A. R. C. Cement Limited v. Appellate Authority for Industrial and Financial Reconstruction
AIR 1998 Delhi 359
Civil Writ Petition No. 3791 of 1996, D/-23-9-1997
A. P. Misra, C. J. and Dalveer Bhandari, J.

Sick Industrial Companies (Special Provisions) Act (1 of 1986), S. 20 – Sick Industrial Company – Company polluting the atmosphere – No alternative site found out by company promptly – Financial Institutions not ready to waive huge interest due from Company – Expert body such as operating agency scrutinizing matter and recommen&ing company for being wound up and not for revival – Order for winding up of Company – No interference by High Court.

Almitra Patel v. Union of India&
(1998) 2 Supreme Court Cases 416
J.S. Verma, C.J. and B.N. Kirpal and V.N. Khare, JJ.

ORDER - We have heard learned Additional Solicitor General and Shri Vellapalli, learned Senior Counsel. We consider it appropriate at this stage to constitute a Committee and to specify the specific aspects which the Committee is required to examine. We direct accordingly.

2. The Committee for Class I Cities (having population over one lakh) shall consist of the following:

(1)	Mr. Asim Burman Commissioner, Calcutta Municipal Corporation	Chairman
(2)	Mr. S.R. Rao Secretary, SSI, Govt. of Gujarat & ex-Commr. Surat	Member
(3)	Mr. S.K. Chawla Chief Engineer, CPWD	Member
(4)	Mr. P.U. Asnani Urban Env. Infrastructure Rep for India, USAID and Consultant, Ahmedabad Municipal Corporation	Member
(5)	Dr. Saroj Jt. Director, Ministry of Environment & Forests	Member
(6)	Mr. Rajat Bhargava Commissioner, Vijayawada Municipal Corporation	Member

(7) Mr. Yogendra Tripathi — Member
(Dy. Secy. Urban Dev. MOUA & E)

(8) Mrs Almitra Patel — Member
(Convenor, INTACH Waste Network)

3. The terms of reference for the Committee shall be as under:

To look into all aspects of urban solid waste management, particularly:

(1) Examine the existing practices and to suggest hygienic processing and waste disposal practices and proven technologies on the basis of economic feasibility and safety which the Corporations/Government may directly or indirectly adopt or sponsor.

(2) Examine and suggest ways to improve conditions in the formal and informal sector for promoting eco-friendly sorting, collection, transportation, disposal, recycling and reuse.

(3) To review municipal bye-laws and the powers of local bodies and regional planning authorities and suggest necessary modifications to ensure effective budgeting financing, administration, monitoring and compliance.

(4) Examine and formulate standards and regulations for management of urban solid waste, and set time-frames within which the authorities shall be bound to implement the same.

4. The Committee is requested to give its report as early as possible preferably not later than 30-6-1998. The Committee is also requested to give such interim reports as it may find convenient so to do.

5. The secretarial assistance at Delhi will be provided by the Ministry of Urban Development which will also make all other arrangements required by the Committee for its proper functioning while arrangements within the States/Union Territories would be made by the State/Union Territory concerned. The expenses incurred for the purpose to the same extent would be borne at this stage by the Ministry of Urban Development and the State Governments/ Union Territories concerned. The final responsibility for meeting these expenses would be decided later on.

6. The local authorities and State Governments/Union Territories concerned shall extend all cooperation and assistance to the Committee for its proper functioning.

Arun Sanyal v. State of West Bengal
AIR 1998 Calcutta 331
Writ Petition No. 7702 (W) of 1998, D/-9-6-1998
B. P. Banerjee and Ronojit Kumar Mitra, JJ.

Bengal Municipal Act (15 of 1932), S. 250 – Duty of Municipal Corporation – Employees of Corporation dumping garbage at particular place in resident locality – Municipal Corporation directed to take effective steps to keep area clean.

Burrabazar Fire Works Dealers Association v. The Commissioner of Police, Calcutta
AIR 1998 Calcutta 121
Writ Petition No. 2725 of 1996, D/- 26-9-1997
Bhagabati Prosad Banerjee and Asis Baran Mukherjee, JJ.

Constitution of India, Arts. 19(I)(g), 21- Right to manufacture, sell and deal with fire works – No inherent right in a citizen to manufacture the fire works which creates sound beyond permissible limits – Restriction on manufacture of such fire works by authorities in pursuance of order of High Court however, without taking formal decision regarding sound level of fire works to be used in State – Pollution Control Board directed to take such decision after considering all aspects of matter.

Environment (Protection) Act (29 of 1986), S. 2(b).

Environment (Protection) Rules (1986), R. 3.

Art.19(1) (g) of the Constitution of India does not guarantee the fundamental right to carry on trade or business which creates pollution or which takes away that communities safety, health and peace. Accordingly, there is no inherent or fundamental right in a citizen to manufacture, sell and deal with fire works which will create sound beyond permissible limit and which will generate pollution which would endanger the health and the public order. A citizen or people cannot be made a captive listener to hear the tremendous sounds caused by bursting out from a noisy fire works. It may give pleasure to one or two persons who burst it but others have to be a captive listener whose fundamental rights guaranteed under Art. 19 (1) (a) and other provisions of the Constitution are taken away, suspended and made meaningless. However, as in the instant case, without taking any formal decision the Pollution Control Board issued orders in pursuance of direction of High Court restricting manufacture, sale, use of certain fire works creating sound beyond permissible limits, the Board was directed to take such decision regarding sound level to be used in the State, after considering all aspects of matter. In such a case, it could not be said that the Parliament and/or the Legislature in their wisdom, had not passed any law for putting such a restriction and in the absence of any specific provision in any law, the administration cannot do this thing through the order of the Court. If a citizen has a right it is also equally a duty on the part

of High Court to see that such rights are preserved and not allowed to be destroyed. Legislature may not rise to the occasion but that does not mean that Court will keep its hand folded in the absence of any legislative mandate. The courts are the custodian of the rights of the citizens and if the court is of the view that citizens' rights guaranteed under the Constitution of India are violated, the court is not powerless to end the wrong. Principle of judicial activisms confers power upon the court to be active and not to remain inactive for the purpose of protecting rights, duties and obligations of the people. Further, in India, no effective and elaborate law has been made for controlling the noise creator. But under Art. 19 (1) (a), read with Art. 21 of the Constitution of India, the citizens have a right of a decent environment and they have a right to live peacefully, right to sleep at night and to have a right to leisure which are all necessary ingredients of the right to life guaranteed under Art. 21 of the Constitution.

(**Paras 53, 54, 57, 61, 67)**

…9. It is submitted that the provisions of under Section 16 (2)(h) of the Air (Prevention and Control of Pollution) Act. 1981 provided power upon the Central Pollution Control Board "lay down standards for the quality of air" and definition of environment pollutants has been defined in Section 2(b) of the Environment (Protection) Act, 1986, which means" any solid, liquid or gaseous substance present in the atmosphere in such concentration as may be or tend to be injurious to environment". Rule 3 of the Environment (Protection) Rules, 1986 provides:

> "(1) For the purpose of protecting and improving the quality of the environment and preventing and abating environmental pollution, the standards for emission or discharge of environmental pollutants from the industries, operations or processes shall be as specified in (schedule I to IV).
>
> (2) Notwithstanding anything contained in sub-rule (1), the Central Board or a State Board may specify more stringent standards from those provided in (schedule I to IV) in respect of any specific industry, operation or process depending upon the quality of the recipient system and after recording reasons, therefore, in writing."

Centre for Environmental Law v. Union of India
1998 ELD 4
Interlocutory Application No. 2 in Writ Petition (Civil) No. 337 of 1995, decided on 7-11-1997
G.T. Nanavati, S.C. Agarwal, JJ.

Ss. 6, 4, 21 – Constitution of Wildlife Advisory Board, appointment of Honorary Wildlife Wardens and issuance of proclamations under S. 21 - Affidavits filed by various States about steps taken in connection with – Further time granted for compliance with Court's orders.

Centre for Environmental Law v. Union of India
1998 ELD 6
Writ Petition (Civil) No. 337 of 1995 with Contempt Petition (Civil) No. 241 of 1998, decided on 17-7-1998
M. Srinivasan, S.C. Agarwal, S. Saghir Ahmad, JJ.

(A) Ss. 33A, 34 and 24 – Directions issued – All States and Union Territories directed: (1) under S. 33A to take concrete steps for the establishment of centres for immunisation of livestock; (2) under S. 34 to frame the necessary rules for purpose of registration of persons in possession of arms within two months and process of registration to be completed within four months thereafter; (3) under S. 24 to indicate the present position with regard to the process of determination of rights and acquisition of rights over land within declared sanctuaries; and (4) to indicate within four weeks the steps taken to provide forest guards with modern arms and communication facilities.

(B) Contempt of Courts Act, 1971 – Notice for initiating contempt proceedings directed to be issued to the Chief Secretary, State of Karnataka as no one appeared and also no affidavit filed regarding steps taken towards issuance of proclamation under S. 21 of wild Life (Protection) Act, 1972 in respect of establishment of wildlife sanctuaries.

(C) S. 12 – Contempt notice against Chief Secretary, Govt. of Nagaland, who present in person, discharged in view of explanation offered in affidavit.

Centre for Environmental Law v. Union of India
1998 ELD 9
Interlocutory Application No. 2 in Writ Petition (Civil) No. 337 of 1995, decided on 20-3-1998
S.C. Agarwal, S. Saghir Ahmad, JJ.

(A) Ss. 4, 6, 21, 33A, 34 – Constitution of Wildlife Advisory Board, appointment of Wildlife Wardens and issuance of proclamations under S. 21.

(B) State Govts/UTs further directed to file affidavits indicating compliance with the provisions of Ss. 33A and 34 and steps taken to prohibit the activities in a national park/sanctuary which are prohibited under the provisions of the Act.

Para 8

Centre for Environmental Law, WWF-India v. Union of India
1998 ELD 10
Interlocutory Application No. 2 in Writ Petition (Civil) No. 337 of 1995, decided on 16-1-1998
S.C. Agrawal and A.P. Misra, JJ.

ORDER

Regarding constitution of Wildlife Advisory Boards

1. From the affidavits that have been filed after the passing of he order dated 7-11-1997 it appears that the Boards have been constituted in all the States/Union Territories.

Regarding appointment of Honorary Wildlife Warden

2. Affidavits have been filed by the States concerned which show that except the national capital territory of Delhi, Honorary Wildlife Wardens have been appointed in the other States/Union Territories. The learned counsel appearing for Delhi State states that the process for appointment is going on and the order for appointment would be issued within four weeks.

3. In our order dated 7-11-1997 we had noticed that only one Honorary Wildlife Warden had been appointed in the State of Uttar Pradesh even though there are a large number of districts. The learned counsel for the State had stated that the process for appointment of Honorary Wildlife Wardens for the districts was going on and that such appointments shall be made within four weeks Shri R.C. Verma, the learned counsel for the State, states that it has not been possible to make the appointments on account of the impending general election and the model code of conduct. He prays for six weeks' further time for making the appointment. We are not satisfied that this is a proper justification for not taking action in the matter of appointment of the Honorary Wildlife Wardens. We, however, give four weeks' time to the State Government to make such appointments.

Regarding issuance of proclamations under Section 21 of the Act

4. We find that he requisite steps for issuance of such proclamations have not been taken in a large number of States.

Andhra Pradesh

5. In Andhra Pradesh there are four national parks but no proclamation has been issued in respect of any of them. There are 20 sanctuaries. In the affidavit filed on behalf of the State it is admitted that proclamation has not been issued in respect of 7 sanctuaries. As regard 5 sanctuaries no information has been given as to whether proclamation has been issued or not.

Arunachal Pradesh

6. In the State of Arunachal Pradesh out or 10 sanctuaries final notification has been given as to whether proclamation has been issued in respect of the remaining 2 sanctuaries.

Gujarat

7. There are 4 national parks and 21 sanctuaries in the State of Gujarat. In the affidavit that have been filed on behalf of the State all that is stated is that initial notifications have been issued but the nature of the notification has not been disclosed. It is not clear as to whether the proclamations under Section 21 have been issued or not in respect of the national parks and the sanctuaries.

Haryana

8. In the State of Haryana there are 9 sanctuaries. Final notification has been issued in respect of one sanctuary. It is stated that proclamation is not required to be issued in respect of 4 sanctuaries which are situate in the reserve forest. No information has been given regarding issuance of proclamation for the remaining sanctuaries.

Karnataka

9. In the State of Karnataka there are 5 national parks and 19 sanctuaries but in the affidavits that have been filed on behalf of the State no information has been furnished with regard to issuance of proclamation under Section 21 or the issuance of the final notification.

Manipur

10. In the State of Manipur there are 2 national parks and 3 sanctuaries. Final notification has been issued in respect of one national park. There is no information as to whether a proclamation has been issued or not with respect to the other national park. Proclamation has not been issued in respect of the 3 sanctuaries.

Nagland

11. There is 1 national park and 2 sanctuaries. In the affidavit filed on behalf of the State no information has been given as regards the issuance of a proclamation or the final notification in respect of the same.

Rajasthan

12. There are 2 national parks and 25 sanctuaries. Proclamation has not been issued in respect of 12 sanctuaries.

Tamil Nadu

13. There are 5 national parks and 17 sanctuaries. Proclamation has not been issued for any of them.

Tripura

14. There are 4 sanctuaries in the State of Tripura. Proclamation has not been issued in respect of any of them.

Uttar Pradesh

15. There are 7 national parks and 29 sanctuaries in the State of Uttar Pradesh. Final notification has been issued in respect of 6 national parks. Proclamation has not been

issued in respect of one national park. Proclamation has not been issued in respect of any of the 29 sanctuaries.

West Bengal

16. There are 5 national parks and 15 sanctuaries. Final notification has been issued in respect of 3 national parks. Proclamation has not been issued for two national parks as they are forest land. 13 out of 15 sanctuaries are on the forest land for which no proclamation is required. No information has been given as to whether the 2 sanctuaries are on the forest land and if not whether proclamation has been issued or not.

Andaman and Nicobar

17. There are 9 national parks and 95 sanctuaries. Final notification has been issued in respect of 7 national parks. Proceeding has been pending in respect of the remaining two as marine national parks. Proclamation has not been issued in respect of 4 sanctuaries.

Chandigarh

18. There are 2 sanctuaries. Proclamation has not been issued in respect of one sanctuary. Ms. Kamini Jaiswal, the learned counsel appearing for the Administration of the Union Territory of Chandigarh, states that proclamation has not been issued in respect of the said sanctuary for the reason that it lies within the reserve forest and proclamation is not required to be issued.

Goa

19. There is one national park and 4 sanctuaries. From the affidavits filed on behalf of the State it is not clear as to whether proclamation under Section 21 has been issued in respect of the national park. Proclamation under Section 21 has been issued in respect of 2 sanctuaries but it has not been issued for the remaining 2 sanctuaries. It is not clear as to whether proclamation is required in respect of those sanctuaries or not.

Delhi

20. There is 1 sanctuary but proclamation has been issued.

Lakshadweep

21. There is 1 sanctuary but proclamation has been issued.

Daman and Diu

22. In the Union Territory of Daman and Diu there is 1 sanctuary but proclamation has not been issued.

23. It would thus appear that in the States/Union Territories referred to above proclamations under Section 21 have been not issued in respect of several national parks and sanctuaries. By our order dated 22-8-1997 we had directed the State Government/ Union Territory Administration concerned to issue the proclamation under Section 21 in respect of the sanctuaries/national parks within two months and complete the process of determination of rights and acquisition of land or rights as contemplated under the Act within period of 1 year.

24. By our order dated 7-11-1997 further time of two months was granted to take steps in that regard. It is a matter of regret that in spite of the aforesaid directions of this Court the State Governments and the Administration of the Union Territories referred to above have not taken the necessary steps for issuing the proclamation under Section 21 in respect of the national parks/sanctuaries. Although, we had directed that in the event of failure to comply with the said directions, contempt proceedings will have to be initiated against the State Government/Union Territory Administration concerned, we are giving a last opportunity to the State Government/Union Territory Administration concerned to take steps to issue the requisite proclamation under Section 21 of the Act in respect of the national parks/sanctuaries for which such proclamation is required to be issued under the Act within a period of six weeks. It is, however, made clear that in the event of failure to comply with this direction contempt proceedings will be initiated against the person/ persons responsible. The States/Union Territories concerned shall file affidavits regarding compliance by 16-3-1998.

25. By our order dated 22-8-1997 we had directed that contempt notices be issued to the respective Chief Secretaries of the States/Union Territories concerned who have not filed the affidavit as directed by this Court. Shri B.B. Singh, the learned counsel appearing for the State of Bihar, has filed the affidavit explaining the position. Keeping in view the aforesaid affidavit, the contempt proceedings initiated against the Chief Secretary of the State of Bihar are dropped and the contempt notice is discharged. The contempt proceedings are also dropped against the Chief Secretary of the State of Manipur and the contempt notice is discharged.

26. List after two months.

Court Masters.

Gramin Sewa Sanstha v. State of M.P.
1998 (Supp) Supreme Court 578
P.N. Bhagwati C. J. and Ranganath Misra, J.

ORDER

1. W.P. No. 529/86: We are informed that the Madhya Pradesh legislature has enacted the Madhya Pradesh Projects Displaced Persons (Resettlement) Act, 1985 but unfortunately, the Hasdeo Bango Dam Project has not been brought under the coverage of this Act with the result that there is no statutory obligation on the Madhya Pradesh Government to provide re-settlement and rehabilitation of the large number of tribals who will be uprooted as a result of implementation of this Project. If the object and purpose of the Act is to provide re-settlement and rehabilitation to the tribals so uprooted as a result of the projects being undertaken by the State Government, it is difficult to see why this large project of Hasdeo Bango Dam has not yet been brought within the Act. We adjourn the

writ petition for two weeks in order to enable the State Government to consider whether the Hasdeo Bango Dam Project should be brought within the coverage of the Act so that the Act may not remain merely a paper legislation with cosmetic effect but becomes really meaningful and effective to provide the re-settlement and rehabilitation to the large number of tribals affected by this Project.

2. We are also informed that though land in 10 villages mentioned in paragraph 7 of the additional counter reply filed on behalf of the State Government to the writ petition has been earmarked by the State Government for re-settlement of the displaced tribals, such land is not available because it is already occupied by other persons who themselves will be uprooted if such land is acquired and made available for the tribals displaced on account of the Hasdeo Bango Dam Project. If this is true, the remedy might be worse than the disease because in order to re-settle one set of displaced persons the State Government would be displacing another set of persons. We would, therefore, direct the State Government to consider in the meanwhile as to whether the cultivable land at any other place or places can be made available for the tribals who are displaced on account of the present project. The State Government will also bear in mind the problem of rehabilitation and re-settlement of tribals' communities settled in the land which is sought to be acquired for the project and it is therefore necessary that the provision for re-settlement which is made for them must be a provision which does not affect their homogeneity for communal life. There are guidelines for re-settlement and rehabilitation of tribals which have been laid down in various reports and particularly in the report of the World Bank in regard to the dams which are being constructed in Gujarat and those guidelines may serve as useful indicators for the purpose of considering what provisions can be made for re-settlement and rehabilitation of the tribals who would be displaced on account of the present project.

3. The writ petition is adjourned to October 1, 1986.

4. W.P. No. 52286: Miss Nandita Hasker, learned counsel appearing on behalf of the petitioner states that though Section 14 sub-section (2) of the Coal Bearing Areas (Acquisition and Development) Act, 1957 provides for the constitution of a Tribunal by the Central Government for the purpose of determining the amount of compensation payable under that Act, no such Tribunal has been constituted by the Central Government insofar as area in question is concerned. The learned counsel appearing on behalf of the State Government draws our attention to paragraph 3 of the counter-reply filed on behalf of the Land Acquisition Officer, Bilaspur, M.P.: "to the knowledge of the answering respondent, such tribunal has been constituted by respondent 1". It seems from this averment that the Land Acquisition Officer, Bilaspur has knowledge that the Tribunal has been constituted by the Central Government for the area in question under Section 14 of sub-section (2) of the Act. Having regard to this positive averment made by the Land Acquisition Officer we ask the learned counsel for the State Government to tell us as to where the Tribunal is located and who is the officer presiding over the Tribunal but the learned counsel has not been able to give this information since he has no instruction nor is there anyone on behalf of the State Government to give any instruction. We asked

learned counsel appearing on behalf of the Union of India: he also seems to be in an unenviable position. We are, therefore, constrained to adjourn the writ petition for one week in order to enable learned counsel for the Union of India and the State of M.P. to obtain necessary instructions but if the Tribunal has been constituted under Section 14 of sub-section (2) having jurisdiction over the area in question, claims for compensation would have to be filed by the displaced persons before the said Tribunal.

5. The writ petition is adjourned for one week.

In Re: Bhavani River-Sakthi Sugars Ltd.
AIR 1998 Supreme Court 2059 (From: Madras)
Writ Petition No. 17333 of 1995, D/-17-7-1997 (Mad)
Special Leave (Civil) No. 22597 of 1997, D/-29-1-1998
Dr. A. S. Anand, B. N. Kirpal and V. N. Khare, JJ.

Water (Prevention and Control of Pollution) Act (6 of 1974), S. 33-A – Pollution in river water – Directions issued by Pollution Control Board to industry in question regarding proper storage of effluent in lagoons and for proper treatment and disposal of treated effluent – Industry contravening conditions imposed by Board and thereby contamination in river water taking place – Court directed closure of industry till unlined lagoons are removed and contamination is stopped – Industry thereafter left with option to approach Court for appropriate orders.

Re: Bhavani River – Sakthi Sugars Ltd.
AIR 1998 Supreme Court 2578 (From: Madras)
Civil Appeal No. 3564 of 1998 (arising out of Special Leave Petition (Civil) No. 22597 of 1997, D/-30-7-1998
Dr. A. S. Anand, B. N. Kirpal and V. N. Khare, JJ.

Constitution of India, Arts. 32, 226 – Public interest litigation – Water pollution – Sugar Industry – Discharge of objectionable effluents – From distillery in river and adjoining areas – Need to arrest unabated pollution – Matter involved greater public interest – Disposal of writ petition by High Court merely on consent of Pollution Control Board – Highly deprecated – Petition remanded to High Court for fresh disposal in accordance with law – Reports submitted by NEERI pursuant to directions issued by Supreme Court – High Court requested to consider said reports and decide operational viability of industry.

Indian Council for Enviro-Legal Action v. Union of India
1998 (1) SCALE (SP) 5
Sujata V. Manohar and D.P. Wadhwa, JJ.

1. In its interim report filed on 16th December, 1997, the Central Pollution Control Board has pointed out the grossly unsatisfactory working of the Common Effluent Treatment Plants of Patancheru and Bollaram. It is also pointed out that there is a Common Effluent Treatment plant in the same area at Jeedimetla also.

2. 72 Industries are members of PETL at Patancheru. These industries send their effluents to the Patancheru plant for treatment. On or after 31st of January 1998 the Patancheru Common Effluent Treatment Plant shall not accept effluents from its member industries or any other industries unless the effluents do not exceed the limits of various parameters are as follows:

PH - between 6.5 and 8.5
SS - not to exceed 1000 mg/l
COD - not to exceed 20,000 mg/l
TDS - not to exceed 20,000 mg/l

3. All those member industries that discharge after 31st of January, 1998, effluents exceeding these parameters shall stop production until further orders.

4. The same directions will also apply to the CETP at Bollaram. 25 industries are members of the CEPT at Bollaram and the above directions apply to them also.

5. In the Patancheru area, in addition to the 72 industries which are members of PETL, there are, according to the report of the Central Pollution Control Board, 42 unlisted industries. The Andhra Pradesh Pollution Control Board shall furnish a list of these industries indicating which of these industries are relevant to the question of water pollution. The report shall also indicate whether the effluent discharged as prescribed by them meets the norms of safe discharge as prescribed by the Central Pollution Control Board and as set out at page 34 of the present report dated 16th December, 1997. In the case of those industries which, according to the Andhra Pradesh Pollution Control Board, do not discharge effluent falling within the safe parameters so laid down, the Andhra Pradesh Pollution Control Board, shall take all steps permissible in law to make industries comply with the prescribed norms. Such steps shall be taken forthwith.

6. In respect of the area covered by the Bollaram Common Effluent Treatment Plant the present report of the Central Pollution Control Board has pointed out that there are 91 industries in the said area which are not members of Bollaram Common Effluent Treatment Plant. Out of these at least 29 industries are relevant on the question of Water Pollution caused by their effluent. There may also be other industries which may be contributing to air pollution. The Andhra Pradesh Pollution Control Board shall furnish a list of these 91 non-member industries indicating therein those industries which are causing water pollution. In respect of these industries also, the direction which we have given above to the Andhra Pradesh Pollution Control Board with respect to non-member industries in the Patancheru area will apply. The report of the Andhra Pradesh Pollution

Control Board shall also include the steps taken by the Board to make these non-member industries comply with the safe standards of effluent discharge norms as set out at page 34 of the Report of the Central Pollution Control Board. The Andhra Pradesh Pollution Control Board Shall submit a comprehensive report on or before 15th of February, 1998.The Andhra Pradesh Pollution Control Board shall also give a notice to all polluting industries in the area of Patancheru and Bollaram informing them about the present pending litigation and also informing them that in case these industries do not comply with the norms for safe discharge of effluents or, in the case of member industries, with the norms prescribed by the Central Pollution Control Board for sending their effluent to the Common Effluent Treatment Plant on or before 31st of January, 1998, they are liable to be closed down.

7. In the report to be supplied by the Andhra Pradesh Pollution Control Board the said board shall also indicate all those industries which are causing air pollution in the entire area and shall State the steps being taken by them for checking air pollution.

8. The Central Pollution Control Board report also points out that there is a Common Effluent Treatment Plant at Jeedimetla also. We do not have any particulars of the industries which are sending effluents to this plant at Jeedimetla nor do we have nay information about the performance of the plant at Jeedimetla. The Central Pollution Control Board shall submit a report in connection with the functioning of this plant at Jeedimetla before the end of February, 1998. In the meanwhile, no additional effluents from any industry in the area served by Patancheru and Bollaram Common Effluent Treatment Plants shall be accepted by CETL at Jeedimetla.

9. The Andhra Pradesh Pollution Control Board had in November, 1997 issued notice to PETL at Patancheru to remove the sludge which is being damped on the banks of the river and put it is secured land fills within 30 days from the date of the notice. Unfortunately no action is taken pursuant to the notice. PETL at Patancheru and the member industries of PETL at Patancheru shall comply with these directions on or before 31st of January, 1998. In case approval of the Andhra Pradesh Pollution Control Board is required for the site selected by PETL and its member industries for dumping of sludge, the Andhra Pradesh Pollution Control Board agrees to consider the request and grant either approval or intimate disapproval within a period of 8 days of the application being made to it.

10. The Andhra Pradesh Pollution Control Board had issued notice dated 15th of November 1997, to CETL at Bollaram. The CETL at Bollaram and its member industries shall comply with the notice on or before 31st of January, 1998. The Andhra Pradesh Pollution Control Board shall inform the industries of the adjourned date of hearing so that any of the industries, if they wish to make a representation, may remain present on the next date of hearing. In view of the fact that learned counsel appearing for the Andhra Pradesh Pollution Control Board has not been able to assist the Court or give proper relevant information, it has become necessary for us to direct the Member Secretary of the Andhra Pradesh Pollution Control Board to remain present in Court on the next date of hearing with all relevant papers.

K. Muniswamy Gowda v. State of Karnataka
AIR 1998 Karnataka 281
Writ Petition No. 3598 of 1996, D/-30-5-1997
G. C. Bharuka, J.

Air (Prevention and Control of Pollution) Act (14 of 1981), Ss. 17, 18(1)(b) – Exemption from provisions of Act – Industrial unit emitting air pollutant – Exemption cannot be granted either by State Government or Air Pollution Board – Exemption granted by Pollution Board – State Government, Pollution Board and industrial unit, beneficiary saddled with exemplary damages.

M. C. Mehta v. Union of India
1998 ELD 17
Interlocutory Application No. 22 in Writ Petition (Civil) No. 4677 of 1985, decided on 26-11-1996
Kuldip Singh, S. P. Kurdukar, JJ.

(A) Classifying all of them under category 'H' and filing the list of such brick kilns along with its recommendations – Relief – Such classification of brick kilns upheld by Supreme Court and consequently the said brick kilns unconditionally directed to close down.

(B) Detailed instructions given to render necessary help and facilities to brick kilns wanting to relocate/shift themselves to any other industrial estate in such a State – shifting brick kilns, on their relocation in new industrial estates, directed to be given incentives in terms of Master Plan and also the incentives normally given to new brick kilns in new industrial estates – Rights of, and benefits to be given to the workmen of the closing brick kilns laid down.

Paras 6, 7

ORDER

1. This Court dealt with 246 brick kilns in its order dated 11-9-1996. It was noticed in the said order that public notice and individual notices had been given to 246 brick kilns and the objections filed by them had been considered by the Delhi Pollution Control Committee. This Court, however, in the interest of justice directed that the brick kilns be given one more opportunity to file objections against their categorisation as 'H' Category Industries. It was directed that the brick kilns may file objections within two weeks of the publication of the notice before the Central Pollution Control Board (for short "the Board"). This Court directed the Board to constitute a Committee to consider the objections. Pursuant to the above said order of this Court the Board considered all the objections which were filed before it in response to the public notice published by the Delhi Pollution Control Committee.

2. The Delhi Pollution Control Committee, after considering the objections filed by various brick kilns had come to the conclusion that 246 brick kilns fell in 'H' Category Industries and an affidavit dated 6-09-1996 to that effect was filed by Mr. D.S. Negi, Secretary (Environment)-cum-Chairman, Delhi Pollution Control Committee. Para 7 of the affidavit is as under:

> "The committee seeks to file the third list of 'H' category industries. This list of 290 'H' category industries includes 246 brick kilns, 43 electric furnaces and a forging unit. (Annexed hereto as Annexure C) The CPCB recommended to the committee for the inclusion of all such industries under category 'H'. The committee, therefore, served individual notices on the said units and included them in the category 'H'."

3. The Board has filed its report dated 18-11-1996. Para 3.1 of the report which relates to the brick kilns is as under:

> "Out of 246 notices issued to brick kilns, only 137 have filed the objections. Following are the recommendations of the Committee in this regard:-
>
> (i) Moving chimney brick kiln should not be permitted in Delhi as it is highly polluting in nature and hence classified as 'Ha' category.
>
> (ii) In L,N & P areas of U.T. of Delhi and designated areas close to thermal power plants (as and when declared by Delhi Administration), manufacturing of *Flyash-sand-lime bricks*, in which flyash requirement is about 80%, should only be permitted.
>
> (iii) However, only fixed chimney clay brick kilns may be allowed to operate in L, N & P areas for a period to be decided by the Hon'ble Court to switch over to flyash-sand-lime bricks manufacturing, which does not require firing, subject to strict compliance of the following conditions. ..."

4. We have heard learned counsel for the parties. We have also heard Dr. B. Sen Gupta, Senior Scientist, Central Pollution Control Board, who is present in Court. Mr. Vijay Panjwani, learned counsel for the Board has taken us through Tables 1, 2 and 3 annexed to the report which give details of major technologies for manufacture of flyash-sand-lime bricks. According to Dr. B. Sen Gupta, various technologies have been developed and have been adopted by various industries for making bricks from flyash-sand-lime mixture. According to Dr. Gupta, in the flyash technology, the pollution is almost negligible. According to him, in the said system, there would be no kiln and no firing to cure the bricks. The bricks are only to be steamed with electricity or by the process of auto plates. Various technologies have been suggested by the Board in the report which can be adopted by the brick kiln industry to be environmentally benign.

5. Keeping in view the report of the Delhi Pollution Control Committee and also of the Board, we have no hesitation in holding that the 246 brick kilns operating in the various zones of Union Territory of Delhi are 'H' category industries and as such cannot operate in the said territory. The said brick kilns are listed hereunder:

Ed: *(List omitted)*

6. We, therefore, direct as under:

1. The above-listed 246 brick kilns cannot be permitted to operate and function in the Union Territory of Delhi. These brick kilns may relocate/shift themselves to any other industrial estate in the National Capital Region (NCR). We direct that the 246 brick kilns listed above shall stop functioning and operating in the city of Delhi with effect from30-6-1997. These brick kilns shall close down and stop functioning with effect from the said date.

2. The Deputy Commissioner of Police concerned shall, as directed by us, effect the closure of the above brick kilns with effect from 30-6-1997 and file compliance report in this Court within 15 days thereafter.

3. The National Capital Region Planning Board shall render all assistance to the brick kilns in the process of relocation. The direction shall go to the Board through its Secretary. The National Capital Territory, Delhi Administration, through its Chief Secretary and Secretary, Industries; State of Haryana through its Chief Secretary and Secretary, Industries; state of Rajasthan through its Chief Secretary and Secretary. Industries; and the State of Uttar Pradesh through its Chief Secretary and Secretary, Industries shall provide all assistance, help and necessary facilities to the brick kilns which intend to relocate themselves in the industrial estates situated in their respective territories.

4. The allotment of plots, construction of factory, buildings, etc., and issuance of any licences/permission, etc., shall be expedited and granted on priority basis.

5. In order to facilitate shifting of brick kilns from Delhi, all the four States constituting the NCR shall set up unified single agency consisting of all the participating States to act as a nodal agency to sort out all the problems of such brick kilns. The single window facility shall be set up by the four States within one month from today. The direction to the four States is through the Chief Secretaries of the States concerned. The Registry shall convey this direction separately to the Chief Secretaries along with a copy of this judgment. We have no doubt that single window facility has already been provided in terms of this Court's earlier order.

6. The use of the land which would become available on account of shifting/relocation of the brick kilns shall be permitted in terms of the orders of this Court dated 10-5-1996 in M.C. Mehta v. Union of India (1996) 4 SCC 351).

7. The shifting brick kilns on their relocation in the new industrial estates shall be given incentives in terms of the provisions of the Master Plan and also the incentives which are normally extended to new brick kilns in new industrial estates.

8. The closure order with effect from 30-6-1997 shall be unconditional. Even if the relocation of brick kilns is not complete they shall stop functioning in Delhi with effect from 30-6-1997.

9. The workmen employed in the above-mentioned 246 brick kilns shall be entitled to the rights and benefits as indicated hereunder:

   (a) The workmen shall have continuity of employment at the new town and place where the brick kiln is shifted. The terms and conditions of their employment shall not be altered to their detriment;

   (b) The period between the closure of the brick kilns in Delhi and its restart at the place of relocation shall be treated as active employment and the workmen shall be paid their full wages with continuity of service.

   (c) All those workmen who agree to shift with the brick kilns shall be given one year's wages as "shifting bonus" to help settle at the new location;

   (d) The workmen employed in the brick kilns which fail to relocate and the workmen who are not willing to shift along with the relocated brick kilns, shall be deemed to have been retrenched with effect from 30-6-1997 provided they have been in continuous service (as defined in section 25B of the Industrial Disputes Act, 1947) for not less than one year in the brick kilns concerned before the said date. They shall be paid compensation in terms of section 25F (b) of the Industrial Disputes Act, 1947. These workmen shall also be paid, in additions, one year's wages as additional compensation;

   (e) The "shifting bonus" and the compensation payable to the workmen in terms of this judgment shall be paid by the management before 30-6-1997.

   (f) The gratuity amount payable to any workmen shall be paid in addition.

7. As directed above, all the brick kilns shall stop operating in the Territory of Delhi so far as their existing method of manufacturing bricks is concerned with effect from 30-6-1997. We give liberty to the brick kiln owners to indicate before 31-1-1997 in writing to the NCT, Delhi Administration, through Secretary, Environment and also to the Delhi Pollution Control Committee through its Secretary that the brick kiln concerned intends to shift to the new technology of manufacturing bricks by flyash-sand-lime technology. The Delhi Pollution Control Committee shall monitor the setting up of the new project by the brick kiln concerned. After obtaining the consent and no objection certificate from the Delhi Pollution Control Committee and also by the Central Pollution Control Board, the brick kiln concerned be permitted to operate at the same site, if it is permitted under law. We direct the NCT, Delhi Administration to render all possible assistance to the brick kiln owners to change over to the new technology and in the setting up of the modern plants with flyash-sand-lime technology.

M. C. Mehta v. Union of India
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ORDER

1. This Court deals with 246 Brick Kilns in its order dated 11.9.1996. It was noticed in the said order that public notice and individual notices had been given to 246 brick kilns and the objections filed by them had been considered by the Delhi Pollution Control Committee. This Court, however, in the interest of justice directed that the brick kilns be given one more opportunity to file objections against their categorization as 'H' Category Industries. It was directed that the brick kilns might file objections within two weeks of the publication of the notification before the Central Pollution Control Board (for short "the Board"). This Court directed the Board in constitute a Committee to consider the objections. Pursuant to the above said order of the Court the Board considered all the objections which were filed before it in response to the public notice published by the Delhi Pollution Control Committee.

2. The Delhi Pollution Control Committee, after considering the objections filed by various brick kilns had come to the conclusion that 246 brick kilns fell in 'H' Category Industries and an affidavit dated 6.9.1996 to that effect was filed by Mr. D.S. Negi, Secretary (Environment)-cum-Chairman, Delhi Pollution Control Committee, Para 7 of the affidavit is as under: -

> *"The committee seeks to file the third list of 'H' category industries. The list of 290 'H' category industries includes 246 brick kilns. 43 electric furnaces and a forging unit. (Annexed hereto as Annexure C.0 the CPCB recommended to the committee for the inclusion of all such industries category 'H'. The committee, therefore, served individual notices on the said units and included them in the category 'H'."*

3. The Board has filed its report dated 18.11.1996 Para 3.1 of the report, which relates to the brick kilns are as under: -

> *"Out of 246 notices issued to brick kilns, only 137 have filed for objections. Following are the recommendations of the Committee in this regard.*
>
> *(i) Moving chimney brick kiln should not be permitted in Delhi as it is highly polluting in nature and hence classified as 'Ha' Category.*
>
> *(ii) In L. N. & P areas of U. T. of Delhi and designated areas close to thermal power plants (as and when declared by Delhi Administration), manufacturing of Flyash-sand-lime bricks, in which flyash requirement is about 80%, should Only be permitted.*
>
> *(iii) However, only fixed chimney clay brick kilns may be allowed to operate in L.N. P areas for a period to be decided by the Hon'ble Court to switch over to flyash-sand-lime bricks manufacturing, which does not require firing, subject to strict compliance of the following conditions....."*

4. We have heard learned counsel for the parties. We have also heard Dr. B. Sen Gupta, Senior Scientist, Central Pollution Control Board, who is present in Court. Mr. Vijay Panjwani, learned counsel for the Board has taken us through Tables 1, 2 and 3 annexed to the report which give details of major technologies for manufacture of flyash-sand-lime bricks. According to Dr. B. Sen Gupta, various technologies have been developed and have been adopted by various industries for making bricks from flyash-sand-lime mixture. According to Dr. Gupta, in the flyash technology, the pollution is almost negligible. According to him, in the said system, there would be no kiln and no firing to cure the bricks. The bricks are only to be steamed with electricity or by the process of auto plates. Various technologies have been suggested by the Board in the report, which can be adopted by the brick kiln industry to be environmentally benign.

5. Keeping in view the report of the Delhi Pollution Control Committee and also of the Board, we have no hesitation in holding that the 246 brick kilns operating in the various zones of Union Territory of Delhi are 'H' category industries and as such cannot operate in the said industry. The said brick kilns are listed hereunder:

6. We, therefore, direct as under:

1. The above-listed 246 brick kilns cannot be permitted to operate and function in the Union Territory of Delhi. These brick kilns may relocate/shift themselves to any other Industrial estate in the National Capital Region (NCR). We direct that the 246 brick kilns shall stop functioning and operating in the city of Delhi with effect from 30.6.1997. These brick kilns shall close down and stop functioning with effect from the said date.

2. The Deputy Commissioner of Police concerned shall, as directed by us, effect the closure of the above brick kilns with effect from 30-6-1997 and the compliance report in this Court within 15 days thereafter.

3. The National Capital Region Planning Board shall render all assistance to the brick kilns in the process of relocation. The direction shall go to the Board through its Secretary. The National Capital Territory, Delhi Administration, through its Chief Secretary and Secretary, Industries; State of Haryana through its Chief Secretary and Secretary, Industries: State of Rajasthan through its Chief Secretary and Secretary, Industries; and the State of Uttar Pradesh through its Chief Secretary and Secretary, Industries shall provide all assistance, Help and necessary facilities to the brick kilns which intend to relocate themselves in the industrial estates situated in their respective territories.

4. The allotment of plots, construction of factory, etc. And issuance of any licences/permission etc. Shall be expedited and granted on priority basis.

5. In order to facilitate shifting of brick kilns from Delhi, all the four States constituting the NCR shall set up unified single agency consisting of all the participating States to act as a nodal agency to sort out all the problems of such brick kilns. The single window facility shall be set up by the four states within one month from today. This direction to the four States is through the Chief

Secretaries of the States concerned. The Registry shall convey this direction separately to the Chief Secretaries along with a copy of this judgment. We have no doubt that single window facility has already been provided in terms of this Court's order.

6. The use of land which would become available on account of shifting/relocating of the brick kilns shall be permitted in terms of the orders of this Court dated 10.5.1996 in M.C. *Mehta v. Union of India.*

7. The shifting brick kilns on their relocation in the new industrial estates shall be given incentives in terms of the provisions of the Master Plan and also the incentives which are normally extended to new brick kilns in new industrial estates.

8. The closure order with effect from 30.6.1997 shall be unconditional. Even if the relocation of brick kilns is not complete they shall stop functioning in Delhi with effect from 30.6.1997.

9. The workmen employed in the above-mentioned 246 brick kilns shall be entitled to the rights and benefits as indicated hereunder:

   (a) *The workmen shall have continuity of employment at the new town and place where the brick kiln is shifted. The terms and conditions of their employment shall not be altered to their detriment.*

   (b) The period between the closure of the brick kilns in Delhi and its restart at the place of relocation shall be treated as active employment and the workmen shall be paid their full wages with continuity of service.

   (c) All those workmen who agree to shift with the brick kilns shall be given one year's wages as "shifting bonus" to help them settle at the new location.

   (d) The workmen employed in the brick kilns which fail to relocate and the workmen who are not willing to shit along with the relocated brick kilns, shall be denied to have been reached with effect from 30-6-1997 provided they have been in continuous service (as defined in Section 25-B of the Industrial Disputes Act, 1947), for not less than one year in the brick kilns concerned before the said date. They shall be paid compensation in terms of Section 25-F (b) of the Industrial Disputes Act, 1947. These workmen shall also be paid, in addition, one year's wages as additional compensation in terms of Section 25-F (b) of the Industrial Disputes Act, 1947. These workmen shall also be paid, in addition, one year's wages as additional compensation.

   (e) The "shifting bonus" and the compensation payable to the workmen in terms of this judgment shall be paid by the management before 30.6.1997.

   (f) The gratuity amount payable to any workman shall be paid in addition.

7. As directed above, all the brick kilns shall stop operating in the Territory of Delhi so far as their existing method of manufacturing bricks is connected with effect from 30.6.1997 in writing to the NCT, Delhi Administration, through Secretary, Environment and also to the Delhi Pollution control Committee through its Secretary that the brick kiln concerned intends to shift to the new technology of manufacturing bricks by flyash-sand-lime technology. The Delhi Pollution Control Committee shall monitor the setting up of the new project by the brick kiln concerned. After obtaining the consent and no objection certificate from the Delhi Pollution Control Committee and also by the Central Board, the brick kiln concerned is permitted to operate at the same site, if it is permitted under law. We direct the NCT, Delhi Administration to render all possible assistance to the brick kiln owners to change over to the new technology and in the setting up of the modern plants with flyash-sand-lime technology.

M. C. Mehta v. Union of India
AIR 1998 Supreme Court 186
Writ Petition (Civil) No. 13029 of 1985, D/-20-11-1997
J.S. Verma, C.J.I., B.N. Kirpal and V.N. Khare, JJ.

Motor Vehicles Act (59 of 1988), Chaps. 4, 5, 8, 13 - Management and control of traffic - Is matter of public safety and fall within ambit of Article 21 of Constitution - Implementation of strict measures - Existing provisions in Act are sufficient to cloth members of police force and transport authorities with ample powers - Inadequacy of personnel and other infrastructure may be constraint - Thus Supreme Court empowered existing authority to delegate their authority to responsible persons including persons chosen even from public for urgent implementation of measures.

Constitution of India, Art. 21.

The existing provisions in the Act alone are sufficient to clothe the members of the police force and the transport authorities with ample powers to control and regulate the traffic in an appropriate manner so that regulate the traffic in an appropriate manner so that no vehicle being used in a public place poses any danger to the public in any form. The requirement of maintaining the motor vehicles in the manner prescribed and its use if roadworthy in a manner which does not endanger public, has to be ensured by the authorities and this is the aim of these provisions enacted in the Act. This conclusion can be reached even without reference to the general powers available to the Police officers under the Police Act and the Code of Criminal Procedure. It is also to be noted that that to overcome the situation when the strength of the police force is not adequate in a given area and the utilization of more men is required for strict enforcement of these salutary provisions, the law confers power of delegation of the authority to other persons. It is a fact that the inadequacy of personnel and other infrastructure may be a constraint which has impeded strict enforcement of these provisions so far. In view of the clarification

made in this order, the Supreme Court expected that, the concerned authorities would mobilize the needed support by delegations of these powers to other authorities/officers and if need be even to responsible members of the public so that the resource crunch or inadequacy of infrastructure is not an impediment in enforcement of the law and the directions given by the Court to obtain the desired results. No doubt, it is for the Government to make a realistic assessment of the strength of police force and Transport Department force to meet the felt need in this behalf but the Court considered it expedient to add that to overcome that deficiency/inaction, this order is to be construed as empowering the existing authorities to delegate their authority, wherever permissible under the law, to responsible persons in the manner they deem fit in the circumstances. In view of the urgency of implementation of these measures, it is also made clear that for the purpose of such delegation to responsible persons chosen even from the public, these authorities would not suffer from any constraint and this, order is sufficient empowerment to them in this behalf notwithstanding any administrative orders imposing any impediment or constraint on them, if any.

(Paras 12, 13)

The entire scope of the matter and particularly the control and regulation of traffic is matter of paramount public safety and therefore, is evidently within the ambit of Art. 21 of the Constitution.

(Para 14)

ORDER: - One of the aspects covered by this writ petition relates to proper management and control of the traffic in the National Capital Region (NCR) and the National Capital Territory (NCT), Delhi to ensure the maximum possible safeguards which are necessary for public safety. The problem is too obvious to require elaboration and the need for urgent measures to prevent any further delay in enforcement at least of the existing provisions of law is imperative. The need is accentuated by the alarming rise in the number of road accidents and the resulting deaths and bodily injuries caused thereby. The most recent tragedy in which a school bus broke the parapet of a bridge and fell into the river a couple of days back does not permit any further delay in taking urgent measures in this behalf. For this reason, in addition to the assistance we have been given by the learned amicus curiae, the Additional Solicitor General and the Bar in general. We considered it appropriate to also require the presence of the Chief Secretary Mr. P. V. Jaikishan, the Police Commissioner Mr. T. K. Kakkar and the Commissioner (Traffic) Ms. Kiran Dhingra, to examine the matter at some length.

2. Having heard all of them and after taking into account the various suggestions which have been given at the hearing, we find that there are adequate provisions in the existing law which, if properly enforced, would take care of the immediate problem and to an extent eliminate problem and to a great extent eliminate the reasons which are the cause of the road accidents in NCR and NCT, Delhi. In view of the fact that the above officers expressed some doubt about the extent of powers of the concerned authorities to take adequate and suitable measures for speedy enforcement of these provisions and the remedial steps needed to curb the growing menace of unregulated and disorderly traffic

on the roads, we consider it expedient to clarify that position in this order with reference to the relevant provisions of the existing law. It is obvious that it is primarily for the Executive to devise suitable measures and provide the machinery for rigid enforcement of those measures to curb this menace. However, the inaction in this behalf of the Executive in spite of the fact that this writ petition is pending since 1985 and the menace instead of being controlled continues to grow in perpetuation of this hazard to public safety, it has become necessary for this Court to also issue certain directions which are required to be promptly implemented to achieve the desired result. It is needless to add that these directions are to remain effective till such time as necessary action in this behalf is taken by the concerned Executive authorities so that the continuance thereafter of these directions may not be necessary.

3. In our opinion, the provisions of the Motor Vehicles Act, 1988, in addition to the provisions in the existing laws, for example, the Police Act and the Code of Criminal Procedure, confer ample powers on the authorities to take the necessary steps to control and regulate the road traffic and to suspend/cancel the registration or permit of a motor vehicle if it poses threat or hazard to public safety. It need hardly be added that the claim of any right by an individual or even a few persons cannot override and must be subordinate to the larger public interest and this is how all provisions conferring any individual right have to be construed. We may now refer to some provisions of the Motor Vehicles Act, 1988 (for short "the Act") which are relevant for the purpose.

4. Section 2(47) defines "transport vehicle" to mean a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle. Each one of these vehicles is separately defined in other sub-sections of Section 2. Sub-section (28) defines "motor vehicle". In short, the definitions contained in Section 2 of the Act cover all kinds of vehicles which ply on the roads so that they are all governed by the provisions of the Act.

5. Chapter II relates to licensing of drivers of motor vehicles wherein Section 19 confers power on the licensing authority to disqualify any person from holding a driving license or revoke such license. A few of the grounds on which this power (sic) been used in commission of a cognizable offence: When the previous conduct as driver of a motor vehicle has shown that his driving is likely to be attended with danger to the public or when he has committed any such act which is likely to cause nuisance or danger to the public, etc. These general grounds alone are sufficient to indicate that any person who poses any threat or is likely to cause nuisance or danger to the public can be disqualified and his license revoked.

6. Chapter IV deals with the registration of motor vehicles wherein Section 39 prescribes the necessity for registration. It says that unless the vehicle is registered in accordance with the provisions of the Act, it cannot be driven in any public place. The responsibility to ensure that such a vehicle is not driven is not merely on the person driving the vehicle but also on the owner of the vehicle. Section 45 permits refusal of registration or renewal of the certificate of registration *inter alia* on the ground that the vehicle is mechanically defective or fails to comply with the requirements of the Act or the rules made there under. It is obvious that the vehicle must be roadworthy in the sense that there is no

mechanical defect therein to permit it being used as a motor vehicle. The necessity of complying with all the requirements makes it clear that any requirement which is specified under the Act or by the rules, has to be fully complied with and such a requirement would include the requirement of specified category of motor vehicles being fitted with speed governors or such other devices as may be prescribed by law. Section 53 permits suspension of registration by the registering authority or other prescribed authority if it has reason to believe that any motor vehicle is in such a condition that its use in a public place would constitute a danger to the public or that it fails to comply with the requirement of this Act or of the rules made there under. It is significant that this power to suspend the registration is available to the authority even if the condition of the motor vehicle is found to be such that its use in a public place would constitute a danger to the public, irrespective of whether that is a specific requirement of the Act or the rules. The conferment of this power is for the obvious reason that a motor vehicle which is considered to be unsafe or which poses a danger to the public in a public place, if driven, should not be permitted to ply at a public place since the paramount need is public safety. It is, therefore, clear that even if speed governors are not prescribed for a particular class of motor vehicles by any requirement of the Act or the rules made there under, it is permissible for the concerned authority to require the fitting of the speed governors in such motor vehicles for the purpose of ensuring that there is no danger to the public by the use of such a motor vehicle in a public place. The power under Section 53 to this extent is wider. Section 53 read with Section 45 leaves no doubt about the amplitude of power of the concerned authorities whose duty it is to control and regulate the traffic in public places. The basic test to be applied by them for exercise of this power is the need to ensure that there is no danger to the public by use of any motor vehicle in a public place.

7. It is indisputable that heavy and medium vehicles as well as light goods vehicles are in a class by themselves insofar as their potential to imperil public safety is concerned. There is, therefore, immediate need to take measures such as installation of speed control devices and ensuring that such vehicles are driven by authorized persons. Such measures, designed to further public safety, would undoubtedly be covered by the aforementioned provisions.

8. Chapter V relates to control of transport vehicles, Section 66 prescribes the necessity of a permit without which the vehicle cannot be used in any public place. Section 84 deals with general conditions attaching to all permits. These conditions are deemed to be incorporated in every permit and do not require any additional or further mention thereof in each permit. Some of the significant general conditions are that the vehicle is at all times to be so maintained as to comply with the requirements of the Act and the rules made there under; and that the vehicle is not driven at a speed exceeding the permitted speed. Section 86 provides for cancellation and suspension of permits. The authorities are empowered to cancel or suspend the permit on the breach of any of the general conditions specified in Section 84 or any other condition when contained in the permit. Both these provisions are to be read with Section 56 which provides for certificate of fitness of transport vehicles. We may also refer to sub-section (4) of Section 86 which permits exercise of the power of cancellation and suspension of permit by the transport authority

or any authority or person to whom such powers are duly delegated. The provision to enable delegation of these powers is obviously to make it workable in case the jurisdiction of the transport authority is so large, as in the case of NCR and NCT, Delhi, so that the need is of several persons to exercise this authority.

9. Chapter VIII deals with the control of traffic. Section 112 pertains to limits of speed and prohibits driving of a motor vehicle or it being allowed to be driven in any public place at a speed exceeding the maximum permissible speed.

10. Chapter XIII relates to offences, penalties and procedure. Section 117 contains the general provisions for punishment of offences which is available in the absence of any specific provision for punishment applicable in a given case. The punishment is a maximum fine of Rs. 100/- for the first offence and for the subsequent offence is only Rs. 300/-. Section 183 provides the punishment for contravention of the speed limits referred in Section 112 and Section 184 provides for punishment for dangerous driving. The maximum punishment provided in all these three Sections has ceased to have any efficacy in the present case and, has, therefore, hardly any deterrent effect. We are informed that some time back Transport Commissioner, Delhi had recommended the raising of the maximum punishment but even the proposal for increase in the amount of maximum fine did not find favour with the Central Government We have no doubt that the very thoughtful proposal made by the Transport Commissioner did not receive the attention it deserved at the level of the Central Government. Taking into account the realities and the chaotic state of road traffic in NCR and NCT, Delhi, we are surprised that any one sitting in Delhi and seeing for himself these conditions, thought it fit not to accept the recommendations made by the Transport Commissioner when in fact the need for increase of the maximum punishment, required in the existing circumstances, is even more.

11. One of the aspects which was considered at length by us was the need to find some stringent and effective measure to at least bring to a halt the danger posed to the public by the continued use of a motor vehicle which is not roadworthy or was being used/driven dangerously. We find that Section 207 takes care of that situation by conferring power on any police officer or other person authorized in this behalf to seize and detain the vehicle if he has reason to believe that the same has been or is being used in contravention of the specified provisions so as to pose a serious threat to the public. The object of enacting such a provision clearly is that such a vehicle cannot be continued to ply once it is found that it poses danger to the public because, in addition to punishing the guilty person for the contravention committed earlier, it is also important and necessary to prevent any further danger to the public by letting the vehicle continue to ply on a public place.

12. In our opinion, the existing provisions in the Act alone are sufficient to clothe the members of the police force and the transport authorities with ample powers to control and regulate the traffic in an appropriate manner so that no vehicle being used in a public place poses any danger to the public in any form. The requirement of maintaining the motor vehicles in the manner prescribed and its use if roadworthy in a manner which does not endanger public, has to be ensured by the authorities and this is the aim of these provisions enacted in the Act. As earlier stated, we reach this conclusion even without

reference to the general powers available to the police officers under the Police Act and the Code of Criminal Procedure.

13. It is also to be noted that to overcome the situation when the strength of the police force is not adequate in a given area and the utilization of more men is required for strict enforcement of these salutary provisions, the law confers power of delegation of the authority to other persons. We are conscious of the fact that the inadequacy of personnel and other infrastructure may be a constraint which has impeded strict enforcement of these provisions so far. We have no doubt that after this clarification made by us in this order, the concerned authorities would mobilize the needed support by delegation of these powers to other authorities/officers and if need be even to responsible members of the public so that the resource crunch or inadequacy of infrastructure is not an impediment in enforcement of the law and the directions given today to obtain the desired results. No doubt, it is for the Government to make a realistic assessment of the strength of police force and Transport Department force to meet the felt need in this behalf but we consider it expedient to add that to overcome that deficiency/inaction, this order is to be construed as empowering the existing authorities to delegate their authority, wherever permissible under the law, to responsible persons in the manner they deem fit in the circumstances. In view of the urgency of implementation of these measures, we also make it clear that for the purpose of such delegation to responsible persons chosen even from the public, these authorities would not suffer from any constraint and this order is sufficient empowerment to them in this behalf notwithstanding any administrative orders imposing any impediment or constraint on them, if any.

14. It is needles for us to add that the entire scope of this matter and particularly this aspect to which this order relates, namely, the control and regulation of traffic in NCR and NCT, Delhi, is a matter of paramount public safety and, therefore, is evidently within the ambit of Article 21 of the Constitution. That being so, the making of this order has become necessary and can no longer be delayed because of the obligation of this Court under Article 32 of the Constitution which is invoked with the aid of Article 142 to give the necessary directions given today separately.

M.C. Mehta v. Union of India
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Writ Petition (Civil) No. 13029 of 1985 (with Writ Petition (Civil) Nos. 9300/82, 939/96, 95/97 and Interlocutory Application Nos. 7, 8, 9 and 10 in Writ Petition. (Civil) No. 13029/85), D/-20-11-1997
J.S. Verma, C.J.I., B. N. Kirpal and V. N. Khare, JJ.

Motor Vehicles Act (59 of 1988), Chap. 8 – Control and regulation of traffic – Enforcement of provisions of Act – Directions issued to police and other authorities – Govt. of India also directed to suitably publicise said directions in print as well as electronic media.

(Para 1)

ORDER:- After hearing learned Counsel for the parties and learned Amicus Curiae, for reasons indicated separately, in exercise of the power of this Court under Article 32 read with Article 142 of the Constitution of India, we hereby give the following directions, namely:

A. the Police and all other authorities entrusted with the administration and enforcement of the Motor Vehicles Act and generally with the control of the traffic shall ensure the following:

(a) No heavy and medium transport vehicles, and light goods vehicle being four wheelers would be permitted to operate on the roads of the NCR and NCT, Delhi, unless they are fitted with suitable speed control devices to ensure that they do not exceed the speed limit of 40 KMPH. This will not apply to transport vehicles operating on Inter-State permits and national goods permits. Such exempted vehicles would, however, be confined to such routes and such timings during day and night as the police/transport authorities may publish. It is made clear that no vehicle would be permitted on roads other than the aforementioned exempted roads or during the times other than aforesaid time without a speed control device.

(b) In our view the scheme of the Act necessarily implies an obligation to use the vehicle in a manner which does not imperil public safety. The authorities aforesaid should, therefore, ensure that the transport vehicles are not permitted to overtake any other four-wheel motorised vehicle.

(c) They will also ensure that wherever it exists, buses shall be confined to the bus lane and equally no other motorised vehicle is permitted to enter upon the bus lane. We direct the Municipal Corporation of Delhi, NDMC, PWD, Delhi Government and DDA. Union Government and the Delhi Cantt. Board to take steps to ensure that bus lanes are segregated and roads markings are provided on all such roads as may be directed by the police and transport authorities.

(d) They will ensure that buses halt only at bus stops designated for the purpose and within the marked area. In this connection also Municipal Corporation of Delhi, NDMC, PWD, Delhi Government, DDA and Union of India and Delhi Cantt. Board would take all steps to have appropriate bus stops constructed, appropriate markings made, and 'bus-bays' built at such places as may be indicated by transport/police authorities.

(e) Any breach of the aforesaid directions by any person would, apart from entailing other legal consequences, be dealt with as contravention of the conditions of the permit which could entail suspension/cancellation of the permit and impounding of the vehicle.

(f) Every holder of a permit issued by any of the road transport authorities in the NCR and NCT, Delhi well within ten days from today, file with its

RTA a list of drivers who are engaged by him together with suitable photographs and other particulars to establish the identity of such persons. Every vehicle shall carry a suitable photograph of the authorised driver, duly certified by the RTA. Any vehicle being driven by a person other than the authorised driver shall be treated as being used in contravention of the permit and the consequences would accordingly follow.

No bus belonging to or hired by an educational institution shall be driven by a driver who has

- less than ten years of experience;
- been challenged more than twice for a minor traffic offence;
- been charged for any offence relating to rash and negligent driving.

All such drivers would be dressed in a distinctive uniform, and all such buses shall carry a suitable inscription to indicate that they are in the duty of an educational institution.

(g) To enforce these directions, flying squads made up for inter-departmental teams headed by an SDM shall be constituted and they shall exercise powers under Section 207 as well as Section 84 of the Motor Vehicles Act.

The Government is directed to notify under Section 86 (4) the officers of the rank of Assistant Commissioners of Police or above so that these officers are also utilised for constituting the flying squads.

(h) We direct the police and the transport authorities to consider immediately the problems arising out of congestion caused by different kinds of motorised and non-motorised vehicles using the same roads. For this purpose, we direct the police and transport authorities to identify those roads which they consider appropriate to be confined only to motorised traffic including certain kind of motorised traffic and identify those roads which they consider unfit for use by motorised or certain kinds of motorised traffic and to issue suitable directions to exclude the undesirable form of traffic from those roads.

(i) The civil authorities including DDA, the railways, the police and transport authorities, are directed to identify and remove all hoardings which are on roadsides and which are hazardous and a disturbance to safe traffic movement. In addition, steps be taken to put up road/traffic signs which facilitate free flow of traffic.

B. We direct the Union of India to ensure that the contents of this Order are suitably publicised in the print as well as the electronic media not later than November 22, 1997 so that every body is made aware of the directions contained in the Order. Such publication would be sufficient public notice to all concerned for due compliance.

C. We direct that this Order will be carried out notwithstanding any other order or directions by any authority. Court or Tribunal, and that no authority shall interfere with the functioning of the police and transport department insofar as implementation and execution of these directions is concerned.

List on 9th December, 1997.

A report of compliance be submitted on or before 8th December, 1997.

Order accordingly.

M. C. Mehta v. Union of India
AIR 1998 Supreme Court 617
Writ Petition (Civil) No. 13029 of 1985 with Writ Petition (Civil) Nos. 9300/82, 939/96, 95/97 and I. A. No. 7 in Writ Petition (Civil) No. 13029/85, D/-7-1-1998
J. S. Verma, C. J. I., B. N. Kirpal and V. N. Khare, JJ.

Environment Protection Act (29 of 1986), S. 3(1)(2) – Environment Pollution (Prevention and Control) Authority – Constitution of regular committee for National Capital Region by Central Govt. under S. 3 – Committee constituted headed by former Judge of Allahabad High Court pursuant to order dated 13th Sept., 1996 passed by Court in writ petition being an ad hoc arrangement, discontinued – Continuance of two authorities with concurrent jurisdiction in any area is bound to create conflict of jurisdiction – Work pending with earlier authority headed by former Judge of Allahabad High Court automatically gets transferred to regular committee on its constitution.

(Paras 2, 3)

Environment Protection Act (29 of 1986), S. 3 – Environment Pollution (Prevention and Control) Authority – Constitution of – Draft order prepared by Govt. of India – Approved by Supreme Court – Court, however, clarified that except for Chairman, Central Pollution Control Board who would be ex-officio member of the authority other persons included in the Committee would be members not because of their office but because of their personal qualifications.

(Para 1)

M. C. Mehta v. Union of India
AIR 1998 Supreme Court 773
Writ Petition (Civil) No. 13029 of 1985 with Writ Petition (Civil) Nos. 939 of 1996 and 95 of 1997, D/-13-1-1998
J. S. Verma C. J. I., Dr. A. S. Anand and B. N. Kirpal, JJ.

Environment Protection Act (29 of 1986), S. 3 (3) - Environment Pollution (Prevention and Control) Authority - Statutory Committee constituted pursuant to

earlier order dated 7th January, 1998 - Powers and jurisdiction - Order as to in 1998 AIR SCW 218 clarified.

(Paras 2, 3)

ORDER:- We have heard the learned Attorney General and the learned Amicus Curiae. The learned Attorney General has pointed out that the *ad hoc* Committee set up pursuant to this Court's order dated 13th September, 1996 in IA No. 18 in WP (C) 4677 of 1985 headed by Mr. Justice R. K. Shukla is no longer necessary after the constitution of the Authority under S. 3 (3) of the Environment Protection Act headed by Shri Bhure Lal but there may be some matters pertaining to environment which may be out side the scope of the authority of the Bhure Lal Committee and be required to be dealt with by the concerned Statutory Authority. It is submitted that a clarification to this effect may be made of our order dated January 7, 1998 (reported in 1998 AIR SCW 218). We are satisfied that this clarification of our earlier order is necessary.

2. Accordingly, our order of January 7, 1998 shall be read with the following modification/addition:

> "In case there are certain matters which are outside the scope of the authority of Bhure Lal Committee constituted under S. 3 (3) of the Environment Protection Act, the same shall be dealt with by the concerned Statutory Authorities. To avoid any ambiguity in this regard, we make it clear that on the Writ Petition 13029 constitution of the Committee, headed by Shri Bhure Lal as an authority under S. 3 (3) of the Act, the earlier *ad hoc* Committee headed by Mr. Justice Shukla would cease to exist."

3. This addition is to be treated as inserted in internal page 4 of the order dated 7th January, 1998 in the paragraph beginning with the words 'In view of this order' after the words 'Committee headed by Shri Bhure Lal on its Constitution,' and before the sentence beginning with the words 'We also place on record our appreciation of the work done by Mr. Justice R. K. Shukla.'

M. C. Mehta v. Union of India
AIR 1998 Supreme Court 2340
Writ Petition No. 13029 of 1985 with Writ Petition Nos. 639 of 1996 and 95 of 1997, D/- 12-5-1998
Dr. A. N. Anand, B. N. Kirpal and V. N.Khare, JJ.

Constitution of India, Articles 47, 48A – Vehicular pollution – Control of – Directions given by Supreme Court in that regard – Non compliance – Court directed counsel of parties to give list of persons who may be appointed as Court Officers to suggest manner in which they can assist administration to carry out their obligations – Affidavits also directed to be filed by Ministry of Petroleum and of Surface Transport to disclose steps taken by them for supply of lead free petrol –

Pollution Control Committee also directed to submit report regarding steps taken by them for controlling vehicular pollution.

(Paras 2, 3, 4)

ORDER:- This Court has, keeping in view the mandate of Articles 47 & 48A of the Constitution of India, issued directions from time to time with a view to tackle the problem arising out of chaotic traffic conditions and vehicular pollution. We are not satisfied with the performance of the concerned authorities in tackling the acute problem of vehicular pollution and traffic regulations in Delhi. Environmental protection appears to have taken a back seat. In fact we are distressed to find that the directions given by this Court, from time to time, have not evoked the response they were expected to evoke. When this Court gave those directions it treated it as a legal issue and proceeded to examine the impact of the right flowing from Article 21 of the Constitution of India *vis-a-vis* decline in environmental quality. Law casts an obligation on the State to improve public health and protect and improve the environment. The directions issued by this court were aimed at making the State to effectively discharge their obligations. In their response the Delhi Administration and the Union of India have pleaded, among other factors lack of manpower to deal with the growing menace of chaotic traffic and decline in the environmental quality.

2. The directions issued by this Court are meant to be complied with and we wish to emphasise that it is the obligation of the State to comply with the same. On our part, we are considering the desirability of appointing Court Officers to assist the administration with a view to ensure compliance of the directions issued by this Court. Article 144 of the Constitution of India provides, "All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court." We have suggested to learned counsel for the parties to give us a list of persons from every colony/area in each of the 9 Police Districts of Delhi, who may be appointed as such Court Officers and suggest the manner in which they can assist the administration to carry out its obligations. This exercise by the Court, we clarify would be with a view to supplement and augment the efforts of the Delhi Administration and the Union of India to deal with the acute problem. Let the needful be done within ten weeks.

3. The learned Additional Solicitor General is also directed to have affidavits filed from the Ministry of Petroleum and Ministry of Surface Transport to disclose the steps taken for supply of lead free petrol and the use of catalytic converter on the new as well as existing vehicles so as to use lead free petrol through out the country. The status report in this behalf together with the affidavits shall be filed within ten weeks.

4. On 7th January, 1998 a committee had been constituted under the Chairmanship of Shri Bhure Lal, known as "Environment Pollution (Prevention and Control) Authority for the National Capital Region." We have so far not received any report from that Committee. A direction shall issue to the Committee to submit a report about the action taken by the Committee for controlling vehicular pollution and the concerned matters.

The Committee may also submit a draft action plan to tackle the situation. The needful shall be done within ten weeks.

5. List the matters after ten weeks.

Order Accordingly.

M.C. Mehta v. Union of India
AIR 1998 Supreme Court 2963
Writ Petition (Civil) No. 13029 of 1986 with Writ Petition No. 939 of 1996, D/-28-7-1998
Dr. A. S. Anand, B. N. Kirpal and V. N. Khare, JJ.

Constitution of India, Art. 32 Vehicular pollution – Steps to be taken immediately for control of – Directions given for implementing them – Further measures proposed by committee and time frame fixed by it for its implementation – Approved by Supreme Court – Directions given to strictly adhere to same and to take effective and adequate steps to notify the public.

Motor Vehicles Act (59 of 1988), S. 110.

(Paras 2, 4)

JUDGMENT: - Realising the urgency and importance of protection and improvement of the environment, this Court has given directions from time to time and impressed upon the authorities to take urgent steps to tackle the acute problem of vehicular pollution in Delhi. Assurances have been held out to the Court through various affidavits filed by the competent officers that effective steps shall be taken in a phased manner within a specified time span. In spite of the matter having engaged the attention of this Court for a long time and lengthy debates on each hearing, precious little appear to have been done by the State administration to check and control the vehicular pollution. We are rather distressed at this apathy of the State Administration, when according to the White Paper published by the Government of India, the vehicular pollution contributes 70% of the air-pollution as compared to 20% in 1970. In the White Paper published by the Government of India, a dead – line of 1st April, 1998 had been proposed for implementation of major actions. No concrete steps have however, been taken till date in spite of the assurances held out in the affidavit dated November 18, 1996.

2. We find from the report submitted by the Authority appointed vide Gazette. Notification dated 29th January, 1998 that none of the major actions, as proposed, has been implemented. The Authority headed by Shri Bhure Lal has also proposed certain measures for immediate improvement of air quality and has given a time frame but for the time being we are not engaging our attention to that time frame. We are, however, of the view that to arrest the growing pollution of air certain steps need to be taken immediately. We, therefore, direct:-

1. Implementation of directions to restrict plying of commercial vehicles including taxis, which are 15 years old, by 2nd October, 1998.

2. Restriction on plying of goods vehicles during the day time shall be strictly enforced by 15th August, 1998.

3. Expansion of pre-mixed oil dispensers (petrol and 2T oil) shall be undertaken by 31st December. 1998.

4. Ban on supply of loose 2T oils at petrol stations and service garages shall be enforced by 31st December, 1998.

3. The Committee headed by Shri Bhure Lal has also proposed the following measures within the time frame in its action taken report filed in the Court.

		Time frame
A)	Augmentation of public transport (stage carriage) to 10,000 buses.	1-4-2001
B)	Elimination of leaded petrol from NCT Delhi as proposed by the Authority and agreed to by the Ministry of Petroleum & Natural Gas.	1-9-1998
C)	Supply of only pre-mix petrol in all petrol filling stations to two-stroke engine vehicles.	31-12-1998
D)	Replacement of all pre-1990 autos and taxis with new vehicles on clean fuels.	31-03-2000
E)	Financial incentives for replacement of all post-1990 autos and taxis with new vehicles on clean fuels.	31-03-2001
F)	No 8-year old buses to ply except on CNG or other clean fuels.	01-04-2000
	Entire city bus fleet (DTC & private) to be steadily converted to single fuel made on CNG.	31-03-2001
G)	New ISBT s tube built at entry points in North and South-West to avid pollution due to entry of inter-state buses.	31-03-2000
H)	GAIL to expedite and expand from 9 to 80 CNG supply outlets.	31-03-2000
J)	Two independent fuel testing labs. to be established.	01-06-1999

K)	Automated inspection and maintenance facilities Immediate to be set up for commercial vehicles in the first phase.	
L)	Comprehensive I/M programme to be started by transport department & private sector.	31-03-2000
M)	CPCB/DPCC to set up new stations and streng-then existing air quality monitoring stations for critical pollutants.	01-04-2000

4. We approve the directions given and the time frame fixed by Shri Bhure Lal Committee. The time frame, as fixed by that Committee and today by this Court, in consultation with learned counsel for the parties, shall be strictly adhered to be all the authorities who shall also take effective and adequate steps to bring, to the notice of the public, both through print and electronic media various directions issued by this Court from time to time in general and the directions hereinabove contained in particular. Report in this behalf shall be filed in the Court within four weeks. We, administer, a strong caution to all concerned that failure to abide by any of the directions hereinabove noticed would invite action under the Contempt of Courts Act against the defaulters.

Order accordingly

M. C. Mehta v. Union of India
AIR 1998 Supreme Court 2605
Writ Petition (Civil) No. 13381 of 1984 (with Interlocutory Application No. 38 of 1987), D/-19-1-1998
S. Saghir Ahmad and M. Jagannadha Rao, JJ.

Ancient Monuments Preservation Act (7 of 1904), S. 5 – Protection of Taj Mahal, an Ancient Monument – Ambient Air Quality Monitoring Station set up by Archaeological Survey – U. P. State Electricity Board directed to sanction 15 KV load to monitoring station and to set up independent feeder line to ensure continuous power supply – Archaeological Survey directed to set up automatic monitoring equipments within four months.

(Paras 1, 2)

ORDER: -

1. The U.P. State Electricity Board in treating the Ambient Air Quality Monitoring Station at the Taj Mahal set up by the Archaeological Survey of India as an ordinary consumer is rather distressing. It is stated that continuous power supply cannot be made to this monitoring station, as they have got only 2 K.V. load. It is further stated that if they apply for 15 K.V. load, the U.P. State Electricity Board will have to provide an independent feeder line through which continuous power supply can be made to the

monitoring station. It is also pointed out by the learned counsel appearing on behalf of the Board that, if the monitoring station installs inverters, then also continuous power supply can be ensured.

Having regard to the fact that the whole purpose of this proceeding is to protect the monument and the setting up of the Ambient Air Quality Monitoring Station at the Taj Mahal was part of the entire job, we direct the U.P. State Electricity Board to sanction 15 K.V. load to the monitoring station and also to set up an independent feeder line for continuous power supply to the station without requiring the monitoring station to formally apply for the sanction of this load. The cost involved in this project shall be borne equally by the U.P. State Electricity Board and the Union of India, for which purpose the officers of the Board and the Government of India in the Ministry of Environment, and the Archaeological Survey of India will chalk out a program, so that the entire project is completed within two months. In the meantime, the Board will install inverters on the monitoring station at their own expenses, as a short-term measure.

2. The affidavit filed on behalf of the Director General, Archaeological Survey of India dated 9th September, 1997 states that efforts are being made by them in running the Ambient Air Quality Monitoring Station at the Taj Mahal. They have made a prayer for granting 10 months time for doing the needful regarding the installation of automatic monitoring equipments. Four months' time is allowed to set up the Automatic Monitoring Equipments at the Air Pollution Monitoring Station.

Order Accordingly.

Mrs. Manju Bhatia v. New Delhi Municipal Council
AIR 1998 Supreme Court 223 (From: Delhi)
Civil Appeal No. 3694 of 1997 (arising out of Special Leave Petition (Civil) No. 21213 of 1996), D/-6-5-1997
K. Ramaswamy, S. Saghir Ahmad and G. B. Patnaik, JJ.

(A) Constitution of India, Art. 226 – Equity – Law of – Its role in field of tort and equity – Discussed.

(B) Constitution of India, Art. 226 – Rule of Equity – Applicability – Building constructed and flats therein sold – Some floors of building subsequently demolished on ground of unauthorised construction – Flat owners were not informed of illegal construction – Entitled to be re-compensated for loss suffered by them – Builder directed to pay back to flat owners amount paid by them plus certain amount on account of escalation of price.

In the case of tort liability arising out of contract equity steps in and tort takes over and imposes liability upon the defendant for unquantified damages for the breach of the duty owned by the defendant to the plaintiff. Equity steps in and relieves the hardships of the plaintiff in a common law action for damages and enjoins upon the defendant to make the damages suffered by the plaintiff on account of the negligence in the case of the duties or

breach of the obligation undertaken or failure to truthfully inform the warranty of title and other allied circumstances. In the instant case, four floors were unauthorisedly constructed and came to be demolished by the Municipal Council. The owners of the flats were not informed of the defective or illegal construction and they were not giving notice of caveat emptor. Resultantly, they were put to loss of lacs of rupees they have invested and giving as values of the flats to the builder-respondent.

Held, the flat-owners should be recompensated for the loss suffered by them. Taking into consideration the escalated price which was around 1.5 crores and totality of the facts and circumstances, the Court directed the builder-respondent to pay Rs. 60 lacs including the amount paid by the allottees, within a period of six months.

Paras 11, 12

Cases Referred:	**Chronological paras**
(1936) KB 399: 154 LT 365: 105 LJ KB 309, Jarvis v. Moy, Davies, Smith Vandervell and Co.	10
(1980) P344 (C.A.), The Kingsway	7
(1868) L R 3 HL 330, Rylands v. Fleatcher	7

JUDGMENT: Leave granted.

2. We have heard learned Counsel on both sides.

3. The admitted facts are that the builder impleaded as one of the respondents, after obtaining the requisite sanction, built 8 floors (including ground floor) on November 22, 1984 as per the guidelines which permitted 150 F.A.R. with the height restriction of 80 feet. The construction of the building known as "White House", came to be made and the possession of the flats was delivered to the purchasers, the appellant being one of them. At a later stage, it was found that the builder constructed the building in violation of the Regulations. Consequently, the flats of the top four floors were demolished. The demolition came to be challenged by way of the writ petition in the High Court. The High Court dismissed the same. Thus this appeal by special leave.

4. Before we go into the controversy involved, it would be appropriate and advantages us at this stage to refer and discuss the law of equity and its rule in the field of tort and equity.

5. In Hanbury and Martin's Modern Equity (14th Edn., 1993) by Jill E. Martin, at page 3 it is stated, on the "General Principles of Equity" that "equity" is a word with many meanings. In a wide sense, it means that which is fair and just, moral and ethical; but its legal meaning is much narrower." "Developed system of law has ever been assisted by the introduction of a discretionary power to do justice in particular cases where the strict rules of law cause hardship. Rules formulated to deal with particular situations may subsequently work unfairly as society develops. Equity is the body of rules which evolved to mitigate the severity of the rules of the common law". Principles of justice and conscience are the basis of equity jurisdiction, but it must not be thought that the contrast between law and equity is one between a system of strict rules and one of broad

discretion. Equity has no monopoly of the pursuit of justice. Equitable principles are rather too often bandied about in common law Courts as though the Chancellor still had only the length of his own foot to measure when coming to a conclusion. Lord Radclifee, speaking of common laywers, said that equity lawyers were "both surprised and discomfited by the plenitude of jurisdiction the imprecision of rules that are attributed to 'equity' by their more enthusiastic colleagues". Just as the common law has escaped from its early formalism, so over the years equity has established strict rules for the application of its principles. Indeed, at one stage the rules became so fixed that a "rigor aequitati" developed; equity itself displayed the very defect which it was designed to remedy. Will see that today some aspects cquity are strict and technical, while others leave considerable discretion to the Court.

6. "Hudson's Building and Engineering Contracts (10th Edn.) by I. N. Duncan and Wallace defines "building contract" as "an agreement under which a person undertakes for reward to carry out, for another person, variously referred to as to the building owner or employer, works of a building or civil engineering character." In the typical case, the work will be carried out upon land of the employer or building owner, though in some special cases obligation to build may arise by contract where that is not so, eg; under building leases and contracts for the sale of land with a house in the course of erection upon it. M.A. Sujan in "Law Relating to building contracts" (2nd Edn.) quotes in para 3.3 Keating's definition of "building contracts" according to which they include "any contract where one person agrees for valuable consideration to carry out building or engineering work for another". He also quotes Gajria's definition thus: "Building contract is defined as contract containing an exact and minute description of the terms, account or remuneration of particulars for the construction of a building". He further quotes thus: "A building or engineering contact is a legally binding agreement which has for its subject-matter or principal subject-matter, the conditions intended to govern the erection of a proposed building or the execution of works of engineering construction; and by which one person or body of persons, undertakens, for a consideration, to erect or construct for another, such works in conformity with the design of the proposed building to be erected by one party on the land of the other and for the latter's benefit. The terms 'contract' and 'agreement' when applied to building and engineering works, have the same legal significance. But in practice, the terms 'building contract' and 'engineering contracts' are used in reference to works to be done for the use and benefit of the landowner, whereas a 'building agreement' is one whereby a lease or other interest in the land is to be immediately granted to the contractor upon completion of the building". Hudson at page 68 has stated that wherever a contractor is liable to a third person in this way, the building owner may also be vicariously liable for the builder's acts or omissions, or perhaps more correctly, will be a joint tortfeasor. At Page 579, under Section 2 dealing with "Damages", he has stated that "Under the complicated provisions of many building contracts the possible breaches of contract by the contractor are numerous, and in each case the general principles set out above must be applied in order to determine what, if any, damage is recoverable for the breach in question. Typical breaches of the less common kind are, for example, unauthorised sub-contracting, failure to insure as required, failure to give notices, payment of unauthorised wages, and so on, which,

depending on the particular circumstances of the case, may or may not cause damage. The commonest breaches causing substantial damage, and hence giving rise to litigation, may be broadly divided into three categories, namely, those involiving abandonment or total failure to complete, those involving delay in completion, and those involving defective work. At page 580, the learned author has stated thus : "In the case of defective work it should also be remembered that the final certificate may, in the absence of an overriding arbitration clause, bind the employer and prevent him from alleging defective work altogether, and many contracts where no architect is used, particularly private-developer sales (or sales of houses "in the course of erection") may, depending on their terms, extinguish liability upon the later conveyance under the caveat emptor principle". The Principle has been dealt with at page 289 stating as under : "The courts, in their desire to escape from the rule of fitness for habitation upon the purchase of a new house from a builder if the house is completed at the time of the contract of sale, have been able to justify a refusal to apply the rule of caveat emptor by finding than at the time of sale the hose was "in the course of erection", and frequently apply the implied term as to habitability to house which are virtually completed at the time of sale. Furthermore, while it might at first sight seem logical that the warranty of fitness should extend only to the work uncompleted at the of sale, this difficulty has been brushed aside, and once a building has been held to be in the course of erection, the warranty has been applied to the whole building including work already done.

7. In Mcgregor on Damages, the Common Law Library No. 9 (14th Edn.) by Harvey Mcgregor at page 683, it is stated that "(P)hysical damage to or destruction of goods may result from a large variety of very different torts of which trespass in the oldest and negligence the most prolific, and which includes torts involving, or bordering upon strict liability, as where the damage or destruction results from nuisance, by reason of damagerous premises, goods or animals in the defendat's control, from his non-natural user of land under the rule in Rylands v. Fletcher (1868) LR 3 HL 330, or from breach of statutory obligation giving rise to an action in tort..... Not only are most of the cases actions of negligence but most of those in which questions of the measure of damages have been worked out have involved damage to or destruction of ships generally by collision. The principles expounded in these cases are however of universal application. "Three is no special measure of damages applicable to a ship", Said Pickford L.J. in the Kingsway ((1918) P 344, 356 (CA)), different from the measure of damages applicable to any other chattel. The nature of the thing damaged may give rise to more difficult questions in the assessment of damages but it does not change the assessment in any way". The normal measure of damages, stated in para 998 at page 684, is the amount by which the value of the goods damaged has been diminished.

8. In the Modern Law of Tort by K.M. Stanton (Sweet and Maxwell) (1995 Edn.) at pages 4-5, it is stated that "(C)ontract and tort are the two main areas of the English law of obligations. Contractual duties are based on an agreement whereby one person is to provide benefits for another in return for some form of benefit, whether in money or otherwise. Tort dutes are imposed by operation of law and may be owed to a wide range of persons who may be affected by actions.... A question which is commonly asked in this context is whether a plaintiff who is in a contractual relationship with the defendant

can invoke tort in order to benefit his case when there has been a breach of contract. There are a number of reasons relating to damages and limitation of actions which may make it advantageous to switch a claim out of contract and into tort". At page 9, it is stated under the heading "Breach of trust and other equitable obligations" that "(R)emedies for breach of trust or other equitable obligations, even though they may result in purely financial awards, are excluded from the law of tort. The reason for this is basically historical; tort derives from the work of common law courts whereas the Court of Chancery, developed completely separate equitable principles." At page 334, it is stated by the author that "the issue of the recovery of pure economic loss also raises fundamental questions concerning the relationship between contract and tort and, in particular, the forms of loss which are recoverable in the different kinds of action. The central question in this debate is whether the tort of negligence has the capacity to provide a remedy for defective quality in the case of buildings and chattels. The traditional view is that it cannot because defects affecting the quality of an item can only give rise to a negligence action in tort if persons have been injured or other property damaged thereby. Damages can only be claimed in the tort of negligence for losses inflicted on the person or other property and not for defects affecting the item itelf."

9. In "Winfield and Jolowicz on Tort" (14th 1994, Edn.) by W.V.H. Rogers at page 4, it is stated under the "Definition of tortious liability" that "(T)ortious liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressible by an action for unliquidated damages". It must also be emphasised that the number of cases in which it will be essential to classify the plaintiff's claim as tort, contract, trust etc., will be comparatively small. A cause of action in modern law is merely a factual situation the existence of which enables the plaintiff to obtain a remedy from the Court and he is not required to head his statement of claim with a description of the branch of the law on which he relies, still less with a description of a particular category (e.g., negligence, trespass, sale) within that branch. But statute and rules of procedure sometimes distinguish between, say, contract and tort with reference to matters such as limitation of actions, service of process, jurisdiction and costs and the Court cannot then avoid the task of classification. On "contract and tort" it is stated at page 5 that "(I)t is unlikely that any legal system can ever cut loose from general conceptual classification such as "contract" and "tort" but the student will quickly come to recognise that the boundary must sometimes be crossed in the solution of a problem. It has long been trite law that a defendant may be liable on the same facts in contract to A and in tort to B (notwithstanding privity of contract); it is a also clearly established (though with qualifications the boundaries of which are rather uncertain) that there may be concurrent, contractual and tortious liability to the same plaintiff, though he may not of course, recover damages twice over. Winfield, therefore, considered that tortious liability could for this reason be distinguished from contractual liability and from liability on bailment, neither of which can exist independently of the parties' or at least of the defendant's agreement or consent. The liability of the occupier of premises to his visitor, for example, which is now governed by the Occupiers' Liability Act, 1957, is based upon breach of a duty of care owned by the occupier to person whom he has permitted to enter upon his

premises. The duty owned to trespassers, i.e., persons who enter without his consent, is not the same.

