi factory and direct the existing tobacco and bidi companies to switch over to some other industry to prevent production of Cigarette, Bidi and other tobacco related products, specifying a reasonable period for the purpose.

(c) To prohibit importation of cigarette or tobacco related product within a reasonable period and meanwhile to impose heavy tax for the import and to print the statutory warning legibly in bold words in Bengali.

(d) The Government, the concerned Ministry or the Broadcasting Television Authority, Newspaper or Bill-board authority or any other agencies engaged in advertisement shall not advertise or telecast any cigarette/bidi related advertisement or commercials and shall not undertake any show / program / propagating cigarette / bidi smoking among the citizens. This direction shall be effective after the expiry of the existing contract of advertisement between them and the manufacturers or their agents.

(e) The Government and/or any concerned authority shall not undertake or encourage any promotional ventures like “Voyage of Discovery” and those shall be strictly prohibited.

(f) The Government shall direct the appropriate authorities to take steps prohibiting smoking in public and public places like Train, Railway Station, Bus, Bus Station, Ferry Ghat, Steamer, in any public Gathering/ meeting/ assembly making the atmosphere noxious to health taking resort to strict compliance of the existing provisions of sections 278, 133, 188 of the Penal Code.

INDIA

Faquirchand v. Sooraj Singh
AIR 1949 Allahabad 467
Second Appeal No. 1424 of 1946, D/-8-2-1949
Mushtaq Ahmad, J.

Civil Procedure Code (1908), S. 91 – Village path forming part of route leading to other villages – Residents of village having right to take their carts to processions along the passage – Defendant causing obstruction by extending his house on portion of such passage – Held passage was village path and not public high way – Residents of village were entitled to decree for removal of obstruction without proving special damage or without consent of Advocate-General.

Joseph Pothen v. The State of Kerala
AIR 1965 Supreme Court 1514
K. Subba Rao, Actg. C.J., K.N. Wanchoo, M. Hidayatullah, J.C. Shah and S. M. Sikri, JJ.

SUBBA RAO, Actg. C. J. : This is a petition under Art. 32 of the Constitution for issuing an appropriate writ to quash the order and notification, dated October 3, 1963, issued by the respondent and to restrain it from interfering with the petitioner's right in the property comprised in survey Nos. 646 to 650 in Trivendrum City.

2. Kizhakke Kottaram (i.e., Eastern Palace), 2 acres and 57 cents, in extent, comprised in survey Nos. 646 to 650 and consisting of land, trees, buildings, out-houses, the surrounding wall on all sides, gates and all appurtenants, in the city of Trivendrum originally belonged to His Highness the Maharaja of Travancore. Under a sale-deed dated January 7, 1959, the Maharaja sold the same to the petitioner. On October 3, 1963, the Government of Kerala passed an order, G.O. (MS) NO. 661/63/Edn., purporting to be under the provisions of the Travancore Ancient Monuments Reservation Regulation 1 of 1112/M.E. (1936-37 A.D.). Under that order the Government considered the Fort walls around the Sree Padmanabhaswamy Temple as of archaeological importance and that they should be preserved as a protected monument. Pursuant to that order the State Government issued a notification dated October 3, 1963, declaring the said walls to be a protected monument for the purpose of the said Regulation. The petitioner, alleging that the part of the said walls situate in the said survey numbers belonged to him and he was in possession thereof and that the said notification infringed his fundamental right under Article 19(1) (f) of the Constitution. filed the present writ petition.

3. The State filed a counter-affidavit in which it admitted that the Kizhakke Kottaram was purchased by the petitioner from the Maharaj of Travancore, but contended that the wall which bounded the Kizhakke Kottaram on the east was part of the fort wall which had always remained and continued to remain to be the property of the Travancore-Cochin, and later on Kerala Government. It was further alleged that though the said wall was part of the historic fort wall, the petitioner deliberately "intermeddled" with it. In short, the respondent claimed that the said wall was part of the historic fort wall and, therefore, the said notification was validly issued in order to preserve the same and that the petitioner had illegally encroached upon it .....

7. The next question is whether the Travancore Ancient Monuments Preservation Regulation (Regulation 1 of 1112 M.E.) ceased to be law in the State of Kerala and, therefore, the said notification issued thereunder had no legal force. It was contended that Regulation 1 of 1112 M.E. was impliedly repealed by the extension of the Central Act, i.e., the Ancient Monuments Preservation Act, 1904, in the year 1951 to Kerala as the said Act covered the same field occupied by the State Act, or at any rate the said Regulation was impliedly repealed by the Ancient and Historical Monuments and Archaeological Sites and Remains (Declaration of National Importance) Act. 1951 (Act 1 XXI of 1951) and the Ancient Monuments and Archaeological Sites and Remains Act. 1958 (Act XXIV of 1958). To appreciate their contention it would be convenient at the outset to notice the relevant legislative fields allotted to the Central and State Legislature by the entries in the three Lists of the Seventh Schedule to the Constitution. The following are the relevant entries in the said Schedule:

> Entry 67 of List I (Union List)
>
> Ancient and historical monuments and records, and archaeological sites and remains, declared by or under law made by Parliament to be of national importance.
>
> Entry 12 of List II (State List).
>
> Libraries, museum and other similar institutions controlled or financed by the State ancient and historical monuments, and records other than those declared by or under law made by Parliament to be of national importance.
>
> Entry 10 of List III (Concurrent List):
>
> Archaeological sites and remains other than those declared by or under law made by Parliament to be of national importance.

It will be noticed that by reason of the said entries Parliament could only make law with respect to ancient and historical monuments and archaeological sites and remains declared by Parliament has not declared them to be of any national importance. Where the Parliament to be of national importance, the State Legislature has exclusive power to make law in respect of ancient and historical monuments and records and both Parliament and the State Legislature can make laws subject to the other constitutional provisions in respect of archaeological sites and remains. Regulation 1 of 1112 M.E. is

of the year 1936 A.D. It was a State law and it is not disputed that it was validly made at the time it was passed. After the Travancore-Cochin State was formed under the Travancore-Cochin Administration and Application of Laws Act, 1125 M.E. (Act VI of 1125 M.E.) (1949 A.D.) the existing laws of Travancore were extended to that part of the area of the new State which before the appointed day formed the territory of the State of Travancore. The result was that the said Regulation continued to be in force in the Travancore area of the new State. The Part B States (Laws) Act, 1951 (Act No. III of 1951) was made by Parliament; and thereunder the Ancient Monuments Preservation Act, 1901, was extended to the new State of Travancore-Cochin. A comparative study of the two Acts, i.e., the Ancient Monuments Preservation Act, 1904, and the Travancore Ancient Monuments Preservation Regulation 1 of 1112 M.E., shows that they practically covered the same filed. If there was nothing more, it may be contended that the State Act was impliedly repealed by the Central Act. But S.3 of the Part B States (Laws) Act, 1951, made the application of the Central Act to the State subject to an important condition. The said S. 3 reads:

> *"The Acts and Ordinances specified in the Schedule shall be amended in the manner and to the extent therein specified, and the territorial extent of each of the said Acts and Ordinance shall, as from the appointed day, and in so far as any* of *the said Acts or Ordinance or any of the provisions contained therein relates to matters with respect to which Parliament has power to make laws, be as stated in the extent clause thereof as so amended."*

The condition is that the said Acts shall relate to matters with respect to which Parliament has power to make laws. The question, therefore, is whether Parliament can make a law in respect of ancient monuments with respect whereof the State had made the impugned Regulation. As we have pointed out earlier, the Parliament can make a law in respect of ancient and historical monuments and records declared by or under law made by it to be of national importance, but the Central Act of 1904 did not embody any declaration to that effect. Therefore, the Central Act could not enter the field occupied by the State Legislature under List II. If so, it follows that the State Act held the field notwithstanding the fact that the Central Act was extended to the State area.

8. Nor can the learned counsel for the petitioner call in aid the Ancient and Historical Monuments and Archaeological Sites and Remains (Declaration of National Importance) Act, 1951 (Act LXXI of 1951), to sustain his argument. That Act applied to ancient and historical monuments referred to or specified in Part I of the Schedule thereto which had been declared to be of national importance. In Part I of the Schedule to the said Act certain monuments in the District of Trichur in Travancore Cochin State were specified. The monuments in question was not included in the said Schedule. The result is that the State Act did not in any way come into conflict with the Central Act LXXI of 1951. The State Act, therefore, survived even after the passing of the said Central Act.

9. The next Central Act is the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (Act XXIV of 1958). It repealed the Central Act LXXI of 1951).

Under S. 3 thereof all ancient and historical monuments declared by Central Act No. LXXI of 1951 to be of national importance should be deemed to be ancient and historical monuments and remained declared to be of national importance for the purpose of the said Act. Section 4 thereof enabled the Central Government to issue a notice of its intention to declare any other monument to be of national importance which did not come under S.S. of the said Act. But the Central Government did not give any notice of its intention to declare the monuments in question as one of national importance. If so, that Act also did not replace the State Act in regard the monument in question.

10. For the aforesaid reasons it must be held that notwithstanding the extension of the Central Act VII of 1904 to the Travancore area and the passing of Central Acts LXXI of 1951 and XXIV of 1958, the State Act continued to hold the field in respect of the monument in question. It follows that the notification issued under the State Act was valid.

11. The next argument of the learned counsel may be briefly stated thus. The disputed wall is not an ancient monument, but an archaeological site or remains; the said matter is covered by Entry 40 of the Concurrent List (List III) of the Seventh Schedule to the Constitution; when Act VII of 1904 was extended by Part B States (Laws) Act III of 1951 to the Travancore area, it occupied practically the entire field covered by the State Act and, therefore, the latter Act was impliedly repealed by the former Act.

12. Assuming that is the legal position, we find it not possible to hold that the Fort wall is not an ancient monument but also an archaeological site or remains. The argument of the learned counsel is built upon the definition of "ancient monument" in the State Act (Regulation 1 of 1112 M.E.) and that the Central Act of 1904. It is not necessary to express our opinion on the question whether the definition is comprehensive enough to take in an archaeological site or remains, and whether the Acts apply to both ancient monuments strictly so called and to archaeological site or remains. If the definition was wide enough to cover both - on which we do not express any opinion - the State Act may be liable to attack on the ground that it, in so far as it deals with archaeological site or remains, was displaced by the Central Act. But the State Government only purported to notify the Fort wall as an ancient monument and, therefore, if the State Act, in so far as it dealt with monuments is good, as we have held it to be, the impugned notification was validly issued thereunder.

13. The Constitution itself, as we have noticed earlier, maintains a clear distinction between ancient monuments and archaeological site or remains; the former is put in the State List and the latter, in the Concurrent List.

14. The dictionary meaning of the two expressions also brings out the distinction between the two concepts. "Monument" is derived from 'monere' which means to remind, to warn. "Monument" means, among others, "a structure surviving from a former period," whereas "archaeology" is the scientific study of the life and culture of ancient peoples.

Archaeological site or remains, therefore, is a site or remains which could be explored in order to study the life and culture of the ancient peoples. The two expressions, therefore, bear different meanings. Though the demarcating line may be thin in a rare case, the distinction is clear... ... ...

17. In this view, it is not necessary to express our opinion on the question whether Art. 363 of the Constitution is a bar to the maintainability of the petition.

18. In the result, the petition fails and is dismissed with costs.

Petition dismissed.

Gotham Construction Co. v. Amulya Krishna Ghose
AIR 1968 Calcutta 91
Bijayesh Mukherji, J.

JUDGMENT : This is an appeal by the defendant, Gotham Construction Co., a firm, against whom the trial judge, and on appeal, the appellate judge as well, have granted a decree, permanently restraining it "from creating any sound nuisance in the workshop (of the firm) at 41 Jhautola Road arising out of hammering on steel or any other plates".

2. The appellant's workshop at 41 Jhautola Road is one for "building the bodies of motor vehicles", as the averment in the second paragraph of the plaint is an averment which the sixth paragraph of the appellant's written statement admits to be "substantially correct". Such is the admission too of the appellant firm's partner, Shri Haridas Goswami, as the 3rd witness for the defendant, in his evidence at the trial. Jhautola Road runs north to south. On the east of the road is "41" with the controversial workshop and also the residence of Shri Haridas Goswami and his family. Shri Bhudeb Sankhanidhi, the 3rd plaintiff (now the 3rd respondent), a director of Lalmohan Saha Sankhanidhi and Co., with its head office in India, lives at the relevant time at 40 Jhautola Road on "the contiguous north and east" of which is "41". 47 Jhautola Road is the house where the first two plaintiffs (now the first two respondents) live ..... "41" as noticed, is on the east of Jhautola Road, running north to south. "47" is on the west. According to Shri Goutam Chakravorty, the 4th witness of the plaintiffs and himself the second plaintiff, "41" is to the south-east of "47". Or is it north-west? That is what Shri Amulya Ghosh, the 8th witness of the plaintiffs and himself the first plaintiff, says : his house (which is "47", the same as Shri Goutam Chakravorty's) is to south-west of "41". Which means that "41" is on the north-east of "47". Obviously, there is some confusion somewhere: either a slip on the part of either of the two Shri Goutam Chakravorty and Shri Amulya Ghosh or a recording mistake. But that does not matter. What do matter are the following:

(A) The distance between the southern wall of "41" and the northern corner wall of "47" cannot be more than 50 to 60 yards.

(B) The width of Jhautola Road with the footpaths would be 60 feet or more.

(C) Inside of "41" there is a tin shed the distance between which and the gate of "41" would be 15 feet or thereabouts.

Such has been the evidence of the respondent, Shri Goutam Chakravorty. Shri Haridas Goswami, a partner of the appellant firm and the defendant's 3rd witness, will however put the distance between the tin shed (with brick-built walls on all sides and asbestos roofing, inside of which body-building works are carried on, according to him) and Jhautola Road as 400 feet or thereabouts.

3. This, then, is the lie of the place where the litigating parties live and one of them, the human agency of the appellant firm carries on business too as the builder of the motor coaches and vehicles. In adjudicating a cause, the instant litigation is like, resting on noise and nuisance, as alleged by the suing party, the respondents before me, such is the milieu a Court cannot simply do without. There is a little more yet. And that little will unfold itself, as I state the respective case the parties come to Court with - which I now proceed to do.

4. Jhautola Road and its vicinity form a residential area inhabited by highly respectable persons. But the peace and quiet of the place have been broken by the terrific sound coming out of the workshop at "41" which works every day from 8 a.m. or thereabouts to 8 p.m. or even later. A nuisance as this has been continuing since early in, February 1961 when the defendant firm (now the appellant) opened its workshop at "41" when it was running only its office earlier. Repeated request to stop the nuisance yielded no result. Hence the suit on January 25, 1962.

5. The appellant qua defendant, by its written statement of April 16, 1962, resisted such suit with more than one plea, summarised below:

First: "there is no bar in law to setting up a motor repairing and body-building garage in the locality."

Second: the workshop was "set up" right in 1958, and that too with the permission of the Corporation of Calcutta and the requisite licence too under the Factories Act, 63 of 1948.

Third: the sound emanating from the workshop, the hours of business of which are 8 a.m. to 6 p.m., is not "terrific" and, ergo, not a nuisance too.

Fourth: no request was made ever to stop "any nuisance"; nor was there any occasion to do so, nothing like a nuisance having been there.

6. Here are the findings come to by the trial judge.

One, Jhautola Road is essentially a residential area.

Two, hammering of steel sheets with hammers which vary from half a pound to four pounds is at "the root of all troubles" and "comes within the category of an actionable nuisance."

Three, the defendant firm, now the appellant before me, is certainly entitled to use its property (41 Jhautola Road) in any manner it likes, but in so doing, it cannot infringe the similar rights of others, in the vicinity, in the enjoyment of their properties.

Four, the nuisance complained of commenced from the early part of 1961, only the office of the defendant firm (as distinguished from the workshop) having been at "41" from 1958.

7. On appeal, the appellate judge finds as much and a little more:

(A) The fact that the defendant firm "has been picked up for a suit for actionable nuisance", though there are some other factories in the locality, "lend the plaintiffs' case a colour of truth", and their evidence, as also the evidence of the first witness for the defendant, "lead to the irresistible conclusion that the hammering sounds coming from the factory are causing substantial interference with the comforts of the plaintiffs and others residing in the locality."

(B) The evidence of the plaintiffs that the workshop got going early in 1961 is there. Even if it be assumed that the workshop was where it is, since 1958, the noise proved itself to be an actionable nuisance from early in 1961, there being no evidence to indicate such noise emanating prior thereto. Delay, in the circumstances, cannot stand between the plaintiffs and the relief of a permanent injunction they pray the court for.

8. Such having been the findings, naturally the suit succeeds in the court of first instance, and an appeal taken against that comes to little. This is why the defendant firm has come up to this court in second appeal.

9. .....

10. Let the contention resting on several provisions of the Calcutta Municipal Act, 33 of 1951, be examined first. Section 436 provides *inter alia* that no person shall, without the previous written permission of the Commissioner (of the Corporation of Calcutta), establish in any premises a workshop, it being open to the Commissioner to refuse to give such permission if he is of opinion that the establishment of such workshop would be objectionable by reason of the density of the population in the neighbourhood thereof, or would be nuisance to the inhabitants of the neighbourhood. Section 5, clause (50), defines nuisance. To notice only the material part of it, in the context of facts here, nuisance includes any act which causes or is likely to cause annoyance, offence to the sense of hearing or disturbance to rest or sleep. Section 437, sub-section (1) clause (b), prohibits the use of any premises for a purpose which is, in the opinion of the Corporation, amongst other things, dangerous to health or likely to create a nuisance, and provides that the opinion of the Corporation shall be conclusive and shall not be challenged in any Court, Section 438, sub-section (2),

clothes the Commissioner with the power to stop the user of any premises, causing a nuisance, if the owner or occupier thereof refuses to obey the order of the Commissioner to stop such nuisance. Section 439 confers on the Corporation the power to declare, by public notice, a specified area inside of which no person shall use any premises for a purpose which, in the opinion of the Corporation, is dangerous to health or likely to create a nuisance: just what Section 437, sub-section (1) clause (b), provides for. Section 537 is the section prescribing penalties. Section 583 enables the Corporation or any person who resides, or owns property, in Calcutta, to complain to a magistrate of the existence of a nuisance.

11. On the strength of such provisions, Mr. Lala Hemanta Kumar contends that whether or not a nuisance exists cannot be agitated in a court, the more so, as, under Section 548 sub-section (3), it is within the competence of the authority, by whom any licence or written permission was granted under the parent Act, to suspend or revoke the same. Mr. Chittatosh Mookerjee, appearing for the respondents, reminds me of Section 9 of the Procedure Code, 5 of 1908, and submits: "The instant litigation is undoubtedly a suit of civil nature, cognizance of which by the court has not been either expressly or impliedly barred, and which the court has, therefore, jurisdiction to try. Pray, do not read, in the provisions of the Calcutta Municipal Act, suspension of a remedy for tort".

12. I am clear in my mind, Mr. Chittatosh Mookerjee's contention must prevail over Mr. Lala Hemanta Kumar's. In the first place, Section 436 can do not duty here. It provides for a workshop "in which it is intended to employ steam, electricity, water or other mechanical power", as sub-section (1) thereof bears. The appellant's workshop does not come within that. More, the nuisance complained of and found is noise generated by the hammering of steel sheets with hammers varying in weight from half a pound to four pounds. No mechanical power this. It is manual power. In the second place, Section 437, sub-section (1) clause (b), does not, in terms, apply. Indeed it cannot. By virtue thereof, the opinion of the Corporation, that "any purpose" is dangerous to health or likely to create a nuisance, shall be conclusive and shall not be challenged in any court. Where is such opinion, even though such opinion would have recoiled on the appellant? So, the very thing which, under the statute, is conclusive and beyond the court's scrutiny, does not exist. To spell out from this provision that even absence of such opinion ousts the jurisdiction of the court is to read into the section much more than what it hears. In the third place, the other provisions of the Calcutta Municipal Act, referred to on behalf of the appellant, do not exclude the jurisdiction of the civil court impliedly, and far less, expressly. They go their own way, without a word or even an implication about the jurisdiction of the court to try a suit of civil nature, which the litigation in hand, complaining of a tortious act, undoubtedly is. Last, and this is indeed the last word on the subject, the settled law now is that the exclusion of jurisdiction of the civil court is not to be readily inferred; on the contrary, such must either be explicitly expressed or clearly implied : *Secretary of State v. Mask and Co.,* (1940) 67 Ind App 222: 44 Cal WN 709: AIR 1940 PC 105, (2) *Mahendra Nath Boy v. Delraddi Chakladar,* AIR 1966 Cal 285, a Full Bench decision, and (3) *State of Kerala v. N. Ramaswami Iyer and Sons,* AIR

1966 SC. 1738, to quote only three out of the crowd of decisions on the point. Imagine a case converse to the one I am seized of, Say, the purpose of the appellant in running a workshop here is, in the opinion of the Corporation, dangerous to health or likely to create a nuisance, and the appellant is up against the said opinion with a suit in the civil court. But exclusion of that court's jurisdiction is explicitly expressed in Section 437, sub-section (1), clause (b), laying down that such opinion of the Corporation shall be conclusive and shall not be challenged in any court. In the case in hand, nothing like this can be said. So, explicit ouster of the civil court's jurisdiction is not simply here. Nor do I see ouster by implication in the provisions relied on by Mr. Lala Hemanta Kumar, whether taken singly or collectively. The right to complain to a magistrate, as conferred by Section 583, does not, without more take away the right to seek redress in a civil court. The same approach holds good mutatis mutandis in regard to other sections referred to above.

13. I, therefore, reject Mr. Lala Hemanta Kumar's contention that whether or not a nuisance exists cannot be agitated in a civil Court. I hold instead, it can be.

14. Then, the contention on behalf of the appellant is: "The respondents are entitled to a suitable remedy under the provisions of the Calcutta Municipal Act noticed above, and in particular under Section 548, sub-section (3) which, when set in motion, may lead to the suspension or revocation of the appellant's licence for the workshop, no less under Section 537 which prescribes, for infraction of Section 437, sub-section (1), a fine of Rs. 1,000, apart from a daily fine of Rs. 100. That being so, no injunction can there be with a view to preventing a nuisance". A contention as this is rested on the following passage at page 453 of Woodroffe's Tagore Law Lectures (1897) on the Law relating to Injunctions 6th edition:

> *"And it may be said, generally, that the aid of an injunction will not be extended for the prevention of a nuisance, when it does not satisfactorily appear that the person aggrieved is without adequate remedy at law".*

This passage, in turn, as it appears from foot-note 5 thereto is rested on, a text-book apart, (i) Section 56, clause (1) of the Specific Relief Act 1 of 1877, (ii) *Tilokchand Nathmal v. Dhundiraj Madhavarao,* AIR 1957 Nag 2, and (iii) Attorney-General (on the *relation of Glamorgan County Council and Pontardawe Rural District Council) v. P.Y.A. Quarries, Ltd.,* (1957) 1 All ER 894. Let these authorities, statute and cases, in support of the passage, be examined.

15. Tilokchand Nathmal's case, AIR 1957 Nag 2 reveals "peculiar circumstances". The wall erected by the defendants encroached on three inches space of their neighbours, the plaintiffs. Were they to pull down the wall so erected, and to build another, leaving three inches of space, that little would hardly be of any use to the plaintiffs. Hidayatullah C.J. (as his Lordship then was) and Mangalmurti J. Did not, therefore, give the discretionary relief of mandatory injunction, but granted instead Rs. 50 as compensation thereby bringing the case within Section 54. Specific Relief Act 1 of 1877, clause (c) in the third paragraph of which enables the court to grant a perpetual injunction where the invasion of the plaintiff's right is such that pecuniary compensation would not afford adequate relief.

For three inches of encroachment Rs. 50 did not afford adequate relief. Ergo, no injunction.

16. But say that of nuisance from noise? No money can afford adequate relief to the respondents and their neighbours who are discomfited by the hammering of steel sheets with hammers weighing up to four pounds a fact found concurrently by the two courts of facts. What to say of such hammering, even the intermittent drone of music cannot but get on the nerves of others living in the neighbourhood, no matter how fond of music they are. I am not taking into reckoning those to whom music is nothing but a compound of noise and nuisance. So, Tilokchand Nathmal's case, AIR 1957 Nag 2 appears to be clearly inapplicable here, on principle and facts, nuisance having been nowhere near.

17. But nuisance - and a public nuisance at that is very much there in 1957-1 All ER 894 the other case listed in the footnote to the passage under consideration. There, however, the court of appeal (Denning, Romer and Parker, L. JJ.) upheld the injunction granted by the trial judge (Oliver J.) against public nuisance from vibration and dust, occasioned by the operations in neighbouring quarry, the nuisance having not been wholly abated at the trial. It is difficult to find, in this decision of the court of appeal, any support of the passage relied on by Mr. Lala Hemanta Kumar from Woodroffe's Injunction, the original and earlier editions of which, before 1957, did not, and naturally could not, cite this case of 1957.....

18. To the statutory provisions just mentioned, I now turn. It bears

> 56. An injunction cannot be granted -
>
> * * *
>
> (i) When equally efficacious relief can certainly be obtained by other usual mode of proceeding except in case of breach of trust;
>
> * * * *

Can an equally efficacious relief be obtained here? Grant, the respondents, harassed and distressed by the noise coming from the appellant's workshop, move the Corporation of Calcutta under the several provisions of the Calcutta Municipal Act, Mr. Lala Hemanta Kumar refers me to Grant too, they get the relief they pray the rating authority for. Even then, the nuisance may continue. So they have to come to the court with a view to restraining the appellant from carrying on its workshop in such a manner as to occasion a nuisance from noise. To say so it is to say that the relief obtainable from the Corporation of Calcutta is not an equally efficacious reliefs. Indeed, it cannot be.

19. Or take it the other way about. The respondents do not get the relief they pray the rating authority for. To the civil court they come with their dispute of a civil nature, as they must and have every right to. How say, then, an equally efficacious relief - the accent is on “equally” - is obtainable at the Corporation end? Why equate the two unequals - the civil court and the Corporation?

20. It is said, the licence granted by the Corporation will then be worth nothing. That, in my judgment, is not the right way to look at the matter. Certainly the licence is worth something: grant of permission to run a workshop (as here, if that). But it does not enable the holder thereof to be licentious, using his workshop in a manner which works annoyance to the respondents and others in the neighbourhood, robs them of their quiet and gives a good shaking to their nerves day in day out for months and years together. Sure enough, the licence, if any, is no charter granted to the holder to cause all this, with impunity' and yet to deprive the persons (as the respondents are) of their common law rights, founded on tort, to move the courts of the land for redress. So let the licence if any, be kept in its proper place instead of being magnified into a charter of unrestrained rights. Such a consideration lends assurance to Mr. Chittatosh Mookerjee's contention that there can be no ouster of the respondent's rights to seek redress in the civil court.

21. Again, the submission is: assuming the civil court has the power to override the Corporation of Calcutta, the licence gives a presumption in favour of the appellant a presumption which the courts below have not considered. No case of an assumption do I see here. It is not a matter under Section 437, sub-section (1), clause (b), of the Calcutta Municipal Act, where, "in the opinion of the Corporation", "any purpose" "is likely to create a nuisance". Had that been so, the civil court's jurisdiction might have been ousted. Since it is not so, the civil court's jurisdiction is always there. (See paragraphs 12 and 13 ante.) Then, where is the licence on which the presumption is rested? Exhibits A and A/1 are the licences for 1961-62 and 1958-59 respectively for professions, trades and callings under Sections 218 and 219 of the Calcutta Municipal Act. That has little to do with a licence under Section 437. The licences for professions etc. can hardly give rise to the presumption contended for. They only serve as an acknowledgement of the holder carrying on a profession, trade or calling, Last, the evidence of a nuisance from noise has been overwhelming, as found by both the courts of facts. That being so, should any presumption lurk anywhere, it has been more than rebutted.

22. The conclusion I have, therefore come to is that a court of law cannot stint in proffering the aid of an injunction for prevention of a nuisance from noise, complained of by the respondents who, it satisfactorily appears, are without any other equally efficacious remedy at law. So I hold, rejecting Mr. Lala Hemanta Kumar's contention formulated in paragraph 14 ante.

23. In support of the conclusion just come to, reference may be made to the Full Bench decision of the *Lahore High Court in Municipal Committee, Montgomery v. Master Sant Singh,* Air 1940 Lab 377, where, amongst other things, is emphasized the finality of a decision in the civil courts, approachable as of right by a person aggrieved by an illegal imposition of tax by the municipality, even after he exhausted his remedy under the relevant Municipal Act - a consideration, which it is held, demonstrates that the remedy may be "efficacious", but never "equally" so.

24. Mr. Lala Hemanta Kumar then bases his criticism of the judgments under appeal on the ground that the delay made by the respondents in instituting the suit has not been given the importance it deserves. In so doing he makes a point of the finding by the trial

court of the nuisance by noise having started early in 1961, and of the finding by the appellate court about the appropriateness of the injunction granted, even if the workshop was there from 1953. To my thinking, this appears to be a pointless point. I find no dissonance in the findings come to by both the Courts, as Mr. Lala Hemanta Kumar does. Here are the findings. The trial court finds

> "..... *I am clearly of opinion that the nuisance commenced from the early part of 1961 and not from 1958 as alleged by the defendants". : page 11, bottom, of the paper book.-*

and appellate court finds:

> *"Plaintiffs no doubt led evidence showing that works in the factory have started only in early part of 1961, but even if it be assumed that the factory works were started in 1958 as said by the defendant, that cannot, in the absence of proving that the hammering sounds, sufficient to constitute substantial interference with the comforts of the residents of the locality, were coming out of the factory since the works commenced in 1958, disentitle the plaintiff to the equitable relief on the ground of delay. Till the sounds proved to be actionable nuisance, the plaintiffs had no cause of action for this suit. When therefore according to the plaintiffs from the early part of 1961, hammering sounds were interfering with their comforts, and there is no evidence indicating that such sounds were also emanating from the factory prior to 1961, it cannot be said that there was delay in the institution of the suit".*

The suit, out of which this appeal arises, was instituted on January 25, 1962

25. True it is that while the finding of the trial Judge is terse, that of the appellate Judge is verbose. But what he seeks to convey is clear enough:

(I) The workshop got going early in 1961, as the plaintiff's evidence is.

(II) Say, the workshop got in 1958, as is the defendant's case. So what? No evidence there is that the nuisance by noise had started then. No such nuisance, no cause of action for the suit.

(III) Nuisance by noise early in 1961. Suit on January 25, 1962. Ergo, no delay.

26. Where then is the dissonance between the findings of the two judges? None, for all I see.

27. This is but one reason why I cannot accept Mr. Lala Hemanta Kumar's contention grounded on delay. There is still another. If I suffer a nuisance for sometime, shall I have to suffer it for ever? Quiscence is not acquiescence always. More, you cannot expect a man to make a bee-line for the nearest court, the moment a nuisance starts tormenting him. He must be given a reasonable time to think over the matter and to consult his neighbours as much distressed by the nuisance as he. Complaints to the maker of the nuisance in the hope that he will wholly abate it consume a good deal of time too.

Furthermore, when three combine to bring a joint action (as here), necessarily the matter must drag. Then, funds have to be thought of and provided for. Litigation is quite an expensive affair these days. In the circumstances, the delay of a little less than a year (February 1961 to January 25, 1962) cannot stand between the respondents and the injunction they have been granted.

28. *Benode Coomaree Dosee v. Soudaminey Dosee,* (1889) ILR 16 Cal 252, cited on behalf of the appellant, turns on its own facts and appears to be clearly distinguishable. There, the plaintiff Soudaminey or her husband Gopal Lall Mitter, so long as he was alive, did not come to court on the first opportunity after the buildings complained of had been commenced. On the contrary, they waited till the building were finished. In the circumstances, a mandatory injunction to pull down the buildings, to the extent of allowing the requisite light and air the plaintiff was entitled to, was refused. This can hardly be said of the case in hand resting on nuisance by noise. Nothing you have to demolish here. All you have to do is avoid the nuisance complained of and found, by pressing into service modern scientific methods, and thereby confining the noise to the workshop only. (More of which hereafter in paragraphs 41 and 42 infra).

29. Consider, on the other hand, what Mr. Chittatosh Mookherjee cites : Venkatasubba Rao, J.'s decision in C. *Ramasubbier v. G. Mahomed Khan Saheb,* AIR 1937 Mad 823, a case on nuisance by carrying, though a drain, filthy water to a neighbour's land. The defence based upon delay is not, his Lordship holds entitled to much weight. The reasons why his Lordship holds so, inter alia are:

(i) *A case of this sort is not one of demolition or destruction of costly structures and the loss, that for diverting the drain is negligible.*

(ii) *Mere delay, so long as delay does not amount to a bar by any Statute of limitation, cannot go far.*

(iii) *When the situation of the parties had in no substantial way been altered either by delay or by anything done during the interval, the defence founded upon time comes to little: Lindsay Petroleum Co. V. Hurd, (1874) 5 PC 221.*

(iv) *The right of throwing filthy water on a neighbour's land is an easement which can be acquired by prescription, grant apart the chances are far greater that the injured party will assert his rights in the second rather than in the first half of the prescriptive period - a consideration which accords with one's experience of human nature : Greenhalgh v. Brindley (1901) 2 Ch 324 at p. 328 (In the case in hand, the delay is not even a year, far, far short of half of the prescriptive period).*

(v) *A person may be willing to submit to an injury for sometime. Only because it is so, do not infer that he wishes to put up with ever; the more so, conscious that he may terminate it at his pleasure, he may not complain. That is different from saying that he acquiesces in the other party acquiring a legal right to inflict the injury.*

30. Such reasons apply mutatis mutandis, to the case before me too. Thus, the contention founded on delay also fails.

31. No expert has been examined at the trial. Mr. Lala Hemanta Kumar makes that a ground of attack of the judgments under appeal. So he does on the authority of *Dattatraya v. Gopisa,* AIR 1927 Nag 236. This is a case about construction of a cess-poll and latrine from which is said to have emanated offensive smells, which caused a private nuisance to neighbours, the suing party, as the allegation was. In that context, a remit was ordered with a view to finding out how far the nuisance and what ways and means could be devised with the help of medical or sanitary experts' evidence for the prevention of such nuisance. More, it was observed:

> *"For a court to decide rightly whether a particular nuisance is one in that the inconvenience is only to the public or there is a special injury to a particular individual. ..... expert evidence is of very great value and is an absolute necessity".*

A passage upon which Mr. Lala Hemanta Kumar strongly relies. If it is thought that this is a proposition of universal application, I must respectfully express my dissent. Each case depends on its own facts. In the case in hand the evidence is overwhelming that a nuisance by noise exists. Furthermore, the finding of fact-and a concurrent finding at that-is just so. Sure enough, whether or no such nuisance exists is a question of fact, as Mr. Mookerjee rightly emphasizes. Still I have to direct a remit for expert evidence. The difference between an expert and a non-expert is that the former has acquired special knowledge, skill or experience in a particular subject, whereas the latter has acquired none. But what is the subject here? The subject is does the hammering of steel plates with hammers weighing upto four pounds create noise? Far from being beyond the range of common knowledge-a field where experts may flourish-it is the commonest of common knowledge-a field where experts may flourish-it is the commonest of common knowledge, in which an expert, if any, has no advantage over a non-expert.

32. Again, in Dattatraya's case, AIR 1927 Nag 236 the material on record was not sufficient to decide the case from the point of view (i) whether the nuisance was public or private and (ii) whether or no the owner of the privy would take scientific precautions to ensure the safety of the health of the inmates of the injured party's house. Can this be said of the litigation I am seized of? The material I see, the material upon which the courts of facts come to the finding of fact on the existence that it is a private nuisance by all means affecting the three suing individuals at the date of the suit. And in order to be a public nuisance, it is not necessary that every member of the public must be affected; it is sufficient to show that a representative cross-section of the public has been injuriously affected. See 1957-1 All ER 894 (supra). The material on record, which includes the evidence of persons of the neighbourhood complaining of noise and nuisance, makes the existence of a public nuisance so probable too. But, this litigation being what it is, it is hardly necessary to go to that length. Thus, no remit is called for, to have expert evidence on the question whether the nuisance found here is private or public. Nor do I need any expert evidence to ascertain whether scientific precautions are to be taken or not to make the workshop a noise-proof one. Once the finding is that there is a nuisance by noise, as it

is here, it is for the appellant to abate such nuisance wholly by resorting to such method which will not allow the noise to travel beyond the workshop. And the appellant does claim that has since been done: para 41 infra. Still a remit. I find it impossible to hold so.

33. Then, why this blind faith in experts whom Jessel, M.R. described in *Lord Abinger v. Ashton* (1873) 17 Eq. 358 at pp. 373-374, as remunerated witnesses available on hire to pledge their oath in favour of the party who has paid them. First and last, the court is an expert of all experts and can need no opinion evidence of an expert in order to determine whether hammering of steel plates by hammers up to 4 pounds creates a terrific noise or not and whether such nuisance can be wholly abated or not by treating the workshop with the well-known method of acoustics. The contention on lack of expert evidence must therefore, fail.

34. Still another criticism of the judgments under appeal is that neither of the two courts has considered the following:

(A) The workshop inside of 41 Jhautola Road, with a shed over it, is 400 feet away from its gate: just what Shri Haridas Goswami says in his evidence.

(B) The distance between the southern wall of "41" and the northern corner wall of "47" is, say, 50 yards : not more than 50 to 60 yards as Shri Goutam Chakravorty says his evidence. 50 yards make 150 feet.

(C) So, the distance between the workshop and "47" is- some 550 ft. Ergo, the volume of noise, unable to do this distance, cannot constitute a nuisance.

35. One answer to such a criticism is that the two courts of facts have found as a fact upon the oral evidence, that the noise from the workshop does constitute a nuisance.

What to say of the plaintiffs and their witness, residing in this residential locality, even two of the defendant's witnesses, Ahmed Ali (No. 1) residing at 48-Jhautola Road for 10 years and Md. Israil (No.5) of 49 Jhautola Road about 100 yards away from "41", speak of the noise from the workshop at "41" having been within their earshot a noise which, they admit, they do not like. Upon the whole of the evidence including this from the defendant's side the fact found by the two courts of facts, existence of a nuisance by noise. I have, therefore, no jurisdiction even to interfere with the finding of fact. Another answer is and is the answer returned by Mr. Mookherjee that there is nothing unusual in the note of the type the evidence discloses travelling a distance of even 450 feet, if that. The probability, indeed, is that the distance is much less. There is still one more answer. The appellate judge does weigh in his mind the evidence of Shri Goswami, the 3rd witness of the defendant on the distance of 400 feet between the workshop and Jhautola Road where the gate of "41" is. See page 23 of the paper-book and paragraph 12 of the appellate judgment.

36. That failure to consider material evidence does make an error of law is beyond argument, though Mr. Lala has been good enough to cite a decision of mine: *Mohammed Safique v. Union of India*, AIR 1963 Cal 399 = 67 Cal WN 279, in support of this

obvious proposition. The difficulty for the appellant is that failure to consider material evidence is not seen. So, this criticism fails too.

37. Again, a point is made of the institution of the suit in hand by three plaintiffs only, even though some residents of this residential locality pledge their oath to complain of nuisance by noise. I consider this to be destitute of merit. Because the very existence of nuisance depends on "the number of houses and concourse of people." If such residents were not called a witnesses, the carriage of the plaintiffs' case would have been open to the comment that they are a group of hypersensitive people making a lot of noise about a so-called noise which other people in the same area pass by.

38. A grievance is then made of the appellant having been singled out for an action in nuisance, though there are other such workshops in the locality. The learned appellate judge has considered this only to hold that this circumstance lends the plaintiffs' case "a colour of truth" and that "the evidence of P.Ws. (the plaintiffs' witnesses) sufficiently establishes" the causing of "substantial interference with the comforts of the residents of the locality" by "the hammering noise". I see no error of law here. That apart, the point here is: does or does not your workshop occasion a nuisance by noise? The answer is: it does. So, that is the end of this litigation. About other workshops, the evidence is too meagre to sustain a firm finding in favour of the appellant. I therefore, see little substance in this grievance.

39. True, it is, as Mr. Lala submits, that Shri Sankhanidhi, the 3rd plaintiff, unable to bear the noise, left 40 Jhautola Road on or about February 20, 1962 hardly a month after the institution of the suit on January 25, 1962. So what? One of the three plaintiffs left the nuisance long after the cause of action and a little after the institution of the suit. But the nuisance has not left the area nor the remaining two plaintiffs and others of the locality. So, the injunction appealed against stands.

40. The form of injunction (quoted in the first paragraph of this judgment) has been complained of. But it has little to be complained about. The form is just the form given in form No. 14 in Appendix D to the Procedure Code. (See paragraph 41 infra.) That apart, the principle a court of law goes, by, is to do justice to both the parties, if it can. The form of injunction granted secures just that. It saves the plaintiffs and others living in the locality from being discomfited by nuisance from noise. It keeps too the business of the defendant appellant intact, provided care is taken, as must be and can be taken, by scientific method to keep the noise within the limits of the workshop. Otherwise, with no injunction, should the nuisance start over again, one more suit has to be instituted. With the injunction, however, no possibility of a nuisance will be there, and no necessity of a fresh suit either. This is as it should be. The more so, because of two additional considerations. One, a nuisance as this is not inevitable. It can be avoided by the exercise of proper skill and care, as it is said to have been avoided. Two, the past conduct, before the suit, of Shri Goswami in paying scant attention to the complaints of the respondents tends to show irresponsibility, not an irrelevant consideration where the granting of an injunction is concerned. See 1957 1 All ER 894 (supra).

41. Indeed, it has been urged before me on behalf of the appellant that in terms of order dated May 22, 1964, issuing a rule on the respondents to show cause why execution of the impugned decree should not be stayed, and order dated August 4, 1964, of this Court, making the aforesaid rule absolute, during the carriage of the present appeal, a sound-proof workshop has since been erected. If that is so, nothing to say of the fact that such interlocutory order does not decide the appeal, but is subject to the result of the appeal, the nuisance has been wholly abated. And the appellant has little to be worried about. Execution, if levied under Order 21. Rule 32, of the Procedure Code, will then come to little. Why, therefore, as Mr. Mookherjee rejoins, press this appeal at all, form no. 14 in appendix D to the Procedure Code containing a paradigm of what a decree for injunction against private nuisance should be like: only restraining the defendant from doing an act so as to occasion a nuisance to the plaintiff.

42. Mr. Lala, however, will not allow the matter to rest here. He makes a spate of submissions which I examine below seriatim:

(i) No opportunity has been given to the appellant to abate the nuisance. I am afraid, that cannot be said upon all I see here. The requisite opportunity is right there in the form of the order itself combined with all that has happened since. Abate the nuisance by erecting a sound-proof workshop, as you say you have done, and the decree for injunction can do you no harm. In vain, therefore, has reliance been placed on the following passage from Woodroffe's Injunction, 6th Edn., at page 456:

"The words of an Injunction against causing a nuisance ought not to be so drawn as the shut out all scientific attempts to attain the desired end without causing a nuisance": (12) *Fleming v. Hislop*, L.R. 11 Appeal Cases 636. Time has thus cured the defect, if any, in the order drawn up.

(ii) By parity of reasoning, it is much too much to say that the injunction is oppressive, as contended for. Mr. Lala sees "total annihilation of the appellant's business". Mr. Mookerjee does not Nor do I. The business will go strong, if not stronger still, with a modern noise proof workshop.

(iii) In *Chiragdin v. Karim Baksh* (1921) 64 Ind Cas 169 (Lah), cited on behalf of the appellant, an injunction was issued restraining the defendants from working their factory between 10 p.m. and 6 a.m. An injunction in that form caused unwarranted and unnecessary hardship, closing the factory for 8 hours. Partial "annihilation of the business" is here. So, the injunction was altered restraining the defendants from carrying on the work in the factory in such a manner so as to occasion a nuisance to the plaintiff. Here the injunction appealed against is just so.

(iv) "Where injury to private rights results from the construction of works which have been authorized and which have been executed with skill and care, the party injured must look for his remedy to the proviso for compensation if

any, within the Statute authorizing the works, and, if there be no such proviso, he is without remedy.": page 457 of Woodroffe's Injunction ibid. But this passage holds good in the case of nuisance by incorporated companies having compulsory powers to take lands and construct works, as the beginning of the paragraph (where from it is quoted) makes it clear. This has little to contribute to the case in hand.

(v) "In cases of private nuisances a court of equity will balance the inconvenience likely to be incurred by the respective parties in exercising its discretion to grant or withhold relief; and where greater harm would result from enjoining than from refusing to enjoin, the injunction will be refused.": Section 417, page 363, of A Treatise on Injunctions by Spelling (1901). In view of all that goes before, it is impossible to say that "greater harm would result from enjoining than refusing to enjoin." On the contrary, "refusing to enjoin" is likely to cause incalculable harm to the respondents and others living in the locality. Not that it has to be proved that the health of the plaintiffs and others of this locality braving the nuisance has in fact gone down a lot. See *Datta Mal Chiranji Lal v. L. Ladli Prasad.* AIR 1960 All 632 a case Mr. Mookerjee cites. And "enjoining" will mean, for the appellant, an added expense, to start with, plus not much of a recurring expenditure. The appellant cannot be, and is not, sore on it. A noise-proof workshop, I am told, has already been erected. More, in the latter half of the 20th Century, you cannot go back to the 18th Century. Regard must be had to modern conditions and knowledge. *Andrec v. Selfridge and Co. Ltd. (1937)* 3 All ER 255. Mr. Mookerjee refers me to, reveals that even a judicial personage must have to move with the times. Bennet J. At the trial did not regard, for example, excavation of a site to a depth of 60 ft for erection thereupon a steel framework etc as the normal use of land by people in England. Sir Wilfrid Greene, M.R., however, delivering the judgment of the Court of Appeal, saw nothing abnormal and unusual in that, and observed:

"It seems to me-that, when the rule, as indeed it is a rule, speaks of the common or ordinary use of land, it does not mean that the methods of using land and building on it are in some way to be stabilised for ever. As time goes on, new inventions and new methods enable land to be more profitably used, either by digging down into the earth or by mounting up into the skies."

Time goes on here too. The method of constructing a factory of a workshop has not been stabilised for ever here as well. Thus, an equitable balance-sheet works entirely in favour of the respondents living in the locality.

(vi) The *Shamnungger Jute Factory v. Ram Narain Chatterjee(1877)* ILR 14 Cal 189 relied on by Mr. Lala, seems to carry the appellant no further. It

does no more than reiterate the principle (just extracted out from Spelling's great work) upon which rests the granting or withholding of an injunction. In the facts of that case, the order of the District Judge refusing to grant an injunction at the instance of a co-owner restraining another co-owners from building a jute mill, but awarding money damages, is upheld. How far refusal to grant an injunction to a co-owner up against a co-owner permanently altering the character and condition of the common land by raising can be regarded as good law today does not fall to be considered here. See, for example, Israil *v. Samser Rehaman,* (1914) 18 Cal WN 176 = (AIR 1914 Cal *362) Ashurosh Roy v. Rampur Boalia Municipality,* (1924) 29 Cal WN 643 = (AIR 1925 Cal 1027) and cases of that class, where removal is directed of buildings, constructed on a common land in defiance of the other co-sharer's protest, or it is held that the refractory co-sharer may be ordered to pull it down and restore the site to its original position. Suffice it to say that Shamnugger Jute Factory's case. (1887) ILR Cal 189 can have no application to this litigation founded on nuisance.....

(ix) Limitation of *3* months for prosecution of most of the statutory offences under the Calcutta Municipal Act (vide section 582 referred to by Mr. Lala) cannot certainly be limitation for the suit here.

43. This exhausts all I have been addressed on by Mr. Lala Hemanta Kumar. And I find myself unable to accept any one of his submissions.

44. In the result, the appeal fails and do stand dismissed with costs.

45. Leave to appeal under clause 15 of the Letters Patent has been asked for. It is refused.

Appeal dismissed.

Radhey Shiam v. Gur Prasad Saxena
AIR 1978 Allahabad 86
T.S. Mishra J.

T.S. Mishra J.: Gur Prasad Saxena and another filed suit No. 595 of 1964 against Radhey Shyam and 5 others for permanent injunction restraining the defendant No. 1 from installing and running flour mill in the premises occupied by the defendant No. 1....

The plaintiffs alleged that they would lose their peace on account of rattling noise of the flour mill and their health would be adversely affected if the flour mill was allowed to be run. The defendant No. 1 did not agree to give up the idea of installing the flour mill hence the plaintiffs filed a suit on 23rd December, 1964. The suit was contested by the defendant No. 1 pleading inter alia that no nuisance had been caused or would be caused because of any of his alleged acts and that the plaintiffs had no right to sue. The trial court, having found that the running of the flour mill was not an actionable

nuisance and that the oil plant of the defendant No. 1 was being run without causing any nuisance to the plaintiff, dismissed the suit. Against that decision the plaintiffs filed Civil Appeal No. 59 of 1968.

2. Gur Prasad Saxena filed another Suit No. 34 of 1966 on 10th January, 1966 against Radhey Shyam and 5 others for permanent injunction restraining the defendant No. 1 from running or continuing to run the oil expeller plant in his shop. This suit was also based on the ground of private nuisance. It was resisted by the defendant No. l. The trial court having found that the running of the oil expeller plant by the defendant No. 1 was not a source of nuisance to the plaintiffs and that it would not weaken the building, dismissed the suit. The plaintiff preferred Civil Appeal No. 58 of 1968 against that decision. Both these appeals were heard together and decided by a common Judgment by the learned Civil Judge, Mohanlalganj, Lucknow. The appeals were allowed and injunction was issued restraining the defendant No. 1, his servants, workmen and agents from making and causing to be made noise and vibrations from the impugned machines lodged in his premises on the ground floor of the building in question, so as to occasion nuisance, disturbance and annoyance to the plaintiff appellants, as the occupier of the residential portion of the first floor of the same building.

3. Aggrieved, Radhey Shyam was filed second appeal.... Since common questions of law and fact are involved in both these appeals, they are being disposed of by one judgment.

4. The appellate court below has, on reappraisal of evidence adduced by the parties, recorded a finding in the following terms:-

> *"Having regard to the locality and the situation of the property and the class of people who inhabited the same, it appears to me that the running of the impugned machines seriously interferes with the comfort physically of the plaintiff appellant and the members of the family in the occupation of his house according to the ordinary notion prevalent among reasonable men and women. " The learned counsel for the appellant submitted that this finding should not be accepted and he referred me to the inspection note of Sri G.P. Srivastava, Civil Judge, Mohanlalganj, dated 10-9-1969.I have gone through that inspection note. It was found by the learned Civil Judge on his inspection that there was no residential premises immediately above the flour mill run by Mahabir Prasad. The shop of the defendant No. 1 is on the ground floor. In the same premises the plaintiff No. 1 resides on the first floor and has his professional office just above the shop of the defendant No. 1. The learned Civil Judge had inspected all the rooms occupied by the plaintiff No. 1 and he found that if the palm of the hand was placed on the walls vibrations could be noticed because of the running of the oil expeller machine. He also noticed that there was monotonous and continuous feeling of slight tremor of "Zoom' sound because of the running of the oil expeller machine. The observation made by the learned Civil Judge were considered by the appellate court below while disposing of the aforesaid two first appeals. A commission was also issued by the trial court to make local inspection. His report and the site plan prepared*

by him are paper Nos. C-30 and C-31 which indicate that the residential portion of the plaintiff is just above the shop wherein the impugned machine is installed. The commissioner had also reported that there were two other flour mills on the southern side of the land shown in his map but they were covered by the tin shed and there was no residential portion over those flour mills. The flour mill of Mahabir Prasad is, however, situated in the same premises but there was no residential portion over that flour mill as well. On these facts it was contended that the plaintiff who is a tenant in the premises in question has to put with certain amount of noise which is caused by the running of the oil machine and therefore, no injunction should have been issued in the case. The principles relating to private nuisance are by now well settled. In Dhanna Lal v. Chittar Singh (AIR 1959 Madh Pra 240) those principles have been succinctly enumerated as under:-

(1) Constant noise, if abnormal or unusual, can be an actionable nuisance if it interferes with one's physical comforts.

(2) The test of a nuisance causing personal discomfort is the actual local standard of comfort, and not an ideal or absolute standard.

(3) Generally, unusual or abnormal noise on defendants' premises which disturbs sleep of the occupants of the plaintiff's house during night, or which is so loud during day time that due to it one cannot hear ordinary conversation in the plaintiffs house or which can not allow the occupants of the plaintiff's house to carry on their ordinary work is deemed to be a noise which interferes with one's physical comforts.

(4) Even in a noisy locality, if there is substantial addition to the noise by introduction of some machine, instrument or performance at defendant's premises which materially affects the physical comforts of the occupants of the plaintiffs house, then also the noise will amount to actionable nuisance.

(5) If the noise amounts to an actionable nuisance, the defence that the defendant is making a reasonable use of his own property will be ineffectual. No use of one's property is reasonable if it causes substantial discomfort to other persons. "If a man creates a nuisance" said Kekewish J. In Attorney General v. Cole & Sons (1901) 1 Ch 205 at p. 207. "He cannot say that he is acting reasonably. The two things are self-contradictory."

(6) If the defendant is found to be carrying on his business so as to cause a nuisance to his neighbours, he is not acting reasonably as regards them, and may be restrained by injunction, although he may be conducting his business in a proper manner according to rules framed in this behalf either by the Municipality or by the Government. The

latter defence can be effective in a case of public nuisance, but not in that of a private nuisance.

(7) If an operation on the defendant's premises cannot by any care and skill be prevented from causing a private nuisance to the neighbours, it cannot be undertaken at all, except with the consent of those injured by it.

(8) The right to commit a private nuisance can in certain circumstances, be acquired either by prescription or by the authority of a statute."

5. Applying principle No. (4) set forth above, it is manifest that a person can claim injunction to stop nuisance if in a noisy locality there is substantial addition to the noise by introducing of some machine, instrument or performance at defendant's premises which materially affects the physical comforts of the occupants of the plaintiff's house. The appellate court below has found as a fact that the running of the impugned machines would seriously interfere with the physical comfort of the plaintiff and the members of his family according to the ordinary notions prevalent among reasonable men and women. This finding being based on evidence is not assailable in second appeal. The plaintiffs were therefore, rightly held to be entitled to the injunction claimed by them. There is no merit in both the appeals.....

Appeals dismissed.

Gobind Singh v. Shanti Sarup
AIR 1979 Supreme Court 143
Y.V. Chandrachud, C.J., R.S. Sarkaria and O. Chinnappa Reddy, JJ.

CHANDRACHUD, C.J.:- The respondent who is a partner of the Punjab Oil Mills, Khanna, filed in the Court of the Sub-Divisional Magistrate, Samrala, an application under S. 133 of the Cr. P.C., 1898, complaining that the appellant, who had been carrying on the occupation of a baker in the premises let out to him by the Mills had constructed an oven and a chimney which constituted a nuisance under S. 133 of the Code.

2. By an order dated Dec. 16, 1969, the learned Sub-Divisional Magistrate served a conditional order on the appellant under S. 133 (1) of the Code calling upon him to demolish the oven and the chimney within a period of 10 days from the date of the order and to show cause why the order should not be confirmed. After hearing the parties and considering the evidence led by them, the learned Magistrate made the conditional order absolute on June 18, 1970. While confirming the conditional order, the learned Magistrate however, directed the appellant to cease carrying on the trade of a baker at the particular site and not to lit the oven again.

3. The appellant filed a revision petition against the order of the Sub-Divisional Magistrate under Ss. 435 and 436 of the Code. By a judgement dated Aug 26, 1971, the learned Additional Sessions Judge, Ludhiana, disagreed with the order passed by the Sub-

Divisional Magistrate and made a reference to the High Court of Punjab and Haryana recommending that since there was no evidence on record to show that the oven was enlarged by the appellant in the year 1969 as alleged by the respondent and since there was positive documentary evidence on the record to show that the particular oven was in existence for a period of 16 or 17 years, the order passed by the Sub-Divisional Magistrate should be quashed.

4. The reference was heard by a learned single Judge of the High Court, who by a judgement dated Jan 15, 1973 rejected the recommendation of the learned Additional Sessions Judge and upheld the order of the Sub-Divisional Magistrate. Being aggrieved by the judgement of the High Court the appellant has filed this appeal by special leave of this Court.

5. Section 133(1) of the Code of 1898 provides in so far as is relevant that whenever a District Magistrate a Sub-Divisional Magistrate or a Magistrate of the first class considers, on receiving a police-report or other information and on taking such evidence if any as he thinks fit,

> that any unlawful obstruction or nuisance should be removed from any public place or from way, river or channel which is or may be lawfully used by the public; or
>
> that the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated; or
>
> that the construction of any building, or the disposal of any substance, as is likely to occasion conflagration or explosion, should be prevented or stopped; or
>
> that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passers by, and that in consequence the removal, repair, or support of such building, tent or structure, or the removal or support of such tree; is necessary,
>
> such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation; or
>
> to prevent or stop the erection of or to remove, repair or support, such building, tent or structure.

6. It is clear from the judgement of the learned Sub-Divisional Magistrate that the evidence disclosed that the smoke emitted by the chimney constructed by the appellant was "injurious to the health and physical comfort of the people living or working in the proximity" of the appellant's bakery and that there was no justification on the part of the appellant for discharging the smoke from the chimney on the G.T. Road. The

learned Magistrate had made a local inspection on the basis of which he prepared a report dated Feb. 11, 1970. That report and the photo-print Ext. 'A', show that the upper horizontal portion of the chimney constructed by the appellant juts out into the G.T. Road to the extent of about six feet. Considering the nature of this construction and the volume of smoke emitted by it the learned Magistrate concluded that the chimney was not only an encroachment upon a public place but its construction led to a graver consequence. Allowing the use of the oven and the chimney was, according to the Magistrate, "virtually-playing with the health of the people". A strong wind, according to the learned magistrate, could carry the flames over a distance and cause a conflagration.

7. It is true that the learned Additional Sessions Judge did not agree with the findings of the Sub-Divisional Magistrate but considering the evidence in the case, the reasons given by the Magistrate in support of his order and the fact that the High Court was unable to accept the recommendation made by the Additional Sessions Judge, we are of the opinion that in a matter of his nature where what is involved is not merely the right of a private individual but the health, safety and convenience of the public at large, the safer course would be to accept the view of the learned Magistrate, who saw for himself the hazard resulting from the working of the bakery.

8. The learned Magistrate has however gone beyond the scope of the conditional order which he had passed on Dec. 16, 1969, by which he required the appellant "to demolish the said oven and the chimney" within a period of 10 days from the issue of the order. The final order passed by the learned Magistrate is to the effect that the appellant shall cease to carry on the trade of a baker at the particular site and shall not light the oven again. Preventing the appellant from using the oven is certainly within the terms of the conditional order but not so the order requiring him to desist from carrying on the trade of a baker at the site. While, therefore, upholding the order of the learned Magistrate and the view of the High Court, we consider it necessary to clarify that the proper order to pass would be to require the appellant to demolish the oven and the chimney constructed by him within a period of one month from today. It is needless to add the appellant shall not in the meanwhile use the oven and the chimney for any purpose whatsoever.

9. For these reasons we dismiss the appeal with the modification suggested above in the order passed by the learned Magistrate.

Order Accordingly.

Municipal Corporation of Delhi v. Ram Sarup
AIR 1980 Supreme Court 174 (From: 1973 Criminal Law Journal 1859 (Delhi))
Criminal Appeal No. 26 of 1973, D/-1-8-1979
R. S. Sarkaria, P. N. Shinghal and O. Chinnappa Reddy, JJ.

(A) Prevention of Food Adulteration Act (1954), Ss. 2 (i) (f) & (1) (7) and 16 - Adulterated food - Sale of 'besan' proved to be insect infested - It is adulterated food and accused can be convicted under S. 7 read with Section 16 - No question of examining the standard of quality of 'besan' specified in R. 5 of the Rules arises. 1973 Cri LJ 1859 (Delhi), Reserved.

(B) Constitution of India, Art. 136 - Appeal by special leave against acquittal under S. 7 read with S. 16, Prevention of Food Adulteration Act - Supreme Court refused to interfere in facts and circumstances of case.

Municipal Corporation of Delhi v. Tek Chand Bhatia
AIR 1980 Supreme Court 360 (From: 1972 FAC 640 (Delhi))
Criminal Appeal No. 195 of 1973, D/-11-10-1979
S. Murtaza Fazal, Ali and A. P. Sen, JJ.

(A) Prevention of Food Adulteration Act (1954), S. 2(1)(f)) – Sale of cashew nuts – Term 'adulterated' – Cashew nuts proved to be insect-infested – Further proof that article was unfit for human consumption not necessary – Words 'or is otherwise unfit for human consumption' is to be read disjunctively. (Interpretation of Statutes – Word 'or'). 1972 FAC 640, Reserved; 1973 Cri LJ 433 (Delhi), Overruled.

(B) Prevention of Food Adulteration Act (1954), S. 19(2) – Prevention of Food Adulteration Rules (1955), Rr. 48-B and 12-A – Sale of cashew nuts – Claim for protection under S. 19(2) – Nuts sold from sealed tins – Invoice bearing description 'S. W. Best Burma' – Protection held was not available.

(C) Prevention of Food Adulteration Act (1954), Ss. 16(1)(a) and 7(1) – Sale of adulterated cashew nuts – Sentence – Mitigating circumstances.

Municipal Council, Ratlam v. Vardhichand
AIR 1980 Supreme Court 1622
Special Leave Petition (Criminal) No. 2856 of 1979, D/-29-7-1980
V. R. Krishna Iyer and O. Chinnappa Reddy, JJ.

Brief Facts: - Residents of a locality within limits of Ratlam Municipality tormented by stench and stink caused by open drains and public excretion by nearby slum-dwellers moved the Magistrate under S. 133 of Cr. P. C. to require Municipality to do its duty towards the members of the public. The Magistrate gave directions to Municipality to draft a plan within six months for removing nuisance. In appeal, Sessions Court reversed the order. The High Court approved the order of Magistrate. In further appeal, the Supreme Court also affirmed the Magistrate's order.

Criminal P.C. (1974), S. 133 - Nuisance in a locality due to existence of open drains, pits and public excretion by humans for want of lavatories - Court can require Officers of Municipality to abate it by affirmative action on time-bound basis on pain of punishment under S. 188 of I.P.C. - (Constitution of India, Art. 38; Penal Code (1860), Section 188; M.P. Municipalities Act (37 of 1961), S. 123; Municipalities - Public Nuisance - Duty to abate).

Where there existed a public nuisance in a locality due to open drains, heaps of dirt, pits and public excretion by humans for want of lavatories and consequential breeding of mosquitoes, the Court could require the Municipality under S. 133 of the Cr. P. C. and in view of S. 123 of the Municipalities Act to abate the nuisance by taking affirmative action on a time-bound basis. When such order was given, the Municipality could not take the plea that notwithstanding the public nuisance financial inability validly exonerated it from statutory liability. 1980 Jab LJ 135, Affirmed.

(Paras 12, 16)

The Criminal Procedure Code operates against statutory bodies and others regardless of the cash in their coffers, even as human rights under Part III of the Constitution have to be respected by the State regardless of budgetary provision. Likewise, S. 123 of the Municipalities Act has no saving clause when the Municipal Council is penniless. Otherwise, a profligate statutory body or pachydermic governmental agency may legally defy duties under the law by urging in self-defence a self-created bankruptcy or perverted expenditure budget. That cannot be.

(Para 12)

S. 133 Cr. P. C. is categoric, although reads discretionary. Judicial discretion when facts for its exercise are present, has a mandatory import. Therefore, when the Magistrate has, before him, information and evidence, which disclose the existence of a public nuisance and, on the materials placed, he considers that such unlawful obstruction or nuisance should be removed from any public place which may be lawfully used by the public, he shall act. Thus, his judicial power shall, passing through the procedural barrel, fire upon the obstruction or nuisance, triggered by the jurisdictional facts. The Magistrate's responsibility under S. 133 Cr. P. C. is to order removal of such nuisance within a time to be fixed in the order. This is a public duty implicit in the public power to be exercised on behalf of the public and pursuant to a public proceeding. Failure to comply with the direction will be visited with a punishment contemplated by S. 188 I. P. C. Therefore, the Municipal Commissioner or other executive authority bound by the order under S. 133 Cr. P. C. shall obey the direction because disobedience, if it causes obstruction or annoyance or injury to any persons lawfully pursuing their employment, shall be punished with simple imprisonment or fine as prescribed in the Section. The offence is aggravated if the disobedience tends to cause danger to human health or safety. The imperative tone of S. 133 Cr. P. C. read with the punitive temper of S. 188 I. P. C. make the prohibitory act a mandatory duty.

(Para 13)

Public nuisance, because of pollutants being discharged by big factories to the detriment of the poorer sections, is a challenge to the social justice component of the rule of law.

Likewise, the grievous failure of local authorities to provide the basic amenity of public conveniences drives the miserable slum-dwellers to ease in the streets, on the sly for a time, and openly thereafter, because under Nature's pressure, bashfulness becomes a luxury and dignity a difficult art. A responsible Municipal Council constituted for the precise purpose of preserving public health and providing better finances cannot run away from its principal duty by pleading financial inability. Decency and dignity are non-negotiable facets of human rights and are a first charge on local self-governing bodies. Similarly, providing drainage system - not pompous and attractive, but in working condition and sufficient to meet the needs of the people - cannot be evaded if the municipality is to justify its existence. A bare study of the statutory provisions makes this position clear.

(Para 15)

Although the two Codes are of ancient vintage, the new social justice orientation imparted to them by the Constitution of India makes it a remedial weapon of versatile use. Social justice is due to the people and, therefore, the people must be able to trigger off the jurisdiction vested for their benefit in any public functionary like a Magistrate under S. 133 Cr. P. C. In the exercise of such power, the judiciary must be informed by the broader principle of access to justice necessitated by the conditions of developing countries and obligated by Art. 38 of the Constitution.

(Para 14)

Cases Referred: **Chronological Paras**

AIR 1979 SC 143: (1979) 2 SCC 267: 1979 Cri LJ 59 17

KRISHNA IYER, J.:- 'It is procedural rules', as this appeal proves, ‘which infuse life into substantive rights, which activate them to make them effective'. Here, before us, is what looks like a pedestrian quasi-criminal litigation under S. 133 Cr. P. C., where the Ratlam Municipality - the appellant - challenges the sense and soundness of the High Court's affirmation of the trial Court's order directing the construction of drainage facilities and the like which has spiralled up to this court. The truth is that a few profound issues of procedural jurisprudence of great strategic significance to our legal system face us and we must zero-in on them as they involve problems of access to justice for the people beyond the blinkered rules of 'standing' of British Indian vintage. If the centre of gravity of justice is to shift, as the Preamble to the Constitution mandates, from the traditional individualism of local standi to the community orientation of public interest litigation, these issues must be considered. In that sense, the case before us between the Ratlam Municipality and the citizens of a ward, is a path-finder in the field of people's involvement in the justicing process, sans which as Prof. Sikes points out (1) the system may 'crumble under the burden of its own insensitivity'. The key question we have to answer is whether by affirmative action a court can compel a statutory body to carry out its duty to the community by constructing sanitation facilities at great cost and on a time-bound basis. At issue is the coming of age of that branch of public law bearing on community actions and the court's power to force public bodies under public duties to implement specific plans in response to public grievances.

2. The circumstances of the case are typical and overflow the particular municipality and the solutions to the key questions emerging from the matrix of facts are capable of universal application, especially in the Third world humanscape of silent subjection of groups of people to squalor and of callous public bodies habituated to deleterious inaction. The Ratlam Municipal town, like many Indian urban centres, is populous with human and sub-human species, is punctuated with affluence and indigence in contrasting co-existence, and keeps public sanitation a low priority item, what with cess-pools and filth menacing public health. Ward No 12, New Road, Ratlam town is an area where prosperity and poverty live as strange bedfellows. The rich have bungalows and toilets, the poor live on pavements and litter the street, with human excreta because they use roadsides as latrines in the absence of public facilities. And the city fathers being too busy with other issues to bother about the human condition, cesspools and stinks, dirtied the place beyond endurance which made the well-to-do citizens protest, but the crying demand for basic sanitation and public drains fell on deaf ears. Another contributory cause to the insufferable situation was the discharge from the Alcohol plant of malodorous fluids into the public street. In this lawless locale, mosquitoes found a stagnant stream of stench so hospitable to breeding and flourishing, with no municipal agent disturbing their stinging music at human expense. The local denizens, driven by desperation, at long last, decided to use the law and call the bluff of the municipal body's bovine indifference to its basic obligations under S. 123 of the M. P. Municipalities Act, 1961 (the Act, for short). That provision casts a mandate:

> 123. Duties of Council - (1) In addition to the duties imposed upon it by or under this Act or any other enactment for the time being in force, it shall be the duty of a council to undertake and make reasonable and adequate provision for the following matters within the limits of the Municipality, namely:
> … …
>
> (b) cleansing public streets, places and sewers, and all places, not being private property, which are open to the enjoyment of the public whether such places are vested in the council or not; removing noxious vegetation, and abating all public nuisances :
>
> (c) disposing of night soil and rubbish and preparation of compost manure from night-soil and rubbish.

And yet the municipality was oblivious to this obligation towards human well-being and was directly guilty of breach of duty and public nuisance and active neglect. The Sub-Divisional Magistrate, Ratlam, was moved to take action under S. 133 Cr. P. C. to abate the nuisance by ordering the municipality to construct drain pipes with flow of water to wash the filth and stop the stench. The Magistrate found the facts proved, made the direction sought and scared by the prospect of prosecution under Section 188, Cr. P. C. for violation of the order under S. 133 Cr. P. C., the municipality rushed from court to court till, at last, years after, it reached this Court as the last refuge of lost causes. Had the municipal council and its executive officers spent half this litigative zeal on cleaning up the street and constructing the drains by rousing the people's resources and laying out the city's limited financial resources, the

people's needs might have been largely met long ago. But litigation with others funds is an intoxicant, while public service for common benefit is an inspiration; and, in a competition between the two, the former overpowers the latter. Not where a militant people's will takes over people's welfare institutions, energises the common human numbers, canalises their community consciousness, forbids the offending factories from polluting the environment, forces the affluent to contribute wealth and the indigent their work and thus transforms the area into a healthy locality vibrant with popular participation and vigilance, not neglected ghettoes noisy with squabbles among the slimy slum-dwellers nor with electoral 'sound and fury signifying nothing'.

3. The Magistrate, whose activist application of S. 133, Cr. P. C. for the larger purpose of making the Ratlam municipal body do its duty and abate the nuisance by affirmative action, has our appreciation. He has summed up the concrete facts which may be usefully quoted in portions:

> "New Road, Ratlam, is a very important road and so many prosperous and educated persons are living on this Road. On the southern side of this Road some houses are situated and behind these houses and attached to the College boundary, the Municipality has constructed a road and this new Road touches the Government College and its boundary. Just in between the said area a dirty Nala is flowing which is just in the middle of the main road i.e. New Road. In this stream (Nala) many a time dirty and filthy water of Alcohol Plant having chemical and obnoxious smell, is also released for which the people of that locality and general public have to face most obnoxious smell. This Nala also produces filth which causes a bulk of mosquitoes breeding. On this very southern side of the said road a few days back municipality has also constructed a drain but it has (?) constructed it completely but left the construction in between and in some of the parts the drain has not at all been constructed. Because of this the dirty water of half constructed drain and septic tank is flowing on the open land of applicants, where due to insanitation and due to non-removing the obstructed earth the water is accumulated in the pits and it also creates dirt and bad smell and produces mosquitoes in large quantities. This water also goes to nearby houses and causes harm to them. For this very reason the applicants and the other people of that locality are unable to live and take rest in their respective houses. This is also injurious to health."

4. There are more dimensions to the environmental pollution which the magistrate points out:

> "A large area of this locality is having slums where no facility of lavatories is supplied by the municipality. Many such people live in these slums who relieve their lateral dirt on the bank of drain or on the adjacent land. This way an open latrine is created by these people. This creates heavy dirt and mosquitoes. The drains constructed in other part of this Mohalla are also not proper; it does not flow the water properly and it creates the water obnoxious. The Malaria Department of the State of M. P. also pays no attention in this direction. The non-applicants have not

managed the drains, Nallahs and Naliyan properly and due to incomplete construction the non-applicants have left no outlet for the rainy water. Owing to above reasons the water is accumulated on the main road, it passes through living houses, sometimes snakes and scorpions come out and thus obstruct the people to pass through this road. This also causes financial loss to the people of this area. The road constructed by Nagarpalika is on a high level and due to this, this year more water entered the houses of this locality and it caused this year more harm and loss to the houses also. This way all works done by the non-applicants i.e. construction of drain, canal and road come within the purview of public nuisance. The non-applicants have given no response to the difficulties of the applicants, and non-applicants are careless in their duties towards the public, for which without any reason the applicants are facing the intolerable nuisance. In this relation the people of this locality submitted their returns, notices and given their personal appearance also to the non-applicants but the non-applicants are shirking from their responsibilities and try to avoid their duty by showing other one responsible for the same, whereas all the non-applicants are responsible for the public nuisance."

5. Litigation is traumatic and so the local people asked first for municipal remedies failing which they moved for magisterial remedies:

"At the last the applicants requested to remove all the nuisance stated in their main application and they also requested that under mentioned works must be done by the non-applicants and for which suitable orders may be issued forthwith:

1. The drains constructed by Municipality are mismanaged and incomplete, they should be managed and be completed and flow of water in the drains should be made so that the water may pass through the drain without obstruction.

2. The big pits and earthen drains which are situated near the College boundary and on the corners of the road where dirty water usually accumulates, they should be closed and the filth shall be removed therefrom.

3. The big 'Nala' which is in between the road, should be managed and covered in this way that it must not create overflow in the rainy season.

4. The Malaria Department should be ordered to sprinkle D. D. T. and act in such a manner and use such means so that the mosquitoes may be eradicated completely from the said locality."

6. The proceedings show the justness of the grievances and the indifference of the local body:

"Both the parties heard. The court was satisfied on the facts contained in their application dated 12-5-1972 and granted conditional order against non-applicants Nos. 1 and 2 u/s 133 of Cr. P. C. (Old Code). In this order all the nuisances were described (which were there in their main application) and the court directed to remove all the nuisances within 15 days and if the non-applicants have any objection

or dissatisfaction against the order then they must file it on the next date of hearing in the court."

…

"The applicants got examined the following witnesses in their evidence and after producing following documents they closed their evidence."

…

“No evidence has been produced by the non-applicants in spite of giving them so many opportunities. Both the parties heard and I have also inspected the site."

…

"The non-applicant (Municipal Council) has sought six times to produce evidence but all in vain. Likewise non-applicant (Town Improvement Trust) has also produced no evidence.”

The Nallah comes into picture after the construction of road and bridge. It has shown that Nallah is property of Nagar-palika according to Ex. p. 10. Many applications were submitted to remove the nuisance but without result. According to Sections 32 to 43 of the Town Improvement Trust Act, it is shown, that it has only the provisions to make plans. Many a time people tried to attract the attention of Municipal Council and the Town Improvement Trust but the non-applicants always tried to throw the responsibility on one another's shoulder.

…

It is submitted by non-applicant (Municipality) that the said Nallah belongs to whom, it is still disputed i.e. whether it belongs to non-applicant 1 or 2. Shastri Colony is within the area of Town Improvement Trust. The Nagarpalika (non-applicant No. 1) is financially very week. But Municipal Council is not careless towards its duties.

Non-applicant (Town Improvement Trust) argued that primary responsibility lies with the Municipal Council only. There is no drainage system.

At the end of it all, the Court recorded: . . . .after considering all the facts I come to this conclusion that the said dirty Nallah is in between the main road of Ratlam City. This dirty Nallah affects the Mohalla of New Road, Shastri Colony, Volga Talkies and it is just in the heart of the city. This is the very important road and is between the Railway Station and the main city. In these mohallas, cultured and educated people are living. The Nallah which flows in between the new Road and Shastri Colony the water is not flowing rapidly and on many places there are deep pits in which the dirty water is accumulated. The Nallah is also not straight that is also the reason of accumulation of dirty water. The Nallah is not managed properly by the non-applicants. It is unable to gush the rainy water and due to this the adjoining areas always suffer from over-flowing of the water and it causes the obstruction to the pedestrians.

…

It is also proved by the evidence given by the applicants that from time to time the power Alcohol factory which is situated outside the premises of the Municipal Council and it

flows its dirty and filthy water into the said Nallah, due to this also the obnoxious smell is spreading throughout the New Road or so it is the bounden duty of the Municipal Council and the Town Improvement Trust to do the needful in this respect.
…

The dirty water which flows from the lavatories and urinals of the residential houses has no outlet and due to this reason there are many pits on the southern side of the New Road and all the pits are full of dirty and stinking water. So it is quite necessary to construct an outlet for the dirty water in the said locality.

In this area many a places have no drainage system and if there is any drain it has no proper flow and water never passes through the drain properly. That causes the accumulation of water and by the time it becomes dirty and stink and then it produces mosquitoes there.

The Magistrate held in the end:

> Thus after perusing the evidence I come to this conclusion and after perusing the applications submitted by the persons residing on the New Road area from time to time to draw the attention of the non-applicants to remove the nuisance, the non-applicants have taken no steps whatsoever to remove all these public nuisances.

He issued the following order which was wrongly found unjustified by the Sessions Court, but rightly upheld by the High Court:

> Therefore, for the health and convenience of the people residing in that particular area all the nuisance must be removed and for that the following order is hereby passed:
>
> (1) The Town Improvement Trust with the help of Municipal Council must prepare a permanent plan to make the proper flow in the said Nallah which is flowing in between Shastri Colony and New Road. Both the non-applicants must prepare the plan within six months and they must take proper action to give it a concrete form.
>
> (2) According to para 13 a few places are described which are either having the same drains and the other area is having no drain and due to this the water stinks there; so the Municipal Council and the Town Improvement Trust must construct the proper drainage system and within their own premises where there is no drain it must be constructed immediately and all this work should be completed within six months.
>
> (3) The Municipal Council should construct drains from the jail to the bridge behind the southern side of the houses so that the water flowing from the septic tanks and the other water flowing outside the residential houses may be canalised and it may stop stinking and it should have a proper flow so that the water may go easily towards the main Nallah. All these drains

should be constructed completely within six months by the Municipal Council.

(4) The places where the pits are in existence the same should be covered with mud so that the water may accumulate in those pits and it may not breed mosquitoes. The Municipal Council must complete this work within two months.

A notice under Section 141 of the Criminal Procedure Code (Old Code) may be issued to the non-applicants Nos. 1 and 2 so that all the works may be carried out within the stipulated period. Case is hereby finalized.

7. Now that we have a hang of the case we may discuss the merits, legal and factual. If the factual findings are good - and we do not re-evaluate them in the Supreme Court except in exceptional cases - one wonders whether our municipal bodies are functional irrelevances, banes rather than boons and 'lawless' by long neglect, not leaders of the people in local self-government. It may be a cynical obiter of pervasive veracity that municipal bodies minus the people and plus the bureaucrats are the bathetic vogue - better than when the British were here!

8. We proceed on the footing, as we indicated even when leave to appeal was sought, that the malignant facts of municipal callousness to public health and sanitation, held proved by the Magistrate, are true. What are the legal pleas to absolve the municipality from the court's directive under S. 133, Cr. P. C.? That provision reads:

> Section 133 (1). Whenever a District Magistrate or a Sub-Divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers -
>
> (a) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public;
>
> …
>
> Such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order -
>
> (i) to remove such obstruction or nuisance; or
>
> …
>
> (iii) to prevent or stop the construction of such building, or to alter the disposal of such substance; or if he objects so to do, to appear before himself or some other Executive Magistrate subordinate to him at a time and place to

be fixed by the order, and show cause, in the manner hereinafter provided, why the order should not be made absolute.

9. So the guns of Section 133 go into action wherever there is public nuisance. The public power of the Magistrate under the Code is a public duty to the members of the public who are victims of the nuisance, and so he shall exercise it when the jurisdictional facts are present as here. "All power is a trust - that we are accountable for its exercise - that, from the people, and for the people, all springs, and all must exist." (1) Discretion becomes a duty when the beneficiary brings home the circumstances for its benign exercise.

10. If the order is defied or ignored, Section 188 I. P. C. comes into penal play:

> 188. Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

11. There is no difficulty in locating who has the obligation to abate the public nuisance caused by absence of primary sanitary facilities. Section 123, which is mandatory (we repeat), reads:

> 123. Duties of Council :— (1) In addition to the duties imposed upon it by or under this Act or any other enactment for the time being in force, it shall be the duty of a Council to undertake and make reasonable and adequate provision for the following matters within the limits of the Municipality, namely : -
>
> (a) .....
>
> (b) cleansing public streets, places and sewers, and all places, not being private property, which are open to the enjoyment of the public whether such places are vested in the Council or not; removing noxious vegetation, and abating all public nuisances;
>
> (c) disposing of night-soil and rubbish and preparation of compost manure from night-soil and rubbish.

12. The statutory setting being thus plain, the municipality cannot extricate itself from its responsibility. Its plea is not that the facts are wrong but that the law is not right because the municipal funds being insufficient it cannot carry out the duties under S. 123 of the Act. This 'alibi' made us issue notice to the State which is now represented by counsel, Shri Gambhir, before us. The plea of the municipality that notwithstanding the public nuisance financial inability validly exonerates it from statutory liability has no juridical basis. The Criminal Procedure Code operates against statutory bodies and others

regardless of the cash in their coffers, even as human rights under Part III of the Constitution have to be respected by the State regardless of budgetary provision. Likewise, S. 123 of the Act has no saving clause when the municipal council is penniless. Otherwise, a profligate statutory body or pachydermic governmental agency may legally defy duties under the law by urging in self-defence a self-created bankruptcy or perverted expenditure budget. That cannot be.

13. Section 133, Cr. P. C. is categories, although reads discretionary. Judicial discretion when facts for its exercise are present, has a mandatory import. Therefore, when the Sub-Divisional Magistrate, Ratlam, has, before him, information and evidence, which disclose the existence of a public nuisance and, on the materials placed, he considers that such unlawful obstruction or nuisance should be removed from any public place which may be lawfully used by the public, he shall act. Thus, his judicial power shall, passing through the procedural barrel, fire upon the obstruction or nuisance, triggered by the jurisdictional facts. The Magistrate's responsibility under S. 133 Cr. P. C. is to order removal of such nuisance within a time to be fixed in the order. This is a public duty implicit in the public power to be exercised on behalf of the public and pursuant to a public proceeding. Failure to comply with the direction will be visited with a punishment contemplated by S. 188, I. P. C. Therefore, the Municipal Commissioner or other executive authority bound by the order under S. 133, Cr. P. C. shall obey the direction because disobedience, if it causes obstruction or annoyance or injury to any persons lawfully pursuing their employment, shall be punished with simple imprisonment or fine as prescribed in the Section. The offence is aggravated if the disobedience tends to cause danger to human health or safety. The imperative tone of S. 133, Cr. P. C. read with the punitive temper of S. 188, I. P. C. makes the prohibitory act a mandatory duty.

14. Although these two Codes are of ancient vintage, the new social justice orientation imparted to them by the Constitution of India makes it a remedial weapon of versatile use. Social justice is due to the people and, therefore, the people must be able to trigger off the jurisdiction vested for their benefit in any public functionary like a Magistrate under S. 133, Cr. P. C. In the exercise of such power, the judiciary must be informed by the broader principle of access to justice necessitated by the conditions of developing countries and obligated by Art. 38 of the Constitution. This brings Indian public law, in its procedural branch, in line with the statement of Prof. Kojima: (2) "the urgent need is to focus on the ordinary man - one might say the little man . . . . . ". "Access to Justice" by Cappelletti and B. Garth summarizes the new change thus: (3).

> "The recognition of this urgent need reflects a fundamental change in the concept of "procedural justice" . . . . . The new attitude to procedural justice reflects what Professor Adolf Homburger has called "a radical change in the hierarchy of values served by civil procedure"; the paramount concern is increasingly with "social justice," i.e., with finding procedures which are conducive to the pursuit and protection of the rights of ordinary people. While the implications of this change are dramatic - for instance, insofar as the role of the adjudicator is concerned - it is worth emphasizing at the outset that the core values of the more traditional

procedural justice must be retained. "Access to justice" must encompass both forms of procedural justice".

15. Public nuisance, because of pollutants being discharged by big factories to the detriment of the poorer sections, is a challenge to the social justice component of the rule of law. Likewise, the grievous failure of local authorities to provide the basic amenity of public conveniences drives the miserable slum-dwellers to ease in the streets, on the sly for a time, and openly thereafter, because under Nature's pressure, bashfulness becomes a luxury and dignity a difficult art. A responsible municipal council constituted for the precise purpose of preserving public health and providing better finances cannot run away from its principal duty by pleading financial inability. Decency and dignity are non-negotiable facets of human rights and are a first charge on local self-governing bodies. Similarly, providing drainage systems - not pompous and attractive, but in working condition and sufficient to meet the needs of the people - cannot be evaded if the municipality is to justify its existence. A bare study of the statutory provisions makes this position clear.

16. In this view, the Magistrate's approach appears to be impeccable although in places he seems to have been influenced by the fact that "cultured and educated people" live in this area and "New Road, Ratlam is a very important road and so many prosperous and educated persons are living on this road". In India ‘one man one value’ is the democracy of remedies and rich or poor the law will call to order where people's rights are violated. What should also have been emphasized was the neglect of the Malaria Department of the State of Madhya Pradesh to eliminate mosquitoes, especially with open drains, heaps of dirt, public excretion by humans for want of lavatories and slums nearby, had created an intolerable situation for habitation. An order to abate the nuisance by taking affirmative action on a time-bound basis is justified in the circumstances. The nature of the judicial process is not purely adjudicatory nor is it functionally that of an umpire only. Affirmative action to make the remedy effective is of the essence of the right which otherwise becomes sterile. Therefore, the court, armed with the provisions of the two Codes and justified by the obligation under S. 123 of the Act, must adventure into positive directions as it has done in the present case. Section 133 Cr. P. C. authorizes the prescription of a time-limit for carrying out the order. The same provision spells out the power to give specific directives. We see no reason to disagree with the order of the Magistrate.

17. The High Court has taken a correct view and followed the observations of this Court in Govind Singh v. Shanti Sarup (1979) 2 SCC 267 at p. 269: (AIR 1979 SC 143) where it has been observed:

> "We are of the opinion that in a matter of this nature where what is involved is not merely the right of a private individual but the health, safety and convenience of the public at large, the safer course would be to accept the view of the learned Magistrate, who saw for himself the hazard resulting from the working of the bakery."

18. We agree with the High Court in rejecting the plea that the time specified in the order is unworkable. The learned judges have rightly said:

> "It is unfortunate that such contentions are raised in 1979 when these proceedings have been pending since 1972. If in seven year's time the Municipal Council intended to remedy such a small matter there would have been no difficulty at all. Apart from it, so far as the directions are concerned, the learned Magistrate, it appears, was reasonable. So far as direction No. 1 is concerned, the learned Magistrate only expected the Municipal Council and the Town Improvement Trust to evolve a plan and to start planning about it within six months; the learned Magistrate has rightly not fixed the time limit within which that plan will be completed. Nothing more reasonable could be said about direction No. 1".

19. A strange plea was put forward by the Municipal Council before the High Court which was justly repelled, viz., that the owners of houses had gone to that locality on their own choice with eyes open and, therefore, could not complain if human excreta was flowing, dirt was stinking, mosquitoes were multiplying and health was held hostage. A public body constituted for the principal statutory duty of ensuring sanitation and health cannot outrage the court by such an ugly plea. Luckily, no such contention was advanced before us. The request for further time for implementation of the Magistrate's order was turned down by the High Court since no specific time-limit was accepted by the municipality for fulfilment of the directions. A doleful statement about the financial difficulties of the municipality and the assurance that construction of drains would be taken up as soon as possible had no meaning. The High Court observed:

> "Such assurances, it appears, are of no avail as unfortunately these proceedings for petty little things like clearing of dirty water, closing the pits and repairing of drains have taken more than seven years and if these seven years are not sufficient to do the needful, one could understand that by granting some more time it could not be done."

The High Court was also right in rejecting the Additional Sessions Judge's recommendation to quash the Magistrate's order on the impression that Section 133, Cr. P. C. did not provide for enforcement of civic rights. Wherever there is a public nuisance, the presence of S. 133, Cr. P. C. must be felt and any contrary opinion is contrary to the law. In short, we have no hesitation in upholding the High Court's view of the law and affirmation of the Magistrate's order.

20. Before us the major endeavour of the municipal council was to persuade us to be pragmatic and not to force impracticable orders on it since it had no where-withal to execute the order. Of course, we agree that law is realistic and not idealistic and what cannot be performed under given circumstances cannot be prescribed as a norm to be carried out. From that angle it may well be that while upholding the order of the Magistrate, we may be inclined to tailor the direction to make it workable. But first thins first and we cannot consent to a value judgment where people's health is a low priority. Nevertheless, we are willing to revise the order into a workable formula the implementation of which would be watch dogged by the court.

21. Three proposals have been put forward before us in regard to the estimated cost of the scheme as directed by the Magistrate. The Magistrate had not adverted to the actual cost of the scheme nor the reasonable time that would be taken to execute it. As stated earlier, it is necessary to ascertain how far the scheme is feasible and how heavy the cost is likely to be. The Court must go further to frame a scheme and then fix time-limits and even oversee the actual execution of the scheme in compliance with the court's order.

22. Three schemes placed before us, together with tentative estimates of the costs, have been looked into by us. Judges are laymen and cannot put on expert airs. That was why we allowed the municipality and the respondents to produce before us schemes prepared by expert engineers so that we may modify the directions issued by the Magistrate suitably. Scheme 'A' is stated to cost an estimated amount of Rs. 1,016 crores. The State Government has revised this proposal and brought down the cost. In our view, what is important is to see that the worst aspects of the unsanitary conditions are eliminated, not that a showy scheme beyond the means of the municipality must be undertaken and half done. From that angle we approve scheme 'C' which costs only around Rs. 6 lakhs. We fix a time limit of one year for completing execution of the work according to that scheme. We further direct that the work shall begun within two months from to-day and the Magistrate shall inspect the progress of the work every three months broadly to be satisfied that the order is being implemented bona fide. Breaches will be visited with the penalty of S. 188, I. P. C.

23. We make the further supplementary directions which we specifically enjoin upon the municipal authority and the State Government to carry out:

1. We direct the Ratlam Municipal Council (RI) to take immediate action, within its statutory powers, to stop the effluents from the Alcohol Plant flowing into the street. The State Government also shall take action to stop the pollution. The Sub-Divisional Magistrate will also use his power under S. 133, I. P. C., to abate the nuisance so caused. Industries cannot make profit at the expense of public health. Why has the Magistrate not pursued this aspect?

2. The Municipal Council shall, within six months from today, construct a sufficient number of public latrines for use by men and women separately, provide water supply and scavenging service morning and evening so as to ensure sanitation. The Health Officer of the Municipality will furnish a report, at the end of the six-monthly term, that the work has been completed. We need hardly say that the local people will be trained in using and keeping these toilets in clean condition. Conscious co-operation of the consumers is too important to be neglected by representative bodies.

3. The State Government will give special instructions to the Malaria Eradication Wing to stop mosquito breeding in Ward 12. The Sub-Divisional Magistrate will issue directions to the officer concerned to file a report before him to the effect that the work has been done in reasonable time.

4. The municipality will not merely construct the drains but also fill up cesspools and other pits of filth and use its sanitary staff to keep the place free from accumulations of filth. After all, what it lays out on prophylactic sanitation is a gain on its hospital budget.

5. We have no hesitation in holding that if these directions are not complied with the Sub-Divisional Magistrate will prosecute the officers responsible. Indeed, this court will also consider action to punish for contempt in case of report by the Sub-Divisional Magistrate of wilful breach by any officer.

24. We are sure that the State Government will make available by way of loans or grants sufficient financial aid to the Ratlam Municipality to enable it to fulfil its obligations under this order. The State will realise that Art. 47 makes it a paramount principle of governance that steps are taken for the improvement of public health as amongst its primary duties'. The municipality also will slim its budget on low priority items and elitist projects to use the savings on sanitation and public health. It is not our intention that the ward which has woken up to its rights alone need be afforded these elementary facilities. We expect all the wards to be benefited without litigation. The pressure of the judicial process, expensive and dilatory, is neither necessary nor desirable if responsible bodies are responsive to duties. Cappelletti holds goods for India when he observes:

"Our judicial system has been aptly described as follows:

> Admirable though it may be, (it) is at once slow and costly. It is a finished product of great beauty, but entails an immense sacrifice of time, money and talent.

This "beautiful" system is frequently a luxury, it tends to give a high quality of justice only when, for one reason or another, parties can surmount the substantial barriers which it erects to most people and to many types of claims."

Why drive common people to public interest action? Where Directive Principles have found statutory expression in Do's and Dont's the court will not sit idly by and allow municipal government to become a statutory mockery. The law will relentlessly be enforced and the plea of poor finance will be poor alibi when people in misery cry for justice. The dynamics of the judicial process has a new 'enforcement' dimension not merely through some of the provisions of the Criminal Procedure Code (as here), but also through activated tort consciousness. The officers in charge and even the elected representatives will have to face the penalty of the law if what the Constitution and follow-up legislation direct them to do are defied or denied wrongfully. The wages of violation is punishment, corporate and personal.

25. We dismiss this petition subject to the earlier mentioned modifications.

Petition dismissed.

The State of Tamil Nadu v. R. Krishnamurthy
AIR 1980 Supreme Court 538 (From: Madras)
Criminal Appeal No. 236 of 1973, D/-15-11-1979
R. S. Sarkaria And O. Chinnappa Reddy, JJ.

(A) Prevention of Food Adulteration Act (1954), S. 2 (v) - 'Food' - Essential requisites of definition - Gingelly oil mixed with groundnut oil is food.

(B) Prevention of Food Adulteration Act (1954), S. 2 (xiii) - 'Sale' - Definition is wide enough to include every kind, manner and method of sale irrespective whether sale is for human consumption or for any other purpose including analysis.

(C) Prevention of Food Adulteration Act (1954), S.16 (1)(a)(i) read with S. 2 (1) (a) - Sale of Gingelly oil mixed with groundnut oil for external use - Punishable under S. 16 (1)(a)(i).

M/s. Paramount Studio v. The Union of India
AIR 1981 Allahabad 186
Civil Misc. Writ Petition No. 248 of 1973 D/-11-11-1980
T. S. Misra and V. K. Khanna, JJ.

(A) Ancient Monuments and Archaeological Sites and Remains Act (24 of 1958), S. 2(a) and (j) - Taj Mahal and Forts at Agra and Fatehpur Sikri are ancient and protected monuments within S. 2(a) and (j).

The Taj Mahal and Forts at Agra and Fatehpur Sikri have a history behind them and known for their superb architecture and beautiful carvings. Besides they yield revenue to the Government and also earn foreign exchange. They are ancient monuments within Sec. 2(a) and protected monuments within Sec. 2(j).

(Para 1)

(B) Ancient Monuments and Archaeological Sites and Remains Act (24 of 1958), S. 38 - Ancient Monuments and Archaeological Sites and Remains Rules, 1959, R. 8 (d) - Business of taking photographs of tourists visiting Taj Mahal and Forts at Agra and Fatehpur Sikri within their precincts – R. 8 (d) requiring photographers to take out licence for said business is not ultra vires.

The provisions of R. 8 (d) requiring photographers carrying on the business of taking photographs of tourists visiting Taj Mahal and Forts at Agra and Fatehpur Sikri within the precincts of those monuments are in conformity with the objects of the Act and have been made with the purpose of regulating the access of visitors to the monuments and use of the precincts thereof by those visitors. No person can claim as of right to carry on business at a place which is not owned or acquired by him or for which he does not have the requisite permission. R. 8 (d) not only regulates the actual entry in the precincts of the monuments but also controls the user of the monuments and is based on ethic principal of

responsibility. R. 8 (d) is, therefore, not ultra vires the Act. The money charged from the license is not in fact a license fee but is a consideration for the grant of the right to use the precincts for the purpose of carrying on the business of taking photographs of visitors for consideration. Nor can R. 8 (d) be declared invalid on the ground that the Archaeological Officer requires the photographers to undergo a test before issuing license.

(Paras 10, 11, 12)

P.C. Cherian v. State of Kerala
1981 KLT 113
Janaki Amma & U.I. Bhat JJ.

.....**2.** The petitioner in Cr. R.P. No. 284 of 1978 is the Managing Partner of the Padinjarekkara Rubber Industries, Veroor, Changanacherry. The petitioner in Cr. R. P. No. 328 of 1978 is the Managing Partner of Aswathi Rubber Works, Veroor, Changanacherry. Both the concerns are having their factories situated in the Industrial Estate, Veroor, and were started for the manufacture of rubber products.

3. The preliminary order passed by the Sub Divisional Magistrate against the petitioner in Cr. R.P. No. 284 of 1978 under S. 133 of the Code stated that information had been received that the petitioner was engaged in mixing rubber with carbon on a voluminous scale in his factory, that the buildings in which the mixing operations were being carried out were not adequately ventilated, with sufficient devices to prevent the carbon black from escaping into the atmosphere, that in the absence of precautionary measures the carbon black spread in the atmosphere and used to get deposited in the neighbouring locality, where there are a large number of residential houses and a Church very close to the factory; that the deposit of such carbon black affected the life and natural avocations of the people in the locality resulting in disastrous injury and discomfort to the public at large and also affected adversely the religious congregational activities of the Church, causing mental agony to the congregation. The petitioner was required to stop the carbon mixing process on or before 23-3-1978 or to appear before the Court on the same day and show cause why the order should not be enforced. A similar order was passed against the petitioner in Cr. R.P. No. 328 of 1978. Both the petitioners filed objections.

4. The petitioner in Cr. R.P. No. 284 of 1978 contended as follows: The factory was established in the year 1969 and from then onwards it was manufacturing rubber goods using carbon black. There were no complaints against the working of the factory till the middle of 1977. No public nuisance was being caused by the working in the factory. Sufficient precautionary measures to prevent carbon black from escaping into atmosphere had been taken. The working of the factory did not cause deposit of carbon black in the neighbouring locality. Carbon dust has no toxic effect on human beings. It does not cause disastrous injury or discomfort to the public or mental agony to the community at large. The Government of Kerala while establishing the Industrial Estate which was solely meant for the manufacture of Rubber and Plastic Goods, was well aware that carbon black was one of the essential ingredients for manufacture of rubber goods. In the Industrial Estate where the factory of the petitioner is situated there is a Government owned factory by name "Common Facility Service Centre" carrying on the same business as the revision petitioner. The precautions made in the revision petitioner's factory was much more efficient than that of the Common Facility Service Centre. No proceedings under S. 133 of the Code have been initiated against the other factories including the Government owned factory.

The action taken against the revision petitioner was arbitrary, without any bonafides and would amount to denial of his fundamental rights. If the factory was not allowed to

function, the loss that it might sustain per day would work out at Rs. 2000 and more than sixty persons would lose their job directly or indirectly. The revision petitioner also alleged that a suit, O.S. No. 487 of 1977, had been filed against the Vazhappally Panchayat for a permanent injunction restraining the Panchayat from doing any act or passing any order or taking any steps to stop the functioning of the factories or any act for the cancellation of the licence issued to the revision petitioner under the Kerala Panchayats (Licensing of Dangerous and Offensive Trades and Factories) Rules, 1963. A temporary injunction had been issued against the Panchayat and it was during the pendency of the suit that the present proceedings were initiated. A Division Bench of the High Court has in W.A. No. 33 of 1978 issued an order granting police protection for the proper working of the factory. If the order directing stoppage of carbon mixing was to be made absolute that would amount to closure of the factory and denial of job facilities to the workers therein and loss of earnings to the petitioner. Similar contentions were raised by the petitioner in Cr. R.P. 328 of 1978 also.

5. The enquiry in both the cases was conducted simultaneously. Pending enquiry an application was filed by the Vicar of the St. Joseph's Church, Veroor, to get himself impleaded in the proceedings, as a person worst affected by the nuisance. The orders impugned mention that the prayer was granted in both the proceedings. After an elaborate enquiry the Sub Divisional Magistrate held that there was profuse use of carbon black in the two factories, that there were no precautionary measures for preventing carbon black from escaping into the atmosphere and depositing in the neighbouring area, and that such carbon so settled was found to cause discomfort, injury and nuisance to the people of the locality and obstructed their avocations. The Court therefore made the conditional order absolute in both the cases, and directed the petitioners in the two revision petitions to stop the mixing of the carbon in the factories forthwith. These orders are being challenged in the two revision petitions.

6. A preliminary objection was raised that the proceedings before the Magistrate were vitiated in that the Court impleaded the Vicar of the St. Joseph's Church as a party to the proceedings. The argument is that in proceedings under S. 133 initiated by the Magistrate, private individuals have no right to get themselves impleaded, and the Court has no jurisdiction to allow a third party to the proceedings to let in evidence in support of his case.

7. There is weight in the contention. Proceedings under Chapter XXIV of the Code are essentially criminal in nature. S. 138(1) states that the Magistrate should take evidence as in a summons case. The person at whose instance proceedings are initiated may no doubt let in evidence in support of the existence of the public right "as in a summons case." But in a case where proceedings under S. 133 of the Code are initiated on the report of a police officer, there is no provision for a private person who is interested in establishing the public right to get himself impleaded. He may however invoke the provisions contained in S. 301 or S. 302 of the Code and seek the permission of the Court either to assist the prosecution or conduct the prosecution as the case may be. The order impleading the Vicar of the St. Joseph's Church as a party to the proceedings is therefore not sustainable. That does not however mean that the proceedings in these

cases are vitiated because though the order mentions about the impleading of the Vicar, the same is not seen carried over in the order passed. If the Court has examined witnesses at the instance of the Vicar, that is not an irregularity which vitiates the proceedings.

8. ..... From 1975 onwards they took up service mixing on a large scale as a job work and began to provide the master batch from the tyre factories. The manufacture of the master batch requires profuse use of carbon black. The excess carbon black usually disseminate into the atmosphere. To prevent such dissemination gadgets have to be provided. When master batch is manufactured in bulk quantities it is usual to install Banbury type equipments to prevent dissemination of carbon. The prosecution case is that petitioners failed to provide the necessary equipments to prevent the dissemination of carbon black with the result that the excess carbon black got into the atmosphere, settled over the neighbouring area and caused discomfort, injury and nuisance to the people of the locality and even prevented them from attending to their avocations. There are about six hundred Christian families in the parish of the St. Joseph's Church, Veroor. A good number of people used to attend the Church for prayers on Sundays. They found their clothes soiled as a result of the atmospheric pollution. Carbon particles got deposited in the Holy Vestments and even in the Holy Eucharist. A public agitation started since November 1975 against the pollution. There were demands for the cancellation of the licence issued to the petitioners. The petitioners filed O.S. No. 487 of 1977 before the Subordinate Judge's Court, Kottayam for an injunction restraining the Vazhappally Panchayat from cancelling the licence issued to them under the Kerala Panchayats (Licensing of Dangerous and Offensive Trades and Factories) Rules 1963 and other reliefs. An interim injunction was issued by the Court. They also filed O.P. No. 4853 of 1977 before this Court under Article 226 of the Constitution for the issue of a writ of mandamus or other appropriate writ directing the District Superintendent of Police and his subordinates in charge of the area to provide the petitioners adequate police protection for their person and for the working of the factory, ensuring free ingress and egress for the employees. In the meanwhile, a meeting was convened on 18-7-1977 by the Minister for Industries, of the representatives of the factories, the Church, the labourers and the residents of the locality to discuss about the alleged nuisance due to dissemination of carbon black from the petitioners' factories. It was decided to have an expert report from the experts of the Council of Scientific and Industrial Research Centre at Nagpur and to implement their proposals within three months. It was also decided that the expenses of cleaning the premises of the Church and articles belonging to it which got contaminated by the carbon black should be borne by the factories. O.P. No. 4853 of 1977 was disposed of by a single Judge of this Court holding that until the petitioners provide safeguards to prevent their manufacturing process being a potential danger to the people of the locality no assistance could be rendered to them. W.A. No. 38 of 1978 was filed against the decision.

The Division Bench which decided the appeal took into account the facts that the District Medical Officer and the Inspector of Factories had recommended the issue of licence to the petitioner and that an injunction had been issued by the Subordinate Judge, Kottayam, restraining the Panchayat from cancellation of the licence and observed that the arm of

the law appeared to be long enough and strong enough to deal with the petitioners in case they contravened the provisions of any statute or rules or were found to indulge in offensive and dangerous activities. The appeal was allowed, granting necessary protection to the petitioners in case there arose "any danger to their lives and property and to assure free ingress or egress of their workers to the factory and free movement of goods into, and out of the factory premises. The appellate order was passed on 2nd March, 1978. It was thereafter on 21st March 1978, that the Sub Inspector of Police, Changanacherry, presented reports on the basis of which the Sub Divisional Magistrate, Kottayam, initiated proceedings under S 133 of the Code. The reports stated that the factories of the petitioners were engaged in the work of mixing of carbon and rubber, that the mixing operation was going on day and night covering 5 to 10 tons of rubber per day, that the building had no ventilation, that there were no precautionary measures to prevent the escape of carbon black into the atmosphere, that the carbon black was getting deposited in the neighbouring locality which is a thickly populated area and that the spread of carbon black being injurious to the health of the people of the locality was a nuisance which should be stopped. The Magistrate after taking evidence directed the stoppage of service mixing of carbon in both the factories.

9. One of the contentions raised by the petitioners is that in view of the order in W.A. No. 38 of 1978 and the injunction in O.S. No. 487 of 1977, the order stopping the mixing operations is unsustainable. But from the facts already detailed it is evident that neither the civil suit nor the order in W.A. No. 38 of 1978 dealt with the question of the existence of nuisance or the abatement thereof. They were concerned with the right of the petitioners to carry on the work of the factory unhampered by the Panchayat Authorities or the public. The issue whether there was dissemination of carbon causing hazard to the health of the community was not the subject of an enquiry in those proceedings. Therefore, those proceedings are no bar for taking action under S. 133 of the Code.

10. It was then argued that when there are statutes like the Panchayat Act, and the Factories Act, prescribing for the issue of licence on satisfying conditions which include absence of hazard to health, it is not within the province of the Magistrate to see whether those conditions are satisfied. The contention is however not available in this case since it is not made out that licences have been issued to the petitioners in the two cases for carrying on the work of carbon mixing. Ext A2 the application for the licence for the year 1977-78 presented by the Padinjarekkara Rubber Manufactures confines the prayer to the running of a rubber factory. Even assuming that the licence authorises the factory to carry on the work of carbon mixing, it is open to the Magistrate to invoke the powers under S. 133 of the Code if the exigencies warrant such an extreme course.

.....**13.** Although the petitioners denied that their factories were responsible for the deposit of carbon black in the neighbourhood, there are documents produced which clearly make out a case of pollution at their instance. Ext. A3 in M.C. No. 4 of 1978 is a letter written by the Production Manager of the Padinjarekkara Factory to the Parish Priest, of the Veroor Catholic Church. In that letter the manager undertook to do all that was possible for the prevention of carbon black flying and invited from the priest, suggestions other than those involving stoppage of work. Ext. A4 is the proceedings of a conference

convened by the concerned Ministers which was-attended by the representatives of the two factories meant for the stoppage of pollution due to black carbon. There is also evidence that the petitioners undertook to defray the expenses incurred by the St. Joseph's Church for removal of the carbon deposits on the walls of the Church. In the face of the above evidence the findings in the two cases that carbon black was emanating from the factories of the petitioners contaminating the atmosphere and was causing deposits of carbon in the neighbourhood do not call for interference. That the devices stated to have been adopted by the two factories to prevent black carbon from escaping into the atmosphere are grossly inadequate is also established beyond doubt.

14. The further question is whether there is weight in the contention that carbon has no toxic effect on human body and dissemination of carbon is not a public nuisance. **It is sheer common sense that if the atmosphere gets contaminated with carbon particles, visible or invisible there is every risk that they would get themselves deposited on the bodies, and get into the respiratory organs of the people residing in the neighbourhood.** The evidence is that the particles get deposited on the wearing apparel of the people and the walls of buildings not to mention the other umpteen articles which may get affected by the deposit. This is therefore an outstanding instance of air pollution which has become a menace to people in the industrial cities. The term air pollution according to the definition adopted by the W.H.O., is limited to the situations in which the outdoor ambient atmosphere contains materials in concentrations which are harmful to man and his environment. *"Air pollution has been shown to increase the incidences of emphysema, bronchitis, pneumonia and asthma. It is suspected of being an ancillary cause of lung cancer and arteriosclerosis. Air pollution obscures vision, damages buildings, destroys crops and alters weather"* (See Environmental Legislation by

Williams and Hurley page 34). The Supreme Court remarked in *Ratlam Municipality v. Vardhichand* (AIR 1980 SC. 1622)

> *"Public nuisance because of pollutants being discharged by big factories to the detriment of the poorer sections, is a challenge to the social justice component of the rule of law. "*

15. To hold that the deposit of carbon black in the instant cases is a public nuisance, it need not necessarily be a hazard to the health of the people. The word public nuisance is not defined in the Code; but S. 2(y) of the Code states that words and expressions not defined therein but defined in the Indian Penal code have meanings respectively assigned to them in that Code. S. 268 of the Indian Penal Code defines public nuisance.....

Under the definition, any act which causes annoyance to the public is a public nuisance. There is no scope for doubt that deposit of carbon black on the clothes of the residents which make them solid, and their deposit on food articles would cause annoyance to their owners. The manner in which the work in the factories of the petitioners was being conducted amounted to a public nuisance and was also injurious to the health and physical comfort of the community.

16. An argument was advanced at the time of hearing that there is no evidence as to which of the two factories involved was responsible for the emanation of carbon and the Court only proceeded on the footing that it was the carbon black from the two factories together that was causing nuisance. This does not appear to be correct. The Court has entered separate findings in the two cases that the working of the concerned factory, viz. the service mixing in large quantities of carbon for supplying major type factories is injurious to the physical comfort of the community.

17. The argument based on the decision in *Ram Autar v. State of U.P.,* (AIR 1962 SC 1794), that the stoppage of work of the factories would deprive the workers thereof their means of livelihood has no application in the cases before us because the danger that the general public has to face by the service mixing of carbon without adequate equipments to prevent dissemination of carbon outweighs the advantage in the form of jobs for a few persons and that too under threat of hazards to their own health.

18. We have no hesitation in holding that the Magistrate was justified in invoking his powers under S. 133 of the Code, in initiating action against the petitioners and in directing them to stop the service mixing of carbon in their factories. We, however, make it clear that it is open to the petitioners to restart the work of service mixing of carbon after introducing gadgets or equipments which would prevent dissemination of carbon black into the atmosphere. In order to avoid further trouble and a repetition of similar action against them they may choose the equipments in consultation with qualified experts in the field of environmental hygiene and to the satisfaction of the authorities concerned.

The Criminal Revision Petitions are dismissed with the above directions.

Rampal v. State of Rajasthan
AIR 1981 Rajasthan 121
Civil Writ Petition No. 1604 of 1979, D/-4-9-1980
Dwarka Prasad, J.

Rajasthan Municipalities Act (38 of 1959), Ss. 98, 174 to 187 – Construction of sewers and drains – Primary duty of Municipality – Mandamus to perform it can be issued. (Constitution of India, Art. 226).

When the statute imposes a duty, the performance and non-performance of which is not a matter of discretion, the High Court has a power to issue a mandamus directing the local body to do what the statute requires to be done. The Municipal Board is under a statutory obligation to construct sewers and drains for the discharge of water which is likely to cause public nuisance, if allowed to accumulate for a long time. Hence, the High Court can issue Mandamus to Municipal Board for construction of sewers and drains.

(Paras 5, 6)

People's Union for Democratic Rights v. Union of India
AIR 1982 Supreme Court 1473
Writ Petition No. 8143 of 1981, D/-18-9-1982
P. N. Bhagwati and Baharul Islam, JJ.

(A) Constitution of India, Arts. 32, 226, 39-A – Public interest litigation – Scope and nature of – Its importance in Legal Aid movement and in ensuring basic human rights to poor and weaker sections of community.

(B) Employment of Children Act (26 of 1938), S. 3(3) and Schedule – Construction industry – Not a process specified in Schedule – Prohibition against employment of children under the Act – Does not apply to employment in construction industry – However, construction work being hazardous employment within meaning of Art. 24, children below 14 years cannot be employed in construction work notwithstanding absence of construction industry in the Schedule (State Governments advised to take immediate steps for inclusion of construction work in the Schedule to the Act). (Constitution of India, Art. 24).

(Para 6)

(C) Constitution of India, Art. 39 – Labour Laws – Violation of – Adequate punishment must be imposed upon errant employers – Practice of imposing meagre fine deprecated. (Labour Laws – Violation - Adequacy of punishment). (Industrial Disputes Act (1947), Pre.).

(D) Constitution of India, Arts. 226, 32 – Locus standi – Concept of – Espousal of cause of workmen engaged in Asiad Projects by a social organisation – Allegation of violation of various labour laws – Held, the organisation had locus standi to maintain writ petition.

(E) Constitution of India, Arts. 226, 32 – Writ petition – Maintainability – Allegations of non-observance and infringement of labour laws by contractors employing workmen for Asiad Projects – Union of India, Delhi Administration and Delhi Development Authority being principal employer cannot escape their obligation – Workmen have cause of action against them – Writ petition to enforce observance of labour laws is maintainable.

(Para 10)

(F) Constitution of India, Arts. 32, 14, 21, 23, 24 – Writ petition before Supreme Court – Maintainability – Violation of fundamental right has to be shown – Writ petition alleging violation of various labour laws – Infringement of fundamental rights under Arts. 14, 21, 23, 24 involved – Writ petition is maintainable.

(Paras 10, 11)

(G) Constitution of India, Art. 23 – Scope of – It protects individual not only against State but also against private citizens.

(Para 12)

(H) Constitution of India, Art. 23 – Begar – Means labour or service which a person is forced to give without receiving any remuneration for it.

AIR 1962 Bom 53, Approved.

(Para 14)

(I) Constitution of India, art. 23 – Forced labour – Meaning of – Contract of personal service – Enforcement of – Amounts to breach of Art. 23. (Specific Relief Act (1963), S. 14.

(J) Constitution of India, Art. 23 – Labour or service for remuneration which is less than minimum wage – Amounts to violation of Art. 23. (Minimum Wages Act (1948), Ss. 12, 22).

(K) Constitution of India, Arts. 17, 23, 24, 226 – Violation of fundamental rights under Arts. 17, 23, 24 – Duty of State.

Lakshman v. State of Madhya Pradesh
and
Rajaram v. State of Madhya Pradesh
and
Krishan v. State of Madhya Pradesh
and
Chogaram v. State of Madhya Pradesh
AIR 1983 Supreme Court 656
Writ Petitions Nos. 829 of 1979 and 1104, 200 and 2655 of 1980, D/-6-5-1983
D. A. Desai and O. Chinnappa Reddy, JJ.

Constitution of India, Arts. 14, 19, 301 - Forest Act (16 of 1927), Ss. 32 (i), 76 - M. P. Grazing Rates Rules (1979), Rr. 7, 6, 3 (2), 5 - M. P. Govt. Notifications under Rr. 6 and 7, Dt. 28-6-1979 - Cattle belonging to persons of States other than M. P. - Levy of higher grazing rates - Ceiling of 45 days in which their cattle must pass through the State - Levy of higher rates and limit of stay are unconstitutional - However, prescription of route along which cattle have to be taken, is constitutional.

(Para 3)

Bandhua Mukti Morcha v. Union of India
AIR 1984 Supreme Court 802
Writ Petition No. 2135 of 1982, D/-16-12-1983
P. N. Bhagwati, R. S. Pathak and Amarendra Nath Sen, JJ.

(A) Constitution of India, Arts. 32, 226, 21, 23, 39, 41, 42 - Public interest litigation - Duty of Government - Existence of bonded labour alleged - Preliminary objection

by Government that fundamental rights are not infringed - Not proper. (Public Interest Litigation).

Where a public interest litigation alleging that certain workmen are living in bondage and under inhuman conditions is initiated it is not expected of the Government that it should raise preliminary objection that no fundamental rights of the petitioners or the workmen on whose behalf the petition has been filed, have been infringed. On the contrary, the Government should welcome an inquiry by the Court, so that if it is found that there are in fact bonded labourers or even if the workers are not bonded in the strict sense of the term as defined in the Bonded Labour System (Abolition) Act 1976 but they are made to provide forced labour or any consigned to a life of utter deprivation and degradation, such a situation can be set right by the Government.

(Paras 9, 75)

Public interest litigation is not in the nature of adversary litigation but it is a challenge and an opportunity to the government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice which is the signature tune of our Constitution. The Government and its officers must welcome public interest litigation, because it would provide them an occasion to examine whether the poor and the down-trodden are getting their social and economic entitlements or whether they are continuing to remain victims of deception and exploitation at the hands of strong and powerful sections of the community and whether social and economic justice has become a meaningful reality for them or it has remained merely a teasing illusion and a promise of unreality, so that in case the complaint in the public interest litigation is found to be true, they can in discharge of their constitutional obligation root out exploitation and injustice and entitlements. When the Court entertains public interest litigation, it does not do so in a cavilling spirit or in a confrontational mood or with a view to tilting at executive authority or seeking to usurp it, but its attempt is only to ensure observance of social and economic rescue programmes, legislative as well as executive, framed for the benefit of the have-nots and the handicapped and to protect them against violation of their basic human rights, which is also the constitutional obligation of the executive. The Court is thus merely assisting in the realisation of the constitutional objectives.

(Paras 9, 82)

Article 21 assures the right to live with human dignity, free from exploitation. The State is under a constitutional obligation to see that there is no violation of the fundamental right of any person, particularly when he belongs to the weaker sections of the community and is unable to wage a legal battle against a strong and powerful opponent who is exploiting him. Both the Central Government and the State Government are therefore bound to ensure observance of various social welfare and labour laws enacted by Parliament for the purpose of securing to the workmen a life of basic human dignity in compliance with the Directive Principles of State Policy. AIR 1982 SC 1473, Followed.

(Para 10)

(B) Constitution of India, Article 32 – Public interest litigation – Locus standi – Aggrieved persons suffering from poverty, disability or socially or economically

disadvantaged position – Writ petition by another person on his behalf – Maintainable. (Public Interest Litigation).

While interpreting Article 32, it must be borne in mind that Court's approach must be guided not by any verbal or formalistic canons of construction but by the paramount object and purpose for which this article has been enacted a fundamental right in the Constitution and its interpretation must receive illumination from the trinity of provisions which permeate and energise the entire Constitution namely, the Preamble, the Fundamental Rights and the Directive Principles of State Policy. It is clear on the plain language of Clause (1) of Article 32 that whenever there is a violation of a fundamental right, any one can move the Supreme Court for enforcement of such fundamental right. Of course, the Court would not, in exercise of its discretion, intervene at the instance of a meddlesome inter-loper or busy body and would ordinarily insist that only a person whose fundamental right is violated should be allowed to activise the Court. Where however, the fundamental right of a person or class of persons is violated but who cannot have resort to the Court on account of their poverty or disability or socially or economically disadvantaged position the Court can and must allow any member of the public acting bona fide to espouse the cause of such person or class of persons and move the Court for judicial enforcement of the fundamental right of such person or class of persons. This does not violate, in the slightest measure, the language of the constitutional provision enacted in Clause (1) of Article 32.

(Paras 11, 51, 75)

(C) Constitution of India, Article 32 (1) – "Appropriate proceeding" envisaged by Article 32 (1) – Connotations of – Supreme Court's power to enforce fundamental right is widest – Not obligatory for Court to follow adversarial procedure.

Article 32 says that the Supreme Court can be moved for enforcement of a fundamental right by any "appropriate" proceeding. There is no limitation in regard to the kind of proceeding envisaged in Clause (1) of Article 32 except that the proceeding must be "appropriate" and this requirement of appropriateness must be judged in the light of the purpose for which the proceeding is to be taken, namely, enforcement of a fundamental right. The Constitution makers deliberately did not lay down any particular form of proceeding for enforcement of a fundamental right nor did they stipulate that such proceeding should conform to any rigid pattern or straight jacket formula because they knew that in a country like India where there is so much of poverty, ignorance, illiteracy, deprivation and exploitation, any insistence on a rigid formula of proceeding for enforcement of a fundamental right would become self-defeating. "Appropriate" proceedings, envisaged by Article 32 means "appropriate" not in terms of any particular form but "appropriate" with reference to the purpose of the proceeding.

(Paras 12, 52, 58, 76, 78, 82)

The power conferred by Clause (2) of Article 32 is in the widest terms. It is not only the high prerogative writs of mandamus, habeas corpus, prohibition, quo warranto and certiorari, which can be issued by the Supreme Court, but also writs in the nature of these

high prerogative writs. This provision conferring on the Supreme Court power to enforce the fundamental rights in the widest possible terms shows the anxiety of the Constitution makers not to allow any procedural technicalities to stand in the way of enforcement of fundamental rights.

(Para 13)

It is not at all obligatory that an adversarial procedure, where each party produces his own evidence tested by cross examination by the other side and the judge sits like an umpire and decides the case only on the basis of such material as may be produced before him by both parties, must be followed in a proceeding under Article 32 for enforcement of a fundamental right. In fact, there is no such constitutional compulsion enacted in Clause (2) of Article 32 or in nothing sacrosanct about the adversarial procedure and in fact it is not followed in many other countries where the civil system of law prevails.

(Para 13)

(D) Constitution of India, Article 32 – Power under – Scope – Includes power to appoint commission for making enquiry into facts relating to violation of fundamental rights – Provisions of Order 26, Civil P.C. and Order 46 of Supreme Court Rules (1966) do not detract against this inherent power of Supreme Court.

(Paras 14, 70, 81)

(E) Bonded Labour System (Abolition) Act (19 of 1976), Sections 2 (d), 12 – Bonded labour – Proof – Labourer compelled to provide forced labour – Presumption that he is bonded labourer arises – Labourer need not prove that he received bonded debt.

Whenever it is shown that a labourer is made to provide forced labour, the Court would raise a presumption that he is required to do so in consideration of an advance or other economic consideration received by him and he is therefore a bonded labourer. This presumption may be rebutted by the employer and also by the State Government if it so chooses but unless and until satisfactory material is produced for rebutting this presumption, the Court must proceed on the basis that the labourer is a bonded labourer entitled to the benefit of the provisions of the Act. The State Government cannot be permitted to repudiate its obligation to identify, release and rehabilitate the bonded labourers on the plea that though the concerned labourers may be providing forced labour, the State Government does not owe any obligation to them unless and until they show in an appropriate legal proceeding conducted according to the rules of adversary system of justice, that they are bonded labourers.

(Paras 24)

(F) Constitution of India, Article 32 – Appropriate proceeding – Letter addressed to Supreme Court by person acting pro bono publico – Can be treated as writ petition. (Public Interest Litigation).

Per Bhagwati, J.:-Where a member of the public acting bona fide moves the Court for

enforcement of a fundamental right on behalf of a person or class of persons who on account of poverty or disability or socially or economically disadvantaged position cannot approach the Court for relief, such member of the public may move the Court even by just writing a letter, because it would not be right or fair to expect a person acting pro bono publico to incur expenses out of his own pocket for going to a lawyer and preparing a regular writ petition for being filed in Court for enforcement of the fundamental right of the poor and deprived sections of the community and in such a case, a letter addressed by him can legitimately be regarded as an "appropriate" proceeding.

(Para 12)

Per Pathak, J.:-A practice has grown in the public of invoking the jurisdiction of Supreme Court by a simple letter complaining of a legal injury to the author or to some other person or group of persons, and the Court has treated such letter as a petition under Article 32 and entertained the proceeding without anything more. It is only comparatively recently that the Court has begun to call for the filing of a regular petition on the letter. Grave danger is inherent in a practice where a mere letter is entertained as a petition from a person whose antecedents and status are unknown or so uncertain that no sense of responsibility can, without anything more, be attributed to the communication. There is good reason for the insistence on a document being set out in a form, or accompanied by evidence, indicating that the allegations made in it are made with a sense of responsibility by a person who has taken due care and caution to verify those allegations before making them. The Court must be ever vigilant against the abuse of its process. It cannot do that better in this matter than insisting at the earliest stage, and before issuing notice to the respondent, that an appropriate verification of the allegations be supplied. The requirement is imperative in private law litigation. Having regard to its nature and purpose, it is equally attracted to public interest litigation. While this Court has readily acted upon letters and telegrams in the past, there is need to insist now on an appropriate verification of the petition or other communication before acting on it. There may be exceptional circumstances which may justify a waiver of the rule. All communications and petitions invoking the jurisdiction of the Court must be addressed to the entire Court, that is to say, the Chief Justice and his companion Judges. No such communication or petition can properly be addressed to a particular Judge. When the jurisdiction of the Court is invoked, it is the jurisdiction of the entire Court.

(Para 54)

Per A. N. Sen, J.:-The Supreme Court for quite some years now has in many cases proceeded to act on the basis of the letters addressed to it. A long-standing practice of the Court in the matter of procedure also acquires sanctity. In various cases the Court has also refused to take any notice of letters or other kind of communication addressed to Court and in many cases also the Court on being moved by a letter has directed a formal writ petition to be filed before it has decided to proceed further in the matter. It is, however, eminently desirable that normally the procedure prescribed in the rules of the Supreme Court should be followed while entertaining a petition under Article 32, though

in exceptional cases and particularly in matter of general public interest, Supreme Court may, taking into consideration the peculiar facts and circumstances of the case, proceed to exercise its jurisdiction under Article 32 for enforcement of fundamental rights treating the letter or the communication in any other form as an appropriate proceeding under Article 32 of the Constitution. It is eminently desirable that any party who addresses a letter or any other communication to Supreme Court should address the letter or communication to the Court and not to any individual Judge by name.

(Para 78)

George Mampilly (Dr.) v. State of Kerala
AIR 1985 Kerala 24
O.P. No. 2088 of 1983, D/-24-2-1984
U.L. Bhat and M. Fatima Beevi, JJ.

(A) Constitution of India, Art. 226 - Locus standi - Public injury - Any member of public can maintain action.

(B) Constitution of India, Art. 47 - Question whether selling arrack in Polythene Sachet is injurious to health -Question needs serious consideration- Essence of Art. 47.

(C) Constitution of India, Art. 14 - Kerala Govt. Order No. G.O. dt. No.58/83/TD-Taxes (A) Dept. 24-1-1983 - Direction to sell arrack in Polythene Sachet in 100 M.L. quantity - Decision of Govt. based on irrelevant consideration - Art. 14 is violated.

Rabin Mukherjee v. State of West Bengal
AIR 1985 Calcutta 222
Writ Application No. Nil, D/-5-3-1985
Bhagabati Prasad Banerjee, J.

Bengal Motor Vehicles Rules (1940), R. 114(d) - Transport vehicles - Use of electric and/or air horn instead of bulb horn as prescribed under the Rule, deprecated - Noise pollution and adverse effect on public health by use of such horn brought to the notice of authorities for necessary action under S. 112 of the M. V. Act. ((i) Motor Vehicles Act (4 of 1939), S. 112; (ii) Motor Vehicle – Horn - Noise pollution)

It is a mandatory provision as provided in R. 114(d) of the Bengal Motor Vehicles Rules, 1940 that each transport vehicle namely stage carriages which include private buses, and State Buses, contract carriers, mini buses, lorries etc. cannot be fitted with any other form of horn excepting a bulb horn. But no transport vehicle owner follows such Rule and the transport vehicles are using electric and air horn in reckless manner. It was observed by the High Court that in a congested State like the State of West Bengal, sudden blowing of

such horn by transport vehicles produces rude shock in the human system and is acknowledged to have serious effect on various aspects of human including blood pressure, mental and nervous system. It is also matter of common knowledge that such transport vehicles even for overtaking another vehicle on the road small or big continuously blow such electric and/or air horn which produces a shrill and loud noise and which creates annoyance to everyone who resides by the side of the road and to all pedestrians including the persons travelling in the vehicles. The indiscriminate use of such horn is amounting to noise pollution in the city of Calcutta and the congested areas of the State of West Bengal and that the same have adverse effect on the public health of the people which creates many a complication including mental restlessness, blood pressure and heart trouble and it is necessary in the interest of the public at large in the State of West Bengal to stop such noise pollution arising out of necessary use of such electric and air horn deliberately. The transport authorities are under a statutory obligation and duty under S. 112 of the Motor Vehicles Act to punish the person who contravenes the provision of R. 114 (d) of the Rules.

(Paras 4, 5, 7)

ORDER:- This writ application was moved by the petitioners for protection of their own rights and also in public interest being aggrieved by the nuisance and noise pollution which are being created in the impunity by the transport operators by indiscriminate installation and use of electric and artificially generated air horns which cause unduly rush, shrill, loud and alarming noise. In the writ petition, the petitioners prayed for a writ in the nature of Mandamus commanding the Respondents to enforce the provisions of R. 114 of the Bengal Motor Vehicles Rules, 1940 and to enforce the restrictions against the use of such electric and other loud and shrill horns including air horns by operators of the transport vehicles. The case of the petitioners is that State of West Bengal is a thickly populated area and the density of population is one of the highest in India. It was further alleged that the prevailing noise level in the State particularly in the Calcutta Metropolitan Area is far in excess of the permissible limit and it is no longer in dispute that such excessive noise level poses positive danger to the residents of the respective locality. It also poses serious threat to the health of the residents apart from causing serious inconvenience to the weak, infirm and indisposed people. It was also alleged that even normal people are increasingly finding it difficult to enjoy their so essential in their lives or to carry on their works whatever be their nature. The petitioners' further case is that one most important factor contributing to the noise nuisance, particularly in the case of those who have their residences in the Calcutta Metropolitan Area or any other urban areas, is the blowing of loud and shrill horns by operators of transport vehicles. The said loud and shrill horn either electric horn or air horn mechanically generated and stored in an air tank in most of the transport vehicles. It was further alleged by the petitioners that sudden blowing of such horns by transport vehicles produces a rude shock in the human system and is acknowledged to have serious effects on various aspects of human life including blood pressure, mental and nervous system. It also does not permit effective concentration to be provided because of sudden disruption caused by such loud and shrill horns. The transport operators particularly the goods transport vehicles operate about 18

hours a day with such type of horns.

2. Mr. Saktinath Mukherjee, learned Advocate appearing on behalf of the petitioners in support of the contentions of the petitioners, referred to the provisions of R. 114 of the Bengal Motor Vehicles Rules, 1940. The said Rule is as follows: -

> "114. Horns- (a) Every motor vehicle shall be fitted with a horn or other approved device available for immediate use by the driver of the vehicle and capable of giving audible and sufficient warning of the approach or position of the vehicle.
>
> (b) No motor vehicle shall be fitted with any multitoned horn giving a succession of different notes or with any other sound producing device giving any unduly harsh, shrill, and loud of alarming noise.
>
> (c) Nothing contained in sub-rule (b) shall prevent the use on vehicles, used as ambulances or for fire fighting or salvage purposes or on vehicle used by police officers in the course of their duties, or on other similar vehicles, of such sound signals as may be approved by the Registering Authority.
>
> (d) Every transport vehicle shall be fitted with a bulb horn".
>
> On the basis of the said Rule it was contended by Mr. Mukherjee that in spite of the provision that every transport vehicle shall be fitted with a bulb horn, the transport operators in gross violation of such Rules are using air horn and electric horn which produces a shrill and loud noise and which is not also necessary for running or operating the vehicles.

3. It is a matter of common knowledge that almost all the transport vehicles use air horn and electric horn instead of using bulb horn as provided in R. 114(d) of the Bengal Motor Vehicles Rules, 1940 and such unnecessary and excessive use of such horn creates annoyance to the people. It was stated in paragraph 15 of the petition that recently a research was conducted jointly by Basu Bijnan Mandir and the Presidency College, Calcutta about noise pollution in the city of Calcutta and the suburbs. On such analysis it is found that the atmosphere and the environment is very much polluted from indiscriminating noise emitted from different quarters and on research it was found that persons who are staying near the Air Port, are becoming victim of various ailments. Such persons even become victim of mental disease. On such research it was also found that workers in various factories even become deaf and hard of hearing. It was further found on such research that as a result of this excessive noise pollution, people suffer from loss of appetite, depression, mental restlessness and insomnia. People also suffer from complain of excessive blood pressure and heart trouble. It is not necessary to go into the question about direct effect of such noise pollution because of indiscriminate and illegal use of such electric and air horn as it is an admitted position that the same is injurious to health and amongst different causes of environmental pollution, sound pollution is one,

which is a matter of grave concern.

4. Rule 114 (d) of the Bengal Motor Vehicles Rules, 1940 provided that every transport vehicle should be fitted with a bulb horn. The "transport vehicle" has been defined in S. 2(33) of the Motor Vehicle Act, 1939 (hereinafter referred to as the said Act) which provides that transport vehicle means a public service vehicle or the goods vehicle. "Public service vehicle" has been defined in S. 2(25) of the said Act, which provides that public service vehicle means any motor vehicle used or adopted to be used for carriage of passengers for hire or reward and includes a motor cab, contract carriage and stage carriage. "Goods vehicles" have been defined in S. 2(8) of the said Act which provides that goods vehicles means any motor vehicle constructed or adopted for use of carriage of goods or any other motor vehicle not so constructed or adopted when used for carriage of goods solely or in addition to passengers. So within the scope and ambit of "transport vehicle" the stage carriages, contract carriages including mini buses, lorries and other transport vehicles comes in. It is a mandatory provision as provided in R. 114 (d) of the Bengal Motor Vehicles Rules, 1940 that each transport vehicle namely stage carriages which include private buses, and State buses, contract carriages, mini buses, lorries etc. cannot be fitted with any other form of horn excepting a bulb horn. But the said mandatory provision of the said Rule is now observed only in breaches and no transport vehicle owner follows such Rule.

5. So in view of the mandatory provision of R. 114 (d) of the said Rules, the transport vehicles are using electric and air horn in a reckless manner and that surprisingly no steps had been taken by the authorities concerned for violation of the said mandatory provision. Section 112 of the Motor Vehicles Act provides that whoever contravenes any of the provisions of the said Act or any Rule made thereunder shall, if no other penalty is provided for the offence, be punishable with fine which may extend to RS. 100/ and if having been previously convicted of any offence under this Act, is again convicted of any offence under this Act, with fine which may extend to RS. 300/.

6. Mr. Mukul Prokash Banerjee, learned Advocate appearing for the respondent State Authorities, could not dispute the position that the provision of R. 114(d) of the said Rule is mandatory in nature and that the transport vehicles cannot use any other form of horn except the bulb horn.

7. Considering the facts and circumstances of the case and considering the mandatory provision of R 114(d) of the said Rules and considering the fact that in a congested State like the State of West Bengal, sudden blowing of such horn by transport vehicle produces rude shock in the human system and is acknowledged to have serious effect on various aspects of human life including blood pressure, mental and nervous system, it is the duty of the respondents to enforce the provision of R. 114(d) of the said Rules. It is also a matter of common knowledge that such transport vehicles even for overtaking another vehicle on the road small or big continuously blow such electric and/or air horn which

produces a shrill and loud noise and which creates annoyance to everyone who resides by the side of the road and to all pedestrians including the persons traveling in the vehicles. The indiscriminate use of such horn is amounting to noise pollution in the city of Calcutta and the congested areas of the State of West Bengal and that the same have adverse effect on the public health of the people which creates many a complication including mental restlessness, blood pressure and heart trouble and that it is necessary in the interest of the public at large in the State of West Bengal to stop such noise pollution arising out of unnecessary use of such electric and air horn deliberately. The respondents are under a statutory obligation and duty under S. 112 of the Motor Vehicles Act to punish the person who contravenes the provision of R. 114(d) of the said Rules. But unfortunately, no positive step had yet been taken in the matter. It is crystal clear that in spite of such statutory provision, such transport vehicles are allowed to use such type of prohibited horn and no action is taken against the person who has been contravening the provision of the said Rules. The passenger transport cannot operate such types of prohibited horn excepting that they can only use bulb horn as provided within S. 114(d) of the Motor Vehicles Rules. The use of such electric and air horn has increased to an alarming extent that it cannot be checked overnight by starting prosecutions in usual manner under S. 112 of the said Act. Under the circumstances aforesaid, I allow the application and direct the respondents to enforce strictly the provisions of R. 114(d) of the Bengal Motor Vehicles Rules, 1940 and to enforce restrictions against the use of such electric and other loud and shrill horn including air horns by operators of the vehicles and considering the problem to control such large scale violation and considering the fact that almost all the transport vehicles are fitted with such prohibited horns, I direct the State Government to issue the notice and/or notification immediately notifying to all the transport vehicles operators about the restrictions provided in R. 114(d) of the said Rules and directing them to remove the electric, air and other loud and shrill horn forthwith and to use only bulb horn in the State of West Bengal giving the operators 15 days time to change the electric and air horn and to fit vehicles with bulb horn with the warning that failure to remove such prohibited horns from their vehicles, penal action should be taken against them according to law and further it should be notified that no such transport vehicles should be given certificate of fitness under S. 38 of the Motor Vehicle Act, if fitted with such horns which are prohibited under R. 114(d) of the Rules. I also direct the respondents to proceed against the vehicle operators by taking penal action if they fail to remove such types of prohibited horns after the expiry of the period of 15 days which shall be provided for change of such horn by notification or by notice to be issued by the State Government in this behalf giving wide publicity through press and the mass media. Such operators should also be warned that failure to change such types of prohibited horn, the said operators shall be liable for prosecution in accordance with law.

8. The State Government should also take steps for notifying such restriction regarding the use of such types of horn in respect of vehicles which enter into the State of West Bengal from other States so that they may be aware of such restriction in the matter of use of such prohibited horn in the State of West Bengal.

9. It is also desirable in the large public interest that the respondents and the State Government and the authorities should take suitable measures to implement the provision

of R. 114(d) of the Motor Vehicle Rules, 1940 and no certificate of fitness should be granted under S. 38 of the said Act, in case of non-compliance of the provisions of 114(d) of the said Rules so that this type of noise pollution is eradicated at an early date from the State of West Bengal. Before I part with the matter, I must place it on record by appreciation for the petitioners for their endeavour to stop such noise pollution in the large interest of people in the State of West Bengal in the matter.

10. There will be no order as to costs.

Order accordingly.

Rural Litigation and Entitement Kendra v. State of U. P.
(1985) 3 SCC 614
P.N. Bhagwati, Amarendra Nath Sen and Ranganath Misra, JJ.

1. There are several applications which have been filed before us by one party or the other following upon the order made by us in these writ petitions on March 12, 1985. Some of the applications have already been disposed of by an order made by us on May 3, 1985 and the remaining applications are being disposed of by this order .....

8. That leaves out only the question in regard to the mined lease minerals which are lying stacked on plots away from lime stone quarries from which there are no adjoining lime stone quarries. The lessees of lime stone quarries forming the subject matter of lease Nos. 8, 24, 31 and 67 have applied to us that there should be no time limit set by us for removal of the mined lease minerals lying stacked at such plots. We are inclined to accede to this application since the plots on which mined lease minerals are said to be stacked are away from the lime stone quarries and there is no danger or apprehension of the lessees clandestinely carrying on mining operations under the guise of the removal of the mined lease minerals if no time limit is set by us. We would therefore direct that if any mined lease minerals are lying stacked on plots in the vicinity of any lime stone quarries, the lessees who have stacked mined lease minerals on such plots shall be permitted to remove the same without any specific time limit provided of course they make an application to the District Magistrate, Dehradun for permission to remove and such permission is granted by the District Magistrate, Dehradun. The District Magistrate, Dehradun shall have the right to assess the quantities of mined lease minerals lying on the plots within 2 weeks from the time when the application for permission for removal is made to him. The District Magistrate, Dehradun shall not make any unreasonable delay in the granting of such permission. But we may make it clear that if the District Magistrate, Dehradun is satisfied that something illegal or contrary to the orders of this Court is being done by any of the lessees, it will be open to him to refuse to grant such permission to the concerned lessee. This, however, does not apply to stacked mineral away from the mines as aforesaid.

Rural Litigation and Entitlement Kendra, Dehradun v. State of U. P.
and
Devaki Nandan Pandey v. Union of India
AIR 1985 Supreme Court 652
Writ Petitions Nos. 8209 and 8821 of 1983; D/- 12-3-1985
P. N. Bhagwati, Amarendra Nath Sen and Ranganath Misra, JJ.

(A) Constitution of India, Art. 32 – Writ petition – Imbalance to ecology and hazard to healthy environment due to working of lime-stone quarries – Supreme Court ordered their closure (Ecological balance – Preservation) (Public health – Hazard to) (Mines minerals – Close down of mining operations on count of public health).

(Paras 7, 10, 12)

(B) Constitution of India, Art. 32 – Writ petition – Advocates fee – Advocate of a party rendering valuable assistance to court in hearing petition – Supreme Court directed the Union Govt. State Govt., respondents to petition, to pay him 5,000 each as additional remuneration and not in lieu of costs. ((i) Supreme Court Rules (1966) Sch. 2 – (ii) Advocates Act (1961) Ss. 29, 30). (Advocate – Remuneration for rendering valuable assistance to court).

(Para 15)

ORDER :- This case has been argued at great length before us not only because a large number of lessees of lime-stone quarries are involved and each of them has painstakingly and exhaustively canvassed his factual as well as legal points of view but also because this is the first case of its kind in the country involving issues relating to environment and ecological balance and the questions arising for consideration are of grave moment and significance not only to the people residing in the Mussoorie Hill range forming part of the Himalayas but also in their implications to the welfare of the generality of people living in the country. It brings into sharp focus the conflict between development and conservation and serves to emphasise the need for reconciling the two in the larger interest of the country. But since having regard to the voluminous material placed before us and the momentous issues raised for decision, it is not possible for us to prepare a full and detailed judgment immediately and at the same time, on account of interim order made by us, mining operations carried out through blasting have been stopped and the ends of justice require that the lessees of lime-stone quarries should know, without any unnecessary delay, as to where they stand in regard to their lime-stone quarries, we proposes to pass our order on the writ petitions. The reasons for the order will be set out in the judgment to follow later.

2. We had by an Order dated 11th August 1983 appointed a Committee consisting of Sh. D. N. Bhargav, Controller General, Indian Bureau of Mines, Nagpur, Shri M. S. Kahlon, Director General of Mines Safety and Col. P. Mishra, Head of the Indian Photo Interpretation Institute (National Remote Sensing Agency) for the purpose of inspecting the lime-stone quarries mentioned in the writ petition as also in the list submitted by the Government of Uttar Pradesh. This Committee which we shall hereinafter for the sake of convenience refer to as to Bhargav Committee, submitted three reports after inspecting most of the lime-stone quarries into three groups. The lime-stone quarries comprised in

category A were those where in the opinion of the Bhargav Committee the adverse impact of the mining operations was relatively less pronounced; category B comprised those lime-stone quarries where in the opinion of the Bhargav Committee the adverse impact of mining operations was relatively more pronounced and category C covered those lime-stone quarries which had been directed to be closed down by the Bhargav Committee under the orders made by us on account of deficiencies regarding safety and hazards of more serious nature.

3. It seems that the Government of India also appointed a Working Group on Mining of Lime-stone Quarries in Dehradun-Mussoorie area, some time in 1983. The Working Group was also headed by the same Sh. D. N. Bhargav who was a member of the Bhargav Committee appointed by us. There were five other members of the Working Group along with Shri D.N. Bhargav and one of them was Dr. S. Mudgal who was at the relevant time Director in the Department of Environment, Government of India and who placed the report of the Working Group before the Court along with his affidavit. The Working Group in its report submitted in September 1983 made a review of lime-stone quarry leases for continuance or discontinuance of mining operations and after a detailed consideration of various aspects recommended that the lime-stone quarries should be divided into two categories, namely category 1 and category 2; category 1 comprising lime-stone quarries considered suitable for continuance of mining operations and category 2 comprising lime-stone quarries which were considered unsuitable for further mining.

4. It is interesting to note that the lime-stone quarries comprised in category A of the Bhargav Committee Report were the same lime-stone quarries which were classified in category 1 by the Working Group and the lime-stone quarries in categories B and C of the Bhargav Committee Report were classified in category 2 of the Report of the Working Group. It will thus be seen that both the Bhargav Committee and the Working Group were unanimous in their view that the lime-stone quarries classified in category A by the Bhargav Committee Report and category 1 by the Working Group were suitable for continuance of mining operations. So far as the lime-stone quarries in category C of the Bhargav Committee Report are concerned, they were regarded by both the Bhargav Committee and the Working Group as unsuitable for continuance of mining operations and both were of the view that they should be closed down. The only difference between the Bhargav Committee and the Working Group was in regard to lime-stone quarries classified in category B. The Bhargav Committee Report took the view that these lime-stone quarries need not be closed down, but it did observe that the adverse impact of mining operations in these lime-stone quarries was more pronounced, while the Working Group definitely took the view that these lime-stone quarries were not suitable for further mining.

5. While making this Order we are not going into the various ramifications of the arguments advanced before us but we may observe straightway that we do not propose to rely on the Report of Prof. K.S. Valdia, who was one of the members of the Expert Committee appointed by us by our Order dated 2nd September 1983, as modified by the Order dated 25th October 1983. This Committee consisted of Prof. K.S. Valdia, Shri

Hukum Singh and Shri D. N. Kaul and it was appointed to enquire and investigate into the question of disturbance of ecology and pollution and affectation of air, water and environment by reason of quarrying operations or stone crushers or lime-stone kilns. Shri D.N. Kaul and Shri Hukum Singh submitted a joint report in regard to the various aspects while Prof. K. S. Valdia submitted a separate report. Prof. K. S. Valdia's Report was confined largely to the geological aspect and in the report he placed considerable reliance on the Main Boundary Thrust (hereinafter shortly referred to as M.B.T) and he took the view that the lime-stone quarries which were dangerously close to the M.B.T. should be closed down, because they were in this sensitive and vulnerable belt. We shall examine this Report in detail when we give our reasons but we may straightway point out that we do not think it safe to direct continuance or discontinuance of mining operations in lime-stone quarries on the basis of the M.B.T. We are therefore not basing our conclusions on the Report of Prof. K. S. Valdia but while doing so we may add that we do not for a moment wish to express any doubt on the correctness of his Report.

6. We shall also examine in detail the question as to whether lime-stone deposits act as aquiferous or not. But there can be no gain-saying that lime-stone quarrying and excavation of the lime-stone deposits do seem to affect the perennial water springs. This environmental disturbance has however to be weighed in the balance against the need of lime-stone quarrying for industrial purposes in the country and we have taken this aspect into account while making this order.

7. We are clearly of the view that so far as the lime-stone quarries classified in category C in the Bhargav Committee Report are concerned which have already been closed down under the directions of the Bhargav Committee should not be allowed to be operated. If the leases of these lime-stone quarries have obtained any stay order from any court permitting them to continue the mining operations, such stay order will stand dissolved and if there are any subsisting leases in respect of any of these lime-stone quarries they shall stand terminated without any liability against the State of Uttar Pradesh. If there are any suits or writ petitions for continuance of expired or unexpired leases in respect of any of these lime-stone quarries pending, they will stand dismissed.

8. We would also give the same direction in regard to the lime-stone quarries in the Sahasradhara Block even though they are placed in category B by the Bhargav Committee. So far as these stone quarries in Sahasradhara Block are concerned, we agree with the Report made by the Working Group and we direct that these lime-stone quarries should not be allowed to be operated and should be closed down forthwith. We would also direct, agreeing with the Report made by the Working Group that the lime-stone quarries placed in category 2 by the Working Group other than those which are placed in categories B and C by the Bhargav Committee should also not be allowed to be operated and should be closed down save and except for the lime-stone quarries covered by mining leases Nos. 31, 36 and 37 for which we would give the same direction as we are giving in the succeeding paragraph in regard to the lime-stone quarries classified as category B in the Bhargav Committee Report. It there are any subsisting leases in respect of any of these lime-stone quarries they will forthwith come to an end and if any suits or writ

petitions for continuance of expired or unexpired leases in respect of any of these lime-stone quarries are pending, they too will stand dismissed.

9. So far as the lime-stone quarries classified as category A in the Bhargav Committee Report and/or category 1 in the Working Group Report are concerned, we would divide them into two classes, one class consisting of these lime-stone quarries which are within the city limits of Mussoories and the other consisting of those which are outside the city limits. We take the view that the lime-stone quarries falling within category A of the Bhargav Committee Report and/or category 1 of the Working Group Report and falling outside the city limits of Musssorie, should be allowed to be operated subject of course to the observance of the requirements of the Mines Act 1952, the Metalliferous Mines Regulations, 1961 and other relevant statutes, rules and regulations. Of course when we say this, we must make it clear that we are not holding that if the leases in respect of these lime-stone quarries have expired and suits or writ petitions for renewal of the leases are pending in the courts, such leases should be automatically renewed. It will be for the appropriate courts to decide whether such leases should be renewed or not having regard to the law and facts of each case. So far as the lime-stone quarries classified in category A in the Bhargav Committee Report and/or category 1 in the Working Group Report and falling within the city limits of Mussories are concerned, we would give the same direction which we are giving in the next succeeding paragraph in regard to the lime-stone quarries classified as category B in the Bhargav Committee Report.

10. That takes us to the lime-stone quarries classified as category B in the Bhargav Committee Report and category 2 in the Working Group Report. We do not propose to clear these lime-stone quarries for continuance of mining operations nor to close them down permanently without further inquiry. We accordingly appoint a high powered Committee consisting of Mr. D. Bandyopadhyay, Secretary, Ministry for Rural Department as Chairman and Shri H. S. Ahuja, Director General, Mines Safety, Dhanbad, Bihar, Shir D.N. Bhargav, Controller General, Indian Bureau of Mines, New Secretariat Building, Nagpur and two experts to be nominated by the Department of Environment, Government of India within four weeks from the date of this Order. The lessees of the lime-stone quarries classified as category A in Bhargav Committee Report and/or category 1 and the Working Group Report and falling within the city limits of Mussoorie as also the lessees of the lime-stone quarries classified as category B in the Bhargav Committee Report will be at liberty to submit a full and detailed scheme for mining their lime-stone quarries to this Committee (hereinafter called the Bandyopadhyay Committee) and if any such scheme or schemes are submitted, the Bandyopadhyay Committee will proceed to examine the same without any unnecessary delay and submit a report to this Court whether in its opinion the particular lime-stone quarries can be allowed to be operated in accordance with the scheme and if so, subject to what conditions and if it cannot be allowed to be operated, the reasons for taking that view. The Bandyopadhyay Committee in making its report will take into account the various aspects which we had directed the Bhargav Committee and the Kaul Committee to consider while making their respective reports including the circumstance that the particular lime-stone quarry may or may not be within the city limits of Mussoorie and also give an opportunity to the concerned lessee to be heard, even though it be briefly. The Bandyopadhyay Committee

will also consider while making it report whether any violations of the provisions of the Mines Act 1952, the Metalliferous Mines Regulations, 1961 and other relevant statutes, rules and regulations were committed by the lessee submitted the scheme or schemes and if so, what were the nature, extent and frequency of such violations and their possible hazards. The Bandyopadhyay Committee will also insist on a broad plan of exploitation coupled with detailed mining management plans to be submitted along with the scheme or schemes and take care to ensure that lime-stone deposits are exploited in a scientific and systematic manner and if necessary, even by two or more lessees coming together and combining the areas of the lime-stone quarries to be exploited by them. It should also be the concern of the Bandyopadhyay Committee while considering the scheme or schemes submitted to it and making its report, to ensure that the lime-stone on exploitation, is specifically utilized only in special industries having regard to its quality and is not wasted by being utilized in industries for which high grade lime-stone is not required. The necessary funds for the purpose of meeting the expenses which may have to be incurred by the members of the Bandyopadhyay Committee will be provided by the State of Uttar Pradesh including their travelling and other allowances appropriate to their office. The State of Uttar Pradesh will also provide to the members of the Bandyopadhyay Committee necessary transport and other facilities for the purpose of enabling them to discharge their functions under this Order. If any notices are to be served by the Bandyopadhyay Committee the District Administration of Dehradun will provide the necessary assistance for serving of such notices on the lessees or other interested parties. The Bandyopadhyay Committee will also be entitled before expressing its opinion on the scheme or schemes submitted to it, to hear the petitioner, the interventionists in this case and such other persons or organizations as may be interested in maintenance and preservation of healthy environment and ecological balance. The Indian Bureau of Mines will provide secretarial facilities to the Bandyopadhyay Committee. The report submitted by the Bandyopadhyay Committee in each case will be considered by the Court and a decision will then be taken whether the lime-stone quarry or quarries in respect of which the report has been made should be allowed to be operated or not. But until then these lime-stone quarries will not be allowed to be operated or worked and the District Authorities of Dehradun will take prompt and active steps for the purpose of ensuring that these lime-stone quarries are not operated or worked and no mining activity is carried on even clandestinely. This order made by us will supersede any stay or any other interim order obtained by the lessee of any of these lime-stone quarries permitting him to carry on mining operations and notwithstanding such stay order or other interim order or subsisting lease, the lessees shall not be entitled to carry on any mining activity whatsoever in any of these lime-stone quarries and shall desist from doing so. The lessees of these lime-stone quarries will also not in the meanwhile be permitted to rectify the defects pointed out in the orders issued by the District Mining Authorities but they may include the proposal for such rectification in the scheme or schemes which they may submit to the Bandyopadhyay Committee. We may however make it clear that non rectification of the defects pursuant to the notices issued by the District Mining Authorities shall not be taken advantage of by the State of Uttar Pradesh as a ground for terminating the lease or leases.

11. We may point out that so far as the lime-stone quarries at Sl. Nos. 17 to 20 in category B in the Bhargav Committee Report are concerned we are informed that they have already been closed down and no further direction therefore is necessary to be given in regard to them save and except in regard to removal of the lime-stone, dynamite and marble chips which may already have been mined and which may be lying at the site for which we are giving separate directions in one of the succeeding paragraphs in this Order.

12. The consequence of this Order made by us would be that lessees of lime-stone quarries which have been directed to be closed down permanently under this Order or which may be directed to be closed down permanently after consideration of the report of the Bandyopadhyay Committee, would be thrown out of business in which they have invested large sums of money and expanded considerable time and effort. This would undoubtedly cause hardship to them, but it is a price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment with minimal disturbance of ecological balance and without avoidable hazard to them and to their cattle, homes and agricultural land and undue affectation of air, water and environment. However, in order to mitigate their hardship, we would direct the Government of India and the State of Uttar Pradesh that whenever any other area in the State of Uttar Pradesh is thrown open for grant of lime-stone or dolomite quarrying, the lessees who are displaced as a result of this order shall be afforded priority in grant of lease of such area and intimation that such area is available for grant of lease shall be given to the lessees who are displaced so that they can apply for grant of lease of such area and on the basis of such application, priority may be given to them subject, of course, to their otherwise being found fit and eligible. We have no doubt that while throwing open new areas for grant of lease for lime-stone or dolomite quarrying, the Government of India and the State of Uttar Pradesh will take into account the considerations to which we have adverted in this Order.

13. We are conscious that as a result of this Order made by us, the workman employed in the lime-stone quarries which have been directed to be closed down permanently under this Order or which may be directed to be closed down permanently after consideration of the report of the Bandyopadhyay Committee, will be thrown out of employment and even those workmen who are employed in the lime-stone quarries which have been directed to be closed down temporarily pending submission of scheme or schemes by the lessees and consideration of such scheme or schemes by the Bandyopadhyay Committee, will be without work for the time being. But the lime-stone quarries which have been or which may be directed to be closed down permanently will have to be reclaimed and afforestation and soil conservation programme will have to be taken up in respect of such lie stone quarries and we would therefore direct that immediate steps shall be taken for reclamation of the areas forming part of such lime stone quarries with the help of the already available Eco-Task Force of the Department of Environment, Government of India and the workmen who are thrown out of employment in consequence of this Order shall, as far as practicable and in the shortest possible time, be provided employment in the afforestation and soil conservation programme to be taken up in this area.

14. There are several application before us for removal of lime-stone, dolomite and marble chips mined from the quarries and lying at the site and these applications also are being disposed of by this Order. So far as lime stone quarries classified as category A in the Bhargav Committee report and/or category 1 in the Working Group Report and falling outside the city limits of Mussorrie are concerned, we have permitted the lessees of these lime-stone quarries to carry on mining operations and hence they must be allowed to remove whatever minerals are lying at the site of these lime-stone quarries without any restriction whatsoever save and except hose prescribed by any statutes, rules or regulations and subject to payment of royalty. So far as the other lime-stone quarries are concerned, whether comprised in category A of Bhargav Committee Report or category 1 of the Working Group Report and falling within the city limits of Mussorie or falling within category B or category C of the Bhargav Committee Report or category 2 of the Working Group Report, there is a serious dispute between the lessees of these lime stone quarries on the one hand and the petitioners and the State of Uttar Pradesh on the other as to what is the exact quantity of minerals mined by the lessees and lying at the site. We had made an order on 15th December 1983 requiring the District Magistrate Dehradun to depute some officer either of his Department or of the Mining Department to visit the site of these lime-stone quarries for the purpose of assessing the exact quantity of lime-stone lying there and to report in this connection. The District Magistrate, Dehradun deputed the Sub-Divisional Magistrates of Mussoorie and Dehradun and Tehsildar (Quarry) Dehradun to inspect the 20 lime-stone quarries comprised in category C of the Bhargav Committee Report which had been ordered to be closed down under the directions of the Bhargav Committee and an affidavit was filed on behalf of the District Magistrate Dehradun, by Kedar Singh Arya, Tehsildar (Quarry) Dehradun, annexing a chart showing the details of the minerals mined by the lessees of those lime-stone quarries and lying and the site. Thereafter, when again the case came up for hearing before us on 5th January 1984, we, in order to allay any apprehensions on the part of the lessees that the District Authorities had not done their job correctly in assessing the quantity of minerals lying at the site, appointed a Committee of two officers, namely, Shri D. Bandyopadhyay and Director of Geology (Mines) Lucknow for the purpose of visiting the lime-stone quarries which had been directed to be closed down and to assess the quantity of minerals lying on the site of those lime-stone quarries after giving notice to the concerned lessees as also to the District Magistrate Dehradun and the representatives of the petitioners. Pursuant to this order made by us, Shri D. Bandyopadhyay and the Director of Geology (Mines) Locknow visited the lime-stone quarries comprised in category C of the Bhargav Committee report and directed to be closed down and assessed the quantity of minerals lying at the site of each of those lime-stone quarries. The quantity of minerals lying at the site, according to Shri D. Bandyopadhyay and the Director of Geology (Mines), was very much less than what was claimed by the lessees and it does appear that though these lime-stone quarries were directed to be closed down, illegal mining was being carried on clandestinely, because otherwise it is difficult to understand how the figures of the quantity of minerals lying at the site as assessed in December 1983 by the District Authorities became inflated when Shri D. Bandyopadhyay and Director of Geology (Mines) made their assessment in January 1984 and thereafter the figures again got inflated if the quantity now claimed by

the lessees as lying on the site is correct. We do not, however, propose to go into the question as to what was the precise quantity of mineral mined by the lessees of these limestone quarries and lying at the site at the time when these lime stone quarries were closed down under the directions of the Bhargav Committee. We would permit the lessees of the lime stone quarries to remove whatever minerals are found lying at the site or its vicinity, provided of course such minerals are covered by their respective leases and/or quarry permits. Such removal will be carried out and completed by the lessees within four weeks from the date of this Order and it shall be done in the presence of an officer not below the rank of Deputy Collector to be nominated by the District Magistrate, Dehradun, a gazetted officer from the Mines Department, nominated by the Director of Mines and a public spirit individual in Dehradun, other than Mr. Avdesh Kaushal, to be nominated by Shri D. Bandyopadhyay. These nominations shall be made within one week from today and they may be changed from time to time depending on the exigencies of the situation. Notice of intended removal of minerals lying at the site shall be given by the lessees to the District Magistrate Dehradun, Director of Mines Dehradun and the person nominated by Shri D. Bandyopadhyay. No part of the minerals lying at the site shall be removed by the lessees except in the presence of the above mentioned three persons. The lessees will on the expiry of the period of four weeks submit a report to this Court setting out the precise quantities of minerals removed by them from the site pursuant to this Order made by us. The lessees shall not be entitled to remove any minerals after the expiration of the period of four weeks.

15. Before we close we wish to express our sense of appreciation for the very commendable assistance rendered to us by Shri Pramod Dayal, learned advocate appearing on behalf of some of the lessees. He undertook the responsibility of arranging the various affidavits and written submissions in a proper and systematic manner and we must confess that but for the extremely able assistance rendered by him, it would not have been possible for us to complete the hearing of this case satisfactorily and to pass this order within such a short time. We would direct that the Government of India and the State of Uttar Pradesh should each pay a sum of Rs.5,000/- to Shri Pramod Dayal for the work done by him. We may point out that this payment to Shri Pramod Dayal is not in lieu of costs but is an additional remuneration which we are directing to be paid in recognition of the very valuable assistance rendered by him to the Court.

Order accordingly.

State of Bihar v. Banshi Ram Modi
AIR 1985 Supreme Court 814 (From: Patna)
Civil Appeal No. 2349 of 1984, D/-7-5-1985
A. P. Sen and E. S. Venkataramiah, JJ.

Forest (Conservation) Act (69 of 1980), S. 2 – Mining operation – Approval of Central Govt. – Forest area already broken up or cleared before commencement of Act – Prior approval of Central Govt. for carrying on mining operations in such area not necessary.

State of Maharashtra v. Baburao Ravaji Mharulkar
AIR 1985 Supreme Court (1) 104
Criminal Appeal No. 460 of 1984, D/-26-10-1984
O. Chinnappa Reddy, A.P. Sen and E.S. Venkataramiah, JJ.

(A) Prevention of Food Adulteration Rules (1955), R.5, Appendix B, Para A. 11, 02. 08 - Minimum standard of 10 cent of milk fat prescribed for ice cream - Not impossible of compliance. Criminal Appeal No. 440 of 1982, D/- 14-9-1982 (Bom) Reserved.

(B) Prevention of Food Adulteration Act (37 of 1954), Ss. 16(1), Proviso 2 (1a) (m) - Prevention of Food Adulteration Rules (1955), R. 5, Appendix B, Para A. 11, 02. 08 - Ice cream sold by accused containing 5.95 per cent of milk fat as against prescribed 10% - Ice cream is adulterated - Accused liable to be convicted under S 16 - However in view of facts that offence was committed years back, it was his first offence and the appeal was against acquittal, Supreme Court imposed minimum sentence of imprisonment prescribed by proviso to S. 16(1)

Tulsiram v. State of M.P
AIR 1985 Supreme Court (1) 299
Petition for Special Leave to Appeal (Criminal) No. 3038 of 1983, D/-11-10-1984
O. Chinnappa Reddy and V. Khalid, JJ.

(A) Prevention of Food Adulteration Act (37 of 1954), Ss. 11, 13 - Prevention of Food Adulteration Rules, 1955, R. 9-A – Sending of Public Analyst's report to vender - Expression "Immediately" in R. 9-A conveys sense of continuity rather than urgency – Non compliance with R.9-A is not fatal.

(B) Prevention of Food Adulteration Act (37 of 1954), S. 16 (1) (a) (i) - Prevention of Food Adulteration Rules, 1955, R.44(e) – Sale of edible oil as soyabean oil – Cotton seed oil mixed with soyabean oil – Vendor is liable to conviction irrespective of whether mixture has injurious effect or not.

B. Venkatappa v. B. Lovis
AIR 1986 Andhra Ppadesh 239
Second Appeal No. 1255 of 1980, D/-10-2-1984
Ramaswamy, J.

Tort – Nuisance - Erection of chimney with holes emitting smoke - It is actionable wrong.

When smoke emanates it will also pass through the holes in the chimney and the emanating smoke will be injurious to the health of neighbours. It will also cause discomfort in the enjoyment of the property and injurious to health as well. The maxim *cujusest solum ejus est usque ad coelum* will equally apply to the enjoyment of open space. Emanating smoke thus constitutes actionable nuisance furnishing cause of

action for a suit. It follows therefore that when the defendant erects a chimney with holes emitting smoke through them towards the side of the plaintiff an actionable wrong is committed by the defendant.

Citizens Action Committee v. C.S. Mayo (General) Hospital, Nagpur
AIR 1986 Bombay 136
Writ Petition Nos. 1915 and 1916 of 1984, D/-19-10-1984
Masodkar and Desh Pande, JJ.

Constitution of India, Art. 226 – City of Nagpur Corporation Act (2 of 1950) S. 57 – Nature and extent of jurisdiction under Art. 226 – High Court has jurisdiction to issue appropriate directions and to give reliefs to citizens in respect of civic amenities – Furtherance of public interest is the sole touchstone – S. 57 (2) and other relevant statute do not stand in the way of High Court while exercising its extra-ordinary jurisdiction. (Point not taken and not disputed).

Janki Nathubhai Chhara v. Sardarnagar Municipality, Sarder
AIR 1986 Gujarat 49
Special Civil Application No. 4916 of 1984, D/ -18-1-1985
P. S. Poti, C. J. and I. C. Bhatt, J.

Constitution of India, Arts. 226 and 14 - Public interest litigation - Matter involving health of area - Petitioners belonging to Chhara community and living in unhygienic area which becomes submerged during monsoon - High Court persuaded Municipality and State Govt. to provide permanent sewerage and drainage system. (Civil P.C. (5 of 1908), O.23, R.3).

M/s. Delhi Bottling Co. Pvt. Ltd., New Delhi v. Central Board for the Prevention and Control of Water Pollution, New Delhi
AIR 1986 Delhi 152
Criminal Misc. (Main) No. 867 of 1984, D/-7-8-1985
H. C. Goel, J.

Water (Prevention and Control of Pollution) Act (6 of 1974), Ss. 21(5), 33 – Order under S. 33 restraining occupier from discharging effluents – Sample must be taken in accordance with sub-sec. (5) of S. 21.

M/s. Sreenivasa Distilleries v. S. R. Thyagarajan
AIR 1986 Andhra Pradesh 328
Civil Revision Petition No. 1375 of 1984, D/-29-11-1985
Kodandaramayya, J.

Water (Prevention and Control of Pollution) Act (6 of 1974), S. 58 – Suit for granting permanent injunction restraining defendant from letting noxious fluids into river – Section does not bar jurisdiction of a civil Court to entertain such a suit. (Civil P. C. (5 of 1908), S. 9)

Olga Tellis v. Bombay Municipal Corporation
and
Vayyapuri Kuppusami v. State of Maharashtra
AIR 1986 Supreme Court 180
Writ Petitions Nos. 4610-4612 and 5068-5079 of 1981, D/-10-7-1985
Y. V. Chandrachud, C. J., S. Murtaza Fazal Ali, V. D. Tulzapurkar, O. Chinnappa Reddy and A. Varadarajan, JJ.

(A) Evidence Act (1 of 1872), S. 115 - Fundamental rights - No estoppel against or waiver of. (Constitution of India, Part III (General), Arts. 14, 16, 19, 21, 226).

There can be no estoppel against the Constitution. The Constitution is not only the paramount law of the land but, it is the source and sustenance of all laws. Its provisions are conceived in public interest and are intended to serve a public purpose. The doctrine of estoppel is based on the principle that consistency in word and action imparts certainty and honesty to human affairs. This principle can have no application to representations made regarding the assertion or enforcement of fundamental rights. There can also be no waiver of fundamental rights. No individual can barter away the freedoms conferred upon him by the Constitution. A concession made by him in a proceeding, whether under a mistake of law or otherwise, that he does not possess or will not enforce any particular fundamental right, cannot create an estoppel against him in that or any subsequent proceeding. Such a concession, if enforced, would defeat the purpose of the Constitution. Were the argument of estoppel valid, and all-powerful State could easily tempt an individual to forgo his precious personal freedoms on promise of transitory, immediate benefits. AIR 1959 SC 149, Rel. on.

(Paras 28, 29)

Merely because an undertaking was given before the High Court in writ proceedings on behalf of the hut and pavement dwellers that they did not claim any fundamental right to put up huts on pavements or public roads and since they had given an undertaking to the High Court that they will not obstruct the demolition of the huts after certain date they could not be stopped from contending before the Supreme Court that the huts constructed by them on the pavements cannot be demolished because of their right to livelihood, which is comprehended within the fundamental right to life guaranteed by Art. 21 of the Constitution.

(Paras 30)

(B) Constitution of India, Arts. 32, 21 - Writ petition to Supreme Court challenging removal of huts from pavements – Maintainability - Plea that procedure prescribed under S. 314 of the Bombay Municipal Corporation Act is arbitrary, unfair and is not "procedure established by law" within Art. 21 - Held, petition is maintainable. (Bombay Municipal Corporation Act (3 of 1888), S. 314). AIR 1962 SC 1621, Rel. on.

(Para 31)

(C) Constitution of India, Arts. 21, 39 (a), 41, 226 - Right to life - Includes right to livelihood - Deprivation of right to livelihood except according to just and fair procedure established by law - Can be challenged as violative of Art. 21.

The right to life includes the right to livelihood. The sweep of the right of life conferred by Art. 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life liveable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life.

(Para 32)

In view of the fact that Arts. 39 (a) and 41 require the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Art. 21 AIR 1960 SC 932, Disting.

(Para 33)

(D) Constitution of India, Art. 21 - Procedure established by law - It must be reasonable and must conform to norms of justice and fair play - Statute prescribing procedure impermissible under Constitution - Is liable to be struck down.

The procedure prescribed by law for the deprivation of the right conferred by Art. 21 must be fair, just and reasonable. Just as a mala fide act has no existence in the eye of law, even so, unreasonableness vitiates law and procedure alike. It is therefore essential that the procedure prescribed by law for depriving a person of his fundamental right must conform to the norms of justice and fair play. Procedure, which is unjust or unfair in the

circumstances of a case, attracts the vice of unreasonableness, thereby vitiating the law which prescribes that procedure and consequently, the action taken under it. Any action taken by a public authority which is invested with statutory powers has therefore, to be tested by the application of two standards: the action must be within the scope of the authority conferred by law and secondly, it must be reasonable. If any action, within the scope of the authority conferred by law, is found to be unreasonable, it must mean that the procedure established by law under which that action is taken is itself unreasonable. The substance of the law cannot be divorced from the procedure which it prescribes for, how reasonable the law is, depends upon how fair the procedure is prescribed by it. If a law is found to direct the doing of an act which is forbidden by the constitution or to compel, in the performance of an act, the adopting of a procedure which is impermissible under the constitution, it would have to be struck down.

(Paras 39, 40, 44)

(E) Bombay Municipal Corporation Act (3 of 1888), Ss. 314, 312 (1), 313 (1) (a) - Removal of encroachments from pavements and public streets - Procedure prescribed under the Act is reasonable. (Constitution of India Art 21).

The authentic empirical data compiled by agencies, official and non-official no doubt reveal that pavement and slum dwellers choose a pavement or a slum in the vicinity of their place of work and for them, to lose the pavement or the slum is to lose the job. It being issue of general public importance reliable data in that regard in each individual case is not necessary. It is apparent that their eviction from pavements and slums will lead to deprivation of their livelihood and consequently to the deprivation of life. But the Constitution does not put an absolute embargo on the deprivation of life or personal liberty. By Art. 21, such deprivation has to be according to procedure established by law. In the first place, footpaths or pavements are public properties which are intended to serve the convenience of the general public. They are not laid for private use and indeed their use for a private purpose frustrates the very object for which they are carved out from portions of public streets.

(Paras 35, 36, 37)

Sections 312 (1), 313 (1) (a) and 314 empower the Municipal Commissioner to cause to be removed encroachments on footpaths or pavements over which the public have a right of passage or access. But the procedure prescribed by S. 314 of the Bombay Municipal Corporation Act for removal of encroachments on the footpaths or pavements over which the public has the right of passage or access cannot be regarded as unreasonable, unfair or unjust. It cannot be said that the claim of the pavement dwellers to put up constructions on pavements and that of the pedestrian to make use of the pavements for passing and re-passing are competing claims and that, the former should be preferred to the later.

(Para 43)

(F) Constitution of India, Art. 21 - Procedure established by law - Reasonableness - Test - Depends on facts of each case.
(Para 42)

(G) Bombay Municipal Corporation Act (3 of 1888), S. 314 - Eviction of pavement dwellers - Giving opportunity of hearing is normal rule - Municipal Commissioner can dispense with previous notice in special circumstances - No useful purpose will be served by giving notice cannot be a ground for denying notice - Encroachment on pavements - Not criminal trespass - Law of torts also requires notice to trespasser before eviction. (Constitution of India, Art. 226).

Considered in its proper perspective, S. 314 is in the nature of an enabling provision and not of a compulsive character. It enables the Municipal Commissioner, in appropriate cases, to dispense with previous notice to persons who are likely to be affected by the proposed action. It does not require and, cannot be read to mean that, in total disregard of the relevant circumstances pertaining to a give situation, the Commissioner must cause the removal of an encroachment without issuing previous notice. S. 314 confers on the Commissioner the discretion to cause an encroachment to be removed with or without notice That discretion has to be exercised in a reasonable manner so as to comply with the constitutional mandate that the procedure accompanying the performance of a public act must be fair and reasonable. It must further be presumed that, while vesting in the Commissioner the power to act without notice, the Legislature intended that the power should be exercised sparingly and in case or urgency which brook no delay. In all other cases, no departure from the audi alteram partem rule ('Hear the other side') could be presumed to have been intended. S. 314 is so designed as to exclude the principles of natural justice by way of exception and not as a general rule. There are situations which demand the exclusion of the rules of natural justice by reason of diverse factors like time, place, the apprehended danger and so on. A departure from audi alteram partem may be presumed to have been intended by the Legislature only in circumstances which warrant it. Such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence. It may be true to say that in the generality of cases, persons who have committed encroachment on pavements or on other public properties may not have an effective answer to give. It is a notorious fact of contemporary life in metropolitan cities, that no person in his senses would opt to live on a pavement or in a slum, if any other choice were available to him. But, though this is so the decision to dispense with notice cannot be founded upon a presumed impregnability of the proposed action. The proposition that notice need not be given of a proposed action because, there can possibly be no answer to it, is contrary to the well recognized understanding of the real import of the rule of hearing. That proposition overlooks that justice must not only be done but must manifestly be seen to be done and confuses one for the other. The appearance of injustice is the denial of justice. The instrumental facet of the right of hearing consists in the means which it affords of assuring that the public rules of conduct, which result in benefits and prejudices alike, are in fact accurately and consistently followed.

(Paras 44 to 47)

It is true that the pavement dwellers and slums dwellers are using pavements and other public properties for an unauthorized purpose. But, their intention or object in doing so is not to "commit an offence or intimidate, insult or annoy any person" which is the gist of the offence of 'Criminal trespass' under S. 441 of the Penal Code. They manage to find a

habitat in places which are mostly filthy or marshy, out of sheer helplessness. Consequently the opportunity of hearing cannot be denied to them on ground that they are trespassers. Trespass is a tort. But even the law of torts requires that though a trespasser may be evicted forcibly, the force used must be no greater than what is reasonable and appropriate to the occasion and, what is even more important, the trespasser should be asked and given a reasonable opportunity to depart before force is used to expel him. Besides, under the Law of Torts, necessity is a possible defense, which enables a person to escape liability on the ground that the acts complained of are necessary to prevent greater damage, inter alia, to himself.

(Para 49)

Held, in the instant case that the opportunity which was denied to slum dwellers and pavement dwellers by the Mpl. Commissioner was granted by the Supreme Court in an ample measure, both sides having made their contentions elaborately on facts as well as on law. It was further held that the Commissioner was justified in directing the removal of the encroachments committed on pavements, footpaths or accessory roads. Direction was given by the Court not to evict the petitioners till 31-10-1985.

(Para 51)

Cases Referred:	**Chronological Paras**
AIR 1981 SC 136 (1981) 1 SCR 746	48, 51
AIR 1981 SC 746 (1981) 2 SCR 516 1981 Cri LJ 306	39, 42
AIR 1980 SC 470 (1980) 2 SCR 913	39
AIR 1980 SC 1579 (1980) 2 SCR 557 1980 Cri LJ 1099	39
AIR1980 SC 1992 (1980) 3 SCR 1338	39
AIR 1979 SC 745 (1979) 2 SCR 1085 1979 Cri LJ 659	39
AIR 1979 SC 1360 (1980) 1 SCC 81 1979 Cri LJ 1036	39
AIR 1979 SC 1369 (1979) 3 SCR 532 1979 Cri LJ 1045	39
AIR 1979 SC 1628 (1979) 3 SCR 1014	41
AIR 1978 SC 597 (1978) 2 SCR 621	39
AIR 1978 SC 1548 (1979) 1 SCR 192 1978 Cr LJ 1678	39
AIR 1978 SC 1675 (1979) 1 SCR 392 1978 Cri LJ 1741	39
AIR 1977 SC 2313 (1978) 1 SCR 563	48
AIR 1974 SC 555 (1974) 2 SCR 348	39
(1972) 32 Law Ed 2d 556 407 US 67 Margarita Fuentes et al v Robert L. Shevin	48
(1970) 1 Ch 345 (1969) 2 All ER 274 (1969) 2 WLR 1294, John v Rees	48
(1970) 397 US 254 25 Law Ed 2d 287 Goldberg v Kelly	47
AIR 1967 SC 1 (1966) 3 SCR 744	31
1964 AC 40 (1963) 2 WLR 935 (1963) 2 All ER 66, Ridge v. Baldwin	48
AIR 1963 SC 1295: (1964) 1 SCR 332: 1963 (2) Cri LJ 329	32
AIR 1962 SC 1621 (1963) 1 SCR 778	31
(1961) 3 All ER 621 (1961) 3 WLR 650 Annamunthodo v. Oilfield Workers Trade Union	48
AIR 1960 SC 932 (1960) 3 SCR 499	34
AIR 1959 SC 149 (1959) Supp (1) SCR 528	29

(1959) 3 Law Ed 2d 1012: 359 US 535 Viterelli v Seaton	40
(1957) 66 Yale LJ 319	47
(1954) 347 MD 442 Baksey v. Board of Regents	21, 32
(1950) 341 US 123 95 Law Ed 817, Joint Antifascist Refugee Committee v Megrath	47
(1900) 1 QB 752 82 LT 321 69 LJ QB 511 Hickman v Maisey	43
(1877) 94 US 113 24 Law Ed 77 Munn v. Illinois	32

CHANDRACHUD, C. J.: - These Writ Petitions portray the plight of lakhs of persons who live on pavements and in slums in the city of Bombay. They constitute nearly half the population of the city. The first group of petitions relates to pavement dwellers while the second group relates to both pavement and Basti or slum dwellers. Those who have made pavements their homes exist in the midst of filth and squalor which has to be seen to be believed. Rabid dogs in search of stinking meat and cats in search of hungry rats keep them company. They cook and sleep where they ease, for no conveniences are available to them. Their daughters come of age bathe under the nosy gaze of passers by, unmindful of the feminine sense of bashfulness. The cooking and washing over, women pick lice form each other's hair. The boys beg. Men folk, without occupation, snatch chains with the connivance of the defenders of law and order; when caught, if at all, they say: "Who doesn't commit crimes in this city?"

2. It is these men and women who have come to this Court to ask for a judgment that they cannot be evicted from their squalid shelters without being offered alternative accommodation. They rely for their rights on Art. 21 of the Constitution which guarantees that no person shall be deprived of his life except according to procedure established by law. They do not contend that they have a right to live on the pavements. Their contention is that they have a right to live, a right which cannot be exercised without the means of livelihood. They have no option but to flock to big cities like Bombay, which provide the means of bare subsistence. They only choose a pavement or a slum which is nearest to their place of work. In a word their plea is that the right to life is illusory without a right to the protection of the means by which alone life can be lived. And the right of life can only be taken away or abridged by a procedure established by law, which has to be fair and reasonable, not fanciful or arbitrary such as is prescribed by the Bombay Municipal Corporation Act or the Bombay Police Act. They also rely upon their right to reside and settle in any part of the country which is guaranteed by Art. 19 (1) (e).

3. The three petitioners in the group of Writ Petitions 4610-4612 of 1981 are a journalist and two pavement dwellers. One of these two pavement dwellers, P. Angamuthu, migrated from Salem, Tamil Nadu, to Bombay in the year 1961 in search of employment. He was a landless labourer in his home town but he was rendered jobless because of drought. He found a job in a Chemical Company at Dahisar, Bombay, on a daily wage of Rs. 23/- per day. A slum-lord extorted a sum of Rs. 2,500/- from him in exchange of a shelter of plastic sheets and canvas on a pavement on the Western Express Highway, Bombay. He lives in it with his wife and three daughters who are 16, 13 and 5 years of age.

4. The second of the two pavement dwellers came to Bombay in 1969 form the Sangamner, District Ahmednagar, Maharashtra. He was a cobbler earning 7 to 8 rupees a day, but his so-called house in the village fell down. He got employment in Bombay as a Badli Kamgar for Rs. 350/- per month. He was lucky in being able to obtain a "dwelling house" on a pavement at Tulsiwadi by paying Rs. 300/- to a goonda of the locality. The bamboos and the plastic sheets cost him Rs. 700.

5. On July 13, 1981, the then Chief Minister of Maharashtra, Shri A.R. Antulay, made an announcement which was given wide publicity by the newspapers that all pavement dwellers in the city of Bombay will be evicted forcibly and deported to their respective places of origin or removed to places outside the city of Bombay. The Chief Minister directed the Commissioner of Police to provide the necessary assistance to respondent 1, the Bombay Municipal Corporation to demolish the pavement dwellings and deport the pavement dwellers. The apparent justification which the Chief Minister gave to his announcement was; "It is a very inhuman existence. These structures are flimsy and open to the elements. During the monsoon there is no way these people can live comfortably."

6. On July, 23 1981 the pavement dwelling of P. Angamuthu was demolished by the officers of the Bombay Municipal Corporation. He and the members of his family were put in a bus for Salem. His wife and daughters stayed back in Salem but he returned to Bombay in search of a job and got into a pavement house once again. The dwelling of the other petitioner was demolished even earlier in January, 1980 but he rebuilt it. It is like a game of hide and seek. The Corporation removes the ramshackle shelters on the pavements with the aid of police, the pavement dwellers flee to less conspicuous pavements in by-lanes and when the officials are gone, they return to their old habitats. Their main attachment to those places is the nearness thereof to their place of work.

7. In the other batch of Writ Petitions Nos. 5068-79 of 1981, which was heard along with the petitions relating to pavement dwellers, there are 12 petitioners. The first five of those are residents of Kamraj Nagar, a basti or habitation which is alleged to have come into existence in about 1960-61, near the Western Express Highway, Bombay. The next four petitioners were residing in structures constructed off the Tulsi Pipe Road, Mahim, Bombay. Petitioner No. 10 is the People's Union of Civil Liberties Petitioner No. 11 is the Committee for the Protection of Democratic Rights while Petitioner No. 12 is a Journalist.

8. The case of the petitioners in the Kamraj Nagar group of cases is that there are over 500 hutments in this particular basti which was built in about 1960 by persons who were employed by a Construction company engaged in laying water pipes along the Western Express Highway. The residents of Kamrak Nagar are municipal employees, factory or hotel workers, construction supervisors and so on. The resident of the Tulsi Pipe Road hutments claim that they have been living there for 10 to 15 years and that, they are engaged in various small trades. On hearing about the Chief Minister's announcement, they filed a writ petition in the High Court of Bombay for an order of injunction restraining the officer of the State Government and the Bombay Municipal Corporation from implementing the directive of the Chief Minister. The High Court granted an ad interim injunction to be in force until July, 21, 1981. On that date, respondents agreed

that the huts will not be demolished until October, 15, 1981. However, it is alleged, on July, 23, 1981 the petitioners were huddled into State Transport buses for being deported out of Bombay. Two infants were born during the deportation but that was set off by the death of two others.

9. The decision of the respondents to demolish the huts is challenged by the petitioners on the ground that it is violative of Arts. 19 and 21 of the Constitution. The petitioners also ask for a declaration that the provisions of Ss. 312, 313 and 314 of the Bombay Municipal Corporation Act, 1888 are invalid as violating Arts. 14, 19 and 21 of the Constitution. The relief asked for in the two groups of writ petitions are that the respondents should be directed to withdraw the decision to demolish the pavement dwelling and the slum hutments and, where they are already demolished, to restore possession of the sites to the former occupants.

10. On behalf of the Government of Maharasthra, a counter-affidavit has been filed by V. S. Munje, under Secretary in the Department of Housing. The counter-affidavit meets the case of the petitioners thus. The Government of Maharashtra neither proposed to deport any pavement dweller out of the city of Bombay nor did it, in fact, deport anyone. Such of the pavement dwellers, who expressed their desire in writing that they wanted to return to their home towns and who sought assistance from the Government in that behalf were offered transport facilities up to the nearest rail head and were also paid railway fare or bus fare and incidental expenses for the onward journey. The Government of Maharashtra had issued instructions to its officers to visit specific pavements on July, 23, 1981 and to ensure that no harassment was caused to any pavement dweller. Out of 10,000 hutment-dwellers who were likely to be affected by the proposed demolition of hutments constructed on the pavements, only 1024 persons opted to avail of the transport facility and the payment of incidental expenses.

11. The counter-affidavit says that no person has any legal right to encroach upon or to construct any structure on a foot-path, public-street or on any place over which the public has a right of way. Numerous hazards of health and safety arise if action is not taken to remove such encroachments. Since no civic amenities can be provided on the pavements, the pavement dwellers use pavements or adjoining streets for easing themselves. Apart from this some of the pavement dwellers indulge in anti-social acts like chain-snatching, illicit distillation of liquor and prostitution. The lack of proper environment leads to increase criminal tendencies, resulting in more crime in the cities. It is, therefore, in public interest that public places like pavements and paths are not encroached upon. The Government of Maharashtra provides housing assistance to the weaker sections of the society like landless labourers and persons belonging to low income groups, within the framework of its planned policy of the economic and social development of the State. Any allocation for housing has to be made after balancing the conflicting demands from various priority sectors. The paucity of resources is a restraining factor on the ability of the State to deal effectively with the question of providing housing to the weaker sections of the society. The Government of Maharaashtra has issued policy directives that 75 per cent of the housing program should be allocated to the lower income groups and the weaker sections of the society. One of the objects of the State's planning policy is to

ensure that the influx of population from the rural to the urban areas is reduced in the interest of a proper and balanced social and economic development of the State and of the country. This is proposed to be achieved by reversing the rate of growth of metropolitan cities and by increasing the rate of growth of small and medium towns. The State Government has therefore devised an Employment Guarantee scheme to enable the rural population, which remains unemployed or underemployed at certain periods of the year to get employment during such periods. A sum of about Rs. 180 crores was spent on that scheme during the years 1979-80 and 1980-81. On October 2, 1980 the State Government launched two additional schemes for providing employment opportunities for those who cannot get work due to old age or physical infirmities. The State Government has also launched a scheme for providing self-employment opportunities under the 'Sanjay Gandhi Niradhar Anudan Yojana'. A monthly pension or Rs. 60 is paid to those who are too old to work or are physically handicapped. In this scheme about 1,56,943 persons have been identified and a sum of Rs. 2.25 crores was disbursed. Under another scheme called 'Sanjay Gandhi Swawalamban Yojana' interest-free loans, subject to a maximum of Rs. 2,500- were being given to persons desiring to engage themselves in gainful employment of their own. About 1,75,000 persons had benefited under this scheme, to whom a total sum of Rs. 5.82 crores was disbursed by way of loan. In short, the objective of the State Government was to place greater emphasis on providing infrastructural facilities to small and medium towns and to equip them so that they could act as growth and service centres for the rural hinterland. The phenomenon of poverty which is common to all developing countries has to be tackled on an all-India basis by making the gains of development available to all sections of the society through a policy of equitable distribution of income and wealth. Urbanization is a major problem facing the entire country, the migration of people from the rural to the urban areas being a reflection of the colossal poverty existing in the rural areas. The rural poverty cannot, however, be eliminated by increasing the pressure of population on metropolitan cities like Bombay. The problem of poverty has to be tackled by changing the structure of the society in which there will be a more equitable distribution of income and greater generation of wealth. The State Government has stepped up the rate of construction of tenements for the weaker sections of the society from 2500 to 9500 per annum.

12. It is denied in the counter-affidavit that the provision of Ss. 312, 313 and 314 of the Bombay Municipal Corporation Act violate the Constitution. Those provisions are conceived in public interest and great care is taken by the authorities to ensure that no harassment is caused to any pavement dweller while enforcing the provision of those sections. The decision to remove such encroachments was taken by the Government with specific instructions that very reasonable precaution ought to be taken to cause the least possible inconvenience to the pavement dwellers. What is more important, so the counter-affidavit says the Government of Maharashtra had decided that, on the basis of the census carried out in 1976, pavement dwellers who would be uprooted should be offered alternate developed pitches at Malvani where they could construct their own hutments. According to that census, about 2,500 pavement hutments only were then in existence.

13. The counter-affidavit of the State Government describes the various steps taken by the Central Government under the Five Year Plan of 1978-83, in regard to the housing programs. The plan shows that the inadequacies of Housing policies in India have both quantitative and qualitative dimensions. The total investment in housing shall have to be of the magnitude of Rs. 2790 crores, if the housing problem has to be tackled even partially.

14. On behalf of the Bombay Municipal Corporation, a counter-affidavit has been filed by Shri D.M. Sukthankar, Municipal Commissioner of Greater Bombay. That affidavit shows that he had visited the pavements on the Tulsi Pipe Road (Senapati Bapat Marge) and the Western Express High Way, Vile Parle (East), Bombay. On July, 23, 1981, certain hutments on these pavements were demolished under S. 314 of the Bombay Municipal Corporation Act. No prior notice of demolition was given since the section does not provide for such notice. The affidavit denies that the intense speculation in land prices, as alleged, owes its origin to the High rise buildings which have come up in the city of Bombay. It is also denied that there are vast vacant pieces of land in the city which can be utilized for housing the pavement dwellers. S 61 of the B.M.C Act lays down the obligatory duties of the Corporation under Clauses (c) (d) of the said section; it is the duty of the Corporation to remove ex-cremations matters, refuse and rubbish and to take measures for abatement of every kind of nuisance. Under Clause (g) of that section, the Corporation is under an obligation to take measures for preventing and checking the spread of dangerous diseases. Under Clause (o), obstructions and projections in or upon public streets and other public places have to be removed. S. 63 (k) empowers the Corporation to take measures to promote public safety, health or convenience not specifically provided otherwise. The object of Ss. 312 to 314 is to keep the pavements and foot-paths free from encroachment so that the pedestrians do not have to make use of the streets on which there is heavy vehicular traffic. The pavement dwellers answer the nature's call, bathe, cook and wash their clothes and utensils on the foot-paths and on parts of public streets adjoining the footpaths. Their encroachment creates serious impediments in repairing the roads, footpaths and drains. The refusal to allow the petitioners and other persons similarly situated to use foot-paths as their abodes is, therefore, not unreasonable, unfair, or unlawful. The basic civic amenities, such as drainage, water and sanitation, cannot possibly be provided to the pavement dwellers. Since the pavements are encroached upon, pedestrians are compelled to walk on the streets, thereby increasing the risk of traffic accidents and impending the free flow of vehicular movement. The Municipal Commissioner disputes in his counter affidavit that any fundamental right of the petitioners is infringed by removal of the encroachment committed by them on public property, especially the pavements. In this behalf, reliance is placed upon an order dated July, 27, 1981 of Lentin J. of the Bombay High Court, which records that counsel for the petitioners had stated expressly on July, 24, 1981 that no fundamental right could be claimed to put up a dwelling on public foot-paths and public roads.

15. The Municipal Commissioner has stated in his counter-affidavit in Writ Petitions 5068-79 of 1981 that the huts near the Western Express Highway, Vile Parle, Bombay, were constructed on an accessory road which is a part of the Highway itself. These

hutments were never regularized by the Corporation and no registration numbers were assigned to them.

16. In answer to the Municipal Commissioner's counter affidavit, petitioner No 12, Prafullachandra Bidwai who is a journalist, has filed a rejoinder asserting that Kamraj Nagar is not located on a foot-path or a pavement. According to him, Kamraj Nagar is a basti off the Highway, in which the huts are numbered, the record in relation to which is maintained by the Road Development Department and the Bombay Municipal Corporation. Contending that petitioners 1 to 5 have been residing in the said basti for over 20 years, he reiterates that the public has no right of way in or over the Kamraj Nagar. He also disputes that the huts on the foot-paths cause any obstruction to the pedestrians or to the vehicular traffic or that those huts are a source of nuisance or danger to public health and safety. His case in paragraph 21 of his reply-affidavit seems to be that since the foot-paths are in the occupation of pavement dwellers for a long time, foot-paths have ceased to be foot-paths. He says that the pavement dwellers and the slum or basti dwellers, who number about 47.7 lakhs constitute about 50 per cent of the total population of greater Bombay, that they supply the major work force for Bombay from menial jobs to the most highly skilled jobs, that they have been living in the hutments for generations, that they have been making a significant contribution to the economic life of the city and that, therefore, it is unfair and unreasonable on the part of the State Government and the Municipal Corporation to destroy their homes and deport them : A home is a home wherever it is. The main theme of the reply affidavit is that "The slum dwellers are the sine qua non of the city. They are entitled to a quid pro quo." It is conceded expressly that the petitioners do not claim any fundamental right to live on the pavements. The right claimed by them is the right to live, at least to exist.

17. Only two more pleadings need be referred to, one of which is an affidavit of Shri Anil V. Gokak, Administrator of Maharashtra Housing and Areas Development Authority, Bombay, who was then holding charge of the post of Secretary, Department of Housing. He filed an affidavit in answer to an application for the modification of an interim order which was passed by this Court on October, 19, 1981. He says that the legislature of Maharashtra had passed the Maharashtra Vacant Lands (Prohibition of Unauthorized Occupation and Summary Eviction) Act, 1975 in pursuance of which the Government had decided to compile a list of slums which were required to be removed in public interest. It was also decided that after a spot inspection, 500 acres of vacant land in and near the Bombay Suburban District should be allocated for re-settlement of the hutment dwellers who were removed from the slums. A Task Force was constituted by the Government for the purpose of carrying out of a census of the hutments standing on land belonging to the Government of Maharashtra, the Bombay Municipal Corporation and the Bombay Housing Board. A census was accordingly, carried out on January, 4, 1976 by deploying about 7,000 persons to enumerate the slum dwellers spread over approximately 850 colonies all over Bombay. About 67 per cent of the hutment dwellers from a total of about 2,60,000 hutments produced photographs of the heads of their families, on the basis of which hutments were unnumbered and their occupants were given identity cards. It was decided that slums which were in existence for a long time and which were improved and developed would not normally be demolished unless the

land was required for a public purpose. In the event that the land was so required, the policy of the State Government was to provide alternative accommodation to the slum dwellers who were censured and possessed identity cards. This is borne out by a circular of the Government dated February, 4, 1976 (No. SIS 1176, D. 41). Shri Gokak says that the State Government has issued instructions directing, inter alia, that "action to remove the slums excepting those which are on the foot-paths or roads or which are new or casually located should not, therefore, be taken without obtaining approval from the Government to the proposal for the removal of such slums and their rehabilitation". Since, it was never the policy of the Government to encourage construction of hutments on foot-paths, pavements or other places over which the public has a right of way, no census of such hutments was ever intended to be conducted. But sometime in July, 1981, when the Government officers made an effort to ascertain the magnitude of the problem of evicting pavement dwellers, it was discovered that some persons occupying pavements carried census cards of 1976. The Government then decided to allot pitches to such occupants of pavements.

18. The only other pleading which deserves to be noticed is the affidavit of the journalist petitioner, Ms. Olga Tellis, in reply to the counter-affidavit of the Government of Maharashtra. According to her, one of the important reasons of the emergence and growth of squatter-settlements in the Metropolitan cities in India is that the Development and Master Plans of most of the cities have not been adhered to. The density of population in the Bombay Metropolitan Region is not high according to the Town Planning Standards. Difficulties are caused by the fact that the population is not evenly distributed over the region, in a planned manner. New constructions of commercial premises, small-scale industries and entertainment houses in the heart of the city, have been permitted by the Government of Maharashtra contrary to law and even residential premises have been allowed to be converted into commercial premises. This coupled with the fact that the State Government has not shifted its main offices to the northern region of the city, has led to the concentration of the population in the southern region due to the availability of job opportunities in that region. Unless economic and leisure activity is decentralized, it would be impossible to find a solution to the problems arising out of the growth of squatter colonies. Even if squatters are evicted, they come back to the city because it is there that job opportunities are available. The alternate pitches provided to the displaced pavement dwellers on the basis of the so-called 1976 census, are not an effective means to their resettlement because, those sites are situated far away from the Malad Railway Station involving cost and time which are beyond their means. There are no facilities available at Malavani like schools and hospitals, which drive them back to the stranglehold of the city. The permission granted to the 'National Centre of Performing Arts' to construct an auditorium at the Nariman Point, Backbay Reclamation is cited as a 'gross' instance of the short sighted, suicidal and discriminatory policy of the Government of Maharashtra. It is as if the sea is reclaimed for the construction of business and entertainment houses in the centre of the city, which creates job opportunities to which the homeless flock. They work therein and live on pavements. The grievance is that as a result of this imbalance, there are not enough jobs available in the northern tip of the city. The improvement of living conditions in the slums and the regional distributions in the

slums and the regional distribution of job opportunities are the only viable remedies for relieving congestion of the population in the centre of the city. The increase allowed by the State Government in the Floor Space Index over and above 1.33 has led to a further concentration of population in the centre of the city.

19. In the matter of housing, according to Ms. Tellis' affidavit, Government has not put to the best use the finances and resources available to it. There is a wide gap between the demand and supply in the area of housing which was in the neighbourhood of forty five thousand units in the decade 1971-81. A huge amount of hundreds of crores of rupees shall have to be found by the State Government every year during the period of the Sixth Plan if adequate provision for housing is at all to be made. The Urban Land Ceiling Act has not achieved its desired objective nor has it been properly implemented. The Employment Schemes of the State Government are like a drop in the ocean and no steps are taken for increasing job opportunities in the rural sector. The neglect of health, education, transport and communication in that sector drives the rural folk to the cities, not only in search of a living but in search of the basic amenities of life. The allegation of the State Government regarding the criminal propensity of the pavement dwellers is stoutly denied in the reply-affidavit and it is said to be contrary to the studies of many experts. Finally, it is stated that it is no longer the objective of the Sixth Plan to reverse the rate of growth of Metropolitan cities. The objective of the earlier plan (1978-83) has undergone a significant change and the target now is to ensure the growth of large Metropolitan cities in a planned manner. The affidavit claims that there is adequate land in the Bombay Metropolitan region to absorb a population of 20 million people which is expected to be reached by the year 2000 A.D.

20. The arguments advanced before us by Ms. Indira Jaising, Mr. V.M. Tarkunde and Mr. Ram Jethmalani cover a wide range but the main thrust of the petitioners' case is that evicting a pavement dweller or slum dweller from his habitat amounts to depriving him of his right to livelihood, which is comprehended in the right guaranteed by Article 21 of the Constitution that no person shall be deprived of this life except according to procedure established by law. The question of the guarantee of personal liberty contained in Article 21 does not arise and was not raised before us. Counsel for the petitioners contended that the Court must determine in these petitions the content of the right to life, the function of property in a welfare State, the dimension and true meaning of the constitutional mandate that property must sub-serve common good, the sweep of the right to reside and settle in any part of the territory of India which is guaranteed by Article 19 (1) (e) and the right to carry on any occupation, trade or business which is guaranteed by Article 19 (1) (g), the competing claims of pavement dwellers on the one hand and of the pedestrians on the other hand, the larger question of ensuring equality before the law. It is contended that it is the responsibility of the Courts to reduce inequalities and social imbalances by striking down statutes which perpetuate them. One of the grievances of the petitioners against the Bombay Municipal Corporation Act, 1888 is that it is a century old antiquated piece of legislation passed in an era when pavement dwellers and slum dwellers did not exist and the consciousness of the modern notion of a Welfare State was not present to the mind of the colonial legislature. According to the petitioners, connected

with these issues and yet independent of them, is the question of the role of the Court in setting the tone of values in a democratic society.

21. The argument which bears on the provisions of Article 21 is elaborated by saying that the eviction of pavement and slum dwellers will lead, in a vicious circle, to the deprivation of their employment, their livelihood and, therefore, to the right to life. Our attention is drawn in this behalf to an extract from the judgment of Douglas J. in Baksey v. Board of Regents (1954) 347 MD 442 in which the learned Judge said:

> "The right to work I have assumed was the most precious liberty that man possesses. Man has indeed, as much right to work as he has to live, to be free and to own property. To work means to eat and it also means to live."

The right to live and the right to work are integrated and inter-dependant and, therefore, if a person is deprived of his job as a result of his eviction from a slum or a pavement, his very right to life is put in jeopardy. It is urged that the economic compulsion under which these persons are forced to live in slums or on pavements impart to their occupation the character of a fundamental right.

22. It is further urged by the petitioners that it is constitutionally impermissible to characterize the pavement dwellers as "trespassers" because, their occupation of pavements arises from economic compulsions. The State is under an obligation to provide to the citizens the necessities of life and, in appropriate cases, the courts have the power to issue orders directing the State by affirmative action, to promote and protect the right to life. The instant situation is one of crisis, which compels the use of public property for the purpose of survival and sustenance. Social commitment is the essence of our Constitution which defines the conditions under which liberty has to be enjoyed and justice has to be administered. Therefore, Directive Principles, which are fundamental in the governance of the country, must serve as a beacon light to the interpretation of the constitutional provisions. Viewed in this context, it is urged, the impugned action of the State Government and the Bombay Municipal Corporation is violative of the provisions contained in Articles 19 (1) (e), 19 (1) (g) and 21 of the Constitution. The paucity of financial resources of the State is no excuse for defeating the fundamental rights of the citizens.

23. In support of this argument, reliance is placed by the petitioners on what is described as the 'factual context'. A publication dated January 1982 of the Planning Commission, Government of India, namely, 'The Report of the Expert Group of Programs for the Alleviation of Poverty' is relied on as showing the high incidence of poverty in India. That Report shows that in 1977-78, 48% of the population lived below the poverty line, which means that out of a population of 303 million who lived below the poverty line, 252 million belonged to the rural areas. In 1979-80 another 8 million people from the rural areas were found to live below the poverty line. A Government of Maharashtra Publication "Budget and the New 20 Point Socio-Economic Program" estimates that there are about 45 Lakh families in rural areas of Maharashtra who live below the poverty line. Another 40% was in the periphery of that area. One of the major causes of the persistent rural poverty of landless labourers, marginal farmers, shepherds, physically

handicapped persons and other is the extremely narrow base of production available to the majority of the rural population. The average agricultural holding of a farmer is 0.4 hectares, which is hardly adequate to enable him to make both ends meet. Landless labourers have no resource base at all and they constitute the hard core of poverty. Due to economic pressures and lack of employment opportunities, the rural population is forced to migrate to urban areas in search of employment. 'The Economic Survey of Maharashtra' published by the State Government shows that the bulk of public investment was made in the cities of Bombay, Pune and Thane, which created employment opportunities attracting the starving rural population to those cities. The slum census conducted by the Government of Maharashtra in 1976 shows that 79% of the slum-dwellers belonged to the low income group with a monthly income below Rs. 600/-. The study conducted by P. Ramachandran of the Tata Institute of Social Sciences shows that in 1972, 91% of the pavement dwellers had a monthly income of less than Rs. 200/-. The cost of obtaining any kind of shelter in Bombay is beyond the means of a pavement dweller. The principal public housing sectors in Maharashtra, namely, The Maharashtra Housing and Area Development Agency (MHADA) and the City and Industrial Development Corporation of Maharashtra Ltd. (CIDCO) have been able to construct only 3000 and 1000 units respectively as against the annual need of 60,000 units. In any event, the cost of housing provided even by these public sector agencies is beyond the means of the slum and pavement-dwellers. Under the Urban Land (Ceiling and Regulation) Act, 1975, private land-owners and holders are given facility to provide housing to the economically weaker sections of the society at a stipulated price of Rs. 90/- per sq. ft. which also is beyond the means of the slum and pavement-dwellers. The reigning market price of houses in Bombay varies from Rs. 150/- per sq ft. outside Bombay to Rs. 2000/- per sq. ft. in the centre of the city.

24. The petitioners dispute the contention of the respondents regarding the non-availability of vacant land for allotment to houseless persons. According to them, about 20,000 hectares of unencumbered land is lying vacant in Bombay. The Urban Land (Ceiling and Regulation) Act, 1975 has failed to achieve its object as is evident from the fact that in Bombay, 5% of the land-holders own 55% of the land. Even though 2952.83 hectares of urban land is available of being acquired by the State Government as being in excess of the permissible ceiling area, only 41.51% of this excess land was, so far, acquired. Thus, the reason why there are homeless people in Bombay is not that there is no land on which homes can be built for them but, that the planning policy of the State Government permits high density areas to develop with vast tracts of land lying vacant. The pavement dwellers and the slum-dwellers who constitute 50% of the population of Bombay, occupy only 25% of the city's residential land. It is in these circumstances that out of sheer necessity for a bare existence, the petitioners are driven to occupy the pavements and slums. They live in Bombay because they are employed in Bombay and they live on pavements because there is no other place where they can live. This is the factual context in which the petitioners claim the right under Article 19 (1) (e) and (g) and Article 21 of the Constitution.

25. The petitioners challenge the vires of Sec. 314 read with Sections 312 and 313 of the Bombay Municipal Corporation Act, which empowers the Municipal Commissioner to

remove, without notice, any object or structure or fixture which is set up in or upon any street. It is contended that, in the first place, Sec. 314 does not authorize the demolition of a dwelling even on a pavement and secondly, that a provision which allows the demolition of a dwelling without notice is not just, fair or reasonable. Such a provision vests arbitrary and unguided power in the Commissioner. It also offends against the guarantee of equality because, it makes an unjustified discrimination between pavement dwellers on the one hand and pedestrians on the other. If the pedestrians are entitled to use the pavements for passing and re-passing, so are the pavement dwellers entitled to use pavements for dwelling upon them. So the argument goes. Apart from this, it is urged, the restrictions which are sought to be imposed by the respondents on the use of pavements by pavement-dwellers are not reasonable. A State which has failed in its constitutional obligation to usher a socialistic society has no right to evict slum and pavement-dwellers who constitute half of the city's population. Therefore, sections 312, 313 and 314 of the B.M.C. Act must either be read down or struck down.

26. According to the learned Attorney General Mr. K.K. Singhvi and Mr. Shankaranarayanan who appear for the respondents, no one has a fundamental right, whatever be the compulsion, to squat on or construct a dwelling on a pavement, public road or any other place to which the public has a right of access. The right conferred by Article 19 (1) (e) of the Constitution to reside and settle in any part of India cannot be read to confer a license to encroach and trespass upon public property. Sec. 3 (w) and (x) of the B.M.C. Act define "Street" and "Public Street" to include a highway, a footway or a passage on which the public has the right of passage or access. Under Sec. 289 (1) of the Act, all pavements and public streets vest in the Corporation and are under the control of the Commissioner. In so far as Article 21 is concerned, no deprivation of life, either directly or indirectly, is involved in the eviction of the slum and pavement-dwellers from public places. The Municipal Corporation is under an obligation under Sec. 314 of the B.M.C. Act to remove obstructions on pavements, public streets and other public places. The Corporation does not even possess the power to permit any person to occupy a pavement or a public place on a permanent or quasi-permanent basis. The petitioners have not only violated the provisions of the B.M.C. Act, but they have contravened Sections 111 and 115 of the Bombay Police Act also. These sections prevent a person from obstructing any other person in the latter's use of a street or public place or from committing a nuisance. Sec. 117 of the Police Act prescribes punishment for the violation of these sections.

27. We will first deal with the preliminary objection raised by Mr. K. K. Singhvi, who appears on behalf of the Bombay Municipal Corporation, that the petitioners are stopped from contending that their huts cannot be demolished by reason of the fundamental rights claimed by them. It appears that a writ petition, No. 986 of 1981 was filed on the Original Side of the Bombay High Court by and on behalf of the pavement dwellers claiming relief similar to those claimed in the instant batch of writ petitions. A learned single Judge granted an ad interim injunction restraining the respondents from demolishing the huts and from evicting the pavement dwellers. When the petition came up for hearing on July 27, 1981 counsel for the petitioners made a statement in answer to a quarry from the Court, that no fundamental right could be claimed to put up dwellings on foot-paths or

public roads. Upon this statement, respondents agreed not to demolish until October 15, 1981, huts which were constructed on the pavements or public roads prior to July 23, 1981. On August 4, 1981, a written undertaking was given by the petitioners agreeing, inter alia, to vacate the huts on or before October 15, 1981 and not to obstruct the public authorities from demolishing them. Counsel appearing for the State of Maharashtra responded to the petitioners undertaking by giving an undertaking on behalf of the State Government that, until October 15, 1981 no pavement dweller will be removed out of the city against his wish. On the basis of these undertaking, the learned Judge disposed off the writ petition without passing any further orders. The contention of the Bombay Municipal Corporation is that since the pavement dwellers had conceded in the High Court that they did not claim any fundamental right to put up huts on pavements or public roads and since they had given an undertaking to the High Court that they will not obstruct the demolition of the huts after October 15, 1981, they are stopped from contending in this Court that the huts constructed by them on the pavements cannot be demolished because of their right to livelihood, which is comprehended within the fundamental right to life guaranteed by Art. 21 of the Constitution.

28. It is not possible to accept the contention that the petitioners are stopped from setting up their fundamental rights as a defence to the demolition of the huts put up by them on pavements or parts of public roads. There can be no estoppel against the Constitution. The Constitution is not only the paramount law of the land but, it is the source and sustenance of all laws. Its provisions are conceived in public interest and are intended to serve a public purpose. The doctrine of estoppel is based on the principle that consistency in word and action imparts certainty and honesty to human affairs. If a person makes a representation to another, on the faith of which the latter acts to his prejudice, the former cannot resile from the representation made by him. He must make it good. This principle can have no application to representations made regarding the assertion or enforcement of fundamental rights. For example, the concession made by a person that he does not possess and would not exercise his right to free speech and expression or the right to move freely throughout the territory of India cannot deprive him of those constitutional rights, any more than a concession that a person has no right of personal liberty can justify his detention contrary to the terms of Article 22 of the Constitution. Fundamental rights are undoubtedly conferred by the Constitution upon individuals which have to be asserted and enforced by them, if those rights are violated. But the high purpose which the Constitution seeks to achieve by conferment of fundamental rights is not only to benefit individuals but to secure the larger interest of the community. The Preamble of the Constitution says that India is a democratic Republic. It is in order to fulfil the promise of the Preamble that fundamental rights are conferred by the Constitution, some on citizens like those guaranteed by Articles 15, 16, 19, 21 and 29 and, some on citizens and non-citizens alike, like those guaranteed by Articles 14, 21, 22 and 25 of the Constitution. No individual can barter away the freedoms conferred upon him by the Constitution. A concession made by him in a proceeding, whether under a mistake of law or otherwise, that he does not possess or will not enforce any particular fundamental right, cannot create an estoppel against him in that or any subsequent proceeding. Such a concession, if enforced, would defeat the purpose of the Constitution. Were the argument

of estoppel valid, an all-powerful State could easily tempt an individual to forgo his precious personal freedoms on promise of transitory, immediate benefits. Therefore, notwithstanding the fact that the petitioners had conceded in the Bombay High Court that they have no fundamental right to construct hutments on pavements and that they will not object to their demolition after October 15, 1981, they are entitled to assert that any such action on the part of public authorities will be in violation of their fundamental rights. How far the argument regarding the existence and scope of the right claimed by the petitioners is well founded is another matter. But, the argument has to be examined despite the concession.

29. The plea of estoppel is closely connected with the plea of waiver, the object of both being to ensure bona fides in day-to-day transactions. In Basheshwar Nath v. Commissioner of Incomes-tax, Delhi, (1959) Supp (1) SCR 528: (AIR 1959 SC 149), a Constitution Bench of this Court considered the question whether the fundamental rights conferred by the Constitution can be waived. Two members of the Bench (Das C.J. and Kapoor J.) held that there can be no waiver of the fundamental right founded on Article 14 of the Constitution. Two others (N. H. Bhagwati and Subba Rao, JJ.) held that not only could there be no waiver of the right conferred by Art. 14, but there could be no waiver of any other fundamental right guaranteed by Part III of the Constitution. The Constitution makes no distinction, according to the learned Judges, between fundamental rights enacted for the benefit of an individual and those enacted in public interest or on grounds of public policy.

30. We must, therefore, reject the preliminary objection and proceed to consider the validity of the petitioners' contentions on merits.

31. The scope of the jurisdiction of this Court to deal with writ petitions under Art. 32 of the Constitution was examined by a Special Bench of this Court in Smt. Ujjam Bai v. State of Uttar Pradesh (1963) 1 SCR 778: (AIR 1962 SC 1621). That decision would show that, in three classes of cases, the question of enforcement of the fundamental rights would arise, namely, (1) where action is taken under a statute which is ultra vires the Constitution; (2) where the statute is intra vires but the action taken is without jurisdiction; and (3) an authority under an obligation to act judicially passes an order in violation of the principles of natural justice. These categories are, of course, not exhaustive. In Naresh Shridhar Mirajkar v. State of Maharashtra, (1966) 3 SCR 744-770 : (AIR 1967 SC 1 at p. 17), a Special Bench of nine learned Judges of this Court held that, where the action taken against a citizen is procedurally ultra vires, the aggrieved party can move this Court under Art. 32. The contention of the petitioners is that the procedure prescribed by Sec. 314 of the B. M.C. Act being arbitrary and unfair, it is not "procedure established by law" within the meaning of Art. 21 and, therefore, they cannot be deprived of their fundamental right to life by resorting to that procedure. The petitions are clearly maintainable under Art. 32 of the Constitution.

32. As we have stated while summing up the petitioners case, the main plank of their argument is that the right to life which is guaranteed by Art 21 includes the right to livelihood and since they will be deprived of their livelihood if they are evicted from their slum and pavement dwellings, their eviction is tantamount to deprivation of their life and

is hence unconstitutional. For purposes of argument, we will assume the factual correctness of the premise that if the petitioners are evicted from their dwellings, they will be deprived of their livelihood. Upon that assumption, the question which we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, that it does. The sweep of the right to life conferred by Art. 21 is wide and far-reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That which alone makes it possible to live, leave aside what makes life liveable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life. Indeed, that explains the massive migration of the rural population to big cities. They migrate because they have no means of livelihood in the villages. The motive force which propels their desertion of their homes in the village is the struggle for survival, that is, the struggle for life. So unimpeachable is the evidence of the nexus between life and the means of livelihood. They have to eat, to live; only a handful can afford the luxury of living to eat. That they can do, namely, only if they have the means of livelihood. That is the context in which it was said by Douglas J. In Baksey, (1954) 347 M.D. 442 that the right to work is the most precious liberty that man possesses. It is the most precious liberty because, it sustains and enables a man to live and the right to life is a precious freedom. "Life", as observed by Field, J. in Munn v. Illinois, (1877) 94 US 113, means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed. This observation was quoted with approval by this Court in Kharak Singh v. State of U.P., (1964) 1 SCR 332: (AIR 1963 SC 1295).

33. Article 39 (a) of the Constitution, which is a Directive Principle of State Policy, provides that the State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood. Art. 41, which is another Directive Principle, provides, inter alia, that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work in cases of unemployment and of undeserved want. Article 37 provides that the Directive Principles, though not enforceable by any Court, are nevertheless fundamental in the governance of the country. The Principles contained in Arts. 39 (a) and 41 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights. If there is an obligation upon the State to secure to the citizens and adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the

right to life. The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Art 21.

34. Learned counsel for the respondents placed strong reliance on a decision of this Court in In Re: Sant Ram, (1960) 3 SCR 499: (AIR 1960 SC 932) in support of their contention that the right to life guaranteed by Art. 21 does not include the right to livelihood. Rule 24 of the Supreme Court Rules empowers the Registrar to publish lists of persons who are proved to be habitually acting as touts. The Registrar issued a notice to the appellant and one other person to show cause why their names should not be included in the list of touts. That notice was challenged by the appellant on the ground, inter alia, that it contravenes Article 21 of the Constitution since, by the inclusion of his name in the list of touts, he was deprived of his right to livelihood, which is included in the right to life. It was held by a constitution Bench of this Court that the language of Art. 21 cannot be pressed in aid of the argument that the word 'life' in Article 21 includes 'livelihood' also. This decision is distinguishable because, under the Constitution, no person can claim the right to livelihood by the pursuit of an opprobrious occupation or a nefarious trade or business, like tourism, gambling or living on the gains of prostitution. The petitioners before us do not claim the right to dwell on pavements or in slums for the purpose of pursuing any activity which is illegal, immoral or contrary to public interest. Many of them pursue occupations which are humble but honourable.

35. Turning to the factual situation, how far is it true to say that if the petitioners are evicted from their slum and pavement dwellings, they will be deprived of their means of livelihood. It is impossible, in the very nature of things, to gather reliable data on this subject in regard to each individual petitioner and, none has been furnished to us in that form. That the eviction of a person from a pavement or slum will inevitably lead to the deprivation of his means of livelihood, is a proposition which does not have to be established in each individual case. That is an inference which can be drawn from acceptable data. Issues of general public importance, which affect the lives of large sections of the society, defy a just determination if their consideration is limited to the evidence pertaining to specific individuals. In the resolution of such issues, there are no symbolic samples which can effectively project a true picture of the grim realities of life. The writ petitions before us undoubtedly involve a question relating to dwelling houses but, they cannot be equated with a suit for the possession of a house by one private person against another. In a case of the latter kind, evidence has to be led to establish the cause of action and justify the claim. In a matter like the one before us, in which the future of half of the city's population is at stake, the Court must consult authentic empirical data compiled by agencies, official and non-official. It is by that process that the core of the problem can be reached and a satisfactory solution found. It would be unrealistic on our part to reject the petitions on the ground that the petitioners have not adduced evidence to show that they will be rendered jobless if they are evicted from the slums and pavements. Commonsense, which is a cluster of life's experiences, is often more dependable than the rival facts presented by warring litigants.

36. It is clear from the various expert studies to which we have referred while setting out the substance of the pleadings that, one of the main reasons of the emergence and growth of squatter-settlements in big Metropolitan cities like Bombay, is the availability of job opportunities which are lacking in the rural sector. The undisputed fact that even after eviction, the squatters return to the cities affords proof of that position. The Planning Commission's publication, 'The Report of the Expert Group of Programs for the Alleviation of Poverty' (1982) shows that half of the population in India lives below the poverty line, a large part of which lives in villages. A publication of the Government of Maharashtra, 'Budget and the New 20 Point Socio-Economic Program' shows that about 45 lakhs of families in rural areas live below the poverty line and that, the average agricultural holding of a farmer, which is O.4 hectares, is hardly enough to sustain him and his comparatively large family. The landless labourers, who constitute the bulk of the village population, are deeply imbedded in the mire of poverty. It is due to these economic pressures that the rural population is forced to migrate to urban areas in search of employment. The affluent and the not-so-affluent are alike in search of domestic servants. Industrial and Business Houses pay a fair wage to the skilled workman that a villager becomes in course of time. Having found a job, even if it means washing the pots and pans, the migrant sticks to the big city. If driven out, he returns in quest of another job. The cost of public sector housing is beyond his modest means and the less we refer to the deals of private builders the better for all, excluding none. Added to these factors is the stark reality of growing insecurity in villages on account of the tyranny of parochialism and casteism. The announcement made by the Maharashtra Chief Minister regarding the deportation of willing pavement dwellers affords some indication that they are migrants from the interior areas, within and outside Maharashtra. It is estimated that about 200 to 300 people enter Bombay every day in search of employment. These facts constitute empirical evidence to justify the conclusion that persons in the position of petitioners live in slums and on pavements because they have small jobs to nurse in the city and there is no where else to live. Evidently, they choose a pavement or a slum in the vicinity of their place of work, the time otherwise taken in commuting and its cost being forbidding for their slender means. To lose the pavement or the slum is to lose the job. The conclusion, therefore, in terms of the constitutional phraseology is that the eviction of the petitioners will lead to deprivation of their livelihood and consequently to the deprivation of life.

37. Two conclusions emerge from this discussion: one, that the right to life which is conferred by Art. 21 includes the right to livelihood and two, that it is established that if the petitioners are evicted from their dwellings, they will be deprived of their livelihood. But the Constitution does not put an absolute embargo on the deprivation of life or personal liberty. By Art. 21, such deprivation has to be according to procedure established by law. In the instant case, the law which allows the deprivation of the right conferred by Art. 21 is the Bombay Municipal Corporation Act, 1888, the relevant provisions of which are contained in Sections 312 (1), 313 (1) (a) and 314. These sections which occur in Chapter XI entitled 'Regulation of Streets' read thus:

"Section 312. Prohibition of structures or fixtures which cause obstruction in streets.

(1) No person shall, except with the permission of the Commissioner under Sec. 310 or 417, erect or set up any wall, fence, trail, post, step, booth or other structure or fixture in or upon any street or upon or over any open channel, drain well or tank in any street so as to form an obstruction to, or an encroachment upon, or a projection over, or to occupy, any portion of such street, channel, drain, well or tank."

"Section 313. Prohibition of deposit, etc., of things in streets.

(1) No person shall, except with the written permission of the Commissioner,—

(a) place or deposit upon any street or upon any open channel, drain or well in any streets (or in any public place) any stall, chair, bench box, ladder, bale or other things so as to form an obstruction thereto or encroachment thereon."

"Section 314. Power to remove without notice anything erected, deposited or hawked in contravention of Sec. 312, 313, or 313A.

The Commissioner may, without notice, cause to be removed—

(a) any wall, fence rail post, step, booth or other structure or fixture which shall be erected or set up in or upon any street, or upon or over any open channel, drain, well or tank contrary to the provisions of sub-sec. (1) of Sec. 312, after the same comes into force in the city or in the suburbs, after the date of the coming into force of the Bombay Municipal (Extension of Limits) Act, 1950 or in the extended suburbs after the date of the coming into force of the Bombay Municipal Further Extension of Limits and Schedule BBA (Amendment) Act, 1956;

(b) any stall, chair, bench, box, ladder, bale, board or shelf, or any other thing whatever placed, deposited, projected, attached or suspended in, upon, from or to any place in contravention of sub-sec. (1) of Sec. 313.

(c) any article whatsoever hawked or exposed for sale in any public place or in any public street in contravention of the provisions of Sec. 313A and any vehicle, package box, board, shelf or any other thing in or on which such article is placed or kept for the purpose of sale."

By Sec. 3 (w), "street" includes a causeway, footway, passage etc. over which the public have a right or passage or access.

38. These provisions which are clear and specific, empower the Municipal Commissioner to cause to be removed encroachments on footpaths or pavements over which the public have a right of passage or access. It is undeniable that, in these cases, wherever constructions have been put up on the pavements, the public have a right of passage or access over those pavements. The argument of the petitioners is that the procedure prescribed by S. 314 for the removal of encroachments from pavements is arbitrary and unreasonable since, not only does it not provide for the giving of a notice before the removal of an encroachment but, it provides expressly that the Municipal Commissioner may cause the encroachment to be removed "without notice."

39. It is far too well settled to admit of any argument that the procedure prescribed by law for the deprivation of the right conferred by Art. 21 must be fair, just and reasonable. (See E. P. Royappa v State of Tamil Nadu, (1974) 2 SCR 348 : (AIR 1974 SC 555); Maneka Gandhi v. Union of India, (1978) 2 SCR 621 : (AIR 1978 SC 597); M. H. Hoskot v. State of Maharashtra, (1979) 1 SCR 192 : (AIR 1978 SC 1548); Sunil Batra v. Delhi Administration, (1979) 1 SCR 392 : (AIR 1978 SC 1675); Sita Ram v. State of U.P., (1979) 2 SCR 1085 : (AIR 1979 SC 745); Hussainara Khatoon I v. Home Secretary, State of Bihar, Patna, (1979) 3 SCR 532, 537 : (AIR 1979 SC 1369 at pp. 1372-73); Hussainara Khatoon II v. Home Secretary, State of Bihar, Patna, (1980) 1 SCC 81 : (AIR 1979 SC 1360); Sunil Batra II v. Delhi Administration, (1980) 2 SCR 557 : (AIR 1980 SC 1579); Jolly George Verghese v. Bank of Cochin, (1980) 2 SCR 913, 921-922 : (AIR 1980 SC 470 at p. 475); Kasturi Lal Lakshmi Reddy v. State of Jammu & Kashmir, (1980) 3 SCR 1338, 1356 : (AIR 1980 SC 1992 at p. 2000); and Francis Coralie Mullin v. Administration, Union Territory of Delhi, (1981) 2 SCR 516, 523-524 : (AIR 1981 SC 746 at p. 750).

40. Just as a mala fide act has no existence in the eye of law, even so, unreasonableness vitiates law and procedure alike. It is therefore essential that the procedure prescribed by law for depriving a person of his fundamental right, in this case the right to life, must conform to the norms of justice and fair play. Procedure, which is unjust or unfair in the circumstances of a case, attracts the vice of unreasonableness, thereby vitiating the law which prescribes that procedure and consequently, the action taken under it. Any action taken by a public authority which is invested with statutory powers has, therefore, to be tested by the application of two standards: The action must be within the scope of the authority conferred by law and secondly, it must be reasonable. If any action, within the scope of the authority conferred by law, is found to be unreasonable, it must mean that the procedure established by law under which that action is taken is itself unreasonable. The substance of the law cannot be divorced from the procedure which it prescribes for, how reasonable the law is, depends upon how fair the procedure is prescribed by it. Sir Raymond Evershed says that 'The Influence of Remedies on Rights' (Current Legal Problems 1953, Volume (6.), "from the point of view of the ordinary citizen, it is the procedure that will most strongly weigh with him. He will tend to form his judgement of excellence or otherwise of the legal system from his personal knowledge and experience in seeing the legal machine at work". Therefore, "He that takes the procedural sword shall perish with the sword" Per Frankfurter J. in Vitarelli v. Seaton, (1959) 3 Law ED 2d 1012.

41. Justice K. K. Mathew points out in his article on "The Welfare State, Rule of Law and Natural Justice", which is to be found in his book 'Democracy, Equality and Freedom', that there is "substantial agreement in juristic thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary exercise of power wherever it is found". Adopting that formulation, Bhagwati J., speaking for the Court, observed in Ramana Dayaram Shetty v. International Airport authority of India, (1979) 3 SCR 1014, 1032: (AIR 1979 SC 1628 at p. 1636), that it is "Unthinkable that in a democracy governed by the rule of law, the executive govt. or any of its officer should possess arbitrary power over the interests of the individual. Every action of the executive

Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement."

42. Having given our anxious and solicitous consideration to this question, we are of the opinion that the procedure prescribed by S. 314 of the Bombay Municipal Corporation Act for removal of encroachments on the footpaths or pavements over which the public has the right of passages or access, cannot be regarded as unreasonable, unfair or unjust. There is no static measure of reasonableness which can be applied to all situations alike. Indeed, the question "is this procedure reasonable?" implies and postulates the inquiry as to whether the procedure prescribed is reasonable in the circumstances of the case. In Francis Coralie Mullin 1981 (2) SCR 516: AIR 1981 SC 746), Bhagwati, J. said:

> ".....it is for the Court to decide in exercise of its constitutional power of judicial review whether the deprivation of life or personal liberty in a given case is by procedure, which is reasonable, fair and just or it is otherwise." (Emphasis supplied page 524). (at p. 750 of AIR)

43. In the first place, footpaths or pavements are public properties which are intended to serve the convenience of the general public. They are not laid for private use and indeed, their use for a private purpose frustrates the very object for which they are carved out from portions of public streets. The main reason for laying out pavements is to ensure that the pedestrians are able to go about their daily affairs with a reasonable measure of safety and security. That facility, which has matured into a right of the pedestrians, cannot be set at naught by allowing encroachments to be made on the pavements. There is no substance in the argument advanced on behalf of the petitioners that the claim of the pavement dwellers to put up constructions on pavements and that of the pedestrians to make use of the pavements for passing and re-passing, are competing claims and that, the former should be preferred to the latter. No one has the right to make use of a public property for a private purpose without the requisite authorization and, therefore, it is erroneous to contend that the pavement dwellers have the right to encroach upon pavements by constructing dwellings thereon. Public streets, of which pavements form a part, are primarily dedicated for the purpose of passage and, even the pedestrians have but the limited right of using pavements for the purpose of passing and re-passing. So long as a person does not transgress the limited purpose for which pavements are made, his use thereof is legitimate and lawful. But, if a person puts any public property to a use for which it is not intended and is not authorized so to use it, he becomes a trespasser. The common example which is cited in some of the English cases (see, for example Hickman v. Maisey, (1900) 1 QB 752) is that if a person, while using a highway for passage, is down for a time to rest himself by the side of the road, he does not commit a trespass. But, if a person puts up a dwelling on the pavement, whatever may be the economic compulsions behind such an act, his user of the pavement would become unauthorized. As stated in Hickman, it is not easy to draw an exact line between the legitimate user of a highway as a highway and the user which goes beyond the right conferred upon the public by its dedication. But, as in many other cases, it is not difficult to put cases well on one side of the line. Putting up a dwelling on the pavement is a case which is clearly on one side of the line showing that it is an act of trespass. Section 61 of

the Bombay Municipal Corporation Act lays down the obligatory duties of the Corporation, under clause (d) of which, it is its duty to take measures for abatement of all nuisances. The existence of dwellings on the pavements is unquestionably a source of nuisance to the public, at least for the reason that they are denied the use of pavements for passing and re-passing. They are compelled, by reason of the occupation of pavements by dwellers, to use highways and public streets as passages. The affidavit filed on behalf of the Corporation shows that the fall-out of pedestrians in large numbers on highways and streets constitutes a grave traffic hazard. Surely, pedestrians deserve consideration in the matter of their physical safety, which cannot be sacrificed in order to accommodate persons who use public properties for a private purpose, unauthorizedly. Under Clause (o) of Section 61 of the B.M.C. Act, the Corporation is under an obligation to remove obstructions upon public streets and other public places. The counter-affidavit of the Corporation shows that the existence of hutments on pavements is a serious impediment in repairing the roads, pavements, drains and streets. Section 63 (k), which is discretionary, empowers the Corporation to take measures to promote public safety, health or convenience not specifically provided any public conveniences to the pavement dwellers on or near the pavements, they answer the nature's call on the pavements or on the streets adjoining them. These facts provide the background to the provision for removal of encroachments on pavements and footpaths.

44. The challenge of the petitioners to the validity of the relevant provisions of the Bombay Municipal Corporation Act is directed principally at the procedure prescribed by Sec. 314 of that Act, which provides by clause (a) that the Commissioner may, without notice, take steps for the removal of encroachments in or upon any street, channel, drain etc. By reason of Sec. 3 (w), 'street' includes a causeway, footway or passage. In order to decide whether the procedure prescribed by Sec. 314 is fair and reasonable, we must first determine the true meaning of that section because, the meaning of the law determines its legality. If a law is found to direct the doing of an act which is forbidden by the Constitution or to compel, in the performance of an act, the adoption of a procedure which is impermissible under the Constitution, it would have to be struck down. Considered in its proper perspective, Sec. 314 is in the nature of an enabling provision and not of a compulsive character. It enables the Commissioner, in appropriate cases, to define with previous notice to persons who are likely to be affected by the proposed action. It does not require and, cannot be read to mean that in total disregard of the relevant circumstances pertaining to a given situation, the Commissioner must cause the removal of an encroachment without issuing previous notice. The primary rule of construction is that the language of the law must receive its plain and natural meaning. What sec. 314 provides is that the Commissioner may, without notice, cause an encroachment to be removed. It does not command that the Commissioner shall, without notice, cause an encroachment to be removed. Putting it differently, Sec. 314 confers on the Commissioner the discretion to cause an encroachment to be removed with or without notice. That discretion has to be exercised in a reasonable manner so as to comply with the constitutional mandate that the procedure accompanying the performance of a public act must be fair and reasonable. We must lean in favour of this interpretation because it

helps sustain the validity of the law. Reading Sec. 314 as containing a command not to issue notice before the removal of an encroachment will make the law invalid.

45. It must further be presumed that, while vesting in the Commissioner the power to act without notice, the Legislature intended that the power should be exercised sparingly and in cases of urgency which brook no delay. In all other cases, no departure from the audi alteram partem rule ('Hear the other side') could be presumed to have been intended. Sec. 314 is so designed as to exclude the principles of natural justice by way of exception and not as a general rule. There are situations which demand the exclusion of the rules of natural justice by reason of diverse factors like time, place, the apprehended danger and so on. The ordinary rule which regulates all procedure is that persons who are likely to be affected by the proposed action must be afforded an opportunity of being heard as to why that action should be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence.

46. It was urged by Shri K. K. Singhvi on behalf of the Municipal Corporation that the Legislature may well have intended that no notice need be given in any case whatsoever because, no useful purpose could be served by issuing a notice as to why an encroachment on a public property should not be removed. We have indicated above that far from so intending, the legislature has left it to the discretion of the Commissioner whether or not to give notice, a discretion which has to be exercised reasonably. Counsel attempted to demonstrate the practical futility of issuing the show cause notice by pointing out firstly, that the only answer which a pavement dweller, for example, can make to such a notice is that he is compelled to live on the pavement because he has no other place to go to and secondly, that it is hardly likely that in pursuance of such a notice, pavement dwellers or slum dwellers would ask for time to vacate since, on their own showing, they are compelled to occupy some pavement or slum or the other if they are evicted. It may be true to say that, in the generality of cases, persons who have committed encroachments on pavements or on other public properties may not have an effective answer to give. It is a notorious fact of contemporary life in metropolitan cities that no person in his senses would opt to live on a pavement or in a slum, if any other choice were available to him. Anyone who cares to have even a fleeting glance at the pavement or slum dwellings will see that they are the very hell on earth. But, though this is so, the contention of the Corporation that no notice need be given because, there can be no effective answer to it, betrays a misunderstanding of the rule of hearing, which is an important element of the principles of natural justice. The decision to dispense with notice cannot be founded upon a presumed impregnability of the proposed action. For example, in the common run of cases, a person may contend in answer to a notice under Sec. 314 that (i) there was, in fact, no encroachment on any public road, footpath or pavement, or (ii) the encroachment was so slight and negligible as to cause no nuisance or inconvenience to other members of the public, or (iii) time may be granted for removal of the encroachment in view of human considerations arising out of personal, seasonal or other factors. It would not be right to assume that the Commissioner would reject these or

similar other considerations without a careful application of mind. Human compassion must soften the rough edges of justice in all situations. The eviction of the pavement or slum dweller not only means his removal from the house but the destruction of the house itself. And the destruction of a dwelling house is the end of all that one holds dear in life. Humbler the dwelling, greater the suffering and more intense the sense of loss.

47. The proposition that notice need not be given of a proposed action because, there can possibly be no answer to it is contrary to the well-recognized understanding of the real import of the rule of hearing. That proposition overlooks that justice must not only be done but must manifestly be seen to be done and confuses one for the other. The appearance of injustice is the denial of justice. It is the dialogue with the person likely to be affected by the proposed action which meets the requirement that justice must also be seen to be done. Procedural safeguards have their historical origin in the notion that conditions of personal freedom can be preserved only when there is some institutional check on arbitrary action on the part of public authorities. [Kadish, "Methodology and Criteria in Due process Adjudication - A Survey and Criticism", (1957)] 66 Yale LJ 319, 340. The right to be heard has two facets, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to individuals or groups, against whom decision taken by public authorities operate, to participate in the processes by which those decisions are made, an opportunity that expresses their dignity as persons [(Goldberg v Kelly, (1970) 397 US 254, 264-65 (right of the poor to participate in public processes)].

> "Whatever its outcome, such a hearing represents valued human interaction in which the affected person experiences at least the satisfaction of participating in the decision that vitally concerns her, and perhaps the separate satisfaction of receiving an explanation of why the decision is being made in a certain way. Both the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome; these rights to interchange express in the elementary idea that to be a <u>person,</u> rather than a <u>thing,</u> is at least to be consulted about what is done with one. Justice Frankfurter captured part of this sense of procedural justice when he wrote that the "validity and moral authority of a conclusion largely depend on the mode by which it was reached ..... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done" [Joint Anti-fascist Refugee Committee v. Mc Grath, (1950) 341 US 123, 171-172]. At stake here is not just the much-acclaimed appearance of justice but, from a perspective that treats process as intrinsically significant, the very essence of justice" [See "American Constitutional Law" by Laurence H. Tribe, Professor of Law, Harvard University (Ed. 1978, Page 503)].

The instrumental facet of the right of hearing consists in the means which it affords of assuring that the public rules of conduct, which result in benefits and prejudices alike, are in fact accurately and consistently followed.

"It ensures that a challenged action accurately reflects the substantive rules applicable to such action; its point is less to assure participation than to use to assure accuracy" [See Laurence H. Tribe, page 503].

48. Any discussion of this topic would be incomplete without reference to an important decision of this Court in S.L. Kapoor v. Jagmohan, (1981) 1 SCR 746, 766: (AIR 1981 SC 136 at p. 147). In that case, the super session of the New Delhi Municipal Committee was challenged on the ground that it was in violation of the principles of natural justice since no show cause notice was issued before the order of super session was passed. Linked with that question was the question whether the failure to observe the principles of natural justice matters at all, if such observance would have made no difference, the admitted or indisputable facts speaking for themselves. After referring to the decisions in Ridge v. Baldwin, 1964 AC 40 at p. 68; John v. Rees, (1970) 1 Ch 345 at p. 402; Annamunthodo v. Oilfield Worker's Trade Union, (1961) 3 All ER 621 at p. 625 (HL); Margarita Fuentes of all v. Robert L. Shevin, (1972) 32 Law ED 2d 556 at p. 574; Chintepalli Agency Taluk Arrack Sales Co-op. Society Ltd. v. Secy. (Food & Agriculture) Govt. of A.P., (1978) 1 SCR 563 at 567, 569-70: (AIR 1977 SC 2313 at pp. 2316 and 2318 and to an interesting discussion of the subject in Jackson's Natural Justice (1980 Edn.) the Court, speaking through one of us, Chinappa Reddy, J. said:

"In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. If it comes from a person who has denied justice that the person who has been denied justice is not prejudiced."

These observations sum up the true legal position regarding the purport and implications of the right of hearing.

49. The jurisprudence requiring hearing to be given to those who have encroached on pavements and other public properties evoked a sharp response from the respondents counsel. "Hearing to be given to trespassers who have encroached on public properties. To persons who commit crimes", they seemed to ask in wonderment. There is no doubt that the petitioners are using pavements and other public properties for an unauthorized purpose. But, their intention or object in doing so is not to "commit an offence or intimidate, insult or annoy any person", which is the gist of the offence of 'Criminal trespass' under section 441 of the Penal Code. They manage to find a habitat in places which are mostly filthy or marshy, out of sheer helplessness. It is not as if they have a free choice to exercise as to whether to commit an encroachment and if so, where. The encroachments committed by these persons are involuntary acts in the sense that those acts are compelled by inevitable circumstances and are not guided by choice. Trespass is a tort. But, even the law of Torts requires that though a trespasser may be evicted forcibly, the force used must be no greater than what is reasonable and appropriate to the occasion and, what is even more important, "the trespasser should be asked and given a reasonable opportunity to depart before force is used to expel him" [See Ramaswamy Iyer's Law of Torts 7th Edn. by Justice and Mrs. S.K. Desai, (Page 98, para 41)]. Besides,

under the law of Torts, necessity is a plausible defence, which enables a person to escape liability on the ground that the acts complained of are necessary to prevent greater damage, inter alia, to himself. "Here, as elsewhere in the Law of trots, a balance has to be struck between competing sets of values ....."[See Salmond and Heuston, 'Law of Torts', 18th Edn. (Chapter 21, page 463, Article 185 - 'Necessity')].

50. The charge made by the State Government in its affidavit that slum and pavement dwellers exhibit especial criminal tendencies is unfounded. According to Dr. P. K. Muttagi, Head of the unit for urban studies of the Tata Institute Social Sciences, Bombay, the surveys carried out in 1972, 1977, 1979 and 1981 show that many families which have chosen the Bombay footpaths just for survival, have been living there for several years and that 53 per cent of the pavement dwellers are self-employed as hawkers in vegetables, flowers, ice-cream, toys, balloons, buttons, needles and so on. Over 38 per cent are in the wage-employed category as casual labourers, construction workers, domestic servants and luggage carriers. Only 1.7 per cent of the total number is generally unemployed. Dr Muttagi found among the pavement dwellers a graduate of Marathwada University and a Muslim poet of some standing, These people have merged with the landscape, become part of it, like the chameleon", though their contact with their more fortunate neighbours who live in adjoining high-rise buildings is casual. The most important finding of Dr. Muttagi is that the pavement dwellers are a peaceful lot, "for, they stand to lose their shelter on the pavement if they disturb the affluent or indulge in fights with their fellow dwellers." The charge of the State Government, besides being contrary to these scientific findings, is born of prejudice against the poor and the destitute. Affluent people living in sky-scrapers as commit crimes varying from living on the gains of prostitution and defrauding the public treasury to smuggling. But, they get away. The pavement dwellers, when caught, defend themselves by asking, "who does not commit crimes in this city?" As observed by Anand Chakravarti, "The separation between existential realities and the rhetoric of socialism indulged in by the wielders of power in the government cannot be more profound. [Some aspects of inequality in rural India: A Sociological Perspective published in 'Equality and Inequality, Theory and Practice' edited by Andro Beteille. 1983]".

51. Normally, we would have directed the Municipal Commissioner to afford an opportunity to the petitioners to show why the encroachments committed by them on pavements or footpaths should not be removed. But, the opportunity which was denied by the Commissioner was granted by us in an ample measure, both sides having made their contentions elaborately on facts as well as on law. Having considered those contentions, we are of the opinion that the Commissioner was justified in directing the removal of the encroachments committed by the petitioners on pavements, footpaths or accessory roads. As observed in S.L. Kapoor, (AIR 1981 SC 136), "....where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because Courts do not issue futile writs." Indeed, in that case, the Court did not set aside the order of super session in view of the factual position stated by it. But, though we do not see any justification for asking the Commissioner to hear the petitioners, we propose to pass an order which, we

believe, he would or should have passed, had he granted a hearing to them and heard what we did. We are of the opinion that the petitioners should not be evicted from the pavements, footpaths or accessory roads until one month after the conclusion of the current monsoon season, that is to say, until October 31, 1985. In the meanwhile, as explained later, steps may be taken to offer alternative pitches to the pavement dwellers who were or who happened to be censused in 1976. The offer of alternative pitches to such pavement dwellers should be made good in the spirit in which it was made, though we do not propose to make it a condition precedent to the removal of the encroachments committed by them.

52. Insofar as the Kamraj Nagar Basti is concerned, there are over 400 hutments therein. The affidavit of the Municipal Commissioner, Shri D. M. Sukhthankar, shows that the Basti was constructed on an accessory road, leading to the highway. It is also clear from that affidavit that the hutments were never regularized and no registration numbers were assigned to them by the Road Development Department. Since the Basti is situated on a part of the road leading to the Express Highway, serious traffic hazards arise on account of the straying of the Basti children on to the Express Highway, on which there is heavy vehicular traffic. The same criterion would apply to the Kamraj Nagar Basti as would apply to the dwellings constructed unauthorisedly on other roads and pavements in the city.

53. The affidavit of Shri Arvind V. Gokak, Administrator of the Maharashtra Housing and Areas Development Authority, Bombay, show that the State Government had taken a decision to compile a list of slums which were required to be removed in public interest and to allocate, after a spot inspection, 500 acres of vacant land in or near the Bombay Suburban District for resettlement of hutment dwellers removed from the slums. A census was accordingly carried out on January 4, 1976 to enumerate the slum dwellers spread over about 850 colonies all over Bombay. About 67% of the hutment dwellers produced photographs of the heads of their families, on the basis of which the hutments were numbered and their occupants were given identity cards. Shri Gokak further says in his affidavit that the Government had also decided that the slums which were in existence for a long time and which were improved and developed, would not normally be demolished unless the land was required for a public purpose. In the event that the land was so required, the policy of the State Government was to provide alternate accommodation to the slum dwellers who were censused and possessed identity cards. The Circular of the State Government dated February 4, 1976 (no. SIS/176/D-41) bears out this position. In the enumeration of the hutment dwellers some persons occupying pavements also happened to be given census cards. The Government decided to allot pitches to such persons at a place near Malavani. These assurances held forth by the Government must be made good. In other words, despite the finding recorded by us that the provision contained in Section 314 of the B.M.C. Act is valid, pavement dweller to whom census cards were given in 1976 must be given alternate pitches at Malavani though not as a condition precedent to the removal of encroachments committed by them. Secondly slum dwellers who were censused and were given identity cards must be provided with alternate accommodation before they are evicted. There is a controversy between the petitioners and the State Government as to the extent of vacant land which is

available for resettlement of the inhabitants of pavements and slums. Whatever that may be, the highest priority must be accorded by the State Government to the resettlement of these unfortunate persons by allotting to them such land as the Govt. finds to be conveniently available. The Maharashtra Employment Guarantee Act, 1977 the Employment Guarantee Scheme, the 'New Twenty Point Socio-Economic Program, 1982', the 'Affordable Low Income Shelter Program in Bombay Metropolitan Region' and the 'Program of House Building for the Economically Weaker Section' must not remain a dead letter as such schemes and programs often do. Not only that, but more and more such programs must be initiated if the theory of equal protection of laws has to take its rightful place in the struggle for equality. In these matters the demand is not so much for less Governmental interference as for positive governmental action to provide equal treatment to neglected segments of society. The profound rhetoric of socialism must be translated into practice for the problems which confer the State are problems of human destiny.

54. During the course of arguments, an affidavit was filed by Shri S. K. Jahagirdar, Under Secretary in the Department of Housing, Government of Maharashtra, setting out the various housing schemes which are under the consideration of the State Government. The affidavit contains useful information on various aspects relating to slum and pavement dwellers. The census of 1976 which is referred to in that affidavit shows that 28.18 lakhs of people were living in 6,27,404 households spread over 1680 slum pockets. The earning of 80 per cent of the slum households did not exceed Rs. 600/- per month. The State Government has a proposal to undertake 'Low Income Scheme Shelter Program' with the aid of the World Bank. Under that Scheme, 85,000 small plots for construction of houses would become available, out of which 40,000 would be in Greater Bombay, 25,000 in the Thane-Kalyan area and 20,000 in the New Bombay region. The State Government is also proposing to undertake 'Slum Up-gradation Program (SUP)' under which basic civic amenities would be made available to the slum dwellers. We trust that these Schemes, grandiose as they appear, will be pursued faithfully and the aid obtained from the World Bank utilized systematically and effectively for achieving its purpose.

55. There is no short term or marginal solution to the question of squatter colonies, nor are such colonies unique to the cities of India. Every country, during its historical evolution, has faced the problem of squatter settlements and most countries of the under developed world face this problem today. Even the highly developed affluent societies face the same problem, though with their larger resources and smaller populations, their task is far less difficult. The forcible eviction of squatters even if they are resettled in other sites, totally disrupts the economic life of the household. It has been a common experience of the administrators and planners that when resettlement is forcibly done, squatters eventually sell their new plots and return to their original sites near their place of employment. Therefore, what is of crucial importance to the question of thinning out the squatters' colonies in metropolitan cities is to create new opportunities for employment in the rural sector and to spread the existing job opportunities evenly in urban areas. Apart from the further misery and degradation which it involves, eviction of slum and pavement dwellers is an ineffective remedy for decongesting the cities. In a highly readable and moving account of the problems which the poor have to face, Susan

George says (‘How the other Half Dies - The Real Reasons for World Hunger' (Pelican books):

> "So long as thorough going land reform, regrouping and distribution of resources to the poorest, bottom half of the population does not take place, third World countries can go on increasing their production until hell freezes and hunger will remain, for the production will go to those who already have plenty - to the developed world or to the wealthy in the Third World itself. Poverty and hunger walk hand in hand." (Page 18)

56. We will close with a quotation from the same book which has a message:

> "Malnourished babies, wasted mothers, emaciated corpses in the streets of Asia have definite and definable reasons for existing. Hunger may have been the human race's constant companion, and the poor may always be with us, but in the twentieth century, one cannot take this fatalistic view of the destiny of millions of fellow creatures. Their condition is not inevitable but is caused by identifiable forces within the province of rational, human control." (p. 15)

57. To summarize, we hold that no person has the right to encroach, by erecting a structure or otherwise, on footpaths, pavements or any other place reserved or ear-marked for a public purpose like, for example, a garden or a playground; that the provision contained in Section 314 of the Bombay Municipal Corporation Act is not unreasonable in the circumstances of the case; and that, the Kamraj Nagar Basti is situated on an accessory road leading to the Western Express Highway. We have referred to the assurances given by the State Government in its pleadings here which, we repeat, must be made good. Stated briefly, pavement dwellers who were censused or who happened to be censused in 1976 should be given though not as a condition precedent to their removal, alternate pitches at Malavani or, at such other convenient place as the Government considers reasonable but not further away in terms of distance; slum dwellers who were given identity cards and whose dwellings were numbered in the 1976 census must be given alternate sites for their resettlement; slums which have been in existence for a long time say for twenty years or more, and which have been improved and developed will not be removed unless the land on which they stand or the appurtenant land, is required for a public purpose, in which case, alternate sites or accommodation will be provided to them; the Low Income Scheme Shelter Program which is proposed to be undertaken with the aid of the World Bank will be pursued earnestly; and the Slum Up-gradation Program (SUP) under which basic amenities are to be given to slum dwellers will be implemented without delay. In order to minimize the hardship involved in any eviction, we direct that the slums, wherever situated, will not be removed until one month after the end of the current monsoon season, that is until October 31, 1985 and, thereafter only in accordance with this judgment. If any slum is required to be removed before that date parties may apply of this Court. Pavement dwellers, whether censused or uncensused, will not be removed until the same date viz, October, 31, 1985.

58. The Writ Petitions will stand disposed off accordingly. There will be no order as to costs.

Order accordingly.

Sheela Barse v. Union of India
AIR 1986 Supreme Court 1773
Writ Petition (Criminal) No. 1451 of 1985, D/-5-8-1986 and 13-8-1986
P. N. Bhagwati, C. J. and Ranganath Misra, J.

(**A) Constitution of India, Art. 39(f) - Children Act - Though passed not enforced in some States - Supreme Court directed that such beneficial statute should be brought into force and administered without delay. (Children Act (60 of 1960), Ss. 1, 5).**

(Para 4)

(B) Constitution of India, Art. 226 - Public interest litigation - Petition by a social worker seeking release of children below 16 years detained in jails - Not adversary litigation - Supreme Court directed that the petitioner should have access to information and should be permitted to visit jails, children's homes, remand homes, observation homes, borstal schools and all institutions connected with housing delinquent or destitute children and that State Governments should extend necessary assistance to the petitioner - Also clarified that information collected by petitioner will be placed before the Court and will not be published otherwise. (Children Act (60 of 1960), S. 1).

(Paras 8, 9)

(C) Constitution of India, Art. 32 - Public Interest litigation - Petition for release of children below 16 years detained in jails - Direction by Supreme Court to all High Courts and District Judges to submit to it information of children in jails, existence of juvenile courts, etc. before certain date - Non-compliance by some Courts - Further directions issued to High Courts to ensure compliance.

(Para 3)

(D) Constitution of India, Art. 39(f) - Children below 16 years - Detention in jails, deprecated. (Children Act (60 of 1960), S. 5).

If a child is a national asset, it is the duty of the State to look after the child with a view to ensuring full development of its personality. That is why all the statutes dealing with children provide that a child shall not be kept in jail. Even apart from this statutory prescription, it is elementary that a jail is hardly a place where a child should be kept. There can be no doubt that incarceration in jail would have the effect of dwarfing the development of the child, exposing him to baneful influences, coarsening his conscience and alienating him from the society. It is a matter of regret that despite statutory provisions and frequent exhortations by social scientists, there are still a large number of children in different jails in the country. It is no answer on the part of the State to say that it has not got enough number of remand homes or observation homes or other places where children can be kept and that is why they are lodged in jails. It is also no answer on the part of the State to urge that the ward in the jail where the children are kept is separate from the ward in which the other prisoners are detained. It is the atmosphere of the jail which has a highly injurious effect on the mind of the child, estranging him from the society and breeding in him aversion bordering on hatred against a system which keeps him in jail. The State Governments must set up necessary remand homes and observation

homes where children accused of an offence can be lodged pending investigation and trial. On no account should the children be kept in jail and if a State Government has not got sufficient accommodation in its remand homes or observation homes, the children should be released on bail instead of being subjected to incarceration in jail.

(Para 10)

(E) Constitution of India, Art. 39(f) - Juvenile Courts - Children, Trial of - Must take place in juvenile courts and not in criminal courts - Special Cadre of Magistrates for juvenile courts recommended. (Children Act (60 of 1960), S. 5).

(Para 11)

(F) Constitution of India, Art. 39(f),21 - Children-Speedy trial - Necessity emphasized. (Children Act (60 of 1960), S-5).

Where a complaint is filed or first information report is lodged against a child below the age of 16 years for an offence punishable with imprisonment of not more than seven years, the investigation shall be completed within a period of three months from the date of filing of the complaint or lodging of the First Information Report and if the investigation is not completed within this time, the case against the child must be treated as closed. If within three months, the charge-sheet is filed against the child in case of an offence punishable with imprisonment of not more than seven years, the case must be tried and disposed of within a further period of six months at the outside and this period should be inclusive of the time taken up in committal proceedings, if any.

(Para 12)

(G) Constitution of India, Arts. 39(f), 21 - Children - Trial of - Uniform Children Act throughout India instead of Children Acts at State level and its earnest implementation, recommended. (Children Act (60 of 1960), S. 1).

(Para 13)

(H) Constitution of India, Art. 21 - Speedy trial - Necessity to set up adequate number of Courts and to appoint requisite number of judges stressed - So also necessity to set up Institute or Academy for training of Judicial Officers. (Criminal P. C. (2 of 1974), S. 6).

(Para 12)

Cases Referred **Chronological Paras**

AIR 1979 SC 1360: (1979) 3 SCR 169: 1979 Cri LJ 1036 12

ORDER dated 5-8-86: - This application under Art. 32 of the Constitution has asked for release of children below the age of 16 years detained in jails within different States of the country, production of complete information of children in jails, information as to the existence of juvenile courts, homes and schools and for a direction that the District Judges should visit jails or sub-jails within their jurisdiction to ensure that children are properly looked after when in custody as also for a direction to the State Legal Aid Boards to appoint duty counsel to ensure availability of legal protection for children as an

when they are involved in criminal cases and are proceeded against. The Union of India and all the States and Union Territories have been impleaded as respondents.

2. On September 24, 1985, notice was directed to all the respondents. A few of the respondent States filed counter-affidavits in response to the notice. The matter was adjourned on March 31, 1986, to April 15, 1986, to enable the respondents who had not yet filed their affidavits to file such affidavits. On April 15, 1986, after hearing counsel who appeared for the parties this Court pointed out:

> "..... It is an elementary requirement of any civilized society and it has been so provided in various statutes concerning children that children should not be confined to jail because incarceration in jail has a dehumanizing effect and it is harmful to the growth and development of children. But even so the facts placed before us, which include the survey made by the Home Ministry and the Social Welfare Department show that a large number of children below the age of 16 years are confined in jails in various parts of the country."

This Court directed the District Judges in the country to nominate the Chief Judicial Magistrate or any other Judicial Magistrate to visit the District Jail and Sub-Jails in their districts for the purpose of ascertaining how many children below the age of 16 years are confined in jail, what are the offences in respect of which they are charged, how many of them have been in detention - whether in the same jail or previously in any other jail - before being brought to the jail in question, whether they have been produced before the children's Court and, if so, when and how many times and whether any legal assistance is provided to them. The Court also directed that "each District Judge will give utmost priority to this direction and the Superintendent of each jail in the district will provide full assistance to the District Judge or the Chief Judicial Magistrate or the Judicial Magistrate, in this behalf who will be entitled to inspect the registers of the jail visited by him as also any other document/documents which he may want to inspect and will also interview the children if he finds it necessary to do so for the purpose of gathering the correct information in case of any doubt. The District Judge, Chief Judicial Magistrate or the Judicial Magistrate, as the case may be, will submit report to this court within 10 weeks from today. It will also be stated in the report as to whether there are any children's homes, Remand Homes or Observation Homes for children within his district and if there are, he will inspect such children's homes, remand homes and observation homes for the purpose of ascertaining as to what are the conditions in which children are kept there and whether facilities for education or vocational training exist. Such reports will be submitted by each District Judge through the Registrars of the respective High Courts to the Registrar of this Court. Each State Government will also file affidavit stating as to how many children's homes, remand homes and observation homes for children are in existence in the respective State and how many inmates are kept in such children's homes, remand home or observation homes. We would also direct the State Legal Aid & Advice Board in each State or any other Legal Aid Organization existing in the State concerned, to send to lawyers to each jail within the State once in a week for the purpose of providing legal assistance to children below the age of 16 years who are confined in the jails." The writ petition was adjourned to July 17, 1986.

3. On April 24, 1986, the Court again made the following order:

> "We adjourned the writ petition to 17-7-86 for hearing and final disposal but we feel that it would be desirable to take it up when the Bench sits in vacation. We would direct that the matter may be placed for final disposal before a Bench of this Court on 24-6-1986. We have granted two months' time to the District Judges to make their reports vide our order dated 15-4-1986. Fresh intimation to this effect may be sent to the District Judges through the Registrars of the High Courts. We may reiterate that as soon as the reports are received copies thereof may be supplied to the Advocates during the vacation itself ...."

The writ petition was thereafter listed on July 12, 1986, during the long vacation for hearing. The Court found that though reports from several District Judges had come in response to the earlier direction, yet several District Judges had not sent their reports. The Court observed:

> "It is a little surprising that though we gave directions long back directing the District Judges/Chief Judicial Magistrates to send their reports of inspection of not only the District Jails but also Sub-Jails in the districts on or before 10-6-86 (24-6-86), the reports have not yet come in respect of several Districts and particularly in respect of sub-jails in the Districts. We propose to give directions for expediting submission of these reports at the next hearing of the writ petition. We are very keen that the High Courts should be requested to monitor the submission of these reports and we have therefore requested the counsel appearing in the case to make constructive suggestions in that behalf."

Six further weeks have passed beyond the time indicated in the order dated April 15, 1986, and even till this day analysis shows that several District Judges have not complied with the direction. This Court had intended that the reports of the District Judges would be sent to the Registrar of this Court through the Registrars of the respective High Courts. This obviously meant that the Registrars of the High Courts were to ensure compliance. We are both concerned and surprised that a direction given by the apex Court has not been properly carried out by the District Judges who are an effective instrumentality in the hierarchy of the judicial system. Failure to submit the reports within the time set by the Court has required adjournment of the hearing of the writ petition on more than one occasion. We are equally surprised that the High Courts have remained aloof and indifferent and have never endeavoured to ensure submission of the reports by the District Judges within the time indicated in the order of this Court. We direct that every defaulting District Judge who has not yet submitted his report shall unfailingly comply with the direction and furnish the report by August 31, 1986, through his High Court and the Registrar of every High Court shall ensure that compliance with the present direction is made.

4. Article 39(f) of the Constitution provides that the State shall direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. Every State

excepting Nagaland has a Children's Act. It is a fact that some of the Acts have been in existence prior to inclusion of the aforesaid clause in Art. 39 by the amendment of 1976. Though the Acts are on the statute book, in some States the Act has not yet been brought into force. This piece of legislation is for the fulfilment of a constitutional obligation and is a beneficial statute. Obviously the State Legislatures have enacted the law on being satisfied that the same is necessary in the interest of the society, particularly of children. There is hardly any justification for not enforcing the statute. For instance, in the case of Orissa though the Act is of 1982, for four years it has not been brought into force. Ordinarily it is a matter for the State Government to decide as to when a particular statute should be brought into force but in the present setting we think that it is appropriate that without delay every State should ensure that the Act is brought into force and administered in accordance with the provisions contained therein. Such of the States where the Act exists but has not been brought into force should indicate by filling a proper affidavit by August 31, 1986, as to why the Act is not being brought into force in case by then the Act is still not in force.

5. Under the Jail Manuals prevalent in different States every jail has a nominated committee of visitors and invariably the District and Sessions Judge happens to be one of the visitors. The purpose of having visitors is to ensure that the provisions in the Manual are strictly complied with so far as the convicts and the under-trial prisoners detained in jail are concerned. Being in jail results in curtailment of freedom. It is, therefore, necessary that the safeguards which are provided in the Manual should be strictly complied with and the prisoners should have the full benefit of the provisions contained in the Manual. We direct that every District and Sessions Judge should visit the District Jail at least once in two months and in course of his visit he should take particular care about child prisoners, both convicts and under-trials and as and when he sees any infraction in regard to the children in the prison he should draw the attention of the Administration as also of his High Court. We hope and trust that as and when such reports are received in the High Court the same would be looked into and effective action would be taken thereupon. It is hardly necessary to point out that it is the obligation of the High Court to ensure that all persons in judicial custody within its jurisdiction are assured of acceptable living conditions.

6. This Court had made a direction to the State Legal Aid Boards to provide the facility of lawyer's service in regard to under-trial children. No report has yet been received from any Board as regards action taken in this direction. The State Boards will now furnish the information also by August 31, 1986.

7. Certain other directions have been given earlier by this Court. All such directions shall be complied with and returns shall be furnished to this Court also by August, 31, 1986. We hope and trust that there would be strict compliance with these directions now made and there would be no occasion for any further direction to be made for the selfsame purpose. The writ application shall be placed for directions on September 8, 1986.

8. The petitioner, we must record, has undertaken real social service in bringing this matter before the Court. She has stated to us that she intends visiting different parts of the country with a view to gathering further information relevant to the matter and verifying

the correctness of statements of facts made in the counter-affidavits filed by the respondent States. We are of the view that the petitioner should have access to information and should be permitted to visit jails, children's homes, remand homes, observation homes and all institutions connected with housing of delinquent or destitute children. We would like to point out that this is not adversary litigation and the petitioner need not be looked upon as an adversary. She has in fact volunteered to do what the State should have done. We expect that each State would extend to her every assistance she needs during her visit as aforesaid. We direct that the Union Government - respondent No. 1 - shall deposit a sum of rupees ten thousand for the time being within two weeks in the Registrar of this Court which the petitioner can withdraw to meet her expenses.

9. We would like to make it clear that the information which the petitioner collects by visiting the children's institutions in different States as indicated above is intended to be placed before this Court and utilized in this case and not intended for publication otherwise.

ORDER (dated 13-8-86.)

10. We made an Order on 12th July, 1986 issuing various directions in regard to physically and mentally retarded children as also abandoned or destitute children who are lodged in various jails in the country for 'safe custody'. We also directed the Director General of Doordarshan as also the Director General of All India Radio to give publicity seeking co-operation of non-governmental social service organizations in the task of rehabilitation of these children. We were extremely pained and anguished that these children should be kept in jail instead of being properly looked after, given adequate medical treatment and imparted training in various skills which would make them independent and self-reliant. Some years ago we came out with a National Policy for the Welfare of Children which contained the following pre-ambulatory declaration:-

> "The nation's children are a supremely important asset. Their nurture and solicitude are our responsibility. Children's programs should find a prominent part in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endowed with the skill and motivations needed by society. Equal opportunities for development to all children during the period of growth should be our aim, for this would serve our large purpose of reducing inequality and ensuring social justice."

If a child is a national asset, it is the duty of the State to look after the child with a view to ensuring full development of its personality. That is why all the statutes dealing with children provide that a child shall not be kept in jail. Even part from this statutory prescription, it is elementary that a jail is hardly a place where a child should be kept. There can be no doubt that incarceration in jail would have the effect of dwarfing the development of the child, exposing him to baneful influences, coarsening his conscience and alienating him from the society. It is a matter of regret that despite statutory provisions and frequent exhortations by social scientists, there are still large numbers of children in different jails in the country as is now evident from the reports of the survey made by the District Judges pursuant to our order dated 15th April, 1986. Even where

children are accused of offences, they must not be kept in jails. It is no answer on the part of the State to say that it has not got enough number of remand homes or observation homes or other places where children can be kept and that is why they are lodged in jails. It is also no answer on the part of the State to urge that the ward in the jail where the children are kept is separate from the ward in which the other prisoners are detained. It is the atmosphere of the jail which has a highly injurious effect on the mind of the child, estranging him from the society and breeding in him aversion bordering on hatred against a system which keeps him in jail. We would therefore like once again to impress upon the State Governments that they must set up necessary remand homes and observation homes where children accused of an offence can be lodged pending investigation and trial. On no account should the children be kept in jail and if a State Government has not got sufficient accommodation in its remand homes or observation homes, the children should be released on bail instead of being subjected to incarceration in jail.

11. The problem of detention of children accused of an offence would become much more easy of solution if the investigation by the police and the trial by the Magistrate could be expedited. The report of survey made by District Judges show that in some places children have been in jail for quite long periods. We fail to see why investigation into offences alleged to have been committed by children cannot be completed quickly and equally why the trial can not take place within a reasonable time after the filing of the charge-sheet. Really speaking, the trial of children must take place in the Juvenile Courts and not in the regular criminal Courts. There are special provisions enacted in various statutes relating to children providing for trial by Juvenile Courts in accordance with a special procedure intended to safeguard the interest and welfare of children, but, we find that in many of the States there are no Juvenile Courts functioning at all and even where there are Juvenile Courts, they are nothing but a replica of the ordinary criminal Courts, only the label being changed. The same Magistrate who sits in the ordinary criminal court goes and sits in the Juvenile Court and mechanically tries cases against children. It is absolutely essential, and this is something which we wish to impress upon the State Governments with all the earnestness at our command that they must set up Juvenile Courts, one in each district, and there must be a special cadre of Magistrates who must be suitably trained for dealing with cases against children. They may also do other criminal work, if the work of the Juvenile Court is not sufficient to engage them fully, but hey must have proper and adequate training for dealing with cases against juveniles, because these cases require a different type of procedure and qualitatively a different kind of approach.