10. In the "Words and Phrases" (Permanent Edition), Vol. 5A, at page 309, "breach of trust" is stated to be, "violation by trustee of any duty which as trustee he owes to beneficiary". The disclosure by an employee of trade secrets and other confidential information obtained by him in the course of his employment is a "breach of trust". A "breach of trust" is a violation by the trustee of any duty which as a trustee he owes to the beneficiary. In Jarvis v. Moy, Davies, Smith, Vandervell and Company, (1936) 1 QB 399 at 404, the facts were that the plaintiff sued the defendants, a firm of stock-brokers, claiming damages for breach of his instructions as to the purchase of certain shares whereby he sustained loss. At the trial, judgment was given in favour of the plaintiff and in was held by Greer L.J. that where the breach of duty complained of arises out of the obligations undertaken by a contract, the action is founded on contract; but where that which is complained of arises out of a liability independently of the personal obligation undertaken by a contract, an action brought in respect of this is founded on tort and this is so even though there may be a contract between the parties.

11. In this backdrop, it would be seen that in the tort liability arising out of contract, equity steps in and tort lake over and imposes liability upon the defendant for unquantified damages for the breach of the duty owed by the defendant to the plaintiff. Equity steps in and relieves the hardships of the plaintiff in a common law action for damages and enjoins upon the defendant to make the damages suffered by the plaintiff on account of the negligence in the case of the duties or breach of the obligation undertaken or failure to truthfully inform the warranty of title and other allied circumstances. In this case, it is found that four floors were unauthorisedly constructed and came to be demolished by the New Delhi Municipal Council. It dose not appear that the owners of the flats were not informed of the defective or illegal construction and they were not given notice of caveat emptor. Resultantly, they are put to loss of lacs of rupees they have invested and given as values of the flats to the builder-respondent.

12. The question arising for consideration is: whether the appellants should be recompensated for the loss suffered by them? The High Court in the impugned judgment has directed the return of the amount plus the escalation charges. We are informed that the escalated price as on the date is around 1.5 crores per flat. In this situation, taking into consideration the totality of the facts and circumstances, we think that the builder respondent should Pay Rs. 60 lacs including the amount paid by the allottees, within a period of six months from today. In case there is any difficulty in making the said payment within the said period to each of the flat owners, the builder respondent is given another six months peremptorily for which, however, the builder respondent will have to pay interest@ 21 per cent per annum on the said amount from the expiry of first six months till the date of payment.

13. The builder impleaded, *suo motu*, as one of the respondents, is also directed to obtain the certified copy of the title deeds and secure the loan, if he so desires. After the payment is so made, the appellants are directed to deliver the original title deeds taken custody of on March 1, 1994. It appears that with regard to the payment of Rs. 1 croe as

the price of the flats, property and money are kept under attachment. The attachment will continue till the said amount is paid over.

14. The appeal is accordingly disposed of No costs.

Order accordingly.

Mrs. S. Rathi v. Union of India
AIR 1998 Allahabad 331
Civil Misc. Writ Petition No. 41713 of 1997, D/-16-3-1998
M. Katju and S. L. Saraf, JJ.

Constitution of India, Art. 21, 226 – Right to life – Public interest litigation – Seeking providing of separate schools with vocational training, hostels with regular medical check-up etc. for the children of lepers in the State – Relief claimed, is just and in accordance with Art. 21 of Constitution of India – Mandamus issued.

Mrs. Shanta v. State of Andhra Pradesh
AIR 1998 Andhra Pradesh 51
Writ Petition No. 621 of 1997, D/-11-2-1997
P.S. Misra, C.J. and V. Rajagopal Reddy, J.

Constitution of India, Art. 21 - Right to life - Medical negligence – Compensation - Petitioner women admitted in Government hospital for third delivery - Doctors performing Caesarean Operation - Petitioner suffering serious injury in her abdomen because the doctors failed in discharge of duty of cleaning abdomen of all portions, objects and bodies including the cotton (mop) which was later removed from her stomach - She has to undergo further two operations - State Government directed to provide all necessary medical care, to her until she is completely cured and until her complete recuperation - Further State Government is directed to pay Rs. 3,00,000 to her by way of compensation - Further petitioner would be free to file police complaint and take action in tort for damages against doctors.

(Paras 18, 21)

Cases Referred:	**Chronological Paras**
1996 Cri LJ 4243: 1996 (4) Andh LT 535	21
AIR 1995 SC 922: 1995 AIR SCW 759	16
AIR 1993 SC 1960: 1993 Cri LJ 2899: 1993 AIR SCW 2366	21

P. S. MISHRA C. J.:- One Mrs. Shanta, 25 years old woman, has invoked this Court's jurisdiction under Art. 226 of the Constitution of India seeking, inter alia, a direction to the first respondent to institute complaint for investigation by the police into the acts and

omissions of the second and the third respondents herein i.e., Superintendent, Government Maternity Hospital, Afzalgunj and Dr. Rama Sundari, Assistant Professor of Obstetrics & Gynaecology, Government Maternity Hospital, Afzalgunj, Hyderabad, which constitute, according to the petitioner, (1) offences against her body while operating for the delivery of a child; (2) other and further actions against the second and the third respondents in accordance with law; and (3) to pay compensation consolidated in a sum of Rs. 8,00,000/- to her for the injuries and sufferings caused to her by the second and the third respondents.

2. Facts in brief:- Petitioner who hails from the State of Karnataka has been residing in Hyderabad and working as an assistant to a cook-Janaki Ramaiah and receiving a monthly remuneration. She has given birth to three children, the eldest being a son of seven years of age, the second being a daughter of four years of age and the third a girl child, who is born only in the Government Maternity Hospital, Afzalgunj on 20-11-1996. According to the petitioner, since she had undergone Caesarean operations for deliveries of the first and the second child, she consulted and visited the Government Maternity Hospital, Afzalgunj for periodical check-up during pregnancy and since she had not been having sufficient financial back-up, she depended upon the free medical services, which finally resulted in her admission into the hospital on 15-11-1996 and operation on 20-11-1996 at 4 a.m. in the hospital. She has narrated the facts in this behalf as follows:

> "It is in these circumstances that I was admitted into the hospital on 15-11-1996 and I was operated upon 20-11-1996 at 4:00 a.m. According to the medical report given to me I was operated by the doctors working in the medical unit called B/C Yellow. I was also affected sterilization and BC No. 88/46 it was indicated that the operation was conducted under spinal anaesthesia. I did not have any consciousness when the operation was conducted. I was discharged from the Government Maternity Hospital on 26-11-1996. I went home. After 1 or 2 days I started developing pain in my abdomen. The pain gradually increased. During this time I visited the Government Maternity Hospital and requested the doctors to give me treatment for the pain. In this connection I met with the 3rd respondent who had conducted the caesarean operation upon me on 20-11-1996. In fact I came to know this only through the medical staff in the out-patient ward.
>
> ..... the 4th respondent after a customary examination told me that the pain would subside in course of time and suggested that I should not be unnecessarily worried about the pain.
>
> ... by 1st January, 1997 my condition became so serious that I could not even get up from by bed. By then I have a one and half month old baby to be looked after personally and two other children who also needed my services. On 1-1-1997 Mr. Janakiram came to my house to see my condition and he rushed me to a private nursing home under the control of the 4th respondent hospital. The 4th respondent Dr. S. Chandra Shekar Rao on examination told me that there was some thing wrong in my stomach and I require to be under his continuous supervision at least for a week and he also prescribed me half a dozen tests for complete examination and diagnosis of my ailment. I was subjected to CBP, ESR, RBC, WBC, Differential Count, Blood

grouping, complete Urine examination and Random blood sugar. On 2-1-1997 Dr. S. Chandra Shekar Rao sent me to Shravya Scan Centre, Narayanguda, Hyderabad for an ultra sound examination of my abdomen.

...Dr. Kamalakar Reddy, the consultant radiologist in his scanning report observed that on palpation of my abdomen he found a diffusible swelling in the left quadrant of the abdomen and it looked tender. He doubted that there was some foreign mass which could be the reason for the continuous pain in my abdomen. He observed that there was a hyper echoic band in the Para spinal region in the left lower abdomen measuring about 10x5 cms. He doubted that some material used in the surgery was left in my abdomen and that could have been a reason for the pain. After receiving the scanning report I have shown it to Dr. S. Chandra Shekar Rao under whose constant vigil I was kept in the nursing home. Dr. S. Chandra Shekar Rao told me that I should undergo laparotomy immediately as the retention of foreign mass might prove fatal to me.

.....I was in the hospital almost penniless and no attendants to me. I was attended to by Dr. S. Chandra Shekar Rao and his team of doctors including Dr. Sudha and Dr. Latha very magnanimously. Despite their repeated suggestions to me to undergo the operation immediately I resisted it on the ground that I would like to have at least one of my relatives and some money at the time of my operation. My condition became serious day by day.

..... I was given all necessary medical help by Dr. S. Chandra Shekar Rao and his team of doctors. On 4-1-1997 I was operated upon at the 4th respondent hospital at about 9:00 a.m. Dr. A. Y. Chary, Assistant Professor of Surgery at Gandhi Medical College along with Dr. S. Chandra Shekar Rao, Dr. Sudha, Dr. Latha and Dr. Madhava Rao who conducted the operation for nearly 4 hours. I was shocked to learn that the mop contained in my abdomen was towel used in the surgery and a few other surgical materials was also extricated from my abdomen. Because of the remaining of the foreign body in the abdomen the small intestine and all other surrounding parts were highly infected and I was almost in the jaws of death on 4-1-1997.

.....I came to know about this only through Dr Chary, Dr. S. Chandra Shekar Rao. The team of doctors had a sign of relief after successful operation and they told me that it would take at least one and half month for my recovery. They also told me that the foreign body that is the mop protruded into the small intestine and it caused a large hole thereby necessitating cutting of my intestine at the infected regions and it was reattached. I was told that I should be required to go another operation within a short span for my total recovery.

..... during this time I have sold away all the jewellery including my Mangalasutram to meet the expenditure.

..... now I am almost a penniless and I am continuing at the magnanimity and mercy of Dr. S. Chandra Shekar Rao and his team of doctors. They are giving me

medicines and food to me and to my attendants. My one and half month's old baby is separated from me and she is fed on an external food. I am sorry that I am not in a position to attend my one and half month old baby and this causing me lot of mental agony. My daughter is not able to adjust to the external food and I have a doubt to that extent that she may not survive if she is not brought under my control, but the doctors cautioned me that the child with me at the hospital might prove fatal to both of us.

..... at present I am suffering from Jaundice and other related ailments and I require to be in the hospital for another 2 months ..... I was taken to the 3rd respondent thrice and the 3rd respondent instead of giving me any help and treatment has threatened me that I would be starved for Medicare if I happen to make any complaint or informed any body that she had conducted the operation upon me. She also told me that she had informed the doctor's association about this and if I am shifted to the Government Maternity Hospital again it would get publicity and the 3rd respondent would be blamed. She prevented me from going back to the hospital for further treatment. I am afraid that if I am shifted back to the same hospital I may not survive and I may be killed to demolish the evidence.

..... I became a victim of the Criminal negligence of the doctors and I am also subjected to black-mailing by the 3rd respondent and others. In these circumstances, I am left with no other option except to approach this Hon'ble Court to protect and preserve my life and also further pray this Hon'ble Court to give me an opportunity to look after my children' by myself. I am a very poor lady and I have already spent at least Rs. 1 lakh for my treatment from November 2nd week to till date. I am totally bed-ridden and I have lost my source of livelihood and I became totally dependant upon the mercy of Dr. S. Chandra Shekar Rao and his team of doctors and Mr. Janakiram. I would like to die rather than to be a total dependant and liability to my family unless I am given due medical assistance at any other hospital or at least in the present hospital itself, the chances of my recovery look very grim. I am financially totally drained.

.....I am prepared to be examined by any doctor or doctors or independent body of impartial people to examine the veracity or otherwise of the contentions made by me in this petition."

3. Janaki Ramaiah, who has figured in the above narration of facts in the affidavit, which has been filed in support of the petition, is introduced in the contents of the affidavit as the expert cook, as whose helper or assistant the petitioner has been working. Since the petitioner was receiving treatment in Sumanchandra Nursing Home, which is not a Government Hospital, we directed for immediate shifting of the petitioner in the Nizam's Institute of Medical Sciences and also for a medical report by a Committee constituted for the purpose by the Government of the State. Director in-charge, Nizam's Institute of Medical Sciences sent to the Court the medical report submitted by the Committee, which examined the petitioner on 25-1-1997 at 5 p.m. We also directed for notices upon the second, the third and the fourth respondents. The second respondent entered appearance and filed counter. The third respondent although entered appearance before 5-2-1997, but

on the day the Court dealt with the report of the expert committee, she had filed no counter. The fourth respondent in spite of notice, however, had not entered appearance. We, after seeing the above, ordered on 5-2-1997 as follows:

> "Before any final order is passed, it is necessary to know all facts concerning the admission of the petitioner in the fourth respondent - Nursing Home, operations and treatments given to her in the said hospital and to see all records pertaining to the patient i.e. the petitioner in the said hospital.
>
> .....Accordingly, let notices issue through a Special Messenger at the cost of the Court to be served upon the fourth respondent in course of the day. Let also all records pertaining to the petitioner in the fourth respondent - Nursing Home be brought to the Court in a sealed cover for which purpose let a direction issue to the Chief Metropolitan Magistrate to depute an officer of his unit for the said purpose and report compliance.

Put up for further orders on 7-2-1997.

In the meanwhile, the second respondent is directed to produce all original records in respect of the treatment of the petitioner in the hospital under his control. Until further orders, treatment of the petitioner in Nizam's Institute of Medical Sciences shall continue and she shall be kept as an indoor patient at the cost of the Government of the State."

4. The third respondent has since filed counter affidavit. The fourth respondent has also appeared and filed affidavit. Records, as directed by the order dated 5-2-1997, have since been received. Responding to the further observations of the Court, the Principal Secretary to the Government, Health, Medical and Family Welfare Department has filed an affidavit stating as follows:

> "Ms. Shanta was admitted into the Nizam's Institute of Medical Sciences on 22-1-1997 for treatment and observation. She was provided the necessary medical support during her stay in the institute. A Medical Board consisting of four members examined her and second report given by the Board is enclosed.
>
> I would like to submit before the Hon'ble Court that Ms. Shanta will be provided free treatment at the expense of the State Government within the State and if required outside the State. The Nizam's Institute of Medical Sciences is equipped to provide her surgical treatment for closure of colostomy and the institute will provide the surgical treatment and other allied medical treatment free of cost, and the Govt. will bear the expenditure."

5. In continuation of the medical report aforementioned, the Committee has submitted a further report, which reads as follows:

> "1. Mrs. Shanta is suffering from a temporary disability.
>
> 2. Mrs. Shanta is due for another operation (Closure of Colostomy) in another 2-3 weeks time. She will require another two weeks to recover from the time of surgery.

Altogether she will require another 1-1$^{1}/_{2}$ months to recover completely provided no further complications occur.

3. According to patient's history, she underwent sterilization procedure along with the last caesarean section. Therefore, there is no chance for her to conceive in the present state. However, the fact that she has undergone sterilization procedure has to be confirmed from the hospital records of the Maternity Hospital where she was operated."

6. Dr. A. Y. Chary, who has figured prominently as one who responded to the call of the fourth respondent and attended upon and examined the petitioner, has stated as follows:

"I was called to see a patient by name Shantha on 4-1-1997 at Suman Chandra Nursing Home, Narayanaguda. She was admitted for pain in Abdomen, distension of abdomen by the Nursing Home. I examined the patient on 4-1-1997 at about 7:30 p.m. She had distension of abdomen with features of sub acute intestinal obstruction and locally on the left side with tenderness and features of local peritonitis. I was told she underwent L.S.C.S operation at Government Maternity Hospital about 45 days back. I have seen the investigations performed on the patient by the Nursing Home U.S. Examination of Abdomen report showed a F.B. (Mop) in the abdomen. In view of the sub acute intestinal obstruction, local peritonitis and the F.B. in abdomen, I advised laparotomy for the patient.

I did the laparotomy. On opening the abdomen the intestines were found to be distended, Sigmoid colon and loop of small bowel were densely adherent to a mass which was present in lower part of left flank. On separation of the mass there was a F.B. (Mop) with surrounding puss which has produced an internal fistula into sigmoid colon and densely got adherent to loop of small intestine. There were no needles no scissors or any metallic objects in the abdomen. The F. B. removed and pus sucked out. The sigmoid colon and the loop of small bowel resected and end to end anatomises performed. A de-functioning transverse colostomy performed to safeguard the anatomises. Thorough peritoneal toilet performed and abdomen closed in layers after applying tension sutures and leaving an abdominal drain.

Patient was managed post operatively with blood transfusions. IV fluids and antibiotics, patient made a smooth, post operative recovery, and her drain and sutures were removed gradually. Patient was taking liquids, soft to normal diet. She was attended by me regularly in the post operative period, her colostomy was functioning normally and I was planning to close it after 4 to 5 weeks. Prior to her shift to NIMS I have seen the patient and she was progressing satisfactorily, she was ambulatory and taking food and was out of critical period."

7. Dr. S. Chandra Shekar Rao, who attended upon the petitioner in the 4th respondent - Nursing Home, has stated in the affidavit that the petitioner came to the Nursing Home on 1-1-1997 complaining of acute pain in the abdomen. After going through her previous medical records and listening to her, he felt that it was necessary to treat her as an impatient in the hospital. After giving her the preliminary treatment, he advised certain

pathological tests, which included CBP, ESR, RBC, WBC, Differential Count, Blood Grouping, complete urine examination and Random Blood Sugar. On 2-1-1997 he sent the petitioner to Shravya Scan Centre, Narayanaguda, Hyderabad for Ultra Sound Scanning of the stomach and abdomen. The Scanning report revealed that there was evidence of a Hyper Echoic Band in the Para spinal region in the left lower abdomen, measuring about 10x5 cms., no echoes noted posterior to the hyper-echoic area foreign body (MOP) impression suggestion of foreign body (MOP) in the left Para spinal region. He has further stated,

> "the consultant Radiologist Dr. D. Kamalakar Reddy of the Shravya Scan Centre opined that there was a MOP in the abdomen. In fact the petitioner was complaining of acute pain hence we gave her treatment for subsiding her pain. On 3-1-1997 I gave a prescription and recommended the petitioner to go to the Government Maternity Hospital, Hyderabad-2 for further treatment. The petitioner's attendant Mr. Janakiram informed on 4-1-1997 afternoon that the patient's condition was becoming serious and the doctors at the 2nd respondent's hospital refused to readmit the petitioner into their hospital nor they were prepared to give her any treatment and further he requested me that the petitioner shall be treated in our hospital.
>
> ..... considering the medical urgency, I invited Dr. A. Y. Chary, Assistant Professor of Surgery, Gandhi Hospital, Hyderabad, a renowned surgeon for the operation which is called Laparotomy. I along with Dr. Sudha, Dr. Latha, Dr. Madhava Rao, assisted Dr. A. Y. Chary in the conduct of operation which began at 10.00 p.m. on 4-1-1997. The clinical findings about the operation done, the MOP removed were mentioned in the case record of patient which was submitted to the Hon'ble Court on 5-2-1997.

8. All records from the 4th respondent Nursing Home have been received and the 4th respondent has also surrendered to the Court the MOP and the portions of intestine nut removed from the patient during the operation on 4-1-1997.

9. The second respondent, however, has stated as follows:

> " ... as disclosed by the Hospital records, the petitioner was admitted in the Government Maternity Hospital, Afzalgunj, Hyderabad, on 15-11-1996 for delivery for a third time.
>
> ..... as the petitioner had previously two deliveries and both babies were delivered by Caesarean Section in our Hospital, she was advised to get admitted in the Hospital for undergoing elective Caesarean Section. As seen further from the Hospital records, she was admitted in the ante-natal ward of the Yellow Unit (Unit V) of our Hospital. Dr. (Mrs.) Adilakshmi, Professor of Obstetrics and Gynaecology is the Chief of the Yellow Unit. In her absence from 18-11-1996 to 24-11-1996 on other duty, Dr. (Mrs.) G. Chandrasena, Professor of Obstetrics and Gynaecology was in-charge of the Yellow Unit. Elective Caesarean Section was planned and the date of operation was fixed on 25-11-1996. But as she set into labour pains early, Caesarean Section was done on her as an emergency operation in the early hours of

20-11-1996 by the then Duty Medical Officer - Dr. (Mrs.) Ramasundari, Assisted by Dr. Manohar, Anaesthetist, Dr. Viswabharathi, Post Graduate Student and Mrs. Krupa, Scrub Nurse. She delivered a female child. After the operation, the petitioner was shifted to the Yellow Unit Ward for further post-operative management. She was under routine post-operative check-ups by the doctors of the said unit up to 26-11-1996. As she was found fit for being discharged by the doctors attending on her, she was discharged from the hospital with her baby girl on 26-11-1996 after removal of sutures and with advise to come for review at the post-natal Department after two weeks."

10. Second respondent has disputed the allegations of the petitioner, called them 'reckless and bereft of truth', particularly, the allegation foreign objects, namely, Surgical Towel and instruments were negligently left in abdomen and the abdomen was sutured. She has given some details of the role of the Superintendent of the Government Hospital and has stated,

"In our Hospital, there are six Professors of Obstetrics and Gynaecology and there are six units. Each Professor is the Chief of one unit. I am the Chief of the Unit called Green Unit, i.e., Unit No. 1 while Dr. (Mrs.) Adilakshmi is the Chief of the Vth Unit called Yellow Unit, i.e., Unit No. II. The Professors who are the Chiefs of their respective Units are the immediate superior officers to the Doctors working under them."

11. The third respondent, Assistant Surgeon in the Government Maternity Hospital, who conducted the caesarean operation of the abdomen of the petitioner has, however, denied all the allegations and stated as follows:

"Suffice it to state that she was admitted in the Government Maternity Hospital, Nayapul, Hyderabad for delivery of her third child on 15-11-1996. At this juncture, ...I am an Assistant Professor in Obstetrics & Gynaecology and I am attached to White Unit. The petitioner was admitted in the Antenatal Ward of Yellow Unit (Unit V) of the hospital. The records of the hospital show that caesarean section was planned on 25-11-1996 on the petitioner. But, it so happened that when I was the Duty Medical Officer on 20-11-1996, the petitioner developed labour pains and I being the Duty Medical Officer, was called upon for examination. I found that the petitioner required a caesarean operation to be performed in as much as the complications would set in if she is not operated immediately. As such, surgery was planned and I being the senior most Duty Medical Officer formed a team along with Dr. Manohar, Anaesthetist, Dr. Viswabharathi, a post-graduate student for assistance during the operation and Mrs. Krupa, who was the sub nurse. The surgery was performed effectively and the petitioner delivered a healthy female child. The surgery was performed under spinal anaesthesia. At this stage, I submit that under spinal anaesthesia, the patient does not lose consciousness; and only the lower portion of the abdomen would become numb and senseless to the pain. I submit that the petitioner/patient was fully conscious and was also co-operating at the time of surgery. There was minimal blood loss during the surgery and as per the procedure, the sub Nurse viz., Mrs. Krupa, who counted all the instruments and swabs intimated

to me that the count was correct. She had also counted the instruments and swabs before the operation. In fact, the sub Nurse viz., Mrs. Krupa had also made an endorsement on the case sheet that she had counted all the instruments and swabs and they were found correct. After the assurance was given by the said Mrs. Krupa, I also made a personal verification with respect to the count of the swabs and instruments and made an endorsement in the cases sheet to that effect. It was only after the counts, the abdomen was closed and sutured."

The third respondent stated, " .... the petitioner was never brought to me for treatment and it is absolutely false to allege that she was brought to me thrice and that I instead of giving any help and treatment had threatened her that she would be starved for Medicare if she complains against me .... I have never seen the patient at the hospital after completion of the operations, which was performed on 20-11-1996. It is also absolutely falsehood for the petitioner to state that I informed her that she should not be shifted to Government Maternity Hospital, as it would be a blemish on me and it is absolutely baseless for her to state that I prevented her from coming back to the hospital for further treatment. In fact, I came to know from the records that while discharging the patient on 26-11-1996, the petitioner was clearly directed to come for examination for a review after two weeks. I also came to know that the petitioner did not come to the hospital for a review nor she complained about any problems during that period. All the allegations made by the petitioner in her affidavit such as that there has been a conspiracy including the petitioner to bring disrepute to the Government hospital and also to my career, thereby cause loss to me. I state and submit that it would be worthwhile to investigate into what that conspiracy is and punish the responsible. This writ petition appears to have been filed only with ulterior motives and to make unlawful gain out of the situation. Soon after I receive notice from this Hon'ble Court I was also served with a memo by the 2nd respondent herein asking me to appear for an enquiry. This memo was served on me on 22-1-1997 and I appeared before the 2nd respondent and submitted my representation on 24-1-1997. I am herewith filing a copy of the same for the kind consideration of this Hon'ble Court."

In short, she has asserted she had performed the surgical operation perfectly and had closed the abdomen only after her personal verification with respect to the count of the swabs and instruments as confirmed by scrub Nurse Mrs. Krupa.

12. Second respondent has forwarded the statement, which he purportedly got recorded in an enquiry and the Scrub Nurse - Mrs. Krupa has also given her statement to the effect that she assisted the third respondent and committed no mistake in counting of the materials and accordingly informed the Doctor i.e. third respondent to close the womb.

13. We have taken almost full stock of the happening and found that the following facts are undisputable.

(1) Petitioner was admitted as an inpatient in the Government Maternity Hospital on 15-11-1996 and subjected to a caesarean operation on 20-11-1996 at 4 a.m. by the third respondent, assisted by others, including Mrs. Krupa, the nurse.

(2) Petitioner developed severe pain and other complications after the operation and was taken to the fourth respondent - Nursing Home, she was subjected to several tests and examinations and on 2-1-1997 was taken through Ultra Scanning of the Stomach and abdomen by Dr. Kamalakara Reddy, who submitted report revealing that there was evidence of a Hyper Echoic Band in the Para spinal region in the left lower abdomen.... suggestion of foreign body (MOP) in the left Para spinal region.

(3) On being called by the fourth respondent Nursing Home, Dr. A. Y. Chary examined the petitioner and attended at her for the operation called 'Laparatomy' and according to him, on opening the abdomen the intestines were found to be distended, Sigmoid colon and loop of small bowel were densely adherent to a mass which was present in lower part of left flank. On separation of the mass there was a F.B. (MOP) with surrounding pus which has produced an internal fistula into sigmoid colon and densely got adherent to loop of small intestine. The F. B. removed and pus sucked out. The sigmoid colon and the top of small bowel resected and end to end anatomises performed. A de-functioning transverse colostomy performed to safeguard the anatomises. Thorough peritoneal toilet performed and abdomen closed in layers after applying tension sutures and leaving an abdominal drain.

14. Rest, however, following the Court's interventions, are matters which leave no manner of doubt that petitioner's sufferings have not yet ended. She is yet to go through another operation and she will need expert and careful treatment to resurrect what she has lost in her body and to recuperate what she has lost in her life.

15. Hypocrites must not have thought and many, who believe that a physician or a surgeon is a healer and a life giver, would never have thought that the oath, which he performed would be only a ritual, would be used more for professing and less in practice. Directives in part IV of the Constitution included in the list of principles of policy to be followed by the State in Art. 39 therein, include that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity unsuited to their age or strength and in Art. 47 therein provide that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties. The cherished right of life as in Art. 21 of the Constitution of India extends to receiving proper and complete medical attention from medical practitioner, whether working in a Government Hospital or a private practitioner. It was believed and there appears to be some still believing that a man of medicines is a missionary and so he takes the oath of service to the suffering human beings, in return receiving subsistence and satisfaction.

16. The Preamble and Art. 38 of the Constitution of India envision, in the words of the Supreme Court, in Consumer Education & Research Centre v. Union of India AIR 1995 SC 922, "as its arch to ensure life to be meaningful and liveable with human dignity." The right to health is an integral facet of meaningful right to life to have not only a meaningful existence but also robust health and vigour without which life is a misery. Any one thus who has opportunity to tinker in any capacity with another, has a duty to

ensure that his or her interference with the life of another has done no injury or harm which would affect the life of that person either diminish it or injure it in any manner. A doctor thus to whom a patient is brought for treatment gets full control upon the life of the patient and when he or she treats the patient, his or her command upon the patient is all pervasive.

17. The question thus posed before us, in the instant proceeding, is whether the second and third respondents have, in any manner, affected the life of the petitioner by what they have been found to have done to her in the early morning of 20th November, 1996 and thereafter when the petitioner's sufferings aggravated and needed immediate attention. On the facts as above, we have no other answer to the above except that they have been negligent and to an extent callous in performing their duty and they, accordingly, have violated the petitioner's right under Art. 21 of the Constitution of India.

18. It is not possible, on the facts of this case, to imagine that there was any foreign body in the petitioner's abdomen when she was admitted in the Government Maternity Hospital, Afzalgunj or when she was examined by the Doctors in the said hospital. Possibility of existence of any foreign body in petitioner's abdomen from before third respondent opened her abdomen for the caesarean operation is completely ruled out by the fact that the third respondent has not noticed any such foreign body or MOP in petitioner's abdomen when she operated upon her. It is difficult to accept the plea that the nurse meticulously and carefully counted every item used in the surgical operation of the abdomen of the petitioner in the morning of 20th November, 1996 and removed all of the them before the third respondent took up the post operational action of closing the womb as well as that before closing the womb the third respondent herself counted each item and nothing used in the course of operation was left in the abdomen of the petitioner. Ultra Sound Scanning report indicated the presence of foreign body on 2-1-1997 and on 4-1-1997 Dr. A. Y. Chary, Assistant Professor Surgery, Gandhi Hospital, Hyderabad, who is described as a renowned surgeon, along with Dr. Sudha, Dr. Latha and Dr. Madhava Rao, removed the MOP and the foreign body from petitioner's body. Presence of the MOP with the womb, which was yet to heal, in the abdomen of the petitioner, it is revealed from the statement of Dr. A. Y. Chary and that of Dr. S. Chandra Sekhara Rao, the Director in-charge of the Suman Chandra Nursing Home, caused many complications and such portions of the intestine nut of the petitioner, which got affected, were removed along with the mop during the operation on 4-1-1997. The latest opinion of the Committee of Experts has emphasized the need for another operation (closure of colostomy) before she would be free of all complications, 2-3 weeks time for the petitioner being sufficiently recovered for the next operation, another two weeks to recover from the time of next surgery and yet another one and half months to recover completely provided no further complication occur. Circumstances are so heavily witted against the statements of the second respondent and the third respondent, which incidentally included the statement of Nurse, who attended the petitioner during the caesarean operation for the third child, that it is irresponsible and only inference which we can draw that she has suffered serious injury in her abdomen because the third respondent and others, who assisted her, failed in discharge of their duty of cleaning the abdomen of all portions, objects and bodies, including the cotton (mop), which later was

removed from her abdomen on 4-1-1997 at Suman Chandra Nursing Home. It would be frightening to the persons, more so for a woman, who has to nurse three children and work for livelihood, to suffer the presence of foreign body in the abdomen, which slowly would damage the system and create complications and if not attended to on time, would lead to collapse and death. It is not difficult to visualize the petitioner's anxiety and her desperation to see the Doctors, who were examining her and who operated upon her, for treatment of the pain, detection of the cause of pain and for necessary surgery. In spite of negligence, that caused unbearable sufferings and agony to the petitioner, of the second respondent's hospital and the third respondent in particular, we would have appreciated their conduct had they responded to the repeated demands of the petitioner to treat her of the pain and the sufferings what may shake the conscious of any person, however, is utter callousness of the Maternity Hospital people and the third respondent, which the petitioner has narrated in some details. Although the second and third respondent, have chosen to deny the allegations, since, as we have found earlier, circumstances speak volumes about their negligence, we cannot accept their version that the petitioner never attempted to meet the third respondent and/or that the third respondent or the second respondent did never refuse to attend upon her and/or threaten her and wanted to restrain her from taking the matter to any other hospital. Contrast in the conduct of Dr. A. Y. Chary, Dr. S. Chandra Sekhara Rao on the one hand and that of the third respondent and other Doctors and staff of the Government Maternity Hospital, who participated in the conduct of the operation upon the abdomen of the petitioner on 20-11-1996, on the other hand is such one can find words insufficient to appreciate the former two and to lament and regret the conduct of the third respondent and the other doctors and staff of the Government Maternity Hospital, who are involved in the caesarean operation upon the petitioner on 20-11-1996.

19. Our attention has been drawn to S. 20-A of the Indian Medical Council Act, 1956 and we are informed that the said Medical Council has prescribed standards of professional conduct and etiquette and a code of ethics for medical practitioners. Our attention is also drawn to S. 33 of the Act, which, besides providing for making the regulations generally to carry out the purposes of the Act, and, without prejudice to the generality of the said power, speaks of certain items for which the Council can frame regulations and includes, regulations for the standards of professional conduct and etiquette and code of ethics to be observed by medical practitioners. Since petitioner has not addressed us with any specific idea in respect of the role of the Medical Council in the matter, we are not persuaded to give any specific direction, yet, the facts being dealt with all constraints, since we regard it as a serious concern for all, we record and accordingly observe that in case any petition is made by the petitioner in accordance with the regulations in this behalf, the Medical Council shall be duty bound to take cognizance of the same and proceed in accordance with law to deal with the conduct of the third respondent and any other person, who if found involved in the matter.

20. It is axiomatic that one who causes loss or injury to another by accident, negligence or design is required to compensate the loss or injury. Any loss or injury produces a right in the person who has suffered to seek compensation by way of damage and an obligation upon the person, who causes the loss or injury, to compensate or indemnify. Courts in

due course of justice are faced with situations when they need to decide whether compensatory damages and nothing more should be granted, only a nominal damages be ordered or exemplary or punitive damages be ordered. Is the case in hand one that the Court can successfully quantify the damages to make good the loss and the injury sustained by the petitioner? In other words, can the Court measure the compensation which would be a destitute for harm sustained by the petitioner? When we care to scan the facts for the said purpose and try to see whether the petitioner can be restored to the position in which she was prior to the injury and the loss, we do not find it to be a case for grant of compensatory damages only. This is a case even by conservative estimates of irreparable damages as no certain pecuniary standard is noticeable for measurement of the injury of the petitioner. Her injuries are such as noticed above which has residual as well as future effects upon the petitioner and on her life. There is sufficient impairment of the capacity of the petitioner by removal of part of intestine and yet a further operation is due. Petitioner's future pains and sufferings can only be tentatively estimated. It is a case in which the negligence of third respondent is aggravated by circumstances which could have been avoided by a reasonable and caring approach and steps to reassure the petitioner which the second and the third respondents have failed to take. There is a need on the facts of this case to provide to the petitioner solace for mental anguish, solace for laceration of her feelings, solace for definite and well-oriented future and solace for her to fulfil the obligations of a mother towards her three children. The third, however, is yet to receive the primary and essential nourishment of the mother's milk.

21. We have held that right to health and health care is protected under Article 21 of the Constitution of India as a right to life. The first three respondents are the State of Andhra Pradesh and servants of the Government of Andhra Pradesh. It is well settled that apart from the punishment to the wrongdoer for the resulting offences and recovery of damages under private law by the ordinary process, in case of any deprivation of life or damage thereto, damages are not awarded only for the tort. Damages are granted in such cases for the contravention of fundamental right and remedy in public law in this behalf is recognized by the courts in our Country. In Nilabati Behera v. State of Orissa, AIR 1993 SC 1960: (1993 Cri LJ 2899), it is said that the defence of sovereign immunity is inapplicable, and alien to the concept of guarantee of fundamental rights. Such a defence is not available in the constitutional remedy. The Court in exercise of its power under Article 226 of the Constitution can grant monetary compensation for contravention of fundamental rights guaranteed by the Constitution. That is an invaluable right and one of the most practicable modes of redress available for the contravention of the fundamental rights by the State or its servants in the purported exercise of their powers. When the State or its servants failed to discharge their duty, when their omissions are such that are seen causing serious injuries, as in the case of the petitioner, we have no hesitation in holding that besides any remedy under the private law for damages, the petitioner shall be entitled to be compensated by the Government of the State for the negligence of its servants -- the third respondent and other Doctors and members of the staff of Government Maternity Hospital, Afzalgunj. In Vasanthi v. Ch. Jaya Prakash Rao, 1996 (4) ALT 535: (1996 Cri LJ 4243), speaking for the Court, one of us has reiterated the principle that the Supreme Court and the High Courts, being the protectors of the civil

liberties of the citizens, have not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction under Articles 32 and 226 to the victim or the heir of the victim whose fundamental rights under Article 21 are established to have been flagrantly infringed by calling upon the State to repair the damage done by its officers to the fundamental rights of the citizen, notwithstanding the right of the citizen to the remedy by way of a civil suit or criminal proceedings. The State, of course, has the right to be indemnified by and take such actions as may be available to it against the wrongdoer in accordance with law through appropriate proceedings. Much of the burden of the Court in the matter has been lessened by the response of the Government of the State by way of an affidavit filed by the principal Secretary to Government, Health, Medical and Family Welfare Department. The Government of the State has taken the responsibility of providing the best medical treatment and agreed to meet all expenses for the treatment as well as other attendant expenses. She has been thus taken by the State Government in its charge for providing to her all necessary medical care, which care the Government has agreed to provide to her until she is completely cured and until her complete recuperation. We see still good reasons to grant monetary compensation for she is not alone to be care for her, her kids will need all care which she was giving to them and the new born will need more care. Children who are all school going age will need education and the loss of income will need be compensated. It will not only look unfair but shall be substantially unfair to the petitioner and many others who suffer at the hands of the servants of the State if penal compensations are not granted. We order, on the facts of the case, accordingly that the first respondent -- the Government of the State of Andhra Pradesh shall set aside a sum of Rs. 3,00,000/- and invest the same in one of its equities or deposits for a monthly income not less than Rs. 3,000/- for a period of not less than five years and pay to the petitioner each month the amount of interest for expenses other than the medical expenses, hospital charges and charges for her food in the hospital and for the expenses upon her dependants i.e. the children and shall pay, after the expiry of the fixed period of not less than five years as above, the said amount of Rs. 3,00,000/- with interest thereon minus interest already paid to the petitioner by way of compensation. The State, however, is indemnified and shall be accordingly entitled to recover the said amount of damages from the third respondent and any other person found responsible for the injuries and losses caused to the petitioner. The petitioner shall be free to take action in tort for the damages under the private law against the third respondent and others and to make complaint for any criminal act of the third respondent before the police and/or any Court, if so advised and in case such complaint is filed, proceedings shall be taken up in right earnest and speedily in accordance with law. Any observations, however, in the judgment by us in respect of the conduct of any of the respondents shall not be taken as conclusive for the proceedings either for damages under the private law or for any criminal prosecution. The first respondent shall issue necessary instructions to the hospitals for the treatment of the petitioner forthwith and invest the above said amount without delay so that the payment of interest to the petitioner begins from the month of March, 1997. The Mop and other materials taken out of the womb of the petitioner in the operation at Suman Chandra Nursing Home shall be kept in Nizam's Institute of Medical Sciences for a period of six months to enable the petitioner to take such legal action as she may deem fit and proper and further retention of the same shall

be subject to the order of any other competent Court of law. Let the said articles deposited in Court by the fourth respondent be transmitted at the cost of the Court to Nizam's Institute of Medical Sciences. Let records pertaining to the petitioner received from the forth respondent as well as second respondent shall be returned to them.

22. Writ petition is ordered accordingly.

Order accordingly.

M/s. Spring Meadows Hospital v. Harjol Ahluwalia through K. S. Ahluwalia
AIR 1998 Supreme Court 1801
Civil Appeal No. 7708 with 7858 of 1997, D/-25-3-1998
S. Saghir Ahmad and G. B. Pattanaik, JJ.

Consumer Protection Act (68 of 1986), Ss. 2 (1) (d) (ii), 14 – Consumer – Definition of – Is wide and include not only person who hires or avails services – But also beneficiary of such services other than person who hires or avails services – Child admitted and treated in hospital by doctor – Child as well as his parents would be "Consumer" – Awarding compensation to both of them for injury each one of them has sustained – Is proper.

Mayank Rastogi v. V. K. Bansal
AIR 1998 Supreme Court 716
Civil Appeal No. 20 with 22 of 1998 (arising out of Special Leave Petition (Civil) No. 13908 with 17234 of 1997), D/-5-1-1998
B. N. Kirpal and D. P. Wadhwa, JJ.

M. P. Nagar Tatha Gram Nivesh Adhiniyam (1973), S. 19(1) – Objection to construction of residential house – Plot on which construction was being made shown as residential plot in development plan for area – Plot earlier earmarked as open space - Because of that objector does not get a right to challenge construction when he had not challenged change in land use in development plan from open space to residential.

Mirzapur Moti Kureshi Kasab Jamat v. State of Gujarat
AIR 1998 Gujarat 220
Special Civil Application No. 9991, 11204, 11309 and 11379 of 1993, D/-16-4-1998
K. Sreedharan, C. J. and A. R. Dave, J.

Bombay Animal Preservation (Gujarat Amendment) Act, (4 of 1994), S. 1 – Validity – Imposition of total ban on slaughter of bulls and bullocks – Amounts to imposition of unreasonable restriction on petitioners carrying on business of buying and selling

bulls and bullocks, and slaughtering them for selling meat – Is *ultra vires* the Constitution.

Constitution of India, Arts. 31C, 39, 47, 48, 14, 19(1)(g).

Nagar Palika Parishad, Mussorie v. State of U. P.
AIR 1998 Allahabad 232
Civil Misc. Writ Petition No. 21796 of 1997, D/-11-7-1997
M. Katju and D. K. Seth, JJ.

Wild Life (Protection) Act (53 of 1972), Ss. 18, 24 and 21 – Declaration of area as sanctuary - Inclusion of any property in declaration – Cannot be challenged by owner of property.

Wild Life (Protection) Act (53 of 1972), Ss. 18, 21, 24 and 27 – Declaration of area as sanctuary – Management of property included in declaration – Claim by owner of property – Not permissible.

Nayan Behari Das v. State of Orissa
AIR 1998 Orissa 39
Original Jurisdiction Case No. 3481 of 1992, D/-5-9-1997
P. C. Naik and P. K. Mohanty, JJ.

Motor Vehicles Act (59 of 1988), S. 110 – Motor Vehicles Rules (1989), R. 119 – Use of multitoned horns – Prohibition for – Petitioner seeking direction for prohibiting such use – Multitoned horns and other devices producing unduly harsh and loud noise is bound to cause disturbance and inconvenience to public in general – Their use not permissible by Rules – Question of issuing direction prohibiting such use does not arise – However certain directions for giving publicity through T. V. and press are issued regarding prohibition of use of such devices.

Puttappa Honnappa Talavar v. Deputy Commissioner, Dharwad
AIR 1998 Karnataka 10
Writ Petition No. 682/1997, D/-3-2-1997
G. C. Bharuka, J.

Constitution of India, Art. 21 – Right to life – Regulation of – Right to dig bore wells to draw underground water – Can be restricted or regulated only by an Act of legislature.

Right to life enshrined in Art. 21 means that right to life includes all those aspects of life which go to make man's life meaningful, complete and worth living. The word law as used in Article 21 would not include mere executive or departmental instructions which have no statutory basis. Therefore, the right to dig bore wells to draw underground water can be restricted or regulated only by an Act of the legislature.

(Para 6)

Rajendra Kumar v. Union of India
AIR 1998 Rajasthan 165 (JAIPUR BENCH)
Civil Writ Petition No. 2735 of 1993, D/-3-12-1997
J. C. Verma, J.

Wild Life (Protection) Act (53 of 1972), S. 49-B(i)(a) (as amended by Act 4 of 1991) - Ivory of Mammoth - Import of - Ban on - Prohibition of all international trade in ivory imported into India or an article made there from specified date mentioned in Amending Act - Includes Mammoth Ivory - Plea that no restriction can be imposed on trade in relation to Mammoth Ivory - Is not tenable.

S. P. Gururaja v. The Executive Member, Karnataka Industrial areas Development Board
AIR 1998 Karnataka 223
Writ Petition No. 30965 of 1996, D/-7-2-1998
R. P. Sethi, C. J and V. Gopala Gowda, J.

(A) Constitution of India, Art. 226 – Public interest litigation – Technical objections should not be given much importance.

(Para 9)

(B) Constitution of India, Art. 226 – Public interest litigation – Locus standi – Allotment of industrial plots – Allegation that Industrial Area Development Board gas allotted land in question contrary to its own Regulations – Petition against, by persons actively involved in social work on behalf of small entrepreneurs proposing to start new industries – Petition being filed in public interest, petitioners cannot be said to have no locus standi to file petition.

(Paras 10, 12A)

Santosh Kumar Gupta v. Secretary, Ministry of Environment, New Delhi
AIR 1998 Madhya Pradesh 43 (Gwalior Bench)
Writ Petitions No. 1500 of 1994 and 1831/95, D/-5-9-1997
Shacheendra Dwivedi and Iripathi, JJ.

Air Prevention and Control of Pollution Act (14 of 1981), S. 31A - Motor Vehicles Act (59 of 1988), S. 88 - Central Motor Vehicles Rules, 115 and 116 – Air pollution in big city of Gwalior - Instructions issued by State Government to authorities - Non-observance of directions-Pollution continuing - High Court issued suitable directions in the matter to bring about reduction in pollution, some of them being installation of smoke meters and gas analyser etc.

(Para 12)

…12. Considering the relevant aspects of the matter and taking into consideration the pit falls there ever they occur in spite of the instructions given by the State Government, we issue the following, directions:

(i) The State Government of Madhya Pradesh shall provide, at least, four smoke meters and gas analyser for measuring carbon monoxide and other pollutants emitted by automobiles for the city of Gwalior.

(ii) Similarly, the State Government shall provide the latest and the less time consuming instruments for checking the emission of monoxide. At Commissionary head quarters three of such instruments be provided and one instrument at every district headquarters.

(iii) The State Government shall also issue necessary instructions to all authorities in-charge of registration of Motor Vehicles to comply with the legislative mandate provided in S. 20 of the Air Pollution Act.

(iv) The Director General of Police of Madhya Pradesh shall issue necessary instructions to their subordinate officers to effectively carry out the functions as envisaged in Rule 116 of the Central Motor Vehicles Rules.

(v) The State Government shall identify the roads, which be declared one way for public vehicles in order to reduce the traffic load on such roads.

(vi) Learned Additional Advocate General, Gwalior shall obtain a report from the Chief Secretary, Transport Commissioner, and Director General of Police of Madhya Pradesh after the expiry of three months in respect of the compliance of Rule 116 of the Central Motor Vehicles Rules, and shall submit the same to the Registrar of this Court.

The above directions be complied with within a period of three months from today.

State of Maharashtra v. Alka B. Hingde
AIR 1998 Supreme Court 2342 (From Bombay)
Writ Petition No. 2029 of 1997, D/-31- 7- 1997 (Bombay)
Civil Appeal No. 2216 of 1998, (arising out of Special Leave Petition (Civil) No. 14278 of 1997), D/-17-4- 1998
G. T. Nanavati and S. P. Kurdukar, JJ.

Constitution of India, Arts. 21, 226 – Encroachment by hut men dwellers – Direction to remove it within 72 hours – Unjustified – Such highhanded removal would lead to law and order and humanitarian problems – Direction modified to removal of encroachment within reasonable time.

(Para 2)

State of Rajasthan v. Sanjay Kumar
AIR 1998 Supreme Court 1919 (From: Rajasthan)
Criminal Appeal No. 532 of 1998, (arising out of Special Leave Petition (Cri) No. 2665 of 1997), D/-1-5-1998
M. K. Mukherjee and Syed Shah Mohammed Quadri, JJ.

Criminal P.C. (2 of 1974), Ss. 468, 469 – Period of limitation – Commencement – Offence of manufacture of adulterated, substandard, misbranded spurious drugs – and/or storage distribution and sale of such drugs in contravention of Act – Filing of complaint – Period of limitation starts only from date of receipt of report of Public Analyst – Not from date of taking of sample by Drug Inspector.

Criminal M. P. No. 293 of 1996, D/-11-4-1996 (Rajasthan), Reversed.

Sugarcane G & S Sugars Shareholders Association v. T. N. Pollution Control Board
AIR 1998 Supreme Court 2614 (From: Madras)
Writ Petition No. 17333 of 1995, D/-17-7-1997 (Mad.)
Petition(s) for Special Leave to Appeal (Civil) No. 22597 of 1997, D/-15-1-1998
M. M. Punchhi, C. J. I., B. N. Kirpal and V. N. Khare, JJ

Environmental Protection Act (29 of 1986), S. 3 – Environmental Pollution – Petition against – Disposal of, merely on consent of Pollution Control Board – not proper since matter affects interest of public at large – Moreover grant of consent by Pollution Control Board on conditions to be satisfied later is also incongruous.

Suo Motu Proceedings in re: Delhi Transport Department
1998 ELD 14
Decided on 18-11-1996
Kuldip Singh and Saghir Ahmad, JJ.

The "precautionary principle" which is a part of "sustainable development" has to be followed by the State Governments in controlling pollution.

ORDER

1. Pursuant to this Court's order dated 8-11-1996 Ms. Kiran Dhingra, Commissioner-cum-Secretary (Transport), Transport Department, Government of NCT of Delhi has filed an affidavit. She has given various suggestions which we appreciate. We are of the view that it is necessary to have Union of India before us in this matter. We issue notice to the Union of India to examine the affidavit filed by Ms. Kiran Dhingra and give response to this Court before 28-11-1996.

2. It is stated in para 3.1 of the affidavit that the vehicular emissions contribute about 70% of the air pollution in the city of Delhi. As noticed by this Court in various orders the city of Delhi is the fourth grubbiest city in the world according to the World Health Organization standards. The medical data indicates that more than seven thousand people died in the city of Delhi because of respiratory diseases. It is utmost necessary to control air pollution in the city of Delhi. We are in the process of monitoring this matter. This Court is of the view that the "precautionary principle" which is a part of the concept of "sustainable development" has to be followed by the State Governments in controlling pollution. The State Government is under a constitutional obligation to control pollution and if necessary by anticipating the causes of pollution and curbing the same. We are of the view that in the process of considering various measures to control the pollution in the city of Delhi, there is likelihood of some restrictions being imposed on the plying of taxis, three-wheelers and other vehicles in the city of Delhi. We, therefore, direct the Commissioner-cum-Secretary (Transport), NCT, Delhi to issue notices to the various operators through their respective unions to be present in this Court, if they so wish to and assist this Court in the process of controlling pollution in the city of Delhi. Notice be issued to the Three-Wheelers' Union, Taxis' Union, Trucks' Union and various other Unions which are operative within the purview of the Transport Department. We issue notice to the Union of India through Secretary (Transport), Secretary, Ministry of Environment and Forests, returnable on 28-11-1996. We request Mr. Ranjit Kumar to assist this Court in this matter.

T. N. Godavarman Thirumulpad v. Union of India
Interlocutory Application 13 in Writ Petition (Civil) No. 171/96; decided on 13-01-1998
A. S. Anand, C.J., and B.N. Kirpal, J.

Uttar Pradesh – Illegal Mining – Mirzapur District – Personal presence of Senior most Officers of the State Government in view of seriousness of the matter – Direction – Chief Secretary to be personally present – Contempt notice to mining officer.

ORDER

We have perused the report of the Committee constituted by this Court's order dated 7-1-1998. The report given after visiting the site discloses on alarming situation of lawlessness requiring urgent drastic action to stop the illegal activities in the area in question. Shri I. K. Dhela, Director of Geology and Mining, Government of Uttar Pradesh, is present in the Court. In response to our query as to when did he come to know for the first time of the illegal mining activities in that area, he told us that it was only on Saturday, the 10th January, 1998 that he came to know of this fact for the first time when the Committee constituted by the Court visited the site. He also tells us that he has been in this office for the last 5 years. *These facts to be taken in to account while fixing the responsibility of the persons responsible for commission of the illegalities and for convincing with the same. In view of the magnitude of the problem and the inaction of the authorities so far, the fact that the Director of Geology and Mining is even now most casual in his approach towards the problem, as is evident from his demeanour in Court before us, we have no option except to require the personal presence of some of the senior most officers of the State Government before we issue further directions in the matter.*

In these circumstances, *we direct that the Chief Secretary of the Government of U.P. should remain personally present in the Court tomorrow (14-1-1988).* The counsel for the State of U. P. would ensure the presence of the Chief Secretary by taking such steps as are necessary to inform him of this order.

The Director, Geology and Mining would also remain personally present in Court.

In view of the contents of the report of the Committee, particularly paragraphs 9 and 10 thereof, we also have notice to Shri V. L. Das, Mining Officer of the area to show cause why proceedings to punish him for contempt of the court should not be initiated against him. The reply be filed within 2 weeks.

The Learned *Amicus Curiae* submitted that this morning Shri A. N. Khanwilkar, a number of the committee has been informed on telephone that after the office bearers and other members of the Vindhya Kisan Sabha had met the committee members and apprised them of the facts, they have been threatened by some miscreants for having given information to the committee. *Amicus Curiae* submitted that in these circumstances an appropriate order may be made to ensure proper protection and security to these persons and members of their family who have assisted the committee since they have been threatened on account of assistance they have rendered to the committee at the time

of the spot inspection under the orders of this Court. We are of the opinion that said direction is required to be made immediately.

Accordingly, we direct that the Director General of Police of U. P. and the concerned I. G. P. of the Zone will ensure proper protection and security being given to the office bearers of the Vindhya Kisan Sabha and Narsingh Netaji, Pusphrij Singh, Anand Shekhar and secretary of Vindhya Kisan Sabha who have assisted the committee in the performance of its task under the orders of this Court. The learned Counsel of the Government of U. P. will take immediate steps to apprise the concerned authorities of this direction to enable them to take immediate steps for this purpose.

The Conservator of Forest, Shri V.K. Thakur is present. We are informed that he has assisted the committee to the spot inspection. He reiterates the facts stated in the report of the committee. Shri Thakur further informs us that ever since he assumed this office about a year back he had been protesting against the illegal mining activities and for this purpose he had also informed the Mining Department as well as the District Magistrate, but to no effect. We appreciate the work of the Conservator Shri V.K. Thakur in this direction and hope that he and other such officers would be able to do the needful hereafter.

T. N. Godavarman Thirumulpad v. Union of India
Interlocutory Application 13 in Writ Petition (Civil) No.171/96; decided on 14-01-1998
J.S. Verma and B.N. Kirpal, JJ.

Uttar Pradesh – Illegal Mining – Mirzapur District – Directions issued – District Magistrate to seize illegally mined mineral – District Magistrate to function as Commissioner of this Court.

ORDER

Mr. R. S. Mathur, the Chief Secretary of Government of Uttar Pradesh is present in person. He has orally apprised us of the notice taken by the State Government in the last 16 hours after the order was made by this Court yesterday. An affidavit of an officer of the level not lower than the Secretary to the State Government be filed today giving details of the action so far taken by the State Government in this behalf. The Chief Secretary also informed us that action has already been taken to provide protection and security to the persons in compliance with this Court's order made yesterday. He added that further action is being taken by the State Government to fix the responsibility of the concerned officers of different departments whose acts and omissions enabled the commission and continuance of the illegalities in the area in question, in addition to taking the necessary steps by stopping these activities now. We are also informed by the Chief Secretary that the Area Mining Officer – Shri V.L. Das, has already been placed under suspension and the Director Geology and Mining – Shri I. K. Dhale has been asked to give his explanation whereafter further action as found necessary would be taken. We direct that full details of allocation taken hereafter be placed before the Court on affidavit

of an officer not below the rank of the Secretary to the State Government be filed on or before 22nd January, 1998.

In view of large quantities of illegally mined minerals admittedly lying in the area, as evident from the material produced before us, we direct the District Magistrate, Mirzapur, U. P. to seize the same forthwith together with instruments and vehicles used for commission of these illegal activities (including vehicles used for transportation of the minerals). The District Magistrate will exercise these functions as a Commissioner of this Court. Particulars of the seized goods be furnished together with details of persons form whose possession they are seized by the District Magistrate on or before 22-1-1998.

The Chief Secretary assures us that the District Magistrate functioning in this capacity would be rendered all assistance by every Department of the Government and all concerned to enable her to perform this task expeditiously.

Arguments of the parties to suggest ways and means to dispose off the felled timber in the forests of North-Eastern Region are in progress. List on 15-1-1998.

T. N. Godavarman Thirumulpad v. Union of India
Interlocutory Application 13 in Writ Petition (Civil) No.171/96; decided on 15-01-1998
A. S. Anand, C.J., and B.N. Kirpal, J.

Orders directing payment of wages to workmen – Not complied –Instances of such violations to be reported.

ORDER

In view of the report of the High Power Committee various directions have been issued for disposal of the felled timber which is lying in the North Eastern States in terms of the signed order.

I.As 254 to 257 of 1997 (filed by Mr. Santosh Bharti and presented through *Amicus Curiae)*

Taken on Board.

Issue notice to the State of Madhya Pradesh, to be served on the Standing Counsel.

I.As 104, 219, 260, 261 and 262

In view of the orders passed by us in WP(C) 202 of 1995 and WP(C) 171 of 1996, these applications stand disposed of.

Rest of the applications will be considered on the next date of hearing.

It is stated by Mr. P. K. Aggarwal, learned Senior Counsel that our earlier orders directing payment of wages etc. to be made to the workmen have not been complied with by several employers. If that be so, particulars of such instances be given in writing within one week to the counsel for the concerned State Governments and the State Governments shall have the matter enquired into by its Labour Commissioner or a similar

authority and submit the factual report within four weeks thereafter. The matter would be considered on receipt of the report.

List the matter on 28th January, 1998 before a Bench consisting of Hon'ble Dr. Justice A. S. Anand, Hon'ble Mr. Justice B.S. Kirpal and Hob'ble Mr. Justice V.S. Khare.

T. N. Godavarman Thirumulpad v. Union of India
Writ Petition (Civil) No.202/95 with Writ Petition (Civil) No.171/96; decided on 15-01-1998
A. S. anand, C.J., and B.N. Kirpal, J.

***North Eastern States*- Transportation of Timber outside the State – Not feasible – Ban on Timber Trade – Neither feasible nor desirable in view of dependence of local people – Number to be regulated according to sustainability.**

***Saw Mills* to be relocated in specified industrial zones – Industrial requirement have to be subordinated to maintenance of ecology and *bona fide* local needs – No fresh felling in Government, District Councils and Regional Councils – Fool proof institutional arrangements to be put in place under supervision of North-Eastern Council – Satellite office of Forest Survey of India to be set up at Shillong.**

***Disposal of felled timber* – Report of High Powered Committee considered – Directions issued – Pricing of timber – Existing royalty to be revised upwardly – Licensing – Licenses given to wood based industries suspended – Wood based industries cleared by High Powered Committee to shift to industrial estate – Complete moratorium on issue of new licenses for wood based industries – Number of wood based industries to be determined on quantity of timber that can be sustainable harvested.**

***Forest Protection* – Action Plan for intensive patrolling to be prepared by PCCF – Report to be submitted to Central Government – State Government to provide all facilities to strictly enforce forest protection measures – Chief Secretary to review the same every six month.**

***Scientific Management of Forest*- Working Plans for all Forest Divisions shall be prepared by State Government and approved.**

District Regional and Village Councils working schemes specified.

***Ecologically sensitive area* – States to identify in consultation with ICFRE, WII, NERIST, NEHU and NGOs – Areas to be totally excluded from exploitation – Minimum extent to be 10% of total forest area in the State.**

***Action against Officials* – States Governments to identify forest divisions where significant illegal felling have taken place – Initiation of disciplinary / criminal proceedings against guilty Timber Extraction – Except in private plantations – To be done only by State agencies.**

Local Laws and Customs relating to forest – Concerned State Government to apply for modification of Court's order.

Arunachal Pradesh – Permit System abolished.

Proceeds from seized timber to be shared between State Government and Tribal Populations.

Wildlife and Biodiversity – States to ensure sufficient budgetary provisions.

Ministry of Environment and Forest to have liberty in issuing suitable directions consisting with order.

Clarification – Term 'State Government to include District Councils'.

ORDER

Learned Attorney General submits that the perception of the Ministry of Environment and Forests is as under:

1. It has been estimated by the HPC that about 1.20 lakhs cubic meters of illicitly felled seized timber, belonging to the State Governments is lying in the forests and depots for varying periods of time between 1 to 2 years and is thereby getting degraded on account of decay and rotting of the wood. It is necessary to dispose it off at the earliest to minimise any further loss in it monetary value. There is, in addition, considerable quantity of Timber claimed by the private industry and local people.

List the matter on 20th January, 1998 before a Bench consisting of Hon'ble Dr. Justice A. S. Anand, Hon'ble Mr. Justice B. N. Kirpal and Hon'ble Mr. Justice V. S. Khare.

In view of the approaching monsoon season (April 98) all such timber needs to be disposed off with urgency to save further loss in quality, as also in value, albeit with, proper checks and balances.

North – Eastern States

2. Given the weak infrastructure in the North – Eastern region, it does not been feasible to transport such huge quantities of timber for auction in markets outside the region in a short time. Moreover, there would be uncertainty of the response in timber markets far away from the source of timber which has been subject to elements of degradation in varying degrees. There is also the likelihood of local resentment, in an otherwise sensitive area, it all such material is removed from the region without processing and value addition, which could be conceived as creating an adverse effect on the region's economy.

3. *Even though the proliferation of wood – based industries has been the main cause of* degradation of forests in the North- Eastern States, considering the extent of forests (64% of the geographical area) and the dependence of the local people on the forest resources in the region it is neither feasible, nor desirable, to ban completely either the timber trade or running of the wood based industries. However, their numbers and capacities were to be regulated *qua* the sustainable availability of forest produce and they are also required to be relocated in specified industrial zones. *Moreover, the industrial requirements have*

to be subordinated to the maintenance of environment and ecology as well as bona fide local needs.

1. There shall be no fresh felling in the forests belonging to the Government, District and regional Councils till the disposal of their existing stocks of legal and illegal timber.

2. In view of the multi-dimensional issues impinging upon forest protection, fool proof institutional arrangements need to be put in place, and made functional under the strict supervision of the North – East Council (NEC). Technical back stopping in the forestry matter will be provided by MoEF by opening a separate Cell in the Ministry under an officer of the rank of CCF and starting a satellite office of the Forest Survey of India at Shillong.

   We appreciate the perception of MoEF as reflected by the learned Attorney General.

   We have heard the *Amicus Curiae*, the Learned Attorney General and learned counsel for North Eastern States. In view of the report of the High Power Committee and taking into account the factors which require an order to be made by the Court for disposal of the felled timber and ancillary matters which are lying in the North – Eastern States, we consider it appropriate to make the following order:-

   1. *Disposal of timber shall commence only after the concerned Principle Chief Conservator of Forests irrevocably certifies that investigations of all felled timber in the State has been completed.*

   2. As a first measure all inventories timber, including seized timber lying in the forest should be immediately transported to specified forest depots.

   3. All illegal / illicit timber found in possession of an offender or abandoned in the forest shall be confiscated to the State Government and shall be disposed off in accordance with the procedure to be adopted for disposal of Government timber.

   4. Out of the seized timber, logs found suitable for manufacture of veneer and plywood shall be processed by the State Governments within their own factories and by hiring such facilities. The finished product can be marketed freely.

   5. The remaining timber belonging to Government and District Councils shall be first offered for sale to Government Departments for their *bona fide* official use and the rest shall be sold in public auction or through sealed tenders after fixing floor price by an Expert Committee with a representative from the MoEF. Private timber owners whose stocks have been cleared by HPC shall have the option of selling the timber either in the auctions organized by the State Forest Departments / Forest Development Corporations or directly.

   6. *The State Governments shall formally notify industrial estates for locating the wood based industries units in consultation with the Ministry of Environment and Forests.*

   7. Timber as per inventory cleared by HPC may be allowed to:

(a) be converted / utilized if the unit is located within the notified industrial estate. As the relocation in proposed industrial estates may take some time, existing units with only legal stocks may convert this timber, as one time exception, notwithstanding anything contained in para 12 hereunder, till such stock last subject to the maximum period as per the norms prescribed by the High Power Committee (*Vide* their Ill report) or six months whichever is less. Any stock remaining thereafter shall rest in the State Government. However, fresh trees / timber will be allotted to these units only when they start functioning within the designated industrial estates. The territorial Deputy Conservator of Forests / Divisional Forest Officer shall be responsible for ensuring that such units process the legal stocks only and will closely monitor the various transit permits (inward and outward) and maintenance of the prescribed records. All such records shall be countersigned (with date) by an officer not less than the rank of an Assistant Conservator of Forests.

(b) allowed to be sold to other units which are located in these industrial estates subject to the condition that such transactions are routed through an authority notified / constituted by the Principal Chief Conservator of Forests.

(c) the State Governments shall ensure disposal of illegal timber before permitting the conversion / disposal of legal of legal / authorized timber available with the wood based industries.

8. Transportation of auctioned timber (as well as legal timber) including sawn timber outside the North Eastern Region shall only be done through railways under the strict supervision of the Forest Department. The Railway Board shall give priority for providing rakes / wagons for such transportation.

9. Modalities for transportation of timber / timber products and alternative modes in case of difficulties in transportation by Railways, will be worked out by the State in concurrence of the Ministry of Environment and Forests.

10. *Existing inventories stock of timber originating from plantations in*

private and community holdings in the States of Meghalaya, Mizoram, Tripura, Manipur and Nagaland may be disposed of by their owners under the relevant State laws and rules. In States where such laws and rules do not exist, the necessary laws and rules may be framed within six months.

PRICING OF TIMBER

11. The State Governments shall ensure that timber / forest produce is supplied to industries including Government Undertakings, at full market rate. The existing royalty shall be reviewed and revised upwardly by a Committee constituted under the Chairmanship of Principal Chief Conservator of Forests with representatives from the concerned Departments and shall also include a representative of Ministry of Environment and Forest. The prices of timber for which royalty has not been realized in full shall also be reviewed by this Committee and the concerned industry shall be required to pay the revised price

or the royalty (including surcharge, fee etc.) whichever is higher after deducting the part royalty already paid.

LICENSING

12. Licensing given to all wood based industries shall stand suspended

13. Wood based industries which have been cleared by the High Power Committee without any penalty shall have the option to shift to industrial estates which shall be identified by the States within 45 days and developed within six months thereafter.

14. Units which have been penalized because they were found to exceed normal recovery norms, but were within 15% of the said norms will have right to approach the High Power Committee on or before 9th February, 1998. The High Power Committee shall examine all relevant material in particular the income tax and excise records for the proceeding three years. The High Power Committee shall dispose of all such applications within 45 days thereafter and such mills may be granted licence if the High Power Committee finds that it is not against public interest so to do.

15. Units which have not furnished details / information to the High Power Committee so far or which have not been cleared by the High Power Committee shall not be granted any licence and the stocks in their custody if any, shall be confiscated to the State Government. In case of leased mills belonging to corporations / trusts /cooperative societies owned / controlled / managed by the State Government and where the lessees have been penalized by the High Power Committee, the leases shall stand revoked. Such mills shall, however, be eligible for relicencing subject to the condition that these mills are not leased out in future except to entity fully owned by the Government.

16. *Units who do not want to shift to the designated industrial estates shall be allowed to wind up as per law.*

17. *Henceforth, licenses of units shall be renewed annually only in those cases where no irregularity is detected*

18. There shall be a complete moratorium on the issue of new licenses by the State Governments or any other authority for the establishment of any new wood based industry for the next five years after which the situation shall be reviewed with the concurrence of Ministry of Environment and Forests.

19. Number of wood based industries shall be determined strictly within the quantity of timber which can be felled annually on sustainable basis as determined by the approved Working Plans from time to time. If it is found that units after relocation in industrial estate have excess capacity then their capacities shall be reduced pro rata to remain within the sustainable levels.

FOREST PROTECTION

20. An action plan shall be prepared by the principal Chief Conservator of Forests / Chief Forest Officer for intensive patrolling and other necessary protective measure to be undertaken in identified vulnerable areas and quarterly report shall

be submitted to the Central Government for approval. The approved plan together with the modifications, if any, shall be acted upon.

21. To ensure protection of the forest wealth the forest officers in the North Eastern States may be empowered with authority to investigate prosecute and confiscate on the lines of the powers conferred on the forest officers in many other States in the country.

22. The State Government shall be responsible for providing all facilities including security and police force to strictly enforce forest protection measures to stop illicit felling, removal and utilizations of such timber. The Chief Secretary shall review the various matters concerning forest protection and development in his State at least once every six months with senior forest officers up to the rank of Conservator of Forest, Regional Chief Conservator of Forests of MoEF shall be invited to all such meetings.

Scientific Management of Forest.

23. *Working Plans for all forest divisions shall be prepared by the State Governments and got approved from the Government of India. Forest working shall be carried out strictly in accordance with the approved prescriptions of the Working Plans. The Working Plans should be prepared within a period of two years. During the interregnum the forests shall be worked according to an annual felling programme approved by the MoEF which shall be incorporated in the concerned working plan. In case a working plan is not prepared within this time frame, future fellings will remain suspended till the regular working plan is prepared and get approved.*

24. The forests under the District, Regional and Village Council shall be worked in accordance with working schemes which shall specify both the programme for regeneration and harvesting and whose period shall not be less than 5 years.

25. The maximum permissible annual yield in the ad interim measures suggested above, shall not exceed the annual harvestable yield determined by Ministry of Environment and Forests. *The plantations schemes raised on private and community holdings shall be excluded from these requirements but shall be regulated under respective State rules and regulations.*

26. The States shall identify ecologically sensitive areas in consultation with leading institutions like the Indian Council of Forestry Research and Education Wildlife Institute of India, North Eastern Hill University, North Eastern Regional Institute of Science and Technology, leading NGOs, etc. and ensure that such areas are totally excluded from any kind of exploitation: The minimum extent of such areas shall be 10% of the total forest area in the state.

ACTION AGAINST OFFICIALS

27. The State Government shall identify within 15 days all those forest divisions where significant illegal felling has taken place and initiate disciplinary / criminal proceedings against those found responsible. The first Action Taken Report

(ATR) in this regard shall be submitted to the Central Government within three months which shall be followed by quarterly reports (Qrs.) till the culmination of the matter.

28. Timber extracting in forests irrespective of ownership except in private plantations, shall be carried out by a State agency only. The States shall endeavour to adopt pattern obtaining in the State of Himachal Pradesh as described in para 2, 3, and 5 of the Rajamani Committee Report.

If there be any local laws / customs relating to the forest in any State, the concerned State Government may apply to this Court for the needed modification, if any, with alternative proposal.

29. The penalties levied on the wood based industries as ordered by the High Power Committee shall constitute the revolving fund to meet the expenses involved in collection and transportation of seized illegal timber. These can be augmented by utilizing the funds generated by the initial sales of illegal timber already available in the forest depots.

30. Each State shall constitute a State level Expert Committee for matters concerning the preparation of Working Plans, their implementation, development of industrial estates, shifting of industrial units to these estates, rules and regulations regarding the grant and renewal of licenses to wood based industry and other ancillary matters, under the chairmanship of Principal Chief Conservator of Forests and with a nominee of Ministry of Environment and Forests as one of its members. Any decision of this Committee which is not acceptable to the State Government shall be referred to the Central Government.

31. *The existing permit system in Arunachal Pradesh shall stand abolished. The State Government may provide financial assistance in each or kind in the form of timber only for the* bona fide *use of the local tribals alone.* Such concessional timber shall not be bartered or sold. Felling of trees for such purpose shall be carried out only by a Government agency.

32. The total sale proceeds from the sale of seized timber, as well as timber products manufactured and disposed by the State Government (Vide para –1) and penalties would be credited to the State Revenues. *Out of this, the State shall utilise one half of the amount for raising forest plantations by local tribal population and as assistance to the tribals. The remaining one half of the total sale proceeds, after deduction of the expense therefrom, would go to the State coffers for other developmental activities in the State.*

33. The States shall ensure that sufficient budgetary provisions are made for the preservation of biodiversity and protection of wildlife.

34. To ensure that timber / forest produce smuggled across the border may not be used as a cover for trade in illegal timber, *it is directed that all such timber seized by customs / Border Security Force should not be redeemed in favour of individuals who are smuggling it but should be confiscated and handed over to*

the concerned State Forest Department along with offenders, vehicles, tools and implements for prosecution under the relevant acts.

35. For the proper and effective implementation of these orders, Ministry of Environment and Forests will have the liberty to issue suitable directions consistent with this order.

36. Action taken report be filed by each State Government and the Ministry of Environment and Forest every two months.

37. Liberty to apply for modification / clarification in case of need.

(Note: In this order the term "State Government" would include District Council also except where the context implies otherwise.)

T. N. Godavarman Thirumulpad v. Union of India
AIR 1998 Supreme Court 769
Interlocutory Applications 254-257; decided on 23-01-1998
V. N. Khare and B.N. Kirpal, JJ.

Uttar Pradesh – Mining – Mirzapur District – Government of U. P. to place before Court list of Mining and quarry leases granted – Directions issued – Immediate stop of mining activities.

Uttarakhand (Uttaranchal) – Clarification – Local residence permitted to avail rights and concession in respect of forest produce for *bona fide* personal use in areas above 1,000 mtrs. above sea level.

ORDER

The District Magistrate, Mirzapur has submitted a report regarding the seizure of illegally mined minerals, vehicles etc. A perusal of the report shows that large scale illegal mining activities have taken place. The seized materials shall remain in the custody of the District Magistrate till further orders.

In the affidavit filed on 22nd January, 1998 by the Secretary, State of Uttar Pradesh, Department of Industrial Development, action taken between 14th January, 1998 and 21st January, 1998 has been indicated. In paragraph 4 of the affidavit it has been stated that in case Crime No.6 of 1998, out of 11 persons, against whom, the case had been registered, four were arrested and 6 had surrendered in the Court. That so far as Mr. Manvendra Bahadur Singh is concerned, it is stated that the police teams were sent to apprehend him in Lucknow, Mirzapur, Allahabad and number of other places but he was not found. It is further stated in the affidavit that Mr. Manvendra Bahadur Singh filed a Criminal Writ Petition No. 132 of 1998 and an order came to be made thereon by the High Court on 20th January, 1998.

Mr. Manvendra Bahadur Singh has voluntarily appeared in this Court today and has field an affidavit. Mr. G. L. Sanghi, learned Senior Counsel appears for him. We have perused

the copy of the Writ Petition filed in the High Court which was made available to us by Mr. Sanghi and find that there is conspicuous silence in the Writ Petition about the proceedings pending in this Court as well as various orders made by this Court from time to time. From a perusal of the order made in the writ petition by the High Court on 20th January, 1998, it appears that Additional Government Advocate was present in the Court on behalf of the State. Presumably, the pendency of the proceedings in this Court and various orders made from time to time were not within his knowledge and were, therefore, not brought to the notice of the High Court. Learned counsel for the State submits that the State Government will immediately bring facts regarding the pendency of the proceedings in this Court and various orders made by this Court to the notice of the High Court at Allahabad.

Learned *Amicus Curiae* has drawn our attention to the complaint filed by one Vijay Singh, son of Jagdish Singh regarding illicit mining activities being carried out in Banjari Kalan. A perusal of that complaint shows that besides other persons named therein, the name of Manvendra Bahadur Singh has been specifically mentioned. This complaint is dated 20th December, 1987. According to Mr. Goel, learned counsel for the State of Uttar Pradesh, FIR No. 5 of 1998 was registered on the basis of that complaint but we are surprised to find that the name of Manvendra Bahadur Singh does not figure in that FIR. The submission of Mr. Salve that his name appears to have been deliberately left out cannot be said to be far perched. The SHO concerned with Mirzapur, who registered the FIR. On the basis of that complaint shall file an affidavit in this court and explain the omission. The needful shall be done by him within two weeks. Learned State counsel shall communicate this order to the concerned SHO. The State of Uttar Pradesh is also directed to file an affidavit of a competent police officer to disclose when and where search was made for apprehending Manvendra Bahadur Singh in connection with Crime Case No. 6 of 1998. The affidavit shall be filed in two weeks.

Learned counsel appearing for the State of Uttar Pradesh submits that enquiry report of the Commissioner, Varanasi Division has been received with regard to illegal mining activities. He shall file a copy of that report together with its translation within two weeks. This Court shall also be informed by the next date as to what further action, if any, has been taken, against Mr. Das, the Mining Officer. The State of Uttar Pradesh shall further state on an affidavit of a competent officer not below the rank of Secretary to the Government an up to date position regarding outstanding mining leases or quarry licences which have been issued by the State of Uttar Pradesh throughout the State together with the details of the names of the parties. The same shall be filed within six weeks, as prayed for by learned counsel for the State. Since, it is stated in the action taken report by the State of Uttar Pradesh that directions have been issued to immediately stop mining activities, we expect that the State shall take appropriate steps to see that those directions are carried out in letter and in spirit.

IA.NO. 273/1999

We have heard learned counsel for the State of Uttar Pradesh, learned Attorney General and the learned *Amicus Curiae*. In view of the difficulties explained in the application, in

modification of our order dated 12th December, 1997 and subsequent orders. We *clarify that the local residents of Uttarakhand (8 Districts) shall be permitted to avail the rights and concessions in respect of forest produce meant for the* bona fide *personal use of local population in the regions which are located 1000 meters or more above the sea level. 32,000* cubic meters of forest produce may be so utilised by them subject to the procedure as detailed in paragraph 4 of the application which reads thus:-

"To ensure that forest produce meant for *bona fide* personal use alone is used, there have always been in-built safeguards in the rules and practice followed by the Forest Department. As per the practice, indent comes through the village Headman and is examined by the D. F. O who issues orders for marking of the forest produce to be granted/permitted for a particular village. After the marking, the collection of forest produce is overseen by Government instrumentalities. The existing safeguard is working properly and check posts also exist to ensure that no misuse takes place."

Care shall be taken to ensure that grant of rights to local populous of the hill area does not adversely effect forest conservation in Uttarakhand area of the State of Uttar Pradesh.

IA stands disposed off.

IA./98

The application for direction is taken on board.

Issue notice to the State of Jammu and Kashmir through the Standing Counsel. Notice shall be made returnable by 27th January, 1998.

IAS 354-357 OF 1998

Issue notice to the State, Mr. Sanghi, learned counsel appearing for the State of Madhya Pradesh accepts notice and prays for two weeks time to file objections. His prayer is allowed.

T. N. Godavarman Thirumulpad v. Union of India
Decided on 28-01-1998
Dr. A, S. Anand, C.J., B. N. Kirpal and V. N. Khare, JJ.

Uttar Pradesh – Mining – Mirzapur district – Show cause notice – Contempt proceedings – Mining officer to be present.

ORDER

Mr. Das the Mining Officer, to whom notice was issued by this Court to show cause why contempt proceedings be not initiated against his, shall remain present in court tomorrow.

T. N. Godavarman Thirumulpad v. Union of India
Decided on 29-01-1998
Dr. A. S. Anand, C.J., B. N. Kirpal and V. N. Khare, JJ.

Uttar Pradesh – Mining – Mirzapur district – Contempt proceedings – Time granted.

Jammu & Kashmir – Felling and removal of Khair trees – Particulars to be disclosed through affidavit.

ORDER

Shri B. L Das, Mining Officer to whom notice was issued to show cause why proceeding to punish him for contempt of Court, on 18th January, 1998, be not initiated is present in Court along with his counsel Mr. Raju Ramachandran, Senior Advocate. Reply has not been field till date, Mr. Raju Ramachandran submits that there has been some confusion in the matter of filing the reply because of the date given by the Registry of this Court in the formal notice issued to Shri B. L. Das. Thought we are of the opinion that since Shri B. L Das was present in Court when notice was given to him and, therefore, there was no scope for any confusion, but in the interest of justice, we accede to the request of Mr. Raju Ramachandran and grant one week further time to Shri Das to file his reply.

We request Mr. H. N. Salve, learned senior advocate assisted by Mr. U. U. Lalit to assist the Court in the contempt proceedings against Shall be listed separately with a separate number from the Registry.

List the contempt case after three weeks.

IA 16

An affidavit has been field by Mr. I. P. Singh, Law Officer, Forest Department, Government of J & K. The same is taken on record.

After hearing learned counsel for the parties, it appears appropriate to us to stay the operation of the orders dated 10-8-1997 issued by the Government of J & K, Forest Department and the order dated 27-12-1997, issued by the Chief Conservator of Forest, Jammu. We further direct that there shall be no felling of the Khair trees nor any of the Khair trees, if already felled, shall be removed from the forests. Notice shall issue to the Contractor – Shri Vijay Singh, S/O Shri Rasal and M/s. B. K. Katha (P) Ltd. to show cause why the orders / agreements for extraction of Khair trees issued in their favour be not cancelled.

We are not satisfied with the affidavit field by Shri I. P. Singh, Mr. Mathur, learned counsel appearing for the State of J& K submits that he may be granted sometime to file a better affidavit. We grant his prayer and give him two weeks time to do the needful. Mr. Mathur shall also cause an affidavit of some competent official from the Forest Department of the Government of J & K to be field disclosing whether any other agreements have been entered into with any other contractors for felling or removal of Khair trees as also if any other orders have been issued in favour of any of the other parties relating to the felling and removal of Khair trees. The particulars of all such cases shall be disclosed in the affidavit. The needful shall be done in three weeks.

T. N. Godavarman Thirumulpad v. Union of India
Interlocutory Application 227 in Writ Petition (Civil) No. 202/ 95, decided on 23-02-1998
Dr. A. S. Anand, C.J., B. N. Kirpal and V. N. Khare, JJ.

Madhya Pradesh – Wildlife – Kanha National Park – Removal of infected Sal trees – Non-infected trees also removal – State Government restrained from cutting any trees.

Uttar Pradesh – Report of Commissioner, Varanasi Division, received.

State of Forest Report, 1997 – Dismal picture and alarming situation depicting deforestation on large scale – Copies of the report to be field in Court.

Madhya Pradesh – Jagdalpur District – Arrest and retention of one person – State to furnish the case.

ORDER

IA 254

In view of the orders made in I.As 256-257, no orders are required on this application. The application shall be consigned to records.

I.As 255-257

Replies have been filed on behalf of the State of Madhya Pradesh to all the trees interim applications. Copies of the relies have been furnished to Mr. Harish Salve, Learned *Amicus Curiae*. He submits that he may be granted a short adjournment to examine the replies and make further submission on the interim applications. We grant his prayer. The three interim applications shall be listed after two weeks.

IA 276

Reply affidavit has been filed on behalf of the State of Karnataka. Copy of the same has been furnished to Learned *Amicus Curiae* who prays for two weeks' time to examine the reply and make further submissions.

IA 227

Dismissed.

IA 263

Learned *Amicus Curiae* has drawn our attention to some of the photographs taken by the Members of the Task Force (Wildlife Sub Group) during the site inspection in January, 1998 and in December 1997 in Buffer Zone of Kanha National Park and in adjoining corridors in East Mandla Forests. Mr. Salve submits that these photographs depict that under the grab of removing infected sal trees, the trees which do not have any disease have also been cut and thereby orders of this Court have been frustrated and violated. The Report of the Task Force (Wildlife Sub Group) is not available with the Court or with the Learned *Amicus Curiae*. Mr. Altaf Ahmed, learned Additional Solicitor General who appears for the Union of India shall furnish copies of the Task Force Report to Learned

Amicus Curiae and to the Court within one week. A copy of the report shall also be furnished to learned counsel for the State of M. P. Learned Additional Solicitor General submits that apart from the report of the Task Force, if there are any other reports or materials available with the Union Government, pertaining to the subject matter in issue, the same shall also be furnished to the Court as well as the Learned *Amicus Curiae* during the same period.

Keeping in view the submissions made by the Learned Amicus Curiae and with a view to see that no illegal felling of trees takes place. We restrain the State Government of Madhya Pradesh and its functionaries to cut any of there trees hereafter, even if in the opinion of the State Government, the particular tree or trees are considered to be deceased trees, till further orders.

Report of the Commissioner, Varanasi Division has been received. Copy of the report has been furnished to Learned *Amicus Curiae.* The same shall come up for consideration along with I. A. No. 263 on the date fixed in that I. A.

There is another aspect of the case which has caused us concern. The Learned *Amicus Curiae,* Mr. Salve has drawn our attention to the State of Forest Report 1997. It is submitted that between 1995 and 1997, dense forest to the extent of 17777 sq. kms. has been lost to the country. This presents a rather dismal picture and is an alarming situation depicting deforestation on a large scale. We find from a perusal of the Report that major defaulters appear to be the State of *Andhra Pradesh, Madhya Pradesh, Assam, Manipur, Nagaland, Orissa & Meghalaya.* Copies of the State Forest Report 1997 have not been filed in the Court so far. The learned Additional Solicitor General undertakes to file the copies of the report within two weeks. Copies of the report shall also be furnished to learned counsel, appearing for the abovementioned defaulting States so that they can explain the position of their respective States with regard to the deforestation of that magnitude.

Learned *Amicus Curiae* submits that he has received a telegram from which it is revealed that one Shri Ratneshwar Nath of Kanker, Bastar District has been arrested on February 20, 1998 and is being held at Jagdalpur. A copy of the telegram has been furnished to learned counsel for the State of Madhya Pradesh who shall ascertain the position and State on affidavit about the correct position. The needful shall be done on or before 26th February, 1998.

List on 26th February, 1998 for furnishing of the information regarding the detention/arrest of Shri Ratneshwarnath at 3:45 p. m. when the matter concerning the restrain order issued by us today to the State of Madhya Pradesh is listed.

A communication extension has been received from the Officer on Special Duty of the Lokayukta, Madhya Pradesh for extension of time to submit the report. The time is extended by six weeks. The learned Lokayukta shall be informed accordingly.