12. We would also direct that where a complaint is filed or first information report is lodged against a child below the age of 16 years for an offence punishable with imprisonment of not more than 7 years, the investigation shall be completed with a period of three months from the date of filing of the complaint or lodging of the First Information Report and if the investigation is not completed within this time, the case against the child must be treated as closed. If within three months, the charge-sheet is filed against the child in case of an offence punishable with imprisonment of not more than 7 years, the case must be tried and disposed of within a further period of 6 months at the outside and this period should be inclusive of the time taken up in committal

proceedings, if any. We have already held in Hussainara Khatoon v. Home Secretary, State of Bihar, (1979) 3 SCR 169: (AIR 1979 SC 1360) that the right to speedy trial is a fundamental right implicit in Art. 21 of the Constitution. If an accused is not tried speedily and his case remains pending before the Magistrate or the Sessions Court for an unreasonable length of time, it is clear that his fundamental right to speedy trial would be violated unless, of course, the trial is held upon account of some interim order passed by a superior court or the accused responsible for the delay in the trial of the case. The consequence of violation of the fundamental right to speedy trial would be that the prosecution itself would be liable to be quashed on the ground that it is in breach of the fundamental right. One of the primary reasons why trial of criminal cases is delayed in the courts of Magistrates and Additional Sessions Judges is the total inadequacy of judge-strength and lack of satisfactory working conditions for Magistrates and Additional Sessions Judges. There are courts of Magistrates and Additional Sessions Judges where the workload is so heavy that it is just not possible to cope with the workload, unless there is increase in the strength of Magistrates and Additional Sessions Judges. There are instances where appointments of Magistrates and Additional Sessions Judges are held up for years and the courts have to work with depleted strength and this affects speedy trial of criminal cases. The Magistrates and Additional Sessions Judges are often not provided adequate staff and other facilities which would help improve their disposal of cases. We are, therefore, firmly of the view that every State Government must take necessary measures for the purpose of setting up adequate number of Courts, appointing requisite number of Judges and providing them the necessary facilities. It is also necessary to set up an Institute or Academy for training of Judicial Offices so that their efficiency may be improved and they may be able to regulate and control the flow of cases in their respective courts. The problem of arrears of criminal cases in the courts of Magistrates and Additional Sessions Judges has assumed rather disturbing proportions and it is a matter of grave urgency to which no State Government can afford to be oblivious. But here, we are not concerned with the question of speedy trial for an accused who is not a child below the age of 16 years. That is a question which may have to be considered in some other case where this Court may be called upon to examine as to what is reasonable length of time for a trial beyond which the Court would regard the right to speedy trial as violated. So far as a child-accused of an offence punishable with imprisonment of not more than 7 years is concerned, we would regard a period of 3 months from the date of filing of the complaint or lodging of the First Information Report as the maximum time permissible for investigation and a period of 6 months from the filing of the charge-sheet as a reasonable period within which the trial of the child must be completed. If that is not done, the prosecution against the child would be liable to be quashed. We would direct every State Government to give effect to this principle or norm laid down by us in so far as any future cases are concerned, but so far as concerns pending cases relating to offences punishable with imprisonment of not more than 7 years, we would direct every State Government to complete the investigation within a period of 3 months from today if the investigation has not already resulted in filing of charge-sheet and if a charge-sheet has been filed, the trial shall be completed within a period of 6 months from today and if it is not, the prosecution shall be quashed.

13. We have by our Order dated 5th August 1986 called upon the State Governments to bring into force and to implement vigorously the provisions of the Children's Acts enacted in the various States. But we would suggest that instead of each State having its own Children's Act different in procedure and content from the Children's' Act in other States, it would be desirable if the Central Government initiates Parliamentary Legislation on the subject, so that there is complete uniformity in regard to the various provisions relating to children in the entire territory of the country. The Children's Act which may be enacted by Parliament should contain not only provisions for investigation and trial of offences against children below the age of 16 years but should also contain mandatory provisions for ensuring social, economic and psychological rehabilitation of the children who are either accused of offences or are abandoned or destitute or lost. Moreover, it is not enough merely to have legislation on the subject, but it is equally, if not more, important to ensure that such legislation is implemented in all earnestness and mere lip sympathy is not paid to such legislation and justification for non-implementation is not pleaded on ground of lack of finances on the part of the State. The greatest recompense which the State can get for expenditure on children is the building up of a powerful human resource ready to take its place in the forward march of the nation.

14. We have already given various directions by our orders dated 12th July 1986 and 5th August, 1986. We have also in the meantime received reports of survey made by several District Judges. We shall take up these matters for consideration at the next hearing of the writ petition which shall take place on 1-9-1986.

Order accordingly.

State of Himachal Pradesh v. Umed Ram Sharma
AIR 1986 Supreme Court 847 (From: Himachal Pradesh)
Special Leave Petition (Civil) No. 12621 of 1984, D/-11-2-1986
V. D. Tulzapuakar, R. S. Pathak, Sabyasachi Mukharji, JJ.

(A) Constitution of India, Arts. 19(1)(d), 21 and 38(2) – Right to life – Scope of – Residents of hilly areas – In the context of constitutional provisions, existence of roads in reasonable conditions is embraced in their right to life

(B) Constitution of India, Arts. 226, 19(1) (d), 21 and 38(2) – Locus standi – Residents in hilly State affected by denial of proper roads and non-availability of roads – They have locus standi to maintain petition for proper direction.

(Para 13)

(C) Constitution of India, Arts. 202 to 207 and 226 – Himachal Pradesh Budget Manual, Chap. 12 – Additional or excess grant for any project – It is executive which can make recommendation to legislature – High Court cannot impinge upon judgment of executive.

(D) Constitution of India, Art. 226, 38, 19 and 21 – Public interest litigation – Affirmative action by High Court in form of remedial measure – Scope of.

The Member-Secretary, Kerala State Board for Prevention & Control of Water Pollution, Kawadiar, Trivandrum v. The Gwalior Rayon Silk Manufacturing (Weaving) Company Ltd.
AIR 1986 Kerala 256
Writ Applications Nos. 329, 330, 336, 337, 341 and etc. of 1993, D/-2-41986
V.S. Malumath, C.J. and K. Sukumaran, J.

Water (Prevention and Control of Pollution) Cess, Ss. 17, 7, Pre-Water (Prevention and Control of Pollution) Cess Rules (1978), R.6- Rules- Validity of - Main function of Board -Not to allow to cause health hazard to public- Rules framed to achieve this object - Rule 6 is valid - Decision of single judge Reserved. (Water (Prevention and Control of Pollution) Cess Act (6 of 1974), Pre., Ss. 16, 17).

United States District Court Southern District of New York
In Re: Union Carbide Corporation Gas Leak Disaster at Bhopal, India, December 1984
MDL Docket No. 626, Misc. No. 21-38 (JFK), 85 Civ. 2696 (JFK), Dated: New York, New York SD/- May 12, 1986 U.S.D.J.
John F. Keynan

FACTURAL BACKGROUND

On the night of December 2-3, 1984 the most tragic industrial disaster in history occurred in the city of Bhopal, state of Madhya Pradesh, Union of India. Located there was a chemical plant owned and operated by Union Carbide India Limited ("UCIL"). The plant, situated in the northern sector of the city, had numerous hutment's adjacent to it on its southern side which were occupied by impoverished squatters. UCIL manufactured the pesticides Seven and Temik at the Bhopal Plant at the request of and with the approval of, the Government of India, Affidavit of John MacDonald ("MacDonald Aff" at 2). UCIL was incorporated under Indian law in 1984. 50.99 of its stock is owned by the defendant, Union Carbide Corporation, a New York corporation. (MacDonald Aff. At 1). Methyl isocynate (MIC), a highly toxic gas, is an ingredient in the production of both Sevin and Temik. On the night of the tragedy MIC leaked from the Plant in substantial quantities for reasons not yet determined.

The prevailing winds on the early morning of December 3, 1984 were from Northwest to Southwest. They blew the deadly gas into the overpopulated hutment's adjacent to the plant and into the most densely occupied parts of the city. The results were horrendous. Estimates of deaths directly attributable to the leak range as high as 2, 100. No one is sure exactly how many perished. Over 200,000 people suffered injuries-some serious and permanent-some mild and temporary. Livestock were killed and corps damaged. Businesses were interrupted.

On December 7, 1984 the first lawsuit was filed by American lawyers in the United States on behalf of thousands of Indians. Dawni et al.v. Union Carbide Corp., S.D.W. Va. (84-2479.). Since then 144 additional actions have been joined and assigned by the

Judicial Panel on Multi District Litigation to the Southern District of New York by order of February 6, 1985.

The Individual Federal court complaints have been superseded by a consolidated complaint filed on June 28, 1985.

The Indian Government on March 29, 1985 enacted legislation, the Bhopal Gas Leak Disaster (Processing of Claims) Act : (21 of 1985) ("Bhopal Act"), providing that the Government of India has the exclusive right to represent India plaintiffs in India and elsewhere in connection with the tragedy. Pursuant to the Bhopal Act, the Union of India, on April 8, 1985, filed a complaint with this Court setting forth claims for relief similar to those in the consolidated complaint of June 28, 1985. In order of April 25, 1985 this Court established a Plaintiffs' Executives Committee, comprised of F. Lee Bailey and Stanley M. Chesley Esqs, who represented individual plaintiffs and Michael V. Ciresi, Esq. whose firm represents the union India. Jack, Hoffinger, Esq., who represents individual plaintiffs, was appointed liaison counsel for the Plaintiffs Executive Committee.

On September 24, 1985, pursuant to the Bhopal Act, the Central Government of India framed a "scheme" for the Registration and Processing of Claims arising out of the disaster. According to the Union of India's counsel, over 487,000 claims have been filed in India pursuant to the "scheme".

There presently are 145 actions filed in the United States District Court for the Southern District of New York under the Judicial Panel for Multi District Litigation's order of February 6, 1985, involving approximately 200,000 plaintiffs.

Before this Court is a motion by the defendant Union Carbide Corporation ("Union Carbide") to dismiss the consolidated action on the grounds of forum non-convenience.

DISCUSSION

The doctrine of forum non-convenient allows a court to decline jurisdiction is authorized by a general venue statute. In support of its position that the consolidated action before the Court should be transferred to a more convenient forum within the Union of India pursuant to this doctrine, Union Carbide relies on United States Supreme Court's decision in Gulf Oil Corp, v. Gilbert, 330. U.S. 501 (1947) and piper Aircraft Co. V. Reyna 454 U.S. 235 (1947) numerous other lower United States Federal Court cases in their briefs and seek to distinguish the Supreme Court's decisions from this case. Of course, Gilbert and Piper are the touchstones in sorting out and examining the conventions of both sides to this motion the various factors bearing on convenience.

Piper teaches a straightforward formulation of the doctrine of forum non-convenience. A district court is advised to determine first whether the proposed alternative forum is adequate. "This inquiry should proceed in the order followed below. Then, as a matter within its "sound discretion". Piper at 257, the district court should consider relevant public and private interest factors, and reasonably balance those factors, in order to

determine whether dismissals is favoured. The Court will approach the various concerns in the same direct manner in which Piper and Gilbert set them out.

At this juncture, It would be appropriate to discuss the presumptions on a forum non-convenience motion. In Piper, the Court discussed its earlier finding in *Koster v. Lumbermens Mutual Casualty Co., 330 U.S.518 (1947)*, which suggested that a plaintiffs choice of forum was entitled to great deference when the forum indicated a reasonable assumption that the choice of the convenient. Koster at 524. Conversely, the Piper Court found:

> When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any forum non-convenience inquiry is to ensure that the trial is convenient, a foreign plaintiff choice deserve less deference.

Piper at 256

In the case now before the court, in which the plaintiffs including the Union of India, are foreign, and share a home forum which is not the instant forum, the assumption that this forum is convenient is not completely reasonable. The foreign plaintiffs' choice of the United States forum "deserved less deference" than would be accorded a United States citizen's choice. This court will apply the presumption in favour of plaintiff's choice of forum with "less than maximum force. Piper at 261. See note at 64, infra.

1. Preliminary Considerations

Extending the limited inquiry of Gilbert, the Piper court delved into the relevance of the substantive and procedural differences in law which would be applied in the event a case was transferred on the grounds of forum non convenience. The Piper Court determined that it was theoretically inconsistent with the underlying doctrine of forum non convenience, as well as grossly impartial, to consider the impact of the putative transferee forum's law on the plaintiff in its decision on a forum non convenience motion "(1) conclusive or substantial weight were given to the possibility of a change in law, the forum non convenience doctrine would become virtually useless." Pipe at 250.

The Court listed numerous practical considerations, which led to its conclusion that an unfavourable change in law for plaintiff was not a relevant factor in the forum analysis. First, the Court observed that if the chance of a change in law were given substantial weight, choice of law questions would "become extremely important." Piper at 251. U.S court would "have to compare the rights, remedies and procedure available" within the two proposed alternative forum, to determine whether a disadvantageous change in law would occur forms, to determine whether a disadvantageous change in law would occur upon transfer. Id, Since "[t] the doctrine of forum non convenience, however, is designed in part to help courts avoid conducting complex exercise in comparative law," the change in law analysis would subvert the doctrine itself. Id. Thus, a court engaged in the enquiry regarding the existence and adequacy of an alternative forum should not hinge its decision on an unfavourable change in law.

Another practical concern relating to the "change in law" inquiry was discussed by the Piper court. Based on the liberality of United States federal law as compared to much foreign law with respect to availability of strict liability for tort, malleable and diverse choice of law rules among the 50 states, the court observed that a change of forum might frequently involve an unfavourable change of law for foreign plaintiffs suing American defendants. Piper at 252, n. 18 consequently, the unfavourable change in law were a major factor in the analysis:

The American courts, which are already extremely attractive. The flow of litigation into the United State would increase and further congest already crowded courts.

Piper at 254 (emphasis in original) (footnote omitted). Thus, while it is not a "major factor" in the analysis, a court must at least consider the effect on plaintiffs of a change in law upon transfer.

To a great extent, the plaintiffs in this case argue that Indian Courts do not offer an adequate forum for this litigation by virtue of the relative "procedural and discovery deficiencies [which] would thwart the victims' quest for" justice. (Memorandum in opposition by Plaintiffs' Executive Committee ("Memo in Opp.") at 2). The defendant disputes this connection.

Plaintiffs' preliminary concern, regarding defendant's amenability to process in the alternative forum, is more than sufficiently met in the instant case. Union Carbide has unequivocally acknowledged that it is subject to the jurisdiction of the Courts of India (Defendant's Memorandum in Reply filed December 20, 1985 ("Reply Memo") at 8): (oral argument January 3, 1986, transcript at 29, comment of Bud Holman, Counsel in India.

Beyond this initial test, plaintiffs' and amicus curiae argue that the Indian legal system is inadequate to handle the Bhopal litigation. In support of this position, plaintiffs' have submitted the affidavit of Professor Marc S. Galanter of the University of Wisconsin Law School. Professor Galanter's credentials are impressive: he was a Fulbright Scholar at the Faculty of Law Delhi University and specialises in South Asian Studies of the University of Wisconsin Law School. He is not, however, admitted to practice in India and the Court views his opinions concerning the Indian legal system, its Jurisdiction and bar as far less persuasive than those of N.A Palkhivala and J.B. Dadachanji, each of whom has been admitted to practice in India for over 40 years. Both are senior advocates before the Supreme Court of India. Mr. Palkhivala served as India the Indian Govt. on three occasions Ambassador to the United States demo 1977 to 1979, and has represented before international tribunals.

Although the outcome of this analysis, given the rule of Piper regarding change in law, seems self-evident, the Court will review plaintiffs' argument on the inadequacy of the Indian forum out of defence to the plaintiffs.

A. Innovation in the Indian Judicial system

Professor Galanter describes the Indian Common Law legal system, inherited the British, in terms of its similarity to that of other common law systems. He compares the system favourably to that of the United States of Great Britain in rooms of appellate structure, the rule of stare decisions, the role of the judiciary as "guardian of [India's] democratic structure and protector of citizens' rights." (Galanter Aff. At 6-12) before pointing to its ostensible deficiencies. According to professor Galanter, India's legal system "was imposed on it" during the period of colonial rule. (Galanter Aff. At 11). Galanter argues that "Indian legal institutions still reflect their colonial organ," (Galanter Aff. 12), in terms of the Lack of broad-based legislative activity, inaccessibility of legal information and legal services, burdensome court filling fees and limited innovativeness with reference to legal practice and education. (Galanter Aff. 12).

On the question of innovativeness, Mr. Palkhivala responds with numerous examples of novel treatment of complex legal issues by the Indian Judiciary. In the words of the former ambassador of India to the United States, "a legal system is not a structure of fossils but is a living organism which grows through the judicial process and statutory enactments." (Palkhivala Aff. at 31). The examples cited by defendant's experts suggest a developed and independent judiciary. Plaintiffs' present no evidence to bolster their contention that the Indian legal system has not sufficiently emerged from its colonial heritage to display the innovativeness, which the Bhopal litigation would demand. Their claim in this regard is not compelling.

B. Endemic Delays in the Legal System

Galanter discusses the problems of the delay and backlog in India courts. Indeed, it appears that India has approximately one-tenth the number of judge per citizen, as the United States, and the postponements and high caseloads are widespread, Galenter urges that the backlog is a result of Indian procedural law, which allows for adjournments in mid-hearing, and for multiple interlocutory and final appeals. Numerous appeals and "[c]considerable delay [are] caused by the tendency of courts to avoid the decision of all the matters in issue in a suit, on the ground that the suit could be disposed off on preliminary point." (Galanter Aff.at 17: 18-20, 21 quoting Indian Law Commission, 54th Report (1973)pp.12-13).

This Court acknowledges that delays and backlog exist in Indian courts but United States courts are subject to delays and backlog, too See Remarks of Honourable Warren E. Burger, Chief Justice, Supreme Court of the United States, 100 F.R.D. 499, 534 (1983).

However, as Mr. Palkhivala states, while delays in the Indian legal system are a fact of Judicial life in the proposed alternative form, there is no reason to assume that the Bhopal litigation will be treated in ordinary fashion.

The Bhopal tragedy has already been approached with imagination in India. Demonstrating the creativity and flexibility of the Indian system, the Parliament of India has passed the Bhopal Act in order to deal with the cases arising from the sad events of December 3, 1984. The Bhopal act permits the cases to be treated "speedily, effectively, equitably and to the best advantage of the claimants." (Palkhivala Aff.at 11).

Mr. Dadachanji refers to another Indian case, which arose from a gas leak in New Delhi. The Chief Justice and another Justice of the Supreme Court of India ordered the presiding courts to expedite adjudication of claims. MC Mehta V. Union of India, (Dadachanji Aff.at 11 and Annexure B thereto). Other means of coping with delay are appointment of special tribunals by the Govt. of India and assignment of daily hearing duties to a single special judge, otherwise unburdened, to hear a special matter. (Dadachanji Aff.at 11). This Court is persuaded by the example of the Bhopal Act itself and other cases where special measures to expedite were taken by the Indian judiciary, that the most significant, urgent and extensive litigation ever to arise from a single event could be handled through special judicial accommodation in India, if required.

C. Procedural and Practical Capacity of Indian Courts

Plaintiffs' contend that the Indian legal system lacks the wherewithal to allow it "to deal effectively and expeditiously" with the issue raised in this lawsuit. (Memo in pp. P.53).

Plaintiffs urged that Indian practitioners emphasize oral skills rather than written briefs. They allegedly lack specialization, practical investigative techniques and coordination into partnerships. These factors, it is argued, limit the Indian bar's ability to handle the Bhopal litigation. As Mr. Dadachanji indicates, Indian lawyers have competently dealt with complex technology transfers, suggesting capability within the technological and scientific area of legal practice, if not "specialization." (Dadachanji Aff.at 8). Moreover, Indian attorneys use experts, when necessary. As to investigative ability, Mr. Dadachanji persuasively points out that the Central Bureau of Investigation ("CBI") of the Union of India is well equipped to handle factual inquiry, as is the Commission of Enquiry constituted by the state of Madhya Pradesh. (Dadachanji Aff.at.8). (Dadachanji Aff.at. 8). While Indian attorneys may not customarily join into large law firm, and as Mr. Palkivala states, are limited by present Indian law to partnerships of no more than twenty, this alone or even in concert with other factors does not establish the inadequacy of the Indian legal system. (Palkhivala Aff.at. 8). There is no reason the Indian legislature could not provide for the expansion of law-firms, if such a choice is required. In any event, this Court is not convinced that the size of a law firm has that much to do with the quality of legal service provided. Many small firms in this country perform work at least on a par with the largest firms. Bigger is not necessarily better.

Moreover, since the Union of India purports to represent all the claimants, it is likely that if the case were transferred to India, the attorney General or Solicitor General of India and the Advocate General of Madhya Pradesh, with attendant staffs, would represent the claimants. The Indian bar appears more than capable of shouldering the litigation if it should be transferred to India. (Palkhivala Aff.at 9).

Next, plaintiffs and Professor Galanter argue that the substantive tort law of India is not sufficiently developed to accommodate the Bhopal claims. Plaintiffs trace the lack of sophistication in Indian tort law to the presence of court fees for litigants as inhibiting the filing of civil suits. Though the filing fees may have had historical significance they are irrelevant here. Professor Galanter acknowledges that court fees may be waived for "poor

parties of for specific classes of litigants." (Galanter Aff.at 28). In fact, filing fees have been waived for claimants in India in the Bhopal litigation already begun there.

Professor Galanter asserts that India lacks codified tort law, has little reported case law in the tort filed to serve as precedent, and has no tort law relating to disputes arising out of complex product or design liability. (Galanter Aff.at 30-36). As an illustration of the paucity of Indian tort law, Professor Galanter states that a search through the All India Reports for the span from 1914 to 1965 revealed only 613 tort cases reported. (Galanter Aff. at 32). Mr. Dadachanji responds that tort law is sparsely reported in India due to frequent settlement of such cases, lack of appeal of higher courts, and the publication of tort cases in specialized journals other than the All-India Reports. (Dadachanji Aff.at 16-17: Palkhivala Af. at 10). In addition, tort law has been codified in numerous Indian statutes. (Dadachanji Aff.at 16-17).

As professor Galanter himself states, "major categories of tort, their elements, the [theories] of liability, defences, respondent superior, the theories of damages-are all familiar." (Galanter Aff. at 37). What is different, Galanter asserts, is the complete absence of tort law relating to high technology of complex manufacturing processes. This is of no moment with respect to the adequacy of the Indian Courts. With the groundwork of tort doctrine adopted from the common law and the presidential weight awarded British cases, as well as Indian ones, it is obvious that a well-developed base of tort doctrine exists to provide a guide to Indian Courts presiding over the Bhopal litigation, In any event, much tort law applied in American cases involving complex technology has its source in legal principles first enunciated in Victorian England. See, e.g., Rylands v. Flecher, 1868, L.R. 3. H.L. 330 as Mr. Palkhivala stated in his affidavit.

Plaintiffs next assert that India lack certain procedural device which are essential to the adjudication of complex cases, the absence of which prevent India from providing an adequate alternative forum. They urge that Indian pre-trial discovery is inadequate and that therefore India is an inadequate alternative forum. Professor Galanter states that the only forms of discovery available in India are written interrogatories, inspection of documents, and requests for admissions. Parties alone are subject to discovery Third-party witnesses need not submit to discovery. Discovery may be directed to admissible evidence only, not material likely to lead to relevant of admissible material, as in the courts of the United States. Parties are not compelled to provide what will be actual proof at trial as part of discovery.

These limits on discovery are adopted from the British system. Similar discovery tools are used in Great Britain today. This Court finds that their application would perhaps, however, limit the victims' access to sources of proof. Therefore, pursuant to its equitable powers, the Court directs that the defendant consent to submit to the broad discovery afforded by the United State Federal Rules of Civil Procedure if or when an Indian court sits in judgement or presides our pre-trial proceedings in Bhopal litigation. Any dismissal of act new by this court is thus conditioned on defendant's consent to submit to discovery on the American model, even after transfer to another jurisdiction.

The ostensible lack of devices for third-party impleaded or for organizing complex cases under the law of the state of Madhya Pradesh are two other procedural deficiencies which plaintiffs assert preclude a finding that India offers an adequate alternative forum. Assuming for the moment that, upon appropriate transfer, the Bhopal litigation would be adjudicated by the local district court in Bhopal and that the law of Madhya Pradesh would be applied, this Court is still not moved by plaintiffs' argument regarding impleader or complex litigation.

Although no specific provision in the Indian Code of Civil Procedure permits the impleading of third parties for whom contribution is sought, other provision in the Code do provide for impleader. As both parties to this motion state, Order 1, Rule 10 (2) of the Indian Code of Civil Procedure "allow the court to add additional parties if the presence of those parties is necessary in order to enable the Court effectively and completely to adjudicate upon and settle all questions involved in the suit." (Galanter Aff.at 60: Dadachanji Aff.at 18). Professor Galanter posits that a joint tort feasor would not be considered a necessary party, and would not be joined. Defendant's expert conversely, asserts that a party can be added to prevent multiplicity of suits and conflicts of decisions. Thus Mr. Dadachanji argues, defendants would be able to seek contribution from third parties if joinder would prevent repetitive litigation of inconsistency. Moreover, the broad provision of inherent powers to aid the ends of justice, as codified at Section 151 of the Indian Code of Civil Procedure would prevent an ultimate miscarriage of justice in the area of impleader. (Dadachanji Aff. at 19).

The absence of procedures of mechanisms within the Indian judiciary to handle complex litigation is presented as support for plaintiffs' position regarding the non-existence of an adequate alternative forum. Professor Galanter asserts, for example, that Indian judges do not promote settlements. The point is wholly irrelevant to the question of whether an adequate alternative forum exist. In any event, this Court has laboured hard and long to promote settlement between the parties for over a year, to no avail. It would appear that settlement, although desirable for many reasons including conservation of attorneys; fee and costs of litigation, preservation of judicial resources, and speed of resolution, is unlikely regardless of the level of activism of the presiding judge.

Plaintiffs' next contention is that since no class action procedure exists in India expedition litigation of the Bhopal suits would be impossible. As with all of plaintiffs' other arguments this purported deficiency does not constitute "any remedy" at all. Professor Galanter himself acknowledges that Order 1, Rule 8 of the Indian Code of Civil Procedure provides a mechanism for "representative" suits 'where there are numerous persons having the same interest in one suit." (Galanter Aff.at 54). Even if the current state of Indian law regarding "representative" suits involves application of the mechanism to pre-existing groups such as religious sects of associations, there is no reason to conclude that the Indian legislature, capable of enacting the Bhopal Act, would not see its way to enacting a specific law for class actions. In addition, it dose not appear on the face of Order 1, Rule 8 that the "representative" suit is expressly limited to pre-existing groups. The Indian district court could adopt the rule for use in newly created class of injured, whose members all have "the same interest" in establishing the liability

of the defendant. An Indian court has law available to created representative class or perhaps a few representative classes. The "scheme" for registration and processing of claims, see supra, at 37 could perform the task of evaluating the specific amounts of claims. Moreover, Mr. Dadachanji gives at least three examples where Indian courts have consolidated suits pursuant to their inherent power under Section 151 of Indian Code of Civil Procedure. In at least one case, such consolidation allegedly occurred without consent of the parties. (Dadachanji Aff.at 9). The absence of a rule for class actions which is identical to the American rules does not lead to the conclusion that India is not alternative forum.

Final points regarding the asserted inadequacies of Indian Procedure involve unavailability of juries of contingent fee arrangements in India. Plaintiffs do not press these arguments, but Mr. Palkhivala touches upon them. They are easily disposed of. The absence of juries in civil cases is a feature of many civil law jurisdictions, and of the United Kingdom. Piper at 252, n. 18 and citations therein. Furthermore, contingency fees are not found in most foreign jurisdictions. Piper at 252, n. 18. In any event, the lack of contingency fees is not an insurmountable barrier to filing claim in India, as demonstrated by the fact that more than 4,000 suits have been filed by victims of the Bhopal gas leak in India, already. According to Mr. Palkhivala, moreover, well known lawyers have been known to serve clients without charging any fees.

Plaintiffs' final contention as to the inadequacy of the Indian forum is that a judgment rendered by an Indian court cannot be enforced in the United States without resort to further extensive litigation. Conversely, plaintiffs assert, Indian law provides res judicata effect to foreign judgment and preclude plaintiffs from bringing a suit on the same cause of action in India. (Galanter Aff.at 63-65). Mr. Dadachanji disputes this description of the Indian law of res judicata. He asserts that the pendency, or even final disposition of an action in a foreign court does not prevent plaintiffs from suing in India upon the original cause of action. Plaintiffs would not be limited, Mr. Dadachanji argues, to an Indian action to enforce the foreign judgment. (Dadachanji Af.at 19-20). In addition, he states that an Indian court, before ordering that a foreign judgment be given effect, would seek to establish whether the foreign court had failed to apply Indian law, or misapplied Indian law. (Dadachanji Aff. 20).

The possibility of non-enforcement of a foreign judgment by courts of either country leads this Court to conclude that the issue must be addressed at this time. Since it is defendant Union Carbide which, perhaps ironically, argues for the sophistication of the Indian legal system in seeking a dismissal on grounds of forum non convenience, and plaintiffs, including the Indian Government, which state a strong preference for American legal system, it would appear that both parties have indicated a willingness to abide by judgment of the foreign nation whose forum each seek to visit. Thus, this court conditions the grant of a dismissal on forum non convenience grounds on Union Carbide's agreement to be bound by the judgment of its preferred tribunal, located in India, and to satisfy any judgment rendered by the Indian Court, and affirmed on appeal in India. Absent such consent to abide by and to "make good" on a foreign judgment, without challenge except for concerns relating to minimal due process, the motion to dismiss now

under consideration will not be granted. The preference of both parties to play ball on a distant field will be taken to its limit, with each party being ordered to be bound by the decision of the respective foreign referees.

To sum up the discussion to this point, the Court determines that the Indian legal system provides an adequate alternative forum for the Bhopal litigation. Far from exhibiting a tendency to be so "inadequate or unsatisfactory" as to provide "no remedy at all," the courts of India appear to be well up to the task of handling this case. Any unfavourable change in law for plaintiffs, which might be suffered upon transfer to the Indian Courts, will, by the rule of Piper, not be given "substantial weight." Differences between the two legal systems even if they inure to plaintiffs' detriment, do not suggest that India is not an adequate alternative forum. As Mr. Palkhivala asserts with some dignity, "while it is true to say that the Indian system today is different in some respects from the American system, is it is wholly untrue to say that it is deficient or inadequate.

Difference is not be equated with deficiency." (Palkhivala ff. At 4) Piper at 254 the inquiry now turn to a weighing of the public and private interest factors.

2. Private Interest Concerns

The Gilbert Court set forth a list of considerations which affect the interest of the specific litigation to an action, and which should be weighed in making a forum non convenience determination. The so-called private interest factors, along with public interest factors discussed below, were not intended to be rigidly applied. As the Court started in Piper.

Piper at 249-50, Recognizing that "Particularly with respect to the question of relative Case of access to sources of proof." "The private interests point in both directions," the Supreme Court nevertheless upheld a district Court's decision to dismiss a case in favour of the relative convenience of a forum Scotland. Piper at 257. By contrast, this Court finds that the private interests point strongly one way. As in Piper, it appears that the burdensome effect of a trial in this forum supports a finding that the private interest factors in this case weigh strongly in favour of dismissal.

A. Source of Proof

The first example of a private interest consideration discussed in Gilbert is "relative ease of access to source of proof." As stated, the analysis of this issue must hinge on the facts. Limited discovery on the issue of forum non-convenience has taken place, pursuant to the Court's order of August 14, 1985." The Court can therefore proceed to discuss this question.

Union Carbide argues that virtually all of the evidence which will be relevant at a trial in this case is located in India. Union Carbide's position is that almost all records relating to liability, and without exception, all records relating to damages, are to be found in and around Bhopal. On the liability question Union Carbide asserts that the Bhopal plant was managed and operated entirely by Indian nationals, who were employed by UCIL. (Affidavit of Warren J. Woomer, formally Works manager of the Bhopal plant ("Woomer Aff."at 2). Defendant asserts that the Bhopal plant is part of UCIL's Agricultural

Products Division, which has been a separated division of UCIL for at least 15 years, and that the plant has "limited contract" with UCIL's Bombay headquarters, and almost no contract with the United States. (Woomer aff. at 4-32). Woomer claims to have been the last American employed by UCIL. He departed from Bhopal in 1982. (Woomer aff.at 2).

Woomer describes the structure and organization of the Bhopal facility at the time of the accident. The plant had seven operating units, each headed by a manager or department head each reported either directly to the plant's General Work Manager, or to one of three Assistant Works Managers. (Woomer Aff.at 6). Each of these is also an Indian national. Three of the operating units which at this very early stage of inquiry into liability appear to have been potentially involved in the MIC leak are the Carob Monoxide, Mic/Phosgene and Carbamoylation units. (Woolmer Aff. 7-10). The Carbon Monoxide and MIC /Phosgene units together employed 63 employees, all Indian nationals. (Woomer Aff.at 10). Mr. Woomer states that an inquiry into the cause of the accident require interviews with at least those employees who were on duty at the Bhopal facility "immediately prior or after the accident." Mr. Woomer asserts that there are 193 employees, all Indians, who must be interviewed. (Woomer aff.at 58)."

In addition to the seven operating units, the Bhopal plant contained seven functional departments, which serviced operations. The seven heads of the units reported within the plant much as the department heads did.

The Maintenance unit was apparently subdivided into departments including instrumentation, Mechanical Maintenance, both parts of the Agricultural Chemical Maintenance unit, which employed 171 people in total, and plant Engineering and Formation Maintenance, which employed 46 people. (Woomer aff.at 11-12). In addition, the Utilities and Electrical department employed 195 people. (Woomer aff.at 13). According to Mr. Woomer, the various maintenance organisations performed repair on equipment, provided engineering support, fabricated certain equipment salvaged other portions, and controlled utilities, temperatures and pressures throughout the planting (Woomer aff.at 11-14).

Moreover, according to Mr. Woomer, these UCIL departments also kept daily, weekly and monthly records of plant operations, many of which were purportedly seized by the CBI and selected for copying by various maintenance units would likely be relevant to the question of liability at trial.

Of the additional functional units, it is possible that quality Control, with 54 employee. Purchasing, with 53 of Stores may have been directly involved in the disaster by virtue of their participation in analyzing plant output, procuring raw material for the chemical processes of the plant, and maintaining spare parts certain chemicals. (Woomer aff.at 14-19). Thus, the records and reports of these three departments may be necessary to on investigation of liability. While examination of members of the Work Office department and Industrial Relations department would likely to be less directly useful, information regarding plant budgets and employee histories might be of relevance of great importance are the records of the Safety/Medical department, which was responsible for daily auditing of safety performance in all departments, training and testing on safety rules,

maintenance safety and planning and implementing safety drills. (Woomer aff. at 22-23). The 31 Indian employees of this department worked with the Central Safety Committee of the plant, whose members were drawn form plant management, and the Departmental Safety Committees. Operating units were required to monitor plant safety mechanisms weekly, and to keep monthly checklists. (Holman Aff. 2 at 9). The Central Safety Committee met monthly, as did the Departmental Safety Committees. (Woomer aff.at 39). The MIC Unit held monthly safety committee meetings, for example, and issued monthly reports. (Woomer aff.at 41). Quarterly "Measures of Performance" reviews also covered safety issues, and were required of each operating unit. (Woomer aff.at 40). Certainly, interviews of the plant personnel involved in safety would be particularly relevant to the investigation of the disaster.

Plaintiffs refer to three occasions upon which Union Carbide, not UCIL, employees conducted safety audits at the Bhopal plant. As defendant correctly argues, these three events constitute a very small fraction of the thousands of safety audits conducted at the Bhopal facility. The three audits, moreover, were conducted in 1979, the fall of 1980 and in May of 1982, many years prior to the accident, which is the subject of the lawsuit. (Plaintiffs' Memo in Opp.at 25), 14.

Two accidents which occurred previously at the Bhopal plant might also be of relevance to the liability inquiry in this litigation. On December 21, 1981, a phosgene gas leak killed a UCH, maintenance worker. Reports of the fatality were sent to Union Carbide management in the United States (Woomer Deposition, Exs. 30 and 31). Plaintiffs assert that the accident report called for increasing training in Bhopal by United States employees of Union Carbide's Institute, West Virginia, plant. Defendant states that the responsibility for remedying problems in the Bhopal plant rested with the plant itself, and the United Carbide did not make any recommendations, and was involved only to the extent of receiving a copy of the report which called for its involvement in further training. (Woomer aff.At 41.)

The second accident at Bhopal prior to the disaster of December, 1984 took place on February 9, 1982, when a pump seal, perhaps improperly used, failed. (Memo in Opp. At 24, Woomer aff. At 41). Many employees were injured, and at least 25 were hospitalized. Plaintiffs discuss the fact that Robert Oldford, President of Union Carbide Agricultural Products Company ("UCAPC") a wholly-owned subsidiary of Union Carbide headquarters in the United Stats, was in Bhopal at the time of February 1982 leak. (Memo in Opp. At 24). Union Carbide asserts that Mr. Oldford was visiting UCII'S Research and Development Centre, located several miles form the Bhopal plant for an unrelated purpose, and was only coincidentally in Bhopal when the leak occurred. To the extent that his presence in India in 1982 has any significance. Mr. Oldford, and any other United States employees of Union Carbide who conducted safety audits in Bhopal or were present when accidents occurred there, may be flown to Bhopal for testimony of discovery.

In addition to safety data, two other types of proof may be relevant to a trial of this case on the merits. Information regarding plant design, commissioning and start-up may bear upon the liability question. Information pertinent to employees training should also have

significance. Mr. Oldford, and any other United States employees of Union Carbide who conducted safety audit in Bhopal for testimony or discovery.

In addition to safety data, two other types of proof may be relevant to a trial of this case on the merits. Information regarding plant design, commissioning and start-up bear upon the liability question. Information pertinent to employee training should also have significance.

Leaving aside the question of whether the Government of India or UCIL chose the site and product of the Bhopal pant, the Court will evaluate the facts, which bear on the issue of relevant records. The findings below concern the location of proof only, and bear solely upon the forum non convenience motion. The Court expressly declines to make findings as to actual liability at this stage of the litigation.

Plaintiffs and defendant agree that in 1973 Union Carbide entered into two agreements with UCIL which were entitled "Design Transfer Agreement" and "Technical Service Agreement". According to Plaintiffs, Union Carbide, pursuant to the Design Transfer Agreement, provided a process design to UCIL, the "detailing (of which) was undertaken in India". (Memo in Opp.at 17). The process design package consisted of the basic plan of the factory, which was to be plashed out in the detailing phase. Plaintiffs state that at least nine Union Carbide technicians travelled to India to monitor the progress of the project. Union Carbide also allegedly assigned a "key engineer", John Couvaras, to serve as UCIL Bhopal Project Manager. Mr. Couvaras allegedly "assumed responsibility for virtually every aspect of the detailing of the process design. "and approved detail reports of "not only UCIL but also independent contractors, including Humphreys and Glasgow Consultant Private Ltd., and Power Gas Limited" of Bombay, India, (Memo in Opp. At 17-20).

Plaintiffs also claim that "(n) change of any substance was made from Union Carbide's design during the detailing phase." Plaintiffs note that only "one portion" of the process design work provided to UCIL by Union Carbide was not used. (Memo in Opp. At 20). In effect, plaintiffs seek to establish that Union Carbide was the creator of the design and in the Bhopal plant, and directed UCIL's relatively minor detailing program. They urge that for the most part relevant proof on this point is located in the United States.

Defendant seeks to refute this contention, with notable success. Turning first to the affidavit of Robert C. Brown, who describes himself as "chief negotiator for Union Carbide Corporation in connection with the two agreements it entered into with ...UCIL in November, 1983," the Court is struck by the assertion the two agreements were negotiated at "arms length" pursuant to Union Carbide corporate policy, and that the Union of India mandated that the Government retain "specific control over the terms of any agreements UCIL made with foreign companies such as Union Carbide Corporation" (Brown Aff. At 3-4)."

Mr. Brown alleges that the Letter of intent issued by the Union of India in March 1972, pursuant to which construction and design of the plant were allowed to ensue provided, inter alia, that:

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Mr. Brown claims, on personal information, that UCIL told him that Union Carbide would not be allowed to be involved in the Bhopal project beyond the provision of process design packages. (Brown Aff. At 5). The Design Transfer Agreement indicates that Union Carbide duty under the Agreement was to provide process design packages, and that UCIL, not Union Carbide, would be responsible to, "detail design, erect and commission the plant", (Defendant's Ex.4, S 4.1), Union Carbide, accordingly, issued limiting warranties with respect to the design packages, detailing of which it would not be involved with. (Brown Aff. At 7, Ex.4. S 4.1, 12.3).

The nature of UCIL's design work is discussed in the affidavit of Ramjet k. Dutta, who has held various positions at UCIL, and UCAPC. From 1973 through 1976, Mr. Dutta was employed as General Manager of the Agricultural Products Division of UCIL, (Dutta Aff. At 2).

Mr. Dutta asserts that the Bhopal facility was built by UCIL over the eight years from 1972 to 1980. (Dutta Aff. At 8). He asserts that Union Carbide's role in the project was "narrow" and limited to providing "certain process design packages for certain parts of the plant." (Dutta Aff. At 9). He continues, stating:

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Mr. Dutta alleges that "at no time were Union Carbide Corporation engineering personnel from the United States involved in approving the detail design of drawing prepared upon which construction was based. Nor did they receive notices of change made." (Dutta Aff.at 24).

Mr. Dutta expressly states that the MIC storage's tank and monitoring instrumentation were fabricated of supplies by two named Indian sub-sectors. The vent gas scrubber is alleged to have been fabricated in the Bhopal plant shop. (Dutta Aff.at 25).

Of the 12,000 pages of documents purportedly seized by the CBI regarding design and Construction of the Bhopal plant, an asserted 2,000 are designed reports of Humphreys and Glasgow UCIL of other contractors. Defendant claims that blueprints and calculations comprise another 1,700 pages in documents held by the CBI. Five thousands pages of contractors are asserted to be in India. In addition, Union Carbide claim that blueprints and diagrams may not reflect final design changes as incorporated into the actual plant, and that the detail design engineer's testimony will be needed to determine the configuration of the actual plant. (Holman Aff.2 at 15-16).

One final point bearing on the information regarding liability is contained in the affidavit of Edward Munoz, at a relevant time the General Manager of UCIL's Agriculture Products Division. He later acted as Managing Director of UCIL. Mr. Munoz has submitted an affidavit in which he states that Union Carbide decided to store MIC in large quantities at the Bhopal plant, despite Mr. Munoz's warnings that MIC should be stored only in small amounts because of safety. (Memo in Opp. At 15-16; Munoz Aff.) Mr. Dutta, for defendant, asserts that there was never any issue of token storage of MIC

at Bhopal, as Mr. Munoz states, and that there is no truth to Mr. Munoz's assertion that he was involved in the storage issue. (Duta Aff.at 30). The Court cannot make any determination as to the conflicting affidavits before it. This question, which involves credibility concerns, is left for later in the litigation. To the extent that this particular matter bears upon the relative case of access to Proof. Mr. Munoz and Mr. Dutta both may be called to testify at trial or discovery, Mr. Dutta's home is in Bhopal. (Dutta Aff.at 1) The Court is not aware of the whereabouts of Mr. Munoz at this time. Either of the two could travel to either alternative forum.

In addition to design and safely records, material regarding training of Bhopal personnel is likely to be relevant to the question of liability. Plaintiffs state that Warren Woomer supervised the training of UCIL personnel at Union Carbide's Institute, West Virginial Plant. According to plaintiffs, 40 UCIL employees were transported to institute's MIC facility for lengthy training. (Memo in Opp.at 22). Mr. Woomer states in reply that the 40 employees thus training represented a fraction of the over 1,000 employees who were trained exclusively in Bhopal. (Woomer)

In the aggregate, it appears to the Court that most of the documentary evidence concerning design, training, safety and start-up, in other words, matters bearing on liability, is to be found in India. Much of the material may be held by the Indian CBI. Material located in this country, such as process design packages and training records of the 40 UCIL employees trained at Institute, constitutes a smaller portion of the bulk of the pertinent data then found in India. Moreover, while records in this country are in English, a language understood in the courts of India, certain of the records in India are Hindi or other Indian languages, as well as in English. (Holman Aff 2 at 12). The Indian language documents would have to be translated to use in the United States. The reverse is not true. It is evident to the Court that records concerning the Design, Manufacture and Operation of the Bhopal plant are relatively more accessible in India than in the United States, and that fewer translation problems would face an Indian Court than an American Court. Since Union Carbide has been directed to submit to discovery in India Pursuant to the liberal grant of the American Federation Rules of Civil Procedure, and this opinion is conditioned upon such submission, any records sought by plaintiffs must be made available to them in India. The private interest factors of relative case of access to sources of proof bearing on liability favour dismissal of the consolidated case. The Indian Government is asserted to have been involved in safety, licensing and other matters to relating to liability. Records relating thereto are located in India, as are the records seized by the CBI. Although plaintiffs state that all such records could and would be made available to this Court, it would be easier to review them in India. Transmitted and translation problems would thereby be avoided.

B. Access to Witnesses

Gilbert teaches a second important consideration under the heading of private interests, the "availability of compulsory process for attendance of willing, and the cost of obtaining attendance of unwilling, witnesses". "Gilbert at 508. As discussed in detail above, most witnesses who testimony would relate to questions of causation and liability are in India. Engineers from UCIL and Humphreys and Glasgow and other sub-

contractors, of whom there are hundreds, are located in India. Shift employees possible for training, safety auditing, procurement, compliance with regulations and other operations might be required to testify. More than likely, many of these potential witnesses do not speak English, and would require translators. Many of the witnesses are not parties to this litigation. Therefore, as the Court of Appeals for the Second Circuit has stated in the context of a forum non convenience motion:

Fitzgerald v. Texaco, 521F. 2d 448, 451-52 (2d cir. 1975), cert denied, 423 U.S. 1052 (19760) (footnote omitted). In contrast, the relatively few witnesses who reside in the United States are primarily employed by Union Carbide. As employees of a party they would probably be subject to the power of Indian courts. Transportation costs would also be lower, since fewer people would have to make the journey to testify.

The presence of the Indian Government in this action is also of critical importance on this motion. Plaintiffs assert that "all necessary officials and employees of the Central Government will voluntarily comply with request to attend trial." (Memo is Opp.at 70; Answer to No. 124 of Defendant's First Requests for Admission, Exhibit 55). This statement does not provide for attendance by officials of Madhya Pradesh or the Bhopal municipality, whom Union Carbide indicates might be impleaded as the third-party defendants. As witnesses only, these officials would not be subject to this Court's subpoena power. As the third-party defendants, they might be immune from suit in the United States by the terms of the Foreign Sovereign Immunities Act, 28 U.S.C 1602 et seq. State and city officials might also lack sufficient contacts with this district to allow this Court to exercise personnel jurisdiction over them.

While Union Carbide might be deprived of testimony of witnesses or even potential third parties if this action were to proceed in this forum, no such problem would exist if litigation went forward in India.

The unavailability of compulsory process for Indian non-party witnesses, of whom there are many, such as would ensure their presence at a trial in this country, the high cost of transporting the large number of Indian Nationals to the United States, as well as the need to translate their testimony should they appear, all support the argument favouring dismissal of this action on forum non convenience grounds. The private interest concerns regarding witnesses emphasize the logic of defendant's position. Relatively fewer. United States than in India. Almost all of the witnesses located in this country are employees of defendant, and would be subject to compulsory process in India as a result. Transportation costs of transporting hundreds of Indian witnesses. Since English is widely 'spoken' in India, less translation would be required for foreign witnesses in India than in the converse situation.' Should this case be tried in India fewer obstacles to calling State and local officials as witnesses or parties would face the defendant. The Court determines that this private interest factor weighs in favour of dismissal.

C. Possibility of View

The third private interest factor articulated in Gilbert is the case of arranging for a view of the premises around which the litigation centres. Plaintiffs assert that the notion that a

jury view of the plant and environs is necessary is "simply preposterous." (Memo in Opp. at 71). Plaintiffs note that a viewing of the premises is rarely conducted in products liability cases, since videotapes pictures, diagrams, schematics and models are more instructive than an actual view. (Memo in I Opp. at 71). A viewing of the plant and hutments would probably not be of utmost importance in determining liability, and this consideration, is not afforded great weight on this motion.

However, the instant case is not identical to the product design defect case cited by plaintiffs, in which a district court judge determined that "the present appearance of the defendants' facilities may or may not be relevant to production which occurred" in the period in which the allegedly violative manufacture occurred. Hondson v. A.H. Robins Co., Inc., 528 F. Supp. 809, 822 (E.D.Va.1981), aff'd 715 F, 2d 142 (Ci. 1983). In the instant case, the site of the accident was sealed after the leak, and the present condition of the plant might be relevant to a finding of liability. A viewing may not be necessary, but conceivably could be called for later in the litigation. An Indian court is in a far better position than this Court to direct and supervise such a viewing should one ever be required.

This consideration, though minor, also weighs in favour of dismissal.

In summary, then, the private interest factors weighing greatly is strongly in favour of the defendant and foreign plaintiffs' choice of a foreign forum is given less than maximum defence, the Court determines that dismissal is favoured at this point in the inquiry. Gilbert at 508.

3. Public Interest Concerns

The Gilbert Court articulated certain which affected the interests of non parties to a litigation to be considered in the context of the doctrine of forum non-convenient. These public interest concerns were held to be relevant to a court's determination of whether to dismiss on these grounds. The Supreme Court expressly identified a few factors:

Gilbert at 508-9. The Court will consider these various factors in turn, as well as others discussed by the parties and amicus curiae.

A. Administrative Difficulties

As is evident from the discussion thus far, the mere size of the Bhopal case, with its multitude of witnesses and documents to be transported and translated, obviously creates administrative problems.

There can be no doubt that the Bhopal litigation will take its toll on any court which sits in judgment on it. This Court sits in one of the busiest districts in the country, and finds, as a matter within its experience, that this is a "congested centre" of litigation as described in Gilbert at 508. The burden which would be imposed should litigation continue here was aptly described by the Court of Appeals for the Second Circuit in Schertenlieb v. Traum, 589 F.2d 1156 (2d Cir. 1978). Reviewing a district judge's ruling for dismissal on the grounds of forum non conveniences, the Second Circuit observed

that “were it not for the somewhat unusual fact that it is the forum resident who seeks dismissal, we would have to say very little regarding the exercise of Judge Metzner’s discretion in dismissing this case.” Schertenlieb at 1164. In affirming the ruling for dismissal, the Court of Appeals asked the rhetorical question:

This Court has already determined that because of the location of the preponderance of the evidence in India, and the difficulty of transporting documents and witnesses of this forum, this district is clearly an inconvenient forum for the litigation. An alterative forum is seen to exist in India. This Court feels that the answer to the Schertenlieb question is clear.

A district judge in this district, in Domingo v. States Marine Lines, 340 F.Supp.811 (S.D.N.Y.1972) evaluated the administrative concerns of the Southern District of New York, relevant to this Court today, a full fourteen years later. The Domingo court stated:

Domingo at 816.

The defendant in this case, involved as it appears to have been in the process design phase of the plant’s construction, may have a slightly less tenuous connection to this forum than a corporation which is merely doing business here. Certain business conducted in New York, or in corporate headquarters in Danbury, Connecticut, may have been directly related to development or operation of the UCIL facility in Bhopal. However, almost “all the relevant events” leading to and following from the accident occurred in India. Indian citizens are primarily involved in the case, both as witnesses and claimants. The substantial administrative weight of this case should be centred on a court with most significant contracts with the events. Thus, a court in Bhopal, rather than New York, should bear the load.

In addition to the burden on the court system, continuation of this litigation in this forum would tax the time and resources of citizens directly. Trial in this case will no doubt be lengthy. As assigned jury would be compelled to sit for many months of proof. Because of the large number of Indian language-speaking witnesses, the jurors would be required to endure continual translations which would double the length of trial. The burden on the jurors themselves, and their families, employees and communities would be considerable. The need for translation would be avoided if trial were to be held in Bhopal.

Clearly, the administrative costs of this litigation are astounding and significant. Despite its deep concern for the victims of the tragedy, this Court is persuaded by a recent relevant decision of the New York State Court of Appeals. In the opinion if Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474(1984), cert. denied, 105 S.Ct..783 (1985), with reference to a decision discussing actions brought in New York by the Iranian Government against the Shah and his Wife, the Court of Appeals stated that:

[T]he taxpayers of this State should not be compelled to assume the heavy financial burden attributable to the cost administering the litigation contemplated when their interest in the suit and the connection of its subject matter. . .is so ephemeral.

Islamic Republic at 483 (citations omitted). Administrative concerns weigh against retention of this case.

B. The Interest of India and the United States

Plaintiffs, and especially amicus curiae emphasize this point of argument in opposition to the motion to dismiss. Concerned with the asserted possibility of developing a "double standard" of liability for multinational corporations, plaintiffs urge that American courts should administer justice to the victims of the Bhopal disaster as they would to potential American victims of industrial accidents. The public interest is served, plaintiffs and amicus argue, when United States corporations assume responsibility, amicus asserts, "Would both injure our standing in the world community and betray the spirit of fairness inherent in the American character." (Amicus Brief at 4). The specific American interest allegedly to be served by this Court's retention of the case include the opportunity of creating precedent which will "bind all American multinationals henceforward," (Amicus Brief at 20); promotion of "international cooperation," (Amicus Brief at 22-23); avoidance of an blackmail of hazardous industries which extract concessions on health and blackmail of hazardous industries which extract concessions on health environmental standards as the price of continuing operations the United States."(Amicus Brief at 20). An additional American public interest ostensible to be served by retention of the litigation in this forum is advanced by plaintiff themselves. They assert that the deterrent effect of this case can be distinguished from the situation in Piper, where the Court reject the argument that "American citizens have an interest in ensuring that American manufacturers are deterrence might be obtained if Piper and [its co-defendant] were tried in the United States, where they could be sued on the basis of both negligence and strict liability." Piper at 260. The Court stated that:

Piper at 260-261.According to plaintiff, the potential for greater deterrence in this case is "self-evident."

The opposing interest of India is argued to be ill-served by sending this litigation to India. Pointing to the fact the Union of India chose this forum, plaintiffs, state that there can be "no question as to the public interest of India." (Memo in Opp. at 91). Union Carbide's statements regarding the interest in this litigation are summarily dismissed by the plaintiffs, who state that "Union Carbide, whose action caused the suffering of an entire city, has no standing to assert this belated concern for the welfare of the Indian populace."(Memo in Opp. At 91).

Union Carbide, not surprisingly, argues that the public interest of the Union States in this litigation is very slight, and that India's interest is great. In the main, the Court agrees with the defendant.

As noted, Rebert C. Brown states in his affidavit on behalf of Union Carbide that the Indian Government preserved the right to approve foreign collaboration and import of equipment to be used in connections with the plant. See supra at 53. In addition, Mr. Brown quoted except from the 1972 Letter of Inter entered into by the Union of India and UCIL, on term of which required that "the purchase of only such design and consultancy

service from abroad as are not available within the country" would be allowed. (Brown Aff. at 6). Ranjit K. Dutta states that the Indian Government, in process of "Indianization," restrict the amount of foreign materials and foreign consultants' time which could be contributed to the project, and mandated the use of Indian material and experts whenever possible. (Dutta Aff.at 35). In and alleged ongoing attempt to minimize foreign exchange losses through imports, the Union of India insisted on approving equipment to be purchased abroad through the mechanism of a "capital goods license." (Dutta Aff. at 48-50).

The Indian Government, through its Ministry of Petroleum and Chemicals, allegedly required information from UCIL regarding all aspects of the Bhopal facility during construction in 1972 and 1973, including "information on toxicity" of chemicals. (Dutta Aff. at 44). The Ministry required progress reports throughout the course of the construction project. These reports were required by the Secretariat for Industrial approval, the Director General. Technical Development and the Director of Industries of Madhya Pradesh. (Dutta Aff. at 45). Moreover, UCIL was ultimately required to obtain numerous license during development, construction and operation of the facility. (Dutta Aff. at 46). The list of licenses obtained fills five pages.

The Indian Government regulated the Bhopal plant indirectly under a series of environment laws, enforced by numerous agencies, such as the Occupational Safety and Health Administration, the Environmental Protection Agency and state and local agencies regulate the chemical industry in the United States. (Dutta Aff. at 53-56). Emissions from the facility were monitored by a state water pollution board, for example. (Dutta Aff. at 64). In addition, state officials periodically inspected the fully- constructed plant. (Dutta Aff.at56). A detailed inquiry into the plant's operations was conducted by the Indian Government in the aftermath of the December, 1981 fatality at the MIC unit and the February, 1982 incident involving a pump seal. (Dutta Aff. at 58-62). Numerous federal, state and local commissions, obviously, investigated the most tragic incident of all, the MIC leak of December, 1984.

The recital above demonstrates the immense interest of various Indian government agencies in the creation, operation, licensing and regulation, and investigation of the plant. Thus, regardless of the extent of Union Carbide's own involvement in the UCIL plant in Bhopal, or even of its asserted "control" over the plant, the facility was within the sphere of regulation of Indian laws and agencies, at all levels. The comments of the Court of Appeal for the Sixth Circuit with respect to its decision to dismiss a product liability action on forum non convenience grounds seem particularly apposite. In re Richardson-Merrell, Inc., 545 F. Supp. 1130 (S.D.Ohio 1982), modified sub. Nom. Dowling v. Richardson Merrell Inc., 727 F. 2d 608 (6th Cir. 1984), the court reviewed a dismissal involving and action brought by a number of plaintiffs, all of whom were citizen of Great Britain. Defendant in the action was a drug company which had developed and tested a drug in the United States which was manufactured and marketed in England. The suit was brought against the American parent, not the British Subsidiary, for injuries allegedly resulting from ingestion of the offending drug in England and Scotland. The district court, in dismissing the case, stated that:

Dowling, 727 F. 2d at 616.

The Indian government, which regulated the Bhopal facility, has its standards for safety are compiled with. As regulators, the Indian government and individual citizen even have an interest in knowing whether extant regulations are extent of regulation by Indian agencies of the Bhopal plant. It finds that this is not the appropriate tribunal to determine whether the Indian regulations were breached, or whether the laws themselves were sufficient to protect Indian citizens from harm. It would be sadly paternalistic, if not misguided, of this Court to attempt to evaluate the regulation and standards imposed in a foreign country. As another district court swatted in the context of drug product liability action brought by foreign plaintiffs in this country.

Harrison v. Wyeth Laboratories, 510 F. Supp. 1,4,(E.D.Pa 1980, aff'dmem. 676 F. 2d 685 (3d Cir. 1982). India no doubt evaluated its need for a pesticide plant against the risks inherent in such development. Its conclusions regarding questions as to the safety of [products] marketed" of manufactured in India were "properly the concern of that country." Harrison at 4 (emphasis omitted). This is particularly true where, as here the interest of the regulators were possible drastically different from concerns of American regulators. The court is well aware of moral danger of creating the "double-standard" feared by plaintiffs and amicus curiae. However, when an industry is as regulated as the chemical industry is in India, the failure to acknowledge inherent differences in the aims and concerns of India, as compared to American citizens would be naive, and unfair to defendant. The district court in Harrison considered the hypothetical instance in which a products liability action arising out of an Indian accident would be brought in the United States. The Court speculated as follow:

Harrison at 4-5. This Court, too thinks that it should avoid imposing characteristically American Values on Indian concerns.

The Indian interest in creating standards of care, enforcing them or even extending them, and of protecting its citizens from ill-use is significantly stronger than the local interest in deterring multinationals from exporting allegedly dangerous technology. The supposed "blackmail" effect of dismissal by which plaintiffs are trouble is not a significant interest of the American population, either. Surely, there will be no relaxing of regulatory standards by the responsible legislators of the United States as a response to lower standards abroad. Other concerns than bald fear of potential liability, such as convenience or tax benefits, bear on decisions regarding where to locate a plant. Moreover, the purported public interest of seizing this change top create new law is no real interest at all. This Court would exceed its authority were it to rule otherwise when restraint was order.

This Court concludes that the public interest of India in this litigation far outweighs the public interest of the United States. This litigation offers a developing nation the opportunity to vindicate the suffering of its own people within framework of a legitimate legal system. This interest is of paramount importance.

C. The Application Law

Gilbert and Piper explicitly acknowledge that the need of an American Court to apply foreign law is an appropriate concern on a forum non convenience motion, and con in fact point toward dismissal. Gilbert at 509; Piper at 260. Especially when, as here all other factors favour dismissal, the need to apply foreign law is a significant consideration on this type of motion. Piper at 260, no.29. A federal Court is bound to apply the choice of law rules of the state in which an action was originally brought; even upon transfer to a different district, "the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue." Van Dusen v. Barrack, 376 U.S. 612, 639(1964). Thus, this Court, sitting over a multidistrict litigation, must apply the various choice of law rules of the state in which the action now consolidated before it were brought. Rather than undertaken the task of evaluating the choice of law rules of each state separately, the court will treat the choice of law doctrine in toto. The "governmental interest" analysis, employed by many jurisdictions, requires a court to look to the question of which state has the most compelling interest in the outcome of the case. India's interest in the outcome of the litigation exceeds America's, see supra at 59-67. The lex loci delicate analysis used in other jurisdictions indicates that the law of the state where the tort occurred should be applied. The place in which the tort occurred was, to a very great extent, India. Other states apply the "most significant relationship" test, or "weight of contact" test, which evaluate in which state most of the events constituting the tort occurred. The contact with India with respect to all phases of plant construction, operation, malfunction and subsequent injuries are greater in number than those with the United States. Thus, under any one of these three doctrines, it is likely that Indian law will emerge as the operative law. An Indian Court, therefore, would be better able to apply the controlling law than would this United states Court, or a jury working with it. This public interest factor also weighs in favour of dismissal on the grounds of forum non convenience.

CONCLUSION

It is difficult to imagine how a greater tragedy could occur to a peacetime population than the deadly gas leak in Bhopal on the night of December 2-3, 1984. The survivors of the dead victims, the injured and others who suffered, or may in the future suffer due to the disaster, are entitled to compensation. This Court is firmly convinced that the India legal system is in a far better position than the American courts to determine the cause of the tragic event and thereby fix liability. Further, the Indian courts have greater access to all the information needed to arrive at the amount of the compensation to be awarded the victims.

The presence in India of the overwhelming majority of the witnesses and evidence, both documentary and real, would by itself suggest that India is the most convenient forum for this consolidated case. The additional presence in India of all but the less than handful of claimants underscores the convenience of holding trial in India. All of the private interest factors described in Piper and Gilbert weigh heavily toward dismissal of this case on the ground forum non convenience.

The public interest factors set forth in Piper and Gilbert also favour dismissal. The administrative burden of this immense litigation would unfairly tax this or any American tribunal. The cost to American tax payers of supporting the litigation in the United States would be excessive. When another, adequate and more convenient forum so clearly exists, there is no reason to press the United States judiciary to the limits of it capacity. No American interest in the outcome of this litigation outweighs the interest of India in applying Indian values to the task of resolving this case.

The Bhopal plant was regulated by Indian agencies. The Union of India has very strain interest in the aftermath of the accident which affected its citizens on its own soil. Perhaps, Indian regulations were ignored or contravened. India may wish to determine whether the regulations imposed on the chemical industry within its boundaries were sufficiently stringent. The Indian interests far outweigh the interests of citizens of the United States in the litigation.

Plaintiffs, including the Union of India, have argued that the courts of India are not up to the task of conducting the Bhopal litigation. They asset that the Indian Judiciary has yet to reach full maturity due to the restrains placed upon it by British colonial rules who shaped the Indian legal system to meet their own end. Plaintiffs allege that the Indian justice system has not yet cast off the burden of colonialism to meet the emerging needs of a democratic people.

The Court thus finds itself faced with a paradox. In the Court's view to retain the litigation in this forum, as plaintiff's request, would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation. This Court declines to play such a role. The Union of India is a world power in 1986, and its courts have the proven judiciary of this opportunity o stand tall before the world and to pass judgment on behalf of its own people would be to revive a history of subservience and subjugation from which India has emerged. India and its people can and must vindicate their claims before the independent and legitimate judiciary created there since the Independence of 1947.

The Court defers to the adequacy and ability of the courts of India. Their interest in the sad events of December 2-3, 1984 at the UCL plant in the City of Bhopal, State of Madhya Pradesh, Union of India, is not subjected to question or challenge. The availability of the probative, relevant, material and necessary evidence to Indian courts is obvious and has been demonstrated in this opinion.

Therefore, the consolidated case is dismissed on the grounds of forum non convenience under the following conditions:

1. Union carbide shall consent to submit to the jurisdiction of the court of Indian and shall continue to waive defence based upon the statue of limitations.

2. Union carbide shall agree to satisfy any judgment rendered by a Indian court, and if applicable, upheld by an appellate court in that country, where such judgment and affirmance comport with the minimal requirements of due process.

3. Union Carbide shall be subjected to discovery under the model of the United States Federal Rules of Civil Procedure after appropriate demand by plaintiffs.

So Ordered.

Ambica Quarry Works v. State of Gujarat
and
Ambalal Manibhai Patel v. State of Gujarat
AIR 1987 Supreme Court 1073 (From: 1986(2) 27 Gujrat LR 1073)
Civil Appeals Nos. 4250 and 4251 of 1986 (Arising out of Special Leave Petition (Civil) Nos. 12041 and 12090 of 1985), D/-11-12-1986
Sabyasachi Mukharji and K.N. Singh, JJ.

(A) Forest (Conservation) Act (69 of 1980), S.2 – Mining lease – Renewal of – Application after coming into force of Act – Rejection of – It is in conformity with purpose of the Act of preventing deforestation and ecological imbalances resulting from deforestation, (Gujarat Minor Mineral Rules (1966), R. 18(b)(i)).

Where the State Govt. rejected the application made after coming into force of the Act, for renewal of mining lease, rejection being in conformity with the purpose of the Act, was not open to challenge notwithstanding the fact that R. 18(b)(i) of Gujarat Minor Mineral Rules, 1966, provided for renewal of lease. What is to be remembered is that the Act was an Act in recognition of the awareness that deforestation and ecological imbalances as a result of deforestation have become social menaces and further deforestation and ecological imbalances should be prevented. That was the primary purpose writ large in the Act. Therefore the concept that power coupled with the duty enjoined upon the authorities to renew the lease stands eroded by the mandate of the legislation as manifest in the Act. The primary duty was to the community and that duty took precedence. The obligation to the society must predominate over the obligation to the individuals. AIR 1985 SC 814, Distinguished. 1986 (2) 27 Guj LR 1073, Affirmed.

(Paras 19, 20)

(B) Precedents-Ratio of decision – Case is not authority for what logically follows from what it decides.

The ration of any decision must be understood in the background of the facts of that case. It has been said long tie ago that a case is only an authority for what it actually decides, and not what logically follows from it.

(Para 18)

Cases Referred:	**Chronological Paras**
AIR 1985 SC 814: (1985) 3 SCC 643	17, 18
AIR 1966 SC 296: (1965) 3 SCR 402	12, 16
1901 AC 495: 85 LT 289: 50 WR 139, Quinn v. Leathem	18
(1880) 5 AC 214: 42 LT 546: 49 LJQB 577, Julius v. Lord Bishop of Oxford	13

SABYASACHI MUKHARJI, J.:- We grant leave in these two special leave applications and dispose of these appeals arising out of the decisions of the High Court of Gujarat by the judgment herein.

2. The two appeals centre round the question of how to strike balance between the need of exploitation of the mineral resources lying hidden in the forests and the preservation of the ecological balance and to arrest the growing environmental deterioration and involve common questions of law. In the appeal arising out of special leave petition No. 12041 of 1985 the appellant firm had been granted a quarry lease for the minor mineral black trap at S. No. 73 of village Morai of Taluka Pardi in the District of Valsad in the State of Gujarat. The lease was granted on or about 8th November, 1971 for a period of ten years. The area comprised of 13 acres of land for quarrying purpose. Three persons were granted $2^1/_2$ acres of land each land the remaining $5^1/_2$ acres of land were placed at the disposal of Industries, Mines and Power Department for the purpose of granting quarry lease from the same. The case of the appellant was that the said lands were dereserved from the forest area from 1971.

3. On or about 3rd August, 1981 when the appellant's term of lease was about to expire, the appellant applied for renewal of lease as per R. 18 of Gujarat Minor Mineral Rules, 1966 (hereinafter called the said Rules). The application of the appellant for renewal of lease was rejected by the Assistant Collector, Valsad, on the ground that the land fell under the "Reserved Forest" area and hence the Forest (Conservation) Act, 1980 (hereinafter called '1980 Act') applied to the forests. The forest department of State of Gujarat refused to give 'no objection' certificate. The contention of the appellant was that by the order dated 29th November, 1971, the forest department has dereserved the said land from the reserved area and has allotted the land for the quarrying purpose to the appellant. The contention of the appellant was as the land was under the control of the Industries, Mines & Power Department, the 1980 Act did not apply to the same. An appeal was preferred by the appellant which was dismissed by the Director, Industries, Mines and Power Department, Government of Gujarat on or about 4th March, 1985.

4. It is asserted by the appellant that on or about 29th January, 1983, the Government had issued two circulars instructing the Director of Geology and Mining and other authorities not to issue the leases in the fresh area issued by the State Government. The appellant thereafter filed a writ petition in the High Court of Gujarat. The High Court of Gujarat dismissed the petition. The appellant has come up in appeal before this Court from the said decision. The appeal arising out of S.L.P. No. 12041 of 1985, hereinafter mentioned as first appeal.

5. The case of the appellants in the second appeal is that on diverse dates quarry leases had been granted to the said appellants. There were ten of them. Eight of the appellants got their first renewal of their quarry leases in 1976-77. Appellant No. 9 applied for first renewal on August, 1979. Appellant No. 6 applied for first renewal on 20th July, 1982. In 1982, some of the appellants except appellants 6 to 9 applied for second renewal to the Collector. In December, 1982, second renewals were refused by the Collector. Revision filed by the appellants against the order of the Collector was rejected by the Director, Geology and Mining in 1983 and in December, 1983, writ petition often described as special civil application was filed before the High Court, challenging the refusal to renew. The High Court rejected the said writ petition. The second appeal herein arises out of the said decision in August, 1985 of the High Court of Gujarat.

6. Both these appeals involve the question, whether after coming into operation of 1980 Act, the appellants were entitled to renewal either first or second of their quarry leases? In this connection it is necessary to refer to the 1980 Act. This was an Act passed by the Parliament to provide for the conservation of forest and for matters connected therewith or ancillary thereto. The Statement of Objects of the said Act is relevant. It is stated that deforestation caused ecological imbalances and led to environmental deterioration. It recognised that deforestation has been taking place on a large scale in the country and it had thereby caused widespread concern. With a view to checking further deforestation, an Ordinance had been promulgated on 25th October, 1980. The Ordinance made the prior approval of the Central Government necessary for dereservation of reserved forests and for the use of forest land for non-forest purposes. The Ordinance had also provided for the constitution of an advisory committee to advise the Central Government with regard to grant of such approval. The 1980 Act replaced the said Ordinance. The Act extends to the whole of India except the State of Jammu and Kashmir, and came into force on 25th October, 1980. Section 2 of the said Act is only relevant for our present purpose. It provides as follows:

> "2. Restriction on the dereservation of forests or use of forest land for non-forest purpose.- Notwithstanding anything contained in any other law for the time being in force in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing-
>
> (i) that any reserved forest (within the meaning of the expression "reserved forest" in any law for the time being in force in that State) or any portion thereof, shall cease to be reserved;
>
> (ii) that any forest land or any portion thereof may be used for any non-forest purpose.
>
> Explanation.- For the purposes of this section "non-forest purpose" means breaking up or clearing of any forest land or portion thereof for any purpose other than re-afforestation."

7. The said section makes it obligatory for the State Government to obtain the permission of the Central Government for (1) dereservation of reserved forest and (2) for use of

forest land for non-forest purposes. It is apparent, therefore, that the two dual situations were intended to be prevented by the legislation in question, namely dereservation of reserved forest, and use of forest land for non-forest purpose.

8. In the instant appeals leases for quarry purposes had been granted prior to the coming into operation of the Act in question. Shri Gobind Das, learned counsel for the appellant in the first appeal and Shri Seth learned counsel for the appellants in the second appeal contended that there was no question of extending for non-forest purposes forest lands. There were existing quarry leases in one case first renewal was sought and in some other cases second or third renewals were being sought. Therefore these were at the relevant time dereserved forests. Neither of the two contingencies sought to be prevented was there. The conditions precedent for the operation of the Act were not there in the facts of these appeals, it was urged.

9. Our attention was drawn to R. 18 of Gujarat Minor Mineral Rules, 1966 which were framed under the Act 67 of 1957 by the Government of Gujarat. The rules provide for the period of the lease, renewals and availability of areas already granted and sub-cl.(b)(i) of the said R. 18 of the said Rules provides as follows:

> "(b)(i).- The lease for all minerals specified in sub-cl.(i) of C1.(a) may be renewed by the competent officer for one or more periods and the period of renewal at one time shall not exceed ten years and the total period for which the lease may be renewed shall not exceed twenty years in the aggregate."

10. Shri Seth drew our attention to R. 3 of Part VIII (page 62) of the Manual which deals with the procedure of granting renewals under the rules.

11. On the other hand Shri Mehta, counsel for the respondents in the first appeal and Shri Poti, counsel for the respondents in the second appeal contended before us that after coming into operation of 1980 Act there was no question of renewal of the leases because this Act had prevented renewal of the lease without the approval of the Central Government.

12. Shri Govind Das, however, placed strong reliance on State of Rajasthan v. Hari Shankar Rajendra Pal, (1965) 3 SCR 402: (AIR 1966 SC 296). That was a decision dealing with Rajasthan Mines Minerals Concession Rules, 1958. This Court in that case was concerned with R. 30 under Chapter IV under the said Rajasthan Rules. This Court observed that the word 'may' in the proviso in R. 30 in regard to the extension of the period by Government should be construed as 'shall' so as to make it incumbent on Government to extend the period of the lease if the lessee desired extension. The Rajasthan Rules provided, inter alia, as follows:

> "Period of lease- A mining lease may be granted for a period of 5 years unless the applicant himself desires a shorter period;

Provided that the period may be extended by the Government for another period not exceeding 5 year with option to the lessee for renewal for another equivalent period, in case the lessee guarantees investments in machinery, equipments and the like, at least to

the tune, of 20 times the value of annual dead-rent within 3 years from the grant of such extension. The value of the machinery, equipment and the like shall be determined by the Government. Where the lease is so renewed, the dead rent and the surface rent shall be fixed by the Government within the limits given in the Second Schedule to these rules, and shall in no case exceed twice the original dead rent and surface rent respectively, and the royalty shall be charged at the rates in force at the time of renewal."

13. It was submitted by Shri Gobind Das that the said rule was in pari materia with sub-rule (b) of R. 18 of Gujarat Minor Mineral Rules, 1966, Often when a public authority is vested with power, the expression 'may' has been construed as 'shall' because power if the conditions for the exercise are fulfilled is coupled with duty. As observed in Craies on Statute Law, 7th Edition, page 229, the expression "may" and "shall" have often been subject of constant and conflicting interpretation. "May" is a permissive or enabling expression but there are cases in which for various reasons as soon as the person who is within the statute is entrusted with the power, if becomes his duty to exercise it. As early as 1880 the Privy Council in Julius v. Lord Bishop of Oxford, (1880) 5 AC 214 explained the position. Earl Cairns, Lord Chancellor speaking for the judicial committee observed dealing with the expression "it shall be lawful" that these words confer a faculty or power and they do not of themselves do more than confer a faculty or power. But the Lord Chancellor explained there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the titled of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so. Whether the power is one coupled with a duty must depend upon the facts and circumstances of each case and must be so decided by the Courts in each case. Lord Blackburn observed in the said decision that enabling words were always compulsory where the words were to effectuate a legal right.

14. Here the case of the appellants is that they have invested large sums of money in mining operations. Therefore, it was they duty of the authorities that the power of granting permission should have been so exercised that the appellants had the full benefits of their investments. It was emphasised that none of the appellants had committed any breach of the terms of grant nor were there any other factors disentitling them to such renewal. While there was power to grant renewal, and in these cases there were clauses permitting renewals, it might have cast a duty to grant such renewal in the facts and circumstances of the cases specially in view of the investments made by the appellants in the area covered by the quarrying leases, but renewals cannot be claimed as a matter of right for the following reasons.

15. The rules dealt with a situation prior to the coming into operation of 1980 Act. '1980 Act' was an Act in recognition of the awareness that deforestation and ecological imbalances as a result of deforestation have become social menaces and further deforestation and ecological imbalances should be prevented. That was the primary purpose writ large in the Act of 1980. Therefore the concept that power coupled with the duty enjoined upon the respondents to renew the lease stands eroded by the mandate of

the legislation as manifest in 1980 Act in the facts and circumstances of these cases. The primary duty was to the community and that duty took precedence, in our opinion, in these cases. The obligation to the society must predominate over the obligation to the individuals.

16. Fore the same reason we are unable to accept the view that the ratio of the decision of this Court in the case of State of Rajasthan v. Hari Shankar Rajendra Pal, (AIR 1966 SC 296) (supra) could be invoked in the facts and circumstances of these cases to demand renewal. Furthermore it appears to us from the affidavits in opposition filed on behalf of the respondents that there were good grounds for not granting the renewal of the lease. The orders of the appropriate authorities in both these case deal with the situation.

17. Both Shri govind Das as well as Shri Seth, however, relied very heavily on the decision of this Court in State of Bihar v. Banshi Ram Modi, (1985) 3 SCC 643: (AIR 1985 SC 814). As the said decision dealt with S. 2 of the 1980 Act, it is necessary to refer to the facts of that case. There a mining lease for winning mica was granted by the State Government in respect of an area of 80 acres of land which formed part of reserved forest before coming into force of 1980 Act. However, the forest land had been dug up and mining operations were being carried on only in an area of 5 acres out of the total lease area of 80 acres. While carrying on mining operations, the respondent came across two associate minerals feldspar and quartz in the area. The respondent in that case, therefore, made an application to the State Government for execution of a deed of incorporation to include the said minerals also in the lease. Though the 1980 Act had come into force, the State Government executed the deed of incorporation incorporating these items without obtaining prior sanction of the Central Government under S. 2 of 1980 Act. Since the respondent in that case made a statement before the Court that he would carry on the mining operations only on 5 acres of land which has already been utilised for non-forest purposes even before the Act came into force, the question for determination was whether prior approval of the Central Government under S. 2 of 1980 Act in the facts of that case was necessary for the State Government for granting permission to win associate minerals also within the same area of 5 acres of land. This Court answered the question in negative and affirmed the judgment of the High Court. This Court observed at pages 647 and 648 (of SCC): (at p. 816 of AIR) of the report as follows:

> "The relevant parts of S.2 of the Act which have to be construed for purposes of this case are C1. (ii) and the Explanation to that section. Clause (ii) of S. 2 of the Act provides that notwithstanding anything contained in any other law for the time being in force in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing that any forest land or any portion thereof may be used for any non-forest purpose. Explanation to S. 2 of the Act defines "non-forest purpose" as breaking up or clearing of any forest land or portion thereof for any purpose other than reafforestation. Reading them together, these two parts of the section mean that after the commencement of the Act no fresh breaking up of the forest land or no fresh clearing of the forest on any such land can be permitted by any State Government or any authority without the prior approval of the Central Government. But if such permission has been accorded

before the coming into force of the Act and the forest land is broken up or cleared then obviously the section cannot apply. In the instant case it is not disputed that in an areas of five acres out of eighty acres covered by the mining lease the forest land had been dug up and mining operations were being carried on even prior to the coming into force of the Act. If the State Government permits the lessee by the amendment of the lease deed to win and remove felspar and quartz also in addition to mica it cannot be said that the State Government has violated S. 2 of the Act because thereby no permission for fresh breaking up of forest land is being given. The result of taking the contrary view will be that while the digging for purposes of winning mica can go on, the lessee would be deprived of collecting feldspar or quartz which he may com across while he is carrying on mining operations for winning mica. That would lead to an unreasonable result which would not in any way sub serve the object of the Act. We are, therefore, of the view that while before granting permission to start mining operations on a virgin area S. 2 of the Act has to be complied with it is not necessary to seek the prior approval of the Central Government for purposes of carrying out mining operations in a forest area which is broken up or cleared before the commencement of the Act. The learned counsel for respondent 1 has also given an undertaking that respondent 1 has also given an undertaking that respondent 1 would confine his mining operations only to the extent of five acres of land on which mining operations have already been carried out and will not fell or remove any standing trees thereon without the prior permission in writing from the Central Government. Taking into consideration all the relevant maters, we are of the view that respondent 1 is entitled to carry on mining operations in the said five acres of land for purposes of removing feldspar and quartz subject to the above conditions."

18. The aforesaid observations have been set in detail in order to understand the true ratio of the said decision in the background of the facts of that case. It is true that this Court held that if the permission had been granted before the coming into operation of the 1980 Act and the forest land has been broken up or cleared, C1. (ii) of S. 2 of 1980 Act would not apply in such a case. But that decision was rendered in the background of the facts of that case. The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it. (See Lord Halsbury in Quinn v. Leathem. 1901 AC 495). But in view of the mandate of Art. 141 that the ratio of the decision of this Court is a law of the land, Shri Govind Das submitted that the ratio of a decision must be found out from finding out if the converse was not correct. But this Court, however, was cautious in expressing the reasons for the said decision in State of Bihar v. Banshi Ram Modi, (AIR 1985 SC 814) (supra). This Court observed in that decision that the result of taking the contrary view would be "that while digging for purposes of winning mica can go on, the lessee would be deprived of collecting feldspar or quartz which he may come across while he is carrying on mining operation in winning mica. That would lead to be unreasonable result which will not in any way sub serve the object of the Act." There was an existing lease where mining operation was being carried on and what was due by incorporation of a new term was that while mining operations

were being carried on some other minerals were available, he was giving right to collect those. The new lease only permitted utilisation or collection of the said other minerals.

19. In the instant appeals the situation is entirely different. The appellants are asking for a renewal of the quarry leases. It will lead to further deforestation or at least it will not help reclaiming back the areas where deforestations have taken place. In that view of the matter, in the facts and circumstances of the case, in our opinion, the ratio of the said decision cannot be made applicable to support the appellants' demands in these cases because the facts are entirely different here. The primary purpose of the Act which must sub serve the interpretation in order to implement the Act is to prevent further deforestation. The Central Government has not granted approval. If the State Government is of the opinion that it is not a case where the State Government should seek approval of the Central Government, the State Government cannot apparently seek such approval in a matter in respect of, in our opinion, which it has come to the conclusion that no renewal should be granted.

20. In that view of the matter and the scheme of the Act, in our opinion, the respondents were right and the appellants were wrong. All interpretations must sub-serve and help implementation of the intention of the Act. This interpretation, in our opinion, will sub serve the predominant purpose of the Act.

21. In that view of the matter, we are unable to sustain the submission urged in support of these appeals. The appeals therefore fail and are accordingly dismissed. In view of the facts and circumstances of these appeals, however, we direct the parties to pay and bear their own costs.

Appeals dismissed.

Banwasi Seva Ashram v. State of U.P.
AIR 1987 Supreme Court 374
Criminal Misc. Petition No. 2662 of 1986 in Writ Petition (Criminal) No. 1061 of 1982, D/-20-11-1986
P. N. Bhagwati, C.J. and Ranganath Misra, J.

Forest Act (16 of 1927), Ss. 20, 4 - Jungle land (Forest) inhabited by Adivasis and backward people - Part of it declared as reserved forest by State Govt. and notification under S. 4 issued as regards remaining part of forest land - Writ by occupants - Direction issued by Supreme Court that there should be no dispossession of occupants - State Govt. initiating acquisition proceedings in respect of these lands for construction of super thermal plant - Scheme for generating electricity being of national importance Supreme Court allowed acquisition of land despite its earlier order preventing dispossession of occupants - Directions to safeguard interest of Adivasis and backward people occupying the land given. (Land Acquisition Act (1894), S. 4); (Constitution of India, Art. 32).

(Para 10)

ORDER: - On the basis of a letter received from Banwasi Seva Ashram operating in the Mirzapur District this writ petition under Art. 32 was registered. Grievance was made on several scores in that letter but ultimately the question that required detailed consideration was relating to the claim of the Adivasis living within Dudhi and Robertsganj Tehsils in the District of Mirzapur in Uttar Pradesh to land and related rights. The State Government declared a part of these jungle lands in the two Tehsils as reserved forest as provided under S. 20, Forest Act, 1927, and in regard to the other areas notification under S. 4 of the Act was made and proceedings for final declaration of those areas also as reserved forests were undertaken. It is common knowledge that the Adivasis and other backward people living within the jungle used the forest area as their habitat. They had raised several villages within these two Tehsils and for generations had been using the jungles around for collecting the requirements for their livelihood, fruits, vegetables, fodder, flowers, timber, animals by way of sports and fuel wood. When a part of the jungle became reserved forest and in regard to other proceedings under the Act were taken, the forest officers stared interfering with their operations in those areas. Criminal cases for encroachments as also other forest offences were registered and systematic attempt was made to obstruct them from free movement. Even steps for throwing them out under the U.P. Public Premises (Eviction of Unauthorised Occupants) Act, 1972 were taken.

2. Some of the villages which were in existence for quite some time also came within the prohibited area. The tribals had converted certain lands around their villages into cultivable fields and had also been raising crops for their food. These lands too were included in the notified areas and, therefore, attempt of the Adivasis to cultivate these lands too was resisted.

3. On 22-8-1983, this Court made the following order:

> "The writ petition is adjourned to 4th October, 1983 in order to enable the parties to work out a formula under which claims of adivasis or tribals in Dudhi and Robertsganj Tehsils, to be in possession of land and to regularisation of such possession may be investigated by a high powered committee with a view to reaching a final decision in regard to such claims. Meanwhile, no further encroachments shall be made on forest land nor will any of the Adivasis or tribals be permitted under colour of this order or any previous order to cut any trees and if any such attempt is made, it will be open to the State authorities to prevent such cutting of trees and to take proper action in that behalf but not so as to take away possession of the land from the Adivasis of tribals."

4. On behalf of the State of Uttar Pradesh an affidavit was filed by the Assistant Record Officer wherein it was stated:

> "It is respectfully submitted that for the information of this Court the State Government is already seized with the matter and is trying to identify claims and find out ways and means to regularise the same. To achieve this aim the Government has already appointed a High Powered Committee chaired by the Chairman of Board of Revenue, U.P., Collector, Mirzapur, and Conservator of Forest, South Circle, are

also members of this Committee. This Committee has already held two sittings. In the last meeting held at pipri on 16/17-8-1983 people of all shades of opinion presented their respective points of view before the Committee."

5. On 15-12-1983, this Court made another order which indicated that the Court was of the view that another High Powered Committee should be appointed. The relevant portion of that order was to the following effect:

" .... the parties will discuss the composition and modalities of the High Powered Committee to be appointed by the Court for the purpose of adjudicating the various claims of the persons belonging to the Scheduled Caste and other backward classes in Robertsganj and Dudhi Tehsils of Mirzapur District. Notice will also specify, that the Court proposes to appoint a High Powered Committee consisting of retired High Court Judge and two other officers for the purposes of adjudicating upon the claims of the persons belonging to Scheduled Caste and Backward Classes in Dudhi and Robertsganj Tehsils of their land entitlements as also to examine the hereditary and customary rights of farmers in those tehsils and to adjudicate upon the claims of tribals of their customary rights with respect to fodder, fuel, wood, small timber, sand and stones for the houses, timber for agricultural implements, flowers, fruits and minor forest produce."

6. The Uttar Pradesh Government had in the meantime indicated that the tenure of the Committee under the Chairmanship of Shri Maheshwar Prasad, was to expire on December 31, 1983 and Government was awaiting the recommendations of that Committee. In that letter it was specifically stated:

"In the opinion of the State Government it would be more fruitful if the Committee proposed in your letter is constituted after the recommendations and advices of the previous Committee are received. The Government have agreed in principle that the proposed Committee with the wide legal powers be constituted for adjudication of disputes."

Admittedly there had been no survey and settlement in these tehsils and in the absence of any definite record, this Court accepted the representation of the parties that it would be difficult to implement the directions of the Court. The Court, therefore, directed that survey and record operation in these Tehsils be completed. But later it was again represented on behalf of the State Government that completion of such operation within a short and limited time would be difficult and particularly, during the rainy and the winter reasons it would not at all be practicable to work. The Court thereafter did not reiterate its directions in the matter of preparation of the survey and record operations and awaited the report of the Maheshwar Prasad Committee. Intermittent directions were given on applications filed on behalf of tribal when further prosecutions were launched.

7. From the affidavit of Shri B. K. Singh Yadav, Joint Secretary to the Revenue Department of the State Government, it appears that the Maheshwar Prasad Committee identified 433 villages lying South of the Kaimur Range of the Mirzapur District to be relevant for the present dispute. Of those 299 were in Dudhi Tehsil and the remaining 134

in Robertsganj Tehsil. The area involved was 9,23,293 acres out of which in respect of 58,937.42 acres notification under S. 20 of the Act has been made declaring the same as reserved forest and in respect of 7,89,086 acres notification under S. 4 of the Act has been made. The Committee in its report pointed out that unauthorised occupation related to roughly one lakh eighty two thousand acres.

8. In the same affidavit, it has been further stated that the Government by notification dated August 5, 1986, has established a special agency for survey and record operations to solve the problems of the claimants in the area and a copy of the notification has also been produced.

9. While this matter had been pending before this Court and there has been a general direction that there should be no dispossession of the local people in occupation of the lands, Government has decided that a Super Thermal Plant of the National Thermal Power Corporation Limited (for short 'NTPC') would be located in a part of these lands and acquisition proceedings have been initiated. NTPC is now a party before us upon its own seeking and has made an application indicating specifically the details of the lands which are sough to be acquired for its purpose. It has been claimed that the completion of Project is a time bound programme and unless the lands intended to be acquired are made free from prohibitive directions of this Court, the acquisition as also the consequential dispossession of persons in occupation and take-over of possession by the Corporation are permitted, the Project cannot be completed.

10. Indisputably, forests are a much wanted national asset. On account of the depletion thereof ecology has been disturbed; climate has undergone a major change and rains have become scanty. These have long term adverse effects on national economy as also on the living process. At the same time, we cannot lose sight of the fact that for industrial growth as also for provision of improved living facilities there is great demand in this country for energy such as electricity. In fact, for quite some time the entire country in general and specific parts thereof in particular, have suffered a tremendous setback in industrial activity for want of energy. A scheme to generate electricity, therefore, is equally of national importance and cannot be deferred. Keeping all these aspects in view and after hearing learned counsel for the parties in the presence of officers of the State Government and NTPC and representatives of the Banwasi Seva Ashram, we proceed to give the following directions:

(1) So far as the lands which have already been declared as reserved forest under S. 20 of the Act, the same would not form part of the writ petition and any direction made by this Court earlier, now or in future in this case would not relate to the same. In regard to the lands declared as reserved forest, it is, however, open to the claimants to establish their rights, if any, in any other appropriate proceeding. We express no opinion about the maintainability of such claim.

(2) In regard to the lands notified under S. 4 of the Act, even where no claim has been filed within the time specified in the Notification as required under S. 6 (c)

of the Act, such claims shall be allowed to be filed and dealt with in the manner detailed below:

I. Within six weeks from 1-12-1986, demarcating pillars shall be raised by the Forest Officers of the State Government identifying the lands covered by the notification under S. 4 of the Act. The fact that a notification has been made under S. 4 of the Act and demarcating pillars have been raised in the locality to clearly identify the property subjected to the notification shall be widely publicised by beat of drums in all the villages and surrounding areas concerned. Copies of notice printed in Hindi in abundant number will be circulated through the Gram Sabhas giving reasonable specifications of the lands which are covered by the notification. Sufficient number of Inquiry Booths would be set up within the notified area so as to enable the people of the area likely to be affected by the notification to get the information as to whether their lands are affected by the notification, so as to enable them to decide whether any claim need be filed. The Gram Sabhas shall give wide publicity to the matter at their level. Demarcation, as indicated above, shall be completed by 15-1-1987. Within three months therefrom, claims as contemplated under S. 6 (c) shall be received as provided by the statute.

II. Adequate number of record officers shall be appointed by 31st December, 1986. There shall also be five experienced Additional District Judges, one each to be located at Dudhi, Muirpur, Kirbil of Dudhi Tehsil and Robertsganj and Tilbudaw of Robertsganj Tehsil. Each of these Additional District Judges who will be spared by the High Court of Allahabad, would have his establishment at one of the places indicated and the State shall provide the requisite number of assistants and other employees for their efficient functioning. The learned Chief Justice of the Allahabad High Court is requested to make the services of five experienced Additional District Judges available for the purpose by 15th December, 1986 so that these officers may be ported at their respective stations by the first of January, 1987. Each of these Additional District Judges would be entitled to thirty per cent of the salary as allowance during the period of their work. Each Additional District Judge would work at such of the five notified places that would be fixed up by the District Judge of Mirzapur before 20th of December, 1986. These Additional District Judges would exercise the powers of the Appellate Authority as provided under S. 17 of the Act.

III. After the Forest Settlement Officer has done the needful under the provisions of the Act, the findings with the requisite papers shall be placed before the Additional District Judge of the area even though no appeal is filed and the same shall be scrutinized as if an appeal has been taken against the order of the authority and the order of the Additional District

Judge passed therein shall be taken to be the order contemplated under the Act.

(3) When the Appellate Authority finds that the claim is admissible, the State Government shall (and it is agreed before us) honour the said decision and proceed to implement the same. Status quo in regard to possession in respect of lands covered by the notification under S. 4 shall continue as at present until the determination by the appellate authority and no notification under S. 20 of the Act shall be made in regard to these lands until such appellate decision has been made.

(4) Necessary assistance by way of legal aid shall be provided to the claimants or persons seeking to raise claims and for facilitating obtaining of requisite information for lodging of claims, actual lodging of claims and substantiating the same both at the original as also the appellate stage as contemplated by the claimant. Legal aid shall be extended to the claimants without requiring compliance of the procedure laid down by the Legal Aid Board. The Legal Aid and Advice Board of Uttar Pradesh and the District Legal Aid and Advice Committee of Mirzapur shall take appropriate steps to ensure availability of such assistance at the five places indicated above. For the purpose of ensuring the provision of such legal aid, State of Uttar Pradesh has agreed to deposit a sum of Rupees five lakhs with the District Legal Aid Committee headed by the District Judge of Mirzapur and has undertaken to deposit such further funds as will be necessary from time to time. It shall be open to the District Legal Aid Committee under the supervision of the State Legal Aid Board to provide legal aid either by itself or through any Social Action Groups, like the Banwasi Seva Ashram.

(5) The land sought to be acquired for the Rihand Super Thermal Power Project of the NTPC shall be freed from the ban of dispossession. Such land is said to be about 153 acres for Ash Pipe Line and 1643 acres for Ash Dyke and are located in the villages of Khamariya, Mitahanai, Parbatwa, Jheelotola, Dodhar and Jarha. Possession thereof may be taken after complying with the provisions of the Land Acquisition Act, but such possession should be taken in the presence of one of the Commissioners who is being appointed by this order and a detailed record of the nature and extent of the land, the name of the person who is being dispossessed and the nature of enjoyment of the land and all other relevant particulars should be kept for appropriate use in future. Such records shall be duly certified by the commissioner in whose presence possession is taken and the same should be available for use in all proceeding that may be taken subsequently.

The NTPC has agreed before the Court that it shall strictly follow the policy on "facilities to be given to land oustees" as placed before the Court in the matter of lands which are subjected to acquisition for its purpose. The same shall be taken as an undertaking to the Court.

(6) It is agreed that when a claim is established appropriate title deed would be issued to the claimant within a reasonable time by the appropriate authority.

(7) The Court appoints the following as a Board of Commissioners to supervise the operations and oversee the implementation of the directions given:
   (i) Mr. P.R. Vyas Bhiman (I.A.S. retired), Executive-Chairman of the State Board of Revenue, U.P. now residing at Lucknow;
   (ii) Dr. Vasudha Dhagamwar;
   (iii) A representative to the nominated by the Banwasi Seva Ashram.

The Committee shall be provided by the State Government with transport facilities and the appropriate infrastructure. This should be completed before 31st December, 1986.

11. In the affidavit filed by Shri Yadav, Joint Secretary to the State Government on November 7, 1986 certain instructions of the State Government have been detailed. To the extent the instructions are not superseded by the Court's directions in to-day's order the same shall remain effective.

12. We must express our satisfaction in regard to the co-operation shown by the parties. Mr. Gopal Subramaniam appearing for the State of Uttar Pradesh has taken considerable pains to give shape to the matter. Mr. Ramamurti for the petitioner has also done considerable work in evolving the ambit of the guidelines, which we have adopted. We hope that all parties concerned with the matter would exhibit the proper spirit necessary to successfully complete the assignment. We give liberty to parties to move for directions as and when necessary. The Board of Commissioner shall also be at liberty to approach this Court for directions when necessary for implementing the present arrangements

Order Accordingly.

Chaitanaya Pulvarising Industry v. Karnataka State Pollution Control Board
AIR 1987 Karnataka 82
Writ Petition No. 19727 of 1985, D/-11-8-1986
Muralidher Rao, J.

(A) Air (prevention and Control of Pollution) Act (14 of 1981), S. 23 (2) - "Remedial measures" – Section does not contemplate closing down industry.

The Act has provided for measures, which are preventive in nature, in the cases of industries to be established; and in the case of industries already established they are remedial. In the case of established industries, it insists on obtaining consent of Board, making the industry amenable to the administrative control of the Board. The primary responsibility of controlling the Air Pollution is on the board. S. 23(2) casts a duty on the Board to cause such remedial measures as are necessary to mitigate the emission of air pollution. Viewed in this background the direction to close down the Factory, solely because it has not obtained consent of the Board is clearly illegal. If the Board thinks that

the petitioner has failed to comply with its order it may take action under S. 37, as proposed in the show cause notice; but that would not justify the passing of a prohibitory order which apart from causing loss to the owner has a serious consequence of paralysing the industry affecting the livelihood of employed persons; the consequences may be more hazardous than the air pollution. Therefore, the "remedial measures" contemplated must be understood as such measures which mitigate the emission of air pollutants. Therefore, the harsh step of prohibiting the working of the Factory is neither warranted nor has it the legal sanctity.

(Para 9, 10)

(B) Air (Prevention and Control of Pollution) Act (14 of 1981), Section 19 – Karnataqka Air (Prevention and Control of Pollution) Rules, 1983, R. 19-Declaration under s. 19-Publication in local newspapers six in Gazette – There is non-compliance with months after publication with R. 19 – Publication must be done simultaneously or within reasonable period. AIR 1985 SC 1622 Followed.

(Para 11)

Fatesang Gimba Vasava v. State of Gujarat
AIR 1987 Gujarat 9
Special Civil Applications Nos. 1932 of 1982 and 6252 and 6257 of 1983 and Leave Petition Application No. 211 of 1981, D/-19-3-1986
A. M. Ahmadi and R. A. Mehta, JJ.

(A) Forest Act (16 of 1927), S. 26 – Gujarat Forest Manual, Volume III, Art. 75 – Privileges conferred upon Adivasis who are local inhabitants of reserved forest, in regard to exploitation of bamboos from such forest – Government orders also issued from time to time conferring such privileges – Local inhabitants belonging to Vasava Community – Vasava Community falls within expression 'aboriginal or hill tribe' occurring in Art. 75 and its members are residents of forest who live out their livelihood by manual labour in forest – Certificate of Gram Panchayat to that effect – Held, those members of Vasava Community are entitled to privileges – Forming of Co-operative Society was not necessary in such case, as they were local inhabitants.

(Para 8, 10)

(B) Forest Act (16 of 1927), Ss. 2(4), 26(1)(g) – 'Forest produce' – Articles prepared from bamboo chips – Are not 'forest produce' – Removal of such bamboo articles out of reserved forest – Permission of forest department not necessary. Writ Petition No. 1412 of 1981, D/ - 24th July, 1981 (Guj), Reversed.

M. C. Mehta v. Union of India
and
Shriram Foods & Fertilizer Industries v. Union of India
AIR 1987 Supreme Court 965
Writ Petition (Civil) No. 12739 of 1985 and Civil Writ Petition No 26 of 1986, D/-17-2-1986
P. N. Bhagwati, C.J., D. P. Madon and G. L. Oza. JJ.

(A) Constitution of India, Arts. 32 and 21 - Public interest litigation - Manufacture and sale of hazardous products - Measures to be taken for reducing hazard to workmen and community living in neighbourhood - Damages in case of accident caused by leakage of liquid or gas - conditions laid down by Supreme Court. ((i) Water (Prevention and Control of Pollution) Act (6 of 1974), Ss. 2 (e) and 24; (ii) Air (Prevention and Control of Pollution) Act (14 of 1981), Ss. 2 (b), 23).

There was leakage of oleum gas from one of the units of Shriram (S) and as a result several persons were affected and it was alleged that one advocate practising in Court died. The leakage was from the caustic chlorine plant of S. There were prohibiting orders under the Factories Act under which the plants were not allowed to work till safety measures were adopted. Numbers of Expert Committees were appointed to report in the matter. The reports showed that the recommendations were complied with and the possibility of risk or hazard to the community had been considerably minimised and it also opined that it was reduced to nil.

Held, that pending consideration of the issue whether the caustic chlorine plant should be directed to be shifted and relocated at some other place, the caustic chlorine plant should be allowed to be restarted by the management subject to certain stringent conditions which were specified. (For conditions see Para 22 - Ed.).

(Para 15)

When science and technology are increasingly employed in producing goods and services calculated to improve the quality of life, there is a certain element of hazard or risk inherent in the very use of science and technology and it is not possible to totally eliminate such hazard or risk altogether. It is not possible to adopt a policy of not having any chemical or other hazardous industries merely because they pose hazard or risk to the community. If such a policy were adopted, it would mean the end of all progress and development. Such industries even if hazardous have to be set up since they are essential for economic development and advancement of well-being to the people.

(Para 21)

It is undoubtedly true that chlorine gas is dangerous to the life and health of the community and if it escapes either from the storage tanks or from the filled cylinders or from any other point in the course of production, it is likely to affect the health and well-being of the workmen and the people living in the vicinity. There can be no doubt, particularly having regard to the opinion of various committees that the possibility of hazard or risk to the community is considerably minimised and there is now no appreciable risk of danger to the community if the caustic chlorine plant is allowed to be

restarted. The interests of the workmen cannot also be ignored while deciding this delicate and complex question. It could not be disputed that the effect of permanently closing down the caustic chlorine plant would be to throw about 4,000 workmen out of employment and that such closure would lead to their utter impoverishment. The Delhi Water Supply Undertaking which gets its supply of chlorine would also have to find alternative sources of supply and it was common ground between the parties that such sources may be quite distant from Delhi. The production of downstream products would also be seriously affected resulting to some extent in short supply of these products. These various considerations on both sides have to be weighed and balanced and a decision has to be made as to on which side the considerations preponderate and tilt the balance. It is none too easy task, for the decision either way may entail serious consequences.

(Para 15)

(B) Constitution of India, Art. 32 - Civil P.C. (5 of 1908), S. 35 - Social action litigation - Case of leakage of oleum gas from caustic chlorine plant belonging to S - Petitioner lone and single fighting valiant battle against S a giant enterprise and achieving substantial success - Petitioner ordered to be paid Rs. 10,000/- by S as costs as token of appreciation of his work by Court.

(Para 24)

ORDER:- Writ Petition No. 12739 of 1985 which has been brought by way of public interest litigation raises some seminal question concerning the true scope and ambit of Arts. 21 and 32 of the Constitution, the principles and norms for determining the liability of large enterprises engaged in manufacture and sale of hazardous products, the basis on which damages in case of such liability should be quantified and whether such large enterprises should be allowed to continue to function in thickly populated areas and if they are permitted so to function, what measures must be taken for the purposes of reducing to a minimum the hazard to the workmen and the community living in the neighbourhood. These questions which have been raised by the petitioner are questions of the greatest importance particularly since, following upon the leakage of MIC gas from the Union Carbide Plant in Bhopal, lawyers, judges and jurists are considerably exercised as to what controls, whether by way of relocation or by way of installation of adequate safety devices, need to be imposed on Corporation employing hazardous technology and producing toxic or dangerous substances and if any liquid or gas escapes which is injurious to the workmen and the people living in the surrounding areas, on account of negligence or otherwise, what is the extent of liability of such Corporations and what remedies can be devised for enforcing such liability with a view to securing payment of damages to the persons affected by such leakage of liquid or gas. These questions arise in the present case since on 4th and 6th December, 1985, there was admittedly leakage of liquid or gas from one of the units of Shriram Foods and Fertiliser Industries and as a result of such leakage, several persons were affected and according to the petitioner and the Delhi Bar Association, one Advocate practising in the Tis Hazari Court died. We propose to hear detailed arguments on these questions at a later date. But one pressing issue which has to be decided by us immediately is whether we should allow the caustic

chlorine plant of Shriram Foods and Fertilizer Industries to be restarted and that is the question which we are proceeding to decide in this judgment.

2. Delhi Cloth Mills Ltd. is a public limited company having its registered office in Delhi. It runs an enterprise called Shriram Foods and Fertilizer Industries and this enterprise has several units engaged in the manufacture of caustic soda, chlorine, hydrochloric acid, stable bleaching powder, super phosphate, vanaspati, soap, sulphuric acid, alum anhydrous sodium sulphate, high test hypochlorite and active earth. These various units are all set up in a single complex situated in approximately 76 acres and they are surrounded by thickly populated colonies such as Punjabi Bagh, West Patel Nagar, Karampura, Ashok Vihar, Tri Nagar and Shastri Nagar and within a radius of 3 kilometres from this Order only with the caustic chlorine plant. This plant was commissioned in the year 1949 and it has a strength of abut 263 employees including executive, supervisors, staff and workers. It appears that until the Bhopal tragedy, no one, neither the management of Shriram Foods and Fertiliser Industries (hereinafter referred to as Shriram) nor the government seemed to have bothered at all about the hazardous character of caustic chlorine plant of Shriram. But it seems that the Bhopal disaster shook the lethargy of everyone and triggered off a new wave of consciousness and every Government became alerted to the necessity of examining whether industries employing hazardous technology and producing dangerous commodities were equipped with proper and adequate safety and pollution control devices and whether they posed any danger to the workmen and the community living around them. The Labour Ministry of the Government of India accordingly commissioned Technica, a firm of Consultants, Scientists and Engineers of United Kingdom to visit the caustic chlorine plant of Shriram and make a report in regard to the areas of concern and potential problems relating to that plant. Dr. Slater visited the caustic chlorine plant on behalf of Technica sometime in June-July 1985 and submitted a report to the Government of India summarising the initial impressions formed during his visit and subsequent dialogue with the management and with one Mr. Harries. This report was admittedly not an in depth engineering study but it set out the preliminary conclusions of Dr. Slater in regard to the areas of concern and potential problems. We do not propose to rely very much on this report since it is a preliminary report.

3. It appears that a question was raised in Parliament sometime in March, 1985 in regard to the possibility of major leakage of liquid chlorine from the caustic chlorine unit of Shriram and of danger to the lives of thousands of workers and others. The Minister of Chemicals and Fertilizers, in answer to this question, stated on the floor of the House that the Government of India was fully conscious of the problem of hazards from dangerous and toxic processes and assured the House that the necessary steps for securing observance of safety standards would be taken early in the interest of the workers and the general public. Pursuant to this assurance the Delhi Administration constituted an Expert Committee consisting of Shri Manmohan Singh, Chief Manager IPCL, Baroda, as Chairman and 3 other persons as Members to go into the existence of safety and pollution control measures covering all aspects such as storage, manufacture and handling of chlorine in Shriram and to suggest measures necessary for strengthening safety and pollution control arrangements with a view to eliminating community risk. The

Manmohan Singh Committee visited the caustic chlorine plant and inspected various operations including storage tanks, cylinders and toners and obtained detailed information from the management and after a thorough and exhaustive inquiry, submitted its Report to the Government. This Report is a detailed Report dealing exclusively with the caustic chlorine plant and considerable reliance must, therefore, be placed upon it. The Manmohan Singh Committee made various recommendations in this Report in regard to safety and pollution control measures with a view to minimising hazard to the workmen and the public and obviously the caustic chlorine plant cannot be allowed to be restarted unless these recommendations are strictly complied with by the management of Shriram.

4. Now, on 4th December, 1985 a major leakage of oleum gas took place from one of the units of Shriram and this leakage affected a large number of persons both amongst the workmen and the public and according to the petitioner and Advocate practising in the Tis Hazari Court died on account of inhalation of oleum gas. This leakage resulted from the bursting of the tank containing oleum gas as a result of the collapse of the structure on which it was mounted and it created a scare amongst the people residing in that area. Hardly had the people got out of the shock of this disaster when, within two days, another leakage, though this time a minor one, took place as a result of escape of oleum gas from the joints of a pipe. The immediate response of the Delhi Administration to these two leakages was the making of an Order dated 6th December, 1985 by the District Magistrate. Delhi under sub-s (1) of S. 133. Cr. P.C. directing and requiring Shriram within two days from the date of issue of the order to cease carrying on the occupation of manufacturing and processing hazardous and lethal chemicals and gases including chlorine, oleum, super-chlorine phosphate. etc, at their establishment in Delhi and within 7 days to remove such Chemicals and gases from the said place and not again to keep or store them at same place or to appear on 17th December 1985 in the Court of the District Magistrate, Delhi to show cause why the order should not be enforced. When we took up the writ petitions for hearing on 7th December, 1985, our attention was drawn to this order made by the District Magistrate, Delhi on 6th December, 1985 and on perusing the order we pointed out the inadequacies in it which had the effect of virtually defeating the urgency of the action to be taken. We had earlier appointed a team of experts to visit the caustic chlorine plant of Shriram and to report whether the recommendations of the Manmohan Singh committee had been carried out by the management and this team of experts orally reported to us at the hearing on 7th December, 1985 that they had been able to inspect the plant for only a couple of hours and that cursory inspection showed that many of the recommendations of the Manmohan Singh Committee appeared to have been complied with and that too two one hundred MT tanks for storage of chlorine which constituted a major element of hazard or risk had been emptied. Since this inspection made by the team of experts had necessarily to be very hurried and superficial on account of want of sufficient time we adjourned the writ petition to 13th December, 1985 with a direction that the petitioner would be entitled to appoint his own team of experts who would be allowed access to the caustic chlorine plant for the purpose of ascertaining whether the various recommendations of the Manmohan Singh Committee had been carried out or not and whether there were any other drawbacks or deficiencies likely to

endanger the lives of workmen and the public. We also with a view to expediting adjudication of claims for compensation on behalf of the victims of oleum gas leakage, appointed the Chief Metropolitan Magistrate as the Officer before whom claims for compensation may be filed by persons affected by leakage of oleum gas in the course of the two incidents referred to above and fixed time of four weeks within which such claim of compensation may be filed before the Chief Metropolitan Magistrate, Delhi. We may point out that subsequently by an Order dated January 16, 1986 we extended the time for filing of compensation claims up to January 31, 1986 and on January 21, 1986 gave a further direction that those who file compensation claims before the Chief Metropolitan Magistrate, Delhi should be got examined be a team of medical experts and this task was entrusted to the Secretary of the Delhi State Legal Aid and Advice Board. This direction was given by us with a view to ensuring that contemporaneous medical evidence of the injuries suffered by the claimants and of the cause of such injury should be available in support of the claims for compensation lodged by the victims of oleum gas leakage.

5. Pursuant to the liberty given by us the petitioner appointed an expert committee consisting of Dr. G. D. Agarwal, Professor T. Shivaji Rao and Shri Purkayastha. This committee, which we shall hereafter refer to as the 'Agarwal committee' visited the caustic chlorine plant and submitted a report to this Court in which it pointed out various inadequacies in the plant and expressed the opinion that it was not possible to eliminate hazard to the public so long as the plant remained at the present location.

6. Since there were conflicting opinions put forward before us in regard to the question whether the caustic chlorine plant should be allowed to be restarted without any real hazard or risk to the workmen and the public at large, we thought it desirable to appoint an independent team of experts to assist us in this task. We accordingly by an Order dated 18th December 1985 constituted a committee of experts consisting of Dr. Nilay Choudhary as Chairman and Dr. Aghoramurty and Mr. R. K. Garg and Members to inspect the caustic chlorine plant and submit a report to the Court on the following three points:

1. Whether the plant can be allowed to recommence the operations in its present state and condition?

2. If not what are the measures required to be adopted against the hazard or possibility of leaks, explosion, pollution of air and water, etc. for this purpose?

3. How many of the safety devices against the above hazards and possibility exist in the plant at present and which of them, though necessary are not installed in the plant?

7. This committee of experts of which we shall hereafter for the sake of convenience refer to as Nilay Choudhary committee, visited the caustic chlorine plant on December 28, 1985 and after considering the Reports of Doctor Slater. Manmohan Singh Committee and Agarwal Committee and hearing the parties made a report to the Court setting out 14 recommendations which in its opinion were required to be complied with the management in order to minimise the hazards due to possible chlorine leak. Nilay

Choudhary committee pointed out that it was in agreement with the recommendations made in the Report of the Manmohan Singh Committee which were exhaustive in nature and obviously the recommendations made by it in its Report were supplementary recommendations in addition to those contained in Manmohan Singh Committee's Report.

8. We have thus two major Reports one of Manmohan Singh Committee and the other of Nilay Choudhary Committee, setting out the recommendations which must be complied with by the management of Shriram in order to minimise the hazard or risk which the caustic chlorine plant poses to the workmen and the public. The question is whether these recommendations have been complied with by the management of Shriram, for it is only if these recommendations have been carried out that we can possibly consider whether the caustic chlorine plant should be allowed to be restarted.

9. There is also one other report to which we must refer in this connection and that is the Report made by the expert committee appointed by the Lt. Governor of Delhi following upon the leakage of oleum gas on 4th December, 1985. Since the leakage of oleum gas caused serious public concern the Lt. Governor of Delhi constituted an expert committee consisting of Shri N. K. Seturaman as Chairman and four other experts as members to go into the cause of spillage of oleum and its after effects, of examine if inspection and safety procedures prescribed under the existing laws and rules were followed by Shriram to fix responsibility for the leakage of oleum gas, to review the emergency plans and measures for containment of risk in the event of occurrence of such situations and for elimination of pollution, to examine any other aspects that may have a bearing on safety pollution control and hazard to the public from the factory of Shriram, to make specific recommendation with a view to achieving effective pollution control and safety measures in the factory and to advise whether the factory should be shifted away from its present location in densely populated area. This Committee to which we shall hereafter refer to as the "Seturaman Committee" made an on the spot inspection of the site of the factory and after obtaining the required information about the plant submitted a Report of 3rd January, 1986. This Report, it must be conceded deals primarily with safety procedures in the sulphuric acid plant from which there was oleum gas leakage and is not based on any in-depth review and study of safety and pollution control measures in the caustic chlorine plant. But even so it does contain some observations which have relevance to the question whether the caustic chlorine plant poses any hazard to the community and what steps or measures are necessary to be taken to minimise the risk to the people living in the vicinity.

10. It is necessary at this stage to point out that whilst these proceedings were going on before the Court, an order dated 7th December, 1985 was issued by the Inspector of Factories, Delhi, in exercise of the power conferred under S. 40, sub-s. (2), Factories Act, 1948. The order commenced with the following recital. viz.,

> "Whereas it has appeared to me that caustic chlorine plant and sulphuric acid plants are running without adequate safety measures being adopted by your management, thereby endangering the human life and safety of the workers and the public at large.

Earlier notices of the Labour Department asking your management to ensure proper safety measures have not been complied with fully; and

Whereas in spite of your management's assurance vide letter dated 14-10-1985, on 4-12-85, non-adoption of the adequate safety measures have resulted in Collapse of the structure on which oleum tank was mounted resulting in the massive leakage of oleum causing fumes in the environment affecting the health and safety of a large number of residents of the Union Territory of Delhi: and

Whereas the factory is not still having adequate safety measures required for such plants."

and prohibited Shriram from using the caustic chlorine and sulphuric acid plants till adequate safety measures are adopted and imminent danger to human life is eliminated. Soon thereafter, on December 13, 1985, a show cause notice was issued by the Assistant Commissioner (Factories) of the Municipal Corporation of Delhi calling upon Shriram to show cause as to why action for revocation of its licence should not be taken under S. 430, Sub-s. (3), Delhi Municipal Corporation Act, 1957, for violation of the terms and conditions of the licence. Shriram by its letter dated 23rd December 1985, showed cause against the proposed cancellation of its licence but by an Order dated 24th December 1985 the Assistant Commissioner (Factories) directed Shriram to stop industrial use of the premises at which the chlorine caustic plant is located. The result is that unless these two orders one dated 7th December, 1985 and the other dated 24th December, 1985 are vacated or suspended, Shriram cannot be allowed to restart the caustic chlorine plant.

11. We may first consider what has been said by the various Expert Committees in regard to the relocation of the caustic chlorine plant. All the Expert Committees are unanimous in their view that by adopting proper and adequate safety measures the element of risk to the workmen and the public can only be minimised but it cannot be totally eliminated. Dr. Slater has in the last part of his Report pointed out that inspection of the caustic chlorine plant revealed "a worrying state of affairs" and he was of the opinion that the plant was liable to be "classed as a major hazard facility by applying most of the currently accepted definitions" and it did not measure up to the responsibilities incumbent upon operators of such plants to safeguard both public and employees so far as is reasonably practicable". He made various recommendations which in his opinion were required to be complied with by Shriram and he added that if a substantial improvement in safety was not possible or rapidly forthcoming along the lines of these recommendations the authorities should consider constraining its activities to protect the public and employees". He concluded by observing that relocation is the only practicable long term option which would guarantee the complete removal of the community risk. The Manmohan Singh Committee also observed towards the end of its Report that "total elimination or risk to the community, i.e.....human population from toxic plant/hazardous industry located in close proximity is improbable. However the probability of risk can be immensely reduced if the plant is run with adequate precautions" and proceeded to make various recommendations for "strict and immediate compliance with and object to minimise risk to the workers and the population around". Seturaman's Committee also

pointed out in para 10.81 of its Report that Shriram factory "is certainly a perennial source of hazard to the community. These hazards cannot be completely eliminated but could be minimised by strict compliance of safety regulations. Giving due weight to the hazard aspects as mentioned above and taking into account the safety of the community as a whole", the Manmohan Singh Committee observed that functioning of the SFFI in the present location is not desirable. So also Agarwal Committee opined that "under so many uncertain factors a chlorine manufacturing unit cannot be even reasonably safe when located in proximity to a densely populated area. In the circumstance, the only practical solution is to relocate the chlorine plant at least 10 k. ms. away from the urban limits of densely populated areas with adequate safety measures." Finally Nilay Choudhary Committee also stated that even if all the recommendations made in its Report as also in the Report of Manmohan Singh committee were carried out, “the risk due to major release of chlorine could only be reduced but not completely eliminated. Complete elimination of the risk to the population at large obviously lies in relocation of the plant in an area without human habitation". It will thus be seen that the general consensus of opinion of all the Expert committees is that relocation of the caustic chlorine plants is the only long term solution if hazard to the community is to be completely eliminated. We have therefore decided to hear arguments on the question as to whether the caustic chlorine plant should be directed to be shifted and relocated at a place where there will be no hazard to the community and if so, within what time frame. This is a question which will require serious consideration and a National Policy will have to be evolved by the Government for location of toxic or hazardous industries and a decision will have to be taken in regard to relocation to such industries with a view to eliminating risk to the community likely to arise from the operation of such industries. But the immediate question which we have to consider is whether the caustic chlorine plant of Shriram should be allowed to be reopened and if so subject to what conditions, keeping in mind constantly that the operation of the caustic chlorine plant does involve a certain amount of hazard or risk to the community.

12. Now it is an admitted fact that the caustic chlorine plant was set up by Shriram more than 35 years ago and whatever might have been the situation at the time when the plant was installed, it cannot be disputed that at present, largely owing to the growth and development of the City, there is sizable population living in the vicinity of the plant and there is therefore hazard or risk to large numbers of people, if, on account of any accident, whether occasioned by negligence or not, chlorine gas escapes. The various expert committees appointed by the Government as well as by the Court clearly emphasise the danger to the community living in the vicinity of the caustic chlorine plant if there is exposure to chlorine gas through an accidental release which may take place on account of negligence or other unforeseen events. Now it is evident from the reports of the expert committees, and on this aspect of the matter they are all unanimous, that there was considerable negligence on the part of the management of Shriram in the maintenance and operation of the caustic chlorine plant and there were also defects and drawbacks in its structure and design. The report of Dr. Slater which is the first report in the series clearly pointed out that the safety policies, practices and awareness on the part of the management needed to be addressed urgently and added inter alia that the

effectiveness and availability of the design and emergency arrangements was, to say the least, questionable and in the real emergency involving a major spill, the measures would probably prove ineffective in limiting serious consequences inside and outside the plant. He also added that the standard of house keeping and training among the operational staff was not good and it was symptomatic of inadequate awareness of the importance of safety devices and the scale of potential consequences following "loss of containment". He also reiterated that the manner in which the caustic chlorine plant was being maintained and operated did not "measure up to the responsibilities incumbent upon operators of such plants". So also the report of Manmohan Singh Committee pointed out various drawbacks and deficiencies in the structure and design of the caustic chlorine plant as also in its maintenance and operation and made various detailed recommendations which in the opinion of the Manmohan Singh Committee needed to be strictly and scrupulously carried out, if the risk to the workers and the population in the vicinity was to be minimised. The Nilay Choudhary Committee also made several recommendations in order to minimise the hazard due to a possible leakage of chlorine gas. The management of Shriram Claimed that all these recommendations made in the reports of Manmohan Singh Committee and Nilay Choudhary Committee had been carried out by Shriram and the possible hazard to the workers and the community living in the vicinity was almost reduced to nil and that Shriram should therefore be allowed to reopen the caustic chlorine plant. The management of Shriram made it clear that they did not intend to restart immediately their plants manufacturing sulphuric acid, oleum, chlorosulphonic acid, super phosphate and granulated fertiliser ferric alum and active earth. Since these plants were under detailed engineering audit and that out of these plants double conversion double absorption sulphuric acid plant and ferric alum and active earth plants would be started in the second phase "after attending to immediate maintenance needs" and that so far as the other plants were concerned, the schedule for restarting would be communicated later. The only plants in respect of which Shriram sought the permission of the Court to restart were the power plant and the plants manufacturing vanaspati and refined oil including its by-products and recovery plants like soap, glycerine and technical hard oil and the caustic chlorine plant including plants manufacturing by-products such as sodium sulphate, hydrochloric acid, stable bleaching powder, superchlor, sodium hypochlorite and container works. Our directions in the present judgement must therefore necessarily be confined only to these plants which Shriram wants to restart immediately and we may make it clear that so far as other plants which Shriram does not propose to restart immediately are concerned, they shall not be restarted by Shriram without obtaining further directions from the Court, particularly since the machinery and equipment in some of these plants is as pointed out in the report of Sethuraman Committee old and worn out and the safety instrumentation is not adequate and the Court would therefore have to be satisfied that the machinery and equipment is properly renovated and its design and structure modernised with a view to ensuring maximum safety before the Court can permit these plants to be decommissioned. Now, of course, there could be no objection to the restarting of the vanaspati and refined oil plant and other recovery plants like soap, glycerine and technical hard oil, because they admittedly do not involve any risk or hazard to the community but these plants obviously cannot be restarted by the management of Shriram

unless and until the caustic chlorine plant is also allowed to be reopened, because hydrogen is needed for the vanaspati and refined oil plant and hydrogen would not be available unless the caustic chlorine plant is put into operation. The question which therefore requires to be considered is whether all the recommendations made in the reports of Manmohan Singh Committee and Nilay Choudhary Committee in regard to the caustic chlorine plant have been carried out by the management of Shriram and if so whether Shriram should be allowed to restart the caustic chlorine plant.

13. Since there was considerable controversy between the parties as to whether the recommendations made in the report of Manmohan Singh Committee and Nilay Choudhary Committee had been carried out by the management of Shriram and a notice dated 28th January, 1986 issued by the Inspector of Factories (Delhi) to the management of Shriram set out seven of these recommendations in respect of which Inspector of Factories did not appear to be satisfied as to whether they had been complied with or/and a dispute was also specifically raised in the affidavit of Mrs. M. Bassi, Joint Labour Commissioner, Delhi Administration dated 31st January, 1986 in regard to compliance with the recommendations of Manmohan Singh Committee set out in para 4 of the affidavit, the Court decided to appoint another expert committee for the purpose of ascertaining whether the various recommendations made in the reports of Manmohan Singh Committee and Nilay Choudhary Committee had been complied with by the management. The Court accordingly made an order on 31st January, 1986, appointing a committee consisting of Shri Manmohan Singh, Professor P. Khanna, Dr. Sharma and Shri Gharekhan to visit the caustic chlorine plant of Shriram and report to the Court whether the recommendations contained in the reports of Manmohan Singh Committee and Nilay Choudhary Committee had been complied with by the management of Shriram and even if there was no strict compliance with any of these recommendations, whether the measures adopted by the management of Shriram were sufficient to meet the requirements set out in the reports of Manmohan Singh Committee and Nilay Choudhary Committee. It seems that Professor P. Khanna could make his services available with the result that the assignment entrusted by us by our order dated 31st January, 1986, had to be carried out by a committee consisting of only three persons, namely, Shri Manmohan Singh, Dr. Sharma and Shri Gharekhan. The Committee inspected the caustic chlorine plant of Shriram and submitted its report dt. 3rd February, 1986, showing the status of compliance of the recommendations made by the Manmohan Singh Committee and Nilay Choudhary Committee. The report showed that barring the construction of a shed on the space where filled cylinders are to be kept, which is expected to be complete by 15th March, 1986, all the recommendations made in the reports of Manmohan Singh Committee and Nilay Choudhary Committee have been complied with by the management of Shriram. The hydraulic test carried out by Messrs Nike Associates, Bombay, a firm recognised by the Chief Inspector of Factories Bombay, as competent person to take up the responsibilities of testing, examining and issuing certificate in respect of pressure vessels also established that all the five tanks had an adequate capacity of withstanding pressure. Since however the authorities wanted a hydraulic test to be carried out once again by the Regional Testing Centre, Okhala, the management of Shriram got a fresh test carried out by the Regional Testing Centre and the certificate

issued by the Regional Testing Centre dated 4th February, 1986 showed that all the five tanks were found to be strong enough to withstand pressure of 375 dsig. for thirty minutes duration. The Committee also insisted that not more than 140 filled chlorine cylinders should be stored and the report shows that this limitation has been accepted by the management of Shriram. The Committee also witnessed a mock drill with a view to ensuring whether there was a specially trained group to handle any chlorine leakage emergency and the committee stated in the report that the mock drill was found to be satisfactory. There was also one or two other recommendations in respect of which the Committee observed that compliance with them could be tested only during the operation of the plant.

14. The question is whether in view of the fact that all the recommendations made in the Reports of Manmohan Singh Committee and Nilay Choudhary Committee have now been complied with by the management of Shriram, the caustic chlorine plant of Shriram should be allowed to be restarted. The petitioner who appeared in person submitted vehemently and passionately that the Court should not permit the caustic chlorine plant to be restarted because there was always an element of hazard or risk to the community in its operation. He urged that chlorine is a dangerous gas and even if the utmost care is taken the possibility of its accidental leakage cannot be ruled out and it would therefore be imprudent to run the risk of allowing the caustic chlorine plant to be restarted. Mrs. Kumarmangalam, learned counsel appearing on behalf of Lokahit Congress Union as also the learned counsel appearing on behalf of Karamchari Ekta Union, however, expressed themselves emphatically against the permanent closure of the caustic chlorine plant and submitted that if the caustic chlorine plant was not allowed to be restarted, it would not be possible to operate the plants manufacturing the downstream products and the result would be that about 4,000 workmen would be thrown out of employment. Both the learned counsel submitted that since all the recommendations made in the reports of Manmohan Singh Committee and Nilay Choudhary Committee had been complied with by the management of Shriram and the possibility of risk or hazard to the community had been considerably minimised and in their opinion reduced to almost nil, the caustic chlorine plant should be allowed to be reopened. The learned Additional Solicitor General appearing on behalf of the Union of India and the Delhi Administration stated before us that his clients were not withdrawing their objection to the reopening of the caustic chlorine plant but if the Court was satisfied that there was no real risk or hazard to the community by reason of various recommendations of Manmohan Singh Committee and Nilay Choudhary Committee having been carried out by the management of Shriram, the Court might make such order as it thinks fit, but in any event, strict conditions should be imposed with a view to ensuring the safety of the workmen and the people in the vicinity. The learned counsel for Shriram strongly pleaded that now that all the recommendations made in the reports of Manmohan Singh Committee and Nilay Choudhary Committee had been complied with by the management and every possible step had been taken and measure adopted for the purpose of ensuring complete safety in the operation of the caustic chlorine plant, there was no real danger of escape of chlorine gas and even if there was some leakage it could easily be contained and there was therefore no reason for permanently closing down the caustic chlorine plant as it would

result not only in loss to the company but also in unemployment of about 4,000 workmen and non-availability of chlorine to Delhi Water Supply Undertaking and short supply of downstream products. These rival contentions raise a very difficult and delicate question before the Court as to what course of action to adopt.

15. It is undoubtedly true that chlorine gas is dangerous to the life and health of the community and if it escapes either from the storage tanks or from the filled cylinders or from any other point in the course of production, it is likely to affect the health and well-being of the workmen and the people living in the vicinity. There was some controversy before us as to what is the concentration of chlorine in the air which is dangerous to life and health. Aggarwal Committee in its report stated that concentration of chlorine in the air above 25 parts per million (PPM) is recognised by Occupational Safety and Health Act (USA) as immediately dangerous to life and health, but this was disputed on behalf of the management of Shriram relying on the report of Manmohan Singh Committee which opined that it is only where concentration of chlorine in the air is between 40 to 60 parts per million (PPM) that exposure for 30 minutes would be dangerous to life. It is not necessary for us to go into this controversy and decide as to which view is correct, whether the one expressed by Aggarwal committee or the one expressed by Manmohan Singh Committee. Fortunately, both committees are agreed that chlorine is a hazardous gas and though smaller concentrations of chlorine in the air may cause only irritation and coughing larger concentrations, whether above 25 parts per million (PPM) are likely to cause serious danger to life. There can therefore be no doubt that there would be hazard to the life and health of the community, if there is escape of chlorine gas from the caustic chlorine plant, whether by reason of negligence of the management or due to accidental release. In fact the Issue of the Journal "Scavengar" for January, 1985 enumerates some major accidents which have occurred in different parts of the world in the process industries and this enumeration shows that not less than 25 accidents have been caused by escape of chlorine gas in the last about 70 years and many of these accidents have resulted in death of quite a few persons. To take only a few examples, the escape of chlorine from storage tank in Wilsum Germany in 1952 resulted in death of seven persons and similarly release of chlorine gas in Bankstown, Australia in 1967 resulted in gassing of five persons and on account of escape of chlorine gas in Baton Rouge in 1976, about 10,000 persons had to be evacuated. It is true that quite a few of these accidents arose on account of escape of chlorine gas in course of transport by rail tank cars but some accidents did occur on account of escape of chlorine gas from storage tanks. We cannot therefore ignore the possible hazard to the health and well-being of the workmen and the people living in the vicinity on account of escape of chlorine gas. We also cannot overlook the old and worn out state of machinery and equipment, the maintenance and operation of the caustic chlorine plant and the indifference shown by the management in installing proper safety devices and safety instruments and taking proper and adequate measures for ensuring safety of the workmen and the people living in the vicinity. These are considerations which are very relevant in deciding whether the caustic chlorine plant should be allowed to be restarted. But as against these considerations we must also take into account the proven fact that all the recommendations made in the Reports of Manmohan Singh Committee and Nilay Choudhary Committee have been carried out by

the management of Shriram and it is the opinion of not only Manmohan Singh Committee and Nilay Choudhary Committee but also of the last Committee appointed by us on 31st January, 1986, that since all these recommendations have been complied with by the management in satisfactory manner, Shriram may be allowed to restart the caustic chlorine plant. There can be no doubt, particularly having regard to the opinion of Manmohan Singh Committee, Nilay Choudhary Committee and the last Committee appointed by us, that the possibility of hazard or risk to the community is considerably minimised and there is now no appreciable risk or danger to the community if the caustic chlorine plant is allowed to be restarted. We cannot also ignore the interests of the workmen while deciding this delicate and complex question. It could not be disputed either by the Government of India or by the Delhi Administration or even by the petitioner that the effect of permanently closing down the caustic chlorine plant would be to throw about 4,000 workmen out of employment and that such closure would lead to their utter impoverishment. The Delhi Water Supply Undertaking which gets its supply of chlorine from Shriram would also have to find alternative sources of supply and it was common ground between the parties that such sources may be quite distant from Delhi. The production of downstream products would also be seriously affected resulting to some extent in short supply of these products. These various considerations on both sides have to be weighed and balanced and a decision has to be made as to on which side the considerations preponderate and tilt the balance. It is none too easy task for the decision either way may entail serious consequences. We have therefore reflected over the various aspects of this rather difficult and complex question with great anxiety and care and taking an overall view of the diverse considerations we have, with considerable hesitation bordering almost on trepidations reached the conclusion that, pending considerations of the issue whether the caustic chlorine plant should be directed to be shifted and relocated at some other place, the caustic chlorine plant should be allowed to be restarted by the management of Shriram, subject to certain stringent conditions which we propose to specify.