T. N. Godavarman Thirumulpad v. Union of India
Writ Petition (Civil) No. 202/ 95, decided on 26-02-1998
Dr. A. S. Anand, C.J., B. N. Kirpal and V. N. Khare, JJ.

State of Forest Report 1997.

Madhya Pradesh – Sal borer epidemic – Directions – state to stop felling of infested trees of any category – Remove Debris of previously cut trees.

ORDER

Copies of the state of Forest Report, 1997 and the other documents recorded in the order dated 23-2-1998 have been filed in the Court by the learned Additional Solicitor General, Mr. Altaf Ahmed. Copies of the same have also been furnished to the Learned *Amicus Curiae* as also to learned counsel for the State of Madhya Pradesh.

An application has been filed through the Learned *Amicus Curiae* for certain directions in the case of Sal trees which are Borer infested and for stopping indiscriminate felling of Sal trees. According to Mr. Salve, under the cover of the borer epidemic, Sal trees which have the capacity to survive are also being indiscriminately cut. Mr. Sanghi, learned senior counsel appearing for the State of Madhya Pradesh disputes the charge and takes notice of the application for directions. He undertakes to file response of the State Government by Monday, the 2nd March, 1998. The application be listed for further orders on Tuesday, the 3rd March, 1998 at 3:30 p.m. *In the meanwhile, we, however, consider it proper to direct the State of Madhya Pradesh to stop felling of the 'Infested Trees' of any category.* These directions, however, shall not come in the way of the State Government to remove the debris of the previously cut trees lying scattered on the forest floor and as a matter of fact we expect the State Government to take prompt and adequate steps to remove the debris.

In response to the notice concerning the arrest of Shri Ratneshwarnath, an affidavit is undertaken to be filed by the State during the course of the day. Copy of the same shall be furnished to Learned *Amicus Curiae*. This matter shall also be listed on Tuesday, the 3rd March, 1998 at 3:30 p. m.

T. N. Godavarman Thirumulpad v. Union of India
Interlocutory Application 291 in Writ Petition (Civil) No. 202/ 95, decided on 03-03-1998
Dr. A. S. Anand, C.J., B. N. Kirpal and V. N. Khare, JJ.

Assam – Implementation of order dated 15-1-1998 – Violation of court order – Government of Assam to file responses.

Madhya Pradesh – Sal borer epidemic – Committee constituted to oversee marking of infested trees in affected areas – Committee to submit report in two weeks.

Madhya Pradesh – Arrest and detention – Arrested person on bail – Matter not to proceed any further.

ORDER

Mr. Harish Salve, Learned *Amicus Curiae,* submits that the Government of Assam has issued an order on 12th February, 1998 whereby wood-based units which have been cleared by the High Powered Committee have been permitted to "procure further stocks" from any other units so cleared by the High Powered Committee and convert these procured stocks and dispose of finished stocks. It is submitted that under cover of the implementation of the order of this Court dated 15th January, 1998, fresh activity appears to have been permitted to the units, which runs counter to the spirit of the order dated 15-1-1998. The Learned *Amicus Curiae* submits that he shall file an appropriate I. A. in this connection and seek directions. We grant permission to do so. He shall furnished a copy of the application to Mr. A. S. Bhasme, learned counsel for the State of Assam, who will have one week's time thereafter to file response of the Government to that application. Copy of the response by the Government of Assam shall be furnished to Learned *Amicus Curiae* on or before 17th March, 1998. I .A. shall be listed for orders after the Holidays, on Friday at 2:00 pm.

I A 291

The Government of India, Ministry of Environment and Forest had constituted a Task Force vide Notification dated 16th January, 1998 on SAL BORER ATTACK IN MADHYA PRADESH. The task Force submitted an interim report to the Government of India on 2nd February, 1998 which presented a rather disquieting picture. We need not go into the merits of that Report or examines its contents at this stage. Suffice it to notice that seven categories of infested trees have been identified by the Task Force, the extent of infestation being maximum in Category 1 of the trees.

With a view to ensure that only infested trees are cut and such trees which, even if infested, are still capable of surviving or rejuvenation are not cut, we consider it appropriate to constitute a Committee to oversee the marking of the infested trees in the affected areas of the forest to be identified by the State of Madhya Pradesh. The marking shall be done compartment wise. The Committee shall also supervise the categorisation of the trees on being identified by the Forest Department of the Madhya Pradesh Government at the time of marking of those trees.

We constitute that Committee with:-

Shri R.B. Lal, Director, Tropical Forest Research Institute, Jabalpur as the Chairman;

One nominee of the Head of the Indian Council of Forest Research Education, Dehradun as the Member : and

Professor Mr. J.S. Singh, Head of the Department of Botany, Banaras Hindu University, Banaras as the Second Member.

Shri Suresh Chand, Conservator of Forests, Regional office, Bhopal, Ministry of Environment & Forests shall be the Member Secretary of the Committee. The Committee is requested to supervise the marking and categorisation of the infested trees at the earliest. The State shall provide all possible assistance to the Committee as well as bear the total expense involved. The Coram of the Committee for the day to day functioning

shall be there. The Committee shall submit its interim reports and the same shall be done fortnightly. The felling of trees of categories 1, 2 and 6 (as mentioned by the Task Force), after the marking and categorisation is completed in a particular compartment, is permitted to be undertaken by the State.

REG. TELEGRAM

We find that a case was registered against Shri Ratneshwarnath and he was arrested in that connection. He has since been released on ball. We need not, therefore, proceed with the matter any further.

T. N. Godavarman Thirumulpad v. Union of India
Decided on 23-03-1998
Dr. A. S. Anand, C.J., B. N. Kirpal and V. N. Khare, JJ.

Uttar Pradesh – Affidavit filed – Illegal Mining Activities- State of Uttar Pradesh directed to produce report of Chief Development Officer in Court.

ORDER

An affidavit has been filed by Shri Pushpa Raj Singh, S/o Shri Pradhuman Singh, who had assisted the Commission which visited the village to find out the State of Affairs about the illegal mining activities in the forest area. From a perusal of his affidavit, it transpires that Shri Pragya Ram Mishra, Chief Development Officer, had been deputy by the District Magistrate to Prepare a report which was to be submitted to this Court, but that report has not been forwarded and in the report submitted by the District Magistrate also there is no reference to the report of Shri Pragya Ram Mishra either. If what is stated in the affidavit is correct to any extent, it does portray a rather distressing situation. We direct learned counsel for the State of U. P. to produce the report in original received from Mr. Pragya Ram Mishra, Chief Development Officer in this Court on the next date in a sealed cover.

In the affidavit of Shri Pushp Raj Singh it has also been averred that illegally mixed materials, other than the ones which have been seized under directions of this Court, are still lying at various places in the District and the same have not been seized by the District Magistrate. This is stated in paragraph 7 of the affidavit. The total number of slabs stated to be roughly about 50,000. Mr. Adarsh Goel, Advocate appearing for the State of U. P. submits that after receipt of the copy of the affidavit of Shri Pushp Raj Singh, the Administration has instituted an enquiry in to the factual aspects constrained in the affidavit and that the result of that enquiry is being complied and shall be filed in this Court before the next date.

Let the report together with the report of Shri Pragya Ram Mishra in original be produced within 10 days.

A copy of the affidavit of Shri Pushp Raj Singh has also been furnished to the learned counsel for the State of Madhya Pradesh, who may respond to the allegations which

concern the State of Madhya Pradesh, particularly those contained in paragraph 8 of the affidavit. The needful shall be done within 10 days.

IA 298/ 98 IN IA 263/ 98

IA 298/98 seeking extension of time to submit the status report is allowed and the delay is condoned. The status report has since been field. Mr. Salve has been provided with a copy of the status report relating to the mining leases or quarry licences etc. He submits that within 10 days he shall examine the report and make his submissions. This I. A. be listed along with the connected matters (arising out of I. A. No. 263 / 98).

IA 60

The Central Bureau of Investigation, Bhopal has forwarded to this Court a copy of the FIR registered on 27th January, 1998. That has been taken on record.

T. N. Godavarman Thirumulpad v. Union of India
Decided on 23-03-1998
Dr. A. S. Anand, C.J., B. N. Kirpal and V. N. Khare, JJ.

Uttar Pradesh – Illegal mining – Mirzapur District – Contempt Proceedings against mining officer – District Magistrate to produce entire records concerning mining activity in forest areas.

ORDER

An additional affidavit has been filed by Shri V. L. Das in response to the notice issued to him to show cause why contempt proceedings be not drawn up against him. In his affidavit it is averred by Shri Das that he had been complaining about illegal mining activities being carried out in forest areas of Mirzapur District to the District Magistrate. It is also stated in the affidavit that he had been sending notes and also writing letters in that behalf of the administration. If the assertion is correct, the matter assumes serious proportions. It appears, therefore, appropriate to us to direct the District Magistrate to produce entire record concerning the mining activities in forest areas, Mirzapur District in general and the complaints and communications received from Shri V. L. Das in particular.

A copy of the additional affidavit as well as the earlier affidavit filed by Shri V.L.Das shall be forwarded to the District Magistrate, Mirzapur for such response as he may consider appropriate and necessary to make. Learned counsel for the State of U. P. submits that he shall communicate this order to the District Magistrate and have the record produced in this Court within two weeks.

The contempt petition No. 157/ 98 shall be listed separately after two weeks on a non-miscellaneous day.

T.N. Godavarman Thirumulpad v. Union of India
1998 ELD 31
Interlocutory Application Nos. 263 and 298 in Writ Petition (Civil) No. 202 of 1995, decided on 15-4-1998
A.S. Anand, B.N. Kirpal and V.N. Khare, JJ.

Illegal mining and deforestation in hills causing damage to the environment and ecology – Independent commission comprising a police officer not below the rank of I.G. and Director, Indira Gandhi National Forest Academy, Dehradun directed to be constituted to survey the extent of illegal mining and deforestation done and damage caused to the hills and forest and to identify the culprits as also the manner of restitution and reforestation.

ORDER

1. On 23-3-1998, we had directed the learned counsel for the State of U.P. to produce the report sent by Pragya Ram Misra, Chief Development Officer to the District Magistrate along with an affidavit/report disclosing what action, if any, was taken on that report. Mr. Goel has filed the report of the District Magistrate in Hindi with its English translation.

2. In the report the steps taken by the District Magistrate in her capacity as the Court Commissioner to seize various equipments used in illegal mining, vehicles, *i.e.*, trucks, tractors, camels, etc., and materials obtained from illegal mining *i.e.*, stones, patia, etc., have been detailed. In the report, the District Magistrate has also controverted the stand taken by Shri Pushpa Raj Singh in his affidavit filed in this Court. We shall revert to that aspect later on.

3. From the various reports, affidavits and seizure memos filed in this Court a clear picture of the extent of illegal mining and the damage done to the hills and the forests does not clearly emerge. The picture is rather hazy and a lot of grey areas have been left. The deforestation and illicit mining has caused immense damage to the environment and ecology. The identification of the persons, including government officials, involved in it has not been clearly disclosed. With a view to get a complete picture of the extent of illegal mining done, deforestation and the damage to the hills and the forests and to identify the culprits as also the manner of restitution and reforestation, it appears appropriate to us to appoint an independent commission which shall survey the area and submit a detailed report on all these aspects. We therefore, direct the Chief Secretary to the Government of U.P. to nominate a police officer not below the rank of an Inspector General of Police to conduct such a survey along with Shri Gangopadhyay, Director, Indira Gandhi National Forest Academy, Dehradun and submit a report on all aspects. Copies of various reports and affidavits already filed in this Court along with the copies of the seizure memos, shall be furnished by the learned State Counsel to the Commission through the Chief Secretary within 10 days. The Commission may also seek assistance from Shri A.M. Khanwilkar, Shri U.U. Lalit and Shri Gopal Singh, Advocates, who are assisting the learned amicus curiae in this case while conducting the survey and assessing damages, etc. The learned advocates above-mentioned may also make available to the Commission copies of the photographs, video cassettes and any other material which is likely to assist the Commission in submitting its complete report. The entire material may

be given to Shri A. K. Goel, learned counsel for the State of U.P., who shall forward the same to the Commission through the Chief Secretary. The expense which may be incurred by the learned advocates shall be reimbursed to them by the State of U.P. The Commission shall submit its report within 6 weeks. The expenses insofar as the Commission work is concerned, including the fee and other expenses of Shri Gangopadhyay shall be borne by the State of U.P. on being so intimated. The fee and expenses of the learned advocates (mentioned above) who may be called upon to assist the Commission shall also be borne by the State of U.P.

4. The learned District Magistrate, as Commissioner of this Court has seized various materials. All those materials are hereby attached till further orders. Any seizure hereinafter made by the District Magistrate or by the Commission shall also stand attached immediately on such seizure being affected. Directions to deal with the materials shall be issued after receipt of the report from the Commission.

5. Some more seizure reports have been filed by Shri A.K. Goel in court today. The same shall be taken on record.

6. On 23-3-1998, we had also directed that a copy of the affidavit of Shri Pushpa Raj Singh be furnished to the learned counsel for the State of M.P. who may respond to the allegations which concern the State of M.P., particularly, those contained in para 8 of the affidavit. In response thereto, an affidavit has been filed by Shri A.P.S. Chauhan, Conservator of Forest, Sagar Circle; Sagar (M.P.) In para 2 of the affidavit, it has been deposed that a team had gone to the site of Lodhi Village on 27-3-1998 and made enquiries and that it was found that no illegal transportation of illegally acquired slabs has been made into Madhya Pradesh. From the report of the District Magistrate filed today it transpires that trucks have access to the illegal mining area via Madhya Pradesh and that the people belonging to Hanumana town of Madhya Pradesh Indulge in illegal mining activities also which activity has been going on for long time. Likewise, it has also been stated in the report that transportation of the illegally extracted mines and minerals takes place through the borders of Madhya Pradesh. The affidavit of Shri A.P. S. Chauhan is rather cryptic and conceals more than what it reveals. We are not satisfied with it. We expect a better affidavit and a clear disclosure from an officer of the rank of Conservator of Forest. Shri S.K. Agnihotri, learned counsel appearing for the State of M.P., submits that he realises that the affidavit of Shri Chauhan is not a complete affidavit and prays for a short adjournment to enable the Conservator of Forest to file a detailed affidavit in this behalf keeping in view the observations made by us in our earlier orders. We grant him two weeks' time to file the affidavit and we emphasise that we expect a complete and full disclosure to be made in the affidavit.

7. Shri O.P. Dube, Officer on Special Duty, Lokayukta Karyalaya has addressed a letter dated 6-4-1998 to this Court seeking extension of time by one month for submitting his report. We grant his prayer. Shri Dube shall be accordingly informed.

8. List after 6 weeks.

T.N. Godavarman Thirumulpad v. Union of India
Decided on 05-05-1998
Dr. A.S. Anand, C.J., B.N. Kirpal and V.N. Khare, JJ.

Madhya Pradesh (now Chattisgarh) - Bastar District - Illegal Felling - Report of Bastar Malik Makbuja Enquiry Committee - Counsel for the parties to consider the report.

Madhya Pradesh - Sal Borer Epidemic - Interim report of Committee appointed by Court submitted.

Karnataka - Chikmagalur Division - Forest fragmentation and degradation due to coffee plantation and agriculture - State Government directed to explain its position in the light of 1997 State of Forest Report.

Uttar Pradesh - Saw Mill licenses - Clarification of order dated 08-05-1997 on relocation of saw mills.

ORDER

IA 60

The Final Report of the Bastar Malik Makbuja Enquiry Committee with continents of the learned Lokayukta, Madhya Pradesh has been received from the office of the Lokayukta, Madhya Pradesh. Learned counsel for the parties are permitted to examine the report and in case they want copies of the report, the same shall be made available to them on payment. So far as the supply of copy to the learned *Amicus Curiae* is concerned, the same shall be made without payment. Learned counsel may after examining the report, file their response, if any, within eight weeks.

IA 166

Mr. Sanghi, learned Senior Counsel appearing for the State of Madhya Pradesh, submits that a detailed affidavit giving the difficulties being experienced by the tribals in the area on account of the order of this court and suggesting certain remedial steps shall be filed within eight weeks. Its advance copy shall be served on Mr. Lalit.

IA 291

The Third Interim report has been furnished by the Committee appointed by this Court after visiting the borer affected areas on 27th and 28th April, 1998. According to the Committee, some more detailed study is required to be undertaken. We request the Committee to do the needful and furnish their report within eight weeks.

It appears that Prof. J.S. Singh, Head, Department of Botany, Banaras Hindu University, Varanasi has expressed his inability to join the Committee because of his pre-engagements. Learned counsel appearing before us may suggest a substitute for Mr.

Singh. List on 12-5-1998 for nominating a substitute in place of Prof. Singh.

IA 276

This application presents rather a disturbing picture of the manner in which forests in Chaikamagalur division have been denuded. It appears that forests have been destroyed and fragmented due to encroachments for growing coffee plantation and agriculture etc. The affidavit filed by Mr. Prasad on behalf of the State of Karnataka on 4th February, 1998 does not make us any wiser about the effective steps taken by the State to prevent deforestation, remove encroachments and restore the forests to its original position. Mr. Nagaraja, learned counsel appearing for the State of Karnataka prays for an is granted one week's time to file a proper affidavit giving all details. Besides giving the statues report, it shall also be disclosed in the affidavit is to why action under Section 64A of the Karnataka Forest Act. 1963, has not been taken against the encroachers, even though as many as 416 cases of encroachment are earlier have been detected by the State Government itself. It is stated that cases have been registered and in most cases is even charge sheets have been filed. Mr. Nagaraja shall inform us the progress made in all other cases.

On 12th of December 1996 directions were issued by this Court banning the felling of trees all over the country including in the State of Karnataka to save forests and prevent deforestation. The State of Forest Report 1997, however, discloses that the area of forest has come down by 5 sq. km in 1997.

Obviously, trees have been permitted to be felled after the order of this Court dated 12th December, 1996 in violation of that order. Before we proceed to bring to book the violators, we grant an opportunity to the State of Karnataka to explain its position in the light of the 1997 Status Report. The learned *Amicus Curiae* submits that because of the violation of the orders of this Court and the inaction on the part of the State to protect the forests in Karnataka, a District Judge may be appointed as a Receiver for the entire area of erstwhile forests. We shall examine that request at a later stage.

IA 385

This order will dispose of IA 385 of 1997 filed by the State of U.P. seeking certain directions and modifications of our earlier order.

On 8th of May, 1997, this Court permitted the Principal Chief Conservator of Forest of the State of U.P., on case to case basis, to consider grant of permission to an existing licence of saw mill to relocate itself, provided that the relocated site is not within 10 km of any existing forest. Mr. Goel learned Counsel for the State of U.P. submits that a clarification is necessary to be made that the area of 10 km, would not include trees standing on either or both sides of the road and railways. *We clarify that the direction dated 8th May, 1997 not to relocate the saw mill within 10 km of any existing forest and imply 10 km of any existing forest excluding the trees on either side of the roads and the railways outside the existing forests and the 10 km ban be considered in that light.*

Mr. Goel further submits that the State Government has examined the rules on the subject and is of the opinion that the rules require to be amended and a cabinet decision has been taken to amend the rules but before notifying the same to bring it to the notice of this Court, and seek permission.

We allow the State Government to amend the relevant rules in accordance with the law keeping in view various orders and directions issued by this Court from time to time on the subject. *It is, however, made clear that the permission hereby granted is not in dilution of any order passed by this Court on this subject.* We also clarify that by the grant of this permission, we should not be taken to have pronounced as the validity or otherwise of the Rules nor expressed any opinion on the correctness or otherwise of the proposed amendments.

In case any other clarification or modification is required of the earlier orders of this Court, the State of U.P. shall be at liberty, to file an appropriate application in that behalf.

T.N. Godavarman Thirumulpad v. Union of India
Interlocutory Application No. 391/98 in Writ Petition (Civil) 202/95, decided on 16-07-1998
Dr. A.S. Anand, C.J., B.N. Kirpal and V.N. Khare, JJ.

Madhya Pradesh - Sal Borer Epidemic - Committee to permit felling of trees to the minimum extent possible under their supervision.

ORDER

Mr. Harish Salve, learned *Amicus Curiae* taken notice of the application and prays for a short time to file the reply. He submits that the reply shall be filed by Monday, the 20th July, 1998.

After hearing learned counsel for the parties, it appears appropriate to us to direct the Committee headed by Shri R.B. Lal to advise us whether the purpose for which this application has been filed namely to cut one or two live trees which contain sap per ha to catch sal borers beetles can be served by permitting cutting of Category-II trees, in which we are told by the learned *Amicus Curiae*, sap is also available. In case the Category-II trees can serve the purpose, the Committee shall permit the felling of such trees to the minimum extent possible under their supervision. However, if the Committee is of the opinion that the felling of Category-II trees would not serve the purpose and trees of some other category are required to be felled to achieve the objective, they may inform this Court by Monday, the 20th July, 1998, and if necessary then by Fax addressed to the Registrar General of this Court.

Post on Tuesday, the 21st July, 1998 at 2:00 p.m. for further orders.

T.N. Godavarman Thirumulpad v. Union of India

Interlocutory Application No. 391 in IA 291 in Writ Petition (Civil) 202 / 95; decided on 21-07-1998

Dr. A.S. Anand, C.J., B.N. Kirpal and V.N. Khare, JJ.

Madhya Pradesh - Sal Borer Epidemic - Report of the Committee consider - State of Madhya Pradesh permitted to fell and use category IV trees for use as trap trees - Felling to be done under supervision of Committee.

ORDER

Through the application for directions, the state of Madhya Pradesh seeks permission to cut trees for the purpose of catching and killing adult insect by using "trap-tree operation" to prevent further growth of Sal borer.

On 16-7-1998, we had requested the Committee headed by Shri R.B. Lal to advise us whether the purpose for which the application had been filed could be served by permitting cutting and felling of Category-II trees and if not, to indicate how the purpose could be achieved. The Committee has submitted its report on 18-7-1998.

We have perused the report and heard learned counsel for the parties.

Keeping in view the report of the Committee and in order to arrest the epidemic, we permit the State of Madhya Pradesh to fell and use Category – IV trees for use as trap trees. In addition, they may also fell and utilise unsound or injured and wind fallen trees as trap trees. The trees shall be cut one tree per two hectares, as suggested by the Committee. The felling shall be done under the supervision of the Committee and the State shall inform this court about the total number of trees which are felled and used, including trees which are of unsound, injured or wind fallen condition. The area from where felling takes place shall also be indicated. The information shall be supplied before the next date.

T.N. Godavarman Thirumulpad v. Union of India

Interlocutory Applications 166, 263, 264, 276, 279, 281, 295, 298, 299, 300 and 392 in Writ Petition (Civil) No. 202 / 95, decided on 28-07-1998

Dr. A.S. Anand, C.J., B.N. Kirpal and V.N. Khare, JJ.

Karnataka-Encroachment on forest land - State Government directed to file affidavit indicating total extent of encroachment existing on forest land including full details - Thatkola Reserve Forest - Court Commissioner appointed and directed to immediately do a survey - Maintenance of *status quo* by encroachers on forest land - Not to imply that legal proceedings against their have been stayed.

Gujarat - Notice of eviction served on applicant by Range Forest Officer - Applicant filed application before Gujarat High Court - Application dismissed - Held - No fault with order of High Court.

ORDER

IA 264

Directions issued by this court on 7-1-1998 to various States and Union Territories to file their response to the questionnaire have not evoked response from the States of Andhra Pradesh, Bihar, Haryana, Himachal Pradesh, Jammu & Kashmir, Karnataka, Kerala, Maharashtra, Meghalaya, Nagaland, Punjab, Tamil Nadu, Tripura, U.P. National Capital Territory of Delhi, Andaman & Nicobar Islands, Chandigarh and Pondicherry.

Learned counsel appearing for the defaulting States /UTs pray for and are granted four weeks time to file their response to the questionnaire. This shall be treated as the final opportunity for doing the needful.

IA 276

Mr. Harish Salve, learned *Amicus Curiae* started his arguments at 2:00 p.m. and was on his legs when the court rose for the day. The matter remained part heard.

We have perused the affidavits filed on behalf of the State of Karnataka on 12-5-1998 and 24-7-1998 whereas both the affidavits reveal that there has been encroachment of the forest land all over the State and that the encroachment has existed prior to 1978 and has continued till 1997, we are unable to find out the total extent of such encroachment, as that has not been disclosed in the affidavits. *We, therefore, direct the State of Karnataka to file an affidavit, indicating the total extent of encroachment of the forest land:(1) as was existing prior to 27-4-1978 all over the State(2) the position of total encroachment as existing in 1988 and (3) the extent of encroachment which has taken place till 1997. The information shall be furnished district–wise.* The affidavit shall also disclose the steps taken by the State to retrieve the encroachment and preventive measures taken after a refusal by the Government to regularise the encroachment which had occurred after 1978, till date. The State shall also indicate the non forestry use to which the encroached land has been put by the encroachers and, in particular, where coffee plantation has taken place. The extent of that area, together with the details of the encroachers shall be furnished in that affidavit.

We notice from the affidavits already filed that a joint survey had been conducted by the ADIR, Revenue Department and the Forest Department. The report of joint survey, however, is not placed on the record. The State of Karnataka is directed to furnish a copy of the report.

The learned *Amicus Curiae* has brought to our notice that so far as Thatkola Reserve Forest is concerned, in District Chickmagalur, there has been large scale deforestation even after the orders of this court prohibiting the felling of trees were made.

We appoint Mr. R.M.N. Sahai, Conservator of forests, as the Commissioner of the Court, and direct that Mr. Sahai shall immediately go to Thatkola Reserve Forest

and give a report with the present state of affairs in that forest. The needful shall be done by him within two weeks. Learned counsel for the State of Karnataka undertakes to apprise Mr. Sahai of this order and offer all possible assistance to him to undertake the task assigned by us to enable him to file the status report.

We consider it appropriate to restrain each and every person occupying any part of the forest land in the state of Karnataka not to change the nature of that encroachment during the pendency of these proceedings.

The directions herein above given with regard to the maintenance of *status quo* by the encroachers on the encroached forest land would not imply that legal proceedings initiated against them have been stayed. Those proceedings shall continue. The directions given by us shall be widely publicised by the State for the knowledge of the encroachers.

Let the affidavit be filed by the State within six weeks.

IA. 279-281 & 300

We have heard learned counsel for the parties in these applications. The applicants were served with a notice dated 13th January, 1997 by the Range Forest Officer calling upon them to remove their encroachments within 24 hours of the receipt of the notice, as it was found that they had unlawfully trespassed into the forest land. Instead of showing cause to the Range Forest Officer, the applicants rushed to the High Court of Gujarat through various Special Civil Applications. By an order dated 9th July, 1997 the Division Bench of the High Court dismissed the Special Civil Applications with the observation that they did not find any good ground to entertain those petitions "at this stage". Since, the applicants had rushed to the High Court against the issuance of notice by the Forest Range Officer without having given any response to the notice, the High Court rightly dismissed their Special Civil Applications. We find no fault with the order of the High Court dated 9th July, 1997.

Learned counsel for the applicants submits that the applicants belong to socially and economically backward classes and that they would show cause to the Range Forest Officer against their eviction and may be granted sometime to present their case to the Range Forest Officer against the notice dated 13th January, 1997. He further states that no clarification, as sought for, in the present applications is necessary in view of the provisions of the Act. We agree. In the interest of justice, we grant applicants two weeks' time to show cause to the Range Forest Officer against the notice dated 13th January, 1997. Mr. Dave, learned Senior Counsel, appearing for the State of Gujarat submits that in the interest of Justice and to be fair to the applicants, the state shall not take steps to forcibly dispossess the applicants during the aforesaid period of two weeks to enable them to approach the Forest Range Officer. We record his submission.

With the aforesaid directions I.As are disposed off.

T.N. Godavarman Thirumulpad v.Union of India
Decided on 30-07-1998
Dr. A.S. Anand, C.J., B.N. Kirpal and V.N. Khare, JJ.

State of Forest Report - States of A.P., Assam, Meghalaya and Orissa have not filed the reports - State of Orissa to pay for adjournment.

ORDER

5A State of Forest Report

In spite of the directions given on 23-2-1998, the State of A.P., Assam and Meghalaya have not filed the reports. Learned counsel appearing these State pray for some more time to file the reports. Four weeks time, as prayed for, is granted subject to payment of Rs. 2,000 as costs by each one of the defaulting States.

So far as the state of Orissa is concerned, not only they have not filed the report but nobody appears on its behalf today either. A direction shall issue to the Chief Secretary, State of Orissa, to have the report filed in this court in accordance with the directions issued on 23-2-1998 by the next date. The State of Orissa shall pay Rs. 5,000 as costs for this adjournment.

The costs shall be deposited by all the defaulting States in the Registry within four weeks. Directions for disbursement of the costs shall be given later.

5B. I.As 263, 293 & 392

A copy of the report submitted by the Committee comprising of Mr. P. B. Gangopadhyay and Mr. S.C.Choube, which has been filed in this Court, shall be furnished by the Registry to the learned *Amicus Curiae*. These applications be listed for further directions on a date to be fixed by the Registry on being intimated by the Learned *Amicus Curiae*.

5C. IA 60

Pursuant to the directions of this court, dated 7-1-1998 in I.A. No. 60 report of the Lokayukta, Madhya Pradesh, along with connected papers was forwarded to the Director, Central Bureau of Investigation. Final report from the Lokayukta, M.P. has now been received with a covering letter from Mr. O.P. Dubey. Copy of the final report shall also be forwarded to the Director, CBI for necessary action /investigation.

T.N. Godavarman Thirumulpad v. Union of India
Interlocutory Application 299 in Writ Petition (Civil) No. 202/95, decided on 06-08-1998
Dr. A.S. Anand, C.J., B.N. Kirpal and V.N. Khare, JJ.

ORDER

In paragraph 8 of the application seeking clarification / modification of the order dated 15-1-1998, it is stated that a large quantity of legally felled / timber belonging to the State Government and the Forest Corporation is held up and would suffer deterioration and rot, if not allowed to be processed and disposed of, sending disposal of the illegally seized timber.

Dr. Singhvi, appearing for the State is granted one week's time to file an affidavit giving details of the legally felled timber belonging to the State Government or the Forest Corporation which is held up for want of disposal of the illegally seized timber. The source from where the legally felled timber acquired as also the present location of the same shall also be indicated in the affidavit...

T.N. Godavarman Thirumulpad v.Union of India
For directions with Interlocutory Application 391in Interlocutory Application 291in Writ Petition (Civil) 202/ 95; decided on 06-08-1998
Dr. A.S. Anand, C.J., B.N. Kirpal and V.N. Khare, JJ.

Madhya Pradesh - Illegal Felling and Removal of Khair trees - Affidavit of Addl. PCCF - State has cut and utilized Category IV trees as well as injured and wind fallen trees.

ORDER

Upon mention by the learned *Amicus Curiae,* we take note of the communication addressed to the learned *Amicus Curiae* by the Chairman of the High Power Committee (HPC) for North Eastern Region dated August 5, 1998. A notice shall issue to the petitioner in CR No. 5920/97 pending in the High Court of Gauhati to show cause why the proceedings in the said Civil Rule be not transferred to this Court. Till further orders from the Court, the proceedings in CR No. 5920/97, in which a notice has been issued to the HPC and the Member-secretary of the HPC impleaded there in as respondent Nos. 2 and 3 shall remain stayed. A copy of this order shall be communicated to the Registrar of the High Court of Gauhati by fax by the Registry.

I.A. No. 391/98

An affidavit has been filed by Mr. V.R. Khare Additional Principal Chief

Conservator of Forest, Government of M.P., Bhopal, stating that the State of M.P. has cut and used category-IV trees and has also used unsound or injured and wind-fallen trees for trap-trees operation and that it has not utilised more than one tree per two hectares.

A response has been filed by the learned *Amicus Curiae* to the interim application filed

by the State of M.P. on 2-6-1998. A copy has been furnished to Mr. Sibal, learned Senior Counsel appearing for the State of M.P. He wants time to examine the response and seek instructions with regard to the suggestions contained in various communication attached to the response filed by Mr. Salve.

The matter is adjourned by three weeks, as requested.

In the meanwhile, our directions dated 27-7-98 shall continue to remain in operation.

T.N. Godavarman Thirumulpad v. Union of India
Interlocutory Application 299 in Writ Petition (Civil) No. 202/95, decided on 17-08-1998
Dr. A.S. Anand, C.J., B.N. Kirpal and V.N. Khare, JJ.

ORDER

Dr. Singhvi, learned Senior Counsel appearing for the state of Arunachal Pradesh submits that he will file a clarificatory chart supported by an affidavit with regard to the quantity of fully paid /partly paid/ unpaid timber within two weeks. Dr. Singhvi for the State and Mr. G.L. Sanghi, learned Senior Counsel appearing for Sawmill Owners Association may give a proposal regarding disposal of the timber and the connected matters, in writing to the learned Additional Solicitor General who shall seek instructions from the Ministry of Environment and Forests with regard to that proposal.

The question as regards modification, if any, of clause 7(c) of the order dated 15-1-1998 would be taken up for consideration after the proposal is considered by the learned Additional Solicitor General and the clarificatory affidavit is filed in this Court by Dr. Singhvi.

Mr. Sanghi is permitted to file an additional affidavit which shall be placed before us on the next date of hearing for consideration.

T.N. Godavarman Thirumulpad v. Union of India
Writ Petition (Civil) No. 202 /1995, Writ Petition (Civil) No. 171/96, decided on 10-09-1998
Dr. A.S. Anand, C.J., B.N. Kirpal and V.N. Khare, JJ.

Jammu & Kashmir - Saw Mills - Directions - For preservation of forest and to prevent illicit felling - Desirable to locate the saw mills beyond 8 kms. of demarcated forest - State to ensure that no saw mill or plywood mill is permitted to operate within a distance of less than 8 kms. from the boundary of a demarcated forest area - Existing saw mill within such distance to be relocated - State to constitute committee to identify areas where saw mills can be relocated.

ORDER

IA 12/97

Mr. Salve, learned *Amicus Curiae* has drawn our attention to a letter (attached with the affidavit of Shri Kuldip Singh Annexure 1/2) bearing No. 346/Simla/Ban dated 20th February, 1997. According to that letter, the total volume of stock of timber comprising Deodar, Fir, Kail and Chir works out be 110059.66 cft. This figure has been given on the basis of a report given by the Conservator of Forests (West) vide letter no. 675/ Timber dated 18-2-1997 and concerns 5 traders mentioned in that letter. In the additional affidavit filed on behalf of the applicants, it is deposed to by the deponent of the affidavit that the affidavit flied by the State on 27th February, 1997 does not reflect the correct position of the stock. Subsequent to the filing of the additional affidavit by the applicant an affidavit has been filed on behalf of the State of Jammu and Kashmir by Mr. M.A. Bukhari, Deputy Secretary to the Government, Forest Department on 2nd September, 1998. According to this affidavit on the basis of the verification by a committee which as constituted after the order was made by this court on 5-5-1998, quantity of timber stock of 119.84 cm (4231.67 cft) was physically found present in the depots of the 5 traders, whose names have been mentioned in the letter attached as Annexure 1/ 2 to the affidavit of the applicant. There is, thus, a great variation with regard to the actual quantity of timber stock in the two affidavits. In the affidavit filed by State on 2nd September, 1998 the averments contained in the additional affidavit filed by he applicant on 19th March, 1998 have not been adverted to contempt complete silence with regard to the correctness or otherwise of the letter dated 20th February, 1997 (Annexure 1/2 attached to the affidavit of the applicant). In view of difference in the total quantity of timber, the matter assumes serious significance as one or the other document /affidavit does not reflect the correct position. We, therefore, consider it appropriate to direct the State of Jammu & Kashmir, through the learned Advocate General, who is present in Court to produce in this Court the file relating to the verification of the stock of timber of the 5 traders whose details have been given in Annexures 1 & 2 attached to the letter dated 20th Feb, 997. The names of the 5 traders also appear in the affidavit of the State dated 2nd September, 1998. The State shall also file an affidavit in reply to the averments contained in the additional affidavit filed by the applicant on 19th March, 1998 and also respond about the genuineness or otherwise of the letter dated 20-2-1997 (Ann. l/2). The file together with the affidavit shall be filed in this court within 3 weeks with an advance copy to the learned *Amicus Curiae*.

I.A. 13

An affidavit has been filed by Mr. M.A. Bukhari, Deputy Secretary to the Government. Forest Department. In the affidavit it is disclosed that there are only 14 persons who are in possession of band saw licences and not 15 persons as mentioned in the petition. It is further stated that all the applicants mentioned in the petition have their saw mills very close to the demarcated forest (within 1/2 to 2 kms.) and that their licences have never been cancelled till 1996. Para 7 of the affidavit then reads thus:

"At this stage, it may be pertinent to mention, that as per the report of Principal Chief Conservator of Forests letter dated 29-6-1998, addressed to the Advocate General, the total number of Band Saw Mills as on 1-6-1998, within the State is 2517, out of which 1122 exist beyond 8 kms. of Demarcated Forests. 1395 exist within 8 Kms. of Demarcated Forests. Apart from these there exist 155 who operate without licences. It is further stated that 733 mills have been dismantled/made non-functional. A copy of the said letter is annexed and marked Annexure R-II."

Mr. Goni, learned Advocate General for the State of Jammu & Kashmir, submits that the State Government has enacted the Saw Mill (Registration and Control) Rules, 1968 *vide* Notification SRO 434 dated 24th October, 1968. These rules have been framed in exercise of the powers conferred by Section 45 of the Jammu & Kashmir Forest Act. Rule 3 of the said rules provides that "no owner of a saw mill shall carry on the business of saw milling except under and in accordance with the terms and conditions of a licence issued under these rules".

For the preservation of forests and to prevent illicit felling, it is desirable to locate the saw mills, including the Band Saws Mills, beyond 8 Kms. of the demarcated forests. The order of this court dated 12-12-98 commanded the States, including the State of Jammu & Kashmir to ensure that no Saw Mill or Plywood Mill is permitted to operate within a distance of less than 8 Kms. from the boundary of an demarcated forest area. It was also directed in that order that any existing saw mill falling in this belt should be relocated. Mr. Goni submits that in view of the topography of the State, most of the areas in the State fall within 8 Kms. radius from demarcated forests and other protected resources and that there is only a small area which is beyond the 8 Kms. radius from the demarcated forests and other protected resources. He submits that the State, has on this account, found itself in a difficult situation to carry out the order of this Court dated 12-12-1996 in that behalf in letter and in spirit. *We, therefore, direct that the State shall constitute a committee to identity the areas where the Saw Mills including Band saws can be relocated. In the event it is found that sufficient area is not available beyond the radius of 8 Kms. for that purpose, the committee may identify such areas where Industrial Zones can be created for shifting of the Saw Mills under proper security arrangement in the State.* The feasibility report shall be filed by the State within 8 weeks from today. The Committee shall keep the provisions of SRO 434 in view, while conducting identification of the areas and submitting the feasibility report.

IA 18

Upon being mentioned, IA 18 is taken on Board.

This application has been filed by the learned *Amicus Curiae.* Mr. Goni takes notice of the application.

After hearing Mr. Salve, we direct the State of Jammu & Kashmir to state on affidavit.

(a) steps taken by it to ensure that no timber other than that certified in accordance with the order of this Court dated 12-12-1996 is permitted to move out of the State;

(b) steps taken by the State, including the steps taken by it for creation of agencies to ensure that there is no movement of timber outside the State;

(c) its response to the allegations that there has been rampant felling of trees within the State by various agencies, which timber has been moved outside the State, even after the order was made by the Court on 12-12-1996;

(d) details of the total number of trees felled along with the total number of trees utilised in pursuance of the implementation of the Environment Plan of the State Government.

The State shall also file an affidavit explaining their perception of the expression "Private Plantations" along with a list of private plantations recognised by it where felling is being permitted at present. This list shall be supported by an affidavit of a competent authority. The needful shall be done within 4 weeks.

IA 401 (Patnitop Matter)

Learned Advocate General for the State of J & K accepts notice of the application and prays for and is granted 4 weeks' time to file the response.

IA 16 with Suo-Motu Contempt Petition Nos. 290- 292 / 98

These petitions shall be listed after 8 weeks as requested by learned counsel for the parties.

IA 299: IA is disposed of in terms of the signed order

Signed order is placed on the file.

Note: All J & K matters be listed on one and the same day.

T.N. Godavarman Thirumulpad v. Union of India
Writ Petition (Civil) No. 202/ 95, decided on 10-09-1998
Dr. A.S. Anand, C.J., B.N. Kirpal and V.N. Khare, JJ.

Arunachal Pradesh - Clarification - Order dated 15-1-1998 - Clause C of para 7 of the order shall not he construed as any restraint on the State Government to dispose off the timber belonging to it which is laying in forest floor or timber depots.

ORDER

We have heard Dr. Singhvi, learned Senior Counsel, appearing for the State of Arunachal Pradesh, Mr. Salve, learned *Amicus Curiae,* the learned Additional Solicitor General on behalf of the Union of India as well as Dr. Dhawan and Mr. Sanghi, learned Senior Counsel.

Although we find force in the submission of the learned *Amicus Curiae* that clause (c) of para 7 of the order dated 15-1-1998 is quite explicit, but after hearing the apprehension expressed by Dr. Singhvi, we consider it appropriate to

clarify that clause (c) of para 7 of the order dated 15-1-1998 shall not be construed as any restraint on the State Government to dispose of the timber belonging to/vesting in it which is lying on the floor of the forest or in the depots with the aforesaid clarification. IA 299 is disposed of.

T.N. Godavarman Thirumulpad v. Union of India

Interlocutory Application 399 for directions on behalf of all Arunachal Saw Mill Owners Association

Interlocutory Application 263 for directions - Mirzapur Mining

with Interlocutory Application. 298 & 392 for extension of time & directions on behalf of State of U.P.

Interlocutory Application 391 in Interlocutory Application 291 for directions - Sal Bearer Infested Trees in

Madhya Pradesh in Writ Petiiton (Civil) No. 202/95

Decided on 17-09-1998.

Dr. A.S. Anand, C.J., B.N. Kirpal and V.N. Khare, JJ.

Uttar Pradesh - Illegal Mining - Mirzapur District - Persons arrested under Goonda Act for illegal mining released on bail - Court not informed - Directions - Particulars of all such cases to be produced before the Court.

High Power Committee - Vacancies of members - M.K. Jiwarajka to continue functioning as Member Secretary.

ORDER

WP (C) 202/95 (Mirzapur Mining Case)

During the pendency of the case, we were informed by Mr. Goel learned Additional Advocate General for the State of Uttar Pradesh that Manvendra Bahadur Singh had been detained under the Preventive Detention Laws by the State Government. The learned *Amicus Curiae* submits that according to his information, Manvendra Bahadur Singe is not in detention and has been released on parole by the Government. Mr. Goel is not in a position to admit or deny the allegations and wants time to ascertain the true position. We would like to know from the State as to when he was released on parole and by whom and what conditions, if any. The information shall be conveyed to as on the affidavit of the Home Secretary. The affidavit will also disclose the grounds on which parole was granted.

The persons, who were arrested in connection with illicit mining in the District under the 'Goondas Act', we are informed, have been since released on bail. This is a serious matter because this Court which is seized of the case has not been informed. We direct that the particulars of all such cases shall be furnished to this Court along with the copies of the orders granting bail, along with an affidavit of a Government Officer.

It appears that some proceedings are pending in the High Court of Allahabad on which the last date of hearing was 11th September, 1998. In those proceedings , on 21st August, 1998, it was directed by the Division Bench of the High Court that a copy of the affidavit filed by Manvendra Bahadur Singh be served on the learned Additional Government Advocate Shri Jagdish Tiwari and the learned Additional Government Advocate was directed to contact the Members of the Committee constituted by this Court. This Court would like to know the nature of the proceedings in which such an order came to be made by the Allahabad High Court as also the purpose for which the Committee was required to be consulted. This information shall be conveyed on an affidavit of a competent officer by Mr. Goel together with the relevant documents.

Let both the affidavits be filed within two weeks.

By our order dated 4th March, 1997 directions were issued for constituting a High Power Committee comprising of a Chairman and two Members, out of which the Member nominated by the Ministry of Environment and Forests was also to act as Member Secretary. Mr. Harish Salve, learned *Amicus Curiae,* has received a letter dated 14th September, 1998 bearing No. EAP/ HPC/PA/l /98 from Shri M.K. Jiwarajka, Member Secretary, High Power Committee. From a perusal of that letter, it appears that it is only the Member Secretary, who is actually working in so far as High Power Committee is concerned, because the earlier Chairman has taken leave of absence and the other Member has not been attending the office. Till substitutes are appointed, we direct that in order to enable the Secretariat provided to High Power Committee to continue to remain functional, the Member Secretary, High Power Committee, Mr. M.K. Jiwarajka shall continue to function as the Member Secretary notwithstanding the vacancies in the Committee.

IA 399/98

All pending I.As in Writ Petition No. 202 of 1995 (concerning Arunachal Pradesh) are, disposed of in terms of the signed order.

T.N. Godavarman Thirumulpad v.Union of India
Writ Petition (Civil) No. 202/95 with Interlocutory Application No. 399, decided on 17-09-1998
Dr. A.S. Anand, C.J., B.N. Kirpal and V.N. Khare, JJ.

Arunachal Pradesh - Constitution of Arunachal Pradesh Forest Protection Authority under sub-section (3) of the Environment (Protection) Act, 1986 - All pending interim application to be referred to this Authority - Powers and functions stipulated - Authority to submit report to Court every three months.

ORDER

Concerned by large scale deforestation and actuated by the desire to take steps for protection and conservation of forests throughout the country, this court has made certain orders in this writ petition from time to time.

On 12-12-1996, an order was made banning all non-forest activities throughout the

country, including the-state of Arunachal Pradesh- On 15-1-1998, a detailed order was made with regard to disposal or confiscation of legal and illegal timber. Various I.As have been filed from time to time seeking directions from this court by the State as well as private parties. This Court has been monitoring the case with a view to see that its orders are implemented in letter and in spirit.

The Central Government has, in exercise of the powers conferred by the sub-section (3) of the Environment (Protection) Act, 1986, constituted an Authority to be known as Arunachal Pradesh Forest Protection Authority. The notification has been issued on 17-9-1998 detailing the powers and jurisdiction of the Authority. It, therefore, now appears appropriate to us to refer all pending interim applications, seeking various directions in so far as the state of Arunachal Pradesh is concerned to the said Authority. It shall also be open to any party, whose application is not pending before us, who wishes to seek some directions in the matter, to approach the Authority directly. The Authority shall consider the applications, both, referred by this court and filed directly before it, and give appropriate direction, subject, however, to the condition that no direction, which is inconsistent with any of the orders or directions made by this court, shall be made. Should the Authority, however, find it necessary to seek any modification or variation of any of the orders or directions issued by this Court, so as to be able to give effective relief to the concerned parties, the Authority shall be at liberty to approach this court for such modification/variation. We expect that the Authority shall dispose of the applications Concerning Arunachal Pradesh within a period of eight weeks from the date the applications are received by it from this court and also within the same time frame of eight weeks, from the date when an application is flied directly before the Authority by any of the parties. The Authority shall submit a report regarding disposal of the applications, together with the orders made thereon to this Court every three months.

The copies of the Interlocutory Applications shall be forwarded by the Registry by Speed Post/Courier, at the expense of the party concerned, to the Authority without any delay. The copies of various orders made by this court on the subject relating to Arunachal Pradesh in particular and forests in the country in general, shall also be forwarded to the Authority by the Registry for its information. Copy of the Writ Petition and counters be also forwarded to the Authority for its information.

Apart from deciding the applications which are forwarded by this Court or filed by the parties directly before the Authority, the Authority is directed to supervise and inform the this court about the implementation of various directions given by this court from time to time in this matter.

With a view to enable the Authority constituted by the Central Government vide Notification dated 17-9-1998 to function effectively and discharge its duties properly, we expect all the parties, including the State Government and the Forest Corporation, to extend their full and proper cooperation to it.

All pending I.As in Writ Petition No. 202 of 1995 (concerning Arunachal Pradesh) are, accordingly disposed of.

T.N. Godavarman Thirumulpad v. Union of India

Interlocutory Application 291 in Writ Petition (Civil) 202 / 95

Interlocutory Application 410 in Interlocutory Application 263 Writ Petition (Civil) No. 202 / 95, decided on 29-10-1998

B.N. Kirpal and V.N. Khare, JJ.

Uttar Pradesh - Illegal Mining - Mirzapur District - Clarification about Commission - Commission not a general commission but only for specific task relating to Mirzapur District.

ORDER

IA 263

Learned *Amicus Curiae* has drawn our attention to an affidavit filed by Shri Naresh Daval, I.A.S. Principal Secretary, Home Government of Uttar Pradesh in obedience to the order of this Court dated 17th September, 1998. It is submitted that the order of detention passed against Manvendra Bahadur Singh on 23rd January, 1998 has been quashed by the High Court, Lucknow Bench vide judgment dated 15th September, 1998. Mr. Goel, learned counsel appearing for the State or Uttar Pradesh submits that the judgment is under consideration and process for considering the question of filing an appeal against the same is going on. He prays for three weeks time to seek instructions.

List after three weeks. In the meanwhile, Mr. Goel shall file an affidavit regarding the latest position with regard to the detention case of Shri Manvendra Bahadur Singh.

IA 410/98 in IA 263

By our order dated 15th April,1998, we had appointed a two-member Commission headed by Shri Gangopadhyay Director, Indira Gandhi National Forest Academy, Dehradun to report regarding the illegal mining activities in the forest area of Mirzapur, (the subject matter of application before us). The learned *Amicus Curiae* appears to be right his submission that the direction given by us about the appointment of Shri Gangopadhyay is being mis-construed by the High Court as if he had been appointed as General Commission in all matters concerning environment litigations pending in any court. We clarify that he appointment of Shri Gangopadhyay was made for the specific task with regard to Mirzapur District having regard to the allegations made in the petition pending before us. This court did not appoint him as a general commission. The High court in writ petition no. 8032 of 1998 appears to be labouring under an impression that Shri Gangopadhyay had been appointed as a general commission. That is not correct. It is open to the High Court to appoint any commission to examine the matter pending in the petition before it but it cannot assume that Shri Gangopadhyay is a good commission appointed by this Court in environment matters.

The application is disposed of.

A copy of this order shall be sent to the Registrar, High Court for being placed before the Bench. A copy shall also be sent to Shri Gangopadhyay.

T.N. Godavarman Thirumulpad v. Union of India
Interlocutory Application 295 in Writ Petition (Civil) No. 202/95, decided on 10-12-1998
B.N. Kirpal and V.N. Khare, JJ.

Orders of the Court dated 12-12-1996 and 15-01-1998 not been properly implemented - Efforts of the Court not bearing the fruit that was expected.

Arunachal Pradesh Forest Protection Authority - Feasibility of constituting such committees/authorities for other States - Response of Central Government also sought for constitution of a supervisory or appellant authority over State Authorities.

Nagaland - Notification of Industrial Estates for locating Wood based industrial units violations - Whole foot hills of Nagaland and areas within 1 km. of National and State Highway declared as illegal - Chief Secretary to State in affidavit as to why action should not be initiated against him for breach of directions of this Court.

Assam - Notification issued by Government of Assam for location of road based industrial units not in conformity with orders of the Court dated 15-01-1998 - Direction - State Government and Ministry of Environment and Forest to have joint meeting within four weeks for location and identification of industrial units.

ORDER

IA 295/95

We are rather distressed that many States have either not implemented various directions issued by this Court from time to time including the directions issued on 12th December, 1996 and 15th January, 1998 or have committed breach of those directions with the result that the efforts made by this court to prevent large scale deforestation and for protection and conservation of forests and environment are not bearing the fruit that we expected these to bear.

The Central Government, in exercise of the powers conferred by sub Section 3 of Section 3 of the Environment Protection Act 1986 constituted an Authority for Arunachal Pradesh known as Arunachal Pradesh Forest Protection Authority. The powers and jurisdiction of the Authority was notified on 17th September, 1998. Mr. Kirit N. Rawal, learned Additional Solicitor General appearing for the Union of India states that according to his instructions this committee has been functioning quite satisfactorily and many matters have been sorted out by that Authority. *Keeping in view this experience of the Authority constituted under sub-section 3 of Section 3 of the Environment Protection Act, 1986, we have asked the learned Additional Solicitor General to seek instructions about the feasibility of constituting such Committees/Authorities for the other States also. It would also be expedient if instructions are also obtained by him with regard to the feasbility of appointment of officers under Section 4 or issuance of directions under Section 5 of the Environment Protection Act, 1986. The response of the Central Government may be filed within 8 weeks.* It may also be worth the consideration of the Central Government whether a Committee of the type envisaged by sub-section 3 of Section 3

of the Environment Protection Act can also be constituted at national level in the nature of a Supervisory or Appellate Authority over the State Authorities.

IA 397

On 15th January, 1998, after taking note of the fact situation that proliferation of wood based industries is the main cause of degradation of forests in the North-Eastern States, it was directed that though it was not desirable or feasible to ban completely the timber trade or running of the wood based industries because of the dependence of the local people on the forest resources in the region, there was need to regulate functioning of these industries. Keeping in view the availability of forest produce, it was suggested that those industries be relocated in specified industrial zones. A specific direction was issued to the effect that: "The State Governments shall formally notify industrial estates for locating wood based industrial units in consultation with the Ministry of Environment and Forests."

In this interim application, a copy of a Notification issued by the Government of Nagaland dated 15th June, 1998 has been placed on record. A perusal of the Notification shows that, "The whole foot hill areas of Nagaland" and "All areas within 1 km of National and State Highways, State Roads" have been declared as Industrial Estates for the purpose of establishing Forest based Industrial Estates. There is no indication in this Notification as to whether any prior consultation took place with the Ministry of Environment and Forests, Government of India. The learned Additional Solicitor General has drawn our attention to a communication dated September 2, 1998 (which is taken on record) issued by the Additional Inspector General of Forests, Shri S.C. Sharma to the Chief Secretary, Government of Nagaland. The last paragraph of that communication reads thus:

> "The State Government has not consulted this Ministry before notifying the industrial estates. The notification is also not in accordance with the Court order and a very large area has been declared as industrial estates. The intention of the Court to notify industrial estates was to keep the industries in compact blocks, where effective monitoring can be done. I, therefore, request you to kindly look into the matter personally and reconsider the action of the State Government in this matter."

This communication was followed by another letter no. 13-18/98 SU dated 5th October, 1998 (taken on record) from the Inspector General of Forests and Special Secretary, Ministry of Environment and Forests, Government of India to the Chief Secretary, Government of Nagaland requesting him to look into the matter because of the non-response to the letter dated September 2, 1998 and further requesting him that, "the notification be held in abeyance immediately it is not in conformity with the orders of this Court....".We are informed that there has been no response to the communication dated 5th October, 1998 either. It is stated that the notification has not been kept in abeyance. The Notification ex-facie, runs in the teeth of the direction issued by this Court (supra).

A notice shall issue in this application to the respondents and to the Chief Secretary,

Government of Nagaland to show cause against the application and, in particular, the Chief Secretary shall also state on affidavit as to why action be not initiated for issuing a Notification in breach of the directions issued by this Court. The notice shall be made returnable within six weeks. A copy of this order shall also be served on the learned standing counsel for the State of Nagaland.

Till further orders from this Court, any follow up action based on the Notification dated 15th June, 1998 shall stay.

Contempt Petition No. 336 of 1998

Before we consider proceeding further in this petition, let a copy of the petition be served on the learned slam standing Counsel for the State of Nagaland. The learned Standing Counsel shall ascertain and inform this Court as to whether the allegations contained in paragraph 5 of the application, which amount to encroachment into a reserved forest and are in breach of the order issued by this Court on 12th December, 1996 are correct. The response to that effect shall be filed on the affidavit of a responsible official of the State Government of Nagaland. The needful shall be done within six weeks.

I.As 408 and 409/98

It is averred by the applicant that it has a legally acquired and inventoried stock of raw material to the tune of about 2100 cubic mtrs. There is no indication, however, in this application as to the source from which the stock of timber had been acquired or the time when the same was acquired. Mr. M.N. Rao learned Senior Counsel appearing for the applicant submits that he shall file an additional detailed affidavit with regard to the acquisition of 'legal' timber stock, Four weeks' time, as prayed for, is granted for the purpose.

Writ Petition (C) ..... /98 (D 13386/98)

Mr.G.L. Sanghi, learned Senior Counsel in instructions, withdraws prayer 'B' at page 27 of the paper book. He submits that this writ petition may be considered minus that prayer and the same may be treated as an interim application, to be heard along with other four interim applications, which are already pending in this Court. We grant his prayer. This petition shall be numbered as an I.A. after the necessary correction is made by the learned counsel on record assisting Mr. Sanghi with regard to deletion of prayer 'B'.

Writ Petition (c) 202 of 1995

(Reg. State of Assam)

Learned Counsel for the State of Assam has placed on record Notification No. FRE-150/96/Vol.- I/ PT.V/239 dated 23rd September, 1998 (taken on record) according to which the Government of Assam has notified certain Town Areas/Municipal Areas/ Municipal Corporation Areas as Industrial estates for locating wood based Industrial Units in the State of Assam. Mr. Rawal, learned Additional Solicitor General,

appearing for the Ministry of Environment and Forests has brought to our notice a communication issued by the Additional Inspector General of Forests dated 27th October, 1998 (taken on record) and to the Chief Secretary, Government of Assam, Gauhati drawing the attention of the Chief Secretary to the order of this Court dated 15th January, 1998. In that communication, the Additional Inspector General of Forests has pointed out that the Notification dated 25th September, 1998 is not in conformity with the order of the Supreme Court dated 15th January, 1998. The learned Additional Solicitor General points out that after this letter was issued to the Chief Secretary, a meeting has taken place between the officials of the Government of India and the Government of Assam on 6th November, 1998 at Gauhati, concerning the subject matter of the Notification. The Additional Inspector General of Forests had advised the Chief Secretary in his communication dated 27th October, 1998 that the Notification dated 25th September, 1998 be kept in abeyance and the State Government was advised to either submit a fresh proposal in conformity with the order of this Court dated 15th January, 1998 or to seek suitable guidance by way of clarification from this Court.

It was in view of large scale destruction of forests and pilferage of timber by the wood based industries that this Court had made an order on 15th January, 1998 directing all North Eastern States to declare industrial estates for relocation of wood based industries so that effective monitoring could be done for conservation of forests in those States. The States were directed to identify the industrial estates within 45 days of the date of the order and to develop the industrial estates within six months thereafter. The notification issued on 23rd September, 1998, ex-facie does not comply with the requirements as spelt out in the order dated 15th January, 1998. It is necessary that the State Government and theMinistry of Environment and Forests (Union of India) should have a joint meeting to sort out the question of location and identification of industrial estates. The needful shall be done within four weeks.

Mr. G. L. Sanghi, learned counsel who appears for M/s. Kitply Industries Ltd. (the applicant in I.A. Nos. 217, 236/97, 285 and 286/98) submits that the applicants are prepared to give an undertaking to the effect that they shall, till the industrial estate is identified, run their unit only on imported veneer. It is submitted that on an affidavit of a responsible officer of the applicant, this Court shall be informed about the total quantity of veneer which is being imported by the unit for one year and that it shall also be disclosed as to the approximate quantity of veneer required to be imported and the parties from whom that import shall take place. The application shall be supported by necessary documentary evidence. A responsible officer of the applicant shall also be an undertaking along with that affidavit to the effect that the operation of the unit shall be confirmed only to imported veneer. The applicants may also file a chart indicating the consumption and import timber and veneer during the last three years, (domestic and imported). Necessary information shall be furnished within two weeks. A copy of the affidavit and the undertaking shall be furnished to learned

counsel for the State of Assam and to Mr. P. Parmeshwaran, Advocate-on-Record for Central Agency, who may file their response thereto within one week from the date of receipt of the affidavit. A copy of the same shall also be furnished to the learned *Amicus Curiae*.

General Direction

Any application filed in Writ Petition 202 of 1995 by any of the parties shall be entertained only after it has been served both on the learned *Amicus Curiae* and the Central Agency (officer of Mr.P.Parmeshwaran, Advocate-on-Record).

Town Area Committee, Naraini, Banda v. Sr. Superintendent of Police, Banda
AIR 1998 Allahabad 251
Civil Misc. Writ Petition No. 17907 of 1989, D/-16-9-1997
Ravi S. Dhavan and V. P. Goel, J.

Constitution of India, Art. 226 – Town planning – Roads – Creation of obstruction by constructing shops by Town Area Committee on roadside – Not permissible – Road is for purpose of passage or highway traffic – Obstruction of roads – It is negation of planning.

U. P. State Electricity Board v. District Magistrate, Dehradun
AIR 1998 Allahabad 1
Civil Misc. Writ Petition No. 36885 of 1996, D/-17-2-1997
M. Katju, J.

(A) Public Liability Insurance Act (6 of 1991), S. 2(d) – Environment (Protection) Act (29 of 1986), S. 2(e) – Electricity – It is hazardous substance.

(Paras 33, 34)

(B) Public Liability Insurance Act (6 of 1991) Pre – Act is beneficial legislation for social objective should be given liberal interpretation – If two views are possible the view in favour of public should be preferred.

Interpretation of statutes.

(C) Public Liability Insurance Act (6 of 1991), S. 3(2) - Scope – It places strict liability (liability without fault) in cases of accidents due to hazardous substance – It is not necessary for claimant to plead that death or injury was caused due to negligence of any person.

(D) Public Liability Insurance Act (6 of 1991), S. 7 – Case for award under Section 7 – Notice in Form II of Rules is not necessary – Further, final report filed in criminal case – It is irrelevant – Proceedings under Section 7 are of civil nature.

(E) Public Liability Insurance Act (6 of 1991), S. 7 – Case for award – No insurance policy taken out by owner handling hazardous substances – Owner does not escape liability.

(F) Public Liability Insurance Act (6 of 1991), Ss. 5 and 7 – Case for award after occurrence – Liability of owner – Collector not verifying occurrence – Owner will not escape liability merely because there is no verification of occurrence – It is open to owner, in proceedings under Section 7 to deny alleged occurrences and Collector has to decide whether accident did occur or not on material placed before him – Thus, even if there was no verification under S. 5, there can be verification in proceedings under Section 7.

(G) Public Liability Insurance Act (6 of 1991), S. 7 – Accident – Case for award – Deceased a bachelor – Parents, laying claim – They are heirs of deceased – Claim is maintainable.

Viniyog Parivar Trust V. Union of India
AIR 1998 Bombay 71
Writ Petition No. 1030 of 1997, D/-24-9-1997
M.B. Shah, C. J. and S.D. Gundewar, J.

Wild Life (Protection) Act (53 of 1972), S. 2(1) - Prevention of Cruelty to Animals Act (1960), S. 2(a) - Transport of Animals Rules (1978) - Prevention of Cruelty (Capture of Animals) Rules (1972) - Birds caught and brought to City of Mumbai for sale, export or other prohibited purposes and given inhuman and cruel treatment - High Court directed Constitution of a committee to supervise implementation of provisions of Acts, Rules and directions given by Supreme Court from time to time.

(Para 6)

Cases Referred:	**Chronological Paras**
AIR 1992 SC 514: (1992) 2 Supp SCC 448: 1992 AIR SCW 102	4
AIR 1989 SC 1: (1988) 4 SCC 655	4
AIR 1988 SC 1115: (1988) 1 SCC 471	2

M. B. SHAH, C. J.:- This public interest litigation is filed for appropriate direction to the concerned authorities so as to prevent atrocities and inhuman and cruel treatment meted out to birds, despite their being full protection under the provisions of the Wild Life (Protection) Act, 1972 and the Rules framed thereunder, particularly by preventing the entry and sale of wild birds in the City of Mumbai and the State of Maharashtra. It is submitted that, despite the provisions of the Prevention of Cruelty to Animals Act, 1960 and the Rules framed thereunder, the Respondents are not taking any action against the persons who violate the said Act and Rules. It has been pointed out that the Respondents,

for reasons best known to them, are turning complete blind eye in implementing the aforesaid Acts and Rules and permit inhuman and cruel treatment to the birds; they are caught and brought to the City of Mumbai for sale, export or other prohibited purposes. It is, therefore, prayed that the Respondents be directed not to grant license to any person for the purpose of bringing in birds and that criminal action be taken against such persons. It is also submitted that such birds be confiscated and released in the National Park. The petitioners have joined various authorities, who are required to implement the Acts and the Rules, as partly-Respondents.

2. The Petitioners have also relied upon Article 51A of the Constitution, which, *inter alia*, prescribes fundamental duties of the citizens to the effect that every citizen of India shall protect and improve the natural environment, including forests, lakes, rivers and wild life, and shall have compassion for living creatures. It is submitted that the directions given by the Supreme Court in the case of M. C. Mehta v Union of India, (1988) 1 SCC 471: (AIR 1988 SC 1115) are not followed by the authorities. The Petitioners have also referred to the provisions of the Wild Life (Protection) Act, 1972, which define the word 'Animal' to mean "amphibians, birds, mammals and reptiles and their young, and also includes, in the cases of birds and reptiles, their eggs." Similarly, provisions of the Prevention of Cruelty to Animals Act, 1960 are also referred to, which define the word 'Animal' to mean "Any living creature other than human being".

3. It has been submitted that, on the basis of the said Acts, the Central Government has framed the following Rules: -

(a) Prevention of Cruelty to the Performing Animal Rules, 1973

(b) Transport of Animals Rules, 1978 and

(c) Prevention of Cruelty (Capture of Animals) Rules, 1972

It is submitted that, despite these Acts and Rules, birds are caught, inter alia, for the following purposes: -

a) Sale in the cities as articles of show of trophies.

b) Sale for marking the birds as pet birds in the houses.

c) Sale for the purposes of killing for food.

d) Sale for the purposes of making trophies from the body of such birds.

e) For the purposes of export out of the country.

It is pointed out that birds brought form all over the country from jungles and forests, including the reserve forest or national parks, are transported to Mumbai where there is a lucrative market for such birds. The birds are transported to the City of Mumbai by trains of central and western railways in the most inhuman and cruel manner; there is no sufficient space for these birds to move in cages or containers in which they are transported. It is submitted that this reveals that, instead of showing any compassion for wildlife and birds, it is positive inhumanity and cruelty meted out to such birds by transporters and by persons who purchase or acquire the birds. The places where this business is carried out are also mentioned.

4. The Petitioners have relied upon the decision rendered by the Supreme Court in the case of Tarun Bharat Sangh v. Union of India, (1992) 2 Supp SCC 448: (AIR 1992 SC 514) wherein the Court has relied upon its earlier decision in the case of State of Bihar v. Murad Ali Khan, (1988) 4 SCC 655: (AIR 1989 SC 1), wherein it has observed as under (at page 3 & 4; of AIR): -

> "The state to which the ecological imbalances and the consequent environmental damage have reached is so alarming that unless immediate, determined and effective steps were taken the damage might become irreversible. The preservation of the fauna and flora, some species of which are getting extinct at an alarming rate, has been a great and urgent necessity for the survival of humanity and these laws reflect a last ditch battle for the restoration, in part at least, a grave situation emerging from a long history of callous insensitiveness to the enormity of the risks to mankind that go with the deterioration of environment. The tragedy of the predicament of the civilized man is that 'Every source from which man has increased his power on earth has been used to diminish the prospects of his successors. All his progress is being made at the expense of damage to the environment which he cannot repair and cannot foresee'. In his foreword to International Wild Life Law, H.R.H. Prince Philip, the Duke of Edinburg, said:
>
> 'Many people seem to think that the conservation of nature is simply a matter of being kind to animals and enjoying walks in the countryside. Sadly, perhaps, it is a great deal more complicated than that...
>
> '...As usual with all legal systems, the crucial requirement is for the terms of the conventions to be widely accepted and rapidly implemented. Regretfully progress in this direction is proving disastrously slow...'
>
> "'Environmentalists' conception of the ecological balance in nature is based on the fundamental concept that nature is 'a series of complex biotic communities of which a man is an interdependent part' and that it should not be given a part to trespass and diminish the whole. The largest single factor in the depletion of the wealth of animal life in nature has been the 'civilized man' operating directly, through excessive commercial hunting or, more disastrously, indirectly through invading or destroying natural habitats."

5. The Petitioners have, therefore, submitted that the Court may appoint appropriate committee for seeing that the aforesaid Acts, Rules and the direction issued by the Supreme Court from time to time are properly implemented. After a discussion, it was agreed that a Committee be appointed, so that the aforesaid Acts, Rules and direction can be implemented.

6. Hence, it is ordered as under: -

(1) Committee consisting of following members be constituted:
   - (i) Deputy General Manager, Western Railway, or his nominee;
   - (ii) Deputy General Manager, Central Railway, or his nominee;
   - (iii) Commissioner of Police, or his nominee;

(iv) Deputy Conservator of Forests (Forest Division), Thane, or his nominee;
(v) Deputy Conservator of Forests (Wild Life), Mumbai, or his nominee;
(vi) Deputy Municipal Commissioner, or his nominee;
(vii) Secretary, Society for prevention of Cruelty to Animals, who shall also act as the Convener of the Committee.

It will be open to Mr. Atul Vrajlal Shah and Mr. Dipan A. Shah, who are the representatives of the petitioners, to assist the Committee.

(2) The functions of the Committee, inter alia, shall be-

(i) To suggest ways and means to ensure compliance with provisions of Wild Life (Protection) Act, 1972, and Prevention of Cruelty to Animals Act, 1960;
(ii) To recommend amendments to plug loopholes, if any, and to otherwise make the provisions of the Rules thereunder more effective;
(iii) To take immediate steps for preventing illicit trade of birds/animals and release of such birds/animals.

(2A) The Committee shall visit the sensitive sites of illicit trade of birds/animals at the appropriate times as may be decided by the Committee. Few such places are identified as under:-

(a) Bombay Central Station
(b) C. S. Terminus, Central Railway
(c) Goods Terminal, Western Railway
(d) Goods Terminal, Central Railway
(e) Bombay Central S. T. Bus Station
(f) Octroi Posts at Dahisar, Mulund and Vashi
(g) Crawford Market, Bandra Market and other places and road-sides where the birds are being brought or kept for sale.

(b) The Committee on such visits and inspection shall identify the cruelties to bird/animals, particularly as to method and manner of carrying them, space for them, food and other provisions etc. The Committee shall also verify whether birds are being dealt with illegally or illicitly for trade, in contravention of provisions of the Wild Life Protection Act, 1972.

(c) On the Committee finding illegal and illicit trade in birds, the police Commissioner or his nominee on the Committee or the competent authority shall ensure that immediate action such as seizure of birds and prosecution of the concerned person is taken. The police Commissioner or his nominee shall ensure adequate police escort consisting of Inspector and Constables so as to take immediate, on-the-spot action in this regard. The Deputy Conservator of Forests shall take appropriate steps for release of the birds/animals at national parks or at such other place as may be suitable for the bird/animals concerned.

(d) The Committee shall have its first preliminary meeting within four weeks from today and file a list of names and addresses of the members in this Court within five weeks from today. Any changes thereafter shall be notified, by filing a change Report in this Court, within two weeks of the change occurring. The Committee shall make its visit at the potential places of illicit birds/animals trade within five weeks from today and thereafter with such periodicity as it may decide but at least once a month.

(e) The Committee shall submit a Report on compliance with this order, every month.

(f) Stand over to the first week of January, 1998.

Petition allowed.

World Saviors v. Union of India
1998 ELD 39
Writ Petition (Civil) No. 320 of 1994, decided on 6-12-1996
A.M. Ahmadi, C.J. and Sujata V. Manohar, J.

Discharge of effluents by industrial units – Report of U.P. Pollution Control Board showing that effluent discharged by an industry was beyond the prescribed pollution control standard and that effluent was being pumped by it to nearby fields belonging to it as well as to farmers for irrigation – Since Water pollution caused by discharge of such effluent likely to cause harm to the subsoil water, that industry directed to be closed.

A. P. Pollution Control Board v. Prof. M.V. Nayadu (Retd.)
1999 (1) SCALE 140
S.B. Majumdar and M. Jagannadha Rao, JJ.

M. Jagannadha Roa, J,- Leave granted in all the special leave petitions. It is said:

> *"The basic insight of ecology is that all living things exist in interrelated system; nothing exists in isolation. The world system is weblike; to pluck one strand is to cause all to vibrate; whatever happens to one part has ramifications for all the rest. Our actions are not individual but social; they reverberate throughout the whole ecosystem. : [Science Action Coalition by A. Fritsch, Environmental Ethics: Choices for Concerned Citizens 3-4 (1980)] (1998) Vol. 12 Harv. Env.L.Rev. at 313)."*

... **2.** Four of these appeals which arise out of SLP (O) No. 10317-10320 of 1998 were filed against the judgement of the Andhra Pradesh High Court dated 1.5. 1998 in four writ petitions, namely, W.P. No. 17832 of 1997 and three others connected writ petitions. All the appeals were filed by the A.P. Pollution Control Board. Three of the above writ

petitions were filed as public interest cases by certain person and the fourth writ petition was filed by the Gram Panchayat, Peddaspur.

3. The fifth Civil Appeal which arises out of SLP (C) No. 13380 of 1998 was filed against the judgement in W.P. No. 16969 of 1997 by the society for Preservation of Environment & Quality of Life, (for short 'SPEQL') represented by Sri P. Janardan Reddi, the petitioner in the said writ petition. The High Court dismissed all these writ petitions.

4. The sixth Civil Appeal, which arises out of SLP (C) No. 10330 of 1998 was filed by A.P. Pollution Control Board against the order, dated 1.5. 1998 in Writ Petition No. 11803 of 1998. The said writ petition was filed by M/s Surana Oils and Derivatives (India) Ltd. (hereinafter called the 'respondent company', for implementation of the directions given by the appellate authority under the Water (Prevention of Pollution) Act, 1974 (hereinafter called the 'Water Act', 1974) in favour of the company.

5. In other words, the A.P. Pollution Board is the appellant in five appeals and the SPEQL is appellant in one of the appeals.

6. According to the Pollution Board under the notification NO. J. 20011/15/88-la, Ministry of Environment & Forest, Government of India dated 27.9.1988, 'vegetable oils including solved extracted oils' (item No. 37) were listed in the 'RED' hazardous category. The Pollution Board contends that Notification No. J. 120012/38/86 1A, Ministry of Environment & Forests of Government of India dated 1.2.1989, prohibits the location of the industry of the type proposed to be established by the respondent company, which will fall under categorisation at No. 11 same category of industry in Doon Valley.

7. On 31.3.1994, based on an Interim Report of the Expert Committee constituted by the Hyderabad Metropolitan Water Supply and Sewerage Board, the Municipal Administration and Urban Development, Government of Andhra Pradesh issued GOMS 192 dated 31.3.1994 prohibited various types of development within 10 k.m. radius of the two lakes, Himayat Sagar & Osman Sagar, in order to monitor the quality of water in these reservoirs which supply water to the twin cities of Hyderabad and Secunderabad.

8. In January 1995, respondent company was incorporated as a public limited company with the object of setting up an industry for production of B.S.S. Castor oil derivatives such as Hydrogenated Caster Oil, 12-Hydroxy Stearic Acid, Dehydrated Caster Oil, Methlated 12-HAS, D.Co., Fatty Acids with by products-like Glycerine, spent Bleaching Earth and carbon and Spent Nickel Catalyst. Thereafter the industries, Government of India for letter of intent under the Industries (Development Regulation) Act, 1951.

9. The respondent Company purchased 12 acres of land on 26.9.1995 in Peddaspur village, Shamshabad Mandal. The Company also applied for consent for establishment of the industry through the single window clearance committee of the Commissionerate of Industries, Government of Andhra Pradesh, in November, 1995. On 28.11.1995 the Government of Andhra Pradesh, wrote to the Ministry of Industry, Government of India as follow:

"The State Government recommends the application of the unit of grant of letter of intent for the manufacture of B.S.S Grade Caster Oil in relaxation of location restriction subject to NOC from A.P. Pollution Control Board, prior to taking implementation steps.

On 9.1.1996, the Government of India issued letter of intent for manufacture of B.S.S Grade Caster Oil (15.000 tons per annum) and Glycerine (600 tons per annum). The issuance of licence was subject to various conditions, *inter-alia,* as follow:

"(a) you shall obtain a confirmation from the State Director of Industries that the site of the project has been approved from the environmental angle by the competent State authority.

(b) you shall obtain a certificate from the concerned State Pollution Control Board to the effect that the measures envisaged for pollution control and the equipment proposed to be installed meet their requirements."

Therefore, the respondent company had to obtain NOC from the A.P. Pollution Control Board.

10. According to the A.P. Pollution Control Board (the appellant), the respondent company could not have commenced civil works and construction of its factory, without obtaining the clearance of the A.P. Pollution Control Board – as the relaxation by government from location restriction as stated in their letter dated 28.11.1995, was subject to such clearance. Report of the Expert Committee of the Hyderabad Metropolitan Water Supply and sewerage Board, the Municipal Administration and Urban Development Department issued GO No. 111 on 8.3.1996 reiterating the 10 k.m. prohibition as contained in the GO 192 dated 31.3.1994 by making some concessions in favour of residential; development.

11. In the pre-scrutiny stage on 24.5.1996 by the Single Window Clearance Committee, which the company's representative attended, the application of the industry was rejected by the A.P. Pollution Control Board since the proposed site fell within 10 k.m. and such a location was not permissible as per GOMS 111 dated 8.3.96. On 31.5.1994, the Gram Panchayat approved plans for establishing factory.

12. On 31.3.1996, the Commissionerate of Industries, rejected the location and directed alternative site to be selected. On 7.9.1996, the Dy. Collector granted permission for conversion of the site (i.e. within 10 k.m.) to be used for non-agricultural purposes.

13. On 7.4.1997, the company applied to the A.P. Pollution Control Board, seeking clearance to set-up the unit under Section 25 of the Water Act. It may be noted that in the said application, the Company listed the following as by-products of its processes:

"Glycerine, spent bleaching earth and carbon and spent nickel catalysts."

According to the AP Pollution Board the products manufactured by this industry would lead to the following sources of pollution:

"(a) Nickel (solid waste) which is heavy metal and also a hazardous waste under Hazardous waste (Management and Handling) Rules, 1989.

(b) There is a potential of discharge or run off from the factory combined joining oil and other waste products.

(c) Emission of sulphur Dioxide and oxide of nitrogen.

It was at that juncture that the company secured from the Government of A.P. by GOMs 153 dated 3.7.1997 exemption from the operation of GOMs 111 of 8.3.1996 which prescribes the 10 k.m. rule from the Osman Sagar and Himayat Sagar Lakes.

14. In regard to grant of NOC by the A.P. Pollution Board, the said Board by letter dated 30.7.1997 rejected the application dated 7.4.1997 for consent, stating.

"(1) The unit is a polluting industry and fall under red category of polluting industry under section S. No. 11 of the classification of industries adopted by MOEF. GOI and opined that it would not be desirable to locate such industry in the catchment area of Himayat Sagar in view of the GOMs No. 111 dated 8.3.1996.

(2) The proposal to set up this unit was rejected at the pre-scrutiny level during the meeting of CDCC/DIPC held on 24.5.1996 in view of the State Government Order No. 111 dated 8.3.1996".

Aggrieved by the above letter of rejection, the respondent company appealed under section 28 of the Water Act. Before the appellate authority, the industry, filed an affidavit of Prof. M. Santappa Scientific Officer to the Tamil Nadu Pollution Control Board in support of its contentions.

15. The appellate authority under section 28 of the Water Act, 1974 (Justice M. Ranga Reddy, (retd.) by order 5.1.1998 allowed the appeal of the Company. Before the appellate authority, as already stated, an affidavit was filed by Prof. M. Shantappa, a retired scientist and technologist at that time, scientific Advisor for T.N. Pollution Control Board) stating that the respondent had adopted the latest eco-friendly technology using all the safeguards regarding pollution. The appellate authority stated that Dr. Siddhu, formerly Scientist to the Government of India and who acted as Director General, Council of Scientific and Industrial Research (CSIR) and who was the Chairman of the Board of Directors if this Company also filed an affidavit. The Managing Director of the respondent company filed an affidavit explaining the details of the technology employed in the erection of the plant. Prof. M. M. Shantappa in his report stated that the company has used the technology obtained from the Indian Institute of Chemical Technology of (IICT), Hyderabad which is a premier institute and that he would not think of a better institute in this Country for transfer of technology. The said Institute has issued a Certificate that this industry will not discharge any acidic effluents and the solid wastes which are the by-products are saleable and they will be collected in M.S. drums by mechanical process and sold. The report of Dr. Shantappa also showed that non-of the by product would be on ground of the factory premises. He also stated that all the conditions which were proposed to be imposed by the Technical Committee on the Company at its

meeting held on 16.7.97 have been complied with. On the basis of these reports, the appellate authority stated that this industry "is not a polluting industry". It further held that the notification dated 1.2.1989 of the Ministry of Environment & Forests, Government of India, whereby industries manufacturing Hydrogenated Vegetable oils were categorised as "red category" industries, did not apply to the catchments areas of Himayat Sagar and Osman Sagar lakes and that notification was applicable only to the Doon Valley of UP and Dahanu in Maharashtra. The appellate authority accordingly directed the AP Pollution Control Board to give its consent for establishment of the factory on such conditions the Board may deem fit as per GOMs 153 dated 3.7.1997 (as amended by GO 181 dated 7.8. 1997.

16. Before the above order dated 5.1.98 was passed by the appellate authority, some of these public interest cases had already been filed. After the 5.1.1998 order of the appellate authority, a direction was sought in the public interest case W.P. No. 2215 of 1996 that the order dated 5.1.1998 passed by the appellate authority was arbitrary and contrary to interim orders passed by the High Court in W.P. 17832, 16969 and 16881 of 1997.

17. The respondent company, in its turn filed W.P. No. 11803 of 1998 for directing the A.P. Pollution Control Board to give its consent, as a consequence to the order of the appellate authority dated 5.1.1998.

18. As stated earlier, the A.P. Pollution Control Board contends that the categorization of industries into red, green and orange had already been made prior to the Notification of 1.2.1989 by Office Memorandum of the Ministry of Environment & Forests, Government of India dated 27.9.1988 and that in that notification also

> *"Vegetable oils including solvent extracted oils" (Item No. 7) and 'Vanaspati Hydrogenated Vegetable oils for industrial purpose (Item 37)'*

were also included in the red category. It also contends that the company could not have started civil works unless NOC was given by the Board.

19. The Division Bench of the High Court in its judgement dated 1.5.1998, held that the writ petitioners who filed the public interest cases could not be said to be having no *locus standi* to file the writ petitions. The High Court observed that while the Technical Committee of the A.P. Pollution Control Board, had some time before its refusal, suggested certain safeguards to be followed by the company, the Board could not have suddenly refused the consent and that this showed double standards. The High Court referred to the order of the appellate authority under Section 28 of the Water Act dated 5.1.1998 and the report of Dr. Sidhu, to the effect that even if hazardous waste was a by product, the same could be controlled if the safeguards mentioned in the Hazardous Wastes (Management and Handling) Rules, 1989 were followed and in particular those in Rules 5, 6 and 11, were taken. The Rules made under Manufacture, Storage and Import of Hazardous Chemical (MSIHC) Rules 1989 also permit industrial actively provided the safeguards mentioned therein are taken. The Chemical Accidents (Emergency Planning, Preparedness and Response) Rules 1991 supplement the MSIHC Rules 1989 on accident

preparedness and envisage a 4-tier crises management system in the country. Therefore, merely because an industry produced hazardous substances, the consent could not be refused. It was stated that as the matter was highly technical, interference was not called for, as "rightly" contended by the learned counsel for the respondent company. The High Court could not sit in appeal over the order of the appellate authority. For the above reasons, the High Court dismissed the three public interest cases, and the writ petitions filed by the Gram Panchayat. The High Court allowed the writ petition filed by the respondent industry and directed grant of consent by the A.P. Pollution Control Board subject to such condition as might be imposed by the Board. It is against the said judgement that the A.P. Pollution Control Board has filed the five appeals. One appeals is filed by SPEQL.

20. In these appeals, we have heard the preliminary submission of Shri R.N. Trivedi, learned Additional Solicitor General for the A.P. Pollution Control Board, Shri M.N. Rao, learned senior counsel for the respondent company, and Sri P. S. Narashimha for the appellant in the appeal arising out of SLP (C) No. 13380 of 1998 and others.

21. It will be noticed that various issues arise in these appeals concerning the validity of the orders passed by the A.P. Pollution Control Board dated 30.7.1997, the correctness of the order dated 5.1.1998 of the Appellate Authority under Section 28 of the Water Act, the validity of GOMs No. 153 dated 3.7.1997 by which Government of A.P. granted exemption for the operation of the 10 k.m. rule in GOMs 111 dated 8.3.1996. Questions also arise regarding the alleged breach of the provisions of the Act. Rules or notification issued by the Central Government and the standards prescribed under the Water Act or rules or notification. Question also arises whether the "appellate" authority could have said that as it was called for, we are just now not going into all these aspects but are confining ourselves to the issues on the technological side.

22. In matters regarding industrial pollution and in particular, in relation to the alleged breach of the provisions of the Water (Prevention and Control of Pollution) Act, 1974, its rules or notifications issued thereunder, serious issues involving pollution and related technology have been arising in appeals under Articles 136 and in writ petitions under Article 32 of the Constitution of India filed in this Courts and also in writ petitions before High Courts under Article 226. The cases involve the correctness of opinions on technological aspects expressed by the Pollution Control Boards or other bodies whose opinions are placed before the Courts. In such a situation, considerable difficulty is experienced by this Court or the High Courts in adjudicating upon the correctness of the technological and scientific opinions presented to the Courts or in regard to the efficacy of the technology proposed to be adopted by the industry or in regard to the need for alternative technology or modifications as suggested by the Pollution Control Board or other bodies. The present case illustrates such problems. It has become, therefore, necessary to refer to certain aspects of environmental law already decided by this Court and also to go into the above scientific problems, at some length and find solutions for the same.

Environment Courts/Tribunals problems of complex technology:

23. The difficulty faced by environmental courts in dealing with highly technological or scientific data appears to be a global phenomenon.

24. Lord Woolf, in his Garner lecture to UKELA, on the theme "Are the Judiciary Environmentally Myopic?" (See 1992 J. Envitl. Law Vol. 4, No. 1, P1) commented upon the problem of increasing specialisation in environmental law and on the difficulty of the Courts, in their present form, moving beyond their traditional role of detached "*Wednesbury"* review. He pointed out the need for a Court or Tribunal.

> *"having a general responsibility for overseeing and enforcing the safeguards provided for the protection of the environment ..... The Tribunal could be granted a wider discretion to determine its procedure so that it was able to bring to bear its specialist experience of environmental issues in the most effective way"*
>
> *Lord Woolf pointed out the need for "a multi-faceted, multi-skilled body which would combine the services provided by existing Courts, Tribunals and Inspectors in the environmental field. it would be a 'one stop shop' which should lead to faster, cheaper and the more effective resolution of disputes in the environmental area. it would avoid increasing the load on already over burdened law institutions by trying to compel them to resolve issues with which they are not designed to deal. it could be a forum in which the judges could play a different role. A role, which enabled them not to examine environmental problems with, limited vision. It could however be based on our existing experience, combining the skills of the existing inspectorate, the Land Tribunal and other administrative bodies. It could be an exciting project"*

According to Lord Woolf, *"while environmental law is now clearly a permanent feature of the legal science, it still lacks clear boundaries are left to be established by Judicial decision as the law developed. After all, the great strength of the English Law has been its pragmatic approach".* Further, where urgent decisions are required, there are often no easy options for preserving the *status quo* on pending the resolution of the dispute. If the project is allowed to go ahead, there may be irreparable damage to the environment; if it is stopped, there may be irreparable damage to an important economic interest. (See Environment Enforcement: The need for a specialized court – by Robert Cranworth QC Jour of Planning & Environment, 1992 p. 798 at 806). Robert Cranworth advocates the constitution of a unified tribunal with a simple procedure which takes the form of Court or an expert panel, the allocation of procedure adopted to the needs of each case – which would operate at two levels – first tier by a single Judge or technical person and a review by a panel or experts presided over by a High Court Judge – and not limited to 'Wednesbury' grounds.

25. In the USA the position is not different. It is accepted that when the adversary process yields conflicting testimony on complicated and unfamiliar issues and the participants cannot fully understand the nature of the dispute, Courts may not be competent to make reasoned and principled decision. Concern over this problem led the Carnegie Commission of Science & Technology (1993) and the Government to undertake a study of the problems of science and technology in Judicial decision making. In the introduction to its final report, the Commission concluded:

"The court's ability to handle complex science-rich cases has recently been called into-question, with widespread allegations that the Judicial system is increasingly unable to manage and adjudicate science and technology (S&T) issues. Critic have objected that Judges cannot make appropriate decisions because they lack technical training, that the Jurors do not comprehend the complexity of the evidence they are supposed to analyze, and that the expert witnesses on whom the system relies are mercenaries whose biased testimony frequently produces erroneous and inconsistent determinations. If these claims go unanswered, or are not dealt with, confidence in the Judiciary will be undermined as the public becomes convinced that the Courts as now constituted are incapable of correctly resolving some of the more pressing legal issues of our day."

The uncertain nature of scientific opinions:

26. In the environment field, the uncertainty of scientific opinions has created serious problems for the Courts. In regard to the different goals of Science and the law in the ascertainment of truth, the U.S. Supreme Court observed in Daubert vs. Merrel Dow Pharmaceuticals inc. (1993) 113 S.Ct2786, as follows:

".....there are important differences between the guest for truth in the Courtroom and the guest for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly."

27. It has also been stated by Brian Wynne in Uncertainty and Environmental Learning, (2, Global Envtl. Change 111) (1992)

Uncertainly, resulting from inadequate date, ignorance and indeterminacy, is an inherent part of science."

Uncertainly becomes a problem when Scientific Knowledge is institutionalized in policy making or used as basis for decision making by agencies and courts. Scientists may refine, modify or discard variables or models when more information is available, however, agencies and Courts must make choices based on existing scientific knowledge. In addition, agency decision making evidence is generally presented in a scientific form that cannot be easily tested. Uncertainty or insufficient knowledge may not be properly considered. (The Status of the Precautionary Principle in Australia: by Chairman Barton (Vol. 22) (1998) (Harv. Envtt. Law Review p. 509 at pp510-511)

28. The inadequacies of science result from identification of adverse effects of a hazard and then working backwards to find the causes. Secondly, clinical tests are involved, on animals and not on humans, that is to say are based on animal's studies or short term cell testing. Thirdly conclusions based on epidemiological studies are flawed by the scientist's inability to control or even accurately assess past exposure of the subjects. Moreover, these studies do not permit the scientist to isolate the effects of the substance of concern. The latency period of many carcinogens and other toxins exacerbates problems of later interpretation. The timing between exposure and observable effect creates intolerable delays before regulation occurs. (See Scientific uncertainly in

protective Environmental decision making – by Alyson C. Flournay (Vol. 15) 1991 Harv. Envtt. Law Review p. 327 at 333-335).

29. It is the above uncertainty of science in the environmental context that has led International Conference to formulate new legal theories and rules of evidence. We shall presently refer to them.

The Precautionary Principle and the new Burden of Proof – The Vellore Case:

30. The 'uncertainty' of scientific proof and its changing frontiers from time to time has led to great changes in environmental concepts during the period between the Stockholm Conferences of 1972 and the Rio Conference of 1992. In *Vellore Citizens' Welfare Forum vs. Union of India and Others* [1996 (5) SCC 647], a three Judge Bench of this Court Referred to these changes, to the 'precautionary principle' and the new concept of 'burden of proof' in environmental matters. Kuldip Singh, J. after referring to the principles evolved in various International Conferences and to the concept of 'Sustainable Development', stated that the Precautionary Principle, the Polluter-Pays Principle and the special concept of Onus of Proof have now emerged and govern the law in our country too, as is clear from Articles 47, 48-A and 51-A(g) of our Constitution and that, in fact, in the various environmental statutes, such as the Water Act, 1974 and other statutes, including the Environment (Protection) Act, 1986, these concepts are already implied. The relevant observation in the Vellore Case in this behalf read as follows:

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

The Court observed that even otherwise the above-said principles are accepted as part of the Customary International Law and hence there should be no difficulty in accepting them as part of our domestic law. In fact on the facts of the case before this Court, it was directed that the authority to be appointed under Section 3(3) of the Environment (Protection) Act, 1986.

"shall implement the Precautionary Principle and the Polluter Pays Principles."

The learned Judges also observed that the new concept which places the Burden of Proof on the Developer or Industrialist who is proposing to alter the *status quo*, has also becomes of our environment law.....

36. It is to be noticed that while the inadequacies of science have led to the precautionary principle', the said 'precautionary principle' in its turn, has led to the special principle of burden of proof in environmental cases where burden as to the absence of injurious effect of the actions, proposed,-is placed on those who want to change the status quo (Wynne, Uncertainty and Environmental Learning, 2 Global Envtl. Change 111 (1992) at p. 123). This is often termed as a reversal of the burden of proof, because otherwise in environmental cases, those opposing the change would be compelled to shoulder the evidentiary burden, procedure that is not fair. Therefore, it is necessary that the party attempting to preserve the status quo by maintaining a less-polluted state should not carry

the burden of proof and the party who wants to alter it, must bear this burden. (See James M. Olson, Shifting the burden of Proof, 20 Envtl. Law p. 891 at 898 (1990), (Quoted in Vol. 22 (1998) Harv. Env. Law Review p. 509 at 519, 550).

37. The precautionary principle suggests at where there is an identifiable risk of serious or irreversible harm, including, for example, extinction of species, widespread toxic pollution in major threats to essential ecological processes, it may be appropriate to place the burden of proof on the person or entity proposing the activity that is potentially harmful to the environment. (See report of Dr. Sreeenivasa Rao Pemmaraju, Special Rapporteur, International Law Commission, and dated 3.4. 19989, para 61).

38. It is also explained that if the environmental risks being run by regulatory inaction are in some way *"uncertain but non-negligible"*, then regulatory action is justified. This will lead to the question as to what is the 'non-negligible risk'. In such a situation, the burden of proof is to be placed on those attempting to alter the *status quo*. They are to discharge this burden by showing the absence of a 'reasonable ecological or medical concern'. That is the required standard of proof. The result would be that if insufficient evidence is presented by them to alleviate concern about the presumption should operate in favour of environmental protection. Such a presumption has been applied in Ashburton *Acclimatization Society vs. Federated Farmers of New Zealand* [1998 (1) NZLR 78]. The required standard now is that the risk of harm to the environment or to human health is to be decided in public interest, according to a 'reasonable persons' test. (See Precautionary Principle in Australia by Chairman Barton) (Vol. 22) (1998) Harv. Env. L. Rev. 509 at 549).

Brief Survey of Judicial and technical inputs in environmental appellate authorities/tribunals.

39. We propose to briefly examine the deficiencies in the Judicial and technical inputs in the appellate system under some of our existing environmental laws.

40. Different statutes in our country relating to environment provide appeals to appellate authorities. But most of them still fall short of a combination of judicial and scientific needs. For example, the qualifications of the persons to be appointed as appellate authorities under section 28 of the Water (Prevention and Control of Pollution Act, 1981, under Rule 12 of the Hazardous Wastes (Management and Handling) Rules, 1989 are not clearly spelled out. While the appellate authority under section 28 in Andhra Pradesh as per the notification of the Andhra Pradesh Government is a Retired High Court Judge and there is nobody on his panel to help him in technical matters, the same authority as per the notification in Delhi is the Financial Commissioner (See notification dated 18.2.1992) resulting in there being in NCT neither a regular judicial member nor a technical one. Again, under the National Environmental Tribunal Act, 1995, which has power to award compensation for death or injury to any person (other than workmen), the said Tribunal under section 10 no doubt consists of a Chairman who could be a Judge or retired Judge of the Supreme or High Court and a Technical member. But section 10 (1) b read with section 10 (2) (b) or (c) permits a Secretary to Government or Additional Secretary who

has been a Vice Chairman For 2 years to be appointed as Chairman. We are citing the above as instances of the grave inadequacies.

Principle of Good Government: Need for modification of our statutes, rules and notifications by including adequate Judicial & Scientific inputs:

41. Good Governance is an accepted principle of International and domestic law. It comprises of the rule of law, effective State institutions, transparency and accountability in public affairs, respect for human rights and the meaningful participation of citizens – (including scientists) – in the political processes of their countries and in decisions processes of their countries and in decisions affecting their lives. (Report of the Secretary General on the work of the Organization, Official records of the UN General Assembly, 52 session, Suppl. 1. (A/52/1) (para 22). It includes the need for the State to take the necessary 'legislative administrative and other actions' to implement the duty of prevention of environmental harm, as noted in Article 7 of the draft approved by the Working Group of the International Law Commission in 1996. (See Report of Dr. Sreenivasa Rao Pemmaraju, Special Rapporteur of the International Law Commission dated 3.4.1998 on 'Prevention of transboundary damage from hazardous activities (paras 103, 104), of paramount importance, in the need for providing adequate Judicial and scientific inputs rather than leave complicated disputes regarding environmental pollution to officers drawn only from the Executive.

42. It appears to us from what has been stated earlier that things are not quite satisfactory and there is an urgent need to make appropriate amendments so as to ensure that at all times, the appellate authorities or tribunals consist of Judicial and also Technical personnel well versed in environmental laws. Such defects in the constitution of these bodies can certainly undermine the very purpose of those legislations. We have already referred to the extreme complexity of the scientific of technology issues that arise in environmental matters. Nor, as pointed out by Lord Woolf and Robert Cranworth should the appellate bodies be restricted to *Wednesbury* limitations.

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

44. In fact, such an environmental Court was envisaged by this Court at least in two judgements. As long back as 1986, Bhagwati, CJ in M.C. Mehta vs. Union of India and Shriram Foods & Fertilizers case [1986 (2) SCC 176 (at page 202] observed:

> "We would also suggest to the Government of India that since cases involving issues of environmental pollution, ecological destruction and conflicts over national resources are increasingly coming up for adjudication and these cases involve assessment and evolution of scientific and technical data, it might be desirable to set up Environmental 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."

In other words, this Court not only contemplated a combination of a Judge and Technical Experts but also an appeal to the Supreme Court from the Environmental Court.

45. Similarly, in the Vellore Case [1996 (5) SCC 647], while criticizing the inaction on the part of Government of India in the appointment of an authority under section 3(3) of the Environment (Protection) Act, 1996. Kuldip Singh, J. observed that the Central Government should constitute an authority under section 3(3):

"headed by a retired Judge of the High Court and it may have other members preferably with expertise in the filed of pollution control and environmental protection – to be appointed by the Central Government".

We have tried to find out the result of the said directions. We have noticed that pursuant to the observations of this Court in Vellore Case, certain notifications have been issued by including a High Court Judge in the said authority. In the notification no. 671 (E) dated 30.9.1996 issued by the Government of India for the State of Tamil Nadu under section 3(3) of the 1986 Act, appointing a 'Loss of Ecology (Prevention and Payment of Compensation) authority, it is stated that it shall be manned by a retired High Court Judge and other technical members who would frame a scheme or schemes in consultation with NEERI etc. It could deal with all industries including tanning industries. A similar notification no. 704 E dated 9.10.1996 was issued for the 'Environmental Impact Assessment Authority' for the NCT including a High Court Judge. Notification dated 6.2.1997 (No 88E) under section 3(3) of the 1986 Act dealing with shrimp industry, of course, includes a retired High Court Judge and technical persons.

46. As stated earlier, the Government of India should, in our opinion, bring shout appropriate amendments in the environmental statutes. Rules and notification to ensure that in all environmental Courts, Tribunals and appellate authorities there is always a Judge of the rank of a High Court Judge or a Supreme Court Judge, - sitting or retired – and Scientists of high ranking and experience so as to help a proper and fair adjudication of disputes relating to environment and pollution.

47. There is also an immediate need that in all the State and Union Territories, the appellate authorities under section 28 of the Water (Prevention of Pollution) Act, 1974 and section 31 of the Air Prevention of Pollution) Act, 1981 or other rules there is always a Judge of the High Court, sitting or retired and a Judge of the High Court, sitting or retired and a Scientist or group of Scientists of high ranking and experience, to help in the adjudication of disputes relating to environment and pollution. An amendment to existing notifications under these Acts can be made for the present.

48. There is also need for amending the notification issued under Rule 12 of the Hazardous Wastes (Management & Handing) Rules, 1989. What we have said applies to all other such Rules or notification issued either by the Central Government or the State Governments.

49. We request the Central and State Governments to take notice of these recommendations and take appropriate action urgently.

50. We finally come to the appellate authority under the National Environment Appellate Authority Act, 1997. In our view it comes very near to the ideals set by this Court. Under that statute, the appellate authority is to consist of a sitting or retired Supreme Court Judge or a sitting or retired Chief Justice of a High Court and a Vice Chairman who has been an administrator of high rank with expertise in technical aspects of problems relating to environment; and Technical members, not exceeding three, who have professional knowledge or practical experience in the areas pertaining to conservation, environmental management, land or planning and development. Appeals to this appellate authority are to be preferred by persons aggrieved by an order granting environmental clearance in the areas in which any industries, operations or processes etc. are to be carried or carried subject to safeguards.

51. As stated above and we reiterate that there is need to see that in the appellate authority under the Act Water (Prevention of Pollution) Act, 1974, the AIR (Prevention of Pollution) and the appellate authority under Rule 12 of the Hazardous Wastes (Management & Handling) Rules, 1989, under the notification issued under section 3(3) of the Environment (Protection) Act, 1986 for National Capital Territory and under section 10 of the National Environment Tribunal Act, 1995 and other appellate bodies, there are invariable Judicial and Technical Members included. This Court has also observed in M.C. Mehta vs. Union of India and Shriram Foods & Fertilizers Case [1986 (2) SCC 176] (at 262) that there should be a right of regular appeal to the Supreme Court, i.e. an appeal incorporated in the relevant statutes. This is a matter for the Governments concerned to considered urgently, by appropriate legislation whether plenary or subordinate or by amending the notifications.

> *The duty of the present generation towards posterity: Principle of Intergenerational Equity : Rights of the Future against the Present:*

52. The principle of Inter-generation equity is of recent origin. The 1972 Stockholm Declaration refers to it in principles 1 and 2. In this context, the environment is viewed more as a resource basis for the survival of the present and future generations.

Principle 1 statutes:

> "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for *present and future generations....."*

Principle 2:

> *'The natural resources of the earth, including the air, water, lands, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning of management, as appropriate"*

Several international conventions and treaties have recognized the above principles and in fact several imaginative proposals have been submitted including the locus standi of individuals or groups to take out actions as representatives of future generations, or appointing Ombudsman to take care of the rights of the future against the present (proposals of sand & Brown Weiss referred to by Dr. Sreenivasa Rao Pammaraju, Special Rapporteur, paras 97, 98 of his report).

Whether the Supreme Court while dealing with environmental matter under Article 32 or Article 136 or High Courts under Article 226 can make reference to the National Environmental Appellate Authority under the 1997 Act for investigation and opinion:

53. In a large number of matters coming up before this Court either under Article 32 or under Article 136 and also before the High Courts under Article 226, complex issues relating to environment and pollution, science and technology have been arising and in some cases, this Court has been finding sufficient difficulty in providing adequate solutions to meet the requirements of public interest, environmental protection, elimination of pollution and sustained development. In some cases this Court has been referring matters to professional or technical bodies. The monitoring of a case as it progresses before the professional body and the consideration of objections raised by affected parties to the opinion given these professional technical bodies have gain been creating complex problems. Further these matters same time require day to day hearing which, having regard to other workload of this Court, (-a factor mentioned by Lord Woof) it is not always possible to give urgent decisions. In such a Situation, this Court has been feeling the need for an alternative procedure which can be expeditions and scientifically adequate. Question is whether. in such a situation, involving grave public interest, this Court could seek the help of other statutory bodies which have an adequate combination of both Judicial and technical expertise in environmental matters, like the Appellate Authority under the National Environmental Appellate Authority Act, 1997 ? .....

56. Environmental concerns arising in this Court under Article 32 or under Article 136 or under Article 226 in the High Courts are, in our view, of equal importance as Human Rights concerns. In fact both are to be traced to Article 21 which deals with fundamental right to life and liberty. While environmental aspects concern `life', human rights aspects concern 'liberty'. In our view, in the context of emerging jurisprudence relating to environmental matter - as it is the case in matters relating to human rights, - it is the duty of this Court to render Justice by taking all aspects into consideration. With a view to ensure that there is neither danger to environment nor to ecology and at the same time ensuring sustainable development, this Court in our view, can refer scientific and technical aspects for investigation and opinion to expert bodies such as the Appellate Authority under the National Environmental Appellate Authority Act, 1997. The said authority comprises of a retired Judge of the Supreme Court and Members having technical expertise in environmental matters whose investigations, analysis of facts and opinion on objections raised by parties, could give adequate help to this Court or the High Courts and also the needed reassurance. Any opinions rendered by the said authority would of course be subject to the approval of this Court. On the analogy of Paramjit

Kaur's Case, such a procedure, in our opinion, is perfectly within the bounds of the law. Such a Procedure, in our view, can be adopted in matters arising in this Court under Article 32 or under Article 136 or arising before the High Courts under Article 226 of the Constitution of India.

The order of reference:

57. After the above view was expressed to counsel on both sides, certain draft issues were prepared for reference. There was some argument that some of the draft issues could not be referred to the Commission while some others required modification. After hearing arguments, parties on both sides agreed for reference of the following issues to the Appellate Authority under the National Environmental Appellate Authority Act, 1997.

58. We shall now set out these issues.

They are:

> (a) Is the respondent industry a hazardous one and what is its pollution potentiality, taking into account, the nature of the product, the effluents and its location?
>
> (b) Whether the operation of the industry is likely to affect the sensitive catchments area resulting in pollution of the Himayat Sagar and Osman Sagar lakes supplying drinking water to the twin cities of Hyderabad and Secunderabad ?

59. We may add that it shall be open to the authority to inspect the premises of the factory, call for documents from the parties or any other body or authority or from the Government of Andhra Pradesh or Union Government and to examine witnesses, if need be. The Authority shall also have all powers for obtaining data or technical advice as it may deem necessary from any source. It shall give an opportunity to the parties or their counsel to file objections and lead such oral evidence or produce such documentary evidence as they may deem fit and shall also give a hearing to the appellate or its counsel to make submissions.

60. A question has been raised by the respondent industry that it may be permitted to make trial *runs* for at least three months so that the results of pollution, could be monitored and analyzed. This was opposed by the appellate and the private respondent. We have not thought it fit to go into this question and we have informed counsel that this issue could also be left to the said Authority to decide because we do not know whether any such trial runs would affect the environment or cause pollution. On this aspect also, it shall be open to the authority to take a decision after hearing the authority to take a decision after hearing the parties.

61. Parties have requested that the authority may be required to give its opinion as early as possible. We are of the view that the Authority could be requested to give its opinion within a period of three months from the date of receipt of this order. We, therefore, refer the above issues to the above-said Appellate Authority for its opinion, and request the Authority to give its opinion, as far as possible, within the period abovementioned. If the

Authority feels any further clarifications or directions are necessary from this Court, it will be open to it to seek such clarifications or directions from this Court.

62. The company shall make available photocopies of the paper books filed in this Court or other papers file in the High Court or before the authority under section 28 of the Water Act, 1974, for the use of the Appellate Authority.

63. The Registry shall communicate a copy of this order to the Appellate Authority under the National Environmental Appellate Authority Act, 1997. Matter may be listed before us after three months, as part heard.

Ordered accordingly.

64. In the context of recommendations made for amendment of the environmental laws and rules by the Central Government and notifications issued by the Central Government and notifications issued by the Central and State Governments, we direct copies of this judgement to be communicated to the Secretary, Environment & Forests (Government of India), New Delhi, to the Secretaries of Environment & Forests in all State Governments and Union Territories, and to the Central Board to communicate a copy of this judgement to all State Pollution Control Board and other authorities dealing with environment pollution, ecology and forest and wildlife. The State Governments shall also take to communicate this judgement to their respective State Pollution Control Boards and other authorities dealing with the above subjects - so that appropriate action can be taken expeditiously as indicated in this judgement.

Centre for Environmental Law, WWF-India v. State of Orissa
AIR 1999 Orissa 15
O.J.C. No. 3128 of 1994, D/-14-5-1998
A. Pasayat and P.C. Naik, JJ.

Constitution of India, Art. 226 – Public Interest Litigation – Petition filed for certain directions to State Govt. so that flora and fauna of certain Wildlife Sanctuary is preserved and ecological balance is maintained – High Court gave detailed directions for achievement of aforesaid goals.

(Para 21)

Centre for Environmental Law v. Union of India
AIR 1999 Supreme Court 354
Writ Petition (Civil) No. 337 of 1995, D/-17-7-1998
S.C. Agrawal, S.Saghir Ahmad and M.Srinivasan, JJ.

Wildlife (Protection) Act (53 of 1972), Ss. 33-A, 34 – Immunisation of live stock and registration of persons possessing arms – Directions by Supreme Court to State Governments/Union Territories Administration for compliance of provisions of Ss. 33-A and 34 – Affidavits regarding such compliance filed before Supreme Court –

No concrete steps found to be taken - State Governments/Union Territories Administration further directed to set veterinary centres and frame rules for effecting such compliance.

(Paras 6, 7, 8)

Indian Council for Enviro-Legal Action v. Union of India
AIR 1999 Supreme Court 1502
Interlocutory Application Nos. 2, 9 and 11 in Writ Petition (Civil) No. 1056 of 1990, D/- 5-5-1998
Mrs. Sujata V. Manohar and G.B. Tattanaik, JJ.

Constitution of India, Art. 32 – Enviro-legal action – Industrial pollution – Affecting villages having drinking water sources – Central and Andhra Pradesh State Pollution Control Board directed to prepare Scheme of Action – Scheme to contain steps to prevent industrial pollution, disposal of industrial waste as also for reclaiming polluted lands and polluted water supply.

Environment Protection Act (29 of 1986), S.3.

(Para 5)

ORDER:- Learned counsel for the State of Andhra Pradesh has stated that out of 15 villages where drinking water sources are affected by industrial pollution, the following two villages have been provided with drinking water supply by laying a pipeline in March 1998. These two villages are:

(i) Aratla.
(ii) Ismailkhanpet.

2. The following 8 villages will receive drinking water supply through pipelines which are being laid and which will be functional by 20th May, 1998: -

(i) Kistareddipeta.
(ii) Patancheru.
(iii) Pocharam.
(iv) Ganapathigudnam.
(v) Lakadaram.
(vi) Inol.
(vii) Bacchuguda.
(viii) Padakanjalla.

3. In respect of the remaining 5 villages, we are informed that tenders have already been invited for laying pipelines to bring drinking water to these villages. The names of these villages are as follows:

(i) Gandigudam.
(ii) Sultanpur.
(iii) Byathda.

(iv) Chiduruppa
(v) Kazipalli.

4. Learned counsel for the State of Andhra Pradesh shall ascertain whether the tenders which have been invited cover the remaining 5 villages also and inform us on the next occasion.

5. The Central Pollution Control Board and the Andhra Pradesh State Pollution Control Board shall jointly prepare a Scheme of Action for containing the industrial pollution and for disposal of industrial waste as also for reclaiming the polluted lands and the polluted water supply. The Scheme will contain immediate steps to by taken either by the State of Andhra Pradesh or by the industries concerned giving particulars thereof setting out the goal to be achieved every four months as also the steps to be taken on a long term basis for prevention of industrial pollution and the stages by which these long term measures have to be completed so that every four months both the Pollution Control Boards can given a report as to whether the measures prescribed have been carried out or not. Since both the State Pollution Control Board as well as the Central Pollution Control Board have now become fully familiar with the problems of the area, such proposals be furnished on or before 9th May, 1998 for further directions on 12th May, 1998.

6. List on 12th May, 1998.

Order Accordingly.

M.C. Mehta v. Union of India
Re: Shri Dalchand and Others Workmen of Birla Textiles
1999 (2) Supreme Court Cases 92
M. Jagannadha Rao, J.

M. JAGANNADHA RAO, J.- The dispute in this batch of IAs is between the workmen and the management of M/s Birla Textiles (Proprietor Textiles Ltd., Calcutta). Common questions arise in all these IAs.

2. IA No. 202 of 1992 (in IA No. 22 in WP No. 4677 of 1985) has been field on behalf of 2800 workers of M/s Birla Textiles (Proprietor Textiles Ltd., Calcutta) ("the Industry") Who claim to have worked for various periods ranging from 5 to 30 years and whose services are in jeopardy upon the closure of the Industry at Delhi, Consequent to orders of this Court. The reliefs sought for in this IA are (i) payment of full back wages w.e.f. 1-12-1996 along with 18% interest , (ii) to that the workmen as in continuous employment for 1-12-1996, (iii) to direct the industry to deem that the workmen have exercised option to shift in accordance with the order of this Hon'ble Court, (iv) to direct the industry to ask the workmen to report at the selection sites after the factory is fully set up and commenced production, with basic amenities for the workers and their families.

3. The following are the facts: by an order dated 8-7-1996 in *M.C. Mehta v. Union of India* this Court directed closure of 168 industries including the Industry in question.

Various directions were given including the grant of incentives and benefits to industries desiring to relocate and also for payment of various amounts to the workmen. We are mainly concerned with directions 9(a) to (f) issued in the above case, which read as follows:

(SCC pp. 769-70, para 28)

"(9) The workmen employed in the above-mentioned 168 industries shall be entitled to the rights and benefits as indicated hereunder:

(a) The workmen shall have continuity of employment at the new town and place where the Industry is shifted. The terms and conditions of their employment shall not be altered to their detriment;

(b) The period between the closure of the Industry in Delhi and its restart at the place of relocation shall be treated as active employment and the workmen shall be paid their full wages with continuity of service;

(c) All those workmen who agree to shift with the Industry shall be given one year's wages as 'shifting bonus' to help them settle at the new location;

(d) The workmen who employed in the industries which fail to relocate and the workmen who are not willing to shift along with the relocated industries, shall be deemed to have been retrenched with effect from 30-11-1996 provided they have been in continuous service (as defined in Section 25-B of the Industrial Disputes Act, 1947) for not less than one year in the industries concerned before the said date. They shall be paid compensation in terms of Section 25-F(b) of the Industrial Disputes Act, 1947. These workmen shall also be paid, in additional, one year's wages as additional compensation;

(e) The 'shifting bonus' and the compensation payable to the workmen in terms of this judgement shall be paid by the management before 31-12-1996.

(f) The gratuity amount payable to any workmen shall be paid in addition."

4. Initially, the Industry was not prepared to relocate elsewhere and therefore, it informed this Court that it would retrench the employees and pay whatever was payable to the workmen under the above order. But pursuant to the suggestions of this Court, the Industry reconsidered the matter and this Court in its order dated 4-12-1996 in *M.C. Mehta v. Union of India* observed that the learned counsel for the industries had accepted the Court's suggestions to have a "fresh look " into the matter. In the same order dated 4-12-1996 this Court modified direction 9(d) relating to payment of back wages as "six years' wages" instead of "one year's wages" in case the Industry decided to close down. That would mean that in the event of non-relocation, the workmen would have to be paid 6 years' wages and not merely 1 year's wages.

5. Subsequently, in suppression of an earlier notice dated 28-11-1996, the Industry published a fresh "notice" on its Notice Board that it had reconsidered the matter as per the orders of this Court dated 4-12-1996 and decided to relocate the Industry in Baddi,

District Solan (H.P.) and that the workmen who were willing to be relocated at the new site "Baddi" should inform the management in writing by 25-12-1996. If they reported, they would be entitled to continuity, their terms and conditions would not be altered, the period between the closure of the unit at Delhi and its restart at Baddi would be treated as active employment and they would be paid full wages with continuity of service. Further, all those workmen agreeing to shift would to shift would get I year's wages as "shifting bonus" to help them to settle at Baddi. Those who were not willing to shift would be deemed to have been retrenched w. e. f. 30-11-1996, provided they were in continuous service (as defined in Section 25-B of the Industrial Disputes Act, 1947) for not less than one year in this unit before the said date. They would be paid compensation in terms of Section 25-F(b) of the Industrial Disputes Act and in addition, one year's wages as additional compensation. It was further notified that the shifting bonus to the workmen who agreed to shift and the compensation for those unwilling to shift to "Baddi" would be paid before 31-12-1996, as per directions of this Court.

6. On 23-12-1996, eight unions of workmen of this Industry sent a reply stating that the Industry had violated the order of this Court as it was relocating in the State of Himachal Pradesh rather than in the National Capital Territory of Delhi as envisaged in the order dated 8-7-1996 and that therefore it was not proper for the Industry to ask the employees to shift to the State of Himachal Pradesh. But ignoring this reply, the Industry published a notice on 30-12-1996 reiterating its plan to relocate in the State of Himachal Pradesh.

7. At that stage, this Court was approached by the industries for modification of the order dated 8-7-1996 and for permitting relocation outside NCT (Delhi). On that, this Court passed an order on j31-12-1996 permitting relocation in Haryana, Punjab, Himachal Pradesh, Rajasthan and Uttar Pradesh and said that if they were so relocated, the industries would be treated on a par with those industries relocating in NCT (Delhi). This order was to be treated as a clarification on the order dated 8-7-1996.

8. There was some controversy that when this order was passed in the chambers on 31-12-1996, all the parties were not present. But the counsel for the industries disputed this contention. Be that as if may, it is not necessary to go into this dispute-particularly, when some later applications field by the workmen for recalling this order dated 8-7-1996 did not fructify.

9. Thereafter, i.e., after 31-12-1996, the Industry put up a fresh notice on 4-1-1997 stating:

> *"As per the directions of the Hon'ble Supreme Court, those workmen who are willing to shift would be entitled to receive salary/wages for December 1996 and for subsequent months. The workmen should intimate to the management by 7-1-1997 their willingness to shift to Baddi, upon which the salary/wages for December 1996 will be disbursed to them on 9-1-1997 and 10-1-1997."*

On the same day, 4-1-1997, a further notice was put up on the Notice Board that though the Industry took steps for payment on 29-12-1996, 30-12-1996 and 31-12-1996, no workmen might come and collect the cheques. Hence, it was requested that the workmen might come and collect the cheques.

10. In reply thereto, seven unions through a Joint Action Committee issued a notice on 6-1-1997 to the Industry stating that the workmen were willing to move to the State of Himachal Pradesh. The said notice read as follows:

> *"That all the workmen and employees of the Birla Textiles Mills hereby give their willingness for relocation/shifting without prejudice to their rights subject to the outcome of the review and other proceeding being pursued by our lawyers before this Hon'ble Supreme Court of India against the order dated 31-12-1996 passed by the Hon'ble Supreme Court of India."*

11. It is the main contention for the Industry (respondents) through its Senior Counsel, Shri Kapil Sibal and Shri Dipankar Gupta that the option exercised by the workmen in the above letter agreeing to shift to Baddi was not an unconditional one but was conditional inasmuch as it stated that they were exercising the option subject to the result of certain applications field by them in this Court, i.e., for recall of the order dated 31-12-1996. According to the respondents, such a conditional option was not within the scope of the order of this Court dated 8-7-1996. Further, the counsel contended workmen of these were no proof that the individual workmen of these unions were parties to this reply. In fact, the status or authority of the Joint Action Committee was not clear, according to them.

12. In the belief that the conditional offer was bad and the Joint Action Committee had no *locus standi* to send the reply dated 6-1-1997, the Industry published a further notice on 8-1-1997 requesting "each workman" to give his willingness within one week to shift in terms of the following performa, to be addressed to the Industry:

"Dear Sirs,

> *I am willing to shift to Baddi, District Solan (H.P.), when the Delhi unit of Birla Textiles is being relocated."*

13. On 19-5-1997, the Labour Commissioner, NCT (Delhi) directed the industry to pay the various amounts payable to the employees. The Industry put up a further notice on 20-5-1997 that in view of the reply of the unions dated 6-1-1997 agreeing to shift to Baddi, the industry had put up a notice on 8-1-1997 requesting the individual workmen to respond in a week. None of the workmen responded. The Industry then said that it was deeming the employees as retrenched w.e.f. 30-11-1996. This was stated in the further notice dated 20-5-1997 and it reads as follows:

> *"We have been legally advised that those workmen who have not expressed in writing their willingness to shift within the stipulated time as per the Above-referred two notices, be deemed to have been retrenched with effect from 30-11-1996 as per the order of the Hon'ble Supreme Court dated 8-7-1996…."*

14. However, the Industry wanted to give one more opportunity and issued another notice on 20-5-1997 the those who were willing to shift were to report at Baddi on or before 7-6-1997. The said notice dated 20-5-1997 stated as follows:

"Such workmen who now give their consent to shift, are requested to report at Baddi immediately, in any case, not later than 7-6-1997…"

15. The Labour Commissioner gave a notice to the Industry on 28-5-1997 to conform to the directions of this Hon'ble Court regarding payment of shifting bonus etc. On 30-3-1998, on account of the delay in the matter, this Court directed 3 months wages to be paid.

16. On the basis of the above facts, learned Senior Counsel for the appellants, Ms Indira Jaisingh, Shri D.K. Agarwal and others submitted for the workmen that the Industry had violated the orders of this Court and treat there was no questions of asking individual workmen to give their options in a performa. According to counsel, the attitude of the Industry revealed that it was bent on retrenching the workmen and taking local employees from H.P. state on lesser wages inasmuch as if the workmen of the Industry were to be continued in employment, they would have to be paid the same wages as were being paid while at Delhi while the minimum wages payable in H.P. to the locals were much lower.

17. Shri. S. B. Sanyal, learned Senior Counsel for the workmen contended that as per the order of this Court dated 8-7-1996 there was no question of the Industry seeking the option of the employees. Such an obligation to exercise option would arise only after the new Industry started functioning at H.P. According to counsel, this Court in its order dated 8-7-1996 guaranteed continuity up to the date of restart of the Industry at the new location and hence the option asked for by the Industry was uncalled for and contrary to the order of this Court.

18. Counsel for the petitioner-workmen in IA No. 201 of 1997 referred to a letter written by one of the workmen, Mr. Ramakant who stated in his letter dated 23-6-1997 that all the workmen were willing to rejoin at Baddi. According to Learned counsel this letter of the workmen superseded the offer dated 6-1-1997 made by the employees and that this letter contained an unconditional option to move to the State of Himachal Pradesh. According to learned counsel, after this, the Industry could not have treated the applicants as unwilling to joint at Baddi. Shri Ranjit Kumar and other counsel also made like submissions on behalf of the workmen.

19. On the other hand, Shri Kapil Sibal, learned Senior Counsel for the Industry submitted that the workmen were not entitled to give a conditional option as contained in their letter dated 6-1-1997, that the workmen having field review petitions etc. in this Court for recalling the order dated 31-12-1996, were indeed – even on 6-1-1997 –not willing to go to Solan, H.P. and that the letter dated 6-1-1997 was not a valid option and hence the Industry rightly deemed the employees as retrenched w.e.f. 30-11-1996. Several opportunities were given by the Industry even later to these workmen to come and join at Baddi. As the Joint Action Committee was not a recognized entity, options had to be called from individual workmen. According to him, out of the total number of 2522 workmen as on 30-11-1996, those who opted to shift to Baddi, Solan within the time specified were only 7 workmen that 595 workmen did not accept the payment and

10 cheques were lying with the workmen or with the postal authorities. In regard to the payment of 3 months' salary, as directed by this Court on 30-3-1998, it was stated that 1938 workmen were eligible to receive the said amount, that 1891 persons took it and cheques of 47 workmen were lying with the Industry.

20. In reply to the contention of the learned Senior Counsel for the workmen that the workmen had time to join at the new location till the Industry was ready for being "restarted", the learned Senior Counsel, Shri Kapil Sibal and Shri Dipankar Gupta contended that would not be a proper interpretation of the order dated 8-7-1996 because under para 28(9)(e) of the said order, the "shifting bonus" and the compensation were payable before 31-12-1996 and hence this Court intended that the workmen should join before 31-12-1996. They pointed out that even so, the Industry extended the time by issuing several public notices. As the workmen did not opt to go to Baddi before 31-12-1996 or by the extended dates as per para 28(9)(d) of the order of this Court dated 8-7-1996, they were rightly deemed to have been already been employed.

21. Learned senior Counsel, Shri Kapil Sibal also referred to the conduct of the workmen which according to him disentitled the workmen to any relief He submitted that before and after 6-1-1997 (the date of notice of the various unions that they were willing to shift to Baddi, subject to the orders in pending application), the workmen were totally unwilling to go to Baddi. They were repeatedly making attempts by filling review petitions to see that the 31-12-1996 order permitting relocation outside NCT of Delhi, H.P. Rajasthan, Haryana, was recalled. Shri Kapil Sibal referred to Review Petition No. 39 of 1997 filed by the workmen seeking review of the order dated 31-12-1996 permitting the industries to shift to H.P., Rajasthan, Haryana and Punjab outside NCT (Delhi). According to the plea of the workmen, the Court was to close the industries, which were not relocating in NCT (Delhi) as "closed" in view of the orders dated 8-7-1996 and 4-12-1996. Counsel submitted that the workmen were interested more in getting the 6 years' salary as compensation by treating the industries as closed and as if they were not relocating. Reference was also made to IA No.52 of 1997 filed by the Government of NCT (Delhi) for review of the order dated 31-12-1996. IA No. 144 was also similar. These IAs Nos. 201,202 and 203 where several other relief's were asked for, the workers urged that the industries be located in NCT (Delhi). Though some ancillary reliefs were prayed for in these IAs, the entire tenor of the affidavits, according to Shri Sibal, was that the order dated 31-12-1996 should be recalled. Counsel stated that the workmen had, in fact, physically prevented the Industry from removing its articles from Delhi to H.P., even as late as on 20-5-1997. Shri Dipankar Gupta, learned Senior Counsel appearing for the respondents also made similar submissions. He also submitted that Baddi was a well-developed place with a large number of industries and banks etc. and all normal facilities were available there if the workmen really desired to shift. According to both counsel, out of 7 unions, only 2 unions had field these IAs while the other unions remained silent. They also submitted that the workmen ought to have helped the Industry during relocation and for that purpose, they should have shifted to Baddi even before the Industry restarted functioning at that place.

22. The party-in-person who appeared in cp.no.532 wanted he paid the 6 years' wages on the basis that the Industry was closing and not shifting. In other words, he was not willing to go to Baddi. The counsel for the respondents, Shri Kapil Sibal stated that a letter with a cheque, which was sent to him, got returned. But if the Industry was relocating and he was not shifting, he would get only 1 year's wages plus compensation under Section 25-F(b) as per the order dated 8-7-1996. The Industry was agreeable to pay him 1 year's wages in addition to Section 25-F(b) compensation.

23. The points for consideration are:

(i) Whether the management was right in its submissions that the workmen, though given opportunity in various letters to give their option for reporting at Baddi, failed to exercise option and must be deemed to have been retrenched on 30-11-1996 in terms of the orders dated 8-7-1996 and 30-12-1996 of this Court?

(ii) Whether the workmen were right in contending that the management had no right to seek options from the workmen even before the Industry was relocated and started functioning at Baddi?

These two points reflect the rival contentions and can be disposed of together.

24. In our opinion, the true answer to the contentions can be found in the order dated 8-7-1996 read with the order dated 31-12-1996. We have already extracted the various clauses in para 28(9) of the order this Court dated 8-7-1996. We shall briefly refer to them again. Sub-clause (a) emphatically says: [SCC p. 770, para 28(9)(a)]

> "(a) The workmen shall have continuity of employment at the new town and place where the Industry is shifted. The terms and conditions of their employment shall not be altered to their determent,"

Sub-clause (b) is important and it says: [SCC p. 770, para 28(9)]

> "(b) The period between the closure of the Industry in Delhi and its restart at the place of relocation shall be treated as active employment and the workmen shall be their full wages with continuity of service,"
>
> (emphasis supplied)

The words "continuity" and "restart" used in sub- clauses (a) and (b) of para reading of these clauses that the workmen were to be treated as if they were in service till the time the Industry restarted at the relocated place and till such time, their services were to be treated as continuous. If that be so, there was no question of the employer asking them for an option to agree to shift and fix an earlier time limit than the date of starting of the industry at Baddi.

25. Learned Senior Counsel for the respondents, Shri Kapil Sibal and Shri Dipankar Gupta argued that could not be the true meaning of clauses (a) and (b). The crucial according to them was clause (e), which stated:

[SCC p. 770, para 28(9)]

> *"(e) The 'shifting bonus' and the compensation payable to the workmen in term of this judgement shall be paid by the management before 31-12-1996."*

The "shifting bonus" was referred to in sub-clause 2 and the payment of compensation was referred to in clause (d) and these amounts had to be paid by 31-12-1996, as stated in clause (e). According to learned counsel, the option to join at Baddi must have, therefore, been exercised before 31-12-1996. They rely on clause (d), which reads as follow:

[SCC p. 770, para 28(9)]

> *"(d) The workmen employed in the industries which fail to relocate and the workmen who are not willing to shift along with the relocated industries, shall be deemed to have retrenched with effect from 30-11-1996… (and) be paid …one year's wages as additional compensation."*
>
> (emphasis supplied)
>
> (Of course, by order dated 4-12-1996 in case the Industry did not relocate, they had to pay 6 years' wages and not merely wages for one year.)

On the basis of clauses (C), (d) and (e), the learned Senior Counsel for the respondents argue that if the workmen did not exercise option by 31-12-1996, they were to be deemed as retrenched by 30-11-1996.

26. In our option, the contention of the Senior Counsel for the respondents are based upon a misconception of the true import of this Court's order dated 8-7-1996. As already stated, the two clauses (a) and (b) are crucial and deal with continuity of service of the workmen on the same terms and conditions and the payment of full wages till the "restart" at the new place and these cannot be altered to their determent. The employees are to be deemed to be in active employment right from the date of "*closure*" of the Industry of Delhi till its "*restart*" at the place of relocation and they had to be paid their full wages with continuity of service for the said period. There was, therefore, no question of the Industry compelling workers that they were prepared to rejoin at the place where the Industry was proposed to be started. The Industry could not be said to be restarted unless and until it had got the plant installed and obtained all necessary permissions for its being commissioned at the new place. Till such time, the said continuum could not be broken by the Industry by unilaterally asking the workmen to exercise an option to join. Such an option on the part of the workmen was nowhere contemplated by the order of this Court dated 8-7-1996. The Industry was nowhere given any right to seek such an option.

27. This Court gave an option to the workmen for "not joining" and not "for joining" at the relocated place. Till the time of "restart" of the Industry at the relocated place, it was open to the workmen to say that they would not rejoin. The only consequence is that if they exercised such an option on any date after the date of closure and before restart, they would still be deemed to have been retrenched w.e.f. 30-11-1996 and not with effect from the date on which they exercised their option not to rejoin. In other words, if they opt not to rejoin, they would not be entitled to wages from the date of closure till the date they exercised their option not be rejoin-inasmuch as any such refusal to rejoin at Baddi, communicated to the Industry before the date of restart, would result in their being deemed to have been retrenched from 30-11-1996.

28. The Industry, in our opinion, proceeded on a total misconception of the order of this Court dated 8-7-1996 and adopted a procedure which ran quite contrary to the scheme which was envisaged by this Court for the benefit of the workmen.

29. The fact that during the period before the Industry was relocated, the workmen approached this Court for recall of the order dated 31-12-1996 which order permitted relocation of the Industry outside NCT (Delhi) could not, in our opinion, be deemed to amount to an option not to rejoin at the proposed place of relocation. In fact, the letter dated 6-1-1997 of the workmen could not be treated as a conditional option to rejoin because they were not obligated to give any option to rejoin but they could have, if they so chose, opted not to rejoin. The letter dated 6-1-1997 could not be treated as a letter exercising option not to rejoin at the place of relocation. This is because it specifically contained an offer to rejoin. The fact that the workmen subjected their intention to rejoin to orders of this Court did not concert an intention to join into an intention not to join at the relocated place. Further, the right of any party to seek review of orders of this Court is a right which is lawfully exercise and cannot be treated as a breach of the order of this Court dated 8-7-1996.

30. For the aforesaid reasons, we reject the contention of the respondents. We accordingly direct the Industry to allow all the workmen-except those who exercised or would exercise an option not to rejoin-to rejoin at Baddi. In order to avoid any scope for future disputes, we direct all those who are willing to rejoin at Baddi, to report there at Baddi on 14-1-1999 and 15-1-1999 along with their identity cards or other evidence to identify them and sing or put their thumb mark in a register in the joint presence of the Deputy Labour Commissioner having jurisdiction over Baddi, District Solan, Himachal Pradesh and the Deputy Labour Commissioner of NCT (Delhi). These officers shall countersign in the register certify that the particular workmen had reported at Baddi. All such workmen who rejoin shall be entitled to the benefits of the orders of this Court dated 8-7-1996 and subsequent orders, in respect of continuity, back wages from the date of closure till the date of such rejoining, in addition to one year's wages towards shifting bonus. The said amount shall be paid by the respondent-Industry to each of these

workmen, within one week of the rejoining at Baddi. In respect of such of the workmen who do not so report by 15-1-1999 as aforesaid or who otherwise give it in writing to the aforesaid authority that they are not willing to rejoin, they shall be deemed to have been retrenched w.e.f. 30-11-1996 and shall be entitled only to one year's wages and also to Section 25-F(b) compensation as per the order of this Court dated 8-7-1996. The said amount shall be disbursed to these employees within one week from 15-1-1999 by the respondent Industry.

31. The applications of the workmen of the Industry working at Delhi are accordingly allowed and disposed of in the manner stated above.

32. As the petitioner in the contempt case (the party-in-person) is not willing to join at Baddi, (the Industry will pay him 1 year's salary plus Section 25-F(b) compensation within 15 days from today, if not already paid. The contempt case is disposed of accordingly.

M. C. Mehta v. Union of India
1999(3) SCALE 166
A. S. Anand, C.J., B.N. Kirpal and V.N. Khare, JJ.

1. Notwithstanding the enactment of the Environment (Protection) act 1986 decline in the quality of environment continues. This prima facie shows a failure on the part of the authorities to perform their obligation under the Constitutional scheme and the mandate of the Act. Concerned by the effects of the citizens, particularly in the National Capital Region (NCR), this court has given directions from time to time to the State/Union as well as other authorities but it appears that despite those directions and the concern expressed by the Court, the pollution level is on the increase and not on the decrease. It is a serious matter.

2. Bhure Lal Committee, which was constituted by an order of this Court on 7th January, 1998, has been submitting its Reports from time and in the Report submitted to this Court on April 1, 1999, it was pointed out that the private (non-commercial) vehicles comprise 90% of the total number of vehicles plying in the NCR. The Report also indicated that more than 90% of Nitrogen Oxide (Nox) and respirable particulate matter (RSPN) from vehicles exhaust over Delhi is due to diesel emissions which is a serious health hazard. On 16th April, 1999, after taking note of the Report of Bhure Lal Committee, this Court had issued certain directions including a direction to the learned Additional Solicitor General to inform the Court, on an affidavit of a responsible Officer, about the number of diesel and petrol driven private vehicles registered in the NCR in 1997, 1998 and 1.1.1999 to 31.3.1999. That information has been furnished though it is totally incomplete.

3. After considering the suggestions made by Bhure Lal Committee and in the application filed by the learned Amicus and hearing learned counsel for various parties (automobile manufacturers), it appears appropriate to us to issue the following directions:

1. All private (non-commercial) vehicles which conform to EURO II norm may be registered in the NCR without may restriction.

2. All private (non-commercial) vehicles shall conform to EURO I norm by 1st June, 1999. All private (non-commercial) vehicles shall conform to EURO II norm by 1st April, 2000. Vehicles may in the meanwhile be registered in the manner indicated below:

   With effect from 1st May, 1999, 250 diesel driven vehicles per month and 1250 petrol driven vehicles per month may be registered on first-cum-first serve basis in the NCR till 1st April, 2000 only if they conform to EURO Anomy. From 1st April, 2000 no vehicles shall be registered unless it conforms to EURO II norm.

   The direction given by us apply both to diesel as well as petrol driven cars (private non-commercial vehicles).

   These directions are made only as an interim arrangement till further orders.

3. So far as the ban on the registration of diesel driven taxis is concerned, that shall be strictly enforced, unless the taxis also conform to EURO II norm. In other words no taxis (diesel) shall be registered with immediate effect unless it conforms to EURO II norm.

4. With a view to facilitate registration in the manner indicated above, the registering authority may register the vehicle concerned on a certificate of the manufacturer, duly authenticated by the authorised officer certificate that the vehicle concerned conforms to EURO I/ EURO II norm.

5. At the request of the learned Additional Solicitor General, we grant liberty to the Union of India to seek variation/modification of this order if on the basis of some data, it is considered necessary to do so.

   I. As. 37,39,41

4. Copies of the applications shall be forwarded to Bhure Lal Committee, which is requested to examine the matters and submit its report/recommendations after granting opportunity to the automobile manufacturers likely to be affected by our directions to make their submissions in this behalf. Further Report of Bhure Lal Committee may be sent to this Court within 8 weeks.

5. List the matters in the last week of July, 1999 after consultation with the learned Amicus.

M. C. Mehta v. Union of India
AIR 1999 Supreme Court 291
Writ Petition (Civil) No. 13029 of 1985; D/-22-09-1998
Dr. A.S. Anand, B.N. Kirpal, V.N. Khare JJ.

Environment Protection Act (29 of 1986), S. 3(1) (2) – Constitution of India, Art. 32 – Vehicular pollution – And chaotic traffic conditions – Problems arising out of – Bhurelal Committee appointed submitting its report – Directions earlier issued by Court to effect that all commercial vehicles which are more than 15 years old shall not be permitted to ply in capital territory of Delhi w.e.f. Oct. 2, 1988 – Transport Commissioner submitting that phasing out and banning all commercial vehicles which are more than 15 years old by Oct. 2, 1988 would lead to great hardship to owners of those vehicles in particular and to general public – Administration also ensuring that steps will be taken by itself to ease pollution level – Court modified its earlier ban order to mitigate hardship and taking note of assurance given – Directions issued to phase out commercial/transport vehicles.

(Paras 6, 7, 8)

ORDER: - With a view to tackle problems arising out of chaotic traffic conditions and vehicular pollution and not being satisfied with the steps taken by the authorities concerned in addressing themselves to those problems, this Court issued certain directions accepting the report of the Bhure Lal Committee, as it was felt by the Court that any further delay in the performance of its duty by the administration could not be permitted. At this stage, we are concerned only with the direction issued by this Court to the effect that all commercial vehicles which are more than 15 years' old shall not be permitted to ply in the national capital territory of Delhi with effect from 2-10-1998.

2. An affidavit has been filed by Shri S. Raghunathan, Principal Secretary-cum-Commissioner, Transport, Government of National Capital Territory of Delhi on 28-8-1998. The learned Solicitor General appearing for the Administration submits that phasing out and banning all commercial vehicles which are more than 15 years' old by 2-10-1998 would lead to great hardship to the owners of those vehicles in particular and to the general public which makes use of those vehicles in general. It is, therefore, submitted by him that we may relax the rigour of the order regarding banning of 15-year-old commercial/transport vehicles with effect from 2-10-1998 and he assures the Court that the Administration itself is keen to phase out all such vehicles gradually to ease the pollution level in the city. It is submitted that the ban order may be applied in phases.

3. A chart has been filed by the learned Solicitor General giving a break-up of the count of the number of commercial/transport vehicles which have paid road tax at least once after 1-4-1997 year wise. According to that chart, we find that the numbers of commercial/transport vehicles are:

(a)	More than 25 years' old	5,718
(b)	Between 24 and 25 years' old	954
(c)	Between 23 and 24 years' old	635
(d)	Between 22 and 23 years' old	524

(e) Between 21 and 22 years' old 748
(f) Between 20 and 21 years' old 770

4. Thus, the total number of vehicles which are more than 20 years' old are 9349. These vehicles are all commercial vehicles which have been registered and on which road tax has been paid.

5. The count of vehicles which are more than 15 years but less than 20 years' old are:

(a) Between 17 to 19 years 3200
(b) Between 15 to 16 years 4962

6. To mitigate the hardship, as pointed out by learned Solicitor General and taking note of the assurance given by him, we modify our previous order and direct that:

(a) all commercial/transport vehicles which are more than 20 years' old (9349) shall be phased out and not permitted to ply in the national capital territory of Delhi after 2-10-1998;

(b) all such commercial/transport vehicles which are 17 to 19 years' old (3200) shall not be permitted to ply after 15-11-1998;

(c) such of the commercial/transport vehicles which are 15 years and 16 years' old (4962) shall not be permitted to ply after 31-12-1998.

7. This order shall apply to all commercial/transport vehicles whether registered in the national capital territory of Delhi or outside (but ply in Delhi) which are of more than the stipulated age.

8. This ban order shall also be applicable to all such vehicles which do not have any authority or permit to ply in the national capital territory of Delhi.

9. Apart from the commercial/transport vehicles which are registered, as noticed above, we are informed that there are vehicles which are either not registered or on which road tax has not been paid in the national capital territory of Delhi. We direct that all such commercial/transport vehicles which are being plied without payment of road tax or registration, shall not be allowed to ply in the national capital territory forthwith and in any event, not with effect from 2-10-1998.

10. The Motor Vehicles Department and the Traffic Department of the Delhi Police shall coordinate their efforts to carry out these directions faithfully and punctually.

11. We further direct that an affidavit shall be filed by the Chief Secretary, Delhi Administration, undertaking to ensure that the directions hereinabove given are carried out in letter and in spirit. The affidavit shall be filed during the course of this week.

12. The Transport Department and the Traffic Department of the Delhi Police shall submit reports of due compliance in the first week of October 1998, the third week of November 1998 and the first week of January 1999 with an advance copy to the learned amicus curiae.

13. List the matter in October 1998 on a date to be fixed by the Registry after consultation with the learned amicus curiae.

Order Accordingly.

M.C. Mehta v. Union of India
Re.: Airports Authority of India Ltd.
AIR 1999 Supreme Court 2367
Interlocutory Application No. 642 of 1999 (in Interlocutory Application No. 22 in Writ Petition (Civil) No. 4677 of 1985), D/-22-7-1999
S. Saghir Ahmad and M. Jagannadha Rao, JJ.

Environment Protection Act (29 of 1996), S. 3. - Hot mix plants - Ordered to be closed being hazardous industry - Application by Airports Authority of India to set up hot mix plants near Indira Gandhi International Airport - Necessity to set up hot mix plant arising because of need to resurface runways - It is a work of national importance - Conditional permission to set up hot mix plants in safe vicinity of airport granted to Airports Authority of India.

(Paras 11, 12)

M.C. Mehta v. Union of India
AIR 1999 Supreme Court 3192
Interlocutory Application No. 61 in Writ Petition (Civil) No. 13381 of 1984, D/-31-8-1999
S. Saghir Ahmad and M. Jagannadha RAO, JJ.

(A) Constitution of India, Art. 21 – Environmental pollution – In and around Taj Trapezium – Direction given in 1997 AIR SCW 552 : AIR 1997 SC 734 : 1997 Lab IC 667 : 1997 All LJ 254 to coal based industries to apply for natural gas connection or stop functioning with aid of coal from 30-4-97 – Industries (Iron foundries) who had not applied for gas connection – Ordered to be closed down.

(Paras 15, 18)

(B) Constitution of India, Art. 21 – Pollution in Taj Trapezium by coal based industries – Prevention – Direction given in 1997 AIR SCW 552 : AIR 1997 SC 734: 1997 Lab IC 667 : 1997 All LJ 254 to stop supply of coal/coke to industries as soon as natural gas becomes available – Non-cupola based iron foundries who had entered into agreement for supply of natural gas but have not switched on to gas though available – Direction to stop supply of coal/coak issued if they do not accept gas by 15 – 9 - 1999.

(Paras 15, 18)

(C) Constitution of India, Art. 21 – Pollution in Taj Trapezium – Prevention – Direction issued in 1997 AIR SCW 552 : AIR 1997 SC 734 : 1997 Lab IC 667 : 1997

All LJ 254 that supply of coal/coke to coal based industries be stopped as soon as natural gas becomes available – Cupola based iron foundries unable to convert from coal to gas despite bona fide efforts – Conversion of all cupola based iron foundries likely to take 2 more years – Considering high level of pollution in Taj Trapezium and required urgent action, coal supply directed to be stopped to these iron foundries.

(Paras 16, 17, 18)

Cases Referred: **Chronological Paras**

M.C. Mehta v. Union of India, 1997 AIR SCE 552: (1997) 2 SCC 353: AIR 1997 SC 734: 1997 Lab IC 667: 1997 All LJ 254 5, 9

M. JAGANNADHA RAO, J.: This application has been filed by the Gas Authority of India Limited (for short 'GAIL') for the following reliefs:

> "(a) extend the schedule for supply of gas to industries in Zone –I of Agra City, laid down vide the order dated 3-4-98 passed by this Hon'ble Court in such a manner that in respect of cupola based industries supply of gas by GAIL coincides with the readiness of the consumer industries to draw gas;
>
> (b) direct non-cupola based industries in Zone I of Agra to draw gas latest by September , 1999;
>
> (c) direct the Secretary, PWD, Government of Uttar Pradesh and Secretary/Director General, Government of India, Ministry of Surface Transport to grant the permission for underpinning the gas pipeline to the Yamuna Road Bridge within four weeks so that GAIL may be able to the schedule for supply of gas to Zone-II and III laid down by this Hon'ble Court vide its order dated 03-04-98."

2. The first relief concerns Zone-I and the second relief concerns Zone – II and III in the city of Agra. We shall first deal with Zone- I and thereafter with Zone II and III.

Zone I.

3. On 3-4-1998, this Court directed the GAIL that it should start supply of Natural Gas to the Industries in Zone-I from July, 1998 so as to make available gas to the specified industries by December, 1998. It is now stated by GAIL that till December, 1998, 115 consumers out of 168 (referred to the order of this Court dated 30-12-96) alone had contacted GAIL for supply of natural gas. Other industries in Zone – I did not contact GAIL. It was stated that GAIL had made gas available in April, 1998 to its first consumer in May, 1998 and that by September, 1998, GAIL had completed gas pipeline network to supply gas to all the 115 consumers with whom it had entered into a contract in Zone – I. The complaint is that 79 out of these 115 consumers are not coming forward in Zone – I and are cupola based iron foundries. The rest are non cupola. All these 115 had given an undertaking earlier to receive natural gas from GAIL. These 79 industries have been awaiting the technology to be developed by the National Metallurgical Laboratory (hereinafter called the 'NML') for conversion to natural gas. GAIL feels that there is

likelihood of delay in the drawl of gas by the 79 cupola based iron foundries in Zone –I by the target dated 31 -12 -1998. Only 4 cupola based – customers are likely to draw Gas by December, 1998.

4. On 12-4-1999, this Court issued notice to 79 industries in Zone-I requiring them to show cause why they were not availing of the gas facility to be supplied by GAIL. They were also asked to state why they did not want to draw the gas and why their industries should not be allowed to be closed down.

5. On 5-4-1999, an affidavit of the Agra Iron Founding Association has been filed stating that 78 (and not 79) were cupola based (item 74 Diwan Chand Suraj Prakash Jain is not cupola based). The affidavit is field on behalf of 78 cupola based industries. They admit that on 30-12-1996, in M.C. Mehta v. Union of India, (1997) 2 SCC 353 : (1997 AIR SCW 552: AIR 1997 SC 734: 1997 Lab IC 667 : 1997 All LJ 254), orders have been passed recording the undertaking on behalf of these industries for receiving gas as industrial fuel. They then refer to the chronology of the steps taken by them bona fide for conversion by approaching NML and Tata-Korf and their spending huge sums of money in that connection. They state that the problem is that foolproof technology for these 78 industries to use natural gas is not yet ready, though now it is in the last stage of completion, through the efforts of NML of Tata-Korf who have been working on a project. As soon as the technology is available, the 78 industries will switch-over to natural gas. They rely on the extension granted to GAIL earlier up to December, 1998 as the cause for delay in switching over. NML has conducted 10 trials on its new technology but these test have not been initially successful. The 78 industries have entered into agreement with GAIL agreeing to switch over to natural gas and have paid Rs. 2 lakhs as security and given Rs. 6 lakhs guarantee/indemnity. They have paid Rs. 14 lakhs to Tata-Korf in January, 1998. On 6-2-1998 NML and Tata Korf visited Agra and on 10-2-78, the Association placed orders with Tata-Korf for supply of the technology. On 19-3-1998, the Association has entered into agreement with Tata-Korf under which Rs. 20 lakhs have been paid as advance out of Rs. 40 lakhs. Know how has been agreed to be provide by 31-7-1999 but the trail runs have failed. A chart is filed in this behalf. In all, 32 lakhs have been paid to Tata-Korf. On 22-4-1999, there has been a meeting with Tata-Korf. All these steps have been taken during 1997, 1998 up to 22-4-1999.

6. On 26-4-1999, Tata Korf has written to the Association that the commissioning of the cupola and stabilizing the same will take place in 1st part of July, 1999 and they expect "to receive the order" from the Association in July, 1999 after the cupola is successfully worked to the satisfaction of the Association. The schedule of supply of cupola is :

(a) 10 cupolas in 4 months

(b) in each month 5-6 cupolas can be completed.

After installation, those cupolas require fine tuning.

7. On 3-8-1999, Tata-Korf has written to the Association that they had installed the new instrumentation successfully on 15-6-1999. Some more heats have to be developed. The

demonstration unit will be established fully by end of September, 1999. Same schedule of supply as stated earlier is given.

8. We have heard learned senior counsel Sri V.R. Reddy for GAIL and Sri Sanjay Parikh for the Association. We have also heard Sri Krishan Mahajan and Sri Vijay Panjwani.

9. Learned counsel Sri Krishan Mahajan has suggested that these 78 industries have been dodging and procrastinating in shifting to natural gas and that as per the orders of this Court dated 30-12-1996 in M.C. Mehta v. Union of India (1997) 2 SCC 353: (1997 AIR SCW 552 : AIR 1997 SC 734: 1997 Lab IC 667 : 1997 All LJ 254), direction No. 5 requires that once the GAIL is ready, the industries, if they did not convert to natural gas, they have to close down. Now GAIL has been ready for supply of natural gas in September, 1999 and at any rate by December, 1999 in respect of all the 115 industries who have agreed to convert to gas. Inasmuch as these 78 industries have not become ready to convert, they are liable to be closed down forthwith.

10. On the other hand, learned counsel for the Association Sri Sanjay Parikh has contended that in view of the above steps taken by the industries during 1997, 1998 and 1999 as narrated earlier, the stage is now set for switch over and that it will create great hardship if the industries are to be directed to be closed down now.

11. Summarising the position, it is as follows. The correspondence between the Association and NML and Tata-Korf, it shows that by end of September, 1999, the demonstration unit will be established. Therefore, cupola will be supplied 10 in 4 months and then in each month, 5 or 6 cupolas will be supplied.

12. Now, going by the date September, 1999, it looks as if 10 cupola units will be supplied by January, 2000 (i.e. in 4 months) and by the time all these 78 cupola industries change over to gas, (as per the time schedule given by Tata-Korf) it will be another 17 months ---- which will take us to July, 2001. This will be the time span on the assumption that conversion to natural gas will be started by these 78 industries after September, 1999.

13. Now is the orders of this Court dated 30-12-1996, the directions (4) and (5) read as follows: (at p. 304):

> "(4) Those industries which neither apply for gas connection nor for alternative industrial plot shall stop functioning with the aid of coke/coal in the TTZ w.e.f. April 30, 1997, supply of coke/coal to these industries shall be stopped forthwith. The District Magistrate and the Superintendent of Police shall have this order complied with.
>
> (5) The GAIL shall commence supply of gas to the industries by June 30, 1997. As soon as the gas supply to an industry commences, the supply of coke/coal to the said industry shall be stopped with immediate effect."

14. In the above background, the question is whether these 78 cupola industries are to be allowed to function on coal/coke without receiving natural gas. So far as the remaining non-cupola industries which are 37(out of 115) who have contracted to draw, there is no reason why they have not accepted the supply of natural gas. Out of these, we are told

only 8 industries were drawing natural gas. The rest 29 have been obviously taking it easy.

15. We can divide the discussion into the various categories as follows:

(i) The overall total was 168 and only 115 have entered into agreement with GAIL. Therefore, so far as the remaining (168-115) = 53 iron foundries are concerned, there is no justification for them to function – unless they have shifted out – and under clause 4 of the order dated 30-12-1996 of this Court, the said 53 iron foundries are already liable to be closed. If they have not shifted, these 53 industries must stop forthwith as they have acted in breach of direction No.4.

(ii) So far as the 29 non-cupola industries out of 115 (excluding 8 which have switched over to gas), there can be no difficulty in applying clause 5 of the order of this Court. If by 5-9-1999, these 29 industries do not accept gas, clause (5) of the order dated 30-12-1996 shall apply forthwith to them.

(iii) So far as the 78 cupola based industries are concerned, the question is what order is to be passed? We have shown that even if the conversion starts from October, 1999, the time frame for all the 78 industries will be easily 21 months which will take us to July, 2001. This Court has given enough time to these industries right from 31-12-1996. We do not mean to say that they have not taken some steps for conversion but if the Tata-Korf time-schedule can give the conversion technology to all the 78 of them at the earliest only by July, 2001, the question is whether these 78 coke/coal based industries which are continuously using coke/coal can be allowed to pollute the air in and around the Taj Trapezium and also whether they are to be allowed such a long period upto July, 2001. We cannot lose sight of the fact that GAIL has completed is obligation to be ready, even by September, 1998.

16. No doubt, even now, as stated by counsel, these 78 industries are prepared to stand by the undertaking given by them to this Court to receive natural gas. In our view, having regard to the fact that the conversion of all these 78 cupola based industries is likely to be not completed till July, 2001 – it will be a matter of grave concern if the atmospheric pollution (as noted in the NEERI and Dr. Varadarajan reports and our earlier orders) is allowed to continue. Question is not strictly whether the 78 industries have or have not acted bona fide in making some efforts for conversion to natural gas but assuming they have taken some steps, the question is whether the danger to the environment does not require urgent action. The data already collected shows high levels of pollution in Agra in this area affecting the environment in the TTZ area.

17. In the circumstances, we are of the view that there is no other way to deal with the situation that to apply clause (5) of the order of this Court dated 30-12-1996 set out above, strictly to these 78 cupola based industries. We are conscious that any order to stop supply of coke/coal to the 78 coke/coal based iron foundries will result in the closing down of these 78 industries for some time, before they are able to switch on to natural gas. Obviously, the closure will have not be permanent one but of a temporary nature.

There will be no difficulty in permitting them to re-open as soon as they have the cupola conversion technology installed in their respective industries. We are, therefore, compelled to put clause (5) of the order of this Court into full effect in respect of these 78 industries w.e.f. 15-9-1999.

18. In the result, we direct as follows:-

(1) Out of 168, 53 iron foundries which have not agreed to accept gas have to be closed forthwith, if not already closed as per orders of this Court dated 30-12-1996 unless they have shifted. The District Magistrate and Superintendent of Police, Agra shall take action accordingly.

(2) (i) Out of 115 which have opted and entered into agreements with GAIL, 37 are non-cupola based and among the 8 have converted to natural gas while in respect of the remaining 29 non-cupola industries. Clause (5) of the order of this Court dated 30-12-1996 shall come into operation w.e.f. 15-9-1999, for they have no excuse for not accepting the natural gas from GAIL. The District Magistrate and Superintendent of Police, Agra will take steps to close down these industries by 15-9-1999.

(ii) However, as and when these 29 non-cupola industries take steps to receive gas, they shall be allowed to function.

(3)(i). In respect of the remaining 78, which are cupola based, in view of the reasons given above, clause (5) of the order dated 30-12-96 of this Court will come into operation w.e.f. 15-9-1999. That will mean that in respect of these 78 iron founding industries, the District Magistrate, Agra and the Superintendent of Police, Agra will have to see to it that no coal/coke is supplied to them after 15-9-1999.

(ii) Out of the 78 cupola based iron foundries, as and when any of them gets converted to natural gas and takes steps to receive gas from GAIL, they will be allowed to function.

19. We dispose of the IA in respect of Zone-I accordingly. Copy to be communicated to District Magistrate and Superintendent of Police, Agra.

20. GAIL and Sri Krishan Mahajan are requested to furnish a list of the respective industries to the above officials in a week.

ZONE II AND ZONE III

21. So far as Zone II and Zone III are concerned, a number of affidavits have been filed by the GAIL and one by the Government of India. As the matter is to be adjourned, we do not propose to give a detailed order. Sir V.R. Reddy, learned senior counsel for GAIL has placed before us the correspondence and contended that, by its affidavit, the Union of India appears to have in principle, accepted that a pipeline can be allowed to be laid along the Old Yamuna Bridge but that the Union of India want to put GAIL on notice that, inasmuch as the old Bridge may require to be dismantled by Government, ---- GAIL must

be prepared to go ahead with laying down the pipeline with that possibility of the Old Bridge being dismantled. Sri Reddy however points out that there are reports of some technical experts that the Old Bridge need not be dismantled in the near future. He contends that, unfortunately, the Government of India has not so far applied its mind to these reports and therefore it has to take a final decision in the matter of dismantling of the Old Yamuna Bridge, after considering these report, Learned senior counsel contends that appropriate directions be given to the Union of India in this behalf.

22. In view of the above contention, we direct the Union of India to examine the experts reports given in connection with the dismantling of the Old Bridge and take a final decision in regard to the same and give its response to this Court by way of affidavit so that GAIL can take a decision as to the laying of its pipeline for supply of natural gas to Zones II and III. Response of Union of India to be filed within four weeks.

23. Thus, we dispose of this I. A. so far as Zone I is concerned. The I.A. now remains pending in respect of Zones II and III. List I.A. after four weeks.

Order Accordingly.

Pushpaleela v. State of Karnataka
AIR 1999 Karnataka 119
Writ Petition No. 4265 of 1988, D/-17-4-1998
R.P. Sethi, C.J. and V. Gopala Gowda, J.

Constitution of India, Art. 226-Public interest litigation-Eye-camp-Persons operated therein losing eye-sight partially and /or fully-Organisers of eye-camp not following guidelines laid down by Govt. for organising such camp-Procedure adopted for sterilization and non-precautionary measures taken resulting in said tragedy-Carelessness and negligence thus found to be evident-Victims and sufferers awarded lump sum compensation in addition to compensation already paid-Petitioner awarded costs for money spent and pains taken.

(Paras 5 to 9)

Torts - Damages.

ORDER:- In this petition filed by way of Public Interest Litigation on behalf of the victims who have lost the eye-sights consequent upon the operations conducted in the Free Eye Camp at Chintamani during the year 1988, the petitioner has prayed for a direction to the respondents to pay adequate compensation and all other medical facilities to the victims and to suitably rehabilitate them under any of the welfare schemes.

2. The brief facts of the case are that on 28th and 29th January 1988 a Free Eye Camp was organized at Chintamani in Kolar District under the joint auspices of Lions Clubs of Chintamani and Bangalore and Common Wealth Society for the Blind, New Delhi. 151 persons were operated for cataract problem at Vasavi Kalyana Mandira and their list has

been produced as Annexure-A in the connected W.P. No. 4351/88 which was dismissed for non-prosecution on 26-5-1997. Among them, 72 persons had lost one eye-sight, 4 victims had lost both the eyes on account of infection developed after the surgery with severe pains. The affected victims were shifted to Minto Regional Institute of Ophthalmology, Bangalore and S.N.R. Hospital, Kolar to provide medical assistance. On 3-3-1988 the Government constituted a one-man Commission of Enquiry headed by Padmabhushana Dr. P. Shiva Reddy to enquire into the circumstances leading to the tragedy and to suggest remedial measures and to submit a report. Such a report was submitted on 2-11-1989, copy of which has been produced at page 26 along with the Synopsis filed by the Government Advocate. We shall later refer to the report. In the meantime, by an order dated 23-6-1988 this Court directed payment of Rs. 5,000.00 as interim compensation to the four persons who have become totally blind, in addition to the sum of Rs. 1000.00 already paid. Vide Government Order dated 1-8-1988 such a payment had been made. Thereafter, on 6-9-1988 this Court had directed payment of Rs. 250.00 per month to each of the 66 victims. By Government order dated 7-8-1990 the said amount has been paid and such payment in being made as of today. At present there are only 45 victims alive and the remaining 27 victims have died during the pendency of the writ petition. The list of the remaining victims is produced.

3. On behalf of the respondents common statement of objections have been filed for both the writ petitions. Whatever facts stated above have not been disputed by the respondents. The conduct of operation, the number of persons affected and all other facts have been admitted. On the other hand, what the respondents have contended is that they have provided the best treatment possible till the victims were completely cured. Respondents sought to justify the action they have taken after the tragedy had occurred. At the end it is stated that the State Government has sympathy for the victims and will do their best to rehabilitate the victims. This is the sum and substance of the objections filed on behalf of the respondents.

3.1. In the light of the aforementioned facts, it has to be tested as to whether there was negligence on the part of the doctors who had performed the operations and what is the amount of compensation payable to the victims.

4. It is to be noted that the Government by its order dated 6 – 10 – 1990 has ordered a detailed joint enquiry against the surgeons who had performed the operations to the ill-fated victims. It is no known as to what happened to that enquiry. However, the fact remains that a considerable number of persons have been affected after the operations. Much investigation is not necessary to ascertain as to whether the damage had been caused on account of negligence and carelessness in conducting the eye camp in the light or the report submitted by Padmabhushan Dr. P. Shiva Reddy. The conclusions/opinion arrived at in the said report are self-explanatory and they are reproduced hereunder in order to arrive at a conclusion. The conclusions/opinion are as under :

"After going through the above points and in view of my personal examination of the camp site and personal examination of the persons involved, I feel that the following circumstances could have led to the tragic incident that has caused loss of sight to some of the patients got operated at Chintamani Eye Camp:--

(1) The site/building selected for conducting operations was not suitable since the room in which operations were performed has got no doors and shuttered windows. In addition, the lavatories were also very close to the theatre and were not closed during surgery. Hence, there was every possibility of getting the cases infected.

(2) The procedure adopted for sterilization was most unsatisfactory as discussed earlier and could have been a cause for infection.

(3) The paramedical staff, who have worked in the cam were not experienced in handling the sterilization and assisting the surgeons in theatre. As per the statements of the individuals, the surgery was not assisted by the individuals methodically. No particular job was entrusted to each individual and the entire camp lacks expert supervision and guidance, which could have given way for human error.

(4) Though the result of the bacteriological examination of saline used for washing sharp instruments and irrigation of Anterior chamber during surgery shows presence of no pathological organisms, it could have been a source of infection since it was exposed continuously.

(5) I find that the Surgeons of the Mobile Ophthalmic Unit. Dr. H.N. Thimma Setty and the Staff Nurse. Smt. Nancy D'souza are to be held responsible for the tragedy that has take place, as I feel that it is their responsibility to look after the pre-operative, operative and post-operative care of the patients. I fine that the greatest lapse is the procedure adopted for sterilization of the instruments, equipment and the appliances etc., in the operation theatre".

In order to arrive at the above conclusions, it was observe that :-

"A single nurse preparing theatre, sterilizing the instruments, doing 150 syringing and assisting the Surgeon during operations with limited sets and writing operation notes was unbelievable.

Lady Health Visitors, who have got no theatre experience, assisting the surgeons in theatre was unimaginable.

Handling of sterilization of instruments was done by the deputed staff on whom the surgeon has got no confidence. In addition, no particular individual had supervised the sterilization. The same staff was also made to carry the trays of instruments, used and unused, and to assist the Surgeons during operations.

Linen was sterilized is a single drum autoclaved and later transferred to a big dressing drum that was previously sterilized by flaming with surgical spirit. Repeatedly the drum was opened to remove the contents of the small autoclaved drum. Thus making it unsterile.

Immersion of sharp instruments in Ethicon fluid one day before operations and transferring to cidex next day was not sufficient.

Only six sets of instruments were used, which are not sufficient for four tables.

The procedure adopted in washing and the used instruments is also not satisfactory. The non-pressure water sterilizer was placed in the operation room itself, making the place hot and uncomfortable for operating surgeon as well as the other staff.

The saline which was used for irrigation of A/c during the surgery was made at Victoria Hospital, Bangalore and further exposed continuously could have been a source of infection."

5. The Government of India has fixed guidelines for organizing Eye Camps. The report says that the said guidelines have not been followed properly. It is also held that the procedure adopted for sterilization was not up to the mark. Thus, it becomes clear that as a result of non-precautionary measures taken and on account of not following the guidelines prescribed by the Government of India, the tragedy had occurred. The carelessness and negligence are evident from this. While performing operations on important vital organs like eyes, special care and attention should have been taken. That has not been done in the instant case. Consequently, the poor, illiterate and aged villagers have become the victims and sufferers.

6. Now, coming to the quantum of compensation payable to the victims, it is no doubt true that shall amount has already been paid towards compensation and a sum of Rs. 250.00 is being paid every month to the victims. What has been paid and is paying will not be sufficient for the poor victims who have lost their vision for no fault of theirs. For such persons, justice must not only be done but must be seen to be done. We bear in mind that the poor victims have lost their vision and had suffered a lot on account of severe pains. They have been deprived of their normal functioning on the one hand and were made a burden to the family. Some of them are no more now. But the sufferings they under gone cannot be forgotten. At the same time, we also take note of the steps taken by the State and other organizations in the matter of providing post operation treatments, the rehabilitative measures undertaken and the compensation amount paid and is being paid every month. Taking into consideration the overall circumstances of the case and the situation in which the ill-fated victims were placed, we are of the opinion that ends of justice would be met if lump sum compensation is awarded to the victims in the following manner:-

(a) Amount payable to the legal representatives of the victims who have lost vision of one or both eyes and who have died:-

(i)	Within two years of the incident	Rs. 40,000-00
(ii)	After two years upto now	Rs. 50,000-00

(b) For those who have lost sight of one Eye end alive now — Rs. 75,000-00

(c) For those who have lost vision of both eyes. — Rs.1,50,000-00

7. Accordingly, the writ petition is allowed and the we direct the respondents for payment of compensation as above within two months from today. Until the payment of the compensation awarded as above, the payment of interim compensation that is being paid now shall continue.

8. We make it clear that the compensation ordered above is excluding whatever compensation already paid having regard to the peculiar facts and circumstances of the case treating this as a special case. The quantum of compensation awarded herein shall not be a precedent or guiding factor for any other case. The compensation awarded is restricted to this case only.

9. Before parting with the case, we feel it necessary to observe that even though the connected W.P. No. 4351/88 was also filed in public interest, namely in the interest of the present victims, the petitioners in that writ petition have not prosecuted the same and allowed the same to dismiss for non-prosecution. However, the petitioner has in the present petition has prosecuted it properly and was successful in securing justice to the ill-fated victims. While appreciating her social work, we feel that it is necessary to award costs to her for the interest she has shown in the public cause, the pains she has taken as also the money and time spent for the prosecution of this case. Accordingly, we direct payment of costs of Rs. 5,000.00 by the first respondent to the petitioner within four weeks from today.

Petition allowed.

Sahil Society for Welfare of the Aged, Poor and Homeless v. Union of India
AIR 1999 Allahabad 87
Civil Misc. Writ Petition No. 30086 of 1998, D/- 16-11-98
M. Katju and D. K. Seth, JJ.

Constitution of India, Arts. 226, 21 - Public Interest Litigation - Right to health - Manufacture and procurement of oral polio vaccine - Govt. directed to follow its own guidelines as well as World Health Organization guidelines and adhere to internationally accepted standards and norms of polio eradication.

(Para 5)

Subhashini K. Reddy v. Bangalore Metropolitan Transport Corporation
AIR 1999 Karnataka 58
Writ Petition No. 36674 of 1997, D/-7-9-1998
Ashok Bhan and S.R. Vankatesha Murthy, JJ.

Constitution of India, Art. 226 – Public interest litigation – Direction sought by public spirited Advocate to City Transport Corporation in respect of infractions of rules in certain matters such as non-reservation of seats for ladies and children etc. leading to lot of inconvenience to women and children – High Court after considering matter gave suitable directions to transport service.

T.N. Godavarman Thirumulpad v. Union of India
Interlocutory Application 397 in Writ Petition (Civil) No. 202/95 for directions on behalf of State of Assam, decided on 20-01-1999
B.N. Kirpal and V.N. Khare, JJ.

Nagaland - Location of industrial units - Affidavit in reply filed by Chief Secretary - No explanation given - Additional better affidavit to be filed in Court.

ORDER

IA 397

While issuing notice on the application filed by the State Assam and the Government of Nagaland on 10-12-1998, we had on being prima facie satisfied that earlier order of this Court had been respected in their breach also directed the issuance of a notice to show cause to the Chief Secretary, Government of Nagaland as to why action be not initiated for issuing Notification in breach of the directions issued to this Court. The Chief Secretary to the Government of Nagaland, Shri A.M. Gukhale has filed an affidavit, in response to the notice dated 10-12-1998. We have perused that affidavit but are not satisfied with the contents thereof. Many areas have been left totally grey and the information which this Court sought for has not been correctly furnished. It is not denied that the foothills of Nagaland along the Nagaland Assam Border have been declared as Industrial Zone for wood based industry. There is no explanation in the affidavit with regard to the creation of Industrial Estates of a compact nature.

Mr. Dipankar Gupta, learned Senior Counsel appearing for the State of Nagaland submits that an additional better affidavit, giving better and fuller details shall be filed in this Court. It is submitted that since discussions are going on between the Ministry of Environment and Forests and the State Government, the outcome of those discussions shall also be placed on record through an affidavit. We grant the prayer of Mr. Gupta and allow him four weeks' time to file a better and complete affidavit of the Chief Secretary to the Government of Nagaland, giving a correct and earlier directions issued by this Court have been complied with or/are being complied with an advance copy of the affidavit shall be furnished to learned *Amicus Curiae* as well as to the learned counsel for the State of Assam who shall have two weeks from the date of service of the advance copy of the affidavit to seek instructions/response of the State of Assam.

This application shall be put up for further consideration after six weeks on a date to be fixed in consultation with the learned Amicus.

T.N. Godavarman Thirumulpad v. Union of India
Writ Petition (Civil) No. 202/95, decided on 20-01-1999
B.N. Kirpal and V.N. Khare, JJ.

Uttar Pradesh - Illegal Mining - Mirzapur District - Contempt Proceedings against mining officer - Behaviour of mining officer most objectionable and wholly inappropriate - Wilful disobedience through issuing of transit form - Held - Guilty of Contempt of Court - Imprisonment till the rising of the Court and fine of Rs. 2000 - Petition disposed off.

ORDER

Concerned by large scale illicit mining and reckless denuding of forests in certain villages of District Mirzapur, this Court issued orders from time to time placing a complete ban on the illicit mining activities. On being informed by the learned Amicus that illicit mining was witnessed by one of the learned Advocates of this Court - Shri A.M. Khanwilkar this Court proceeded to examine the matter in some details. On 7th of January, 1998, Shri Anand, Secretary, Ministry of Environment was personally present in Court. He also brought to the notice of the Court continuance of illegal mining activity, in spite of various orders made by this Court to prevent such illegal activity. The Court, accordingly appointed a Committee consisting of Shri A. M. Khanwilkar and Shri Gopal Singh, Advocates of this Court along with an Officer of the Ministry of Environment, to be nominated by the secretary to the Ministry. The Committee was requested to visit the named villages in Mirzapur District as well as in Doon Valley and submit a report. The District Magistrate and the Superintendent of police were directed to render all assistance needed by the Committee for the performance of its task. The Committee visited the concerned villages and submitted its Report dated 12th January, 1998. On 13th January, 1998, this Court considered the Report of the Committee and found that the Report disclosed an alarming situation of lawlessness, requiring urgent drastic action so as to stop illegal mining activities in the area in question. The Court, taking serious note of statements made in paragraphs 9 and 10 of the Report which reads thus:

> "9. Copies of the correspondence given by the Forest Officials shows that the local administration has been appraised of the problem from time to time, but to no avail. Specific grievance was made by them against the Mining Officer. According to them, he has been issuing permits/licences/transit passes for quarrying in Forest Area, despite the ban placed by this Hon'ble Court. Perusal of the files showed that the Mining Officer was, time and again, informed about the order of the Hon'ble Court.
>
> 10. *The Mining Officer was not only uncooperative but was down right insulting. No information/explanation was forthcoming from him except to state that he had done no wrong. On a specific query, in the residential officer of the District Magistrate and in her presence, he even challenged the authority of the committee to ask him questions and then went on to add that "the committee was free to report what it wanted" and further that "what is the maximum that can happen-hanging? Fine then hang me". All the high*

officials present there were mute spectators to this offensive out-burst. None chose to restrain him leave alone reprimand him." Directed issuance of notice to Shri V. L. Das, Mining Officer of the area to show cause why proceedings to punish him for contempt of Court should not be initiated against him.