16. But before we proceed to set out the conditions which must strictly be observed by the management of Shriram while operating the caustic chlorine plant, we must deal with one other question which was raised before us on behalf of the Central Board of Prevention and Control of Water Pollution (hereinafter referred to as the Central Board). The Central Board is constituted under the Water (Prevention and Control of Pollution) Act, 1974 (hereinafter referred to as the Water Act) and it is also required to perform the functions assigned under the Air (Prevention and Control and Pollution) Act. 1981 (hereinafter referred to as the Air Act). Since some of the plants of Shriram are situated within the complex including the vanaspati plant were discharging effluent, Shriram was required to obtain consent for discharging effluent from the Central Board under S. 25, Water Act, and Shriram accordingly made an application for this purpose in the prescribed form. The Central Board passed an Order on 19th April, 1979, granting consent to Shriram to discharge effluent from their factory in the sever, subject to the terms and conditions set out in the consent order. The consent granted to Shriram was renewed from time to time and the last renewed Consent Order was dated 22nd July, 1985. Pursuant to the Consent Order Shriram installed effluent treatment plants in the vanaspati, stable

bleaching powder, super phosphate and active earth units with a view to complying with the Limiting standards stipulated by the Central Board in the Consent Order. The waste water in other units was either solar dried in lagoons or recycled in the different process houses and the major units emanating waste water were thus vanaspati, active earth, super phosphate and stable bleaching power plants used to be drained out through one common terminal outlet and the complaint of the Central Board was that this combined effluent at the terminal outlet never complied with the limiting standards proscribed by the Central Board. The results of analysis of the samples collected by the officers of the Central Board at the terminal outlet were annexed as Annexure I to the supplementary affidavit dated 19th December, 1985, filed by Shri P. R. Gharekhan on behalf of the Central Board. The Central Board also repeatedly complained that the effluent discharged from the vanaspati plant was not in accordance with the limiting standards prescribed in the Consent Order. Now, as pointed out by Surendra Kumar, Senior Environmental Engineer in the Employ of Shriram, there are broadly two technologies available for effluent treatment in vanaspati industry. One is the technology of removing suspended solids by settling with the help of clariflocculation and the other is the technology of removing suspended solids, oils and grease and greasy solids by flotation and skimming. The affidavit of Surendara Kumar stated that the technology based on settling with the help of clariflocculation was recommended by the Central Board for supply of an effluent treatment plant employing this technology. But, unfortunately, the plant of Messrs Dorr Oliver failed to give the guaranteed results presumably because this technology was not satisfactory. The Central Board in fact carried out a performance evaluation of this plant in December, 1983 and they came to the conclusion that this plant would require substantial effluent standards. It was then realised that the technology of removal of impurities by flotation method is more appropriate for vanaspati plant effluent and Shriram accordingly once again as pointed out in affidavit of Surendra Kumar, made a reference to the Central Board. On 17th January, 1985, the Central Board directed that Messrs Krofta Engineering Company should be asked to set up a pilot plant based on dissolved air flotation technology in the vanaspati plant for treatability study of the effluent. But despite the follow-up action taken by Shriram, the pilot plant was not set up by Messres Krofta Engineering Company. Shriram thereupon in its anxiety to comply with the limiting standards set by the Central Board in the Consent Order, placed an order with another reputed supplier namely, Messrs Patel Brothers of Bombay in June 1985 appointed for supply of a plant based on flotation technology. Messres Patel Brothers guaranteed to install and commission the plant by 31st December, 1985, but the affidavits show that there has been some delay in the installation of this plant and its installation is now going to be completed by 28th February, 1986. Meanwhile, however, Shriram installed at the terminal outlet a plant based on dissolved air flotation technology of Messrs Krofta Engineering Company and the counter affidavit of Shri P. R. Gharekhan dated 13th January, 1986, shows that the representatives of the Central Board have verified that this terminal treatment plant has been installed. However, the performance of this terminal treatment plant is yet to be evaluated by the Central Board in order to assess compliance with the limiting standards stipulated in the Consent Order. The Central Board will therefore have to evaluate the performance of this terminal treatment plant after the caustic chlorine and other plants of Shriram commence production. So far

as the effluent discharged by the active earth plants and stable bleaching plant is concerned, it complies with the limiting standards prescribed for it in the Consent Order but the effluent discharged by the vanaspati plant does not comply with the relevant limiting standards. Shriram has, however, stated that once the plant ordered from Messrs Patel Brother, Bombay is installed, it will be possible to secure compliance with the requirement of the limiting standards. This of course will have to be assessed on the basis of performance evaluation of the plant of Messrs Patel Brothers when installed.

17. But there is one difficulty in the way of Shriram restarting its vanaspati plant. The last renewed Consent Order dated 2nd July, 1985 expired on 31st December, 1985 and obviously therefore Shriram cannot operate the vanaspati plant and discharge effluent unless and until the Consent Order is renewed, for the discharge of effluent without Consent Order would be contrary to the provisions of the Water Act. We however, find that the Central Board has stated in the affidavit filed in this behalf by Shri D.C. Sharma, Assistant Environmental Engineer, that the Central Board has no objection to grant temporary consent pursuant to the provisions of the Water Act on condition that Shriram would comply with all the recommendations of various Committees appointed by this Court or otherwise and that such consent would be valid only for a period of one month from the date of issue of the Consent Order. Since we are permitting Shriram to reopen its caustic chlorine, vanaspati and other plants above referred to, we would ask the Central Board to grant a temporary Consent Order to Shriram valid for a period of one month from the date of its issue and the Central Board will take samples from the effluent discharged from the vanaspati plant as also at the terminal outlet and ascertain whether the samples comply with the relevant standards, the Central Board will immediately bring such fact to the notice of this Court and it will be open to the Central Board to take such action as it thinks fit including non-renewal of the Consent Order.

18. So far as compliance with the provisions of the Air Act is concerned, the Central Government in consultation with the Central Board issued a notification under S 19 (1), Air Act, notifying certain areas in the Union Territory of Delhi as air pollution control area. The plants of Shriram are admittedly situated in the air pollution control area and the industries carried on by Shriram also fall within the schedule of industries specified in the Air Act. Shriram was therefore required to apply for a Consent Order from the Control Board under S. 21 of the Air Act and an application was accordingly made by Shriram on the basis of which a Consent Order was issued by the Central Board on 13th June, 1985, authorising Shriram to operate their plants in the air pollution control area, subject to the conditions set out in the Consent Order. The Consent Order relates to three plants of Shriram, namely sulphuric acid plant, super phosphate plant and power plant. We are not concerned at the present stage with the sulphuric acid and super phosphate plants since permission to restart them is not presently sought by Shriram and we need not therefore pause to consider whether the conditions laid down in the Consent Order in respect of these two plants have been complied with or not. So far as the power plant of Shriram is concerned, it is not the case of the Central Board that the conditions in the Consent Order in regard to the operation of the power plant are not being complied with by the management, though there is a specific complaint made in the affidavit filed on behalf of the Central Board that the conditions in the Consent Order relating to sulphuric

acid and super phosphate plants are not being observed. We may however point out that if the Central Board finds at any time that the conditions in the Consent Order relating to the power plant are not being complied with and the particulate matter emitted by the stacks of the boilers is more than 150 mg/Nm^3 it will be open to the Central Board to take whatever action is appropriate under the law.

19. Before we part with this topic of water and air pollution by the plants operated by Shriram, we may point out a most unsatisfactory state of affairs which seems to prevail in the Delhi Municipal Corporation. The Municipal Corporation sewer in the Nazafgarh area has admittedly been lying chocked since 1980 with the result that Shriram has since then not been able to discharge its domestic effluent in the municipal sewer and the domestic effluent has to be discharged in the Nazafgarh drain thereby adversely affecting the standards prescribed by the Central Board. It is difficult to understand as to why the Delhi Municipal Corporation has not taken any steps for the last five years to clean up the sewer so that it can be used for carrying domestic effluent discharged by the people. We are not issuing any direction in this behalf but we are certainly constrained to express our deep sense of regret at the total indifference of the Delhi Municipal Corporation in discharging its obligations under the law.

20. We have therefore decided to permit Shriram to restart its power plant as also plants for manufacture of caustic chlorine including its by-products like sodium sulphate, hydrochloric acid, stable bleaching power, syperchlor, and sodium hypochlorite, vanaspati refined oil including its by-products are recovery plants like soap, glycerine and technical hard oil and container works. But there are two orders which prohibit Shriram from operating these plants. One is the order dated 7th December, 1985 issued by the Inspector of Factories, Delhi, prohibiting Shriram from using the caustic chlorine and other plants till adequate safety measures are adopted and imminent danger to human life is eliminated and the other is the order dated 24th December, 1985 issued by the Assistant Commissioner (Factories) directing Shriram to stop industrial use of the premises on which the caustic chlorine plant is located. The validity of these two orders has been assailed by Shriram in Writ Petition No. 26 of 1986. We are not inclined at the present moment to vacate these two orders because the permission which we are granting by this judgement to Shriram to reopen these plants is as temporary measure to be reviewed at some point of time in the future and we would therefore merely suspend the operation of these two orders until further directions with a view to enabling Shriram to restart these plants. But we are laying down certain conditions which shall be strictly and scrupulously followed by Shriram and if at any time it is found that any one or more of these conditions are violated, the permission granted by the will be liable to be withdrawn. We formulate these conditions as follows:-

(1) Since it is clear from the affidavits and the reports of the various expert committees that the management of Shriram was negligent in the operation and maintenance of the caustic chlorine plant and did not take the necessary measures for improving the design and quality of the plant and equipment and installing adequate safety devices and instruments with a view to ensuring the maximum safety of the workers and the community living in the vicinity and it

is only after W.P. No. 12739 of 1985 was filed and all the glaring deficiencies were pointed out that the management carried out various alterations and adopted various measures in accordance with the recommendations made by Manmohan Singh Committee and Nilay Choudhary Committee, it is necessary that an expert committee should be appointed by us which will monitor the operation and maintenance of the plant and equipment and ensure the continued implementation of the recommendations of these two committees. We accordingly constitute an expert committee consisting of Shri Manmohan Singh, Shri P. R. Gharekhan and Professor P. Khanna of the India Institute of Technology Bombay, and if Professor P. Khanna is not available for any reason, Dr. Sharma of the University Department of Chemical Technology, Bombay, will take his place as a member of the expert committee, and this expert committee will inspect the caustic chlorine plant of Shriram at least once in a fortnight and examine whether the recommendations made by Manmohan Singh Committee and Nilay Choudhary Committee are being Scrupulously implemented by the management. The expert committee will also examine the adequacy of the design, materials, fabrication, etc., of the devices, instruments and other hardware calculated to monitor, warn, avoid, control and handle all situations arising on account of possible accidental release of chlorine gas, keeping in mind meteorological factors, location of the plant and the largeness of the population exposed to hazard or risk. This examination may involve a thorough check and experimentation at site with a view to determining how far the safety measures adopted by the management are adequate to deal with a possible situation. The expert committee will submit a report of its examination to this Court immediately after completion of the examination with copies to the petitioner and Shriram. The first such examination shall be made by the expert committee within one week of the restarting of the caustic chlorine plant and it shall be followed by a second examination within a further period of 15 days. If as a result of either such examination it is found that there is default on the part of the management in continuous compliance with any of the recommendations made by Manmohan Singh Committee and Nilay Choudhary Committee or the safety devices or instruments are not adequate or are not in operation or are not properly functioning, the petitioner will be at liberty to immediately bring such default to the notice of this Court so that in that event, the permission granted to the management to restart the caustic chlorine plant may be revoked. Shriram will, within 3 days from today, deposit a sum of Rs. 30, 000/- in this Court to meet the travelling, boarding and lodging expenses of the members of the expert committee.

(2) One operator should be designated as personally responsible for each safety device or measure and the head of the caustic chlorine division should be made individually responsible for the efficient operation of such safety device or measure. If at any time during examination by the expert committee or inspection by the Inspectorate it is found that any safety device or measure is

inoperative or is not properly functioning, the head of the caustic chlorine plant as well as the operator in charge of such safety device or measure shall be held personally responsible. Their duty shall be not merely to report non-functioning or mal-functioning of any safety device or measure to the higher authority but to see that the operation of the entire plant is immediately shut-down, the safety device is urgently replenished and the plant does not restart functioning until such replenishment is completed.

(3) The Chief Inspector of Factories or any Senior Inspector duly nominated by him, who has necessary expertise in inspection of chemical factories, will inspect the caustic chlorine plant at least once in a week by paying surprise visit without any previous intimation and examine whether the recommendations of Manmohan Singh Committee and Nilay Choudhary Committee are being complied with by the management and whether the safety devices or instruments installed by the management are operative and are properly functioning or whether there are any defects or deficiencies in the operation and maintenance of the caustic chlorine plant and in the safety devices or instruments installed in the plant. The Chief Inspector of Factories or the Senior Inspector nominated by him, who carries out such inspection, shall immediately report to this Court and to the Labour Commissioner any default, deficiency or remissness on the part of the management which may be noticed by him in the course of such inspection and on such report being made it will be open to the Labour commissioner and the Chief Inspector of Factories to take such action as they think fit.

(4) The Central Board will also depute a senior Inspector to visit the caustic chlorine plant and the Vanaspati Plant at least once in a week without any prior notice to the management, for the purpose of ascertaining whether the effluent discharge from the Vanaspati Plant as also at the terminal outlet complies with the limiting standards laid down in the Consent Order issued under the Water Act and the particulate matter emitted by the stacks of the boilers in the power plant complies with the standards laid down in the Consent Order issued under the Air Act and if there is any default in complying with the relevant standards in either case, such default shall be brought to the notice of this Court and the Central Board will be entitled to take such action as it thinks fit, including revocation of the relevant Consent Order.

(5) The management of Shriram will obtain an undertaking from the Chairman and Managing Director of the Delhi Cloth Mills Ltd., which is the owner of the various units of Shriram as also from the officer or officers who are in actual management of the caustic chlorine plant that in case there is any escape of chlorine gas resulting in death or injury to the workmen or to the people living in the vicinity, they will be personally responsible for payment of compensation for such death or injury and such undertakings shall be filed in Court within 1 week from today.

(6) There shall be a committee of three representatives of Lokahit Congress Union and three representatives of Karamchari Ekata Union to look after the safety arrangements in the caustic chlorine plant. The function of this committee will be to ensure that all safety measures are strictly observed and there is no non-functioning or mal-functioning of the safety devices and instruments and for this purpose, they will be entitled to visit any section or department of the plant during any shift and ask for any relevant information from the management. If there is any default or negligence in the observance of the safety measures and the maintenance and operation of the safety devices and instruments, this Committee will be entitled to bring such default or negligence ot the notice of the management and if the management does not heed the same, this committee will be entitled to draw the attention of the Labour Commissioner to such default or negligence. The members of this committee will be given proper and adequate training in regard to the functioning for the caustic chlorine plant and the operation of the safety devices and instruments and this will be done within a period of 2 weeks after the nomination of three representatives on the Committee is communicated by each of the two unions to the management.

(7) There shall be placed in each department or section of the caustic chlorine plant as also at the gate of the premises a detailed chart in English and Hindi stating the effects of chlorine gas on human body and informing the workmen and the people as to what immediate treatment should be taken in case they are affected by leakage of chlorine gas.

(8) Every worker in the caustic chlorine plant should be properly trained and instructed in regard to the functioning of the specific plant and equipment in which he is working and he should also be educated and informed as to what precautions should be taken and in case of leakage of chlorine gas, what steps should be taken to control and contain such leakage. The most effective way of giving such training and instruction would be through audio-visual programmes to be specially prepared by the management. Even after proper training and instruction is given it is likely that the workers engaged in the plant may, on account of lapse of time, forget the sequence of steps to be taken to monitor, warn, avoid, control and handle any chlorine leakage emergency and refresher courses should therefore be conducted at least once in 6 week with mock trials.

(9) Loud speakers shall be installed all around the factory premises for giving timely warning and adequate instructions to the people residing in the vicinity in case of leakage of chlorine gas.

(10) The management shall maintain proper vigilance with a view to ensuring that workers working in the caustic chlorine plant wear helmets, gas masks or safety belts as the case may be while working in the hazardous departments or sections of the plant and regular medical check-up of the workers shall be got

carried out by the management in order to ensure that the workers are in good health.

(11) The management of Shriram will deposit in this Court a sum of Rs. 20 lacs as and by way of security for payment of compensation claims made by or on behalf of the victims of oleum gas, if and to the extent to which such compensation claims are held to be well founded. This amount deposited by the management of Shriram will be invested by Registrar of this Court in fixed deposit with a Nationalised Bank so that it earns interest and it will abide further directions of this Court. The management of Shriram will also furnish a bank guarantee to the satisfaction of the Registrar of this court for a sum Rs. 15 lacs which bank guarantee shall be encashed by the Registrar, wholly or in part, in case there is any escape of chlorine gas within a period of three years from today resulting in death or injury to any workman or to any person or person living in the vicinity. The amount of the bank guarantee when encashed shall be utilised in or towards payment of compensation to the victims of chlorine gas, the quantum of compensation being determinable by the District Judge, Delhi on applications for compensations being made to him by the victims of chlorine gas. The amount of Rs. 20 lacs shall be deposited and the bank guarantee for Rs. 15 lacs shall be furnished within a period of 2 weeks from today and on failure of the management of Shriram to do so, the permission granted by the chlorine plant and other plants shall stand withdrawn.

21. We have formulated these conditions with a view to ensuring continuous compliance with the recommendations of Manmohan Singh Committee and Nilay Choudhary Committee and strict observance of safety standards and procedures, so that the possibility of hazard or risk to the workmen and the community is almost reduced to nil. We would like to point out that the caustic chlorine plant of Shriram is not the only plant which is carrying on a hazardous industry. There are many other plants in Delhi which are employing hazardous technology or are engaged in manufacture of hazardous goods and if proper and adequate precautions are not taken, they too are likely to endanger the life and health of the community. We would therefore suggest that a High Powered Authority should be set up by the Government of India in consultation with the Central Board for overseeing functioning of hazardous industries with a view to ensuring that there are no defects or deficiencies in the design, structure or quality of their plant and machinery, there is no negligence in maintenance and operation of the plant and equipment and necessary safety devices and instruments are installed and are in operation and proper and adequate safety standards and procedures are strictly followed. This is a question which needs serious attention of the Government of India and we would request the Government of India to take the necessary steps at the earliest, because the problem of danger to the health and well being of the community on account of chemical and other hazardous industries has become a pressing problem in modern industrial society. It is also necessary to point that when science and technology are increasingly employed in producing goods and services calculated to improve the quality of life, there is a certain element of hazard or risk inherent in the very use of science and technology and it is not

possible to totally eliminate such hazard or risk altogether. We cannot possibly adopt a policy of not having any chemical or other hazardous industries merely because they pose hazard or risk to the community. If such a policy were adopted, it would mean the end of all progress and development. Such industries even if hazardous, have to be set up since they are essential for economic development and advancement of well-being of the people. We can only hope to reduce the element of hazard or risk to the community by taking all necessary steps for locating such industries in a manner which would pose least risk or danger to the community and maximising safety requirements in such industries. We would therefore like to impress upon the Government of India to evolve a national policy for location of chemical and other hazardous industries in areas where populations is scarce and there is little hazard or risk to the community, and when hazardous industries are located in such area, every care must be taken to see that large human habitations does not grow around them. There should preferably be a green belt of 1 to 5 k.m. width around such hazardous industries.

22. There is also one other matter to which we should like to draw the attention of the Government of India. We have noticed that in the past few years there is an increasing trend to the number of cases based on environmental pollution and ecological destruction coming up before the Courts. Many such cases concerning the material basis of livelihood of millions of poor people are reaching this court by way of public interest litigation. In most of these cases there is need for neutral scientific expertise as an essential input to inform judicial decision making. These cases require expertise at a high level of scientific and technical sophistication. We felt the need for such expertise in this very case and we had to appoint several expert committees to inform the Court as to what measures were required to be adopted by the management of Shriram to safeguard against the hazard or possibility of leaks, explosion, pollution of air and water, etc., and how many of the safety devices against this hazard or possibility existed in the plant and which of them, though necessary, were not installed. We had great difficulty in finding out independent experts who would be able to advise the Court on these issues. Since there is at present no independent and competent machinery to generate, gather and make available the necessary scientific and technical information, we had to make an effort on our own to identify experts who would provide reliable scientific and technical input necessary for the decision of the case and this was obviously a difficult and by its very nature, unsatisfactory exercise. It is therefore absolutely essential that there should be an independent Centre with professionally competent and public spirited expert to provide the needed scientific and technological input. We would in the circumstances urge upon the Government of India to set up an Ecological Sciences Research Group consisting of independent, professionally competent experts in different branches of science and technology, who would act as an information bank for the Court and the Government department and generate new information according to the particular requirements of the Court or the concerned Government department. We would also suggest to the Government of India that since cases involving issues of environmental pollution, ecological destruction and conflicts over natural resources are increasingly coming up for adjudication and these cases involve assessment and evolution of scientific and technical data, it might be desirable to set up Environment Courts on the regional basis with one

professional Judge and two experts drawn from the Ecological Sciences Research Group keeping in view the nature of the case and the expertise required for its adjudication. There would of course be a right of appeal to this Court from the decision of the Environment Court.

23. We have in this judgement dealt only with the question as to whether Shriram should be allowed to restart its caustic chlorine plant and other plants manufacturing by-products and if so, subject to what conditions. There are many other issues of seminal importance arising out of the claims for compensation by victims of oleum gas which have to be considered by the Court. We have formulated these issues and asked the petitioner and those supporting him in W. P. 12739 of 1985 to file their written submissions on or before 24th February, 1986 and Shriram to file their written submissions on or before 28th February, 1986 so that we can take up the hearing of the writ petitions on 3rd March, 1986.

24. Before we part with this judgment we would like to express our deep sense of appreciation for the bold initiative taken by the petitioner in bringing this public interest litigation before the Court. The petitioner has rendered signal service to the community by bringing this public interest litigation and he has produced before the Court considerable material bearing on the issues arising in the litigation. He has argued his case with great sincerity and dedication and the people of Delhi must be grateful to him for espousing such a public cause. There is no doubt in our mind that but for this public interest litigation brought by the petitioner, there would have been no improvement in the design, structure and quality of the machinery and equipment in the caustic chlorine plant nor would any proper and adequate safety devices and instruments have been installed nor would there have been any pressure on the management to observe safety standards and procedures and the possibility cannot be ruled out that perhaps some day oleum gas tragedy might have been repeated but this time with chlorine gas which is admittedly more dangerous than oleum gas. Though lone and single, he has fought a valiant battle against a giant enterprise and achieved substantial success. We would therefore as a token of our appreciation of the work done by the petitioner direct that a sum of Rs. 10,000/- be paid by Shriram to the petitioned by way of costs.

Order accordingly.

M. C. Mehta v. Union of India
AIR 1987 Supreme Court 982
Civil Misc. Petition No. 6263 of 1986, D/- 10-3-1986
P.N. Bhagwati C.J.; D.P. Madon and G.L. Oza, JJ.

Constitution of India, Art. 32- Writ petition-Permission given to certain industry to restart its power plant with certain conditions, for ensuring proper maintenance of safety devices and enforcing liability in case of death or injury on account of escape of chlorine gas- Modification in respect of certain conditions allowed.

(Paras 4, 6)

Cases Referred: **Chronological Paras**

AIR 1987 SC 965 1

ORDER:- This application has been made by Shriram Foods and Fertiliser Industries (hereinafter referred to as 'Shriram') for clarification in respect of certain conditions set out in the Order passed by us on 17th February, 1986 in Writ Petitions. Nos. 12739 of 1985 and 26 of 1986: (Reported in AIR 1987 SC 965). Though the application has been styled as an application for clarification it is really and in substance, and application for modification of some of the conditions contained in the Order. We passed the Order permitting Shriram to restart its power plant as also plants for manufacture of caustic chlorine including its by-products like sodium sulphate, hydrochloric acid, stable bleaching powder, superchlor and sodium hypochlorite and vanaspati refined oil including its by-products and recovery plants like soap, glycerine and technical hard oil, but we made the permission subject to certain conditions which, we insisted, should be strictly and scrupulously followed by Shriram and we made it clear that if at any time it is found that any one or more of these conditions are violated, the permission would be liable to be withdrawn. There are three out of these conditions in respect of which modification is sought by Shriram on the ground that compliance with these conditions would entail certain operational and practical difficulties.

2. The first condition in respect of which modification is sought by Shriram is conditions No. 2 which runs as follows:

> "(2) One operator should be designated as personally responsible for each safety device or measure and the head of the caustic chlorine division should be made individually responsible for the efficient operation of such safety device or measure. If at any time during examination by the Expert Committee or inspection by the Inspectorate it is found that any safety device or measure is inoperative or is not properly functioning, the head of the caustic chlorine plant as well as the operator in charge of such safety device or measure shall be held personally responsible. Their duty shall be not merely to report non-functioning or mal-functioning of any safety device or measure to the higher authority but to see that the operation of the entire plant is immediately shut-down, the safety device is urgently replenished and the plant does not restart functioning until such replenishment is completed."

It is urged on behalf of Shriram that there are more than 150 safety devices in the plant and it is not possible to have an individual operator to be made personally responsible for each safety device and, moreover, considering the magnitude of the responsibility for efficient operation of a safety device, it would not be proper to impose such responsibility on an operator who is merely a workman but that such responsibility should be cast on an officer to be placed in charge of a group of safety devices. Shriram also submitted that the condition that 'if any safety device is found to be non-functioning or mal-functioning, the operation of the entire plant should immediately be shut down' also requires to be modified, firstly, because failure of every kind of safety device need not require the shutting down of the entire plant form the safety point of view; secondly, because the operator in charge of any particular safety device would not have control or knowledge of

the entire plant and he would not, therefore, be in a position to take a decision regarding the stoppage of the plant and, thirdly, because frequent stoppage and restart of the plant would by itself be a potent source of hazard. We find considerable force in this contention urged on behalf of Shriram. We agree that every kind of safety device installed in the plant need not require the shutting down of the entire plant in the event of its non-functioning or mal-functioning. There are three different categories of safety devices which have to be taken into account. The first category consists of safety devices which are for the entire factory including the caustic chlorine plant such as fire-tender, loud speakers, wind direction recorder, etc., the second category consists of safety devices exclusively for the caustic chlorine plant such as neutralisation system and suction control system and the last category consists of safety devices for different components of the machinery and equipment such as load cell which is a safety device for storage tank in the caustic chlorine plant. Some of these safety devices are critical while some others are not. Where a safety device is not critical it may not be necessary to shut down the plant in case such safety devices is found to be non-functioning or mal-functioning, as for example where a safety device is attached to a component which can be easily isolated and repaired or replenished without shutting down the plant. Even where a safety device is critical and it is found to be non-functioning or mal-functioning, it may be possible to take immediate remedial action without going to the extreme of shutting down the plant, as for example. Where a safety device has an effective back-up system. We also agree that it would not be practicably feasible to place one operator in charge of each safety device and it would not be desirable to place the responsibility for effective monitoring and functioning of the safety device on an operator who is merely a workman, but instead such responsibility should be cast on an officer who should be placed in charge of a group of safety devices. We would therefore direct the committee of experts appointed by us to scrutinise the safety devices which are installed for the entire factory as also the safety devices installed in the caustic chlorine plant for the purpose of evaluating as to which are critical and which are to critical. The criterion for determining which safety devices are critical or non-critical shall be whether the particular safety device is of such a nature as to imperil the safety of the plant in case it is found to be non-functioning or mal-functioning, so as to require immediate shutting down of the plant until the safety device is repaired or replenished. We would direct that if any safety device designed by the committee of experts to be critical is found not functioning or mal-functioning and a report to that effect is made by the officer responsible for such safety device, the management of Shriram will immediately shut down the operation of the plant and ensure that the plant does not restart functioning until such safety device is repaired or replenished. Even where a safety device is designated by the committee of experts to be non-critical in the sense that its functioning or mal-functioning need not necessarily require shutting down of the plant, the committee of experts will determine as to what remedial action should immediately be taken in case it is found that such safety device is non-functioning or mal-functioning and on the officer responsible for such safety device drawing the attention of the management to non-functioning or mal-functioning of such safety device, the management will immediately take the remedial action prescribed by the committee of experts. The committee of experts will also determine how and in what manner the different safety devices can be grouped together

so that one officer can be made responsible for each group of safety devices. The committee of experts will carry out this assignment within 7 days from the starting of the caustic chlorine plant and submit a report to this Court with copies to the petitioner and to the Delhi Administration, the Chief Inspector of Factories, the management of Shriram, Lokhit Congress Union and Karamchari Ekta Union. The Officer who is placed in charge of each group of safety devices will be responsible for the non-functioning or mal-functioning of any safety devices under his charge. Besides the officer who is designated as personally responsible for each safety device or measure, the head of the caustic chlorine division would be individually responsible for the efficient operation of such safety device or measure and if at any time during examination by the committee of experts or inspection by the Inspectorate, it is found that any safety device or measure is inoperative or is not properly functioning the head of the caustic chlorine plant as well as the officer in charge of such safety device shall be held personally answerable and it will be the responsibility of the head of the caustic chlorine division and the management to immediately take proper remedial action in that behalf.

3. The next contention in respect of which modification is sought by Shriram is Condition No. 5 which runs as follows:

> "(5) The management of Shriram will obtain and undertaking from the Chairman and Managing Director of the Delhi Cloth Mills Ltd. which is the owner of the various units of Shriram as also from the officer or officers who are in actual management of the caustic chlorine plant that in case there is any escape of chlorine gas resulting in death or injury to the workmen or to the people living in the vicinity, they will be personally responsible for payment of compensation for such death or injury and such undertaking shall be filed in Court within 1 week from today."

The contention of Shriram is that it is not clear as to who can be described as officer in actual management of the caustic chlorine plant and that this particular direction requires clarification so that the management can obtain the necessary undertaking from such officer. So far as this difficulty pointed out on behalf of Shriram is concerned, we would like to clarify that the officer whose undertaking is required to be taken under the directions given in our Order dt. 17th February, 1986 is the officer who is the 'occupier' under the Factories Act, 1948 because he is the person who has actual control over the affairs of the factory and/or the officer who is in charge of the actual operation of the caustic chlorine plant and who is responsible to the management for the operation of the plant. But it was urged on behalf of Shriram that if we insist upon an undertaking to be given by any such officer or officers it would be impossible to secure the services of any competent officers because they would not be willing to accept employment in a situation where they are made responsible not only for their own acts or omissions but also for the acts or omissions of others over whom they have no control. It was therefore seriously contended on behalf of Shriram that the condition requiring undertaking to be given by such officer or officers should be deleted. We are unable to persuade ourselves to accept this contention of Shriram. If the contention of Shriram is and that is the contention which has seriously been pressed on behalf of Shriram in support of their plea that the caustic chlorine plant should be allowed to be reopened that there is no risk or hazard to

the community in the operation of the caustic chlorine plant, there is no reason why the officer or officers who have ultimate control over the affairs of the caustic chlorine plant and/or who are responsible to the management for the efficient operation of the caustic chlorine plant should hesitate to give an undertaking to the Court that in case of death or injury arising on account of escape of chlorine gas, they would be personally responsible. But while making this comment we are not unmindful of the fact that if absolute unlimited liability were to be imposed on any officer or officers in the employ of Shriram for death or injury arising on account of possible escape of chlorine gas, many competent persons would shy away from accepting employment in Shriram and that would make it difficult for Shriram to have really competent and professionally qualified persons to manage and operate the caustic chlorine plant. We would therefore modify the condition prescribed by us by providing that undertaking shall be obtained from the officer who is 'occupier' of the caustic chlorine plant under the Factories Act, 1948, and/or the officer who is responsible to the management for the actual operation of the caustic chlorine plant as its head and such undertaking shall stipulate that in case there is any escape of chlorine gas resulting in death or injury to the workmen or to the people living in the vicinity the officer concerned will be personally responsible, to the extent of his annual salary with allowances, for payment of compensation for such death or injury but if he shows that such escape of gas took place as a result of act of God or vis major or sabotage or that he had exercised all due diligence to prevent such escape of gas, he shall be entitled to be indemnified by Shriram.

4. So far as the undertaking to be obtained from the Chairman and Managing Director of Shriram is concerned it was pointed out by Shriram that Delhi Cloth Mills Ltd. which is the owner of Shriram has several units manufacturing different products and each of these units is headed and managed by competent and professionally qualified persons who are responsible for the day to day management of its affairs and the Chairman and Managing Directors is not concerned with day to day functioning of the units and it would not therefore be fair and just to require the Chairman and Managing Director to give an undertaking that in case of death or injury resulting on account of escape of chlorine gas, the Chairman and Managing Director would be personally liable to pay compensation. We find it difficult to accept this contention urged on behalf of Shriram. We do not see any reason why the Chairman and/or Managing Director should not be required to give and undertaking to be personally liable for payment of compensation in case of death or injury resulting on account of escape of chlorine gas, particularly when we find that according to the reports of various expert committees which examined the working of caustic chlorine plant, there was considerable negligence in looking after its safety requirements and in fact, considerable repair and renovation with and installation of safety devices had to be carried out at fairly heavy cost in order to reduce the element of risk or hazard to the community. We may however make it clear that the undertaking to be given by the Chairman and/or Managing Director may provide that no liability shall attach to the Chairman and/or Managing Director if he can show that the escape of chlorine gas was due to an Act of God or sabotage. But in all other cases the Chairman or Managing Director must hold himself liable to pay compensation. That alone in our opinion would ensure proper and adequate maintenance of safety devices and instruments

and operation of the caustic chlorine plant in a manner which would considerably reduce, if not eliminate, risk or hazard to the workmen and to the people living in the vicinity.

5. The last contention in respect of which modification is sought by Shriram is Condition No. 6 which provides as follows:

> "(6) There shall be a Committee of three representatives of Lokahit Congress Union and three representatives of Karamchari Ekta Union to look after the safety arrangements in the caustic chlorine plant. The function of this Committee will be to ensure that all safety measures are strictly observed and there is no non-functioning of the safety devices and instruments and for this purpose, they will be entitled to visit any section or department of the plant during any shift and ask for any relevant information from the management. If there is any default or negligence in the observance of the safety measures and the maintenance and operation of the safety devices and instruments, this Committee will be entitled to bring such default or negligence to the notice of the management and if the management does not heed the same, this Committee will be entitled to draw the attention of the Labour Commissioner to such default or negligence. The members of this Committee will be given proper and adequate training in regard to the functioning of the caustic chlorine plant and the operation of the safety devices and instruments and this will be done within a period of 2 weeks after the nomination of three representatives on the Committee is communicated by each of the two Unions to the management."

The contention of Shriram in regard to this conditions is that it would not be feasible for Shriram to train the Committee of representatives of the two union (hereinafter referred to as the Committee of workmen) to such an extent that they would acquire sufficient knowledge and expertise to ensure proper functioning of various safety devices and moreover some of the members of the Committee of workmen would be performing essential operational duties and they cannot be permitted to leave their duties and go for inspection at any time they like without prior authorisation from the officer in charge of the particular department in which they are working nor can they be permitted to walk into any part of the caustic chlorine plant for the purpose of inspection, because the caustic chlorine plant is high risk security area which has been cordoned off by the management and put under round-the-clock security and the entry of any person or persons to this area has to be regulated by proper authorisation. There is some force in this contention urged on behalf of Shriram. There are bound to be some safety devices and instruments of highly sophisticated nature which require technical knowledge in order to appreciate how they are functioning and it may not be possible for the committee of workmen to effectively supervise the functioning of such safety devices and instruments. But even so, we do not see any reason why the committee of workmen should not be given an opportunity of participating in this task of ensuring proper observance of safety measures. The management of Shriram can certainly give to the committee of workmen basic knowledge and information in regard to the operation of the safety devices and instruments, even if some of these are of a sophisticated nature. We do not subscribe to the view that workmen who have been working for years in a plant cannot acquire some elementary knowledge about the operation of various safety devices

in the plant. We have known of various instances where ordinary workmen, though not highly educated, have been able to acquire sufficient expertise, through long experience, in the operation of the machinery and equipment which they are working. We do not therefore propose to modify this part of the condition imposed by us. We may however make it clear that at least two out of the three representatives who are appointed on the committee of workmen by each Union should be workmen who have experience of working in the caustic chlorine plant. We must also clarify, in agreement with the management, that the workmen who are members of the committee of workmen should not leave their duty for going on inspection without giving prior intimation to the officer in charge and they should give at least half an hour's notice to the officer in charge so that the essential functions which they are discharging are not disturbed. The committee of workmen should also give prior intimation of at least half an hour to the officer in charge of the caustic chlorine pant that they propose to come for inspection of any particular department or departments so that the necessary safety and security precautions can be taken. With this small modification, Condition No. 6 stipulated by us will stand intact.

6. We may reiterate that the permission granted by us to Shriram to reopen the caustic chlorine plant is subject to the conditions set out in our Order dt. 17th February, 1986 as modified by this Order. But if for any reason Shriram does not comply with any of these conditions and is therefore unable to reopen the caustic chlorine plant, it will be open to Shriram to restart the other plants in respect of which permission has been given by us by our Order dt. 17th February, 1986 so long as Shriram can do so without operating the caustic chlorine plant.

7. The application will accordingly stand disposed of in terms of this Order.

Order accordingly.

M.C. Mehta v. Union of India
AIR 1987 Supreme Court 1086
Writ Petition (Civil) No. 12739 of 1985, D/- 20-12-1986
P. N. Bhagwati, C.J., Ranganath Misra, G.L. Oza, M.M. Dutt and K. N. Sigh, JJ.

(A) Constitution of India, Arts. 32 and 21- Social action litigation-Procedure-Oleum gas leak during pendency of petition by public spirited body like Legal Aid and Advice Board for closer of certain units of a company-Supreme Court can entertain applications for compensation on behalf victims of gas leak-Failure to amend petition to include claim for compensation- Immaterial. (Civil P.C. (1908), 0.6, R. 17).

Where during the pendency of a writ petition filed by Legal Aid and Advice Board and Bar Association for closure of certain units of a company on ground of health hazard, there are leakage of oleum gas, the Supreme Court could entertain applications for compensation for damage even though the writ petitioner did not amend the writ petition

to include the claim for compensation. The applications for compensation are for enforcement of the fundamental right to life enshrined in Art. 21 of the Constitution and while dealing with such applications, a hyper-technical approach which would defeat the ends of justice could not be adopted. If the Court is prepared to accept a letter complaining of violation of the fundamental right of an individual or a class of individuals who cannot approach the Court for justice, there is no reason why the applications for compensation which have been made for enforcement of the fundamental right of the persons affected by the oleum gas leak under Art. 21 should not be entertained. The Court while dealing with an application for enforcement of a fundamental right must look at the substance and not the form.

(Para 2)

(B) Constitution of India, Arts. 32 and 21 – Social action litigation-Infringement of fundamental right of large number of persons –Supreme Court can award remedial relief of compensation in writ petition itself.

The Supreme Court under Art. 32 (1) is free to devise any procedure appropriate for the particular purpose of the proceeding, namely, enforcement of a fundamental right and under Art. 32 (2) the Court has the implicit power to issue whatever direction, order or writ is necessary in a given case, including all incidental or ancillary power necessary to secure enforcement of the fundamental right. The power of the Court is not only injunctive in ambit, that is, preventing the infringement of a fundamental right, but it is also remedial in scope and provides relief against a breach of the fundamental right already committed. If the Court were powerless to issue any direction, order or writ in cases where a fundamental right has already been violated, Art. 32 would be robbed of all its efficacy, because then the situation would be that if a fundamental right is threatened to be violated, the Court can injunct such violation but if the violator is quick enough to take action infringing the fundamental right, he would escape from the net of Art. 32. That would, to a large extent, emasculate the fundamental right guaranteed under Art. 32 and render it impotent and futile. It must therefore, be said that Art. 32 is not powerless to assist a person when he finds that his fundamental right has been violated. He can in that event seek remedial assistance under Art. 32. The power of the Court to grant such remedial relief may include the power to award compensation in appropriate cases. Of course the infringement of the fundamental right must be gross and patent, that is, incontrovertible and ex facie glaring and either such infringement should be on a large scale affecting the fundamental rights of a large number of persons, or it should appear unjust or unduly harsh or oppressive on account of their poverty or disability or socially or economically disadvantaged position to require the person or person affected by such infringement to initiate and pursue action in the civil Courts. Ordinarily, of course, a petition under Art. 32 should not be used as a substitute for enforcement of the right to claim compensation for infringement of a fundamental right through the ordinary process of Civil Court. It is only in exceptional cases of the nature indicated above, that compensation may be awarded in a petition under Art. 32.

(Para 6)

(C) Constitution of India, Art. 32-Social action litigation-Procedure-Letter addressed to only one justice of Court can be entertained.

It would not be right to reject a letter addressed to an individual justice of the Supreme Court merely on the ground that it is not addressed to the Court or to the Chief Justice and his companion Judges. Similarly the Court should not adopt a rigid stance that no letters will be entertained unless they are supported by an affidavit. What should not be forgotten is that letters would ordinarily be addressed by poor and disadvantaged person or by social action groups who may not know the proper form of address. They may know only a particular Judge who comes from their State and they may therefore address the letters to him. If the Court were to insist that the letters must be addressed to the Court or to the Chief Justice and his companion Judges, it would exclude from the judicial ken a large number of letters and in the result, deny access to justice to the deprived and vulnerable sections of the community. Even if a letter is addressed to an individual Judge of the Court, it should be entertained, provided of course, it is by or on behalf of a person in custody or on behalf of a woman or a child or a class of deprived or disadvantaged persons.

(Para 5)

(D) Constitution of India, Art. 12 – 'Authority'-Corporation deemed to be authority within Art. 12- It would not continue to be so and subject to constitutional limitation of fundamental rights, irrespective of functional context.

It is not correct to say that in India once a corporation is deemed to be 'authority', it would be subject to the constitutional limitation of fundamental rights in the performance of all its functions and that the appellation of 'authority' would stick to such corporation, irrespective of the functional context.

(Para 29)

(E) Torts- Constitution of India, Arts. 21 and 32- Compensation-Industry engaged in inherently hazardous activity-Harm caused to others-Industry is liable to compensate all affected persons-Compensation-Determination of-Mode.

Where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortuous principle of strict liability. In such a case, the measure of compensation must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise.

(Paras 31, 32)

An enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding area owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of substance or any other related element that caused the harm the enterprise must be held strictly liable for causing such harm as a part of the social cost for carrying on the hazardous or inherently dangerous activity.

(Para 31)

(F) Precedents-Supreme Court cannot allow its judicial thinking to be constricted by reference to law as it prevails in England or in any other country.

(Para 31)

Cases Referred:	**Chronological Paras**
AIR 1984 SC 802: (1984) 2 SCR 67: 1984 Lab IC 560	8 3, 4, 5, 6, 7
AIR 1983 SC 1086: 1983 Cri LJ 1644	7
AIR 1982 SC 149: 1981 Supp SCC 87	4
AIR 1982 SC 1473: (1983) 1 SCR 456: 1982 Lab IC 1646	4
AIR 1981 SC 212: (1981) 2 SCR 111	18
AIR 1981 487: (1981) 2 SCR 79	17, 26
AIR 1981 SC 1829: (1982) 1 SCR 438: 1981 Lab IC 1313	29
AIR 1980 SC 1992: (1980) 3 SCR 1338	28
AIR 1979 SC 1628: (1979) 3 SCR 1014	12, 13, 14, 15, 16, 17, 26, 28, 29, 30
(1976) 50 Law Ed 2d 343: 429 US 125, General Electric Company v. Martha V. Gilber	29
AIR 1975 SC 266: (1975) 2 SCR 674	28
AIR 1975 SC 1331: (1975) 1 SCC 421: 1975 Lab IC 881	12, 15, 26
(1974) 42 Law Ed 2d 477: 419 US 345, Jackson v. Metropolitan Edison Company	29
AIR 1969 SC 1081: (1969) 3 SCR 374	28
AIR 1967 SC 1857: (1967) 3 SC 377	11
(1868) 19 LT 220: 37 LJ Ex 161: LR 3 HL 330, Rylands v. Fletcher	31

BHAGWATI, C.J.:- This writ petition under Article 32 of the Constitution has come before us on a reference made by a Bench of three Judges. The reference was made because certain question of seminal importance and high constitutional significance were raised in the course of arguments when the writ petition was originally heard. The facts

giving rise to the writ petition and the subsequent events have been set out in some detail in the Judgment given by the Bench of three Judges on 17th February 1986 (reported in AIR 1987 SC 965), and it is therefore not necessary to reiterate the same. Suffice it to state that the Bench of three Judges permitted Shriram Foods and Fertiliser Industries (hereinafter referred to as Shriram) to restart its power plant as also plants for manufacture of caustic soda and chlorine including its by-products and recovery plants like soap, glycerine and technical hard oil, subject to the conditions set out in the Judgement. That would have ordinarily put an end to the main controversy raised in the writ petition which was filed in order to obtain a direction for closure of the various units of Shriram on the ground that they were hazardous to the community and the only point dispute would have survived would have been whether the units of Shriram should be directed to be removed from the place where they are presently situate and relocated in another place where there would not be much human habitation so that there would not be any real danger to the health and safety of the people. But while the writ petition was pending there was escape of oleum gas from one of the units of Shriram on 4th and 6th December 1985 and applications were filed by the Delhi Legal Aid & Advice Board and the Delhi Bar Association for award of compensation to the persons who had suffered harm on account of escape of oleum gas. These applications for compensation raised a number of issues of great constitutional importance and the Bench of three Judges therefore formulated these issues and asked the petitioner and those supporting him as also Shriram to file their respective written submissions so that the Court could take up the hearing of these applications for compensation. When these applications for compensation came up for hearing it was felt that since the issues raised involved substantial questions of law relating to the interpretation of Arts. 21 and 32 of the Constitution, the case should be referred to a larger Bench of five Judges and this is how the case has now come before us.

2. Mr. Diwan, learned counsel appearing on behalf of Shriram raised a preliminary objection that the Court should not proceed to decide these constitutional issues since there was no claim for compensation originally made in the writ petition and these issues could not be said to arise on the writ petition. Mr. Diwan conceded that the escape of oleum gas took place subsequent to the filing of the writ petition but his argument was that the petitioner could have applied for amendment of the writ petitions so as to include a claim for compensation for the victims of oleum gas but no such application for amendment was made and hence on the writ petition as it stood, these constitutional issues did not arise for consideration. We do not think this preliminary objection raised by Mr. Diwan is sustainable. It is undoubtedly true that the petitioner could have applied for amendment of the writ petition so as to include a claim for compensation but merely because he did not do so, the applications for compensation made by the Delhi Legal Aid and Advice Board and the Delhi Bar Association cannot be thrown out. These applications for compensation are for enforcement of the fundamental right to life enshrined in Art. 21 of the Constitution and while dealing with such applications we cannot adopt a hyper-technical approach which would defeat the ends of justice. This Court has on numerous occasions pointed out that where there is a violation of a fundamental or other legal right of a person or class of persons who by reason of poverty

or disability or socially or economically disadvantaged position cannot approach a Court of law for justice, it would be open to any public spirited individual or social action group to bring an action for vindication of the fundamental or other legal right of such individual or class of individuals and this can be done not only by filing a regular writ petition but also by addressing a letter to the Court. If this Court is prepared to accept a letter complaining of violation of the fundamentals who cannot approach the Court for justice, there is no reason why these applications for compensation which have been made for enforcement of the fundamental right of the persons affected by the oleum gas leak under Art. 21 should not be entertained. The Court while dealing with an application for enforcement of a fundamental right must look at the substance and not the form. We cannot therefore sustain the preliminary objection raised by Mr. Diwan.

3. The first question which requires to be considered is as to what is the scope and ambit of the jurisdiction of this Court under Art. 32 since the applications for compensation made by the Delhi Legal Aid and Advice Board and the Delhi Bar Association are application sought to be maintained under that Article. We have already had occasion to consider the ambit and coverage of Art. 32 in the Bandhua Mukti Morcha v. Union of India, (1984) 2 SCR 67 : (AIR 1984 SC 802) and we wholly endorse what has been stated by one of us namely, Bhagwati, J. as he then was in his judgment in that case in regard to the true scope and ambit of that Article. It may now be taken as well settled that Art. 32 does not merely confer power on this Court to issue a direction, order or writ for enforcement of the fundamental rights but it also lays a constitutional obligation on this Court to protect the fundamental rights of the people and for that purpose this Court has all incidental and ancillary powers including the power to forge new remedies and fashion new strategies designed to enforce the fundamental rights. It is in realisation of this constitutional obligation that this Court has in the past innovated new methods and strategies for the purpose of securing enforcement of the fundamental rights, particularly in the case of the poor and the disadvantaged who are denied their basic human rights and to whom freedom and liberty have no meaning.

4. Thus it was in S. P. Gupta v. Union of India, 1981 Supp. SCC 87 : (AIR 1982 SC 149) that this Court held that "where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened, and any such person or determinate class of persons is by reason of poverty or disability or socially or economically disadvantaged position unable to approach the Court for relief, any member of the public or social action group can maintain an application for an appropriate direction, order or writ in the High Court under Art. 226 and in case of breach of any fundamental right of such person or class of persons, in this Court under Art. 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons. This Court also held in S. P. Gupta's case (supra) as also in the People's Union for Democratic Rights v. Union of India, (1983) 1 SCR 456: (AIR 1982 SC 1473) and in Bandhua Mukti Morcha's case (supra) that procedure being merely a hand-maiden of justice it should not stand in the way of access to justice to the weaker sections of Indian humanity and therefore where the poor and the disadvantaged are

concerned who are barely eking out a miserable existence with their sweat and toil and who are victims of an exploited society without any access to justice, this Court will not insist on a regular writ petition and even a letter addressed by a public spirited individual or a social action group acting pro bono publico would suffice to ignite the jurisdiction of this Court. We wholly endorse this statement of the law in regard to the broadening of *locus standi* and what has come to be known as epistolary jurisdiction.

5. We may point out at this stage that in Bandhua Mukti Morcha's case, (AIR 1984 SC 802) (supra) some of us apprehending that letters addressed to individual justices may involve the Court in frivolous cases and that possibly view could be taken that such letters do not invoke the jurisdiction of the Court as a whole, observed that such letters should not be addressed to individual justices of the Court but to the Court or to the Chief Justice and his companion judges. We do not think that it would be right to reject a letter addressed to an individual justice of the Court merely on the ground that it is not address to the Court or to the Chief Justice and his companion Judges. We must not forget that letters would ordinarily be addressed by poor and disadvantaged persons or by social action groups who may not know the proper form of address. They may know only a particular Judge who comes from their State and they may therefore address the letters to him. If the Court were to insist that the letters must be addressed to the Court or to the Chief Justice and his companion Judges, it would exclude from the judicial ken a large number of letters and in the result, deny access to justice to the deprived and vulnerable sections of the community. We are therefore of the view that even if a letter is addressed to an individual Judge of the Court, it should be entertained, provided of course it is by or on behalf of a person in custody or on behalf of a woman or a child or a class of deprived or disadvantaged persons. We may point out that now there is no difficulty in entertaining letters addressed to individual justice of the Court, because this Court has a Public Interest Litigation Cell to which all letters addressed to the Court or to the individual justices are forwarded and the staff attached to this Cell examines the letters and it is only after scrutiny by the staff members attached to this Cell that the letters are placed before the Chief Justice and under his direction, they are listed before the Court. We must therefore hold that letters addressed to individual justice of the Court should not be rejected merely because they fail to conform to the preferred form of address. Nor should the Court adopt a rigid stance that no letters will be entertained unless they are supported by an affidavit. If the Court were to insist on an affidavit as a condition of entertaining the letters the entire object and purpose of epistolary jurisdiction would be frustrated because most of the poor and disadvantaged persons will then not be able to have easy access to the Court and even the social action groups will find it difficult to approach the Court. We may point out that the Court has so far been entertaining letters without an affidavit and it is only in a few rare cases that it has been found that the allegations made in the letters were false. But that might happen also in cases where the jurisdiction of the Court is invoked in a regular way.

6. So far as the power of the Court under Art. 32 to gather relevant material bearing on the issues arising in this kind of litigation, which we may for the sake of convenience call social action litigation, and to appoint Commissions for this purpose is concerned, we endorse what one of us namely, Bhagwati, J., as he then was, has said in his judgment in

Bandhua Mukti Morcha's case (supra). We need nor repeat what has been stated in that judgment. It has our full approval.

7. We are also of the view that this Court under Art. 32 (1) is free to devise any procedure appropriate for the particular purpose of the proceeding, namely, enforcement of a fundamental right and under Art. 32 (1) the Court has the implicit power to issue whatever direction order or writ is necessary in a given case, including all incidental or ancillary power necessary to secure enforcement of the fundamental right. The power of the Court is not only injunctive in ambit, that is, preventing the infringement of a fundamental right, but it is also remedial in scope and provides relief against a breach of the fundamental right already committed vide Bandhua Mukti Morcha's case, (AIR 1984 SC 802) (supra). If the Court were powerless to issue any direction, order or writ in cases where a fundamental right has already been violated, Art. 32 would be robbed of all its efficacy, because then the situation would be that if a fundamental right is threatened to be violated, the Court can injunct such violation but if the violator is quick enough to take action infringing the fundamental right, he would escape from the net of Art. 32. That would, to a large extent, emasculate the fundamental right guaranteed under Art. 32 and render it impotent and futile. We must therefore, hold that Art. 32 is not powerless to assist a person when he finds that his fundamental right has been violated. He can in that event seek remedial assistance under Art. 32. The power of the court to grant such remedial relief may include the power to award compensation in appropriate cases. We are deliberately using the words "in appropriate cases" because we must make it clear that it is not in every case where there is a breach of a fundamental right committed by the violator that compensation would be awarded by the Court in a petition under Art. 32. The infringement of the fundamental right must be gross and patent, that is, incontrovertible and ex facie glaring and either such infringement should be on a large scale affecting the fundamental rights of a large number of persons or it should appear unjust or unduly harsh or oppressive on account of their poverty or disability or socially or economically disadvantaged position to require the persons or persons affected by such infringement to initiate and pursue action in the civil Courts, Ordinarily, of course, a petition under Art. 32 should not be used as a substitute for enforcement of the right to claim compensation for infringement of a fundamental right through the ordinary process of civil Court. It is only in exceptional cases of the nature indicated by us above, that compensation my be awarded in a petition under Art. 32. This is the principle on which this Court awarded compensation in Rudul Shah v. State of Bihar, AIR 1983 SC 1086. So also, this Court awarded compensation to Bhim Singh, whose fundamental right to personal liberty was grossly violated by the State of Jammu and Kashmir. If we make a fact analysis of the cases where compensation has been awarded by this Court, we will find that in all the cases, the fact of infringement was patent and incontrovertible, the violation was gross and its magnitude was such as to shock the conscience of the Court and it would have been gravely unjust to the person whose fundamental right was violated, to require him to go to the civil Court for claiming compensation.

8. The next question which arises for consideration on these applications for compensation is whether Article 21 is available against Shriram which is owned by Delhi Cloth Mills Limited, a public company limited by shares and which is engaged in an

industry vital to public interest and with potential to affect the life and health of the people. The issue of availability of Art. 21 against a private corporation engaged in an activity which has potential to affect the life and health of the people was vehemently argued by counsel for the applicants and Shriram. It was emphatically contended by counsel for the applicants, with the analogical aid of the American doctrine of State Action and the functional and control test enunciated by this Court in its earlier decisions, that Art. 21 was available, as Shriram was carrying on an industry which, according to the Government's own declared industrial policies, was ultimately intended to be carried out by itself, but instead of the Government immediately embarking on that industry, Shriram was permitted to carry it on under the active control and regulation of the Government. Since the Government intended to ultimately carry on this industry and the mode of carrying on the industry could vitally affect public interest, the control of the Government was linked to regulating that aspect of the functioning of the industry which could vitally affect public interest. Special emphasis was laid by counsel for the applicants on the regulatory mechanism provided under the Industries (Development and Regulation) Act, 1951 where industries are included in the schedule if they vitally affect public interest. Regulatory measures are also to be found in the Bombay Municipal Corporation Act, the Air and Water Pollution Control Act and now the recent Environment Act, 1986. Counsel for the applicants also pointed to us the sizable aid in loans, land and other facilities granted by the Government to Shriram in carrying on the industry. Taking aid of the American State Action doctrine, it was also argued before us on behalf of the applicants that private activity, if supported, controlled or regulated by the State may get so entwined with governmental activity as to be termed State action and it would then be subject to the same constitutional restraints on the exercise of power as the State.

9. On the other hand, counsel for Shriram cautioned against expanding Art. 12 so as to bring within its ambit private corporations. He contended that control or regulation of a private corporation's functions by the State under general statutory law such as the Industries (Development and Regulation) Act, 1951 is only in exercise of police power of regulation by the State. Such regulation does not convert the activity of the private corporation into that of the State. The activity remains that of the private corporation; the State in its police power only regulates the manner in which it is to be carried on. It was emphasized that control which deems a corporation, an agency of the State, must be of the type where the State controls the management policies of the Corporation, whether by sizable representation on the board of management or by necessity of prior approval of the Government before any new policy of management is adopted, or by any other mechanism. Counsel for Shriram also pointed out the inappositeness of the State action doctrine to the Indian situation. He said that in India the control and function test have been evolved in order to determine whether a particular authority is an instrumentality or agency of the State and hence other authority' within the meaning of Article 12. Once an authority is deemed to be 'other authority' under Article 12, it is State for the purpose of all its activities and functions and the American functional dichotomy by which some functions of an authority can be termed State action and others private action, cannot operate here. The learned counsel also pointed out hat those rights which are specifically

intended by the Constitution makers to be available against private parties are so provided in the Constitution specifically such as Articles 17, 23 and 24. Therefore, to so expand Article 12 as to bring within its ambit even private corporations would be against the scheme of the Chapter on fundamental rights.

10. In order to deal with these rival contentions we think it is necessary that we should trace that part of the development of Article 12 where this Court embarked on the path of evolving criteria by which a corporation could be termed 'other authority' under Art. 12.

11. In Rajasthan Electricity Board v. Mohan Lal, (1967) 3 SCR 377 : (AIR 1967 SC 1857) this Court was called upon to consider whether the Rajasthan Electricity Board was an 'authority' within the meaning of the expression 'other authorities' in Art. 12. Bhargava, J. who delivered the judgment of the majority pointed out that the expression 'other authorities' in Art. 12 would include all constitutional and statutory authorities on whom powers are conferred by law. The learned Judge also said that if any body of persons has authority to issue directions, the disobedience of which would be punishable as a criminal offence, that would be an indication that the concerned authority is 'State'. Shah, J., who delivered a separate judgment agreeing with the conclusion reached by the majority, preferred to give a slightly different meaning to the expression 'other authorities'. He said that authorities, constitutional or statutory, would fall within the expression "other authorities" only if they are invested with the sovereign power of the State, namely, the power to make rules and regulations which have the force of law. The ratio of this decision may thus be stated to be that a constitutional or statutory authority would be within the expression "other authorities" if it has been invested with statutory power to issue binding directions to third parties, the disobedience of which would entail penal consequences or it has the sovereign power to make rules and regulations having the force of law.

12. This test was followed by Ray, C.J., in Sukhdev v. Bhagat Ram, (1975) 1 SCC 421: (AIR 1975 SC 1331). Mathew, J. however, in the same case propounded a broader test. The learned Judge emphasised that the concept of 'State' had undergone drastic changes in recent year and today 'State' could not be conceived of simply as a coercive machinery wielding the thunderbolt of authority; rather it has to be viewed mainly as a service corporation. He expanded on this dictum by stating that the emerging principle appears to be that a public corporation being an instrumentality or agency of the 'State' is subject to the same constitutional limitations as the 'State' itself. The preconditions of this are two, namely, that the corporation is the creation of the 'State' and that there is existence of power in the corporation to invade the constitutional rights of the individual. this Court in Ramanna D. Shetty v. International Airport Authority, (1979) 3 SCR 1014 : (AIR 1979 SC 1628) accepted and adopted the rationale of instrumentality or agency of State put forward by Mathew, J., and spelt out certain criteria with whose aid such an inference could be made. However, before we come to these criteria we think it necessary to refer to the concern operating behind the exposition of the broader test by Justice Mathew which is of equal relevance to us today, especially considering the fact that the definition under Art. 12 is an inclusive and not an exhaustive definition. That concern is the need to curb arbitrary and unregulated power wherever and howsoever reposed.

13. In Ramanna D. Shetty v. International Airport Authority (supra) this Court deliberating on the criteria on the basis of which to determine whether a corporation is acting as instrumentality or agency of Government said that it was not possible to formulate an all inclusive or exhaustive test which would adequately answer this question. There is no cut and dried formula which would provide the correct division of corporations into those which are instrumentalities or agencies of Government and those which are not. The Court said whilst formulating the criteria that analogical aid can be taken from the concept of State Action as developed in the United States wherein the U.S. Courts have suggested that a private agency if supported by extra-ordinary assistance given by the State may be subject to the same constitutional limitations as the State. It was pointed out that the State's general common law and statutory structure under which its people carry on heir private affairs, own property and enter into contracts, each enjoying equality in terms of legal capacity, is not such assistance as would transform private conduct into State Action. "But if extensive and unusual financial assistance is given and the purpose of such assistance coincides with the purpose for which the corporation is expected to use the assistance and such purpose is of public character, it may be a relevant circumstance supporting an inference that the corporation is an instrumentality or agency of the Government".

14. On the questions of State control, the Court in R. D. Shetty case, (AIR 1979 SC 1628) (supr) clarified that some control by the State would not be determinative of the question, since the State has considerable measure of control under its police power over all types of business organization. But a finding of State financial support plus an unusual degree of control over the management and policies of the corporation might lead to the characterisation of the operation as State Action.

15. Whilst deliberating on the functional criteria namely, that the corporation is carrying out a governmental function, the Court emphasised that classification of a function a governmental should not be done on earlier day perceptions but on what the State today views as an indispensable part of its activities, for the State may deem it as essential to its economy that it owns and operates a railroad, a mill or an irrigation system as it does to own and operate bridges, street lights or a sewage disposal plant. The Court also reiterated in R. D. Shetty's case, (AIR 1979 SC 1628) (supra) what was pointed out by Mahew, J. in Sukhdev v. Bhagatram, (AIR 1975 SC 1331) that "institutions engaged n matters of high public interest or public functions are by virtue of the nature of the functions performed government agencies. Activities which are too fundamental to the society are by definition too important not to be considered government functions."

16. The above discussion was rounded off by the Court in R. D. Shetty's case (supra) by enumerating the following five factors namely, (1) financial assistance given by the State and magnitude of such assistance (2) any other form of assistance whether of the usual kind or extraordinary (3) control of management and policies of the corporation by the State – nature and extent of control (4) State conferred or State protected monopoly status and (5) functions carried out by the corporation, whether public functions closely related to governmental functions, as relevant criteria for determining whether a corporation is an instrumentality or agency of the State or not, though the Court took care to point out

that the enumeration was not exhaustive and that it was the aggregate or cumulative effect of all the relevant factors that must be taken as controlling.

17. The criteria evolved by this Court in Ramana Shetty's case, (AIR 1979 SC 1628) (supra) were applied by this Court in Ajay Hasia v. Khalid Mujib, (1981) 2 SCR 79 : (AIR 1981 SC 487 at pages 492, 493, 494), where it was further emphasised that :

> "Where constitutional fundamentals vital to the maintenance of human rights are at stake, functional realism and not facial constitutional must be the diagnostic tool for constitutional law must seek the substance and not the form. Now it is obvious that the Government may act through the instrumentality or agency of natural persons or it may employ the instrumentality agency of judicial persons to carry out its function.... It is really the Government which acts through the instrumentality or agency of the corporation and the juristic veil of corporate personality work for the purpose of convenience of management and administration cannot be allowed to obliterate the true nature of the reality behind which is the Government ... for if the Government acting through its officers is subject to certain constitutional limitations it must follow a fortiori that the Government acting through the instrumentality or agency of a corporation should be equally subject to the same limitations."

On the canon of construction to be adopted for interpreting constitutional guarantees the Court pointed out:

> ".....constitutional guarantees ... should not be allowed to be emasculated in their application by a narrow and constricted judicial interpretation. The Courts should be anxious to enlarge the scope and width of the fundamental rights by bringing within their sweep every authority which is an instrumentality or agency of the Government or through the corporate personality of which the Government is acting, so as to subject the Government in all its myriad activities, whether through natural persons or through corporate entities to the basic obligation of the fundamental rights."

In this case the Court also set at rest the controversy as to whether the manner in which a corporation is brought into existence had any relevance to the question whether it is a State instrumentality or agency. The Court said that it is immaterial for the purpose of determining whether a corporation is an instrumentality or agency of the Sate or not whether it is created by a Statute or under a statute: "the inquiry has to be not as to how the juristic person is born but why it has been brought into existence. The corporation may be a statutory corporation created by a statute or it may be a Government company or a company formed under the Companies Act, 1956 or it may be a society registered under the Societies Registration Act, 1860 or any other similar statute". It would come within the ambit of Art. 12, if it is found to be an instrumentality or agency of the State on a proper assessment of the relevant factors.

18. It will thus be see that this Court has not permitted the corporate device to be utilised as a barrier ousting the constitutional control of the fundamental rights. Rather the Court has held:

> "It is dangerous to exonerate corporations from the need to have constitutional conscience, and so that interpretation, language permitting, which makes governmental agencies whatever their mien amenable to constitutional limitations must be adopted by the Court as against the alternative of permitting them to flourish as an imperium in imperie." Som Prakash v. Union of India, (1981) 2 SCR 111: (AIR 1981 SC 212)

19. Taking the above exposition as our guideline, we must now proceed to examine whether a private corporation such as Shriram comes within the ambit of Art. 12 so as to be amenable to the discipline of Art. 21.

20. In order to assess the functional role allocated to private corporation engaged in the manufacture of chemicals and fertilizers, we need to examine the Industrial policy of the Government and see the public interest importance given by the State to the activity carried on by such private corporation.

21. Under the Industrial Policy Resolution, 1956 industries were classified into three categories having regard to the part which the State would play in each of them. The first category was to be the exclusive responsibility of the State. The second category comprised those industries which would be progressively State owned and in which the State would therefore generally take the initiative in establishing new undertakings but in which private enterprise would be expected to supplement the effort of the State by promoting and developing undertakings either on its own or with State participation. The third category would include all the remaining industries and their future development would generally be left to the initiative and enterprise of the private sector. Schedule B to the Resolution enumerated the industries.

22. Appendix I to the Industrial Policy Resolution, 1948 dealing with the problem of State participation in industry and the conditions in which private enterprise should be allowed to operate stated that there can be no doubt that the State must play a progressively active role in the development of industries. However under the present conditions, the mechanism and resources of the State may not permit it to function forthwith in Industry as widely as may be desirable. The Policy declared that for some time to com, the State could contribute more quickly to the increase of national wealth by expanding its present activities wherever it is already operating and by concentration on new units of production in other fields.

23. On these considerations the Government decided that the manufacture of arms and ammunition, the production and control of atomic energy and the ownership and management of railway transport would be the exclusive monopoly of the Central Government. The establishment of new undertakings in Coal, Iron and Steel, Aircraft manufacture, ship building, manufacture of telephone telegraph and wireless apparatus and mineral oil were to be the exclusive responsibility of the State except where in national interest the State itself finds it necessary to secure the cooperation of private enterprise subject to control of the Central Government.

24. The policy resolution also made mention of certain basic industries of importance the planning and regulation of which by the Central Government was found necessary in national interest. Among the eighteen industries so mentioned as requiring such Central control, heavy chemicals and fertilizers stood included.

25. In order to carry out the objective of the Policy Resolution the industries (Development and Regulation) Act of 1951 was enacted which, according to its objects and reasons, brought under central control the development and regulation of a number of important industries the activities of which affect the country as a whole and the development of which must be governed by economic factors of all India import. Section 2 of the Act declares that it is expedient in the public interest that the Union should take under its control the industries specified in the First Schedule. Chemicals and Fertilizers find a place in the First Schedule as Items 19 and 18 respectively.

26. It an analysis of the declarations in the Policy Resolutions and the Act is undertaken, we find that the activity of producing chemicals and fertilizers is deemed by the State to be an industry of vital public interest, whose public import necessitates that the activity should be ultimately carried out by the State itself, though in the interim period with State support and under State control, private corporations may also be permitted to supplement the State effort. The argument of the applications on the basis of this premise was that in view of this declared industrial policy of the State, even private corporations manufacturing chemicals and fertilizers can be said to be engaged in activities which are so fundamental to the Society as to be necessarily considered government functions. (Sukhdev v. Bhagat Ram, (AIR 1975 SC 1331); Ramanna Shetty, (AIR 1979 SC 1628) and Ajay Hasia, (AIR 1981 SC 487) (supra).

27. It was pointed out on behalf of the applications that as Shriram is registered under the Industries (Development and Regulation) Act, 1951, its activities are subject to extensive and detailed cannot and supervision by the Government. Under the Act a licence is necessary for the establishment of a new industrial undertaking or expansion of capacity or manufacture of a new article by an existing industrial undertaking carrying on any of the Schedule Industries included in the First Schedule of the Act. By refusing licence for a particular unit, the Government can prevent over-concentration in a particular region or over-investment in a particular industry. Moreover, by its power to specify the capacity in the license it can also prevent over-development of a particular industry if it has already reached target capacity. Section 18 G of the Act empowers the Government to control the supply, distribution, price etc. of the articles manufactured by a scheduled industry and under S. 184 Government can assume management and control of a industrial undertaking engaged in a scheduled industry if after investigation it is found that the affairs of the undertaking are being managed in a manner detrimental to public interest and under S. 18AA in certain emergent cases, takeover is allowed even without investigation. Since Shriram is carrying on a scheduled industry, it is subject to this stringent system of registration and licensing. It is also amenable to various directions that may be issued by the Government under Ss. 18A, 18 and 18G.

28. Shriram is required to obtain a license under the Factories Act and is subject to the directions and orders of the authorities under the Act. It is also required to obtain a

license for its manufacturing activities from the Municipal authorities under the Delhi Municipal Act, 1957. It is subject to extensive environment regulation under the Water (Prevention and Control of Pollution) Act, 1974 and as the factory is situated in an air pollution control area, it is also subject to the regulation of the Air (Prevention and Control of Pollution) Act, 1981. It is true that control is not exercised by the Government in relation to the internal management policies of the Company. However, the control is exercised on all such activities of Shriram which can jeopardize public interest. This functional control is of special significance as it is the potentiality of the fertilizer industry to adversely affect the health and safety of the community and its being impregnated with public interest which perhaps dictated the policy decision of the Government to ultimately operate this industry exclusively and invited functional control. Along with this extensive functional control, we find that Shriram also receives sizable assistance in the shape of loans and overdrafts running into several crores of rupees from the Government through various agencies. Moreover, Shriram is engaged in the manufacture of caustic soda, chlorine etc. Its various units are set up in a single complex surrounded by thickly populated colonies. Chlorine gas is admittedly dangerous to life and health. If the gas escapes either from the storage tank or from the filled cylinders or from any other point in the course of production, the health and well-being of the people living in the vicinity can be seriously affected. Thus Shriram is engaged in an activity which has the potential to invade the right to life of large sections of people. The question is whether these factors are cumulatively sufficient to bring Shriram within the ambit of Art. 12. Prima facie it is arguable that when the State's power as economic agent, economic entrepreneur and allocate of economic benefits is subject to the limitations of fundamental rights. (vide Eruian Equipment and Chemicals Ltd. v. State of West Bengal, (1975) 2 SCR 674 : (AIR 1975 SC 266), Rashbehari Panda v. State, (1969) 3 SCR 374 : (AIR 1969 SC 1081), Ramanna Shetty v. International Airport Authority, (AIR 1979 SC 1628) (supra) and Kasturilal Reddy v. State of Jammu & Kashmir, (1980) 3 SCR 1338 : (AIR 1980 SC 1992), why should a private corporation under the functional control of the State engaged in an activity which is hazardous to the health and safety of the community and is imbued with public interest and which the State ultimately proposes to exclusively run under its industrial policy, not be subject to the same limitations. But we do not propose to decide this question and make any definite pronouncement upon it for reasons which we shall point out later in the course of this judgment.

29. We were, during the course of arguments, addressed at great length by counsel on both sides on the American doctrine of State action. The learned counsel elaborately traced the evolution of this doctrine in its parent country. We are aware that in America since the Fourteenth Amendment is available only against the State, the Courts, in order to thwart racial discrimination by private parties devised the theory of State action under which it was held that wherever private activity was aided, facilitated or supported by the State in a significant measure, such activity took the colour of State action and was subject to the constitutional limitations of the Fourteenth Amendment. This historical context in which the doctrine of State action evolved in the United States is irrelevant for our purpose especially since we have Art. 15 (2) in our Constitution. But it is the principle behind the doctrine of State aid, control and regulation so impregnating a

private activity as to give it the colour of State action that is of interest to us and that also to the limited extent to which it can be Indianized and harmoniously blended with our constitutional jurisprudence. That we in no way consider ourselves bound by American exposition of constitutional law is well demonstrated by the fact that in Ramanna Shetty (supra) this Court preferred the minority opinion of Douglas J. in Jackson v. Metropolitan Edison Company, (1974) 42 Law ed 2d 477 as against the majority opinion of Rehnquist, J. And again in Air India v. Nergesh Mirza, (1982) 1 SCR 438 : (AIR 1981 SC 1829) this Court whilst preferring the minority view in General Electric Company v. Martha v. Gilbert, (1976) 50 Law ed 2d 343 said that the provisions of the American Constitution cannot always be applied to Indian conditions or to the provisions of our Constitution and whilst some of the principles adumbrated by the American decision may provide a useful guide, close adherence to those principles while applying them to the provisions of our Constitution is not to be favoured, because the social conditions in our country are different. The learned counsel for Shriram stressed the inappositeness of the doctrine of State action in the Indian context because, according to him, once an authority is brought within the purview of Art. 12, it is State for all intents and purposes and the functional dichotomy in America where certain activities of the same authority may be characterised as State action and others as private action cannot be applied here in India. But so far as this argument is concerned, we must demur to it and point out that it is not correct to say that in India once a corporation is deemed to be 'authority', it would be subject to the constitutional limitation of fundamental rights in the performance of all its functions and that the appellation of 'authority' would stick to such corporation, irrespective of the functional context.

30. Before we part with this topic, we may point out that this court has throughout the last few years expanded the horizon of Art. 12 primarily to inject respect for human rights and social conscience in our corporate structure. The purpose of expansion has not been to destroy the raison deters of creating corporations but to advance the human rights jurisprudence. Prima facie we are not inclined to accept the apprehensions of learned counsel for Shriram as well founded when he says that our including within the ambit of Art. 12 and thus subjecting to the discipline of Article 21 those private corporations whose activities have the potential of affecting the life and health of the people, would be a death blow to the policy of encouraging and permitting private entrepreneurial activity. Whenever a new advance is made in the field of human rights, apprehension is always expressed by the status quoits that it will create enormous difficulties in the way of smooth functioning of the system and affect its stability. Similar apprehension was voiced when this Court in Ramanna Shetty's case, (AIR 1979 SC 1628) (supra) brought public sector corporation within the scope and ambit of Art. 12 and subjected them to the discipline of fundamental rights. Such apprehension expressed by those who may be affected by any new and innovative expansion of human rights need not deter the Court from widening the scope of human rights and expanding their reach ambit, if otherwise it is possible to do so without doing violence to the language of the constitutional provision. It is through creative interpretation and bold innovation that the human rights jurisprudence has been developed in our county to a remarkable extent and this forward march of the human rights movement cannot be allowed to be halted by unfounded

apprehensions expressed by status quoists. But we do not propose to decide finally at the present stage whether a private corporation like Shriram would fall within the scope and ambit of Article 12, because we have not had sufficient time to consider and reflect on this question in depth. The hearing of this case before us concluded only on 15th December 1986 and we are called upon to deliver our judgment within a period of four days, on 19th December 1986. We are therefore of the view that this is not a question on which we must make any definite pronouncement at this stage. But we would leave it for a proper and detailed consideration at a later stage if it becomes necessary to do so.

31. We must also deal with one other question which was seriously debated before us and that question is as to what is the measure of liability of an enterprise which is engaged in an hazardous or inherently dangerous industry, if by reason of an accident occurring in such industry, persons die or are injured. Does the rule Rylands v. Fletcher, (1868 (19) LT 220) apply or it there any other principle on which the liability can be determined. The rule in Rylands v. Fletcher was evolved in the year 1868 (1868) and it provides that a person who for his own purpose brings on to his land and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril and, it he fails to do so, is prima facie liable for the damage which is the natural consequence of its escape. The liability under this rule is strict and it is no defence that the thing escaped without that person's wilful act, default or neglect or even that he had no knowledge of its existence. This rule laid down a principle of liability that if a person who brings on to his land and collects and keeps there anything likely to do harm and such thing escapes and does damage to another, he is liable to compensate for the damage caused. Of course, this rule applies only to non-natural user of the land and it does not apply to things naturally on the land or where the escape is due to an act of God and an act of a stranger or the default of the person injured or where the thing which escapes is present by the consent of the person injured or in certain cases where there is statutory authority. Vide Halsbury, Laws of England, Vol. 45 para 1305. Considerable case law has developed in England as to what is natural and what is non-natural use of land and what are precisely the circumstances in which this rule may be displaced. But it is not necessary for us to consider these decisions laying down the parameters of this rule because in a modern industrial society with highly developed scientific knowledge and technology where hazardous or inherently dangerous industries are necessary to carry a part of the developmental programme. This rule evolved in the 19th Century at a time when all these development of science and technology had not taken place cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present day economy and social structure. We need not feel inhibited by this rule which was evolved in this context of a totally different kind of economy. Law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic developments taking place in the country. As new situations arise the law has to be evolved in order to meet the challenge of such new situations. Law cannot afford to remain static. We have to evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialised economy. We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that in any other foreign country. We no longer

need the crutches of a foreign legal order. We are certainly prepared to receive light from whatever source it comes but we have to build up our own jurisprudence and we cannot countenance an argument that merely because the new law does not recognise the rule of strict and absolute liability in cases of hazardous or dangerous liability or the rule as laid down in Rylands v. Fletcher as is developed in England recognises certain limitations and responsibilities. We in India cannot hold our hands back and I venture to evolve a new principle of liability which English Courts have not done. We in India cannot hold our hands back and I venture to evolve a new principle of liability which English Courts have not done. We have to develop our own law and if we find that it is necessary to construct new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy, there is no reason why we should hesitate to evolve such principle of liability merely because it has not been so done in England. We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of substance or any other related element that caused the harm the enterprise must be held strictly liable for causing such harm as a part of the social cost for carrying on the hazardous or inherently dangerous activity. If the enterprise is permitted to carry on an hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of cost of any accident arising on account of such hazardous or inherently dangerous activity as an appropriate item of its overheads. Such hazardous or inherently dangerous activity for private profit can be tolerated only on condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not. This principle is also sustainable on the ground that the enterprise alone has the resource to discover and guard against hazards or dangers and to provide warning against potential hazards. We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm result to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortuous principle of strict liability under the rule in Rylands v. Fletcher (supra).

32. We would also like to point out that the measure of compensation in the kind of cases referred to in the preceding paragraph must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise.

33. Since we are not deciding the question as to whether Shriram is an authority within the meaning of Article 12 so as to be subjected to the discipline of the fundamental right under Article 21, we do not think it would be justified in setting up a special machinery for investigation of the claims for compensation made by those who allege that they have been the victims of oleum gas escape. But we would direct that Delhi Legal Aid and Advice Board take up the cases of all those who claim to have suffered on account of oleum gas and to file actions on their behalf in the appropriate Court for claiming compensation against Shriram. Such actions claiming compensation may be filed by the Delhi Legal Aid and Advice Board within two months from today and the Delhi Administration is direction to provide the necessary funds to the Delhi Legal Aid and Advice Board for the purpose of filing and prosecuting such actions. The High Court will nominate one or more Judges as may be necessary for the purpose of trying such actions so that they may be expeditiously disposed of. So far as the issue of relocation and other issues are concerned the writ petition will come up for the hearing on 3rd February, 1987.

Order accordingly.

M/s. Mukesh Textile Mills (P) Ltd. v. H.R. Subramanya Sastry
AIR 1987 Karnataka 87
M.N. Venkatachaliah and S.R. Rajasekhara Murthy, JJ.

VENKATACHALLIAH, J.:- Appellant Mukesh Textile Mills (P) Ltd., the defendant in the Court below, has a sugar factory in Harige Village, Shimoga District. Adjacent to the sugar factory, on the north, the respondents-plaintiffs own several extents of land irrigated by a distributory channel of the Barda Reservoir canal. The water channel runs West to East, in between the premises of the sugar factory on the South and respondents' lands on the North. Appellant stores molasses, a bye-product in the manufacture of sugar, in three tanks in the factory premises. Two of them are steel tanks and the third, a mud one with earthen embankment, is close to the respondents' land separated only by the said water channel. At the material point of time, some 8000 tonnes of molasses were stored in the earthen tank. It would appear that the northern embankment of this earthen tank had become dilapidated having been dug into by rodents and as a result, on the night of 16th of April 1970, the northern embankment collapsed and a large quantity of molasses in the tank overflowed and emptied themselves into the water-channel and through the water channel, inundated and spread over respondents' land. The inundation of' water, fully laden with the molasses, damaged the standing paddy and sugarcane crop raised by the respondents.

2. Respondents brought the present suit O.S. 26 of 1972 on the file of the Civil Judge, Shimoga, for damages of Rs. 35,000/- contending that extensive cultivation of paddy and sugarcane had been damaged.

Originally, the defence was one of denial that the molasses had so inundated respondents' land; but later the appellant sought, and was granted, leave to include by amendment the following defence:

> *"That in any event as the breach of the tank wherein the Molasses was stored was due to the burrowing activity of the rodents in the said tank precincts, this was an Act of God and the defendant is in no way liable to answer the suit claim even granting that the plaintiff has suffered damages by reason of his crops being destroyed. The defendant could not have seen this burrowing by rodents."*

3. On these pleadings, the Court below framed the necessary and relevant issues. On the plaintiffs side - P.W. 1 - a Revenue Inspector; P.W. 2 a Photographer, P.W. 3 - the Shanbogue and P.W. 4 - the Patel of Harige Village were examined. The first plaintiff tendered evidence as P.W. 5.

On the side of the appellant-defendant, D.W. 1 - the Chief Chemist of the Factory; P.W. 2 and P.W. 3 – the Cane Superintendent and the Manager, respectively of the factory, were examined. A number of documents were marked on either side.

4. On an appreciation of the evidence on record, the Court below held that as a result of a breach of the retaining wall of the mud tank molasses overflowed contaminating the water channel resulting in the inundation of respondents' lands by molasses laden water and that the breach of the wall of the tank and the consequent damage suffered by respondents were attributable to actionable negligence on the part of the appellant. In regard to the quantum of damages the Court below held that the claim as put forward by the respondents was somewhat exaggerated and that the loss of crops was only in respect of 4 acres of paddy and 3 acres of sugarcane Rs. 10,500/- and 4,200/- respectively, in all, Rs. 14,700/- was awarded as damages.

5. We have heard Sri B.T. Parthasarathy, learned Counsel for appellant-defendant and Sri T.S. Ramachandra, learned Counsel for the respondents-plaintiffs. We have been taken through the judgement under appeal and the evidence on record.

On the contentions urged at the hearing, the following points fall for determination in this appeal:

(a) Whether the breach of the molasses tank and the inundation of crops by molasses laden water was the direct consequence of appellant's omission to keep the said tank in a state of good repair?

(b) Even if the breach was attributable to appellant's neglect, whether the damage to the crop was too remote and the result of an independent cause?

(c) Whether, at all events, the respondents ought to have mitigated the damages and thier omission in this behalf disentitles them to relief? and

(d) Whether the damages of Rs. 14,700/awarded are supportable on the evidence on record?

6. Re: Point (a): is to be pointed out, at the outset, that Sri Parthasarathy did not, quite rightly, press into service the plea of "Act of God". Such a defence is limited to occurrences which are outside human agency and could not reasonably be anticipated. It is an operation of natural forces so unexpected that any consequence arising from it must be regarded as too remote to be the foundation of legal liability. Here, there is no suggestion that any natural force, so unforeseen in its occurrence, so unexpected in its severity and so unanticipated in its range of consequences had come into play.

Sri T.S. Ramachandra put it as a simple application of a basic and well recognised principle of Lord Atkin's "neighbour" principle.

The liability of the appellant rests at least on two principles. One is that the appellant, who had stored large quantities of molasses in a mud tank had the duty to take reasonable care in the matter of maintenance, in a state of good repair, of the embankments of the tank. The duty, no doubt, is not simply to act carefully but not to cause injury carelessly. The doctrine of legal causation, in reference both to the creation of liability and to measurement of damages is much discussed. So, is the place of 'causation' and 'foresee ability' in the tort of 'negligence'.

But in this case it was virtually admitted that the rodents had burrowed holes into the earthen embankment of the tank rendering its walls weak. Both from the foresee ability test and of initial causation it must be held that the appellant is liable. Appellant could reasonably have foreseen that damage was likely to be caused if there was a breach of the tank. There was clearly a duty-situation and appellant had omitted to do what a reasonable man, in those circumstances, would have done or would not have omitted to do. The damage that was likely to occur to the neighbouring land by a breach of a tank in which was stored 8,000 tonnes of molasses was reasonably foreseeable, engendering a duty situation. No defence was forthcoming that the tank had been inspected periodically and all reasonable steps taken to keep it in a state of good repair.

In *Donoghue v. Stevenson* 1932 AC 562 Lord Atkins stated the 'neighbour' principle and the duty of care thus:

> *"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyers' question, who is my neighbour? Receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called - in question."*

7. The second ground of liability is this: Appellant by storing a large quantity of molasses on the land had put the land to a non-natural user and if a person collects on his premises things which are intrinsically dangerous or might become dangerous, if they escape, he has a liability, if things so stored escape and cause damage. This is the rule in *Rylands v. Fletcher* (1868) LR 3 HL 330 in which Blackburn, J. enunciated the Rule thus:

> *"We think that the true rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril, and if he does not do so, is prima facie answerable for all the damages which is the natural consequence of its escape."*

On either of the two principles, a duty situation emerges and the appellant must be held liable for the consequence of the escape of the fluid from its tank.

There is yet another side. By storing of such large quantities of a liquid close to respondents boundary, appellant chose to assume a relationship with an outsider and the law requires of him to conduct himself as a reasonable man with adequate skill, knowledge and resources would have conducted himself. In *British Railway Board v. Herrington,* 1972 AC 877 at p. 898 Lord Reid said:

> ".....If *a person chooses to assume a relationship with members of the public, say by setting out to drive a car or to erect a building fronting a highway, the law requires him to conduct himself as a reasonable man with adequate skill, knowledge and resources would do. He will not be heard to say that in fact he could not attain that standard. If he cannot attain that standard he ought not to assume the responsibility which that relationship involves.... "*

The obligation of the occupier of premises is relation to a trespasser might be somewhat different. The occupier is required only to act in humane manner. On this the learned Lord said:

> "....But *an occupier does not voluntarily assume a relationship with trespassers. By trespassing they force a "neighbour" relationship on him. When they do so he must act in a humane manner - that is not asking too much* of *him - but 1 do not see why he should be required to do more."*

Looked at from any side, the present one is a clear case of a duty-situation and also one of omission to discharge it on the part of the appellant. Point(a) is held against the appellant.

8. Re: Point (b) - What Sri B.T. Parthasarathy suggests is, in substance, a defence of a "novus actus interveniens. "If damage results from the intervention of acts of an independent third-party, it may be very difficult to discover the causal connection between such damage and the original wrongful act.

In the present case the molasses escaping into the water-channel - and through it to the respondents' land - is an unbroken chain of events. There was no conscious act of volition

of an independent third-party superimposed on the chain of events. Of the circumstances where the chain of events. Of the circumstances where the chain of events can be said to have been broken. Salmond States (Salmond and Heuston on the LAW OF TORTS, 18th Edn at page 308):

> *"The rule in Rylands v. Fletcher is not applicable to damage done by the act of a stranger. Thus if a trespasser lights a fire on my land I am not liable if it burns my neighbour's property, unless with knowledge or presumed knowledge of its existence have failed to extinguish it within reasonable time. So in Box v. Jubb, (1879) 4 Ex D 76) the defendants were held not responsible for damage done through an overflow from their reservoir, when that overflow was caused by an act of a third person who emptied his own reservoir into the stream which fed that of the defendant. So in Rickards* v. *Lothian, (1913 AC 263) it was held by the Judicial Committee on this ground that the occupier of an upper storey of a block of flats was not liable for damage done to the occupier of a lower storey by the escape of water from a lavatory, when the escape was caused by the malicious means a conscious or deliberate act which could not reasonably have been foreseen."*

As to the circumstances in which the chain of events is not broken and liability is not so excepted, Charlesworth says (Charles worth and Percy on 'NEGLIGENCE' - 1983 Edn. Para 5.37 Page 332):

> *"In the Oropesa, a collision occurred at sea between the Oropesa and the Manchester Regiment, in consequence of the negligent navigation of the former vessel. The captain of the Manchester Regiment put out in a lifeboat, in order to consult with the captain of the Oropesa with a view to saving the damaged ship but the lifeboat capsized during the voyage in heavy seas, with loss of Oropesa, it was contended that the death of the seamen was the result of the Manchester Regiment's captain's decision to put to sea in the lifeboat and not of the original negligence of the Oropesa, which had caused the collision. The Court of Appeal held that, since the captain's decision was a reasonable one in the circumstances, it did not constitute a novus actus interveniens."*

In this case, the plea of novus actus' has absolutely no foundation. The chain of events set into motion by the negligence of the appellant, in improper maintenance of the tank which resulted in the breach of the tank and the damage caused to the crops, constitutes a direct and uninterrupted chain of events. It all happened in the night. The molasses contaminated the water in the channel and through it, the crops. The appeal to the principle of 'novus actus' appears to be somewhat misplaced. Point (b) is answered accordingly.

9. Re. Point (c): The contention of Sri B.T. Parthasarathy, pushed to its logical conclusions, is that though the respondents' land was infested with molasses, the respondents' remedy was simple enough - if fresh water had been allowed to further irrigate and inundate the lands, the contamination would have been washed out. Learned Counsel submitted that as the respondents has not shown that they had so taken the

requisite care to mitigate the damages they are not entitled to any damages. This plea was not taken in the Court below. There is no material so show that such a process would have been really effective and practicable.

As to onus on the plea, McGregor on Damages says: (Page 154, para 216)-

> *"The onus of proof on the issue of mitigation is on the defendant. If he fails to show that the plaintiff ought reasonably to have taken certain mitigating steps, then the normal measure will apply. This has been long settled, ever since the decision in Roper v. Johnson, (1873 LR 8 CP 167) and is now confirmed by Garnac Grain Co. V. Faure & Fairclough, (1968 AC 1130)."*

In view of the circumstances that there is no plea of mitigation, much less any material placed before the Court, the appellant, as defendant must be held not to have discharged that burden. The damages must, therefore, be at large. Point (c) is also held against the appellant.

10. Re. Point (d): We have examined the evidence on record on this point. The Court below held that there was paddy crop on 14 acres and sugarcane crop on 3 acres. The Court below estimated the probable yield at 15 pallas of paddy per acre. Valuing paddy at Rs. 50/- per palla, Court below estimated the loss of paddy crop at Rs. 10,500/-. The yield from 3 acres of sugarcane was estimated at 60 tonnes valued at Rs. 70/- per ton. That brought in a further sum of Rs. 4200/- D.W. 2 himself admitted the existence of the paddy and sugarcane crop. There is other material also to support this finding apart from the evidence of the 1st-

11. However, there is some force in what Sri Parthasarathy said about the gross value of the crops having been taken while the crops had not been ready for harvest and required some more expenditure for their maintenance for sometime more before harvest and that the expenses for its upkeep and maintenance of the crops and expenses of harvest having to be deducted. We think that it is appropriate to deduct some amount from the damages awarded towards such expenditure, which was reasonably expected to be incurred. Accordingly, we deduct a sum of Rs. 2,500/- on this score. The damages awarded would, therefore, have to be scaled down to Rs. 12,200/from Rs. 14,700/-. This is our finding on Point (d).

12. In the result, this appeal is allowed in part, only in relation to the quantum of damages. In modification of the judgement and decree under appeal, the suit is decreed in a sum of Rs. 12,200/- on which respondent-plaintiff shall be entitled to interest at 6% from the date of suit till the date of realisation. The respondents shall be entitled to their costs in the suit proportionate to their success. The appellant shall, however, bear and pay its own costs in the Court below. Both the parties are left to bear and pay their own costs in the appeal.

Order accordingly.

Appeal partly allowed.

Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh
and
Devaki Nandan Pandey v. Union of India
AIR 1987 Supreme Court 359
Writ Petitions Nos. 8209 and 8821 of 1983, D/-18-12-1986
P. N. Bhagwati, C.J. and Ranganath Misra, J.

Constitution of India, Arts, 32 51A (g) - Ecology versus industrial development - Exploitation of limestone from the Himalayan ranges - Closure of certain quarries - Government should take policy decision and firmly implement it for purpose of striking proper balance.

This is the first case of its kind the Country invoking the issues relating to environment and ecological balance. The Supreme Court in its earlier decision dt. 12-3-1985 (See AIR 1985 SC 652) had issued certain directions in respects of limestone quarries in Dehradun district. The question which remained to be considered was whether the schemes submitted by the mine lesees to the Bandopadhyaya Committee under the earlier Supreme court Order have been rightly rejected or not by the Bandopadhya Committee and whether under those schemes, the mine lesses can be allowed to carry on mining operations without in any way adversely affecting environment or ecological balance or causing hazard to individuals, cattle and agricultural lands.

Held that is for the Government and the Nation, and not for the Court, to decide whether the limestone deposits should be exploited at the cost of ecology and environmental considerations or the industrial requirement should be otherwise satisfied. It may be perhaps possible to exercise greater control and vigil over the operation and strike a balance between preservation and utilisation that would indeed be a matter for an expert body to examine and on the basis of appropriate advice. Government should take a policy decision and firmly implement the same.

(Para 17)

The consequences of interference with ecology and environment have now come to be realised. It is necessary that the Himalayas and the forest growth on the mountain range should be left uninterfered with so that there may be preserved without being eroded and the natural setting of the area may remain intact. Of course, natural resources have got to be tapped for the purposes of social development but one cannot forget at the same time that tapping of resources has to be done with requisite attention and care so that ecology and environment may not be affected in any serious way; there may not be any depletion of water resources and long-term planning must be undertaken to keep up the national wealth. It has always to be remembered that these are permanent assets of mankind and are not intended to be exhausted in one generation. Preservation of the environment and keeping the ecological balance unaffected is a task which not only Governments but also every citizen must undertake. It is a social obligation and let every Indian citizen be reminded that it is his fundamental duty as enshrined in Art. 51A (g) of the Constitution.

(Paras 18, 19, 20)

RANGANATH MISRA, J.:- On March 12, 1985, after hearing counsel and parties appearing in person at great length this Court made a detailed order wherein it was said (AIR 1985 SC 652 at p. 653) :

> "This case has been argued at great length before us not only because a large number of lessees of limestone quarries are involved and each of them has painstakingly and exhaustively canvassed his factual as well as legal points of view but also because this is the first case of its kind in the country involving issues relating to environment and ecological balance and the questions arising for consideration are of grave moment and significance not only to the people residing in the Mussorie Hill range forming part of the Himalayas but also in their implications to the welfare of the generality of people living in the country. It brings into sharp focus the conflict between development and conservation and serves to emphasise the need for reconciling the two in the larger interest of the country. But since having regard to the voluminous material placed before us and the momentous issues raised for decision, it is not possible for us to prepare a full and detailed judgement immediately and at the same time, on account of interim order made by us, mining operations carried out through blasting have been stopped and the ends of justice require that the lessees of limestone quarries should know, without any unnecessary delay, as to where they stand in regard to their limestone quarries, we propose to pass our order on the writ petitions. The reasons for the order will be set out in the judgment to follow later".

2. In the meantime, one of us, our learned brother Sen, J., has retired from the Court. Before that event happened, on 30th September, 1985, Reported in (1986) 1 Supreme 287 he delivered a judgement expressing his views on the matter. He indicated:

> "I do not think it necessary to give any further reasons than those which are already stated in the order made by us on 12th March, 1985. Speaking personally for myself, I think that the broad reasons have been adequately set out in the order and it would be an unnecessary exercise to elaborate them."

On a perusal of our order of the 12th March, 1985, we are inclined to agree with his view that the detailed order covered almost all the relevant aspects and touched upon every issue germane to the matter.

3. As this was the first case of its type with wide and serious ramifications, we would like to give a brief account of the manner in which the proceedings commenced were carried on and are to be concluded.

4. By an order dated 14-7-1983, this Court directed a letter received from the Rural litigation and Entitlement Kendra, Dehradun dated 2-7-1983 along with accompanying affidavits to be treated as a writ petition and issued notice to the State of Uttar Pradesh and the Collector of Dehradun. The main allegation therein related to unauthorised and illegal mining operations carried on in the Mussoorie Hills and the area around adversely affecting the ecology of the area and leading to environmental disturbances. Later on, another application was directed to be tagged on and both the applications were dealt

with together. Several parties, mainly, mining lessees numbering more than 100, got impleaded either at the instance of the petitioners or on their own seeking. By a later order made in the month of July 1983, this Court directed all fresh quarrying to be stopped and called upon the District Magistrate and the Superintendent of Police of Dehradun District to strictly enforce that order.

5. On 11-8-1983, after hearing the counsel for parties then appearing, this Court appointed a Committee for the purpose of inspecting all the mines other than those belonging to the State of Uttar Pradesh and the Union of India, with a view to determining whether the safety standards laid down in the Mines Act, 1952, and the Mines Rules made thereunder were being observed or not and whether there was any danger of landslides on account of the quarrying operations particularly during the monsoon in any of the mines and if there was any other hazard to individuals, cattle or agricultural lands by reason of the carrying on of mining operations. Blasting operations in the area were also directed to be stopped. This Committee came to be known as the Bhargava Committee and its members were authorised to inspect the mines and give suitable directions. The Committee made its main report on the basis whereof this Court on August 24, 1983 permitted removal of limestone already quarried. The Committee directed closure of some of the mines and reported the defects appearing in the other mines and called upon the mine owners to carry out rectifications.

6. The Bhargava Committee classified the mines in the area into three groups being A, B and C. So far as the mines in Group (C) were concerned, the Committee was of the view that they were not suitable for continuance and should, therefore, be closed down. So far as the question related to the mines in Group A, the Committee was of the opinion that the quarrying could be carried on without any environmental or ecological hazard. In regard to the B group mines, the Bhargava Committee opined that those may not be closed down permanently though it did notice the adverse impact of their mining activities. In its order of 12th March, 1985, this Court took note of the fact that the Union government had appointed a Working Group on mining of limestone quarries in Dehradun and Mussoorie area some time in 1983 and the Working Group was also headed by Shri Bhargava who was heading the Committee appointed by this Court. The other members of the Working Group were experts in the field and the Working Group had submitted the report in September 1983. A comparative analysis was made by this Court in regard to the mines by referring to both the reports. The Court found that the Working Group had taken these very mines for their study and had divided the mines into two categories namely, Class I and Class II. It transpires that all the mines then categorised as Class I were now included by the Bhargava Committee in Group A and the remaining mines now classified as Group B and C by the Bhargava Committee were in Class II.

7. This Court had also appointed an Expert Committee with Professor Valdia and two Members mainly to consider the problems of ecology and environment with reference to mining. Professor Valdia gave a separate report while the other two members gave a joint report. Dealing with the separate report furnished by Professor Valdia, this Court in its order of March 12, 1985 (reported in AIR 1985 SC 652 at P. 654) states:

"We may observe straightway that we do not propose to rely on the report of Professor Valdia who was one of the Members of the Expert Committee appointed by our order dated 2-9-1983 as modified by the order dated 23rd October, 1983. This Committee consisted of Professor Valdia, Shri Hukum Singh and Shri D. N. Kaul and it was appointed to enquire and investigate into the question of disturbance of ecology and pollution and affectation of air, water and environment by reason of quarrying operations or working of stone crushers or limestone kilns. Shri Hukum Singh submitted a joint report in regard to various aspects while Professor Valdia submitted a separate report. Professor Valdia's report was confined shortly to the geological aspect and in his report he placed considerable reliance on the Mian Boundary Thrust (shortly referred to as M.B.T.) and he took the view that limestone quarries which were dangerously close to M.B.T. should be closed down, because they were in the sensitive and vulnerable belt. We shall examine this report in detail when we give our reasons but we may straightway point out that we do not think it safe to direct continuance or discontinuance of mining operations in limestone quarries on the basis of M.B.T."

At the further hearings after the said order, parties did not address arguments with reference to M.B.T and we are of the view that this topic need not be dealt with by us. In 12th March, 1985 order we directed that the limestone quarries located in Sahasradhara Working Group should be closed down. We further said:

"We would also direct, agreeing with the Report made by the Working Group that the limestone quarries placed in Category II by the Working Group other than those which are placed in Categories B and C by the Bhargava Committee should also be closed down save and except for the limestone quarries covered by the mining leases numbers 31, 36 and 37 for which we will give the same direction as we are giving in the succeeding paras in regard to the limestone quarries classified as Category B in the Bhargava Committee Report. If there are any subsisting leases in respect of any of these limestone quarries they will forthwith come to an end and if any suits or writ petitions for continuance expired or unexpired leases in respect of any of these limestone quarries are pending, they too will stand dismissed."

8. This Court directed closing down of the mines in A Category located within the municipal limits of Mussoorie.

9. In regard to B Class quarries of the Bhargava Committee Report which featured in Category II of the Working Group Report, as also of the A Category quarries within the municipal limits, we set up a Committee under the chairmanship of Shri D. Bandyopadhyay, then Secretary in the Ministry of Rural Development and called upon the mine owners to submit a full and detailed scheme to that Committee which would examine the said scheme keeping in view the provisions of the law as also the expediency of allowing mining operations in the area and report to the Court about the same. We have directed that until further orders from this Court on the basis of Bandopadhyay Committee report these mines shall not be worked. It may be pointed out that the Bandopadhyay Committee has submitted its report rejecting the schemes put forward by

various lessees of the mines which have been closed down and on 20th November, 1986, this Court has directed:

> "We are informed that Bandopadhyay Committee has submitted its report rejecting the schemes put forward by various erstwhile lessees of the mines which have been closed down now. This Report was made as far back as in April 1986 and those who wanted to raise objections, ought to have done so within a reasonable time after the report was submitted and those who have failed to do so, we cannot shut them out and prevent them from raising their objections; and in any event delay in filing cannot prejudice public interest since stone quarrying had already closed down. We would therefore, grant time to the erstwhile lessees of mines, who wish to raise objections, to file their objections within six weeks from today and reply, if any, to those objections may be filed on behalf of the petitioners and the State of Uttara Pradesh within four weeks thereafter.
>
> The old record of the case may also be kept in Court at the time of the hearing of this Writ Petition.
>
> Writ Petition will come up for hearing on 3rd Tuesday in February 1987 before a Bench of which Hon'ble Mr. Justice Ranganath Misra is a member."

10. From the aforesaid order it is clear that in view of the directions given by this Court the question still remains to be considered whether the schemes submitted by the mine lessees to the Bandopadhyaya Committee under our Order dated 12th March 1985 have been rightly rejected or not and whether under those schemes, the mine lessees can be allowed to carry on mining operations without in any way adversely affecting environment or ecological balance or causing hazard to individuals, cattle and agricultural lands. This question would, of course, have to be decided in the light of the view taken by us in our Order dated 12th March 1985 and the present judgment.

11. The Himalayan range on the Northern Boundary of India is the most recent mountain range and yet it is the tallest. It has formed the Northern boundary of the country and until recent times provided an impregnable protection to the Indian sub-continent from the Northern direction. This mountain range has been responsible to regulate the monsoons and consequently the rainfall in the Indogangetic belt. The Himalayas are the source for perennial rivers the Ganges, Yamuna and Brahmputra as also several other tributaries which have joined these main rivers. For thousands of years nature has displaced its splendour through the lush green trees, innumerable springs and beautiful flowers. The Himalayas has been the store house of herbs, shrubs and plants. Deep forests on the lower hills have helped to generate congenial conditions for good rain.

12. The Doon Valley has been an exquisite region bounded by the Himalayan and the Shivalik ranges and the Ganga and Yamuna rivers. The perennial water streams and the fertile soil have contributed not only to the growth of dense lush green forest but have helped the yield of basmati rice and leechis. Mussoorie, known as the queen of Indian hill stations situated at a height of 5000 ft. above sea level and Dehradun located below the

heights have turned out to be important places of tourist attraction, centres of education, research and defence complex.

13. At present the Valley is in danger because of erratic, irrational and uncontrolled quarrying of limestone. The landscape has been stripped bare of its verdant cover. Green cover today is about 10 per cent of the area while from decades ago it was almost 70 per cent.

14. The limestone belt had acted as the aquifer - to hold and release water perennially, all the important streams - Song, Baldi, Rispana, Kairuli and Bhitarli originate from this area. Reckless mining, careless disposal of the mine, debris and random blasting operations have disturbed the natural water system and the supply of water both for drinking and irrigation has substantially gone down. There is a growing apprehension that if mining is carried on in this process, a stage will come when there would be dearth of water in the entire belt.

15. About a hundred years back around the middle of the last century, Britishers penetrated into the area and developed Mussoorie as a Hill Resort. The existence of huge limestone deposits came to be discovered by the beginning of this century. Quarrying operations on small scale began. Direct human interference in limestone quarrying seems to have begun in 1900. Around 1904 all the quarries were declared as property of the Government and as appears from the Bandopadhyay Report, in the year 1911 there existed only four limestone quarries. It had been working in the Dehradun area. Around 1947, limestone quarrying took a new turn and a number of persons who had migrated from Pakistan started working on limestone deposits by quarrying in private lands. In 1949, the Minerals Concession Rules made by the Central Government under the Minerals Regulations Act, 1948, authorised grant of mining leases and several applicants came forward for quarrying of high grade limestone. Until 1962, extraction of limestone was permitted on temporary permits by the State Government of Uttar Pradesh.

16. In these proceedings we came across 105 mining leases and these, as the various reports have indicated, had direct environmental impact on the area. It is said that the limestone deposits in this area are of high grade having up to 99.8 calcium carbonate. Mining operation in these areas have led to cutting down of the forest. Digging of limestone and allowing the waste to roll down or carried down by rain water to the lower levels has affected the villages as also the agricultural lands located below the hills. The naturally formed streams have been blocked. Blasting has disturbed the natural quiet, has shaken the soil, loosened the rocky structures and disturbed the entire ecology of the area. For removing the limestone quarried from the mine, roads have been laid and for that purpose the hills have been interfered with; traffic hazard for the local population both animals and men has increased.

17. The limestone quarries in this area are estimated to satisfy roughly three per cent of the country's demand for such raw materials and we were told during the hearing that the Tata Iron and Steel Company is the largest consumer of this limestone for manufacture of a special kind of steel. At the present rate of mining, the deposits are likely to last some 50 years. It is for the Government and the Nation and not for the Court, to decide whether

the deposits should be exploited at the cost of ecology and environmental considerations or the industrial requirement should be otherwise satisfied. It may be perhaps possible to exercise greater control and vigil over the operation and strike a balance between preservation and utilisation that would indeed be a matter for an expert body to examine and on the basis of appropriate advice, Government should take a policy decision and firmly implement the same.

18. Governments both at the Centre and in the State-must realize and remain cognizant of the fact that the stake involved in the matter is large and far reaching. The evil consequences would last long. Once that unwanted situation sets in, amends or repairs would not be possible. The greenery of India, as some doubt, may perish and the Thar desert may expand its limits.

19. Consciousness for environmental protection is of recent origin. The United Nations Conference on World Environment held in Stockholm in June 1972 and the follow-up action thereafter is spreading the awareness. Over thousands of years men had been successfully exploiting the ecological system for his sustenance but with the growth of population the demand for land has increased and forest growth has been and is being cut down and man has started encroaching upon Nature and its assets. Scientific developments have made it possible and convenient for man to approach the places which were hitherto beyond his ken. The consequences of such interference with ecology and environment have now come to be realised. It is necessary that the Himalayas and the forest growth on the mountain range should be left uninterfered with so that there may be sufficient quantity of rain. The top soil may be preserved without being eroded and the natural setting of the area may remain intact. We had commended earlier to the State of Uttar Pradesh as also to the Union of India that afforestation activity may be carried out in the whole valley and the hills. We have been told that such activity has been undertaken. We are not oblivious of the fact that natural resources have got to be tapped for the purposes of social development but one cannot forget at the same time that tapping of resources have to be done with requisite attention and care so that ecology and environment may not be affected in any serious way, there may not be any depletion of water resources and long-term planning must be undertaken to keep up the national wealth. It has always to be remembered that these are permanent assets of mankind and are not intended to be exhausted in one generation.

20. We must place on record our appreciation of the steps taken by the Rural Litigation and Entitlement Kendra. But for this move, all that has happened perhaps may not have come. Preservation of the environment and keeping the ecological balance unaffected is a task which not only Governments but also every citizen must undertake. It is a social obligation and let us remind every Indian citizen that it is his fundamental duty as enshrined in Art. 51A (g) of the Constitution.

21. We are of the view that the Kendra should be entitled to the costs of this proceeding. We assess the same at Rs. 10,000/- and direct the State of Uttar Pradesh to pay the same either directly or through Court within one month.

Order Accordingly.

Sachidanand Pandey v. State of West Bengal
AIR 1987 Supreme Court 1109
Civil Appeal No. 378 of 1987, D/-11-2-1987
O. Chinnappa Reddy and V. Khalid, JJ.

(A) Constitution of India, Arts. 226, 32, 48-A, 51-A(g) – Ecological imbalance – Administrative action involving environmental problems – Government aware of problem and arriving at conscious decision – Court will not interfere unless mala fides and/or likelihood of prejudice to public is established – Directive principle and fundamental duty – Implementation of – Court is competent to give appropriate directions.

(B) Constitution of India, Art. 226 – Administrative order – Commercial transaction involved – Final order allotting government land on lease to private party for construction of 5-star hotel preceded by negotiations over long period of time and arrived at after considering relevant factors – Reasons can be gathered from entire course of events – Order not bad on ground that reasons were supplemented later.

(C) Bengal Public Parks Act (2 of 1904), Pre. – Applicability of the Act – Allotment of some land of Zoological Gardens, Calcutta to Taj group of Hotels on lease for construction of Five Star Hotel – Provisions of the Act are not attracted.

(Para 29)

(D) W.B. Land Manual (1977), Paragraphs 165, 166, 167 – Applicability – Allotment of government land to private company on lease for constructing Five Star Hotel – Principle and immediate object was not to secure revenue but was to encourage tourism, earned foreign exchange and such other social and economic benefits – Provisions of manual not attracted.

(Para 32)

(E) Constitution of India, Arts. 226, 14 – State-owned or public owned property – Disposal of – Public auction or inviting tenders is normal rule but not invariable one – Public interest is paramount consideration – Allotment of public land for constructing Five Star Hotel – Finalization of deal by negotiations with leading Hotelier company instead of inviting tenders or holding auction – Government cannot be said to have acted with probity.

(F) Constitution of India, Arts. 14, 31 – Government land – Lease of 99 years to private person – Compensation – Adoption of "net sales" method instead of "rent-based-on market-value" method – No impropriety – Former method being profit oriented would be in best interest of Government.

(Para 41)

(G) Constitution of India, Art. 226 – Public interest litigation – Must inspire confidence in Court and among public – Necessity to lay down guideline for entertaining such petitions emphasized.

T. Damodhar Rao v. The Special Officer, Municipal Corporation of Hyderabad
AIR 1987 Andhra Pradesh 170
Writ Petition No. 8261 of 1984, D/-20-1-1987
P. A. Choudary, J.

(A) Hyderabad Municipal Corporation Act (2 of 1956), S. 464(1) - Development plan - Nature of use of land fixed under plan is binding - Compulsory acquisition has no effect on binding nature of plan.

The purpose of compulsory acquisition proceedings which is to transfer compulsorily the title to private property from one owner to another owner does not in any way alter the binding nature of the developmental plan. Whether a particular piece of land is compulsorily acquired or is sold voluntarily or is allowed to be in the hands of the previous owners, the direction of the developmental plan dictating the uses to which that particular piece of land could be put will prevail and will have to be honoured.

(Para 4)

(B) Hyderabad Municipal Corporation Act (2 of 1956), Ss. 464(1), 112 - Development plan - Land reserved under plan for recreational park - Person for whom part of such land is acquired cannot use it for construction of residential houses. (Constitution of India, Art. 21).

Where the land was reserved under the approved development plan for the purpose of recreational park, a portion of it cannot be used by the person for whom it was acquired, for construction of residential houses.

(Para 17)

It is undoubted that under the common law ownership which is a bundle of rights carries with it the right to put the property to any use the owner chooses. Under the common law, therefore, the purchaser could not have been restrained from constructing residential quarters on the plot. The purchaser would have been well within their legal powers as owners of their properties to build residential houses. But that ownership right is now curtailed by a statutory provision contained in the developmental plan. Putting the plot to residential use would be clearly contrary to the restrictions which the developmental plan had imposed on the above land. Developmental plan had forbidden any use of that land except as recreational zone. The common law rights of the owners must give in to the statutory restrictions. The common law use and enjoyment of these ownership rights should, therefore, be subject to the requirements of the statutory law of the developmental plan. The declarations regarding demarcations of land use contained in a developmental plan published under statutory authority are neither pious aspirations nor empty promises. Such declarations are legally enforceable. Those declarations impose legal obligations on the land owners and the public authorities. The public authorities should enforce those obligations. If they do not, it becomes the solemn duty of the Court to compel those authorities to perform their mandatory obligations.

(Para 17)

The plea that the land had been acquired for a public purpose of building houses by the Life Insurance Corporation of India and that, therefore, the Life Insurance Corporation or its transferee can build houses on that land even acting contrary to the developmental plan has no merit. The fact that as regards the land in question the State Government has relaxed the provisions of the layout Rules with respect to the maintenance of the width of the roads and has also relaxed the provisions of the Building bye-laws, 1972 with respect to the maintenance of the height of the kitchen and bed-rooms etc., are also irrelevant. The relaxation orders could not be construed as an amendment to the developmental plan nor do they lift the prohibitions on use of land imposed by the development plan.

(Paras 18, 19)

The very purpose of preparing and publishing the development plan is to maintain an environmental balance. The object of reserving certain area as recreational zone would be utterly defeated if private owners of the land in that area are permitted to build residential houses. The attempt of the Life Insurance Corporation to build houses in this area is contrary to law and also contrary to Art. 21 of Constitution.

(Para 25)

(C) Constitution of India, Art. 21 - "Enjoyment of life" as guaranteed under - Embraces protection and preservation of nature's gift - Causing environmental pollution is violation of Art. 21.

The enjoyment of life and its attainment and fulfilment guaranteed by Art. 21 of the Constitution embrace the protection and preservation of nature's gifts without which life cannot be enjoyed. There can be no reason why practice of violent extinguishments of life alone should be regarded as violative of Art. 21 of the Constitution. The slow poisoning by the polluted atmosphere caused by environmental pollution and spoliation should also be regarded as amounting to violation of Art. 21 of the Constitution.

(Para 24)

Cases Referred: **Chronological Paras**

AIR 1985 SC 652 24

ORDER :- The broad question that falls for consideration is whether the Life Insurance Corporation of India and the Income-tax Department, Hyderabad, can legally use the land owned by them in a recreational zone within the city limits of Hyderabad for residential purposes contrary to the developmental plan published in G.O. Ms. No. 414 M.A. dt. 27-9-1975.

2. Although the City of Hyderabad was founded about 400 years ago in 1951 (sic) around the present area of the historic Charminar, its growth till recently was never regulated by settled laws. During these four centuries, the city had grown in all directions without any plan or design. Particularly after the formation of the State of Andhra Pradesh and in the aftermath of the Second World War, this city had started growing wildly and almost as an uncultivated jungle. For the first time, its civic problems have, therefore, become unmanageable. Although by size and population, Hyderabad is today one of the country's biggest cities, it is a city without any effective and satisfactory provision for elementary

civic amenities to its inhabitants. Passers by praise it while its permanent residents curse it. Absence of a development plan coupled with the presence of an unimaginative and indifferent administration has been the cause of this malady. For too long a time rule of law is not fully enforced here. The city has been for long in the grip of several well known city land grabbers. Being most of the time insensitive to the civil needs of the community and acting largely to the dictates of the power brokers, the Government has been often aiding and abetting this maladministration. Multi-storied buildings are allowed to be built up contrary to municipal bye-laws. Transgressing of municipal laws in general and the building bye-laws in particular are generally condoned. New areas are allowed to be developed even without any provision being made for the minimum civic needs. Today, on a rough estimate, the city has more than 100 slums spreading dirt, disease and squalor everywhere. Roaming herds of king size buffaloes and pale, pathetic and hungry looking cows passing through the city thoroughfares and posing serious traffic hazards both to motorist and pedestrian are a regular sight of some of the city main roads. Probably nowhere else in India, the citizen's fundamental right to move freely is so heavily trampled upon by the beast as it is done on the roads of this city. Regulation of city traffic is a neglected item of the traffic police. Much of traffic on the impossibly narrow roads of the city wends through when it moves at all on its own motion while the traffic police merrily watches and whistles aimlessly. The so-called local lorries occupy many a congested parts of the city roads without being charged for violation of laws and with the traffic police taking no preventive or prohibitive action. In most parts of the city drainage and sewerage systems even where they exist do not function well. Consequently, most of the city inhabitants are condemned to live in their houses without access to pure air or water and under unhygienic conditions. Spread over 120 square miles and having one hundred and above slum dwelling areas and not having enough of open spaces developed for the recuperation of the health of the city inhabitants, and going without bare minimum of civil amenities the city of Hyderabad is painfully dying a civic death. Large chunks of public land that could have been freely used and developed by the city corporation for the common purposes of the community are generally occupied and appropriated by the land grabbers, of late even Gods have joined this unwholesome game by establishing their abodes on the busy roads openly obstructing the free flow of traffic. Land grabbing makes the availability of public land for public purposes such as creation of recreational parks almost impossible. Notwithstanding the frequent claims made by the city corporation about Hyderabad city being a beautiful city, surely it is one of the ugliest cities of India.

3. It is in the above circumstances that need for drawing a developmental plan was felt. Accordingly, a draft developmental plan, sometimes also called Master Plan, has been first conceived and published in the State Government gazette in G. O. Ms. No. 470 Municipal Administration, dated 6th Nov. 1973. The draft plan was published under the legal authority of the Hyderabad Municipal Corporation Act and the Developmental Rules made under that Act. That Draft Plan proposed and fixed the various uses to which each bit of the land situated in the Hyderabad city owned either privately or publicly could be put by the owners. For that purpose, the various parts of the city were divided into a residential, commercial, recreational or other area. The approval of such a draft

plan makes the plan final and legally binding. It would not then matter whether the land belongs to a private individual or to the State. The draft plan once approved would have the undoubted effect of restricting and curtailing even denying the rights of enjoyment of the land which otherwise belongs to the land owners. An approved draft plan can also affect the rights of the inhabitants of those areas to live in peacefully. The law, therefore, requires the draft plan to be published inviting objections or suggestions to those proposals. The draft plan published in the above G. O. Ms. No. 470 went through all these stages. After expiry of the time stipulated for receipt of objections and suggestions, if any, the Government, acting under S. 464(1) of the Hyderabad Municipal Corporation Act, 1955, gave its final approval to the above draft developmental plan. In G.O. Ms. No. 414 Municipal Administration dated 27th Sept., 1975, the Government gave its sanction to the developmental plan. The Map No. 2 and the explanatory reports that accompanied the plan had identified the areas and the specific uses to which the land in those areas could be put. Thus a final developmental plan restricting the user of the lands in city of Hyderabad by force of law has come into existence. We are here concerned with the user of a small bit of a land adjoining the tank bund area. According to the above developmental plan, land measuring Acs. 151.55 cents and situated below the Tank Bund and adjacent to Ram Gopal Mills on either side of Hussainsagar surplus nalla is reserved for laying a recreational park. Thereby the use of the above mentioned land of Acs. 151.55 cents were fixed. That land of Acs. 151.55 cents could be used under the above G. O. Ms. No. 414 only as a part of a recreational park. That land could not be used either as a residential area or commercial area or industrial area. In law an approved developmental plan operates both as a prohibition against the owners putting their land for any impermissible use. It also operates as a permission to use the lands for the purpose indicated in the developmental plan. As the above extent of Acs. 151.55 cents of land situated below the Tank Bund and adjacent to Ram Gopal Mills on either side of Hussainsagar nalla is shown as a part of the recreational park, the owners of those lands situated within that area, whether they be private owners or public owners cannot legally use that land except as a recreational park.

4. So much cannot seriously be disputed. Yet the Life Insurance Corporation and the Income-tax Department are claiming rights to use a part of this very area for residential purposes contrary to the above plan on the basis of their ownership. What seems to have led these parties to this untenable position is the somewhat confusing history of acquisition of some of this land. Long prior to the issuance of the above G.O. Ms. No. 414 making a developmental plan providing for the creation of a recreational park in an area of Acs. 151.55 cents, Government planned for the creation of a much larger park extending over an extent of Acs. 200.00. For that purpose it had proposed to acquire the necessary extent of the land. In fact a Notification under S. 4(1) proposing to acquire the necessary extent of land for that purpose was even published. But in G.O. Rt. No. 725 dated 9-1-1969 published under S. 6 of the Land Acquisition Act, the Government declared its intention to acquire only a smaller extent of Acs. 99.19 guntas. Accordingly, only that extent of land was acquired. But on physical verification it was found that the land was measuring actually Acs. 101.19. guntas. What is, however, important to note is the fact that the above extent of Acs. 101.19 guntas is a part of the above mentioned Acs.

151.55 cents demarcated by the above developmental plan is to be used as a recreational park. Subsequently, an extent of Acs. 37.00 and odd out of the above extent of Acs. 151.55 cents was acquired under the Land Acquisition Act for the purpose of enabling the Life Insurance Corporation of India to build houses. A small part of the above Acs. 37.00 were later sold by the Life Insurance Corporation of India to the Income-tax Department. The above are the facts which probably led the Life Insurance Corporation and the Income-tax Department to assert their right to build houses. But clearly the acquisition of the land by the Life Insurance Corporation of India or the Income-tax Department is of no relevance or significance for deciding the question that falls for consideration in this case. For the purpose of this writ petition all that is necessary and relevant to be noticed is that the entire extent of Acs. 37.00 above mentioned is a part of the area demarcated for recreational park by the developmental plan. It must be stressed that the purpose of compulsory acquisition proceedings which is to transfer compulsorily the title to private property from one owner to another owner does not in any way alter the binding nature of the developmental plan and its decision to create a recreational park. Whether a particular piece of land is compulsorily acquired or is sold voluntarily or is allowed to be in the hands of the previous owners, the direction of the developmental plan dictating the uses to which that particular piece of land could be put will prevail and will have to be honoured. Accordingly, the question of acquisition of the land can be omitted as irrelevant from our consideration.

5. Subsequent to the acquisition of Acs. 101.19 guntas the Hyderabad Municipality has developed an area of about Acs. 50.00 as a park called 'Indira Park'. There can be no objection to this because that action of the Hyderabad Municipal Corporation is in conformity with the requirements of the developmental plan published in Go. O. Ms. No. 414. It is also in conformity with the requirements of S. 112 of the Hyderabad Municipal Corporation Act. The developmental plan has thus been put into force in part. But thereafter the Hyderabad Municipality had not only failed and faltered in carrying out its statutory duties of developing the rest of the area into a recreational park but it has also started acting contrary to the dictates of the above mentioned S. 112 of the Hyderabad Municipal Corporation Act and also to the developmental plan. It has already allowed the Life Insurance Corporation of India to build a few residential houses in the above extent of Acs. 37.00 of land acquired by the Life Insurance Corporation of India. Now the Income-tax Department also wants to build houses in an extent of 10 acres and odd which it has recently acquired from the Life Insurance Corporation of India. Judicial notice may also be taken of the fact that there are several other structures built in this area. These clearly constitute contravention of the law laid down by developmental plan regarding the land uses in the area. Those contraventions gave rise to the filing of this writ petition.

6. The present writ petition has been filed by some of the residents and rate-payers of the Hyderabad Municipal Corporation who live around the above-mentioned area demarcated by the developmental plan as a recreational park. Their complaint is that the balance of about Acs. 50.00 of land out of the afore-mentioned Acs. 151.55 cents which is shown by the developmental plan as a part of the recreational park ought not to be allowed to be used by the Life Insurance Corporation or Income-tax Department as a residential area. This writ petition is, therefore, filed to direct the Municipal Corporation

of Hyderabad and the Bhagyanagar Urban Development authority, Hyderabad, to develop the entire area comprising of the land bounded in the West by Tank Bund, in the East by Ashoknagar Colony, in the North by D. B. R. Mills and in the South Domalguda locality as a public park in accordance with the approved developmental plan.

7. The petitioners say that many residents of the cities are economically backward and poor people and are having insufficient accommodation to live in. According to the affidavit allegations, the majority of inhabitants of Hyderabad have no open spaces left in front of their houses to relax and recreate themselves and maintain their health. The petitioners additionally argue, though it is strictly not necessary for obtaining the relief in the writ petition, that as the above extent of Acs. 101.19 guntas of land has been acquired with the express object of developing that area into a park and for the purpose of promoting the well-being and welfare of the residents of the twin cities in general and of those belonging to the weaker sections of the society in particular, the Hyderabad Municipal Corporation is bound in law not to allow any part of that land to be used for any purpose other than the one the developmental plan had allocated to it. The petitioners referred to S. 112 of the Hyderabad Municipal Corporation Act, 1955, whereunder a mandatory duty is imposed on the Hyderabad Municipal Corporation to make adequate provision for public parks, gardens, play-grounds and recreational grounds. The petitioners say that the reservation of the above area under the developmental plan for recreational park renders that omission on the part of the Municipal Corporation to develop that area fully is a failure to carry out its duty both under S. 112 of the Hyderabad Municipal Corporation Act and under the developmental plan. Accordingly, they argue that it is the statutory obligation of the Hyderabad Municipal Corporation to develop the abovementioned area into a recreational zone.

8. To this writ petition as originally filed only the Hyderabad Municipal Corporation and the Bhagyanagar Urban Developmental Authority and the Life Insurance Corporation of India were added as party-respondents. By 14th of Oct. 1985, the Hyderabad Municipal Corporation had been asserting that the State Government had granted exemption from the above developmental plan to a portion of the above mentioned land of 101 and odd acres which were acquired from private owners for the specific purpose of developing it as a park. It was in these circumstances the State Government was impleaded as a party-respondent so as to find out the correctness of the assertion of the Municipal Corporation. The State Government, after taking several adjournments, had filed its counter into this Court on 22nd of April, 1986. Earlier the Hyderabad Municipal Corporation filed its counter on 21st of Feb., 1986. In the month of March, 1986, the Life Insurance Corporation of India had filed its counter. The Income-tax Commissioner had impleaded himself as a party-respondent on 8th July, 1986. While this writ petition is pending in this Court, he has purchased a small extent of land which is part of the area shown by the Developmental plan as a recreational park. He has filed his counter on 21st of July, 1986. The Bhagyanagar Urban Development Authority was the last to file its counter-affidavit on 17-9-1986.

9. There is no serious dispute that in the above developmental plan published under G.O. Ms. No. 414 an extent of Acs. 151.55 cents and situated within the above-mentioned

boundaries is shown as a recreational park. In para 2 of the counter-affidavit of the Hyderabad Urban Development Authority it was admitted that,

> "The development plan was approved by the Municipal Corporation in its resolution No. 307 dated 1-8-1970 and it was notified by the Government in G. O. Ms. No. 470 dated 6-11-1973 for public objection and suggestion, and after examining all suggestions and objections, the Government approved the plan under G. O. Ms. No. 414 dated 27-9-1975. It was notified and came into force from 1-10-75."

In the same para, the Hyderabad Urban Development Authority said,

> "In the Master Plan of 1975 under planning division No. 3 the vacant land below Tank Bund adjacent to Ramgopal Mills on either side of Hussainsagar surplus nalla to an extent of Acs. 151-55 is reserved for recreation purposes as park and open spaces. A major part of the land was acquired and India Park was developed therein."

10. The State Government in its counter-affidavit also admits the above material facts. In para 2 of the counter-affidavit of the State Government, it is said that,

> "In G. O. Rt. No. 877 M.A., dated 17-10-1986, the Government approved the draft notification under S. 4(1) of the Land Acquisition Act, 1894 submitted by the Joint Collector, Hyderabad, for acquisition of Acs. 231.00 of land in Daira, Ganganmahal, Bakaram and Lingampally villages of Hyderabad District, below tank bund for National Park. The draft notification was published at pages 19-24 in the Andhra Pradesh Gazette No. 44-A, dated 10-11-1966".

11. The State Government in para 3 of the same counter-affidavit said,

> "The Standing Committee of the Corporation recommended to the General Body of the Corporation to acquire only Acs. 100-00 out of those Acs. 231-00 by deleting certain areas in respect of which lay out plans was submitted. Thereupon the General Body in its Resolution No. 3 dated 6-11-1968 resolved to delete land covered by 16 survey numbers and sent proposals with plans for confining the acquisition to an extent of Acs. 100.00 only out of the already notified area ..... The Government considered those objections and overruled them and issued G.O. Rt. No 25, M.A. dated 9-1-1969 approving the draft declaration under S. 6 of the Land Acquisition Act which was sent by the Board of Revenue which was in existence at that time for an extent of Acs. 99.19 guntas and the same was published in the extraordinary issue of the Andhra Pradesh Gazette dated 10-1-1969. But on actual verification of the above land, it was found to be Acs. 101.19 guntas instead of Acs. 99.19 guntas."

12. The Hyderabad Municipal Corporation in its counter-affidavit had admitted the above facts. In para 6 of the counter-affidavit of the Hyderabad Municipal Corporation there is a significant admission. There it is said,

> "I admit the averments in paras 5 to 10 of the affidavit to the extent that originally the Government in Master Plan have shown 231 acres of land as recreational zone."

13. From the above extracted statements it is clear that the above extent of Acs. 101.19 guntas which was acquired by the Government is a part of Acs. 151.55 cents which the developmental plan allocated to be developed as a recreational park. The specifications and details of the developmental plan published in G. O. Ms. No. 414 Municipal Administration dated 27th September, 1975 clearly attest to this fact. It is, however, true that the Life Insurance Corporation of India had acquired an extent of nearly Acs. 37.00 in the villages of Gaganmahal, Daira and Bagh Lingampally for promoting housing schemes and took possession of it on 12th of March, 1974 and subsequently an extent of Acs. 10.95 out of the above extent of Acs. 37.00 acquired by the Life Insurance Corporation of India has been sold and conveyed to the Income-tax Department while this writ petition was pending. Possession of that land was also taken by the Income-tax Commissioner from the Life Insurance Corporation on 16-9-1986 and the Life Insurance Corporation had also constructed a few residential houses. But in my opinion these facts are of no legal significance for our purpose.

14. From the facts stated above, it is clear that Acs. 151.55 cents has been reserved, according to the developmental plan for purposes of recreational park and that a part of that land has been later acquired by the Life Insurance Corporation of India and the Income-tax Commissioner for building residential houses. Neither in the counter-affidavit of the Life Insurance Corporation nor in the counter-affidavit of the Income-tax Commissioner the fact of publication of a draft and final developmental plan with respect to Acs. 151.55 is specifically denied. In fact, the various public documents including the maps make the taking of such a plea by any party almost impossible. What is, therefore, ascertained by these two respondents is their title to this land. The Life Insurance Corporation of India in its counter-affidavit has boldly asserted, "This Hon'ble Court has no jurisdiction or authority in law to issue any direction to the 1st respondent to encroach upon the land purchased by this respondent." There is no doubt that the Life Insurance Corporation is greatly mistaken in making the above assertion. The question in this writ petition is not, who owns the land that is shown as a part of the recreational zone by the developmental plan but whether that land owned either by the Life Insurance Corporation of India or by the Income-tax Department or by any other person or body is covered by a developmental plan and is allocated to be used as a recreational park. As I have noticed above, the setting up of such a case is almost impossible in this case. As a fact neither of these respondents has set up such a case specifically in their counter-affidavits although there is a vague and unspecified assertion in the counter-affidavit of the Life Insurance Corporation of India. On the other hand, there is positive affidavit evidence in the respondents' counter-affidavits admitting the preparation and publication of the developmental plan covering this very area of Acs. 151.55. In this connection a letter dated 3rd of July, 1981 written by the Special Officer, Municipal Corporation of Hyderabad and filed into the Court as a material exhibit by the Income-tax Commissioner himself should be noticed. Material part of that letter reads as follows:

> "Moreover in the year 1975, the developmental plan for twin cities of Hyderabad and Secunderabad has come into force. In the developmental plan, the entire stretch of Land from lower Tank Bund Road to Hussain Sagar surplus nallah has been

earmarked for recreational zone wherein residential houses are not permitted in normal course."

The above letter written in 1981 shows that the land of Acs. 37.00 acquired by the Life Insurance Corporation of India is a part of the Acs. 151.55 cents covered by the developmental plan published in G. O. Ms. No. 414.

15. From the above the conclusion that the land of Acs. 151.55 cents situated below the Tank Bund and adjacent to Ram Gopal Mills on either side of Hussain Sagar surplus nallah is declared by the developmental plan published in G.O. Ms. No. 414 as a recreational park and that 3, 7 and odd acres which was acquired by the Life Insurance Corporation of India is a part of the above extent of Acs. 151.55 cents covered by the development plan becomes unavoidable and inevitable. There is overwhelming un-contradicted documentary evidence in support of that conclusion. Many parties admit the fact in their counter-affidavits.

16. On the basis of the above conclusion it cannot be seriously contended that the Life Insurance Corporation or the Income-tax department can use the land which they have acquired and which is presently under their occupation for the purpose of constructing residential quarters or for any other purpose except for the purpose of a recreational park.

17. It is undoubted that under the common law ownership which is a bundle of rights carries with it the right to put the property to any use the owner chooses. Under the common law, therefore, the Life Insurance Corporation as well as the Income-tax Department could not have been restrained from constructing residential quarters on the above 37 acres plot. Those bodies would have been well within their legal powers as owners of their properties to build residential houses. But that ownership right is now curtailed by a statutory provision contained in the developmental plan. Putting the above 37 acres to residential use would be clearly contrary to the restrictions which the developmental plan had imposed on the above land. Developmental plan had forbidden any user of that land except as recreational zone. The common law rights of the owners must give in to the statutory restrictions. The common law use and enjoyment of these ownership rights should, therefore, be subject to the requirements of the statutory law of the developmental plan. Municipal laws are the earliest example of statutory laws restricting the use of property rights. Chapter XIII of the Hyderabad Municipal Corporation Act, 1955 and more particularly S. 464 of that Act which is now repealed and replaced by the provisions of the Andhra Pradesh Urban Areas (Development) Act, 1975 are of that nature. They provide in the interests of the general welfare of the community for the preparation and enforcement of development plans. Those laws require conducting of the elaborate survey of the civil needs of the inhabitants and feasibility and practicability of the various land uses and the prospective growth of the city before demarcating the land for different purpose. According to that law the developmental plans should define the various zones into which the area sought to be developed may be divided and should also indicate the manner in which the land in each zone is proposed to be used. The dominant intention of these statutory provisions is to plan for the present and future development of the whole area by restricting and regulating the ownership rights of the landlords under the common law. Those owners

can no longer enjoy their unrestricted right available to them under common law to use their lands as they desire. Once a developmental plan has been prepared and published in accordance with law, the owners of the area concerned can only use their property in accordance with and in conformity with the provisions of the developmental plan. Once the developmental plan has been legally and finally published, no one in the area can use the land contrary to the provisions of the developmental plan. In this case, it has already been shown that the developmental plan has been published in accordance with law in the above-mentioned G.O. Ms. No. 414. We have also seen that the entire extent of Acs. 151.55 cents of land abutting the Tank Bund and situated adjacent to Ram Gopal Mills on either side of Hussain Sagar surplus nalla was reserved in the above G. O. Ms No. 414 by the developmental plan for the purpose of recreational park. In view of the above, the assertion of the Life Insurance Corporation of India or that of the Income-tax Department that they have a legal right to build residential houses on the land they own because they own that land should be rejected as being contrary to all accepted principles of law. In using or attempting to use the land which they have acquired within the recreational zone as residential area, these bodies or authorities are clearly violating the provisions of the developmental plan and are acting contrary to law. Because the developmental plan is law, it should also be held that the State Government and the Municipal Corporation of Hyderabad and the Hyderabad Urban Development Authority are equally bound to implement and enforce the developmental plan. Rule of law requires these authorities to implement the developmental plan. These legal authorities cannot, therefore, permit either the Life Insurance Corporation of India or the Income-tax Department to use any part of the abovementioned Acs. 151.55 cents of land for any purpose other than the one indicated in the developmental plan. It may be noted that the Special Officer of the Hyderabad Municipal Corporation in his letter of 1981 written to the State Government had shown long time back complete awareness of this plain legal position. His objection to use of the above land by the Income-tax Department for residential purposes is based solely on the ground that the use of this land in the developmental plan is shown as recreational park and that it would not be permissible to use such a land as a residential area. It is as well that I make it clear that the declarations regarding demarcations of Land user contained in a developmental plan published under statutory authority are neither pious aspirations nor empty promises. Such declarations are legally enforceable. Those declarations impose legal obligations on the land owners and the public authorities. The public authorities should enforce those obligations. If they do not, it becomes the solemn duty of this Court to compel those authorities to perform their mandatory obligations. Law should not be allowed to be mocked by the haughty and the mighty. I, therefore, declare that the use of the above area for the construction of residential houses by the Life Insurance Corporation of India or the Income-tax Department, is quite clearly illegal and contrary to law.

18. The argument that the above land of 37 acres and odd had been acquired for a public purpose of building houses by the Life Insurance Corporation of India and that, therefore, the Life Insurance Corporation or its transferee can build houses on that land even acting contrary to the developmental plan has no merit or meaning. An element of public purpose is a necessary condition for the exercise of that inherently unjust powers of

eminent domain, but is otherwise irrelevant for deciding the question whether the Life Insurance Corporation can disregard or ignore a developmental plan.

It is relevant only for validating a compulsory transfer of title. It has the least relevance in the context of the restrictions to be imposed on the land user in accordance with the terms of the developmental plan. That a transferee cannot have greater rights than the original owner is too plain a proposition to require elaboration.

19. Acting in utter contempt of rule of law, the State Government under G.O. Rt. No. 449, Municipal Administration, dated 18-3-1986 relaxed the provisions of R. 10(1) of the layout Rules with respect to the maintenance of the width of the roads. Acting similarly the State Government also relaxed the provisions of bye-laws 34(2) and 70 of the Building bye-laws, 1972 with respect to the maintenance of the height of the kitchen and bed-rooms etc. But those relaxations would be wholly ineffective and inoperative in an area reserved to be used by the developmental plan solely for recreational purposes. Such relaxations made by the State Government would have been fruitful if made with respect to lands outside the recreational zone where it is permissible to build residential buildings. The above relaxation orders could not be construed as an amendment to the developmental plan either. Once approved, the developmental plan can only be altered by the well settled statutory method mentioned in S. 12 of the A.P. Urban Areas (Development) Act, 1975. Under that section, the A.P. Urban Areas Development Authority can made modification without affecting important alterations in the character of the developmental plan. Similarly, the Government's power to make modifications to the developmental plan is hedged by several limitations. In either case, a prior notice should be published inviting objections and suggestions from all with respect to any amendments proposed to be made to a developmental plan. The objections so received should be considered by the proposal of the draft amendments. This statutory obligation to hear and dispose of the objections shows that the law treats the alteration of a developmental plan as affecting the rights and valuable interests of the city inhabitants. There is thus a list present which can be disposed off only by applying judicial norms. Modifications to the approved developmental plan cannot, therefore, be made except for substantial reasons. In such a scheme of things policy considerations and personal predilections and intention to favour powerful bodies like Life Insurance Corporation or Income-tax Department can have no place. Further every modification to the developmental plan validly approved should be published in a reasonable manner. It is nobody’s case here that the Government has ever published any draft modification or invited any objections or otherwise followed the procedure dictated by S. 11 of the A.P. Urban Areas (Development) Act, 1975 or it published a finally modified developmental plan. Thus it must be held that the developmental plan published in G.O. Ms. No. 414 still holds the filed even to this day. Inasmuch as the above-mentioned G.O. Rt. No. 449 dated 18th March, 1976 was not even remotely connected with the scheme of S. 11 of the A.P. Urban Areas (Development) Act that G.O. cannot be considered to be valid or efficacious to alter the land uses fixed by the developmental plan. Relaxing the Layout rules and the Building bye-laws has no relevance to the enforcement of developmental plans. Such a relaxation as the one made by the Government in G. O. Rt. NO. 449 can only apply to the lands which are permitted to be used by the developmental plan as

residential areas. Where there is a legal prohibition regarding the use of certain areas except as a recreational park, the relaxations granted under the Layout Rules and the Building bye-laws cannot lift those prohibitions. They do not apply at all because the layout rules and the building bye-laws would not apply to areas where there is no (sic); legal prohibition to build residential houses.

Law of ecology and environment: .....

20. The matter may be examined from the view point of our legal and constitutional obligation to preserve and protect our ecology and environment.

21. Under the common law, ownership denotes the right of the owner to possess the thing which he owns and his right to use and enjoy the thing he owns. That right extends even to consuming, destroying or alienating the thing. Under the doctrine of right to choose the uses to which an owner can put his land belongs exclusively to his choice. The right of use thus becomes inseparable from the right of ownership. The thrust of this concept of individual ownership is to deny communal enjoyment of individual property. This private law doctrine of ownership is comparable in its width and extent to the public law doctrine of sovereignty.

22. Into the domain of this doctrine of ownership, it is the collectivist jurisprudence of municipal administration that has made its first in roads. But in the recent past the law of ecology and environment has been more seriously shaken its roots. Under the powerful impact of the nascent but the vigorously growing law of environment, the unbridled right of the owner to enjoy his piece of land granted under the common law doctrine of ownership is substantially curtailed.

23. The objective of the environmental law is to preserve and protect the nature's gifts to man and women such as air, earth and atmosphere from pollution. Environmental law is based on the realisation of mankind of the dire physical necessity to preserve these invaluable and none too easily replenishable gifts of mother nature to man and his progeny from the reckless wastage and rapacious appropriation that common law permits. It is accepted that pollution "is a show agent of death and if it is continued the next 30 years as it has been for the last 30, it could become lethal". (See Krishna Iyer's Pollution and Law). Stockholm Declaration of United Nations on Human Environment evidences this human anxiety:—

> "The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystem, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate ..... Nature conservation including wildlife must therefore receive importance in planning for economic development."

Similarly, the African Charter on Human and People's rights declares that "all peoples shall have the right to a general satisfactory environment favourable to their development". Judicially responding to this situation, Justice Douglas has suggested that environmental issues might be litigated in the name of "the inanimate object about to be ..... deposited" with those who have an "intimate relation" with it recognised as its

legitimate spokesmen. Common law being basically blind to the future and working primarily for the alienated good of the individual and operating on the cynical theory that because posterity has proved its utter inadequacy to achieve the urgent takes of preservation and protection of our ecology and environment. Roscoc Pound blamed the common law for its serious social shortfalls. He wrote:—

> "Men have changed their views as to the relative importance of the individual and of society; but the common law has not. Indeed, the common law knows individuals only ..... It tries questions of the highest social import as mere private controversies between John Deo and Richard Deo and this compels a narrow and one sided view."

Rejecting these individualistic legal theories of common law that are found to be incompatible with the basic needs and requirements of the modern collective life environmental laws all over the world lay down rules for the preservation of environment and prevention of pollution of our atmosphere, air, earth and water. Our Parliament has recently enacted the Environment (Protection) Act (Act No. 29 of 1986) for the purpose of protecting and improving our environment. It widely distributed powers on all those who are traditionally classified as not aggrieved persons to take environmental disputes to Courts. This is clearly in harmony with our Constitutional goals which not only mandate the State to protect and improve the environment and to safeguard the forests and wildlife of the Country (Art. 48A); but which also hold it to be the duty of every one of our citizens to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures (Art. 51-A(g)).

24. From the above it is clear that protection of the environment is not only the duty of the citizen but it is also the obligation of the State and all other State organs including Courts. In that extent, environmental law has succeeded in unshackling man's right to life and personal liberty from the clutches of common law theory of individual ownership. Examining the matter from the above constitutional point of view, it would be reasonable to hold that the enjoyment of life and its attainment and fulfilment guaranteed by Art. 21 of the Constitution embrace the protection and preservation of nature's gifts without life cannot be enjoyed. There can be no reason why practice of violent extinguishments of life alone should be regarded as violative of Art. 21 of the Constitution. The slow poisoning by the polluted atmosphere caused by environmental pollution and spoliation should also be regarded as amounting to violation of Art. 21 of the Constitution. In R.L. & E. Kendra, Dehradun v. State of U.P., AIR 1985 SC 652, the Supreme Court has entertained environmental complaints alleging that the operations of lime-stone quarries in the Himalayan range of Mussoorie resulted in degradation of the environment affecting ecological balance. In R. L. & E. Kendra, Dehradun v. State of U. P., AIR 1985 SC 652 the Supreme Court in an application under Art. 32 has ordered the closure of some of these quarries on the ground that their operations were upsetting ecological balance. Although Art. 21 is not referred to in these judgments of the Supreme Court, those judgments can only be understood on the basis that the Supreme Court entertained those environmental complaints under Art. 32 of the Constitution as involving violation of Art. 21's right to life.

25. It, therefore, becomes the legitimate duty of the Courts as the enforcing organs of Constitutional objectives to forbid all action of the State and the citizen from upsetting the environmental balance. In this case the very purpose of preparing and publishing the developmental plan is to maintain such an environmental balance. The object of reserving certain area as a recreational zone would be utterly defeated if private owners of the land in that area are permitted to build residential houses. It must, therefore, be held that the attempt of the Life Insurance Corporations of India and the Income-tax Department to build houses in this area is contrary to law and also contrary to Art. 21 of the Constitution.

26. Accordingly, I allow this writ petition and direct a mandamus to issue forbidding the Life Insurance Corporation of India and the Income-tax Department, Hyderabad, from raising any structures or making any constructions or otherwise using the land referred to above for residential purposes. I also direct the State Government of Andhra Pradesh, the Hyderabad Municipal Corporation and the Bhagyanagar Urban Development Authority, Hyderabad, to enforce the law as contained in the developmental plan in G.O. Ms. No. 414 and to prevent and forbid the Life Insurance Corporation of India and the Income-tax Department, Hyderabd, from using the above land for residential purposes. I also direct the State Government of A. P., the Hyderabad Municipal Corporation and the Bhagyanagar Urban Development Authority, Hyderabad, to remove within sixty days any structures that might have been raised by the Life Insurance Corporation of India or the Income-tax Department, Hyderabad, during the pendency of this writ petition in this Court. I, however, make it clear that any residential houses or structures which have been built prior to the filing of this writ petition will not be covered by the judgment.

27. The writ petition is accordingly allowed with costs. Advocate's fee Rs. 500/-.

Petition allowed.

Vincent Panikurlangara v. Union of India
AIR 1987 Supreme Court 990
Writ Petition No. 3492 of 1983, D/-3-3-1987
Ranganath Misra and M.M.Dutt, JJ.

(A) Constitution of India, Art. 32 – Public Interest Litigation – Banning of injurious drugs – Judicial proceeding is not appropriate forum – Issue being of national importance certain directions given by the Supreme Court. (Drug and Cosmetics Act (23 of 1940), Ss. 10-A and 26-A).

In the instant case, directions are sought from the Supreme Court in public interest, banning import, manufacture, sale and distribution of such drugs which have been recommended for banning by the Drugs Consultative Committee and has also asked for cancellation of all licences authorising import, manufacture, sale and distribution in respect of such drugs. The issues raised are of vital importance as they relate to

maintenance of approved standards of drugs in general. The issues that fall for consideration are not only relating to technical and specialised matters relating to therapeutic value, justification and harmful side effect of drugs but also involve examination of the ectness of action taken by the government on the basis of advice; the matter also involves the interest of manufacturers and traders of drugs as also the interest of patients who require drugs for their treatment.

Having regard to the magnitude, complexity and technical nature of the enquiry involved in the matter and keeping in view the far reaching implications of the total ban of certain medicines, for which appropriate direction is sought, the Supreme Court observed that a judicial proceeding of the nature initiated is not an appropriate one for determination of such matters. A healthy body is the very foundation for all human activities. In a welfare State, therefore, it is the obligation of the State to ensure the creation and the sustaining of conditions congenial to good health. Attending to public health therefore is of high priority – perhaps the one at the top.

(Paras 15, 16)

The branch of health care of citizens involves an ever changing challenge. The problem is a shifting one and one cannot have a fixed process to deal with the situations that would arise from time to time. The Central Government on the basis of the expert advice can indeed adopt an approved national policy and prescribe an adequate number of formulations which would on the whole meet the requirements of the people at large. Obviously, instant attention has to be bestowed to keep abreast of the changing situations and make proper and timely amends. While laying the guidelines on this score, injurious drugs should be totally eliminated from the market. Great care in this regard has to taken. Such drugs as are found necessary should be manufactured in abundance and availability to satisfy every demand should be ensured. Undue competition in the matter of production of drugs by allowing too many substitutes should be reduced as it introduces unhealthy practice and ultimately tends to effect equality.

(Paras 19, 20)

(B) Constitution of India, Art. 32 – Public Interest Litigation – Duty of statutory bodies towards Court – Writ Petition seeking banning of injurious drugs – Question is of national importance – Notices issued to Medical Council of India; Indian Medical Association; Drugs Medical Council of India and Drugs Authorities of States for their participation in debate and for assisting the Court – They are duty-bound to join - No option to go ex parte like ordinary litigants.

(Para 11)

Abhilash Textiles v. Rajkot Municipal Corporation
AIR 1988 Gujarat 57
Special Civil Applications Nos. 6203, 6318, 6442 and 6538 of 1986, D/-5-8-1987
A.P. Ravani, J.

Bombay Provincial Municipal Corporation Act (59 of 1949), Ss. 376A, 376, 63 – Use of premises causing nuisance – Notices to owners of factories calling upon them to prevent discharge of dirty water on public road and in drainage within certain times and further stating that in case of failure to comply with notice, the factories would be closed – Notice valid – No question of violation of principles of Natural Justice. (Constitution of India, Arts. 19(6), 51A(g), 226).

Dr. Shivarao Shantaram Wagle v. Union of India
AIR 1988 Supreme Court 952
A.P. Sen and L.M. Sharma, JJ.

ORDER:- This special leave petition is directed against the judgement and order of the Bombay High Court dated November 24, 1987 declining to issue a writ in the nature of mandamus and other appropriate writs, directions or orders under Art. 226 of the Constitution as prayed for by the petitioners to direct the respondents to forbear from releasing 7500 cartons (200 MT) of Irish butter imported into India under the EEC Grant-in-Aid for Operation Flood Programme, supplied to the Greater Bombay Milk Scheme by respondent No. 2 National Dairy Development Board, on the ground that the butter was contaminated by nuclear fallout.

2. From the counter-affidavits filed on behalf of respondent No. 1 Union of India and respondent No. 2 National Dairy Development Board it appears that so on after the Chernobyl disaster when it was realised that the imported milk and food products particularly from the EEC countries had the possibility of radio-active contamination, and so the Bhabha Atomic Research Centre took up the matter with the respective agencies and advised them to get the representative samples for radio-active analysis before releasing them for public distribution in India. It further appears that the Atomic Energy Regulatory Board which is a statutory body, has set limits for radio-activity for the imported foodstuffs. In disallowing the writ petition the High Court observed:

> *"We are satisfied that the best scientific brain available in the country has applied itself to the question. The question is whether in the product with which we are concerned here, there is radioactivity above the permissible limit. This question has been sought to be answered by the respondents on the basis of laboratory tests conducted on their behalf. Fixation of the permissible limit of radioactivity in a product naturally, is for the scientists to decide, but the tests themselves are carried on by persons working in the laboratory, naturally, again under the guidance of the scientists concerned. We have not found that any defect is disclosed in the material which has been placed before us in the manner of testing. We have also not been*

shown that any other better method is available. Mr. Setalvad appearing for respondent No. 2 has told us that if any other method of sampling is suggested the respondents will willingly examine the same and conduct the tests accordingly."

3. At one stage, the High Court felt disturbed about the concept of the 'permissible limit' and asked counsel appearing for both the sides to examine the question in the light of certain queries which arose in its mind. It wanted to know on what basis the permissible limit of radio-activity was determined, and in particular, whether this permissible limit had been determined on the basis of consumption by human beings of any natural food in which radio-activity was present or was it based upon the external irradiation and added:

"This question can, naturally, be answered if there is also answer to the question whether natural foods contain radioactivity under normal circumstances".

The High Court relied upon a letter dated November 13, 1987 from the Secretary, Atomic Energy Regulatory Board produced along with an affidavit which furnished an answer to the question. As regards the contention that the radio-activity that is found naturally in articles of human consumption and the radio-activity that is found in such articles acquired by pollution are qualitatively different, and therefore, the concept of permissible limit evolved by the scientists in India should not be accepted, and further that the permissible limit so evolved based upon studies on articles for human consumption, which include articles such as Potassium was a dangerous concept because Potassium and Caesium-137 have different radio activity properties, the High Court declined to be drawn into the controversy which was of a highly technical nature placing reliance on the words of caution administered by this Court in *Vincent Vs. Union of India* AIR 1987 SC 990. In conclusion, the High Court observed:

"We have already broadly indicated the complicated nature of the questions involved. We are also satisfied that the authorities concerned are fully aware of the problem at the highest level. They have adopted methods regarded by them as best suited methods which have been approved by scientists. In these circumstances, we do not see how in a petition under Art. 226 of the Constitution it is possible for us to resolve this controversy."

4. After hearing Ms. Indira Jaising, learned counsel for the petitioners, Shri Atul Setalvad, learned counsel for respondent No. 2 National Dairy Development Board and Shri Kuldeep Singh, learned Additional Solicitor General at quite some length on January 20, 1988 this Court having given the matter its anxious consideration thought it desirable to appoint a committee of three experts, namely (1) Professor M.G.K. Menon (2) Dr. P.K. lyengar and (3) G.V.K. Rao to give its opinion on the following question:

"Whether milk and dairy products and other food products containing man made radionuclides within permissible levels by the Atomic Energy Regulatory Board on 27th August, 1987 are safe and/or, harmless for human consumption?"

The Committee of Experts after due deliberation examined the question in depth and by its report dated February 19, 1988 has expressed its opinion that the consignment of

imported butter was safe and harmless for human consumption. The conclusions reached by the Committee can best be stated in its own words:

> *"1. The permissible levels of radioactivity in milk, dairy and other food products fixed by the Atomic Energy Regulatory Board as per its communication of August 27, 1987 has been arrived at after due consideration of ICRP dose limits for the General population.*
>
> *2. The AERB has allowed more safety margin than other countries, and international organisations like PAO and WHO in arriving at the levels fixed for milk, dairy and other food products. The levels adopted by AERB are one of the lowest in the world.*
>
> *3. The consumption of milk, dairy and other food products, having levels of man made radionuclides below the permissible levels fixed by AERB, by all sections of population, and throughout the year, are safe and harmless."*

The report of the Committee of Experts shall become and form part of this order.

5. We have heard learned counsel for the petitioners at considerable length on the objections formulated by them in the counter affidavit and gone through the annexures thereto. We do not find any substance in any of them. In its most recent recommendations, the International Commission or Radiological Protection observes that 'limits for the inhalation or ingestion of radioactive material depend on the concentration of those materials in limiting target organs'. The petitioners in their counter-affidavit have shown different permissible limits in different countries such as France, U.K., E.E.C. and Australia at 3700, 2000, 370 and 100. These are the limits of radio activity prescribed by these countries for imported foodstuffs. As against this, the prescribed limit for India admittedly is 40(bq/1). As already stated, the analysis of the imported butter by the Bhabha Atomic Research Centre which according to the Committee of Experts must be treated to be accurate, showed the presence in the samples of imported butter of CS-137 at limits ranging from 0.6 Bq/Kg of 2.9 Bq/Kg. The learned counsel for the petitioners read out letters sent in reply by some internationally known scientists including Nobel laureates tending to show that it is desirable to avoid foodstuffs containing low level radio-activity which, according to them, might in the long run prove to be hazardous. What is remarkable about these letters is that they are in general terms and only represent a particular school of thought. Surely, the Committee of Experts comprising two eminent scientists and an equally well-known Agro-Economist was well aware of this point of view. Lastly, learned counsel for the petitioners suggested that the Court should give a direction that all articles of foodstuffs using the imported butter should carry a label 'Manufactured Out of Butter Imported from the EEC Countries'. We are afraid, the contention cannot be accepted.

6. In *Vincent's case* (AIR 1987 SC 990), this Court in dealing with a case where a direction was sought in public interest for banning of Import, manufacture, sale and distribution of certain drugs which has been recommended for banning by the Drugs Consultative Committee, had occasion to observe (at p. 994)

"Having regard to the magnitude, complexity and technical nature of the enquiry involved in the matter and keeping in view the far-reaching implications of the total ban of certain medicines for which the petitioner has prayed, we must at the outset clearly indicate that a judicial proceeding of the nature initiated is not an appropriate one for determination of such matters."

We are of like opinion.

7. Special leave petition is dismissed and also the order of status quo granted by the High Court stands discharged.

Petition dismissed.

REPORT OF THE COMMITTEE

Background

The Hon'ble Supreme Court by its order dated January 20, 1988 appointed this Expert Committee to give its opinion to the Court on the following question, arising in the proceedings of the Special Leave Petition (Civil) No. 15408 of 1987.

"Whether milk and dairy products and other food products containing man made radionuclides within permissible levels by the Atomic Energy Regulatory Board on 27th August, 1987 are safe and/or, harmless for human consumption?"

1. The Committee examined in detail the Special Leave Petition, various affidavits and other supplementary documents sent by the Hon. Court. The Committee have also deliberated on the issues raised by the petitioners, and explanations of the respondents for understanding the background of the petition.

2. The internationally followed practices in radiation protection were examined and it was observed that the concept of permissible levels of radio activity and radiation exposure in universally followed both for occupational workers and members of the public. India is no exception.

3. After ascertaining this, the Committee went into the basis used by Atomic Energy Regulatory Board (AERB) in arriving at the permissible levels for milk, dairy and food products prescribed by the Board. IT concluded its deliberations by discussing the specific question referred to the Committee and arrived at the unanimous opinion given at the end.

Scientific Back Ground.

1. The issues raised and apprehensions expressed by the petitioners arise from the fact that Chernobyl reactor accident, which occurred in USSR in April, 1986, deposited radio activity in measurable and varying quantities in several European countries. Consequently, the possibility exist that milk and dairy products produced soon after the accident in such countries contain radio active contamination. The specific issue raised is about Irish butter imported into India after the accident. The apprehension is that if

such contaminated food products are consumed by the Indian population, harmful effects may be caused.

2. On the basis of scientific information available, the following facts would by the relevant background to take a balanced view on the issue raised.

3. Man has evolved in the background of natural radio activity, and atomic and nuclear Radiations, which have been present on the earth since its formation. The important sources of natural radiation exposures to man have been continuous cosmic radiations coming from the Sun and Outer space, natural radio activity such as due to K-40, and to a lesser extent due to uranium and thorium and their daughter products in the environment. The human body itself contains several (of the order of three) thousands bequerels of radio activity, mostly due to K 40. Exposure to natural radiation sources is thus unavoidable.

The Cosmic ray component of natural radiation exposure varies with altitude and latitude. Terrestrial component also varies from place to place due to differences in the concentrations of K-40, uranium and thorium in the soils. Exposures due to inhalation of radon and its daughters, from uranium present in the soil, varies even at the same place with the time of the day and season of the year. Similarly, concentrations of natural radionuclides in food items vary depending on the place where they are produced. Thus, the total exposure to man from natural causes varies considerably (up to a factor of 10) in different parts of India.

4. The effects of radio activity or radiation exposure in human beings are related to the radiation dose delivered to body tissues. The radiation dose depends on a number of parameters i.e. physical half-life, energy and type of radiation, biological half-life, sensitive body organ etc.

5. The effect on human body is, thus, determined by the above complex parameters. The human body does not differentiate between natural and man-made sources of radiation exposure as regards their effects.

6. Consequent to the Chernobyl reactor accident, radio active fallout deposited over several European countries. Ireland was also affected by this radio active fallout, though to a smaller extent as compared to several other European countries. e.g. Sweden, Norway, Poland, Finland, Switzerland, etc. The most important radionuclides so dispersed were I-131, Cs-137 and Sr-90, 1-131 being a short-lived radionuclide (half-life 8 days) was of concern to the countries receiving the fallout, and not to India. By the time imported food items arrived in India, I-131 even if it was present when the item was produced, if must have decayed. Strontium-90 being long lived (half-life 29 years) could have been of concern, but it was deposited in small amounts, and the ratio of Sr.90/Cs-137 in milk observed in European countries was of the order of 1 % (UN Scientific Committee on the Effects of Atomic Radiation draft report No. A/AC.82/R.461 dt. 4-2-87, relevant papers annexed to SLP, Additional Documents submitted by Respondent 2 pp. 47-49). Measurements in India on selected dairy product samples also, confirmed Sr.90/Cs-137 radio reported by UNSCEAR to be in the range 0.5-1/5%. In most of the

imported milk powder samples Sr. 90 was below detection limits. Therefore, Cs-1347 is the most important long-lived radionuclide from the Chernobyl accident; lifetime of Cs-137 is 30 years. Since it can also be measured in a short-time by a sensitive gamma spectrometer, it is the ideal radionuclide for screening of imported food items. It is for these reasons that not only India, but most of the other countries also adopted Cs-137 measurements for screening of the imported food items.

7. Direct deposition of radio-active fallout on a grass surface (called foliar deposition) can rapidly transfer Cs-137 contamination to milk, through the grass-cattle-milk pathway. Therefore, in the first few months after the fallout, there is a greater possibility of milk and dairy products from such areas to be contaminated, as compared to other food items. Of course, over long periods this mode of radio-activity transfer is reduced because once Cs-137 deposits on the soil, its up take by grass through roots is smaller. In view of these facts, milk and dairy products become important items of food which should be carefully measured for possible contamination. Since milk is the staple diet of children, they are a particularly sensitive group of the population.

8. Even though milk and other dairy products are more susceptible to radio-active contamination due to fallout, amongst various dairy products, butter oil is likely to be less contaminated with Cs-137. This is because butter oil is composed of fat, which is separated from the liquid milk fraction in the process of its manufacture. Caesium compounds being highly water soluble, almost all of the Cs-137 is left behind in the liquid portion.

9. The International Commission on Radiological Protection (ICRP) is an unique international non-governmental body of professionals from related disciplines involved in assessing radiation effects and recommending guidelines for the protection of man and his environment. It was established in 1928. ICRP recommendations are followed universally. ICRP has defined limits for the general public as 1mSv per year average over a life span, but in any single year, it should not exceed 5 mSv. The maximum permissible limits for food items etc., are derived by each country as per its national policy, dietary components etc. Therefore, derived limits for food items and dairy products vary from country to country.

10. The Atomic Energy Regulatory Board (AERB) constituted by the Government of India in 1983 is the competent authority for this country for radiological protection, and has been empowered to prescribe acceptable limits of environmental release of radioactive substances.

11. In arriving at maximum permissible limits for butter oil, milk and other food products, AERB has considered ICRP recommendations regarding dose limits for the members of the public and several other factors, e.g. sensitive population group, dietary pattern etc. It has adopted a more conservative approach than other countries. For example, out of 1 mSv/year does limit recommended by ICRP, AERB has allowed only 10% to the exposure through intake of food items (0.1 mSv/y). Further, taking into account the dietary pattern in India and considering milk, meat, cereals and vegetables as the important constituents of Indian diet and their daily consumption by an average

Indian, it has allowed only 0.013 mSvl/y through milk and dairy products. Therefore, if the milk and dairy products containing the permissible level of Cs-137 are consumed in an unrestricted manner throughout the year by an average India, the resulting does for one full year would only be 0.013 mSv, which is less than the dose permitted by ICRP by a factor of more than 50. It is because of this extra safety and caution, that the limits prescribed by AERB, as given in the table at the end, are one of the lowest. Several other countries, and agencies like FAO, on the other hand, have allowed a higher portion of the permitted dose by ICRP (up to full 1 mSv/year) to milk and dairy products, and consequently their permissible limits are higher than those prescribed by AERB.

12. The natural radiation dose varies from place to place in India by a factor of 10, the average being around. 7 mSv/year. Even at the same place it can vary by a factor of 2 and more in different seasons. The biological effects, if any, due to the consumption of food items containing permissible levels of radionuclides will be insignificant and indistinguishable, from those, if any, due to natural sources of radiation in the general population.

13. The concept of permissible levels is not unique to radionuclides. Such levels are prescribed by appropriate agencies for other harmful substances as well, in the case of air and water pollutants and' contaminants (microbial, chemical etc.)

14. Man-made radio isotopes like Cs-137 existed in milk and other dairy and food products in measurable quantities due to atmospheric testing of nuclear weapons, even prior to Chernobyl accident. In India, a network of monitoring stations for such food items has been in operation at BARC since mid-fifties. After the cessation of large scale testing of nuclear weapons in the atmosphere in 1962, as a result of the partial test ban treaty, the levels of Cs-137 in India started declining, after reaching their highest levels, during 1964-65. China and France continued atmospheric testing of weapons up to 70's, though on a much smaller scale, which gave rise to measurable levels of Cs-137 in Indian milk and dairy products. However, at no time the levels exceeded the permissible levels prescribed by AERB.

15. As a consequence of the above monitoring programme pursued at BARC, very sensitive equipment and techniques as well as sampling and monitoring experience has accumulated over the years. AERB, therefore, entrusted them with. the task of measuring post Chernobyl samples of imported food items including milk and dairy products. Thus, in the opinion of the Committee, measurement of butter oil samples has been entrusted to the most competent agency in the country.

16. The butter oil is normally used to make up the fat content of the reconstituted milk (6% for whole milk, for example), and hence it will not form more than a few per cent (maximum 6 per cent) of the milk to be distributed to the public. The level of radio activity in reconstituted milk will, therefore, be diluted by a large factor. Even if it is used for preparation of ghee as the end product, the level of radio activity in ghee will not be significantly different, as both have nearly same (around 99 per cent) fat content. Thus,

no mechanism is envisaged by which the radio activity in the product meant for public distribution using the butter oil, can get concentrated.

17. The petition makes a mention of sampling a measurement procedures for the butter oil consignment received by IDC (now NDDB). In this connection it is observed that three sets of samples from the consignment have been measured at BARC. The first set comprises 2 samples collected by IDC, the second set of 10 samples collected and sent by the Quality Control Officer of Greater Bombay Milk Scheme (GBMS) and the third set of 20 samples collected jointly by the Quality Control Officer of GBMS and the scientists of BARC. Only the first 2 samples showed very small levels of Cs-137 (2.9 Bqkg and 1.3 Bqkg), close to the detection level and all the rest showed below detection levels (detection level being 0.6 Bqkg of Cs-137 activity).-The fact that none of the packages sampled in the three sets of samples collected have shown any significant amount of radio-activity, with the most sensitive equipment used in BARC, it is a clear indication that it is most unlikely that any of the unsampled packages are contaminated with Cs-137 to the permissible limit set by AERB.

The procedures laid down by Indian Standards Institution (now called Bureau of Indian Standards) for materials which are produced in bulk and packed in smaller volume elements should in principles be adequate. These procedures have been followed for the butter consignment. Therefore, on scientific considerations, the steps taken by the respondents are satisfactory.

OPINION

On a consideration of all the relevant facts, the unanimous opinion of the Committee on the question referred to it as follows:

1. The permissible levels of radio-activity in milk, dairy and other food products fixed by the Atomic-Energy Regulatory Board as per its communication of August 27, 1987 have been arrived at after due consideration of ICRP lose limits for the general population.

2. The AERB has allowed more safety margin than other countries, and international organisations like FAO and WHO, in arriving at the levels fixed for milk, dairy and other food products. The levels adopted by AERB are one of the lowest in the world.

3. The consumption of milk, dairy and other food products, having levels of man-made radionuclides below the permissible levels fixed by AERB, by all sections of population, and throughout the year, are safe and harmless.

Kinkri Devi v. State
AIR 1988 Himachal Pradesh 4
Civil Writ Petition No. 82 of 1987, D/-29-5-1987
P.D. Desai, C.J. and R.S. Thakur, J.

Constitution of India, Arts. 51-A (g), 48-A , 226 – Ecological balance – Preservation of against mining operations – Indiscriminate operation of mines proving hazardous to natural wealth and environment – Court will have no option but to intervene by issuing suitable writs, order, direction including direction as to closure of mine in furtherance of constitutional goal enshrined in Arts. 51-A(g) and 48-A.

L.K. Koolval v. State of Rajasthan
AIR 1988 Rajasthan 2 (Jaipur Bench)
D.L. Mehta, J.

1. Right and duty co-exists. There cannot be any right without any duty and there cannot be any duty without any right. It is a happy sign that the citizens of Jaipur, through the present petitioner Mr. L.K. Koolwal has moved to this Court in the manner of sanitation of Jaipur City. Good numbers of affidavits have been filed by the citizen of Jaipur relating to each of the locality referred to in the writ petition to show that the sanitation problem is acute in Jaipur which is hazardous to the life of the citizens of Jaipur. Insanitation leads to a slow poisoning and adversely affects the life of the citizen and invites the death at an earlier date than the natural death.

2. Article 51-A of the Constitution has been inserted in the constitution of India vide 42nd Amendment in 1976. We can call Art. 51-A ordinarily as the duty of the citizens as it creates the right in favour of the citizen to move to the Court to see that the State performs its duties faithfully and the obligatory and primary duties are performed in accordance with the law of land. Omissions or commissions are brought to the notice of the Court by the citizen and thus, Art. 51A gives a right to the citizen to move the Court for an enforcement of the duty cast on State, instrumentalities, agencies, departments, local bodies and statutory authorities created under the particular law of the State. It provides particularly under clause (g) that the State and its instrumentalities and agencies should strive to protect and prove the natural environment. Under clause (j) it has been further provided that the State should (strive towards) collective activity so that the nation constantly rises to the higher levels of endeavour and achievement. Parliament in its wisdom has correctly used the word citizen instead of the word subject to create a feeling of citizenship amongst the masses and also to see that the persons living in the country do not feel that they are subjects. We were used to be the subjects prior to independence, but now we have ceased to be the subject and now we are the citizens of the Country. The requirement of the time is that we should be real citizens of the Country. That can only be achieved if we strive towards the achievement of the goal laid down in the Preamble of the Constitution. Chapter IV directs the principles of the Constitution and Art. 51-A of Chapter IVA. Prior to 1976 everyone used to talk of the rights but none cared to think that there is a duty also. The right cannot exist without a duty and it is the duty of

the citizen to see that the rights which he has acquired under the Constitution as a citizen are fulfilled.

3. Citizen has a right to know about the activities of the State, the instrumentalities, the departments and the agencies of the State. The privilege of secrecy which existed in the old times that the State is not bound to disclose the facts, does not survive now to a great extent. Under Art. 19(1)(a) of the constitution there exists the right of freedom of speech. Freedom of speech is based on the foundation of the freedom of right to know. The State can impose and should impose the reasonable restrictions in the matter like other fundamental rights where it affects the national security and any other allied matter affecting the nation's integrity. But this right is limited and particularly in the matter of sanitation and other allied matter every citizen has a right to know how the State is functioning and why the State is withholding such information in such matters. Mr. Koolwal has approached this Court in exercise of rights vested in him under Art. 51A, though it is said to be a duty, that the Court should issue directions against the respondents to implement the law, the Municipal Law and to perform the obligatory duties cast on the State. Maintenance of health, preservation of the sanitation and environment falls within the purview of Art. 21 of the Constitution as it adversely affects the life of the citizen and it amounts to slow poisoning and reducing the life of the citizen because of the hazards created, if not checked.

4. In the instant case, Mr. Vimal Choudhary was appointed as Commissioner by the Court and he has submitted the report earlier and pointed out the dirtiness existed at that time in some parts of the City. Yesterday, the Court requested Mr. G.S. Bafna, Mr. Vimal Choudhary, Mr. R.K. Kala, Administrator, Municipal Board and others to visit the same site and to make submission about the existing condition prevalent the present petitioner has given a long list of the areas and that all the details supported by the affidavits of the residents of that locality to show that there is in-sanitation, which is injurious to the health of the citizen and the mandamus must be issued against the Municipality to perform the obligatory duties cast on it. He has also submitted the sketch map and also suggested some measures for the improvement of the sanitation of the Jaipur City. A person who acts as a citizen, a real citizen, who highlights the problem of the city and who brings to the notice the conditions which are hazardous to the life of the citizens, needs appreciation by the Court as such persons are very few in the country at this moment.

5. Under Chap. 6 of the Rajasthan Municipalities Act, 1959, S. 98 provides that it is the duty of every Board to make reasonable provisions referred therein within the Municipality under its authority. Cls. (c) and (d) of S. 98 reads as under: -

> (c) "*cleaning public streets, places and sewers, and all spaces, not being private property, which are open to the enjoyment of the public, whether such spaces are vested in the Board or not, removing noxious vegetation and obtaining all public nuisances."*

(d) "removing filth, rubbish, night-soil odour, or any other noxious or offensive matter from privies, latrines, urinals, cess-pools or other common receptacles for such matter in or pertaining to a building or buildings."

6. It will not be out of place here to mention that Chapter VI deals with three of duties of the Municipality namely, primary duty, secondary functions and special duty. Cleaning public streets, places and sewers, and all spaces, not being private property which are open to the enjoyment of the public, whether such spaces are vested in the Board or not, removing noxious vegetation and all public nuisance are the primary duties of the Municipality. Furthermore, it provides that it is the primary duty of the Municipal Council to remove filth, rubbish, night-soil, odour or any other noxious or offensive matter. The primary duties will have to be performed by the Municipal Board and there cannot be any plea whether the funds are available or not; whether the staff is available or not. It is for the Municipality to see how to perform the primary duties and how to raise resources for the performance of that duty. In the performance of primary duty no excuse can be taken and can be directed also as it is primary, mandatory and obligatory duty to perform the same.

7. The Commissioner, Mr. Vimal Choudhary, eminent lawyers Mr. R.K. Kala and Mr. G.S. Bafna visited yesterday Chokri Modi Kana area and submitted the written report today. It was submitted that the Municipality have effectively taken some steps in that area and though the problem exists but the quantum has been reduced. It was further pointed out that in Radha Damodar Ji Ka Gali the sanitation problem is because of the encroachment made by the fabricators. It was also pointed out by Mr. Kala particularly that because of 'SARIS' there is also insanitation in Lalji Sand Ka Rasta and it was supported also by the Commissioner Mr. Vimal Choudhary and Mr. G.S. Bafna equally with same vigilance. It was also submitted that in Tomar Ji Ka Nohra there is a problem of insanitation because of the buffaloes which are tied on the road and the problem is created by the persons of that very locality. It was also submitted that because of the old in sanitary latrines which exist nearby Acharya Ka Gali, there is a problem of insanitation and it is very difficult for the people to move through that area and the odour is so bad that one cannot move.

8. Mr. Koolwal who is the real person to plead the case was not satisfied to a great extent and submits that it is true that in some parts of Chokri Modi Khana the Municipal Board has taken step to remove the dirt, filth etc. and to provide some hygienic condition. A pertinent question was placed by Mr. Koolwal that what about the other parts of the city which he had referred in the writ petition and why the Municipal Council has not taken steps to clean that area so far. It was also submitted by Mr. Koolwal that the sanitation problem is throughout the city and the special efforts will have to be made. -A special effort has been made by the Municipality to some extent. He has also submitted that some steps have been taken by the Municipality, but the taking of some steps will not suffice and the directions should be issued to the Municipality to see that the provisions of Cls.(c) and (d) of S. 98 of the Municipal Act are implemented in its true spirit. On behalf of Municipality Mr. Mehta submitted that Municipality has taken keen interest in the sanitation problem of the city and he has submitted that the very report of the

Commissioner is an indicative that the Municipality has taken steps though there may be latches somewhere and there may be necessity for the removal of dirt, night-soil filth etc. Mr. Mehta submits that the Municipality is trying its best to implement the provisions of Cls. (c) and (d) of S. 98. But he is not in a position to say whether it has been implemented in full. He has given an affidavit that the Administrator has taken steps and has divided the area into zones and regular inspections are done now and problem which exists in the city of Jaipur particularly relating to the sanitation shall be dealt with in some time and as a result of which the people of Jaipur may not have any complaint about the sanitation and they may appreciate the Municipal Council for the work done by them. I am of the view that the Municipality has taken steps but the provisions of Cls. (c) and (d) of S. 98 have not been implemented in full and the sanitation problem exists even today. This is evident from the submissions made by the Commissioner Mr. Vimal Choudhary, Mr. G.S. Bafna and Mr. R.K. Kala Advocates who have visited the same sites yesterday. This is also evident from the affidavits filed by the various citizens. Mr. U.N. Bhandari, an eminent lawyer of this Court voluntarily submitted that the manhole nearby the house of Mr. S.R. Surana, Advocate is lying open for quite some time and the condition of the sanitation is not good.

9. Taking into consideration the serious allegation made in the affidavits and spontaneous submissions made by some of the eminent members of the Bar in the Court during the course of argument as well as taking into consideration the report of the Commissioner, which is the foundation for arriving at the conclusion, I am of the view that the problem of sanitation is very acute in Jaipur city and it is creating hazard to the life of the citizens. It is true that now after a lapse of time, the Municipality has awakened and is trying to do something and let us hope that they will do something within a short period.

10. In the result, I accept the writ petition and hereby direct the Municipality to remove the dirt, filth etc. within a period of six months and clean the entire Jaipur city and particularly in relation to the areas mentioned in the list submitted by the petitioner with this writ petition. Some applications have also been filed by some persons during the course of hearing about different areas and the Municipality will see that the sanitation is maintained in accordance with the provisions of Cls.(c) and (d) of s. 98, in those areas also. A team of five eminent Advocates of this Court is appointed as Commissioner in this case to inspect the city with the petitioner and Administrator, Municipality and to submit the report about the implementation of provisions of Cls. (c) and (d) of S. 98. The team shall consist of Mr. U.N. Bhandari, Mr. D.L. Bardhar, Mr. R.K. Kala, Mr. G.S. Bafna and Mr. Vimal Choudhary, Mr. U.N. Bhandari shall fix up the date in consultation with other Advocates, the petitioner and Administrator, Municipal Council. It is a healthy sign that the Advocates of this Court have voluntarily offered their services and they have decided not to charge any fees in the performance of the duty, particularly as it relates to the city in which they are residing. The petitioner and Administrator, Municipal Council shall also accompany them and prepare the report of the area referred to in the writ petition as well as in the applications. In the first month the report shall be given about the area of Ch. Topkhana Desh, Ch. Visheshwariji and Ch. Topkhana Hujuri. In the second month the report shall be given about the area of Ramganj Chopar, Purani Basti and Badi Chopar. In the coming months the report shall be given about the remaining

parts of the cities which are not mentioned in the writ petition. After the dictation of this part of the judgement it was submitted by the Administrator, Municipal Council that it is very difficult to clean the entire city within the stipulated period of six months. It has been made very clear that it is not the duty of the Court to see whether the funds are available or not and it is the duty of the Administrator, Municipal Council to see that the primary duties of the Municipality are fulfilled. Municipality cannot say that because of the paucity of fund or because of paucity of staff they are not in a position to perform the primary duties. If the Legislature or the State Govt. feels that the law enacted by them cannot be implemented then the Legislature has liberty to scrap it, but the law which remains on the statutory books will have to be implemented, particularly when it relates to primary duty.

Order accordingly.

M.C. Mehta v. Union of India
AIR 1988 Supreme Court 1037
Writ Petition No. 3727 of 1985, D/- 22-9-1987
E.S. Venkataramiah and K.N. Singh, JJ.

Water (Prevention and Control of Pollution) Act (6 of 1974), Ss. 16 and 17 – Environment (Protection) Act (29 of 1986), litigation –Tanneries discharging effluent in Ganga and not setting up primary treatment plan in spite of being asked to do so for several years, not caring to put in appearance to express willingness to set up pre-treatment plan – Order directing them to stop working their tanneries issued.

Where in a public interest litigation owners of some of the tanneries discharging effluents from their factories in Ganga and not setting up a primary treatment plant in spite of being asked to do so for several years did not care in spite of notice to them even to enter appearance in the Supreme Court to express their willingness to take appropriate steps to establish the pre-treatment plants it was held that so far as they were concerned an order directing them to stop working their tanneries should be passed. It was observed that the effluent discharged from a tannery is ten times noxious when compared with the domestic sewage water which flows into the river from any urban area on its banks. It was further observed that the financial capacity of the tanneries should be considered as irrelevant while requiring them to establish primary treatment plants. Just like an industry which cannot pay minimum wages to its workers cannot be allowed to exist, a tannery which cannot set up a primary treatment plant cannot be permitted to continue to be in existence for the adverse effect on the public at large which is likely to ensure by discharging of the trade effluents from the tannery to the river Ganga would be immense and it will outweigh any inconvenience that may be caused to the management and the labour employed by it on account of its closure.

(Paras 13, 19)

VENKATARAMIAH, J.:- This is a public interest litigation. The petitioner who is an active social worker has filed this petition inter alia for the issue of a writ/ order/ direction in the nature of mandamus to the respondents other than Respondents 1 and 7 to 9 restraining them from letting out the trade effluents into the river Ganga till such time they put up necessary treatment plants for treating the trade effluents in order to arrest the pollution of water in the said river. Respondent 1 is the Union of India, Respondent 7 is the Chairman of the Central Board for Prevention and Control of Pollution, Respondent 8 is the Chairman, Uttar Pradesh Pollution Control Board and Respondent 9 is the India Standards Institute.

2. Water is the most important of the elements of the nature. River valleys are the cradles of civilization from the beginning of the world. Aryan civilization grew around the towns and villages on the banks of the river Ganga. Varanasi which is one of the cities on the banks of the river Ganga is considered to be one of the oldest human settlements in the world. It is the popular belief that the river Ganga is the purifier of all but we are now led to the situation that action has to be taken to prevent the pollution of the water of the Ganga since we have reached a stage that any further pollution of the river water is likely to lead to a catastrophe. There are today large towns inhabited by millions of people on the banks of the river Ganga. There are also large industries on its banks. Sewage of the towns and cities on the banks of the river and the trade effluents of the factories and other industries are continuously being discharged into the river. It is the complaint of the petitioner that neither the Government nor the people are giving adequate attention to stop the pollution of the river Ganga. Steps have, therefore, to be taken for the purpose of protecting the cleanliness of the stream in the river Ganga, which is in fact the life sustainer of a large part of the northern India.

3. When this petition came up for preliminary hearing, the Court directed the issue of notice under O.I.R. 8 of the Code of Civil Procedure treating this case as a representative action by publishing the gist of the petition in the newspapers in circulation in northern India and calling upon all the industrialists and the municipal corporations and the town municipal councils having jurisdiction over the areas through which the river Ganga flows to appear before the Court and to show cause as to why directions should not be issued to them as prayed by the petitioner asking them not to allow the trade effluents and the sewage into the river Ganga without appropriately treating them before discharging them into the river. Pursuant to the said notice a large number of industrialists and local bodies have entered appearance before the Court. Some of them have filed counter-affidavits explaining the steps taken by them for treating the trade effluents before discharging them into the river. When the above case came up for consideration before the Court on the last date of hearing we directed that the case against the tanneries at Jajmau area near Kanpur would be taken up for hearing first. Respondents 15 to 87 and 89 are the tanneries near Kanpur. Of them respondents 16 to 32, 34 to 36, 43, 47, 52, 54, 55, 57, 58, 60 to 62, 64, 67 to 69, 72, 74, 75, 77 to 82, 85, 87 and 89 are represented by counsel. The remaining tanneries did not appear before the Court at the time of the hearing nor were they represented by any counsel.

4. Before proceeding to consider the facts of this case it is necessary to state a few words

about the importance of and need for protecting our environment. Article 48-A of the Constitution provides that the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country. Article 51-A of the Constitution imposes as one of the fundamental duties on very citizen the duty to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures. The proclamation adopted by the United Nations Conference on the Human Environment which took place at Stockholm from 5th to 16th of June, 1972 and in which the Indian delegation led by the Prime Minister of India took a leading role runs thus.

(1) Man is both creature and moulder of his environment which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when through the rapid acceleration of science and technology, man has acquired the power, to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and the man-made, are essential to his well being and to the enjoyment of basic human rights-Even the right to life itself.

(2) The protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world, it is the urgent desire of the peoples of the whole world and the duty of all Governments.

(3) Man has constantly to sum up experience and go on discovering, inventing, creating and advancing. In our time man's capability to transform his surroundings, if used wisely, can bring to all peoples the benefits of development and the opportunity to enhance the quality of life. Wrongly or heedlessly applied, the same power can do incalculable harm to human beings and the human environment. We see around us growing evidence of man-made harm in many regions of the earth; dangerous levels of pollution in water, air, earth and living beings; major and undesirable disturbances to the ecological balance of the biosphere; destruction and depletion of irreplaceable resources; and gross deficiencies harmful to the physical, mental and social health of man, in the man-made environment; particularly in the living and working environment.

A point has been reached in history when we must shape our actions throughout the world with a more prudent care for their environmental consequences. Through ignorance or indifference we can do massive and irreversible harm to the earthly environment on which our life and well-being depend. Conversely, through fuller knowledge and wiser action, we can achieve for ourselves and our posterity a better life in an environment more in keeping with human needs and hopes. There are broad vistas for the enhancement of environmental quality and the creation of a good life. What is needed is an enthusiastic but calm state of mind and intense but orderly work. For the purpose of attaining freedom in the world of nature man must use knowledge to build in collaboration with nature a better environment. To defend and improve the human

environment for present and further generations has become an imperative goal for mankind a goal to be pursued together with, and in harmony with, the established and fundamental goals of peace and of world-wide economic and social development.

To achieve this environmental goal will demand the acceptance of responsibility by citizens and communities and by enterprises and institutions at every level, all sharing equitably in common efforts. Individuals in all walks of life as well as organizations in many fields, by their values and the sum of their actions, will shape the world environment of the future. Local and National Governments will bear the greatest burden for large-scale environmental policy and action within their jurisdiction. International co-operation is also needed in order to raise resources to support the developing countries carrying out their jurisdictions. International co-operation is also needed in order to raise resources to support the developing countries carrying out their responsibilities in this filed. A growing class of environmental problems, because they are regional or global in extent or because they affect the common international realm, will require extensive cooperation among nations and action by international organizations in the common interest. The Conference calls upon the Governments and peoples to exert common efforts for the preservation and improvement of the human environment, for the benefit of all the people and for their posterity.

The proclamation also contained certain common convictions of the participant nations and made certain recommendations on development and environment. The common convictions stated include the conviction that the discharge of toxic substances or of other substances and the release of heat in such quantities or concentrations as to exceed the capacity of environment to render them harmless must be halted in order to ensure that serious or irreversible damage is not inflicted upon eco systems, that States shall take all possible steps to prevent pollution of the seas so that hazards to human health, harm to living resources and marine life, damage to the amenities or interference with other legitimate uses of seas is avoided, that the environmental polices would enhance and not adversely affect the present and future development potential of development countries, that science and technology as part of their contributions to economic and social development must be applied with identification, avoidance and control of environmental risks and the solution of environmental problems and for the common good of mankind, that States have the responsibility to ensure that activities of exploitation of their own resources within their jurisdiction are controlled and do not cause damage to the environment of other States or areas beyond the limit of national jurisdiction, that it will be essential in all cases to consider the systems of values prevailing in each country and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost and that man and his environment must be spared the effects of nuclear weapons and all other means of mass destruction. These are only some of the statements of principles proclaimed by the Stockholm Conference. (Vide Lal's Commentaries on Water and Air Pollution Laws (2nd Edn.)

5. Realising the importance of the prevention and control of pollution of water for human existence Parliament has passed the Water (Prevention and Control of Pollution) Act,

1974 (Act 6 of 1974) (hereinafter referred to as the Act) to provide for the prevention and control of water pollution and the maintaining or restoring of wholesomeness of water, for the establishment, with a view to carrying out the purposes aforesaid of Boards for the prevention and control of water pollution, for conferring on and assigning to such Boards powers and functions relating thereto and for matters connected therewith. The Act was passed pursuant to resolutions passed by all the Houses of Legislatures of the States of Assam, Bihar, Gujarat, Haryana, Himachal Pradesh, Jammu and Kashmir, Karnataka, Kerala, Madhya Pradesh, Rajasthan, Tripura and West Bengal under Cl. (1) of Art. 252 of the Constitution to the effect that the prevention and control of water pollution should be regulated in those States by Parliamentary legislation. The Act has been since adopted by the State of Uttar Pradesh also by resolutions passed in that behalf by the Houses of Legislature of the said State in the year 1975 (vide notification No. 897/IX-3-100-74 dated 3-2-1975). Section 24 of the Act prohibits the use of any stream or well for disposal of polluting matter etc. It provides that subject to the provision of the said Act any poisonous, noxious or polluting matter determined in accordance with such standards as may be laid down by the State Board to enter whether directly or indirectly into any stream or well or no person shall knowingly cause or permit to enter into any stream any other matter which may tend either directly or in combination with similar matters to impede the proper flow of the water of the stream in a manner leading or likely to lead to a substantial aggravation of pollution due to other causes or of its consequences. The expression stream is defined by S. 2 (j) of the Act as including river water course whether flowing or for the time being dry, inland water whether natural or artificial, sub-terranean waters, sea or tidal waters to such extent or as the case may be to such point as the State Government may by notification in the Official Gazette, specify in that behalf. Under that Act it is permissible to establish a Central Board and the State Boards. The functions of the Central Board and the State Boards are described in Ss. 16 and 17 respectively. One of the functions of the State Board is to inspect sewage or trade effluents, works and plants for the treatment of sewage and trade effluents and to review plans, specification of other data relating to plants set up for the treatment of water works for the purification and the system for the disposal of sewage or trade effluents. 'Trade effluent' includes any liquid, gaseous or solid substance which is discharged from any premises used for carrying on any trade or industry, other than domestic sewage. The State Board is also entrusted with the work of laying down standards of treatment of sewage and trade effluents to be discharged into particular stream taking into account the minimum fair weather dilution available in that stream and the tolerance limits of pollution permissible in the water of the stream, after the discharge of such effluents. The State Board is also entrusted with the power of making application to courts for restraining apprehended pollution of water in streams or well. Notwithstanding the comprehensive provisions contained in the Act no effective steps appear to have been taken by the State Board so far to prevent the discharge of effluents of the Jajmau near Kanpur to the river Ganga. The fact that such effluents are being first discharged into the municipal sewerage does not absolve the tanneries from being proceeded against under the provisions of the law in force since ultimately the effluents reach the river Ganga from the sewerage system of the municipality.

6. In addition to the above Act, Parliament has also passed the Environment (Protection) Act, 1986 (29 of 1986) which has been brought into force throughout India with effect from Nov. 19, 1986. Section 3 of this Act confers power on the Central Government 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. 'Environment' includes water, air and land and the inter-relationship which exists among and between water, air and land and human beings, other living creatures, plants, micro organism and property. (Vide S. 2 (a) of the Environment (Protection) Act, 1986). Under S. 3 (2) (iv) of the said Act the Central Government may lay down standards for emission or discharge of environmental pollutants from various sources whatsoever. Notwithstanding anything contained in any other law but subject to the provisions of the Environment (Protection) Act, 1986, the Central Government may under S. 5 of the Act, in the exercise of its powers and performance of its functions under that Act issue directions in writing to any person, officer or authority and such authority is bound to comply with such directions. The power to issue direction under the said section includes the power to direct the closure, prohibition or regulation of any industry, operation or process or stoppage or regulation of the supply of electricity or water or any other service. Section 9 of the said Act imposes a duty on every person to take steps to prevent or mitigate the environmental pollution. Section 15 of the said Act contains provisions relating to penalties that may be imposed for the contravention of any of the provisions of the said Act or directions issued thereunder. It is to be noticed that not much has been done even under this Act by the Central Government to stop the grave public nuisance caused by the tanneries at Jajmau Kanpur.

7. All the tanneries at Jajmau, Kanpur which were represented by counsel, except respondents Nos. 87 and 89 have relied upon a common counter-affidavit filed by them and their case is argued by Shri S. K. Dholakia and Shri Mukul Mudgal. Respondent No. 87 is represented by Shri R. P. Gupta and respondent No.89 is represented by Shri P. Narasimhan. There is not much dispute on the question that the discharge of the trade effluents from these tanneries into the river Ganga has been causing considerable damage to the life of the people who use the water of the river Ganga and also to the aquatic life in the river. The tanneries at Jajmau in Kanpur have themselves formed an association called Jajmau Tanners Pollution Control Association with the objects among others:

(1) To establish, equip and maintain laboratories, workshop, institutes, organization and factories for conducting and carrying on experiments and to provide funds for the main objects of the Company.

(2) To procure and import wherever necessary the chemicals etc. for the purpose of pollution control in tanning industries.

(3) To set up and maintain common effluent treatment plant for member tanners in and around Jajmau.

(4) To make periodical charges on member for the effluent treatment based on the benefit he/it derives from time to time to meet the common expenses for maintenance, replacement incurred towards effluent treatment.

8. In the Fiscal Plan for setting up common Effluent Treatment Plants for India Tanning Industry- (March, 1986) prepared by the committee constituted by the Directorate General of Technical Development (Government of India) it is observed thus:-

> "Leather industry is one of the three major industries besides paper and textiles consuming large quantities of water for processing of hides and skins into leather. Naturally most of the water used is discharged as waste water. The waste water contains putrescible organic and toxic inorganic materials which when discharged as such will deplete dissolved oxygen content of the receiving water courses resulting in the death of all aquatic life and emanating foul odour. Disposal of these untreated effluents on to land will pollute the ground water resources. Discharging of these effluents without treatment into public sewers results in the choking of sewers.
>
> Realising the importance of keeping the environment clean, the Government of India has enacted the Water Pollution Control Act (Central Act 6 of 1974) and almost all the State Governments has adopted the Act and implementing the Act by forming the Pollution Control Boards in their respective States. The Pollution Control Boards have been insisting that all industries have to treat their effluents to the prescribed standards and leather industry is no exception to this rule. Tanneries situated all over the country have been faced with the problem of treating their effluents. Seized with the problem of finding out a solution, the Central Leather Research Institute, Madras has brought out of Management Investment Report (CLRI core Committee Report) as early as 1976 which contains 14 flow sheets indicating the treatment technologies for various types of leather processing techniques, quantity of effluents etc. including the cost of treatment.

8A. A monograph entitled 'Treatment Technology of Tanner Effluents' prepared by S. Rajamani, W. Madavakrishna and G. Thygarajan of the Central Leather Research Institute, Adyar, Madras states that generally the waste water from beam house process namely soaking, liming, delimiting etc. are highly alkaline containing decomposing organic matter, hair, lime sulphide etc. and is nearly ten times as strong as domestic sewage and refers to the various methods by which the effluents of the tanneries could be treated before their discharge into any river. They recommend four types of waste water treatment technology so far as the tanneries are concerned- 1) segregation or mixing of suitable sectional waste water from different processes; 2) primary treatment; 3) secondary biological treatment; and 4) disposal of solid wastes from the treatment system. The said monograph explains the work at the primary treatment unit thus:-

> "The primary treatment units principally comprise of coarse screens, two numbers of settling tanks and sludge drying beds. The settling tank, each of about 1-2 days capacity acts as an equalization-cum-settling tank as well. As an alternative, clarifier can be provided in place of settling tank for treating higher capacity effluents. Depending of the quality of composite effluent, addition of neutralising chemicals like lime, alum, ferric chloride etc. would be required for effective precipitation of chromium and removal of suspended solids in the sedimentation process. The sludge from the settling tanks and clarifier is removed and dried on sludge drying beds made up of filtering media gravel, sand and supporting masonry structure. For

operational reasons, sludge drying beds are divided into four or more compartments. The dried sludge from the sludge drying beds can be used as manure for landfill if it is vegetable tannery waste. In case of chrome tannery waste, the dried sludge should be buried or disposed off suitably as per the directions of regulatory agencies and local bodies".

9. The secondary treatment units are explained in the said monograph thus:

"The pre-treated effluent needs suitable secondary biological treatment to meet the pollution control standards. The general biological treatment units which can be adopted under Indian conditions are anaerobic lagoon, aerated lagoon, extended aeration systems like oxidation ditch, activated sludge process etc.

Anaerobic lagoon is a simple anaerobic treatment unit suitable for effluents with high BOD like vegetable tannery (Raw to E.1) waste water. In depth the lagoon varies from 3-5 metres and detention time from 10-20 days depending upon the pollution load and atmospheric conditions. This is an open type digester with no provision for gas collection. No power is required for this system and its performance is proved to be efficient in South Indian conditions.

Anaerobic contact filter is also an anaerobic treatment unit. This is a closed tank type unit made up of R.C.C. or masonry structure filled up with media like broken granite stones etc. This unit occupies less land area since the detention time is about 1-2 days only. This system is reported to be efficient for treating high organic load, but the capital cost would be comparatively high.

Aerated lagoon is a shallow water tight pond of about 2-3 metres depth with a detention time of about 4-6 days. Fixed or floating type surface aerators are provided to transfer oxygen from atmospheric air to the effluent for biological treatment using micro organisms under aerobic conditions. The system is suitable for treating low organic load.

Extended aeration systems like 'activated sludge process' and 'oxidation ditch' are the improved aerobic biological treatment systems occupying less land area since the detention time/capacity would be only about 1-2 days. These units require secondary settling tank and sludge re-circulation arrangements. Extended aeration systems are proved to be efficient. The operational and maintenance cost is comparatively high for smaller installations, but economical for treatment capacity of 150 M^3 and above per day."

10. A study of the conditions prevailing at Jajmau, Kanpur was made by the Sub Committee on Effluent Disposal constituted by the Development Council for Leather and Leather Goods Industries along with the various tanneries situated in some other parts of India and in its report submitted in April, 1984, the Sub-Committee has observed in the case of tanneries at Jajmau, Kanpur thus:-

"In the case of Jajmau, Kanpur, the committee visited few tanneries where the effort has been made to have primary treatment of the effluent before it is discharged to the

common drain/the river Ganges. There are 60 tanneries in Jajmau which will be covered under joint effluent disposal. The total production is to the tune of 12000 hides with a total discharge of 5 million litres per day. The State Government has taken appropriate steps in preparation of the feasibility report under the guidance of U.P. Pollution Control Board. This proposal was also supported by Central Pollution Board, Delhi by sharing the total fee of Rs. 80,000 to be paid to the Public Health Engineering Constancy, Bombay which has prepared the report with the help of IIT, Bombay. The report suggests that each tanner should take arrangement for the primary treatment of their effluent and then it will be discharged into common treatment plant."

11. There is a reference to the Jajmau tanneries in 'an Action Plan for Prevention of Pollution of the Ganga' prepared by the Department of Environment, Government of India in the year 1985, which is as under:-

"1.1 The Ganga drains eight State Himachal Pradesh, Punjab, Haryana, Uttar Pradesh, Rajasthan, Madhya Pradesh, Bihar West Bengal and the Union Territory of Delhi. It is also the most important river of India and has served as the cradle of Indian Civilization. Several major pilgrim centre have existed on its banks for centuries and millions of people come to bathe in the river during religious festivals, especially the Kumbhas of Haridwan and Allahabad. Main towns on the Ganga, e.g., Kanpur, Allahabad, Patna and Calcutta have very large populations and the river also serves as the source of water supply for these towns. The Ganga is, however, being grossly polluted especially near the towns situated on its banks. Urgent steps need to be taken to prevent the pollution and restore the purity of river water.

2.0. Sources of Pollution

2.1. The main sources of pollution of the Ganga are the following:-

Urban liquid waste (sewage, storm drainage mixed with sewage, human, cattle and kitchen wastes carried by drains etc.

Industrial liquid waste

Surface run-off of cultivated land where cultivators use chemical fertilisers, pesticides, insecticides and such manures the mixing of which may make the river water unsafe for drinking and bathing.

Surface run-off from areas on which urban solid waters are dumped

Surface run-off from areas on which industrial solid wastes are dumped

.....

4.4.12 Effluent from industries:

Under the laws of the land the responsibility for treatment of the industrial effluents is that of the industry. While the concept of 'Strict Liability' should be adhered to

in some cases, circumstances may require that plans for sewerage and treatment systems should consider industrial effluents as well. Clusters of small industries located in a contiguous area near the river bank and causing direct pollution to the river such as the tanneries in Jajmau in Kanpur is a case in point. In some cases, waste waters from some industrial units may have already been connected to the city sewer and, therefore, merit treatment along with the sewage in these wage treatment plant. It may also be necessary in some crowded areas to accept waste waters of industries in a city sewer to be fed to the treatment plant, provided the industrial waste is free from heavy metals, toxic chemicals and is not abnormally acidic or alkaline.

In such circumstances, scheme proposals have to carefully examine the case of integrating or segregating industrial wastes for purposes of conveyance and treatment as also the possibilities for appointment of capital and operating costs between the city authorities and the industries concerned." (Emphasis added)

12. Appearing on behalf of the Department of Environment, Government of India, Shri B. Dutta the learned 1st Additional Solicitor General of India placed before us a memorandum explaining the existing situation at Jajmau area of Kanpur. It reads thus:

"Status regarding construction of treatment facilities for treatment of wastes from Tanneries in Jajmau area of Kanpur.

1. About 70 small, medium and large tanneries are located in Jajmau area of Kanpur. On an average they generate 4.5 MLD of waste water.

2. Under the existing laws, tanneries like other industries are expected to provide treatment of their effluents to different standards depending on whether these are discharged into stream or land. It is the responsibility of the industry concerned to ensure that the quality of the wastewater conforms to the standards laid down.

3. From time to time, tanneries of Kanpur have represented that due to lack of physical facilities, technical know-how and funds, it has not been possible to install adequate treatment facilities.

4. Jajmau is an environmentally degraded area of Kanpur. The location of numerous tanneries in the area is a major cause of the degradation. Civic facilities for water supply, sanitation, solid waste removal etc. are also highly inadequate. Because the area abuts the Ganga river, its pollution affects the river quality as well. Accordingly, under the Ganga Action Plan an integrated sanitation project is being taken up for the Jajmau area. Some aspects of the Plan relate to tannery wastes as follows:

    (i) The medium and large units will have to up pre-treatment facilities to ensure that the standard of sewage discharged into the municipal sewer also conform to the standards laid down. Scientific institutions such as Central Leather Research Institute are looking into the

possibilities of pre-treatment including recovery of materials such as chromium. The setting up of pre-treatment facility in the respective units will be the responsibility of the individual units concerned. The Ganga Project Directorate as part of the Ganga Action Plan, will play a facilitative role to demonstrate application of modern technologies for cost effective pre-treatment which the small tanners can afford.

(ii) Since the wastes will be ultimately discharged into the river, the waste will have to further conform to the standards laid down for discharge into the stream. For this purpose, it will be necessary to treat the waste further and as part of the Ganga Action Plan a treatment plant will be constructed for this purpose utilising some advanced processes. It is also proposed to combine the domestic waste with the industrial waste conveyed through the industrial sewer which will then be treated in a treatment plant.

(iii) It is estimated that cost of this proposed sewage treatment facility which will treat the waste from the domestic sources and the pre-treated wastes from tanneries will be about Rs. 2.5 crores. It will have a capacity of 25 MLD and the first demonstration module of about 5 MLD is expected to be installed in early 1988-89. Necessary work for designing of the plant has already been initiated and the infrastructure facilities such as availability of land, soil testing etc. have also been ensured. Tender specifications are being provided and it is expected that the tenders will be floated sometime in October 87. It is expected that in the combined treatment facility of 25 MLD, about 20 MLD will be from the domestic sources and 5 MLD will be from the domestic sources and 5 MLD will be from the tanneries after pre-treatment in the region.

13. In the counter-affidavit filed on behalf of the Hindustan Chambers of Commerce, of which 43 respondents are members it is admitted that the tanneries discharge their trade effluents into the sewage nullah which leads to the municipal sewage plant before they are thrown into the river Ganga. It is not disputed by any of the respondents that the water in the river Ganga is being polluted grossly by the effluent discharged by the tanneries. We are informed that six of the tanneries have already set up the primary treatment plants for carrying out the pre-treatment of the effluent before it is discharged into the municipal sewerage which ultimately leads to the river Ganga. About 14 of the tanneries are stated to be engaged in the construction of the primary treatment plants. It is pleaded on behalf of the rest of the Tanneries who are the members of the Hindustan Chambers of Commerce and three other tanneries represented by Shri Mukul Mudgal that if some time is given to them to establish the pre-treatment plants they would do so. It is, however, submitted by all of them that it would not be possible for them to have the secondary system for treating wastewater as that would involve enormous expenditure which the tanneries themselves would not be able to meet. It is true that it may not be possible for the tanneries to establish immediately the secondary system plant in view of the large

expenditure involved but having regard to the adverse effect the effluents are having on the river water, the tanneries at Jajmau, Kanpur should, at least set up of the primary treatment plants and that is the minimum which the tanneries should do in the circumstances of the case. In the counter-affidavit filed on behalf of the Hindustan Chamber of Commerce it is seen that the cost of pre-treatment plant for a 'A' class tannery is Rs. 3,68,000/-, the cost of the plant for a 'B' class tannery is Rs. 2,30,000/- and the cost of the plant for 'C' class tannery is Rs. 50,000/-. This cost does not appear to be excessive. The financial capacity of the tanneries should be considered as irrelevant while requiring them to establish primary treatment plants. Just like an industry which cannot pay minimum wages to its workers cannot be allowed to exist a tannery which cannot set up a primary treatment plant cannot be permitted to continue to be in existence for the adverse effect on the public at large which is likely to ensure by the discharging of the trade effluents from the tannery to the river Ganga would be immense and it will outweigh any inconvenience that may be caused to the management and the labour employed by it on account of its closure. Moreover, the tanneries involved in these cases are not taken by surprise. For several years they are being asked to take untreated wastewater from their factories into the river. Some of them have already complied with the demand. It should be remembered that the effluent discharged from a tannery is ten times noxious when compared with the domestic sewage water which flows into the river from any urban area on its banks. We feel that the tanneries at Jajmau, Kanpur cannot be allowed to continue to carry on the industrial activity unless they take steps to establish primary treatment plants. In cases of this nature this Court act affecting or likely to affect the public is being committed and the statutory authorities who are charged with the duty to prevent it are not taking adequate steps to rectify the grievance. For every breach of a right there should be a remedy. It is unfortunate that a number of tanneries at Jajmau even though they are aware of these proceedings have not cared even to enter appearance in this Court to express their willingness to take appropriate steps to establish the pre-treatment plants. So far as they are concerned an order directing them to stop working their tanneries should be passed. We accordingly direct M/s. Delight Tannery (respondent 14), M/s. Hindustan Tannery (respondent 15), M/s. Primer Allarmin Tannery (respondent 33), M/s. Mahaboob Tannery (respondent 38), M/s. Standard Tannery (respondent 39), M/s. Vikash Tannery (respondent 40), M/s. New Golden Tannery (respondent 41), M/s. D.D. Tannery (respondent 42), M/s. Himalaya Tannery (respondent 44), M/s. Commercial Industry Tannery (respondent 45), M/s. Madina Tannery (respondent 46), M/s. Kanpur Tannery (respondent 48), M/s. New Jab Tannery (respondent 49), M/s. Famous Tannery (respondent 50), M/s. Glaxy Tannery (respondent 53), M/s. Bengal Tannery (respondent 56), M/s. Chhangal Tannery (respondent 59), M/s. Nadari Tannery (respondent 63), M/s. Jajmau Tannery (respondent 65), M/s. International Tanning Industry (respondent 66), M/s. Poorwanchal Tanning Industry (respondent 70), M/s. Navratan Tanning (respondent 71), M/s. Haroou Tanning (respondent 73), M/s. Himalaya Tanning (respondent 76), M/s. R. A. Traders Tanning (respondent 79), M/s. Alam Tanning (respondent 83), M/s. G.T. Tanning (respondent 84), and M/s. Awadh Tanning (respondent 86), to stop the running of their tanneries and also not to let out trade effluents from their tanneries either directly or indirectly into the river Ganga without subjecting the trade effluents to a pre-treatment process by setting up primary treatment

plants as approved by the State Board (respondent 6M/s. Navratan Tanning (respondent 71),8) with effect form 1-10-1987.

14. M/s. Indian Tanning Industry (respondent 30), the U.P. Tannery (respondent 19), M/s. Zaz Tannery (respondent 28), M/s. Super Tannery India Ltd. (respondent 21), M/s. Shewan Tannery (respondent 20), M/s. Pioneer Tannery (respondent 23), and M/s. M.K.J. Corporation (respondent 89) who have already put up the primary treatment plants may continue to carry on production in their factories subject to the condition that they should continue to keep the primary treatment plants established by them in sound working order.

15. Shri S.K. Dholakia, learned counsel for the other tanneries who are members of the Hindustan Chambers of Commerce and the other tanneries who have entered appearance through Shri Mukul Mudgal submits that they will establish primary treatment plants within six months and he further submits that in the event of their not completing the construction of the primary treatment plants as approved by the State Board (respondent 8) and bringing them into operation within the period of six months the said tanneries will stop carrying on their business. We record the statement made by the learned counsel and grant them time till 31-3-1988 to set up the primary treatment plants. If any of these tanneries does not set up a primary treatment plant within 31-3-1988 it is directed to stop its business with effect from 1-4-1988.

16. We issue a direction to the Central Government, the Uttar Pradesh Board, established under the provisions of the Water (Prevention and Control of Pollution) Act, 1974 and the District Magistrate, Kanpur to enforce our order faithfully. Copies of this order shall be sent to them for information.

17. The case is adjourned to 27th October, 1987 to consider the case against the municipal bodies in the State Uttar Pradesh having jurisdiction over the areas through which the river Ganga is passing.

SINGH, J.:- 18. I respectfully agree with every word that my learned brother Venkataramiah, J. has stated in the proposed order and the directions issued by that order. However, I wish to add few words.

19. The river Ganga is one of the greatest rivers of the world, although its entire course is only 1560 miles from its source in Himalaya to the sea. There are many rivers larger in shape and longer in size but no river in the world has been so great as the Ganga. It is great because to millions of people since centuries it is the most sacred river, it is called "Sursari" river of the Gods, 'Patitpawani' purifier of all sins and 'Ganga Ma' Mother Ganges. To millions of Hindus, it is the most sacred, most venerated river on earth. According the Hindu belief and Mythology to bathe in it is to wash away guilt, to drink the water, having bathed in it, and to carry it away in containers for those who may have not had the good fortune to make the pilgrimage, to it, is meritorious. To be cremated on its banks, or to die there, and to have one's ashes cast in its waters is the wish of every Hindu. Many saints and sages have perused their quest for knowledge and enlightenment on the banks of the river Ganga. Its water has not only purified the body and soul of the

millions but it has given fertile land to the country in Uttar Pradesh and Bihar. Ganga has been used as means of water transport for trade and commerce. The Indian civilization of the Northern India thrived in the Plains of Ganga and most of the important towns and places of pilgrimage are situated on its banks. The river Ganga has been part of Hindu civilization. Pt. Jawahar Lal Nehru who did not consider himself a devout Hindu gave expression to his feelings for the Ganga that is to be found in his will and Testament, a short extract from which is as under:

> "My desire to have a handful of my ashes thrown into the Ganga at Allahabad has no religious significance, so far as I am concerned. I have no religious sentiment in the matter. I have been attached to the Ganga and the Jamuna rivers in Allahabad ever since my childhood and, as I have grown older, this attachment has also grown. I have watched their varying moods as the seasons changed, and have often thought of the history and myth and tradition and song and story that have become attached to them through the long ages and become part of their flowing waters. The Ganga, especially, as the river of India, beloved of her people, round which are intertwined her racial memories, her hopes and fears, her songs of triumph, her victories and her defeats. She has been a symbol of India's age-long culture and civilization, ever-changing, ever-flowing, and yet ever the same Ganga. She reminds me of the snow-covered peaks and the deep valleys of the Himalayas, which I have loved so much, and of the rich and vast plains below, where my life and work have been cast."

20. The river Ganga is the life line of millions of people of India, Indian culture and civilization has grown around it. This great river drains of eight States of India, Himachal Pradesh, Punjab, Haryana, Uttar Pradesh, Rajasthan, Madhya Pradesh, Bihar and West Bengal. The Ganga has always been an integral part of the nation's history, cultures and environment. It has been the source of sustenance of the millions of people who have lived on its bank from time immemorial.

21. Millions of our people in the Ganga drink its water under an abiding faith and belief to purify themselves to achieve moksha release from the cycle of birth and death. It is tragic that the Ganga, which has since time immemorial, purified the people are being polluted by man in numerous ways, by dumping of garbage, throwing carcass of dead animals and discharge of effluents. Scientific investigations and survey reports have shown that the Ganga which serves one-third of the India's population is polluted by the discharge of municipal sewage and the industrial effluents in the river. The pollution of the river Ganga is affecting the life, health, and ecology of the Indo-Gangatic Plain. The Government as well as Parliament both have taken a number of steps to control the water pollution, but nothing substantial has been achieved. I need not refer to those steps as my learned brother has referred to them in detail. No law or authority can succeed in removing the pollution unless the people cooperate. To my mind, it is the sacred duty of all those who reside or carry on business around the river Ganga to ensure the purity of Ganga. Tanneries at Jajmau area near Kanpur have been polluting the Ganga in a big way. This Court issued notices to them but in spite of notices many industrialists have not bothered either to respond to the notice or to take elementary steps for the treatment of industrial effluent before discharging the same into the river. We are therefore issuing the

directions of the closure of those tanneries which have failed to take minimum steps required for the primary treatment of industrial effluent. We are conscious that closure of tanneries may bring unemployment, loss of revenue, but life, health and ecology have greater importance to the people.

Order accordingly.

M. C. Mehta v. Union of India
AIR 1988 Supreme Court 1115
Writ Petition No. 3727 of 1985, D/- 12-1-1988
E.S Venkataramiah and K.N. Singh, JJ.

(A) Constitution of India, Arts. 32, 226 - Public interest litigation-Pollution of river Ganga - Public nuisance - Writ petition by person who is not a riparian owner but is interested in protecting lives of people using water of river Ganga - Maintainable as public interest litigation. (Civil P.C. (1908), O.39 R.1)

In common law the Municipal Corporation can be restrained by an injunction in an action brought by a riparian owner who has suffered on account of the pollution of the water in a river caused by the Corporation by discharging into the river insufficiently treated sewage from discharging such sewage into the river. 1953 Chancery 149, Rel. on.

In the instant case, the petitioner had filed writ petition for prevention of nuisance caused by the pollution of the river Ganga. No doubt, the petitioner is not a riparian owner. He is a person interested in protecting the lives of the people who make use of the water flowing in the river Ganga and his right to maintain the petition cannot be disputed. The nuisance caused by the pollution of the river Ganga is a public nuisance, which is widespread in range and indiscriminate in its effect and it would not be reasonable to expect any particular person to take proceedings to stop it as district from the community at large. The petition, was, therefore, entertained as a Public Interest Litigation. The petitioner was entitled to move the Supreme Court in order to enforce the statutory provisions which impose duties on the municipal authorities and the Boards constituted under the Water Act.

It was observed that although Parliament and the State Legislature have enacted many laws imposing duties on the Central and State Boards and the Municipalities for prevention and control of pollution of water, many of those provisions have just remained on paper without any adequate action being taken pursuant thereto. On account of failure of authorities to obey the statutory duties for several years the water in the river Ganga at Kanpur has become so much polluted that it can no longer be used by the people either for drinking or for bathing. The Nagar Mahapalika of Kanpur has to bear the major responsibility for the pollution of the river near Kanpur city.

(B) Constitution of India, Arts. 32, 226 - Pollution of river Ganga at Kanpur - Prevention and control of - Certain directions issued by Supreme Court - (Pollution

of water-Prevention and control of) - (U.P. Nagar Mahapalika Adhiniyam (1959), Ss. 114, 251, 296, 405 and 407 - (U.P. Municipalities Act (11 of 1916), Ss. 245, 275) - (Water (Prevention and Control of Pollution) Act (6 of 1974). Ss. 2(g), 2(k), 19) - Environment (Protection) Act (29 of 1986), S.7)

In order to control and prevent the pollution of water in the river Ganga at Kanpur the Supreme Court issued certain directions for compliance by the Kanpur Municipal (Mpl.) Corporation and concerned authorities.

1. It is seen that Kanpur Mpl. Corporation is taking certain steps but not with sufficient speed. It is noticed that the Mpl. Corporation has not submitted its proposals for sewage treatment works to the State Board constituted under the Water Act. The Mpl. Corporation should submit its proposals to the State Board within six months from 12-1-1988.

2. Appropriate steps be taken to prevent pollution of water on account of waste accumulated at the dairies.

3. Should take immediate steps to increase the size of the sewers in the labour colonies so that the sewage may be carried smoothly through the sewerage system. Wherever sewerage line is not yet constructed steps should be taken to lay it.

4. Immediate action should also be taken by the Kanpur Nagar Mahapalika to construct sufficient number of public latrines and urinals for free use of the poor people in order to prevent defecation by them on open land.

5. Since the problem of pollution of the water in the river Ganga has become very acute the High Courts should not ordinarily grant orders of stay of criminal proceedings in cases under S. 482, Cr. P.C., and even if such an order of stay is made in any extraordinary case the High Courts should dispose of the case within a short period, say about two months, from the date of the institution of such case.

6. Steps shall be taken by the Kanpur Nagar Mahapalika and the Police authorities to ensure that dead bodies or half-burnt bodies are not thrown into the river Ganga.

7. Licences should not be issued to establish new industries unless adequate provision has been made for the treatment of the factories. Immediate action should be taken against the existing industries if they are found responsible for pollution of the water.

8. Central Government should direct all educational institutions to include the subject of national environment in text-books.

9. To make people aware of the importance of cleanliness and hazards of pollution, "Keep city/village clean" weeks should be observed.

10. The directions given to the Kanpur Mpl. Corporation applies mutatis mutandis to other Mpl. Corporations and Municipalities.

(C) Criminal P.C (2 of 1974), S. 482 Prosecution of Industries for pollution of river Ganga - Stay by High Courts - Should not ordinarily be granted - If granted, matter should be disposed of within short period, say about two months.

Cases Referred: **Chronological Paras**

AIR 1988 SC 1037: (1987) 4 SCC 463 1, 4

(1953) Ch. 149: (1953) 2 WLR 58: (1953) 1 All ER 179 (Rel on), Pride of Derby and Derbyshire Angling Association v. British Celanese Ltd.

VENKATARAMIAH, J.:- By our judgement dated September 22, 1987 in M.C. Mehta v. Union of India, (1987) SC 1037) we issued certain directions with regard to the industries in which the business of tanning was being carried on at Jajmau near Kanpur on the banks of the river Ganga. On that occasion we directed that the case in respect of the municipal bodies and the industries which were responsible for the pollution of the water in the river Ganga would be taken up for consideration on the next date of hearing. Accordingly, we took up for consideration first the case against the municipal bodies. Since it was found that Kanpur was one of the biggest cities on the banks of the river Ganga, we took up for consideration the case in respect of the Kanpur Nagar Mahapalika.

2. The Kanpur Nagar Mahapalika is established under the provisions of the Uttar Pradesh Nagar Mahapalika Adhiniyam, 1959 (hereinafter referred to as 'the Adhiniyam'). Sub-section (3) of section 1 of the Adhiniyam, which is to be found in its 1st Chapter, provides that the 1st Chapter of the Adhiniyam, shall come into operation at once and the remaining provisions in relation to a city shall come into operation from such date as the State Government may by notification in the official Gazette appoint in that behalf and different provisions. In exercise of the powers conferred by the said sub-section and in continuation of a notification dated September 28, 1959 bringing into operation sections 579 and 580 of the Adhiniyam, the Governor of Uttar Pradesh was pleased to issue a notification dated January 18, 1960 appointing the 1st day of February, 1960 as the date on which the remaining provisions of the Adhiniyam and the three Schedules, appended thereto, would come into operation in relation to the cities of Kanpur, Allahabad, Varanasi, Agra and Lucknow, as constituted under section 3 of the Adhiniyam. The duties and powers of the Mahapalika and Mahapalika authorities are set out in Chapter V of the Adhiniyam. Clauses (iii), (vii) and (viii) of section 114 of the Adhiniyam, which incorporates the obligatory duties of the Mahapalika, read as follows:

> "114. Obligatory duties of the Mahapalika - It shall be incumbent on the Mahapalika to make reasonable and adequate provision, by any means or measures which it is lawfully competent to it to use or to take, for each of the following matters, namely,
> .....
>
> (iii) the collection and removal of sewage, offensive matter and rubbish and treatment and disposal thereof including establishing and maintaining farm or factory;
> .....

(vii) the management and maintenance of all Mahapalika Waterworks and the construction or acquisition of new works necessary for a sufficient supply of water for public and private purposes;

(viii) guarding from pollution water used for human consumption and preventing polluted water from being so used;
....."

3. Sections 251, 388, 396, 397, 398, 405 and 407 of the Adhiniyam read as follows:

"251. Provision of means for disposal of sewage-The Mukhya Nagar Adhikari may, for the purpose of receiving, treating, storing, disaffecting, distributing or otherwise disposing of sewage, construct any work within or without the City or purchase or take on lease any land, building, engine, material apparatus either within or without the City or enter into any arrangement with any person for any period not exceeding twenty years for the removal or disposal of sewage within or without the City.
.....

388. Provision may be made by Mukhya Nagar Adhikari for collection, etc. or excrementitious and polluted matter- (1) The Mukhya Nagar Adhikari may give public notice of his intention to provide, in such portion of the City as he may specify, for the collection, removal and disposal by Mahapalika agency, of all excrementitious and polluted matter from privies urinals, and cess-pools, and thereupon it shall be the duty of the Mukhya Nagar Adhikari to take measures for the daily collection, removal and disposal of such matter from all premises situated in such portion of the City.

(2) In any such portion as is mentioned in sub-section (1) and in any premises, wherever situated, in which there is a water closer or privy connected with a Mahapalika drain, it shall not be lawful, except with the written permission of the Mukhya Nagar Adhikari, for any person who is not employed by or on behalf of the Mukhya Nagar Adhikari to discharge any of the duties of scavengers.
.....

396. Removal of carcasses of dead animals -(1) It shall be the duty of the Mukhya Nagar Adhikari to provide for the removal of the carcasses of all animals dying within the City.

(2) The occupier of any premises in or upon which any animal shall die or in or upon which the carcass of any animal shall be found, and the person having the charge of any animal which dies in the street or in any open place, shall, within three hours after the death of such animal or, if the death occurs at night within three hours after sunrise, report the death of such animal at the nearest office of the Mahapalika health department.

(3) For every carcass removed by Mahapalika agency, whether from any private premises or from public street or place, a fee for the removal of such amount as shall be fixed by the Mukhya Nagar Adhikari shall be paid by the owner of the animal, or,

if the owner is not known, by the occupier of the premises in or upon which, or by the person in whose charge, the said animal died.

397. Prohibition of cultivation, use of manure or irrigation injurious to health-If the Director of Medical and Health Services or the Civil Surgeon or the Nagar Swasthya Adhikari certifies that the cultivation of any description of crops or the use of any kind of manure or the irrigation of land in any specified manner -

(a) in a place within the limits of a City is injurious or facilitates practices which are injurious to the health of persons dwelling in the neighbourhood, or

(b) in a place within or beyond the limits of a City is likely to contaminate the water supply of such City or otherwise render it unfit for drinking purposes,

the Mukhya Nagar Adhikari may by public notice prohibit the cultivation of such crop, the use of such manure or the use of the method of irrigation so reported to be injurious, or impose such conditions with respect thereto as may prevent the injury or contamination:

Provided that when, on any land in respect of which such notice is issued, the act prohibited has been practised in the ordinary course of husbandry for the five successive years next preceding the date of prohibition, compensation shall be paid from the Mahapalika Fund to all persons interested therein for damage caused to them by such prohibition.

398. Power to require owners to clear away noxious vegetation- The Mukhya Nagar Adhikari may, by notice, require the owner or occupier of any land to clear away and remove any vegetation or undergrowth which may be injurious to health or offensive to the neighbourhood.

.....

405. Power to require removal of nuisance arising from tanks, etc.- The Mukhya Nagar Adhikari may by notice require the owner or occupier of any land or building to cleanse, repair, cover, fill up or drain off a private well, tank, reservoir, pool, depression or excavation therein which may appear to the Mukhya Nagar Adhikari to be injurious to health or offensive to the neighbourhood:

Provided that the owner or occupier may require the Mukhya Nagar Adhikari to acquire at the expense of the Mahapalika or otherwise provide, any land or rights in land necessary for the purpose of effecting drainage ordered under this section.

407. Any place may at any time be inspected for purpose of preventing spread of dangerous disease-The Mukhya Nagar Adhikari may at any time, by day or by night, without notice or after giving such notice of his intention as shall in the circumstances, appear to him to be reasonable, inspect any place in which any dangerous disease is reported or suspected to exist, and take such measures as he shall think fit to prevent the spread of the said disease beyond such place".

4. The above provisions deal with the specific duties of the Nagar Mahapalika or the Mukhya Nagar Adhikari appointed under the Adhiniyam with regard to the disposal of sewage and protection of the environment in or around the City to which the Adhiniyam applies. There are as most similar provisions of the Uttar Pradesh Municipalities Act, 1916 which applies to the smaller municipal bodies. The Uttar Pradesh Water Supply and Sewerage Act, 1975 impose statutory duties on the authorities mentioned therein regarding the provision of water supply to the cities and towns and construction of sewerage systems in them. The perusal of these provisions in the laws governing the local bodies shows that the Nagar Mahapalikas and the Municipal Boards are primarily responsible for the maintenance of cleanliness in the areas under their jurisdiction and the protection of their environment. We have in the judgement delivered by us on September 22, 1987 (reported in AIR 1988 SC 1037), briefly referred to the Water (Prevention and Control of Pollution) Act, 1974 (Act No. 6 of 1974) (hereinafter referred to as 'the Water Act') in which provisions have been made for the establishment of the Boards for the prevention and control of water pollution for conferring on and assigning to such Boards powers and functions relating thereto and for matters connected therewith. In the Water Act the expressions 'pollution', 'sewage effluent', 'stream', and 'trade effluent' are defined as follows:

"2. Definitions-In this Act, unless the context otherwise requires-

.....

(e) 'Pollution' means such contamination of water or such alteration of the physical, chemical or biological properties of water or such discharge of any sewage or trade effluent of any other liquid, gaseous or solid substance into water (whether directly or indirectly) as may or is likely to, create a nuisance or render such water harmful or injurious to public health or safety, or to domestic, commercial, industrial, agricultural or other legitimate uses, or to the life and health of animals or plants or of aquatic organisms;

.....

(g) 'sewage effluent' means effluent from any sewerage system or sewage disposal works and includes sullage from open drains;

(gg) 'sewer' means any conduit pipe or channel, open or closed, carrying sewage or trade effluent;

.....

(j) 'stream' includes-

- (i) river;
- (ii) water course (whether flowing or for the time being dry);
- (iii) inland water (whether natural or artificial);
- (iv) sub-terranean waters;
- (v) sea or tidal waters to such extent or, as the case may be, to such point as the State may, by notification in the Official Gazette, specify in this behalf;

(vi) 'trade effluent' includes any liquid, gaseous or solid substance which is discharged from any premises used for carrying on any trade or industry, other than domestic sewage".

5. Sections 3 and 4 of the Water Act provide for the constitution of the Central Board and State Boards respectively. A State Board has been constituted under section 4 of the Water Act in the State of Uttar Pradesh. Section 16 of the Water Act sets out the functions of the Central Board and section 17 of the Water Act lays down the functions of the State Board. The functions of the Central Board are primarily advisory and supervisory in character. The Central Board is also required to advise the Central Government on any matter concerning the prevention and control of water pollution and to co-ordinate the activities of the State Boards. The Central Board is also required to provide technical assistance and guidance to the State Boards, carry out and sponsor investigations and research relating to problems of water pollution and prevention, control or abatement of water pollution. The functions of the State Board are more comprehensive. In addition to advising the State Government on any matter concerning the prevention, control or abatement of water pollution, the State Board is required among other things (i) to plan a comprehensive programme for the prevention, control or abatement of pollution of streams and wells in the State and to secure the execution thereof, (ii) to collect and disseminate information relating to water pollution and the prevention, control or abatement thereof; (iii) to encourage, conduct and participate in investigations and research relating to problems of water pollution and prevention, control or abatement of water pollution; (iv) to inspect sewage or trade effluents, works and plants for the treatment of sewage and trade effluents; (v) to review plans, specifications or other data relating to plants set up for the treatment of water, works for the purification thereof and the system for the disposal of sewage or trade effluents or in connection with the grant of any consent as required by the Water Act; (vi) to evolve economical and reliable methods of treatment of sewage and trade effluents, having regard to the peculiar conditions of soils, climate and water resources of different regions and more especially the prevailing flow characteristics of water in streams and wells which render it impossible to attain even the minimum degree of dilution, and (vii) to lay down standards of treatment of sewage and trade effluents to be discharged into any particular stream taking into account the minimum fair weather dilution available in that stream and the tolerance limits of pollution permissible in the water of the stream, after the discharge of such effluents. The State Board has been given certain executive powers to implement the provisions of the Water Act. Sections 20, 21 and 23 of the Water Act confer power on the State Board to obtain information necessary for the implementation of the provisions of the Water Act, to take samples of effluents and to analyse them and to follow the procedure prescribed in connection therewith and the power of entry and inspection for the purpose of enforcing the provisions of the Water Act. Section 24 of the Water Act prohibits the use of stream or well for disposal of polluting matters etc. contrary to the provisions incorporated in that section. Section 32 of the Water Act confers the power on the State Board to take certain emergency measures in case of pollution of stream or well. Where it is apprehended by a Board that the water in any stream or well is likely to be polluted by reason of the disposal of any matter therein or of

any likely disposal of any matter therein, or otherwise, the Board may under section 33 of the Water Act make an application to a court not inferior to that of a Presidency Magistrate or a Magistrate of the first class, or restraining the person who is likely to cause such pollution from so causing.

6. The Environment (Protection) Act, 1986, which has also been referred to in our earlier judgment, also contains certain provisions relating to the control, prevention and significant provision in that Act is what is contained in section 17 thereof, which provides that where an offence under that Act is committed by any Department of Government, the Head of that Department shall be deemed to be guilty of the offence and is liable to be punished.

7. It is unfortunate that although Parliament and the State Legislature have enacted the aforesaid laws imposing duties on the Central and State Boards and the municipalities for prevention and control of pollution of water, many of those provisions have just remained on paper without any adequate action being taken pursuant thereto. After the above petition was filed and notice was sent to the Uttar Pradesh State Board constituted under the Water Act, an affidavit has been filed before this Court by Dr. G.N. Misra, Scientific Officer of the U.P. Pollution Control Board setting out the information which the Board was able to collect regarding the measures taken by the several local bodies and also by the U.P. Pollution Control Board in order to prevent the pollution of the water flowing in the river Ganga. A copy of the report relating to the inspection made at Kanpur on 23-11-87/24-11-87 by Shri Tanzar Ullah Khan, Assistant Environmental Engineer and Shri A.K. Tiwari, Junior Engineer enclosed to the counter-affidavit as Exhibit K-5 reads thus:

The inspection made on 23-11-87/24-11-87 along with Sri A.K. Tiwari, Junior Engineer. Following are the facts observed at the time or inspection.

1. Kanpur town is situated on the southern bank of river Ganges.
2. The present population of the town is approximately 20 lacs.
3. The city is covered with piped water supply.
4. The city has developed between river Ganges on the north side and river Pandu on the south side. G.T. Road divides the city into two halves.

In the north side most of the area is covered by sewerage system and the sullage/sewage is discharged without treatment into river Ganges through 17 nalas including sewerage by-pass channel at Jajmau.

In the south side there is no sewerage system and the sewage/sullage are discharged without treatment into river Pandu through 5 nalas. River Pandu joins river Ganges near Fatehpur (Sketch enclosed.)

5. The Kanpur Nagar Mahapalika has not yet submitted any proposal of sewage treatment works to the Board.
6. Mr. Ikramur Rahman, A.E. Nagar Mahapalika told the Kanpur town is covered under Ganga Action Plan and following are the proposals-
   (A) U.P. Jal Nigam.

(1) Re-modelling of sewage pumping station at Jajmau and improvement to sewage farm.
(2) Nala Tapping.
(3) Sewage Treatment Plant.

(B) Kanpur Jal Sansthan
(1) Cleaning of Trunk and main sewers.

(C) Integrated Environmental and Sanitary Engineer Project is being executed under the Dutch Assistance in Jajmau area.

1. Crash programme (is to remove deficiencies in the existing sanitary facilities)
2. Laying of Industrial sewer.
3. U.A.S.B. Sewage Treatment Plant.

sd/- sd/-
J.E (TANZARULLAH KHAN)
(A.K. TIWARI) ASSTT. ENVIRONMENTAL ENGINEER"

8. Appendix A/1 to 'An Action Plan for Prevention of Pollution of the Ganga' gives the following particulars relating to the quantity of sewerage generated in the City of Kanpur which is discharged into the river Ganga and other relevant matters:

KANPUR

Population in 1981	Estimated water supply in 1981	Estimated sewage generated Treatment (70% of the water supply to the city)
16.39 lacs	392.14 million litres a day	274.50 million litres a day Nil

9. It is thus seen that 274.50 million litres a day of sewage water is being discharged into the river Ganga from the city of Kanpur, which is the highest in the State of Uttar Pradesh and next only to the city of Calcutta which discharges 580.17 million litres a day of sewage water into the river Ganga. Para 4 of the affidavit filed by Shri Jai Shanker Tewari, Executive Engineer of Kanpur Nagar Mahapalika reads thus:

"4. That the pollution in river Ganga from Kanpur is occurring because of following reasons:

(i) About 16 nalas collecting sullage water, sewage, textile waste, power plant waste and tannery effluents used to be discharged without any treatment into the river. However some Nalas have been tapped now.

(ii) The dairies located in the city have a cattle population of about 80,000. The dung, fodder waste and other refuse from this cattle population is quantitatively more than the sullage from the city of human population of over 20 lakhs. All this finds its way into the sewerage system and the nalas in

the rainy season. It has also totally choked many branches of sewers and trunk sewers resulting in the overflow of the system.

(iii) The night soil is collected from the unscrewed areas of the city and thrown into the nalas.

(iv) There are more than 80 tanneries in Jajmau whose effluent used to be directly discharged into the river.

(v) The total water supply in Kanpur is about 55 million gallons per day. After use major part of it goes down the drains, nalas and sewers, sewage is taken to Jajmau sewage pumping station and a part of it is being supplied to sewage farms after diluting it with raw Ganges water and the remaining part is discharged into the river.

(vi) Dhobi Ghats.

(vii) Defecation by economically weaker sections."

10. The affidavit further states that the U.P. Jal Nigam, the U.P. Water Pollution Control Board, the National Environmental Engineering Research Institute, The Central Leather Research Institute, the Kanpur Nagar Mahapalika, the Kanpur Development Authority and the Kanpur Jal Sansthan have started taking action to minimise the pollution of the river Ganga. It is also stated therein that the financial assistance is being provided by the Central Ganga Authority through Ganga Project Directorate, State Government, the World Bank, the Dutch Government etc. for implementing the said measures. The said affidavit gives information about the several works undertaken at Kanpur for minimising the pollution of the river Ganga. It also states that Rs. 493.63 lacs had been spent on those works between the years 1985 and 1987 and that the total allocation of funds by the Central Ganga Authority for Kanpur is Rs. 3694.94 lacs and that up to the end of the current financial year it is proposed to spend Rs. 785.58 lacs (1985 to 1987-88) towards various schemes to be completed under Ganga Action Plan. The affidavit Points out that in Kanpur City sewer cleaning has never been done systematically and in a planned way except that some sewers were cleaned by the U.P. Jal Nigam around 1970. The main reasons for mal-functioning and choking of the city sewerage, according to the affidavit, are (i) throwing or discharging of solids, clothes, plastics, metals etc. into the sewerage system; (ii) throwing of cow dung from dairies which are located in every part of the city which consists of about 80.000 cattle; (iii) laying of under-sized sewers specially in labour colonies; (iv) throwing of solid wastes and malba from construction of buildings into sewers through manholes; (v) non-availability of mechanical equipment for sewer cleaning works; and (vi) shortage of funds for proper maintenance. It is asserted that the discharge of untreated effluents into the river Ganga will be stopped up to 80% by March. 1988.

11. Shri M.C. Mehta, the petitioner herein, drew our attention to the Progress of the Ganga Action Plan (July, 1986-January, 1987) prepared by the Industrial Toxicology Research Centre, Council of Scientific & Industrial Research. At page 20 of the said report the details of the analysis of the Ganga water samples collected during August,

1986 to January, 1987 from Uttar Pradesh region are furnished. That report shows that the pollution of the water in the river Ganga is of the highest degree at Kanpur. The Ganga water in the river Ganga at Kanpur consisted of 29.200 units (mg/ml) of iron in the month of August, 1986 when the ISI limit for river water is 0.3 and 0.900 (mg/ml) of manganese whereas the WHO limit of manganese for drinking water is 0.05. The Progress Report for the period February, 1987 of Micro Level Intensive Monitoring of Ganga under Ganga Action Plan describes the samples of the water taken from the river Ganga at Kanpur thus:-

"B.O.D. (Bio Oxygen Demand) values are found to be higher than prescribed values of I.S.I. C.O.D. (Chemical Oxygen Demand) values are also found to be higher. These values clearly indicate that river water is not fit for drinking, fishing and bathing purposes.

Table II further shows that Total Coliform and Fecal Coliform bacteria are always found very high. This is due to disposal of large quantity of untreated municipal waste into river Ganga. These high values of bacteria indicate that water is not fit for drinking, bathing and fishing purpose.

To improve quality of water in Ganga, all nallahs should be trapped immediately and raw water should be treated conventionally at water works and disinfected by chlorination."

(underlining by us)

12. In the concluding part of the said Progress Report it is stated thus:

> "The Ganga is grossly polluted at Kanpur. All nullahs are discharging the polluted waste water into river Ganga. But Jajmau by-pass channel, Sismau, Muir Mill, Golf Club and Gupta Ghat nullah are discharging huge quantities of polluted waste water. To improve the water quality of Ganga all major nullahs should be diverted and treated. Combined treatment should be provided for Jajmau tanneries. Effluent treatment plants should be installed by all major polluting industries."

13. It is needless to say that in the tropical developing countries a large amount of misery, sickness and death due to infectious diseases arises out of water supplies. In Lall's commentaries on Water and Air Pollution Laws (2nd Edition) at pages 331 and 333 it is observed thus:

> "In the tropics, we cannot safely take such a limited view. Such water-borne diseases as malaria, schistosomiasis, guinea worm and yellow fever are either terrible scourges of or threats to, many tropical populations. The hazards from bad water are thus much greater. Poverty is much more serious for many tropical areas; in the rural areas - where most people live - and around the edges of the cities, which are the fastest-growing communities, most people cannot afford a conventionally good water supply at present, and the choice in the short run may be between doing nothing and providing somewhat improved supply. If an ideal water system is not possible, there are options as to what needs should be met by the partial improvements. To make the right decisions we need again the broad picture of

water-related diseases. So, because of these two tropical characteristics - warmth and poverty - a wider view than in temperate lands is necessary. (P.311)

...

Water-borne diseases-The classical water-borne diseases are due to highly infective organisms where only rather few are needed to infect someone, relative to the levels of pollution that readily occur. The two chief ones have a high mortality if untreated and are diseases which a community is very anxious to escape: typhoid and cholera. Both are relatively fragile organisms whose sole reservoir is man.

Typhoid is the most cosmopolitan of the classical water-borne infections. In man it produces a severe high fever with generated systemic, more than intestinal, symptoms. The bacteria are ingested and very few are sufficient to infect. The typhoid patient is usually too ill to go out polluting the water and is not infective prior to falling sick. However, a small proportion of those who recover clinically continue to pass typhoid bacterial in their faces for months or years; these carriers are the source of water-borne infections. Gallstones predispose to the carrier state as the bacteria persist in the inflamed gall bladder. In the tropics, lesions of Schistosoma haematobium in the bladder also act as nide of infection, producing urinary typhoid carriers, whilst rectal schistosomiasis combined with typhoid leads to a persistent severe fever lasting many months. Typhoid bacteria survive well in water but do not multiply there.

Cholera is in some ways similar to typhoid, but its causative bacteria are more fragile and the clinical course is extremely dramatic. In classical cholera the onset of diarrhoea is sudden and its volume immense so that the untreated victim has a high probability of dying from dehydration within 24 hours or little more.

Several other infections are water borne but are less important than typhoid and cholera. Leptospirosis, due to a spirochete, has its reservoir in wild rodents which pollute the water. Leptospires can penetrate the skin as well as being ingested. They produce jaundice and fever, called 'weil's disease, which is severe but not common."

14. The amount of suffering which the members of the public are likely to undergo by using highly polluted water can be easily gathered from the above extract.

15. In the book titled 'Water Pollution and Disposal of Waste Water on Land' (1983) by U.N. Mahida, I.S.E. (Retd) the problem of water pollution, the benefits of control of pollution and urgency of the problem have been dealt with. At pages 1, 2, and 5 of the said book it is observed thus:

"As long as the human population was small and communities were scattered over large areas of land, the disposal of human wastes created no problems. People could defecate in areas surrounding villages and other habitations and leave it to nature to dispose off the waste by assimilation in the surrounding land and air. But as communities became more concentrated and villages and towns agencies came to be replaced by organised disposal, though again through the agency of natural land and

soil columns. The collection of human excreta and its disposal in earthen trenches was resorted to by many towns and adopted the basket privy system.

The introduction of a system of water-borne sewage created new problems in the disposal of human wastes, as now along with the earlier problem of getting rid of solid wastes, i.e., human excreta, the problem of the disposal of the water employed for the removal of human wastes had also to be faced. This was the origin of the problem of sewage disposal. At first, the natural instinct was to channelize the sewage-the soiled water-to natural streams and rivers. For a time this mode of disposal was even considered quite efficacious. Such methods did not create difficulties as sewage discharges were small as compared to the stream flow. But with the increased discharge of progressively large quantities of sewage, polluted streams became a serious menace to public health.

NATURE OF THE PROBLEM

The introduction of modern water carriage systems transferred the sewage disposal from the streets and the surroundings of townships to neighbouring streams and rivers. This was the beginning of the problem of water pollution. It is ironic that man, from the earliest times, has tended to dispose off his wastes in the very streams and rivers from which most of his drinking water is drawn. Until quite recently this was not much of a problem, but with rapid urbanisation and industrialisation, the problem of the pollution of natural waters is reaching alarming proportions.

The most disturbing feature of this mode of disposal is that those who cause water pollution are seldom the people who suffer from it. Cities and industries discharge their untreated or only partially treated sewage and industrial waste waters into neighbouring streams and thereby remove waste matter from their own neighbourhood. But in doing so, they create intense pollution in streams and rivers and expose the downstream riparian population to dangerously unhygienic conditions. In addition to the withdrawal of water for downstream towns and cities, in many developing countries, numerous villages and riparian agricultural population generally rely on streams and rivers for drinking water for themselves and their cattle, for cooking, bathing, washing and numerous other uses. It is thus riparian population that specially needs protection from the growing menace of water pollution. (pages 1 and 2)

...

BENEFITS OF CONTROL

The benefits which result from the prevention of water pollution include a general improvement in the standard of health of the population, the possibility of restoring stream waters to their original beneficial state and rendering them fit as sources of water supply, and the maintenance of clean and healthy surroundings which would then offer attractive recreational facilities. Such measures would also restore fish and other aquatic life.

Apart from its menace to health, polluted water considerably reduces the water resources of a nation. Since the total amount of a country’s utilisable water remains essentially the same and the demand for water is always increasing, schemes for the prevention of water

pollution should, wherever possible, make the best use of treated waste waters either in industry or agriculture. Very often such processes may also result in other benefits in addition to mere reuse. The application of effluents on agricultural land supplies not only much needed water to growing crops but also manorial ingredients; the recovery of commercially valuable ingredients during the treatment of industrial waste waters often yields by products which may to some extent offset the cost of treatment.

If appropriate financial credits could be calculated in respect of these and other incidental benefits, it would be apparent that measures for the prevention of pollution are not unduly costly and are within the reach of all nations, advanced or developing. It is fortunate that people are becoming more receptive to the idea of sharing the financial burden for lessening pollution. It is now recognised in most countries that it is the responsibility of industries to treat their trade wastes in such a way that they do not deteriorate the quality of the receiving waters, which otherwise would make the utilisation of such polluted waters very difficult or costly for downstream settlers.

URGENCY OF THE PROBLEM

The crucial question is not whether developing countries can afford such measures for the control of water pollution but it is whether they can afford to neglect them. The importance of the latter is emphasised by the fact that in the absence of adequate measures for the prevention or control of water pollution, a nation would eventually be confronted with far more onerous burdens to secure wholesome and adequate supplies of water for different purposes. If developing countries embark on suitable pollution prevention policies during the initial stages of their industrialisation, they can avoid the costly mistakes committed in the past by many developed countries. It is, however, unfortunate that the importance of controlling pollution is generally not realised until considerable damage has already been done.

16. In common law the Municipal Corporation can be restrained by an injunction in an action brought by a riparian owner who has suffered on account of the pollution of the water in a river caused by the Corporation by discharging into the river insufficiently treated sewage from discharging such sewage into the river. In Pride of Derby and Derbyshire Angling Association v. British Celanese Ltd., (1953) Ch 149 the second defendant, the Derby Corporation admitted that it had polluted the plaintiff's fishery in the River Derwent by discharging into it insufficiently treated sewage, but claimed that by the Derby Corporation Act, 1901 it was under a duty to provide a sewerage system, and that the system which had accordingly been provided had become inadequate solely from the increase in the population of Derby. The Court of Appeal held that it was not inevitable that the work constructed under the Act of 1901 should cause a nuisance, and that in any case the Act on its true construction did not authorize the commission of a nuisance. The petitioner in the case before us is no doubt not a riparian owner. He is a person interested in protecting the lives of the people who make use of the water flowing in the river Ganga and his right to maintain the petition cannot be disputed. The nuisance caused by the pollution of the river Ganga is a public nuisance, which is widespread in range and indiscriminate in its effect and it would not be reasonable to expect any particular person to take proceedings to stop it as distinct from the community at large.

The petition has been entertained as a Public Interest Litigation. On the facts and in the circumstances of the case we are of the view that the petitioner is entitled to move this Court in order to enforce the statutory provisions which impose duties on the municipal authorities and the Boards constituted under the Water Act. We have already set out the relevant provisions of the statute which impose those duties on the authorities concerned. On account of their failure to obey the statutory duties for several years the water in the river Ganga at Kanpur has become so much polluted that it can not longer be used by the people either for drinking or for bathing. The Nagar Mahapalika of Kanpur has to bear the major responsibility for the pollution of the river near Kanpur City.

17. It is no doubt true that the construction of certain works has been undertaken under the Ganga Action Plan at Kanpur in order to improve the sewerage system and to prevent pollution of the water in the river Ganga. But as we see from the affidavit filed on behalf of the Kanpur Nagar Mahapalika hat certain target dates have been fixed for the completion of the works already undertaken. We expect the authorities concerned to complete those works within the target dates mentioned in the counter affidavit and not to delay the completion of the works beyond those dates. It is, however, noticed that the Kanpur Nagar Mahapalika has not yet submitted its proposals for sewage treatment works to the State Board constituted under the Water Act. The Kanpur Nagar Mahapalika should submit its proposals to the State Board within six months from today.

18. It is seen that there is a large number of dairies in Kanpur in which there are about 80,000 cattle. The Kanpur Nagar Mahapalika should take action under the provisions of the Adhiniyam or the relevant bye-laws made thereunder to prevent the pollution of the water in the river Ganga on account of the waste accumulated at the dairies. The Kanpur Nagar Mahapalika may either direct the dairies to be shifted to a place outside the city so that the waste accumulated at the dairies does not ultimately reach the river Ganga or in the alternative it may arrange for the removal of such waste by employing motor vehicles to transport such waste from the existing dairies in which event the owners of the dairies cannot claim any compensation. The Kanpur Nagar Mahapalika should immediately take action to prevent the collection of manure at private manure pits inside the city.

19. The Kanpur Nagar Mahapalika should take immediate steps to increase the size of the sewers in the labour colonies so that the sewage may be carried smoothly through the sewerage system. Wherever sewerage line is not yet constructed steps should be taken to lay it.

20. Immediate action should also be taken by the Kanpur Nagar Mahapalika to construct sufficient number of public latrines and urinals for the use of the poor people in order to prevent defecation by them on open land. The proposal to levy any charge for making use of such latrines and urinals shall be dropped as that would be a reason for the poor people not using the public latrines and urinals. The cost of maintenance of cleanliness of those latrines and urinals has to be borne by the Kanpur Nagar Mahapalika.

21. It is submitted before us that whenever the Board constituted under the Water Act initiates any proceedings to prosecute industrialists or other persons who pollute the water in the river Ganga, the persons accused of the offences immediately institute

petitions under section 482 of the Code of Criminal Procedure, 1973 in the High Court and obtain stay orders thus frustrating the attempt of the Board to enforce the provisions of the Water Act. They have not placed before us the facts of any particular case. We are, however, of the view that since the problem of pollution of the water in the river Ganga has become very acute the High courts should not ordinarily grant orders of stay of criminal proceedings in such cases and even if such an order of stay is made in any extraordinary case the High Courts should dispose of the case within a short period, say about two months, from the date of the institution of such case. We request the High courts to take up for hearing all the cases where such orders have been issued under sections 482 of the code of Criminal Procedure, 1973 staying prosecutions under the Water Act within two months. The counsel for the Board constituted under the Water act shall furnish a list of such cases to the Registrar of the concerned High Court for appropriate action being taken thereon.

22. One other aspect to which our attention has been drawn is the practice of throwing corpses and semi-burnt corpses into the river Ganga. This practice should be immediately brought to an end. The cooperation of the people and police should be sought in enforcing this restriction. Steps shall be taken by the Kanpur Nagar Mahapalika and the Police authorities to ensure that dead bodies or half burnt bodies are not thrown into the river Ganga.

23. Whenever application for Licences to establish new industries are made in future, such applications shall be refused unless adequate provision has been made for the treatment of trade effluents flowing out of the factories. Immediate action should be taken against the existing industries if they are found responsible for pollution of water.

24. Having regard to the grave consequences of the pollution of water and air and the need for protecting and improving the natural environment which is considered to be one of the fundamental duties under the Constitution [vide Clause (g) of Article 51A of the Constitution] we are of the view that it is the duty of the Central Government to direct all the educational institutions throughout India to teach at least for one hour in a week lessons relating to the protection and the improvement of the natural environment including forests, lakes, rivers and wild life in the first ten classes. The Central Government shall get text books written for the said purpose and distribute them to the educational institutions free of cost. Children should be taught about the need for maintaining cleanliness commencing with the cleanliness of the house both inside and outside, and of the streets in which they live. Clean surroundings lead to healthy body and healthy mind. Training of teachers who teach this subject by the introduction of short term courses for such training shall also be considered. This should be done throughout India.

25. In order to rouse amongst the people the consciousness of cleanliness of environment the Government of India and the Governments of the States and of the Union Territories may consider the desirability of organising 'Keep the city clean' week (Nagar Nirmalikarana Saptaha), 'keep the town clean' week (Pura Nirmalikarana Saptaha) and 'Keep the village clean' week (Grama Nirmalikarana Saptaha) in every city, town and village throughout India a least once a year. During that week the entire city,

town or village should be kept as far as possible clear, tidy and free from pollution of land, water and air. The organisation of the week should be entrusted to the Nagar Mahapalikas, Municipalities, Village Panchayats or such other local authorities having jurisdiction over the area in question. If the authorities decide to organize such a week it may not be celebrated in the same week throughout India but may be staggered depending upon the convenience of the particular city, town or village. During that week all the citizens including the members of the executive, members of Parliament and the State Legislatures, members of the judiciary may be requested to cooperate with the local authorities and to take part in the celebrations by rendering free personal service. This would surely create a national awareness of the problems faced by the people by the appalling all-round deterioration of the environment which we are witnessing today. We request the Ministry of Environment of the Government of India to give a serious consideration to the above suggestion.

26. What we have stated above applies mutatis mutandis to all other Mahapalikas and Municipalities which have jurisdiction over the areas through which the river Ganga flows. Copies of this judgment shall be sent to all such Nagar Mahapalikas and Municipalities. The case against the Nagar Mahapalikas and Municipalities in the State of Uttar Pradesh shall stand adjourned by six months. Within that time all the Nagar Mahapalikas and Municipalities into the State of Uttar Pradesh through whose areas the river Ganga flows shall file affidavits in this Court explaining the various steps they have taken for the prevention of pollution of the water in the river Ganga in the light of the above judgment. The case as against the several industries in the State of Uttar Pradesh which are located on the banks of the river Ganga will be taken up for hearing on the 9th for February, 1988.

Order accordingly.

Madhavi v. Thilakan
1988(2) KLT 730
Sankaran Nair J.

1. Petitioner herein moved the sub-Divisional Magistrate, Fort Cochin for initiating proceedings under S. 133 of Code, for removal of nuisance. Respondents 1 & 2 are said to be running a workshop adjacent to petitioner's house, in a manner injurious to health and physical comfort of the community.

2. It is alleged that, repairs of autorikshaws, welding, painting and like operations are carried on from dawn to dusk, and late into night, causing nuisance. According to petitioner, this causes not only air pollution, but also noise pollution. It is alleged that, fumes emanating from the workshop are positive health hazards.

3. Learned Public Prosecutor invited my attention to a report made by the Sub Inspector dated 15-2-1985 to the effect that respondents 1 & 2 have committed the acts complained

of. But he says that, they should not be stopped from doing these because, that would deprive them of their livelihood.....

5. Running a workshop in certain circumstances can cause air pollution and noise pollution. running into several decibels. Discharge of carbon monoxide fumes, a carcinogen, can induce dreaded diseases, fatal to life. The recommendation in the report of the Sub Inspector reflects not only a sense of levity-if not irresponsibility-but also total unawareness of the need to preserve community health and hygiene. To say that 'a workshop or factory should not be closed down, as it provides livelihood to some persons, unmindful of the consequences to others, would be to say the untenable. Constitutionally recognised values, cannot be ignored. Article 47 of the Constitution enjoys that .....

6. Article 21 of the Constitution guaranteeing protection of life and liberty' has been enriched in colour and content, revealing new horizons, by the Supreme Court. The Declaration of American Independence said:

> *"We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life liberty and pursuit of happiness.... "*

Pursuit of happiness was not articled into Part III of the Constitution, chapter and verse. But, the gloss that life has writ on Constitutional Clauses, and the meanings that apex court has found in the Constitution, have made Article 21, a valuable charter. *Francis Coralie* (AIR 1981 SC 745), *Olga Tellis* (AIR. 1986 SC 180), etc. are but few of the landmark decisions in this direction. Right to life, is far more than the right to animal existence. The importance of public health has been highlighted by the Supreme Court in *Vincent Panikulangara v. Union of India* (AIR 1987 SC 990), Ranganath Misra J. observed:

> *"In a welfare State, it is the bligation of the State to ensure the creation and maintaining of conditions congenial to good health".*

The right to enjoy life as a serene experience, in quality far more than animal existence, is thus recognised. Personal autonomy, free from intrusion and appropriation is thus a constitutional reality. The right to live in peace, to sleep in peace and the right to repose and health, are part of the right to live. We recognise every man's home to be his castle, which cannot be invaded by toxic fumes, or tormenting sounds. This principle expressed through law and culture, consistent with nature's ground rules for existence, has been recognised in S. 133 (1)(b). "*The conduct of any trade or occupation, or keeping of any goods or merchandise, injurious to health or physical comfort of community",* could be regulated, or prohibited under the section.

7. Various Municipal Laws & Regulations have been enacted to ensure that industrial enterprises, do not telescope into residential areas, causing health hazards. Law relating to abatement of nuisance must be strictly enforced. The Sub Divisional Magistrate will take back the petition on file, and proceed afresh in accordance with law, after giving an opportunity to both sides to adduce further evidence, if they so wish.

A copy of this order will be forwarded to the Munsiff, Cochin, who will expedite the disposal of 0. S. 518 of 1985.

Revision Petition is allowed as above.

Rural Litigation and Entitlement Kendra v. State of U. P.
AIR 1988 Supreme Court 2187
Writ Petition (Civil) Nos. 8209 and 8321 of 1983, D/-30-8-1988
Ranganath Misra and Murari Mohon Dutt, JJ.

(A) Constitution of India, Art. 32 - Public interest litigation - Procedural law, applicable though not strictly - Res judicata - Illegal mining - Subsequent public interest litigation to protect environment - Not barred either by Central Act 29 of 1986 or on facts of the case. (Public interest litigation - Applicability of procedural law); (Civil P. C. (5 of 1908)/S, 11); (Environment (Protection) Act (29 of 1986), Pre.).

It could not be said that for public interest litigations, procedural laws do not apply. At the same time it has to be remembered that every technicality in the procedural law is not available as a defence when a matter of grave public importance is for consideration before the Court. Even if it is said that there was a final order, in a dispute regarding closure of mines causing environmental disorder in hill areas, the plea of res judicata could not be entertained in a subsequent public interest litigation to protect the environment. Undoubtedly, the Environment (Protection) Act, 1986 (29 of 1986) has come into force with effect from 19th November, 1986. Under this Act power is vested in the Central Government to take measures to protect and improve the environment. The instant writ petitions were filed as early as 1983 - more than three years before the Act came into force. The Supreme Court appointed several Expert Committees, received their reports and on the basis of materials placed before it, made directions, partly final and partly interlocutory, in regard to certain mines in the area. Several directions from time to time have been made by the Court. As many as four reportable orders have been given. The several parties and their counsel have been heard for days together on different issues during the three and a quarter years of the pendency of the proceedings. The Act does not purport to- and perhaps could not- take away the jurisdiction of the Supreme Court to deal with a case of this type. In consideration of these facts, there would be no justification to decline the exercise of jurisdiction at this stage. Ordinarily the Court would not entertain a dispute for the adjudication of which a special provision has been

made by law but that rule is not attracted in the instant case. Besides it is a rule of practice and prudence and not one of jurisdiction.

(Paras 15, 16, 17)

(B) Constitution of India, Arts. 32, 226 - Civil P.C. (5 of 1908), 0. 19, R. 3 - Writ petition - Affidavit - Supreme Court directing Union of India to file affidavit - Affidavit filed by Secretary to Govt. - Cannot be brushed aside on ground that statement therein indicates department's submission to court and not of Union of India - In the circumstances it could be assumed that Secretary had disclosed stand of Union of India with full authority and with the intention of binding Union of India by his statement. (Affidavit - Filed by Secretary to Govt. - Binding Nature of).

(Para 22)

(C) Forest (Conservation) Act (69 of 1980), S. 2 - Scope Act does not permit mining in the forest area.

(Para 23)

(D) Forest (Conservation) Act (69 of 1980), S. 2 - Mining lease - Renewal - Provisions of Act are applicable - Even if there was provision for renewal in lease agreement on exercise of lessees option requirements of Act had to be satisfied before grant of renewal.

(Paras 35, 36)

(E) Constitution of India, Arts. 32, 226 - Natural justice - Mining lease - Renewal - Refusal of request - Parties obtaining decrees and interim orders against it - Supreme Court vacating all such orders on environmental ground - All parties were before Court and have also been heard on various aspects at different times - Order made by Supreme Court to nullify decrees in such circumstances would not be violative of the principles of natural justice. (Natural justice - Rejection of renewal of mining lease); (Forest (Conservation) Act (69 of 1980), S. 2).

(Para 36)

(F) Constitution of India, Art. 32 - Environment protection - Mining in Doon valley area - Directed to be totally stopped - Decree or order if any, has already been obtained by Court relating renewal of disputed mining leases, vacated.

(Para 36, 46)

(G) Forest (Conservation) Act (69 of 1980), Pre. - Applicability of Act - Mines whether in reserved forest or in other forest area - Provisions of Act would apply.

(Paras 2, 7)

(H) Constitution of India, Art. 32 - Environment protection - Supreme Court directed stoppage of mining in Doon Valley area - Rehabilitation of displaced mine owners - Supreme Court directed to set up rehabilitation committee with representative of various State Govts. and Authorities.

(Para 58)

Cases Referred:	**Chronological Paras**
AIR 1987 SC 352: 1986 Suppl SCC 517: 1987 All LJ 95	5,14
AIR 1987 SC 1073: (1987) 1 SCC 213	35, 36
AIR 1987 SC 2426	5, 12, 14, 18, 22, 36, 38, 42
AIR 1985 SC 652: (1985) 3 SCR 169	3, 4, 5
AIR 1985 SC 814: (1985 3 SCC 643)	14, 16, 36, 58, 5
AIR 1985 SC 1259: (1985) 3 SCC 614	5
AIR 1966 SC 296: (1965) 3 SCR 402	35

RANGANATH MISRA, J.:- On July 14, 1983, a letter received from the Rural Litigation and Entitlement Kendera, Dehradun, bearing the date July 2, 1983, was directed to be registered as a writ petition under Article 32 of the Constitution and notice was ordered to the State of Uttar Pradesh and the Collector of Dehradun. Allegations of unauthorised and illegal mining in the Mussoorie - Dehradun belt which adversely affected the ecology of the area and led to environmental disorder were made. Later on another application with similar allegations was directed to be tagged with the earlier one. That is how these two writ petitions were born in the registry of this Court in a very innocuous manner as public interest litigation. The number of parties inflated both under the orders of the Court and on application to be added. Apart from the Governments of the Union and of Uttar Pradesh, Several governmental agencies and mining lessees appeared in the proceedings. What initially appeared to be two simple applications for limited relief got expanded into a comprehensive litigation requiring appointment of committees, inspection and reports in them from time to time, serious exercises on the part of the mine owners before the committees, filing of affidavits both original and further, and lengthy arguments at the Bar. These also necessitated several comprehensive interlocutory directions and orders. These two writ petitions are being disposed of by this common judgement.

2. On August 11, 1983, this Court appointed a Committee for inspection of the mines with a view to securing assistance in the determination as to whether safety standards laid down in the Mines Act of 1952 and the Rules made thereunder have been followed and whether there was any danger of land-slide on account of quarrying operations particularly during the rainy season, and if there was any other hazard to any individual, cattle or agricultural lands on account of carrying of the mining operations. At the preliminary stage this Court directed total stopping of blasting operations which, however, was modified later. The said Committee, referred to as the Bhargava Committee after its Chairman, classified the mines which it inspected into three groups, being A, B and C. It took note of the fact that earlier an Expert Committee known as the Working Group had been set up by the Union Government which had also inspected these mines. The Bhargava Committee was of the view that the C Group mines should be totally stopped; in the A Group mines, quarrying could be carried on after ensuring that there was no ecological or environmental hazard; and in regard to that the B Group mines, the Committee opined those may not be closed down permanently but the matter should be probed further.

3. A three-Judge Bench of this Court by an order dated March 12, 1985 1985 (3) SCR 169): (AIR 1985 SC 652) directed closure of the C category mines as also certain B category mines on permanent basis and gave directions in regard to further action to be taken by the Bhargava Committee. While making the order the Courts specifically stated that the reasons for the order would follow. One of the learned Judges constituting the three-Judge Bench retired from the Court on September 30, 1985, and the said learned Judge (A. N. Sen, J.) expressed his views in a short order dated 30th September, 1985. The working Group appointed by the Union Government was also headed by the same Mr. Bhargava and had five other members. The examination by the two Committees appeared to be with the same object, namely, as to whether the mining was being properly done and whether such activity should be carried on in this area. The Working Group had classified the mines into two categories being I and II. They put those mines which according to them were suitable for continuing operation under Category I and the mines which in their opinion were unsuitable for further mining under Category II. An interesting feature in these two Reports seems to be that almost the same lime stone quarries which have been put by the Bhargava Committee under Category A feature in Category I of the Working Group. This Court in its order of March 12, 1985 (reported in Air 1985 SC 652 at p. 654), referred to those aspects and pointed out:-

> "It will thus be seen that both the Bhargava Committee and the Working Group were unanimous in their view that the lime stone quarries classified in category A by the Bhargava Committee Report and category I by the Working Group were suitable for continuance of mining operations. So far as the lime stone quarries in category C of the Bhargava Committee Report are concerned, they were regarded by both the Bhargava Committee and the Working Group as unsuitable for continuance of mining operations and both were of the view that they should be closed down. The only difference between the Bhargava Committee and the Working Group was in regard to lime stone quarries classified in category B."

This Court had also appointed an Expert Committee consisting of Prof. K. S. Valdia, Mr. Hukum Singh and Mr. D. N. Kaul to enquire and investigate into the question of disturbance of ecology and pollution and affectation of air, water and environment by reason of quarrying operations or stone crushers and setting up to lime stone kilns. Mr. Kaul and Mr. Hukum Singh submitted a joint report with reference to various aspects indicated in their order of appointment while Prof. Valdia submitted a separate report. In the order of March 12, 1985, this Court took note of the position that Prof. Valdia's report was confined largely to the geological aspect and considerable reliance on the Main Boundary Thrust (MBT) had been placed by him in making of the report and he had taken the view that the lime stone quarries which were dangerously close to the MBT should be closed down inasmuch as that was a sensitive and vulnerable belt. This Court then took the view that not much importance could be placed to Dr. Valdia's report for this litigation. The joint report submitted by Mr. Kaul and Mr. Hukum Singh had been taken into account by this Court in making interim directions and for the making of the final order no specific reference is called for.