On 3rd of February 1998, Shri V. L. Das filed an affidavit in response to the show cause notice. In paragraph 3 of the affidavit, he deposed, " the deponent being a senior responsible officer cannot think of committing contempt of this Hon'ble Court or any other Court or any Commission or Committee appointed by this Hon'ble Court....." Thereafter, the deponent has stated, "The deponent sincerely regrets and apologised for his attitude and conduct towards Hon'ble Members of the Committee and he assures this Hon'ble Court that he will not conduct himself in future in such a manner and prays for being forgiven."

In so far as the response to paragraph 9 of the Report is concerned, the deponent has stated that he had not issued any mining lease/permit during his tenure at Mirzapur in the villages Banjari-Kalan, Atari and Panwari. In Paragraph 5 of the affidavit Shri Das again tendered his unconditional apology to this Court and to the Hon'ble Members of the Committee and reiterated that no such act will be repeated in future.

Shri Das filed an additional affidavit dated 24th of February 1998 on 5th of March, 1998. Through the additional affidavit, Shri Das gave reply to various paragraphs of the Report of the Committee. In paragraph 10 of the additional affidavit, it was reiterated that none of the permits/leases had been granted by him. It was, however, admitted that the forms for transit passes were supplied by him. In paragraph 12, the deponent again stated as follows:

"The deponent most humbly reiterates his unconditional apology for his conduct towards the Hon'ble Members of the Committee and to this Hon'ble Court prays he be forgiven and contempt notice be discharged".

Shri Shakil Ahmed Syed, learned counsel appearing for Shri V. L. Das, who is also present in Court, has once again tendered an apology to the Court for the objectionable conduct of Shri V.L. Das towards the members of the Committee appointed by this Court.

We have heard Shri Shakil Ahmed Syed, learned counsel on behalf of Shri V.L. Das and Shri H.N. Salve, learned Senior Counsel, who had been requested by the Court to assist the Court in these contempt proceedings.

There is no doubt that the conduct of Shri V.L. Das and his behaviour towards the members of the Committee was most objectionable and wholly inappropriate. The expressions used by him before the members of the Committee unmistakably expose his objectionable attitude towards the order of this Court and his attempt to interfere with and obstruct the administration of Justice as well as scandalize the authority of the Court. His conduct has been most

reprehensible. It was a deliberate attempt on his part to insult the members the Committee.

It is not denied by Shri V.L.Das that various orders made by this Court, including the order completely banning illicit mining activity in the area, had been brought to his notice, yet, despite this knowledge, he wilfully disobeyed those orders by issuing transit forms. His action in issuing the transit forms was in direct breach and violation of the orders issued by this Court and constitutes, by itself, contempt of this Court. Apart from the fact that the ban order had been issued pertaining to the area in question where Shri Das was a Mining Officer and he was made aware of the order and was obliged to ensure its implementation. *Even Article 144 of the Constitution of India which enjoins upon all authorities, civil and judicial, in the territory of India to act in aid of the Supreme Court was flouted.* The action of Shri Das established beyond any manner of doubt that he has committed gross contempt of this Court by acting in breach of the orders issued by this Court and by his objectionable and disrespectful behaviour towards the members of the Committee appointed by this Court.

Shri Shakil Ahmed Syed, learned Counsel for Shri V. L. Das submits that Shri Das is now truly repentant of his actions and has tendered an unqualified apology and placed himself at the mercy of the Court. He submits that lenient view may be taken and assures that Shri V. L. Das shall not, hereafter, repeat such an action.

After giving the matter our careful consideration and taking into account all factors of the case, we are of the opinion that the apology tendered by Shri V. L. Das *is not a* bona fide *expression of his repentance and is meant only to escape punishment. However, keeping in view the fact that Shri V.L. Das had been placed under suspension for his mis-behaviour with the member of the Committee constituted to this Court by the Government of Uttar Pradesh, vide order no. 217/18-11-98 I.A. dated 13th January, 1998, and that order of suspension is continuing till date. It appears appropriate to us to take a somewhat lenient view in the matter of imposition of sentence.*

We accordingly, convict Shri V. L. Das for committing contempt of this Court and sentence him to undergo imprisonment till the rising of the Court and to pay a fine of Rs. 2,000. In default of payment of fine, Shri Das shall suffer simple imprisonment for a period of 15 days. The fine shall be paid within one week.

Before parting with this order, we wish to place on record our sincere appreciation for the assistance rendered by Shri H. N. Salve, learned Senior Counsel appearing as a friend of the Court as also by the members of the committee - Shri A.M. Khanwilkar, Shri Gopal Singh, learned Advocates of this Court and Shri Jitender Kumar, Deputy Conservator of Forest (Central), Ministry of Environment and Forests, Government of India.

The Contempt Petition stands disposed of in above terms.

T.N. Godavarman Thirumulpad v. Union of India
Interlocutory Application 397 in Writ Petition (Civil) No. 202/95
Contempt Petition (Civil) 336/1998
Decided on 12-04-1999
M. Jaganndha Rao, C.J., and Santosh Hegde, J.

ORDER

List on 16th April, 1999.

T.N. Godavarman Thirumulpad v. Union of India
Interlocutory Application No. 258 in Writ Petition (Civil) 202/95
Contempt Petition No.336 in Interlocutory Application 397 in Writ Petition (Civil) No. 202/95
Interlocutory Application 259 in Writ Petition (Civil) 202/95
Decided on 16-04-1999
B.N. Kirpal and V.N. Khare, JJ.

Karnataka - Encroachment in Thatkola Reserve Forest - News item stating that demarcation of Thatkola Reserve Forest has been stopped by Minister - Notice issued.

Nagaland - Industrial Estates - Affidavit submitted - Draft notification has been issued and examined by Ministry of Environment and Forest and found be in order - Application disposed off - Contempt petition dismissed.

ORDER

IA 276

On 29th July, 1998, we had appointed Mr. R.N. Sahai, Conservator of Forests, as the Commissioner of the Court and directed him to immediately go to Thatkola Reserve Forest and submit a report about the present state of affairs.... that forest. Learned counsel for the State of Karnataka had assured the Court that the State would offer all possible assistance to Mr. Sahai to undertake the task assigned by the Court to enable him to file the status report. The report has now been filed by Mr. Sahai and subsequently he has also filed a supplementary affidavit to update the main report. Copy of the same has been furnished to learned Amicus. The matter shall come up for further direction on the next date for considering the report.

Our attention has been drawn to a news item under the caption 'Demarcation of Tatkola Forest land stopped, says minister' which appears in Deccan Herald of 12th January, 1999. A perusal of the news item shows that on going demarcation of the Tatkola forest land which was being carried out by the Forest and the Survey of India Department has been stopped under orders of a Minister of the State of Karnataka. Issue a notice to the State of Karnataka to file the response. The allegations attached

in the news item, copy of which shall be sent along with the notice to the State. The state may also file their comment to the report of Mr. Sahai in the meanwhile.

A Copy of the news item should also be served along with the notice on the standing counsel for the State of Karnataka.

List the matter on 7th of May, 1999 before a Bench presided over by Hon'ble B.N. Kirpal, J.

IA 397

On 10th December, 1998, this Court had observed that the notification dated 15th June, 1998 issued by the Government of Nagaland, without consulting the Ministry of Environment and Forests, Government of India ran in the teeth of the directions issued by this Court. Subsequently, an affidavit was filed by the Government of Nagaland on 15th January, 1999. From that affidavit it appeared that the Government of Nagaland had not declared industrial estates as contemplated by the orders made by this Court. The matter was adjourned, at the request of learned counsel for the Government of Nagaland.

An affidavit dated 22nd February, 1999 was filed on 23rd February, 1999 along with a draft notification including annexure 'A' stating that industrial estate and minor industrial estates have not been established the Government of Nagaland. The location of those estates has been indicated in the notification. The learned Additional Solicitor General Mr. K.N. Rawal appearing for the Ministry of Environment and Forests, Government of India submits that the declaration of the industrial estates and minor industrial estates as contained in the annexure to the draft Notification has been examined by the Union of India and found to be in order.

With the publication of this draft Notification, the matter is now given a quietus.

Let the Notification be published. The Government of Nagaland shall act strictly in accordance with the Notification. A follow up report shall be filed by the state after three months front the date of the publication of the Notification. In so far as the status of the shifting of wood based industries in the industrial estates/minor industrial estates.

The application is disposed of.

IA 258

Issued notice

IA 259

Notice shall issue confined to prayer 'b' which reads thus;

> "(b) direct the District Magistrate to refund the amount deposited by the applicant herein with interest at the rate of 24% per annum from the date of payment till its realisation."

Contempt Petition No. 336 of 1998

Vide our order of even date, we have permitted the Government of Nagaland to publish the draft Notification creating industrial/ minor industrial estates in obedience to our orders. In view of the order made by us in I.A. No. 397 no orders are required to be made in this petition. The Contempt Petition is accordingly dismissed and consigned to record without expressing any opinion on the allegations made therein.

T.N. Godavarman Thirumulpad v. Union of India
Interlocutory Application 276 in Writ Petition (Civil) No. 202/95
News item dated 12-01-1999 appeared in Deccan Herald
Interlocutory Application s414, 417, 418, 419, 420 and 450
Decided on 07-05-1999
M.B. Shah, B.N. Kirpal and V.N. Khare, JJ.

Karnataka - Encroachment on Thatkola Reserve Forest - Report of Survey of India on encroachment in forest land to be submitted to this Court within three months - No forest officer associated with the Survey to be transferred.

Railways - Restrained from procuring or using any wooden sleepers in the whole of India.

ORDER

IA 276

An affidavit has been filed on behalf of the State of Karnataka. It is *inter alia* stated therein that the Report of Mr. M.N. Sahai was received by the State only on 29th April, 1999 and, therefore, it has not been possible for the State to file any affidavit in response to the said Report. Eight weeks' time is sought for to file a response. The said time is granted. Response be filed by way of an affidavit within eight weeks.

From the affidavit, it also appears that some survey was being carried out in the Chickamaglur area in respect of which certain orders were passed by the Minister concerned. Without going into the validity of the said orders, *we direct the Survey of India to continue with the surrey operation which it was carrying on in the said area and it may associate in the conduct of the said survey such officers of the Forest Department as may be required. The Report regarding encroachment in the Chickamgalur area of the forest should be submitted by the survey of India to this Court, if possible, within three months. Copy of this order be sent by the Registry to the Survey General of India at Dehradun. During the conduct of the survey and till the submission of the Report, there shall be no administrative interference in the work which will be carried on by the team, of the survey of India. During this time, no Forest Officer especially the one who is associated by the survey of India with the work shall be transferred. Lastly, no regularisation of any forest or other land in this area shall be made till further orders of this Court.*

To come up for further orders in the week commencing 7th September, 1999. Subject to orders of Hon'ble the Chief Justice of India, the main Writ Petition (Civil) No. 202/1995 and all other connected I.As and matters be listed for final disposal on that day.

IA 400 and IA 414

We see no reason to issue any direction at this stage till the Court is satisfied that sufficient plantation wood will be available to the existing saw mills. An affidavit on record should be filed within eight weeks for the purpose of satisfying this court that plantation wood is available in sufficient quantity. List thereafter.

IA 419 and IA 420

Notice to Union of India and State of Madhya Pradesh.

The *Amicus Curiae* may file his response to the applications. The Ministry of Environment should also file a response to the applications and place on record all the material on the basis of which clearance was given by it. Responses by the Ministry of Environment will be filed by 14th July, 1999 and by the *Amicus Curiae* by 31st July, 1999.

List in the first week of August, 1999.

IA 417

Notice to the *Amicus Curiae* as well as to the Union of India.

In the meantime, the applicants, *i.e.* the Railways are restrained from procuring or using any wooden sleepers in the whole of India.

IA 418

Notice to the State of Tamil Nadu returnable in the first week of August, 1999.

In the meantime, no pattas with regard to any forest land shall be granted nor shall any encroachment be regularised.

I.A .....(filed by Mr. Prashant Bhushan in the matter of Santosh Bharti)

Taken on board. IA be registered

Notice to the State of Madhya Pradesh returnable in the first week of August, 1999.

T.N. Godavarman Thirumulpad v.Union of India
Interlocutory Applications 417, 418, 419, 420 & 424 in Writ Petition (Civil) No. 202/95, decided on 08-08-1999
A.S. Anand, B.N. Kirpal and V.N. Khare, JJ.

Madhya Pradesh - Mining - NMDC - Permission to work the mines - Compensatory afforestation - Affidavit to state in detail deforestation, conditions with respect to afforestation, present status of afforestation.

Madhya Pradesh - Transport of cut wood by Bhoomiswamis - Direction - State

directed not to allow any movement of cut trees whether belong to Bhoomiswamis or anybody else.

ORDER

IA 419 and IA 420

These two applications are for the purpose of getting permission to work the mines. These applications which have been filed by National Mineral Development Corporation Ltd. (NMDC), *inter alia*, state that they are existing lessees and they have been operating the mines for over 20 years.

From the papers, we find that afforestation was required to be done by NMDC. It is not clear as to what was the condition which was imposed with regard to afforestation, how much deforestation has actually been taken place and what is the present status of the trees if they have been planted. A further detailed affidavit in this regard is required which should also enquire type of tress which have been planted in by way of afforestation. Both the Ministry of Environment and the NMDC should file this affidavit within three weeks.

The State of Madhya Pradesh should also file an affidavit indicating as to how much money it has received from NMDC for the purpose of afforestation, how that money has been utilized and what is the present status of afforestation, if it has been carried out.

IA 424

We have heard the learned counsel for the parties at some length and with some concern.

We are dealing here with a State which was full of green forests which is now fast dwindling. In the reply to the application, the State of Madhya Pradesh has justified the action of allowing trucks laden with cut wood to be taken away on the plea that wood belonged to bhoomiswamis. How such a plea could be taken in the fact of this Court's order dated 12-12-1996, is beyond comprehension. Furthermore, no details have been given as to who the Bhoomiswamis are to whom the land belonged and what is the extent of the trees which have been taken out.

Our attention has also been drawn to case where crane was apprehended in this forest area along with the two trucks carrying timber. Our attention was also drawn to the order dated 2nd June, 1999 passed by the Anit Shrinivasan, Chief Judicial Magistrate, Damoh. We are surprised that despite this well-considered and correct order, how the counsel for the State before the High Court conceded and did not oppose the handing over of the crane to the owners thereof. If the State finds out that the concession was made by the counsel on instructions by the State, the state will give an explanation to this Court as to why these instructions were given. If the counsel acted without instructions, then no further cases relating to forest should be entrusted to him.

In order to know the correct state of affairs with regard to the allegations made in IA 257/97, we feel that the same should be looked into by an impartial agency. Mr. N.K. Sharma is directed to investigate the facts and give a report to this Court

with regard to the matters contained in IA 257/97. Papers of this IA as well as any other relevant document including reply, affidavits, etc. should be given to Mr. Sharma who should file his report within four weeks. The State of Madhya Pradesh is also at liberty to file any affidavit which it may choose to do so.

In the meanwhile, we direct the State of Madhya Pradesh not to allow any movement of cut trees whether belonging to bhoomiswamis or anybody else. We further direct that Shri Dharmveer Kapil, Shri Srinivas Sharma, Shri Ashok Vyas, Shri Ashok Rai, Dr.A.K.Shrivastava and Shri D.P. Dwidvedi should immediately be relieved of/shifted from their duties/charge in connection with the Forest Department. The State of Madhya Pradesh/Forest Surveyor of India will render all assistance and cooperation to Mr. Sharma so as to enable him to complete his task.

T.N. Godavarman Thirumulpad v. Union of India
Decided on 16-08-1999
B.N. Kirpal and S. Rajendra Babu, JJ.

Madhya Pradesh - Damoh - Assault on Santosh Bharati - Direction - CBI and Addl. Solicitor General to depute responsible officers to go to Damoh - Home Secretary to personally ensure that adequate protection is given to Santosh Bharati - CBI to submit report.

ORDER

Mention has been made by Mr. Harish N. Salve and Mr. Prashant Bhushan stating that pursuant to the order dated 02-08-1999 passed by this Court in IA 424, the officers concerned and especially the office of the D.F.O., Damoh, have taken law into their own hands and are in the process of destroying the files. *It is further stated that in connivance with the State Police, Mr. Santosh Bharati has been beaten up and he is now admitted in the Intensive Care Unit of the District Hospital at Damoh. They state that they have received fax message to this effect which shall be placed on record within two days along with the formal application/affidavit.* As the matter is of some urgency, we direct the C.B.I, through the Addl. Solicitor General to depute a responsible officer today itself to go to Damoh and seal the office of the D.F.O. and see that adequate protection given to Mr. Bharati and such other persons who may have been injured along with him. In this regard, the Home Secretary, State of M.P. is directed to personally see and ensure that the person of Mr. Bharati and others are given adequate protection and no physical harm befalls them. The officer of the C.B.I. who is deputed to go to Damoh should submit a report about the incident mentioned in the fax message should be given to the Addl, Solicitor General today itself. The report of the C.B.I. would indicate whether any State official or any other person was involved in the incident

Matter to come up for further orders on 27th August, 1999.

Mr. Satish K. Agnihotri will immediately communicate this order to the Home Secretary, State of M.P.

T.N. Godavarman Thirumulpad v.Union of India
Interlocutory Application 424 in Writ Petition (Civil) No. 202/95, decided on 20-08-1999
B.N. Kirpal and S. Rajendra Babu, JJ.

Madhya Pradesh - Damoh - Assault on Santosh Bharati - Modification of earlier order - Direction - CBI and Addl. IG Forest to take position of records of office of DFO Damoh - Office to be desealed.

ORDER

Heard counsel for the parties

In modification of our earlier orders we direct that the officer of the C.B.I. and Shri N. K. Sharma, Additional Inspector General (Forest), Ministry of Environment, New Delhi will take into their possession such of the records of the office of the D.F.O., *Damoh which they consider to be relevant, and after taking the said records in their custody the office can be desealed and can be used by the concerned officers of the State.* The needful will he done by the C.B.I. and Mr. N. K. Sharma as soon as possible but certainly not later than seven days from their being communicated with this order.

The Advocate general appearing of the state of Madhya Pradesh States that there is a report which has been made by the Lokayukta in connection with the matters concerning this I.A. The State of Madhya Pradesh may produce the said report in Court, if possible, on the next date of hearing *i.e.* 27-8-1999.

T.N. Godavarman Thirumulpad v. Union of India
Interlocutory Applications 480 and 481, decided on 27-08-1999
A.S. Anand, B.N. Kirpal and V.N. Khare, JJ.

Madhya Pradesh - Damoh - Assault on Santosh Bharati - Show cause notice of contempt to police officers.

ORDER

Report has been filed by Shri Kewal Singh, Superintendent of Police, C.B.I. /A.C.B., Jabalpur. The same is taken on record. The said Report refers, in paragraph 14 thereof, to an order of the Chief Judicial Magistrate, Damoh who had directed the persons accused before him to be examined by a Medical Board consisting of three doctors. The said report was submitted. The learned Additional Solicitor General has drawn our attention to the same. A copy of the said report is placed before us. The same is taken on records. Copy be also given to the *Amicus Curiae* and the State of Madhya Pradesh.

IA 480 - Notice to issue to Addl. Superintendent of Police Shri Bara, City Superintendent of Police Shri Sen, Town Inspector Shri Tiwari, SHO Shri Hempal Singhal, Shri Vend Chubby and SI Shri Sharma to show cause why proceedings should not be initiated against them for contempt of court. Notice to the served through the State of Madhya Pradesh.

Notice also to issue to Shri A..K. Bhatt, DFO, Sagar to file an affidavit stating as to how and under whose orders was the office of the DFO opened on the night of 15th August, 1999 and what action, if any, he has taken pursuant to the incident which had occurred therein.

The State of Madhya Pradesh should also, on the next date of hearing, file an affidavit indicating as to what is their stand.

Notice to be returnable on 6th September, 1999.

The Advocate General, M.P. drew our attention, to the fact that the Lokayukta, M.P. is also inquiring in the matter concerning IA 424 and IA 480. The pendency of these proceedings cannot under any circumstance be regarded as inhibiting the Lokayukta from carrying on his inquiry. Any report which he submits can only be of assistance to this Court.

Name wrongly typed as "Shri N.K. Sharma", Addl. I.G. (Forest), Ministry of Environment, New Delhi, in our earlier orders, be read as "Shri N.K. Sharma".

T.N. Godavarman Thirumulpad v. Union of India
Decided on 06-09-1999
B.N. Kirpal, V.N. Khare, M.B. Shah, JJ.

Madhya Pradesh - Damoh - Assault on Santosh Bharati - Show cause notice of contempt against Duos - Immediate action called for in view of report of CBI and report of Medical Board - Large number of inquiries on Santosh Bharati including broken rib - Direction – Guilty police officers to be immediately suspended pending departmental action.

ORDER

Pursuant to the order dated 27th August, 1999, the police officers to whom notices were issued are present in Court. The Advocate General of State of Madhya Pradesh, however, brings to our notice the fact that there is no police officer called Shri Sharma who was posted at Damoh. According to Mr. Prashant Bhutan, the officer concerned was SI Shri L. S. \Mishra.

Mr. Decant Dave appears for the police officers and prays for time to file a reply to the show cause notice. Reply be filed within a week.

Notice also to issue to DFO Shri A. K. Bhatt and SI Shri L. S. Mishra to show cause why proceedings be not initiated against them also for contempt of court, returnable after six weeks. Service will be effected through the State of Madhya Pradesh.

We have heard the learned counsel at length and seen the Report which has been filed by the Central Bureau of Investigation under the signatures of Shri Kewal Singh, Spud. of Police, CBI, Jabalpur. This report read along with additional affidavit filed on behalf of the applicant Santosh Bharti supported by the statements which are annexed to

that affidavit which statements were made by persons before the CBI, it appears to us that immediate action is called for. It will not, in our opinion, be appropriate to say more than what is necessary because that may prejudice parties to the case. But, in our opinion the immediate action is called for, keeping in view only the Report of the CBI and the Report of the Medical Board, which was constituted by the court in M.P. which showed large number of injuries on the person of Shri Santosh Bharti and others including a broken rib. We direct that in respect of the police officers stated to be present at the scene of the incident and mentioned in paragraph 10 of the Report of Shri Kewal Singh, namely, Addl. SP Shri P. Stake City SP Shri R. K. Sen, Town Inspector Shri A. P. Tiwari, Shri L. S. Mishra, Shri P. S. Thakur, Shri Vend Choosey as well as Shri Hempal Singhal and ASI Shri Marian Singh, the State Government shall pass orders immediately suspending them pending departmental action against them.

The Central Bureau of Investigation shall take charge of the case, complete their investigation and take such follow-up action as may be required in accordance with law including prosecution of the case if so warranted on inquiry being completed by them. The CBI should complete its inquiry and submit a final Report in this Court within six weeks.

We further direct that the State Government shall immediately, not later than 7 days from today, post a permanent DFO at Damoh. The State Government will also be at liberty to transfer and post other police officers to man the posts which are, as of today, being held by the officers who are to be suspended.

The departmental disciplinary action should await the final outcome of the CBI Report.

The compliance report should be filed by the State Government within a week. The Advocate General, State of M.P. should communicate to the State Government the order passed by us today.

Shri N. K. Sharma should also submit a report within four weeks from today.

T.N. Godavarman Thirumulpad v. Union of India
Interlocutory Application 477 & 480, Interlocutory Application 424 in Writ Petition (Civil) No. 202/95, decided on 01-11-1999
A.S. Anand, B.N. Kirpal and V.N. Khare, JJ.

Seizure - 50 wagons to remain seized till further orders.

ORDER

On a mention being made by Mr. Rawal, the 50 wagons mentioned in the Action Taken Report by the Ministry of Environment & Forests, which are referred to in para 7 at page 9, are directed to remain seized till further orders.

T.N. Godavarman Thirumulpad v. Union of India
Decided on 17-12-1999
B.N. Kirpal, V.N. Khare and M.B. Shah, JJ.

Madhya Pradesh - Mining - NMDC - Permission for mining granted by Central Government - Clarification of Court order dated 12-12-96 - What was prohibited was carrying on of any non-forest activity in the forest without the permission of the Central Government - What was prohibited was illegal cutting of trees without the permission of the Central Government - Once permission is granted by Central Government Applicant would be at liberty to operate the said mines - Modification of order dated 11-02-97 - I.As disposed of.

Madhya Pradesh - Damoh - First report of Shri M.K. Sharma furnished before Court - Collector Damoh to file reply to the same - Direction - No felling of any tree in the State of M.P. - No movement of any timber without further order of the Court.

ORDER

I.As 419 and 420

These are two I.As filed by N.M.D.C., in which it is stated that it has acquired six leases in Bilabial area which is a forest land in which permission has been granted by the Central Government to carry on mining operations. It is stated that the State of M.P. on 20th August, 1998 has also granted the necessary permission but has observed this while cutting the trees special care should be taken to implement the order *of* this court in the *T.N. Godavarman V. Union of India,* 1997(2) SCC 267.

It is clear that as far as this Court is concerned, it has prohibited the carrying on of any non-forest activity in a forest area without the permission of the Central Government. Now that the Central Government has granted permission subject to the conditions which have been or may be imposed, the applicant would of course be at liberty to operate on the said mines. What was prohibited by this Court was illegal cutting of trees and cutting of trees without the permission of the Central Government. It is nobody's case before us that the cutting of trees in carrying on the mining operations in the present case would be environmentally hazardous or contrary to any law especially in view of the fact that an obligation has been cast on the applicant to carry out afforestation hopefully on an area greater or larger than the area on which the trees are to be cut. In this view of the matter, the permission to carry on the mining operations is granted.

We further clarify that the order dated 11-2-1997 passed in IA 60/97 in WP (C) No. 202/95 stands modified to that extent. These I.As in this regard stand disposed of leaving open the question as to the manner in which the compensatory afforestation is to be done. A comprehensive proposal in this regard will be placed before the Court by the Ministry of Environment on the next date of hearing. For this purpose and the case to come up in the 2nd week of January, 2000 along with the Damoh matter.

IA 484

Further to the order dated 2nd August, 1999 of this Court in IA 424/99, Mr. M.K. Sharma, who was appointed by this Court and directed to go into the allegations made in IA. No. 257/97 in W.P. (C) No. 202/95, has furnished his First Report. A copy of this Report has been given to Mr. S. K. Agnihotri. The Collector, Damoh is directed to file an affidavit within three weeks from today replying and/or dealing with the said Report and in particular with regard to the land at Village Singrampur stated to have been purchased by Shri Ratnesh Solomon and the felling of the trees on the said land.

Till further orders, we direct subject to the orders I.A. No. 419 and 420 that there shall be no felling of any tree in the State of M.P. and there will be no movement of any timber without further orders of this Court, from one district to another.

The State of M.P through the Chief Secretary should also within three weeks then today to file an affidavit in response to the Report.

Notice of the Report may also go to Mr. Ratnesh Solomon who is at liberty to file such an affidavit as he may choose to do in response to this Report within three weeks from today. Copy of Report will be supplied to him by the State of M.P. service of notice on Mr. Solomon be effected through Mr. Agnihotri

This IA and the other connected I.As dealing with Damoh will be listed in the second week of January, 2000.

Th. Majra Singh v. Indian Oil Corporation
AIR 1999 Jammu & Kashmir 81
O.W.P. No. 324 of 1997, D/-12-8-1998
T. S. Doabia, J.

Constitution of India, Art. 226 – Mandamus – Environment – Protection – Petitioner objecting to location of plant for filling cylinders with liquefied petroleum gas – Held, Court can only examine as to whether authorities have taken all precautions with view to see that laws dealing with environment and pollution have been given due care and attention – High Court gave various directions in the light of said principle.

Almitra Patel v. Union of India
(2000) 2 Supreme Court Cases 679
B.N. Kirpal, M.B. Shah and D.P. Mohapatra, JJ.

KIRPAL, J.- More in anguish, than out of anger, this Court nearly four years ago in *B.L. Wadhera (Dr) vs. Union of India*[1] (SCC at p. 595, para 1) observed:

"Historic city of Delhi – the capital of India – is one of the most polluted cities in the world. The authorities, responsible for pollution control and environment protection, have not been able to provide clean and healthy environment to the residents of Delhi. The ambient air is so much polluted that it is difficult to breathe. More and more Delhities are suffering from respiratory diseases and throat infections. River Yamuna – the main source of drinking water supply – is the free dumping place for untreated sewage and industrial waste. Apart from air and water pollution, the city is virtually an open dustbin. Garbage strewn all over Delhi is a common sight. The Municipal Corporation of Delhi (the MCD) constituted under the Delhi Municipal Act, 1957 (Delhi Act) and the New Delhi Municipal Council (the NDMC) constituted under the New Delhi Municipal Council Act, 1994 (New Delhi Act) are wholly remiss in the discharge of their duties under law. It is no doubt correct that rapid industrial development, urbanisation are regular flow of persons from rural to urban areas have made major contribution towards environmental degradation but at the same time the authorities – entrusted with the work of pollution control – cannot be permitted to sit back with folded hands on the pretext that they have no financial or other means to control pollution and protect the environment."

The Court then proceeded to issue 14 directions in an effort to see that the capital of the biggest democracy in the world is not branded as being one of the most polluted cities in the world.

2. It is indeed unfortunate that despite more than sufficient time having elapsed the condition of Delhi has not improved. The citizens of Delhi increasingly suffer from respiratory and other diseases, River Yamuna is highly polluted and garbage and untreated domestic and industrial waste is being either freely dumped into the said river or is left on open land, a large volume of which remains unattended.

3. The present writ petition is concerned with the question of solid waste disposal. By order dated 16-1-1998[+] this Court constituted a Committee headed by Mr. Asim Burmon to look into all aspects of urban solid waste management and in particular to the following four areas : (SCC pp. 417-18, para 3)

"*3. (1) Examine the existing practices and to suggest hygienic processing and waste-disposal practices and proven technologies on the basis of economic feasibility and safety which the Corporations Government may directly or indirectly adopt or sponsor.*

(2) Examine and suggest ways to improve conditions in the formal and informal sector for promoting eco-friendly sorting, collection, transportation, disposal, recycling and reuse.

(3) To review municipal bye-laws and the powers of local bodies and regional planning authorities and suggest necessary modifications to ensure effective budgeting financing, administration, monitoring and compliance.

(4) Examine and formulate standards and regulations for management of urban solid waste, and set time frame within which the authorities shall be bound to implement the same."

4. After a preliminary and then the final report of the said Committee was received notices were issued to all the State who were required to file their responses to the report of the Committee. None of the States really opposed the recommendations made by the Committee and it is noticed that the responses of the States were in fact positive. Keeping the aforesaid report in mind, the Management of Municipal Solid Waste (Management and Handling) Rules, 1999 were notified by the Central Government which, as the heading itself suggests, deal with the questions as to how the solid waste in the cities is to be managed and handled.

5. In this Court's order dated 15-10-1999 it was indicated that we proposed to take up the question of cleaning of four metropolitan cities, namely, Mumbai, Chennai, Calcutta and Delhi as also the city of Bangalore.

6. We have first heard counsel appearing on behalf of the National Capital Territory of Delhi in connection with the management and handling of the solid waste. It was in this connection that our attention was drawn to the 14 directions issued by this Court in *Dr. B.L. Wadehra case*[1] It is indeed unfortunate that till today the said directions have not been complied with. When this was put to the learned counsel appearing for Delhi as to why the said directions were not complied with, there was, in effect, no satisfactory answer. For example, sites for landfill have not been identified and handed over to MCD nor have four additional compost plants been constructed though specific direction in this regard was issued in *Dr. B.L. Wadehra Case*[1]. The Court also approved of the experimental scheme placed before it by MCD whereunder certain localities had been selected for distribution of polythene bags and collection of garbage from door to door but no effective progress appears to have been made in this regard. These are but a few examples which show non-compliance with the directions issued.

7. We are not oblivious of the fact that in a large city like Delhi where the floating population which comes in everyday is not very small, keeping the city clean is indeed a daunting task. Just because the work involved is difficult cannot be a reason for lack of initiative or inaction on the part of the authorities concerned.

8. We are informed that one of the local authorities, namely, MCD itself employs about forty thousand safai karamcharis. This is in addition to the staff employed by other local bodies, namely, NDMC and the Cantonment Board. Like all government and municipal employees these karamcharis are expected to work for the stipulated period of time, namely, eight hours a day. It was submitted by Mr. Dushyant Dave, learned Amicus Curiae that the insanitary conditions of different areas of Delhi does not in any show that requisite effort has been put in or the required time spent in the cleaning operations which are supposed to be carried but by this large workforce.

These employees are move invisible than visible. There appears to be a complete lack of accountability at all levels of the Corporation, in this behalf.

9. Keeping Delhi clean is not an easy task but then it is not an impossible one either. What is required is initiative, selfless zeal and dedication and professional pride – elements which are sadly lacking here.

10. Surat had for time immemorial been known to be one of the dirtiest cities in the country. The plague there in 1995 was the result of the filth which had accumulated therein. Nevertheless the effort of one man, namely the Municipal Commissioner, who worked in the field and in the office with dedication resulted in not only eradicating the plague and cleaning up Surat but gave the city of Surat the distinction of being the second most clean city in the whole of India. The people of Surat who threw garbage all around were so affected by the tireless effort of one person that they themselves have not become zealous guardians of their new-found clean city of Surat. This shows what one man as the head of an organisation, like the Municipal Corporation, with selfless zeal, initiative and dedication and without allowing any outside interference can achieve by motivating his employees to clean up the city while acting fairly, justly and efficiently within the four corners of the law.

11. In Delhi which is the capital of the country and which should be its showpiece no effective initiative of any kind has been taken by the numerous Governmental agencies operating here in cleaning up the city. As a result thereof the Court had to in *Dr. B.L. Wadehra case*[1] perforce step in because of the non-performance or non-implementation of the law by the municipal authorities. The law, inter alia, makes it obligatory on them to discharge their municipal functions and at least prevent filth and garbage from lying strewn at different public places causing hazard to public health.

12. The local authorities are constituted for providing services to the citizens – not merely to provide employment to a few its inhabitants. Tolerating filth, while not taking against the lethargic and inefficient workforce for fear of annoying them, is un-understandable and impermissible. Non-accountability has possibly led to lack of effort on the part of the employees concerned. They are perhaps sanguine in their belief that non-performance is not frowned upon by the Government or by the heads of the organisations and no harm will befall them.

13. Domestic garbage and sewage is a large contributor of solid waste. The drainage system in a city is intended to cope and deal with household effluent. This is so in a planned city. But when a large number of inhabitants live in unauthorised colonies, effluents or in slums with no care for hygiene the problem becomes more complex.

14. Establishment or creating of slums, it seems, appears to be good business and is well organised. The number of slums has multiplied in the last few years by geometrical proportion. Large areas of public land, in this way, are usurped for private use free of cost. It is difficult to believe that this can happen in the capital of the country without passive or active connivance of the land-owning agencies and /or the municipal authorities. The promise of free land, at the taxpayer's cost, in place of a jhuggi, is a proposal which attracts more land grabbers. Rewarding an encroacher on public land with a free alternative site is like giving a reward to a pickpocket. The Department of Slum Clearance does not seem to have cleared any slum despite its being in existence for

decades. In fact more and more slums are coming into existence. Instead of "Slum clearance" there is "Slum creation" in Delhi. This in turn gives rise to domestic waste being strewn on open land in and around the slums. This can best be controlled at least, in the first instance, by preventing the growth of slums. The authorities must realise that there is a limit to which the population of a city can be increased, without enlarging its size. In other words the density of population per square kilometre cannot be allowed to increase in density has to be prevented. What the Slum Clearance Department has to show, however, does not seem to be visible. It is the garbage and solid wasted generated by these slums which require to be dealt with most expeditiously and on the basis of priority.

15. It was suggested by the learned amicus curiae that we should issue various direction to MCD and NDMC including relating to the manner in which the solid waste generated in Delhi is to be handled. We believe it is not for this Court to direct as to how the municipal authorities should carry out their functions and resolve difficulties in regard to the management of solid waste. The Court, in fact, is ill-equipped to do so. Without doubt the governmental agencies including the local authorities have all the powers of the State to take action and ensure that the city remains clean. They have only to wake up an act. The Court should, however, direct that the local authorities, Government and all statutory authorities must discharge their statutory duties and obligations in keeping the city at least reasonably clean. We propose to do so now by issuing appropriate directions.

16. Before we pass the necessary orders some difficulties are stated to have been encountered in implementing some of the directions *Dr. B.L. Wadehra case*[1] which need to be dealt with.

17. One of the difficulties pointed out before us was that even though the MCD and the NDMC Acts permit action being taken, inter alia, against persons who litter the city a sufficient number of Judicial Magistrates are not available for ensuring proper enforcement of the provisions of the said Acts. But the shortage of Judicial Magistrates can be easily overcome by the Government appointing suitable persons as executive magistrates under Section 20 or Special Executive Magistrates under Section 21 of the Code of Criminal Procedure who can be empowered to deal with such minor offences under the provisions of the MCD and the NDMC Acts. There are a large number of retired government officials and ex-defence officers who have held responsible posts and are living in Delhi who, we are sure, will be willing to act as such Magistrates. Delhi is divided into a number of municipal wards and for every ward one or more Executive Magistrates or Special Executive Magistrate can easily be appointed. This will also take some burden off the courts.

18. The counsel of MCD has submitted that despite orders having been passed in *Dr. B.L. Wadehra case* a sufficient number of sites for landfills have neither been identified nor handed over to it. One of the reasons for the sites not being made available, it was stated, was that land-owning agencies like DDA or the Government of National Capital Territory of Delhi are demanding market value of the land or more than rupees forty lakhs per acre before the land can be transferred to MCD. Keeping Delhi; clean is a

governmental function. There is more than one agency that administers Delhi, namely, the Union of India though the Ministry of Urban Department. Government of National Capital Territory of Delhi, the Commissioner of MCD, the Chairman, NDMC, the Cantonment Board and DDA. It is the duty of all concerned to see that landfill sites are provided in the interest of public health. Providing of landfill sites is not a commercial venture, which is being undertaken by MCD. It is as much the duty of the MCD as that of other authorities enumerated above to see that of other authorities enumerated above to see that sufficient sites for landfills to meet the requirement of Delhi for the next twenty years are provided. Not providing the same because MCD is unable to pay an exorbitant amount is un-understandable. Landfill site has to be provided and it is wholly immaterial which governmental agency of local authority has to pay the price for it. As for nearly four years since the direction was issued in *Dr. B.L. Wadehra case*[1] this problem has not been solved it has now become necessary for this Court to issue appropriate directions in this behalf, which we shall presently do.

19. One of the important directions issued in *Dr. B.L. Wadehra case*[1] was regarding the construction of compost plants. In addition to the compost plant at Okhla, which was expected to be in operation by 1-6-1996, four additional compost plants were to be constructed, as recommended by the Jagmohan Committee. This has not happened and even land for a sufficient number of compost plants has not been identified or handed over. It has, therefore, become necessary to issue time-bound directions in this behalf.

20. Up till now no action has been taken against people who spread litter. Discipline amongst people in this behalf has to be inculcated and the guilty punished. Appropriate orders in this behalf are proposed to be issued including the appointment of Magistrates under Section 20 and or Section 21 of the Code of Criminal Procedure, inter alia, to deal with such cases.

Conclusions

21. In addition to and not in derogation of the orders passed by this Court in Dr. B.L. Wadehra case[1] we order as follows:

(1) We direct the Municipal Corporation of Delhi through the Commissioner, NDMC through its Chairman and the Cantonment Board through its Executive Officer and all other officials concerned including Sanitation Superintendent / Chief Sanitary Inspectors/ Sanitary Inspectors/ Sanitary Guides/ Medical Officers to ensure that the relevant provisions of the DMC Act, 1957, the New Delhi Municipal Council Act, 1994 and the Cantonments Act, 1924 relating to sanitation and public health prohibiting accumulation of any rubbish, filth, garbage or other polluted obnoxious matters in any premises and / or prohibiting any person from depositing the same in any street or public place shall be scrupulously complied with.

(2) We direct that the streets, public premises such as parks etc. Shall be surface-cleaned on a daily basis, including on Sundays and public holidays.

(3) We direct and authorize MCD, NDMC and other statutory authorities though competent officers, as may be designated by them(but not lower than in the rank of Sanitary Superintendent or equivalent post) to levy and recover charge and costs from any person littering or violating the provisions of the diverse Acts, by-laws and regulations relating to sanitation and health for violating the directions being issued herein. For this purpose the Commissioner, MCD, the Chairman, NDMC and other heads of sanitary authorities concerned will prepare and publish for the information of the public at large the scale of such charges/costs as may be levied and recovered in respect of the diverse acts of commission/ omission. The charges/ costs will be recoverable on the spot by such designated officers from any person found littering or throwing rubbish and causing nuisance so as to affect sanitation and public health. The Commissioner, MCD and the Chairman, NDMC and other authorities may frame and publish such schemes as may be necessary to ensure compliance with these directions forthwith. Till the scheme is framed and published, the authorities named above would recover Rs. 50 as charges and costs from any person littering or violating provisions of the Municipal Corporation Act, Bye-laws and Regulations relating to sanitation and health. This part be published and implemented at the earliest through the Sanitary Inspectors concerned.

(4) We direct MCD through the Comissioner, NDMC through its Chairman and other statutory authorities through their respective heads to ensure proper and scientific disposal of waste in a manner so as to subserve the common good. In this connection they shall endeavour to comply with the suggestions and directions contained in the report prepared by the Asim Burmon Committee.

(5) We direct that sites for landfills will be identified bearing in mind the requirement of Delhi for the next twenty years within a period of four weeks from today by the exercise jointly conducted by the Union of India through the Ministry of Urban Development, the Government of National Capital Territory of Delhi, the Commissioner, MCD and the Chairman, NDMC and other heads of statutory authorities like DDA etc. These sites will be identified keeping in mind the environmental considerations and in identifying the same the Central Pollution Control Board's advice will be taken into consideration. The sites so identified shall be handed over to MCD and / or NDMC within two weeks of the identification, free from all encumbrances and without MCD or NDMC having to make any payment in respect thereof.

(6) We direct the Union of India through the Ministry of Urban Development, the Government of National Capital Territory of Delhi, the Commissioner of MCD, the Chairman, NDMC and other statutory authorities like DDA and the Railways to take appropriate steps for preventing any fresh encroachment or unauthorised occupation public land for the purpose of dwelling resulting in creation of a slum. Further appropriate steps be taken to improve the sanitation in the existing slums till they are removed and the land reclaimed.

(7) We further direct the Union of India through the Ministry of Urban Development, the Government of National Capital Territory of Delhi, the Commissioner of MCD, the Chairman, NDMC and other statutory authorities like DDA etc. to identify and make available to MCD and NDMC within four weeks from today sites for setting up compost plants. Initially considering the extent of solid waste, which is required to be treated by compost plants, the number of sites which should be made available will be eight. Such sites shall be handed over to MCD/NDMC free of cost and free from all encumbrances within two weeks of identification. MCD and NDMC shall thereupon take appropriate steps to have the compost plants/processing plants established or caused to be established and to be in operation by 30-9-2000.

(8) We direct MCD, NDMC and other statutory authorities concerned with sanitation and public health to regularly publish the names of the Superintendents of Sanitation concerned and such equivalent officers who are responsible for cleaning Delhi who can be approached for any complaint/ grievance by the citizens of Delhi together with their latest office and residential telephone numbers and addresses.

(9) We direct the Government of National Capital Territory of Delhi to appoint Magistrates under Section 20 and or Section 21 of the Code of Criminal Procedure for each board/circle/ward for ensuring compliance with the provisions of the MCD and the NDMC Acts and to try the offences specified therefore in relation to littering and causing nuisance, sanitation and public health. These appointments shall be made within a period of six weeks from today in conformity with the reasons contained in this order.

(10) All the authorities concerned will file compliance report of these directions reports of these directions within eight weeks from today. The Central Pollution Control Board will also file within the same time an affidavit indicating as to what extent the directions issued have been complied with.

22. It is needless to say that the violation of the directions issued by this Court shall be viewed seriously.

Almitra Patel v. Union of India
CONNECTED ORDER
(Record of Proceedings)
B.N. Kirpal and M. Srinivasan, JJ.

ORDER

1. Learned counsel on behalf of the State of Tamil Nadu states that additional response is to be filed. The needful be done within two weeks. Other States/ Union Territories who have not yet filed responses should also do the needful within the same time. It is represented on behalf of the petitioner that copies of

all the responses have not been served on the petitioner. Copies of all the responses should be served within two weeks.

2. In the meantime, we propose to take up the question of cleaning of four metropolitan cities – Mumbai, Chennai, Calcutta and Delhi as also the city of Bangalore. The learned counsel for the petitioner will prepare a chart indicating briefly, the recommendations of the Committee the responses in respect of these four metropolitan cities and the city of Bangalore and also of the Union of India, the provisions of the local municipal laws in respect of cleaning of the cities and the officers of the authorities responsible for complying with the provisions of the law. The Central Government should indicate as to whether it is possible to privatize some or all of the municipal services and if the privatisation takes place, what safeguards can be ensured so that ultimately there is no undue financial impact on the local authorities by way of they being obliged to take over the services of unwanted employees.

3. We observe this because Mr. Dave has brought to our notice that in Mumbai this problem has arisen and privatization may become, in that sense, counterproductive. Keeping in view the fact that the finances are very limited, Mr. Dave submits that there is no other option but to privatize some of the municipal activities, without in any way increasing the financial burden on the authorities of the State.

Hari Shankar v. Union of India
AIR 2000 Rajasthan 26
Civil Special Appeal No. 1101 of 1998, D/-9-8-1999
V. S. Kokje and S. C. Mital, JJ.

Ancient Monuments and Archaeological Sites and Remains Act (24 of 1958), Ss. 2(i)(d), 19(1) – Protected Area – Jaisalmer Fort is protected area under the Act and declared to be ancient and historical monuments and archaeological sites and remains of national importance – Construction of building within walls for Fort – Demolition of – Proper.

Lok Adhikar Sangh v. State of Gujarat
AIR 2000 Gujarat 280
Special Civil Petition No. 4578 of 1997, D/-17-2-2000
C.K.Thakkar and K.M.Mehta, JJ.

Constitution of India, Arts. 226 - Public Interest Litigation - Allegations of lack of fire safety measures in high rise buildings, cinema halls and factories - Municipal Corporation and Urban Development Authority, as far as construction of high rise

buildings concerned, directed to ensure compliance of fire protecting system and installation of fire safety measures by owners/builders/contractors/developers etc. - Authorities directed not to grant NOC or occupation certificate unless sufficient fire protective system is installed in respect of existing high rise buildings but still not occupied - No renewal licence was directed to be granted unless adequate protective measures are taken in case of cinema halls - Authorities directed to insist compliance with S.38 of Factories Act and Rules in case of factories.

(Para 12)

M.C Mehta v. Kamal Nath
AIR 2000 Supreme Court 1997
Writ Petition (Civil) No. 182 of 1996, D/-12-5-2000
S. Saghir Ahmad and Doraiswamy Raju, JJ.

(A) Constitution of India, Art. 21 - Life - Hazardous act - Any disturbance of basic environment elements, namely air, water and soil - Is hazardous to 'life' under Art. 21.

(Para 8)

(B) Constitution of India, Arts. 32, 21, 20, 226, 142 - Water (Prevention and Control of Pollution) Act (6 of 1974), Chap. VII - Environment (Protection) Act (29 of 1986), S. 15 - Air (Prevention and Control of Pollution) Act (14 of 1981) Chap. VI - Environment and ecology - Protection - Proceedings under Arts. 32, 226 - Court can direct polluter to pay compensation to victims - But cannot levy fine on the polluter in such proceedings - Fin cannot be imposed even by recourse to Art. 142.

(C) Constitution of India, Arts. 21, 32, 226 - Environmental Pollution - Is tort against community - Person found guilty of disturbing environment - Court in proceedings under Arts. 32 and 226 can levy exemplary damages on him - Considerations for which "fine" can be imposed upon a person guilty of committing an offence are different from those on the basis of which exemplary damages can be awarded.

(Para 24)

ORDER

This case, which was finally decided by this Court by its judgment dated December 13, 1996 has been placed before us for determination of the quantum of pollution fine. It may be stated that the main case was disposed of with the following directions:

1. The public trust doctrine, as discussed by us in this judgment is a part of the law of the land.

2. The prior approval granted by the Government of India, Ministry of Environment and Forest by the letter dated November 24, 1993 and the lease-deed dated April 11, 1994 in favour of the Motel are quashed. The lease granted to the Motel by the said lease-deed in respect of 27 bighas and 12 biswas of area, is cancelled and set aside. The Himachal

Pradesh Government shall take over the area and restore it to its original natural conditions.

3. The Motel shall pay compensation by way of cost for the restitution of the environment and ecology of the area. The pollution caused by various constructions made by the Motel in the river bed and the banks of the river Beas has to be removed and reversed. We direct NEERI through its Director to inspect the area, if necessary, and give an assessment of the cost which is likely to be incurred for reversing the damage caused by the Motel to the environment and ecology of the area. NEERI may take into consideration the report by the Board in this respect.

4. The Motel through its management shall show cause why pollution fine in addition be not imposed on the Motel.

5. The Motel shall construct a boundary wall at a distance of not more than 4 meters from the cluster of rooms (main building of the Motel) towards the river basin. The boundary wall shall be on the area of the Motel which is covered by the lease dated September 29, 1981. The Motel shall not encroach/cover/utilise any part of the river basin. The boundary wall shall separate the Motel building from the river basin. The river bank and the river basin shall be left open for the public use.

6. The Motel shall not discharge untreated effluents into the river. We direct the Himachal Pradesh Pollution Control Board to inspect the pollution control devices/treatment plants set up by the Motel. If the effluent/waste discharged by the Motel is not conforming to the prescribed standards, action in accordance with law be taken against the Motel.

7. The Himachal Pradesh Pollution Control Board shall not permit the discharge of untreated effluent into river Beas. The Board shall inspect all the hotels/institutions/factories in Kullu-Manali area and in case any of them are discharging untreated effluent/waste into the river, the Board shall take action in accordance with law.

8. The Motel shall show cause on December 18, 1990 why pollution-fine and damages be not imposed as directed by us. NEERI shall send its report by December 17, 1996. To be listed on December 18, 1996." Pursuant to the above Order, notice was issued requiring the Motel to show cause on two points; (i) why the Motel be not asked to pay compensation to reverse the degraded environment and (ii) why pollution fine, in addition, be not imposed. Mr. G. L. Sanghi, learned Senior Counsel, appearing for M/s. Span Motel Private Ltd., has contended that though it is open to the Court. In proceedings under Article 32 of the Constitution to grant compensation to the victims whose Fundamental Rights might have been violated or who are the victims of an arbitrary executive action or victims of atrocious behaviour of public authorities in violation of public duties cast upon them, it cannot impose any fine on those who are guilty of that action. He contended that the fine is a component of Criminal Jurisprudence and cannot be utilised in civil proceedings especially under Article 32 or 226 of the Constitution either by this Court or the High Court as imposition of fine would be contrary to the provisions contained in Articles 20 and 21 of the Constitution. It is contended that fine

can be imposed upon a person only if it is provided by a statute and gives jurisdiction to the Court to inflict or impose that fine after giving a fair trial to that person but in the absence of any statutory provision, a person cannot be penalised and no fine can be imposed upon him. Mr. M. C. Mehta, who has been pursuing this case with the usual vigour and vehemence, has contended that if a person disturbs the ecological balance and tinkers with the natural conditions of rivers, forests, air and water, which are the gifts of nature, he would be guilty of violating not only the Fundamental Rights, guaranteed under Article 21 of the Constitution, but also be violating the fundamental duties to protect environment under Article 51-A(g) which provides that it shall be the duty of every citizen to protect and improve the natural environment including forests, lakes, rivers and wildlife and to show compassion for living creatures.

9. The planet Earth which is inhabited by human beings and other living creatures, including animals and birds, has been so created as to cater to the basic needs of all the living creatures. Living creatures do not necessarily mean the human beings, the animals, the birds, the fish, the worms, the serpents, the hydras, but also the plants of different varieties, the creepers, the grass and the vast forests. They survive on fresh air, fresh water and the sacred soil. They constitute the essential elements for survival of "life" on this planet. The living creatures, including human beings, lived peacefully all along. But when the human beings started acting inhumanly, the era of distress began which in it wake brought new problems for survival.

10. The industrial revolution brought an awakening among the men inhabiting this Earth that the Nature, with all its resources was not unlimited and forever renewable. The uncontrolled industrial development generating tonnes of industrial waste disturbed the ecological balance by polluting the air and water which in turn, had a devastating effect on the wildlife and, therefore, the early efforts to protect the environment related to the protection of wildlife. But then the two world wars, the first world war (1914-1918) and the second world war (1939 to 1945) during which atomic bombs were exploded resulting in the loss of thousands of lives and burning down of vast expanses of forests made the man realise that if the environmental disturbances were not controlled, his own survival on this planet would become impossible. The United Nations, therefore, held a Conference on human environment at Stockholm in 1972. In the wake of the resolutions adopted at that Conference, different countries at different stages enacted laws to protect the deteriorating conditions of environment. Here in India, the Legislature enacted three Acts, namely. The Water (Prevention and Control of Pollution) Act, 1974; the Air (Prevention and Control of Pollution) Act, 1981 and The Environment (Protection) Act, 1986. It also enacted the Water (Prevention and Control of Pollution) Cess Act, 1977. Under these Acts, Rules have been framed to give effect to the provisions thereof. They are: The Water (Prevention and Control of Pollution) Rules, 1975; The Water (Prevention and Control of Pollution) Cess Rules, 1978; The Air (Prevention and Control of Pollution) Rules, 1982. The Air (Prevention and Control of Pollution) (Union Territories) Rules, 1983; The Environment (Protection) Rules, 1986; The Hazardous Wastes (Management and Handling) Rules, 1989; The Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989, The Chemical Accidents (Emergency Planning, Preparedness and Response) Rules, 1996 and hosts of other Rules and Notifications.

11. In addition to these Acts and Rules, there are, on the Statute Book, other Acts dealing, in a way, with the Environmental laws, for example, the Indian Forest Act, 1927; The Forest (Conservation) Act, 1980; The Wildlife (Protection) Act, 1972 and the Rules framed under these Acts. Various States in India have also made their Environmental laws and rules for the protection of environment.

12. Apart from the above Statutes and the Rules made thereunder, Article 48-A of the Constitution provides that the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country. One of the fundamental duties of every citizen as set out in Article 51A(g) is to protect and improve the natural environment, including forests, lakes, rivers and wildlife and to have compassion for living creatures. These two Articles have to be considered in the light of Article 21 of the Constitution which provides that no person shall be deprived of his life and liberty except in accordance with the procedure established by law. Any disturbance of the basic environment elements, namely air, water and soil, which are necessary for "life", would be hazardous to "life" within the meaning of Article 21 of the Constitution.

13. In the matter of enforcement of rights under Article 21 of the Constitution, this Court, besides enforcing the provisions of the Acts referred to above, has also given effect to Fundamental Rights under Articles 14 and 21 of the Constitution and has held that if those rights are violated by disturbing the environment, it can award damages not only for the restoration of the ecological balance, but also for the victims who have suffered due to that disturbance. In order to protect the "life", in order to protect "environment" and in order to protect "air, water and soil" from pollution, this Court, through its various judgments has given effect to the rights available, to the citizens and persons alike, under Article 21 of the Constitution. The judgment for removal of hazardous and obnoxious industries from the residential areas, the directions for closure of certain hazardous industries, the directions for closure of slaughter-house and its relocation, the various directions issued for the protection of the Ridge area in Delhi, the directions for setting up effluent treatment plants to the Industries located in Delhi, the directions to Tanneries etc., are all judgments which seek to protect environment.

14. In the matter of enforcement of Fundamental Rights under Article 21 under Public Law domain, the Court, in exercise of its powers under Article 32 of the Constitution has awarded damages against those who have been responsible for disturbing the ecological balance either by running the industries or any other activity which has the effect of causing pollution in the environment. The Court while awarding damages also enforces the "POLLUTER PAYS PRINCIPLE" which is widely accepted as a means of paying for the cost of pollution and control. To put in other words, the wrongdoer, the polluter, is under an obligation to make good the damage caused to the environment.

15. The recognition of the vice of pollution and its impact on future resources was realised during the early part of 1970. The United Nations Economic Commission for Europe, during a panel discussion in 1971, concluded that the total environmental expenditure required for improvement of the environment was overestimated but could be reduced by increased environmental awareness and control. In 1972, the Organisation for Economic Co-operation and Development adopted the "POLLUTER PAYS

PRINCIPLE" as a recommendable method for pollution cost allocation. This principle was also discussed during the 1972 Paris Summit. In 1974, the European Community recommended the application of the principle by its member States so that the costs associated with environmental protection against pollution may be allocated according to uniform principles throughout the Community. In 1989, the Organisation for Economic Co-operative and Development reaffirmed its use and extended its application to include costs of accidental pollution. In 1987, the principle was acknowledged as a binding principle of law as it was incorporated in European Community Law through the enactment of the Single European Act, 1987. Article 130r 2 of the 1992 Maastricht Treaty provides that Community Environment Policy "shall be based on the principle that the polluter should pay."

16. "POLLUTER PAYS PRINCIPLE" has also been applied by this Court in various decisions. In Indian Council for Enviro-Legal Action v. Union of India, AIR 1996 SC 1446: (1996) 2 SCR 503: (1996) 3 SCC 212: (1996) (2) JT (SC) 196: (1996 AIR SCW 1069) it was held that once the activity carried on was hazardous or inherently dangerous, the person carrying on that activity was liable to make good the loss caused to any other person by that activity. This principle was also followed in Vellore Citizens Welfare Forum v. Union of India, AIR 1996 SC 2715 : (1996) 5 SCC 647: (1996) 7 JT (SC) 375 : (1996 AIR SCW 3399) which has also been discussed in the present case in the main judgment. It was for this reason that the Motel was directed to pay compensation by way of cost for the restitution of the environment ecology of the area. But it is the further direction why pollution fine, in addition, be not imposed which is the subject matter of the present discussion.

17. Chapter VII of the Water (Prevention and Control of Pollution) Act, 1974 contains the provisions dealing with penalties and procedure. This Chapter consists of Sections 41 to 50. Sub-sections (2) and (3) of Section 41 provide for the punishment and imposition of fine. They are quoted below:

> "41.(2) Whoever fails to comply with any order issued under Clause (e) of sub-section (1) of Section 32 or any direction issued by a Court under sub-section (2) of Section 33 or any direction issued under Section 33-A shall in respect of each failure and on conviction, be punishable with imprisonment for a term which shall not be less than one year and six months but which may extend to six years and fine, and in case the failure continues, with an additional fine which may extend to five thousand rupees for every day during which such failure continues after the conviction for the first such failure.
>
> (3) If the failure referred to in sub-section (2) continues beyond a period of one year after the date of conviction, the offender shall, on conviction, be punishable with imprisonment for a term which shall not be less than two years but which may extend to seven years and with fine."

18. Similarly, Section 42 provides that a person shall be liable to be punished with imprisonment for a term which may extend to three months or with fine which may extend to ten thousand rupees or with both.

Sub-section (2) of Section 42 also contemplates imprisonment for a term which may extend to three months or with fine which may extend to ten thousand rupees or with both. Section 43 contemplates penalty for contravention of the provisions of Section 24. Section 44 contemplates penalty for contravention of Section 25 or Section 26. They also contemplate imposition of fine. Section 45 provides that if a person who has been convicted of any offence under Section 24 or Section 25 or Section 26 is again found guilty of an offence involving a contravention of the same provision, he shall, on the second and on every subsequent conviction, be punishable with imprisonment for a term which shall not be less that two years but which may extend to seven years and with fine. Section 45-A provides that whoever contravenes any of the provisions of this Act or fails to comply with any order or direction given under this Act, for which no penalty has been elsewhere provided in this Act, shall be punishable with imprisonment which may extend to three months or with fine which may extend to ten thousand rupees or with both and in the case of continuing contravention or failure, he may be punished with an additional fine. Section 47 contemplates offences by Companies while Section 48 contemplates offences by Government Departments.

19. Section 15 of the Environment (Protection) Act, 1986 provides for penalty for contravention of the provisions of the Act and the rules, orders and directions made thereunder. Sub-section (1) of Section 15 speaks of imprisonment for a term which may extend to five years or with fine which may extend to one lakh rupees, or with both, and in case the failure or contravention continues, with additional fine which may extend to five thousand rupees for every day during which such failure or contravention continues after the conviction for the first such failure or contravention. Section 16 of the Act contemplates offences by the Companies while Section 17 contemplates offences by Government Departments.

20. Chapter VI of the Air (Prevention and Control of Pollution) Act, 1981 contains the provisions for penalties and procedure. This Chapter consists of Sections 37 to 46. Section 37 provides penalties for failure to comply with the provisions of Section 21 or Section 22 or with the directions issued under Section 31-A. It provides that the person shall be punishable with imprisonment for a term which shall not be less than one year and six months but which may extend to six years and with fine, and in case the failure continues, with an additional fine which may extend to five thousand rupees for every day. Sub-section (2) of this Section provides that if the failure continues beyond the period of one year after the date of conviction, the offender shall be punishable with imprisonment for a term which shall not be less than two years but which may extend to seven years and with fine. Section 38 also provides penalties for certain acts and it provides that for such acts as are referred to in that Section, a person shall be punishable with imprisonment for a term which may extend to three months or with fine which may extend to ten thousand rupees or with both. Section 39 contemplates penalty for contravention of certain provisions of the Act and it provides for imprisonment for a term which may extend to three months or with fine which may extend to ten thousand rupees or with both, and in the case of continuing contravention, with an additional fine which may extend to five thousand rupees for every day during which such contravention

continues after conviction for the first such contravention. Section 40 speaks of offences by Companies while Section 41 speaks of offences by Government Departments.

21. All the three Acts, referred to above, also contemplate the taking of the cognizance of the offences by the Court. Thus, a person guilty of contravention of provisions of any of the three Acts which constitutes an offence has to be prosecuted for such offence and in case the offence is found proved then alone he can be punished with imprisonment and fine or both. The sine qua non for punishment of imprisonment and fine is a fair trial in a competent Court. The punishment of imprisonment or fine can be imposed only after the person is found guilty.

22. In the instant case, a finding has been recorded that M/s. Span Motel had interfered with the natural flow of river and thus disturbed the environment and ecology of the area. It has been held liable to pay damages. The quantum of damages is under the process of being determined. The Court directed a notice to be issued to show cause why pollution fine be not imposed. In view of the above, it is difficult for us to hold that the pollution fine can be imposed upon M/s. Span Motel without there being any trial and without there being any finding that M/s. Span Motel was guilty of the offence under the Act and are, therefore, liable to be punished with imprisonment or with FINE. This notice has been issued without reference to any provision of the Act.

23. The contention that the notice should be treated to have been issued in exercise of power under Article 142 of the Constitution cannot be accepted as this Article cannot be pressed into aid in a situation where action under that Article would amount to contravention of the specific provisions of the Act itself. A fine is to be imposed upon the person who is found guilty of having contravened any of the provisions of the Act. He has to be tried for the specific offence and then on being found guilty, he may be punished either by sentencing him to undergo imprisonment for the period contemplated by the Act or with fine or with both. But recourse cannot be taken to Article 142 to inflict upon him this punishment.

24. The scope of Article 142 was considered in several decisions and recently in Supreme Court Bar Association v. Union of India, AIR 1998 SC 1895: (1998) 4 SCC 409: (1998 AIR SCW 1706) by which the decision of this Court in V. C. Mishra, Re, (1995) 2 SCC 584 was partly overruled, it was held that the plenary power of this Court under Article 142 of the Constitution are inherent in the Court and are "COMPLEMENTARY" to those powers which are specifically conferred on the Court by various statutes. This power exists as a separate and independent basis of jurisdiction apart from the statutes. The Court further observed that though the powers conferred on the court by Article 142 are curative in nature, they cannot be construed as powers which authorise the court to ignore the substantive rights of a litigant. The Court further observed that this power cannot be used to "supplant" substantive law applicable to the case or cause under consideration of the court. Article 142 even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby achieve something indirectly which cannot be achieved directly.

25. Similarly, in M.S. Ahlawat v. State of Haryana, AIR 2000 SC 168: (2000) 1 SCC 278: (1999 AIR SCW 4255: 2000 Cri LJ 388) it was held that under Article 142 of the Constitution, the Supreme Court cannot altogether ignore the substantive provisions of a statute and pass orders concerning an issue which can be settled only through a mechanism prescribed in another statute.

26. Thus, in addition to the damages which have to be paid by M/s. Span Motel, as directed in the main Judgment, it cannot be punished with fine unless the entire procedure prescribed under the Act is followed and M/s. Span Motel are tried for any of the offences contemplated by the Act and is found guilty.

27. The notice issued to M/s. Span Motel why pollution fine be not imposed upon them is, therefore, withdrawn. But the matter does not end here.

28. Pollution is a civil wrong. By its very nature, it is a Tort committed against the community as a whole. A person, therefore, who is guilty of causing pollution has to pay damages (compensation) for restoration of the environment and ecology. He has also to pay damages to those who have suffered loss on account of the act of the offender. The powers of this Court under Article 32 are not restricted and it can award damages in a PIL or a Writ Petition as has been held in a series of decisions. In addition to damages aforesaid, the person guilty of causing pollution can also be held liable to pay exemplary damages so that it may act as a deterrent for others not to cause pollution in any manner. Unfortunately, notice for exemplary damages was not issued to M/s. Span Motel although it ought to have been issued. The considerations for which "fine" can be imposed upon a person guilty of committing an offence are different from those on the basis of which exemplary damages can be awarded. While withdrawing the notice for payment of pollution fine, we direct a fresh notice be issued to M/s. Span Motel to show cause why in addition to damages, exemplary damage be not awarded for having committed the acts set out and detailed in the main judgment. This notice shall be returnable within six weeks. This question shall be heard at the time of quantification of damages under the main judgment.

M.C. Mehta v. Union of India
AIR 2000 Supreme Court 2701
Interlocutory Application No. 129 in Interlocutory Application No. 22 in Writ Petition (Civil) No. 4677 of 1985, D/-28-4-2000
B.N. Kirpal and S.S. Mahammed Quadri, JJ.

Delhi Development Act (61 of 1957), S. 15 - Acquisition of land - Supreme Court in 1996 AIR SCW 2621, directed to shift hazardous/noxious/heavy industries in view of master plan - It also directed industries to surrender surplus land - Court did not direct any compensation to be paid in respect of land required to be surrendered - But this element of compensation was clearly present in its mind when it increased Floor Area Ratio and permitted owner to build more than what was permissible

under Master Plan - Therefore, plea that Development Authority is bound to acquire said land under S. 15 after paying compensation, would not be tenable - Further, industries cannot be permitted to raise said contention as they did not raise it earlier.

(Paras 5, 7, 10)

M.C. Mehta v. Union of India
AIR 2000 Supreme Court 3052
Interlocutory Applications Nos. 1243, 1246, 1247, 1248 and 1259 in Interlocutory Application 129 in Interlocutory Application 22 in Writ Petition (Civil) No. 4677 of 1985, D/-29-8-2000
B.N. Kirpal and Mrs. Ruma Pal, JJ.

Environment Pollution Act (29 of 1986), S. 3 - Constitution of India, Art. 32 - Hazardous, noxious industries - Brick kilns in NCT of Delhi - Direction to close or shift and surrender land given by orders in 1996 AIR SCW 2621 and (1988) 9 SCC 149 - Modified so far they related to requirement of surrender of land.

M.C. Mehta v. Union of India
AIR 2000 Supreme Court 3609 (1)
Interlocutory Applications Nos. 1170 in Interlocutory Application 202 in Writ Petition (Civil) No. 4677 of 1985, D/-1-12-1999[1]
G.B. Pattanaik and M.B. Shah, JJ.

Constitution of India, Art. 32 - Industrial Pollution case - Court directing relocations of industries - Workmen directed to be employed and compensated - Grievance of workmen that employment is not on same terms and conditions and, therefore, payment is not being made in accordance with orders passed - Cannot be looked into in interim application filed - Workmen can raise dispute before appropriate Industrial Forum.

Narmada Bachao Andolan v. Union of India
AIR 2000 Supreme Court 3751
Writ Petition (Civil) No. 319 of 1994 with Writ Petition (Civil) Nos. 345 of 1994 and 104 of 1997, Special Leave Petition (Civil) No. 3608 of 1985, Transfer Case (Civil) No. 35 of 1995 and Civil Appeal No. 6014 of 1994, D/-18-10-2000
Dr. A.S. Anand, C. J.I., S.P. Bharucha and B.N. Kirpal, JJ.

(A) Inter-State Water Disputes Act (33 of 1956), S. 5 – Award of Tribunal – Binding nature – Construction of dam on river – Disputes as to height of dam, rehabilitation

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etc. - Decision/directions as to by Tribunal – Binding on States – Not open to third party to challenge correctness thereof.

2000 (3) Scale 505, Rel. on.

Per B.N. Kirpal, J. (for himself and on behalf of Dr. A. S. Anand, CJI) (Majority view).

(B) Constitution of India, Art. 226 - Public interest – Construction of dam on Narmada river (Sardar Sarovar Project) – Cannot be said to be not in national or public interest in view of need of water of increasing population.

Per B. N. Kirpal, J. (for himself and on behalf of Dr. A. S. Anand, CJI) (Majority view). The allegation that the Sardar Sarovar Project was not in the national or public interest is not correct seeing to the need of water for burgeoning population which is most critical and important. The population of India, which is now one billion, is expected to reach a figure between 1.5 billion and 1.8 billion in the year 2050, would necessitate the need of 2788 billion cubic meter of water annually in India to be above water stress zone and 1650 billion cubic metre to avoid being water scarce country. The main source of water in India is rainfall which occurs in about 4 months in a year and the temporal contribution of rainfall is so uneven that the annual averages have very little significance for all practical purposes. According to the Union of India, one-third of the country is always under threat of drought not necessarily due to deficient rainfall but many times due to its uneven occurrence. To feed the increasing population, more food grain is required and effort has to be made to provide safe drinking water, which, at present, is a distant reality for most of the population specially in the rural areas. Keeping in view the need to augment water supply, it is necessary that water storage capacities have to be increased adequately in order to ward off the difficulties in the event of monsoon failure as well as to meet the demand during dry season. It is estimated that by the year 2050 the country needs to create storage of at least 600 billion cubic meter against the existence storage of 174 billion cubic meter. Dams play a vital role in providing irrigation for food security, domestic and industrial water supply, hydroelectric power and keeping flood waters back. On full development, the Narmada has a potential of irrigation over 6 million hectares of land and generating 3000 mw of power.

(Paras 88, 89)

There would be a positive impact on preservation of ecology as a result from the project. The SSP would be making positive contribution for preservation of environment in several ways. The project by taking water to brought – prone and arid parts of Gujarat and Rajasthan would effectively arrest ecological degradation which was returning to make these areas inhabitable due to salinity ingress, advancement of desert, ground water depletion, fluoride and nitrite affected water and vanishing green cover. The ecology of water scarcity areas is under stress and transfer of Narmada Water to these areas will lead to sustainable agriculture and spread of green cover. There will also be improvement of fodder availability which will reduce pressure on biodiversity and vegetation. The SSP by generating clean eco-friendly hydropower will save the air pollution which would otherwise take place by thermal generation power of similar capacity.

(Para 90)

(C) Constitution of India, Art. 226 – Fundamental right – When violated – Construction of dam – Displacement of tribals and other persons – Would not per se violate their fundamental or other rights – Only it is to be seen that on their rehabilitation at new location they are better off than what they were.

Per B. N. Kirpal, J. (for himself and on behalf of Dr. A. S. Anand, CJI) (Majority view).

(Para 91)

(D) Environment (Protection) Act (29 of 1986), S. 3 – Environment clearance – Construction of dam – documents and letters on record showing that Government of India was deeply concerned with environmental aspects of Narmada Sagar and Sardar Sarovar Project – On difference of opinion between ministries, matter referred to Prime Ministers – Series of discussion took place in Prime Minister Secretariat – Conscious decision was taken to grant environmental clearance and in order to ensure that environmental management plans are implemented pari passu with engineering and other works, Narmada Management Authority was directed to be constituted – Prime Minister gave Environmental clearance thereafter – Thus Environmental clearance to Sardar Sarovar Project cannot be said to be given without application of mind.

Per B. N. Kirpal, J. (for himself and on behalf of Dr. A. S. Anand, CJI) (Majority view). (Bharucha, J. Contra).

(Paras 118, 119, 13, 14)

(E) Environment (Protection) Act (29 of 1986), S. 3 – Environmental clearance – Grant of, for construction of dam on Narmada river, Sardar Sarovar Project – Exchange of correspondence between concerned ministries thereafter and conduct of various meetings of Environment Sub-group from time to time under Chairmanship of the Secretary, Ministry of Environment and Forests – Dispels doubt of environment clearance having been lapsed – More so when Environment Sub-group consistently monitoring progress of various environmental works and observing in its minutes of various meetings held from time to time, about its analysis of works done by respective States in matter of the status of studies, surveys and environmental action plans in relation with.

Per B. N. Kirpal, J. (for himself and on behalf of Dr. A. S. Anand, CJI) (Majority view)

(Paras 122, 146)

(F) Environment (Protection) Act (29 of 1986), S. 3 – Environment clearance – For construction of dam on Narmada river – Condition of afforestation – Fact that afforestation if taking place on waste land or lesser quality land – Not a ground to say that forests would be of lesser quality or quantity.

Per B. N. Kirpal, J. (for himself and on behalf of Dr. A. S. Anand. CJI) (Majority view).

(Para 135)

(G) Environment (Protection) Act (29 of 1986), S. 3 – Environment clearance – Construction of dam – Ecological degradation – Burden of proof – Mere change of status in environment – Not sufficient to presume that construction of dam would result in ecological disaster.

Per B. N. Kirpal, J. (for himself and on behalf of Dr. A. S. Anand, CJI) (Majority view). The 'precautionary principle' and the corresponding burden of proof on the person who wants to change the status quo will ordinarily apply in a case of polluting or other project or industry where the extent of damage likely to be inflicted is not known. When there is a state of uncertainty due to lack of data or material about the extent of damage or pollution likely to be caused then, in order to maintain the ecology balance, the burden of proof that the said balance will be maintained must necessarily be on the industry or the unit which is likely to cause pollution. On the other hand where the effect on ecology or environment of setting up of an industry is known, what has to be seen is that if the environment is likely to suffer, then what mitigative steps can be taken to off set the same. Merely because there will be a change is no reason to presume that there will be ecological disaster. It is when the effect of the project is known then the principle of sustainable development would come into play which will ensure that mitigative steps are and can be taken to preserve the ecological balance. Sustainable development means what type or extent of development can take place which can be sustained by nature/ecology with or without mitigation. In the instant case what is being constructed is a large dam. The dam is neither a nuclear establishment nor a polluting industry. The construction of a dam undoubtedly would result in the change of environment but it will not be correct to presume that the construction of a large dam like the Sardar Sarovar will result in ecological disaster. India has an experience of over 40 years in the construction of dams. The experience does not show hat construction of large dam is not cost effective or leads to ecological or environmental degradation. On the contrary there has been ecological upgradation with the construction of large dams. What is the impact on environment with the construction of a dam is well-known in India.

(Paras 150. 151)

(H) Constitution of India, Art. 21 –Right of life – Construction of dam (Sardar Sarovar Project) – Environment clearance – Grant of – Mere change in environment – Does not per se violate right under Art.21 – More so when steps were taken to improve ecology, environment and rehabilitation in case of displacement.

Environment (Protection) Act (29 of 1986), S. 3.

Per B. N. Kirpal, J. (for himself and on behalf of Dr. A. S. Anand, CJI) (Majority view). In India notification had been issued under S. 3 of the Environmental Act regarding prior environmental clearance in the case of undertaking of projects and setting up of industries including Inter – State River Project. In the instant case the notification granting environment clearance to the Sardar Sarovar Project has been made effective from 1994. There was, at the time when the environmental clearance was granted in 1987, no obligation to obtain any statutory clearance. The environmental clearance which was granted in 1987 was essentially administrative in nature, having regard and concern of the environment in the region. Change in environment does not per se violate any right

under Art. 21 of the Constitution of India especially when ameliorative steps are taken not only to preserve but to improve ecology and environment and in case of displacement, prior relief and rehabilitation measures take place pari passu with the construction of the dam. At the time when the environmental clearance was granted by the Prime Minister whatever studies were available were taken into consideration. It was known that the construction of the dam would result in submergence and the consequent effect which the reservoir will have on the ecology of the surrounding areas was also known. Various studies relating to environmental impact, some of which have been referred to earlier in this judgment, had been carried out. There are different facts of environment and if in respect of a few of them adequate data was not available it does not mean that the decision taken to grant environmental clearance was in any way vitiated. The clearance required further studies to be undertaken and has been and is being done. Care for environment is an on going process and the system in place would ensure that ameliorative steps are taken to counter the adverse effect, if any, on the environment and the construction of the dam.

(Paras 153, 154)

(I) Environment (Protection) Act (29 of 1986), S. 3 – Environment clearance – Construction of dam (Sardar Sarovar Project) – Clearance granted in 1987 – Procedure for obtaining it prescribed in 1994 – Would not be applicable retrospectively to project whose construction commenced nearly eight years prior thereto.

Per B. N. Kirpal, J. (for himself and on behalf of Dr. A. S. Anand, CJI) (Majority view). The notification under S. 3 of the Environment Protection Act cannot be regarded as having any retrospective effect. This notification is clearly prospective and inter alia prohibits the undertaking of a new project listed in Schedule I without prior environmental clearance of the Central Government in accordance with the procedure now specified. In the present case of Sardar Sarovar Project clearance was given by the Central Government in 1987 and at that time no procedure was prescribed by any statute, rule or regulation. The procedure now provided in 1994 for getting prior clearance cannot apply retrospectively to the project whose construction commenced nearly eight years prior thereto.

(Para 157)

(J) Inter-State Water Disputes Act (33 of 1956), S. 5 – Award of tribunal – Dam on river Narmada (Sardar Sarovar Project) – Re-settlement and rehabilitation packages for oustees in three affected States – Need not be to the same extent and at same time – States cannot be faulted if packages offered though not identical, is more liberal than one envisaged by Tribunal's award.

Per B. N. Kirpal, J. (for himself and on behalf of Dr. A. S. Anand, CJI) (Majority view), Re – settlement and rehabilitation packages in the three States in regard to the oustees of Sardar Sarovar Project (dam on river Narmada) were different due to different geographical, local and economic conditions and availability of land in the States. The liberal packages available to the Sardar Sarovar Project oustees in Gujarat are not even available to the project affected people of other projects in Gujarat. It is incorrect to say

that the difference in R & R packages, the package of Gujarat being the most liberal, amounts to restricting the choice of the oustees. Each State has its own packages and the oustees have an option to select the one which was most attractive to them. A project affected family may, for instance, chose to leave its home State of Madhya Pradesh in order to avail the benefits of more generous packages of the State of Gujarat while other PAFs (Project Affected Families) similarly situated may opt to remain at home and take advantage of the less liberal package of the State of Madhya Pradesh. There is no requirement that the liberalisation of the packages by three States should be to the same extent and at the same time, the States cannot be faulted if the package which is offered, though not identical with each other, is more liberal than the one envisaged in the Tribunal's Award.

(Para 193)

(K) Inter State water Disputes Act (33 of 1956), S. 5 – Sardar Sarovar Project – Rehabilitation packages – All those who are entitled to be rehabilitation as per the Award will be provided with benefits of the package offered and chosen – Therefore it is neither necessary nor possible to decide number of persons who were living in submergence area and were not farmers and would lose their livelihood due to loss of community and/or loss of river.

Per B. N. Kirpal, J. (for himself and on behalf of Dr. A. S. Anand, CJI) (Majority view).

(Para 194)

(L) Inter State Water Disputes Act (33 of 1956), S. 5 – Sardar Sarovar Project – Rehabilitation packages – Relief to canal affected people – State would not be required to give same relief as would be given to oustees of submergence area (Per Court).

(Paras 3, 196)

(M) Inter State Water Disputes Act (33 of 1956), S. 5 – Award of Tribunal – Interpretation – Award contemplating re-settlement of oustees of Sardar Sarovar Project at places where civic amenities are available – Does not mean oustees families should be resettled as homogenous group in village exclusively set up for each group.

Per B. N. Kirpal, J. (for himself and on behalf of Dr. A. S. Anand, CJI) (Majority view). In the instant case what the Award of the Tribunal required is re-settlement of the Project Affected Families (PAs) of Sardar Sarovar Project in Gujarat at places where civic amenities like dispensary, schools are available. Subsequent to the Tribunal's Award, on the recommendation of the World Bank, the Government of Gujarat adopted the principle of re-settlement that the oustees shall be relocated as village units, village sections or families in accordance with the outstees preference. The oustees choice has actively guided the re-settlement process. The requirement in the Tribunal's Award was that the Gujarat shall establish rehabilitation villages in Gujarat in the irrigation command of the Sardar Sarovar Project on the norms mentioned for rehabilitation of the families who were willing to migrate to Gujarat. This provision could not be interpreted to mean that

the oustees families should be resettled as a homogeneous group in a village exclusively set up for each such group. The concept of community wise re-settlement, therefore, cannot derive support from the above quoted stipulation. Besides, the norms referred to in the stipulation relate to provisions for civic amenities. They vary as regards each civic amenity vis-a-vis the number of oustees families. Thus, one panchayat ghar, one dispensary, one children's' park, one seed store and one village pond is the norm for 500 families, one primary school (3 rooms) for 100 families and a drinking water well with trough and one platform for every 50 families. The number of families to which the civic amenities were to be provided was thus not uniform a standardised pattern for the establishment of a site which had nexus with the number of oustees' families of a particular community or group to be resettled. These were not indicators envisaging re-settlement of the oustees families on the basis of tribes, sub-tribes, groups or sub-groups. While re-settlement as a group in accordance with the oustees preference was an important principle/objective, the other objectives were that the oustees should have improved or regained the standard of living that they were enjoying prior to their displacement and they should have been fully integrated in the community in which they were re-settled. These objectives were easily achievable if they were re-settled in the commence area where the land was twice as productive as the affected land and where large chunks of land were readily available. This was what the Tribunal's Award stipulated and one objective could not be seen in isolation of the other objectives. The Master Plan, 1995 of Narmada Control Authority also pointed out that "the Bhils, who are individualistic people building their houses away from one another, are getting socialised; they are learning to live together". Looking to the preferences of the affected people to live as a community, the Government of Gujarat has basically relied on the affected families decision as to where they would like to relocate, instead of forcing them to relocate as per a fixed plan.

(Paras 197 to 200)

The underlined principle in forming the R&R policy was not merely of providing land for PAFs but there was a conscious effort to improve the living conditions of the PAFs and to bring them into the mainstream. If one compares the living conditions of the PAFs in their submerging villages with the rehabilitation packages first provided by the Tribunal's Award and they liberalised by the States, it is obvious that the PAFs had gained substantially after their re-settlement. It is for this reason that in the Action Plan of 1993 of the Government of Madhya Pradesh it was stated before this Court that "therefore, the re-settlement and rehabilitation of people whose habitat and environment makes living difficult does not pose any problems and so that the rehabilitation and re-settlement does not pose a threat to environment".

(Para 201)

(N) Inter State Water Disputes Act (33 of 1956), S. 5 – Sardar Sarovar Project-Rehabilitation of oustees – Under Award sons in families becoming major one year prior to issuance of notification for land acquisition in 1981-82 were entitled to be allotted land – However State of Gujarat made relaxation so as to cover all those who become major up to 1-1-87 – Said relaxation of cut off date so as to give age of majority at a later date, cannot be faulted or criticised.

Per B. N. Kirpal, J. (for himself and on behalf of Dr. A. S. Anand, CJI) (Majority view).

(Para 203)

(O) Inter State Water Disputes Act (33 of 1956), S. 5 – Award of tribunal – Compliance – Concerned State governments established Relief and Rehabilitation Group and Constituted Grievances Redressal Authorities – Thus review of Project by some independent agency, not necessary.

Per B. N. Kirpal, J. (for himself and on behalf of Dr. A. S. Anand, CJI) (Majority view). It cannot be said that it would be necessary to review the Sardar Sarovar Project and that an independent agency should monitor the R&R of the oustees. The Tribunal's Award is final and binding on the States. The machinery of Narmada Control Authority has been envisaged and constituted under the Award itself. It is not possible to accept that Narmada Control Authority is not to be regarded as an independent authority. Of course some of the members are Government Officials but apart from the Union of India, the other States are also represented in this Authority. The project is being undertaken by the Government and it is for the Governmental authorities to execute the same. With the establishment of the R&R Sub-group and constitution of the Grievances Redressal Authorities by the States of Gujarat, Maharashtra and Madhya Pradesh, there is a system in force which will ensure satisfactory re-settlement and rehabilitation of the oustees. There is no basis for contending that some outside agency or National Human Rights Commission should see to the compliance of the Tribunal Award.

(Para 204)

(P) Constitution of India, Art. 32 – Latches – Policy decision by Govt. as to construction of dam – Challenged after commencement of execution of project – Liable to be thrown out on ground of latches – Fact that challenge was made by way of public interest litigation – Would be of no relevance.

Per B. N. Kirpal, J. (for himself and on behalf of Dr. A. S. Anand, CJI) (Majority of view). Where the Govt. in view of its policy decision to construct the dam (Sardar Sarovar Project) on river Narmada, had granted the environment clearance after conducting studies, the petition opposing the construction of dam filed by way of public interest litigation after commencement of execution of project would be barred by latches. The Courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infra-structural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy making process and the Courts are ill equipped to adjudicate on a policy decision so undertaken. The Court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution. Even then any challenge to such a policy decision must be before the execution of the project is undertaken. Any delay in the execution of the project means over run in costs and the decision to undertake a project, if challenged after it's execution has commenced, should be thrown out at the very threshold on the ground of latches if the petitioner had the knowledge of such a decision and could have approached the Court at that time. Just because a petition is termed as a PIL does not

mean that ordinary principles applicable to litigation will not apply. Latches is one of them. Public Interest Litigation (PIL) was an innovation essentially to safeguard and protect the human rights of those people who were unable to protect themselves. With the passage of time the PIL Jurisdiction has been ballooning so as to encompass within its ambit subjects such as probity in public life, granting of largess in the form of licences, protecting environment and the like. But the balloon should not be inflated so much that it bursts. Public Interest Litigation should not be allowed to degenerate to becoming Publicity Interest Litigation or Private Inquisitiveness Litigation.

(Paras 77 to 80, 255, 256)

Per Bharucha, J. (dissenting). When the public interest is so demonstrably involved, it would be against public interest to decline relief only on the ground that the Court was approached belatedly.

(Para 27)

(Q) Constitution of India, Art. 32 – Policy decision – Construction of dam (Sardar Sarovar Project) – Petition claiming welfare of oustees – Govt. had already constituted Authority to implement award of Tribunal and sub-group formed to look after grievances of oustees – Grievances Redressal machinery was also set up – It cannot be assumed that these authorities would not function properly-Court has no role to play.

Per B. N. Kirpal, J. (for himself and on behalf of Dr. A. S. Anand, CJI) (Majority view). Once a considered decision to start a project is taken, the proper execution of the same should be taken expeditiously. It is for the Government to decide how to do its job. When it has put a system in place for the execution of a project and such a system cannot be said to be arbitrary, then the only role which a Court may have to play is to see that the system works in the manner it was envisaged. A project may be executed departmentally or by an outside agency. The choice has to be of the Government. When it undertakes the execution itself, with or without the help of another organisation, it will be expected to undertake the exercise according to some procedure or principles. In the instant case the Narmada Control Authority, was constituted to give effect to the Award of Tribunal in regard to Sardar Sarovar Project, various sub-groups have been established under the NCA and to look after the grievances of the resettled oustees each State has set up a Grievance Redressal Machinery. Over and above the NCA is the Review Committee. There is no reason now to assume that these authorities will not function properly. The Court should have no role to play.

(Paras 253, 254)

(R) Constitution of India, Art. 32 – Judicial review – Scope Policy decision by Govt. as to construction of dam (Sardar Sarovar Project) – Execution – No material to show that decision was mala fide – Court cannot go into the matter afresh and interfere with execution of project.

Per B. N. Kirpal, J. (for himself and on behalf of Dr. A. S. Anand, CJI) (Majority view). In matters of policy the Court will not interfere. When there is a valid law requiring the Government to act in a particular manner the Court ought not to, without striking down

the law, give any direction which is not in accordance with law. In other words, the Court itself is not above the law. In respect of public projects and policies which are initiated by the Government the Court's should not become an approval authority. Normally such decisions are taken by the Government after due care and consideration. In a democracy welfare of the people at large, and not merely of a small section of the society, has to be the concern of a responsible Government. If a considered policy decision has been taken, which is not in conflict with any law or is not mala fide, it will not be in Public Interest to require the Court to go into and investigate those areas which are the function of the executive. For any project which is approved after due deliberation the Court should refrain from being asked to review the decision just because a petitioner in filing a PIL alleges that such a decision should not have been taken because an opposite view against the undertaking of the project, which view may have been considered by the Government, is possible. When two or more options or view are possible and after considering them the Government takes a policy decision it is then not the function of the Court to go into the matter afresh and, in a way, sit in appeal over such a policy decision.

(Paras 259, 260)

The facts in the instant case clearly indicate that the Central Government had taken a decision to construct the Dam on river Narmada (Sardar Sarovar Project) as that was the only solution available to it for providing water to water scare areas. It was known at that time that people will be displaced and will have to be rehabilitated. There is no material to enable the Court to come to the conclusion that the decision was mala fide. A hard decision need not necessarily be a bad decision. Furthermore environment concern has not only to be of the area which is going to be submerged and is surrounding area. The impact on environment should be seen in relation to the project as a whole. While an area of land will submerge but the construction of the Dam will result in multifold improvement in the environment of the areas where the canal waters will reach. Apart from bringing drinking water within easy reach the supply of water to Rajasthan will also help in checking the advancement of the Thar Desert. Human habitation will increase there which, in turn, will help in protecting the so far porous border with Pakistan. While considering Gujarat's demand for water, the Government had reports that with the construction of a high dam on the river Narmada, water could not only be taken to the scarcity areas of Northern Gujarat, Saurashtra and parts of Kutch but some water could also be supplied to Rajasthan. Conflicting rights had to be considered. If for one set of people namely those of Gujarat, there was only one solution, namely, construction of a dam, the same would have an adverse effect on another set of people whose houses and agricultural land would be submerged in water. It is because of this conflicting interest the considerable time was taken before the project was finally cleared in 1987. Perhaps the need for giving the green signal was that while for the people of Gujarat, there was no other solution but to provide them with water from Narmada, the hardships of oustees from Madhya Pradesh could be mitigated by providing them with alternative lands, sites and compensation. In governance of the State, such decisions have to be taken where there are conflicting interests. When a decision is taken by the Government after due consideration and full application of mind, the Court is not to sit in appeal over such decision.

(Paras 261 to 264)

In the case of projects of national importance where Union of India and/or more than one State (s) are involved and the project would benefit a large section of the society and there is evidence to show that the said project had been contemplated and considered over a period of time at the highest level of the States and the Union of India and more so when the project is evaluated and approval granted by the Planning Commission, then there should be no occasion for any Court carrying out any review of the same or directing its review by any outside or "independent" agency or body. In a democratic set up, it is for the elected Govt. to decide what project should be undertaken for the benefit of the people. Once such a decision had been taken that unless and until it can be proved or shown that there is a blatant illegality in the undertaking of the project or in its execution, the Court ought not to interfere with the execution of the project.

(Para 266)

Displacement of people living on the proposed project sites and the areas to be submerged is an important issue. Most of the hydrology projects are located in remote and in-accessible areas, where local population is, like in the present case, either illiterate or having marginal means of employment and the per capita income of the families is low. It is a fact that people are displaced by projects from their ancestral homes. Displacement of these people would undoubtedly disconnect them from their past, culture, custom and traditions, but then it becomes necessary to harvest a river for larger good. In the instant case, the R&R, Relief and Rehabilitation packages of the States, specially of Gujarat, are such that the living conditions of the oustees will be much better than what they had in their tribal hamlets.

(Para 267)

So far a number of such river valley projects have been undertaken in all parts of India. The petitioner has not been able to point out a single instance where the construction of a Dam has, on the whole, had an adverse environmental impact. On the contrary the environment has improved. That being so there is no reason to suspect, with all the experience so far, that the position here will be any different and there will not be overall improvement and prosperity. It should not be forgotten that poverty is regarded as one of the causes of degradation of environment. With improved irrigation system the people will prosper.

(Para 270)

(S) Inter State Water Disputes Act (33 of 1956), S. 5 – Construction of dam (Sardar Sarovar Project) – Award of Tribunal – Is binding on States – Its implementation can be ensured by Supreme Court by issuing time bound by directions – Putting projects on hold is no solution, in case of short fall in carrying out relief and rehabilitation measures as regards oustees.

Per B. N. Kirpal, J. (for himself and on behalf of Dr. A. S. Anand, CJI) (Majority view). The Award of the Tribunal regarding construction of Sardar Sarovar Project on river Narmada is binding on the States concerned. The said Award also envisages the relief and rehabilitation measures which are to be undertaken. If for any reason, any of the State Governments involved lag behind in providing adequate relief and rehabilitation then the proper course, for a Court to take, would be to direct the Award's implementation and not

to stop the execution of the project. Supreme Court, as a Federal Court of the country specially in a case of inter-State river dispute where an Award had been made, has to ensure that the binding Award is implemented. In this regard, the Court would have the jurisdiction to issue necessary directions to the State which, though bound, chooses not to carry out its obligations under the Award. Just as an ordinary litigant is bound by the decree, similarly a State is bound by the Award. Just as the execution of a decree can be ordered, similarly, the implementation of the Award can be directed. If there is a short fall in carrying out the R&R measures, a time bound direction can and should be given in order to ensure the implementation of the Award. Putting the project on hold is no solution. It only encourages recalcitrant Sate to flout and not implement the award with impunity. This certainly cannot be permitted. Nor is it desirable in the national interest that where fundamental right to life of the people who continue to suffer due to shortage of water to such an extent that even the drinking water becomes scarce, non-co-operation of a State results in the stagnation of the project.

(Para 271)

(T) Constitution of India, Art. 32 – Policy decision – Construction of dam (Sardar Sarover Project) – Plea for reduction of dam's height – Govt. on considering various factors determined height of dam to be 455 ft. with capability of developing hydel power generation – Cannot be interfered with by Court.

Per B. N. Kirpal, J. (for himself and on behalf of Dr. A. S. Anand, CJI) (Majority view). In the instant case of Govt. considered various factors and took decision and the Award of the Tribunal was also passed determining the height of Sardar Sarovar Project on river Narmada to be 455 ft. in order to develop hydel power generation. The State of Madhya Pradesh is keen for the reduction of the dam's height to 436 ft. Apart from Gujarat and Rajasthan the State of Maharashtra also is not agreeable to this. The only benefit from the project which Rajasthan get is it's share of hydel power from the project. The lowering of the height from 455 ft. to 436 ft. will take away this benefit even though 9399 hectares of it's land will be submerged. With the reduction of height to 436 ft. not only will there be loss of power generation but it would also render the generation of power seasonal and not throughout the year. One of the indicators of the living standard of people is the per capita consumption of electricity. There is, however, perennial shortage of power in India and, therefore, it is necessary that the generation increases. The world over, countries having rich water and river systems have effectively exploited these for hydel power generation. In India, the share of hydel power in the total power generated was as high as 50% in the year 1962-63 but the share of hydel power started declining rapidly after 1980. There is more reliance now on thermal power projects. But these thermal power projects use fossil fuels, which are not only depleting fast but also contribute towards environmental pollution. Global warming due to the greenhouse effect has become a major cause of concern. One of the various factors responsible for this is the burning of fossil fuel in thermal power plants. There is, therefore, international concern for reduction of greenhouse gases which is shared by the World Bank resulting in the restriction of sanction of funds for thermal power projects. On the other hand, the hydel power's contribution in the greenhouse effect is negligible and it can be termed ecology friendly.

Not only this but the cost of generation of electricity in hydel projects is significantly less. The Award of the Tribunal has taken all these factors into consideration while determining the height of the dam at 455 ft. Giving the option of generating eco-friendly electricity and substituting it by thermal power may not, therefore, be the best option. Perhaps the setting up of a thermal plant may not displace as many families as a hydel project may but at the same time the pollution caused by the thermal plant and the adverse effect on the neighbourhood could be far greater than the inconvenience caused in shifting and rehabilitating the oustees of a reservoir. There is and has been in the recent past protests and agitations not only against hydel projects but also against the setting up of nuclear or thermal power plants. In each case reasons are put forth against the execution of the proposed project either as being dangerous (in case of nuclear) or causing pollution and ecological degradation (in the case of thermal) or rendering people homeless and possess adverse environment impacts as has been argued in the recent case. But then electricity has to be generated and one or more of these options exercised. What option to exercise, in our Constitutional framework, is for the Government to decide keeping various factors in mind. In the present case, a considered decision has been taken and an Award made whereby a high dam having an FRL of 455 ft. with capability of developing hydel power to be constructed. In the facts and circumstances enumerated hereinabove, even if this Court could go into the question, the decision so taken cannot be faulted.

(Paras 277, 278, 279)

(U) Constitution of India, Arts. 32, 21 – Construction of dam (Sardar Sarovar Project)-Award of Tribunal – Protection of right of oustees under Art. 21 – Supreme Court issued directions for completion of project at earliest – And. for ensuring compliance with conditions on which environment clearance was given to project, including completion of relief and rehabilitation work.

Per B. N. Kirpal, J. (for himself and on behalf of Dr. A. S. Anand, CJI) (Majority view). In a petition challenging the construction of dam on river Narmada (Sardar Sarovar Project) the Supreme Court issued the directions in view of two principles (i) the completion of project at the earliest and (ii) ensuring the compliance with conditions on which clearance of the project was given including completion of relief and rehabilitation work and taking of ameliorative and compensatory measures for environmental protection in compliance with the scheme framed by the Government thereby protecting the rights under Art. 21 of the Constitution. The directions are as follows :- (I) Construction of the dam will continue as per the Award of the Tribunal. (2) As the Relief and Rehabilitation Sub-group has cleared the construction up to 90 meters, the same can be undertaken immediately. Further raising of the height will be only pari passu with the implementation of the relief and rehabilitation and on the clearance by the Relief and Rehabilitation Sub-group. The Relief and Rehabilitation Sub-group will give clearance of further construction after consulting the three Grievances Redressal Authorities. (3) The Environment Sub-group under the Secretary, Ministry of Environment and Forest, Government of India will consider and give, at each stage of the construction of the dam, environment clearance before further construction beyond 90 meters can be undertaken.

(4) The permission to raise the dam height beyond 90 meters will be given by the Narmada Control Authority, from time to time, after it obtains the abovementioned clearances from the Relief and Rehabilitation Sub-groups and the Environment Sub-group. (5) The reports of the Grievances Redressal Authorities, and of Madhya Pradesh in particular, shows that there is a considerable slackness in the work of deification of land, acquisition of suitable land and the consequent steps necessary to be taken to rehabilitate the project oustees. Court directed the States of Madhya Pradesh, Maharashtra and Gujarat to implement the Award and give relief and rehabilitation to the oustees in terms of the packages offered by them and these States shall comply with any direction in this regard which is given either by the NCA or the Review Committee or the Grievance Redressal Authorities, (6) Even though there has been substantial compliance with the conditions imposed under the environment Sub-group will continue to monitor and ensure that all steps are taken not only to protect but to restore and improve the environment. (7) The NCA will within four weeks from today draw up an Action Plan in reflection to farther construction and the relief and rehabilitation work to be undertaken. Such an Action Plan will fix a time frame so as to ensure relief and rehabilitation pari passu with the increase in the height of the dam. Each State shall abide by the terms of the action plan so prepared by the NCA and in the event of any dispute or difficulty arising, representation may be made to the Review Committee. However, each State shall be bound to comply with the directions of the NCA with regard to the acquisition of land for the purpose of relief and rehabilitation to the extent and within the period specified by the N.C.A. (8) The Review Committee shall meet whenever required to do so in the event of there being any un-resolved dispute on an issue which is before the NCA. In any event the Review Committee shall meet at least once in three months so as to oversee the progress of construction of the dam and implementation of the R&R programmes. If for any reason serious differences in implementation of the Award arise and the same cannot be resolved in the Review Committee, the Committee may refer the same to the Prime Minister whose decision, in respect thereof, shall be final and binding on all concerned. (9) The Grievance Redressal Authorities will be at liberty, in case the need arises, to issue appropriate directions to the respective States for due implementation of the R&R programmes and in case of non implementation of its directions, the GRAs will be at liberty to approach the Review Committee for appropriate orders. (10) Every endeavor shall be made to see that the project is completed as expeditiously as possible.

(Para 280)

Per Bharucha, J. (Minority view) When the project obtains environmental clearance, each of the Grievance Redressal Authorities of the concerned States must certify, after inspection, before work on the further construction of the dam can begin, that all those ousted by reason of the increase in the height of the dam by 5 meters from its present level have already been satisfactorily rehabilitated and also that suitable vacant land for rehabilitating all those who will be ousted by the increase in the height of the dam by another 5 meters is already in the possession of the respective States; and this process must be repeated for every successive proposed 5 meters increase in the dam height – It was further directed that if project is not completed all oustees who have been rehabilitated must have the option to continue to reside where they have been

rehabilitated or to return to where they were ousted from, provided such place remains habitable, and they must not be made at all liable in monetary or other terms on this account.

(Paras 24, 26)

Cases Referred :	**Chronological Cases**
State of Karnataka v. State of Andh Pra, 2000 (3) SCALE 505: 2000 (4) Supreme 39 (Rel. on.)	82
A. P. Pollution Control Board v. Prof. M. V. Nayadu, 1999 AIR SCW 434 : AIR 1999 SC 812 : (1999) 2 SCC 718	147, 151
People's Union for Civil Liberties v. Union of India, 1997 AIR SCW 1234: AIR 1997 SC 1203: (1997) 3 SCC 433	82
Vellore Citizens Welfare Forum v. Union of India, 1996 AIR SCW 3399: AIR 1996 SC 2715: (1996) 5 SCC 647	149
Consumer Education and Research Centre v. Union of India, 1995 AIR: SCW 759: AIR 1995 SC 922 : (1995) 3 SCC 42	82
B. D. Sharma v. Union of India, 1992 Suppl (3) SCC 93	168, 206
Gramophone Co. of India Ltd. v. B. B. Pandey, AIR 1984 SC 667 : (19984) 2 SCC 534	82
Tennessee Valley Authority v. Hiram G. Hill, (1978) 437 US 153: 57 Law Ed 2d 117	155,156
Sierra Club et v. Robert F. Froehlka, (1973) 350 bf Supp 1260	152
Arlington Coalition on Transportation v. John A. Volpe, (1972) 458 F 2d 1323	157
Environmental Defence Fund Inc. v. Corps of Engineers of United States Army, (1971) 325 F. Supp 749	157

BHARUCHA, J.:- I have read the judgment proposed to be delivered by my learned brother, the Hon'ble Mr. Justice B.N. Kirpal. Respectfully, I regret my inability to agree therewith.

2. I do not set out the facts here: they are detailed in Brother Kirpal's judgment.

3. I take the view that the Sardar Sardar Sarovar Project does not require to be re-examined, having regard to its cost effectiveness or otherwise, and that the seismicity aspect of the Project has been sufficiently examined and no further consideration thereof is called for. I do not accept the submission on behalf of the petitioner that those ousted by reason of the canals emanating from the reservoir in the Project must have the same

relief and rehabilitation benefits as those ousted on account of the reservoir itself, this is for the reason that the two fall in different classes.

4. Having said this, I turn to the aspect of the environmental clearance of the Project. The Planning Commission accorded provisional sanction to the Project subject to the environment clearance thereof being obtained. At the relevant time, the responsibility for giving environmental clearance lay with the Department of Environment in the Ministry of Environment and Forests of the Union government. The department has in January, 1985 issued Guidelines for Environmental Impact Assessment of River Valley Projects. The Preface thereof stated that environmental appraisal was an important responsibility assigned to the Department. It involved the evaluation of the environmental implications of and the incorporation of necessary safeguards in activities having a bearing on environmental quality. While river valley projects were a basic necessity to a country whose economy was largely based on agriculture, over the years the realization had dawned that river valley projects had their due quota of positive and adverse impacts which has to be carefully assessed and balanced for achieving sustained benefits. Therefore, it had been decided in the late 70s that all river valley projects should be subjected to a rigorous assessment of their environmental impact so that necessary mitigative measures could be duly incorporated therein at the inception state. The Guidelines set out the procedure to be adopted for carrying out environmental impact assessments. In the Chapter headed Relevance of Environmental Aspects for River Valley Development Projects, the Guidelines stated, "Concern for environmental pollution is rather a recent phenomenon which has been triggered mainly by the backlash effect to accelerated industrial growth in the developed countries. The two major criteria - the project should maximize economic returns and it should be technically feasible - are no longer considered adequate to decide the desirability or even the viability of the project. It is now widely recognised that the development effort may frequently produce not only sought for benefits, but other - often unanticipated - undesirable consequences as well which may nullify the socio-economic benefits for which the project is designed." After reference to the strong felling that were often expressed in favour of measures that would provide the provision of adequate food and shelter to the millions, the Guidelines stated, "Such strong feelings are easy to understand in the context of the prevailing economic stagnation. It does not, however, follow that the arguments advanced are valid. The basic flaw in these arguments is that they presume incompatibility between environmental conservation and the development effort". Apart from some selected cases where the uniqueness of the natural resources like wildlife, flora and genetic pool, which demanded exclusive earmarking of a given region for their specific use, the majority of cases did not call for a choice between development projects and preservation of the natural environment; but in all cases there was great need to consider the environmental aspects along with other feasibility considerations. It was imperative to analyse whether the adoption of environmental measures was going to result in any short or long-term social or economic benefits. A careful study of the direct costs involved, which would be caused by the absence of environmental imitative measures on river valley projects, was an eye-opener. These included effects on health plant genetic resources, aquatic resources, water-logging and salinity of irrigated soils, deforestation and soil

conservation. During the planning and feasibility assessment stages, several factors has to be taken into account, including short and long term impact on population and human settlements in the inundated and watershed areas, flora and fauna (wildlife) in the vicinity, wildlife, including birds, national parks and sanctuaries, on sites and monuments of historical, cultural and religious significance and on forests, agriculture, fisheries and recreation and tourism. Requisite data for impact assessment was not readily available, this being relatively a new discipline, and it had to be generated through necessary filed surveys as:

> "-Pre-impoundment census of flora & fauna, particularly the rare & endangered species, in submergence areas;
> - Census of animal population and available grazing areas;
> - Land-use pattern in the area with details of extent & type of forest;
> - Pre-impoundment survey of fish habitat and nutrients levels;
> - Groundwater level, its quality, and existing water use pattern;
> - Mineral resources, including injurious minerals, in the impoundment;
> - Living conditions of affected tribals/aboriginals etc.

The cost of proposed remedial and mitigative measures to protect measures to protect the environment had to be included in the project cost. Mitigative measures included, among other things, compensatory afforestation. Only when the incorporation of environmental aspects in the project planning was made a part and parcel of all river valley projects would there be hope to protect and preserve "our natural environment and fulfil the objective of rapid economic development on the sustained basis while safeguarding the natural resources including the air, water, land, flora and fauna for the benefit of present and future generations." The necessary data that was required to be collected for impact assessment was set out in the Guidelines. A chart of the impact assessment procedure was also contained in the Guidelines.

5. It appears that though it ought rightly to have been taken by the Ministry of Environment and Forests, the decision whether or not to accord environmental clearance to the Project was left to the Prime Minister.

6. A Note was prepared by the Ministry of Water Resources in or about October, 1986 on the environmental aspects of the Sardar Sarovar and the Narmada Sagar Multi Purpose Projects. It stated that a decision on the clearance of these projects from the environmental angle and under the Forest Conservation Act, 1980 had become a matter of urgency. Delays had occurred which had necessitated a recasting of the schedule. The Ministry of Environment and Forests had been doing its best to expedite the process of examination and clearance "but have been finding the material submitted inadequate and unsatisfactory.....". While the State Governments had done their best to meet the requirements, "some of the information and action will necessarily take time and will have to proceed *pari passu* with the implementation of the project, which in any case will take a decade or more to complete. "The Note stated that the Ministry of Water Resources shared the concerns and anxieties of the Ministry of Environment and Forests, as also the sense of urgency of the Governments of Gujarat and Madhya Pradesh, who felt that it was urgently necessary to take a decision in regard to the clearance. Under the

sub-heading, “Should the projects be taken up at all?”, the Note stated that the abandonment of the projects would mean the abandonment of the generation of 2450 MW of power and the possibilities of economic development, which that quantum of power would bring, as also increased agricultural production resulting from the creation of an irrigation potential of 2,041 million hectares. No effective alternatives to the two projects were available. Reference to the adverse environmental impact of the projects carried the implicit assumption that if the projects were not sanctioned the status quo would remain and there would be no deterioration of the environment. Such an assumption was not warranted. Despite the submergence of land and displacement of people and livestock, there was no case for the abandonment of the projects. What needed to be done was to take appropriate and adequate counter measures to off-set the environmental impact of the projects. The Note then gave a broad picture of the likely environmental impact of the two projects. In respect of the flora and fauna, it said, “Quantified data not yet available”. In respect of the possibility of soil erosion from the catchment leading to excessive siltation of the reservoirs, it said, “Extent of critically degraded area needing treatment to be identified”. Specifically in respect of the Sardar Sarovar Project, the Note said that for the area to be submerged in Maharashtra, the Maharashtra Government had proposed compensatory afforestation over an area of 6490 hectares of the denuded forest in the impact area. In respect of fauna, the Note said that the Narmada Sagar Project authorities had commissioned a wildlife census of the areas by the Zoological Survey of India and were negotiating terms with the Indian Institute of Wildlife Management, Dehradun, for carrying out detailed wildlife studies for re-location purposes. They proposed to undertake all necessary steps to minimise the adverse impact of the Project on wildlife. Gujarat and Maharashtra were also taking similar action with the help of specialised agencies. In respect of the Projects’ flora, the Note said that the first preliminary survey in the area by the Botanical Survey of India was started in December, 1985 and it was estimated that the survey would take two to three years to be completed. In respect of catchment area treatment, the Note said that field surveys were likely to be started shortly. The Project authorities had identified three representative pilot project areas. The biological and engineering measures to be adopted in the treatment of the balance of the catchment area would be designed on the basis of the experience to be gained from these pilot projects. Under the Sub-heading. “What still remains to be done”, the Note stated, “While some plans have been made, studies undertaken and action initiated, it will be clear from the preceding paragraphs that much still remains to be done. Indeed, it is the view of the Ministry of Environment, Forests and Wildlife that what has been done so far whether by way of action or by way of studies does not amount to much, and that many matters are as yet in the early and preliminary stages.” What was then set out was an enumeration of what remained to be done. The survey of flora, to assess if there were any rare or threatened plant species, had been assigned to the Botanical Survey of India, which was expected to be completed in a period of two years. The wildlife survey undertaken by the Zoological Survey, of India was also likely to take two years. The Indian Institute of Wildlife Management, Dehradun was to consider and assess the impact on wildlife of the destruction of their habitat, and to prepare a project report for their re-location. After all these reports became available, a master plan had to be prepared. Field surveys for the identification of the critically

eroding areas was necessary and would take three years. The results from pilot studies would be available only after three years. Then under the sub-heading "Options in regard to the Clearance of the Projects", the Note stated:

"There are two options:

(i) As a number of studies, censuses, field surveys, mapping of areas, etc., are likely to take between 2 and 3 years, one possibility is that all these should be completed; detailed operational plans for catchment treatment, compensatory afforestation, rehabilitation and resettlement of affected population, and remedial or re-location measures for planned species, wildlife, etc., formulated; the responsibility for their implementation clearly identified; and then the projects should be given a clearance from the environmental and forest angles. This will mean a postponement of the clearance of projects by about 3 years.

(ii) The other option is that the projects should be given the necessary clearance now, with clear conditions and stipulations in regard to the actions to be taken on the various environmental aspects and appropriate monitoring arrangements to ensures that the actions are taken in a time-bound manner.

13.2 The arguments against a postponement of clearance by three years are very strong."

The postponement of the decision at this stage seemed, to the writers of Note, "scarcely conceivable". A postponement would lead to substantial increases in project costs and the benefits expected from the projects would be delayed. Also the work that had already been done would be rendered infructuous. The deferment of clearance by three years would put the organisational set-up that had been built up into a state of uncertainty, retard the momentum that had been gathered, and sap the organisational morale and motivation. The Note added. "Finally, the numerous studies, surveys, data collection exercises, plans for remedial measures, etc. which have been enumerated earlier would involve time, money and organisational commitment. With the project decision postponed for three years, and with no assurance that at the end of that period the decision will be positive, it is difficult to believe that all these studies, surveys and plans relating to the environmental aspects will be pursued with energy and enthusiasm, and the necessary resources devoted to them. In other words, the postponement of the decision in the interest of collecting the information relating to the environmental aspect and completing the formulation of the necessary operational plans may in fact prove to be a self defeating exercise. On the other hand, if the project decisions are taken now, subject to firm conditions and stipulations regarding the environmental aspects there is greater likelihood of these conditions being met ..... A possible argument against the immediate clearance of the projects could be that once the projects are cleared, the management would concentrate on the engineering and construction aspects and would not pay adequate attention to the environmental and human aspects. There seems to be no need for such apprehensions. It should be entirely possible to give a conditional clearance and ensure that the conditions are properly met through a process of clear assignment of responsibility and frequent monitoring ... Moreover, even assuming that the

postponement of a decision by three years will improve the availability of detailed information and the state of preparedness on environmental matters, there can be no grater assurance at that stage than there is now regarding the whole-hearted and effective implementation of the remedial and ameliorative measures. We would still have to depend on proper monitoring ....". In conclusion, the Note urged that clearance from the environmental angle and under the Forest Conservation Act, 1980 be given immediately, subject to conditions and stipulations relating to the various environmental and related aspects outlined in the Note. (Emphasis supplied)

7. Another Note was prepared by the Ministry of Water Resources and forwarded to the Additional Secretary to the Prime Minister of 20th November, 1986. Insofar as catchment area treatment was concerned, it concluded that it was certain that the catchment area treatment programme could not be realistically formulated and assessed for at least another three years. Therefore, it was premature to comment on the efficacy or otherwise of the catchment area treatment programme which was still to be formulated. The action programme for Command area development was yet to be made available. The lining of the canal network and the digging of tube wells in the Command could not be considered to be adequate. A lot of field work and planning was needed to be done to arrive at a workable and effective Command area development programme. As to compensatory afforestation, the land for the same was yet to be identified and procured before it could be evaluated for the purpose. In regard to the loss of flora and fauna, the following studies were considered absolutely essential to determine the adequacy or otherwise of the left over habitat to sustain wildlife:

> "A wildlife census of the area" (ZSI will take at least 2-3 years to complete the survey):
>
> (i) Preparation of a Master Plan showing all protected areas, National Parks, Wildlife Reserves, Reserve and Protected Forests, etc. on which should be superimposed the area to be taken up for various reservoirs, roads, canals, settlement colonies, etc.
>
> (ii) Study of the carrying capacity of the surrounding areas where the wildlife from the submergence area will disperse."

In the circumstances, it was not considered possible to assess the impact of the loss of habitat on the wildlife and the overall loss of biological diversity. The absence and inadequacy of data on the following environmental aspects persisted:

(i) Rehabilitation;
(ii) Catchment Area Treatment;
(iii) Command Area Development;
(iv) Compensatory Afforestation; and
(v) Flora and Fauna.

Considering the magnitude of rehabilitation, involving a large percentage of tribals, loss of extensive forest area rich in biological diversity, enormous environmental cost of the project and considering the fact that the basic data on vital aspects was still not available

"there could be but one conclusion, that the projects are not ready for approval." "There were two options in regard to the clearance. As a number of studies, censuses, field surveys, mapping of areas etc. was likely to take between two and three years, one possibility was that all these should be completed; detailed operational plans for catchment treatment, compensatory afforestation, rehabilitation and re-settlement of affected population and remedial or re-location measures for plant species, wildlife, etc. formulated; the responsibility for their implementation clearly identified; and then the projects should be given a clearance from the environmental and forest angles. This would mean a postponement of the clearance of projects by about three years. "The other option was that the project should be given the necessary clearance with conditions and stipulations in regard to the actions to be taken on the various environmental aspects with appropriate monetary arrangements. The Note recommended the latter option. (Emphasis supplied).

8. On 19th December, 1986 the Ministry of Environment and Forests sent to the Secretary to the Prime Minister a Note on the environment aspects of the Narmada Sagar and the Sardar Sarovar Projects. The Note stated that it covered the major environmental issues that included the rehabilitation of the affected population, catchment area treatment, Command area development, compensatory afforestation and the loss of flora and fauna. It explained the then status of each of these aspects in terms of availability of data and plans and the readiness to execute them. It said that other components of the environmental aspect like the higher incidence of water borne diseases and loss of mineral reserves were important but were not dealt with in detail in the note. It stated that in respect of catchment area treatment, the requirement was of demarcation of critically degraded areas on the basis of aerial photographs, satellite imagery and ground checks; creation of a chain of nurseries of suitable species for biological treatment of the catchment area; and preparation of phased action programme for biological and engineering treatment of the degraded catchment area. Considering that catchment area treatment on an intensive scale was imperative, both to reduce silt load and to maintain ecological balance, and keeping in view the fact that the interpretation of the aerial photographs and satellite imagery would take at least one year for completion, to be followed by ground truth checks; the detailed land and soil surveys would take three years to be completed; the geo-morphological studies to suggest the engineering and biological treatment for the eroded areas were still to be taken up and the chain of nurseries needed to provide the necessary saplings in adequate quantity along with manpower and other infrastructure requirements were still to be mobilised, it was "reasonable to conclude that the catchment area treatment programme can be realistically formulated only after three years when these data become available". Command area development was to achieve the prevention of water-logging and salinity, the optimisation of water utilisation and the maintenance of water quality. A detailed survey of the Command area was required on priority to prepare a package of the nature and quantity of development and drainage and on farm works to fully utilise the irrigation potential. An action programme was yet to be detailed. The Ministry of Water Resources was preparing an Evaluation Report covering the extent of likely water-logging and salinity problems and the effectiveness of measures proposed or likely to be proposed to

combat these problems "as per the action programme to be formulated". In so far as compensatory afforestation was concerned, the Project authorities had not been able to identify non-forest land for compensatory afforestation on double the extent for degraded forest land, which proposal was fairly detailed and seemed satisfactory. In the matter of the loss of flora and fauna the Note stated "that the forest area, specially affected by the Narmada Sagar Project, represents, areas harbouring rich heritage of genetic resources as well as wild life. The preliminary study carried out by the Environmental Planning and Coordination Organisation, Bhopal as well as the observations made by the World Bank clearly underlined the need for preparing a master plan showing not just the present status but also the likely scenarios after the project was to ascertain the loss of biological diversity and whether the wildlife would be able to sustain itself after the destruction of its habitat. The following studies were considered absolutely essential both to determine the loss of flora and the adequacy or otherwise of the left over habitat to sustain the wildlife;

- A wildlife census of the area (ZSI will take at least 2-3 years to complete the survey);
- Preparation of a Master Plan showing all protected areas i.e. National Parks, Wildlife Reserves, Reserve and Protected Forests, etc. on which should be superimposed the areas cannot be taken up for various reservoirs, roads, canals, settlement colonies, etc;
- Study of the carrying capacity of the surrounding areas where the wildlife from the submergence area will disperse.

These studies are considered especially important in the case of NSP. The work initiated by BSI and ZSI at the request of the Project Authorities will be completed only by 1989. The other studies have not yet been initiated. Under the circumstances, it is not possible to assess the impact of the loss of biological diversity and genetic reserves.

Even if one were to assume that the forests to be destroyed do not contain genetic resources, which in any case cannot be valued, the simple loss of these forests would have an environmental cost estimated at several thousand crore of Rupees as per norms developed by FRL. The environmental costs is thus colossal".

The Note concluded:

> "(1) Taking note of the fact that the project formulation has been in progress for more than three decades and the active interaction of the Project authorities with the Department of Environment has been going on for almost three years, the absence and inadequacy of data on some important environmental aspects still persists.
>
> (2) In an objective sense the Narmada Sagor Project (NSP) is not ready for clearance from environmental angle. Even though Sardar Sarovar Project (SSP) is in a fairly advanced stage of preparedness, it is neither desirable nor recommended that the SSP should be given approval in isolation on technical and other grounds.

(3) The state of readiness in the case of NSP is such that it gives just an outline of the Intention Plan. The fact that this Intention Plan will be converted to an Action Plan and that be effectively implemented has to be taken on trust. In case of SSP, readiness to execute is reasonably good except on the issue of rehabilitation of oustees especially from M.P. and Maharashtra.

(4) Holding up of the projects even for the next few months is not likely to improve the level of preparedness on most of the environment aspects, specially in the case of NSP. In the meanwhile, further studies will not perhaps pick up speed and thus at no time will the requisite information be fully available.

(5) A large amount of money has already been invested on SSP that is critically linked - on technical and operational aspects - to NSP. However, it may not be too late even now to modify some of the parameters of NSP and SSP to minimise environmental damage at the same time ensuring optimal utilisation of water resources.

...

The choice is difficult but a choice has to be made."

9. A Note was prepared on 15th January, 1987 in the Prime Minister's Office. It noted that the main issues on environmental concerns were the rehabilitation of the affected population, compensatory afforestation, treatment of the catchment area and Command area development, pertaining, particularly, to drainage, water logging and salinity. The Department of Environment and Forests had raised the point that the rehabilitation plan was not ready, land had not been surveyed, areas of land use capability and water availability had not been identified and the land being suggested for rehabilitation, prima facie, appeared to be infertile. Detailed meetings with the State Governments revealed that they were seriously undertaking surveys, land identification and preparation of a rehabilitation plan, of which the first phase was more or less ready. The catchment area treatment preparation would take time. A compensatory afforestation programme could be chalked out without difficulty. The issue was whether detailed plans should be made fully ready before giving environmental clearance or whether there could be a conditional clearance so that the Project could start. The Secretary to the Prime Minister had discussed the matter with the Secretary, Water Resources and the Secretary, Environment and Forests and it had been agreed that clearance might be given on the following conditions:

"Preparation in due time of detailed and satisfactory plans for rehabilitation, catchment area treatment, compensatory afforestation and Command Area Development.

Setting up of Narmada Management Authority with adequate powers and teeth to ensure that environmental management plans are implemented *pari passsu* with engineering and other works."

Below the aforesaid Note, the Secretary to the Prime Minister sought his approval to conditional clearance of the Project from the environmental angle. The Project, she said,

had been pending clearance for seven years and the Chief Ministers of Gujarat and Madhya Pradesh were keenly awaiting it. The Chief Minister of Gujarat had requested a "green signal" before 20th January, 1987.

10. On 19th January, 1987 the Prime Minister made a handwritten endorsement on the aforesaid Note, "Perhaps this is a good time to try for a River Valley Authority, Discuss". But it appears that a River Valley Authority was not found feasible and the sanction to the Project from the environmental angle was issued by the Ministry of Environment and Forests on 24th June, 1987.

11. The environmental sanction to the project reads thus:

"Office Memorandum

Subject: Approval of Narmada Sagar Project, Madhya Pradesh and Sarovar Project, Gujarat from environmental angle.

1. The Narmada Sagar Project, Madhya Pradesh and Sardar Sarover Project, Gujarat have been referred to this Department for environmental clearance.

2. On the basis of examination of details of these projects by the Environmental Appraisal Committee for River Valley Projects and discussions with the Central and State authorities, the following details were sought from the project authorities:

(i) rehabilitation Master Plan.

(ii) Phased Catchment Area Treatment Scheme.

(iii) Compensatory Afforestation Plan.

(iv) Command Area Development.

(v) Survey of Flora and Fauna.

(vi) Carrying Capacity of surrounding area.

(vii) Seismicity; and

(viii) Health Aspects.

3. Field Surveys are yet to be completed. The first set of information has been made available and complete details have been assured to be furnished by 1989.

4. The NCA has been expanded and its terms of reference has been amplified to ensure that environmental safeguard measures are planned and implemented in depth and in its pace of implementation pari passu with the progress of work on the project.

5. After taking into account all relevant facts of Narmada Sagar Project, Madhya Pradesh and the Sardar Sarovar Project, Gujarat are hereby accorded environmental clearance subject to the following conditions:

(i) The Narmada Control Authority (NCA) will ensure that environmental safeguard measures are planned and implemented pari passu with progress of work on projects.

(ii) The detailed surveys/studies assured will be carried out as per the schedule proposed and details made available to the Department for assessment.

(iii) The Catchment Area Treatment programme and the Rehabilitation plans be so drawn as to be completed ahead of reservoir filling.

(iv) The Department should be kept informed of progress on various works periodically.

6. Approval under Forest (Conservation) Act, 1980 for diversion of forest land will be obtained separately. No work should be initiated on forest area prior to this approval.

7. Approval from environmental and forestry angles for any other irrigation, power or development projects in the Narmada Basin should be obtained separately."

12. Even in 1987, when the environmental clearance to the Project was given, it had been found necessary by the Union of India to rigorously assess the environmental impact of river valley projects. This was to determine whether the uniqueness of the natural resources, like wildlife, flora and the genetic pool in the region, demanded its exclusive earmarking for the purpose, in which event the river valley project would not be accorded clearance. Even otherwise it was imperative to consider the projects environmental aspects, such as its effect on health, plant genetic resources, aquatic resources, water-logging and salinity of irrigated soils, deforestation and soil conservation. Its short and long term impact on population, on flora and fauna, on wildlife on national parks and sanctuaries, on historical, cultural and religious monuments on forests, agriculture, fisheries and recreation and tourism had to be taken in account. Field surveys were necessary for generating the requisite data for the impact assessment. The cost of the proposed remedial and mitigated measures had to be included in the project cost. The necessary data that was required to be collected for the purposes of the assessment of a project's environmental impact was set out in Guidelines for the purpose issued by the Ministry of Environment and Forests of the Union Government (which have been referred to above).

13. The contemporaneous Notes, prepared by the Ministry of Water Resources and the Ministry of Environment and Forests, also referred to above, leave no manner of doubt that the requisite data for assessment of the environmental impact of the Project was not available when the environmental clearance thereof was granted. In the words of one of the Notes, "While some plan have been made, studies undertaken and action initiated, it will be clear from the preceding paragraphs that much still remains to be done. Indeed it is the view of the Ministry of Environment, Forests and Wild life that what has been done so far whether by way of action or by way of studies does not amount to much and that many matters are yet in the early and preliminary stages". The Notes make clear that the studies, censuses, mapping of areas and field surveys for the collection of data for assessment of the environmental impact of the Project were likely to take a further 2 to 3 years. An environmental clearance based on next to no data in regard to the

environmental impact of the Project was contrary to the terms of the then policy of the Union of India in regard to environmental clearances and, therefore, no clearance at all.

14. The environmental clearance of 24th June, 1987 stated that details had been sought from the Project authorities in respect of the rehabilitation master plan, phased catchment area treatment scheme, compensatory afforestation plan, Command area development, survey of flora and fauna, carrying capacity of surrounding area, seismicity and health aspects; field surveys had yet to be completed and complete details had been assured by 1989. Clearly, therefore, the necessary particulars in regard to the environmental impact of the Project, as required by the Guidelines, were not available when the environmental clearance was given, and it, therefore, could not have been given.

15. The conditions upon which the environmental clearance was given were that detailed surveys and studies would be carried out and the Narmada Control Authority, whose terms of reference had been amplified, would ensure that "environmental safeguard measures" were planned and implemented *pari passu* with the progress of work on the Project. No further assessment of the environmental impact of the Project was contemplated by the environmental clearance, nor, indeed, was it ever carried out.

16. What the environmental safeguards measures the Narmada Control Authority was to ensure were, and what their cost would be, was not known when the environmental clearance was given. There was, therefore, no way in which this cost could be included in the cost of the Project, which was a requirement of the guidelines.

17. While the environmental safeguard measures were to be planned and implemented pari passu with the progress of the work on the Project, the catchment area treatment programme and the rehabilitation plans were required to be "so drawn as to be completed ahead of reservoir filling". This condition clearly required that before any water was impounded in the reservoir the catchment area treatment programme was not only to be drawn but also to be completed; so also the rehabilitation plan. If, as the Project authorities interpreted this clause, only the drawing of the catchment area treatment programme and the rehabilitation plans were to be completed ahead of reservoir filling, the clause would have read "The catchment area treatment programme and the rehabilitation plans shall be drawn ahead of reservoir filling". What the clause as drawn required was that the catchment area treatment programme and the rehabilitation plans should be drawn in such a manner that the catchment area treatment and the rehabilitation works would be completed ahead of impoundment in the reservoir. This, plainly, was intended to off-set, so far as was possible in the circumstances, the adverse effect of the impoundment of water in the reservoir upon the catchment and those who were required to be settled elsewhere. In fact, the impoundment began much before.

18. Learned counsel for the Union of India submitted that most of the necessary surveys and studies had been carried out in regard to the environmental impact of the project before the environmental clearance was given, and he invited our attention to what had been done. The short answer to the submission on behalf of the Union of India is that the two concerned Ministries of the Union of India thought otherwise at the relevant time. To quote the Note of one Ministry again, "While some plans have been made, studies

undertaken and action initiated, it would be clear from the preceding paragraph that much still remains to be done. Indeed it is the view of the Ministry of Environment, Forests and Wildlife that what has been done so far whether by way of action or by way of studies does not amount to much and that many matters are yet in the early and preliminary stages".

19. The fact that the environmental clearance was given by the Prime Minister and not by the Ministry of Environment and Forests, as it would ordinarily have been done, makes no difference at all. Under its own policy, as indicated by the Guidelines, the Union of India was bound to give environmental clearance only after (a) all the necessary data in respect of the environmental impact of the Project had been collected and assessed; (b) the assessment showed that the project could proceed; and (c) the environment safeguard measures, and their cost had been worked out.

20. An adverse impact on the environment can have disastrous consequences for this generation and generations to come. This Court has in its judgments on Article 21 of the Constitution recognised this. This Court cannot place its seal of approval on so vast an undertaking as the Project without first ensuring that those best fitted to do so have had the opportunity of gathering all necessary data on the environmental impact of the Project and of assessing it. They must then decide if environmental clearance to the project can be given, and, if it can, what environmental safeguard measures have to be adopted, and their cost. While surveys and studies on the environmental aspects of the Project have been carried out subsequent to the environmental clearance, they are not, due to what are euphemistically called "slippages", complete. Those who now examine whether environmental clearance to the Project should be given must be free to commission or carry out such surveys and studies and the like as they deem necessary. They must also, of course, consider such surveys and studies as have already been carried out. Given that the construction of the dam and other work on the Project has already commenced, this factor must play a part in their deciding whether or nor environmental clearance should be accorded. Until environmental clearance to the Project is accorded by them, further construction work on the dam shall cease.

21. The Union of India has issued a notification on 27th January, 1994 called the "Environment Impact Assessment Notification 1994" (and amended it on 4th May, 1994). Its terms are not applicable to the present proceedings, but its provisions are helpful insofar as they prescribe who is to asses the environmental impact assessment reports and environment management plans that are submitted by applicants for new projects, including hydro-electric projects. The notification says, "The reports submitted with the application shall be evaluated and assessed by the Impact Assessment Agency, and if deemed necessary it may consult a Committee of Experts, having a composition as specified in Schedule-III of this Notification. The Impact Assessment Agency (IAA) would be the Union Ministry of Environment and Forests. The Committee of Experts mentioned above shall be constituted by the IAA or such other body under the Central Government authorised by the IAA in this regard. ....."

Schedule III of the notification reads thus:

"COMPOSITION OF THE EXPERT COMMITTEES FOR ENVIRONMENTAL IMPACT ASSESSMENT

1. The Committees will consist of experts in the following disciplines:

(i) Eco-System Management
(ii) Air/Water Pollution Control
(iii) Water Resource Management
(iv) Flora/Fauna Conservation and management
(v) Land use Planning
(vi) Social Sciences/Rehabilitation
(vii) Project Appraisal
(viii) Ecology
(ix) Environmental Health
(x) Subject Area Specialists
(xi) Representatives of NGOs/Persons concerned with Environmental Issues.

2. The Chairman will be an outstanding and experienced ecologist or environmentalist or technical professional with wide managerial experience.

3. The representative of IAA will act as Member-Secretary.

4. Chairman and members will serve in their individual capacities, except those specifically nominated as representatives.

5. The membership of a Committee shall not exceed 15".

The Environmental Impact Agency of the Union Ministry of Environment and Forests shall now appoint a committee of experts composed of experts in the fields mentioned in Schedule III of the notification and the committee of experts shall assess the environmental impact of the project as stated above.

22. When the writ petition was heard at the admission stage, this Court was most concerned about the distressing state of the relief to and rehabilitation of those ousted on account of the Project. The proper implementation of relief and rehabilitation measures was the aim of the Court at that time; but it was not contemplated that the other issues in the writ petition would not to be considered at the stage of its final hearing.

23. The many interim orders that this court made in the years in which this writ petition was pending show how very little had been done in regard to the relief and rehabilitation of those ousted. It is by reason of the interim orders, and, in fairness, the cooperation and assistance of learned counsel who appeared for the States, that much that was wrong has now been redressed. The States have also been persuaded to set up Grievance Redressal Authorities and it will be the responsibility of these Authorities to ensure that those ousted by reason of the Project are given relief and rehabilitation in due measure.

24. The States are lagging behind in the mater of the identification and acquisition of land upon which the oustees are to be resettled. Having regard to the experience of the past, only the Grievance Redressal Authorities can be trusted by this Court to ensure that the

States are in possession of vacant lands suitable for the rehabilitation of the oustees. During the time that it takes to assess the environmental impact of the Project, the States must take steps to obtain, by acquisition or otherwise, vacant possession of suitable lands upon which the oustees can be rehabilitated. When the Project obtains environmental clearance, assuming that it does, each of the Grievance Redressal Authorities of the States of Gujarat, Madhya Pradesh and Maharashtra must certify, after inspection, before work on the further construction of the dam can begin, that all those ousted by reason of the increase in the height of the dam by 5 meters from its present level have already been satisfactorily rehabilitated and also that suitable vacant land for rehabilitating all those who will be ousted by the increase in the height of the dam by another 5 meters is already in the possession of the respective States; and this process must be repeated for every successive proposed 5 meter increase in the dam height.

25. Only by ensuring that relief and rehabilitation is so supervised by the Grievance Redressal Authorities can this Court be assured that the oustees will get their due.

26. It is necessary to provide for the contingency that, for one or other reason, the work on the Project, now or at any time in the future, does not proceed and the Project is not completed. Should that happen, all oustees who have been rehabilitated must have the option to continue to reside where they have been rehabilitated or to return to where they were ousted from, provided such place remains habitable, and they must not be made at all liable in monetary or other terms on this account.

27. When the writ petition was filed the process of relief and rehabilitation, such as it was, was going on. The writ petitioners were not guilty of any laches in that regard. In the writ petition they raised other issues, one among them being related to the environmental clearance, when the public interest is so demonstrably involved, it would be against public interest to decline relief only on the ground that the Court was approached belatedly.

28. I should not be deemed to have agreed to anything stated in Brother Kirpal's judgment for the reason that I have not traversed it in the course of what I have stated.

29. In the premises,

(1) The Environmental Impact Agency of the Ministry of Environment and Forests of the Union of India shall forthwith appoint a Committee of Experts in the fields mentioned in Schedule III of the notification dated 27th January, 1994, called the Environmental Impact Assessment Notification, 1994.

(2) The Committee of Experts shall gather all necessary data on the environmental impact of the Project. They shall be free to commission or carry out such surveys and studies and the like as they deem necessary. They shall also consider such surveys and studies as have already been carried out.

(3) Upon such data, the Committee of Experts shall assess the environmental impact of the Project and decide if environmental clearance to the project can

be given and, if it can, what environmental safeguard measures must be adopted, and their cost.

(4) In so doing, the Committee of Experts shall take into consideration the fact that the construction of the dam and other work on the Project has already commenced.

(5) Until environmental clearance to the project is accorded by the Committee of Experts as aforestated, further construction work on the dam shall cease.

(6) The Grievance Redressal Authorities of the States of Gujarat, Madhya Pradesh and Maharashtra shall ensure that those ousted by reason of the Project are given relief and rehabilitation in due measure.

(7) When the Project obtains environmental clearance, assuming that it does, each of the Grievance Redressal Authorities of the States of Gujarat, Madhya Pradesh and Maharashtra shall, after inspection, certify, before work on the further construction of the dam can begin, that all those ousted by reason of the increase in the height of the dam by 5 meters from its present level have already been satisfactorily rehabilitated and also that suitable vacant land for rehabilitating all those who will be ousted by the increase in the height of the dam by another 5 meters is already in the possession of the respective States.

(8) This process shall be repeated for every successive proposed 5 meter increase in the dam height.

(9) If for any reason the work on the Project, now or at any time in the future, cannot proceed and the Project is not completed, all oustees who have been rehabilitated shall have the option to continue to reside where they have been rehabilitated or to return to where they were ousted from, provided such place remains habitable, and they shall not be made at all liable in monetary or other terms on this account.

30. The writ petition is allowed in the aforesaid terms. The connected matters are disposed of in the same terms.

31. No order as to costs.

KIRPAL, J. (For himself and on behalf of the Dr. A.S. Anand, C.J., I) (Majority view):- 32. Narmada is the fifth largest river in India and largest West flowing river of the Indian Peninsula. Its annual flow approximates to the combined flow of the rivers Sutlej, Beas and Ravi. Originating from the Maikala ranges at Amarkantak in Madhya Pradesh, it flows Westwards over a length of about 1312 km. before draining into the Gulf of Cambay, 50 km. West of Bharuch City. The first 1077 km. stretch is in Madhya Pradesh and the next 35 km. stretch of the river forms the boundary between the States of Madhya Pradesh and Maharashtra. Again, the next 39 km. forms the boundary between Maharashtra and Gujarat and the last stretch of 161 km. lies is Gujarat.

33. The Basin area of this river is about 1 lac sq.km. The utilisation of this river basin, however, is hardly about 4%. Most of the water of this peninsula river goes into the sea. In spite of the huge potential, there was hardly any development of the Narmada water resources prior to independence.

34. In 1946 the then Government of Central Provinces and Berar and the then Government of Bombay requested the Central Waterways, Irrigation and Navigation Commission (CWINC) to take up investigations on the Narmada river system for basin wise development of the river with flood control, irrigation, power and extension of navigation as the objectives in view. The study commenced in 1947 and most of the sites were inspected by engineers and geologists who recommended detailed investigation for seven projects. Thereafter in 1948, the Central Ministry of Works, Mines and Power appointed as Ad-hoc Committee headed by Shri A. N. Khosla, Chairman, CWINC to study the projects and to recommend the priorities. This Ad-hoc Committee recommended as an initial step detailed investigations for the following projects keeping in view the availability of men, materials and resources:

1. Bargi Project
2. Tawa Project near Hoshangabad
3. Punasa Project and
4. Broach Project

35. Based on the recommendations of the aforesaid Ad-hoc Committee, estimates for investigations of the Bargi, Tawa, Punasa (Narmadasagar) and Broach Projects were sanctioned by the Government of India in March, 1959.

36. The Central Water and Power Commission carried out a study of the hydroelectric potential of the Narmada basin in the year 1955. After the investigations were carried out by the Central Water and Power Commission, the Navagam site was finally decided upon in consultation with the erstwhile Government of Bombay for the construction of the dam. The Central Water and Power Commission forwarded its recommendations to the then Government of Bombay. At that time the implementations was contemplated in two stages. In Stage-I, the Full Reservoir Level (thereinafter referred to as 'FRL') was restricted to 160 ft, with provision for wider foundations to enable raising of the dam to FRL 300 ft. in Stage-II. A high level canal was envisaged in Stage-II. The erstwhile Bombay Government suggested two modifications, first the FRL of the dam be raised from 300 to 320 ft. in Stage-II and second the provision of a power house in the river bed and a power house at the head of the low level canal be also made. This project was then reviewed by a panel of Consultants appointed by the Ministry of Irrigation and Power who in a report in 1960 suggested that the two stages of the Navagam dam as proposed should be combined into one and the dam be constructed to its final FRL 320 ft. in one stage only. The Consultants also stated that there was scope for extending irrigation from the high level canal towards the Rann of Kutch.

37. With the formation of the State of Gujarat on 1st May, 1960, the Narmada Project stood transferred to that State. Accordingly, the Government of Gujarat gave an administrative approval to Stage-I of the Narmada Project in February, 1961. The Project

was then inaugurated by late Pandit Jawaharlal Nehru on 5th April, 1961. The preliminary works such as approach roads and bridges, colonies, staff buildings and remaining investigations for dam foundations were soon taken up.

38. The Gujarat Government undertook surveys for the high level canal in 1961. The submergence area survey of the reservoir enable assessment of the storage capability of the Navagam reservoir, if its height should be raised that a reservoir, if its height should be raised beyond FRL 320 ft. The studies indicated that a reservoir with FRL +460 ft. would enable realisation of optimum benefits from the river by utilising the untapped flow below Punasa dam and would make it possible to extend irrigation to a further area of over 20 lakh acres. Accordingly, explorations for locating a more suitable site in the narrower gorge portion were taken in hand and finally in November, 1963, site No. 3 was found to be most suitable on the basis of the recommendations of the Geological survey of India and also on the basis of exploration and investigations with regard to the foundation as well as construction materials available in the vicinity of the dam site.

39. In November, 1963, the Union Minister of Irrigation and Power held a meeting with the Chief Ministers of Gujarat and Madhya Pradesh at Bhopal. As a result of the discussions and exchange of views, an agreement (Bhopal Agreement) was arrived at. The salient features of he said Agreement were:

(a) That the Navagam Dam should be built to FRL 425 by the Government of Gujarat and its entire benefits were to be enjoyed by the State of Gujarat.

(b) Punasa Dam (Madhya Pradesh) should be built to FRL 850. The costs and power benefits of Punasa Power Project shall be shared in the ratio 1: 2 between the Governments of Gujarat and Madhya Pradesh. Out of the power available to Madhya Pradesh half of the quantum was to be given to the State of Maharashtra for a period of 25 years for which the State of Maharashtra was to provide a loan to the extent of one-third the cost of Punasa Dam. The loan to be given by the State of Maharashtra was to be returned within a period of 25 years.

(c) Bargi Project was to be implemented by the State of Madhya Pradesh, Bargi Dam was to be built to FRL 1365 in Stage I and FRL 1390 in Stage II and the Governments of Gujarat and Maharashtra were to give a total loan assistance of Rs. 10 crores for the same.

40. In pursuance of the Bhopal Agreement, the Government of Gujarat prepared a brief project report envisaging the Navagam Dam FRL 425 ft. and submitted the same to the Central Water and Power Commission under Gujarat Government‘s letter dated 14th February, 1964. Madhya Pradesh, however, did not ratify the Bhopal Agreement. In order to over come the Stalemate following the rejection of the Bhopal Agreement by Madhya Pradesh, a High Level Committee of eminent engineers headed by Dr. A. N. Khosla, the then Governor of Orissa, was constituted on 5th September, 1964 by the Government of India. The terms of reference of this Committee were decided by the Government of

India in consultation with the State of Madhya Pradesh, Maharashtra and Gujarat. The same read as under:

(i) Drawing up of a Master Plan for the optimum and integrated development of the Narmada water resources.

(ii) The phasing of its implementation for maximum development of the resources and other benefits.

(iii) The examination, in particular, of Navagam and alternative projects, if any, and determining the optimum reservoir level or levels.

(iv) Making recommendations of any other ancillary matters.

41. The Khosla Committee submitted the unanimous report to the Government of India in September, 1965 and recommended a Master Plan of the Narmada water development. In Chapter XI of the said Report, the Khosla Committee outlined its approach to the plan of Narmada development. An extract from this Chapter is reproduced below:

"11.1 In their meeting from 14th to 18th December, 1964 at which the State representatives were also present, the Committee laid down the following basic guidelines in drawing up the Master Plan for the optimum and integrated development of the Narmada water resources :-

1. National interest should have overriding priority. The plan should, therefore, provide for maximum benefits in respect of irrigation, power generation, flood control, navigation etc. irrespective of State boundaries;

2. Rights and interests of State concerned should be fully safeguarded subject to (I) above;

3. Requirements of irrigation should have priority over those of power ;

Subject to the provision that suitable apportionment of water between irrigation and power may have to be considered, should it be found that with full development of irrigation, power production is unduly affected;

4. Irrigation should be extended to the maximum area within physical limits of command, irrespective of State boundaries, subject to availability of water; and in particular, to the arid areas along the international border with Pakistan both in Gujarat and Rajasthan to encourage sturdy peasants to settle in these border areas (later events have confirmed the imperative need for this); and

5. All available water should be utilised to the maximum extent possible for irrigation and power generation and, when no irrigation is possible, for power generation. The quantity going waste to the sea without doing irrigation or generating power should be kept to the unavoidable minimum."

42. The Master Plan recommended by the Khosla Committee envisaged 12 major projects to be taken up in Madhya Pradesh and one, viz., Navagam in Gujarat. As far as Navagam Dam was concerned, the Committee recommended as follows:-

1. The terminal dam should be located at Navagam.
2. The optimum FRL of the Navagam worked out to RL 500 ft.
3. The FSL (Fully Supply Level) of the Navagam canal at off-take should be RL 300 ft.
4. The installed capacity at the river bed power station and canal power station should be 1000 mw and 240 mw respectively with one stand-by unit in each power station (in other words the total installed capacity at Navagam would be 1400 mw).

The benefits of the Navagam dam as assessed by the Khosla Committee were as follows:-

> "(1) Irrigation of 15.80 lakh hectares (39.4 lakh acres) in Gujarat and 0.4 lakh hectares (1.00 lakh acres) in Rajasthan. In addition, the Narmada waters when fed into the existing Mahi Canal system would release Mahi water to be diverted on higher contours enabling additional irrigation of 1.6 to 2.0 lakh hectares (4 to 5 lakh acres) approximately in Gujarat and 3.04 lakh hectares (7.5 lakh acres) in Rajasthan.
>
> (2) Hydro-power generation of 951 MW at 60% LF in the mean year of development and 511 MW on ultimate development of irrigation in Gujarat Madhya Pradesh, Maharashtra and Rajasthan."

43. The Khosla Committee stressed an important point in favour of high Navagam Dam, namely, additional storage. They emphasized that this additional storage will permit greater carryover capacity, increased power production and assured optimum irrigation and flood control and would minimise the wastage of water to the sea. The Khosla Committee also observed that instead of higher Navagam Dam as proposed, if Harinphal or Jalsindhi dams were raised to the same FRL as at Navagam, the submergence would continue to remain about the same because the cultivated and inhabited areas lie mostly above Harinphal while in the intervening 113 km (70 mile) gorge between Harinphal and Navagam, there was very little habitation or cultivated areas.

44. The Kholsa Committee report could not be implemented on account of disagreement among the States. On 6th July, 1968 the State of Gujarat made a complaint to the Government of India under Section 3 of the inter-State Water Disputes Act. 1956 stating that a water dispute had arisen between the State of Gujarat and the respondent States of Madhya Pradesh and Maharashtra over the use, distribution and control of the waters of the Inter-State River Narmada. The substance of the allegation was that executive action had been taken by Maharashtra and Madhya Pradesh which had prejudicially affected the State of Gujarat objected to the proposal of the State of Madhya Pradesh to construct Maheshwar and Harinphal Dams over the river Narmada in its lower reach and also to the agreement reached between the State of Madhya Pradesh and Maharashtra to jointly construct the Jalsindhi Dam over Narmada in its course between the two States. The main reason for the objection was that if these projects were implemented, the same would

prejudicially affect the rights and interests of Gujarat State by compelling it to restrict the height of the dam at Navagam to FRL 210 ft. or less. Reducing the height of the dam would mean the permanent detriment of irrigation and power benefit that would be available to the inhabitants of Gujarat and this would also make it impossible for Gujarat to re-claim the desert area in the Ranns of Kutch. According to the State of Gujarat, the principal matters in disputes were as under:

(i) the right of the State of Gujarat to control and use the waters of the Narmada River on well-accepted principles applicable to the use of waters of Inter-State rivers;

(ii) the right of the State of Gujarat to project to the arrangement between the State of Madhya Pradesh and the State of Maharashtra for the development of Jaisindhi dam;

(iii) the right of the state of Gujarat to raise the Navagam dam to an optimum height commensurate with the efficient use of Narmada waters including its control for providing requisite cushion for flood control; and

(iv) the consequential right of submergence of area in the States of Madhya Pradesh and Maharashtra and areas in the Gujarat State.

45. Acting under Section 4 of the Inter State Water Disputes Act, 1956, the Government of India constituted a Tribunal headed by Hon'ble Mr. Justice V. Ramaswamy, a retired Judge of this Court. On the same day the Government made a reference of the water dispute to the Tribunal. The Reference being in the following terms:

> "In exercise of the powers conferred by sub-section (1) of Section 5 of the Inter-State Water Disputes Act. 1956 (33 of 1956). the Central Government hereby refers to the Narmada Water Disputes Tribunal for adjudication of the water dispute regarding the inter-State river, Narmada, and the river-valley thereof, emerging from letter No. MIP-5565/C-10527-K dated the 6th July, 1968, from the Government of Gujarat".

46. On 16th October, 1969, the Government of India made another reference of certain issues raised by the State of Rajasthan to the said Tribunal.

47. The State of Madhya Pradesh filed a Demurrer before the Tribunal stating that the constitution of the Tribunal and reference to it were *ultra vires* of the Act. The Tribunal framed 24 issues which included the issues relating to the Gujarat having a right to construct a high dam with FRL 530 feet and a canal with FSL 300 feet or thereabouts. Issues 1 (a), 1(b), 1(A), 2, 3 and 19 were tried as preliminary issues of law and by its decision dated 23rd February, 1972, the said issues were decided against the respondents herein. It was held that the Notification of the Central Government dated 16th October, 1969 referring the matters raised by the State of Rajasthan by its complaint was *ultra vires* of the Act but constitution of the Tribunal and making a reference of the water dispute regarding the Inter-State river Narmada was not ultra vires of the Act and the Tribunal had jurisdiction to decide the dispute referred to it at the instance of State of

Gujarat. It further held that the proposed construction of the Navagam project involving consequent submergence of portions of the territories of Maharashtra and Madhya Pradesh could form the subject matter of a "water dispute" within the meaning of Section 2(c) of the 1956 Act. It also held that it had the jurisdiction to give appropriate direction to Madhya Pradesh and Maharashtra to take steps by way of acquisition or otherwise for making submerged land available to Gujarat in order to enable it to execute the Navagam Project and the Tribunal had the jurisdiction to give consequent directions to Gujarat and other party States regarding payment of compensation to Maharashtra and Madhya Pradesh, for giving them a share in the beneficial use of Navagam dam, and for rehabilitation of displaced persons.

48. Against the aforesaid judgement of the Tribunal on the preliminary issues, the State of Madhya Pradesh and Rajasthan filed appeals by special leave to this Court and obtained a stay of the proceedings before the Tribunal to a limited extent. This Court directed that the proceedings before the Tribunal should be stayed but discovery, inspection and other miscellaneous proceedings before the Tribunal may go on. The State of Rajasthan was directed to participate in these interlocutory proceedings.

49. It appears that on 31-7-1972, the Chief Ministers of Madhya Pradesh, Maharashtra, Gujarat and Rajasthan had entered into an agreement to compromise the matters in dispute with the assistance of Prime Minister of India. This led to a formal agreement dated 12th July, 1974 being arrived at between the Chief Ministers of Madhya Pradesh, Maharashtra and Rajasthan and the Advisor to the Governor of Gujarat on a number of issues which the Tribunal otherwise would have had to go into. The main features of the Agreement, as far as this case is concerned, were that the quantity of water in Narmada available for 75% of the year was to be assessed at 28 million acre feet and the Tribunal in determining the disputes referred to it was to proceed on the basis of this assessment. The net available quantity of water for use in Madhya Pradesh and Gujarat was to be regarded as 27. 25 million acre feet which was to be allocated between the States. The height of the Navagam Dam was to be fixed by the Tribunal after taking into consideration various contentions and submissions of the parties and it was agreed that the appeals filed in this Court by the States of Madhya Pradesh and Rajasthan would be withdrawn. It was also noted in this agreement that "development of Narmada should no longer be delayed in the best regional and national interests".

50. After the withdrawal of the appeals by the States of Madhya Pradesh and Rajasthan, the Tribunal proceeded to decide the remaining issues between the parties.

51. On 16th August, 1978, the Tribunal declared it's Award under Section 5(2) read with Section 5(4) of the Inter-State Water Disputes Act, 1956. Thereafter, reference numbers 1,2,3,4, & 5 of 1978 were filed by the Union of India and the States of Gujarat, Madhya Pradesh, Maharashtra and Rajasthan respectively under Section 5(3) of the Inter-State Water Disputes Act, 1956. These references were heard by the Tribunal witch on 7th December, 1979, gave its final order. The same was published in the extraordinary Gazette by the Government of India on 12th December, 1979. In arriving at its final decision, the issues regarding allocation, height of dam, hydrology and other related issues came to be subjected to comprehensive and thorough examination by the Tribunal.

Extensive studies were done by the Irrigation Commission and Drought Research Unit of India. Meteorological Department in matters of catchment area of Narmada Basin, major tributaries of Narmada Basin, drainage area of Narmada Basin climate, rainfall, variability of rainfall, arid and semiarid zones and scarcity area of Gujarat. The perusal of the report shows that the Tribunal also took into consideration various technical literature before giving its Award.

AWARD OF THE TRIBUNAL

The main parameters of the decision of the Tribunal were as under:

(A) DETERMINATION OF THE HEIGHT OF SARDAR SAROVAR DAM

The height of the Sardar Sarovar Dam was determined at FRL 455 ft. The Tribunal was of the view that the FRL +436 ft. was required for irrigation use alone. In order to generate power throughout the year, it would be necessary to provide all the live storage above MDDL for which an FRL + 453 ft. with MDDL +362 ft. would obtain gross capacity of 7.44 MAF. Therefore, the Tribunal was of the view that FRL of the Sardar Sarovar Dam should be +455 ft. providing gross storage of 7.70 MAF. It directed the State of Gujarat to took up and complete the construction of the dam.

(B) GEOLOGICAL AND SEISMOLOGICAL ASPECTS OF THE DAM SITE.

The Tribunal accepted the recommendations of the Standing Committee under Central Water & Power Commission that there should be seismic co-efficient of 0.10 g for the dam.

(C) RELIEF AND REHABILITATIONS:

The final Award contained directions regarding submergence, land acquisition and rehabilitation of displaced persons. The award defined the meaning of the land, oustee and family. The Gujarat Government was to pay to Madhya Pradesh and Maharashtra all costs including compensation, charges, expenses incurred by them for and in respect of compulsory acquisition of land. Further, the Tribunal had provided for rehabilitation of oustees and civic amenities to be provided to the oustees. The award also provided that if the State of Gujarat was unable to re-settle the oustees or the oustees being unwilling to occupy the area offered by the States, then the oustees will be re-settled by home State and all expenses for this were to be borne by Gujarat. An important mandatory provision regarding rehabilitation was the one contained in Clause XI sub-clause IV (6) (ii) which stated that no submergence of any area would take place unless the oustees were rehabilitated.

(D) ALLOCATION OF THE NARMADA WATERS:

The Tribunal determined the utilizable quantum of water of the Narmada at Sardar Sarovar Dam site on the basis of 75% dependability at 28 MAF. It further ordered that out of the utilizable quantum of Narmada water, the allocation between the States should be as under:

Madhya Pradesh : 18.25 MAF
Gujarat : 9.00 MAF

Rajasthan : 0.50 MAF
Maharashtra : 0. 25 MAF

(E) PERIOD OF NON-REVIEWAIBILITY OF CERTAIN AWARD TERMS:

The Award provided for the period of operation of certain clauses of the final order and decision of the Tribunal as being subject to review only after a period of 45 years from the date of the publication of the decision of the Tribunal in the official gazette. What is important to note however is that the Tribunal's decision contained in clause II relating to determination of 75% dependable flow as 28 MAF was non-review able. The Tribunal decision of the determination of the utilizable quantum of Narmada water at Sardar Sarovar Dam site on the basis of 75% dependability at 28 MAF is not a clause which is included as a clause whose terms can be reviewed after a period of 45 years.

52. The Tribunal in its Award directed for the constitution of an inter-State Administrative Authority i.e. Narmada Control Authority for the purpose of securing compliance with and implementation of the decision and directions of the Tribunal. The Tribunal also directed for constitution of a Review Committee consisting of the Union Minister for Irrigation (now substituted by Union Minister for Water Resources) as its Chairperson and the Chief Ministers of Madhya Pradesh, Maharashtra, Gujarat and Rajasthan as its members. The Review Committee might review of decisions of the Narmada Control Authority and the Sardar Sarovar Construction Advisory Committee headed by the Secretary, Ministry of Water Resources as its Chairperson was directed to be constituted for ensuring efficient, economical and early execution of the project.

53. Narmada Control Authority is a high powered committee having the Secretary. Ministry of Water Resources. Government of India as its Chairperson. Secretaries in the Ministry of Power, Ministry of Environment and Forests, Ministry of Welfare, Chief Secretaries of the concerned four States as Members. In addition thereto, there are number of technical person like Chief Engineers as the members.

54. Narmada Control Authority was empowered to constitute one or more sub-committees and assign to them such of the functions and delegate such of its powers as it thought fit. Accordingly, the Narmada Control Authority constituted the following discipline based sub-groups.

(i) Resettlement and Rehabilitation subgroup under the Chairmanship of Secretary, Ministry of Welfare;

(ii) Rehabilitation Committee under Secretary, Minister of Welfare to supervise the rehabilitation process by undertaking visits to R&R sites and submergence villages;

(iii) Environment Sub-group under the Chairmanship of Secretary, Ministry of Environment and Forests;

(iv) Hydromel Sub-group under the Chairmanship of Member (Civil), Narmada Control Authority;

(v) Power Sub-group under the Chairmanship of Member (Power) Narmada Control Authority;

(vi) Narmada main Canal Sub-committee under the Chairmanship of Executive Member, Narmada Control Authority.

55. The Award allocated the available water resources of the Narmada river between the four States. Based on this allocation, an overall plan for their utilisation and development had been made by the States. Madhya Pradesh was the major share of the water. As per the water resources development plan for the basin it envisaged in all 30 major dams,135 medium dam projects and more than 3000 minor dams. The major terminal dam at Sardar Sarovar was in Gujarat, the remaining 29 being in Madhya Pradesh. Down the main course of the river, the four major dams were the Narmada Sagar (now renamed as Indira Sagar). Omkareshwar and Maheshwar all in Madhya Pradesh and Sardar Sarovar in Gujarat. Rajasthan was to construct a canal in its territory to utilize its share of 0.5 MAF.

56. Relevant Details of the Sardar Sarovar Dam:

As a result of the Award of the Tribunal, the Sardar Sarovar Dam and related constructions, broadly speaking, are to comprise of the following:

(a) Main dam across the flow of the river with gates above the crest level to regulate the flow of water into the Narmada Main Canal.

(b) An underground River Bed Power through which a portion of the water is diverted to generate power (1200 MW). This water joins the main channel of the Narmada river downstream of the dam.

(c) A saddle dam located by the side of main reservoir through which water to the main canal system flows.

(d) A Canal Head Power House located at the toe of the saddle dam, through which the water flowing to the main canal system is to be used to generate power (250 MW).

(e) The main canal system know as Narmada main canal 458 KM. long which is to carry away the water meant for irrigation and drinking purposes to the canal systems of Gujarat and Rajasthan.

57. Expected benefits from the project:

The benefits expected to flow from the implementation of the Sardar Sarovar Project had been estimated as follows:

Irrigation : 17.92 lac hectare of land spread over 12 districts, 62 talukas and 3393 villages (75% of which is drought – prone areas) in Gujarat and 73000 hectares in the arid areas of Barmer and Jallore districts of Rajasthan.

Drinking Water facilities to 8215 villages and 135 urban centres in Gujarat both within and outside command. These include 5825 villages and 100 urban centres of Saurashtra

and Kachchh with are outside the command. In addition, 881 villages affected due to high contents of fluoride will get potable water.

Power Generation: 1450 Megawatt.
Annual Employment Potential:
7 lac man-years in post construction.
6 lac man-years in post construction.
Protection against advancement of little Rann of Kutch and Rajasthan desert.

Flood protection to riverine reaches measuring 30,000 hac. 210 villages including Bharuch city and 7.5 lac population.

Benefits to:

(a) Dhumkhal Sloth Bear Sanctuary.
(b) Wild Ass Sanctuary in Little Rann of Kachchh.
(c) Black Buck Sanctuary at Velavadar.
(d) Great Indian Bustard Sanctuary in Kachchh.
(e) Nal Sarovar Bird Sanctuary

Development of fisheries: Deepening of all villages tanks of command which will increase their capacities, conserve water, will recharge ground water, save acquisition of costly lands for getting earth required for constructing canal banks and will reduce health hazard.

Facilities of sophisticated communication system in the entire command.
Increase in additional annual production on account of

(Rs. in crores)	
Agricultural production	900
Domestic water supply	100
Power Generation	440
Total	1400

POST AWARD CLEARANCES:

58. In order to meet the financial obligations, consultations had started in 1978 with the World Bank for obtaining a loan. The World Bank sent its Reconnaissance Mission to visit the project site and carried out the necessary inspection. In May, 1985, the Narmada Dam and Power Project and Narmada Water Delivery and Drainage Project were sanctioned by the World Bank under International Development Agency, credit No. 1552. Agreement in this respect was signed with the Bank on 10-5-1985 and credit was to be made available from 6th January, 1986.

59. With regard to the giving environmental clearance, a lot of discussion took place at different levels between the Ministry of Water Resources and the Ministry of Environment. Ultimately on 24th June, 1987 the Ministry of Environment and Forests, Government of India accorded clearance subject to certain conditions. The said Office Memorandum containing the environmental clearance reads as follows:

OFFICE MEMORANDUM

Subject: Approval of Narmada Sagar Project Madhya Pradesh and Sardar Project, Gujarat from environmental angle.

The Narmada Sagar Project, Madhya Pradesh and Sardar Sarovar Project Gujarat have referred to this Department for environmental clearance.

2. On the basis of examination of details on these projects by the Environmental Appraisal Committee for River Valley Projects and discussions with the Central and State authorities the following details were sought from the project authorities:

1. Rehabilitation Master Plan
2. Phased Catchment Area Treatment Scheme
3. Compensatory Afforestation Plan
4. Command Area Development
5. Survey of Flora and Fauna
6. Carrying capacity of surrounding area
7. Seismicity and
8. Health Aspects

3. Field surveys are yet to be completed. The first set of information has been made available and complete details have been assured to be furnished in 1989.

4. The NCA has been examined and its terms of reference have been amplified to ensure that environmental safeguard measures are planned and implemented in depth and in its pace of implementation *pari passu* with the progress of work on the projects.

5. After taking into account all relevant facts the Narmada Sagar Project, Madhya Pradesh and the Sardar Sarovar Project, Gujarat State are hereby accorded environmental clearance subject to he following conditions:

(i) The Narmada Control Authority (NCA) will ensure that environmental safeguard measures are planned and implemented *pari passu* with progress of work on project.

(ii) The detailed surveys/studies assured will be carried out as per the schedule proposed and details made available to the Department for assessment.

(iii) The Catchment Area treatment programme and the Rehabilitation plans be so drawn as to be completed ahead of reservoir filling.

(iv) The Department should be kept informed of progress on various works periodically.

6. Approval under Forest (Conservation) Act, 1980 for diversion of forest land will be obtained separately. No work should be initiated on forest area prior to this approval.

7. Approval from environmental and forestry angles for any other irrigation, power or development projects in the Narmada Basin should be obtained separately.

Sd/-
(S. MUDGAL)
DIRECTOR (IA)"

60. In November, 1987 for monitoring and implementation of various environmental activities effectively, an independent machinery of Environment Sub-Group was created by Narmada Control Authority. This Sub-Group was appointed with a view to ensure that the environmental safeguards were properly planned and implemented. This Sub-Group is headed by the Secretary, Ministry of Environment and Forest, Government of India, as its Chairperson and various other independent experts in various fields relating to environment as its members.

61. After the clearance was given by the Ministry of Environment and Forests, the Planning Commission, on 5th October, 1988, approved investment for an estimated cost of Rs. 6406/- crores with the direction to comply with the conditions laid down in the environment clearance accorded on 24th June, 1987.

62. According to the State of Gujarat and Union of India, the studies as required to be done by the O.M. dated 24th June, 1987, whereby environmental clearance was accorded, have been undertaken and the requisite work carried out. The construction of the dam had commenced in 1987.

63. In November, 1990 one Dr. B.D. Sharma wrote a letter to this Court for setting up of National Commission for Scheduled Castes and Scheduled Tribes including proper rehabilitation of oustees of Sardar Sarovar Dam. This letter was entertained and treated as a writ petition under Article 32 of the Constitution being Writ Petition No. 1201 of 1990.

64. On 20th September, 1991, this Court in the said Writ Petition bearing No. 1201 of 1990 gave a direction to constitute the Committee headed by Secretary (Welfare) to monitor the rehabilitation aspects of Sardar Sarovar Project.

65. The Narmada Bachao Andolan, the petitioner herein, had been in the forefront of agitation against the construction of the Sardar Sarovar Dam. Apparently because of this, the Government of India. Ministry of Water Resources vide Office Memorandum dated 3rd August, 1993 constituted a Five Member Group to be headed by Dr. Jayant Patil, Member, Planning Commission and Dr. Vasant Gowarikar, Mr. Ramaswamy R. Iyer, Mr. L.C. Jain and Dr. V.C. Kulandaiswamy as its members to continue discussions with the Narmada Bachao Andolan on issues relating to the Sardar Sarovar Project. Three months time was given to this Group to submit its report.

66. During this time, the construction of the dam continued and on 22nd February, 1994 the Ministry of Water Resources conveyed its decision regarding closure of the construction sluices. This decision was given effect to and on 23rd February, 1994 closure of ten construction sluices was effected.

67. In April, 1994 the petitioner filed the present writ petition *inter alia* praying that the Union of India and other respondents should be restrained from proceeding with the construction of the dam and they should be ordered to open the aforesaid sluices. It appears that the Gujarat High Court had passed an order staying the publication of the report of the Five Member Group established by the Ministry of Water Resources. On

15th November, 1994, this Court called for the report of the Five Member Group and the Government of India was also directed to give its response to the said report.

68. By order dated 13th December, 1994, this Court directed that the report of the Five Member Group be made public and responses to the same were required to be filed by the States and the report was to be considered by the Narmada Control Authority. This Report was discussed by the Narmada Control Authority on 2nd January, 1995 wherein disagreement was expressed by the State of Madhya Pradesh on the issues of height and hydrology. Separate responses were filed in this Court to the said Five Member Group Report by the Government of India and the Governments of Gujarat and Madhya Pradesh.

69. On 24th January, 1995, orders were issued by this Court to the Five Member Group for submitting detailed further report on the issues of:

(a) Height
(b) Hydrology
(c) Resettlement and Rehabilitation and environmental matters.

Dr. Patil who had headed the Five Member Group expressed his unwillingness to continue on the ground of ill-health and on 9th February, 1995, this Court directed the remaining four members to submit their report on the aforesaid issues.

70. On 17th April, 1985 the Four Member Group submitted its report. The said report was not unanimous, unlike the previous one and the Members were equally divided. With regard to hydrology, Professor V.C. Kulandaiswamy and Dr. Vasant Gowariker were for adoption of 75% dependable flow of 27 MAF for the design purpose, on the basis of which the Tribunal's Award had proceeded. On the other hand, Shri Ramaswamy R. Iyer and Shri L. C. Jain were of the opinion that for planning purposes, it would be appropriate to opt for the estimate of 23 MAF. With regard to the question relating to the height of the dam, the views of Dr. Gowariker were that the Tribunal had decided FRL 455 ft. after going into exhaustive details including social, financial and technical aspects of the project and that it was not practicable at the stage when an expenditure of Rs. 4000 crores had been incurred and an additional contract amounting to Rs. 2000 crores entered into and the various parameters and features of the project having been designed with respect to FRL 455 ft. that there should be a reduction of the height of the dam. The other three Members proceeded to answer this question by first observing as follows:

> "We must now draw conclusions from the foregoing analysis, but a preliminary point needs to be made. The SSP is now in an advanced stage of construction, with the central portion of the dam already raised to 80 m., the canal constructed up to a length of 140 Kms.; and most of the equipment for various components of the project ordered and some of it already wholly or partly manufactured. An expenditure of over Rs. 3800 crores is said to have been already incurred on the project; significant social costs have also been incurred in terms of displacement and rehabilitation. The benefits for which these costs have been and are being incurred have not materialised yet. In that situation, any one with a concern for keeping

project cost under check and for ensuring the early commencement of benefits would generally like to accelerate rather than retard the completion of the project as planned. If any suggestion for major changes in the features of the project at this juncture is to be entertained at all, there will have to be the most compelling reasons for doing so."

71. It then addressed itself to the question whether there were any compelling reasons. The answer, they felt, depended upon the view they took on the displacement and rehabilitation problem. The two views which, it examined, were, firstly whether the problem of displacement and rehabilitation was manageable and, if it was, then here would be no case of reduction in the height. On the other hand, if relief and rehabilitation was beset with serious and persistent problems then they might be led to the conclusion that there should be an examination of the possibility of reducing submergence and displacement to a more manageable size. These three Members then considered the question of the magnitude of the relief and rehabilitation problem. After taking into consideration the views of the States of Madhya Pradesh and Gujarat, the three Members observed as follows:

"We find that the Government of India's idea of phased construction outlined earlier offers a practical solution, it does not prevent the FRL from being raised to 455' in due course if the necessary conditions are satisfied, and it enables the Government of Madhya Pradesh to take stock of the position at 436' and call a halt if necessary. We would, however, reiterate the presumption expressed in paragraph 3-9-2 above namely that no delinking of construction from R&R is intended and that by "phased construction" the Government of India do not mean merely tiered construction which facilitates controlled submergence in phases. We recommend phased construction in a literal sense, that is to say, that at each phase it must be ensured that the condition of advance completion of R&R has been fulfilled before proceeding to the next phase (i.e. the installation of the next tier of the gates). This would apply ever to the installation of the first tier. "Judicious operation of the gates" (while necessary) cannot be a substitute for the aforesaid condition."

The possibility of further construction when the FRL 436 ft. was reached or a stoppage at that stage was left open by the Members. With regard to the environment it observed that this subject had been by and large covered in the first FMG report.

RIVAL CONTENTIONS

72. On behalf of the petitioners, the arguments of Sh. Shanti Bhushan, learned senior counsel, were divided into four different heads, namely, general issues, issues regarding environment, issues regarding relief and rehabilitation and issues regarding review of Tribunal's Award. The petitioners have sought to contend that it is necessary for some independent judicial authority to review the entire project, examine the current best estimates of all costs (social, environmental, financial), benefits and alternatives in order to determine whether the project is required in its present form in the national interest or whether it needs to be restructured/modified. It is further the case of the petitioners that no work should proceed till environment impact assessment has been fully done and its

implications for the projects viability being assessed in a transparent and participatory manner. This can best be done, it is submitted, as a part of the comprehensive review of the project.

73. While strongly championing the cause of environment and of the tribals who are to be ousted as a result of the submergence, it was submitted that the environmental clearance which was granted in 1987 was without any or proper application of mind as complete studies in that behalf were not available and till this is done the project should not be allowed to proceed further. With regard to relief and rehabilitation a number of contentions were raised with a view to persuade this Court that further submergence should not take place and the height of the dam, if at all it is to be allowed to be constructed, should be considerably reduced as it is not possible to have satisfactory relief and rehabilitation of the oustees as per the Tribunal's Award as a result of which their fundamental rights under Article 21 would be violated.