4. In the order or March 12, 1985 (reported in AIR 1985 SC 652), this Court directed that the C category mines of the Bhargava Committee Report should be closed down permanently and if any mining lessee of such a mine was running under the first grant or under Court's orders after its expiry, it would not be entitled to take advantage of the position. Similar order was made in regard to the B category mines situated in the Shasradhara block. This Court directed A category mines located within the Mussoorie municipal limits and the remaining B category mines to submit schemes subjected to further enquiry and ordered (at p. 655):-

> "We accordingly appoint a high powered Committee consisting of Mr. D. Bandyopadhyay, Secretary, Ministry of Rural Development as Chairman, and Shri H. S. Ahuja, Director General, Mines Safety, Dhanbad, Bihar, Shri D. N. Bhargava, Controller General, Indian Bureau of Mines, New Secretariat Building, Nagpur and two experts to be nominated by the Department of Environment, Government of India within four weeks from the date of this Order. The lessees of the lime stone quarries classified as category A in Bhargava Committee Report and for Category in the Working Group Report and falling within the city limits of Mussoorie as also the lessees of the lime stone quarries classified as category B in the Bhargava Committee Report will be at liberty to submit a full and detailed scheme for mining their lime stone quarries to this Committee (hereinafter called the Bangyopadhyay Committee) and if any such scheme or schemes are submitted the Bandyopadhyay Committee will proceed to examine the same without any unnecessary delay and submit a report to this Court whether in its opinion the particular lime stone quarry can be allowed to be operated in accordance with the scheme and if so, subject to what conditions and if it cannot be allowed to be operated, the reasons for taking that view. The Bandyopadhyay Committee in making its report will take into account the various aspects which we had directed the Bhargava Committee and the kual Committee to consider while making their reports including the circumstances that the particular lime stone quarry may or may not be within the city limits of Mussoorie and also give an opportunity to the concerned lessee to be heard, even though it be briefly."

Several mining lessees submitted their schemes which were examined by the Committee but none of them was cleared. Objections against rejection of the schemes had been filed before this Court by many of the aggrieved lessees. It was directed in the aforesaid order of 12th March, 1985 (reported in AIR 1985 SC 652), that until the Bandyopadhyay Committee cleared the particular mines for operation, mining activity in regard to all mines covered within the purview of examination by that Committee would stop. This Court, however, allowed A category mines located outside the city limits to operate. While directing closure of the Shasradhara area B category mines and all the C category mines, as also A and B category mines within the municipal limits, this Court made it clear that the ban indicated by it would supersede any order of any other court. The Court observed (at p. 656):-

> "The consequence of the Order made by us would be that the lessees of lime stone quarries which have been directed to be closed down permanently under this Order

> or which may be directed to be closed down permanently after consideration of the report of the Bandyopadhyay Committee, would be thrown out of business in which they have invested large sums of money and expanded considerable time and effort. This would undoubtedly cause hardship to them but it is a price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment with minimal disturbance of ecological balance and without avoidable hazard to them and to their cattle, homes and agricultural land and undue affection of air, water and environment."

The Order of 12th March, 1985, did not refer to the Forest (Conservation) Act of 1980 when it permitted the A category lime stone quarries located outside the city limits to operate.

5. This Court made several orders relating to specific aspects after the order of 12th March, 1985 (reported in AIR 1985 SC 652). One such order was made on 30th May, 1985, (1985 (3) SCC 614) : (AIR 1985 SC 1259) another on 18th December, 1986, (1986 Supp\SCC517) : (AIR 1987 SC359), where reasons for the order of 12th March, 1985, were given, and yet another order was made on 19th October, 1987 (AIR 1987 SC 2426). We shall refer to the last of these orders in a later part of this judgement. In the order of 16th December, 1986, when the reasoning for the order dated 12th March, 1985 were given this Court had stated (at p.63 of AIR):-

> "It is for the Government and the Nation and not for the Court to decide whether the deposits should be exploited at the cost of ecology and environmental considerations or the industrial requirement should be otherwise satisfied. It may be perhaps possible to exercise greater control and vigil over the operation and strike a balance between preservation and utilisation; that would indeed be a matter for an expert body to examine and on the basis of appropriate advice, Government should take a policy decision and firmly implement the same."

The Court had also indicated in its earlier order that it should be ensured that the low grade celica content lime stone is specifically utilised only in special industries having regard to its quality and should not be wasted by being utilised for purposes for which this special grade lime stone is not required.

6. Keeping these aspects in view, the Government of India in the Ministry of Environment and Forests, Department of Environment, Forests and Wildlife, constituted a Committee to examine the working of the lime stone mining operations in the Doon Valley by its memorandum No. J-20012/48/86-1A, dated 30th of December, 1986, which was also called the Working Group. Shri D. N. Bhargava was nominated as Chairman and the committee had three other members, namely, Shri V.C.Verma, Director General, Mines Safety, Dhanbad; Prof. B.B. Dhar, Department of Mining Engineering of the Banaras Hindu University, Varanasi; and shri R. Mehta, Principal Scientific Officer, Department of Environment Forest and Wildlife, New Delhi, Shri Verma was substituted by Shri N. Mishara, Deputy Director General, Northern Zone. The terms of reference of the Committee were:-

(i) Whether the operations are being carried out on scientific lines?

(ii) Whether the limestone quarried is being supplied to end-users as stipulated by the Supreme Court?; and

(iii) The extent to which the mining operations are contributing to environmental damage?

This Committee visited the six mines which are operating and indicated:-

> "The limestone deposits of Dehradun Mussoorie area are highly valuable mineral resource now essentially required by the steel industry and it would be necessary to exploit them, of course, in a very planned and systematic manner."

The Committee addressed itself to two aspects, namely:-

(i) those which were considered suitable for mining operations, and

(ii) those which were considered unsuitable for further mining.

The Committee whose entire report has been made available to us came to the following conclusion in regard to each of the six operating mines:

(i) Lambidhar Limestone Mine of M/s. Uttar Pradesh State Mineral Development Corporation Ltd. (UPSMDC) is a State Undertaking and holds a mining lease of 97 hectares covering the Lambidhar Hills and the lease is valid up to 10th March, 1996. The Committee found that 36% of its production was supplied to steel and chemical industries, 12% to sugar, 6% to cement and other miscellaneous industries and 46% to chips and lime kilns industries and disapproved this position. It further found that while colour limestone which is a metamorphose is being recorded as a minor mineral whereas it was learnt that it was being used for dispatch as major mineral. The arrangement for classification of the lime stone also was not acceptable to the Committee. It further found:

> "The hill slopes and the river/nullah base are covered by screw generated both during road construction as well as subsequent mining operations. This is the result of allowing the excavated material to roll down the slopes. The Committee is of the opinion that road making may be done with front-end loader instead of bulldozer as with latter equipment excavated materials roll down the hill slope uncontrollable. The vegetation cover along the slopes has been damaged by the rolling material as well as the excavation made for the road making and the hills present an ugly look. Hydro-seeding may be done to improve looks of hill slopes. Deposition of debris in the nullahs specially in Betarli is the cause of concern because it happens to be one of the main streams which is source of water supply to the villages as well as Dehradun city. The approach road has reached the top and mining operations have been started but no work on reclamation of mined out area has yet commenced. A proper disposal year for stocking debris must be provided so that the present practice of disposing it near the camp office on the bank of the rivulet is

prevented. Details of arrangements for controlling dust both in mining and crushing operations are not available."

UPSMDC is the largest of the working mines and apart from the fact that it belongs to the Government of Uttar Pradesh, it has also the largest of investment. It has been claimed before us on its behalf that it operates most scientifically and satisfies all the requirements appropriate for ecological and environmental safeguards. The Report of the Committee, extracted above, negatives all these claims.

(ii) We shall now refer to M/s. Punjab Lime and Limestone Company which has two mines both of which are working. Lease No. 14 covers 44.5 and is a lease for 20 years from 1966; as such it has already expired. Lease No. 96 is for 28.92 hectares and would expire in December, 1989. Lease No. 14 had two areas and this Court disallowed mining in the Northern block. The Committee found that 16.4 hectares equal to 41 acres, out of lease No. 96 comprised of thick forest and the lessee has surrendered the forest area. The mining operation is being carried on in lease No. 14 under orders of the Court and the residual portion of lease No. 96. The Committee found that the scheme which had been offered to the Bandyopadhyay Committee was in regard to the mining in the northern block of lease No.14 which has since been abandoned. It further transpires that about 27% of its output during 1986 was supplied for the steel industry. The report indicates that there is little generation of screw. As there is sparse growth of trees in the area covered by the mines, no significant deforestation is involved. Disposal of overburden is not significant. Check dams have been set up in the lower reaches which are on the right bank of Bhitarli river and no significant fall of the screw into the river was apprehended.

(iii) Next is lease No. 72 of Shri R.K. Oberai which would expire on 10th of April, 1994. It has an area of 15.91 hectares. The Committee found that this mine lies in the upper reaches of the Song river. Thick forest growth is seen close to the mine and the Committee gathered that the forest authorities have declined permission to extend the mine soakings beyond RL 1280. The Committee found that the lessee has undertaken to carry out afforestation and has also started compensatory forestry in the adjacent areas. There was no apprehension of spreading of screw and future mining operations are not likely to involve any significant deforestation. The Committee also has opined that there is no apprehension of choking of the water-ways due to mining operations as the Song river flows about 400 mts. away.

7. Apart from these three mines which are operating under valid mining leases, the Committee inspected the mines corresponding to leases Nos. 16, 17 and 76, belonging to Ved Pal Singh Chaudhary, Seth Ram Avtar and Shri C.G. Gujral respectively. All these leases have expired in December, 1982, and under orders of different courts mining is being carried on.

8. Dhitarli Kalan Limestone Mines of Shri Ved Pal Singh Chaudhary was a lease for 38.8 hectares and expired on 29th December, 1982. This Court has already directed closure of mining operation in a small area of the left bank on Bhitarli river.

9. Seth Rem Avtar has a lease of 14.18 hectares on the left bank of Bhitarli river and the lease expired on 2nd December, 1982. The Committee found that he had no environment management plan. The working plan submitted by the lessee did not show any plantation area.

10. The last of the working mines which the Committee visited is that of Shri C.G. Gujral. The lease was for 24.16 hectares and expired on 17th December, 1982. The Committee found that the lease area contained very good forest. The rolling of scree/debris along the slopes had left not only ugly scars but also resulted in destruction of the green cover. The debris flow has also choked the Sansaru nullah which once used to be a perennial stream. There was no environmental management plan. In fact the Committee came to the conclusion that the working of this mine was not conducive to the environmental conservation.

11. We have in another part of this judgement indicated our conclusion that mining activity as a whole should be stopped in the Doon Valley area but for the reasons indicated therein. We have also come to the conclusion that the three mining lessees who have been operating under valid leases may be permitted to work subject to such conditions as have been indicated. Keeping the report of the Working Group in view and for the reasons we have elsewhere indicated, we direct that mining operations in leases No. 16, 17 and 76 where the respective leases have expired and mining operation is being carried on under Court's Orders shall stop and the several orders of the courts enabling mining activity shall stand superseded.

12. This Court in its order dated 19th of October, 1987, (AIR 1987 SC 2426) came to the clear conclusion:-

> "We are of the view that the stone quarrying in the Doon Valley area should generally be stopped and reasons therefore we shall provide in due course".

13. In another part of this judgement, reasons in support of that conclusion have been provided. The direction to close down the three operating mines where the period of lease has expired is to bring the position in accord with that conclusion.

14. One of the submissions advanced at the Bar is that the decision of this Court dated 12th March, 1985 reported in AIR 1985 SC 652), was final in certain aspects including the release of the A category mines outside the city limits of Mussoorie from the proceedings and in view of such finality it is not open to this Court in the same proceeding at a later stage to direct differently in regard to what has been decided earlier. Connected with this submission is the contention that during the pendency of these writ petitions the Environmental (Protection) Act of 1986 has come into force and since that Statute and the Rules made thereunder provide detailed procedure to deal with the situations that arise in these cases, this Court should no more deal with the matter and leave it to be looked into by the authorities under the Act. Counsel have relied upon what

was stated by this Court while giving reasons in support of the order of March 12, 1985, namely, "it is for the Government and the Nation-and not for the Court-to decide whether the deposits should be exploited at the cost of ecology and environmental considerations". In the order of 12th March, 1985 (reported in AIR 1985 SC65 2 dt p. 655), this Court had pointed out:-

> "So far as the limes stone quarries classified as category A in the Bhargava Committee Report and/or category 1 in the Working Group Report are concerned, we would divide them into two classes, one class consisting of those lime stone quarries which are within the city limits of Mussoorie and the other consisting of those which are outside the city limits. We take the view that the lime stone quarries falling within category A of the Bhargava Committee Report and/or category 1 of the Working Group Report and falling outside the city limits of Mussoorie, should be allowed to be operated subject, of course, to the observance of the requirements of the Mines Act, 1952, the Metalliferous Mines Regulations, 1961 and other relevant statutes, rules and regulations. Of course when we say this, we must make it clear that we are not holding that if the leases in respect of these lime stone quarries have expired and suits or writ petitions for renewal of the leases are pending in the courts, such leases should be automatically renewed. It will be for the appropriate courts to decide whether such leases should be renewed or not having regard to the law and facts of each case. So far as the lime stone quarries classified in category A in the Bhargava Committee Report and category 1 in the Working Group Report and falling within the city limits of Mussorie are concerned, we would give the same direction which we are giving in the next succeeding paragraph in regard to the lime stone quarries classified as category B in the Bhargava Committee Report."

The argument that A category mines outside the city limits had been cleared is based upon what has been indicated above. Dealing with this part of the direction, this Court in its order of 19th October, 1987 (reported in AIR 1987 SC 2426 at p. 2428), stated:-

> "Consciousness regarding environmental upkeep is of recent origin. Cognisance of ecological importance has entered into governmental activity only in this decade. Everyday that consciousness as also the sense of social obligation in this regard are on the increase. It has been pointed out to us in course of hearing of the objections that the classification of the A category lime stone quarries on the basis of their location within the municipal limits and outside was indeed not a real one. We have been shown and it seems to be factually true that some of the lime stone quarries said to be outside the city limits are closer to the heart of the city of Mussoorie than others located within the city limits. If the real purpose of the order made by the Court was not to permit mining within the city limits without further scrutiny as in the case of B category stone quarries, we really do not see any justification as to why these stone quarries located outside the city limits but close to the heart of the city should not have been subjected to such scrutiny. Since the writ petitions have not been finally disposed of and the order made in regard to the A category quarries located outside the city limits by the judgement referred to above only exempted them from further scrutiny as was directed in respect of the other quarries, we see no

impediment in the matter of giving a re-look at the matter even with reference to the A category quarries located outside the city limits.

In this connection it is relevant to take note of the fact that the State Government has already formed an improvement programme of the area by constituting a combined body for Mussoorie and Dehradun. The considerations which had weighed with the Court on the basis of municipal limits has indeed to be extended now to the entire area covered by the new scheme. We are, therefore, of the view that the A category stone quarries in this area irrespective of location within or outside city limits should be subjected to further order of this Court and there is no legal impediment for this Court to do the same."

We reiterate our opinion that by the order of 12th March, 1985 (reported in AIR 1985 SC 652), the A category mining leases outside the city limits were only exempted from further scrutiny and not released from the proceedings. Our order of 18th December 1986 (Reported in AIR 1987 SC 359), left certain aspects to be considered by the State and immediately the Central Government responded by appointing the second Working Group. We would like to reiterate what we have already said in the order of 19th of October, 1987 (Reported in AIR 1987 SC 2426), that the examination by this Court when it made the order of 12th March, 1985, omitted to consider the impact of the Forest (Conservation) Act of 1980 which was then a statute in force. If the provisions of the Conservation Act had been noticed and impact thereof for the continuance of mining activity had been considered, perhaps the Court would have made no exemptions and no mining may have been permitted. Besides, if the Court really intended to release the A category mines outside the city limits, it could very well pronounce that in clear terms.

15. In view of what we have indicated above, it is difficult to accept the stand taken by some of the lessees and by Mr. Nariman appearing for the intervener that a final order has been passed by this Court in regard to the A category mines outside the city limits of Mussoorie.

16. The writ petitions before us are not inter-party disputes and have been raised by way of public interest litigation and the controversy before the Court is as to whether for social safety and for creating a hazardless environment for the people to live in, mining in the area should be permitted or stopped. We may not be taken to have said that for public interest litigations, procedural laws do not apply. At the same time it has to be remembered that every technicality in the procedural law is not available as a defence when a matter of grave public importance is for consideration before the Court. Even if it is said that there was a final order, in a dispute of this type it would be difficult to entertain the plea of res judicata. As we have already pointed out when the order of 12th March, 1985 (reported in AIR 1985 SC 652) was made, no reference to the Forest (Conservation) Act of 1980 had been done. We are of the view that leaving the question open for examination in future would lead to unnecessary multiplicity of proceedings and would be against the interests of society. It is proper as also in the interest of the parties that the entire question is taken into account at this stage.

17. Undoubtedly, the Environment (Protection) Act, 1986 (29 of 1986) has come into force with effect from 19th November, 1986. Under this Act power is vested in the Central Government to take measures to protect and improve the environment. These write petitions were filed as early as 1983 more than three years before the Act came into force. This Court appointed several expert Committees, received their reports and on the basis of materials placed before it, made directions, partly final and partly interlocutory, in regard to certain mines in the area. Several directions from time to time have been made by this Court. As many as four reportable orders have been given. The several parties and their counsel have been heard for days together on different issues during the three and a quarter years of the pendency of the proceedings. The Act does not purport to-and perhaps could not-take away the jurisdiction of this Court to deal with a case of this type. In consideration of these facts, we do not think there is any justification to decline the exercise of jurisdiction at this stage. Ordinarily the Court would not entertain a dispute for the adjudication of which a special provision has been made by law but that rule is not attracted in the present situation in these cases. Besides it is a rule of practice and prudence and not one of jurisdiction. The contention against exercise of jurisdiction advanced by Mr. Nariman for the intervener and reiterated by some of the lessees before this Court must stand overruled.

18. We shall now briefly indicate reasons in support of our conclusion mentioned in the order of October 19, 1987 (reported in AIR 1987 SC 2426), that mining in this area should be stopped.

19. Kalidas, the greatest of the Indian poets, sang the praises of the Humalayas in 'Meghadoot' by describing it as the loftiest mountain on earth surface located on the north of the country. The Himalayan ranges apart from operating as a natural seal on the northern border against intruders, have influenced the climate, culture, ecology and environment of the sub continent. These are the ranges from where originate several perennial rivers like the Ganges and the Yamuna. These two rivers which mingle at Allahabad and later flow into the Bay of Bengal as one river have built up what is known as the gangetic belt the most fertile part of India. The legendary tradition of our culture is deeply associated with these two rivers. Apart from providing succour to millions of people who inhabit this belt, Yamuna is said to have provided the backdrop of Krishna Leela. The catchments area of this river is spread over the Mussoorie Hills-otherwise known as the Doon Valley with which we are concerned. Before a quarter of a century, Yamuna was having adequate water flow throughout the year. Unlike the Ganges which has her main tributaries originating from the snow-clad regions of the mountain range and melting snow in summer helping the tributaries to be perennial, the Yamuna used to receive the bulk of her water from the streams joining her in the lower regions. The Doon Valley used to receive sumptuous rains during the season; the tree roots helped the water to be stored; the lime stone mines operated as aquifers. The stored water was released in a continuous process and the streams even without the support of melting snow, provided perennial supply to the Yamuna. Assured of such supply, the twin cities of Mussoorie and Dehradun grew up. Lower down, hundreds of villages and small towns had also sprung up.

20. Lime stone mining operations in the Doon Valley became wide-spread during the decade between 1955 and 1965 and many of the leases were granted in 1962. In the decade after 1965, the depredations of mining began to be felt. Peace and tranquillity of the Valley was gone. Trees were felled at random and lush green forests disappeared. Blasting affected and shook up the hills. Rocks and scree rolled down and killed or injured the cattle, damaged the cultivable lands and adversely affected the villagers. The natural beauty of the Queen of the hill stations was no more to be seen. With the felling of the forests, rains became less, with the trees gone and the lime stone dug out, the aquifers cased to exist. The streams got blocked by scree and stones and the flow of water was substantially reduced. Tourist traffic was adversely affected. Irrigation was no more possible. The tributaries no longer fed the Yamuna sufficiently. Dehradun experienced scarcity of even drinking water. These led to the dispatch of the letter in July, 1983, to this Court.

21. The Doon Valley lime stone deposits are a gift of nature to mankind. Underneath the soil cover there is an unseen store house of bounty almost everywhere. Similarly forests provide the green belt and are a bequest of the past generations to the present. Lime stone deposits if excavated and utilised get exhausted while if forests are exploited, there can be regeneration provided reafforestation is undertaken. Trees, however, take time to grow and ordinarily a 15 to 25 year period is necessary for such purpose.

22. We have already indicated that several expert Committees appointed by this Court have opined generally against continuing the mining activity in the Valley. The Second working Group found in as late as 1987 that limited mining is the on-going mines was not congenial to ecological and environmental discipline. This Court by its order on October 19, 1987, (AIR 1987 SC 2426) called upon the Union of India (at pp. 24288-29):-

> "…….. to place before the Court on affidavit the minimum total requirement of this grade of limes stone for manufacture of quality steel and defence armaments. The affidavit should also specify as to how much of high grade ore is being imported into the country and as to whether other indigenous sources are available to meet such requirement. This Court would also require an affidavit from responsible authorities of the Union of India as to whether keeping the principles of ecology, environmental protection and safeguards and anti-pollution measures, it is in the interest of the Society that the requirement should be met by import or by taking other alternate indigenous sources or mining activity in this area should be permitted to a limited extent. The Court expects the Union of India to balance these two aspects and place on record its stand not as a party to the litigation but as a protector of the environment in discharge of its statutory and social obligation for the purpose of consideration of the court……"

The two affidavits filed on behalf of the Union of India have been dealt with elsewhere in the judgement and it would be sufficient for the instant aspect to extract from the affidavit of Mr. Seshan, Secretary to the Government in the Ministry of Environment and Forests, where he has stated:-

"5.1 Union of India submits that from the point of view of protection of the environment in the unique Doon Valley, it would be desirable that lime stone mining operations in the Valley are stopped completely."

Mr. Nariman questioned the value of this statement in view of the indication in the affidavit the if was the department's submission of the Court. We do not think that the ministry Secretary's affidavit can be brushed aside that way. Read in the background of the directions in the Order of 19th October, 1987, and in the sequence of the first affidavit not having been accepted by the Court as compliance, we must assume that Mr. Seshan has disclosed the stand of the Union of India with full authority and with the intention of binding the Union of India by his statement.

23. We are separately dealing with the Forest (Conservation) Act and its bearing and effect on this aspect. It is sufficient to note that the Act does not permit mining in the forest areas. We are also satisfied that if mining activity even to a limited extent is permitted in future, it would be not congenial to ecology and environment and the natural calm and peace which is a special feature of this area in its normal condition shall not be restored. This tourist zone in its natural setting would certainly be at its best if its serenity is restored in the fullest way. We are of the considered opinion that mining activity in this Valley must be completely stopped but as indicated in another part of this judgement such a situation will be available only after the original leases of the working mines are over.

24. It is time to turn to the contention relating to forests. Air and water are the most indispensable gifts of Nature for preservation of life. Abundant sun-shaine together with adequate rain keeps Nature's generating force at work. Human habitations all through the ages have thrived on river banks and in close proximity of water sources. Forests have natural growth of herbs which provide cure for diseases. Our ancestors knew that trees were friends of mankind and forests were necessary for human existence and civilisation to thrive. It is these forests that provided shelter for the 'Rishies' and accommodated the ancient 'Gurukulas'. They too provided food and sport for our forefathers living in the State of Nature. That is why there is copious reference to forests in the Vedas and the ancient literature of ours. In ancient times trees were worshiped as gods and prayers for up-keep of forests were offered to the Divine. In the Artharva Veda (5.30.6) it has been said:-

"Man's paradise is on earth; This living world is the beloved place of all; It has the blessings of Nature's bounties; Live in a lovely spirit."

25. In due course civilisation developed and men came to live away from forests. Yet the human community depended heavily upon the forests which caused rains and provided timber, fruits, herbs and sports. With sufficient sun-shine and water there was luxuriant growth of forests in the tropical and semitropical zones all over the globe. Then came the age of science and outburst of human population. Man required more of space for living as also for cultivation as well as more of timber. In that pursuit the forests were cleared and exploitation was arbitrary and excessive; the deep forests were depleted; consequently rainfall got reduced; soil erosion took place. The earth crust was washed

away and places like Cherapunji in Assam which used to receive and average annual rainfall of 500 inches suffered occasional drought.

26. Scientists came to realise that forests play a vital role in maintaining the balance of the ecological system. They came to know that forests preserve the soil and heavy humus acts as a porous reservoir for retaining water and gradually releasing it in a sustained flow. The trees in the forests draw water from the bowls of the earth and release the same into the atmosphere by the process of transpiration and the same is received back by way of rain as a result of condensation of clouds formed out of the atmospheric moisture. Forests thus help the cycle to be completed. Trees are responsible to purify the air by releasing oxygen into the atmosphere through the process of photosynthesis. It has, therefore, been rightly said that there is a balance on earth between air, water, soil and plant. Forests held up the mountains, cushion the rains and they discipline the rivers and control the floods. They sustain the springs; they break the winds; they foster the bulks; they keep the air cool and clean. Forests also prevent erosion by wing and water and preserve the carpet of the soil.

27. In the second half of the 19th Century felling of trees came to be regulated. In 1858, the Department of Forestry was set up and in 1864 the first Inspector General of Forests was appointed. In the following year the first Indian Forest Act came into the Statute Book to be followed by another Act in 1878 and yet another in 1927 which is still in force providing measures of regulation. This Act has been amended in the various States and presently reference shall be made to the relevant amendments in Uttar Pradesh.

28. Laying the railway track and providing sleepers therefore required clearing of forest areas and cutting down of trees. During the Second World War Indian forests were very badly mauled for various defence purposes. By the time India became independent it had about 2 per cent of the earth's land area, 1 per cent of productive forest area, 15 per cent of world's population and 10 per cent of world's animal life a situation indicative of the fact that there was acute deficit of forest area. The Government of India declared its National Forest Policy in 1952 which laid down that forests should occupy 33 per cent of the land surface as against 23 percent then. Attention was intended to be bestowed for expansion of forests in each of the Five Year Plans that followed with a view to rehabilitating the forest. The demand occasioned by the growing population and the spread of economic development and consequent demand of timber as raw material as also fuel led to excessive exploitation of the forests and consequent clearing of forest areas notwithstanding the declared National Forest Policy.

29. It is interesting to note that the national per capita average of forest areas works out to 0.11 hectare as against an international average of 1.5 hectare. State wise, Arunachal Pradesh has per capita forest of 8.21 hectares which is the maximum and Haryana has the minimum being 0.01 hectare (figures based on Census Report of 1981 and the report of the Central Forestry Commission). While some of the advanced countries like Australia, Canada, Germany, Japan and United States have forest over of higher area, on account of want of regulation and appropriate care and attention, this unhappy situation has arisen in India.

30. The Birla Institute of Scientific Research in its Report on Social Forestry in India: Problems and Prospects (1986 Reprint) has indicated:-

> "The treeless expanse of land provides and environment least conducive to healthy living. Tree leaves recharges the atmosphere with life giving oxygen, take away excess carbon dioxide and transmit moisture to the atmosphere by way of transpiration. It is estimated that one hectare of woodland consumes 3.7 tonnes of carbon dioxide and gives out 2 tonnes of oxygen per year. Denied these beneficial processes, life becomes lead heavy. A tree-covered environment is much healthier to live and work in. Amongst the immediately perceptible effects of loss of vegetative protection are soil erosion, floods and droughts. If trees and other vegetations are present, they bear the brunt of winds, heat, cold and rain water, first in their crowns and foliage. The soil remains covered by humus, decomposing litter and freshly fallen leaves which protect it from direct action of the adverse natural forces. In a wooded area the flow of rain water gets regulated through the leaves and the spongy material overlying the soil; but in a barren, unprotected surface the rain drops hit the soil directly and the water flows torrentially, dislodging and carrying with it the soil participles which have taken hundreds of years to form. This results in disastrous floods in lower areas causing damage to life and property. Fast running water also causes landslides and other calamities en route. With all the rain water having run away in the form of floods, the land surface losses its resilience to drier spells and severe droughts are caused. The removal of soil by water produces fertility and the productive capacity of the up lands to a considerable degree.
>
> It is estimated that nearly 6,000 million tonnes of soil is washed away every year in floods. With that go 6.0 million tonnes of nutrients-more than the amount that is applied in the form of fertilisers."

31. We shall now deal with legislative measures to preserve the forests and impact of such provisions on mining after briefly referring to the legislative power in regard to forests.

"Forest" was initially a State subject covered by Entry 19 in List II of the Seventh Schedule. In 1976, under the 42nd Amendment the entry was deleted and entry 17-A in the concurrent List was inserted. The change from the state list to the Concurrent list was brought about following the realisation of the Central Government that forests were of national importance and should be placed in the Concurrent List to enable the Central Government to deal with the matter. The same amendment of the Constitution brought in Article 48-A in Part IV providing thus:-

> "The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country."

Article 51-A in Part IV-A of the Constitution inserted by the same amendment provided a set of fundamental duties and clause (g) runs thus:-

> "It shall be the duty of every citizen of India-
> …….

(g) to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures."

1972 marks a watershed in the history of environmental management so far as India is concerned. The National Committee of Environment and Planning and Co-ordination was set up and various steps were taken to implement the recommendations already made and to be made thereafter. The National Commission on Agricultural in 1976 noticed the inadequate implementation of the 1952 National Forest Policy and proposed the following amendments:-

(i) Provision for prior approval of the Central Government before taking steps for dereservation or diversion of forest lands to non-forest use.

(ii) Preventing and evicting encroachment of forest lands.

(iii) Safeguarding against monoculture practices in raising forest plantations so that preservation of habitats for natural flora and fauna is ensured.

(iv) Encouraging large scale industrial plantation to foster growth of forest industries.

32. The problem of forest preservation and protection was no more to be separated form the life style of tribals. The approach required a shift from the dependence on law and executive implementation to dependence on the conscious and voluntary participation of the masses. This required educating the masses as well as appropriate education of the departmental employees. In this background the Forest (Conservation) Act of 1980 was enacted with which we propose presently to deal after noticing certain provision of the Indian Forest Act of 1927.

33. The Forest Act of 1927 deals with four categories of forests, namely-

1. Reserved Forests in Chapter II
2. Village Forests in Chapter III
3. Protected Forests in Chapter IV
4. Non-Government Forests in Chapter V.

The first there categories deal with forests which are Government property while the last refers control over forests and lands which are not Government property. Most of the private forests covered under the fourth category were earlier parts of estates which have now been abolished and thus such forests have also become Government property. In Uttar Pradesh there have been several amendments of the Forest Act and Chapter V-A has been incorporated which provides for control over forests of claimants. Detailed procedure has been laid in Chapter II in respect of reserved forests. Section 3 vests power in the State Government to reserve forests. The process for reservation of forests starts with section 4 and ends up with the final declaration under section 20. Section 27 vests power in the State Government to declare a forest to be no longer reserved.

34. As noticed earlier, notwithstanding the regulatory provisions in the Forest Act of 1927 and the Government' National Forest Policy of 1952, forests generally got rapidly

depleted. To meet this alarming situation the Forest (Conservation) Ordinance of 1980 was promulgated by the president and the Ordinance was followed by the Forest (Conservation) Act of 1980. The Statements of Objects and Reasons, as far as relevant, point out:-

> "Deforestation causes ecological imbalance and leads to environmental deterioration. Deforestation had been taking place on a large scale in the country and it had caused widespread concern.
>
> With a view to checking further deforestation the President promulgated on the 25th October, 1980, the Forest (Conservation) Ordinance, 1980. The Ordinance made the prior approval of the Central Government necessary for dereservation of forests and for use of forest land for non-forest purposes. The Ordinance also provided for the constitution of an advisory committee to advice the Central Government with regard to grant of such approval."

Section 2 of the Act which is relevant provides:-

> "Notwithstanding anything contained in any other law for the time being in force in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing-
>
> (i) that any reserved forest (within the meaning of the expression reserved forest) in any law for the time being in force in that State) or any portion thereof, shall cease to be reserved:
>
> (ii) that any forest land or any portion thereof may be used for any non-forest purpose.

Explanation-For the purposes of this section non-forest purpose means breaking up or clearing of any forest land or portion thereof for any purpose other than reafforestation.

Thus the power which was vested in the State Government under section 27 of the Indian Forest Act of 1927 or any other law containing a similar provision is now exercisable subject to prior approval of the Central Government.

35. This Court dealt with the provisions of the 1980 Act in the case of Ambica Quarry Works v. State of Gujarat, (1987) 1 SC 213: (AIR 1987 SC 1073). The question of renewal of mining leases in Gujarat came for consideration in this case before the Court. At page 219 (of SCC): (at p. 1076 of AIR) of the Reports, it was stated:-

> "The rules dealt with a situation prior to the coming into operation of 1980 Act. '1980 Act' was an act in recognition of the awareness that deforestation and ecological imbalances as a result of deforestation have become social menaces and further deforestation and ecological imbalances should be prevented. That was the primary purpose writ large in the Act of 1980. Therefore, the concept that power coupled with the duty enjoined upon the respondents to renew the lease stands eroded by the mandate of the legislation as manifest in 1980 Act in the facts and circumstances of these cases. The primary duty was to the community and the duty

took precedence, in our opinion, in these cases. The obligation to the society must predominate over the obligation to the individuals."

Again in paragraph 19, this Court observed:-

"In the instant appeals the situation is entirely different. The appellants are asking for a renewal of the quarry leases. It will lead to further deforestation or at least if will not help reclaiming back the areas where deforestations have taken place. In that view of the matter, in the facts and circumstances of the case, in our opinion, the ratio of said decision (State of Bihar v. Banshi Ram Modi (1985) 3 SCC 643: (AIR 1985 SC 814), cannot be made applicable to support the appellants' demands in these cases because the facts are entirely different here. The primary purpose of the Act which must subserve the interpretation in order to implement the Act is to prevent further deforestation. The Central Government has not granted approval……."

The ratio of the decision of this Court in State of Rajasthan v. Hari Shankar Rajendra Pal, (1965) 3 SCR 402 : (AIR 1966 SC 296) has obviously no application to the facts of this case. In Banshi Ram Modi's case (supra) what was being considered was extension of the leases for another mineral which was found while exploitation under the existing mining lease was undertaken. We agree with the view expressed by Brother Mukharji that the Conservation Act of 1980 applies to renewals as well and even if there was a provision for renewal in the lease agreement of exercise of lessee's option, the requirements of 1980 Act had to be satisfied before such renewal could be granted.

36. Many of these leases, as already indicated by us, expired in 1982. Renewal had been applied for and in many of these cases the request for renewal was rejected. On the plea that the State had no right to reject the request for first renewal, the aggrieved lessees went before different courts and obtained decrees or interim orders. We have already pointed out that in the order of 12th March, 1985 (reported in AIR 1985 SC 652), this Court vacated such orders or decrees regarding all C category and some B category mines. It is clear form the directions contained in the order of 12th March, 1985, as also the ratio of the judgement in the Ambica Quarry Works case (AIR 1987 SC 1073) (supra) that even if there has been an order of the Court and no challenge in raised against such order this court Could invoke its jurisdiction to nullify the direction or order and if any order, direction or decree has been passed ignoring the provisions of the Conservation Act of 1980 the same would not be binding. We have been given to understand during the hearing of these cases that appeals have been preferred by the State of Uttar Pradesh where decrees have been passed directing renewal. When this Court left the litigations to be continued, the Conservation Act of 1980 had not been noticed. Therefore, liberty had been granted to agitate the disputes arising out of refusal to renew. In view of the provisions in the Conservation Act and the opinion expressed in Ambica Quarry Works case (supra), with which we are in agreement, the decrees also would not be sustainable where prior approval of the Central Government has not been obtained. We agree with Brother Mukharji that whether it is a case of first grant or renewal following exercise of option by the lessee, the compliance of section 2 of the Conservation Act is necessary as a condition precedent. No useful purpose would be served by allowing the litigations to

be continued in different courts, particularly when keeping the broad interest of society with reference to ecology and environment, we have come to the conclusion that mining in this area has to be stopped. Notice has to be taken of the situation that the entire dispute has been before this Court and the scope of the dispute is comprehensive. All parties are before this Court. Parties have also been heard on various aspects at different times. An order made by this Court to nullify the decrees in such circumstances would not be violative of the principles of natural justice. Apart from the notice contained in the Court's Order of 19th October, 1987 (reported in AIR 1987 SC 2426), where it had been specifically stated that this Court was of the view that mining in the Doon Valley area should be totally stopped, the position was also made clear to different parties in course of the hearing which continued for several weeks. We, therefore, hold that if any decree or order has already been obtained from any court relating to renewal of these leases, the same shall stand vacated and similarly an appeal or other proceeding taken to obtain a renewal or against order/decrees granting renewal shall also become non est.

37. We shall now turn our attention to the consideration as to whether mining should be totally stopped outright or in a phrased manner.

38. In our order dated 19th October, 1987 we had categorically indicated that mining in this area has to be stopped but instead own total mining operations we were of the view that mining activity may have to be permitted to the extent it was necessary in the interest of defence of the country as also by way of the safeguarding of the foreign exchange position. Pursuant to our direction in the said order (AIR 1987 SC 2426) the Union of India filed an affidavit on 18th November, 1987, through Dr. S. Maudgal, Director in the Department of Environment, Forests & Wildlife in the Ministry of Environment and Forest. That affidavit inter alia stated:

> "3.1 The Ministry of Defence do not require any high-grade low silica limestone over and above what is needed for production of steel. Therefore, the limestone requirements of the Defence Ministry are fully covered in the requirement of the steel industry in the country.
>
> 3.2 High-grade limestone with low silica content is required in steel production only in the units which are operating on the LD process. As of today, only Bhilai, Rourkela, Bokaro and TISCO, Jamshedpur are operating on the LD process. The requirement of low-silica limestone in 1986-87 as provided by the Steel Authority of India Ltd. for its plants is 2,20,550 tonnes with the break-up given in Table-1

TABLE-I

Source	Quantity received 1986-87	Planned 1987-88
UPSMDC, Dehradun	18,300	100,000
RSMDC (Gotann/Jaisalmer)	183,000	200,000
Imported	19,250	100,000
	220,550	400,000

3.3 In addition to these steel plants, Durgapur Steel Plant and IISCO, Burnpur Plant is also expected to switch over to the LD process by 1994-95. The requirement of low silica limestone for the steel plants as projected in the report of the Steel and Mines, Department of Steel in March, 1997 is given in Table -II

TABLE-II

Plant	1989-1990	1994-1995	1999-2000
Bhilai Steel Plant	600	800	1,700
Durgapur Steel Plant	--	540	890
Rourkela Steel Plant	340	580	920
Bokaro Steel Plant	1,360	1,530	1,800
Indian Iron & Steel Co. Ltd.	--	330	660
SAIL TOTOAL	2,300	3,780	5,990
Tata Iron & Steel Co. Ltd.	480	810	810
Vizag Steel Plant	330	550	750
Mini Steel Plants	50	100	200
TOTAL REQUIREMENTS	3,130	5,240	7,750

3.4 The occurrence of LD grade limestone deposits has been identified at Lambidhar, Barkot (Distt. Dehra Dun) in U.P. Gotan and Jaisalmer in Rajashtan, Solan in Himachal Pradesh and Khorram in Meghalaya. The deposits outside U.P. have not, however, been prospected/explored in detail. Detailed exploration of these deposits is necessary for the preparation of mining and environmental management plants before definite assessment of the extent of production of LD-grade from these deposits can be determined. Jaisalmer being the most favoured deposit should be explored on priority. All the same, prima facie availability pattern of the LD-grade limestone from various deposits is as given in Table-III.

TABLE-III

(000 tonnes)

Location	1989-1990	1994-1995	1999-2000
Gotan	400	800	800
Jaisalmer*	200	800	1,000
Lambidhar	240	450	450
Barkot	--	--	1,000
Solan	--	500	1,000
Meghalaya	--	200	500
Katni/Satna	2,000	2,500	3,000
Total	2,840	5,250	7,750
Requirement	3,130	5,240	7,750
Surplus/Deficit	(-) 290	--	--

** (Subject to broad guage link with Jaisalmer)*

3.5 Data furnished by the six mine owners whose quarries are operating shows that a total of 1,73,768 tonnes has been supplied to the steel plants from Dehradun-Mussoorie area during 1986 which is approximately 25% of their limestone production. In this context, the State Government of U.P. have brought the following facts to our notice:

It has to be pointed out that the Dehradun Mussoorie limestone belt also meets the requirements of our sugar industry, and the units set up for the manufacture of chemicals and paper. The following Table indicates the approximate short and long term requirements of industries that ate dependent upon limestone from this belt:

(in tonnes)

Short term		Long term
Sugar Industry	1,50,000	2,00,000
Chemicals & Paper Industry	3,00,000	4,00,000

There are over 90 sugar factories in the State which are traditionally dependent on limestone from Dehradun for use in the process of manufacture. Sugar industry in our State is a key agriculture based industry on which the economy of farmers of nearly40 out of 57 districts depends. The limestone needs of this industry are, therefore, important for its survival. The chemical and paper industry further set up in Western and Northern U.P. with large investments, is also dependent upon Dehradun limestone for their existence. Mini cement plants located in Western U.P. and in the Doon Valley (M/S Venus Cements) utilise off grade limestone generated from the mines consequent to their operations. This, in effect, helps with the control of pollution that would have occurred from mine wastes if dumped or allowed to roll into depressions, Valleys or stream beds; it also helps with conservation and maximum utilisation of the resource.

39. Adverting to the question as to whether mining activity in this area should be permitted to a limited extent. Keeping the principles of ecology in view, the affidavit stated:-

> "The Union Government has all along taken the stand that the Doon Valley is a fragile eco-system and is endowed by nature with perennial water streams, lush green forests and scenic beauty. All these factors have contributed to Mussoorrie being called the queen of hill stations and Dehradun becoming and important place of tourist attraction as well as centre of education. The unscientific and uncontrolled limestone quarrying operations spread over the entire 40km. Belt on the Mussoorie slopes, however, endangered the delicate ecological balance resulting in ugly scars, excessive debris flow, drying up of water streams and perennial streams and rivulets and deforestation.
>
> Taking note of the disastrous ecological consequences, the technical group constituted by the State and Union Governments since 1979 have consistently recommended only controlled mining in this area. The Technical Expert Committee constituted by the Honourable Supreme Court under the Chairmanship of Shri D. N. Bhargav examined all the operating quarries and came to the conclusion that all of them, to a larger or smaller extent, have violated the statutory provisions relating to mines. Conditions in some of the mines sere considered to be so bad that 20 of these

were closed immediately in 1983. The Committee, under the Chairmanship of Shi D. Sandopadhyaya examined the Mining and Environmental Management Plans prepared by parties and came to the unanimous conclusions that none of these plans are satisfactory. Therefore, the Bandyopadhyaya committee strongly recommended that none of the mines reviewed by it should be allowed to operate. It is relevant to reiterate here that closure of these mines has been recommended by the Bhayopadhyaya Committee not just on the ground that they are located within the Mussoorie city limits but after due consideration of the environmental implications, status of preparedness of mining and Environmental Management Plans and capability of the lessee to undertake mining operations on a scientific basis so that the damage to life and property, apart from environmental degradation is avoided. None of the mines already closed is, therefore, fit to be considered for operation.

It is the view of Government that to prevent any further degradation of the ecology and environment in the area and to allow for rejuvenation, it is essential that lime stone mining operations, if they are to continue, should be on a limited scale and completely regulated to ensure that they are done in an entirely scientific manner consistent with the imperatives of preservation and restoration of the ecology and environment in this area. In order to meet the essential requirements of steel industry, it would be necessary to maintain supply of low silica limestone from the Dehradun-Mussoorie area. The State Government of U.P. also has brought to our notice that certain other vital industrial and agricultural operations are dependent on limestone supplies from this area. In view these considerations, it is felt that limestone mining on a limited scale may have to continue under strict regulation."

This affidavit of Dr. Maudgal was not accepted by this Court as it did not fulfil the requirements of the directions given in this Court's order dated 19th October, 1987. Then came another affidavit dated 24th February, 1988, by Shri T.N. Seshan, Secretary in the Ministry of Environment and Forests. This Affidavit indicated that 90 per cent of the low silica high grade limestone was supplied by the Rajasthan mines to the Steel Authority of India Ltd. And 10 per cent of supplies came from the Dehradun quarries. Tatal Iron and Steel Company at Jamshedpur, however, received a sizeable supply from the Dehradun quarries. According to this affidavit, in 1986, the total production of high grade limestone in the Dehradun-Mussoorie area was 6.02 lakh tonnes. The affidavit indicated availability of such limestone in several other parts of the country. In regard to import of limestone and foreign exchange components, this affidavit indicated that as low silica high grade limestone is available from indigenous sources, import thereof could be dispensed with. In paragraph 5 of this affidavit, the question as to whether keeping in view the principles of ecology, mining activity in the Dehradun-Mussoorie area could be permitted to a limited extent, perhaps as pleaded in the earlier affidavit, has been dealt with. This affidavit stated:-

"5.2 Now that high grade low silica limestone is also available in the extensive deposits covering large areas in the State of Rajasthan which can meet the requirements of the steel industry which also includes Defence requirements, there is

justification for discontinuance of the existing mining operations in the Dehradun-Mussoorie area and, in fact, complete closure of the said mines in this area."

It is a fact that while in the first affidavit, controlled and limited mining was suggested, in the second affidavit filed after a gap of about three months total stoppage of mining activity in this area has been stressed. Counsel appearing on behalf of the State of Uttar Pradesh and UPSMDC offered serious criticism against this changed stance and we were called upon to reject the second affidavit also. We do not find any justification in this plea for rejection of the affidavit. This Court in its order of 19th October, 1987, had in clear terms indicated what aspects were exactly required to be answered by the affidavit of the Union of India. Since the first affidavit did not answer those points it was rejected and a further affidavit was directed to be filed. There can be no two opinions that both the affidavits pleaded for banning of mining; but the first affidavit suggested controlled and limited mining in view of the demands while the second affidavit, on consideration of the fact that alternate sources were available for supply of the limestone of the desired quality, asked for total stoppage of mining operations. As we have already indicated in another part of this judgement, awareness of the environmental problem has first been gradually increasing and though in the affidavit, the Union of India had expressed its view that limited and controlled mining could be permitted, on a reconsideration of the matter and taking into account the relevant aspects for reaching its conclusion, the Union of India has come to adopt the view that there should be no mining in this area. We can well gather why the UPSMDC would feel aggrieved by the second affidavit but so far as the State of Uttar Pradesh is concerned, we do not see any justification in its critical stand against the second affidavit on the plea that the stand accepted in the first affidavit has been given a go-by. Maintenance of the environment and ecological balance is the obligation of the State and the Central Governments and unless there was any real objection to the opinion of the Union of India as to co continuing or closing down of mining activity, it should have been taken in the proper light and the little modified stand adopted in the second affidavit should have been welcomed.

40. In another part of our judgement we have found that the entire area is more or less forest. Many portions are reserved while others constitute forest land. It is indisputable that mining operations are detrimental to forest growth. In fact the Union Government in the Ministry of Environment and Forest have on 31st of May, 1988, informed the Secretaries of all the State Governments in the Department of Forest that even mining area below the forests would affect the forests.

41. The variation of the stand in the second affidavit that mining activity should be totally stopped is certainly an improvement on the stand taken in the first affidavit but we do not think there is any inconsistency in the stand inasmuch as the justification in support of the plea of total closure has been indicated.

42. Even before any of these two affidavits was filed, this Court in its order of 19th of October, 1987 (reported in AIR 1987 SC 2426), had clearly indicated that mining activity in this area should be totally stopped. The view expressed in the second affidavit is in accord with what this Court has stated. On assessment of the factual position, we do not think there is any substance in the argument advanced on behalf on the Uttar Pradesh

Government, UPSMDC or any other mine owner which would justify our rejecting the second affidavit. We would like to add that this is not a case of a somersault as contended on behalf of the State Government of Uttar Pradesh nor has it been occasioned by any illegitimate consideration.

43. The point which still remains to be dealt with is whether mining activity should be totally stopped immediately.

44. It is the accepted position by all parties that low silica content limestone is necessary for manufacturing class steel. The earlier LD process is being abandoned by new factories and even some are switching over to new methods but for quite some time there would be demand for low silica content limestone for manufacture of steel by the LD process. The alternate source which has been indicated in these two affidavits of the Union of India is not readily available to the fullest extent. The Gotan-Jaisalmer belt has to be worked out in full swing and that would take some time. The main difficulty for the Jaisalmer production to reach the consumers in the location of the mining area. It has no broad-gauge rail connection and admittedly the location is in the interior. The consumer would immediately face transport difficulty until there is conversion of the railway track to broad-gauge and surface transport difficulty until there is conversion of the railway track to broad-gauge and surface transport facility improves. Even if these facilities are made available the distant location is bound to reflect itself in the cost factor.

45. The question of foreign exchange component does not seem to be very material as the required type of mineral is indigenously available and import may not be necessary when the production in Rajasthan area increases. The fact that in there recent past the Tata Iron and Steel Company has made some import has indeed no real bearing on the question as that import has been necessitated on account of the closure of the mines in this area and non-availability of the material from the alternate indigenous source.

46. We have already recorded a finding elsewhere in this judgement that most of these mines are either within reserved forests or in forest lands, as covered by the U.P. Amendment of the Forest Act. To these areas the Forest Conservation Act applies and to allow mining in these areas even under strictest control as a permanent feature would not only be violative of the provisions of Forest (Conservation) Act but would be detrimental to restoration of the forest growth in a natural way in this area. Once the importance of forests in realised and as a matter of national policy and in the interests of the community, preservation of forests is accepted as the goal, nothing which would detract from that end should be permitted. In such circumstances we reiterate our conclusion that mining in this area has to be totally stopped.

47. There was some controversy as to whether some of the mines were located in the reserved forests. We have not made any attempt to resolve that controversy here as, in our opinion, whether the mines are within the reserved forests or, in other forest area, the provisions of the Conservation Act apply.

48. We do not agree with the submission advanced by Mr. Nariman for the intervener, Mr. Sibhal for the Utter Pradesh Government, Mr. Yogeshwar Prasad for the UPSMDC,

Dr. Singhvi for some of the mine owners and similar contentions advanced by other counsel of different mine lessens that there would be a total in the manufacture of drugs and sugar, as also steel, in case mining activity is stopped; yet we would accept this position that these would be hard-hit if mining activity in this area is stopped all of a sudden. With the pressing demand in the market and discovery of useful limestone deposits in other parts of the country apart from what has been indicated in the second affidavit of the Union of India the trade would adjust itself as every economic activity does. We area, however, of the view that the position should be monitored and the switch-over from the present position to a total ban should be spread over a period and not be sudden.

49. We have already taken note of the fact that for different treasons several mines are closed down and only six, as indicated in another part of this judgement, are working. Now that we have found that some mining activity for some more time in this area may be permitted under strict regulation, we have now to decide which of the mines may be permitted to work and for what period as also subject to what conditions.

50. Majority of the mining leases was granted in 1962. The lease period being 20 years, the original period of lease has expired in all such cases where the leases commenced from 1962. But following are the mines where the original grant is still valid and their date of expiry is separately indicated:

Sl. No.	Name of the Lessee	Lease No.	Vaild Up-to
1.	U.P.S.M.D.C.	94	10-3-1996
2.	Sh. R. K. Oberai	72	10-4-1994
3.	Punjab Lime & Limestone Co.	96	12-12-1989

Apart from these three, there are four other mines which are also operating under decrees/orders of Courts as per the details below:

Sl. No.	Name of the Lessee	Lease No.	Lease expired on
1.	Punjab Lime & Limestone Co.	14 (ii)	2-12-82
2.	Ch. Ved Pal Singh	16	2-12-82
3.	Seth Ram Avtar	17	2-12-82
4.	Sh. C. G. Gujaral	76	15-12-82

In all these cases, the leases have expired and the lessor Government refused to renew them. The lessees have obtained orders from the Court and are working continuously. In view of what we have held, the orders or decrees become inoperative and are deemed to have been set aside by this judgement. Mining in these four leases must stop within one month from today.

51. Apart from the three working mines specified above where the Original Lease period in yet to expire, there are six other A category mines with valid leases which are not working now as per the particulars below:-

Sl. No.	Name of the Lessee	Lease No.	Vaild up-to
1.	New Era Minerals	4	25-02-1990
2.	U.P. Minerals	8	10-04-1994
3.	Rajgiri Minerals	9	24-11-1992
4.	Anand Brothers	67	15-2-1992
5.	Uttrakhand Minerals	98	12-12-1989
6.	Vijayashree Minerals	99	20-3-1990

52. These mines are not operating at present for one reason or the other. On the 12th of May, 1985, the mines within the municipal limits of Mussoorie were directed to close down until they were cleared by the Bandyopadhyay Committee and that Committee did not clear any. So far as the first five mines are concerned, they are either within the municipal limits or within the forest area. We do not think it appropriate to allow them to operate until their lease periods lapse particularly when we have reached the conclusion that mining operation in this area should close down. An exception has to be made in the case of the mine being lease No. 99 where the lease period has to expire in 1990. The lease in of 15 acres of land and another 100 acres are from some private source. Mr. Jain appearing for the lessee had undertaken before us the over that 100 acres, there would be no mining operation and the lessee would immediately restore vegetation over the area and full forest growth will be available in regard to the 100 acres. The mine is neither within forest nor municipal area and minerals from this area would be removed not through the city limits. He has also assured us that immediately after the lease period is over, which would be about a year and half from now, the 15 acres would also be subject to reafforestation by the lessee. He has agreed to file a undertaking in this Court which we direct him to do within four weeks hence. On the undertaking being filed this mine, as a special case, shall be permitted to operate until the expiry of the lease. The Committee appointed under this order shall supervise the reafforestation programme undertaken by the lessee of lease No. 99 and in case it is of the view that the undertaking is not being properly worked out, on the report of the Committee to that effect, permission to work the lease may be varied.

53. Mr. Jain appearing for another lessee and Mr. Pramod Dayal appearing for the lessee in respect of lease No. 67 had tried to make out specific cases. During the hearing of these cases we had felt impressed by what had been placed before us but since we have now taken a decision to close down mining activity in the area we do not think fresh mining operations where mining has already been stopped-whatever be the ground-should on principle be permitted. To make out a special case for a few lessees from amongst similarly placed mine owners on small differences for being permitted to workout stopped mines, in our opinion, would not be appropriate at this stage. On the other hand to treat them all as a class and subject them to a common order would be just

and proper. He reiterates that the exception in the case of lease No. 99 is for testing the genuineness of the representation of the lessee and in consideration of the smallness of the area.

54. We would like to notice at this place the contention of Dr. Shingvi that a category mine owners should not suffer on account of this Court's order and similar treatment to all A category mine owners should be given. There can be no two opinions about the Court extending equal treatment to all equally placed parties before it. It is, however, not correct that the A category mines which are operating and those that are closed down are similarly situate. In fact, when the Court made the earlier order asking for closing down, the distinction was noticed and on that basis orders involving different treatments had been made. It may be that we have not found the distinction to be a tenable one at a later stage. But in the peculiar situation emerging in this case we do not accept the submission of Dr. Shingvi that those A category mines which had stopped working should be permitted to run. There are certain situations where in the interest of general benefit to the community, interests of individual citizens may be overlooked. We are satisfied that this situation attracts that principle to operate and even if some of the mine owners are worse affected than some others, permission to reopen the mines located in the forests and within municipal limits cannot be granted with a view to compensating them for being placed at par with the less affected group.

55. It is perhaps necessary to indicate why three on-going mines whose original lease period has not lapsed are being permitted to continue mining. We have already taken note of the position that UPSMDC is a public sector undertaking of the State of Uttar Pradesh and there has been a huge investment by the State in this establishment. It gives sizeable output. Though certain defects have been pointed out in its activities by the Working Group, we are of the opinion that if appropriately controlled, mining activities can be regulated and simultaneously reafforestation can be activised. So far as R.K. Oberai is concerned, the Working Group has found least objection against it. The lease of Pubjab Lime & Limestone Company shall have life of a little more than one year. All these three mines are running their initial lease period. No additional exercises are necessary to make them operative. If any of these mines is closed down there would be problem of unemployment. In regard to the mines closed for more than there years, we do not think the labour is sitting idle and the mine owner is paying them. They must have got employed elsewhere or they have lost their service and have taken to alternate engagement. In our opinion, therefore, allowing these three ongoing mines to operate for their initial period of lease is the most appropriate direction that can be given during the switch over from the present position to one of complete closing down of mining operation. We, therefore, permit these three mines to continue mining operation subject to compliance with all legal requirements and the additional conditions which we shall hereafter indicate.

56. The next aspect to be considered is as to under what conditions mining operation by these three lessees should be permitted. The objections raised by the working Group against the UPSMDC are germane and legitimate. We shall require this lessee to meet all these objections within a period of four months from now. If by the end of December,

1988, the lessee fails to comply with this direction to the satisfaction of the Monitoring Committee which is being set up by this judgement, the Monitoring Committee is empowered to direct closing down of this mine subject to any other direction of this Court. So far as the other two mines are concerned, whatever objections have been raised by the Working Committee should also be removed within the same time limit and on failure of compliance, they too shall be visited with the same consequences.

57. There is no dispute that continuance of mining operations affects environment and ecology adversely and at the same time creates a prejudicial situation against conservation of forests. It is, therefore, necessary that each of these working mines shall have to work with an undertaking given to the Monitoring Committee that all care and attention shall be bestowed to preserve ecological and environmental balance while carrying on mining operations. 25% of the gross profits of these three mines shall be credited to the Fund In charge of the Monitoring Committee in such manner as the Committee may direct and the Committee shall ensure maintenance of ecology and environment as also reafforestation in the area of mining by expending money from the fund. In the event of expenses exceeding the contribution by these three respective lessees, the Committee shall report to this Court for directions. On the expiry of their respective leases, they shall not be entitled to carry mining operation and by operation of this judgement shall have to wind up. No application for renewal shall be entertained from them. These three lessees as also any other lessee shall not be entitled to any compensation for closing down of the mines under orders of this Court.

58. In the Order of 12th March, 1985 (reported in AIR 1985 SC 652), a three-judges Bench of this Court had indicated that the mine owners who had been displaced should be rehabilitated. There is no material on record if any alternate provision has been made either by the State of Uttar Pradesh or the Union of India. On-going leases have been terminated under orders of this Court without provision for compensation. Indisputably displacement has been suffered by these lessees and the sudden displacement must have up-set their activities and brought about substantial inconvenience to them. The Court has no other option but to close down the mining activity in the broad interests of the community. This, however, does not mean that the displaced mine owners should not be provided with alternative occupation. Pious observation or even a direction in that regard may not be adequate, what is necessary is a time frame functioning if rehabilitation is to be made effective. It is, therefore, necessary that a Committee should be set up to over-see the rehabilitation of the displaced mine owners. The Uttar Pradesh Government, as apprehended by many of these mine owners, by itself may not be able to meet the requirements of the situation. It may be that all the displaced mine owners may not find suitable placement within the State of Uttar Pradesh. It is, therefore, necessary to associate of the some other States in the programme. Unless a high-powered Committee is set up wherein Union of India is also represented, the Committee to be constituted may not be effective and there may be lack of co-ordination. There is material that lime stone quarries are available in Rajasthan and Gujarat. It is, therefore, necessary that representatives of these State Governments are also on the Committee. We accordingly direct a Committee to be set up with representatives of the Union of India, the State Governments of Uttar Pradesh, Rajasthan and Gujarat. While effecting rehabilitation by

giving alternate mining sites, ecology and environment will have to be considered. It is, therefore, necessary that on such Committee Ministry of Environment should also be represented. Apart from them there should at least be two experts. We direct constitution of a Rehabilitation Committee with the following members:-

1. Secretary, Department of Mines, Government of India-Chairman.
2. Secretary, Department of Environment and Forest, Government of India-Member.
3. Secretaries, Department of Mining of the States of Uttar Pradesh, Rajasthan and Gujarat-Members.

Mr. Anil Agarwal of Centre of Science and Environment, G-92, Kalkaji, New Delhi, and Mr. Subrata Sinha, Senior Deputy Director General, Geological Survey of India, 27, Jawaharlal Nehru Road, Calcutta, are nominated as the expert Members of this Committee. The Committee shall have and officer of the grade of Under Secretary to the Government of India as its Secretary and the minimum skeleton staff for carrying its activities. For convenience, the office may be located for the time being in the Ministry of Steel and Mines at New Delhi. The Ministry of Environment and Forest is directed to deposit a sum of Rs. 3 Lacs in the Registry of this Court within four weeks from today to be transferred to the Committee for the purposes of the Committee subject to appropriate accounts to be rendered to the Ministry concerned. The Committee is directed to make an initial report on the problem and the manner it proposes to tackle it within eight weeks from today. On the basis of such report, further directions shall be made. The laws in force shall have to be kept in view and the above-named members are directed to extend full co-operation with zeal and a sense of understanding of the problem so that rehabilitation can be done as a part of the environmental programme.

59. The Court is of the view that a Monitoring Committee is necessary for reafforestation of the areas as also for overseeing the running of the three mines. The State of Uttar Pradesh has already undertaken a reafforestation programme in the area. The record, however, does not indicate much of improvement yet. We have taken note of the position that the Uttar Pradesh Government has a Master Plan for the Doon Valley spread over a quarter of century beginning with 1986. Since the Court has stepped in to close down mining operation in this area except to a very limited extent, we are of the view that a High Powered Committee should be set up to look after reafforestation, mining activities and all other aspects necessary to bring about natural normalcy in the Doon Valley. Mr. K. P. Geetakrishnan, a Member of the Indian Administrative Service, now Secretary, Forest, Wild Life and Environment in the Central Government, in our opinion, should be made the Chairman of the Mentoring Committee. Mr. D. Bandyopadhyay, a Member of the Indian Administrative Service, now Secretary, Department of Revenue in the Central Government, who had headed a Committee set up by this Court is aware of the problems of this area. We are of the opinion that he should be made a member of the Monitoring Committee. The Head of the Indian Defence Academy, the Head of the Indian Forest Institute, the Head of the establishment of ONGC (all located at Dehradun), the Secretary, Forest Department of the Uttar Pradesh

and the Chairmen of the Mussoorie and Dehradun Municipalities, and two public spirited citizens-one belonging to Mussoorie and another to Dehradun area are to be the members of this Committee. The two non-official members shall be co-opted by the Committee. The Committee shall have its office at Dehradun in the accommodation to be provided either by the ONGC or the Forest Staff College. The Government of Uttar Pradesh is directed to deposit a sum of Rs. 5 Lacs for creating the initial fund of the Monitoring Committee. The amount should be deposited in the Registry of this Court within four weeks from now. It shall be open to the Monitoring Committee to appoint a skeleton staff with the suitable officers to run the establishment. We hope and expect that the concerned Governments will permit their officers to undertake the respective assignments in public interest and we expect the officers also to extend their whole-hearted support to work out the trust reposed in them. The Monitoring Committee shall have powers to oversee reafforestation in the area by the State of Uttar Predesh and undertake and appropriate scheme of reafforestation. It shall ensure that mining activity by the three on-going mines is carried out in accordance with law and with appropriate safeguards from environment and ecology point of view. It shall also ensure that the screen is removed from the natural streams and the flow of water is maintained. After the Committee makes its initial report within eight weeks from now to the Registry further directions as necessary shall be given.

60. It is not our intention to continue control over these matters. Once this Court is satisfied that the Committee are operating on the right lines we shall consider whether it is any longer necessary for the Court to supervise their activity.

61. Before we part with the case, we must indicate our appreciation of services rendered by the petitioners and their counsel to the cause, the co-operation and understanding extended by the mine owners, their counsel, the Members of the several Committees constituted by the Court but for which these proceedings could not have come to terminate in the present manner. The records of the case have become unusually bulky and but for the continued assistance of Mr. Parmod Dayal, a member of the bar of this Court, it would indeed have been difficult for us as also parties and their advocates to handle the matter with case. Mr. Parmod Dayal deserves our commendation for the labour he has put in. He was appearing for some of the lessees but assisted the Court very willingly as and when called upon. We are of the view that he should be paid a total sum of Rs. 5,000/- (Rupees Five Thousand only) for the services rendered. We direct the Union of India to deposit the said amount with the Registry of this Court within two weeks from now. This amount when deposited shall be paid to Mr. Parmod Dayal.

62. The writ petitions are disposed of. There would be no order for costs. We direct that the reports of the two Committees, as and when received, shall be placed before this Court for directions.

Order accordingly.

Sankar Banerjee v. Durgapur Projects Ltd.
AIR 1988 Calcutta 136
C.O. 2068 (W) of 1985, D/-20-7-1987
Sudhir Ranjan Roy, J.

Constitution of India, Arts. 21, 43, 226 – Right to life – Compelling a person to live with his family in one small room of a two room quarter and to share bath, toilet and kitchen with another family – Is violative of his fundamental right envisaged under Arts. 21 and 43. (Industrial Disputes Act (14 of 1947), Sch. 2 Item 3).

U. P. Pollution Control Board v. M/s Modi Distillery
AIR 1988 Supreme Court 1128 (From: 1984 All. L. J. 847)
Criminal Appeal No. 415 of 1986, D/-6-8-1987
A. P. Sen and S. Natarajan.JJ.

Water (Prevention and Control of Pollution) Act (6 of 1974), Ss. 47,25,26,44 - Pollution by industrial unit - Prosecution of Chairman, Managing Director and other Directors of Company - Wilful default of industrial unit in furnishing details - Consequently, name of Company wrongly described in complaint - No ground for quashing complaint against Chairman etc. - 1984 All LJ 847, Reversed. (Prevention of Food Adulteration Act (1954), S. 17 (4); (Industrial Pollution- Prosecution of Director of Company).

Where an offence has been committed by a company, every person who at the time of the commission of the offence was 'in charge of and responsible of' the company for the conduct, of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Proviso to sub-s (1) of S. 47 however engrafts an exception in the case of any such person if he were to prove that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence. Sub-s. (1) of S. 47 is much wider than sub-s (4) of S. 17 of the Prevention of Food Adulteration Act, 1974. Furthermore, proviso to sub-s.(1) shifts the burden on the delinquent officer or servant of the company responsible for the commission of the offence. Its burden is on him to prove that he did not know of the offence or connived in it or that he had exercised all due diligence to prevent the commission of such offence. The non-obstinate clause in sub-s. (2) expressly provides that notwithstanding anything contained in sub-s. (1), where an offence under the Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence, and shall be liable to be proceeded against and punished accordingly.

It is true that there can be no vicarious liability of the Chairman, Vice-Chairman, Managing Director and members of the Board of Directors under sub-s (1) of (2) of S. 47

of the Act unless the Company owning the industrial unit, is prosecuted. However, where the industrial unit itself wilfully failed to furnish the requisite information to the Board regarding the particulars and names of the Managing Director, Directors and other person responsible for the conduct of the Company resulting in mentioning incorrect name of the Company in complaint (Modi Distillery instead of Modi Industries Ltd., in the instant case) it was not open to them to take advantage of the lapse of their own industrial unit (Modi Distillery) and claim that prosecution be quashed against them. The technical flaw of describing the name of the Company wrongly could be rectified by amending the complaint accordingly, 1984 All LJ 847, Reversed. AIR 1979 SC 1977, Disting.

Cases Referred: **Chronological Paras**

AIR 1979 SC 1977 (Disting)

SEN, J.:- This appeal by special leave is directed against the judgment and order of the High Court of Allahabad dated May 19, 1984 setting aside in its revisions jurisdiction an order of the Chief Judicial magistrate, Gaziabad dated November 3, 1983 directing the issue of process against the respondents on a complaint filed by the appellant under Section 44 of the Water (Prevention and Control of Pollution) Act, 1974. The issue involved is whether the Chairman, Vice-Chairman, Managing Director and members of the Board of Directors of Messers Modi Industries Limited, the Company owning the industrial unit called Messers Modi Distillery could be proceeded against on a complaint against the said industrial unit. A learned single Judge (K.C. Agarwal J.) following the decision of this court in State (Delhi Admin.) v. I. K. Nangia (1980) 1 SCC 258: (AIR 1979 SC 1977) interpreting a similar provision contained in sub-s (4) of S. 17 of the Prevention of Food adulteration Act, 1954 has held that there was no sufficient ground against the respondents inasmuch as the allegations made in the complaint do not constitute an offence punishable under Section 44 for the admitted contravention of Ss. 25 (1) and 26 read with S.47 of the Act. The question essentially turns upon the rule of construction to be adopted in S. 47.

2. The facts of the case are these. Messers Modi Industries Limited is an existing company under the Companies Act, 1956. It is a large business organisation having diversified business activities. Prior to the commencement of the Act it had established an industrial unit called Messers Modi Distillery at Modi Nagar, Gaziabad engaged in the business of manufacture and sale of industrial alcohol. During the process of manufacture of such industrial alcohol, the said industrial unit discharges its highly noxious and polluted trade effluents into the Kali River through the Kadrabad Drain which is a stream within the meaning of S.2 (j) of the Act and thereby causes continuous pollution of the said stream without the consent of the Board and therefore it falls within the purview of S. 26. Under the provisions of S. 26, as amended, it has been made mandatory for every existing industry of obtain the consent of the Board for discharging its trade effluent into a stream or well or sewer or on land. The last date for submission of such application seeking the consent of the Board by an existing industry had been extended up to December 31, 1981. In accordance with the procedure laid down under Ss. 25 (1) and 26 of the Act, the Company was required to submit an application for consent of the Board in the prescribed form along with the prescribed consent fee and the particulars. Instead

of the Company its industrial unit, namely, Messers Modi Distillery on March 27, 1981 applied to the Board for grant of consent to discharge its trade effluents into the stream. The aforesaid application was scrutinised by the Board and found incomplete in many respects. The Board accordingly by its letter dated April 29, 1981 informed the said industrial unit with regard to the discrepancies and the particulars wanting. There was no response from the respondents nor did they rectify the discrepancies pointed out or furnish the particulars required. The Board accordingly by its letter dated July 30, 1981 refused to grant the consent prayed for the public interest since the application was found incomplete in many respects and also because the said industrial unit did not have proper arrangements for treatment of its highly polluted trade effluents. Thereafter, the Board by its letter dated June 30, 1982 issued a notice under S. 20 of the Act directing the company to furnish certain information regarding the particulars and names of the Managing Director, Directors and other persons responsible for the conduct of the Company, but the respondents did not furnish the information called for. This was followed by two subsequent letters of the Board dated February 21, 1983 and June 9, 1983 drawing the attention of the respondents that they were deliberately violating the provisions of the Act and thereby rendering themselves liable to be punished under S. 44 for contravention of the provisions of Ss. 25 (1) and 26. On October 21, 1983 the Board lodged a complaint against the respondents under S. 44 of the Act in the Court of the Chief Judicial Magistrate, Gaziabad. Unfortunately, the complaint was inartistically drafted. It was averred in paragraph 2 that Messers Modi Distillery i.e. the industrial unit was a company within the meaning of S. 47 of the Act, that it had been knowingly and wilfully discharging its highly noxious and polluted trade effluents into the Kali River which is a steam within the meaning of S. 2 (j) of the Act through the Kadrabad Drain and thereby causing continuous pollution of the said steam. There were eleven persons arrayed as accused. Instead of launching a prosecution against Messrs Modi Industries Limited, the Board imploded its industrial unit Messers Modi Distillery as respondent No. 1 while respondents Nos. 2, 11 were the Chairman, Vice-Chairman, Managing Director and members of the Board of Directors of Messrs Modi Industries Limited i.e. the Company owning the industrial unit.

3. It appears that the respondents did not appear before the learned Chief Judicial Magistrate in response to the notice issued to them. The learned Magistrate after recording the statement of S. N. Pandey, Legal Assistant of the Board directed the issue of process to the respondents. Aggrieved, respondents Nos. 2,3 and 4, namely, K. N. Modi, K.K. Modi and M.L. Modi, the Chairman, Vice-Chairman and Managing Director respectively of Messrs Modi Industries Limited preferred a revision before the High Court under S. 397 of the Code of Criminal Procedure, 1973. Two of the other accused, namely, S. C. Trikha and Reghunath Rai, the nominated members of the Board of Directors of the Company also filed an application before the High Court under S. 482 of the Code for quashing the proceedings. As already stated, a learned single Judge invoking the revisional jurisdiction of the High Court has quashed the proceedings on the ground that there could be no vicarious liability saddled on the Chairman, Vice-Chairman, Managing Director and other members of the Board of Directors of the Company under S. 47 of the Act unless there was a prosecution of the Company i.e. Messrs Modi

Industries Limited. He held that the complaint suffers from the serious legal infirmity and in the circumstances, to allow the proceedings to continue would amount to an abuse of the process of the Court.

4. The question that arises in the appeal is whether the Chairman, Vice-Chairman, Managing Director and members of the Board of Director are liable to be proceeded against under S. 47 of the Act in the absence of a prosecution of the Company owning the said industrial unit. S. 47 insofar as material reads as follows:

> " 47. Offences by companies- (1) Where an offence under this Act has been committed by a company every person who at the time the offence was committed was in charge of, and was responsible to the company for the conduct, of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.
>
> Provided that nothing contained in this sub section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.
>
> (2) Notwithstanding anything contained in sub section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of or, is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary of other officer shall also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly."

5. On a plain reading of sub-s. (1) of S. 47 of the Act, where an offence has been committed by a company, every person who at the time of the commission of the offence was in charge of and responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Proviso to sub-s (1) however engrafts an exception in the case of any such person if he were to prove that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence. It would be noticed that sub-s. (1) of S. 47 is much wider than sub-s (4) of S. 17 of the Prevention of Food Adulteration Act, 1954 which fell for consideration in I.K. Nangia's case. Furthermore, proviso to sub-s (1) shifts the burden on the delinquent officer or servant of the company responsible for the commission of the offence. The burden is on him to prove that he did not know of the offence or connived in it or that he had exercised all due diligence to prevent the commission of such offence. The non obstinate clause in sub-s (2) expressly provides that notwithstanding anything contained in sub-s (1), where an offence under the Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or, is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence, and shall be liable to be proceeded against and punished accordingly.

6. On a combined reading of the provision contained in sub-ss. (1) and (2), we have no doubt, whatever that the Chairman, Vice-Chairman, Managing Director and members of the Board of Directors of Messrs Modi Industries Limited, the Company owning the industrial unit Messrs Modi Distillery could be prosecuted as having been in charge of and responsible to the company, for the business of the industrial unit Messrs Modi Distillery owned by it and could be deemed to be guilty of the offence with which they are charged. The learned single Judge has failed to bear in mind that this situation has been brought about by the industrial unit viz. Messrs Modi Distillery of Messrs Modi Industries Limited because in spite of more than one notice being issued by the Board, the unit of Messrs Modi Distillery deliberately failed to furnish the information called for regarding the particulars and names of the Managing Director, Directors and other persons responsible for the conduct of the Company. Having wilfully failed to furnish the requisite information to the Board, it is now not open to the Chairman, Vice-Chairman, Managing Director and other members of the Board of Directors to seek the Court's assistance to derive advantage from the lapse committed by their own industrial unit. The learned single Judge has focussed his attention only on the technical flaw in the complaint and has failed to Comprehend that the flaw had occurred to the recalcitrant attitude of Messrs Modi Distillery and furthermore the infirmity is one which could be easily removed by having the matter remitted to the Chief Judicial Magistrate with a direction to call upon the appellant to make the formal amendments to the averments contained in paragraph 2 of the complaint so as to make the controlling company of the industrial unit figure as the concerned accused in the complaint. All that has to be done is the making of a formal application for amendment by the appellant for leave to amend by substituting the name of Messrs Modi Industries Limited, the Company owning the industrial unit, in place of Messrs Modi Distillery. Although as a pure proposition of law in the abstract the learned single Judge's view that there can be no vicarious liability of Chairman, Vice-Chairman, Managing Director and members of the Board of Directors under sub-s. (1) or (2) of S.47 of the Act unless there was a prosecution against Messrs Modi Industries Limited, the Company owning the industrial unit, can be termed as correct, the objection raised by the petitioners before the High Court ought to have been viewed not in isolated but in the conspectus of facts and events and not in vacuum. We have already pointed out that the technical flaw in the complaint is attributable to the failure of the industrial unit to furnish the requisite information called for by the Board. Furthermore, the legal infirmity is of such a nature which could be easily cured. Another circumstance which brings out the narrow perspective of the learned single Judge is his failure to appreciate the fact that the averment in paragraph 2 has to be construed in the light of the averments contained in paragraphs 17, 18 and 19 which are to the effect that the Chairman, Vice-Chairman, Managing Director and members of the Board of Directors were also liable for the alleged offence committed by the Company.

7. It is regrettable that although Parliament enacted the Water (Prevention of Control & Pollution) Act, 1974 to meet the urgent need for introducing a comprehensive legislation with its established unitary agencies in the Centre and the States to provide for the prevention, abatement and control of pollution of rivers and streams, for maintaining or restoring wholesomeness of water courses and for controlling the existing and new

discharges of domestic and industrial wastes, which is a matter of grave national concern, the manner in which some of the boards are functioning leaves much to be desired. This is an instance where due to the sheer negligence on the part of the legal advisors in drafting the complaint a large business house is allowed to escape the consequences of the breaches committed by it of the provisions of the Act with impunity. It was expected that the Board and its legal advisors should have drafted the complaint with greater circumspection not to leave any technical flaw which would invalidate the initiation of the prosecution allowing the respondents to escape the consequences of the breaches committed by them of the provisions of the Act with impunity. As already stated, prior to the commencement of the Act the Company owned an industrial unit styled as Messrs Modi Distillery which was discharging its trade effluents into the Kali River through the Kadrabad Drain and therefore the matter fell within the ambit of S. 26 of the Act. S. 26 provides that where immediately before the commencement of the Act any person was discharging any sewage or trade effluent into a stream, the provisions of S. 25 shall, so far as may be, apply to such person referred to in that section. S. 25(1) creates an absolute prohibition against bringing into use any new or altered outlet for the discharge of sewage or trade effluent into a stream without the consent of the Board. On a combined reading of Ss. 25(1) and 26 it was mandatory for the Company viz. Messrs Modi Industries Limited to make an application to the Board under sub-s. (2) of S. 25 read with S. 26 in the prescribed form containing the prescribed particulars for grant of consent for the discharge of its trade effluents into the said stream, subject to such conditions as it may impose. Along with the complaint the appellant has placed on record several documents showing that the rejection of the application was in the public interest as it was incomplete in many respects. These documents also reveal that the Company did not have proper arrangements for treatment of the highly polluted trade effluents discharged by it and although the appellant repeatedly by its letter required the Company to obtain the consent of the Board, the company was intentionally and deliberately avoiding compliance of the requirements of Ss. 25 (1) and 26 of the Act. The contravention of these provisions is an offence punishable under S. 44. The other ten persons arrayed by names as accused in the complaint are respondents Nos. 2-11, the Chairman, Vice-Chairman, Managing Director and members of the Board of Directors of Messrs Modi Industries Limited. It cannot be doubted that in such capacity they were in charge of and responsible for the conduct of the business of the company and were therefore deemed to be guilty of the said offence and liable to be proceeded against and punished under S. 47 of the Act. It would be a travesty of justice if the big business house of Messrs Modi Industries Limited is allowed to defeat the prosecution launched and avoid facing the trial on a technical flaw which is not incurable for their alleged deliberate and wilful breach of the provisions contained in Ss. 25 (1) and 26 made punishable under S. 44 read with S. 47 of the Act.

8. Faced with the difficulty of refuting the gravamen of the offence set out in the complaint, Shri Ram Jethmalani, learned counsel appearing for the respondents drew our attention to the counter-affidavit of Virendra Prasad, Manager (Personnel & Administration), Modi Distillery dated January 13, 1986 and the two supplementary affidavits dated August 25, 1986 and November 17, 1986 tending to show that Messrs

Modi Industries Limited, the company owning the industrial unit, have taken effective steps to set up an effluent treatment plant by entering into an agreement dated December 23, 1985 with Messrs Chemical Consultants & Engineers, Ahamadnagar who would set it up in collaboration with Sulzer Bros. Limited, Switzerland by employment of the technical know-how which would be able to recover Methane gas up to 70% and also bring down BOD reduction up to 90%. Further, it is averred that the company sought and obtained the approval of the Board subject to a time schedule for erection and installation of the plant by the end of June 1987. It is also averred that since the Government of India has turned down the application of the respondents for subsidy for installation of the said plant insofar as the year 1985-86 was concerned, they are trying other sources of finance and that in the meanwhile pending the installation and commissioning of the plant based on the Sulzer's process and treating the effluents by alternative methods in order to reduce the extent of BOD discharge. They are diluting the effluents by mixing fresh water to the extent of 13 to 15 times the amount of effluent discharged in order to reduce the extent of pollution. In view of the subsequent events the learned counsel submits that this was a fit case for dropping the proceedings. The averments made by the respondents in the various affidavits have been controverted by the affidavit-in-rejoinder sworn by Chandra Bhal Singh, Law Officer of the appellant-Board showing that there is little or no progress in the matter of establishment of the effluents treatment plant. We need not enter into this controversy. These are all matters to be dealt with by the learned Chief Judicial Magistrate.

9. The result therefore is that the appeal succeeds and is allowed. The judgment and order passed by the High Court are set aside and that of the learned Chief Judicial Magistrate directing issue of process to the respondents are restored. The learned Magistrate shall proceed with the trial as expeditiously as possible in accordance with law.

Appeal allowed.

Union Carbide Corporation v. Union of India
AIR 1988 Madhya Pradesh 206
Misc. Civil Case No. 704 of 1987, D/-3-12-1987
C.P. Sen and P.C. Pathak, JJ.

Civil P.C. (1908), S. 24(1)(b)(i) – M.P. High Court Rules and Orders, Section I, Chap.I Rules 1 (g) and (m) and 4 – Transfer of case to High Court – Gas leakage tragedy occurring in Bhopal – Claim cases filed in District Judge's Court at Bhopal – Withdrawal or transfer of cases to High Court at Jabalpur – Jurisdiction can be exercised by Division Bench – Held, on facts there was no justification for withdrawal of cases, Constitution of India, Art. 228.

Upendra Jha v. State of Bihar
AIR 1988 Patna 263 (At Ranchi Bench)
Civil Writ Jurisdiction Case No. 775 of 1984 (R), D/-16-4-1987
N. P. Singh and B.P. Singh, JJ.

Forest (Conservation) Act (69 of 1980), S.2 - Mines and Minerals (Regulation and Development) Act (67 of 1957), Ss. 4, 5 - Forest Land - Not only lease but also renewal of lease for carrying on mining operations be granted with prior approval of Central Government in view of S. 2 of 1980 Act.

Vikram Deo Singh Tomar v. State of Bihar
AIR 1988 Supreme Court 1782
Writ Petition (Civil) No. 1426 of 1987, D/-2-8-1988
R.S. Pathak, C.J., L.M. Sharma and N.D. Ojha, JJ.

Constitution of India, Arts. 21, 39 – Right to Life – Care homes maintained by State – Must provide at least the minimum conditions ensuring human dignity of the inmates – Supreme Court directed State of Bihar to take immediate steps for welfare of inmates of Care home, Patna. (Care Home – Must provide minimum conditions ensuring human dignity); (Destitute – Home for – Human dignity to be ensured to inmates).

B. V. Joshi v. State of Andhra Pradesh
AIR 1989 Andhra Pradesh 122
Writ Petition No. 7806 of 1984, D/-6-6-1988
K. Ramswamy, J.

Forest (Conservation) Act (69 of 1980), S. 2 - Mineral Concession Rules 1960, R. 28 - Mining lease - Renewal of - Lessee has no vested right for grant of renewal - Renewal within discretion of State Government - Mines situated within reserve forest area - Prior approval of Central Government necessary for granting lease.

Janak Lal v. State of Maharashtra
1989 (4) Supreme Court Cases 121
L.M. Sharma and J.S. Verma. JJ.

SHARMA, J. – Notice for final disposal of the case was served on the respondents. Heard the learned counsel for the parties. Special leave is granted.

2. This case is dependent on the correct meaning and scope of Rule 59 of the Mineral Concession Rules, 1960 (hereinafter referred to as 'the Rules'). A certain area in villages

Bazargaon, District Nagpur was reserved for nistar purposes (that is, for grazing of cattle etc.). Respondent 4 applied for grant of a mining lease in regard to the said area which was allowed. The appellant, who is a local resident, challenged the allotment on the ground that the procedure for settlement as laid down in Rule 59 read with Rule 58 was not followed before the grant.

3. Rule 58 deals with availability of areas for re-grant of a mining lease and requires an entry to that effect to be made in a register referred to in Rule 21(2) of the Rules, and a notification to be published in the official Gazette at least 30 days in advance. The purpose obviously is to enable the members of general public to apply for the proposed lease. Rule 59 directs the procedure in Rule 58 to be followed in the cases mentioned thereunder in the following terms:

> "59. Availability of certain areas for grant to be notified – In the case of any land which is otherwise available for the grant of a prospecting licence of a mining lease but in respect of which the State Government has refused to grant a prospecting licence or a mining lease on the ground that the land should be reserved for any purpose, the State Government shall, as soon as such land becomes again available for the grant of a prospecting licence or mining lease, grant the licence or lease after following the procedure laid down in Rule 58".

The appellant contends that as the prescribed procedure has not been followed, the grant in favour of respondent 4 is illegal and fit to be set aside.

4. Admittedly the disputed area was reserved for nistar purposes and when an application for grant of mining lease was earlier made by the third party it was rejected on the ground that it was so reserved. Further, there is no dispute that before the impugned grant was made in favour of respondent 4 the procedure prescribed by Rule 58 was not followed, and no opportunity was given to any other person before entertaining the request of respondent 4. The question in this background is whether Rule 59 is attracted to the case.

5. The appellant's application under Article 226 of the Constitution was dismissed by the Bombay High Court on the ground that Rule 59 was confined to cases where earlier reservation was made for mining purposes. The stand of the respondents that the expression "reserved for any purpose" in Rule 59 does not cover a case where the area was reserved for nistar purposes or for any purpose other than that of mining was accepted.

6. Earlier the expression "reserved for any purpose" was followed by the words "other than prospecting or mining for minerals", which were omitted by an amendment in 1963. Mr. Dholakia, learned counsel for the respondents appearing in support of the impugned judgment, has contended that as a result of this amendment the expression must now be confined to cases of prospecting or mining for minerals and all other cases where the earlier reservation was for agricultural, industrial or any other purpose must be excluded from the scope of the rule. We are not persuaded to accept the suggested interpretation. Earlier, the only category which was excluded from the application of Rule 59 was prospecting or mining leases and the effect of the amendment is that by omitting this

exception, prospecting and mining leases are also placed in the same position as the other cases. We do not see any reason as to why by including in the rule prospecting and mining leases, the other cases to which it applied earlier would get excluded. The result of the amendment is to extend the rule and not to curtail its area of operation. The words "any purpose" is of wide connotation and there is no reason to restrict its meaning.

7. We do not see any ground for limiting the scope of the rule so as to deprive the members of general public to approach the State with competitive terms. It is clearly in the public interest to notify the proposal to grant a mining lease, so that the best deserving person may have a chance to be considered. The State and its authorities will, in that case, have the choice of selecting the most suitable person by following the just and equitable criteria laid down by the rules. If, on the other hand, the rule is construed as suggested by the respondents, a resourceful applicant can succeed in striking an undeserved bargain to the prejudice of the public interest.

8. We are, therefore, of the view that Rule 59 covered the present case and the grant in favour of respondent 4 was illegally made in violation of Rule 58. Accordingly, the appeal is allowed, the judgment of the High Court is set aside and the decision to grant the mining lease in question to respondent 4 is quashed. The State Government may now issue a notification and take other steps in accordance with law before proceeding further.

There will be no order as to costs.

State of Bihar v. Murad Ali Khan
AIR 1989 Supreme Court 1
Criminal Appeals Nos. 551-553 of 1988 (arising out of Special Leave Petitions Nos. 1877 to 1879 of 1979), D/-10-10-1988
Ranganath Misra and M. N. Venkatachaliah, JJ.

(A) Wild Life Protection Act (1972), Ss. 9(1), 51 – Offence under – Cognisance can be taken only on complaint of particular statutory functionary – Even if police register a case for alleged offence against Act, provisions of S. 210, Cr.P.C. would not be attracted. Criminal Misc. Nos. 258 and 259 of 1987 (R), D/ - 18 – 2 – 1987 (Pat), Reversed. (Criminal P.C. (2 of 1974), S. 210.

(B) Criminal P.C. (2 of 1974), S. 482 – Inherent powers – Exercise of – Allegation in complaint, taken on their face value amounting to offence against Wild Life Protection Act – Quashing of proceeding by High Court on ground that *Prima facie* offence was not made out – Impermissible Criminal Misc. Nos. 258 and 259 of 1987 (R), D/ - 13 - 2 - 1987 (Pat) and Criminal Misc. No. 223 of 1987, D/ - 13 - 2 - 1987 (Pat), Reversed. (Wild Life Protection Act (1972), Ss. 9, 51).

(C) Wild Life Protection Act (1972), Ss. 56, 9(1), 2(16), 51 – "Same offence" – Offence under S. 9(1) read with S. 51 – Is not same or substantially same as offence under S. 429 Penal Code. (Penal Code (1860), S. 429); (Constitution of India, Art. 20(2); (Criminal P.C. (2 of 1974), S. 300; (General Clauses Act (1897), S. 26); (Double jeopardy – Same offence – Offence under S. 9(1) read with S. 51 of Wild Life Protection Act is not same as offence under S. 429 of Penal Code).

Attakoya Thangal v. Union of India
1990(1) KLT 580
Sankaran Nair, J.

JUDGMENT

1. The conflict in these cases, is the conflict of yesterdays and a new day – the conflict of the lifestyle of a lotus eyed leisurely day gone by, and the exacting demands of today on material resources.

2. The coral isles of Lakshadweep, with their wind swept beaches of silver sands washed by the soft ripples of the lagoons, lie scattered like pearls in the sapphire sea, to the west of the Malabar coast. The palm fringed isles are endowed with scenic loveliness; but are not endowed with enough material resources. According to petitioners, ground water resources in these islands are limited. Potable water is in short supply, and large scale withdrawals with electric or mechanical pumps can deplete the water sources, causing seepage or intrusion of saline water from the surrounding Arabian Sea. The administration has evolved a scheme to augment water supply, by digging wells and by drawing water from those existing wells to meet increasing needs. This, petitioners say, would upset the fresh water equilibrium leading to salinity is the awailable water resources. Pursuant to a scheme recommended by the Kerala Public Health Engineering Department, the administration is said to have taken this decision to extract ground water by using pumps. Action of the administration amounts to an invasion of the rights under Art. 21, say petitioners and they seek to restrain the administration from implementing the scheme, by the issuance of appropriate writs or directions.

3. Referring to the data available, petitioners submit that only 0.6 to 0.75 metres deep of ground water is available in the islands. The potential for recharge is limited, and if available ground water is withdrawn, hydraulic head will be lowered and water lens, penetrated by saline water causing diminution of potable water. Pristine form of hand withdrawal of water from wells alone will sustain the water resources, and the digging of radial wells would disturb the water equilibrium, according to them. They base their submission on observations made by the Central Ground Water Board, the Indian Council of Agricultural Research, the Central Public Health Engineering and Environment Department and other expert bodies.

4. Petitioners place considerable reliance on passages from the report, on "Strategy for an Integrated Development of Lakshadweep" by Prof. M.G.K. Menon, then Scientific Advisor to the Prime Minister of India and Member of the Planning Commission. Prof. Menon observed:

> "A hydrogeological survey of the island is essential. Although the Kerala Public Health and Engineering Department and Central Public Health and Engineering Organisations have prepared a report, it needs to be carefully examined by a group of experts particularly in terms of aquifer sizes, recharge rates, intrusion of saline water etc."

The Advocate General appearing for petitioners referred to the decision of the Supreme Court in *Shri. Sachidanand Pandey v. State of West Bengal & Ors.* (AIR 1987 S.C. 1109) to highlight the risk in interfering with nature beyond the degree of tolerance. For every triumph that men make over nature, she takes her revenge. In answer, the respondents submit that with the growing need for more water, it is not possible to content with the available sources of supply. It is further submitted that low environmental sanitary conditions and prevalence of water bourse diseases, make it necessary to introduce a scheme of protected water supply. The available water is of is of bad quality and purification is necessary according to respondents. They further submit that infiltration galleries/pumps will be located only at shallow depths and that water will only be skimmed from the surface of available resources, guarding against excessive withdrawals. Water will be skimmed to collector wells, and from there pumped to distribution outlets. It is submitted that there will be no direct pumping. that the bottom of wells will be plugged, and that pumping would be restricted to half an hour, followed by a break for 21/2 hours, thus ensuring against excessive withdrawals. This method would not jeopardise fresh water equilibrium, and respondents rely on a Project Report of the National Environmental Engineering Research Institute, shortly called 'NEERI', and on another Report by the Centre for Earth Science Studies, shortly called 'CESS', to support their contention.

5. By orders on C.M.P. 5763/87 in O.P. 9736/86, this court directed the Central Ground Water Board to investigate into the various aspects raised in the writ petition, and submit a report. A team consisting of Sarvashree V.C. Jacob, K. Rajagopalan, D.S. Thambi, K.M. Najeeb & K. Raman made a very detailed study of various aspects, and submitted a Report. They examined the question from different angles. Investigations were made with reference to physiography, climate, soil, agriculture & irrigation, hydrogeological aspects, tidal and water level fluctuations, hydrology infiltration studies, aquifer characteristics, hydrochemical studies, resource evaluation, recharge potential, water management concerns and other relevant matters.

6. Some of the findings of the team are:

(1) Extractable ground water potential is around 0.23 MCM, of which the present draft is around 0.18 MCM.

(2) Salt water intrusion is observed around pumping centres and that salt water fresh water interface was moving inland wherever pumping was more. Hence pumping of ground water should be stopped by legislation.

(3) The ground water level and quality should be continuously monitored.

They categorically expressed the view that water supply scheme that is proposed is not feasible. The team estimated the volume of ground water that could be safely drawn as 0.23 cms. According to them, 0.525 MCM is the total dynamic reserve of ground water above mean sea level, and tidal fluctuation is between 0.03 and 0.39m. To keep a buffer of 10 cm. water column above sea level, 0.05 MCM water is required which is approximately 10% of the reserve. According to them, by A.D. 2013, the water requirement will be around 0.35 MCM and this cannot be met by ground water resources. If withdrawals exceed 0.23 MCM, salinity will result. During test pumping it was noticed that water quality fell to 908/US/cm from 1100. Electrical conductivity varied from 3000 to 8000 during pumping.

7. They therefore suggested other means of augmenting water supply, mainly by harvesting rain water, desalination and reverse osmosis. More or less similar are recommendations and findings of the 'NEERI', 'CESS' and the other agencies, relied on by the respondents. Thus, largely there is consensus between these agencies. All the agencies agreed that existing ground water resources are limited, that excessive withdrawals will upset fresh water equilibrium, leading to salinity and diminution of potable water, and that new sources must be identified for augmentation. The sources indicated by all agencies are similar and they are – harvesting of rain water, desalination and reverse osmosis. But, while the team that reported in pursuance of orders of this court is positively against use of mechanical devices, the 'NEERI' and 'CESS' are not against restricted extraction of ground water by use of infiltration galleries to collector wells, under controlled conditions. How and how much of ground water can be extracted is thus the issue to be determined. The question arises in an area, where administrative and technical aspects come into sharp focus. The Executive Government has onerous responsibilities in the matter of providing civic amenities. The Technocrat too has his role to play, in view of the impact the matter has on environmental and hydrogeological concerns. There must be an effective and wholesome interdisciplinary interaction. At once, the administrative agency cannot be permitted to function in such a manner as to make inroads, into the fundamental right under Art. 21. The right to life is much more than the right to animal existence and its attributes are many fold, as life itself. A prioritisation of human needs and a new value system has been recognised in these areas. The right to sweet water, and the right to free air, are attributes of the right to life, for, these are the basic elements which sustain life itself.

8. Consistent with these diverse concerns, a methodology has to be evolved for extraction of ground water. As already indicated, over exploitation of water resources has to be contained.

9. Water and rivers have dominated the destiny and fortunes of man. Plentiful rivers, have brought prosperity to those who lived on their banks. Great civilisations, going back

to India's immemorial past, flourished along the banks of our great rivers. Legends and lores, linger around them. Along the banks of Indus and Ganges grew up the greatest civilisations, that mankind knew of. If Bhageerathi brought salvation, Ganga sustains life. The Ganga rising in torrential springs from the foothills of the Himalayas, runs like a lifeline through India's Heartland and has brought plenty of prosperity. Ages have rolled by it, and it has remained eternal. In a way it has been a symbol. In the words of Jawaharlal Nehru, 'the Ganga has been to me a symbol and a memory of the past of India, running into the present, and flowing on to the great ocean of future'. Prof. Humayun Kabir in 'Men and rivers' has portrayed life on the banks of Padma. The viscitudes of life. varies – happiness and sorrow-with her moods and seasons.

10. Environmentalists and Scientists in other disciplines, have indicated the importance of water management in the present day. Perhaps water management, will be one of the biggest challenges in the opening decades of the next century. Water resources have therefore to be conserved.

11. Consistent with natural constraints, a scheme, viable technically and meeting the requirements as nearly as possible has to be evolved. With changes in the way of life, even a basically conventional society, may go in for modern means and make use of pumps to draw water from private wells. Restrictions, comprehending the total situation, will be necessary, even in the shape of statutory regulations. Safeguards must be evolved to stop withdrawal of ground water at a cut off level, to impose restrictions and introduce a system of effective monitoring at all levels. To decide on the modalities the matter should receive a final look, at the hands of the competent Ministries of the Government of India, which may be the Ministry of Science and Technology and the Ministry of Environment.

12. The Scheme as envisaged shall not be implemented until it gets the final green signal from the aforesaid agencies. I say so, because some of the suggestions indicated by the administration in its counter affidavit do not seen to be satisfactory. For example, to protect equilibrium, the Administration has suggested plugging of the bottom of wells. If plugging is done, recharge potential will be limited. These matters will be considered by the aforesaid Ministries and the Ministries will issue such directions as they consider appropriate, informed as they are of the technical aspects. If considered necessary, statutory regulations should be made and a responsible agency set up for monitoring the functioning of the system set up. The respondents will refer the matter to the Ministries aforesaid.

With these directions, writ petitions are disposed of. No costs.

I express appreciation of the thorough work done by the Committee constituted pursuant to the directions in C.M.P. 5763/87 in O.P. 9736/86. The reports of the 'NEERI' and 'CESS' have also helped this court considerably in considering the various questions raised in the writ petitions.

Charan Lal Sahu v. Union of India
AIR 1990 Supreme Court 273
Civil Appeal Nos. 3187 and 3188 of 1988 with Special Leave Petition (Civil) No. 13080 of 1988, D/-14, 15-2-1989, 5-4-1989 and 4-5-1989
R. S. Pathak, C. J.; E. S. Venkataramiah, Ranganath Misra, M. N. Venkatachaliah and N. D. Ojha, JJ.

Torts – Compensation to victims of mass disaster – Quantification – Factors to be taken into consideration – Bhopal Gas Leak Disaster – Ordinary standards for determination of compensation for fatal accident actions discarded – US Dollar 470 Millions (approximately Rs. 750/- crores) awarded as damages after allocating sums to different categories of victims such as fatal cases, seriously injured etc. – Need for evolving national policy to protect national interest from such hazardous pursuit of economic gains also stressed by Supreme Court.

Bhopal Gas Leak-Compensation-Determination

Damages were sought on behalf of victims of Bhopal Gas Leak mass disaster. The Supreme Court considered it a compelling duty, both judicial and humane, to secure immediate relief to the victims. The Court examined the prima facie material as to the basis of quantification of a sum which, having regard to all the circumstances including the prospect of delays inherent in the judicial process in India and thereafter in the matter of domestication of the decree in the United States for the purpose of execution and directed that 470 million US dollars, which upon immediate payment and with interest over a reasonable period, pending actual distribution amongst the claimants, would aggregate very nearly to 500 million US dollars or its rupee equivalent of approximately Rs. 750/-crores be made the basis of the settlement. In doing so one of the important considerations was the range disclosed by the offers and counter offers which was between 426 million US dollars made by the Carbide Company and 500 million US dollars made by the Attorney General of India. The Court also examined certain materials available on record including the figures mentioned in the pleadings, the estimate made by the High Court and also certain figures referred to in the course of the arguments. The ordinary standards for awarding the compensation in fatal accident actions were discarded which if applied would have limited the aggregate of compensation payable in fatal cases to a sum less than Rs. 70/-crores in all. The Court estimated the number of fatal cases at 3000 where compensation could range from Rs. 1 lakh to Rs. 3 lakhs. This would account for Rs. 70/-crores, nearly 3 times higher than what would, otherwise, be awarded in comparable cases in motor vehicles accident claims. A sum of Rs. 500 crores approximately was thought of as allocable to the fatal cases and 42,000 cases of such serious personal injuries leaving behind in their trail total or partial incapacitation either of permanent or temporary character. It was considered that some outlays would have to be made for specialised institutional medical treatment for cases requiring such expert medical attention and for rehabilitation and after care. Rs. 25/- crores for the creation of such facilities was envisaged. Such cases of claims apparently pertaining to serious cases of permanent or temporary disabilities but are cases of a less serious nature, comprising claims for minor injuries, loss of personal belongings, loss of live-stock etc., for which

there was a general allocation of Rs. 225/- crores. Moreover, the Court also took into consideration the general run of damages in comparable accident claim cases and in cases under workmen's compensation laws. The broad allocations made are higher than those awarded or awardable in such claims.

(Paras 18, 20, 23, 28, 30, 32, 33, 35, 37)

The Supreme Court lastly observed that there is need to evolve a national policy to protect national interests from such ultra hazardous pursuits of economic gains and that jurists, technologists and other experts in economics, environmentology, futurology, sociology and public health etc. should identify areas of common concern and help in evolving proper criteria which may receive judicial recognition and legal sanction.

(Para 42)

Cases Referred:	**Chronological Paras**
AIR 1987 SC 1086	28, 43

ORDER D/-14th Feb., 1989

Having given our careful consideration for these several days to the facts and circumstances of the case placed before us by the parties in these proceedings, including the pleadings of the parties, the mass of data placed before us, the material relating to the proceedings in the Courts in the United States of America, the offers and counter-offers made between the parties at different stages during the various proceedings, as well as the complex issues of law and fact raised before us and the submissions made thereon, and in particular the enormity of human suffering occasioned by the Bhopal Gas disaster and the pressing urgency to provide immediate and substantial relief to victims of the disaster, we are of opinion that the case is pre-eminently fit for an overall settlement between the parties covering all litigations, claims, rights and liabilities related to and arising out of the disaster and we hold it just, equitable and reasonable to pass the following order:

2. We order:

(1) The Union Carbide Corporation shall pay a sum of U.S. Dollars 470 millions (Four hundred and seventy millions) to the Union of India in full settlement of all claims, rights and liabilities related to and arising out of the Bhopal Gas disaster.

(2) The aforesaid sum shall be paid by the Union Carbide Corporation to the Union of India on or before 31 March, 1989.

(3) To enable the effectuation of the settlement, all civil proceedings related to and arising out of the Bhopal Gas disaster shall hereby stand transferred to this Court and shall stand concluded in terms of the settlement, and all criminal proceedings related to and arising out of the disaster shall stand quashed wherever these may be pending.

A memorandum of settlement shall be filed before us tomorrow setting forth all the details of the settlement to enable consequential directions, if any, to issue.

3. We may record that we are deeply indebted to learned counsel for the parties for the dedicated assistance and the sincere co-operation they have offered the Court during the hearing of the case and for the manifest reasonableness they have shown in accepting the terms of settlement suggested by this Court.

ORDER D/- 15th Feb., 1989

4. Having heard learned counsel for the parties, and having taken into account the written memorandum filed by them, we make the following order further to our order dated 14 February, 1989 which shall be read with and subject to this Order:

1. Union Carbide India Ltd., which is already a party in numerous suits filed in the District Court at Bhopal, and which have been stayed by an order dated 31 December, 1985 of the District Court, Bhopal, is joined as a necessary party in order to effectuate the terms and conditions of our order dated 14 February, 1989 as supplemented by this order.

2. Pursuant to the order passed on 14 February, 1989 the payment of the sum of U.S. $ 470 Million (Four Hundred and Seventy Millions) directed by the court to be paid on or before 31 March, 1989 will be made in the manner following:

    (a) A sum of U.S. $ 425 Millions (Four Hundred and Twenty Five Millions) shall be paid on or before 23 March, 1989 by Union Carbide Corporation to the Union of India, less U.S. $ 5 Millions already paid by the Union Carbide Corporation pursuant to the order dated 7 June, 1985 of Judge Keenan in the Court proceedings taken in the United States of America.

    (b) Union Carbide India Ltd. will pay on or before 23 March, 1989 to the Union of India the rupee equivalent of U.S. $ 45 Millions (Forty Five Millions) at the exchange rate prevailing at the date of payment.

    (c) The aforesaid payments shall be made to the Union of India as claimant and for the benefit of all victims of the Bhopal Gas Disaster under the Bhopal Gas Leak Disaster (Registration and Processing of Claims) Scheme, 1985, and not as fines, penalties, or punitive damages.

3. Upon full payment of the sum referred to in paragraph 2 above:

    (a) The Union of India and the State of Madhya Pradesh shall take all steps which may in future become necessary in order to implement and given effect to this order including but not limited to ensuring that any suits, claims or civil or criminal complaints which may be filed in future against any Corporation, Company or person referred to in this settlement are defended by them and disposed of in terms of this order.

(b) Any such suits, claims or civil or criminal proceedings filed or to be filed before any Court or authority are hereby enjoined and shall not be proceeded with before such Court or authority except for dismissal or quashing in terms of this order.

4. Upon full payment in accordance with the Court's directions:

(a) The undertaking given by Union Carbide Corporation pursuant to the order dated 30 November, 1986 in the District Court, Bhopal shall stand discharged, and all orders passed in Suit No. 1113 of 1986 and/or in revision therefrom shall also stand discharged.

(b) Any action for contempt initiated against counsel or parties relating to this case and arising out of proceedings in the Courts below shall be treated as dropped.

5. The amounts payable to the Union of India under these orders of the Court shall be deposited to the credit of the Registrar of this Court in a Bank under directions to be taken from this Court.

This order will be sufficient authority for the Registrar of the Supreme court to have the amount transferred to his credit which is lying unutilized with the Indian Red Cross Society pursuant to the direction from the International Red Cross Society.

6. The terms of settlement filed by learned counsel for the parties today are taken on record and shall form part of our order and the record.

5. The case will be posted for reporting compliance on the first Tuesday of April, 1989.

Terms of Settlement Consequential to the Directions and Orders Passed by this Hon'ble Court

1. The parties acknowledge that the order dated February 14, 1989 as supplemented by the order dated February 15, 1989 disposes of in its entirety all proceedings in Suit No. 1113 of 1986. This settlement shall finally dispose of all past, present and future claims, causes of action and civil and criminal proceedings (of any nature whatsoever wherever pending) by all India Citizens and all public and private entities with respect to all past, present and future deaths, personal injuries, health effects, compensation, losses, damages and civil and criminal complaints of any nature whatsoever against UCC, Union Carbide India Limited, Union Carbide Eastern, and all of their subsidiaries and affiliates as well as each of their present and former directors, officers, employees, agents, representatives, attorneys, advocates and solicitors arising out of, relating to or connected with the Bhopal Gas Leak Disaster, including past, present and future claims, causes of action and proceedings against each other. All such claims and causes of action whether within or outside India of Indian citizens, public or private entities are hereby extinguished, including without limitation each of the claims filed or to be filed under the Bhopal Gas Leak Disaster (Registration and processing of Claims) Scheme 1985, and all such civil proceedings in India are hereby transferred to this court and are dismissed with prejudice,

and all such criminal proceedings including contempt proceedings stand quashed and accused deemed to be acquitted.

2. Upon full payment in accordance with the Court's directions the undertaking given by UCC pursuant to the order dated November 30, 1986 in the District Court, Bhopal stands discharged, and all orders passed in Suit No. 1113 of 1986 and/ or in any Revision therefrom, also stand discharged.

ORDER D/- 5th April, 1989

6. Having considered the circumstance that various proceedings are pending in this Court in relation to the Bhopal Gas Disaster which have an important bearing on the settlement between the Union of India and the Union Carbide Corporation embodies in our order dated February 14, 1989 read with our order dated February 15, 1989, including the Writ Petitions challenging the vires of the Bhopal Gas Leak Disaster (Registration and Processing of Claims) Act, 1985 which question the right of the Union of India to the terms of our order dated February 24, 1989, consequential orders, including orders on the affidavits of John Macdonald dated March 31, 1989 and C. P. Lal dated April 3, 1989 filed by the Union Carbide Corporation and the Union Carbide India Ltd. respectively, in these appeals and in the suit are deferred and it is ordered that the Union Carbide Corporation will continue to be subject to the jurisdiction of the Courts in India until further orders.

7. During the course of argument before us, it transpired that allegations have been made in some of the documents filed before us that attempts were made to settle the dispute between the Union Carbide Corporation and the Union of India in respect of compensation to be paid to the victims involved in the Bhopal Gas Disaster at U.S. 350 million dollars and towards the expenses of the Government in the sum of U.S. 100 million dollars. It seems necessary that the Union of India and the Union Carbide corporation should file respective affidavits indicating the precise terms of proposals made from time to time outside the Court in regard to the settlement of the claims. The affidavit of the Union of India shall contain specific details in regard to the quantum of compensation, the time frame for payment, and other particulars suggested in the proposals and mentioning specifically the persons concerned who suggested the quantum and particulars and/or were concerned in the negotiation, whether belonging to the Government or otherwise. The Union of India will keep ready in its possession all the relevant documents on the basis of which the averments are made in the affidavit filed by it, so that such documents may be produced as and when this Court calls upon the said Union of India to do so before it.

8. Three weeks are allowed to the Union of India and the Union Carbide Corporation for filing the aforesaid affidavits. The matters will now come up on May 2, 1989 for further orders.

ORDER D/-4TH May, 1989

9. The Bhopal Gas Leak tragedy that occurred at midnight on 2nd December, 1984, by the escape of deadly chemical fumes from the appellant's pesticide-factory was a

horrendous industrial mass disaster, unparalleled in its magnitude and devastation and remains a ghastly monument to the dehumanising influence of inherently dangerous technologies. The tragedy took an immediate toll of 2,660 innocent human lives and left tens of thousands of innocent citizens of Bhopal physically impaired of affected in various degrees. What added grim poignancy to the tragedy was that the industrial-enterprise was using Methyl Isocyanate, a lethal toxic poison, whose potentiality for destruction of life and biotic-communities was, apparently, matched only by the lack of a pre-package of relief procedures for management of any accident based on adequate scientific knowledge as to the ameliorative medical procedures for immediate neutralisation of its effects.

10. It is unnecessary for the present purpose to refer, in any detail, to the somewhat meandering course of the legal proceedings for the recovery of compensation initiated against the multi-national company initially in the Courts in the United States of America and later in the District Court at Bhopal in Suit No. 113 of 1986. It would suffice to refer to the order dated 4 April, 1988: (reported in AIR 1988 NOC 50) of the High Court of Madhya Pradesh which, in modification of the interlocutory order dated 17 December, 1987 made by the learned District Judge, granted an interim compensation of Rs. 250/- crores. Both the Union of India and the Union Carbide Corporation appealed against that order.

11. This Court by its order dated 14 February, 1989 made in those appeals directed that there be an overall settlement of the claims in the suit, for 470 million US dollars and termination of all civil and criminal proceedings. The opening words of the order said:

> "Having given our careful consideration for these several days to the facts and circumstances of the case placed before use by the parties in these proceedings, including the pleadings of the parties, the mass of data placed before us, the material relating to the proceedings in the Courts in the United States of America, the offers and counter-offers made between the parties at different stages during the various proceedings, as well as the complex issues of law and fact raised before us and the submissions made thereon, and in particular the enormity of human suffering occasioned by the Bhopal Gas Disaster and the Pressing urgency to provide immediate and substantial relief to victims of the disaster, we are of opinion that the case is pre-eminently fit for an overall settlement between the parties covering all litigation, claims, rights and liabilities related to and arising out of the disaster……" (Emphasised supplied)

12. It appears to us that the reasons that persuaded this Court to make the order for settlement should be set out, so that those who have sought a review might be able effectively to assist the Court in satisfactorily dealing with the prayer for a review. The statement of the reasons is not made with any sense of finality as to the infallibility of the decision; but with an open mind to be able to appreciate any tenable and compelling legal or factual infirmities that may be brought out, calling for remedy in Review under Art. 137 of the Constitution.

13. The points on which we propose to set out brief reasons are the following:

(a) How did this Court arrive at the sum of 470 million US dollars for an over-all settlement?

(b) Why did the Court consider this sum of 470 million US dollars as 'just, equitable and reasonable'?

(c) Why did the Court not pronounce on certain important legal questions of far reaching importance said to arise in the appeals as to the principles of liability of monolithic, economically entrenched multi-national companies operating with inherently dangerous technologies in the developing countries of the third world- questions said to be of great contemporary relevance to the democracies of the third-world?

14. There is yet another aspect of the Review pertaining to the part of the settlement which terminated the criminal proceedings. The questions raised on the point in the Review-petitions, prima facie, merit consideration and we should, therefore, abstain from saying anything which might tend to pre-judge this issue one way or the other.

15. The basic consideration motivating the conclusion of the settlement was the compelling need for urgent relief. The suffering of the victims has been intense and unrelieved. Thousands of persons who pursued their own occupations for an humble and honest living have been rendered destitute by this ghastly disaster. Even after four years of litigation, basic questions of the fundamentals of the law as to liability of the Union Carbide Corporation and the quantum of damages are yet being debated. These, of course, are important issues which need to be decided. But, when thousands of innocent citizens were in near destitute conditions, without adequate substantial needs of food and medicine and with every coming morrow haunted by the spectre of death and continued agony, it would be heartless abstention, if the possibilities of immediate sources of relief were not explored. Considerations of excellence and niceties of legal principles were greatly over-shadowed by the pressing problems of very survival for a large number of victims.

16. The Law's delays are, indeed, proverbial. It has been the unfortunate bane of the judicial process that even ordinary cases, where evidence consists of a few documents and the oral testimony of a few witnesses, require some years to realise the fruits of litigation. This is so even in cases of great and unquestionable urgency such as fatal accident action brought by the dependants. These are hard realities. The present case is one where damages are sought on behalf of the victims of a mass disaster and, having regard to the complexities and the legal questions involved, any person with an unbiased vision would not miss the time consuming prospect for the course of the litigation in its sojourn through the various Courts, both in India and later in United States.

17. It is indeed a matter for national introspection that public response to this great tragedy which affected a large number of poor and helpless persons limited itself to the expression of understandable anger against the industrial enterprise but did not channel itself in any effort to put together a public supported relief fund so that the victims were not left in distress, till the final decision in the litigation. It is well known that during the

recent drought in Gujarat, the devoted efforts of public spirited persons mitigated, in great measure, the loss of cattle-wealth in the near famine conditions that prevailed.

18. This Court, considered it a compelling duty, both judicial and humane, to secure immediate relief to the victims. In doing so, the Court did not enter upon any forbidden ground. Indeed, efforts had earlier been made in this direction by Judge Keenan in the United States and by the learned District Judge at Bhopal. What this Court did was in continuation of what had already been initiated. Even at the opening of the arguments in the appeal, the court had suggested to learned counsel on both sides to reach a just and fair settlement. Again, when counsel met for re-scheduling of the hearings the suggestion was reiterated. The response of learned counsel on both sides was positive in attempting a settlement, but they expressed a certain degree of uneasiness and scepticism at the prospects of success in view of their past experience of such negotiations when, as they stated, there had been uniformed and even irresponsible criticism of the attempts at settlement. The learned Attorney General submitted that even the most bona fide, sincere and devoted efforts at settlement were likely to come in for motivated criticism.

19. The Court asked learned counsel to make available the particulars of offers and counter offers made on previous occasions for a mutual settlement. Learned counsel for both parties furnished particulars of the earlier offers made for an overall settlement and what had been considered as a reasonable basis in that behalf. The progress made by previous negotiations was graphically indicated and those documents form part of the record. Shri Nariman stated that his client would stand by its earlier offer of Three Hundred and Fifty Million US dollars and also submitted that his client had also offered to add appropriate interest, at the rates prevailing in the U.S.A., to the sum of 350 million US dollars which raised the figure to 426 million US dollars. Shri Nariman stated that his client was of the view that that amount was the highest if could go up to. In regard to this offer of 426 million US dollars the learned Attorney-General submitted that he could not accept this offer. He submitted that any sum less than 500 million US dollars would not be reasonable. Learned counsel for both parties stated that they would leave it to the Court to decide what should be the figure of compensation. The range of choice for the Court in regard to the figure was, therefore, between the maximum of 426 million US dollars, offered by Shri Nariman and the minimum of 500 million US dollars suggested by the learned Attorney-General.

20. In these circumstances, the Court examined the prima facie material as to the basis of quantification of a sum which, having regard to all the circumstances including the prospect of delays inherent in the judicial process in India and thereafter in the matter of domestication of the decree in the United States for the purpose of execution and directed that 470 million US dollars, which upon immediate payment and with interest over a reasonable period, pending actual distribution amongst the claimants, would aggregate very nearly to 500 million US dollars or its rupee equivalent of approximately Rs. 750/- crores which the learned Attorney-General had suggested, be made the basis of the settlement. Both the parties accepted this direction.

21. The settlement proposals were considered on the premise that Government had the exclusive statutory authority to represent and act on behalf of the victims and neither

counsel had any reservation as to this. The order was also made on the premise that the Bhopal Gas Leak Disaster (Registration and Processing of Claims) Act, 1985 was as valid law. In the event the Act is declared void in the pending proceedings challenging its validity, the order dated 14 February, 1989 would require to be examined in the light of the decision.

22. We should make it clear that if any material is placed before this Court from which a reasonable inference is possible that the Union Carbide Corporation had, at any time earlier, offered to pay any sum higher than an out-right down payment of US 470 million dollars, this Court would straightway initiate *suo moto* action requiring the concerned parties to show cause why the order dated 14 February, 1989 should not be set aside and the parties relegated to their respective original positions.

23. The next question is as to the basis on which this Court considered this sum to be a reasonable one. This is not independent of its quantification; the idea of reasonableness of the present purpose in necessarily a broad and general estimate in the context of a settlement of the dispute and not on the basis of an accurate assessment by adjudication. The question is how good or reasonable it is as a settlement, which would avoid delays, uncertainties and assure immediate payment. The estimate, in the very nature of things, cannot share the accuracy of adjudication. Here again one of the important considerations was the range disclosed by the offers and counter offers which was between 426 million US dollars and 500 million US dollars. The Court also examined certain materials available on record including the figures mentioned in the pleadings, the estimate made by the High Court and also certain figures referred to in the course of the arguments.

24. There are a large number of claims under the Act. In the very nature of the situation, doubts that a sizeable number of them are either without any just basis or were other wise exaggerated could not be ruled out. It was, therefore, though not unreasonable to proceed on some prima facie undisputed figures of cases of death and of substantially compensate able personal injuries. The particulars of the number of persons treated at the hospitals were an important indicator in that behalf. This Court had no reason to doubt the bona fides of the figures furnished by the plaintiff itself in the pleadings as to the number of persons suffering serious injuries.

25. From the order of the High Court and the admitted position on the plaintiff's own side, a reasonable, prima facie, estimated of the number of fatal cases and serious personal injury cases was possible to be made. The High Court said:

> "… In the circumstances, leaving a small margin for the possibility of some of the claims relating to death and personal injuries made by the multitude of claims before the Director of Claims of the State Government being spurious, there is no reason to doubt that the figure furnished by the plaintiff Union of India in its amended plaint can be safely accepted for the purpose of granting the relief of interim payment of damages. It has been stated by the plaintiff-Union of India that a total number of 2660 persons suffered agonising and excruciating deaths and between 30000 to 40000 sustained serious injuries as a result of the disaster……..."
>
> (Emphasis supplied)

26. There is no scope for any doubt that the cases referred to as those of 'serious injuries' include both types of cases of permanent total and partial disabilities of various degrees as also cases of temporary total or partial disabilities of different damages. The High Court relied upon the averments and claims in the amended pleadings of the plaintiff, the Union of India, to reach this prima facie finding.

27. Then, in assessing the quantum of interim compensation the High Court did not adopt the standards of compensation usually awarded in fatal-accidents-actions or personal-injury-actions arising under the Motor Vehicles Act. It is well known that in fatal-accident-action where children are concerned, the compensation awardable is in conventional sums ranging from Rs. 15,000/- to Rs. 30,000/- in each case. In the present case of large number of deaths was of children of very young age. Even in the case of adults, according to the general run of damages in comparable cases, the damages assessed on the usual multiplier-method in the case of income groups comparable to those of the deceased persons would be anywhere between Rs. 80,000/- and Rs. 1,00,000/-

28. But the High Court discarded, and rightly, these ordinary standard which, if applied, would have limited the aggregated of compensation payable in fatal cases to a sum less than Rs. 20/-crores in all. The High Court thought it should adopt the broader principle of M.C. Mehta v. Union of India, AIR 1987 SC 1086. Stressing the need to apply such a higher standard, the High Court said:

> "As mentioned earlier, the measure of damages payable by the alleged tort-feaser as per the nature of tort involved in the suit has to be correlated to the magnitude and the capacity of the enterprises because such compensation must have a deterrent effect……."
>
> (Emphasis supplied)

Applying these higher standards of compensation, the High Court proceeded to assess damages in the following manner:

> "Bearing in mind, the able factors, in the opinion of this Court, it would not be unreasonable to assume that if the suit proceeded to trial the plaintiff-Union of India obtain judgment in respect of the claims relating to deaths and personal injuries at least in the following amounts: (a) Rs. 2 lakhs in each case of death; (b) Rs. 2 lakhs in each case of total permanent disability; (c) Rs. 1 lakh in each of permanent partial disablement; and (d) Rs. 50,000/- in each case of temporary partial disablement." (Emphasis supplied)

Half of these amounts were awarded as interim compensation. An amount of Rs. 250/-crores was awarded.

29. The figure adopted by the High Court in regard to the number of fatal cases and cases of serious personal injuries do not appear to have been disputed by anybody before

the High Court. These data and estimates of the High Court had a particular significance in the settlement. Then again, it was not disputed before us that the total number of fatal cases was about 3000 and of grievous and serious personal injuries, as verifiable from the records of the hospitals of cases treated at Bhopal was in the neighbourhood of 30,000. It would not be unreasonable to expect that persons suffering serious and substantially compensate-able injuries would have gone to hospitals for treatment. It would also appear that within about 8 months of the occurrence, a survey had been conducted for purposes of identification of cases of death and grievous and serious injuries for purposes of distribution of certain ex gratia payments sanctioned by Government. These figures were, it would appear, less than ten thousand.

30. In these circumstances, as a rough and ready estimate, this Court took into consideration the prima facie findings of the High Court and estimated the number of fatal cases at 3000 where compensation could range from Rs. 1 lakh to Rs. 3 lakhs. This would account for Rs. 70/-crores, nearly 3 times higher than what would otherwise be awarded in comparable cases in motor vehicles accident claims.

31. Death has an inexorable finality about it. Human lives that have been lost were precious and in that sense priceless and invaluable. But the law can compensate the estate of a person whose life is lost by the wrongful act of another only in the way the law is equipped to compensate i.e. by monetary compensations calculated on certain well recognised principles. "Loss to the estate" which is the entitlement of the estate and the 'loss of dependency' estimated on the basis of capitalised present-value awardable to the heirs and dependants are the main components in the computation of compensation in fatal accident actions. But, the High Court in estimating the value of compensation had adopted a higher basis.

32. So far as personal injury cases are concerned, about 30000 were estimated as cases of permanent total or partial disability. Compensation ranging from Rs. 2 lakhs to Rs. 50,000/- per individual according as the disability is total or partial and degree of the latter was envisaged. This alone would account of Rs. 250/-crores. In another 20,000/– cases of temporary total or partial disability compensation ranging from Rs. 1 lakh to Rs. 2500 depending on the nature and extent of the injuries and extent and degree of the temporary incapacitation accounting for a further allocation of Rs. 100/- crores, was envisaged. Again, there might be possibility of injuries of utmost severity in which case even Rs. 4 lakhs per individual might have to be considered. Rs. 80 crores, additionally for about 2000 of such cases was envisaged. A sum of Rs. 500 crores approximately was thought of as allocable to the fatal cases and 42,000 cases of such serious personal injuries leaving behind in their trail total or partial incapacitation either of permanent or temporary character.

33. It was considered that some outlays would have to be made for specialised institutional medical treatment for cases requiring such expert medical attention and for rehabilitation and after care. Rs. 25/- crores for the creation of such facilities was envisaged.

34. That would leave another Rs. 225/- crores. It is true that in assessing the interim compensation the High Court had taken into account only the cases of injuries resulting in permanent or temporary disabilities-total-or partial-and had not adverted to the large number of other claims, said to run into lakhs, filed by other claimants.

35. Such cases of claims do not, apparently, pertain to serious cases of permanent or temporary disabilities but are cases of a less serious nature, comprising claims for minor injuries, loss of personal belongings, loss of live-stock etc., for which there was a general allocation of Rs. 225/- crores. If in respect of these claims allocations are made at Rs. 20,000/-, Rs. 15,000/- and Rs. 10,000/- for about 50,000- persons or claims in each category-accounting for about one and half lakhs more claims-the sums required would be met by Rs. 225/- crores.

36. Looked at from another angle, if the corpus of Rs. 750/- crores along with the current market rates of interest on corporate borrowings, of say 14% or $14^1/_2$% is spent over a period of eight year it would make available Rs. 150- crores each year; or even if interest along is taken, about Rs. 105 to 110 crores per year could be spent, year-after-year, perpetually towards compensation and relief to the victims.

37. The court also took into consideration the general run of damages in comparable accident claim cases and in cases under workmen's compensation laws. The broad allocations made are higher than those awarded or awardable in such claims. These apportionments are merely broad consideration generally guiding the idea of reasonableness of the overall basis of settlement. This exercise is not a pre-determination of the quantum of compensation amongst the claimants either individually or category wise. No individual claimant shall be entitled to claim a particular quantum of compensation even if his case is found to fall within any of the broad categories indicated above. The determination of the actual quantum of compensation payable to the claimants has to be done by the authorities under the Act, on the basis of the facts of each case and without reference to the hypothetical quantifications made only for purposes of an overall view of the adequacy of the amount.

38. These are the broad and general assumption underlying the concept of 'justness' of the determination of the quantum. If the total number of cases of death or of permanent, total or partial, disabilities or of what may be called 'catastrophic' injuries is shown to be so large that the basic assumptions underlying the settlement become wholly unrelated to the realities, the element of 'justness' of the determination and of the 'truth' of its factual foundation would seriously be impaired. The 'justness' of the settlement is based on these assumptions of truth. Indeed, there might be different opinions, on the interpretation of laws or on questions of policy or even on what may be considered wise or unwise; but when one speaks of justice and truth, those words mean the same thing to all men whose judgment is uncommitted. Of Truth and Justice, Anatole France said:

> "Truth passes within herself a penetrating force unknown alike to error and falsehood. I say truth and you must understand my meaning. For the beautiful words Truth and Justice need not be defined in order to be understood in their true sense.

They bear within them a shining beauty and a heavenly light. I firmly believe in the triumph of truth and justice. That is what upholds me in times of trial……."

39. As to the remaining question, it has been said that many vital juristic principles of great contemporary relevance to the Third World generally, and to India in particular, touching problems emerging from the pursuit of such dangerous technologies for economic gains by multi-nationals arose in this case. It is said that this is an instance of last opportunity to this apex Court to give the law the new direction on vital issues emerging from the increasing dimensions of the economic exploitation of developing countries by economic forces of the rich ones. This case also, it is said, concerns the legal limits to be envisaged, in the vital interests of the protection of the constitutional rights of the citizenry, and of the environment, on the permissibility of such ultra-hazardous technologies and to prescribe absolute and deterrent standards of liability if harm is caused by such enterprises. The prospect of exploitation of cheap labour and of captive markets, it is said, induces multi-nationals to enter into the developing countries for such economic-exploitation and that this was eminently and appropriate case for a careful assessment of the legal and Constitutional safeguards stemming from these vital issues of great contemporary relevance.

40. These issues and certain cognate areas of even wider significance and the limits of the adjudicative disposition of some of their aspects are indeed questions of seminal importance. The culture of modern industrial technologies; which is sustained on processes of such pernicious potentialities, in the ultimate analysis, has thrown open vital and fundamental issues of technology-options. Associated problems of the adequacy of legal protection against such exploitative and hazardous industrial adventurism, and whether the citizens of the country are assured the protection of a legal system which could be said to be adequate in a comprehensive sense in such contexts arise. These, indeed, are issues of vital importance and this tragedy, and the conditions that enabled it happen, are of particular concern.

41. The chemical pesticide industry is a concomitant, and indeed, and integral part, of the Technology of Chemical Farming. Some experts think that it is time to return from the high-risk, resource-intensive, high-input, anti-ecological, monopolistic 'hard' technology which feeds, and is fed on, its self-assertive attribute, to a more human and humane, flexible, eco-conformable, "soft" technology with its systemic-wisdom and opportunities for human creativity and initiative. "Wisdom demands" says Schumacher "a new orientation of science and technology towards the organic, the gentle, the non-violent, the elegant and beautiful". The other view stressing the spectacular success of agricultural production in the new era of chemical farming, with high-yielding strains, points to the break-through achieved by the Green Revolution with its effective response to, and successful management of, the great challenges of feeding the millions. This technology in agriculture has given a big impetus to enterprises of chemical fertilisers and pesticides. This, say its critics, has brought in its trail its own serious problems. The technology-options before scientists and planners have been difficult.

42. Indeed, there is also need to evolve a national policy to protect national interests from such ultra-hazardous pursuits of economic gains. Jurists, technologists and other

experts in Economics, environmentology, futurology, sociology and public health etc. should identify areas of common concern and help in evolving proper criteria which may receive judicial recognition and legal sanction.

43. One aspect of this matter was dealt with by this Court in M.C Mehta v. Union of India (AIR 1987 SC 1086) (supra) which marked a significant stage in the development of the law. But, at the hearing there was more than a mere hint in the submissions of the Union Carbide that in this case the law was altered with only the Union Carbide Corporation in mind, and was altered to its disadvantage even before the case had reached this Court. The criticism of the Mehta principle, perhaps, ignores the emerging postulates of tortuous liability whose principal focus is the social-limits on economic adventurism. There are certain things that a civilised society simply cannot permit to be done to its members, even if they are compensated for their resulting losses. We may not a passage in "Theories of Compensation" (R.E. Goodin: Oxford Journal of Legal Studies, 1989, P.57.).

> "It would, however, be wrong to presume that we as a society can do anything we like to people, just so long as we compensate them for their losses. Such a proposition would mistake part of the policy universe for the whole. The set of policies to which it points… policies that are 'permissible, but only with compensation….' Is bound on the one side by a set of policies that are 'permissible, even without compensation' and on the other side by a set of policies that are 'impermissible, even with compensation."

44. But, in the present case, the compulsions of the need for immediate relief to tens of thousand of suffering victims could not, in our opinion, wait till these questions, vital though they be, are resolved in the due course of judicial proceedings. The tremendous suffering of thousand of persons compelled us to move into the direction of immediate relief which, we thought, should not be subordinated to the uncertain promises of the law, and when the assessment of fairness of the amount was based on certain factors and assumptions not disputed even by the plaintiff.

45. A few words in conclusion. A settlement has been recorded upon material and in circumstances which persuaded the Court that it was a just settlement. This is not to say that this Court will shut out any important material and compelling circumstances which might impose a duty on it to exercise the powers of review. Like all other human institutions, this court is human and fallible. What appears to the court to be just and reasonable in that particular context and setting need not necessarily appear to others in the same way. Which view is right, in the ultimate analysis, is to be judged by what it does to relieve the undeserved suffering of thousands of innocent citizens of this country. As a learned author said (Wallace Mendel son: Supreme Court Statecraft-The Rule of Law and Men.):

> "In this imperfect legal setting we expect judges to clear their endless dockets, uphold the Rule of Law, and yet not utterly disregard our need for the discretionary justice of Plato's philosopher king. Judges must be sometimes cautions and

sometimes bold. Judges must respect both the traditions of the past and the convenience of the present……..”

But the course of the decision of courts cannot be reached or altered or determined by agitation pressures. If a decision is wrong, the process of correction must be in a manner recognised by law. Here, many persons and social action groups claim to speak for the victims, quite a few in different voices. The factual allegations on which they rest their approach are conflicting in some areas and it becomes difficult to distinguish truth from falsehood and half-truth, and to distinguish as to who speaks for whom.