74. While the State of Madhya Pradesh has partly supported the petitioners inasmuch as it has also pleaded for reduction in the height of the dam so as to reduce the extent of submergence and the consequent displacement, the other States and the Union of India have refuted the contentions of the petitioners and of the State of Madhya Pradesh. While accepting that initially the relief and rehabilitation measures had lagged behind but now adequate steps have been taken to ensure proper implementation of relief and rehabilitation at least as per the Award. The respondents have, while refuting other allegations, also question the bona fides of the petitioners in filing this petition. It is contended that the cause of the tribals and environment is being taken up by the petitioners not with a view to benefit the tribals but the real reason for filing this petition is to see that a high dam is not erected *per se*. It was also submitted that at this late stage this Court should not adjudicate on the various issues raised specially those which have been decided by the Tribunal's Award.

75. We first propose to deal with some legal issues before considering the various submissions made by Sh. Shanti Bhushan regarding environment, relief and rehabilitation, alleged violation of rights of the tribals and the need for review of the project.

LATCHES

76. As far as the petitioners is concerned, it is an anti-dam organisation and is opposed to the construction of the high dam. It has been in existence since 1986 but has chosen to challenge the clearance given in 1987 by filling a writ petition in 1994. It has sought to contend that there was lack of study available regarding the environmental aspects and also because of the seismicity, the clearance should not have been granted. The rehabilitation packages are dissimilar and there has been no independent study or survey done before decision to undertake the project was taken and construction started.

77. The project, in principle, was cleared more than 25 years ago when the foundation stone was laid by late Pandit Jawahar Lal Nehru. Thereafter, there was an agreement of the four Chief Ministers in 1974, namely, the Chief Ministers of Madhya Pradesh,

Gujarat, Maharashtra and Rajasthan for the project to be undertaken. Then dispute arose with regard to the height of the dam which was settled with the award of the Tribunal being given in 1978. For a number of years, thereafter, final clearance was still not given. In the meantime some environmental studies were conducted. The final clearance was not given because of the environmental concern which is quite evident. Even though complete data with regard to the environment was not available, the Government did in 1987 finally give environmental clearance. It is thereafter that the construction of the dam was under taken and hundreds of crores have been invested before the petitioner chose to file a writ petition in 1994 challenging the decision to construct the dam and the clearance as was given. In our opinion, the petitioner which had been agitating against the dam since 1986 is guilty of latches in not approaching the Court at an earlier point or time.

78. When such projects are undertaken and hundreds of crores of public money is spent, individual or organisations in the garb of PIL cannot be permitted to challenge the policy decision taken after a lapse of time. It is against the national interest and contrary to the established principles of law that decisions to undertake developmental projects are permitted to be challenged after a number of years during which period public money has been spent in the execution of the project.

79. The petitioner has been agitating against the construction of the dam since 1986, before environmental clearance was given and construction started. It has, over the years, chosen different paths to oppose the dam. At it's instance a Five Member Group was constituted but it's report could not result in the stoppage of construction *pari passu* with relief and rehabilitation measures. Having failed in it's attempt to stall the project the petitioner has resorted to Court proceedings by filing this writ petition after the environmental clearance was given and construction started. The pleas relating to height of the dam and the extent of submergence, environment studies and clearance, hydrology, seismicity and other issues, except implementation of relief and rehabilitation, cannot be permitted to be raised at this belated stage.

80. This Court has entertained this petition with a view to satisfy itself that there is proper implementation of the relief and rehabilitation measures at least to the extent they have been ordered by the Tribunal's Award. In short it was only the concern of this Court for the protection of the fundamental rights of the oustees under Article 21 of the Constitution of India which led to the entertaining of this petition. It is the Relief and Rehabilitation measures that this Court is really concerned with and the petition in regard to the other issues raised is highly belated. Though it is, therefore, not necessary to do so, we however presently propose to deal with some of the other issues raised.

AWARD-BINDING ON THE STATES

81. It has been the effort on the part of the petitioners to persuade this Court to decide that in view of the difficulties in effectively implementing the Award with regard to relief and rehabilitation and because of the alleged adverse impact the construction of the dam, will have on the environment, further construction of the dam should not be permitted. The petitioners support the contention on behalf of the State of Madhya Pradesh to the

effect that the height of the dam should be reduced in order to decrease the number of oustees. In this case, the petitioners also submit that with regard to hydrology, the adoption of the figure 27 MAF is not correct and the correct figure is 23 MAF and in view thereof the height of the dam need not be 455 feet.

82. The Tribunal in this Award has decided a number of issues which have been summarised hereinabove. The question which arises is as to whether it is open to the petitioner to directly or indirectly challenge the correctness of the said decision. Briefly stated the Tribunal had in no uncertain terms come to the conclusion that the height of the dam should be 455 ft. It had rejected the contention of the State of Madhya Pradesh for fixing the height at a lower level. At the same time in arriving at this figure, it had considered the relief and rehabilitation problems and had issued direction in respect thereof. Any issue which has been decided by the Tribunal would, in law, be binding on the respective States. That this is so has been recently decided by a Constitution Bench of this Court in The State of Karnataka v. State of Andhra Pradesh, 2000 (3) Scale 505. That was a case relating to a water dispute regarding inter-State river Krishna between the three riparian States and in respect of which the Tribunal constituted under the Inter-State Water Disputes Act, 1956 had given an Award. Dealing with the Article 262 and the scheme of the Inter-State Water Disputes Act, this Court at page 572 observed as follows:

> "The Inter-State Water Disputes Act having been framed by the Parliament under Article 262 of the Constitution is a complete Act by itself and the nature and character of a decision made there under has to be understood in the light of the provisions of the very Act itself. A dispute or difference between two or more State Governments having arisen which is a water dispute under Section 2(C) of the Act and complaint to that effect being made to the Union government under Section 3 of the said Act the Central Government constitutes a Water Disputes Tribunal for the adjudication of the dispute in question, once it forms the opinion that the dispute cannot be settled by negotiations. The Tribunal thus constituted, is required to investigate the matters referred to it and then forward to the Central Government a report setting out the facts as found by him and giving its decision on it as provided under sub-section (2) of Section 5 of the Act. On consideration of such decision of the Tribunal if the Central Government or any State Government is of the opinion that the decision in question requires explanation or that guidance is needed upon any point not originally referred to the Tribunal then within three months from the date of the decision, reference can be made to the Tribunal for further consideration and the said Tribunal then forwards to the Central Government a further report giving such explanation or guidance as it deems fit. Thereby the original decision of the Tribunal is modified to the extent indicated in the further decision as provided under Section 5(3) of the Act. Under Section 6 of the Act the Central Government is duty bound to publish the decision of the Tribunal in the Official Gazette where after the said decision becomes final and binding on the parties to the dispute and has to be given effect to, by them. The language of the provisions of Section 6 is clear and unambiguous and unequivocally indicates that it is only the decision of the Tribunal which is required to be published in the Official Gazette and on such publication that decision becomes final and binding on the parties."

Once the Award is binding on the States, it will not be open to a third party like the petitioners to challenge the correctness thereof. In terms of the award, the State of Gujarat has a right to construct a dam up to the height of 455ft. and, at the same time, the oustees have a right to demand relief and resettlement as directed in the Award. We, therefore, do not propose to deal with any contention which, in fact seems to challenge the correctness of issue decided by the Tribunal.

GENERAL ISSUES RELATING TO DISPLACEMENT OF TRIBALS AND ALLEGED VIOLATION OF THE RIGHTS UNDER ARTICLE 21 OF THE CONSTITUTION:

The submission of Sh. Shanti Bhushan, learned senior counsel for the petitioners was that the forcible displacement of tribals and other marginal farmers from their land and other sources of livelihood for a project which was not in the national or public interest was a violation of their fundamental rights under Article 21 of the Constitution of India read with ILO Convention 107 to which India is a signatory. Elaborating this contention, it was submitted that this Court had held in a large number of cases that international treaties and covenants could be read into the domestic law of the country and could be used by the Courts to elucidate the interpretation of fundamental rights guaranteed by the Constitution. Reliance in support of this contention was placed on Gramophone Co. of India Ltd. v. B. B. Pandey, (1984) 2 SCC 534: (AIR 1984 SC 667); PUCL v. Union of India, (1997) 3 SCC 433: (1997 AIR SCW 1234: AIR 1997 SC 1203) and CERC v. Union of India, (1995) 3 SCC 42: (1995 AIR SCW 759: AIR 1995 SC 922). In this connection, our attention was drawn to the ILO Convention 107 which stipulated that tribal population shall not be removed from their lands without their free consent from their habitual territories except in accordance with national laws and regulations reasons relating to national security or in he interest of national economic development. It was further stated that the said Convention provided that in such cases where removal of this population is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to that of lands previously occupied by them, suitable to provide for their present needs and future development. Sh. Shanti Bhushan further contended that while Sardar Sarovar Project will displace and have an impact on thousands of tribal families it had not been proven that this displacement was required as an exceptional measure. He further submitted that given the seriously flawed assumptions of the project and the serious problems with the rehabilitation and environmental mitigation, it could not be said that the project was in the best national interest, it was also submitted that the question arose whether the Sardar Sarovar Project could be said to be in the national and public interest in view of its current best estimates of costs, benefits and evaluation of alternatives and specially in view of the large displacement of tribals and other marginal farmers involved in the project. Elaborating this contention, it was contended that serious doubts had been raised about the benefits of the project – the very rationale which was sought to justify the huge displacement and the massive environmental impacts etc. It was contended on behalf of the petitioners that a project which was sought to be justified on the grounds of providing a permanent solution to water problems of the drought prone areas of Gujarat would touch only the fringes of these areas, namely, Saurashtra and Kutch and even this water, which was allocated on paper, would not really accrue due to

host of reasons. It was contended that in spite of concentrating on small scale decentralized measures which were undertaken on a large scale could address the water problem of these draught prone areas. Huge portions of the State resources were being diverted to the Sardar Sarovar Project and as a result the small projects were ignored and the water problem in these areas persists. It was submitted that the Sardar Sarovar Project could be restructured to minimise the displacement.

83. Refuting the aforesaid arguments, it has been submitted on behalf of the Union of India and the State of Gujarat that the petitioners have given a highly exaggerated picture of the submergence and other impacts of this project. It was also submitted that the petitioner's assertion that there was large-scale re-location and uprooting of tribals was not factually correct. According to the respondents, the project would affect only 245 villages in Gujarat, Maharashtra and Madhya Pradesh due to poundage and backwater effect corresponding to 1 in 100 year flood. The State wise break up of affected villages and the number of project affected families (PAFs) shows that only four villages would be fully affected (three in Gujarat and one in Madhya Pradesh) and 241 would be partially affected (16 in Gujarat, 33 in Maharashtra and 192 in Madhya Pradesh). The total project affected families who would be affected were 40827. The extent of the submergence was minimum in the State of Madhya Pradesh. The picture of this submergence as per the Government of Madhya Pradesh Action plan of 1993 is as follows:

> Abadi will be fully submerged in 39 villages and partially in 116 villages, agricultural land will be affected up to 10% in 82 villages, 11 to 25% in 32 villages. 26 to 50% in 30 villages, 51 to 75% in 14 villages, 76 to 90% in 4 villages and 100% in only 1 village. In 21 villages, only abadi will be affected and Government land only in 9 villages. Thus, in most of the villages, submergence is only partial."

The submergence area of the SSP can be divided into two areas:

(i) Fully tribal, hilly area covering the initial reach of about 105 villages with manly subsistence economy. It includes 33 villages of Maharashtra, 19 of Gujarat and about 53 of Madhya Pradesh.

(ii) Mixed population area in the plains of Nimad, with a well developed economy and connected to the mainstream. This area includes about 140 villages in Madhya Pradesh.

These two areas have quite different topographic and habitation features which result in totally different types of submergence impacts. The state of the hilly area to be affected by its submergence and where most of the tribal population exists is described by the Government of Madhya Pradesh Action Plan 1993 as follows:

> "The Narmada flows in hilly gorge from the origin to the Arabian Sea. The undulating hilly terrain in the lower submergence area of Sardar Sarovar Project exhibit naked hills and depleted forests. Even small forest animals area very rarely seen because of lack of forest cover and water. The oft quoted symbiotic living with forests is a misnomer in this area because the depleted forests have nothing to offer

but fuel wood. Soil is very poor mostly disintegrated, granite and irrigation is almost nil due to undulating and hilly land. Anybody visiting this area finds the people desperately sowing even in the hills with steep gradient. Only one rain fed crop of mostly maize is sown and so there is no surplus economy.

PAPs inhabiting these interior areas find generous rehabilitation and resettlement packages as a means to assimilate in the mainstream in the valley."

84. In 193 villages of Madhya Pradesh to be affected by the project, a very high proportion of the houses would be affected whereas the land submergence was only 14.1%. The reason for this is that the river bed is a deep gorge for about 116 km. upstream of the dam and as a result the reservoir will be long (214 km), narrow (average width of 1.77 km) and deep. The result of this is that as one goes further upstream, the house on the river banks are largely affected while agricultural land which is at a distance from the river banks is spared. A majority of 33014 families of Madhya Pradesh (which would include 15018 major sons) would lose only their houses and not agricultural lands would be required to be resettled in Madhya Pradesh by constructing new houses in the new abadi. According to the Award, agricultural land was to be allotted only if the project affected families lost 25% or more of agricultural land and on this basis as per the Government of Madhya Pradesh, only 830 project affected families of Madhya Pradesh were required to be allotted agricultural land in Madhya Pradesh.

85. According to the Government of Gujarat the tribals constituted bulk of project affected families who would be affected by the dam in Gujarat and Maharashtra, namely, 97% and 100% respectively. Out of the oustees of project affected families of Madhya Pradesh, tribals constituted only 30% while 70% were non-tribals. The total number of tribal project affected families were 17725 and out of these, 9546 are already re-settled. It was further the case of the respondents that in Madhya Pradesh the agricultural land of the tribal villages was affected on an average to the extent of 28% whereas in the upper reaches i.e. Nimad where the agriculture was advanced, the extent of submergence, on an average, was only 8.5%. The surveys conducted by HMS Gour University (Sagar), the Monitoring and Evaluation Agency set up by the Government of Madhya Pradesh, reveal that the major resistance to relocation was from the richer, non-tribal families of Nimad who feared shortage of agriculture labour if the landless labourers from the areas accepted re-settlement. In the Bi-Annual report, 1996 of HMS Gour University, Sagar, it was observed as follows:

"The pre-settlement study of submerging villages has revealed many starting realities. Anti-dam protagonists presents a picture that tribals and backward people are the worst sufferers of this kind of development project. This statement is at least not true in case of the people of these five affected villages. Though, these villages comprise a significant population of tribals and people of weaker sections, but majority of them will not be a victim of displacement. Instead, they will gain from shifting. The present policy of compensation is most beneficial for the lot of weaker sections. These people are living either as labourers or marginal farmers. The status of oustee will make them the owner of two hectares of land and a house. In fact, it is the land-owning class which is opposing the construction of dam by playing the card

of tribals and weaker section. The land-owners are presently enjoying the benefit of cheap labour in this part of the region. Availability of cheap labour is boon for agricultural activities. This makes them to get higher return with less inputs."

It is apparent that the tribal population affected by the submergence would have to move but the rehabilitation package was such that the living condition would be much better than what it was before there. Further more though 140 villages of Madhya Pradesh would be affected in the plains of Nimad, only 8.5% of the agricultural land of these villages shall come under submergence due to SSP and as such the said project shall have only a marginal impact on the agricultural productively of the area.

86. While accepting the legal proposition that International Treaties and Covenant can be read into the domestic laws of the country the submission of the respondent was that Article 12 of the ILO Convention No. 107 stipulates that "the populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations relating to national security, or in the interest of national economic development or of the health of the said populations."

87. The said Article clearly suggested that when the removal of the tribal population is necessary as an exceptional measure, they shall be provided with land of quality at least equal to that of the land previously occupied by them and they shall be fully compensated for any resulting loss or injury. The rehabilitation package contained in the Award of the Tribunal as improved further by the State of Gujarat and the other State *Prima facie* shows that the land required to be allotted to the tribals is likely to be equal, if not better, than what they had owned.

88. The allegation that the said project was not in the national or public interest is not correct seeing to the need of water for burgeoning population which is most critical and important. The population of India, which is now one billion, is expected to reach a figure between 1.5 billion and 1.8 billion in the year 2050, would necessitate the need of 2788 billion cubic meter of water annually in India to be above water stress zone and 1650 billion cubic meter to avoid being water scarce country. The main source of water in India is rainfall which occurs in about 4 months in a year and the temporal distribution of rainfall is so uneven that the annual averages have very little significance for all practical purposes. According to the Union of India, one third of the country is always under threat of drought not necessarily due to deficient rain fall but many times due to its uneven occurrence. To feed the increasing population, more food grain is required and effort has to be made to provide safe drinking water, which, at present, is a distant reality for most of the population specially in the rural areas. Keeping in view the need to augment water supply, it is necessary that water storage capacities have to be increased adequately in order toward off the difficulties in the event of monsoon failure as well as to meet the demand during dry season. It is estimated that by the year 2050 the country needs to create storage of at least 600 billion cubic meter against the existing storage of 174 billion cubic meter.

89. Dams play a vital role in providing irrigation for food security, domestic and industrial water supply, hydroelectric power and keeping flood waters back. On full

development, the Narmada has a potential of irrigating over 6 million hectares of land and generating 3000 mw of power. The present stage of development is very low with only 3 to 4 Maf of waters being used by the party States for irrigation and drinking water against 28 Maf availability of water at 75% dependability as fixed by NWDT and about 100 MW power developed. 85% of the waters are estimated as flowing waste to sea. The project will provide safe and clean drinking water to 8215 villages and 135 towns in Gujarat and 131 villages in desert areas of Jalore District of Rajasthan, though against these only 241 villages are getting submerged partially and only 4 villages fully due to the project.

90. The cost and benefit of the project were examined by the World Bank in 1990 and the following passage speaks for itself:

> "The argument in favour of the Sardar Sarovar Project is that the benefits are so large that they substantially outweigh the costs of the immediate human and environmental disruption. Without the dam, the long term costs for people would be much greater and lack of an income source for future generation would put increasing pressure on the environment. If the waters of the Narmada river continue to flow to the sea unused there appears to be no alternative to escalating human deprivation, particularly in the dry areas of Gujarat. The project has the potential to feed as many as 20 million people, provide domestic and industrial water for about 30 million, employ about 1 million, and provide valuable peak electric power in an area with high unmet power demand (farm pumps often get only a few hours power per day). In addition, recent research shows substantial economic "multiplier" effects (investment and employment triggered by development) from irrigation development. Set against the futures of about 70,000 project affected people, even without the multiplier effect, the ratio of beneficiaries to affected persons is well over 100.1…"

There is merit in the contention of the respondent that there would be a positive impact on preservation of ecology as a result from the project. The SSP would be making positive contribution for preservation of environment in several ways. The project by taking water to drought-prone and arid parts of Gujarat and Rajasthan would effectively arrest ecological degradation which was returning to make these areas inhabitable due to salinity ingress, advancement of desert, ground water depletion, fluoride and nitrite affected water and vanishing green cover. The ecology of water scarcity areas is under stress and transfer of Narmada water to these areas will lead to sustainable agriculture and spread of green cover. There will also be improvement of fodder availability which will reduce pressure on biodiversity and vegetation. The SSP by generating clean eco-friendly hydropower will save the air pollution which would otherwise take place by thermal generation power of similar capacity.

91. The displacement of the tribals and other persons would not *per se* result in the violation their fundamental or other rights. The effect is to see that on their rehabilitation at new locations they are better off than what they were. At the rehabilitation sites they will have more and better amenities than which they enjoyed in their tribal hamlets. The

gradual assimilation in the main stream of the society will lead to betterment and progress.

ENVIRONMENTAL ISSUES

92. The four issues raised under this head by Sh. Shanti Bhushan are as under:

I. Whether the execution of a large project, having diverse and far reaching environmental impact, without the proper study and understanding of its environmental impact and without proper planning of mitigative measures is a violation of fundamental rights of the affected people guaranteed under Article 21 of the Constitution of India?

II. Whether the diverse environmental impacts of the Sardar Sarovar Project have been properly studied and understood?

III. Whether any independent authority has examined the environmental costs and mitigative measures to be undertaken in order to decide whether the environmental costs are acceptable and mitigative measures practical?

IV. Whether the environmental conditions imposed by the Ministry of Environment have been violated and if so, what is the legal effect of the violations?

93. It was submitted by Sh. Shanti Bhushan that a large project having diverse and far reaching environmental impacts in the concerned States would require a proper study and understanding of the environmental impacts. He contended that the study and planning with regard to environmental impacts must precede construction. According to Sh. Shanti Bhushan, when the environmental clearance was given in 1987, proper study and analysis of the environmental impacts and mitigative measures, which were required to be taken, were not available and, therefore, this clearance was not valid. The decision to construct the dam was stated to be political one and was not a considered decision after taking into account the environmental impacts of the project. The execution of SSP without a comprehensive assessment and evaluation of its environmental impacts and a decision regarding its acceptability was alleged to be a violation of the rights of the affected people under Article 21 of the Constitution of India. It was further submitted that no independent authority has examined vehemently the environmental costs and mitigative measures to be undertaken in order to decide whether the environmental costs are acceptable and mitigative measures practical. With regard to the environmental clearance given in June, 1987, the submission of Sh. Shanti Bhushan was that this was the conditional clearance and the conditions imposed by the Ministry of Environmental and Forests had been violated. The letter granting clearance, it was submitted, disclosed that even the basic minimum studies and plans required for the environmental impact assessment had not been done. Further more it was contended that in the year 1990, as the deadline for completion of the studies was not met, the Ministry of Environment and Forests had declared that the clearance had lapsed. The Secretary of the said Ministry had requested the Ministry of water Resources to seek extension of the clearance but ultimately no extension was sought or given and the studies and action plans continued to

lag to the extent that there was no comprehensive environmental impact assessment of the project, proper mitigation plans were absent and the costs of the environmental measures were neither fully assessed nor included in the projects costs. In support of his contentions, Sh. Shanti Bhushan relied upon the report of a Commission called the Independent Review or the Morse Commission. The said Commission had been set up by the World Bank and it submitted its report in June, 1992. In its report, the Commission had adversely commented on practically all aspects of the project and in relation to environment, it was stated as under:

> "Important assumptions upon which the projects are based are now questionable or are known to be unfounded. Environmental and social trade-off have been made, and continue to be made, without a full understanding of the consequences. As a result, benefits tend to be over-stated, while social and environmental costs are frequently understated. Assertions have been substituted for analysis.
>
> We think that the Sardar Sarovar Projects as they stand are flawed, that resettlement and rehabilitation of all those diaplaced by the projects is not possible under the prevailing circumstances, and that the environmental impacts of the projects have not been properly considered or adequately addressed.
>
> The history of environmental aspects of Sardar Sarovar is a history of non-compilance. There is no comprehensive impact statement. The nature and magnitude of environmental problems and solutions remains elusive."

94. Sh. Shanti Bhushan submitted that it had become necessary for some independent judicial authority to review the entire project, examine the current best estimates of all costs (social, environmental, financial), benefits and alternatives in order to determine whether the project is required in its present form in the national interest, or whether it needs to be restructured/modified.

95. Sh. Shanti Bhushan further submitted that environmental impacts of the projects were going to be massive and full assessment of these impacts had not been done. According to him the latest available studies show that studies and action plans had not been completed and even now they were lagging behind *pari passu.* It was also contended that mere listing of the studies does not imply that everything is taken care of. Some of the studies were of poor quality and based on improper data and not independent body had subjected these to critical evaluation.

RE-ENVIRONMENTAL CLEARANCE:

96. As considerable stress was laid by Sh. Shanti Bhushan challenging the validity of the environmental clearance granted in 1987 *inter alia* on the ground that it was not preceded by adequate studies and it was not a considered opinion and there was non-application of mind while clearing the project, we first propose to deal with the contention.

97. The events after the Award and upto the environmental clearance granted by the Government vide its letter dated 24th June, 1987 would clearly show that some studies, though incomplete, had been made with regard to different aspects of the environment.

Learned counsel for the respondents stated that in fact on the examination of the situation, the claim made with regard to the satisfactory progress was not correct. In order to carry out the directions in the Award about the setting up of an authority, the inter-State Water Disputes Act, 1956 was amended and Sections 6-A was inserted to set out how a statutory body could be constituted under the Act. On 10th September, 1980 in exercise of the powers conferred by Section 6-A of the Act the Central Government framed a scheme, constituted the Narmada Control Authority to give effect to the decision of the Award.

98. In January, 1980, the Government of Gujarat submitted to the Central Water Commission a detailed project report in 14 volumes. This was an elaborate report and dealt with various aspects like engineering details, canal systems, geology of area, coverage of command area etc. On 15th February, 1980 the Central Water Commission referred SSP to the then Department of Environment in Department of Science and Technology. At that point of time, environmental clearance was only an administrative requirement. An environmental checklist was forwarded to Government of Gujarat on 27th February, 1980 which sought to elucidate information including following ecological aspects:

i) Excessive sedimentation of the reservoir
ii) Water logging
iii) Increase in salinity of the ground water.
iv) Ground water recharge
v) Health hazard-water borne diseases, industrial pollution etc.
vi) Submergence of important minerals
vii) Submergence of monuments
viii) Fish culture and aquatic life
ix) Plant life-forests
x) Life of migratory birds
xi) National Park and Sanctuaries
xii) Seismicity due to filling of reservoir

The Government of Gujarat accordingly submitted information from September, 1980 till March, 1983. The information was also submitted on proviso-social and economic studies for Narmada Commend Area covering cropping pattern, health aspects, water requirement etc. A note of influence of Navagam dam on fish yield including impact on downstream fisheries was also submitted.

99. The techno-economic appraisal of the project was undertaken by the Central Water Commission which examined water availability, command area development, construction etc. The project was considered in the 22nd meeting of the Technical Advisory Committee on Irrigation. Flood Control and Multi-purpose projects held on 6-1-1983 and found it acceptable subject to environmental clearance.

100. At this point of time, the matter was handled by the Department of Science and Technology which also had a Department dealing with Environment. Environmental Appraisal Committee of the Department of Environment, then headed by a Joint Secretary, had in its meeting held on 12-4-1983 approved the project, in principle, and

required that further data be collected. This Environmental Appraisal Committee dealt with the project on two other occasions, namely, on 29-3-1985 when it deferred meeting to await report of Dewan Committee on soil conservation, and thereafter on 6-12-1985 when it deferred the meeting to await comments from the Forest Department. As stated hereafter, subsequently the Secretary of newly constituted Ministry of Environment and Forests took up further consideration of this project along with other higher officials.

101. After the project was approved, in principle, studies and collections of data were continuing. In May, 1983 the Narmada Planning Group Government of Gujarat after completion of preliminary surveys submitted work plans for various for various activities such as cropping pattern, health aspects, water requirements, distribution system, lay out and operation, development plan of the command, drainage and ground water development.

102. In July, 1983, a study report on "Ecology and Environmental Impact of Sardar Sarovar Dam and its Environs "prepared by MS University was also submitted by Government of Gujarat, covering the issues as mentioned below:

*Climate
*Geology
*Soil
*Land use
*Forest and Wildlife, Aquatic Vegetation
*Water Regime (Salinity, Tidal movements etc.)
*Fisheries
*Health
*Seismicity

103. A review meeting was convened by the Secretary, Ministry of Water Resources in January, 1984 which was attended by a representative of the Department of Environment. During this meeting, it was emphasized that the issues regarding catchment area treatment, impact on wildlife, health water logging etc, should be studied in depth for assessment. The issue of charging of cost of catchment area treatment to the project was also discussed. To sort out this matter, a meeting was subsequently convened by the Member, Planning Commission on 23rd May, 1984 in which the Ministry of Environment & Forests took a stand that there was a need for an integrated approach to basin development covering the catchment and command area. A project report, therefore, should be prepared to cover these aspects. Since the catchment area for Narmada Sagar and Sardar Sarovar was very vast, it was decided that an Inter-Departmental Committee should be set up by the Ministry of Agriculture under the Chairmanship of Dr. M.L. Dewan. This group could submit its report only in August, 1985 covering areas of catchment of Narmada and Sardar Sarovar and recommended that at least 25-30% of the area might require treatment for these projects.

104. The consideration of the project in the Ministry, therefore, got is for this report on catchment area treatment. During this time, Government of Madhya Pradesh entrusted the studies on flora for Narmada Valley Project to Botanical survey of India and other related surveys were being carried out. Even though there was a request on 10th June,

1995 from the Chief Minister of Gujarat to the Minister of State for Environment and Forests for delinking of catchment area treatment works on clearance of the project, but this request was not agreed.

105. By this time the approval of SSP was being considered by the Secretary, Ministry of Environment and Forests who invited other high officials in a review meeting which was held on 31st December, 1985 under his Chairmanship. In this meeting, detailed presentations were made by the State officials of Gujarat, Madhya Pradesh and Maharashtra as well as the experts who were involved in preparation of plans. The Secretary, Ministry of Environment and Forests assessed and reviewed readiness on various environmental aspects like Catchment Area Treatment, Compensatory Afforestation, Rehabilitation, Command area Development, Labour force and health issues, aquatic species, seismicity etc. and discussed the available reports in detail in the presence of the officers of the Central/State Government, Botanical Survey of India, senior officers of Forest Department, Planning Commission, Agriculture Department, Additional Inspector of Forests, Government of India, Deputy Inspector General, Assistant Inspector General of Forest, Government of India, senior officers of the Ministry of Environment and Forests Secretary, Irrigation.

106. As a follow up, the Government of Maharashtra submitted environmental data regarding affected areas in Maharashtra. This included:

- Impact assessment on wild life
- Impact assessment on genetics, specifically identifying the plant types which are likely to be lost as a result of submergence
- Socio anthropological studies on tribals
- The suitability of alternative land suggested for compensatory afforestation for growing.
- Data regarding alternate land in large blocks.
- Arrangements made for exploitation of mineral resources going under submergence.
- Alternative fuels to the labourers.
- Micro-climatic changes.
- Arrangements made for treatment of catchment area including soil conservation afforestation.
- Steps taken for preserving archaeological and historical monuments.
- Proper land use
- Actions taken by Government of Maharashtra in pursuance of Dewan Committee Report.
- Arrangements for monitoring for environmental impact for the project.
- Data related to rehabilitation of project affected persons.

107. The Government of Gujarat also forwarded to the Government of India work plans on the following:

Forests and Wildlife
Fish and Fisheries
Health aspects

The work plan on forests and wildlife incorporated actions to be taken on the recommendations of the Inter-Departmental Committee headed by Dr. Dewan on soil conservation and afforestation works in the catchment area.

108. In March, 1988, a meeting was convened by the Ministry of Water Resources in order to discuss the issues of fisheries, flora/fauna, health, archaeology with the officers of the Botanical survey of India, Zoological Survey of India, Archaeological Survey of India and the officers of the various departments of the State and Centre to gear up the preparation of the environmental work plans. The next meeting was held on 11th April, 1986. The Secretary, Ministry of Environmental and Forests, who chaired the meeting of senior officials, representatives of States and other agencies, sought additional information to be made available by 30th April, 1986 before assessment and management decision.

109. In October, 1986, the Ministry of water Resources prepared and forwarded to the Ministry of Environment and Forests, a note on environmental aspects of the two projects and noted the urgency of the decision. It also considered the importance of the project, should the project be taken at all, environmental aspects of the project and ultimately rehabilitation, compensatory afforestation, fauna and flora, catchment area treatment, public health aspect, prevention of water logging. If then considered what remained to be done and enumerated the same with time schedule as follows:

1. Madhya Pradesh to complete the detailed survey of population likely to be affected in all phases of N.S.P.

   …….. Three years
2. Maharashtra to prepare a detailed rehabilitation plan for 33 villages under phase 1 to SSP.

   ……. Three years
3. Madhya Pradesh to identify degraded forest lands twice the forest area to be submerged for compensatory afforestation.

   …….. Six months
4. Survey of flora in Narmada valley assigned to Botanical Survey of India.

   …….. Two years
5. Survey of Wildlife by Zoological Survey of India.

   ……. Two years
6. Aerial photographs and satellite imagery to be analysed by all India Soil and Land Use Survey Organisation and National Remote sensing Agency and critically degraded areas in catchment.

   Field Surveys ……Three years

   Pilot studies to determine measures for CAT in 25000 ha.

   …….. Three years after Aerial survey.

110. In this note two options were considered – one to postpone the clearance and the other was to clear it with certain conditions with appropriate monitoring authorities to ensure that the action is taken within the time bound programme. It was concluded that

in the light of the position set out, it was necessary that the project should be cleared from the environmental angle, subject to conditions and stipulations outlined.

111. The Department of Environment and Forests made its own assessment through a note of the Secretary, Ministry of Environment and Forests. It took the view that following surveys/studies as set out therein might take at least 2-3 years. It noted in this regard that:

(i) The estimate of Ministry of Water Resources on analysis of aerial photographs and satellite imageries as 2-3 years.

(ii) Catchment area treatment programme cab be formulated by three thereafter;

(iii) Wildlife census by Zoological Survey of India would take at least three years;

(iv) Survey by Botanical Survey of India would take three years.

It further took the view that it was essential that there should be a strong management authority. It finally concluded that if the Government should decide to go ahead with the project it should be done with provision of environmental management authority with adequate powers and teeth to ensure that environment management plan in implemented *pari passu* with engineering and other works. It concluded that effective implementation of the engineering and environmental measures simultaneously will go a long way and that such a project could be implemented by harmonizing environmental conservation needs with the developmental effort.

112. The Ministry of Environment and Forests had not given environmental clearance of Narmada Sagar and Sardar Sarovar Dam despite all discussions which had taken place. The documents filed along with the affidavit of Shri P.K. Roy, Under Secretary, Prime Minister's Office dated 27th April, 2000 indicate that there was difference of opinion with regard to the grant of environmental clearance between the Ministry of Water Resources and the Ministry of Environment and Forests. This led to the matter being referred to the Prime Minister's Secretariat for clearance at the highest level. A note dated 20th November, 1986 prepared by the Ministry of Water Resources was forwarded to the Prime Minister Secretariat as well as to the Ministry of Environment and Forests after dealing with the environmental aspects relating to rehabilitation, catchment area treatment, command area development, compensatory afforestation, flora and fauna. This note indicated that there were two options with regard to the clearance of the said project. One was to await for two to three years for the completion of the operational plans and other detailed studies and the second option was that the project should be given the necessary clearance subject to the stipulation with regard to the action to be taken in connection with various environmental aspects and appropriate monitoring arrangements to ensure that the actions were taken in a time bound manner. The Ministry of Water Resources recommended that it should be possible to give environmental clearance of the project and ensure that the conditions are properly met through a process of clear assignment of responsibility and frequent monitoring. The modus operandi for instituting a monitoring system could be discussed at the meeting.

113. On 26th November, 1986, a meeting took place which was attended, *inter alia*, by the Secretary, Ministry of Water Resources, Secretary, Ministry of Environment and Forests, Additional Secretary, Prime Minister Secretariat and representatives of the Government of Madhya Pradesh and Gujarat regarding the environmental aspects of the Narmada Sagar and Sardar Sarovar Project. The minutes of the meeting, *inter alia*, disclosed "It was decided that the Government of Gujarat would identify lands for allocation to the project affected persons of Madhya Pradesh within a specified period of time. The meeting also envisaged the arrangement of a Monitoring and Enforcement Authority to monitor the project and to ensure that the actions on the environmental aspects proceed according to the schedule and *pari passu* with the rest of the project. "This Authority was not to be mainly a advisory one but was to be given executive powers of enforcement including the power to order stoppage of construction activity in the event of its being of the opinion that there was lack of progress in action on the environmental front.

114. On 19th December, 1986, the Secretary, Ministry of Environment and Forests sent to the Secretary to the Prime Minister a combined note on environmental aspects of both the projects, namely, Narmada Sagar and Sardar Sarovar Project. In this note, it was, *inter alia*, stated that there was absence and inadequacy on some important environmental aspects even though the Sardar Sarovar Project was in a fairly advance stage of preparedness. The note also recommended the establishment of the Narmada Management Authority with adequate powers and teeth to ensure that the Environmental Management Plan did not remain only on paper but was implemented; and implemented *pari passu* with engineering and other works. In the end, in the note, it was stated as follows:

> "If despite the meagre availability of data and the State of readiness on NSP, the Government should decide to ahead with the project it is submitted that it should do so only on the basis of providing a Management Authority as outlined above with the hope that the public opposition, not just by vested interests but by credible professional environmentalists can be overcome. Effective implementation of the engineering and environmental measurers simultaneously would go a long way to prove that even such a project can be implemented by harmonising environmental conservation needs with the development effort.
>
> The choice is difficult but a choice has to be made"

Along with this note was the statement showing the cost and the benefits of the Narmada Sagar and the Sardar Sarovar dam. The same reads as follows:

"COSTS	**NARMADA AGAR**	**SARDAR SAROVAR**
1. Dam construction	Rs. 1400 crores (1981 Price level)	Rs. 4240 crores (1982 Price level)
2. Loss of forest	Rs. 320 crores	
3. Environmental cost of loss of forest	Rs. 30923 crores	+-Rs. 8190 crores
4. Catchment Area development	Rs. 300 crores	Not available

5. Common area development	Rs. 243.7 crores	Rs. 604.0 crores Rs. 300.0 crores (conjunctive use)
6. Loss of Mineral Reserves	-	-
7. Diversion of 42 km. Railway line	-	-
8. Population affected	129346 (1981 census) 86572 (Excluding population with land submerged for short period every year)	
9.Land submerged	91348 ha	39134 ha
Benefits		
10. Area irrigated Net culturable and	123000 ha 140960 ha	1792000 ha 2120000 ha
11. Power Generations	223.5 MW (firm power) 1000 MV (Installed capacity) 118.3 MW in 2023 A.D."	300 MW 4050 (installed)

115. After a series of meetings held between the Secretary to Prime Minister's office as well as the Ministry of Water Resources, a detailed note dated 15th January, 1987 was prepared by Mrs. Otima Bordia, Additional Secretary to the Prime Minister. The notes opened by saying that Narmada Sagar and Sardar Sarovar multipurpose projects have been pending approval of the Government of India for a considerable amount of time. The States of Madhya Pradesh and Gujarat have been particularly concerned and have been pressing for their clearance. The main issues of environmental concern related to the rehabilitation of the affected population, compensatory afforestation, treatment of the catchment area, command area development, pertaining particularly to drainage, water logging and salinity. The said note mentioned that the Department of Environment and Forests had sent a note with the approval of the Minister for Environment and Forests and had recommended conditional approval to the Narmada Sagar and Sardar Sarovar Projects subject to three conditions:

(i) Review of design parameters to examine the feasibility of modifying the height of the dam;

(ii) Preparation in due time, detailed and satisfactory plans for rehabilitation, catchment area treatment, compensatory afforestation and command area development;

(iii) Setting up of Narmada Management Authority with adequate powers and teeth to ensure that environmental management plans are implemented *pari passu* with engineering and other works;

116. It is further stated in the note that the Ministry of Water Resources and the State Government had no difficulty in accepting conditions (ii) and (iii). With regard to review of design parameters and dam height, the Ministry of Water Resources had examined the same after taking into consideration the comments of the Central Water Commission and concluded that the reduction of the FRL of the Narmada Sagar project would not be worthwhile. The Secretary to the Prime Minister had discussed the matter with the Secretary, Ministry of Water Resources and Secretary, Ministry of Environment and Forests and it was agreed that the recommendation of the Ministry of Environment and Forests of giving clearance on the condition that items (ii) and (iii) referred to hereinabove be accepted. The note also stated that in view of the technical report, reduction in the dam height did not appear to be feasible. This note of Mrs. Otima Bordia recommended that the Prime minister's approval was sought on giving conditional clearance. On this note, Mrs. Seria Grewal, Secretary to the Prime Minister noted as follows:

> "Proposal at para 17 may kindly be approved. This project has been pending clearance for the last 7 years and both the C.Ms. of Gujarat and Madhya Pradesh are keenly awaiting the clearance of the same. The agency, which is proposed to be set up to monitor the implementation of this project, will fully take care of the environmental degradation about which P.M. was concerned. The Ministry of Environment and Forests have recommended clearance of this project subject to conditions which will take care of P.M's apprehensions. I shall request Secretary, Water Resources, who will be Chairman of the Monitoring Agency, to see that no violation of any sort takes place and P.M's office will be kept informed of the progress of this project every quarter. The matter is urgent as last week C.M. Gujarat had requested for green signal to be given to him before 20th January.
>
> P.M. may kindly approve."

The Prime Minister Shri Rajiv Gandhi, instead of giving the approval, made the following note:

> "Perhaps this is a good time to try for a River Valley Authority. Discuss"
>
> It appears that the Ministry of Environment and Forests gave its clearance to the setting up of inter-Ministerial Committee and on 8th April, 1987, following note was prepared and forwarded to the Prime Minister.
>
> "This case has got unduly delayed. P.M. was anxious that speedy action should be taken. As such, since the Ministry of Environment have given its clearance subject to setting up of an Inter-Ministerial Committee as indicated at A' above, we may give the necessary clearance. The three Chief Ministers may be requested to come over early next week to give their clearance in principle for the setting up of a River Valley Authority so that simultaneous action can be initiated for giving practical shape to this concept. The clearance of the project, however, should be communicated within two weeks as I have been informed by Shri Shiv Shanker and Shri Bhajan Lal that interested parties are likely to start an agitation and it is better if clearance is communicated before mischief is done by the interested parties.

117. Along with another affidavit of Shri P.K. Roy, Under Secretary, Prime Minister's Office dated 2nd May, 2000, some correspondence exchanged between Legislature and the Prime Minister has also been placed on record relating to the granting of the environmental clearance by the Prime Minister. On 31st March, 1987, Shri Shanker Sing Vaghela, the then Member of Parliament, Rajya Sabha had written a letter to the Prime Minister in which it was, *inter alia*, stated that the foundation stone for the Narmada Project had been laid 25 years ago by the late Pandit Jawahar Lal Nehru and that after the Tribunal's Award, Mrs. Indira Gandhi had cleared the project in 1978, but still the environmental clearance had not so far been given. It was also stated in his letter that the project was now being delayed on account of so-called environmental problems. It was further stated in his letter that the Sardar Sarovar Project, when completed, will solve more of the pressing problems of environment than creating them. To this letter of Shri Vaghela, the Prime Minister sent a reply dated 8th April, 1987 stating as follows:

> "I have seen your letter of 31st March regarding the Narmada Project. All aspects have to be carefully considered before decisions are taken on a project of this size. This is being done.
>
> The environment and ecological factors cannot be disregarded. We cannot also dismiss the needs of our tribal people. Safeguards are required to ensure that rehabilitation plans are effective.
>
> All these aspects are being examined and a decision will be taken soon".

On 30th April, 1987, a press note was released by the Government of India, in which it was stated that in a meeting presided over by the Prime Minister, it was agreed by the Chief Ministers of Madhya Pradesh and Gujarat and representatives of the Maharashtra Government that a high level River Valley Authority would be set up for the control and development of the river basin. This press note also stated that the Narmada Sagar and the Sardar Sarovar Project on the river Narmada had been cleared. Soon, thereafter Shri Ahmad Patel, Member of Parliament from Gujarat wrote a letter dated 14th April, 1987 to Shri Rajiv Gandhi expressing his gratitude for according clearance to the Narmada multi-purpose project. This letter was replied to on 22nd April, 1987 by Shri Rajiv Gandhi who thanked Shri Patel for writing his letter dated 14th April, 1987 regarding the Narmada project. On 20th April, 1987, Shri Shanker Singh Vaghela wrote another letter to the Prime Minister. While thanking him for clearing the project, it was stated that there was apprehension about the environment and ecological factors and also about the needs of the tribal People. The Prime Minister was requested "to clarify to the people of Gujarat whether or not these aspects have finally been cleared or not and all the doubts on his front have been finally set at rest or not." On 4th May, 1987 the Prime Minister replied to this letter in which it was stated as follows:

> There should be no grounds for any misunderstanding in this regard. The Narmada Project has been cleared while at the same time ensuring that environmental safeguards will be enforced and effective measures taken for the rehabilitation of the tribals. You could ask the Ministry of Water Resources or the State Government for details."

Lastly, we need make reference to a letter dated 10th June, 1987 written by Smt. Chandraben Sureshbhai Shrimali, an M.L.A. of Gujarat and the reply of the Prime Minister thereto. In the said letter dated 10th June, 1987, Smt. Shrimali thanked the Prime Minister for clearing the Narmada project and it was stated that the dry land of Gujarat and Saurashtra would be fertilised through Narmada Yojna. To this reply dated 30th June, 1987 of the Prime Minster was as follows:

Thank you for your letter of 10th June. The visit to Surendranagar was useful and educative. We are all looking forward to the early implementation of the Sardar Sarovar Project. The question of environmental protection also needs serious attention. I wish you and the people of Surendrangar a good monsoon.

118. From the documents and the letters referred to hereinabove, it is more than evident that the Government of India was deeply concerned with the environmental aspects of the Narmada Sagar and Sardar Sarovar Project. Inasmuch as there was some difference of opinion between the Ministries of Water Resources and Environment and Forests with regard to the grant of environmental clearance, the matter was referred to the Prime Minister. Thereafter, series of discussions took place in the Prime Minister's Secretariat and the concern of the Prime Minister with regard to the environment and desire to safeguard the interest of the tribals resulted in some time being taken. The Prime Minister gave environmental clearance on 13th April, 1987 and formal letter was issued thereafter on 24th June, 1987.

119. It is not possible, in view of the aforesaid State of affairs, for this Court to accept the contention of the petitioner that the environmental clearance of the project was given without application of mind. It is evident, and in fact this was the grievance made by Shri Vaghela, that the environmental clearance of the project was unduly delayed. The Government was aware of the fact that number of studies and data had to be collected relating to environment. Keeping this in mind, a conscious decision was taken to grant environmental clearance and in order to ensure that environmental management plans are implemented *pari passu* with engineering and other works, the Narmada Management Authority was directed to be constituted. This is also reflected from the letter dated 24th June, 1987 of Shri Mudgal giving formal clearance to the project.

Re: OTHER ISSUES RELATING TO ENVIRONMENT

120. Prior to the grant of the environmental clearance on 24th June, 1967, sufficient studies were made with regard to different aspects of environment on the basis of which conditional clearance was granted on 24th June, 1987 one of the condition of clearance being that the balance studies should be completed within a stipulated time frame. According to the Government of Gujarat, the conditions imposed in the environmental clearance granted on June 24, 1987 were:

(a) The NCA would ensure that the environmental safeguard measures are planned and implemented *pari passu* with the progress of work on the project.

(b) The detailed survey/studies assured will be carried out as per the schedule proposed and details made available to the department for assessment.

(c) The catchment area treatment programme and rehabilitation plans be so drawn so as to be completed ahead of reservoir filling.

(d) The department should be informed of progress on various works periodically.

It was further submitted by the Government of Gujarat that none of these conditions were linked to any concrete time frame.

(a) The first condition casts a responsibility on the NCA to ensure that the environmental aspects are always kept in view. The best way to attain the first and the fourth condition-was to create an environmental sub-group headed by the Secretary in the Ministry of Environment and Forest.

(b) The second condition-the conducting of surveys by its very nature-could not be made time bound. The surveys related to various activities to undo any damage or threat to the environment not only by the execution of the project but in the long term. Therefore, any delay in the conduct of surveys was not critical. Besides a perusal of the latest status report on environment show that a large umber of surveys were carried out right from 1983 and also after 1987.

(c) The third condition has already stood fully complied with as observed by Environment Sub-Group.

(d) The fourth condition again involved keeping the department informed.

121. It was submitted that the concept of "lapsing" is alien to such conditions. In other words, formal environmental and forest clearances granted by the Ministry of Environment and Forests. Government of India are not lapsed and are very much alive and subsisting.

122. With regard to the lapsing of the clearance granted in 1987, it was contended by Mr. Harish Salve that a letter dated 25th May, 1992 was written by the Secretary, Ministry of Environment and Forests, Government of India to the Secretary, Ministry of Water Resources stating, *inter alia*, that the conditions of clearance of the project were not yet met and, therefore, a formal request for extension of environmental clearance, as directed by Review Committee of Narmada Control Authority may be made and falling which, a formal notification may be issued revoking the earlier clearance. It is, however, an admitted position that no formal notification has ever been issued revoking and/or cancelling the aforesaid two clearances at any point of time by the Ministry of Environment and Forests, Government of India. The Secretary, Ministry of Environment and Forests has continued to hold and chair the meeting of Environment Sub-Group, Narmada Control Authority closely monitoring the execution of SSP for ensuring that environmental safeguard measures are implemented *pari passu* with the progress of work. On 11th August, 1992, a letter was written by Narmada Control Authority to the Secretary, Ministry of Environment and Forests sending action plan and status in respect of Environmental safeguard measures taken and also stating amongst other details, the following:

"A number of letters were exchanged between the MOWR and MOEF and a great deal of discussion took place both in the Environment Sub-Group and NCA as to whether an application for extension of time as above is at all necessary. After a detailed discussion in the last NCA meeting on 25th July, 1992, it has been decided that NCA should clearly indicate the additional time required for the completion of the remaining studies like flora and fauna and some aspects of fisheries and a revised action plan based thereon be also sent expeditiously."

XXXXXXXXXX

XXXXXXXXXX

"Keeping in view the fact and circumstances mentioned above, I request you to kindly agree to the schedule of the studies and the follow up actions as presented here. A brief account of the action plan together with bar charts are enclosed, presenting a pictorial view."

On 15th December, 1992, a letter was written to the Secretary, Ministry of Environment and Forests, more particularly stating as under, amongst other things:

"The Narmada Control Authority has already prepared an action plan and status on the environmental measures of Sardar Sarovar Project and submitted to the Ministry of Environment and Forests vide their letter No. NCA/EM/683 dated 11-8-1992 for concurrence. As may be seen from their report on action, so far there is no safeguard measures.

During field season of every year this will be closely reviewed to attain *pari passu* objectives so that the submergence during monsoon is taken care of.

The above actions are scheduled to be completed by June, 1993. No doubt, action in Maharashtra is lagging. The Matter was taken up with the Chief Secretary of Maharashtra. A copy of his reply dated 7-11-1992 is in enclosed. You will observe that the reasons for the lag are largely due to the uncooperative and agitational approach adopted by some people.

Taking all these into account, you will appreciate that the action plans are adequate."

The Minister for Water Resources, government of India wrote a letter on 27th January, 1993 to the Minister of State for Environment and Forests stating that there had been no violation of environmental safeguard measures. On 7th July, 1993, the Secretary, Ministry of Water Resources, Government of India wrote a letter to the Secretary, Ministry of Environment and Forests, Government of India, more particularly stating as under:

"Progress of all the environmental works is summarised in the sheet enclosed herewith. I share your concern for initial delay in some of the studies but now it seems that the work has started in full swing. However, there is a need to keep a close watch and I am advising the NCA for the same."

By letter dated 17th September, 1993, the Minister of State for Environment and Forests, Government of India wrote to the Minister for Water Resources, Government of India appreciating the efforts made by the concerned State Governments in making the environmental plans. The exchange of the aforesaid correspondence and the conduct of various meetings of the Environment Sub-group from time to time under the Chairmanship of the Secretary, Ministry of Environment and Forests dispels the doubt of the environment clearance having been lapsed. In other words, there could not have been any question of the .....environmental clearance granted to SSP being lapsed more particularly within the Environment Sub-group had been consistently monitoring the progress of various environmental works and had been observing in its minutes of various meetings held from time to time, about its analysis of the works done by the respective States in the matter of the status of studies, surveys and environmental action plans in relation with:

(i) phased catchment area treatment;
(ii) compensatory afforestation;
(iii) command area development;
(iv) survey of flora, fauna etc.
(v) archaeological and anthropological survey;
(vi) sesmicity and rim stability of reservoir;
(vii) health aspects and
(viii) fisheries development of SSP and NSP reservoirs.

123. Sh. Shanti Bhushan in the course of his submissions referred to the report of the Morse Committee in support of his contentions that the project was flawed in more ways than one.

124. The Morse Committee was constituted, as already noted, by the World Bank. Its recommendations were forwarded to the World Bank. Apart from the Criticism of this report from other quarters, the World Bank itself, did not accept this report as is evident from its press release dated 22nd June, 1992 where it was *inter alia,* stated as follows:

> "The Morse Commission provided a draft of its report to the Bank for management comments several weeks prior to the final release of the document. About two weeks before this release the commission provided a draft of its findings and recommendations. The final version of the report is the sole responsibility of its authors; the report was not cleared by the World Bank.
>
> On resettlement and rehabilitation (R&R), Bank management agrees with the description of the R&R situation in each of the three States and with the report's conclusions about the shortcomings in the preparation and appraisal of the project's R&R aspects. We also agree that work should have been done earlier on the issue of people affected by the canal in Gujarat. However we do not share the view that resettlement would be virtually impossible even if Maharashtra and Madhya Pradesh adopted the liberal resettlement package provide for displaced people by the State of Gujarat. Given the experience so far, and the fact that most of the impact of submergence on people will not occur until 1997, there is still time to develop

meaningful R&R packages and programs in consultation, with the affected peoples. Efforts are being intensified to achieve this.

On environment, bank management agrees with the independent review on the need for a more effective central management in the Narmada Basin on environment impact studies and mitigation programmes. Management also agrees on the need to accelerate work on estuary studies and health maters in Gujarat. However, management does not share the reviews conclusions about the environmental seventy of the study delays. Command area issues are being addressed, including issues of water logging and salinity. On water availability (hydrology), Bank Management disagrees with the finding that there is insufficient impoundment of water upstream of the Sardar Sarovar Dam site to make the irrigation system work as designed."

The Government of India vide its letter dated 7th August, 1992 from the Secretary, Ministry of Environment and Forests did not accept the report and commented adversely on it.

125. In view of the above, we do not propose, while considering the petitioners' contentions, to place any reliance on the report of Morse Committee.

126. It was submitted on behalf of the petitioners that the command area development was an important aspect as the benefits of the project depended on this and if proper studies and plans were not done and not implemented, the very areas that were supposed to benefit will end up being rendered unfit for cultivation and the water logging and salinisation could refer vast areas of the command unproductive. It was also submitted that still there was no integrated command area environmental impact assessment. After referring to the status reports and studies regarding the command are development, it was submitted that there was need for some independent agency to examine the various studies, action plans and the experience and to see whether there was ground to believe that the proposed measures will work or not. It was contended that master plan or not. It was contended that master plan for drainage and command area development was still not in place and even the full studies had not been done.

127. While refuting the aforesaid contentions it was argued on behalf of learned counsel for the respondents that the SSP will provide irrigation water for a cultivable command are of 1.9 million hectares in Gujarat and 75.000 hectares in Rajasthan. The introduction of fresh water to the drought-prone areas of Gujarat will create obvious benefits for the farming communities. In order to safeguard these benefits, control and monitoring was suggested by the Secretary, Ministry of Environment and Forests and Chairman of the Environment Sub-group in the following areas from time to time:

- drainage, water logging and soil salinity;
- water quality;
- forest loss;
- potential impact on flora and fauna;
- effects on public health;
- socio-economic impacts.

128. Pursuant thereto fifty in-depth studies had been carried out by the State Governments of Gujarat and Rajasthan and some of the studies were still in progress. One of the main objectives of carrying out these studies was to prevent excessive use of ground water and water-logging.

129. There is no reason whatsoever as to why independent experts should be required to examine the quality, accuracy, recommendations and implementation of the studies carried out. The Narmada Control Authority and the Environmental Sub-group in particular have the advantage of having with them the studies which had been carried out and there is no reason to believe that they would not be able to handle any problem, if and when, it arises or to doubt the correctness of the studies made.

130. It was submitted by Sh. Shanti Bhushan that the catchment area treatment programme was not to be done *pari passu* but was required to be completed before the impoundment. This contention was based on the terms of the letter dated 24th June, 1987 wherein conditional environmental clearance was granted, *inter alia,* on the condition that "the catchment area treatment programme and rehabilitation plans be drawn so as to be completed ahead of reservoir filling." "Admittedly, the impounding began in 1994 and the submission of Sh. Shanti Bhushan was that catchment area treatment programme had not been completed by them and, therefore, this very important condition had been grossly violated. Reference was also made to the Minutes of the Environmental Sub-group meetings to show that there had been slippage in catchment area treatment work.

131. The clearance of June, 1987 required the work to be done *pari passu* with the construction of the dams and the filling of the reservoir. The area wherein the rainfall water is collected and drained into the river or reservoir is called catchment area and the catchment area treatment was essentially aimed at checking of soil erosion and minimising the silting of reservoir within the immediate vicinity of the reservoir in the catchment area. The respondents had proceeded on the basis that the requirement in the letter of June, 1987 that catchment area treatment programme and rehabilitation plans be drawn up and completed ahead of reservoir filling would imply that the work was to be done *pari passu*, as far as catchment area treatment programme is concerned, with the filling of reservoir. Even though the filling of the reservoir started in 1994, the impoundment Award was much less than the catchment area treatment which had been affected. The status of compliance with respect to *pari passu* conditions indicated that in the year 1999, the reservoir level was 88.0 meter, the impoundment are was 6881 hectares (19%) and the area where catchment treatment had been carried out was 128230 hectares being 71.56% of the total work required to be done. The Minutes of the Environmental Sub-group as on 28th September, 1999 stated that catchment area treatment works were nearing completion in the states of Gujarat and Maharashtra. Though, there was some slippage in Madhya Pradesh, however, overall works by and large were on schedule. This clearly showed that the monitoring of the catchment treatment plan was being done by the Environmental Sub-group quite effectively.

132. With regard to compensatory afforestation it was contended by Sh. Shanti Bhushan that it was being carried out outside the project impact area. Further, it was submitted that the practice of using waste land or lesser quality land for compensatory afforestation

means that the forest will be of lesser quality. Both of the together defeated the spirit of the compensatory afforestation. It was contended that the whole compensatory afforestation programme was needed to be looked at by independent experts.

133-134. While granting approval in 1987 to the submergence of forest land and/or diversion thereof for the SSP, the Ministry of Environment and Forests had laid down a condition that for every hectare of forest land submerged or diverted for construction of the project, there should be compensatory afforestation on one hectare of non-forest land plus reforestation on two hectare of degraded forest. According to the State of Gujarat, it had fully complied with the condition by raising afforestation in 4650 hectares of non-forest areas and 9300 hectares in degraded forest areas before 1995-96 against the impoundment area of 19%. The *pari passu* achievement of afforestation in Gujarat was stated to be 99. 62%.

135. If afforestation was taking place on waste land or lesser quality land, it did not necessarily follow, as was contended by the petitioners, that the forests would be of lesser quality or quantity.

136. It was also contended on behalf of the petitioners that downstream impacts of the project would include not only destruction of downstream fisheries, one of the most important ones in Gujarat on which thousands of people are dependent but will also result in salt water ingress. The project, it was contended, will have grave impacts on the Narmada Estuary and unless the possible impacts were properly studied and made public and mitigation plans demonstrated with the requisite budget, one could not accept the claim that these matters were being looked into. The need to assess the problem was stated to be urgent as according to the petitioners rich fisheries downstream of the dam, including the famed Hilsa would be almost completely destroyed. The salinity ingress threatened the water supply and irrigation use of over 210 villages and towns and Bharuch city. All these would not only have serious economic and other impacts but would also directly destroy the livelihoods of at least of 10000 fisher families.

137. Again all these contentions were based on the Morse Committee Report which the World Bank and the Union of India had already rejected. That apart, according to the respondents, in 1992 Sardar Sarovar Narmada Nigam limited issued an approach paper on environmental impact assessment for the river reach downstream. This provided technical understanding of the likely hydrological changes and possible impact in relation thereto. It was further submitted by learned counsel for the respondents that the potential for environmental changes in the lower river and estuary had to be seen in the context of the long term development of the basin. The current stage was clearly beneficial. The three stages could be identified as follows:

Stage 1 covers the period roughly from the completion of Sardar Sarovar Dam to the year 2015. Events occurring during this stage include (a) SSP Canal Command will have reached full development and requires diversion of some water, (b) the upstream demand will reach about 8MAF and (c) the Narmada Sagar Dam will have been built and placed in operation.

Stage 2 covers the period from 2015 and 2030 during which the demands upstream of SSP continue to grow and will reach about 12 MAF still below the volume of 18 MAF that Madhya Pradesh can take in 75% year.

Stage 3 covers the period upto and beyond full basin development.

The report given by M/s. H.R. walling ford in March, 1993 in respect of the down stream impacts of Sardar Sarovar Dam observes, *inter alia*, as under:

> "The overall conclusion of the team undertaking the assessment described in this report is that there are no down steam impacts whose magnitude and effect are such as to cause doubts to be cast over the wisdom of proceeding with the Sardar Sarovar Projects provided that appropriate monitoring and mitigation measurers are applied. Much of this work is already in progress under the auspices of the NPG, SSNNL and NCA. The recommendations in this report are intended to provide a synthesis of their work and suggestions as to whether it might be modified to enhance its usefulness."

The said M/s. H.R. Walling ford in the findings of 1995 stated as under:

> "It is thought unlikely that any significant negative environmental impacts will occur over the next 30 years as a result of the project. Some possible adverse effects have been identified the main one being the effect of flood attenuation on Hilsa migration. These needs to be monitored and more studies undertaken to better understand the conditions which trigger spawning. Beneficial impacts in this period include reduced flooding and more reliable dry season flows as well as an overall improvement of the health and wealth being of the people to the reliable domestic water supply, improved nutrition and enhanced economic activity."

The above report clearly demonstrates that the construction of dam would result into more regulated and perennial flow into the river with an overall beneficial impact. It is also evident that until all the dams are constructed upstream and the entire flow of river is harnessed, which is not likely in the foreseeable future, there is no question of adverse impact including the fishing activity and the petitioner's assertions in this regard are ill-conceived.

138. The area of submergence was stated to be rich in archaeological remains but it still remained to be studied. It was contended that there was danger of rich historical legacy being lost and even a small increase in the dam height would threaten to submerge many of the sites listed in the report of the Archaeological survey of India. There were stated to be five monuments which would be affected at the dam height of 90 meter or above and no work was stated to have commenced to protect any of the five monuments.

139. According to the State of Gujarat, the Ancient Monuments and Archaeological Sites and Remains Act, 1958 charged the Central and/or State Department of Archaeology with responsibility for the protection of important cultural sites. Under the Act, sites were classified into three categories as follows:

Type 1: Monuments of national importance which are protected by the Central Government;

Type 2: Monuments of religious or cultural importance which are protected by the State Government; and

Type 3: Monuments which are neither Centrally nor State protected, but which are considered to be an important part of cultural heritage.

Under the same law, authorities charged with the protection of the monuments are permitted to take suitable measures to ensure the preservation of any protected site under threat from decay, misuse or economic activity.

In the case of Sardar Sarovar, where several sites may be submerged, the NDWT award stipulated that the entire cost of relocation and protection should be chargeable to Gujarat. Relocation work was to be supervised by the Department of Archaeology under the provisions of the Ancient monuments and Archaeological Sites and Remains Act, 1958.

140. The three State Governments carried out a complete survey of cultural and religious sites within the submergence zone. The principle of these surveys was to list all Archaeological sites, identify and name any site under State protection and further identify sites of religious or cultural significance which although not protected under national law, were of sufficient value to merit relocation. So far as the State of Gujarat is concerned the Department of Archaeology surveyed archaeological sites in nineteen villages of submergence zone in Gujarat under the title of "Archaeological survey of Nineteen Villages in Gujarat submerged by Sardar Sarovar Reservoir, 1989."

In addition to baseline studies on archaeological aspects, work had been carried out on the anthropological heritage of Narmada Basin, including examination of evidence of ancient dwellings and cultural artefacts. The principal studies in this behalf are described below:

Anthropological Survey of India: Narmada Salvage Plan: The Narmada Salvage Plan contains detailed background data on palaeoanthropolical, human ecological and other aspects of the Narmada Valley. By May, 1992, surface scanning of 17 sample villages coming under the submergence had been carried out an 424 specimens including ancient tools etc. had been collected.

Anthropological Survey of India: Peoples of India: This project entailed a complete survey of 33 tribes of India including those of Narmada Basin. The study covered all aspects of tribal culture in India and was published in 61 volumes in 1992.

Summary of current situation and progress, Government of Gujarat

Survey of village in submergence zone	Complete for all items in the State
Identification of cultural sites	Complete for all items in the State
Collection of data and documentation of sites	Complete
Selection of appropriate sites	Complete
Action Plan	Complete

It was further submitted on behalf of respondents that no centrally or State protected cultural sites were located in the submergence area of the project. In Gujarat, the Department of Archaeology concluded that the temples of Shoolpaneshwar and Hampheshwar were important monuments and should be moved to a higher level. Sites were selected for constructing new Shoolpaneshwar and Hampheshwar had been relocated and reconstructured near Goa, about 15 Km downstream from the present location. Hampheshwar was also constructed at higher ground in consultation with the temple trustees and pranpratistha was also planned on 22nd to 24th April, 2000 i.e. before the temple was submerged.

141. In relation to flora and fauna studies, it was contended by the petitioners that the studies had finished only recently and the action plans were awaited in many cases. In the meanwhile, extensive deforestation of the submergence zone had taken place, as also part of the area had been submerged, even as the studies have been on. It was also contended that the impact on some of these Wild Ass Sanctuary in Kutch would be very severe.

142. The guidelines of the Ministry of Environment and Forests required that while seeking environmental clearance for the hydropower projects, surveys should be conducted so that the status of the flora and fauna present could be assessed. A condition of environmental clearance of 1987 as far as it related to flora and fauna was that the Narmada Control Authority would ensure in-depth studies on flora and fauna needed for implementation of environmental safeguard measures. It is the case of the respondents that number of studies were carried out and reports submitted. It was observed that the submergence area and catchment area on the right bank of the proposed reservoir exhibited a highly degraded ecosystem which was in contract to the left bank area where there was fairly good forest cover which formed part of Shoolpaneshwar Wildlife Sanctuary. With regard to the study of fauna, the said report indicated that a well-balanced and viable eco-system existed in the Shoolpaneshwar Sanctuary. Moreover, with the construction of dam, water availability and soil moisture will increase and support varieties of plants and animals.

143. It was also contended on behalf of petitioners that the whole project will have serious impacts on health, both around the submergence area and in the command. The preventive aspects had not been given attention. There was no linkage between the studies and work.

144. On behalf of State of Gujarat, it was contended that large number of studies had been carried out on the health profile of villagers including studies on water related diseases in SSP commend area including the area downstream of the dam. The study of M.S. University in 1983 and other studies concluded that the most common diseases in the basin were Malaria, Scabies, Dysentery and Diarrhoea. Of these only a threat to Malaria needed to be of concern. The study concluded that the incidence of hygiene related diseases other than Malaria could be reduced by better water availability. The Gujarat Work Plan covered villages within 10 Kms. radius of the reservoir including resettled population and made provision for the monitoring surveillance and control of Malaria. The principal features of the Gujarat Work Plan included establishment of a hospital at Kevadia near the dam site, strengthening of laboratory facility including establishment of mobile unit residual insecticidal spraying operations etc. This showed that the area of public health was in no way being neglected.

145. The petitioner was also critical of the functioning of the Environmental Sub-group as it was contended that the claims of the studies and progress report were accepted at the face value and without verification. It was also contended that the Ministry of Environment and Forests had grossly abdicated its responsibility. This submission was based on the premise that clearance, which had been granted, had lapsed and the Ministry of Environment and Forests did not insist on the Ministry of Water Resources for its renewal and further more the Ministry of Environment and Forests had not taken any cognizance of the criticism about environmental aspects contained in the Morse Committee Report. Lastly the Five Member Group in its first report was critical in many respects and pointed out studies which had remained incomplete but no cognizance was taken by the Ministry of Environment and Forests. The repeated abdication, it was submitted, of the responsibility by the Ministry of Environment and Forests indicated that it was not taking the whole issue with the seriousness it deserved.

146. On behalf of the State of Gujarat, it was contended that various alleged dangers relating to environment as shown by the petitioners were mostly based on the recommendations of the Morse Committee Report and Five Member Group. While the report of Morse Committee does not require our attention, the same not having been accepted either by the World Bank or the Government of India. Para 4.5.2 of the report of Five Member Group which relates to creation of the Environment Sub-group commends it's establishment, it's observation about its powers of as follows:

> **"4.5.2.** It must be noted that the Environmental Sub-groups is not a body which merely observes and reports, but watchdog body which can recommend even the stoppage of work if it feels dissatisfied with the progress on the environment front. The recommendations of the Environmental Sub-group will have to be considered by the NCA, and if there is any difference of opinion at that level, it will have to be referred to the Review Committee, which has the Minister of Water and Environment and Forests as a member. It seems doubtful whether any more effective mechanism could have been devised or made to work within the framework of our existing political and administrative structures, particularly in the context of a federal system. Secretary (Environment & Forests) has, in fact, been given a special

position in the NCA inasmuch as he can insist on matters being referred to the Review Committee and at the Review Committee the Minister of Environment and Forests forcefully plead the environmental cause; he can also make the environmental point of view heard at the highest level. If in spite of all these arrangements, the environmental point of view fails to be heard adequately, and if project construction tends to take an over-riding precedence, that is a reflection of the relative political importance of these two points of view in our system. This can be remedied only in the long term through persuasion and education, and not immediately through institutional arrangements which run counter to the system." (Emphasis added)

Apart from the fact that we are not convinced that construction of the dam will result in there being an adverse ecological impact there is no reason to conclude that the Environmental Sub-group is not functioning effectively. The group which is headed by the Secretary, Ministry of Environment and Forests is a high powered body whose work cannot be belittled merely on the basis of conjectures or surmises.

147. Sh. Shanti Bhushan, learned Senior Counsel while relying upon A.P. Pollution Control Board v. Professor M.V. Mayadu (1999) 2 SCC 718 ; (1999 AIR SCW 434 : AIR 1999 SC 812) submitted that in cases pertaining to environment, the onus of proof is on the person who wants to change the status quo and, therefore, it is for the respondents to satisfy the Court that there will be no environmental degradation.

148. In A.P. Pollution Control Board's case this Court was dealing with the case where an application was submitted by a company to the Pollution Control Board for permission to set up an industry for production on "BSS Castor Oil Derivatives". Though later on a letter of intent had been received by the said company, the Pollution Control Board did not give its no-objection certificate to the location of the industry the site proposed by it. The Pollution Control Board, while rejecting the application for consent, *inter alia,* stated that the unit was a polluting industry which fell under the red category of polluting industry and it would not be desirable to locate such an industry in the catchment area of Himayat Sagar, a lake in Andhra Pradesh. The appeal filed by the company against the decision of the Pollution Board was accepted by the appellate authority. A writ petition was filed in the nature of public interest litigation and also by the Gram Panchayat challenging the order of the appellate authority but the same was dismissed by the High Court. On the other hand, the writ petition filed by the company was allowed and the High Court directed the Pollution Board to grant consent subject to such conditions as may be imposed by it.

149. It is this decision which was the subject-matter of challenge in this Court. After referring to the different concepts in relation to environmental cases like the 'precautionary principle' and the 'polluter-pays principle', this Court relied upon the earlier decision of this Court in Vellore Citizens' Welfare Forum v. Union of India, (1996) 5 SCC 647 : (1996 AIR SCW 3399 : AIR 1996 SC 2715) and observed that there was a new concept which places the burden of proof on the developer or industrialist who is proposing to alter the status quo and has become part of our environmental law. It was noticed that inadequacies of science had led to the precautionary principle and the said

'precautionary principle' in its turn had led to the special principle of burden of proof in environmental cases where burden as to the absence of injurious effect of the actions proposed is placed on those who want to change the status quo. At page 735, this Court, while relying upon a report of the International Law Commission, observed as follows:

> The precautionary principle suggests that where there is an identifiable risk of serious or irreversible harm, including, for example, extinction of species, widespread toxic pollution is major threats to essential ecological processes, it may be appropriate to place the burden of proof on the person or entity proposing the activity that is potentially harmful to the environment.

150. It appears to us that the 'precautionary principle' and the corresponding burden of proof on the person who wants to change the status quo will ordinarily apply in a case of polluting or other project or industry where the extent of damage likely to be inflicted is not known. When there is State of uncertainty due to lack of data or material about the extent of damage or pollution likely to be caused then, in order to maintain the ecology balance, the burden of proof that the said balance will be maintained must necessarily be on the industry or the unit which is likely to cause pollution. On the other hand where the effect on ecology of environment of setting up of an industry is known, what has to be seen is that if the environment is likely to suffer, then what mitigative steps can be taken to off set the same. Merely because there will be a change is no reason to presume that there will be ecological disaster. It is when the effect of the project is known then the principle of sustainable development would come into play which will ensure that mitigative steps are and can be taken to preserve the ecological balance. Sustainable development means what type or extent of development can take place which can be sustained by nature/ecology with or without mitigation.

151. In the present case we are not concerned with the polluting industry which is being established. What is being constructed is a large dam. The dam is neither a nuclear establishment nor a polluting industry. The construction of a dam undoubtedly would result in the change of environment but it will not be correct to presume that the construction of a large dam like the Sardar Sarovar will result in ecological disaster. India has an experience of over 40 years in the construction of dams. The experience does not show that construction of a large dam is not cost effective or leads to ecological or environmental degradation. On the contrary there has been ecological up gradation with the construction of large dams. What is the impact on environment with the construction of a dam is well known in India and, therefore, the decision in A.P. Pollution Control Board's case (1999 AIR SCW 434: AIR 1999 SC 812) (supra) will have no application in the present case.

152. Reference was made by Sh. Shanti Bushan to the decision of the United States District Court in the case of Sierra Club etc. v. Robert F. Froehlke (1973) 350bF. Supp. 1280. In that case work had begun on Wallisville Project which, inter alia, consisted of a construction of a low dam. It was the case of the plaintiff that the construction of the project would destroy hundreds of thousands of trees and enormous grain, fish and other wide life will lose their habitat and perish. It was contended that the defendants were proceeding in violation of law by not complying with the requirements of National

Environmental Policy Act, 1969 (NEPA) Plaintiff, *inter alia*, sought an injunction for restraining the undertaking of the project in violation of the said Act. The District Court held that not with standing the substantial amount of work had already been done in connection with the project but the failure to satisfy full disclosure requirement of NEPA injunction would be issued to halt any further construction until requirements of NEPA had been complied with, that even though there was no Act like NEPA in India at the time when environmental clearance was granted in 1987, nevertheless by virtue of Stockholm Convention and Article 21 of the Constitution the principles of Sierra Club decision should be applied.

153. In India notification had been issued under Section 3 of the Environmental Act regarding prior environmental clearance in the case of undertaking of projects and setting up of industries including Inter-State River Project. This notification has been made effective from 1994. There was, at the time when the environmental clearance was granted in 1987, no obligation to obtain any statutory clearance. The environmental clearance which was granted in 1987 was essentially administrative in nature, having regard and concern of the environment in the region. Change in environment does not per se violate any right under Article 21 of the Constitution of India especially when ameliorative steps are taken not only to preserve but to improve ecology and environment and in case of displacement, prior relief and rehabilitation measures take place *pari passu* with the construction of the dam.

154. At the time when the environmental clearance was granted by the Prime Minister whatever studies were available were taken into consideration. It was known that the construction of the dam would result in submergence and the consequent effect which the reservoir will have on the ecology of the surrounding areas was also known. Various studies relating to environmental impact, some of which have been referred to earlier in this judgment, had been carried out. There are different facets of environment and if in respect of a few of them adequate data was not available it does not mean that the decision taken to grant environmental clearance was in any way vitiated. The clearance required further studies to be undertaken and we are satisfied that this has been and is being done. Care for environment is an on going process and the system in place would ensure that ameliorative steps are taken to counter the adverse effect, if any, on the environment with the construction of the dam.

155-156. Our attention was also drawn to the case of Tennessee Valley Authority v. Heram G. Hill (1978) 437 US 153 : 57 L. Ed. 2d 117: 98 S Ct 2279) where the Tennessee Valley Authority had begun construction of the Tellico Dam and reservoir project on a stretch of Little Tennessee River. While major portion of the dam had been constructed the Endangered Species Act 1973 was enacted wherein a small fish popularly known as the "Snail darter" was declared an endangered species. Environmental groups brought an action in the United States District Court for restraining impounding of the reservoir on the ground that such an action would violate the Endangered Species Act by causing the snail darter extinction. The District Court refused injunction but the same was granted by the United State Court of Appeal. On further appeal the US Supreme Court held that the Endangered Species Act prohibited the authority for further impounding the river. The

said decision has no application in the present case because there is no such act like the Endangered Species Act in India or a declaration similar to the one which was issued by the Secretary of the Interior under that Act. What is, however, more important is that it has not been shown that any endangered species exists in the area of impoundment. In Tennessee Valley Authority case it was an accepted position that the continued existence of snail darter which was an endangered species would be completely jeopardised.

157. Two other decisions were referred to by Sh. Shanti Bhushan-Arlington Coalition on Transportation v. John A. Volpe, (1972) 458 F.2d 1323 and Environmental Defence Fund Inc. v. Corps of Engineers of United States Army, (1971) 325 F. Supp. 749. In both these decisions it was decided that the NEPA would be applicable even in case of a project which had commenced prior to the coming into force of the said Act but which had not been completed. In such cases there was a requirement to comply with the provisions of NEPA as already noticed earlier. The notification under Section 3 of the Environment Protection Act cannot be regarded as having any retrospective effect. The said notification dated 27th January 1994 *inter alia,* provides as follows:

> "Now, therefore, in exercise of the powers conferred by sub-section (1) and Clause (v) of sub-section (2) of Section 3 of the Environment (Protection) Act, 1986 (29 of 1986) read with Clause (d) of sub-rule (3) of Rule 5 of the Environment (Protection) Rules, 1986, the Central Government hereby directs that on and from the date of publication of this notification in the Official Gazette expansion or modernization of any activity (if pollution load is to exceed the existing one) or a new project listed in Schedule I to this notification, shall not be undertaken in any part of India unless it has been accorded environmental clearance by the Central Government in accordance with the procedure hereinafter specified in this notification."

This notification is clearly prospective and inter alia prohibits the under taking of a new project listed in Schedule I without prior environmental clearance of the Central Government in accordance with the procedure now specified. In the present case clearance was given by the Central Government in 1987 and at that time no procedure was prescribed by any statute, rule or regulation. The procedure now provided in 1994 for getting prior clearance cannot apply retrospectively to the project whose construction commenced nearly eight years prior thereto.

RELIEF AND REHABILITATION

158. It is contended by the petitioner that as a result of construction of dam over 41,000 families will be affected in three States spread over 245 villages. The number of families have increased from 7000 families assessed by the Tribunal. It was further contended that the submergence area can be broadly divided into two areas, fully tribal area which covers the initial reach of about 100 or so villages which are almost 100% tribal and hilly. These include all the 33 villages of Maharashtra, all 19 of Gujarat and many of the Madhya Pradesh. The second part of the submergence area is the mixed population area on the Nimad plains with a very well developed economy that is well connected to the

mainstream. While the tribal areas are stated to be having a rich and diverse resource base and the self sufficient economy, the lack of so-called modern amenities like roads, hospitals and schools are far more a reflection of the neglect and disregard by the Government over the last fifty years than on anything else. Of the 193 villages stated to be affected by Sardar Sarovar submergence 140 lie in the Nimad Plains. The population of these villages are a mixture of caste and tribal and these villages have all the facilities like schools, post offices, bus service etc.

159. It was contended that whereas the project authorities talk only about the families affected by submergence, none of the other families affected by the project are considered as PAFs nor has any rehabilitation package been designed for then. These non-recognised categories for whom no rehabilitation package is given are stated to be those persons living in submergence area who are not farmers but are engaged in other occupation like petty traders, villages shopkeepers who are to be affected by submergence; colony affected people whose lands were taken in 1960 to build the project colony, warehouses etc. canal affected people who would be losing 25 per cent of their holdings because of the construction of the canals; drainage affected people whose lands will be acquired for drainage; 10,000 fishing families living downstream whose livelihood will be affected; lands of the tribals whose catchment treatment area has been carried out; persons who are going to be affected by the expansion of Shoolopaneshwar Sanctuary; persons going to be affected by Narmada Sagar Project and Garudehwar Weir. It was contended that there was an urgent need to assess comprehensively the totality of the impact and prepare category specific rehabilitation policies for all of them.

160. It was also submitted that the total number of affected families in all the three States as per the Master Plan prepared by the Narmada Control Authority is 40727. According to the petitioner, however, this figure is an under-estimate and the estimate of the land required for these PAFs is also on a much lower side. The basis for making this submission is:

(1) In each village there are many persons left out of the Government list of declared PAFs. These are joint holders (non recognized as landed oustees or PAFs) and the adult sons.

(2) Incorrect survey have been conducted and the affected persons have serious apprehensions about the validity of the surveys since at many places the level marking are suspect, in many cases the people affected at higher levels have been given notices for lower levels, many others at the same levels have been lift out and so on. It is also alleged that there have been shortcomings in the policies and if they are corrected many more oustees will be entitled to PAFs status. Further more the cut off date for PAFs in Madhya Pradesh including adult son is linked to the date of issuance of notification. Since land acquisition process is still incomplete the number of adult sons entitled to land would increase with the issuance of fresh Section 4 Notification.

161. From the aforesaid it was contended that the total impact in terms of number of oustees as well as land entitlement will be much larger than what is considered in the Master Plan.

162. It is also submitted that there was major lacunae in the said policy like the three States having dissimilar policy for R&R. This difference in rehabilitation packages of different States, with the package of Gujarat being more favourable, is leading to a situation where the oustees are forced to shift to Gujarat. The other lacunae which are stated to have many serious problems are alleged to be non provision for fuel wood and grazing land with fodder. No provision for rehabilitation of people involved in non-agricultural occupation. According to the petitioner the number of affected people even by submergence have been underestimated. The policy regime governing them has many serious lacunae. The increase in the numbers is due to lack of proper surveys and planning and the provision of just and due entitlements to the PAFs. Since this process of providing just entitlements is still incomplete, and the policies need a thorough review, the number and entitlements are likely to go up further. Even the magnitude of the task of R&R cannot be assessed properly till the above are considered and proper policies introduced.

163. It is also contended that before embarking on the Sardar Sarovar Project it was necessary that the Master Plan for rehabilitation of the families to be affected is completed. According to the petitioner the Master Plan which was submitted in the Court cannot be regarded as an acceptable Master Plan inasmuch as it has no mention of people affected by Sardar Sarovar Project other than those affected by submergence and it has no estimate of resource base of the oustees in their original village. Further the plan makes no estimation of the forest land, grazing land and resources being used by the oustees. The Master Plan persists with the discriminatory and different policies which are less than just to the oustees. There is also no planning for community resettlement even though the Award of the Narmada Tribunal made detailed provision regarding rehabilitation of the oustees which required that there should be village wise community rehabilitation.

164. In support of this contention reliance is placed on the following stipulation for rehabilitation contained in the Award of the Narmada Tribunal "That Gujarat shall establish rehabilitation villages in Gujarat in the irrigation command of the SSP on the norms hereafter mentioned for rehabilitation of the families who are willing to migrate to Gujarat. "The submission is that no specific rehabilitation village, as envisaged by the Tribunal's Award, has been established in Gujarat. The issue of community re-settlement is stated to be not merely an issue of community facility but is a more fundamental issue. The issue is really one of preserving social fabric and community relation of the oustees which, it is alleged, is being destroyed due to dispersal of the community who are being resettled at different sites.

165. Dealing with the situation of those oustees who have been resettled in Gujarat it is submitted by the petitioner that there are large number of grievances of the said oustees in 35 re-settlement sites. With the passage of time the number of problems overall would become much more, is the contention. The petitioner finds fault with the quality of land which has been given in Gujarat to the oustees contending that large number of oustees have been given land outside the command area of irrigation and in some re-settlement sites there is a serious water-logging problem. It also contends that though some amenities have been provided but they are not adequate. It is also the case of the

petitioner that sufficient land for re-settlement of the oustees from Madhya Pradesh is not available in Gujarat despite the claim of the State of Gujarat to the contrary.

166. With regard to Maharashtra it is contended by the petitioner that the official figure of the total number of PAFs affected in Maharashtra is not correct and the number is likely to be more than 3113 PAFs estimated by the State of Maharashtra. Further more adequate land of desired quality has not been made available for re-settlement till 90 tm. and even thereafter. Reference is made to the affidavit of the State of Maharashtra in which it is stated that it proposes to ask for the release of 1500 hectares of forest and for re-settlement and the submission on behalf of the petitioner is that release of such land shall be in violation of Forest Conservation Act, 1980 and is not in public interest for forest cover will be further depleted.

167. With regard to the State of Madhya Pradesh it is submitted that as per the award the PAFs have a right to choose whether to go to Gujarat or to stay in the home State. The State of Madhya Pradesh stated to have planned the whole re-settlement based on the assumption that overwhelming proportion of oustees entitled to land will go to Gujarat yet even for the limited number of oustees who are likely to stay in Madhya Pradesh the submission is that no land is available. The petitioner also disputes the averment of the State of Madhya Pradesh that the oustees have been given a choice as to Gujarat or stay in the home State. According to the petitioner the majority of the oustees would prefer to stay in the home State that is Madhya Pradesh but sufficient and for their re-settlement in Madhya Pradesh is not available. According to the petitioner the State of Madhya Pradesh has stated that it does not have land for any PAFs above 830 and even for 830 PAFs the land is not available. It is not submitted that the Madhya Pradesh Government cannot wriggle out of its responsibility to provide land for the oustees by offering them cash compensation. The petitioner finds fault with the effort of the State of Madhya Pradesh to push the oustees to Gujarat whose rehabilitation scheme is more attractive and beneficial than that of Madhya Pradesh.

168. The petitioner further contends that one of the fundamental principle laid down is that all the arrangements and re-settlement of the oustees should be made one year in advance of submersion. In B. D. Sharma v. Union of India's case (1992(Suppl) 3 SCC 93) this Court has held that resettlement and rehabilitation has to be done at least six months in advance of submersion, complete in all respects. It is, therefore, contended that since offers to the Madhya Pradesh oustees affected at 90 mtr. to be settled in Madhya Pradesh has not been made, there cannot be any question of further construction till one year after the re-settlement of these PAFs at 90 mtr.

169. The petitioner is also critical of the functioning of the R&R Sub-group and it is contended that the said Sub-group has not taken any cognizance of the various issues and problems enumerated by the petitioner. It is submitted that in assuring that the relief and rehabilitation arrangements are being done the said R&R Sub-group merely accepts the assertions of the Government rather than verifying the claims independently. There is also a complaint regarding the manner in which the R&R Committee takes decision on the spot when it makes frequent visits. It is contended that the decisions which are taken in an effort to solve the grievances of the oustees is done in the most insensitive way. The

R&R Sub-group, it is contended, is an official agency of the Government it self being a Sub-group of the NCA, which is pushing the project ahead and the question raised by the petitioner is as to how can the same body which is building a project and executing the R&R be also monitoring it.