46. However, all of those who invoke the corrective-processes in accordance with law shall be heard and the court will do what the law and the course of justice requires. The matter concerns the interests of a large number of victims of a mass disaster. The Court directed the settlement with the earnest hope that it would do them good and bring them immediate relief, for tomorrow might be too late for many of them. But the case equally concerns the credibility of, and the public confidence in, the judicial process. If, owing to the pre-settlement procedures being limited to the main contestants in the appeal, the benefit of some contrary of supplemental information or material, having a crucial bearing on the fundamental assumptions basic to the settlement, have been denied to the court and that, as a result, serious miscarriage of justice, violating the constitutional and legal rights of the persons affected, has been occasioned, it will be the endeavour of this Court to undo any such injustice. But that, we reiterate, must be by procedures recognised by law. Those who trust this Court will not have cause for despair.

Order accordingly.

Charan Lal Sahu v. Union of India
AIR 1990 Supreme Court 1480
Writ Petitions Nos. 268 and 281 of 1989 and 164 and 1551 of 1986, D/-22-12-1989
Sabyasachi Mukherji JJ, C. J., K. N. Singh, S. Ranganathan, A. M. Ahmadi and K. N. Saikia, JJ.

(A) Bhopal Gas Disaster (Processing of Claims) Act (1985), Pre, Ss. 3, 4, 9, 10 - Validity - Victims of gas leak - Claim for compensation - Representation - Taking over claims of victims by Govt. - Not illegal.

Gas leak disaster - Claim for compensation by victims - Taking over by State.

Maxims - Parens patriae.

Constitution of India, Arts, 14, 226.

Conceptually and from the jurisprudential point of view, especially in the background of the preamble to the Constitution of India and the mandate of the directive principles, it was possible to authorise the Central Government to take over the claims of the victims of gas lake to fight against the multinational corporation in respect of the claims because

of the situation the victims were under disability in pursuing their claims in the circumstances of the situation fully and properly. On its plain terms the State has taken over the exclusive right to represent and act in place of every person who has made or is entitled to make a claim for all purposes connected with such claim in the same manner and to the same effect as such person. Whether such provision is valid or not in the background of the requirement of the Constitution and the Code of Civil Procedure, is another debate. But there is no prohibition or inhibition, conceptually or jurisprudentially for Indian State taking over the claims of the victims or for the State acting for the victims as the Act has sought to provide.

(Para 36)

The Act in question was passed in recognition of the right of the sovereign to act as parens patriae. The Government of India in order to effectively safeguard the rights of the victims in the matter of the conduct of the case was entitled to act as parens patriae, which position was reinforced by the statutory provisions, namely, the Act. It has to be borne in mind that conceptually and jurisprudentially, the doctrine of parens patriae is not limited to representation of some of the victims outside the territories of the country. It is true that the doctrine has been so utilised in America so far. Where citizens of a country are victims of a tragedy because of the negligence of any multi-national, a peculiar situation arises which calls for suitable effective machinery to articulate and effectuate the grievances and demands of the victims, for which the conventional adversary system would be totally inadequate. The State in discharge of its sovereign obligation must come forward. The Indian State because of its constitutional commitment is obliged to take upon itself the claims of the victims and to protect them in their hour of need. Parens patriae doctrine can be invoked by sovereign state within India, even if it be contended that it has not so far been invoked inside India in respect of claims for damages of victims suffered at the hands of the multinational. Therefore conceptually and jurisprudentially, there is no bar on the State to assume responsibilities analogous to parens patriae to discharge the State's obligations under the Constitution. What the Central Government has done in the instant case is an expression of its sovereign power. This power is plenary and inherent in every sovereign state to do all things which promote the health, peace, morals, education and good order of the people and tend to increase for the wealth and prosperity of the State. Sovereignty is difficult to define. By the nature of things the State sovereignty in this matter cannot be limited. It has to be adjusted to the conditions touching the common welfare when covered be legislative enactments. This power is to the public what the law of necessity is to the individual. It is comprehended in the maxim salus populi suprema lex - regard for public welfare is the highest law. It is not a rule, it is an evolution. This power has always been as broad as public welfare and as strong as the arm of the state, this can only be measured by the legislative will of the people, subject to the fundamental rights and constitutional limitations. This is an emanation of sovereignty subject to as aforesaid. Indeed, it is the obligation of the State to assume such responsibility and protect its citizens. It has to be borne in mind, that conferment of power and the manner of its exercise are two different matters. The power to compromise and to conduct the proceedings is not unanalysed or arbitrary. These were clearly

exercisable only in the ultimate interests of the victims. The possibility of abuse of a statute does not impart to it any element of invalidity.

(Paras 37, 63)

It is true that victims or their representatives are sui generis and cannot as such due to age, mental capacity or other reason not, legally incapable for suing or pursuing the remedies for the rights yet they are at a tremendous disadvantage in the broader and comprehensive sense of the term. These victims cannot be considered to be any match to the multinational companies or the Government with whom in the conditions that the victims or their representatives were after the disaster physically, mentally, financially, economically and also because of the position of litigation would have to contend. In such a situation of predicament the victims can legitimately be considered to be disabled. They were in a position to look after their own interests effectively or purposefully. In that background, they are people who needed the States' protection and should come within the umbrella of State's sovereignty to assert, establish and maintain their rights against the wrongdoers in this mass disaster. In that perspective, it is jurisprudentially possible to apply the principle of parens patriae doctrine to the victims. But quite apart from that, it has to be borne in mind that in this case the state is acting on the basis of the statute itself. For the authority of the Central Government to sue for and on behalf of or instead in place of the victims, on other theory, concept or any jurisprudentially principle is required than the Act itself. The Act displaces the victims by operation of S. 3 of the Act and substitutes the Central Government in its place. The victims have been divested of their rights to sue and such claims and such rights have been vested in the Central Government. The victims have been divested because the victims were disabled. The disablement of the victims vis-a-vis their adversaries in this matter is a self-evident factor. If that is the position then, even if the strict application of the 'parens partriae` doctrine is not in order, as a concept it is a guide. The jurisdiction of the state's power cannot be circumscribed by the limitations of the traditional concept of parens partriae. Jurisprudentially, it could be utilised to suit or alter or adapt itself in the changed circumstances. In the situation in which the victims were, the state had to assume the role of a parent protecting the rights of the victims who must come within the protective umbrella of the State and the common sovereignty of the Indian people. The Act is an exercise of the sovereign power of the State. It is an appropriate evolution of expression of sovereignty in the situation that had arisen.

(Para 100)

Factually the Central Government does not own any share in UCIL. These are the statutory independent organisation, namely, Unit Trust of India (UTI) and Life Insurance Corporation (LIC), who own 20 to 22% share in UCIL. Government has certain amount of say and control in LIC and UTI. Hence, it cannot be said that there is any conflict of interest in the real sense of matter in respect of the claims of Bhopal gas leak disaster between the Central Government and the victims. Secondly, in a situation of this nature, the Central Government is the only authority which can pursue and effectively represent the victims. There is no other organisation or Unit which can effectively represent the victims. Perhaps, theoretically, it might have been possible to constitute another independent statutory body by the Government under its control and supervision in whom

the claim of the victims might have been vested and substituted and that body could have been entrusted with the task of agitating or establishing the claims in the same manner as the Central Government has done under the Act. But the fact that has not been done does not in any way affect the position.

(Para 102)

Per Ranganathen, J. (for himself and A. M. Ahmadi, J, Concurring):- In the instant case there are more illiterates then enlightened ones. There are very few of the claimants, capable of finding the financial wherewithal required for fighting the litigation. Very few of them are capable of prosecuting such a litigation in this country not to speak of the necessity to run to a foreign country. The financial position of UCIL was negligible compared to the magnitude of the claim that could arise and, though eventually the battle has to be pitched on our own soil, an initial as well as final recourse to legal proceedings in the United States was very much on the cards, indeed inevitable. In this situation, the legislature was perfectly justified in coming to the aid of the victims with this piece of legislation and in asking the Central Government to shoulder the responsibility by substituting itself in place of the victims for all purposes connected with the claims. Even if the Act has provided for a total substitution of the Government of India in place of the victims and had completely precluded them from exercising their rights in any manner, it could perhaps have still been contended that such deprivation was necessary in larger public interest.

(Para 141)

Sections 3 and 4 thus combine together the interests of the weak, illiterate, helpless and poor victims as well as the interests of those who could have managed for themselves, even without the help of this enactment. The combination thus envisaged enables the Government to fight the battle with the foreign adversary with the full aid and assistance of such of the victims of their legal advisers as are in a position to offer any such assistance. Though S. 3 denies the claimants the benefit of being eo nomine parties in such suits or proceedings, S. 4 preserves to them substantially all that they can achieve by proceeding on their own. In other words while seeming to deprive the claimants of their right to take legal action on their own, it has preserved those rights, to be exercised indirectly. A conjoint reading of Ss. 3 and 4 would, therefore, show that there has been no real total deprivation of the right of the claimants to enforce their claim for damages in appropriate proceedings before any appropriate forum. There is only a restriction of this right which, in the circumstances, is totally reasonable and justified. The validity of the Act is, therefore, not liable to be challenged on this ground.

(Para 141)

It is common knowledge that any authority given to conduct litigation cannot be effective unless it is accompanied by an authority to withdraw or settle the same if the circumstances call for it. The vagaries of a litigation of this magnitude and intricacy could not be fully anticipated. There were possibilities that the litigation may have to be fought out to the bitter finish. There were possibilities that the UCC might be willing to adequately compensate the victims either on their own or at the insistence of the Governments concerned. The legislation therefore cannot be considered to be

unreasonable merely because in addition to the right to institute a suit or other proceedings it also empowers the Government to withdraw the proceedings or enter into a compromise.

(Para 141)

(B) Bhopal Gas Disaster (Processing of Claims) Act (1985), Pre, Ss. 3,4 - Gas leak disaster - Claim for compensation - Interim compensation to victims by Government - Not provided - Obligation of granting interim relief by Government is, however, inherent and must be the basis of properly construing the spirit of Act.

Interpretation of Statutes - Constructive intuition

Per Sabyasachi Mukharji, C.J. (for himself and Saikia, J.) (K. N. Singh, J. agreeing with him):- It is true that there is no actual expression used in the Act itself which expressly postulates or indicates an obligation of granting interim relief or maintenance by the Central Government until the full amount of the dues of the victims is realised from the Union Carbide after adjudication or settlement and then deducting therefrom the interim relief paid to the victims. Such an obligation is, however, inherent and must be the basis of properly construing the spirit of the Act. This is the true basis and will be in consonance with the spirit of the Act. It must be, to use the well-known phrase the major matriculate premise' upon which though not expressly stated, the Act proceeds. It is on this premise or premises that the State would be justified in taking upon itself the right and obligation to proceed and prosecute the claim and deny access to the courts of law to the victims on their own. If it is only so read, it can only be held to be constitutionally valid. It has to be borne in mind that the language of the Act does not militate against this construction but on the contrary, Ss. 9, 10 and the scheme of the Act suggest that the Act contains such an obligation. If it is so read, then only meat can be put into the skeleton of the Act making it meaningful and purposeful. The Act must, therefore, be so read. This approach to the interpretation of the Act can legitimately be called the constructive intuition which is a permissible mode of viewing the Acts of Parliament. The freedom to search for the spirit of the Act' or the quantity of the mischief at which it is aimed (both synonymous for the intention of the Parliament) opens up the possibility of liberal interpretation "that delicate and important branch of judicial power, the concession of which is dangerous, the denial ruinous". Given this freedom it is a rare opportunity though never to be misused and challenge for the Judges to adopt and give meaning to the Act, articulate and inarticulate, and thus translate the intention of the Parliament and fulfil the object of the Act. After all, the Act was passed to give relief to the victims who, it was thought were unable to establish their own rights and fight for themselves. It is common knowledge that the victims were poor and impoverished. How could they survive the long ordeal of litigation and ultimate execution of the decree or the orders unless provisions be made for their sustenance and maintenance, especially when they have been deprived of the right to fight for these claims themselves.

(Para 101)

Per Ranganthan, J. (for himself and A. M. Ahmadi, J.):- The validity of the Act does not depend upon its explicitly or implicitly providing for interim payments. In the first place it was, and perhaps still is, a moot question whether a plaintiff suing for damages in

tort would be entitled to advance or interim payments in anticipation of a decree. That was, indeed, the main point on which the interim orders in this case were challenged before the Supreme Court and, in the context of the events that took place, remains undecided. May be there is a strong case for ordering interim payments in such a case but, in the absence of full and detailed consideration, it cannot be assumed that, left to themselves, the victims would have been entitled to a "normal and immediate" right to such payment. Secondly, even assuming such right exists, all that can be said is that the State, which put itself in the place of the victims, should have raised in the suit a demand for such interim compensation - which it did - and that it should distribute among the victims such interim compensation as it may receive from the defendants. To say that the Act would be bad if it does not provide for payment of such compensation by the government irrespective of what may happen in the suit is to impose on the State an obligation higher than what flows from its being subrogated to the rights of the victims. The fact that the Act and the scheme thereunder envisage interim relief to the victims, the point is perhaps only academic.

(Para 143)

(C) Constitution of India, Article 32 - Petition under - Matters regarding claim for compensation in Bhopal Gas leak case - Order by Constitution Bench that matters would be listed before Constitution Bench for decision on the sole question whatever the Bhopal Gas Disaster (Processing of Claims) Act, 1985 is ultra vires - Is a judicial order passed by Constitution Bench and not an administrative order.

(Para 87)

(D) Bhopal Gas Disaster (Processing of Claims), Act (1985), Per., S. 9 – Scope - Act does not in any way circumscribe liability of Union Carbide Company, UCIL or Government of India or Government of Madhya Pradesh.

The Act does not in any way circumscribe the liability of the UCC, UCIL or even the Government of India or Government of Madhya Pradesh if they are jointly or severally liable. This Act also does not deal with any question of criminal liability of any of the parties concerned. On an appropriate reading of the relevant provisions of the Act, it is apparent that the criminal liability arising out of Bhopal Gas leak disaster is not the subject matter of this Act and cannot be said to have been in any way affected, abridged or modified by virtue of this Act. Thus the plea that the Act was bad as it abridged or took away the victims right to proceed criminally against the delinquent, be it UCC or UCIL or jointly or severally the Government of India, Government of Madhya Pradesh or the erstwhile Chief Minister of Madhya Pradesh, is on a wrong basis. There is no curtailment of any right with respect to any criminal liability. Criminal liability is not the subject-matter of the Act.

(Paras 89, 90, 92)

The Act does not in any way except to the extent indicated in the relevant provisions of the Act circumscribe or abridge the extent of the victims so far as the liability of the delinquents are concerned. Whatever are the rights of the victims and whatever claims arise out of the gas leak disaster for compensation, personal injury, loss of life and property, suffered or likely to be sustained or expenses to be incurred or any other loss

are covered by the Act and the Central Government by operation of S. 3 of the Act has been given the exclusive right to represent the victims in their place and stead. By the Act, the extent of liability is not in any way abridged and, therefore, if in case of any industrial disaster like the Bhopal Gas leak disaster, there is right in victims to recover damages or compensation on the basis of absolute liability, then the same is not in any manner abridged or curtailed.

(Para 90)

Per Ranganathan, J. (for himself and A. M. Ahmadi, J. concurring):- The Act talks only of the civil liability of, and the proceedings against the UCC or UCIL, or others for damages caused by the gas leak. It has nothing to say about the criminal liability of any of the parties involved. Clearly, therefore, the part of the settlement comprising a term requiring the withdrawal of the criminal prosecutions launched is outside the purview of the Act. The validity of the Act cannot, therefore, be impugned on the ground that it permits - and should not have permitted - the withdrawal of criminal proceedings against the delinquents.

(Para 144)

(E) Bhopal Gas Disaster (processing of Claims) Act (1985), Pre, Ss. 3,4 - Gas leak disaster -Claim for compensation - Ss. 3 and 4 giving exclusive right to act in place of persons who are entitled to make claim - Cannot be said to be only an enabling provision - It does not give the right to victim to sue along with Central Government.

The plea that Ss. 3 and 4 was only an enabling provision for the Central Government and not depriving or disabling provisions for the victims would not be tenable. In order to make the provisions constitutionally valid, the concept of exclusiveness to the Central Government could not be eliminated. It does not give the right to victim to sue along with the Central Government.

(Paras 96, 97)

Per Ranganathan, J. (for himself and A. M. Ahmadi, J. Concurring) - The provisions of the Act, read by themselves, guarantee a complete and full protection to the rights of the claimants in every respect. Save only that they cannot file a suit themselves; their right to acquire redress has not really been abridged by the provisions of the Act. Ss. 3 and 4 of the Act properly read, completely vindicate the objects and reasons which compelled Parliament to enact this piece of legislation. Far from abridging the rights of the claimants in any manner, these provisions are so worded as to enable the Government to prosecute the litigation with the maximum amount of resources, efficiency and competence at its command as well as with all the assistance and help that can be extended to it by such of those litigants and claimants as are capable of playing more than a mere passive role in the litigation.

(Para 141)

(F) Bhopal Gas Disaster (Processing of Claims) Act (1985), Pre, Ss.3,4 - Gas leak disaster - Claim for compensation - Settlement - Procedure evolved for victims under Act - Is just, fair and reasonable and not violative of Art. 14.

Constitution of India, Art. 14.

The Act does provide a special procedure in respect of the rights of the victims and to that extent the Central Government takes upon itself the rights of the victims. It is a special Act providing a special procedure for a kind of special class of victims. In view of the enormity of the disaster the victims of the Bhopal gas leak disaster, as they were placed against the multi-national and a big Indian Corporation and in view of the presence of foreign contingency lawyers to whom the victims were exposed, the claimants and victims can legitimately be described as a class by themselves different and distinct, sufficiently separate and identifiable to be entitled to special treatment for effective, speedy, equitable and best advantageous settlement of their claims. There indubitably is differentiation. But this differentiation is based on a principle which has national nexus with the aim intended to be achieved by this differentiation. The disaster being unique in its character and in the recorded history of industrial disasters situated as the victims were against a mighty multinational with the presence of foreign contingency lawyers looming on the scene, it could be said that there were sufficient grounds for such differentiation and different treatment. In treating the victims of the gas leak disaster differently and providing them a procedure, which was just, fair, reasonable and which was not unwarranted or unauthorised by the Constitution, Art. 14 is not breached. It cannot be said that by the procedure envisaged by the Act, the victims of the gas leak have been deprived and denied their rights and property to fight for compensation. It cannot also be said that the procedure evolved under the Act for the victims is peculiar and disadvantageous and therefore violative of Art. 14.

(Paras 98, 97, 103)

In view of the background, the plight of the impoverished, the urgency of the victims need, the presence of the foreign contingency lawyers, the procedure of settlement in USA in mass action, the strength for the foreign multinationals, the nature of injuries and damages, the limited but significant right of participation of the victims as contemplated by S.4 of the Act, the Act cannot be condemned as unreasonable.

(Para 99)

Per Ranganathan, J. (for himself and A. M. Ahmadi, J. Concurring):- The power to conduct a litigation, particularly in a case of this type, must, to be effective, necessarily carry with it a power to settle it at any stage. It is impossible to provide statutorily any detailed catalogue of the situations that would justify a settlement or the basis or terms on which a settlement can be arrived at. The Act, moreover, cannot be said have conferred any unguided or arbitrary discretion to the Union in conducting proceedings under the Act. Sufficient guidelines emerge from the Statement of Objects and Reasons of the Act which makes it clear that the aim and purpose of the Act is to secure speedy and effective redress to the victims of the gas leak and that all steps taken in pursuance of the Act should be for the implementation of the objects. Whether this object has been achieved by a particular settlement will be a different question but it is altogether impossible to say that the Act itself is bad for the reason alleged.

(Para 142)

(G) Bhopal Gas Disaster (Processing of Claims) Act (1985), Pre, Ss. 3, 4, - Gas leak disaster - Claim for compensation - Representation of claims of victims by Central Government - Principles of natural justice not violated.

Constitution of India, Art. 226.

The concept that where there is a conflict of interest, the person having the conflict should not be entrusted with the task of this nature, does not apply in the instant case. In the instant case, no question of violation of the principle of natural justice arises, and there is no scope for the application of the principle that no man should be a Judge in his own cause. The Central Government was not judging any claim, but was fighting and advancing the claims of the victims. In that circumstance, it cannot be said that there was any violation of the principles of natural justice and such entrustment to the Central Government of the right to ventilate for the victims was improper or bad. The adjudication would be done by the courts, and therefore there is no scope of the violation of any principle of natural justice.

(Para 102)

The question whether there is scope for the Union of India being responsible or liable as a joint tort feasor is a difficult and different question. But even assuming that it was possible that the Central Government might be liable in case of this nature, it was only proper that the Central Government should be able and authorised to represent the victims. In such a situation, there will be no scope of the violation of the principles of natural justice. The doctrine of necessity would be applicable in a situation of this nature. In the circumstances of the case, the Government of India is only capable to represent the victims as a party. The adjudication, however, of the claims would be done by the Court. In that circumstance the challenge on the ground of the violation of principles of nature justice would not be tenable. The principle of de facto validity will not be applicable. By the plea of the doctrine of bona fide representation of the interests of victims in all these proceeding would not also be attracted. The doctrine of bona fide representation would not be quite relevant.

(Para 105)

(H) Constitution of India, Art. 226 - Natural justice - Power to give pre-decisional hearing not conferred by statutes - Administrative decisions after post decisional hearing would not be bad.

Administrative law - Post decisional hearing.

Natural justice - Post decisional hearing.

Post decisional hearing - Effect.

Audi alteram partem is a highly effective rule devised by the Courts to ensure that a statutory authority arrives at a just decision and it is calculated to act as a healthy check on the abuse or misuse of power. The rules of natural justice can operate only in areas not covered by any law validly made. The general principle as distinguished from an absolute rule of uniform application is that where a statute does not in term exclude this rule of

prior hearing but contemplates a post-decisional hearing amounting to a full review of the original order and merits then such a statute would be construed as excluding the audi alteram rule at the pre-decisional stage. If the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected the administrative after post-decisional hearing was good.

(Para 109)

(I) Bhopal Gas Disaster (Processing of Claims) Act (1985), Pre, S. 4- Gas leak disaster - Claims for compensation - Settlement - Opportunity of making representation should be to victims before Court comes to any conclusion in respect of settlement.

Constitution of India, Art, 226

In a case of gas leak disaster, when the victims have been given some say by S.4 of the Act, in order to make that opportunity contemplated by S.4 of the Act meaningful and effective, it should be so read that the victims have to be given an opportunity of making their representation before the Court comes to any settlement. How that opportunity should be given would depend upon the particular situation. Fair procedure should be followed in a representative mass tort action.

(Para 114)

The purpose of the Act and the principles of natural justice lead to the interpretation of S. 4 of the Act that in case of a proposed or contemplated settlement, notice should be given to the victims who are affected or whose rights are to be affected to ascertain their views. S. 4 is significant. It enjoins the Central Govt. only to have "due regard to any matters which such person may require to be urged". So, the obligation is on the Central Govt. in the situation contemplated by S.4 to have due regard to the views of the victims and that obligation cannot be discharged by the Central Govt. unless the victims are told that a settlement is proposed, intended or contemplated. It is not necessary that such views would require consent of all the victims. The Central Govt. as the representative of the victims must have the view of the victims and place such views before court in such manner it considers necessary before a settlement is entered into. If the victims want to advert to certain aspect of the matter during the proceedings under the Act and settlement indeed is an important stage in the proceedings, opportunities must be given to the victims. Individual notices may not be necessary. The Court can, and should in such situation formulate modalities of giving notice and public notice can also be given inviting views of the victims by the help of mass media.

(Para 117)

The difficulties in having the consent of all and unanimity would not deter the court from construing the section as aforesaid.

(Para 118)

If a part of the claims, for good reasons or bad, is sought to be compromised or adjusted without at least considering the views of the victims that would be unreasonable deprivation of the rights of the victims. After all, it has to be borne in mind that injustice

consists in the sense in the minds of the people affected by any act or inaction a feeling that their grievance, views or claims have gone unheeded or not considered. Such a feeling is in itself an injustice or a wrong. The law must be so construed and implemented that such a feeling does not generate among the people for whose benefit the law is made.

(Para 111)

Per Ranganathan, J. (for himself and A. M. Ahmadi, J. Concurring):- The Act has provided an adequate opportunity to the victims to speak out and or the counsel engaged by some of them in the trial court had kept in touch with the proceeding in the Supreme Court, they could have most certainly made themselves heard. If a feeling has gained ground that their voice has not been fully heard, the fault was not with the statute but was rather due to the developments leading to the finalisation of the settlement when the appeal against the interim order was being heard in the Supreme Court.

(Para 144)

(J) Bhopal Gas Disaster (Processing of Claims) Act (1985), Pre, Ss. 3, 4, 11 - Gas leak disaster - Claim for compensation - Representation of claims of victims by Central Govt. - Applicability of Civil P.C. not expressly barred.

Civil P.C. (5 of 1908), Pre, O. 23, Rr. 1, 3; O. 1, R. 8.

The Act does not expressly exclude the application of the Code of Civil Procedure. S. 11 of Act provides the overriding effect indicating that anything inconsistent with the provisions of the Act in other law including the Civil Procedure Code should be ignored and the Act should prevail. Strictly speaking, O. 1, R. 8 will not apply to a suit or a proceeding under the Act. It is not a case of one having common interest with others. Here the plaintiff, the Central Govt. has replaced and divested the victims. There is no question of abandonment as such of the suit or part of the suit; the provisions of this Rule would also not strictly apply. However, O. 23, R. 36 of the Code is an important and significant pointer and the principles behind the said provision would apply to this case. The said R. 3-B provides that no agreement or compromise in a representative suit be entered into without the leave of the court expressly recorded in the proceeding ; and sub-rule (2) of R. 3-B enjoins that before granting such leave the court shall give notice in such manner as it may think fit in a representative action. Representative suit, again, has been defined under Explanation to the said rule vide cl. (d) as any other suit in which the decree passed may, by virtue of the provision of this Code or any other law for the time in force, bind any person who is not named as party to the suit. In this case, indubitably the victims would be bound by the settlement though not named in the suit. If that is so, it would be a representative suit in terms of and for the purpose of R. 3-B of O. 23 of the Code. If the principles of this rule are the principles of natural justice then the principles behind it would be applicable; and also that S.4 should be so construed in spite of the difficulties of the process of notice and other difficulties of making "informed decision making process cumbersome".

(Paras 115, 116)

Per Ranganathan, J. (for himself and A. M. Ahmadi, J. Concurring):- It is not possible to bring the suites brought under the Act within the categories of representative

action envisaged in the code of Civil Procedure. The Act deals with a class of action which is sui generis and for which a special formula has been found and encapsuled in S. 4. The Act divests the individual claimants of their right to sue and vests it in the Union. In relation to suits in India, the Union is the sole plaintiff, none of the other are envisaged as plaintiff or respondents. The victims of the tragedy were so numerous that they were never defined at the stage of filing the plaint nor do they need to be defined at the stage of a settlement. The litigation is carried on by the State in its capacity, not exactly the same as but somewhat analogous to that of a "parens patriae". In the case of a litigation by karta of a Hindu undivided family or by a guardian on behalf of a ward, who is non sui juries, for example, the junior members of the family of the wards, are not to be consulted before entering into a settlement. In the case, the Court acts as guardian of such persons to scrutinise the settlement and satisfy itself that it is in the best interest of all concerned. If it is later discovered that there has been any fraud or collusion, it may be to the junior members of the family or the wards to call the karta or guardian to but, barring such a contingency, the settlement would be effective and binding. In the same way, the Union as "parents patriae" would have been at liberty to enter into such settlement as it considered best on its own and the Court's approval therefore.

(Para 114)

The statute has provided that though the Union of India will be the dominus litus in the suit, the interests of all the victims and the claims should be safeguarded by giving them a voice in the proceeding to the extent indicated above. This provision of the statute is an adaptation of the principles of O.1, R. 4 and of O. 23, R. 3-B of the Code of Civil Procedure in its application to the suits governed by it and, though the extent of participation allowed to the victims is somewhat differently enunciated in the legislation, substantially speaking, it does incorporate the principles of nature justice to the extent possible in the circumstance. The statute cannot, therefore, be faulted, on the ground that denies the victims an opportunity to present their views or places them at any disadvantage in the matter of having an effective voice in the matter of settling the suit by way of compromise.

(Para 144)

(K) Bhopal Gas Disaster (Processing of Claims) Act (1985), Pre, S. 4 - Gas leak disaster - Compensation - Settlement - by Central Govt. - Notice to victims necessary.

Constitution of India, Art. 226.

S. 4 means and entails that before entering into any settlement by Central govt. affecting the rights and claims of victims some kind of notice or information should be given to the victims; it is not enough to say that the victims of gas leak must keep vigil and watch the proceeding for compensation. One assumption under which the Act is justified is that the victims were disabled to defend themselves in an action of this type. If that is so, then the Court cannot presume that the victims were a lot, capable and information to be able to have comprehended or contemplated the settlement. In the aforesaid view of the matter, notice to the victims was necessary before the Central Govt. representing their claim reaches to settlement.

(Para 119)

All the further particulars upon which the settlement had been entered into need not be given in the notice. It is not necessary that all other particulars for the basis of proposed settlement should be disclosed in a suit of this nature before the final decision. Whatever data was already there have been disclosed, that would have been sufficient for the victims to be able to give their views, if they want to. Disclosures of further particulars are not warranted by the requirement of principles of natural justice. Indeed, such disclosure in this case before finality might jeopardise future action, if any, necessary so consistent with justice of the case.

(Para 123)

(L) Bhopal Gas Disaster (Processing of Claims) Act (1985), Pre. Ss. 3, 4, 6 - Gas leak disaster - Compensation – Disbursement - Supreme Court directed to issue notification under S.6.

Constitution of India, Art. 226.

For disbursement of the compensation contemplated under the Act, a notification is directed to be issued under S. 6(3) authorising the commissioner or other officers to exercise all or any of the powers which the Central Government may exercise under S.5 to enable the victims to place before the Commissioner or Deputy Commissioner any additional evidence that they would like to adduce. Further it is directed that in the Scheme categorisation to be done by the Deputy Commissioner should be appeal able to an appropriate judicial authority and the Scheme should be modified accordingly. The basis of categorisation and the actual categorisation should be justifiable and judicially revisable - the provision in the Act and the Scheme should be so read. The scheme is an integrated whole and it would not be proper to amend it piecemeal. In respect of categorisation and claim, the authorities must act on principles of natural justice and act quasi-judicially.

(Para 125)

(M) Bhopal Gas Disaster (Processing of Claims) Act (1985), Pre, Ss. 3,4 - Validity - Gas leak disaster - Claim for compensation by victims - Act is constitutionally valid.

Constitution of India, Arts. 226, 14.

Post decisional hearing - Claim for compensation.

The Act is constitutionally valid. It proceeds on the hypothesis that until the claims of the victims are realised or obtained from the delinquents, namely, UCC and UCIL by settlement or by adjudication and until the proceedings in respect thereof continue the Central Government must pay interim compensation or maintenance for the victims. In entering upon the settlement in view of S.4 of the Act, regard must be had to the views of the victims and for the purpose of giving regard to these, appropriate notices before arriving at any settlement, were necessary. In some cases, however, post-decisional notice might be sufficient but in the facts and the circumstances of this case, no useful purpose would be served by giving a post-decisional hearing and having regard to the fact that there are no further additional data and facts available with the victims which can be profitably and meaningfully presented to controvert the basis of the settlement and further

having regard to the fact that the victims had their say or on their behalf their views had been agitated in these proceedings and will have further opportunity in the pending review proceedings.

(Para 127)

The Act was conceived on the noble promise of giving relief and succour to the dumb, pale, meek and impoverished victims of a tragic industrial gas leak disaster, a concomitant evil in this industrial age of technological advancement and development. The Act had kindled high hopes in the hearts of the weak and worn, wary and forlorn. The Act generated hope of humanity. The implementation of the Act must be with justice. Justice perhaps has been done to the victims situated as they were, but it is also true that justice has not appeared to have been done. That is a great infirmity. That is partly due to the fact that procedure was not strictly followed and also partly because of the atmosphere that was created in the country, attempts were made to shake the confidence of the people in the judicial process and also to undermine the credibility of the Supreme Court. This was unfortunate. This was perhaps due to misinformed public opinion and also due to the fact that victims were not initially taken into confidence in reaching the settlement. This is a factor which emphasises the need for adherence to the principles of natural justice. The credibility of judiciary is as important as the alleviation of the suffering of the victims, great as these were. It is hoped that these adjudications will restore that credibility. Principles of natural justice are integrally embedded in our constitutional framework and their pristine glory and primacy cannot and should not be allowed to be submerged by the exigencies of particular situations or cases. The Supreme Court must always assert primacy of adherence to the principles of natural justice in all adjudications. But at the same time, these must be applied in a particular manner in particular cases having regard to the particular circumstances. It is, therefore, necessary to reiterate that the promises made to the victims and hopes raised in their hearts and minds can only be redeemed in some measure if attempts are made vigorously to distribute the amount realised to the victims in accordance with the scheme as indicated above. That would be a redemption to a certain extent. It will also be necessary to reiterate that attempts should be made to formulate the principles of law guiding the government and the authorities to permit carrying on of trade dealing with materials and things which have dangerous consequences within sufficient specific safeguards especially in case of multi-national corporations trading in India. An awareness on these lines has dawned. Let action follow that awareness. It is also necessary to reiterate that the law relating to damages and payment of interim damages or compensation to the victims of this nature should be seriously and scientifically examined by the appropriate agencies.

(Para 128)

(N) Constitution of India, Art. 32 - Industrial licence - Grant of, to industries dealing with materials which are of dangerous potentialities - Need for laying down certain norms and standards to be followed by the Govt., stated.

The Bhopal gas leak disaster and its aftermath emphasise the need for laying down certain norms and stands that the government to follow before granting permissions or

licences for the running of industries dealing with materials which are of dangerous potentialities. The Govt. should, therefore examine or have the problem examined by an expert committee as to what should be the conditions on which further licences and/or permission for running industries on Indian soil would be granted and for ensuring enforcement of those conditions, sufficient safety measures should be formulated and scheme of enforcement indicated. The Government should insist as a condition precedent to the grant of such licences or permission, creation of a fund in anticipation by the industries to be available for payment of damages out of the said fund in cases of leakages or damages in case of accident or disaster flowing from negligent working of such industrial operations or failure to ensure measures preventing such occurrence. The Government should also ensure that the parties must agree to abide to pay such damages out of the said damages by procedure separately evolved for computation and payment of damages without exposing the victims or sufferers of the negligent act to the long and delayed procedure. Special procedure must be provided for and the industries must agree as a condition for the grant of licence to abide by such procedure or to abide by statutory arbitration. The basis for damages in cases of leakages and accident should also be statutorily fixed taking into consideration the nature of damages inflicted, the consequences thereof and the ability and capacity of the parties to say. Such should also provide for deterrent for punitive damages, the basis for which should be formulated by a proper expert committee or by the Government. For this purpose, the Government should have the matter examined by such body as it considers necessary and proper like the Law Commission or other competent bodies. This is vital for the future.

(Para 129)

Per K.N. Singh, J. (Concurring):- In the context of our national dimensions of the human rights, right to life, liberty, pollution free air and water is guaranteed by the Constitution under Arts. 21, 48-A and 51(g), it is the duty of the State to take effective steps to protect the guaranteed constitutional rights. These rights must be integrated and illumined by the evolving international dimensions and stands, having regard to our sovereignty, as highlighted by Clauses 9 and 13 of U.N. Code of Conduct on Transnational Corporations. The evolving standards of international obligations need to be respected, maintaining dignity and sovereignty of our people, the State must take effective steps to safeguard the constitutional rights of citizens by enacting laws. The laws so made may provide for conditions for granting licence to Transnational Corporations, prescribing norms and standards for running industries on Indian soil ensuring the constitutional rights of our people relating to life, liberty, as well as safety to environment and ecology to enable the people to lead a healthy and clean life. A Transnational Corporation should be made liable and subservient to laws of our country and the liability not be restricted to affiliate company only but the parent corporation should also be made liable for any damage caused to the human bearings or ecology. The law must require Transnational Corporation to agree to pay such damages as may be determined by the statutory agencies and forums constituted under it without exposing the victims to long drawn litigation. Under the existing civil law, damages are determined by the Civil Courts, after a long drawn litigation, which destroys the very purpose of awarding damages. In order to meet the situation, to avoid delay and to ensure immediate

relief to the victims it was suggested that the law made by the Parliament should provide for constitution of Tribunals regulated by special procedure for determining compensation to victims of industrial disaster or accident, appeal against which may lie to the Supreme Court on limited ground of questions of law only after depositing the amount determined by the Tribunal. The law should also provide for interim relief to victims during the pendency of proceedings. These steps would minimise the misery and agony of victims of hazardous enterprises.

(Paras 137, 146)

Industrial development in the our country and the hazards involved therein pose a mandatory need to constitute a statutory "Industrial Disaster Fund", contributions to which may be made the Government, the industries whether they are transnational corporations or domestic undertaking, public or private. The extent of contribution may be worked out having regard to the extent of hazardous nature of the enterprise and other allied matters. The Fund should be permanent in nature, so that money is readily available for providing immediate effective relief to the victims. This may avoid delay, as has happened in the instant case in providing effective relief to the victims. The Government and the Parliament should therefore take immediate steps for enacting laws, having regard to these suggestions, consistent with the international norms and guidelines as contained in the United Nations Code of Conduct on Transnational Corporation.

(Paras 138, 146)

Per Ranganathan, J. (for himself and A. M. Ahmadi, J. Concurring):- Before we gained independence, on account of our close association with Great Britain, we were governed by the common law principles. In the field of torts, under the common law of England, no action could be laid by the dependents or heirs of a person whose death was brought about by the tortuous act of the maxim action personal is moritur cumpersona, although a person injured by a similar act could claim damages for the wrong done to him. In England this situation was remedied by the passing of the Fatal Accidents Act, 1845, popularly known as Lord Campbell's Act. Soon thereafter the Indian Legislature enacted the Fatal Accidents Act, 1855. This Act is fashioned on the lines of the English Act of 1846. Even though the English Act has undergone a substantial change, our law has remained static and seems a trifle archaic. The magnitude of the gas leak disaster in which hundreds lost their lives and thousands were maimed, not to speak of the damage to livestock, flora and fauna, business and property, is an eye opener. The nation must learn a lesson from this traumatic experience and evolve safeguards at least for the future. The time is ripe to take a fresh look at the outdated century old legislation which is out of tune with modern concepts. While it may be a matter for scientists and technicians to find solutions to avoid such large scale disasters, the law must provide an effective and speedy remedy to the victims of such torts. The Fatal Accidents Act, on account of its limited and restrictive application, is hardly suited to meet such a challenge. Therefore, the old antiquated Act should be drastically amended or fresh legislation should be enacted which should, inter alia, contain appropriate provisions in regard to the following matters: (i) the payment of a fixed minimum compensation on a "no-fault liability" basis (as under the Motor Vehicles Act), pending final adjudication of the claims by a prescribed forum; (ii) the creation of a special forum with specific power to grant interim relief in

appropriate cases; (iii) the evolution of a procedure to be followed by such forum which will be conducive to the expeditious determination of claims and avoid the high degree of formalism that attaches to proceedings in regular; and (iv) a provision requiring industries and concerns engaged in hazardous activities to take out compulsory insurance against third party risks.

(Para 146)

(O) Bhopal Gas Disaster (Processing of Claims) Act (1985), Pre, Ss. 3, 4 - Gas leak disaster - Claim for compensation - Representation by Govt. - Act is not invalid on ground that it has entrusted responsibility not only of carrying on but also entering into a settlement.

Per Ranganathan, J. (for himself and A.M. Ahmadi, J. Concurring):- In case of compensation for Bhopal Gas leak disaster it cannot be alleged that the Union is itself a joint tort-feasor (sued as such by some of the victims) with an interest (adverse to the victims) in keeping down the amount of compensation payable to the minimum so as to reduce its own liability as a joint tort-feasor. The Union of India itself is one of the entities affected by the gas leak and has a claim for compensation from the UCC quite independent of the other victims. From this point of view, it is in the same position as the other victims and, in the litigation with the UCC, it has every interest in securing the maximum amount of compensation possible for itself and other victims. It is, therefore, the best agency in the circumstances, that be looked up to for fighting the UCC on its own as on behalf of victims. The suggestion that the Union is a joint tort-feasor has been stoutly resisted. But, even assuming that the Union has some liability in the matter, it cannot derive any benefit of advantage by entering into a low settlement with the UCC. The Act and Scheme thereunder have provided for an objective and quasi-judicial determination of the amount of damages payable to the victims of the tragedy. There is no basis for the fear that the officers of the Government may not be objective and may try to cut down the amounts of compensation, so as not to exceed the amount received from the UCC. It is common ground indeed, that the settlement with the UCC only puts an end to the claims against the UCC and UCIL and does not in any way affect the victim's rights, if any, to proceed against the Union, the State of Madhya Pradesh of the ministers' officers thereof, if so advised. If the Union and these officers are joint tort-feasors, as alleged, the Union will not stand to gain by allowing the claims against the UCC to be settled for a low figure. On the contrary it will be interested in settling the claims against the UCC at as high a figure as possible so that its own liability as a joint tort-feasor (if made out) can be correspondingly reduced. Therefore there is no vitiating element in the legislation insofar as it has entrusted the responsibility not only of carrying on but also of entering into a settlement, it thought fit.

(Para 141)

(P) Bhopal Gas Disaster (Processing of Claims) Act (1985), Pre, Ss. 3,4 - Gas leak disaster - Claim for compensation - Claims processed and their aggregate is determined - Post decisional hearing to victims in the circumstance, not necessary.

Per Ranganathan, J. (A. M. Ahmadi, J. agreeing with him).

Post decisional hearing - Claims for compensation - Processed and determined - Hearing not necessary.

(Para 145)

(Q) Bhopal Gas Disaster (Processing of Claims) Act (1985), Pre., Ss. 3,4- Gas leak disaster - Claim for compensation - Settlement by Central Govt. before Supreme Court - No interference.

Per Ranganathan, J. (A.M. Ahmadi, J. agreeing with him) - It would be more correct and proper not to disturb the orders in AIR 1990 SC 273 on the ground that the rules of natural justice have not been complied with, particularly in view of the tendency of the review petition.

(Para 145)

Cases Referred:	**Chronological Paras**
(1989) CA Nos. 9187-89 of 1988 and SLP (C) No. 13080 of 1988 D/- 14-2-1989	14
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SABYASACHI MUKHARJI, C. J.:- Is that Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 (hereinafter referred to as 'the Act') is constitutionally valid? That is the question.

2. The Act was passed as a sequel to a grim tragedy. On the night of 2nd December, 1984 occurred the most tragic industrial disaster in recorded human history in the city of Bhopal in the State of Madhya Pradesh in India. On that night there was massive escape of lethal gas from the Methyl Iso Cyanate (MIC) storage tank at Bhopal Plant of the Union Carbide (1) Ltd. (hereinafter referred to as `UCIL') resulting in large scale death and untold disaster. A chemical plant owned and operated by UCIL was situated in the northern sector of the city of Bhopal. There were numerous hutments adjacent to it on its southern side, which were occupied by impoverished squatters. UCIL manufactured the pesticides, Sevin and Temik, at the Bhopal plant, at the request of, it is stated by Judge John F. Keenan of the United States District Court in his judgement, and indubitably with the approval of the Govt. of India. UCIL was incorporated in 1984 under the appropriate Indian law. 50.99% of its shareholdings were owned by the Union Carbide Corporation (UCC), a New York Corporation. L.I.C. and the Unit trust of India own 22% of the shares of U.C.I.L., a subsidiary of U.C.C.

3. Methyl Iso Cyanate (MIC), a highly toxic gas, is an ingredient in the production of both Sevin and Temik. On the night of the tragedy MIC leaked from the plant in substantial quantities. The exact reasons for and circumstances of such leakage have not yet been ascertained or clearly established. The results of the disaster were horrendous. Though no one is yet certain as to how many actually died as the immediate and direct result of the leakage, estimates attribute it to about 3000. Some suffered injuries the effects of which are described as carcinogenic and ontogenetic by Ms. Indira Jaisingh, learned counsel; some suffered injuries serious and permanent and some mild and temporary. Livestock was killed, damaged and infected. Businesses were interrupted. Environment was polluted and the ecology affected, flora and fauna disturbed.

4. On 7th December, 1984, Chairman of UCC Mr. Warren Anderson came to Bhopal and was arrested. He was later released on bail. Between December 1984 and January 1985 suits were filed by several American lawyers in the courts in America on behalf of several victims. It has been stated that within a week after the disaster many American lawyers described by some as 'ambulance chasers', whose fees were stated to be based on a percentage of the contingency of obtaining damages or not, flew over to Bhopal and obtained powers of Attorney to bring actions against UCC and UCIL. Some suits were also filed before the District Court of Bhopal by individual claimants against UCC (the American Company) and the UCIL.

5. On or about 6th February, 1985, all the suits in various U.S. Distt. Courts were consolidated by the Judicial Panel on Hulti-District Litigation and assigned to U.S. Distt. Court, Southern Distt. of New York. Judge Keenan was at all material times the Presiding Judge there.

6. On 29th March, 1985, the Act in question was passed. The Act was passed to secure that the claims arising out of or connected with the Bhopal gas leak disaster were dealt

with speedily, effectively and equitably. On 8th April, 1985 by virtue of the Act the Union of India filed a complaint before the U.S. Distt. Court, Southern Distt. of New York. On 16th April, 1985 at the first pre-trial conference in the consolidated action transferred and assigned to the U.S. Distt. Court, Southern Distt., New York, Judge Keenan gave the following directions:-

(i) that a three member Executive Committee be formed to frame and develop issues in the case and prepare expeditiously for trial or settlement negotiations. The Committee was to comprise of one lawyer selected by the firm retained by the Union of India and two other lawyers chosen by lawyers retained by the individual plaintiffs.

(ii) that as a matter of fundamental human decency, temporary relief was necessary for the victims and should be furnished in a systematic and co-ordinated fashion without unnecessary delay regardless of the posture of the litigation then pending.

7. On 24th September, 1985 in exercise of powers conferred by Section 9 of the Act, the Govt. of India framed the Bhopal Gas Leak Disaster (Registration and Processing of Claims) Scheme, 1985 (hereinafter called the Scheme).

8. On 12th May, 1986 an order was passed by Judge Keenan allowing the application of UCC on Forum non conveniens as indicated hereinafter. On 21st May, 1986 there was a motion for fairness hearing on behalf of the private plaintiffs. On 26th June, 1986 individual plaintiffs filed appeal before the US Court of Appeal for the second circuit challenging the order of Judge Keenan. By an order dated 28th May, 1986 Judge Keenan declined the motion for a fairness hearing. The request for fairness hearing was rejected at the instance of Union of India in view of the meagreness of the amount of proposed settlement. On 10th July, 1986 UCC filed an appeal before the US Court of Appeal for the Second Circuit. It challenged Union of India being entitled to American mode of discovery, but did not challenge the other two conditions imposed by Judge Keenan, it is stated. On 29th July, 1986 the Union of India filed cross-appeal before the US Court of Appeal praying that none of the conditions imposed by Judge Keenan should be disturbed. In this connection it would be pertinent to set out the conditions incorporated in the order of Judge Keenan, dated 12th May, 1986 whereby he had dismissed the case before him on the ground of Forum non conveniens, as mentioned before. The conditions were following:-

1. that UCC shall consent to the jurisdiction of the courts of India and shall continue to waive defences based on the statute of limitation,

2. that UCC shall agree to satisfy any judgement rendered by an Indian court against it and if applicable, upheld on appeal, provided the judgement and affirmance "comfort with minimal requirements of due process",

3. that UCC shall be subject to discovery under the Federal Rules of Civil Procedure of the US after appropriate demand.

9. On 5th September, 1986 the Union of India filed a suit for damages in the Distt. Court of Bhopal, being regular suit No. 1113/86. It is this suit, inter alia, and the orders passed therein which were settled by the orders of this Court dated 14th & 15th February, 1989, which will be referred to later. On 17th November, 1986 upon the application of the Union of India, the Dist. Court Bhopal, granted a temporary injunction restraining the UCC from selling assets, paying dividends or buying back debts. On 27th November, 1986 the UCC gave an undertaking to preserve and maintain unencumbered assets to the extent of 3 billion US dollars.

10. On 30th November, 1986 the Dist. Court Bhopal lifted the injunction against the Carbide selling assets on the strength of the written undertaking by UCC to maintain unencumbered assets of 3 billion US dollars. On 16th December, 1986 UCC filed a written statement contending that they were not liable on the ground that they had nothing to do with the Indian Company; and that they were a different legal entity; and that they never exercised any control and that they were not liable in the suit. Thereafter, on 14th January, 1987 the Court of Appeal for the Second Circuit affirmed the decision of Judge Keenan but deleted the condition regarding the discovery under the American procedure granted in favour of the Union of India. It also suo motu set aside the condition that on the judgement of the Indian court complying with due process and the decree issued should be satisfied by UCC. It ruled that such a condition cannot be imposed as the situation was covered by the provisions of the Recognition of Foreign Country Money Judgements Act.

11. On 2nd April, 1987, the court made a written proposal to all parties for considering reconciliatory interim relief to the gas victims. In September, 1987, UCC and the Govt. of India sought time from the Court of Distt. Judge, Bhopal, to explore avenues for settlement. It has been asserted by the learned Attorney General that the possibility of settlement was there long before the full and final settlement was effected. He sought to draw our attention to the assertion that the persons concerned were aware that efforts were being made from time to time for settlement. However, in November, '87 both the Indian Govt. and the Union Carbide announced that settlement talks had failed and Judge Deo extended the time.

12. The Distt. Judge of Bhopal on 17th December, 1987 ordered interim relief amounting to Rs. 350 crores. Being aggrieved thereby the UCC filed a Civil Revision which was registered as Civil Revision Petition No. 26/88 and the same was heard. On or about 4th February, 1988, the Chief Judicial Magistrate of Bhopal ordered notice for warrant on Union Carbide, Hong Kong for the criminal case filed by CBI against Union Carbide. The charge sheet there was under sections 304, 324, 326, 429 of the Indian Penal Code read with section 35 IPC and the charge was against Shri Warren Anderson, Keshub Mahindra, Vijay Gokhale, J. Mukund, Dr. R. B. Roy Chowdhary, S. P. Chowdhary, K. V. Shetty, S. I. Qureshi and Union Carbide of U.S.A., Union Carbide of Hong Kong and Union Carbide having Calcutta address. It charged the Union Carbide by saying that MIC gas was stored and it was further stated that MIC had to be stored and handled in stainless steel which was not done. The charge sheet, inter alia, stated that a scientific Team headed by Dr. Varadarajan had concluded that the factors which had led to the toxic gas

leakage causing its heavy toll existed in the unique properties of very high reactivity, volatility and inhalation toxicity of MIC. It was further stated in the charge sheet that the needless storage of large quantities of the material in very large size containers for inordinately long periods as well as insufficient caution in design, in choice of materials of construction and in provision of measuring and alarm instruments, together with the inadequate controls on systems of storage and on quality of stored materials as well as lack of necessary facilities for quick effective disposal of material exhibiting instability, led to the accident. It also charged that MIC was stored in a negligent manner and the local administration was not informed, inter alia, of the dangerous effect of the exposure of MIC or the gases produced by its reaction and the medical steps to be taken immediately. It was further stated that apart from the design defects the UCC did not take any adequate remedial action to prevent back flow of solution from VGS into RVVH and PVN lines. There were various other acts of criminal negligence alleged. The High Court passed an order staying the operation of the order dated 17-12-87 directing the defendant applicant to deposit Rs. 3500 million within two months from the date of the said order. On 4th April, 1988 the judgement and order were passed by the High Court modifying the order of the Distt. Judge, and granting interim relief of Rs. 250 crores. The High Court held that under the substantive law of torts, the Court has jurisdiction to grant interim relief under Section 9 of the CPC. On 30th June, 1988 Judge Deo passed an order restraining the Union Carbide from settling with any individual gas leak plaintiffs. On 6th September, 1988 special leave was granted by this Court in the petition filed by UCC against the grant of interim relief and Union of India was also granted special leave in the petition challenging the reduction of quantum of compensation from Rs. 350 crores to Rs. 250 crores. Thereafter, these matters were heard in November-December '88 by the bench presided over by the learned Chief Justice of India and hearing continued also in January February '89 and ultimately on 14-15th February, 1989 the order culminating in the settlement was passed.

13. In judging the constitutional validity of the Act, the subsequent events, namely, how the Act has worked itself out, have to be looked into. It is, therefore, necessary to refer to the two orders of this Court. The proof of the cake is in its eating, it is said, and it is perhaps not possible to ignore the terms of the settlement reached on 14th and 15th Feb. 1989 in considering the effect of the language used in the Act. Is that valid or proper---or has the Act been worked in any improper way? These questions do arise.

14. On 14th February, 1989 an order was passed in C.A. Nos. 3187-88/88 with S.L.P. (C) No. 13080/88. The parties thereto were UCC and the Union of India as well as Jana Swasthya Kendra, Bhopal, Zehraeli Gas Kand Sangharsh Morcha, Bhopal, MP. That order recited that having considered all the facts and the circumstances of the case placed before the Court, the material relating to the proceedings in the Courts in the United Sates of America, the offers and counter-offers made between the parties at different stages during the various proceedings, as well as the complex issues of law and fact raised and the submissions made thereon, and in particular the enormity of human suffering occasioned by the Bhopal Gas disaster and the pressing urgency to provide immediate and substantial relief to victims of the disaster, the Court found that the case was pre-eminently fit for an overall settlement between the parties covering all litigations, claims,

rights and liabilities relating to and arising out of the disaster and it was found just, equitable and reasonable to pass, inter alia, the following orders :-

> "(1) The Union Carbide Corporation shall pay a sum of U.S. Dollars 470 million (Four hundred and seventy millions) to the Union of India in full settlement of all claims, rights and liabilities related to and arising out of Bhopal Gas disaster.
>
> (2) The aforesaid sum shall be paid by the Union Carbide Corporation to the Union of India on or before 31st March, 1989.
>
> (3) To enable the effectuation of the settlement, all civil proceedings related to and arising out of the Bhopal Gas disaster shall hereby stand transferred to this Court and shall stand concluded in terms of the settlement, and all criminal proceedings related to and arising out of the disaster shall stand quashed wherever these may be pending....."

15. A written memorandum was filed thereafter and the Court on 15th February, 1989 passed an order after giving due consideration thereto. The terms of settlement were as follows:

> "1. The parties acknowledge that the order dated February 14, 1989 disposes of in its entirety all proceedings in Suit No. 1113 of 1986. This settlement shall finally dispose of all past, present and future claims, causes of action and civil and criminal proceedings (of any nature whatsoever, wherever pending) by all Indian citizens and all public and private entities with respect to all past, present or future deaths, personal injuries, health effects, compensation, losses, damages and civil and criminal complaints of any nature whatsoever against UCC, Union Carbide India Limited, Union Carbide Eastern, and all of their subsidiaries and affiliates as well as each of their present and former directors, officers, employees, agents, representatives, attorneys, advocates and solicitors arising out of, relating to or connected with the Bhopal gas leak disaster, including past, present and future claims, causes of action and proceedings against each other. All such claims and causes of action whether within or outside India of Indian citizens public or private entities are hereby extinguished, including without limitation each of the claims filed or to be filed under the Bhopal Gas Leak Disaster (Registration and Processing of Claims) Scheme, 1985, and all such civil proceedings in India are hereby transferred to this Court and are dismissed with prejudice, and all such criminal proceedings including contempt proceedings stand quashed and accused deemed to be acquitted.
>
> 2. Upon full payment in accordance with the Court's directions the undertaking given by UCC pursuant to the order dated Nov. 30, 1986 in the District Court, Bhopal stands discharged, and all orders passed in suit No.1113 of 1986 and/or in any Revision therefrom, also stand discharged."

16. It appears from the settlement of objects & reasons of the Act that the Parliament recognized that the gas leak disaster involving the release, on 2nd and 3rd Dec. 1984 of highly noxious and abnormally dangerous gas from a plant of UCIL, a subsidiary of UCC, was of an unprecedented nature, which resulted in loss of life and damage to

property on an extensive scale, as mentioned before. It was stated that the victims who had managed to survive were still suffering from the adverse effects and the further complications which might arise in their cases, of course, could not be fully visualised. It was asserted by Ms. Indira Jaising that in case of some of the victims the injuries were carcinogenic and ontogenic and these might lead to further genetic complications and damages. The Central Govt. and the Govt. of Madhya Pradesh and various agencies had to incur expenditure on a large scale for containing the disaster and mitigating or otherwise coping with the effects thereto. Accordingly, the Bhopal Gas Leak Disaster (Processing of Claims) Ordinance, 1985 was promulgated, which provided for the appointment of a Commissioner for the welfare of the victims of the disaster and for the formulation of the Scheme to provide for various matters necessary for processing of the claims and for the utilisation by way of disbursal or otherwise of amounts received in satisfaction of the claims.

17. Thereafter, the Act was passed which received the assent of the President on 29th March, 1985. Section 2 (b) of the Act defines 'claim'. It says that "claim" means (i) a claim, arising out of, or connected with, the disaster, for compensation or damages for any loss of life or personal injury which has been, or is likely to be, suffered; (ii) a claim, arising out of, or connected with, the disaster, for any damage to property which has been, or is likely to be sustained; (iii) a claim for expenses incurred or required to be incurred for containing the disaster or mitigating or otherwise coping with the effects of the disaster; (iv) any other claim (including any claim by way of loss of business or employment) arising out of, or connected with, the disaster. A "claimant" is defined as a person entitled to make a claim. It has been provided in the Explanation to Section 2 that for the purpose of clauses (b) and (c), where the death of a person has taken place as a result of the disaster, the claim for compensation or damages for the death of such person shall be for the benefit of the spouse, children (including a child in the womb) and other heirs of the deceased and they shall be deemed to be the claimants in respect thereof.

18. Section 3 is headed "power of Central Govt. to represent claimants". It provides as follows:-

> "3(1) Subject to the other provisions of this Act, the Central government shall, and shall have the exclusive right to, represent, and act in place of (whether within or outside India) every person who has made, or is entitled to make, a claim for all purposes connected with such claim in the same manner and to the same effect as such persons.
>
> (2) In particular and without prejudice to the generality of the provisions of sub-section (1), the purposes referred to therein include--
>
> (a) institution of any suit or other proceeding in or before any court or other authority (whether within or outside India) or withdrawal of any such suit or other proceeding, and
>
> (b) entering into a compromise.
>
> (3) The provisions of sub-section (1) shall apply also in relation to claims in respect

of which suits or other proceedings have been instituted in or before any court or other authority (whether within or outside India) before the commencement of this Act:

> Provided that in the case of any such suit or other proceeding with respect to any claim pending immediately before the commencement of this Act in or before any court or other authority outside India, the Central Govt. shall represent, and act in place of, or along with, such claimant, if such court or other authority so permits."

19. Section 4 of the Act is headed as "Claimant's right to be represented by a legal practitioner". It provides as follows:-

> "Notwithstanding anything contained in Section 3, in representing, and acting in place of, any person in relation to any claim, the Central Government shall have due regard to any matters which such person may require to be urged with respect to his claim and shall, if such person so desires, permit at the expense of such person, a legal practitioner of his choice to be associated in the conduct of any suit or other proceeding relating to his claim."

20. Section 5 deals with the powers of the Central Govt. and enjoins that for the purpose of discharging its functions under this Act, the Central Govt. shall have the powers of a civil court while trying a suit under the Code of Civil Procedure, 1908. Section 6 provides for the appointment of a Commissioner and other officers and employees. Section 7 deals with powers to delegate. Section 8 deals with limitation, while Section 9 deals with the power to frame Scheme. The Central Govt. was enjoined to frame a scheme which was to take into claims for securing their enforcement, creation of a fund for meeting expenses in connection with the administration of the Scheme and of the provisions of this Act and the amounts which the Central Govt. might, after due appropriation made by the Parliament by law in that behalf, credit to the fund referred to in clauses above and any other amounts which might be credited to such fund. Such scheme was enjoined, as soon as after it had been framed, to be laid before each House of Parliament. Section 10 deals with removal of doubts. Section 11 deals with the overriding effect and provides that the provisions of the Act and of any Scheme framed thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than the Act or any instrument having effect by virtue of any enactment other than the Act.

21. A Scheme has been framed and was published on 24th September, 1985. Clause 3 of the said Scheme provides that the Deputy Commissioners appointed under Section 6 of the Act shall be the authorities for registration of Claims (including the receipt, scrutiny and proper categorisation of such claims under paragraph 5 of the Scheme) arising within the areas of their respective jurisdiction and they shall be assisted by such other officers as may be appointed by the Central Govt. under Section 6 of the Act for scrutiny and verification of the claims and other related matters. The Scheme also provides for the manner of filing claims. It enjoins that the Dy. Commissioner shall provide the required forms for filing the applications. It also provides for categorisation and registration of

claims. Sub-clause (2) of Clause 5 enjoins that the claims received for registration shall be placed under different heads.

22. Sub-clause (3) of Clause 5 enjoins that on the consideration of claims made under paragraph 4 of the Scheme, if the Dy. Commissioner is of the opinion that the claims fall in any category different from the category mentioned by the claimant, he may decide the appropriate category after giving an opportunity to the claimant to be heard and also after taking into consideration any facts made available to him in this behalf. Sub-clause (5) of Clause 5 enjoins that if the claimant is not satisfied with the order of the Dy. Commissioner, he may prefer an appeal against such order to the Commissioner, who shall decide the same.

23. Clause 9 of the Scheme provides for processing of Claims Account Fund, which the Central Govt. may, after due appropriation made by Parliament, credit to the said Fund. It provides that there shall also be a Claims and Relief Fund, which will include the amounts received in satisfaction of the claims and any other amounts made available to the Commissioner as donation or for relief purposes. Sub-clause (3) of clause 10 provides that the amount in the said Fund shall be applied by the Commissioner as donation or for relief, or apportionment in settlement of claims arising in future or for disbursal of amounts to the Govt. of Madhya Pradesh for the social and economic rehabilitation of the persons affected by the Bhopal gas leak disaster.

24. Clause 11 of the Scheme deals with the disbursal, apportionment of certain amounts, and sub-clause (2) thereof enjoins that the Central Govt. may determine the total amount of compensation to be apportioned for each category of claims and the quantum of compensation payable in general, in relation to each type of injury or loss. Sub-clause (5) thereto provides that in case of a dispute as to disbursal of the amounts received in satisfaction of claims, an appeal shall lie against the order of the Dy. Commissioner to the Additional Commissioner, who may decide the matter and make such disbursal as he may, for reasons to be recorded in writing, think fit. The other clauses are not relevant for our present purposes.

25. Counsel for different parties in all these matters has canvassed their submissions before us for the gas victims. Mr. R. K. Garg, Ms. Indira Jaising, and Mr. Kailash Vasudav have made various submissions challenging the validity of the Act on various grounds. They all have submitted that the Act should be read in the way they suggested and as a whole. Mr. Shanti Bhushan, appearing for interveners on behalf of Bhopal Gas Peedit Mahila Udyog Sangathan and following him Mr. Prashant Bhushan have urged that the Act should be read in the manner canvassed by them and if the same is not so read then the same would be violative of the fundamental rights of the victims, and as such unconstitutional. The learned Attorney General assisted by Mr. Gopal Subramanium has on the other hand urged that the Act is valid and constitutional and that the settlement arrived at on 14th /15th February is proper and valid.

26. In order to appreciate the background Ms. Indira Jaising placed before us the proceedings of the Lok Sabha wherein Mr. Veerendra-Patil, the Hon'ble Minister, stated on March 27, 1985 that the tragedy that had occurred in Bhopal on 2nd and 3rd Dec. 1984

was unique and unprecedented in character and magnitude not only for our country but for the entire world. It was stated that one of the options available was to settle the case in Indian courts. The second one was to file the cases in American courts. Mr. Patil reiterated that the Govt. wanted to proceed against the parent company and also to appoint a Commission of Inquiry.

27. Mr. Garg in support of the proposition that the Act was unconstitutional, submitted that the Act must be examined on the touchstone of the fundamental rights on the basis of the test laid down by this Court in State of Madras v. V. G. Row, 1952 SCR 597:(AIR 1952 SC 196). There at page 607 of the report (SCR):(at p. 199 of AIR) this Court has reiterated that in considering the reasonableness of the law imposing restrictions on the fundamental rights, both the substantive and procedural aspects of the impugned restrictive law should be examined from the point of view of reasonableness. And the test of reasonableness, wherever prescribed, should be applied to each individual Statute impugned, and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict (emphasis supplied). Chief Justice Patanjali Sastri reiterated that in evaluating such elusive factors and forming their own conception of what is reasonable in the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision would play an important role.

28. Hence, whether by sections 34 & 11 the rights of the victims and the citizens to fight for their own causes and to assert their own grievances have been taken away validly and properly must be judged in the light of the prevailing conditions at the time, the nature of the right of the citizen, the purpose of the restrictions on their rights to sue for enforcement in the courts of law or for punishment for offences against his person or property, the urgency and extent of the evils sought to be remedied by the act, and the proportion of the impairment of the rights of the citizen with reference to the intended remedy prescribed. According to Mr. Garg, the present position calls for a comprehensive appreciation of the national and international background in which precious rights to life and liberty were enshrined as fundamental rights and remedy for them was also guaranteed under Article 32 of the Constitution. He sought to urge that multinational corporations have assumed powers or potencies to override the political and economic independence of the sovereign nations which have been used to take away in the last four decades, much wealth out of the Third World. Now these are plundered much more than what was done to the erstwhile colonies by imperialist nations in the last three centuries of foreign rule. The role of courts in cases of conflict between rights of citizens and the vast economic powers claimed by Multinational Corporation to deny moral and legal liabilities for their corporate criminal activities should not be lost sight of. He in this background, urged that these considerations assume immense importance to shape human rights jurisprudence under the Constitution, and for the Third World to regulate and control the power and economic interests of multinational corporations and the power of exploitation and domination by developed nations without submitting to due observance

of the laws of the developing countries. It therefore appears that the production of, or carrying on trade in dangerous chemicals by multinational industries on the soil of Third World countries call for strictest enforcement of constitutional guarantees for enjoying human rights in free India, urged Mr. Garg. In this connection, our attention was drawn to the Charter of Universal Declaration of Human Rights. Art. 1 of the Universal Declaration of Human Rights, 1948 reiterates that all human-beings are born free and equal in dignity and rights. Art. 3 states that everyone has right to recognition everywhere as a person before the law. Art. 7 states that all are equal before the law and are entitled without any discrimination in and against any incitement to such discrimination. Art. 8 states that everyone has the right to an effective remedy by competent national Tribunal for acts violating fundamental rights guaranteed to him by the Constitution or by the law. It is, therefore, necessary to bear in mind that Indian citizens have a right to live which cannot be taken away by the Union of India or the Government of a State, except by a procedure which is just, fair and reasonable. The right to life includes the right to protections of limb against mutilation and physical injuries, and does not mean merely the right to breathe but also includes the right to livelihood. It was urged that this right is available in all its dimensions till the last breath against all injuries to head, heart and mind or the lungs affecting the citizen or his next generation or of genetic disorders. The enforcement of the right to life or limb calls for adequate and appropriate reliefs enforceable in courts of law and of equity with sufficient power to offer adequate deterrence in all cases of corporate criminal liability under strict liability, absolute liability, punitive liability and criminal prosecution and punishment to the delinquents. The damages awarded in civil jurisdiction must be commensurate to meet well defined demands of evolved human rights jurisprudence in modern world. It was, therefore, submitted that punishment in criminal jurisdiction for serious offences is independent of the claims enforced in civil jurisdiction and no immunity against it can be granted as part of settlement in any civil suit. If any Act authorises or permits doing of the same, the same will be unwarranted by law and as such bad. The Constitution of India does not permit the same.

29. Our attention was drawn to Art 21 of the Constitution and the principles of international law. Right to equality is guaranteed to every person under Art. 14 in all matters like the laws of procedure for enforcement of any legal or constitutional right in every jurisdiction, substantive law defining the rights expressly or by necessary implications, denial of any of these rights to any class of citizens in either field must have nexus with constitutionally permissible object and can never be arbitrary. Arbitrariness is, therefore, antithetical to the right of equality. In this connection, reliance was placed on the observations of this Court in D. P. Rayappa v. State of Tamil Nadu, (1974) 2 SCR 348: (AIR 1974 SC 555 : (AIR 1978 SC 597) where it was held that the view that Arts. 19 and 21 constitute watertight compartments has been rightly overruled. Articles dealing with different fundamental rights contained in Part III of the Constitution do not represent entirely separate streams of rights which do not mingle at any point of time. They are all parts of an integrated scheme in the Constitution and must be preserved and cannot be destroyed arbitrarily. Reliance was placed on the observations in R. D. Shetty v. The Union of India, (1979 3 SCR 1014: (AIR 1979 SC 1628). Hence, the rights of the citizens

to fight for remedies and enforce their rights flowing from the breach of obligation in respect of crime cannot be obliterated. The Act and Ss. 3, 4 and 11 of the Act in so far as these purport to do so and have so operated, are violative of Arts. 14, 19(1) (g) and 21 of the Constitution. The procedure envisaged by the said Sections deprives the just and legitimate rights of the victims to assert and obtain their just dues. The rights cannot be so destroyed. It was contended that under the law the victims had right to ventilate their rights.

30. It was further contended that Union of India was a joint tort-feasor along with UCC and UCIL. It had negligently permitted the establishment of such a factory without proper safeguards exposing the victims and citizens to great danger. Such a person or authority cannot be entrusted to represent the victims by denying the victims their rights to plead their own cases. It was submitted that the object of the Act was to fully protect people against the disaster of highly obnoxious gas and disaster of unprecedented nature. Such an object cannot be achieved without enforcement of the criminal liability by criminal prosecution. Entering into settlement without reference to the victims was, therefore, bad and unconstitutional, it was urged. If an Act, it was submitted, permits such a settlement or deprivation of the rights of the victims, then the same is bad.

31. Before we deal with the various other contentions raised in this case, it is necessary to deal with the application for intervention and submission made on behalf of the Coal India in Writ Petition No. 268/89 wherein Mr. L. N. Sinha in his written submission had urged for the intervener that Art. 21 of the Constitution neither confers nor creates nor determines the dimensions nor the permissible limits of restrictions which appropriate legislation might impose on the right to life or liberty. He submitted that provisions for procedure are relevant in judicial or quasi judicial proceedings for enforcement of rights or obligations. With regards to alteration of rights, procedure is governed by the Constitution directly. He sought to intervene on behalf of Coal India and wanted these submissions to be taken into consideration. However, when this contention was sought to be urged before this Court on 25th April, 1989, after hearing all the parties, it appeared that there was no dispute between the parties in the instant writ petitions between the victims and the Government of India that the rights claimed in these cases are referable to Art. 21 of the Constitution. Therefore, no dispute really arises with regard to the contention of Coal India and we need not consider the submissions urged by Shri Sinha on behalf of the intervener in this case. It has been so recorded.

32. By the order dated 3rd March, 1989, Writ Petitions Nos. 168/89 and 164/86 have been directed to be disposed of by this Bench. We have heard these two writ petitions along with the other writ petitions and other matters as indicated hereinbefore. The contentions are common. These writ petitions question the validity of the Act and the settlement entered into pursuant to the Act. Writ Petition No. 164/86 is by one Shri Rakesh Shrouti who is an Indian citizen and claims to be a practicing advocate having his residence at Bhopal. He says that he and his family members were at Bhopal on 2nd/3rd December, 1984 and suffered immensely as a result of the gas leak. He challenges the validity of the Act on various grounds. He contends that the Union of India should not have the exclusive right to represent the victims in suits against the Union Carbide and thereby

deprive the victims of their rights to sue and deny access to justice. He further challenges the right of the Union of India to represent the victims against Union Carbide because of conflict of interests. The conduct of the Union of India was also deprecated and it was further stated that such conduct did not inspire confidence. In the premises, the said petitioner sought a declaration under Art. 32 of the Constitution that the Act is void, inoperative and unenforceable as violative of Arts. 14, 19 and 21 of the Constitution. Similarly, the second writ petition, namely Writ Petition No. 268/89 which is filed by Sh. Charan Lal Sahu, who is also a practising Advocate on behalf of the victims and claims to have suffered damages as a result of the gas leak, challenges the Act. He further challenges the settlement entered into under the Act. He says that the said settlement was violative of principles of natural justice and the fundamental right of the said petitioner and other victims. It is his case that in so far as the Act permits such a course to be adopted; such a course was not permissible under the Constitution. He further asserts that the Union of India was negligent and a joint tort-feasor. In the premises, according to him, the Act is bad, the settlement is bad and these should be set aside.

33. In order to determine the question whether the Act in question is constitutionally valid or not in the light of Arts. 14, 19(1)(g) and 21 of the Constitution, it is necessary to find out what does the Act actually mean and provide for. The Act in question, as the Preamble to the Act states, was passed in order to confer powers on the Central Government to secure that the claims arising out of, or connected with the Bhopal gas leak disaster are dealt with speedily, effectively, equitably and for matters incidental thereto. Therefore, securing the claims arising out of or connected with the Bhopal gas leak disaster is the object and purpose of the Act. We have noticed the proceedings of the Lok Sabha in connection with the enactment of the Act. Our attention was also drawn by the learned Attorney General to the proceedings of the Rajya Sabha wherein the Hon'ble Minister, Shri Virendra Patil explained that the Bill enabled the Government to assume exclusive right to represent and act, whether within or outside India in place of every person who had made or was entitled to make claim in relation to the disaster and to institute any suit or other proceedings or enter into any compromise as mentioned in the Act. The whole object of the Bill was to make procedural changes to the existing Indian law which would enable the Central Government to take up the responsibility of fighting litigation on behalf of these victims. The first point was that it sought to create a locus standi in the Central Government to file suits on behalf of the victims. The object of the statute, it was highlighted, was that because of the dimension of the tragedy covering thousands of people, large number of whom being poor, would not be able to go to the courts, it was necessary to create the locus standi in the Central Government to start the litigation for payment of compensation in the courts on their behalf. The second aspect of the Bill was that by creating this locus standi in the Central Government, the Central Government became competent to institute judicial proceedings for payment of compensation on behalf of the victims. The next aspect of the Bill was to make a distinction between those on whose behalf suits had already been filed and those on whose behalf proceedings had not yet then been instituted. One of the Members emphasised that under Art. 21 of the Constitution, the personal liberty of every citizen was guaranteed and it has been widely interpreted as to what was the meaning of the

expression 'personal liberty'. It was emphasised that one could not take away the right of a person, the liberty of a person, to institute proceedings for his own benefit and for his protection. It is from this point of view that is was necessary, the member debated, to preserve the right of a claimant to have his own lawyers to represent him along with the Central Government in the proceedings under S. 4 of the Act, this made the Bill constitutionally valid.

34. Before we deal with the question of constitutionally, it has to be emphasised that the Act in question deals with the Bhopal gas leak disaster and it deals with the claims meaning thereby claims arising out of or connected with the disaster for compensation of damages for loss of life or any personal injury which has been or is likely to be caused and also claims arising out of or connected with the disaster for any damages to property or claims for expenses incurred or required to be incurred for containing the disaster or making or otherwise coping with the impact of the disaster and other incidental claims. The Act in question does not purport to deal with the criminal liability, if any, of the parties or persons concerned nor does it deal with any of the consequences flowing from those. This position is clear from the provisions and the Preamble to the Act. Learned Attorney General also says that the Act does not cover criminal liability. The power that had been given to the Central Government is to represent the 'claims', meaning thereby the monetary claims. The monetary claims, as was argued on behalf of the victims, are damages flowing from the gas disaster. Such damages, Mr Garg and Ms. Jaising submitted, are based on strict liability, absolute liability and punitive liability. The Act does not, either expressly or impliedly, deals with the extent of the damages or liability. Neither S. 3 nor any other section deals with any consequences of criminal liability. The expression "the Central Government shall, and shall have the exclusive right to, represent, and act in place of (whether within or outside India) every person who has made, or is entitled to make, a claim for all purposes connected with such claim in the same manner and to the same effect as such person", read as it is, means that Central Government is substituted and vested with the exclusive right to act in place of the victims, i.e., eliminating the victims, their heirs and their legal representatives, in respect of all such claims arising out of or connected with the Bhopal gas leak disaster. The right, therefore, embraces right to institute proceedings within or outside India along with right to institute any suit or other proceedings or to enter into compromise. Sub-section (1) of S.3 of the Act, therefore, substitutes the Central Government in place of the victims. The victims, or their heirs and legal representatives, get their rights substituted in the Central Government along with the concomitant right to institute such proceedings, withdraw such proceedings or suit and also to enter into compromise. The victims or the heirs or the legal representatives of the victims are substituted and their rights are vested in the Central Government. This happens by operation of Section 3 which is the legislation in question. Sub-section (3) of Section 3 makes it clear that the provisions of sub-section (1) of Section 3 shall also apply in relation to claims in respect of which suits or other proceedings have been instituted in or before any Court or other authority (whether within or outside India) before the commencement of this Act, but makes a distinction in the case of any such suit or other proceeding with respect to any claim pending immediately before the commencement of this Act in or before any Court or other

authority outside India, and provides that the Central Government shall represent, and act in place of, or along with, such claimant, if such Court or other authority so permits. Therefore, in cases where such suits or proceedings have been instituted before the commencement of the Act in any Court or before any authority outside India, the section by its own force will not come into force in substituting the Central Government in place of the victims or the heirs or their legal representatives, but the Central Government has been given the right to act in place of, or along with, such claimant, provided such Court or other authority so permits. It is to have adherence and conformity with the procedure of the countries or places outside India, where suits or proceedings are to be instituted or have been instituted. Therefore, the Central Government is authorised to act along with the claimants in respect of proceedings instituted outside India subject to the orders of such Courts or the authorities. Is such a right valid and proper?

35. There is the concept known both in this country and abroad, called "parens patriae'. Dr. B. K. Mukherjea in his "Hindu Law of Religious and Charitable Trusts, Tagore Law Lectures, Fifth Edition, at p. 454, referring to the concept of parens patriae, has noted that in English law, the Crown as parens patriae is the constitutional protector of all property subject to charitable trusts, such trusts being essentially matters of public concern. Thus the position is that according to Indian concept parens patriae doctrine recognized King as the protector of all citizens and as parent. In Budhkaran Chaukhani v. Thakur Prosad Shah, AIR 1942 Cal 311 the position was explained by the Calcutta High Court in Banku Behary v. Banku Behary Hasra, AIR 1943 Cal 203 at p. 205 of the report. The position was further elaborated and explained by the Madras High Court in Kumaraswami Mudaliar v. Rajammal, AIR 1957 Mad 563 at p. 567 of the report. This Court also recognised the concept of parens patriae relying on the observations of Dr. Mukherjee aforesaid in Ram Saroop v. S. P. Sahi, (1959) 2 Supp SCR 583 a pp. 598 and 599: (AIR 1959 SC 951 at pp, 958-959). In the "Words and Phrases" permanent edition, Vol. 33 at p. 99, it is stated that parens patriae is the inherent power and authority of a Legislature to provide protection to the person and property of persons non sui juris, such as minor, insane, and incompetent persons, but the words "parens patriae" meaning thereby 'the father of the country', were applied originally to the King and are used to designate the state referring to its sovereign power of guardianship over persons under disability, (Emphasis supplied). Parens patriae jurisdiction, it has been explained, is the right of sovereign and imposes a duty on sovereign, in public interest, to protect persons under disability who have no rightful protector. The connotation of the term "parens patriae" differs from country to country, for instance, in England it is the King, in America it is the people, etc. The Government is within its duty to protect and to control persons under disability. Conceptually, the parens patriae theory is the obligation of the State to protect and take into custody the rights and the privileges of its citizens' for discharging its obligations. Our Constitution makes it imperative for the State to secure to all its citizens the rights guaranteed by the Constitution and were the citizens are not in a position to assert and secure their rights, the State must come into picture and protect and fight for the rights of the citizens. The preamble to the Constitution, read with the Directive Principles, Arts. 38, 39 and 39A enjoin the State to take up these responsibilities. It is the protective measure to which the social welfare state is committed. It is necessary for the

State to ensure the fundamental rights in conjunction with the Directive Principles of State Policy to effectively discharge its obligation and for this purpose, if necessary, to deprive some rights and privileges of the individual victims or their heirs to protect their rights better and secure these further. Reference may be made to Alfred L. Snapp & Son, Inc. v. Puerto Rico, (1982) 458 US 592: 73 L Ed. 2d 995: 102 SC 3260 in this connection. There it was held by the Supreme Court of the United States of America that Commonwealth of Puerto have standing to sue as parens patriae to enjoin apple growers' discrimination against Puerto Rico migrant farm workers. This case illustrates in some aspect the scope of 'parens patriae'. The Commonwealth of Puerto Rico sued in the United States District Court for the Western District of Virginia, as parens patriae for Puerto Rican migrant farm workers, and against Virginia apple growers, to enjoin discrimination against Puerto Ricans in favour of Jamaican workers in violation of the Wagner-Peyser Act, and the Immigration and Nationality Act. The District Court dismissed the action on the ground that the Commonwealth lacked standing to sue, but the Court of Appeal for the fourth Circuit reversed it. On certiorari, the United States Supreme Court affirmed. In the opinion by White, J., joined by Surger, Chief Justice and Brennan, Marshall, Blackmun, Rennquist, Stevens, and O'Connor, JJ., it was held that Puerto Rico had a claim to represent its quasi-sovereign interests in federal Court at least which was as strong as that of any State, and that it had parens patriae standing to sue to secure its residents from the harmful effects of discrimination and to obtain full and equal participation in the federal employment service scheme established pursuant to the Wagner-Peyser Act and the Immigration and Nationality Act of 1952. Justice White referred to the meaning of the expression "parens patriae". According to Black's Law Dictionary, 5th Edition 1979, page 1003, it means literally 'parent of the country' and refers traditionally to the role of the State as a sovereign and guardian of persons under legal disability. Justice White at page 1003 of the report emphasised that parens patriae action had its roots in the common-law concept of the "royal prerogative". The royal prerogative included the right or responsibility to take care of persons who were legally unable, on account of mental incapacity, whether it proceeds from idiocy or lunacy to take proper care of themselves and their property. This prerogative of parens patriae is inherent in the supreme power of every State, whether that power is lodged in a royal person or in the legislature and is a most beneficent function. After discussing several cases Justice White observed at page 1007 of the report that in order to maintain an action, in parens patriae, the State must articulate an interest apart from the interests of particular parties, i.e. the State must be more than a nominal party. The State must express a quasi-sovereign interest. Again an instructive insight can be obtained from the observations of Justice Holmes of the American Supreme Court in the case of Georgia v. Tennessee Copper Co., (1907) 206 US 230: 51 L Ed. 1038: 27 S Ct 618 which was a case involving air pollution in Georgia caused by the discharge of noxious gases from the defendant's plant in Tennessee. Justice Holmes at page 1044 of the report described the State's interest as follows:

> "This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its

mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power.....

.....When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests".

36. Therefore, conceptually and from the jurisprudential point of view, especially in the background of the preamble to the Constitution of India and the mandate of the Directive Principles, it was possible to authorise the Central Government to take over the claims of the victims to fight against the multinational Corporation in respect of the claims. Because of the situation the victims were under disability in pursuing their claims in the circumstances of the situation fully and properly. On its plain terms the State has taken over the exclusive right to represent and act in place of every person who has made or is entitled to make a claim for all purposes connected with such claim in the same manner and to the same effect as such person. Whether such provision is valid or not in the background of the requirement of the Constitution and the Code of Civil Procedure, is another debate. But there is no prohibition or inhibition, in our opinion, conceptually or jurisprudentially for Indian State taking over the claims of the victims or for the State acting for the victims as the Act has sought to provide. The actual meaning of what the Act has provided and the validity thereof, however, will have to be examined in the light of the specific submissions advanced in this case.

37. Ms. Indira Jaising as mentioned hereinbefore on behalf of some other victims drew out attention to the background of the passing of the Act in question. She drew our attention to the fact that the Act was to meet a specific situation that has arisen after the tragic disaster and the dovent of American lawyers seeking to represent the victims in American courts. The Government's view, according to her, as was manifest from the Statement of Objects and Reasons, debates of the Parliament, etc. were that the interests of the victims would be best served if the Central Government was given the right to represent the victims in the courts of United States as they would otherwise be exploited by 'ambulance-chasers' working on contingency fees. The Government also proceeded initially on the hypothesis that US was the most convenient forum in which to sue UCC. The Government however feared that it might not have locus standi to represent the victims in the courts of the United States of America unless a law was passed to enable it to sue on behalf of the victims. The dominant object of the Act, therefore, according to her, was to give to the Government of India locus standi to sue on behalf of the victims in foreign jurisdiction, a standing which it otherwise would not have had. According to her, the Act was never intended to give exclusive rights to the Central Government to sue on behalf on the victims in India or abroad. She drew our attention to the Parliamentary debates as mentioned hereinbefore. She drew our attention to the expression 'parens patriae' as appearing in the Words and Phrases, Volume 31 p. 99. She contends that the Act was passed to provide locus standi only to represent in America. She drew our attention to the "American Constitutional Law" by Laurence B. Tribe, 1978 Edition at

paragraph 3. 24, where it was stated that in its capacity as proprietor, a State may satisfy the requirement of injury to its own interest by an assertion of harm to the state as such. It was further stated by the learned author there that the State may sue under the federal anti-trust laws to redress wrongs suffered by it as the owner of a railroad and as the owner and operator of various public institutions. It was emphasised that in its quasi-sovereign capacity, the state has an interest, independent of and behind the titles of its domain. It was sought to be suggested that in the instant Act no such right was either asserted or mentioned. The State also in its quasi-sovereign capacity is entitled to bring suit against a private individual to enjoin a corporation not to discharge noxious gases from its out of State plant into the suing State's territory. Finally, it was emphasised that as 'parens patriae' on behalf of the citizens, where a State's capacity as parens patriae is not negated by the federal structure, the protection of the general health, comfort, and welfare of the State's inhabitants has been held to give the State itself a sufficient interest. Ms. Jaising sought to contend that to the extent that the Act was not confined to empowering the Government to sue on behalf of those who were not sui generis but extended also to representing those who are, this exercise of the power cannot be referable to the doctrine of 'parens patriae'. To the extent it is not confined in enabling the Government to represent its citizens in foreign jurisdiction but empowered it to sue in local courts to the exclusion of the victims it cannot be said to be in exercise of doctrine of 'parens patriae', according to her. We are unable to agree. As we have indicated before conceptually and jurisprudentially there is no warrant in the background of the present Act, in the light of circumstance of the Act in question to confine the concept into such narrow field. The concept can be varied to enable the Government to represent the victims effectively in domestic forum if the situation so warrants. We also do not find any reason to confine the 'parens patriae' doctrine to only quasi-sovereign right of the State independent of and behind the title of the citizen, as we shall indicate later.

38. It was further contended that deprivation of the rights of the victims and denial of the rights of the victims or the rights of the heirs of the victims to access to justice was unwarranted and unconstitutional. She submitted that it has been asserted by the Government that the Act was passed pursuant to Entry 13 of the List I of the Seventh Schedule to the Constitution. It was therefore submitted that to the extent it was a law relating to civil procedure, it sets up a different procedure for the Bhopal gas victims and denies to them equality before law, violating Article 14 of the Constitution. Even assuming that due to the magnitude of the disaster, the number of claimants and their disability, they constituted a separate class and that it was permissible to enact a special legislation setting up a special procedure for them, the reasonableness of the procedure has still to be tested. Its reasonableness according to her, will have to be judged on the touchstone of the existing Civil Procedure Code of 1908 and when so tested, it is found wanting in several respects. It was also contended by the Government that it was a legislation relating to "actionable wrongs" under Entry 8 of the Concurrent List of the seventh Schedule. But so read, she said, it could only deal with the procedural aspects and not the substantive aspect of "actionable wrongs". If it does, then the reasonableness of a law must be judged with reference to the existing substantive law of actionable wrongs and so judged it is in violation of many constitutional rights as it takes away from

the victims the right to sue for actionable wrongs, according to counsel for the victims. According to her, it fails to take into account the law of strict liability for ultra hazardous activity as clarified by this Court in M.C. Mehta's case (supra). She further submitted that it is a bad act as it fails to provide for the right to punitive damages and destruction of environment.

39. It was contended on behalf of the Central Government that the Act was passed to give effect to the directive principle as enshrined under Article 39-A of the Constitution of India. It was, on the other side, submitted that it is not permissible for the State to grant legal aid on pain of destroying rights that inhere in citizens or on pain of demanding that the citizens surrender their rights to the State. The Act in fact demands a surrender of rights of the citizens to the State. On the interpretation of the Act, Ms. Indira Jaising submitted that Sections 3 and 4 as noted above, give exclusive power to the Government to represent the victims and there is deprivation of the victims' right to sue for the wrongs done to them which is uncanalised and unguided and the expression "due regard" in Section 4 of the Act does not imply consent and as such violative of the rights of the victims. The right to be associated with the conduct of the suit is hedged in with so many conditions that it is illusory. According to her, a combined reading of Section 3 and 4 of the Act lend to the conclusion that the victims are displaced by the Central Government which has constituted itself as the "surrogate" of the claimants, that they have no control over the proceedings, that they have no right to be heard by the court before any such compromise is effected. Therefore, Section 3 read with Section 4, according to her, hands over to the Government all effective rights of the victims to sue and is a naked usurption of power. It was submitted that in any event on a plain reading of the Act, Section 4 did not grant the Government immunity from being sued as a joint tort-feasor.

40. It was further urged that Section 9 makes the Government the total arbiter in the matter of the registration, processing and recording of claims. Reference was made to Section 9(2)(a)(b) and (c) and disbursal of claims under Sections 9(2)(f) and 10. It was urged that the Deputy Commissioner and Commissioner appointed under the Act and the scheme are subordinates and agents of the Central Government. They replace impartial and independent civil court by officers and subordinates of the Central Government. Clause 11 of the Scheme makes the Central Government, according to counsel, judge in its own cause in as much as the Central Government could be and was in fact a joint tort-feasor. It was submitted that Sections 5 to 9 of the Act read with the Scheme do not set up a machinery which is constitutionally valid. The Act, it was urged, deprives the victims of their rights out of all proportion to the object sought to be achieved, namely, to sue in foreign jurisdiction or to represent those incapable of representing themselves. The said object could be achieved, according to counsel, by limiting the right to sue in foreign jurisdiction alone and in any event representing only those victims incapable of representing themselves. The victims who wish to sue for and on their own behalf must have power to sue, all proper and necessary parties including Government of India, Government of Madhya Pradesh, UCIL and Shri Arjun Singh to vindicate their right to life and liberty and their rights cannot and should not be curtailed, it was submitted. Hence, the Act goes well beyond its objects and imposes excessive restriction amounting to destruction of the rights of the victims, according to counsel. In deciding whether any

rights are affected, it is not the object of the Act that is relevant but its direct and inevitable effect on the rights of the victims that is material. Hence no matter how laudable the object of the Act is alleged to be by the Government of India, namely, that it is an Act to give effect to Directive Principles enshrined in Article 39-A of the Constitution, the direct and inevitable effect of Section 3 according to counsel for the victims is to deprive the victims of the right to sue for and on their own behalf through counsel of their choice and instead empower the Central Government to sue for them.

41. The Act is, it was contended, unconstitutional because it deprives the victims of their right to life and personal liberty guaranteed by Article 21. The right to life and liberty includes the right to sue for violations of the right, it was urged. The right to life guaranteed by Article 21 must be interpreted to mean all that makes life liveable, life in all its fullness. According to counsel, it includes the right to livelihood. Reference was made to the decision of Olga Tellis v. U. M. C. (1985 Supp. 2 SCR 51 at p. 78-83). This right, it was contended, is inseparable from the remedy. It was urged that personal liberty includes a wide range of freedoms to decide how to order one's affairs. Reference was made to Maneka Gandhi v. Union of India (AIR 1978 SC 597) (supra). The right to life and liberty also includes the right to healthy environment free from hazardous pollutants. The right to life and liberty, it was submitted, is inseparable from the remedy to judicial vindication of the violation of that right - the right of access to justice must be deemed to be part of that right. Therefore, the importance is given to the right to file a suit for an actionable wrong. See Ganga Bai v. Vijay Kumar (1974) 3 SCR 882 at p. 886: (AIR 1974 SC 1126 at p. 1128). According to counsel appearing for the victims, the Act read strictly infringes the right to life and personal liberty because the right to sue by the affected person for damages flowing from infringement of their rights is taken away. Thus, it was submitted, that not just some incidents of the right to life, but the right itself in all its fullness is taken away. Such deprivation, according to counsel, of the right is not in accordance with procedure established by law inasmuch as the law which takes away the right, i.e., impugned Act is neither substantively nor procedurally just, fair or reasonable. A law which divests the victims of the right to sue to vindicate for life and personal liberty and vests the said right in the Central Government is not just, fair or reasonable. The victims are sui generis and able to decide for themselves how to vindicate their claims in accordance with law. There is, therefore, no reason shown to exist for divesting them of that right and vesting that on the Central Government.

42. All the counsel for the victims have emphasised that vesting of the right in Central Government is bad and unreasonable because there is conflict of interests between the Central Government and the victims. It was emphasised that the conflict of interest has already prejudiced the victims in the conduct of the case inasmuch as a compromise unacceptable to the victims has been entered into in accordance with the order of this Court of 14th\16th February, 1989 without hearing the victims. This conflict of interest will continue, it was emphasised, to adversely effect the victims inasmuch as Section 9 of the Act read with clauses 6, 10 and 11 of the Scheme empower the Central Government to process claims, determine the category into which these fall, determine the basis on which damages will be payable to each category and determine the amount of compensation payable to each claimant. Learned counsel urged that the right to a just, fair

and reasonable procedure was itself a guaranteed fundamental right under Article 14 of the Constitution. This included right to natural justice. Reference was made to Olga Tellis's case (supra) and S. L. Kapoor v. Jagmohan (1981) 1 SCR 746at pp. 753, 766: (AIR 1981 SC 136 at p. 141). The right to natural justice is included in Article 14. Union of India v. Tulsiram Patel (1985 Supp (2) SCR 131: (AIR 1985 SC 1416). Reference was also made to Maneka Gandhi`s case (supra). It was contended by counsel that the right to natural justice is the right to be heard by Court at the pre-decisional stage, i.e., before any compromise is effected and accepted. Reference was made to the decision of this Court in Swadeshi Cotton Mills v. Union of India, (1981) 2 SCR 533: (AIR 1981 SC 818). It was submitted that natural justice is a highly effective tool devised by the Courts to ensure that a statutory authority arrives at a just decision. It was calculated to act as a healthy check on the abuse of power. Natural justice is not dispensable nor is it an empty formality. Denial of that right can and has led to the miscarriage of justice in this case. According to counsel, if the victims had been given an opportunity to be heard, they would, inter alia, have pointed out that the amount agreed to be paid by UCC was hopelessly inadequate and that UCC, its officer and agents ought not to be absolved of criminal liability, that the Central Government itself was liable to have been sued as a joint tort-feasor and, according to counsel, had agreed to submit to a decree if found liable under the order dated 31st December, 1985, that suits had been filed against the State of Madyha Pradesh, Shri Arjun Singh and UCIL which said suits cannot be deemed to have been settled by the compromise/order of 14th/15th February, 1989. It was also pointed out that Union of India was under a duty to sue UCIL, which it had failed and neglected to do. It was submitted that to the extent that the statute does not provide for a pre-decisional hearing on the fairness of the proposed settlement or compromise by Court, it is void as offending natural justice hence Article 14 and 21 of the Constitution. Alternatively, it was contended by the counsel that since the statute neither expressly nor by necessary implication bars the right to be heard by Court before any compromise is effected such a right to a pre-decisional hearing by Court must be read into Section 3(2)(b) of the Act. Admittedly, it does not expressly exclude the right to a hearing by Court prior to any settlement being entered into. Far from excluding such a right by necessary implication, having regard to the nature of the rights affected, i.e., the right to life and personal liberty, such a right to hearing must be read into the Act in order to ensure that justice is done to the victims, according to all the counsel. The Act sets up a procedure different from the ordinary procedure established by law, namely, Civil Procedure Code. But it was submitted that the Act should be harmoniously read with the provisions of Civil Procedure Code and if it is not so read, then the Act in question would be unreasonable and unfair. In this connection, reliance was placed on the provisions of Order 1, Rule 4, Order 23, Rule 1 proviso, Order 23, Rules 3-9 and Order 32, Rule 7 of CPC and it was submitted that these are not inconsistent with the Act. On the contrary these are necessary and complementary, intended to ensure that there is no miscarriage of justice.

Hence these must be held to apply to the facts and circumstances of the case and the impugned Act must be read along with these provisions. Assuming that the said provisions do not directly apply then, provisions analogous to the said provisions must be

read with Section 3(2)(b) to make the Act reasonable, it was submitted. It was urged that if these are not so read then the absence of such provisions would vest arbitrary and unguided powers in the Central Government making Section 3(2)(b) unconstitutional. The said provisions are intended to ensure the machinery of accountability to the victims and to provide to them an opportunity to be heard by court before any compromise is arrived at. In this connection, reference was made to Rule 23(3) of the Federal Rules of Civil Procedure in America which provides for a hearing to the victims before a compromise is affected. The victims as plaintiffs in an Indian court cannot be subjected to a procedure which is less fair than that provided by a US forum initially chosen by the Government of India, it was urged.

43. Counsel submitted that Section 6 of the Act is unreadable because it replaces an independent and impartial Civil Court of competent jurisdiction by an Officer known as the Commissioner to be appointed by the Central Government. No qualification, according to counsel, had been prescribed for the appointment of commissioner and clause 5 of the Scheme framed under the Act vests in the Commissioner the judicial function of deciding appeals against the order of the Deputy Commissioner registering or refusing to register a claim. It was further submitted that clause 11(2) of the Scheme is unreasonable because it replaces an independent and impartial civil court of competent jurisdiction with the Central Government, which is a joint tort-feasor for the purposes of determining the total amount of compensation to be apportioned for each category of claims and the quantum of compensation payable for each type of injury or loss. It was submitted that the said function is a judicial function and if there is any conflict of interest between the victims and the Central Government, vesting such a power in the Central Government amounts to making it a judge in its own cause. It was urged that having regard to the fact that amount received in satisfaction of the claims is ostensibly pre-determined, namely, 470 million dollars unless the order of 14th/15th February is set aside which ought to be done, according to counsel, the Central Government would have a vested interest in ensuring that the amount of damages to be disbursed does not exceed the said amount. Even otherwise, according to counsel, the Government of India has been sued as a joint tort-feasor, and as they would have a vested interest in depressing the quantum of damages, payable to the victims. This would, according to counsel, result in a deliberate underestimation of the extent of injuries and compensation payable.

44. Clause 11(4) of the Scheme, according to counsel, is unreasonable inasmuch as it does not take into account the claims of the victims to punitive and exemplary damages and damages for loss and destruction of environment. Counsel submitted that in any event the expression "claims" in Section 2(b) cannot be interpreted to mean claims against the Central Government, the State of Madhya Pradesh, UCIL, which was not sued in suit No. 1113/86 and Shri Arjun Singh, all of whom have been sued as joint tort-feasors in relation to the liability arising out of the disaster. Counsel submitted that if Section 3 is to be held to be intra vires, the word "exclusive" should be severed from Section 3 and on the other hand, if Section 3 is held ultra vires, then victims who have already filed suits or those who had lodged claims should be entitled to continue their own suits as well as Suit No. 1113/86 as plaintiffs with leave under Order 1 Rule 8.

Counsel submitted that interim relief as decided by this Court can be paid to the victims even otherwise also, according to counsel, under clause 10(2)(b) of the Scheme.

45. Counsel submitted that the balance of $ 470 million after deducting interim relief as determined by this Court should be attached. In any event, it was submitted that, it be declared that the word "claim" in Section 2 does not include claims against Central Govt. or State of Madhya Pradesh or UCIL. Hence, it was urged that the rights of the victims to sue the Government of India, the State of Madhya Pradesh or UCIL would remain unaffected by the Act or by the compromise affected under the Act. Machinery to decide suit expeditiously has to be devised, it was submitted. Other suits filed against UCC, UCIL, State of Madhya Pradesh and Arjun Singh should be transferred to the Supreme Court for trial and disposal, according to counsel. It was submitted that the Court should fix the basis of damages payable to different categories, namely, death and disablement mentioned under clause 5(2) of the Scheme. Counsel submitted that this Court should set up a procedure which would ensure that an impartial judge assisted by medical experts and assessors would adjudicate the basis on which an individual claimant would fall into a particular category. It was also urged that this Court should quantify the amount of compensation payable to each category of claimant in clause 5(2) of the scheme. This decision cannot, it was submitted, be left to the Central Government as is purported to be done by clause 11(2) of the Scheme.

46. This Court must set up, it was urged, a trust with independent trustees to administer the trust and trustees to be accountable to this Court. An independent census should be carried out of number of claimants, nature and extent of injury caused to them, the category into which they fall. Apportionment of amounts should be set aside or invested for future claimants, that is the category in clause 5(2)(a) of the Scheme, which is, according to counsel, of utmost importance since the injuries are said to be carcinogenic and ontoganic and widely affecting persons yet unborn.

47. Shri Garg, further and on behalf of some of the victims counsel, urged before us that deprivation of the rights of the victims and vesting of those rights in the State is violative of the rights of the victims and cannot be justified or warranted by the Constitution. Neither Section 3 nor Section 4 of the Act gives any right to the victims; on the other hand, it is a complete denial of access to justice for the victims, according to him. This, according to counsel, is arbitrary. He also submitted that Section 4 of the Act, as it stands, gives no right to the victims and as such even assuming that in order to fight for the rights of the victims, it was necessary to substitute the victims even then in so far as the victims have been denied the right of say, in the conduct of the proceedings, this is disproportionate to the benefit conferred upon the victims. Denial of rights to the victims is so great and deprivation of the right to natural justice and access to justice is so tremendous that judged by the well settled principles by which yardsticks provisions like these should be judged in the constitutional framework of this country, the Act is violative of the fundamental rights of the victims. It was further submitted by him that all the rights of the victims by the process of this Act, the right of the victims to enforce full liability against the multinationals as well as against the Indian Companies, absolute liability and criminal liability have all been curtailed.

48. All the counsel submitted that in any event, the criminal liability cannot be subject matter of this Act. Therefore, the Government was not entitled to agree to any settlement on the ground that criminal prosecution would be withdrawn and this being a part of the consideration or inducement for settling the civil liability, he submitted that the settlement arrived at on the 14th/15th February, 1989 as recorded in the order of this Court is wholly unwarranted, unconstitutional and illegal.

49. Mr. Garg additionally further urged that by the procedure of the Act, each individual claim had to be first determined and that could only be done by aggregating the individual claims of the victims. That was not done, according to him. Read in that fashion, according to Shri Garg, the conduct of the Government in implementing the Act is wholly improper and unwarranted. It was submitted by him that the enforcement of the right of the victims without a just, fair and reasonable procedure which is vitally necessary for representing the citizens or victims was bad. It was further urged by him that the Bhopal gas victims have been singled out for hostile discrimination resulting in total denial of all procedures of approach to competent courts and tribunals. It was submitted that the Central Government was incompetent to represent the victims in the litigation's or for enforcement of the claims. It was then submitted by him that the claims of the victims must be enforced fully against the Union Carbide Corporation carrying on commercial activities for profit resulting in unprecedented gas leak disaster responsible for a large number of amount of deaths and severe injuries to others. It was submitted that the liability of each party responsible, including the Government of India, which is a joint tort-feasor along with the Union Carbide, has to be ascertained in appropriate proceedings. It was submitted on behalf of the victims that Union of India owned 22% of the shares in Union Carbide and, therefore, it was incompetent to represent the victims. There was conflict of interest between the Union of India and the Union Carbide and so Central Government was incompetent. It is submitted that pecuniary interest howsoever small disqualifies a person to be a judge in his own cause. The settlement accepted by the Union of India, according to various counsel is vitiated by the pecuniary bias as holders of its shares to the extent of 22%.

50. It was submitted that the pleadings in the court of the United States and in the Bhopal Court considered in the context of the settlement order of this Court accepted by the Union of India establish that the victims individually were sacrificed wantedly and callously and, therefore, there was violation according to some of the victims, both in the Act and in its implementation of Articles 14 19 (1)(g) and 21 of the Constitution.

51. The principles of the decision of this Court in M. C. Mehta v. Union of India, (1987) 1 SCR 819: (AIR 1987 SC 1086) must be so interpreted that complete justice is done and it in no way excludes the grant of punitive damages for wrongs justifying deterrents to ensure the safety of citizens in free India. No multinational corporation, according to Shri Garg, can claim the privilege of the protection of Indian law to earn profits without meeting fully the demands of civil and criminal justice administered in India with this Court functioning as the custodian. Shri Garg urged that the liability for damages, in India and the Third World Countries, of the multinational companies cannot be less but must be more because the persons affected are often without remedy for reasons of

inadequate facilities for protection of health or property. Therefore, the damages sustainable by Indian victims against the multinationals dealing with dangerous gases without proper security and other measures are far greater than damages suffered by the citizens of other advanced and developed countries. It is, therefore, necessary to ensure by damages and deterrent remedies that these multinationals are not tempted to shift dangerous manufacturing operations intended to advance their strategic objectives of profit and war to the Third World Countries with little respect for the right to life and dignity of the people of sovereign Third World countries. The strictest enforcement of punitive liability also serves the interest of the American people, is clearly unconstitutional and therefore, void.

52. It was urged that the settlement is without jurisdiction. This Court was incompetent to grant immunity against criminal liabilities in the manner it has purported to do by its order dated 14th/15th February, 1989, it was strenuously suggested by counsel. It was further submitted that to hold the Act to be valid, the victims must be heard before the settlement and the Act can only be valid if it is so interpreted. This is necessary further, according to Shri Garg, to lay down the scope of hearing. Shri Garg also drew our attention to the scheme of disbursement of relief to the victims. He submitted that the scheme of disbursement is unreasonable and discriminatory because there is no procedure which is just, fair and reasonable in accordance with the provisions of Civil Procedure Code. He further submitted that the Act does not lay down any guidelines for the conduct of the Union of India in advancing the claims of the victims. There were no essential legislative guidelines for determining the rights of the victims, the conduct of the proceedings on behalf of the victims and for the relief claimed. Denial of access to justice to the victims through an impartial judiciary is so great a denial that it can only be consistent with the situation which calls for such a drastic provision. The present circumstances were not such. He drew our attention to the decisions of this Court in Basheshar v. Income Tax Commr., AIR 1959 SC 149; in Re Special Courts Bill, (1979) 2 SCR 476: (AIR 1979 SC 478); A. R. Antulay v. R. S. Nayak, (1988) 2 SCC 602; (AIR 1988 SC 1531); Ram Krishna Dalmia v. Tendulkar 1955 SCR 279 : (AIR 1958 SC 538); Ambika Prasad v. State of U.P., (1980) 3 SCR 1159: (AIR 1980 SC 1762); and Budhan Chowdhury v. State of Bihar, (1955) 1 SCR 1045: (AIR 1980 SC 1762); and Budhan Chowdhary v. State of Bihar, (1955) 1 SCR 1045: (AIR 1955 SC 191). Shri Garg further submitted that Article 21 must be read with Article 51 of the Constitution and other directive principles. He drew out attention to Lakshmi Kant Pandey v. Union of India, (1984) 2 SCR 795: (AIR 1984 SC 469); M. S. Mackinnon Machkezie & Co. Ltd. v. Audrey D'Costa, (1987) 2 SCC 469: (AIR 1987 SC 1281); Sheela Barse v. Secy., Children Aid Society, (1987) 1 SCR 870: (AIR 1987 SC 656). Shri Garg submitted that in India, the national dimensions of human rights and the international dimensions are both congruent and their enforcement is guaranteed under Articles 32 and 226 to the extent these are enforceable against the State, these are also enforceable against transitional corporations inducted by the State on conditions of due observance of the Constitution and all laws of the land. Shri Garg submitted that in the background of an unprecedented disaster resulting in extensive damage to life and property and the destruction of the environment affecting large number of people and for the full

protection of the interests of the victims and for complete satisfaction of all claims for compensation, the Act was passed empowering the Government of India to take necessary steps for processing of the claims and for utilisation of disbursal of the amount received in satisfaction of the claims. The Central Government was given the exclusive right to represent the victims and to act in place of, in United States or in India, every citizen entitled to make a claim. Shri Garg urged that on a proper reading of Section 8(1) of the Act read with Section 4, exclusion of all victims for all purpose is incomplete and the Act is bad. He submitted that the decree for adjudication of the Court must ascertain the magnitude of the damages and should be able to grant reliefs required by law under heads of strict liability, absolute liability and punitive liability.

53. Shri Garg submitted that it is necessary to consider that the Union of India is liable for the torts. In several decisions to which Shri Garg drew our attention, it has been clarified that Government is not liable only if the tortuous act complained has been committed by its servants in exercise of its sovereign powers by which it is meant powers that can be lawfully exercised under sovereign rights only vide Nandram Heralal v. Union of India, AIR 1978 Madhya Pradesh 209 at p. 212. There is a real and marked distinction between the sovereign functions of the government and those which are non-sovereign and some of the functions that fall in the latter category are those connected with trade, commerce, business and industrial undertaking. Sovereign functions are such acts which are of such a nature as cannot be performed by a private individual or association unless powers are delegated by sovereign authority of State.

54. According to Shri Garg, the Union and the State Governments under the Constitution and as per laws of the Factories, Environment Control, etc. are bound to exercise control on the factories in public interest and public purpose. These functions are not sovereign functions, according to Shri Garg, and the Government in this case was guilty of negligence. In support of this, Shri Garg submitted that the offence of negligence on the part of the Govt. would be evident from the fact that-

(a) the Government allowed the Union Carbide factory to be installed in the heart of the city;

(b) the Government allowed habitation in the front of the factory knowing that the most dangerous and lethal gases were being used in the manufacturing processes;

(c) the gas leakage from this factory was a common affair and it was agitated continuously by the people, journalists and it was agitated in the Vidhan Sabha right from 1980 to 1984. These features firmly proved, according to Shri Garg, the grossest negligence of the government. Shri Garg submitted that the gas victims had legal and moral right to sue the government and so it had full right to implead all the necessary and proper parties like Union Carbide, UCIL, and also the then Chief Minister Shri Arjun Singh of the State. He drew our attention to Order 2, R. 3 of the Civil Procedure Code. In suits on joint torts, according to Shri Garg, each of the joint tort-feasors is responsible for the injury sustained for the common acts and they can all be sued together. Shri Garg's

main criticism has been that the most crucial question of corporate responsibility of the peoples' right to life and their right to guard it as enshrined in Article 21 of the Constitution were sought to be gagged by the Act. Shri Garg tried to submit that this was an enabling Act only but not an Act which deprived the victims of their right to sue. He submitted that in this Act, there is denial of natural justice both in the institution under Section 3 and in the conduct of the suit under Section 4. It must be seen that justice is done to all (R. Viswanathan v. Rukh-ul-Mulk Syed Abdul Wajid, (1963) 3 SCR 22; (AIR 1963 SC 1). It was urged that it was necessary to give a reasonable notice to the parties. He referred to M. Narayanan Nambiar v. State of Kerala, 1963 Supp. (2) SCR 724; (AIR 1963 SC 1116).

55. Shri Shanti Bhushan appearing for Bhopal Gas Peedit Mahila Udyog Sangathan submitted that if the Act is to be upheld, it has to be read down and construed in the manner urged by him. It was submitted that when the Bhopal gas disaster took place, which was the worst industrial disaster in the world which resulted in the deaths of several thousands of people and caused serious injuries to lakhs of others, there arose a right to the victims to get not merely damages under the law of the torts but also arose clearly, by virtue of right to life guaranteed as fundamental right by Article 21 of the Constitution a right to get full protection of life and limb. This fundamental right also, according to Shri Shanti Bhushan, embodied within itself a right to have the claim adjudicated by the established courts of law. It is well settled that right of access to courts in respect of violation of their fundamental rights itself is a fundamental right which cannot be denied to the people. Shri Shanti Bhushan submitted that there may be some justification for the Act being passed. He said that the claims against the Union Carbide are covered by the Act. The claims of the victims against the Central Government or any other party who is also liable under tort to the victims are not covered by the Act. The second point that Shri Shanti Bhushan made was that the Act so far as it empowered the Central Government to represent and act in place of the victims is in respect of the civil liability arising out of disaster and not in respect of any right in respect of criminal liability. The Central Govt., according to Shri Shanti Bhushan, cannot have any right or authority in relation to any offences which arose out of the disaster and which resulted in criminal liability. It was submitted that there cannot be any settlement or compromise in relation to non-compoundable criminal cases and in respect of compoundable criminal cases the legal right to compound these could only be possessed by the victims alone and the Central Government could not compound those offences on their behalf. It was submitted by Shri Shanti Bhushan that even this Court has no jurisdiction whatsoever to transfer any criminal proceedings to itself either under any provision of the Constitution or under any provision of the Criminal Procedure Code or under any other provision of law and, therefore, if the settlement in question was to be treated not as a compromise but as an order of the Court, it would be without jurisdiction and liable to be declared so on the principles laid down, according to Shri Bhushan, by this Court in Antulay's case (AIR 1988 SC 1531) (supra). Shri Shanti Bhushan submitted that even if under the Act, the Central Government is considered to be able to represent the victims and to pursue the litigation on their behalf and even to enter into compromise on their behalf, it would be a

gross violation of the constitutional rights of the victims to enter into settlement with the Union Carbide without giving the victims opportunities to express their views about the fairness or adequacy of the settlement before any court could permit such a settlement to be made.

56. Mr. Shanti Bhushan submitted that the suit which may be brought by the Central Government against Union Carbide under Section 3 of the Act would be a suit of the kind contemplated by the Explanation to Order 23, Rule 3 of the Code of Civil Procedure since the victims are not parties and yet the decree obtained in the suit would bind them. It was, therefore, urged by Shri Shanti Bhushan that the provisions of Section 3(1) of the Act merely empowers the Central Government to enter into a compromise but did not lay down the procedure which was to be followed for entering into any compromise. Therefore, there is nothing which is inconsistent with the provisions of Order 23, Rule 3-B of the CPC to which the provisions of Section 11 of the Act be applied. If, however, by any stretch of argument the provisions of the Act could be construed so as to override the provisions of Order 23, Rule 3-B CPC, it was urged, the same would render the provisions of the Act violative of the victims' fundamental rights and the actions would be rendered unconstitutional. If it empowered the Central Government to compromise the victims' rights, without even having to apply the principles of natural justice, then it would be unconstitutional and as such bad. Mr. Shanti Bhushan, Ms. Jaising and Mr. Garg submitted that these procedures must be construed in accordance with the provisions contained in Order 23, Rule 3-B CPC and an opportunity must be given to those whose claims are being compromised to show to the court that the compromise is not fair and should not accordingly be permitted by the court. Such a hearing in terms, according to counsel, of Order 23, Rule 3-B CPC has to be before the compromise is entered into. It was then submitted that Section 3 of the Act only empowers the Central Government to represent and act in place of the victims and to institute suits on behalf of the victims or even to enter into compromise on behalf of the victims.

57. The Act does not create new causes of action; create special courts. The jurisdiction of the civil court to entertain suit would still arise out of Section 9 of the CPC and the substantive cause of action and the nature of the relief's available would also continue to remain unchanged. The only difference produced by the provisions of the Act would be that instead of the suit being filed by the victims themselves the suit would be filed by the Central Government on their behalf.

58. Shri Shanti Bhushan then augured that the cause of action of each victim is separate and entitled him to bring a suit for separate amount according to the damages suffered by him. He submitted that even where the Central Government was empowered to file suits on behalf of all the victims it could only ask for a decree of the same kind as could have been asked for by the victims themselves, namely, a decree awarding various specified amounts to different victims whose names had to be disclosed. According to Shri Shanti Bhushan, even if all the details were not available at the time when the suit was filed, the details of the victims' damages had to be procured and specified in the plaint before a proper decree could be passed in the suit. Even if the subject matter of the suit had to be compromised between the Central Government and the Union Carbide the compromise

had to indicate as to what amount would be payable to each victims, in addition to the total amount which was payable by Union Carbide, submitted Shri Shanti Bhushan. It was submitted that there was nothing in the Act which permitted the Central Government to enter into any general compromise with Union Carbide providing for the lump sum amount with disclosure as to how much amount is payable to each victim.

59. If the Act in question had not been enacted, the victims would have been entitled to not only sue Union Carbide themselves but also to enter into any compromise or settlement of their claims with the Union Carbide immediately. The provisions of the Act, according to Mr. Shanti Bhushan, deprive the victims of their legal right and such deprivation of their rights and creation of a corresponding right in the Central Government can be treated as reasonable only if the deprivation of their rights imposed a corresponding liability on the Central Government to continue to pay such interim relief to the victims as they might be entitled to till the time that the Central Government is able to obtain the whole amount of compensation from the Union Carbide. He submitted that the deprivation of the right of the victims to sue for their claims and denial of access to justice and to assert their claims and the substitution of the Central Government to carry on the litigation for or on their behalf can only be justified, if and only if the Central Government is enjoined to provide for such interim relief or continue to provide in the words of Judge Keenan, as a matter of fundamental human decency, such interim relief, necessary to enable the victims to fight the battle. Counsel submitted that the Act must be so read. Shri Shanti Bhushan urged that if the Act is construed in such a manner that it did not create such an obligation on the Central Government, the Act cannot be up held as a reasonable provision when it deprived the victims of their normal legal rights of immediately obtaining compensation from Union Carbide. He referred to Section 10(b) of the Act and clauses 10 and 11(1) of the Scheme to show that the legislative policy underlying the Bhopal Act clearly contemplated payment of interim relief to the victims from time to time till such time as the Central Government was able to recover from Union Carbide full amount of compensation from which the interim relief paid by the Central Government were to be deducted from the amount payable to them by way of final disbursal of the amounts recovered.

60. The settlement is bad, according to Shri Shanti Bhushan if part of the bargain was giving up of the criminal liability against UCIL and UCC. Shri Shanti Bhushan submitted that this Court should not hesitate to declare that the settlement is bad because the fight will go on and the victims should be provided reliefs and interim compensation by the Central Government to be reimbursed ultimately from the amount to be realised by the Central Government. This obligation was over and above the liability of the Central Government as a joint tort-feasor, according to Shri Shanti Bhushan.

61. Shri Kailash Vasdev, appearing for the petitioners in writ petition No. 1551/86 submitted that the Act displaced the claimants in the matter of their right to seek redressal and remedies of the actual injury and harm caused individually to the claimants. The Act in question by replacing the Central Government in place of the victims, by conferment of exclusive right to sue in place of victims, according to him, contravenes the procedure established by law. The right to sue for the wrong done to an individual was exclusive to

the individual. It was submitted that under the civil law of the country, individuals have rights to enforce their claims and any deprivation would place them into a different category from the other litigants. The right to enter into compromise, it was further submitted, without consultation of the victims, if that is the construction of Section 3 read with Section 4 of the Act, then it is violative of procedure established by law. The procedure substituted if that be the construction of the Act, would be in violation of the principles of natural justice and as such bad. It was submitted that the concept of 'parens patriae' would not be applicable in these cases. It was submitted that traditionally, sovereigns can sue under the doctrine of 'parens patriae' only for violations of their "quasi-sovereign" interests. Such interests do not include the claims of individual citizens. It was submitted that the Act in question is different from the concept of perens patriae because there was no special need to be satisfied and a class action, according to Shri Vasdev, would have served the same purpose as a suit brought under the statute and ought to have been preferred because it safeguarded claimants' right to procedural due process. In addition, a suit brought under the statute would threaten the victims' substantive due process rights. It was further submitted that in order to sustain an action, it was necessary for the Government of India to have standing.

62. Counsel submitted that 'parens patriae' has received no judicial recognition in this country as a basis for recovery of money damages for injuries suffered by individuals. He may be right to that extent but the doctrine of parens patriae' has been used in India in varying contexts and contingencies.

63. We are of the opinion that the Act in question was passed in recognition of the right of the sovereign to act as parens patriae as contended by the learned Attorney General. The Government of India in order to effectively safeguard the rights of the victims in the matter of the conduct of the case was entitled to act as parens patriae', which position was reinforced by the statutory provisions, namely, the Act. We have noted the several decisions referred to hereinbefore, namely, Bhudhkaran Chandkhai v. Thakur Prosad Shad (AIR 1942 Cal 311) (supra), Banku Behary v. Bankdu Behari Hazra (AIR 1943 Cal 203) (supra), Kumaraswami Mudiliar v. Rajammal (AIR 1951 Mad 563) (supra) and to the decision of this Court in Ram Saroop Dasji v. S. Pourashavas. Sahi (AIR 1959 SC 951) (supra) and the decision of the American Supreme Court in Alfred Schnapp v. Puerto Rico (1982) 458 US 592 (supra). It has to be borne in mind that conceptually and jurisprudentially the doctrine of parens patriae is not limited to representation of some of the victims outside the territories of the country. It is true that the doctrine has been so utilised in America so far. In our opinion, learned Attorney General was right in contending that where citizens of a country are victims of a tragedy because of the negligence of any multinational a peculiar situation arises which calls for suitable effective machinery to articulate and effectuate the grievances and demands of the victims, for which the conventional adversary system would be totally inadequate. The State in discharge of its sovereign obligation must come forward. The Indian state because of its constitutional commitment is obliged to take upon itself the claims of the victims and to protect them in their hour of need. Learned Attorney General was also right in submitting that the decisions of the Calcutta, Madras and U.S. Supreme Court clearly indicate that parens patriae doctrine can be invoked by sovereign state within

India, even if it be contended that it has not so far been invoked inside India in respect of claims for damages of victims suffered at the hands of the multinational. In our opinion, conceptually and jurisprudentially, there is no bar on the State to assume responsibilities analogous to parens partiae to discharge the State's obligations under the Constitution. What the Central Government has done in the instant case seems to us to be an expression of its sovereign power. This power is plenary and inherent in every sovereign state to do all things which promote the health, peace, moral, education and good order of the people and tend to increase for the wealth and prosperity of the state. Sovereignty is difficult to define. (See in this connection, Weaver on Constitutional Law, p. 490). By the nature of things, the state sovereignty in these matters cannot be limited. It has to be adjusted to the conditions touching the common welfare when covered by legislative enactments. This power is to the public what the law of necessity is to the individual. It is comprehended in the maxim salus populi suprema lex regard for public welfare is the highest law. It is not a rule, it is an evolution. This power has always been as broad as public welfare and as strong as the arm of the State, this can only be measured by the legislative will of the people, subject to the fundamental rights and constitutional limitations. This is an emanation of sovereignty subject to as aforesaid. Indeed, it is the obligation of the State to assume such responsibility and protect its citizens. It has to be borne in mind, as was stressed by the learned Attorney General, that conferment of power and the manner of its exercise are two different matters. It was submitted that the power to conduct the suit and to compromise, if necessary, was vested in the Central Government for the purpose of the Act. The powers to compromise and to conduct the proceedings are not unanalysed or arbitrary. These were clearly exercisable only in the ultimate interests of the victims. The possibility of abuse of a statute does not impart to it any element of invalidity. In this connection, the observations of Viscount Simonds in Belfast Corpn. v. O.D. Cars ((1960) AC 490 at 520-21) are relevant where it was emphasised that validity of a measure is not to be determined by its application to particular cases. This Court in Collector of Customs, Madras v. Sampathu Chetty, (1962) 3 SCR 786 at p. 825: (AIR 1962 SC 316) emphasised that the constitutional validity of the statute would have to be determined on the basis of its provisions and on the ambit of its operation as reasonably construed. It has to be borne in mind that if upon so judged it passes the test of reasonableness then the possibility of the powers conferred being improperly used is no ground for pronouncing the law itself invalid. See in this connection also the observation in Pourashavas. J. Irani v. State of Madras (1962) 2 SCR 169 at p. 178 to 181: (AIR 1961 SC 1731 at pp. 1736, 1737), and D. K. Trivedi v. State of Gujarat 1986 (supp) SCC 20 at p. 60-61: (AIR 1966 SC 1323 at p. 1350).

64. Sections 3 and 4 of the Act should be read together as contended by the learned Attorney General, along with other provisions of the Act and in particular Sections 9 and 11 of the Act. These should be appreciated in the context of the object sought to be achieved by the Act as indicated in the Statement of Objects and Reasons and the Preamble to the Act. The Act was so designed that the victims of the disaster are fully protected and the claims of compensation or damages for loss of life or personal injuries or in respect of other matters arising out of or connected with the disaster are processed speedily, effectively, equitably and to the best advantage of the claimants. Section 3 of

the Act is subject to other provisions of the Act which includes Sections 4 and 11. Section 4 of the Act is subject to other provisions of the Act which includes Sections 4 and 11. Section 4 of the Act opens with non obstante clause, vis-a-vis, Section 3 and, therefore, overrides Section 3. Learned Attorney General submitted that the right of the Central Government under Section 3 of the Act was to represent the victims exclusively and act in the place of the victims. The Central Government, it was urged, in other words, is submitted in the place of the victims and is the dominus litis. Learned Attorney General submitted that the dominus litis carries with it the right to conduct the suit in the best manner as it deems fit, including, the right to withdraw and right to enter into compromise. The right to withdraw and the right to compromise conferred by Section 3(2) of the Act cannot be exercised to defeat the rights of the victims. As to how the rights should be exercised is guided by the objects and reasons contained in the preamble, namely, to speedily and effectively process the claims of the victims and to protect their claims. The Act was passed replacing the Ordinance at a time when many private plaintiffs had instituted complaints/suits in the American Courts. In such a situation, the Government of India acting in place of the victims necessarily should have right under the statute to act in all situations including the position of withdrawing the suit or to enter into compromise. Learned Attorney General submitted that if the UCC were to agree to pay a lump sum amount which would be just, fair and equitable, but insists on a condition that the proceedings should be completely withdrawn, then necessarily there should be power under the Act to so withdraw. According to him, therefore, the Act engrafted a provision empowering the Government to compromise. The provisions under Section 3(2)(b) of the Act to enter into compromise was consistent with the powers of dominus litis. In this connection, our attention was drawn to the definition of 'Dominus Litis' in Black's Law Dictionary, Fifth Edition, p. 437, which states as follows:

> "Dominus Litis.' The master of the suit; i.e. the person who was really and directly interested in the suit as a party, as distinguished from his attorney or advocate. But the term is also applied to one who, though nor originally a party, has made himself such, by intervention or otherwise, and has assumed entire control and responsibility for one side and is treated by the Court as liable for costs. Virginia Electric & Power Co. v. Bowrs 181 Va 542, 25, S.E. 3d 361.263."

65. Learned Attorney General sought to contend that the victims had not been excluded entirely either in the conduct of proceedings or in entering into compromise, and he referred to the proceedings in detail emphasising the participation of some of the victims at some stage. He drew our attention to the fact that the victims had filed separate consolidated complaints in addition to the complaint filed by the Government of India. Judge Keenan of the District Court of America had passed orders permitting the victims to be represented not only by the private Attorneys but also by the Govt. of India. Hence, it was submitted that it could not be contended that the victims had been excluded. Learned Attorney General further contended that pursuant to the orders passed by Judge Keenan imposing certain conditions against the Union Carbide and allowing the motion for forum non convenience of the UCC that the suit came back to India and was instituted before the Distt. Court of Bhopal. In those circumstances, it was urged by the learned Attorney General that the private plaintiffs who went to America and who were

represented by the contingency lawyers fully knew that they could also have joined in the said suit as they were before the American Court along with the Govt. of India. It was contended that in the proceedings at any point of time or state including when the compromise was entered into, these private plaintiffs could have participated in the court proceedings and could have made their representation, if they so desired. Even in the Indian suits, these private parties have been permitted to continue as parties represented by separate counsel even though the Act empowers the Union to be the sole plaintiff. Learned Attorney General submitted that Section 4 of the Act clearly enabled the victims to exercise their right of participation in the proceedings. The Central Govt. was enjoined to have due regard to any matter which such person might require to be urged. Indeed, the learned Attorney General urged very strenuously that in the instant case, Zehreeli Gas Kand Sangharsh Morcha and Jana Swasthya Kendra (Bhopal) had filed before the Distt. Judge, Bhopal, an application under Order 1 Rule 8 read with order 1 Rule 10 and Section 151 of the CPC for their intervention on behalf of the victims. They had participated in the hearing before the learned Distt. Judge, who referred to their intervention in the order. It was further emphasised that when the UCC went up in revision to the High Court of Madhya Pradesh at Jabalpur against the interim compensation ordered to be paid by the Distt. Court, the intervener through its Advocate, Mr. Vibhuti Jha had participated in the proceedings. The aforesaid Association had also intervened in the civil appeals preferred pursuant to the special leave granted by this Court to the Union of India and Union Carbide against the judgement of the High Court for interim compensation. In those circumstances it was submitted that there did not exist any other gas victim intervening in the proceedings, claiming participation under Section 4. Hence, the right to compromise provided for by the Act could not be held to be violative of the principles of natural justice. According to the learned Attorney General, this Court first proposed the order to counsel in court and after they agreed thereto, dictated the order on 14th February, 1989. On 15th February, 1989 after the Memorandum of Settlement was filed pursuant to the orders of the court, further orders were passed. The said Association, namely, Zehreeli Gas Kand Sangharsh Morcha was present, according to the records, in the Court on both the dates and did not apparently object to the compromise. Mr. Charanlal Sahu, one of the petitioners in the writ petition, had watched the proceedings and after the Court had passed the order on 15th February, 1989 mentioned that he had filed a suit for Rs. 100 crores. Learned Attorney General submitted that Mr. Sahu neither protested against the settlement nor did he make any prayer to be heard. Shri Charan Lal Sahu, in the petition of opposition in one of these matters have prayed that a sum of Rs. 100 million should be paid over to him for himself as well as on behalf of those victims whom he claimed to represent. In the aforesaid background on the construction of the Section, it was urged by the learned Attorney General that Section 3 of the Act cannot be held to be unconstitutional. The same provided a just, fair and reasonable procedure and enabled the victims to participate in the proceedings at all stages-those who were capable and willing to do so. Our attention was drawn to the fact that Section 11 of the Act provides that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other enactment other than the Act. It was, therefore, urged that the provisions of the Civil

Procedure Code stood overridden in respect of the areas covered by the Act, namely, (a) representation, (b) powers of representation; and (c) compromise.

66. According to the learned Attorney General, the Act did not violate the principles of natural justice. The provisions of the CPC could not be read into the Act for Section 11 of the Act provides that the application of the provision of the Civil Procedure Code in so far as those were inconsistent with the Act should be construed as overridden in respect of areas covered by it. Furthermore, in as much as Section 4 had given a qualified right of participation to the victims, there cannot be any question of violation of the principles of natural justice. The scope of the application of the principles of natural justice cannot be judged by any straight-jacket formula. According to him, the extension of the principles of natural justice beyond what is provided by the Act in Sections 3 & 4, was unwarranted and would deprive the provisions of the statute of their efficacy in relation to the achievement of 'speedy relief', which is the object intended to be achieved. He emphasised that the process of notice, consultation and exchange of information, informed decision-making process, the modalities of assessing a consensus of opinion would involve such time that the Govt. would be totally unable to act in the matter efficiently, effectively and purposefully on behalf of the victims for realisation of the just dues of the victims. He further urged that the Civil Procedure Code before its amendment in 1976 did not have the provisions of Order 1 Rules 8(4), (5) & (6) and Explanations etc. nor Order XXIII Rules 3A and 3B. Before the amendment the High Court had taken a view against the requirement of hearing the parties represented in the suit under Order 1, Rule 8 before it before settling or disposing of the suit. Our attention was drawn to the decision of the Calcutta High Court in Chintaharan Ghose v. Gujaraddi Sheik, AIR 1951 Cal 456 at pp. 457-459, wherein it was held by the learned single Judge that the plaintiff in a representative suit had right to compromise subject to the conditions that the suit was properly filed in terms of the provisions of that Rule and the settlement was agreed *bona fide*. Learned Attorney General in that context contended that when the suit was validly instituted, the plaintiff had a right to compromise the suit and there need not be any provision for notice to the parties represented before entering into any compromise. Reliance was placed on the decision of the Allahabad High Court in Ram Sarup v. Nanak Ram, AIR 1952 All 275, where it was held that a compromise entered into in a suit filed under Order 1, Rule 8 of the CPC was binding on all persons as the plaintiffs who had instituted the suit in representative capacity had the authority to compromise. He further submitted that most, if not all, of the victims had given their powers of attorney which were duly filed in favour of the Union of India. These powers of attorney have neither been impeached nor revoked or withdrawn. By virtue of the powers of attorney the Union of India, it was stated, had the authority to file the suits and to compromise the interests of the victims if so required. The Act in question itself contemplates settlement as we have noted, and a settlement would need a common spokesman.

67. It was submitted that the Govt. of India as the statutory representative discharged its duty and is in a centralised position of assessing the merits and demerits of any proposed course of action. So far as the act of compromise, abridging or curtailing the ambit of the rights of the victims, it was submitted that in respect of liabilities of UCC & UCIL, be it corporate, criminal or tortious, it was open to an individual to take a decision of enforcing

the liability to its logical extent or stopping short of it and acceding to a compromise. Just as an individual can make an election in the matter of adjudication of liability so can a statutory representative make an election. Therefore, it is wholly wrong to contend, it was urged, that Section 3 (ii) (b) is inconsistent with individual's right of election and at the same time it provides the centralised decision making processes to effectively adjudge and secure the common good. It was only a central agency like the Govt. of India, who could have a perspective of the totality of the claims and a vision of the problems of individual plaintiffs in enforcing these, it was urged. It was emphasised that it has to be borne in mind that a compromise is a legal act. In the present case, it is a part of the conduct of the suit. It is, therefore, imperative that the choice of compromise is made carefully, cautiously and with a measure of discretion, it was submitted. But if any claimant wished to be associated with the conduct of the suit, he would necessarily have been afforded an opportunity for that purpose, according to the learned Attorney General. In this connection, reference was made to Section 4 of the Act. On the other hand, an individual who did not participate in the conduct of the suit and who is unaware of the various intricacies of the case could hardly be expected to meaningfully partake in the legal act of settlement either in conducting the proceeding or entering into compromise, it was urged. In those circumstances, the learned Attorney General submitted that the orders of 14-15th February, 1989 and the Memorandum of Settlement were justified both under the Act and Constitution. According to him, the terms of Settlement might be envisaged as pursuant to Section 3 (ii) (b) of the Act, which was filed according to him pursuant to judicial direction. He sought more than once to emphasise, that the order was passed by the highest Court of the land in exercise of extraordinary jurisdiction vested in it under the Constitution.

68. Our attention was drawn to several decisions for the power of this Court under Articles 136 and 142 of the Constitution. Looked closely at the provision of the Act, it was contended that taking into consideration all the factors, namely, possibilities of champerty, exploitation unconscionable agreements and the need to represent the dead and the disabled, the course of events would reveal a methodical and systematic protection and vindication of rights to the largest possible extent. It was observed that the rights are indispensably valuable possessions, but the right is something which a man can stand on, something which must be demanded or insisted upon without embarrassment or shame. When rights are curtailed, permissibility of such a measure can be examined only upon the strength, urgency and the pre-eminence of rights and the largest good of the largest number sought to be served by curtailment. Under the circumstance which were faced by the victims of Bhopal gas tragedy, the justifying basis, according to the learned Attorney General, or ground of human rights is that every person morally ought to have something to which he or she is entitled. It was emphasised that the Statute aimed at it. The Act provides for assumption of rights to sue with the aim of securing speedy, effective and equitable results to the best advantage of the claimants. The Act and the scheme, according to the learned Attorney General sought to translate that profession into a system of faith and possible association when in doubt. Unless such a profession is shown to be unconscionable under the circumstances or strikes judicial conscience as a subversion of the objects of the Act, a declaredly fair, just and equitable exercise of a

valid power would not be open to challenge. He disputed the submission that the right to represent victims postulated as contended mainly by the counsel on behalf of the petitioners, a predetermination of each individual claim as a sine qua non for proceeding with the action. Such a construction would deplete the case of its vigour, urgency and sense of purpose, he urged. In this case, with the first of the cases having been filed in U.S. Federal Court on December 7, 1984 a settlement would have been reached for a much smaller sum to the detriment of the victims. Learned Attorney General emphasised that this background has to be kept in mind while adjudging the validity of the Act and the appropriateness of the conduct of the suit in the settlement entered into.

69. He submitted that it has to be borne in mind that if the contentions of the petitioners are entertained, the rights theoretically might be upheld but the ends of justice would stand sacrificed. It is in those circumstances that it was emphasised that the claimant is an individual and is the best person to speak about his injury. The knowledge in relation to his injury is relevant for the purpose of compensation, whose distribution and disbursement is the secondary stage. It is fallacious to suggest that the plaint was not based upon necessary data. He insisted that the figures mentioned in the plaint although tentative were not mentioned without examination or analysis.

70. It was further submitted by the learned Attorney General that while the Govt. of India had proceeded against the UCC, it had to represent the victims as a class and it was not possible to define each individual's right after careful scrutiny, nor was it necessary or possible to do so in a mass disaster case. The settlement was a substitute for adjudication since it involved a process of reparation and relief. The relief and reparation cannot be said to be irrelevant for the purpose of the Act. It was stated that the alleged liability of the Govt. of India or any claim asserted against the alleged joint tort feasors should not be allowed to be a constraint on the Govt. of India to protect the interests of its own citizens. Any counterclaim by UCC or any claim by a citizen against the Govt. cannot vitiate the actions of the State in the collective interest of the victims, who are the citizens. Learned Attorney General submitted that any industrial activity, normally, has to be licensed. The mere regulation of any activity does not carry with it legally a presumption of liability for injury caused by the activity in the event of a mishap occurring in the course of such an activity. In any event, the learned Attorney General submitted that Govt. of India enjoys sovereign immunity in accordance with settled law. If this were not the case, the Sovereign will have to abandon all regulatory functions including the licensing of drivers of automobiles. Hence, we have to examine the question whether even on the assumption that there was negligence on the part of the Govt. of India in permitting licensing of the industry set up by the Union Carbide in Bhopal or permitting the factory to grow up such permission or conduct of the Union of India was responsible for the damage which has been suffered as a result of Bhopal gas leakage. It is further to be examined whether such conduct was in discharge of the sovereign functions of the Govt., and as such damages, if any, resulting therefrom are liable to be proceeded against the Govt. as a joint tort-feasor or not. In those circumstances, it was further asserted on behalf of the Union of India that though calculation of damage in a precise manner is a logical consequence of a suit in progress it cannot be said to be a condition precedent for the purpose of settling the matter. Learned Attorney General urged that the accountability to the victims should be

through the court. He urged that the allegation that a large number of victims did not give consent to the settlement entered into is really of no relevance in the matter of a compromise in a mass tort action. It was highlighted that it is possible that those who do not need urgent relief or are uninformed of the issues in the case may choose to deny consent and may place the flow of relief in jeopardy. Thus, consent based upon individual subjective opinion can never be correlated to the proposal of an overall settlement in an urgent matter. Learned Attorney General urged further that if indeed consent were to be insisted upon as a mandatory requirement of a Statute, it would not necessarily lead to an accurate reflection of the victims' opinion as opinions may be diverse. No individual would be in a position to relate himself to a lump sum figure and would not be able to define his expectations on a global criteria. In such circumstances the value of consent is very much diminished. It was urged that if at all consent was to be insisted it should not be an expression of the mind without supporting information and response. To make consent meaningful it is necessary that it must be assertion of a right to be exercised in a meaningful manner based on information and comprehension of collective welfare and individual good. In a matter of such dimensions the insistence upon consent will lead to a process of enquiry which might make effective consideration of any proposal impossible. For the purpose of affording consent, it would also be necessary that each individual not only assesses the damage to himself objectively and places his opinion in the realm off fair expectation, but would also have to do so in respect of others. The learned Attorney General advanced various reasons why it is difficult now or impossible to have the concurrence of all.

71. In answer to the criticism by the petitioners, it was explained on behalf of the Union of India that UCIL was not impleaded as a party in the suit because it would have militated against the plea of multi-national enterprise liability and the entire theory of the case in the plaint. It was highlighted that the power to represent under the Act was exclusive, the power to compromise for the Govt. of India is without reference to the victims, yet it is a power guided by the sole object of the welfare of the victims. The presence and ultimately the careful imprimatur of the judicial process is the best safeguard to the victims. Learned Attorney General insisted that hearing the parties after the settlement would also not serve any purpose. He urged that it can never be ascertained with certainty whether the victims or groups have authorised what was being allegedly spoken on their behalf; and that the victims would be unable to judge a proposal of this nature. A method of consensus need not be evolved like in America where every settlement on the basis of its order of February 14, 1989 and the interveners were heard, it was urged. It was also urged that notice to the victims individually would have been a difficult exercise and analysis of their response time-consuming.

72. The learned Attorney General urged that neither the Central Govt. nor the State Govt. of Madhya Pradesh is liable for the claim of the victims. He asserted that, on the facts of the present case, there is and can be no liability on their part as joint tort-feasors. For the welfare of the community several socio-economic activities will have to be permitted by the Govt. Many of these activities may have to be regulated by licensing provisions contained in Statutes made either by Parliament or by State Legislatures. Any injury caused to a person, to his life or liberty in the conduct of a licensed authority so as to

make the said licensing authority or the Govt. liable to damages would not be in conformity with jurisprudential principle. If in such circumstances, it was urged on behalf of the Govt., the public exchequers is made liable it will cause great public injury and may result in drainage of the treasury. It would terrorise the welfare state from acting for development of the people, and will affect the sovereign governmental activities which are beneficial to the community not being adequately licensed and would thereby lead to public injury. In any event, it was urged on behalf of the Govt., that such licensing authorities even assuming without admitting could be held to be liable as joint tort-feasors. It could be so held only on adequate allegations of negligence with full particulars and details of the alleged act or omission of the licensing authority alleged and its direct nexus to the injury caused to the victims. It had to be proved by cogent and adequate evidence. On some conjecture or surmise without any foundation on facts, Govt's right to represent the victims cannot be challenged. It was asserted that even if the Govt. is considered to be liable as a joint tort-feasor, it will be entitled to claim sovereign immunity on the law as it now stands.

73. Reference was made to the decision of this Court in Kasturilal Ralia Ram Jain v. State of U. P., (1965) 1 SCR 375: (AIR 1965 SC 1039), where the conduct of some police officers in seizing gold in exercise of their statutory powers was held to be in discharge of the sovereign functions of the State and such activities enjoyed sovereign immunities. The liability of the Govt. of India under the Constitution has to be referred to Article 300, which takes us to Section 15 & 18 of the Indian Independence Act, 1947, and Section 176 (1) of the Government of India Act, 1935. Reference was also made to the observations of this Court in State of Rajasthan v. Mst. Vidhyawati, 1962 (2) Supp SCR 989: (AIR 1962 SC 933).

74. We have noted the shareholding of UCC. The circumstances that financial institutions held shares in the UCIL would not disqualify the Govt. of India from acting as parens patriae and in discharging of its statutory duties under the Act. The suit was filed only against the UCC and not against UCIL. On the basis of the claim made by the Govt. of India, UCIL was not a necessary party. It was suing only the multi-national based on several legal grounds of liability of the UCC, inter alia, on the basis of enterprise liability. If the Govt. of India had instituted a suit against UCIL to a certain extent it would have weakened its case against UCC in view of the judgement of this Court in M. C. Mehta's case, (AIR 1987 SC 1086) (supra). According to learned Attorney General, the Union of India in the present case was not proceeding on the basis of lesser liability of UCC predicated in Mehta's case but on a different jurisprudential principle to make UCC strictly and absolutely liable for the entire damages.

75. The learned Attorney General submitted that even assuming for the purpose of argument without conceding that any objection can be raised for the Govt. of India representing the victims, to the present situation the doctrine of necessity applied. The UCC had to be sued before the American courts. The tragedy was treated as a national calamity, and the Govt. of India had the right, and indeed the duty, to take care of its citizens, in the exercise of its parens patriae jurisdiction or on principle analogous thereto. After having statutorily armed itself in recognition of such parens patriae right or on

principles analogous thereto, it went to the American courts. No other person was properly designed for representing the victims as a foreign court had to recognise a right of representation. The Govt. of India was permitted to represent the victims before the American courts. Private plaintiffs were also represented by their attorneys. A Committee of three attorneys was formed before the case proceeded before Judge Keenan. It was highlighted that the order of Judge Keenan permitted the Govt. of the India to represent the victims. If there was any remote conflict of interests between the Union of India and the victims from the theoretical point of view the doctrine of necessity would override the possible violation of the principles of natural justice - that no man should be Judge in his own case. Reference may be made to Halsbury's Laws of England, Vol, 1. 4th Ed., page 89, para 73, where it was pointed that if all the members of the only tribunal competent to determine a matter are subject to disqualification, they may be authorised and obliged to hear that matter by virtue of the operation of the common law doctrine of necessity. Reference was also made to De Smith's Judicial Review of Administrative Action (4th Edn. pages 276-277), See also G. A. Flick - Natural Justice (1379, pages 138-141). Reference was also made to the observations of this Court in J. Mohapatra & Co. v. State of Orissa, (1984) 4 SCC 103: (AIR 1984 SC 1572), where at page 112 of the report the Court recognised the principle of necessity. It was submitted that these were situations where on the principle of doctrine of necessity a person interested was held not disqualified to adjudicate on his rights. The present is a case where the Govt. of India only represented the victims. The representation of the victims by the Govt. of India cannot be held to be bad, and there is and there was no scope of violation of any principle of natural justice. We are of the opinion in the facts and the circumstances of the case that this contention urged by Union of India is right. There was no scope of violation of the principle of natural justice on this score.

76. It was also urged that the doctrine of de facto representation will also apply to the facts and the circumstances of the present case. Reliance was placed on the decision of this Court in Gokaraju Rangaraju v. State of A. P., (1981) 3 SCR 474; (AIR 1981 SC 1473) where it was held that the doctrine of de facto representation envisages that acts performed within the scope of assumed official authority in the interest of public or third persons and not for one's own benefit, are generally to be treated as binding as if they were the acts of officers de jure. This doctrine is founded on good sense, sound policy and practical expediency. It is aimed at the prevention of public and private mischief and protection of public and private interest. It avoids endless confusion and needless chaos. Reference was made to the observations of this Court in Pushpadevi Jatia v. M. L. Wadhawan, (1987) 3 SCC 367 at pp. 389-390 and M/s. Beopar Sahayak (P) Ltd. v. Vishwa Nath, (1987) 3 SCC 693 at pp 702 & 703 : (AIR 1987 SC 2111). Apart from the aforesaid doctrine, doctrine of bona fide representation was sought to be resorted to in the circumstances. In this connection, reference was made to Dharampal Singh v. Director of Small Industries Services, AIR 1980 SC 1828, D. K. Mohammad Sulaiman v. N. C. Mohammad Ismail, (1966) 1 SCR 937 ; (AIR 1966 SC 792) and Malharjun in Shigramappa Pasare v. Narhari Bin Shivappa, (1900) 27 Ind App 216 (PC).

77. It was further submitted that the initiation of criminal proceedings and then quashing thereof would not make the Act ultra vires so far as is concerned. Learned Attorney

General submitted that the Act only authorised the Govt. of India to represent the victims to enforce their claims for damages under the Act. The Govt. as such had nothing to do with the quashing of the criminal proceedings and it was not representing the victims in respect of the criminal liability of the UCC or UCIL to the victims. He further submitted that quashing of criminal proceedings was done by the Court in exercise of plenary powers under Articles 136 and 142 of the Constitution. In this connection, reference was made to State of U.P. v. Poosu, (1976) 3 SCR 1005 :(AIR 1976 SC 1750), K. M. Nanavati v. State of Bombay, (1961) 1 SCR 497 : (AIR 1961 SC 112), According to the learned Attorney General, there is also power in the Supreme Court to suggest a settlement and give relief as in Ram Gopal v. Smt. Sarubai, (1981) 4 SCC 505, India Mica & Micanite Industries Ltd. v. State of Bihar, (1982) 3 SCC 182.

78. Learned Attorney General urged that the Supreme Court is empowered to act even outside a Statute and give relief in addition to what is contemplated by the latter in exercise of its plenary power. This court acts not only as a Court of Appeal but is also a Court of Equity. See Roshanlal Nuthiala v. Mohan Singh, (1975) 2 SCR 491: (AIR 1975 SC 824). During the course of hearing of the petitions, he informed this Court that the Govt. of India and the State Govt. of Madhya Pradesh refuted and denied any liability, partial or total, of any sort in the Bhopal gas leak disaster, and this position is supported by the present state of law. It was, however, submitted that any claim against the Govt. of India for its alleged tortuous liability was outside the purview of the Act and such claims, if any, are not extinguished by reason of the orders dated 14th February, 1989 of this Court.

79. Learned Attorney General further stated that the amount of $470 million which was secured as a result of the memorandum of settlement and the said orders of this Court would be meant exclusively for the benefit of the victims who have suffered on account of the Bhopal gas leak disaster. The Govt. of India would not seek any reimbursement on account of the expenditure incurred *suo motu* for relief and rehabilitation of the Bhopal victims nor will the Govt. or its instrumentality make any claim on its own arising from this disaster. He further assured this Court that in the event of disbursement of compensation being initiated either under the Act or under the orders of this Court, a notification would be instantaneously issued under Section 5 (3) of the Act authorising the Commissioner or any other officers to discharge functions and exercise all or any powers which the Central Govt. may exercise under Section 5 to enable the victims to place before the Commissioner or the Dy. Commissioner any additional evidence that they would like to be considered.

80. The Constitution Bench of this Court presided over by the learned Chief Justice has pronounced an order on 4th May, 1989 giving reasons for the orders passed on 14th-15th February, 1989. Inasmuch as good deal of criticism was advanced before this Court during the hearing of the arguments on behalf of the petitioners about the propriety and validity of the settlement dated 14th - 15th February, 1989 even though the same was not directly in issue before us, it is necessary to refer briefly to what the Constitution Bench has stated in the said order dated 4h May, 1989. After referring to the facts leading to the settlement, the Court has set out the brief reasons on the following points:-

(a) How did the Court arrive at the sum of 470 million US dollars for an overall settlement?

(b) Why did the Court consider the sum of 470 million US dollars as 'just, equitable and reasonable'?

(c) Why did the Court not pronounce on certain important legal questions of far-reaching importance said to arise in the appeals as to the principles of liability of monolithic, economically entrenched multinational companies operating with inherently dangerous technologies in the developing countries of the third world? These questions were said to be of great contemporary relevance to the democracies of the third world. This Court recognised that there was another aspect of the review pertaining to the part of the settlement which terminated the criminal proceedings. The questions raised on the point in the review petitions, the Court was of the view, prima facie merit consideration and, therefore, abstained from saying anything which might tend to pre-judge this issue one way or the other.

81. The basic consideration, the Court recorded, motivating the conclusion of the settlement was the compelling need for urgent relief, and the Court set out the law's delays only considering that there was a compelling duty both judicial and humane, to secure immediate relief to the victims. In doing so, the court did not enter upon any forbidden ground, the Court stated. The Court noted that indeed efforts had already been made in this direction by Judge Keenan and the learned District Judge of Bhopal. Even at the opening of the arguments in the appeals, the Court had suggested to learned counsel to reach a just and fair settlement. And when counsel met for re-scheduling of the hearings the suggestion was reiterated. The Court recorded that the response of learned counsel was positive in attempting a settlement but they expressed a certain degree of uneasiness and scepticism at the prospects of success in view of their past experience of such negotiations when, as they stated, there had been uninformed and even irresponsible criticism of the attempts at settlement.

82. Learned Attorney General had made available to the Court the particulars of offers and counter-offers made on previous occasions and the history of settlement. In those circumstances, the Court examined the prima facie material as the basis of quantification of a sum which, having regard to all the circumstances including the prospect of delays inherent in the judicial process in India and thereafter in the matter of domestication of the decree in the U.S. for the purpose of execution and directed that 470 million US dollars, which upon immediate payment with interest over a reasonable period, pending actual distribution amongst the claimants, would aggregate to nearly 500 million US dollars or its rupee equivalent of approximately Rs. 750 crores which the learned Attorney General had suggested, be made the basis of settlement, and both the parties accepted this direction.

83. The Court reiterated that the settlement proposals were considered on the premise that the Govt. had the exclusive statutory authority to represent and act on behalf of the victims and neither counsel had any reservation on this. The order was also made on the

premise that the Act was a valid law. The Court declared that in the event the Act is declared void in the pending proceedings challenging its validity, the order dated 14th February, 1989 would require to be examined in the light of that decision. The Court also reiterated that if any material was placed before it from which a reasonable inference was possible that the UCC had, at any time earlier, offered to pay any sum higher than an outright down payment of US 470 million dollars, this Court would straightway initiate *suo motu* action requiring the concerned parties to show cause why the order dated 14th February 89 should not be set aside and the parties relegated to their original positions. The Court reiterated that the reasonableness of the sum was based not only on independent quantification but the idea of reasonableness for the present purpose was necessarily a broad and general estimate in the context of a settlement of the dispute and not on the basis of an accurate assessment by adjudication. The Court stated that the question was how good or reasonable it was as a settlement, which would avoid delay, uncertainties and assure immediate payment. An estimate in the very nature of things would not have the accuracy of an adjudication. The Court recorded the offers, counteroffers, reasons and the numbers of the persons treated and the claims already made. The Court found that from the order of the High Court and the admitted position on the plaintiff's side, a reasonable prima facie estimate of the number of fatal cases and serious personal injury cases, was possible to be made. The Court referred to the High Court's assessment and procedure to examine the task of assessing the quantum of interim compensation. The Court referred to M. C. Mehta's case (AIR 1987 SC 1086) reiterated by the High Court, bearing in mind the factors that if the suit proceeded to trial the plaintiff-Union of India would obtain judgment in respect of the claims relating to deaths and personal injuries in the following manner:-(a) Rs. 2 lakhs in each case of death; (b) Rs. 2 lakh in each case of total permanent disability, (c) Rs. 1 lakh in each case of permanent partial disablement; and (d) Rs. 50,000/-in each case of temporary partial disablement.

84. Half of these amounts were awarded as interim compensation by the High Court.

85. The figures adopted by the High Court in regard to the number of fatal cases and cases of serious personal injuries did not appear to have been disputed by anybody before the High Court, this Court observed. From those figures, it came to the conclusion that the total number of fatal cases was about 3000 and of grievous and serious personal injuries, as verifiable from the records were 30,000. This Court also took into consideration that about 8 months after the occurrence a survey had been conducted for the purpose of identification of cases. These figures indicated less than 10,000. In those circumstances, as a rough and ready estimate, this Court took into consideration the prima facie findings of the High Court and estimated the number of fatal cases at 3000 where compensation could range from Rs. 1 lakh to Rs. 3 lakhs. This would account for Rs. 70 crores, nearly 3 times higher than what would have otherwise been awarded in comparable cases in motor vehicles accident claims.

86. The Court recognised the effect of death and reiterated that loss of precious human lives is irreparable. The law can only hope to compensate the estate of a person whose life was lost by the wrongful act of another only in the way the law was equipped to

compensate i.e. by monetary compensation calculated on certain well-recognised principles. "Loss to the estate" which is the entitlement of the estate and the 'loss of dependency' estimated on the basis of capitalised present value awardable to the heirs and dependants, this Court considered, were the main components in the computation of compensation in fatal accident actions, but the High Court adopted a higher basis. The Court also took into account the personal injury cases, and stated that these apportionments were merely broad considerations generally guiding the idea of reasonableness of the overall basis of settlement, and reiterated that this exercise was not a predetermination of the quantum of compensation amongst the claimants either individually or category-wise; and that the determination of the actual quantum of compensation payable to the claimants has to be done by the authorities under the Act. These were the broad assessments and on that basis the Court made the assessment. The Court believed that this was a just and reasonable assessment based on the materials available at that time. So far as the other question, namely, the vital juristic principles of great contemporary relevance to the Third World generally, and to India in particular, touching problems emerging from the pursuit of such dangerous technologies for economic gains by multinationals in this case, the Court recognised that these were great problems and reiterated that there was need to solve a national policy to protect national interests from such ultra-hazardous pursuits of economic gain; and that Jurists, technologists and other experts in Economics, environmentology, futurology, Sociology and public health should identify the areas of common concern and help in evolving proper criteria which might receive judicial recognition and legal sanction. The Court reiterated that some of these problems were referred to in M. C. Mehta's case (AIR 1987 SC 1086) (supra). But in the present case, the compulsions of the need for immediate relief to tens of thousand of suffering victims could not wait till these questions vital though they be, were resolved in due course of judicial proceedings; and the tremendous suffering of thousands of persons compelled this Court to move into the direction of immediate relief which, this Court thought, should not be subordinated to the uncertain promises of the law, and when the assessment of fairness of amount was based on certain factors and assumptions not disputed even by the plaintiffs.

87. Before considering the question of constitutional validity of the Act, in the light of the background of the facts and circumstances of this case and submissions made, it is necessary to refer to the order dated 3rd March, 1989 passed by the Constitution Bench in respect of writ petitions nos. 164/86 and 268/89, consisting of 5 learned Judges presided over by the Hon'ble Chief Justice of India. The order stated that these matters would be listed on 8th March, 1989 before a Constitution Bench for decision "on the sole question whether the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 is ultra vires". This is a judicial order passed by the said Constitution Bench. This is not an administrative order. Thus, these matters are before this Court. The question, therefore, arises: What are these matters? The aforesaid order specifically states that these matters were placed before this Bench on the "sole question" whether the Act is ultra vires. Hence, these matters are not before this Bench for disposal of these writ petitions. If as a result of the determination, one way or the other, it is held, good and bad, and that some relief becomes necessary, the same cannot be given or an order cannot be passed in

respect thereof, except declaring the Act or any portion of the Act, valid or invalid constitutionally as the decision might be.

88. In writ petition No. 268/89 there is consequential prayer to set aside the order dated 14/15th February, 1989. But since the order dated 3rd March, 1989 above only suggests that these matters have been placed before this Bench 'on the sole question' whether the Bhopal Act is ultra vires or not, it is not possible by virtue of that order to go into the question whether the settlement is valid or liable to be set aside as prayed for in the prayers in these applications.

89. The provisions of the Act have been noted and the rival contentions of the parties have been set out before. It is, however, necessary to reiterate that the Act does not in any way circumscribe the liability of the UCC, UCIL or even the Govt. of India or Govt. of Madhya Pradesh if they are jointly or severally liable. This follows from the construction of the Act from the language that is apparent. The context and background do not indicate to the contrary. Counsels for the victims plead that that is so. The learned Attorney General accepts that position. The liability of the Government is, however, disputed. This Act also does not deal with any question of criminal liability of any of the parties concerned. On an appropriate reading of the relevant provisions of the Act, it is apparent that the criminal liability arising out of Bhopal gas leak disaster is not the subject-matter of this Act and cannot be said to have been in any way affected, abridged or modified by virtue of this Act. This was the contention of learned counsel on behalf of the victims. It is also the contention of the learned Attorney General. In our opinion, it is the correct analysis and consequence of the relevant provisions of the Act. Hence, the submissions made on behalf of some of the victims that the Act was bad as it abridged or took away the victims right to proceed criminally against the delinquent, be it UCC or UCIL or jointly or severally the Govt. of India, Govt. of Madhya Pradesh or Mr. Arjun Singh, the erstwhile Chief Minister to Madhya Pradesh, is on a wrong basis. There is no curtailment of any right with respect to any criminal liability. Criminal liability is not the subject-matter of the Act. By the terms of the Act and also on the concessions made by the learned Attorney General, if that be so, then can non-prosecution in criminal liability be a consideration or valid consideration for settlement of claims under the Act? This is a question which has been suggested and articulated by learned counsel appearing for the victims. On the other hand, it has been asserted by the learned Attorney General that part of the order dated 14/15th February, 1989 dealing with criminal prosecution or the order of this Court was by virtue of the inherent power of this Court under Articles 136 & 142 of the Constitution. These, the learned Attorney General said, were in the exercise of plenary powers of this Court. These are not considerations which induced the parties to enter into settlement. For the purpose of determination of constitutional validity of the Act, it is however necessary to say that criminal liability of any of the delinquents or of the parties is not the subject-matter of this Act and the Act does not deal with whether claims or rights arising out of such criminal liability. This aspect is necessary to be reiterated on the question of validity of the Act.

90. We have set out the language and the purpose of the Act, and also noted the meaning of the expression 'claim' and find that the Act was to secure the claims connected with or

arising out of the disaster so that these claims might be dealt with speedily, effectively, equitably and to the best advantage of the claimants. In our opinion, Clause (b) of Section 2 includes all claims of the victims arising out of and connected with the disaster for compensation and damages or loss of life or personal injury or loss to the business and flora and fauna. What, however, is the extent of liability, is another question. This does not purport to or even deal with the extent of liability arising out of the said gas leak disaster. Hence, it would be improper or incorrect to contend as did Ms. Jaising, Mr. Garg and other learned counsel appearing for the victims, that the Act circumscribed the liability - criminal, punitive or absolute of the parties in respect of the leakage. The Act provides for a method or procedure for the establishment and enforcement of that liability. Good deal of argument was advanced before this Court on the question that the settlement has abridged the liability and this Court has lost the chance of laying down the extent of liability arising out of disaster like the Bhopal gas leak disaster. Submissions were made that we should lay down clearly the extent of liability arising out of the these types of disaster and we should further hold that the Act abridged such liability and as such curtailed the rights of the victims and was bad on that score. As mentioned hereinbefore, this is an argument under a misconception. The Act does not in any way except to the extent indicated in the relevant provisions of the Act circumscribe or abridge the extent of the rights of the victims so far as the liability of the delinquents are concerned. Whatever are the rights of the victims and whatever claims arise out of the gas leak disaster for compensation, personal injury, loss of life and property, suffered or likely to be sustained or expenses to be incurred or any other loss are covered by the Act and the Central Govt. by operation of Section 3 of the Act has been given the exclusive right to represent the victims in their place and stead. By the Act, the extent of liability is not in any way abridged and, therefore, if in case of any industrial disaster like the Bhopal gas leak disaster, there is right in victims to recover damages or compensation on the basis of absolute liability, then the same is not in any manner abridged or curtailed.

91. Over 120 years ago Rylands v. Fletcher (1868) 3 HL 330 was decided in England. There A, was the lessee of certain mines. B, was the owner of a mill standing on land adjoining that under which the mines were worked. B, desired to construct a reservoir, and employed competent persons, such as engineers and a contractor to construct it. A had worked his mines up to a spot where there were certain old passages of disused mines; these passages were connected with vertical shafts which communicated with the land above, and which had also been out of use for years, and were apparently filled with marl and the earth of the surrounding land. No care had been taken by the engineer or the contractor to block up these shafts, and shortly after water had been introduced into the reservoir it broke through some of the shafts, flowed through the old passage and flooded A's mine. It was held by the House of Lords in England that where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damage. But if he brings upon his land anything which should not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damage for any mischief thereby occasioned. In the background of the facts it

was held that A was entitled to recover damages from B, in respect of the injury. The question of liability was highlighted by this Court in M. C. Mehta's case (supra) where a Constitution Bench of this Court had to deal with the rule of strict liability. This Court held that the rule in Rylands v. Fletcher (supra) laid down a principle that if a person who brings on his land and collects and keep there anything likely to do harm and such thing escapes and does damage to another, he is liable to compensate for the damage caused. This rule applies only to non-natural user of the land and does not apply to things naturally on the land or where the escape is due to an act of God and an act of a stranger or the default of the person injured or where the things which escape are present by the consent of the person injured or in certain cases where there is a statutory authority. There, this Court observed that the rule in Rylnds v. Fletcher (supra) evolved in the 19th century at a time when all the developments of science and technology had not taken place, and the same cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present day economy and social with highly developed scientific knowledge and technology where hazardous or inherently dangerous industries are necessary to be carried on as part of the developmental process, Courts should not fell inhibited by this rule merely because the new law does not recognise the rule of strict and absolute liability in case of an enterprise engaged in hazardous and dangerous activity. This Court noted that law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic developments taking place in the country. Law cannot afford to remain static. This Court reiterated there that if it is found necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy, the Court should not hesitate to evolve such principle of liability merely because it has not been so done in England. According to this Court, an enterprise which is engaged in a hazardous or inherently dangerous industry, which poses potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results to anyone on account of an accident in the operation of such activity resulting, for instance, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who were affected by the accident as part of the social cost for carrying on such activity, regardless of whether it is carried on carefully or not. Such liability is not subject to any of the exceptions which operate vis-a-vis the tortuous principle of strict liability under the rule in Rylands v. Fletcher. If the enterprise is permitted to carry on a hazardous or dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such activity as an appropriate item of its overheads. The enterprise alone has the resources to discover and guard against hazards and to provide warning against potential hazards. This Court reiterated that the measure of compensation in these kinds of cases must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the

amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise. The determination of actual damages payable would depend upon various facts and circumstances of the particular case.

92. It was urged before us that there was an absolute and strict liability for an enterprise which was carrying on dangerous operations with gases in this country. It was further submitted that there was evidence on record that sufficient care and attention had not been given to safeguard against the dangers of leakage and protection in case of leakage. Indeed, the criminal prosecution that was launched against the Chairman of Union Carbide Shri Warren Anderson and others, as indicated before, charged them along with the defendants in the suit with delinquency in these matters and criminal negligence in conducting the toxic gas operations in Bhopal. As in the instant adjudication, this Court is not concerned with the determination of the actual extent of liability, we will proceed on the basis that the law enunciated by this Court in M. C. Mehta's case (AIR 1987 SC 1086) (supra) is the decision upon the basis of which damages will be payable to the victims in this case. But then the practical question arises: What is the extent of actual damages payable, and how would the quantum of damages be computed? Indeed, in this connection, it may be appropriate to refer to the order passed by this Court on 3rd May, 1989 giving reasons why the settlement was arrived at the figure indicated. This Court had reiterated that it had proceeded on certain prima facie undisputed figures of death and substantially compensating personal injury. This Court has referred to the fact that the High Court had proceeded on the broader principle in M. C. Mehta's case (supra) and on the basis of the capacity of the enterprise because the compensation must have deterrent effect. On that basis the High Court had proceeded to estimate the damages on the basis of Rs. 2 lakhs for each case of death and of total permanent disability, Rs. 1 lakh for each case of partial permanent disability and Rs. 50,000/- for each case of temporary partial disability. In this connection, the controversy as to what would have the damages if the action had proceeded, is another matter. Normally, in measuring civil liability, the law has attached more importance to the principle of compensation than that of punishment. Penal redress, however, involves both compensation to the person injured and punishment as deterrence. These problems were highlighted by the House of Lords in England in Rookes v. Barnard, 1964 AC 1129, which indicate the difference between aggravated and exemplary damages. Salmond on the Law of Torts, 15th Edition at p. 30 emphasises that the function of damages is compensation rather than punishment, but punishment cannot always be ignored. There are views which are against exemplary damages on the ground that these infringe in principle the object of law of torts, namely, compensation and not punishment and these tend to impose something equivalent to find in criminal law. In Rookes v. Barnard (supra), the House of Lords in England recognised three classes of cases in which the award of exemplary damages was considered to be justifiable. Awards must not only, it is said, compensate the parties but also deter the wrong doers and others from similar conduct in future. The question of awarding exemplary or deterrent damages is said to have often confused civil and criminal functions of law. Though it is considered by many that it is a legitimate encroachment of punishment in the realm of civil liability, as it operates - as a restraint on the

transgression of law which is for the ultimate benefit of the society. Perhaps, in this case, had the action proceeded, one would have realised that the fall out of this gas disaster might have been formulation of a concept of damages, blending both civil and criminal liabilities. There are, however, serious difficulties in evolving such an actual concept of punitive damages in respect of a civil action which can be integrated and enforced by the judicial process. It would have raised serious problems of pleading, proof and discovery, and interesting and challenging as the task might have been, it is still very uncertain how far decision based on such a concept would have been a decision according to 'due process' of law acceptable by international standards. There were difficulties in that attempt. But as the provisions stand these considerations do not make the Act constitutionally invalid. These are matters on the validity of settlement. The Act, as such does not abridge or curtail damage or liability whatever that might be. So the challenge to the Act on the ground that there has been curtailment or deprivation of the rights of the victims which is unreasonable in the situation is unwarranted and cannot be sustained.

93. Mr. Garg tried to canvass before us the expanding of horizons of human rights. He contended that the conduct of the multinational corporations dealing with dangerous gases for the purpose of development specially in the conditions prevailing under the Third World countries requires closer scrutiny and vigilance on the part of emerging nations. He submitted that unless courts are alert and active in preserving the rights of the individuals and in enforcing criminal and strict liability and in setting up norms compelling the Govt. to be more vigilant and enforcing the sovereign will of the people of India to oversee that such criminal activities which endanger even for the sake of developmental work, economy and progress of the country, the health and happiness of the people and damage the future prospects of health, growth and affect and pollute the environment, should be curbed and, according to him, these could only be curbed by insisting through the legal adjudication, punitive and deterrent punishment in the form of damages. He also pleaded that norms should be set up indicating how these kinds of dangerous operations are to be permitted under conditions of vigilance and surveillance. While we appreciate the force of the arguments, and endorse his plea that norms and deterrence should be aspired for it is difficult to correlate that aspect with the present problem in this decision.

94. We do reiterate, as mentioned in the Universal Declaration of Human Rights that people are born free and the dignity of the persons must be recognised and an effective remedy by competent Tribunal is one of the surest method of effective remedy. If, therefore, as a result of this tragedy new consciousness and awareness on the part of the people of this country to be more vigilant about measures and the necessity of ensuring more strict vigilance for permitting the operations of such dangerous and poisonous gases down, then perhaps the tragic experience of Bhopal would not go in vain.

95. The main question, however, canvassed by all learned Counsel for the victims was that so far as the Act takes away the right of the victims to fight or establish their own rights, it is a denial of access to justice, and it was contended that such denial is so great a deprivation of both human dignity and right to equality that it cannot be justified because it would be affecting right to life, which again cannot be deprived without a procedure established by law which is just, fair and reasonable.

96. On this aspect, Shri Shanti Bhushan tried to urge before us that Secs. 3 and 4 of the Act, insofar as these enjoin and empower the Central Govt. to institute or prosecute proceedings was only an enabling provision for the Central Govt. and not depriving or disabling provisions for the victims. Ms. Jaisingh sought to urge in addition, that in order to make the provisions constitutionally valid, we should eliminate the concept of exclusiveness to the Central Govt. and give the victims right to sue along with the Central Govt. We are unable to accept these submissions.

97. In our opinion, Secs. 3 and 4 are categorical and clear. When the expression is explicit, the expression is conclusive, alike in what it says and in what it does not say. These give to the Central Government an exclusive right to act in place of the persons who are entitled to make claim or have already made claim. The expression 'exclusive' is explicit and significant. The exclusivity cannot be whittled down or watered down as suggested by counsel. The said expression must be given its full meaning and extent. This is corroborated by the use of the expression 'claim' for all purposes. If such duality of rights are given to the Central Govt. along with the victims in instituting or proceeding for the realisation or the enforcement of the claims arising out of Bhopal gas leak disaster, then that would not be the best or more advantageous procedure for securing the claims arising out of the leakage. In that view of the matter and in view of the language used and the purpose intended to be achieved, we are unable to accept this aspect of the arguments advanced on behalf of the victims. It was then contended by the procedure envisaged by the Act, the victims have been deprived and denied their rights and property to fight for compensation. The victims, it has been asserted, have been denied access to justice. It is a great deprivation, it was urged. It was contended that the procedure evolved under the Act for the victims is peculiar and having good deal of disadvantages for the victims. Such special disadvantageous procedure and treatment is unequal treatment, it was suggested. It was, therefore, violative of Art. 14 of the Constitution, that is the argument advanced.

98. The Act does provide a special procedure in respect of the rights of the victims and to that extent the Central Government takes upon itself the rights of the victims. It is a special Act providing a special procedure for a kind of special class of victims. In view of the enormity of the disaster the victims of the Bhopal gas lead disaster, as they were placed against the multinational and a big Indian corporation and in view of the presence of foreign contingency lawyers to whom the victims were exposed, the claimants and victims can legitimately be described as a class by themselves different and distinct, sufficiently separate and identifiable to be entitled to special treatment for effective, speedy, equitable and best advantageous settlement to their claims. There indubitably is differentiation. The disaster being unique in its character and in the recorded history of industrial disasters situated as the victims were against a mighty multinational with the presence of foreign contingency lawyers looming on the scene, in our opinion, there were sufficient grounds for such differentiation and different treatment. In treating the victims of the gas leak disaster differently and providing them a procedure, which was just, fair, reasonable and which was not unwarranted or unauthorised by the Constitution, Article 14 is not breached. We are, therefore, unable to accept this criticism of the Act.

99. The second aspect canvassed on behalf of the victims is that the procedure envisaged is unreasonable and as such not warranted by the situation and cannot be treated as a procedure which is just, fair and reasonable. The argument has to be judged by the yardstick, as mentioned hereinbefore, enunciated by this Court in State of Madras v. V. G. Rao (AIR 1952 SC 196) (supra). Hence, both the restrictions and limitations on the substantive and procedural rights in the impugned legislation will have to be judged from the point of view of the particular Statute in question. No abstract rule or standard of reasonableness can be applied. That question has to be judged having regard to the nature of the rights alleged to have been infringed in this case, the extent and urgency of the evil sought to be remedied, disproportionate imposition, prevailing conditions at the time, all these facts will have to be taken into consideration. Having considered the background, the plight of the impoverished, and the urgency of the victims' need, the presence of the foreign contingency lawyers, the procedure of settlement in USA in mass action, the strength for the foreign multinationals, the nature of injuries and damages, and the limited but significant right of participation of the victims as contemplated by S. 4 of the Act, the Act cannot be condemned as unreasonable.

100. In this connection, the concept of 'parens patriae' in jurisprudence may be examined. It was contended by the learned Attorney General that the State had taken upon itself this onus to effectively come in as parens patriae. We have noted the long line of Indian decision where, though in different contexts, the concepts of State as the parent of people who are not quite able to or competent to fight for their rights or assert their rights, have been utilised. It was contended that the doctrine of parens patriae cannot be applicable to the victims. How the concept has been understood in this country as well as in America has been noted. Legal dictionaries have been referred to as noted before. It was asserted on behalf of the victims by learned Counsel that the concept of 'parens patriae' can never be invoked for the purpose of suits in domestic jurisdiction of any country. This can only be applied in respect of the claims out of the country in foreign jurisdiction. It was further contended that the concepts of 'parens patriae' can only be applied in case of persons who are under disability and would not be applicable in respect of those who are able to assert their own rights. It is true that victims or their representatives are sui generis and cannot as such due to age, mental capacity or other reason not legally incapable for suing or pursuing the remedies for the rights yet they are at a tremendous disadvantage in the broader and comprehensive sense of the term. These victims cannot be considered to be any match to the multinational companies or the Govt. with whom in the conditions that the victims or their representatives were after the disaster physically, mentally, financially, economically and also because of the position of litigation would have to contend. In such a situation of predicament has victims can legitimately be considered to be disabled. They were in no position by themselves to look after their own interests effectively or purposefully. In that background, they are people who needed the State's protection and should come within the umbrella of State's sovereignty to assert, establish and maintain their rights against the wrong doers in this mass disaster. In that perspective, it is jurisprudentially possible to apply the principle of parens patriae doctrine to the victims. But quite apart from that, it has to be borne in mind that in this case the State is acting on the basis of the Statute itself. For the authority of

the Central Govt, to sue for and on behalf of or instead in place of the victims, no other theory, concept or any jurisprudential principle is required than the Act itself. The Act empowers and substitutes the Central govt. It displaces the victims by operation of Sec. 3 of the Act and substitutes the Central Govt. in its place. The victims have been divested to their rights to sue and such claims and such rights have been vested in the Central Govt. The victims have been divested because the victims vis-a-vis their adversaries in this matter are a self-evident factor. If that is the position then, in our opinion, even if the strict application of the 'parens patriae' doctrine is not in order, as a concept is a guide. The jurisdiction of the State's power cannot be circumscribed by the limitations of the traditional concept of parens patriae. Jurisprudentially, it could be utilised to suit or alter or adapt itself in the changed circumstances. In the situation in which the victims were, the State had to assume the role of a parent protecting the rights of the victims who must come within the protective umbrella of the State and the common sovereignty of the Indian people. As we have noted the Act is an exercise of the sovereign power of the State. It is an appropriate evolution of the expression of sovereignty in the situation that had arisen. We must recognize and accept it as such.

101. But this right and obligation of the State has another aspect. Shri Shanti Bhushan has argued and this argument has also been adopted by other learned Counsel appearing for the victims that with the assumption by the State of the jurisdiction and power as a parent to fight for the victims in the situation there is an incumbent obligation on the State, in the words of Judges Keenan, 'as a matter of fundamental human decency' to maintain the victims until the claims are established and realised from the foreign multinationals. The major inarticulate premise apparent from the Act and the scheme and the spirit of the Act is that so long as the rights of the victims are prosecuted the State must protect and preserve the victims. Otherwise the object of the Act would be defeated, its purpose frustrated. Therefore, continuance of the payments of the interim maintenance for the continued sustenance of the victims is an obligation arising out of State's assumption of the power and temporary deprivation of the rights of the victims and divestiture of the rights of the victims to fight for their own rights. This is the only reasonable interpretation which is just, fair and proper. Indeed, in the language of the Act there is support for this interpretation. Section 9 of the Act gives power to the Central Govt. to frame by notification, a scheme for carrying into effect the purposes of the Act. Sub-section (2) of Sec. 9 provides for the matters for which the scheme may provide. Amongst others, clause (d) of Sec. 9 (2) provides for creation of a fund for meeting expenses in connection with the administration of the scheme and of the provisions of the Act, and clause (e) of S. 9 (2) covers the amounts which the Central Govt. "may after due appropriation made by Parliament by law in that behalf, credit to the fund referred to in clause (d) and any other amounts which may be credited to such fund". Clause (f) of Section 9 (2) speaks of the utilisation, by way of disbursal (including apportionment) or otherwise, of any amounts received in satisfaction of the claims. These provisions are suggestive but not explicit. Clause (b) of S. 10 which provides that in disbursing under the scheme the amount received by way of compensation or damages in satisfaction of a claim as a result of the adjudication or settlement of the claim by a Court or other authority, deduction shall be made from such amount of the sums, if any, paid to the

claimant by the Govt. before the disbursal of such amount. The scheme framed is also significant. Clause 10 of the Scheme provides for the claims and relief funds and includes disbursal of amounts as relief including interim relief to persons affected by the Bhopal gas leak disaster and Cl. 11 (1) stipulates that disbursal of any amounts under the scheme shall be made by the Deputy Commissioner to each claimant through credit in a bank or postal saving account, stressing that the legislative policy underlined the Bhopal Act contemplated payment of interim relief till such time as the Central Govt. was able to recover from the Union Carbide full amount of compensation from which the interim reliefs already paid were to be deducted from the amount payable to them for the final disbursal. The Act should be construed as creating an obligation on the Central Govt. to pay interim relief as the Act deprives the victims of normal and immediate right of obtaining compensation from the Union Carbide. Had the Act not been enacted, the victims could have and perhaps would have been entitled not only to sue the Union Carbide themselves, but also to enter into settlement or compromise of some sort with them. The provisions of the Act deprived the victims of that legal right and opportunity, and that deprivation is substantial deprivation because upon immediate relief depends often the survival of these victims. In that background, it is just and proper that this deprivation is only to be justified if the Act is read with the obligation of granting interim relief or maintenance by the Central Government until the full amount if the dues of the victims is realised from Union Carbide after adjudication or settlement and then deducting therefrom the interim relief paid to the victims. As submitted by learned Attorney General, it is true that there is no actual expression used in the Act itself which expressly postulates or indicated such a duty or obligation under the Act. Such an obligation is, however, inherent and must be the basis of properly construing the spirit of the Act. In our opinion, this is the true basis and will be in consonance with the spirit of the Act. It must be, to use the well-known phrase 'the major inarticulate premise' upon which thought not expressly stated, the Act proceeds. It is on this premise or premises that the State would be justified in taking upon itself the right and obligation to proceed and prosecute the claim and deny access to the courts of law to the victims on their own. If it is only so read, it can only be held to be constitutionally valid. It has to be borne in mind that the language of the Act does not militate against this construction but on the contrary, Secs. 9, 10 and the scheme of the Act suggest that the Act contains such an obligation. If it is so read, then only meat can be put into the skeleton of the Act making it meaningful and purposeful. The Act must, therefore, be so read. This approach to the interpretation of the Act can legitimately be called the 'constructive intuition' which, in our opinion, is a permissible mode of viewing the Acts of Parliament. The freedom to search for 'the spirit of the Act' or the quantity of the mischief at which it aimed (both synonymous for the intention of the Parliament) opens up the possibility of liberal interpretation "that delicate an important branch of judicial power, the concession of which is dangerous, the denial ruinous". Given this freedom it is a rare opportunity though never to be misused and challenge for the Judges to adopt and give meaning to the Act, articulate and inarticulate, and thus translate the intention of the Parliament and fulfil the object of the Act. After all, the Act was passed to give relief to the victims who, it was thought, were unable to establish their own rights and fight for themselves. It is common knowledge that the victims were poor and impoverished. How could they

survive the long ordeal of litigation and ultimate execution of the decree or the orders unless provisions be made for their sustenance and maintenance, especially when they have been deprived of the right to fight for these claims themselves? We, therefore, read the Act accordingly.

102. It was, then, contended that the Central Govt. was not competent to represent the victims. This argument has been canvassed on various grounds. It has been urged that the Central Govt. owns 22% share in UCIL and as such there is a conflict of interest between the Central Govt. and the victims, and on that ground the former is disentitled to represent the latter in their battle against UCC and UCIL. A large number of authorities on this aspect were cited. However, it is not necessary in the view we have taken to deal with these because factually the Central Govt. does not own any share in UCIL. These are the statutory independent organisations, namely, Unit Trust of India and Life Insurance Corporation, who own 20 to 22% share in UCIL. The Govt. has certain amount of say and control in LIC and UTI. Hence, it cannot be said, in our opinion, that there is any conflict of interest in the real sense of matter in respect of the claims of Bhopal gas leak disaster between the Central Govt. and the victims. Secondly, in a situation of this nature, the Central Govt. is the only authority which can pursue and effectively represent the victims. There is no other organisation or Unit which can effectively represent the victims. Perhaps, theoretically, it might have been possible to constitute another independent statutory body by the Govt. under its control and supervision in whom the claim of the victims might have been vested and sub trusted with the task of agitating or establishing the same claims in the same manner as the Central Govt. has done under the Act. But the fact that that has not been done, in our opinion does not in any way affect the position. Apart from that, lastly, in our opinion, this concept that where there is a conflict of interest, the person having the conflict should not be entrusted with the task of this nature does not apply in the instant situation. In the instant case, no question of violation of the principle of natural justice arises, and there is no scope for the application of the principle that no man should be a Judge in his own cause. The Central Govt. was not judging any claim, but was fighting and advancing the claims of the victims. In those circumstances, it cannot be said that there was any violation of the principles of natural justice and such entrustment to the Central Govt. of the right to ventilate for the victims was improper or bad. The adjudication would be done by the Courts, and therefore there is no scope of the violation of any principle of natural justice.

103. Along with this submission, the argument was that the power and the right given to the Central Govt. to fight for the claims of the victims is unguided and uncanalised. This submission cannot be accepted. Learned Attorney General is right that the power conferred on the Central Govt. is not uncanalised. The power is circumscribed by the purpose of the Act. If there is any improper exercise or transgression of the power then the exercise of that power can be called in question and set aside, but the Act cannot be said to be violative of the rights of the victims on that score. We have noted the relevant authorities on the question that how power should be exercised is different and separate from the question whether the power is valid or not. The next argument on behalf of the victims was that there was conflict of interest between the victims and the Govt. viewed from another aspect of the matter. It has been urged that the Central Govt. as well as the

Govt. of Madhya Pradesh along with the erstwhile Chief Minister of the State of Madhya Pradesh Shri Arjun Singh were guilty of negligence, malfeasance and nonfeasance, and as such were liable for damages along with Union Carbide and UCIL. In other words, it has been said that the Govt. of India and the Govt. of Madhya Pradesh along with Mr. Arjun Singh are joint tort-feasors and joint wrong doers. Therefore, it was urged that there is conflict of interest in respect of the claims arising out of the gas leak disaster between the Govt. of India and the victims and in such a conflict, it is improper, rather illegal and unjust to vest in the Govt, of India the rights and claims of the victims. As noted before, the Act was passed in a particular background and, in our opinion, if read in that background, only covers claims against Union Carbide or UCIL. "Bhopal gas leak disaster" or "disaster" has been defined in clause (a) of S. 2 as the occurrence on the 2nd and 3rd days of December, 1984 which involved the release of highly noxious and abnormally dangerous gas from a plant in Bhopal (being a plant of the UCIL, a subsidiary of the UCC of U.S.A.) and which resulted in loss of life and damage to property on an extensive scale.

104. In this context, the Act has to be understood that it is in respect of the person responsible, being the person in-charge of the UCIL and the parent company UCC. This interpretation of the Act is further strengthened by the fact that a "claimant" has been defined in clause (c) of Sec. 2 as a person who is entitled to make a claim and the expression "person" in S. 2(e) includes the Govt. Therefore, the Act proceeded on the assumption that the Govt. could be a claimant being a person as such. Furthermore, this construction and the perspective of the Act is strengthened if a reference is made to the debate both in Lok Sabha and Rajya Sabha to which references have been made.

105. The question whether there is scope for the Union of India being responsible or liable as a joint tort-feasor is a difficult and different question. But even assuming that it was possible that the Central Government might be liable in a case of this nature, the learned Attorney General was right in contending that it was only proper that the Central Government should be able and authorised to represent the victims. In such a situation, there will be no scope of the violation of the principles of natural justice. The doctrine of necessity would be applicable in a situation of this nature. The doctrine has been elaborated, in Halsbury's Laws of England; 4th Edition, p. 89, paragraph 75, where it was reiterated that even if all the members of the Tribunal competent to determine a matter were subject to disqualification, they might be authorised and obliged to hear that matter by virtue of the operation of the common law doctrine of necessity. An adjudicator who is subject to disqualification on the ground of bias or interest in the matter which he has to decide may in certain circumstances be required to adjudicate if there is no other person who is competent or authorised to be adjudicator or if a quorum cannot be formed without him or if no other competent Tribunal can be constituted. In the circumstances of the case, as mentioned herein before, the Government of India is only capable to represent the victims as a party. The adjudication, however, of the claims would be done by the Court. In those circumstances, we are unable to accept the challenge on the ground of the violation of principles of natural justice on this score. The learned Attorney General, however, sought to advance, as we have indicated before, his contention on the ground of de facto validity. He referred to certain decisions. We are of the opinion that

this principle will not be applicable. We are also not impressed by the plea of the doctrine of bona fide representation of the interests of victims in all these proceedings. We are of the opinion that the doctrine of bona fide representation would not be quite relevant and as such the decisions cited by the learned Attorney General need not be considered.

106. There is, however, one other aspect of the matter which requires consideration. The victims can be divested of their rights i.e. these can be taken away from them provided those rights of the victims are ensured to be established and agitated by the Central Govt. following the procedure which would be just, fair and reasonable. Civil Procedure Code is the guide which guides civil proceedings in this country and in other countries procedure have been recognised and accepted as being in consonance with the fairness of the proceedings and in conformity with the principles of natural justice. Therefore, the procedure envisaged under the Act has to be judged whether it is so consistent. The Act, as indicated before, has provided the procedure under Ss. 3 and 4. Section 11 provides that the provisions of the Act and of any Scheme framed thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than the Act or any instrument having effect by virtue of any enactment other than the Act. Hence, if anything is inconsistent with the Act for the time being, it will not have force and the Act will override those provisions to the extent it does. The Act has not specifically contemplated any procedure to be followed in the action to be taken pursuant to the powers conferred under Section 3 except to the extent indicated in S. 4 of the Act. Section 5, however, authorises the Central Government to have the powers of a Civil Court for the purpose of discharging the functions pursuant to the authority vested under Ss. 3 and 4 of the Act. There is no question of Central Government acting as a Court in respect of the claims which it should enforce for or on behalf or instead of the victims' of the Bhopal gas leak disaster. In this connection, it is necessary to note that it was submitted that the Act, so far as it deals with the claims of the victims should be read in conformity with Civil Procedure Code and/or with the principles of natural justice; and unless the provisions of the Act are so read it would be violative of Arts. 14 and 21 of the Constitution in the sense that there will be deprivation of rights to life and liberty without following a procedure which is just, fair and reasonable. That is the main submission and contention of the different counsel for the victims who have appeared. The different view points from which this contention has been canvassed have been noted before. On the other hand, on behalf of the Government, the learned Attorney General has canvassed before us that there were sufficient safeguards consistent with the principles of natural justice within this Act and beyond what has been provided for in a situation for which the Act was enacted, nothing more could be provided and further reading down the provisions of the Act in the manner suggested would defeat the purpose of the Act. The aforesaid Sec. 3 provides for the substitution of the Central Government with right to represent and act in place of (whether within or outside India) every person who has made, or is entitled to make, a claim in respect of the disaster. The State has taken over the rights and claims of the victims in the exercise of sovereignty in order to discharge the constitutional obligations as the parent and guardian of the victims who in the situation as placed needed the umbrella of protection. Thus, the State has the power and jurisdiction and for this purpose unless the Act is otherwise unreasonable or violative of

the constitutional provisions, no question of giving a hearing to the parties for taking over these rights by the State arises. For legislation by the Parliament, no principle of natural justice is attracted provided such legislation is within the competence of the legislature, which indeed the present Act is within the competence of the Parliament. We are in agreement with the submission of the learned Attorney General that Section 3 makes the Central Government the dominus litus and it has the carriage of the proceedings, but that does not solve the problem of what procedure the proceedings should be carried.

107. The next aspect is that Sec. 4 of the Act, which, according to the learned Attorney General gives limited rights to the victims in the sense that it obliges the Central Government to "have due regard to any matters which such person may require to be urged with respect to his claim and shall, if such person so desires, permit at the expense of such person, a legal practitioner of his choice to be associated in the conduct of any suit or other proceeding relating to his claim". Therefore, it obliges the Central Government to have 'due regard' to any matters, and it was urged on behalf of the victims that this should be read in order to make the provisions constitutionally valid as providing that the victims will have a say in the conduct of the proceedings and as such must have an opportunity of knowing what is happening either by instructing or giving opinions to the Central Government and/or providing for such directions as to settlement and other matters. In other words, it was contended on behalf of the victims that the victims should be given notice of the proceedings and thereby an opportunity, if they so wanted, to advance their view; and that to make the provisions of S.4 meaningful and effective unless notice was given to victim, disabled as he is, the assumption upon which the Act has been enacted, could not come and make suggestion in the proceedings. If the victims are not informed and given no opportunity, the purpose of S.4 cannot be attained.

108. On the other hand, the learned Attorney General suggested that Sec. 4 has been complied with, and contended that the victims had notice of the proceedings. They had knowledge of the suit in America, and of the order passed by Judge Keenan. The private plaintiffs who had gone to America were represented by foreign contingency lawyers who knew fully well what they were doing and they had also joined the said suit along with the Government of India. Learned Attorney General submitted that S.4 of the Act clearly enabled the victims to exercise their right of participation in the proceedings. According to him, there was exclusion of victims from the process of adjudication but a limited participation was provided and beyond that participation no further participation was warranted and no further notice was justified either by the provisions of the Act as read with the constitutional requirements or under the general principles of natural justice. He submitted that the principles of natural justice cannot be put into straight-jacket and their application would depend upon the particular facts and the circumstances of a situation. According to the learned Attorney General, in the instant case, the legislature had formulated the area where natural justice could be applied, and up to what area or stage there would be association of the victims with the suit, beyond that no further application of any principle of natural justice was contemplated.

109. The fact that the provisions of the principles of natural justice have to be complied with is undisputed. This is well settled by the various decisions of the Court. The Indian

Constitution mandates that clearly, otherwise the Act and the actions would be violative of Art. 14 of the Constitution and would also be destructive of Art. 19(1) (g) and negate Art. 21 of the Constitution by denying a procedure which is just, fair and reasonable. See in this connection, the observations of this Court in Maneka Gandhi's case (AIR 1978 SC597) (supra) and Olga Tellis's case (AIR 1986 SC 180) (supra). Some of these aspects were noticed in the decision of this Court in Swadehi Cotton Mills v. Union of India (AIR 1981 SC 818) (supra). That was a decision which dealt with the question of taking over of the industries under the Industries (Development and Regulation) Act, 1951. The question that arose was whether it was necessary to observe the rules of natural justice before issuing a notification under Sec. 18A (1) of the Act. It was held by the majority of Judges that in the facts of that case there had been non-compliance with the implied requirement of the audi alteram partem rule of natural justice at the pre-decisional stage. The order in that case could be struck down as invalid on that score but the Court found that in view of the concession that a hearing would be afforded to the company, the case was remitted to the Central Government to give a full, fair and effective hearing. It was held that the phrase 'natural justice' is not capable of static and precise definition. It could not be imprisoned in the straight-jacket or a cast-iron formula. Rules of natural justice are not embodied rules. Hence, it was not possible to make an exhaustive catalogue of such rules. This Court reiterated that audi alteram partem is a highly effective rule devised by the Courts to ensure that a statutory authority arrives at a just decision and it is calculated to act as a healthy check on the abuse or misuse of power. The rules of natural justice can operate only in areas not covered by any law validly made. The general principle as distinguished from an absolute rule of uniform application seems to be that where a statute does not in terms exclude this rule or prior hearing but contemplates a post-decisional hearing amounting to a full review of the original order on merits then such a statute would be construed as excluding the audi alteram partam rule at the pre-decisional stage. If the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected the administrative decision after post-decisional hearing was good.

110. The principles of natural justice have been examined by this Court in Union of India v. Tulsi Ram Patel (AIR 1985 SC 1416) (supra). It was reiterated, that the principles of natural justice are not the creation of Article 14 of the Constitution. Article 14 is not the negetter of the principles of natural justice but their constitutional guardian. The principles of natural justice consist, inter alia, of the requirement that no man should be condemned unheard. If, however, a legislation of a Statute expressly or by necessary implication excludes the application of any particular principle of natural justice then it requires close scrutiny by the Court.

111. It has been canvassed on behalf of the victims that the Code of Civil Procedure is an instant example of what is a just, fair and reasonable procedure, at least the principles embodied therein and the Act would be unreasonable if there is exclusion of the victims to vindicate properly their views and rights. This exclusion may amount to denial of justice. In any case, it has been suggested and in our opinion, there is good deal of force in this contention that if a part of the claim for good reasons or bad is sought to be compromised or adjusted without at least considering the views of the victims that would

be unreasonable deprivation of the rights of the victims. After all, it has to be borne in mind that injustice consists in the sense in the minds of the people affected by any act or inaction a feeling that their grievances, views or claims have gone unheeded or not considered. Such a feeling is in itself an injustice or a wrong. The law must be so construed and implemented that such a feeling does not generate among the people for whose benefit the law is made. Right to a hearing or representation before entering into a compromise seems to be embodied in the due process of law understood in the sense the term has been used in the constitutional jargon of this country though perhaps not originally intended. In this connection, reference may be made to the decision of this Court in Sangram Singh v. Election Tribunal, Kotah, (1955) 2 SCR 1: (AIR 1955 SC 425). The Representation of the People Act, 1951 contains Sec. 90 and the procedure of Election Tribunals under the Act was governed by the said provision. Sub-section (2) of S. 90 provides that "Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the Tribunal, as nearly as may be, in accordance with the procedure, applicable under the Code of Civil Procedure, 1908 to the trial of suits". Justice Bose speaking for the Court said that it is procedure, something designed to facilitate justice and further its ends, and cannot be considered as a penal enactment for punishment or penalties; not a thing designed to trip people up rather than help them. It was reiterated that our laws of procedure are grounded on the principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there may be exceptions and where they are clearly defined these must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle. At page 9 of the report, Justice Bose observed as under;

> "But that a law of natural justice exists in the sense that a party must be heard in a Court of law, or at any rate be afforded an opportunity to appear and defend himself, unless there is express provision to the contrary, is, we think, beyond dispute. See the observations of the Privy Council in Balakrishna Udayar v. Vasudeva Ayyar, ILR 40 Mad 793, 800 : (AIR 1917 PC 71) and especially in T.B. Barret v. African Products Ltd., AIR 1928 PC 261-261, where Lord Buckmaster said "no forms or procedure should ever be permitted to exclude the presentation of a litigant's defence". Also Hari Vishnu's case which we have just quoted.
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> In our opinion, Wallace, J. was right in Venkatasubbiah v. Lakshmi Narasimham, AIR 1925 Mad 1274, holding that "One cardinal principle to be observed in trials by a Court obviously is that a party has a right to appear and plead his cause on all occasions when that cause comes on for hearing", and that "it follows that a party should not be deprived of that right and in fact the Court has no option to refuse that right, unless the Code of Civil Procedure deprives him of it."

112. All civilised countries accept the right to be heard as part of the due process of law where questions affecting their rights, privileges or claims are considered or adjudicated.

113. In S. L. Kapoor v. Jagmohan, (1981) 1 SCR 746 at p. 765 ; (AIR 1981 SC 136 at pp. 146-147), Chinnappa Reddy, J. Speaking for this Court observed that the concept that justice must not only be done but must manifestly be seen to be done is basic to our system. It has been reiterated that the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary and it has been said that it comes from a person who has denied justice that the person who has been denied justice, is not prejudiced. Principles of natural justice must, therefore, be followed. That is the normal requirement.

114. In view of the principles settled by this Court and accepted all over the world, we are of the opinion that in a case of this magnitude and nature, when the victims have been given some say by Sec. 4 of the Act, in order to make that opportunity contemplated by S. 4 of the Act, meaningful and effective, it should be so read that the victims have to be given an opportunity of making their representation before the Court comes to any conclusion in respect of any settlement. How that opportunity should be given, would depend upon the particular situation. Fair procedure should be followed in a representative mass tort action. There are instances and some of these were also placed before us during the hearing of these matters indicating how the Courts regulate giving of the notice in respect of a mass action where large numbers of people's views have to be ascertained. Such procedure should be evolved by the Court when faced with such a situation.

115. The Act does not expressly exclude the application of the Code of Civil Procedure. Section 11 of the Act provides the overriding effect indicating that anything inconsistent with the provisions of the Act in other law including the Civil Procedure Code should be ignored and the Act should prevail. Our attention was drawn to the provisions of 0.1, r. 8(4) of the Code. Strictly speaking, O. 1, R. 8 will not apply to a suit or a proceeding under the Act. It is not a case of one having common interest with others. Here the plaintiff, the Central Govt. has replaced and divested the victims.

116. Learned Attorney General submitted that as the provisions of the Code stood before 1976 Amendment, the High Courts had taken the view that hearing of the parties represented in the suit was not necessary before compromise. Further reference was made to proviso to O. XXIII, R.1. As in this case there is no question, in our opinion, of abandonment as such of the suit or part of the suit, the provisions of this Rule would also not strictly apply. However, Order XXIII, Rule 3B of the Code is an important and significant pointer and the principles behind the said provision would apply to this case. The said Rule 3B provides that no agreement or compromise in a representative suit shall be entered into without the leave of the Court expressly recorded in the proceedings; and sub-rule (2) of R. 3B enjoins that before granting such leave the Court shall give notice in such manner as it may think fit in a representative action. Representative suit, again, has been defined under Explanation to the said Rule vide clause (d) as any other suit in which the decree passed may, by virtue of the provisions of this Code or of any other law for the time being in force, bind any person who is not named as party to the suit. In this case,

indubitably the victims would be bound by the settlement though not named in the suit. This is a position conceded by all. If that is so, it would be a representative suit in terms of and for the purpose of R. 38, O XXIII of the Code. If the principles of this Rule are the principles of natural justice then we are of the opinion that the principles behind it would be applicable; and also that Sec. 4 should be so construed in spite of the difficulties of the process of notice and other difficulties of making "informed decision making process cumbersome", as canvassed by the learned Attorney General.

117. In our opinion, the constitutional requirements, the language of the Section, the purpose of the Act and the principles of natural justice lead us to this interpretation of S.4 of this Act that in case of a proposed or contemplated settlement, notice should be given to the victims who are affected or whose rights are to be affected to ascertain their views. Section 4 is significant. It enjoins the Central Govt. only to have "due regard to any matters which such person may require to be urged". So, the obligation is on the Central Govt. in the situation contemplated by S. 4 to have due regard to the views of the victims and that obligation cannot be discharged by the Central Govt. unless the victims are told that a settlement is proposed, intended or contemplated. It is not necessary that such views would require consent of all the victims. The Central Govt. as the representative of the victims must have the views of the victims and place such views before the court in such manner it considers necessary before a settlement is entered into. If the victims want to advert to certain aspect of the matter during the proceedings under the Act and settlement indeed is an important stage in the proceedings, opportunities must be given to the victims. Individual notices may not be necessary. The Court can, and in our opinion, should in such situation formulate modalities of giving notice and public notice can also be given inviting views of the victims by the help of mass media.

118. Our attention was drawn to similar situations in other lands where in mass disaster actions of the present type or mass calamity actions affecting large number of people, notices have been given in different forms and it may be possible to invite the views of the victims by announcement in the media, Press, radio, and TV etc. intimating the victims that a certain settlement is proposed or contemplated and inviting views of the victims within a stipulated period. And having regard to the views, the Central Govt. may proceed with the settlement of the action. Consent of all is not a precondition as we read the Act under S. 4. Hence, the difficulties suggested by the learned Attorney General in having the consent of all and unanimity do not really arise and should not deter us from construing the section as we have.

119. The next aspect of the matter is, whether in the aforesaid light S.4 has been complied with. The fact that there was no specific notice given to the victims as such in this case is undisputed. Learned Attorney General, however, sought to canvass the view that the victims had notice and some of them had participated in the proceedings. We are, however, unable to accept the position that the victims had notice of the nature contemplated under the Act upon the underlying principle of Order XXIII, R. 32 of the Code. It is not enough to say that the victims must keep vigil and watch the proceeding. One assumption under which the Act is justified is that the victims were disabled to defend themselves in an action of this type. If that is so, then the Court cannot presume

that the victims were a lot capable and informed to be able to have comprehended or contemplated the settlement. In the aforesaid view of the matter, in our opinion, notice was necessary. The victims at large did not have the notice.

120. The question, however, is that the settlement had been arrived at after great deal of efforts to give immediate relief to the victims. We have noticed the order dated 4th May, 1989 passed by this Court indicating the reasons which impelled the Court to pass the orders on 14/15th February, 1989 in terms and manner as it did. It has been urged before us on behalf of some of the victims that justice has not been done to their views and claims in respect of the damages suffered by them. It appears to us by reading the reasons given by this Court on 4th May, 1989 that justice perhaps has been done but the question is, has justice appeared to have been done and more precisely, the question before this Court is; does the Act envisage a procedure or contemplate a procedure which ensures not only that justice is done but justice appears to have been done. If the procedure does not ensure that justice appears to have been done, is it valid? Therefore, in our opinion, in the background of this question we must hold that S. 4 means and entails that before entering into any settlement affecting the rights and claims of the victims some kind of notice or information should be given to the victims; we need not now spell out the actual notice and the manner of its giving to be consistent with the mandate and purpose of S. 4 of the Act.

121. This Court in its order dated 4th May, 1989 has stated that in passing orders on 14th/15th February, 1989, this Court was impelled by the necessity of urgent relief to the victims rather than to depend upon the uncertain promise of law. The Act, as we have construed, requires notice to be given in what form and in what manner, it need not be spelled out, before entering into any settlement of the type with which we are concerned. It further appears that that type of notice which is required to be given had not been given. The question, therefore, is what is to be done and what is the consequence? The Act would be bad if it is not construed in the light that notice before any settlement under S. 4 of the Act was required to be given. Then arises the question of consequences of not giving the notice. In this adjudication, we are not strictly concerned with the validity or otherwise of the settlement, as we have indicated hereinbefore. But constitutional adjudication cannot be divorced from the reality of a situation, or the impact of an adjudication. Constitutional deductions are never made in the vacuum. These deal with life's problems in the reality of a given situation. And no constitutional adjudication is also possible unless one is aware of the consequences of such an adjudication. One hesitates in matter of this type where large consequences follow one way or the other to put as under what others have put together. It is well to remember, as did Justice Holmes, that time has upset many fighting faiths and one must always wager one's salvation upon some prophecy based upon imperfect knowledge. Our knowledge changes; our perception of truth also changes. It is true that notice was required to be given and notice has not been given. The notice which we have contemplated is a notice before the settlement or what is known in legal terminology as 'pre-decisional notice'. But having regard to the urgency of the situation and having regard to the need for the victims for relief and help and having regard to the fact that so much effort has gone in finding a basis for the settlement, we, at one point of time, thought that a post-decisional hearing in

the facts and circumstances of this case might be considered to be sufficient compliance with the requirements of principles of natural justice as embodied under S. 4 of the Act. The reasons that impelled this Court to pass the orders of 14th/15th February, 1989 are significant and compelling. If notice was given, then what would have happened? It has been suggested on behalf of the victims by counsel that if the victims had been given an opportunity to be heard, then they would have perhaps pointed out, inter alia, that the amount agreed to be paid through the settlement was hopelessly inadequate. We have noted the evidence available to this Court which this Court has recorded in its order dated 4th May, 1989 to be the basis for the figure at which the settlement was arrived at. It is further suggested that if an opportunity had been given before the settlement, then the victims would have perhaps again pointed out that criminal liability could not be absolved in the manner in which this Court has done on the 14th/15th February, 1989. It was then contended that the Central Government was itself sued as a joint tort-feasor. The Central Government would still be liable to be proceeded in respect of any liability to the victims if such a liability is established; that liability is in no way abridged or affected by the Act or the settlement entered into. It was submitted on behalf of the victims that if an opportunity had been given, they would have perhaps pointed out that the suit against the Central Government, Government of Madhya Pradesh and UCIL could not have been settled by the compromise. One of the important requirements of justice is that people affected by an action or inaction should have opportunity to have their say. That opportunity the victims have got when these applications were heard and they were heard after utmost publicity and they would have further opportunity when review application against the settlement would be heard.

122. On behalf of the victims, it was suggested that the basis of damages in view of the observations made by this Court in M.C. Mehta's case (AIR 1987 SC 1086) (supra) against the victims of UCC of UCIL would be much more than normal damages suffered in similar case against any other company or party which is financially not so solvent or capable. It was urged that it is time in order to make damages deterrent the damages must be computed on the basis of the capacity of a delinquent made liable to pay such damages and on the monetary capacity of the delinquent the quantum of the damages awarded would vary and not on the basis of actual consequences suffered by the victims. This is an uncertain promise of law. On the basis of evidence available and on the basis of the principles so far established, it is difficult to foresee any reasonable possibility of acceptance of this yardstick. And even if it is accepted, there are numerous difficulties of getting that view accepted internationally as a just basis in accordance with law. These, however, are within the realm of possibility.

123. It was contended further by Shri Garg, Shri Shanti Bhushan and Ms. Jaising that all the further particulars upon which the settlement had been entered into should have been given in the notice which was required to be given before a settlement was sanctified or accepted. We are unable to accept this position. It is not necessary that all other particulars for the basis of the proposed settlement should be disclosed in a suit of this nature before the final decision. Whatever data was already there have been disclosed, that, in our opinion, would have been sufficient for the victims to be able to give their views, if they want to. Disclosures of further particulars are not warranted by the

requirement of principles of natural justice. Indeed, such disclosure in this case before finality might jeopardise future action, if any, necessary so consistent with justice of the case.

124. So on the materials available, the victims would have to express their views. The victims have not been able to show at all any other point or material which would go to impeach the validity of the settlement. Therefore, in our opinion, though settlement without notice is not quite proper, on the materials so far available, we are of the opinion that justice has been done to the victims but justice has not appeared to have been done. In view of the magnitude of the misery involved and the problems in this case, we are also of the opinion that the setting aside of the settlement on this ground in view of the facts and the circumstances of this case keeping the settlement in abeyance and giving notice to the victims for a post-decisional hearing would not be in the ultimate interest of Justice. It is true that not giving notice was not proper because principles of natural justice are fundamental in the constitutional set up of this country. No man or no man's right should be affected without an opportunity to ventilate his views. We are also conscious that justice is a psychological yearning, in which men seek acceptance of their view point by having an opportunity of vindication of their view point before the forum or the authority enjoined or obliged to take a decision affecting their right. Yet, in the particular situations, one has to bear in mind how an infraction of that should be sought to be removed in accordance with justice. In the facts and the circumstances of this case where sufficient opportunity is available when review application is heard on notice, as directed by Court, no further opportunity is necessary and it cannot be said that injustice has been done. "To do a great right" after all, it is permissible sometimes "to do a little wrong". In the facts and circumstances of the case, this is one of those rare occasions. Though entering into a settlement without the required notice is wrong. In the facts and the circumstances of this case, therefore, we are of the opinion, to direct that notice should be given now, would not result in vain (sic) justice in the situation. In the premises, no further consequential order is necessary by this Court, had it been necessary for this Bench to have passed such a consequential order, we would not have passed any such consequential order in respect of the same.

125. The sections and the scheme dealing with the determination of damages and distribution of the amount have also been assailed as indicated before. Our attention was drawn to the provisions of the Act dealing with the payment of compensation and the scheme framed therefore. It was submitted that S. 6 of the Act enjoins appointment by the Central Government of an officer known as the Commissioner for the welfare of the victims. It was submitted that this does not give sufficient judicial authority to the officer and would be really leaving the adjudication under the scheme by an officer of the executive nature. Learned Attorney General has, however, submitted that for disbursement of the compensation contemplated under the Act or under the orders of this Court, a notification would be issued under S. 6(3) of the Act authorising the Commissioner or other officers to exercise all or any of the powers which the Central Government may exercise under S. 6 to enable the victims to place before the Commissioner or Deputy Commissioner any additional evidence that they would like to adduce. We direct so, and such appropriate notification be issued. We further direct that

in the Scheme categorisation to be done of the Deputy Commissioner should be appeal able to an appropriate judicial authority and the Scheme should be modified accordingly. We reiterate that the basis of categorisation and the actual categorisation should be justifiable and judicially review able - the provisions in the Act and the Scheme should be so read. There were large numbers of submissions made on behalf of the victims about amending the scheme. Apart from and to the extent indicated above, in our opinion, it would be unsafe to tinker with the scheme piecemeal. The scheme is an integrated whole and it would not be proper to amend it piecemeal. We, however, make it clear that in respect of categorisations and claim; the authorities must act on principles of natural justice and act quasi-judicially.

126. As mentioned hereinbefore, good deal of arguments were advanced before us as to whether the clause in the settlement that criminal proceedings would not be proceeded with and the same will remain quashed is valid or invalid. We have held that these are not part of the proceedings under the Act. So the orders on this aspect in the order of 14th/15th February, 1989 are not orders under the Act. Therefore, on the question of the validity of the Act, this aspect does not arise. Whether the settlement of criminal proceedings or quashing the criminal proceedings could be a valid consideration for settlement or whether if it was such a consideration or not is a matter which the Court reviewing the settlement has to decide.

127. In the premise, we hold that the Act is constitutionally valid in the manner we read it. It proceeds on the hypothesis that until the claims of the victims are realised or obtained from the delinquents, namely, UCC and UCIL by settlement or by adjudication and until the proceedings in respect thereof continue the Central Government must pay interim compensation or maintenance for the victims. In entering upon the settlement in view of S. 4 of the Act, regard must be had to the views of the victims and for the purpose of giving regard to these, appropriate notices before arriving at any settlement, were necessary. In some cases, however, post-decisional notice might be sufficient but in the facts and the circumstances of this case, no useful purpose would be served by giving a post-decisional hearing having regard to the circumstances mentioned in the order of this Court dated 4th May, 1989 and having regard to the fact available with the victims which can be profitably and meaningfully presented to controvert the basis of the settlement and further having regard to the fact that the victims had their say or on their behalf their views had been agitated in these proceedings and will have further opportunity in the pending review proceedings. No further order on this aspect is necessary. The sections dealing with the payment of compensation and categorisation should be implemented in the manner indicated before.

128. The Act was conceived on the noble promise of giving relief and succour to the dumb, pale, meek and impoverished victims of a tragic industrial gas leak disaster, a concomitant evil in this industrial age of technological advancement and development. The Act had kindled high hopes in the hearts of the weak and worn, wary and forlorn. The Act generated hope of humanity. The implementation of the Act must be with justice. Justice perhaps has been done to the victims situated as they were, but it is also true that justice has to be appeared to have been done. That is a great infirmity. This is

due partly to the fact that procedure was not strictly followed as we have understood it and also partly because of the atmosphere that was created in the country, attempts were made to shake the confidence of the people in the judicial process and also to undermine the credibility of this Court. This was unfortunate. This was perhaps due to misinformed public opinion and also due to the fact that victims were not initially taken into confidence in reaching the settlement. This is a factor which emphasises the need for adherence to the principles of natural justice. The credibility of judiciary is as important as the alleviation of the suffering of the victims, great as these were. We hope these adjudications will restore that credibility. Principles of natural justice are integrally embedded in our constitutional framework and their pristine glory and primacy cannot and should not be allowed to be submerged by the exigencies of particular situation or cases. This Court must always assert primacy of adherence to the principles of natural justice in all adjudications. But at the same time these must be applied in a particular manner in particular cases having regard to the particular circumstances. It is, therefore, necessary to reiterate that the promises made to the victims and hopes raised in their hearts and minds can only be redeemed in some measure if attempts are made vigorously to distribute the amount realised to the victims in accordance with the scheme as indicated above. That would be a redemption to a certain extent. It will also be necessary to reiterate that attempts should be made to formulate the principles of law guiding the Government and the authorities to permit carrying on of trade dealing with materials and things which have dangerous consequences within sufficient specific safeguards especially in case of multinational corporations trading in India. An awareness on these lines has dawned. Let action follow that awareness. It is also necessary to reiterate that the law relating to damages and payment of interim damages or compensation to the victims of this nature should be seriously and scientifically examined by the appropriate agencies.

129. The Bhopal Gas Leak disaster and its aftermath of that emphasise the need for laying down certain norms and standards that the Government to follow before granting permissions of licences for the running of industries dealing with materials which are of dangerous potentialities. The Government should, therefore, examine or have the problem examined by an expert committee as to what should be the conditions on which future licences and/or permission for running industries on Indian soil would be granted and for ensuring enforcement of those conditions, sufficient safety measures should be formulated and scheme of enforcement indicated. The Government should insist as a condition precedent to the grant of such licences or permissions, creation of a fund in anticipation by the industries to be available for payment of damages out of the said fund in case of leakages or damages in case of accident or disaster flowing from negligent working of such industrial operations or failure to ensure measures preventing such occurrence. The Government should also ensure that the parties must agree to abide to pay such damages out of the said damages by procedure separately evolved for computation and payment of damages without exposing the victims or sufferers of the negligent act to the long and delayed procedure. Special procedure must be provided for and the industries must agree as a condition for the grant of licence to abide by such procedure or to abide by statutory arbitration. The basis for damages in case of leakages

and accident should also be statutorily fixed taking into consideration the nature of damages inflicted, the consequences thereof and the ability and capacity of the parties to pay. Such should also provide for deterrent or punitive damages, the basis for which should be formulated by a proper expert committee or by the Government. For this purpose, the Government should have the matter examined by such body as it considers necessary and proper like the Law Commission or other competent bodies. This is vital for the future.

130. This case has taken some time. It was argued extensively. We are grateful to counsel who have assisted in all these matters. We have taken some time in pronouncing our decision. We wanted time to lapse so that the heat of the moment may calm down and proper atmosphere restored. Justice, it has been said, is the constant and perpetual disposition to render every man his due. But what is a man's due in a particular situation and in a particular circumstance is a matter for appraisement and adjustment. It has been said that justice is balancing. The balances have always been the symbol of even-handed justice. But as said by Lord Denning in Jones v. National Coal Board Ltd., (1957) 2 QB 55, at p. 64, let the advocates one after the other put the weights into the scales the 'nicely calculated less or more' but the Judge at the end decides which way the balance tilts, be it ever so slightly. This is so in every case and every situation.

131. The applications are disposed of in the manner and with the direction, we have indicated above.

SINGH, J.:-132. I have gone through the proposed judgment of my learned brother, Sabyasachi Mukharji, CJI. I agree with the same but I consider it necessary to express my opinion on certain aspects.

133. Five years ago between the night of December 2-3, 1984 one of the most tragic industrial disasters in the recorded history of mankind occurred in the city of Bhopal, in the State of Madhya Pradesh, as a result of which several persons died and thousands were disabled and physically incapacitated for life. The ecology in and around Bhopal was adversely affected and air, water and the atmosphere was polluted, its full extent has yet to be determined. Union Carbide India Limited (UCIL) a subsidiary of Union Carbide Corporation (a Transnational Corporation of United State) has been manufacturing pesticides at its plant located in the city of Bhopal. In the process of manufacture of pesticide the UCIL had stored stock of Methyl Isocyanate commonly known as MIC a highly toxic gas. On the night of the tragedy, the MIC leaked from the plant in substantial quantity causing death and misery to the people working in the plant and those residing around it. The unprecedented catastrophe demonstrated the dangers inherent in the production of hazardous chemicals even though for the purpose of industrial development. A number of civil suits for damages against the UCC were filed in the United States of America and also in this country. The cases filed in USA were referred back to the Indian courts by Judge Keenan details of which are contained in the judgment of my learned brother Mukharji CJI. Since those who suffered in the catastrophe were mostly poor, ignorant, illiterate and ill-equipped to pursue their claims for damages either before the courts in USA or in Indian Courts, the Parliament enacted the Bhopal Gas Leak Disaster (processing of Claims) Act 1985 (hereinafter referred to as 'the Act')

conferring power on the Union of India to take over the conduct of litigation in this regard in place of the individual claimants. The facts and circumstances which led to the settlement of the claims before this Court have already been stated in detail in the judgment of Mukharji, CJ and, therefore, I need not refer to those facts and circumstances. The constitutional validity of the Act has been assailed before us in the present petitions. If the Act is declared unconstitutional, the settlement which was recorded in this Court, under which the UCC has already deposited a sum of Rs. 750 crores for meeting the claims of Bhopal Gas victims would fall and the amount of money which is already in deposit with the Registry of this Court would not be available for relief to the victims. Long and detailed arguments were advanced before us for a number of days and on an anxious consideration and having regard to the legal and constitutional aspects and especially the need for immediate help and relief to the victims of the gas disaster, which is already delayed, we have upheld the constitutional validity of the Act. Mukharji, CJ has rendered a detailed and elaborate judgment with which I respectfully agree. However, I consider it necessary to say few words with regard to the steps which should be taken by the Executive and the Legislature to prevent such tragedy in future, and to avoid the prolonged misery of victims of an industrial disaster.

134. We are a developing country, our national resources are to be developed in the field of science, technology, industry and agriculture. The need for industrial development has led to the establishment of a number of plants and factories by the domestic companies and undertaking as well as be Transnational Corporations. Many of these industries are engaged in hazardous or inherently dangerous activities which pose potential threat to life, health and safety of persons working in the factory, or residing in the surrounding areas. Though working of such factories and plants is regulated by a number of laws of our country, i.e. the Factories Act, Industrial Development and Regulation Act and Workmen's Compensation Act etc. there is no special legislation providing for compensation and damages to outsiders who may suffer on account of any industrial accident. As the law stands to-day, affected persons have to approach civil courts for obtaining compensation and damages. In civil courts, the determination of amount of compensation or damages as well the liability of the enterprise has been bound by the shackles of conservative principles laid down by the House of Lords in Ryland v. Fletcher, (1868) 3 HL 330. The principles laid therein made it difficult to obtain adequate damages from the enterprise and that too only after the negligence of the enterprise was proved. This continued to be the position of law till a Constitution Bench of this Court in M. C. Mehta v. Union of India, (1987) 1 SCC 395 : (AIR 1987 SC 1086), commonly known as Sriram Oleum Gas Leak case evolved principles and laid down new norms to deal adequately with the new problems arising in a highly industrialised economy. This Court made judicial innovation in laying down principles with regard to liability of enterprises carrying hazardous or inherently dangerous activities departing from the rule laid down in Ryland v. Fletcher. The Court held as under:

> "We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to

anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of substance or any other related element that caused the harm the enterprise must be held strictly liable for causing such harm as a part of the social cost of carrying on the hazardous or inherently dangerous activity. If the enterprise is permitted to carry on an hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such hazardous or inherently dangerous activity as an appropriate item of its overheads. Such hazardous or inherently dangerous activity for private profit can be tolerated only on condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not. This principle is also sustainable on the ground that the enterprise alone has the resource to discover and guard against hazards or dangers and to provide warning against potential hazards. We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortuous principles of strict liability under the rule in Rylands v. Fletcher."

135. In the instant case there is no dispute that UCIL a subsidiary of UCC was carrying on activity of manufacturing pesticide and in that process it had stored MIC, a highly toxic and dangerous gas which leaked causing vast damage not only to human life but also to the flora and fauna and ecology in and around Bhopal. In view of this Courts decision in M.C. Mehta's case (AIR 1987 SC 1086) there is no scope for any doubt regarding the liability of the UCC for the damage caused to the human beings and nature in and around Bhopal. While entering into the settlement the UCC has accepted its liability and for that reason it has deposited a sum of Rs. 750 crores in this Court. The inadequacy of the amount of compensation under the settlement was assailed by the counsel for the petitioners but it is not necessary for us to express any opinion on that question as review petitions are pending before another Constitution Bench and more so, as in the present cases we are concerned only with the constitutional validity of the Act.

136. The Bhopal Gas tragedy has raised several important questions regarding the functioning of multi-nationals in third world countries. After the Second World War

Colonial Rule came to end in several parts of the globe, as a number of nations secured independence from foreign rule. The political domination was over but the newly born nations were beset with various problems on account of lack of finances and development. A number of multi-nationals and transnational corporations offered their services to the underdeveloped and developing countries to provide finances and technical know-how by setting up their own industries in those countries on their own terms that brought problems with regard to the control over the functioning of the transnational corporations. Multi-national companies in many cases exploited the underdeveloped nations and in some cases they influenced political and economic policies of host countries which subverted the sovereignty of those countries. There have been complaints against the multi-nationals for adopting unfair and corrupt means to advance their interests in the host countries. Since this was a worldwide phenomenon the United Nations took up the matter for consideration. The Economic and Social Council of the United Nations established a Commission on Transnational Corporations to conduct research on various political, economic and social aspects relating to transnational corporations. On a careful and detailed study the Commission submitted its Report in 1985 for evolving a Code of Conduct for transnational corporations. The Code was adopted in 1986 to which large numbers of countries of the world are signatories. Although it has not been fully finalised as yet the Code presents a comprehensive instrument formulating the principles of Code of Conduct for transnational corporations carrying on their enterprises in under-developed and developing countries. The Code contains provisions regarding ownership and control designed to strike balance between the competing interests of the Transnational Corporations and the host countries. It extensively deals with the political, economic, financial, social and legal questions. The Code provides for disclosure of information to the host countries and it also provides guidelines for nationalisation and compensation, obligations to international law and jurisdiction of Courts. The Code lays down provisions for settlement of disputes between the host States and an affiliate of a Transnational Corporation. It suggests that such disputes should be submitted to the national courts or authorities of host countries unless amicably settled between the parties. It provides for the choice of law and means for dispute settlement arising out of contracts. The Code has also laid down guidelines for the determination of settlement of disputes arising out of accident and disaster and also for liability of Transnational Corporations and the jurisdiction of the Courts. The Code is binding on the countries which formally accept it. It was stated before us that India has accepted the Code. If that be so, it is necessary that the Government should take effective measures to translate the provisions of the Code into specific actions and policies backed by appropriate legislation and enforcing machinery to prevent any accident or disaster and to secure the welfare of the victims of any industrial disaster.

137. In the context of our national dimensions of human rights, right to life, liberty, pollution free air and water is guaranteed by the Constitution under Articles 21, 48A and 51(g). It is the duty of the State to take effective steps to protect the guaranteed constitutional rights. These rights must be integrated and illumined by the evolving international dimensions and standards, having regard to our sovereignty, as highlighted by Cls. 9 and 13 of U.N. Code of Conduct of Transnational Corporations. The evolving

standards of international obligations need to be respected, maintaining dignity and sovereignty of our people, the State must take effective steps to safeguard the constitutional rights of citizens by enacting laws. The laws so made may provide for conditions for granting licence to Transnational Corporations, prescribing norms and standards for running industries on Indian soil ensuring the constitutional rights of our people relating to life, liberty, as well as safety to environment and ecology to enable the people to lead a healthy and clean life. A Transnational Corporation should be made liable and subservient to laws of our country and the liability should not be restricted to affiliate company only but the parent Corporation should also be made liable for any damage caused to the human beings or ecology. The law must require transnational corporations to agree to pay such damages as may be determined by the statutory agencies and forums constituted under it without exposing the victims to long drawn litigation. Under the existing civil law, damages are determined by the Civil Courts, after a long drawn litigation, which destroys the very purpose of awarding damages. In order to meet the situation, to avoid delay and to ensure immediate relief to the victims we would suggest that the law made by the Parliament should provide for constitution of tribunals regulated by special procedure for determining compensations to victims of industrial disaster or accident, appeal against which may lie to this Court on limited ground of questions of law only after depositing the amount determined by the Tribunal. The law should also provide for interim relief to victims during the pendency of proceedings. The steps would minimise the misery and agony of victims of hazardous enterprises.

138. This it yet another aspect which needs consideration by the Government and the parliament. Industrial development in our country and the hazards involved therein, pose a mandatory need to constitute a statutory "Industrial Disaster Fund", Contributions to which may be made by the Government, the industries whether they are transnational corporations or domestic undertakings, public or private. The extent of contribution may be worked out having regard to the extent of hazardous nature of the enterprise and other allied matters. The Fund should be permanent in nature, so that money is readily available for providing immediate effective relief to the victims. The Government and the parliament should therefore take immediate steps for enacting laws, having regard to these suggestions, consistent with the international norms and guidelines contained in the United Nations Code of Conduct on Transnational Corporations.

139. With these observations, I agree with the order proposed by my learned brother, Sabhyasachi Mukharji, CJI.

RANGANATHAN, J.:- 140. Five years ago, this country was shaken to its core by a national catastrophe, second in magnitude and disastrous effects only to the havoc wrought by the atomic explosions in Hiroshima and Nagasaki. Multitudes of illiterate and poverty-stricken people in and around Bhopal suffered damage to life and limb due to the escape of poisonous Methyl Isocyanate (MIC) gas from one of the storage tanks at the factory of the Union Carbide (India) Limited (UCIL) in Bhopal, a wholly owned

subsidiary of the multinational plant, the Union Carbide Corporation (UCC). A number of civil suits claiming damages from the UCC were filed in the United States of America and similar litigation also followed in Indian courts. Fearing the possibilities of the exploitation of the situation by vested interests, the Government of India enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 ('the Act') to regulate the course of such litigation. Briefly speaking, it empowered the Union of India to take over the conduct of all litigation in this regard and conduct it in place of, or in association with, the individual claimants. It also enabled the Union to enter into a compromise with the UCC and UCIL and arrive at a settlement. The writ petitions before us have been filed challenging the constitutional validity of this statute on the ground that the divestiture of the claimants' individual rights to legal remedy against the multinational for the consequences of carrying on dangerous and hazardous activities on our soil violates the fundamental rights guaranteed under Arts. 14, 19 and 21 of the Constitution.

In consequence of certain proceedings before Judge Keenan of the U.S. District Courts, the venue of the litigation shifted to India. In the principle suit filed in India by the Union (Civil Suit No. 1113/86) orders were passed by the trial Court in Bhopal directing the UCC to deposit Rs. 370 crores (reduced to Rs. 250 crores by the Madhya Pradesh High Court) as interim payment to the gas victims pending the disposal of the suit. There were appeals to this Court in which the UCC contested the Court's jurisdiction to pass an order for an interim payment in a suit for money, while the Union pleaded that a much higher interim payment should have been granted. When the matter was being argued in this Court, a settlement was arrived at between the Union and the UCC under which a sum of Rs. 750 crores has been received by the Union in full settlement of all the claims of all victims of the gas leak against the UCC. The Union also agreed to withdraw certain prosecutions that had been initiated against the officials of the UCC and UCIL in this connection. This settlement received the imprimatur of this Court in its orders dt. 14th and 15th February, 1989.

It is unfortunate that, though the writ petitions before us were pending in this Court at that time, neither their contents nor the need of considering first the issue of the validity of the Act before thinking of a settlement in pursuance of its provisions seem to have been effectively brought to the notice of the Bench which put an end to all the litigation on this topic in terms of the settlement. The settlement thus stood approved while the issue of validity of the Act under which it was affected stood undecided. When this was brought to the notice of the above Bench, it directed these writ petitions to be listed before a different Bench to avoid any possible feeling that the same Bench may be coloured in its views on the issue by reason of the approval it had given to the fait accompli viz. the settlement. That is now these matters come before us.

The petitions claiming to represent a section of the victims are firstly, against any settlement at all being arrived at with the UCC. According to them, it is more important to ensure by penal action that multinational corporations do not play with the views of people in developing and under developed countries than to be satisfied with mere

compensation for injury and that the criminal prosecutions initiated in this case should have been pursued. Secondly, they are of the view that the amount for which the claims have been settled is a pittance, far below the amount of damages they would have been entitled to, on the principles of strict, absolute and punitive liability enunciated by this Court in Mehta's case, (1987) l SCR 819: (AIR 1987 SC 1086). Thirdly, their grievance is that no publicity at all was given, before this Court passed its order, to enable individual claimants or groups of them to put forward their suggestions or objections to the settlement proposed. Their interests were sealed, they say, without complying with elementary principles of natural justice. They contend that the provisions of an Act which has made such a settlement possible cannot be constitutionally valid.

The arguments before us ranged over a very wide ground, covered several issues and extended to several days. This Bench has been placed in somewhat of a predicament as it has to pronounce on the validity of the provisions of the Act in the context of implementation of its provisions in a particular manner and, though we cannot (and do not) express any views regarding the merits of the settlement, we are asked to consider whether such settlement can be consistent with a correct and proper interpretation of the Act tested on the touchstone of the fundamental rights guaranteed under the Constitution. Mukharji, C.J., has outlined the issues, dealt elaborately with the contentions urged, and given expression to his conclusions in a learned, elaborate and detailed judgment which we have had the advantage of perusing in draft. Our learned brother K.N. Singh, J., has also highlighted certain aspects in his separate judgment. We are, in large measure, in agreement with them, but should like to say a few words on some of the issues in this case, particularly those in regard to which our approach has been somewhat different.

141. The issue regarding the validity of the Act turns principally on the construction of Secs. 3 and 4 of the Act. We are inclined to hold that the fact that a settlement has been effected, or the circumstances in which or the amount for which the claims of the victims have been settled, do not have a bearing on this question of interpretation and have to be left out of account altogether except as providing a contextual background in which the question arises. Turning therefore to the statute and its implications, the position is this. Every person who suffered as a consequence of the gas leak had a right to claim compensation from the persons who, according to him, were liable in law for the injury caused to him and also a right to institute a suit or proceeding before any Court or authority with a view to enforce his right to claim damages. In the normal course of events, such a claimant who instituted a suit or proceeding would have been at complete liberty to withdraw the said suit or proceeding or enter into any compromise he may choose in that regard. Section 3 undoubtedly takes away this right to the claimant altogether; (a) except to the limited extent specified in the proviso to S. 4, for this section clearly states that it is the Central Government and the Central Government alone which has the right to represent and act in place of the claimants, whether within or outside India, for all purposes in connection with the enforcement of his claims. We may first consider how far the main provision in S. 3 (leaving out of account the proviso as well as S. 4) is compatible with the Constitution.

The first question that arises is whether the legislature is justified in depriving the claimants of the right and privilege of enforcing their claims and prosecuting them in such manner as they deem fit and in compulsorily interposing or substituting the Government in their place. We think that, to this question, there can be only one answer. As pointed out by our learned brother, the situation was such that the victims of the tragedy needed to be protected against themselves as their adversary was a mighty multi-national corporation and proceedings to a considerable extent had been initiated in a foreign country, where the conduct of the cases was entrusted to foreign lawyers under a system of litigation which is unfamiliar to us here. In the stark reality of the situation, it cannot even be plausibly contended that the large number of victims of the gas leak disaster should have been left to tend for itself and merely provided with some legal aid or one type or another. It is necessary to remember that, having regard to the identity of the principal ground of claim of all the victims, even if a single victim was not diligent in conducting his suit or entered into a compromise or submitted to a decree judging the issues purely from his individual point of view, such a decision or decree could adversely affect the interests of the innumerable other victims as well. In fact, it appears that a settlement between one set of claimants and the adversary corporation was almost imminent and would perhaps have been through out for the timely intervention of the Government of India. The battles for the enforcement of one's rights was bound to be not only prolonged but also very arduous and expensive and the decision of the legislature that the fight against the adversary should be consolidated and its conduct handed over to the Government but, as pointed out by our learned brother, the course adopted was also not objectionable - was perhaps the only decision that could have been taken in the circumstances. This is indeed a unique situation in which the victims, in order to realise to the best advantage their right against UCC, had to be helped out by transposing that right to be enforced by the Government.

We did not indeed understand any learned Counsel before us to say that the legislature erred in entrusting the Government of India with the responsibility of fighting for the victims. The only grievance is that in the process their right to take legal proceedings should not have been completely taken away and that they should also have had the liberty of participating in the proceedings right through. In fact, though the Act contemplates the Central Government to completely act in place of the victims, the Government of India has not in fact displaced them altogether. In all the proceedings pending in this country, as well as those before Judge Keenan, the Government of India has conducted the proceedings but the other victims or such of them as chose to associate themselves in these proceedings by becoming parties were not shut out from taking part in the proceedings. In fact, as the learned Attorney General pointed out, one of the groups of litigants did give great assistance to the trial Judge at Bhopal. But even if the provisions of S. 3 had been scrupulously observed and the names of all parties, other than the Central Government, had been got deleted from the array of parties in the suits and proceedings pending in this country, we do not think that the result would have been fatal to the interests of the litigants. On the contrary, it enabled the litigants to obtain the

benefit of all legal expertise at the command of the Government of India in exercising their rights against the Union Carbide Corporation. Such representation can well be justified by resort to a principle analogous to, if not precisely the same as that of, "parens patriae". A victim of the tragedy is compelled to part with a valuable right of his in order that it might be more efficiently and satisfactorily exploited for his benefit than he himself is capable of. It is of course possible that there may be an affluent claimant or lawyer engaged by him, who may be capable of fighting the litigation better. It is possible that the Government of India as a litigant may or may not be able to pursue the litigation with as much determination or capability as such a litigant. But in a case of the present type one should not be confounded by such a possibility. There are more indigent litigants then affluent ones. There are more illiterates than enlightened ones. There are very few of the claimants, capable of finding the financial wherewithal required for fighting the litigation. Very few of them are capable of prosecuting such a litigation in this country not to speak of the necessity to run to a foreign country. The financial position of UCIL was negligible compared to the magnitude of the claim that could arise and, though eventually the battle had to be pitched on our own soil, an initial as well as final recourse to legal proceedings in the United States was very much on the cards, indeed inevitable. In this situation, the legislature was perfectly justified in coming to the aid of the victims with this piece of legislation and in asking the Central Government to shoulder the responsibility by substituting itself in place of the victims for all purposes connected with the claims. Even if the Act had provided for a total substitution of the Government of India in place of the victims and had completely precluded them from exercising their rights in any manner, it could perhaps have still been contended that such deprivation was necessary in larger public interest.

But the Act is not so draconian in its content. Actually, as we have said a little earlier, the grievance of the petitioners is not so much that the Government was entrusted with the functions of a dominus litus in this litigation. Their contention is that the whole object and purpose of the litigation is to promote the interests of the claimants, to enable them to fight the UCC with greater strength and determination, to help them overcome limitations of time, money and legal assistance and to realise the best compensation possible consistent not only with the damage suffered by them but also consistent with national honour and prestige. It is suggested that the power conferred on the Government should be construed as one hedged in by this dominant object. A divestiture of the claimant's rights in this situation would be reasonable, it is said, only if the claimant's rights are supplemented by the Government and not supplanted by it.

Assuming the correctness of the argument, the provisions of the proviso to Sec. 3(3) and of S. 4 furnish an answer to this contention. While the provision contained in the main part of Sec. 3 may be sufficient to enable the Government of India to claim to represent the claimants and initiate and conduct suits or proceeding on their behalf, the locus standi of the Government of India in suits filed by other claimants before the commencement of the Act outside India would naturally depend upon the discretion of the Court enquiring into the matter. That is why the proviso to S. 3 makes the right of the Government of

India to represent and act in place of the victims in such proceedings subject to the permission of the Court or authority where the proceedings are pending. It is of course open to such Court to permit the Central Government even to displace the claimants if it is satisfied that the authority of the Act is sufficient to enable it to do so. In the present case it is common ground that the proceedings before Judge Keenan were being prosecuted by the Central Government along with various individual claimants. Not only did Judge Keenan permit the association of the Government of India in these proceedings but the Government of India did have a substantial voice in the course of those proceedings as well.

Again Section 4 mandates that, notwithstanding anything contained in Sec. 3, the Central Government, in representing and acting in place of any person in relation to any claim, shall have due regard to any matters which such person may require to be urged with respect to his claim. It also stipulates that if such person so desires, the Central Government shall permit, at the expense of such person, a legal practitioner of his choice to be associated in the conduct of any suit or other proceeding relating to his claim. In other words, though, perhaps, strictly speaking, under Sec. 3 the Central Government can totally exclude the victim himself or his legal practitioner from taking part in the proceedings (except in pending suits outside India), Section 4 keeps the substance of the rights of the victims intact. It enables, and indeed obliges, the Government to receive assistance from individual claimants to the extent they are able to offer the same. If any of the victims or their legal advisers has any specific aspect which they would like to urge, the Central Government shall take it into account. Again if any individual claimant at his own expense retains a legal practitioner of his own choice, such legal practitioner will have to be associated with the Government in the conduct of any suit or proceeding relating to his claim. Sections 3 and 4 thus combine together the interests of the weak, illiterate, helpless and poor victims as well as the interests of those who could have managed for themselves, even without the help of this enactment. The combination thus envisaged enables the Government to fight the battle with the foreign adversary with the full aid and assistance of such of the victims or their legal advisers as are in a position to offer any such assistance. Though Sec. 3 denies the claimants the benefit of being nominee parties in such suits or proceedings, Sec. 4 preserves to them substantially all that they can achieve by proceeding on their own. In other words, while seeming to deprive the claimants of their right to take legal action on their own, it has preserved those rights, to be exercised indirectly. A conjoint reading of Ss. 3 and 4 would, in our opinion, therefore, show that there has been no real total deprivation of the rights of the claimants to enforce their claim for damages in appropriate proceedings before any appropriate forum. There is only a restriction of this right which, in the circumstances, is totally reasonable and justified. The validity of the Act is, therefore, not liable to be challenged on this ground.

The next angle from which the validity of the provision is attacked is that the provision enabling the Government to enter into a compromise is bad. The argument runs thus: The object of the legislation can be furthered only if it permits the Government to withdraw it

or enter into a compromise. According to them, the Act fails the impecunious victims in this vital aspect. The authority conferred by the Act on the Government to enter into a settlement or compromise, it is said, amounts to an absolute negation of the rights of the claimants to compensation and is capable of being so exercised to render such rights totally valueless, as in fact, it is said, has happened.

It appears to us that this contention proceeds on a misapprehension. It is common knowledge that any authority given to conduct a litigation cannot be effective unless it is accompanied by an authority to withdraw or settle the same if the circumstances call for it. The vagaries of a litigation of this magnitude and intricacy could not be fully anticipated. There were possibilities that the litigation may have to be bought out to the bitter finish. There were possibilities that the UCC might be willing to adequately compensate the victims either on their own or at the insistence of the Government concerned. There was also the possibility, which had already been in evidence before Judge Keenan that the proceedings might ultimately have to end in a negotiated settlement. One notices that in most of the mass disaster cases reported, proceedings finally end in compromise if only to avoid an indefinite prolongation of the agonies caused by such litigation. The legislation, therefore, cannot be considered to be unreasonable merely because in addition to the right to institute a suit or other proceedings it also empowers the Government to withdraw the proceedings or enter into a compromise.

Some misgivings were expressed, in the course of the hearing, of the legislative wisdom (and, hence the validity) or entrusting the carriage of these proceedings and, in particular, the power of settling it out of Court, to the Union of India. It was contended that the Union is itself a joint tort-feasor (sued as such by some of the victims) with an interest (adverse to the victims) in keeping down the amount of compensation payable to the minimum so as to reduce its own liability as a joint tort-feasor. It seems to us that this contention is misconceived. As pointed out by Mukharji, C.J., the Union of India itself is one of the entities affected by the gas leak and has a claim for compensation from the UCC quite independent of the other victims. From this point of view, it is in the same position as the other victims and, in the litigation with the UCC, it has every interest in securing the maximum amount of compensation possible for itself and the other victims. It is, therefore, the best agency in the circumstances that could be looked up to for fighting the UCC on its own as well as on behalf of the victims. The suggestion that the Union is a joint tort-feasor has been stoutly resisted by the learned Attorney General. But, even assuming that the Union has some liability in the matter, we fail to see how it can derive any benefit or advantage by entering into a low settlement with the UCC. As is pointed out later in this judgement and by Mukharji, C.J., the Act and Scheme thereunder have provided for an objective and quasi-judicial determination of the amount of damages payable to the victims of the tragedy. There is no basis for the fear expressed during the hearing that the officers of the Government may not be objective and may try to cut down the amounts of compensation, so as not to exceed the amount received from the UCC. It is common ground and, indeed, the learned Attorney General fairly

conceded, that the settlement with the UCC only puts an end to the claims against the UCC and UCIL and does not in any way affect the victims' rights, if any, to proceed against the Union, the State of Madhya Pradesh or the Ministers and officers thereof, if so advised. If the Union and these officers are joint tort-feasors, as alleged, the Union will not stand to gain by allowing the claims against the UCC to be settled for a low figure. On the contrary it will be interested in settling the claims against the UCC at as high a figure as possible so that its own liability as a joint tort-feasor (if made out) can be correspondingly reduced. We are, therefore, unable to see any vitiating element in the legislation insofar as it has entrusted the responsibility not only of carrying on but also of entering into a settlement, if thought fit.

Nor is there basis for the contention that the Act enables a settlement to be arrived at without a proper opportunity to the claimants to express their views on any proposals for settlement that may be mooted. The right of the claimant under Sec. 4 to put forward his suggestions or to be represented by a legal practitioner to put forth his own views in the conduct of the suit or other proceeding certainly extends to everything connected with the suit or other proceeding. If, in the course of the proceedings there should arise any question of compromise or settlement, it is open to the claimants to oppose the same and to urge the Central Government to have regard to specific aspects in arriving at a settlement. Equally it is open to any claimant to employ a legal practitioner to ventilate his opinions in regard to such proposals for settlement. The provisions of the Act, read by them, therefore, guarantee a complete and full protection to the rights of the claimants in every respect. Save only that they cannot file a suit themselves; their right to acquire redress has not really been abridged by the provisions of the Act. Section 3 and 4 of the Act properly read, in our opinion, completely vindicate the objects and reasons which compelled Parliament to enact this piece of legislation. Far from abridging the rights of the claimants in any manner, these provisions are so worded as to enable the Government to prosecute the litigation with the maximum amount of resources, efficiency and competence at its command as well as with all the assistance and help that can be extended to it by such of those litigants and claimants as are capable of playing more than a mere passive role in the litigation.

But then, it is contended, the victims have had no opportunity of considering the settlement proposals mooted in this case before they were approved by the Court. This aspect is dealt with latter.

142. One of the contentions before us was that UCC and UCIL are accountable to the public for the damages caused by their industrial activities not only on a basis of strict liability but also on the basis that the damages to be awarded against them should include an element of punitive liability and that this has been lost sight or while approving of the proposed settlement. Reference was made in this context to M. C. Mehta's case (AIR 1987 SC 1086) (supra). Whether the settlement should have taken into account this factor is, in the first place, a moot question. Mukharji, C. J. has pointed out - and we are inclined to agree - that this is an "uncertain province of the law" and it is premature to say

whether this yardstick has been or will be, accepted in this country, not to speak of its international acceptance which may be necessary should occasion arise for executing a decree based on such a yardstick in another country. Secondly, whether the settlement took this into account and, if not, whether it is bad for not having kept this basis in view are questions that touch the merits of the settlement with which we are not concerned. So we feel we should express no opinion here on this issue. It is too far fetched; it seems to us, to contend that the provisions of the Act permitting the Union of India to enter into a compromise should be struck down as unconstitutional because they have been construed by the Union of India as enabling it to arrive at such a settlement.

The argument is that the Act confers a discretionary and enabling power in the Union to arrive at a settlement but lays down no guidelines or indications as to the stage at which, or circumstances in which, a settlement can be reached or the type of settlement that can be arrived at; the power conferred should, therefore, be struck down as unguided, arbitrary and uncanalised. It is difficult to accept this contention. The power to conduct a litigation, particularly in a case of this type, must, to be effective, necessarily carry with it a power to settle it at any stage. It is impossible to provide statutorily and detailed catalogue of the situations that would justify a settlement or the basis or terms on which a settlement can be arrived at. The Act, moreover, cannot be said to have conferred any unguided or arbitrary discretion to the Union in conducting proceedings under the Act. Sufficient guidelines emerge from the Statement of Objects and Reasons of the Act which makes it clear that the aim and purpose of the Act is to secure speedy and effective redress to the victims of the gas leak and that all steps taken in pursuance of the Act should be for the implementation of the object. Whether this object has been achieved by a particular settlement will be a different question but it is altogether impossible to say that the Act itself is bad for the reason alleged. We, therefore, think it necessary to clarify, for our part, that we are not called upon to express any view on the observations in Mehta's case (AIR 1987 SC 1086) and should not be understood as having done so.

143. Shri Shanti Bhushan, who supported the Union's stand as to the validity of the Act, however, made his support conditional on reading into its provisions an obligation on the part of the Union to make interim payments towards their maintenance and other needs consequent on the tragedy, until the suits filed on their behalf ultimately yield tangible results. That a modern welfare State is under an obligation to give succour and all kinds of assistance to people in distress cannot at all be gainsaid. In point of fact also, as pointed out by the learned Chief Justice, the provisions of the Act and Scheme thereunder envisage interim payments to the victims; so, there is nothing objectionable in this Act on this aspect. However, our learned brother has accepted the argument addressed by Sri Shanti Bhushan which goes one step further viz. that the Act would be unconstitutional unless this is read as a major inarticulate promise" underlying the Act. We doubt whether this extension would be justified for the hypothesis underlying the argument is, in the words of Sri Shanti Bhushan, that had the victims been left to fend for themselves, they would have had an "immediate and normal right to obtaining compensation from the Union Carbide" and, as the legislation has vested their rights in this regard in the Union

the Act should be construed as creating an obligation on the Central Government to provide interim relief. Though we would emphatically reiterate that grant of interim relief to ameliorate the plight of its subjects in such a situation is a matter of imperative obligation on the part of the State and not merely 'a matter of fundamental human decency' as Judge Keenan put it, we think that such obligation flows from its character as a welfare State and would exist irrespective of what the Statute may or may not provide. In our view the validity of the Act does not depend upon its explicitly or implicitly providing for interim payments. We say this for two reasons. In the first place, it was, and perhaps still is, a moot question whether a plaintiff suing for damages in tort would be entitled to advance or interim payments in anticipation of a decree. That was, indeed the main point on which the interim orders in this case were challenged before this Court and, in the context of the events that took place, remains undecided. It may be mentioned here that no decided case was brought to our notice in which interim payment was ordered pending disposal of an action in tort in this country. May be there is a strong case for ordering interim payments in such a case but, in the absence of full and detailed consideration, it cannot be assumed that, left to themselves, the victims would have been entitled to a "normal and immediate" right to such payment. Secondly, even assuming such right exists, all that can be said is that the State, which put itself in the place of the victims, should have raised in the suit a demand for such interim compensation - which it did - and that it should distribute among the victims such interim compensation as it may receive from the defendants. To say that the Act would be bad if it does not provide for payment of such compensation by the Government irrespective of what may happen in the suit is to impose on the State an obligation higher than what flows from its being subrogated to the rights of the victims. As we agree that the Act and the Scheme thereunder envisage interim relief to the victims, the point is perhaps only academic. But we felt that we should mention this as we are not in full agreement with Mukharji, C. J., on this aspect of the case.

144. The next important aspect on which much debate took place before us was regarding the validity of the Act qua the procedure envisaged by it for a compromise or settlement. It was argued that if the suit is considered as a representative suit no compromise or settlement would be possible without notice in some appropriate manner to all the victims of the proposed settlement and an opportunity to them to ventilate their views thereon (vide Order XXIII, Rule 33, C.P.C.). The argument runs thus: S. 4 of the Act either incorporated the safeguards of these provisions in which event any settlement effected without compliance with the spirit, if not the letter, of these provisions would be ultra vires the Act. Or it does not, in which event, the provisions of Sec. 4 would be bad as making possible an arbitrary deprivation of the victims' rights being inconsistent with, and derogatory of, the basic rules established by the ordinary Law of the land viz. the Code of Civil Procedure. We are inclined to take the view that it is not possible to bring the suits brought under the Act within the categories of representative action envisaged in the Code of Civil Procedure. The Act deals with a class of action which is sui generis and for which a special formula has been found and encapsuled in Sec. 4. The Act divests the individual claimants of their right to sue and vests it in the Union. In relation to suits in

India, the Union is the sole plaintiff, none of the others are envisaged as plaintiffs, or respondents. The victims of the tragedy were so numerous that they were never defined at the stage of filing the plaint nor do they need to be defined at the stage of a settlement. The litigation is carried on by the State in its capacity, not exactly the same as but somewhat analogous to that of a "parens patriae". In the case of a litigation by a karta of a Hindu undivided family or by a guardian on behalf of a ward, who is non-sui juris, for example, the junior members of the family or the wards, are not to be consulted before entering into a settlement. In such cases, the Court acts as guardian of such persons to scrutinise the settlement and satisfies itself that it is in the best interest of all concerned. If it is later discovered that there has been any fraud or collusion, it may be open to the junior members of the family or the wards to call the karta or guardian to account, but barring such a contingency, the settlement would be effective and binding. In the same way, the Union as "parens patriae" would have been at liberty to enter into such settlement as it considered best on its own and seek the Court's approval therefore.

However, realising that the litigation is truly sought on behalf and for the benefit of innumerable, though not fully identified, victims the Act has considered it necessary to assign a definite role to the individual claimants and this is spelt out in Sec. 4. This section directs-

(i) that the Union shall have due regard to any matters which such person may require to be urged with respect to his claim; and

(ii) that the Union shall, if such person so desires, permit at the expense of such person, a legal practitioner of his choice to be associated in the conduct of any suit or other proceeding relating to his claim.

This provision adequately safeguards the interests of individual victims. It enables each one of them to bring to the notice of the Union any special features or a circumstance which he would like to urge in respect of any matter and if any such features are brought to its notice the Union is obliged to take it into account. Again, the individual claimants are also at liberty to engage their own counsel to associate with the State counsel in conducting the proceedings. If the suits in this case had proceeded, in the normal course, either to the stage or a decree or even to one of settlement the claimants could have been more than adequate to ensure that the points of view of all the victims are presented to the Court. Even a settlement or compromise could not have been arrived at without the Court being apprised of the view of any of them who chose to do so. Advisedly, the statute has provided that though the Union of India will be the dominus litus in the suit, the interests of all the victims and their claims should be safeguarded by giving them a voice in the proceedings to the extent indicated above. This provision of the statute is an adaptation of the principle of O. I, R. 8 and of O. XXIII, R. 38 of the Code of Civil Procedure in its application to the suits governed by it and, though the extent of participation allowed to the victims is somewhat differently enunciated in the legislation, substantially speaking, it does incorporate the principles of natural justice to the extent possible in the circumstances. The statute cannot, therefore, be faulted, as has been pointed out earlier

also, on the ground that it denies the victims an opportunity to present their views or places them at any disadvantage in the matter of having an effective voice in the matter of settling the suit by way of compromise.

The difficulty in this case has arisen, as we see it, because of a fortuitous circumstance viz. that the talks or compromise were mooted and approved in the course of the hearing of an appeal from an order for interim payments. Though compromise talks had been in the air right from the beginning of this episode, it is said that there was an element of surprise when they were put forward in Court in February, 1989. This is not quite correct. It has been pointed out that even when the issue regarding the interim relief was debated in the Courts below, attempts were made to settle the whole litigation. The claimants were aware of this and they could - perhaps should - have anticipated that similar attempts would be made in this Court also. Though certain parties had been associated with the conduct of the proceedings in the trial Court - and the trial Judge did handsomely acknowledge their contribution to the proceedings -they were apparently not alert enough to keep a watching brief in the Supreme Court, may be under the impression that the appeal here was concerned only with the quantum of interim relief. One set of parties was present in the Court but, apart from praying that he should be forthwith paid a share in the amount that would be deposited in Court by the UCC in pursuance of the settlement, no attempt appears to have been made to put forward a contention that the amount of settlement, was inadequate or had not taken into account certain relevant considerations. The Union also appears to have been acting on the view that it could proceed ahead on its own both in its capacity as "parens patriae" as well as in view of the powers of attorney held by it from a very large number of the victims though the genuineness of this claim is now contested before us. There was a day's interval between the enunciation of the terms of the settlement and their approval by the Court. Perhaps the Court could have given some more publicity to the proposed settlement in the newspapers, radio and television and also permitted some time to lapse before approving it, if only to see whether there were any other points of view likely to emerge. Basically speaking, however, the Act has provided an adequate opportunity to the victims to speak out and if they or the counsel engaged by some of them in the trial Court had kept in touch with the proceedings in this Court, they could have most certainly made themselves heard. If a feeling has gained ground that their voice has not been fully heard, the fault was not with the statute but rather due to the developments leading to the finalisation of the settlement when the appeal against the interim order was being heard in this Court.

One of the points of view on which considerable emphasis was laid in the course of the arguments was that in a case of this type the offending parties should be dealt with strictly under the criminal law of the Land and that the inclusion, as part of the settlement, of a term requiring the withdrawal of the criminal prosecutions launched was totally unwarranted and vitiates the settlement. It has been pointed out by Mukharji, C. J., … and we agree - that the Act talks only of the civil liability of, and the proceedings

against, the UCC or UCIL or others for damages caused by the gas leak. It has nothing to say about the criminal liability of any of the parties involved. Clearly, therefore, this part of the settlement comprises a term which is outside the purview of the Act. The validity of the Act cannot, therefore, be impugned on the ground that permits - and should not have permitted - the withdrawal of criminal proceedings against the delinquents. Whether in arriving at the settlement, the aspect could also have been taken into account and this term included in it, is a question concerning the validity of the terms of reference to us and we, therefore, express no opinion in regard thereto.

145. A question was mooted before us as to whether the actual settlement - if not the statutory provision - is liable to be set aside on the grounds that the principles of natural justice have been flagrantly violated. The merits of the settlement as such are not in issue before us and nothing we say can or should fetter the hands of the Bench bearing a review petition which has already been filed, from passing such orders thereon as it considers appropriate.

Our learned brother, however, has, while observing that the question referred to us is limited to the validity of the Act alone and not the settlement, incidentally discussed this aspect of the case too. He has pointed out that justice has in fact been done and that all facts and aspects relevant for a settlement have been considered. He has pointed out that the grievance of the petitioners that the order of this Court did not give any basis for the settlement has since been sought to be met by the order passed on 4th May, 1989 giving detailed reasons. This shows that the Court had applied its mind fully to the terms of the settlement in the light of the data as well as all the circumstances placed before it and had been satisfied that the settlement proposed was a fair and reasonable one that could be approved. In actions of this type, the Court's approval is the true safety valve to prevent unfair settlement. He has also pointed out that a post-decisional hearing in a matter like this will not be of much avail. He has further pointed out that a review petition has already been filed in the case and is listed for hearing. The Court has already given an assurance in its order of May 4, 1989, that it will only be too glad to consider any aspects that may have been overlooked in considering the terms of the settlement. Can it be said, in the circumstances, that there has been a failure of justice which compels us to set aside the settlement as totally violative of fundamental rights? Mukharji, C. J., has pointed out that the answer to this question should be in the negative. It was urged that there is a feeling that the maxim : "Justice must not only be done but must also appear to be done" has not been fully complied with and that perhaps, if greater publicity had attended the hearing, many other facts and aspects could have been highlighted resulting in a higher settlement or no settlement at all. That feeling can be fully ventilated and that deficiency can be adequately repaired, it has been pointed out by Mukharji, C. J., in the hearing on the review petition pending before this Court. Though we are prima facie inclined to agree with him that there are good reason why the settlement should not be set aside on the ground that the principles of natural justice have been violated, quite apart from the

practical complications that may arise as the result of such an order, we would not express any final opinion on the validity of the settlement but would leave it open to be agitated, to the extent permissible in law, in the review petition pending before this Court.

There is one more aspect which we may perhaps usefully refer to in this context. The scheme of the Act is that on the one hand the Union of India pursues the litigation against the UCC and the UCIL; on the other all the victims of the tragedy are expected to file their claims before the prescribed authority and have their claims for compensation determined by such authority. Certain infirmities were pointed out on behalf of the petitioners in the statutory provisions enacted in the regard. Our learned brother has dealt with these aspects and given appropriate directions to ensure that the claims will be gone into by a quasi judicial authority (unfettered by executive prescriptions of the amounts of compensation by categorising the nature of injuries) with an appeal to an officer who has judicial qualifications. In this manner the scheme under the Act provides for a proper determination of the compensation payable to the various claimants. Claims have already been filed and these are being scrutinised and processed. A correct picture as to whether the amount of compensation for which the claims have been settled is meagre, adequate or excessive will emerge only at that stage when all the claims have been processed and their aggregate is determined. In these circumstances, we feel that no useful purpose will be served by a post - decisional hearing on the quantum of compensation to be considered adequate for settlement.

For these reasons, it would seem more correct and proper not to disturb the orders of 14-15 February, 1989 on the ground that the rules of natural justice have not been complied with, particularly in view of the pendency of the review petition.

146. Before we conclude, we would like to add a few words on the state of the law of torts in this country. Before we gained independence, on account of our close association with Great Britain, we were governed by the common law principles. In the field of torts, under the common law of England, no action could be laid by the dependants or heirs of a person whose death was brought about by the tortuous act of another on the maxim actio personalis moritur cum persona although a person injured by a similar act could claim damages for the wrong done to him. In England this situation was remedied by the passing of the Fatal Accidents Act, 1846, popularly known as Lord Camphell's Act. Soon thereafter the Indian Legislature enacted the Fatal Accidents Act, 1855. This Act is fashioned on the lines of the English Act of 1846. Even though the English Act has undergone a substantial change, our law has remained static and seems a trifle archaic. The magnitude of the gas leak disaster in which hundreds lost their lives and thousands were maimed, not to speak of the damage to livestock, flora and fauna, business and property, is an eye opener. The nation must learn a lesson from this traumatic experience and evolve safeguards at least for the future. We are of the view that the time is ripe to take a fresh look at the outdated century old legislation which is out of tune with modern concepts.

While it may be a matter for scientists and technicians to find solutions to avoid such large scale disasters, the law must provide an effective and speedy remedy to the victims

of such torts. The Fatal Accidents Act, on account of its limited and restrictive application, is hardly suited to meet such a challenge. We are, therefore, of the opinion that the old antiquated Act should be drastically amended or fresh legislation should be enacted which should, inter alia, contain appropriate provisions in regard to the following matters:

(i) The payment of a fixed minimum compensation on a "no-fault liability" basis (as under the Motor Vehicles Act), pending final Adjudication of the claims of a prescribed forum;

(ii) The creation of a special forum with specific power to grant interim relief in appropriate cases;

(iii) The evolution of a procedure to be followed by such forum which will be conducive to the expeditions determination of claims and avoid the high degree of formalism that attaches to proceedings in regular courts; and

(iv) A provision requiring industries and concerns engaged in hazardous activities to take out compulsory insurance against third party risks.

In addition to what we have said above, we should like to say that the suggestion made of our learned brother, K. N. Singh, J., for the creation of an Industrial Disaster Fund (by whatever name called) deserves serious consideration. We would also endorse his suggestion that the Central Government will be well advised if, in future, it insists on certain safeguards before permitting a transnational company to do business in this country. The necessity of such safeguards, at least in the following two directions, is highlighted in the present case:

(a) Shri Garg has alleged that the processes in the Bhopal Gas Plant were so much shrouded in secrecy that neither the composition of the deadly gas that escaped nor the proper antidote therefore were known to anyone in this country with the result that the steps taken to combat its effects were not only delayed but also totally inadequate and ineffective. It is necessary that this type of situation should be avoided. The Government should therefore insist, when granting license to a transnational company to establish its industry here, on a right to be informed of the nature of the processes involved so as to be able to take prompt action in the event of an accident.

(b) We have seen how the victims in this case have been considerably handicapped on account of the fact that the immediate tort - feasor was the subsidiary of a multi-national with its Indian assets totally inadequate to satisfy the claims arising out of the disaster. It is, therefore, necessary to evolve, either by international consensus or by unilateral legislation, steps to overcome these handicaps and to ensure (i) that foreign corporations seeking to establish an industry here, agree to submit to the jurisdiction of the Courts in India in respect of actions for tortuous acts in this country; (ii) that the liability of such a corporation is not limited to such of its assets (or the assets of its affiliates) as may be found in this country, but that the victims are able to reach out to the assets of such concerns anywhere in the World; (iii) that any decree obtained in

Indian Courts in compliance with due process of law is capable of being executed against the foreign corporation, its affiliates and their assets without further procedural hurdles, in those other countries.

147. Our brother, K. N. Singh, J., has in the context dealt at some length with the United Nations Code of Conduct for Multi-national Corporations which awaits approval of various countries. We hope that calamities like the one which this country has suffered will serve as catalysts to expedite the acceptance of an international code on such matters in the near future.

148. With these observations, we agree with the order proposed by the learned Chief Justice.

Order accordingly.

Tehri Bandh Virodhi Sangarh Samiti v. The State of U. P.
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K. N Singh and Kuldip Singh, JJ.

ORDER

1. This petition under Article 32 of the Constitution of India has been filed in public interest by Tehri Bandh Virodhi Sangarsh Samiti and others. The petitioners have prayed that the Union of India, State of Uttar Pradesh and the Tehri Hydro Development Corporation be restrained from constructing and implementing the Tehri Hydro Power Project and the Tehri Dam.

2. The main grievance of the petitioner is that in preparing the plan for the Tehri dam project the safety aspect has not been taken into consideration. It is asserted that/ the dam is allowed to be constructed poses a serious threat to the life, ecology and the environments of the entire northern Indian as the site of the dam is prone to earthquake. After this petition was filed a number of persons have intervened and the parties have filed affidavits and counter affidavits. The matter was heard by this Court at various stages. The controversy relating to the project has not only been debated in this Court but has also taken a good deal of Parliament's time.

3. Shri P.S. Poti, learned senior advocate appearing for the petitioners has argued that the seismic experts in India and abroad are of the view that past records of earthquake show that the likely length of fracture along the convergence boundary is of the order of 200-300 kilometre. According to him, it is thus possible that segment of such a length along the Himalayan belt covering the region from approximately Dehradun on the West and India-Nepal border in the east, could be the fracture of a future large earthquake of magnitude 8 or so. According to him, the Government of India has not applied its mind to this very important aspect in preparing the project.

4. Shri V.K. Khanna, Joint Secretary, Ministry of Energy, Department of Power, New Delhi has filed an affidavit dated November 5, 1990 wherein relevant material has been placed before this Court showing that the Government of India, though its various

departments and ministries has at every stage considered all relevant data and fully applied its mind to the safety and various other aspects of the project.

5. The project was initially considered by the environment Appraisal Committee of the Ministry of Environment and Forests and the said Committee, taking into consideration the geological and seismic setting, the consequence risks and hazards, ecological and social impacts accompanying the project and the costs and benefits expected, came to the unanimous conclusion that the Tehri Dam Project did not merit environmental clearance and should be dropped.

6. The report submitted by the Environmental Appraisal Committee was considered and discussed in the meeting of the Committee of Secretaries held on March 20, 1990. The Committee of Secretaries came to the conclusion that the Environmental Appraisal Committee ought to have concerned itself with the environmental parameters within which the opinion of the said Committee was relevant. It was also opined by the Committee of Secretaries that the safety aspect of the design and earthquake engineering could be best looked into by the scientific and specialised organisations such as Geological Survey of India, National Geological Research Institute, Central Water Commission and Earthquake Engineering Department of the Roorkee University. In this context the Committee of Secretaries further observed that the safety aspect relating the project ought to be resolved and in this regard directed the constitution of a High Level Committee of Experts to examine the issues relating to the safety aspects of Tehri Dam Project.

7. Pursuant to the decision of the Committee of Secretaries the Government of India constituted a High Level Committee consisting of Shri D.P. Dhoundial, Director General Geological Survey of India as Chairman, Prof. U.K. Gaus Secretary, Department of Ocean Development, Dr. D. Gupta Sarma, Director, National Geological Research Institute, Dr. C.D. Thatte, Member Central Water Commission, Prof. L.S. Srivastava, Head Department of Earthquake Engineering University of Roorkee and Shri S.K. Shrone, Director, Geological Survey of India as members of the said Committee. The Committee was directed to examine the safety aspect of the project.

…

14. In our opinion the Court can only investigate and adjudicate the question as to whether the Government was conscious to the inherent danger as pointed out by the petitioner and applied its mind to the safety of the dam. We have already given facts in detail which show that the Government has considered the question on several occasions in the light of the opinions expressed by the experts. The Government was satisfied with the report of the experts and only thereafter clearance has been given to the project. The petitioners contend that project has not as yet been cleared.

...

16. We appreciate the petitioners concern for the safety of the project which is of prime importance to the general public, however, in view of the material on the record we do not find any good reason to issue a direction restraining the respondents from proceeding ahead with the implementation of the project. The petition, therefore, fails and is accordingly dismissed with no order as to costs.