170. It is a case of the petitioners that there is a need for independent monitoring agency in the three States who should be asked to monitor the R&R of the oustees and see to the compliance with the NDWT award. No construction should be permitted to be undertaken without clearance from this authority. Lastly it is contended that large number of grievances are persisting even after twenty years and the pace of resettlement has been slow. The petitioner seems to have contended that the relief and rehabilitation can be manageable only if the height of the dam is significantly lessened which will reduce submersion and displacement of people.

171. In order to consider the challenge to the execution of the project with reference to Relief and Rehabilitation it is essential to see as to what is the extent and the nature of submergence.

172. The Sardar Sarovar Reservoir level at 455 ft. would affect 193 villages in Madhya Pradesh, 33 villages in Maharashtra and 19 villages in Gujarat. The submergence villages are situated on the banks of river Narmada having gentle two steep slopes of the satpura hills. A village is considered affected even when the water level touches the farm/hut at lowest level. It may be noted that only 4 villages (3 villages in Gujarat and 1 village in Madhya Pradesh) are getting submerged fully and the rest 241 villages are getting affected partially.

173. The state-wise land coming under submergence (category-wise) is given below:

			STATES		(in Hectares)
Sr No.	Type of Land	GUJARAT	MAHARASHTRA	MADHYA PRADESH	TOTAL
	Cultivated land	1877	1519	7883	11279
	Forest Land	4166	6488	2731	13385
	Other land including river bed	1069	1592	10208	12869
	Total land	7112	9599	20822	37533

174. The aforesaid table shows that as much as 12869 hectares of the affected land is other than agricultural and forest and includes the river bed area.

175. When compared to other similar major projects, the Sardar Sarovar Project has the least ratio of submergence to the area benefited (1.98% only). The ratio of some of the existing schemes is as much as 25% as can be seen from the table below.

Sr. No.	Name of Project	State	Benefit of Area (in ha)	Submergence Area (in ha)	Irrigation benefit per ha. Submergence	Percentage of are submerged to area irrigated
	Hirakund	Orissa	251150	73892	3.40	29.42
	Shriram Sagar	Andhra Pradesh	230679	44517	5.24	19.14
	Gandhi Sagar	Madhya Pradesh	503200	66186	7.60	13.15
	Paithan	Maharas htra	278000	35000	7.94	15.29
	Tungbha dra	Karnatak a	372000	37814	9.84	10.16
	Pench	Maharas htra	34000	7750	12.13	8.24
	Nagarjun sagar	Andhra Pradesh	895000	28500	31.40	3.18
	Bhakra	Himachal Pradesh	676000	16800	40.24	2.48
	Sardar Sarovar	Gujarat	1903500	37533	50.71	1.97

176. Countering the assertion that the construction of the dam would result in large scale relocation and uprooting of tribals, the factual position seems to be that the tribals constitute bulk of PAFs in Gujarat and Maharashtra, namely, 97% and 100% Respectively. In the case of Madhya Pradesh, the tribals PAFs are only 30% while 70% are non-tribals.

177. The tribals who are affected are in indigent circumstances and who have been deprived of modern fruits of development such as tap water, education, road, electricity, convenient medical facilities etc. The majority of the project affected families are involved in rain-fed agricultural activities for their own sustenance. There is partial employment in forestry sector. Since the area is hilly with difficult terrain, they as wholly dependent on vagaries of monsoon and normally only a single crop is raised by them. Out of the PAFs of Madhya Pradesh who have re-settled in Gujarat, more than 70% are tribal families. Majority of the total tribal PAFs are stated to have already been re-settled in Gujarat after having exercised their option. It is the contention of the State of Gujarat that the tribals in large number have responded positively to the re-settlement package offered by that State.

178. In Madhya Pradesh, the agricultural lands of the tribal villages are affected on an average to the extent of 28% whereas in the upper reaches i.e. Nimad where the agriculture is advanced, the extent of submergence on an average, is only 8.5%. The surveys conducted by HVMs Gour University (Sagar) the Monitoring and Evaluation Agency, set up by Government of Madhya Pradesh, reveals that the major resistance to

relocation from the richer, non-tribal families of Nimad who fear shortage of agricultural labour if the landless labourers from the areas accept re-settlement.

179. The displacement of the people due to major river valley projects has occurred in both developed and developing countries. In the past, there was no definite policy for rehabilitation of displaced persons associated with the river valley projects in India. There were certain project specific programmes for implementation on temporary basis. For the land acquired, compensation under the provisions of Land Acquisition Act, 1894 used to be given to the project affected families. This payment in cash did not result in satisfactory resettlement of the displaced families. Realising the difficulties of displaced persons, the requirement of relief and rehabilitation of PAFs in the case of Sardar Sarovar Project was considered by the Narmada Water Disputes Tribunal and the decision and final order of the Tribunal given in 1979 contains detailed directions in regard to acquisition of land and properties, provision for land, house plots and civic amenities for the resettlement and rehabilitation of the affected families. The re-settlement policy has thus emerged and developed along with Sardar Sarovor Project.

180. The Award provides that every displaced family, whose more than 25% of agricultural land holding is acquired, shall be entitled to and be allotted irrigable land of its choice to the extent of land acquired subject to the prescribed ceiling of the State concerned with a minimum of two hectares land. Apart from this land based rehabilitation policy, the Award further provides that each project affected persons will be allotted a house plot free of cost and re-settlement and rehabilitation grant. The civic amenities required by the Award to be provided at places of re-settlement include one primary school for every 100 families, one Panchayat Ghar, one dispensary, one seed store, one children's park, one village pond and one religious place of worship for every 500 families, one drinking water well with trough and one tree platform for every 50 families, approach road linking each colony to main road; electrification, water supply, sanitary arrangement etc. The State Governments have liberalized the policies with regard to re-settlement and have offered packages more than what was provided for in the Award e.g. the Governments of Madhya Pradesh, Maharashtra and Gujarat have extended the R&R benefits through their liberalized policies even to the encroachers, landless/displaced persons, joint holders, Tapu land (Island) holders and major sons (18 years old) of all categories of affected persons. The Government of Maharashtra has decided to allot one hectare of agricultural land free of cost even to unmarried major daughters of all categories of PAFs.

181. In the environmental clearance granted by the Ministry of Environment and Forests vide its letter dated 24th June, 1987, one of the conditions stipulated therein was for information from the project authorities on various action plans including Rehabilitation Master Plan of 1989.

182. It is the contention of the petitioners that the failure to prepare a "Master Plan" constitutes non-compliance with the requirement of the Tribunal's Award as well as environmental clearance. The Tribunal's Award does not use the expression 'Master Plan' but as per clause XI sub-clause IV (2) (ii), what is required, is as under:

"The three States by mutual consultation shall determine within two years of the decision of the Tribunal, the number and general location of rehabilitation Villages required to be established by Gujarat in its own territory."

183. It is with regard to this clause in the Award that, presumably, the aforesaid letter of 24th June, 1987 granting environmental clearance required the preparation of the new Master Plan.

184. In 1988 when the project was first cleared by the Planning Commission from investment angle, it was estimated that 12180 families would be affected in three States. Based on these numbers, the State Governments independently prepared their action plans and announced their R & R policy based on Tribal's Award. On the basis of the said action plans the Narmada Control Authority submitted Rehabilitation Master Plan to the Ministry of Environment and Forests along with its letter dated 3/4-5-1989. Out of the total population, which is affected by the submergence, large number are tribals and hence attention was paid by the State Governments to liberalise their policies for protecting the socio-economic and cultural milieu and to extend the R&R benefits even to other categories of persons who were not covered by the Tribunal's Award. This led to the liberalization of the R & R packages by the three States which packages have been referred to hereinabove. As a result of the liberalization of the packages, the number of PAFs as estimated in 1992 by the State Governments were 30144. Based on the material available, the three State Governments prepared individual action plans in 1993 but those action plans were integrated by the Narmada Control Authority first in 1993 and again in 1995 as an integrated Master Plan to present a holistic picture of the R&R programme. The Master Plan deals with socio-economic and cultural milieu of PAFs, the legal framework, R & R policy and procedures, implementation machinery, organization for R & R, monitoring and evaluation, empowerment of women and youth, special care for vulnerable groups, financial plans for R & R etc. As per the 1990 Master Plan the total PAFs have increased to 40227 from 30144 due to addition of 100 more genuine PAFs in Maharashtra. This Master Plan includes villages-wise, category-wise PAFs and their preference in R & R to settle in home State or in Gujarat.

The reason for increase in number of PAFs has been explained in the Master plan and the reasons given, *inter alia*, are:

(a) After CWC prepared backwater level data, the number of PAFs in Madhya Pradesh (MP) increased by 12000 PAFs as their houses are affected in a 1 in 100 years flood.

(b) Government of Gujarat (GOG) included major sons of the dyke villages as PAFs.

(c) Cut off date for major sons was extended by GOG and Government of Maharashtra (GOM).

(d) PAFs affected in MP, have increased due to delay in publication of S.4 notification under the Land Acquisition Act.

(e) Persons socially or physically cut off due to impounding of water in reservoir, are also considered as PAFs by all the three States.

(f) All the three States decided to consider encroachers as PAFs.

(g) Major unmarried daughters in Maharashtra are considered as a separate family by Government of Maharashtra.

(h) Some genuine PAFs were earlier left out (as many stayed in remote areas or used to undertake seasonal migration to towns and developed area in search of casual work).

185. As far as the State of Gujarat is concerned, its contention is that the task of R & R is not impossible as recognized by the FMG-I in its 1994 report and according to the State, it is fully ready and prepared to re-settle in Gujarat all the PAFs upto FRL 455 ft.

186. On 13th November, 1996, a meeting of the Review Committee of the Narmada Control Authority chaired by the Union Minister of Water Resources was held. This meeting was attended by the Chief Ministers of all the States including Rajasthan and representatives of Ministry of Environment and Forests. Ministry of Social Justice and Empowerment, Government of India. In the meeting it was unanimously decided that the reviews of the implementation of resettlement and rehabilitation measures will be undertaken for every five meter height of the dam jointly by the concern R & R Sub-group and Environmental Sub-group so that work could progress *pari passu* with the implementation measurers. In its meeting held on 6th January, 1999, R & R Sub-group of Narmada Control Authority observed that arrangements made by the States for R & R of the balance families pertaining to the dam height EL. 90 meter were adequate and a meeting of the party States should be convened shortly to finalise the action plan. Pursuant thereto a special inter-State Meeting was convened under the chairmanship of the Secretary to the Government of India, Ministry of Social Justice and Empowerment on 21st January, 1999 at New Delhi and action plan for re-settlement and rehabilitation for balanced families of dam height EL 90 meter was finalized for implementation by the States. It is the case of the State of Gujarat that it had issued notices and made offers in January, 1998 to PAFs affected at RL 90 meter in connection with the selection of land and their re-settlement in Gujarat. According to it, even in respect of PAFs affected at RL 95 meter, notices were issued in January, 1999 and to the PAFs included in the subsequent list, notices were issued in September 1999. The process of land selection by PAFs who had opted to resettle in Gujarat at RL 95 meter was already started. According to the Union of India, the Master Plan was under implementation and the progress of R & R at various elevations of dam viz. EL 90 meter, EL 95 meter, EL 110 meter and FRL 138.68 meter has been made.

187. The measures which have been implemented for sustainable development with regard to preserving the socio-cultural environment of the displaced persons in the State of Maharashtra, Gujarat and Madhya Pradesh are stated to be as follows:

- Three choices to the people for the selection of relocation sites.
- Integration of the displaced person with the neighbouring villages by organizing medical check-up camps, animal husbandry camps, festivals, eye camps, rural development seminar for village workers etc.

- Establishment of rehabilitation committees at different levels.
- Respect of traditional beliefs, rituals and rights at the starting of house construction, the day and time of leaving the old house and village and the day and time of occupying the new house etc.
- The sacred places at the native villages are being recreated along with their settlements at new sites.
- Installation of all the religious deities with the due consultation of religious heads.
- Promotion of cultural milieu viz. Social festivals, religious rights, rights of passage, presence of priests, shaman, kinsmen, clansmen etc.
- Special consideration for the preservation of holistic nature of the culture.
- Proper use of built-in-mechanism of cultural heritage of the displaced persons.
- Launching of culturally appropriate development plan.
- Genuine representation of the traditional leader.

188. The Tribunal had already made provision of various civic amenities which were further liberalized by the State Governments during implementation. The existing development programmes were strengthened for ensuring sustainable development at the rehabilitation sites. These were Integrated Rural Development Programme (IRDP) for agriculture, Business and village industries, Integrated Child Development Scheme (ICDS) for nutrition, health and education; Jawahar Rojgar Yojna (JRY); aids for improved seeds, fertilizers, irrigation, animal husbandry. Training Rural Youth for self-employment (TRYSEM); Employment Guarantee Scheme (EGS), social Assistance; Industrial Training Institute (ITI); Tribunal Development Programme (TDP), financial benefits to the backward classes, economically weaker sections, tribals and other backward classes (OBC) eye camps, subsidies to farmers (seed, tractorisation, fertilizers, diesel, etc.) agricultural prices support subsidy etc.

189. Other benefits which were extended for improving the quality of life of the resettled PAFs included fodder farm, mobile sale, shop of fodder, seeds cultivation training, initial help in land preparation for agricultural activities better seeds and fertilizers, access to finance, special programme for women in the traditional skills entrepreneurship development, employment skill formation, different plantation programmes, special emphasis for pasture management, environment awareness and education programme, for bio-gas/smokeless chulhas, safe drinking water supply, electricity, lift irrigation, fertilizers kit distribution, gypsum treatment of soil etc.

190. The Project authorities in these three States of Madhya Pradesh, Gujarat and Maharashtra represented that comprehensive health care was available in tribal areas where the displaced families had been re-settled. It was contended that extensive preventive health measures like mass immunization, anti-malaria programme, family welfare programmes, child development schemes etc. had been undertaken. What is

important is that primary health centres were established at relocation sites for all necessary health facilities to the PAFs.

191. The submission on behalf of Union of India was that there was a well-established mechanism of Government of India for coordination and monitoring of Re-settlement & Rehabilitation (R & R) Programmes in case of Sardar Sarovar Project. The R&R Sub-group convenes its meeting regularly to monitor and review the progress of R&R while Rehabilitation Committee of Narmada Control Authority are responsible for applying its independent mind on R & R. The Sub-group and Rehabilitation Committee visits the submergence areas/relocation sites to see whether the rehabilitation is taking place physically and to hear the individual problems of the PAPs. The R&R Group, keeping in view the progress of relief and rehabilitation, has not permitted the height to be raised, until and unless it is satisfied that adequate satisfactory progress has been made with regard to R&R. Whereas at an earlier point of time in 1994, the construction schedule had required the minimum block level to be raised to 85 meters, the R&R Sub-group had permitted the same to be raised to EL 69 meter only during that period to match the R & R activity. It was in the meeting of R&R Sub-group on 6th January, 1999 after the R&R Sub-group had reviewed the progress and had satisfied itself that the land for re-settlement in Gujarat, Maharashtra and Madhya Pradesh, which were available, was more than required for the re-settlement of the balanced PAFs that it cleared the construction up to the dam height EL 90 meters. The action plan for the same had been approved and is under implementation by the States concerned.

192. The petitioners had contended that no proper surveys were carried out to determine the different categories of affected per sons as the total number of affected persons had been shown at a much lower side and that many had been denied PAF status. From what is being stated hereinabove, it is clear that each State has drawn detailed action plan and it is after requisite study had been made that the number of PAFs have been identified. The number has substantially increased from what was estimated in the Tribunal's Award. The reason for the same, as already noticed, is the liberalization of the R & R packages by the State governments. Except for a bald assertion, there appears to be no material on which this Court can come to the conclusion that no proper surveys had been carried out for determining the number of PAFs who would be adversely affected by the construction of the dam.

193. Re-settlement and rehabilitation packages in the three States were different due to different geographical, local and economic conditions and availability of land in the States. The liberal packages available to the Sardar Sarovar Project outees in Gujarat are not even available to the project affected people of other projects in Gujarat. It is incorrect to say that the difference in R&R packages, the package of Gujarat being the most liberal, amounts to restricting the choice of the oustees. Each State has its own package and the oustees have an option to select the one which was most attractive to them. A project affected family may, for instance, chose to leave its home State of Madhya Pradesh in order to avail the benefits of more generous package of the State of Gujarat while other PAFs similarly situated may opt to remain at home and take advantage of the less liberal package of the State of Madhya Pradesh. There is no

requirement that the liberalisation of the packages by three States should be to the same extent and at the same time, the States cannot be faulted if the package which is offered, though not identical with each other, is more liberal than the one envisaged in the Tribunal's Award.

194. Dealing with the contention of the petitioners that there were large number of persons who were living in the submergence area and were not farmers and would lose their livelihood due to loss of the community and/or loss of the river and were not being properly rehabilitated. Mr. Harish Salve, learned Senior Counsel contended that this averment was not true. According to him, all the families in the 105 hilly tribal villages were agriculturists, cultivating either their own land or Government land and all of whom would be eligible for alternative agricultural land in Gujarat. Only a small number of non-agriculturists, mainly petty shopkeepers were found in these villages of tribal areas. In Gujarat there were 20 such non-agriculturists families out of a total of 4600 affected families and all of these had been resettled as per their choice so that they could restart their business. In Maharashtra out of 3213 affected families, not a single family was stated to fall under this category. Amongst the affected families of Madhya Pradesh, the figure of such non-agriculturists family was also stated to be not more than couple of 100. In our opinion it is neither possible nor necessary to decide regarding the number of people likely to be so affected because all those who are entitled to be rehabilitated as per the Award will be proved with benefits of the package offered and chosen.

195. With regard to the colony affected people whose 1380 acres of land was acquired in six villages for the construction of a colony, most of the landholders had continued to stay in their original houses and about 381 persons were stated to have been provided permanent employment in the project works. At the time, the land was acquired in 1962-63, compensation was paid and in a addition thereto, the Government of Gujarat devised a special package in August, 1992 providing ex-gratia payment up to Rs. 36000.00 to the land losers for purchase of productive assets of land for those who had not received employment in the project.

196. Dealing with the contention of the petitioners that there will be 23500 canal affected families and they should be treated at par to that of oustees in the submergence area, the respondents have broadly submitted that there is a basic difference in the impacts of the projects in the upstream submergence area and its impacts in the beneficiary zone of the command area. While people, who were oustees from the submergence zone, required re-settlement and rehabilitation, on the other hand, most of the people falling under the command area were in fact beneficiaries of the projects and their remaining land would now get relocated with the construction of the canal leading to greater agricultural output. We agree with this view and that is why, in the Award of the Tribunal, the State of Gujarat was not required to give to the canal affected people the same relief which was required to be given to the oustees of the submergence area.

197. Dealing with the contention of the petitioners that the oustees were not offered a chance to re-settle in Gujarat as a community and that there was a clear requirement of

village-wise communication rehabilitation which had not been complied with, the contention of the respondents was that no provision of Tribunal's Award had been shown which caused any such obligation on the Government of Gujarat. What the award of the Tribunal required is re-settlement of the PAFs in Gujarat at places where civil amenities like dispensary, schools, as already been referred to hereinabove, are available.

198. Subsequent to the Tribunals Award, on the recommendation of the World Bank, the Government of Gujarat adopted the principle of resettlement that the oustees shall be relocated as village units, Village sections of families in accordance with the oustees preference. The oustees' choice has actively guided the re-settlement process. The requirement in the Tribunals Award was that the Gujarat shall establish rehabilitation villages in Gujarat in the irrigation command of the Sardar Sarover Project on the norms mentioned for rehabilitation of the families who were willing to migrate to Gujarat. This provision could not be interpreted to mean that the oustees families should be resettled as a homogeneous group in a village exclusively set up for each such group. The concept of community wise resettlement, therefore, cannot derive support from the above quoted stipulation. Besides, the norms referred to in the stipulation relate to provisions for civic amenities. They vary as regards is civic amenity vis-a-vis the number of oustees families. Thus, one panchayat ghar, one dispensary, one children's' park, one seed store and one village pond is the norm for 500 families, one primary school (3 Rooms) for 100 families and a drinking water well with trough and one platform for every 50 families. The number of families to which the civic amenities were to be provided was thus not uniform and it was not possible to derive there from a standardize pattern for the establishment of a site which had nexus with the number of oustees' families of a particular community or group to be resettled. These were not indicators envisaging re-settlement of the oustees families on the basis of tribes, sub-tribes, groups or sub-groups.

199. While re-settlement as a group in accordance with the outstees preference was an important principle/objective, the other objectives were that the oustees should have improved or regained the standard of living that they were enjoying prior to their displacement and they should have been fully integrated in the community in which they were re-settled. These objectives were easily achievable if they were re-settled in the command area where the land was twice as productive as the affected land and where large chunks of land were readily available. This was what the Tribunal's Award stipulated and one objective could not be seen in isolation of the other objectives.

200. The Master Plan, 1995 of Narmada Control Authority also pointed out that "the Bhils, who are individualistic people building their houses away from one another, are getting socialized; they are learning to live together". Looking to the preferences of the affected people to live as a community, the Government of Gujarat had basically relied on the affected families' decision as to where they would like to relocate, instead of forcing them to relocate as per a fixed plan.

201. The underlined principle in forming the R&R policy was not merely of providing land for PAFs but there was a conscious effort to improve the living conditions of the PAFs and to bring them into the mainstream. If one compares the living conditions of the

PAFs in their submerging villages with the rehabilitation package first provided by the Tribunal's Award and then liberalized by the States, it is obvious that the PAFs had gained substantially after their re-settlement. It is for this reason that in the Action Plan of 1993 of the Government of Madhya Pradesh it was stated before this Court that "therefore, the re-settlement and rehabilitation of people whose habitat and environment makes living difficult does not pose any problems and so the rehabilitation and re-settlement does not pose a threat to environment." In the affidavit of Dr. Asha Singh, Additional Director (Socio & CP), NVDA, as produced by the Government of Madhya Pradesh in respect of visit of R & R sites in Gujarat during 21st to 23rd February, 2000 for ascertaining the status relating to grievances and problems of Madhya Pradesh PAFs resettled in Gujarat, it was, *inter alia*, mentioned that "the PAFs had informed that the land allotted to them is of good quality and they take the crops of Cotton, Jowar and Tuwar. They also stated that their status has improved from the time they had come to Gujarat but they want that water should start flowing in the canals as soon as possible and in that case they will be able to take three crops in one year as their land is in the command area. "Whereas the conditions in the hamlets, where the tribals lived, were not good enough the rehabilitation package ensured more basic facilities and civic amenities to the re-settled oustees. Their children would have schools and children's park, primary health centre would take care of their health and, of course, they would have electricity which was not a common feature in the tribal villages.

202. Dealing with the contention of the petitioners that there was no provision for grazing land and fuel wood for the PAFs, it is rightly contended by the State of Gujarat that grazing land was not mandated or provided for in the Tribunal's Award but nevertheless, the grazing land of six villages was available for use of PAFs. It may be that the grazing land was inadequate but this problem will be faced by the entire State of Gujarat and not making such land available for them does not in any way violate any of the provisions of the Award.

203. With regard to providing irrigation facilities, most of the re-settlement of the project affected families were provided irrigation facilities in the Sardar Sarovar Project command area or in the command areas or other irrigation projects. In many of the out of command sites, irrigated lands were purchased. In cases where the irrigation facilities were not functioning, the Government of Gujarat had undertaken the work of digging tube wells in order to avoid any difficulty with regard to irrigation in respect of those outstees who did out have adequate irrigation facilities. It was contended that because of the delay in the construction of the project, the cut off date of 1st January, 1987 for extending R & R facilities to major sons were not provided. The Tribunals Award had provided for land for major sons as on 16-8-1978. The Government of Gujarat, however, extended this benefit and offered rehabilitation package by fixing the cut off date of 1-1-1987 for granting benefits to major sons. According to the Tribunal's Award, the sons who had become major one year prior to the issuance of the Notification for land acquisition were entitled to be allotted land. The Land Acquisition Notification had been issued in 1981-82 and as per the Award, it was only those sons who had become major one year prior to that date who would have become eligible for allotment of land. But in

order to benefit those major sons who had attained majority later, the Government of Gujarat, made a relaxation so as to cover all those who became major up to 1-1-1987. The Government of Gujarat was under no obligation to do this and would have been quite within its right merely to comply with the provisions of the Tribunal's Award. This being so, relaxation of cut off date so as to give extra benefit to those sons who attained age of majority at a later date, cannot be faulted or criticized.

204. Dealing with the contention of the petitioners that there is a need for a review of the project and that an independent agency should monitor the R & R of the oustees and that no construction should be permitted to be undertaken without the clearance of such an authority, the respondents are right in submitting that there is no warrant for such a contention. The Tribunal's Award is final and binding on the States. The machinery of Narmada Control Authority has been envisaged and constituted under the Award itself. It is not possible to except that Narmada Control Authority is not to be regarded as an independent authority. Of course some of the members are Government officials but apart from the Union of India, the other States are also represented in this Authority. The Project is being undertaken by the Government and it is for the Governmental authorities to execute the same. With the establishment of the R & R Sub-group and constitution of the Grievances Redressal Authorities by the States of Gujarat, Maharashtra and Madhya Pradesh, there is a system in force which will ensure satisfactory re-settlement and rehabilitation of the oustees. There is no basis for contending that some outside agency or National Human Rights Commission should see to the compliance of the Tribunal Award.

MONITORING OF REHABILITATION PROGRAMME

205. The Ministry of Water Resources, Government of India is the Nodal Ministry for the Sardar Sarovar Project and other Union Ministries involved are the Ministries of Environment and Forests and Social Justice and Empowerment. As a consequence of the Tribunals Award, Narmada Control Authority was created to co-ordinate and oversee the overall work of the project and to monitor the R & R activities including environmental safeguard measures. The Review Committee of the Narmada Control Authority consists of the Union Minister of Water Resources as its Chairman, the Union Ministry of Environment and Forests and the Chief Ministers of Gujarat, Madhya Pradesh, Maharashtra and Rajasthan as Members. This Review Committee may *suo motu* or on the application of any party State or the Secretary, Ministry of Environment and Forests review any decision of the Narmada Control Authority. In the Narmada Control Authority, Re-settlement & Rehabilitation (R & R) Sub-group has been created for closely monitoring the R & R progress. This Sub-group is headed by the Secretary, Government of India, Ministry of Social Justice & Empowerment and is represented by Members/Invitees of participating States, academic institutions having expertise in R & R, independent socio-anthropological experts and non-Governmental Organisations. The functions of this Sub-group are as follows:

1. To monitor the progress of land acquisition in respect of submergence land of Sardar Sarovar Project and Indian (Narmada) Sagar Project (ISP).

2. To monitor the progress of implementation of the action plan of rehabilitation of project affected families in the affected villages of SSP and ISP in concerned States.

3. To review the R & R action plan from time to time in the light of results of the implementation.

4. To review the reports of the agencies entrusted by each of the State in respect of monitoring and evaluation of the progress in the matter of re-settlement and rehabilitation.

5. To monitor and review implementation of re-settlement and rehabilitation programmes *pari passu* with the raising of the dam height, keeping in view the clearance granted to ISP and SSP from environmental angle by the Government of India and the Ministry of Environment and Forests.

6. To co-ordinate States/agencies involved in the R & R programmes of SSP and ISP.

7. To undertake any or all activities in the matter of re-settlement and rehabilitation pertaining to SSP and ISP.

REHABILITATION COMMITTEE

206. This Court vide order dated 9-8-1991 in B.D. Sharma v. Union of India 1992 Suppl. (3) SCC 93 directed the formation of a Committee under the chairmanship of the Secretary, Ministry of Social Justice & Empowerment, Government of India to visit the submergence areas/re-settlement sites and furnish the report of development and progress made in the matter of rehabilitation. The Rehabilitation Committee headed by the Secretary, Government of India, Ministry of Social Justice and Empowerment and having representatives of the three State Governments as its members had been constituted. It is the case of the Union of India that this Committee visited regularly the various R&R sites and submergence villages in the three States and submitted reports to this Court from time to time, By order dated 24th October, 1994, this Court in the aforesaid case of B.D. Sharma (Supra) observed that all the directions issued by the court from time to time have been complied with and nothing more be done in the petition and the petition was disposed off. Most of the recommendations/objections as made by this Committee are stated to have been complied fairly by the States concerned.

207. In addition to the above, the officials of the Narmada Control Authority are also stated to be monitoring the progress of R & R regularly by making field visits. The individual complaints of the PAFs are attended and brought to the notice of the respective Governments.

GRIEVANCES REDRESSAL MECHANISM

208. The appeal mechanism has been established in the policy statements by all the three State Governments for the redressal of grievances of the PAFs. According to this

mechanism, if a displaced person is aggrieved by the decision of the Rehabilitation Officers in respect of any R & R process, he may appeal to the concerned agency/officers.

209. Vide Resolution dated February 17, 1999, the Government of Gujarat set up a high-level authority called "Grievance Redressal Authority (GRA)" before whom the oustees already re-settled and to be resettled in Gujarat could ventilate their grievances for redressal after their re-settlement till the process of re-settlement and rehabilitation is fully completed. The said Grievances Redressal Authority has Mr. Justice P.D. Desai, retired Chief Justice as its Chairman. This machinery had been established to:

(A) create an Authority before whom oustees who have re-settled in the State of Gujarat can ventilate their grievances relating to the R & R measures taken by the State of Gujarat.

(B) ensure that the oustees already settled and the oustees settled hereinafter in the R & R sites created for re-settlement and rehabilitation of the oustees from the States of Madhya Pradesh and Maharashtra receive all the benefits and amenities in accordance with the award and the various Government resolutions made from time to time.

(C) Ensure that Gujarat oustees re-settled in Gujarat have received all the benefits and amenities due to them.

210. The Gujarat Rehabilitation Authority has installed a permanent in-house Grievances Redressal Cell (GRC) within Sardar Sarovar Punarvasavat Agency. The Grievances Redressal Cell deals with the Grievances of the PAFs and the grievances redressal is undertaken by it in the following three ways.

(i) Grievances Redressal Cell deals grievances in the regular course on the basis of applications i.e. by holding enquiries and implementing decisions taken pursuant thereto.

(ii) Grievances redressal on the spot though mechanism of Tatkal Fariyad Nivarn Samiti.

(iii) Grievances redressal under the mechanism of Single Window Clearance System.

211. Grievances Redressal Authority has surveyed sites in which PAFs have been resettled and has submitted reports to this Court from time to time which disclose substantial compliance with the terms of the award and the rehabilitation package.

212. In its Fourth Report dated 15-11-1999, the Grievances Redressal Authority observed "pursuant to the grievances redressal measures taken by GRC, whose approach is positive and grievance redressal oriented, a considerable number of grievance have been resolved by extensive land improvement work done on agricultural land at different sites within a period of six months i.e. April-September, 1999".

213. The R & R Sub-group in its 20th field visit of the R & R sites in Gujarat on 12/ 13-1-2000 has noted as follows:

"The Committee after the visit and from interaction with the PAFs, concluded that there is vast improvement in the conditions of PAFs at these R & R sites as compared to the grievances reported in the same sites during previous visits by the Committee/ NCA officers. Assessing the perception of PAFs the Committee deserved that the majority of PAFs are happy and joining maubatream of country's development".

214. The Grievances Redressal Cell has dealt with and decided a total of over 6500 grievances.

215. In the instance of Grievances Redressal Authority, an Agricultural Cell is set up in Sardar Sarovor Punarvasavat Agency with effect from 1st July, 1999. This was done with an objective of enhancing the productivity of agricultural land allotted to PAFs by adopting of suitable farm management practices and in assisting in resolving land related grievances. Similarly, w.e.f. 1-5-1999, Medical Cells have been set up in Sardar Sarovar Punarvasavat Agency for ensuring effective functioning of medical infrastructure and providing organized system of supervising and monitoring and also for conducting health survey-cum-medical check up activities. The Grievance Redressal Authority has become an effective monitoring and implementing agency with regard to relief and rehabilitation of the PAFs in Gujarat. Apart from resolving independent grievances of PAFs and enforcing the compliance of the provisions of the Award through its exhaustive machinery and mechanism, it is also trying to guide in respect of various other issues not covered by the provisions of the Award such as-

(i) Vocational training of the oustees;
(ii) Review of Narmada oustees employment opportunity rules;
(iii) Issue relating to Kevadia Colony;
(iv) Issue relating to tapu land;
(v) Development of Kevadia as a tourist centre etc.

216. In Maharashtra a local committee was constituted comprising of Additional Collector (SS), Divisional Forest Officer, Resettlement Officer and two representatives of the oustees nominated by the local Panchayat Samities from among the elected members of the village panchayats in the project affected villages/taluka. This Committee is required to examine the claims of the PAFs and give directions within a time frame and an appeal from its decision lies to the Commissioner. In addition thereto, vide notification dated 17th April, 2000 the government of Maharashtra has set up a Grievances Redressal Authority in lines established by the State of Gujarat and Mr. Justice S. P. Kurdukar, retired Judge of this Court, has been appointed as its chairman. This Authority is expected to be analogous to the Grievances Redressal Authority of Gujarat.

217. In Madhya Pradesh, the grievances of the PAFs have first to be made by a acclaim which will be verified by the Patwari and then scrutinized by the Tehsildar. PAFs may file an appeal against the decision of R & R official before the District Collector who is required to dispose off the same within a period of three months. In the case of Madhya Pradesh also by Notification dated 30th March, 2000 the Government of Madhya Pradesh

has constituted Grievances Redressal Authority similar to the one in Gujarat with Mr. Justice Sohni, retired Chief Justice of Patna High Court as its Chairman.

IN DEPENDENT MONITORING & EVALUATION AGENCIES

218. The Monitoring and Evaluation of the rehabilitation programme is also being carried out by the independent socio-anthropological agencies appointed by the Sate Governments of Maharashtra, Madhya Pradesh and Gujarat as well as Narmada Control Authority. These agencies which are professional and academic institutes, conduct surveys and in-depth studies relating to PAFs in the submergence and rehabilitation villages. The main object of the monitoring is oriented towards enabling the management to assess the progress, identify the difficulties, ascertaining problem areas, provide early warning and thus call for corrections needed immediately.

219. The Centre for Social Studies, Surat is the monitoring agency for the Government of Gujarat. This Institute has prepared 24 six monthly progress reports in relation to the re-settlement of PAFs of submergence villages of Gujarat. Similarly for the project affected families of Madhya Pradesh/Maharashtra who have re-settled in Gujarat, the Government of Gujarat has appointed the Gujarat Institute of Development Research, Ahmedabad as the independent Monitoring and Evaluation Agency for monitoring R & R programmes.

220. In Madhya Pradesh the monitoring and evaluation had been carried out by Dr. H. S. Gaur University, Sagar and the same has been dis-engaged now and a new agency is being appointed. The findings of Dr. H. S. Guar University, Sagar indicated that dis-placed families in Madhya Pradesh are, by and large, happy with the new re-settlement in Gujarat and one of the main reason behind their happiness was that the shifting from hamlets had changed their socio-economic status.

221. In Maharashtra the monitoring and evaluation was earlier being done by the Tata Institute of Social Sciences, Mumbai. This agency had reported that overall literacy rate among project affected persons above six years of age is bout 97%, while illiteracy in submergence villages was rampant. Furthermore the report showed that in the submergence villages, the tribals mostly relied on traditional healers for their ailments. Now the current scenario is that at R & R sites, health centres and sub-centres have been established.

222. It is thus seen that there is in place an elaborate network of authorities which have to see to the execution and implementation of the project in terms of the award. All aspects of the project are supervised and there is a Review Committee which can review any decision of the Narmada Control Authority and each of the three rehabilitating States have set up an independent Grievances Redressal Authority to take care that the relief and rehabilitation measures are properly implemented and the grievances, if any of the oustees are redressed.

223. On 9th May, 2000, this Court directed the State Governments of Gujarat. Madhya Pradesh and Maharashtra to file affidavits disclosing the latest status of resettlement and rehabilitation work for the existing as well as prospective oustees likely to be affected by raising the height of the dam.

224. Pursuant to the said direction affidavit on behalf of the three States have been failed and, in response thereto, the petitioners have also failed an affidavit.

225. On behalf of the State of the Gujarat the affidavit of Sh. V. K. Babbar, Commissioner (Rehabilitation) and Chief Executive Officer, Sadar Sarovar Punarvasvat Agency (SSPA) has been failed , according to which at FRL 138.68 m. the status with regard to PAFs to be re-settle is stated to be as follows:

State	**Total umber of PAFs resettled/allotted agricultural land in Gujarat**	**Balance PAFs to be resettled in Gujarat**
Gujarat	4575	25
Maharashtra	710	290
Madhya Pradesh	3280	10450
Total	8565	10765

226. It is the case of State of Gujarat that 8565 PAFs have been accommodated in 182 R & R sites fully equipped with the requisite civic amenities as provided by the Tribunal's award. The agricultural land allotted to these PAFs is 16973 hectares.

227. Dealing specifically with the status of PAFs at RL 90 mtr., 95 mtr. and 110 mtr. It is averred in the said affidavit that all the PAFs Gujarat at RL 90 mtr. have been re-settled and the balance PAFs of Madhya Pradesh and Maharashtra affected at RL 90 mtr. have already been offered R&R package in Gujarat. The process of re-settlement is continuing an reliance is placed on the observation of the GRA which has stated in its fourth report dated 15th November, 1999 that "There is substantial compliance of the Re-settlement and rehabilitation measure as mandated by the Final Report of NWDT, including provision of civil amenities, and also of all the inter-linked provisions of the Government of Gujarat and that, therefore, PAFs from the States of Madhya Pradesh and Maharashtra affected up to the height of RL 90mtr. can be accommodate as per their choice at these selected 35 sites in Gujarat..

228. With respect to the PAFs affected at RL 95 mtr. the affidavit states that the PAFs of Gujarat have already been settled and while the affected PAFs of Madhya Pradesh and Maharashtra have been offered R&R package in Gujarat in January 1999, September, 1999 and January 2000. RL 95 mtr. Action Plan for these PAFs has also been prepared by the Government of Gujarat in consultation with the Governments of Madhya Pradesh and Maharashtra and has been sent to the NCA. The case of the State of Gujarat therefore, is that all the PAFs wanting to be re-settled in Gujarat have been offered the package but consent of all the PAFs has not so far been received but the Government of Gujarat has sufficient land readily available can be allotted to the said PAFs as soon as they come and select the same.

229. With regard to the status of PAFs at RL 110 mtr. all the PAFs of Gujarat have been re-settled and 2761 PAFs (2642 of Madhya Pradesh and 119 of Maharashtra) remain to be re-settled in Gujarat and R&R package will be offered to them before November 2000. The land which is required to be allotted to them is stated to be around 6074 hectares and

the State of Gujarat has in its possession 8146 hectares. The civic amenities in 40 new R&R sites are schedule to be completed by December 2000 and these sites would serve to accommodate not only PAFs between RL 95 mtr. and 110 mtr. but would also serve to accommodate PAFs from submergence villages which would be getting affected at levels above RL 110 mtr. The Action Plan giving the village-wise details is said to have been sent to NCA in June 2000 for its approval.

230. According to the said affidavit the balance number of PAFs remaining to be re-settled at Gujarat at FRL 138.68mtr. is 10765. Taking into account with an additional area of 10% towards house plot and common civic amenities would be required in addition to the allotment of minimum 2 hectares of agricultural land, the total land requirement per PAF would be approximately 2.2hectares. For planning purpose in respect of 10765 PAFs the land requirement would be about 23700 hectares. As against this requirement the status of land, as per the said affidavit, under different categories with the Government of Gujarat is stated to be as under:

Sr. No.	**PARTICULARS**	**Land [in ha]**
1.	Land identified (offers received in respect of private land and Government land)	15716 ha.
2.	Land available (private land for which price is approved by Expert Committee and offer/counter offer conveyed and acceptance of land holder obtained.	480 ha.
3.	Land in possession of SSPA/GOG in 12 districts	8416 ha.
	Total	**24612 ha.**

It is averred that between March and 21st June 2000 the land in possession as well as the land identified has increased considerably.

231. It has also been explained in the said affidavit that the Government of Gujarat has a well-established practice of procuring land for R&R at realistic market price for wiling sellers. Officers hold discussions with prospective sellers, verify the suitability of land and after the prices is settled the same is procured through legal process of Land Acquisition Act and consent awards reassessed so that the PAPs are assured of undisputed legal title free from encumbrance. This process of negotiated purchase has been streamlined. At the instance of the GRA, a retired Judge of the High Court is now appointed as Chairman of the Expert Committee with retired senior Government Secretaries as its members. This Expert Committee oversees the exercise of purchase of suitable land at the market price. At the instance of the GRA, PAPs are being issued Sanads for the land allotted to them which will ensure provision of a proper legal document in their favour.

232. Dealing with the term of the Award to the effect that Gujarat shall acquire and make available a year in advance of the submergence before each successive stage, land and house sites for rehabilitation of the oustees families from Madhya Pradesh and Maharashtra who are wiling to migrate to Gujarat, the affidavit states that the Gujarat

Government has already identified sufficient land for accommodating the balance PAFs remaining to be re-settled in Gujarat at FRL 138.68 mtr. In respect of PAFs up to RL 110 mtr. Gujarat has sufficient land available to meet the R&R requirements but for the PAFs above RL 110 mtr. suitable land has already been identified and the same would be acquired and made available one year in advance of the submergence before each successive stage. The affidavit gives reason as to why it is not advisable for the State, at this stage, to acquire the total requirement of land for FRL in one go. What is stated in the affidavit is as follows:

i. Since at present GOG has sufficient land to meet R&R requirement to accommodate PAFs up to RL 110 m, it would not be necessary to acquire further land immediately, especially when the additional land would be required only after the R&R Sub-group and Environment Sub-group give approval for RL 95 m. to RL 110m. after examining the preparedness at different stages. This would ensure that public money is not unnecessarily blocked for a long period.

ii. By acquiring land much before it would be required, problems of illegal trespass are likely to arise.

iii. The excess land would, by and large, remain fallow and no agricultural production would take place.

iv. If the land remains fallow for long the overall productivity of the land would be adversely affected.

v. All the time of allotment, the State Government would again have to spend a sizeable amount to remove weeds, bushes, small trees etc.

vi. The State Government would have to incur sizeable amount to prevent tampering with the boundary marks, prevent neighbouring farmers removing the top soil or from diverting natural drains passing through their fields towards the land purchased for R&R etc.

233. The affidavit also gives facts and figures showing that all requisite civic amenities have been developed and made available at the R&R sites. Some of the salient features which are highlighted in this behalf are as under:

- A three-room primary school is provided in all MP/MH sites irrespective of the member of the families resettled.
- A dispensary with examination room, medical equipment, medicines is provided in all MP/MH sites irrespective of the number of resettled families.
- 3439 PAFs (86%) out of the total MP/MH PAFs resettled in Gujarat have availed of the Rs.4500 finance assistance and built pucca core houses.
- Overhead tanks for drinking water are provided in large R&R sites.
- At all instance of GRA, toilets are being provided in the houses of PAFs with the help of NGOs.

234. The total cost incurred so far by the Government of Gujarat in providing the land and civic amenities up to May 2000 is stated to be 194 crores. The Grievances Redressal Cell is stated to have redressed large number of grievances of the PAFs whether they were related to land, grant of civic amenities or others. The salient features of working of the Grievance Redressal Cell is stated to be as follows:

- At present 2 senior IAS officers with supporting staff are working exclusively for redressal of grievances.
- A reasonable reply is given to the applicants. The applicant is also informed that if he is aggrieved with the decision he may prefer an apple to GRA within thirty days.
- The Single Window Clearance System's main objective is proactively resolve grievance and to avoid delays in inter-departmental co-ordination.
- Tatkal Fariyad Nivaran Samitis are held in the R&R sites to resolve grievance of the PAFs in an open forum.
- The PAFs are being involved at every stage of grievance redressal. The works have been carried out in most case by the PAFs.
- The Agriculture Officers of the Agricultural Cell are actively helping, guiding the PAFs in their agricultural operations and upgrading their skills.

235. With a view to effectively rehabilitate and assimilate the PAPs Vashant Samitis have been constituted in 164 R&R sites, consisting of 5 PAPs, one of whom is a female. This ensures the participation of the PAPs in the process of development and these Samities are vested with the responsibility to sort out minor problems. With a view to ensure more effective participation in panchayat affairs and better integration of PAPs an Order Section 98 of the Gujarat panchayat Act, 1993 has been issued by the Government of Gujarat providing that there shall be up to two invites from amongst the PAPs depending upon the number of PAPs at the sites in the village Panchayat within whose jurisdiction the R&R are situated. Pursuant to this 196 PAPs have been inducted as invitees to then Village Panchayats. The salient features of the rehabilitation programme of the PAPs are as follows:

- PAFs are given productive assets in kind (700/PAFs) to purchase bullocks, bullock carts. Oil engines etc.
- PAFs are given subsistence allowance (Rs. 4500/PAF) in case to meet contingency needs in the initial period.
- Vocational training is provided to PAFs for improving their income levels, priority being given to those dependents who are not entitled to be declared as PAFs on their own rights. Tool kits are supplied either free or with 50% subsidy.
- NGOs are actively involved in all the rehabilitation activities such as conducting training classes.
- PAFs are being covered by the ongoing developmental schemes of the Government (DRDA), tribal Sub plan etc.

- Extension (Agriculture) officers has been appointed for approximately every 150families to guide them in agriculture operation and assist them in day to day problems (getting ration cards, khedut khatavahis etc.)
- In recent years focus is on empowering the PAFs and making them self dependent.

236. Medical cell has been set up for providing services and treatment to PAPs free of cost. The cell is headed by Deputy Director (Medical) and is having a nucleus of medical experts consisting of a physician, a paediatrician, a gynaecologist, 21 MBBS doctors, pharmacists etc. The salient features of the medical help programme for the benefit of PAPs is stated to be follows:

- The Medical Officers and paramedic staff are making house-to-house visits to motivate the PAPs to come forward to avail of the medical services.
- In all dispensaries, a full time multipurpose health worker (female) is available.
- Multi-specialization diagnostic/treatment camps are organized fortnightly, where advance investigations are diagnostic facilities like ECG, X-ray ultrasound are available.
- Patients requiring further services are brought to Government hospital or any other special and necessary treatment given free of cost.
- GOG has placed an order for a mobile medical hospital equipped with diagnostic and treatment equipments.
- A comprehensive health survey and medical cheek up covered 29423 PAPs has been completed. A special record system of family health folder and health profile of each PAP is prepared.
- Nutrition supplement are given to children (up to 6 years), expectant and lactating mothers through the Integrated Child Development Scheme (ICDS).
- Special food supplement in the form of "Hyderabad Mix" is given to malnourished children and vulnerable target groups.
- School going children are covered under the Mid-Day Meal Scheme.
- Under TB Control, all chest symptomatic persons are screened by special examinations like sputum microscopy, X-ray, blood tests and persons found positive for TB are given domiciliary treatment under direct observation of doctors or paramedics. In 77 cases, treatment is completed and patients are cured.
- Under preventive health care, health education material is distributed and Health and Cleanliness Shibirs are organized.
- A special survey covering physically handicapped and mentally-retarded persons has been organized and social welfare benefits given.
- Other National Health Programmes (maternal child health, immunization, school health check up, family welfare etc.) are regularly conducted.

237. An Agricultural Cell has been set up in the SSPA which assists the Grievances Redressal Machinery in resolving the problem relating to the agricultural land. The salient features of this cell are as follows:

- The Agriculture Cell is involved in purchasing land, supervision of land improvement works and processing land related grievances of the PAFs.
- Agriculture training classes are organize for PAFs in the training institutes of the State Government.
- Assistance is given for availing crop-loan credit from banks and extension education is imparted in matters of marketing, cropping pattern, use of improved seeds, insecticides and latest equipments.
- Afforestation was carried out in 33 R&R sites during 1999-2000 by planting 3500 saplings which are protected by bamboo tree-guards. Plantation is done along the roadside, common plots, school premises etc. In the remaining sites plantation work is undertaken by NGOs.

238. At the instance of GRA an educational cell has been set up in the SSPA. The main function of which is to improve the quality of education imparted and to improve the school enrolment. The salient features of the cell are as under:

- School enrolment which was 4110 in 1998-99, increased to 4670 in 1999-2000. Out of the 4670 students enrolled, 2126 were girls (46.3%).
- The number of schools is 170 and the number of teachers is 384. In the last academic year, 66 schools were upgraded by increasing the number of classes.
- SSPA is regularly sending the teachers for in-service training. So far 120 teachers have been imparted training.
- Every year during the period of June to August, a special drive taken to increase the school enrolment.
- In the current year 150 adult education classes have been started in the R&R sites with the help of NGOs.
- An advisory committee has been created to make recommendation on how to improve the education being imparted. Members include faculty of MS University, officer of Education Department, Principal of Teacher Training Centre.

239. It is further averred this affidavit that at the instance of GRA a large number of measures have been taken to improve the organizational structure of SSPA so as to effectively meet the challenge of R&R and make the R&R staff accountable. The salient features of this are stated to be as follows:

- A strategic policy decision has been taken to create three separate divisions in SSPA for rehabilitation, Re-settlement and planning. Each division is in charge of a senior level officer of the rank of Additional/Joint Commissioner.

- Staff strength in SSPA has been considerably augmented especially at the field level.
- To review the structural and functional aspects of SSPA services of a management consultancy agency (M/s. TCS) has been engaged and draft report has been received and is being examined.
- A demographic survey is to be conducted to comprehensively document information regarding the PAPs with special reference to their family composition, marriage, births, deaths, life expectancy, literacy, customs, culture, social integration etc.
- Staff is being trained to sensitize them especially with regard to rehabilitation and second-generation issues. Senior level officer have been sent for R&R training at Administrative Staff College of India, Hyderabad.

240. From the aforesaid affidavit it is more than clear that the GRA, of which Mr. Justice P. D. Desai. Is the Chairman, has seen to the establishment of different cells and have taken innovative steps with a view to making R&R effective and meaningful. The steps which are being taken and the assistance given is much more than what is required under the Tribunal's Award. There now seems to be a commitment on the part of the Government of Gujarat to see that there is no laxity in the R&R of the PAPs. It appears that State of Gujarat has realized that without effective R&R facilities no further construction of the dam would be permitted by the NCA and under the guidance and directions of the GRA meaningful steps are being undertaken in this behalf. In this connection we may take note of the fact that along with the said affidavit Sh. V. K. Babbar, again under the directions of the GRA, has given an undertaking to this Court, which reads as follows:-

1. As per this undertaking, *inter alia*, in respect of scattered pieces or parcels of lands in possession of the SSPA for R&R which do not add up to a contiguous block of 7 hectares by themselves or in conjunction with other lands steps will be taken to purchase or acquire contiguous lands so that the said small pieces of land become a part of continuous block of 6 hectares or more. This exercise will be undertaken and completed on or before 31st December, 2000. In case it is not possible to have a contiguous block of minimum of 6 hectares further directions will be sought from GRA or such piece or parcel of land will be put to use for other public purposes relating to R&R but which may not have been provided for in the NWDT award.

2. Henceforth, the land which is acquired or purchased for R&R purposes shall be contiguous to each other so as to constitute a compact block of 6 hectares.

3. Henceforth, land to be purchased for R&R will be within a radius of 3kms. from an existing or proposed new site and if there is a departure from this policy prior approval of the GRA will be obtain.

4. Demarcation of boundary of 5211 hectares of land whose survey has been undertaken by the GRA and carving out individual plots of 2 hectares for

allotment to PAFs will be undertaken and complete on or before 31st December, 2000.

5. The other undertakings relate to soil testing and/ or ensuring that suitable land is made available to the PAFs after the quality of land is cleared by the agricultural experts of the Gujarat Agriculture University. With regard to the lands in possession of the SSPA which are low lying and vulnerable to water logging during monsoon, an undertaken has been given that the land has been deleted from the inventory of lands available for R&R unless such lands are examined by the Agricultural Cell of SSPA and it is certified that the access to these lands is clear and unimpeded and that they are suitable for R&R. Compliance report in this regard is to be submitted to the GRA on or before 31st December, 2000.

241. In addition to the aforesaid undertaken of Sh.V. K. Babbar, undertakings of the collectors of Khedr, Vadodara Ahmedabad, Narmada, Panchmahal and Bharuch Districts have also been filed. Apart from reiterating what is contained in the undertaking of Sh. V. K. Babbar, in these undertakings of the collectors, it is stated that necessary mutation entries regarding entering the name of SSPA/SSNNL in the village records of right in respect of the land in possession for R&R or PAFs likely to be resettled in Gujarat have been made but the certification of these entries will be complete and the matter reported to the GRA before 31st August, 2000. If this is not done the land is to be deleted from the inventory of land available for R&R. Necessary mutation entries in the village records or rights regarding removal of encumbrances of original landholders shall also be completed by that date.

242. From what is noticed hereinabove, this Court is satisfied that more than adequate steps are being taken by the State of Gujarat not only to implement the Award of the Tribunal to the extent it grants relief to the oustees but the effort is to substantially improve thereon and, therefore continued monitoring by this Court may not be necessary.

243. On behalf of the State of Madhya Pradesh, in response to this Court's order dated 9th May, 2000, an affidavit of Sh. H. N. Tiwari, Director(TW), Narmada Valley Development Authority has been filed. It is stated therein that with a view to arrange re-settlement of the PAFs to be affected at different levels detailed instructions to the Field Officers of the submergence area were issued by Sh. Tiwari vide letter dated 20th May, 2000 in respect of all the aspects of re-settlement of the PAFs. This is related to identification of land, processing of land acquisition cases and passing of the Award, taking of PAFs to Gujarat for selection of land, allotment of land to the PAFs who decided to remain in Madhya Pradesh and development of sites. There are 92 sites for re-settlement of the PAFs which are required to be established and out of these 18 are stated to be fully developed, development in 23 sites is in progress, 18 sites are such where location has been determined and land identified but development work has not started and 33 sites are such where location of land for the development is to be decided by the task force constituted for this purpose.

244. Dealing specially with the States of PAFs to be affected at different levels this affidavit, *inter alia*, states that with regard to PAFs to be affected at EL 85 mtr. those of

whom who have opted to go to Gujarat land has been offered to them by the Government of Gujarat, those PAFs who have changed their mind and now want to remain in Madhya Pradesh land is being shown to them in Madhya Pradesh.

245. It has not been categorically stated whether the PAFs who are so affected have been properly resettled or not. On the contrary, it is stated that no Awards in land acquisition cases have been passed in respect of six villages and it is only after the Awards are passed that house plots will be allotted and compensation paid. The provision for financial assistance for purchase of productive assets will be released when the PAFs shift and start construction of the houses. The reason for not making the payment in advance rightly is that if the grants are paid to the oustees before they shift they may possibly squander the grant and the State Government may be required to pay again to establish them on some self employment venture. For the re-settlement of PAFs in Madhya Pradesh out of ten relocation sites mentioned in the affidavit only five have been fully developed. It is also stated that 163 PAFs are resisting from shifting to Gujarat under the influence of anti dam, activists, though they have been given notices containing offer of the land and house plots by the Government of Gujarat. In addition thereto 323 PAFs who were earlier resisting have now been persuaded and arrangement for selection of land for them in Gujarat has been initiated.

246. With regard to the R&R status of PAFs to be affected at EL 95 mtr. It is, *inter alia*, stated that those losing 25 per cent of their holding are entitled to be allotted cultivable land and notices were given to them to identify the land which can be allotted. In the said notice was stated that the development process will be undertaken with regard to the said land only after it is selected by the PAFs. There is also a mention in the affidavit field in the name of Narmada Bachao Andolon, the petitioner herein, not allowing the State Government to conduct survey for demarcation of the submergence area and identification of the PAFs to be affected at EL 132.86 mtrs.(436ft.). Six out of twenty five relocation sites required to be developed have been fully developed.

247. Affidavit on behalf of the States of Madhya Pradesh draws a picture of rehabilitation which is quite different from that of Gujarat. There seems to be no hurry in taking steps effectively rehabilitate the Madhya Pradesh PAFs in their home State. It is indeed surprising that even awards in respect of six villages out of 33 villages likely to be affected at 90 mtr. dam height have not been passed. The impression which one gets after reading the affidavit on behalf of the State of Madhya Pradesh clearly is that the main effort of the said States is to try and convince the PAFs that they should go to Gujarat whose rehabilitation package and effort is far superior to that of the State of Madhya Pradesh. It is, therefore, not surprising that vast majority of the PAFs of Madhya Pradesh have opted to be re-settled in Gujarat but that does not by itself absolve the State of Madhya Pradesh of its responsibility to take prompt steps so as to comply at least with the provisions or the Tribunal's Award relating to relief and rehabilitation. The State of Madhya Pradesh has been contending that the height of the dam should be lowered to 436 ft. so that lesser number of people are dislocated but we find that even with regard to the rehabilitation of the oustees at 436 ft. the R&R programme of the State is nowhere implemented. The State is under an obligation to effectively resettle those oustees whose

choice is not to go to Gujarat. Appropriate direction may, therefore, have to be given to ensure that the speed in implementing the R&R picks up. Even the interim report of Mr. Justice Soni, the GRA for the State of Madhya Pradesh, indicates lack of committee on the States part in looking to the welfare of its own people who are going to be under the threat of ouster and who have to be rehabilitated. Perhaps the lack of urgency could be because of lack of resources, but then the rehabilitation even in the Madhya Pradesh is to be at the expense of Gujarat. A more likely reason could be that, apart from electricity, the main benefit of the construction of the dam is to be of Gujarat and to a lesser extent to Maharashtra and Rajasthan. In a federal set up like India whenever any such Inter-State project is approved and work undertaken the States involved have a responsibility to co-operate with each other. There is a method of settling the differences which may arise amongst there like, for example, in the case of Inter-State water dispute the reference of the same to a Tribunal. The Award of the Tribunal being binding the States concerned are duly bound to comply with the terms thereof.

248. On behalf of the State of Maharashtra affidavit in response to this Court's order dated 9th May, 2000, the position regarding the availability of land for distribution to the PAFs was stated to be as follows:

i) Total land made available by the Forest Department	4191.86 Hectares
ii) Land which could not be allotted at present to PAF	
[a] Goathan land [use residential purposes]	209.60 hectare
[b] Land occupied by river/nallah/hills	795.62 hectare
[c] Land under encroachment by third parties	434.13 hectare
Therefore, the net land available	
at present for allotment was 4191.869(-) 1439.35	2752.51 hectare
Total area of land allotted to 1600PAPFs	2434.01 hectare
Remaining cultivable land available with the State [2752-2434.01]	318.50 hectare

It is further stated in this affidavit that out of 795.62 hectares of forest land which was reported to be uncultivable the State has undertaken a survey for ascertaining whether any of these lands can be made available for cultivation and distribution by resorting to measures like binding, terracing and levelling. It is estimated that 30 to 40 hectares of land would become available. In addition there to the affidavit states that the Government of Maharashtra has decided to purchase private land in nearby villages for resettlement of PAFs and further that GRA has been established and justice S. P. Kurudkar, a retire Judge of this Court has been appointed as it its Chairman. It is categorically stated in this affidavit that the State Government would be in a position to make these land available to all concerned project affected families.

CONCLUSION

249. Water is one element without which life cannot sustain. Therefore, it is to be regarded as one of the primary duties of the Government to ensure availability of water to the people.

250. There are only three sources of water. They are rainfall, ground water or from river. A river itself gets water either by the melting of the snow or from the rainfall while the

ground water is again dependent on the rainfall or from the river. In most parts of India, rainfall takes place during a period of about 3 to 4 months known as the Monsoon Season. Even at the time when the monsoon is regarded as normal, the amount of rainfall varies from region to region. For example, North-Eastern States of India receive much more rainfall than some of other States like Punjab, Haryana or Rajasthan. Dams are constructed not only to provide water whenever required but they also help in flood control by storing extra water. Excess of rainfall causes floods while deficiency thereof results in drought. Studies show that 75% of the monsoon water drains into the sea after flooding a large land area due to absence of the storage capacity. According to a study conducted by the Central Water Commission in 1998, surface water resources were estimated at 1869 cu km and rechargeable groundwater resources at 432cu km. It is believed that only 690 cu km of surface water resources (out of 1869 cu km) can be utilised by storage. At present the storage capacity of all dams in India is 174 cu km. which is incidentally less than the capacity of Kariba Dam in Zambia/Zimbabwe(180.6 cu km) and only 12 cu km more than Aswan High Dam of Egypt.

251. While the reservoir of a dam stores water and is usually situated at a place where it can receive a lot of rainfall, the canals take water from this reservoir to distance places where water is a scared commodity. It was, of course, contended on behalf of the petitioner that if the practice of water harvesting is resorted to and some check dams are constructed, there would really be not need for a high dam like Sadar Sarovar. The answer to this given by the respondent is that water harvesting serves a useful purpose but it cannot ensure adequate supply to meet all the requirements of the people. Water harvesting means to collect, preserve and use the rain water. The problem of the area in question is that there is deficient rainfall and small scale water harvesting project may not be adequate. During the non rainy days, one of the essential ingredients of water harvesting is the storing of water. It will not be wrong to say that the biggest dams to the smallest percolating tanks meant to tap the rain water are nothing but water harvesting structures to function by receiving water from the common rainfall.

252. Dam serves a number of purposes. It stores water, generates electricity and releases water throughout the year and at times of scarcity. Its storage capacity is meant to control floods and the canal system which emanates there from is meant to *convey* and provide water for drinking, agriculture and industry. In addition thereto, it can also be a source of generating hydro-power. Dam has, therefore, necessarily to be regarded as an infrastructural project.

253. There are three stages with regard to the undertaking of an infrastructural project. One is conception or planning second is decision to undertake the project and the third is the execution of the project. The conception and the decision to undertake a project is to be regarded as a policy decision. While there is always a need for such projects not being unduly delayed, it is at the same time expected that as thorough a study as is possible will be undertaken before a decision is taken to start a project. Once such a considered decision is taken, the proper execution of the same should be taken expeditiously. It is for the Government to decide how to do its job. When it has put a system in place for the execution of a project and such a system cannot be said to be arbitrary, then the only role

which a Court may have to play is to see that the system works in the manner it was envisaged.

254. A project may be executed departmentally or by outside agency. The choice has to be of the Government. When it undertakes the execution itself, with or without the help of another organization, it will be expected to undertake the exercise according to some procedure or principles. The NCA was constituted to give effect to the Award, various sub-groups have been established under the NCA and to look after the grievances of the resettled oustees and each State has set up a Grievance Redressal Machinery. Over and above the NCA is the Review Committee. There is no reason now to assume that these authorities will not function properly. In our opinion the Court should have no role to play.

255. It is now well-settled that the Courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy making process and the Courts are ill equipped to adjudicate on a policy decision so undertaken. The Court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution. Even then any challenge to such a policy decision must be before the execution of the project is undertaken. Any delay in the execution of the project means over run in costs and the decision to undertake a project, if challenged after it's execution has commenced, should be thrown out at he very threshold on the ground of laches if the petitioner had the knowledge of such a decision and could have approached the Court at that time. Just because a petition is termed as a PIL does not mean that ordinary principles applicable to litigation will not apply. Laches is one of them.

256. Public Interest Litigation (PIL) was an innovation essentially to safeguard and protect the human rights of those people who were unable to protect themselves. With the passage of time the PIL jurisdiction has been ballooning so as to encompass within its ambit subjects such as probity in public life, granting of largess in the form of licences, protecting environment and the like. But the balloon should not be inflated so much that it bursts. Public Interest Litigation should not be allowed to degenerate to becoming Publicity Interest Litigation or Private Inquisitiveness Litigation.

257. While exercising jurisdiction in PIL cases Court has not forsaken its duty and role as a Court of law dispensing justice in accordance with law. It is only where there has been a failure on the part of any authority in acting according to law or in non-action in violation of the law that the Court has stepped in. No directions are issued which are in conflict with any legal provisions. Directions have, in appropriate cases, been given where the law is silent and inaction would result in violation of the Fundamental Right or other Legal provisions.

258. While protecting the rights of the people from being violated in any manner utmost care has to be taken that the Court does not transgress its jurisdiction. There is in our Constitutional frame-work a fairly clear demarcation of powers. The Court has come

down heavily whenever the executive has sought to impinge upon the Court's jurisdiction.

259. At the same time, in exercise of its enormous power the Court should not be called upon or undertake governmental duties or functions. The Courts cannot run the Government nor the administration indulge in abuse or non-use of power and get away with it. The essence of judicial review is a constitutional fundamental. The role of the higher judiciary under the constitution casts on it a great obligation as the sentinel to defend the values of the constitution and rights of Indians. The Courts must, therefore, act within their judicially permissible limitations to uphold the rule of law and harness their power in public interest. It is precisely for this reason that it has been consistently held by this Court that in matters of policy the Court will not interfere. When there is a valid law requiring the Government to act to act in a particular manner the Court ought not to, without striking down the law, give any direction which is not in accordance with law. In other words the Court itself is not above the law.

260. In respect of public projects and policies which are initiated by the Government the Courts should not become an approval authority. Normally such decisions are taken by the Government after due care and consideration. In a democracy welfare of the people at large, and not merely of a small section of the society, has to be the concern of a responsible Government. If a considered policy decision was been taken, which is not in conflict with any law or is not mala fide, it will not be in Public Interest to require the Court to go into and investigate those areas which are the function of the executive. For any project which is approved after due deliberation the Court should refrain from being asked to review the decision just because a petitioner in filing a PIL alleges that such a decision should not have been taken because an opposite view against the undertaking of the project, which view may have been considered by the Government, is possible. When two or more options or view are possible and after considering them the Government takes a policy decision it is then not the function of the Court to go into the matter afresh and, in a way, sit in appeal over such a policy decision.

261. What the petitioner wants the Court to do in this case is precisely that. The facts enumerated hereinabove clearly indicate that the Central Government had taken a decision to construct the Dam as that was the only solution available to it for providing water to water scare areas. It was known at that time that people will be displaced and will have to be rehabilitated. There is no material to enable this Court to come to the conclusion that the decision was mala fide. A hard decision need not necessarily be a bad decision.

262. Furthermore environment concern has not only to be the area which is going to be submerged and its surrounding area. The impact on environment should be seen in relation to the project as a whole. While an area of land will submerge but the construction of the Dam will result in multifold improvement in the environment of the areas where the canal waters will reach. Apart from bringing drinking water within easy reach the supply of water to Rajasthan will also help in checking the advancement of the Thar Desert. Human habitation will increase there which, in turn, will help protecting the so far porous border with Pakistan.

263. While considering Gujarat's demand for water, the Government had reports that with the construction of a high dam on the river Narmada, water could not only be taken to the scarcity areas of Northern Gujarat, Saurashtra and parts of Kutch but some water could also be supplied to Rajasthan.

264. Conflicting rights had to be considered. If for one set to people namely those of Gujarat, there was only one solution, namely, construction of a dam, the same would have an adverse effect on another set of people whose houses and agricultural land would be submerged in water. It is because of this conflicting interest that considerable time was taken before the project was finally cleared in 1987. Perhaps the need for giving the green signal was that while for the people of Gujarat, there was no other solution but to provide them with water from Narmada, the hardships of outees from Madhya Pradesh could be mitigated by providing them with alternative lands, sites and compensation. In governance of the Sate, such decisions have to be taken where there are conflicting interests. When a decision is taken by the Government after due consideration and full application of mind, the Court is not to sit in appeal over such decision.

265. Since long the people of India have been deriving the benefits of the river valley projects. At the time of independence, food grain was being imported into India but with the passage of time and the construction of more dams, the position has been reversed. The large-scale river valley projects per se all over the country have made India more than self-sufficient in food. Famines which used to occur have now become a thing of the past. Considering the benefits with have been reaped by the people all over India with the construction of the dams, the Government cannot be faulted with deciding to construct the high dam on the river Narmada with a view to provide water not only to the small areas of the State of Rajasthan where the shortage of water has been there since the time immemorial.

266. In the case of projects of national importance where Union of India and/or more than one State(s) are involved and the project would benefit a large section of the society and there is evidence to show that the said project had been contemplated and considered over a period to time at the highest level of the States and the Union of India and more so when the project is evaluated and approval granted by the Planning Commission, then there should be on occasion for any Court carrying out any review by any outside or "independent" agency or body. In a democratic set up, it is for the elected Government to decide what project should b undertaken for the benefit of the people. Once such a decision had been taken that unless and until it can be proved or shown that there is a blatant illegality in the undertaking of the project or in its execution, the Court ought not to interfere with the execution of the project.

267. Displacement of people living on the proposed project sites and the areas to be submerged is an important issue. Most of the hydrology projects are located in remote and inaccessible areas, where local population is, like in the present case, either illiterate or having marginal means of employment and the per capita income of the families is low. It is a fact that people are displaced by projects from their ancestral homes. Displacement of these people would undoubtedly disconnect them from their past, culture, custom and traditions, but then it becomes necessary to harvest a river for larger

good. A natural river is not only meant for the people close by but it should be for the benefits of those who can make use of it, being away from it or nearby. Realising the fact that displacement of these people would disconnect them from their past, culture, custom and traditions, the moment any village is earmarked for take over for dam or any other developmental activity, the project implementing authorities have to implement R&R programmes. The R&R plans are required to be specially drafted and implemented to mitigate problems whatsoever relating to all, whether rich or poor, land owner or encroacher, farmer or tenant, employee or employer, tribal or non-tribal. A properly drafted R & R plan would improve living standards of displaced persons after displacement. For example residents of villages around Bhakra Nangal Dam, Nagarjun Sagar Dam, Tehri, Bhillai Steel Plant, Bokaro and Bala Iron and Steel Plant, and numerous other developmental sites are better off than people living in villages in whose vicinity no development project came in. It is not fair that tribals and the people in undeveloped villages should continue in the same condition without ever enjoying the fruits of science and technology for better health and have a higher quality of life style. Should they not be encouraged to seek greener pastures elsewhere, if they can have access to it, either through their own efforts due to information exchange or due to outside compulsions. It is with this object in view that the R & R plans which are developed are meant to ensure that those who move must be better off in the new locations at Government cost. In the present case, the R & R packages of the Stats, specially of Gujarat, are such that the living conditions of the oustees will be much better than what they had in their tribal hamlets.

268. Loss of forest because of any activity is undoubtedly harmful. Without going into the question as to whether the loss of forest due to river valley project because of submergence is negligible, compared to deforestation due to other reasons like cutting of trees for fuel, it is true that large dams cause submergence leading to loss of forest areas. But it cannot be ignored and it is important to note that these large dams also cause conversion of waste land into agricultural land and making the area greener. Large dams can also becomes instruments in improving the environment, as has been the case in the Western Rajasthan, which transformed into a green area because of Indira Gandhi Canal, which draws water from Bhakhra Nangal Dam. This project not only allows the farmers to grow crops in deserts but also checks the spread of Thar desert in adjoining areas of Punjab and Haryana.

269. Environmental and ecological consideration must, of course, be given due consideration must, of course, be given due consideration but with proper channellisation of development activities ecology and environment can be enhanced. For example, Periyar Dam Reservoir has become an elephant sanctuary with thick green forests all round while at the same time wiped out famines that used to haunt the district of Madural in Tamil Nadu before its construction. Similarly Krishnarajasagar Dam which has turned the Madhya district which was once covered with shrub forests with wild beasts into a prosperous one with green paddy and sugarcane fields all round.

270. So far a number of such river valley projects have been undertaken in all parts of India. The petitioner has not been able to point out a single instance where the construction of a Dam has, on the whole, had an adverse environmental impact. On the contrary the environment has improved. That being so there is no reason to suspect, with all the experience gained so far, that the position here will be any different and there will not be overall improvement and prosperity. It should not be forgotten that poverty is regarded as one of the causes of degradation of environment. With improved irrigation system the people will prosper. The construction of Bhakra Dam is a shining example for all to see how the backward area of erstwhile undivided Punjab has now become the granary of India with improved environment than what was there before the completion of the Bhakra Nangal project.

271. The Award of the Tribunal is binding on the States concerned. The Said Award also envisages which are to be undertaken. If for any reason, any of the State Governments involved lag behind in providing adequate relief and rehabilitation then the proper course, for a Court to take, would be to direct the Award's implementation and not to stop the execution of the project. This Court, as a Federal Court of the country specially in a case of inter-State river dispute where an Award had been made, has to ensure that the binding Award is implemented. In this regard, the Court would have the jurisdiction to issue necessary directions to the State which, though bound, chooses not to carry out its obligations under the Award. Just as an ordinary litigant is bound by the decree, similarly a State is bound by the Award. Just as the execution of a decree can be ordered, similarly, the implementation of the Award can be directed. If there is a shortfall in carrying out the R & R measures, a time bound direction can and should be given in order to ensure the implementation of the Award. Putting the project on hold is no solution. It only encourages recalcitrant State to flout and not implement the award with impunity. This certainly cannot be permitted. Nor is it desirable in the national interest that where fundamental right to life of the people who continue to suffer due to shortage of water to such an extent that even the drinking water becomes scarce, non-cooperation of a State results in the stagnation of the project.

272. The clamour for the early completion of the project and for the water to flow in the canal is not by Gujarat but is also raised by Rajasthan.

273. As per Clause 3 of the final decision of the Tribunal published in the Gazette notification of India dated 12th December, 1979, the State of Rajasthan has been allocated 0.5 MAF of Narmada water in national interest from Sardar Sarovar Dam. This was allocated to the State of Rajasthan to utilize the same for irrigation and drinking purposes in the arid and drought-prone areas of Jalore and Barmer districts of Rajasthan situated on the international border with Pakistan, which have no other available source of water.

274. Water is the basic need for the survival of human beings and is part of right of life and human rights as enshrined in Article 21 of the Constitution of India and can be served only by providing source of water where there is none. The Resolution of the U.N.O. in 1977 to which India is a signatory, during the United Nations Water Conference resolved unanimously inter alia as under.

"All people, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantum and of a quality equal to their basic needs."

275. Water is being made available by the State of Rajasthan through tankers to the civilians of these areas once in four days during summer season in quantity, which is just sufficient for their survival. The districts of Barmer and Jalore are part of Thar Desert' and on account of scarcity of water the desert area is increasing every year. It is a matter of great concern that even after half a century of freedom, water is not available to all citizens even for their basic drinking necessity violating the human right resolution of U.N.O and Article 21 of the Constitution of India. Water in the rivers of India has great potentiality to change the miserable condition of the arid, drought-prone and border areas of India.

276. The availability of drinking water will benefit about 1.91 lac of people residing in 124 villages in arid and drought-prone border areas of Jalore and Barmer districts of Rajasthan who have no other source of water and are suffering grave hardship.

277. As already seen, the State of Madhya Pradesh is keen for the reduction of the dam's height to 436 ft. Apart from Gujarat and Rajasthan the State of Maharashtra also is not agreeable to this. The only benefit from the project which Rajasthan get is it's share of hydel power from the project. The lowering of the height from 455 ft. to 436 ft. will take away this benefit even though 9399 hectares of it's land will be submerged. With the reduction of height to 436 ft. not only will there be loss of power generation but it would also render the generation of power seasonal and not throughout the year.

278. One of the indicators of the living standard of people is the per capita consumption of electricity. There is, however, perennial shortage of power in India and, therefore, it is necessary that the generation increases. The world over, countries having rich water and river systems have effectively exploited these for hydel power in the total power generated was as high as 50% in the year 1992-93 but the share of hydel power started declining rapidly after 1980. There is more reliance now on thermal power projects. But these thermal power projects use fossil fuels, which are not only depleting fast but also contribute towards environmental pollution. Global warming due to the green-house effect has become a major cause of concern. One of the various factor responsible for this is he burning of fossil fuel in thermal power plans. There is, therefore, international concern for reduction of green-house gases which is shared by the World Bank resulting in the restriction of sanction of funds for thermal power projects. On the other hand, the hydel power's contribution in the greenhouse effect is negligible and it can be termed ecology friendly. Not only this but the cost of generation of electricity if hydel projects is significantly less. The Award of the generating ecology-friendly. Not only this but the cost of generation of electricity if hydel project is significantly less. The Award of the Tribunal has taken all these. The Award of the Tribunal has taken all these factors into consideration while determining the height of the dam at 455 ft. Giving the option of generating eco friendly electricity and substituting it by thermal power may not, therefore, be the best option. Perhaps the setting up of a thermal plant may not displace as many families as a hydel project my but at the same time the pollution caused by the

thermal plant and the adverse affect on the neighbourhood could be far greater than the inconvenience caused in shifting and rehabilitating the outees of a reservoir.

279. There is and has been in the recent past protests and agitations not only against hydel projects but also against the setting up of nuclear or thermal power plants. In each case reasons are put forth against the execution of the proposed project either as being dangerous (in case of nuclear)or causing pollution and ecological degradation (in the case of thermal) or rendering people homeless and possess adverse environment impact as has been argued in the present case. But then electricity has to be generated and one or more of these options exercised. What option to exercise, in our Constitutional framework, is for the Government to decide keeping various factors in mind. In the present case, a considered decision has been taken and an Award made whereby a high dam having an FRL of 455 ft. with capability of developing hydel power to be constructed. In the facts and circumstance enumerated hereinabove, even if this Court could go into the question, the decision so taken cannot be faulted.

DIRECTIONS:

280. While issuing directions and disposing of this case, two conditions have to be kept in mind, (i) the completion of project at the earliest and (ii) ensuring compliance with conditions on which clearance of the project was given including completion of relief and rehabilitation work and taking of ameliorative and compensatory measures for environmental protection in compliance with the scheme framed by the Government thereby protecting the rights under Article 21 of the Constitution. Keeping these principles in view, we issue the following directions.

(1) Constitution of the dam will continue as per the Award of the Tribunal.

(2) As the Relief and Rehabilitation Sub-group has cleared the construction up to 90 meters, the same can be under taken immediately. Further raising of the height will be only pari passu with the implementation of the relief and rehabilitation and on the clearance by the Relief and Rehabilitation Sub-group. The Relief and Rehabilitation Sub-Group will give clearance of further construction after consulting the three Grievances Redressal Authorities.

(3) The Environment Sub-group under the Secretary, Ministry of Environment & Forests, Government of India will consider and give, at each stage of the construction of the dam, environment clearance before further construction beyond 90 meters can be undertaken.

(4) The permission to raise the dam height beyond 90 meters will be given by the Narmada Control Authority, from time to time, after it obtains the above-mentioned clearances from the Relief and Rehabilitation Sub-group and the Environment Sub-group.

(5) The reports of the Grievances Redressal Authorities, and of Madhya Pradesh in particular, shows that there is a considerable slackness in the work of identification of land, acquisition of suitable land and the consequent steps necessary to be taken to rehabilitate the project oustees. We direct the States of

Madhya Pradesh, Maharashtra and Gujarat to implement the Award and give relief and rehabilitation to the oustess in terms of the packages offered by them and these States shall comply with any direction in this regard which is given either by the NCA or the Review Committee or the Grievances Redressal Authorities.

(6) Even though there has been substantial compliance with the conditions imposed under the environment clearance the NCA and the Environment Sub-group will continue to monitor and ensure that all steps are taken not only to protect but to restore and improve the environment.

(7) The NCA will within four seeks from today draw up an Action Plan in relation to further construction and the relief and rehabilitation work to be undertaken. Such an Action Plan will fix a time frame so as to ensure relief and rehabilitation pari passu with the increase in the height of the dam. Each State shall abide by the terms of the action plan so prepared by the NCA and in the event of any dispute or difficulty arising, representative may be made to the Review Committee. However, each State shall be bound to comply with the directions of the NCA with regard to the acquisition of land for the purpose of relief and rehabilitation to the extent and within the period specified by the NCA.

(8) The Review Committee shall meet whenever required to do so in the event of there being any un-resolved dispute on an issue which is before the NCA. In any event the Review Committee shall meet at least once in three months so as to obersee the progress of construction of the dam and implementation of the R&R programmes.

If for any reason serious differences in implementation of the Award arise and the same cannot be resolved in the Review Committee, the Committee may refer the same to the Prome Minister whose decision, in re-spect thereof, shall be final and binding on all concerned.

(9) The Grievances Redressal Authorities will be at liberty, in case the need arises, to issue appropriate directions to the respective States for due implementation of the R&R programmes and in case of non-implementation of its directions, the GRAs will be at liberty to approach the Review Committee for appropriate orders.

(10) Every endeavour shall be made to see that the project is completed as expeditiously as possible.

281. This and connected petitioners are disposed of in the aforesaid terms.

Order accordingly.

Ramji Patel v. Nagrik Upbhokta Marg Darshak Manch
(2000) 3 Supreme Court Cases 29
S. Saghir Ahmad, R. C. Lahoti and Y.K. Sabharwal, JJ.

S. SAGHIR AHMAD, J. – The Madhya Pradesh High Court, in a public interest litigation, instituted under Article 226 of the Constitution, has directed, by the impugned judgment dated 16-12-1996, that the dairies, located on the outskirts of Jabalpur city, be shifted from their present location to alternative sites. This judgment was passed in a writ petition in which the following reliefs were claimed:

> "(a) to direct the respondents to take appropriate, effective and immediate steps to remove the cow/buffalo dung and urine from the pipeline of water filtration plant at Lalpur, Gwarighat;
>
> *(b) direct the respondents to ensure that in future also no storage of cow/buffalo dung and urine of animals may be done on the water supply pipeline of Lalpur, Gwarihat as stated in the body of the petition;*
>
> *(c) direct the respondents to take appropriate steps against the persons who have stored these hazardous materials on the water supply pipelines;*
>
> *(d) any other order/orders, writ/writs or direction/directions that this Hon'ble Court may deem fir and proper, may also kindly be given."*

2. The principle ground on which the petition was found was that the main water pipelines, which supplied water, after its filtration at Lalpur Filtration Plant, to Jabalpur city, passed through the place where a number of dairy-owners, had started storing cow/buffalo dung and waste of the dairy products, and too, near the pipelines which was likely to contaminate the pure water supplied to the residents of the city for home consumption. On this aspect, the High Court recorded the following findings:

> "We called the public health engineering persons and the Corporation Authorities. The Corporation Authorities informed us that proceedings under Section 133 of the Code of Criminal Procedure were taken against these persons and against Shri Manohar Singh Marwah. Against Marwah Dairy, final order has been passed which is also the subject of revision before the Session Judge, Jabalpur in which interim order has been passed by the Session Judge restraining the M.P. Electricity Board from disconnection of their power supply. We also sought reports from the Public Health Engineering Department, Revenue authorities and Corporation Authorities and after considering the matter, we find that keeping all these dairies around these water supply lines is a great hazard to the lives of the people of Jabalpur, because most of them get water from these pipelines on which cow/buffalo dung is being stored by the dairy-owners as a result of which there is every likelihood of pollution in town by the supply of polluted water."

3. The High Court, thereafter, considered the question of rehabilitating the dairy-owners at some other place and passed the following order on a consideration of the case of each dairy-owner individually:

"5. We, therefore, explored the possibility of rehabilitating these dairy-owners away from the present location so that cow/buffalo dung may not pollute the water supply lines. We have been informed that so far as dairy owner Ramji Patil is concerned, this present dairy is situated on Khasra No. 15/3 at Gwarighat. He has 107 cattle-heads. He has other lands in Village Lalpur, i.e. settlement No. 641, bearing Khasras Nos. 134, 154/2, 135 and 136/3. It is, therefore, directed that since Ramji Patel has a site available on the lands bearing the aforesaid Khasra numbers, he should shift his dairy from the present site to any of the above-mentioned sites of Khasra No. 15/3 at Gwarighat within two months from today.

6. Shiv Kumar Patel has got his dairy at Gwarighat on Khasra No. 15/2. He has 18 cattle-heads. He has also a land in Khasras Nos. 4 and 5/2 at Gwarighat which site is sufficiently away from the present site. He is also directed to remove his dairy to any of the above mentioned places from the present one within two months from today.

7. Hariram Rajak has his dairy at Gwarighat. He does not have any land of how own. He has 30 cattle-heads. He does not have any alternative land. Therefore, we asked the SDM, Jabalpur that he may be provided a site for his dairy. He has pointed out that there is a land available at village Tilhari, bearing Khasra No. 200/1 of Patwari Circle No. 23/27, measuring about 30.106 hectares. We asked the Public Health Engineering Department Authorities also to go and find out whether there is water available in that area or not. Shri A.K. Tiwari, Chief Engineering, Public Health Engineering Department, Jabalpur and his Executive Engineer both have inspected the area and also conducted by hydrological tests. According to their report, there is plenty of water in that area. Therefore, there will be no difficulty so far as supply of water to this dairy is concerned. It is directed that Hariram Rajak shall make a proper application before the Nazul Officer, Jabalpur and the Collector, Jabalpur shall forward the same to the state Government for allotting 0.50 hectare of land to him for running his dairy. The State Government is directed that 0.50 hectare of land shall be allotted to Hariram Rajak on usual charges within a month from today. The Public Health Engineering Department shall dig a tube well for him at that place at the cost of the State exchequer within another period of one month. Hariram Rajak shall be removed from the present place within a period of two months to the newly-allotted site. All this exercise should be done by the State Government and the Public Health Engineering Department within a period of two months from today. It will be the responsibility of the Corporation to see that the dairy of Hariram Rajak is removed within two months from today and all formalities shall also be completed by the State Government within this period.

8. Another dairy owner is Shri Manohar Singh Marwah. He shall also be allotted land at Tilhari. He has his dairy on 0.148 hectare of land at Gwarighat. He has 150 cattle-heads. He shall be allotted land at Tilhari out of Khasra No. 2000/1, Patwari Circle No. 23/27, measuring 30.10 hectares. Out of this Khasra, he will be given 0.50 hectare of land on usual charges. He shall make an application before the Nazul Officer, Jabalpur and the Collector shall forward his application to the State

Government. The State Government is directed to allot this piece of land to Shri Manohar Singh Marwah. The Public Health Engineering Department shall also dig a tube well on this land at the cost of the State. All this exercise should be done within a period of two months from today. It will be the responsibility of the State Government and the Public Health Engineering Authority that all these facilities are made available to the aforesaid dairy-owners. It also be the responsibility of the Jabalpur Corporation to remove all the aforesaid dairies within two months from today to the locations mentioned above."

4. On the special leave petitions being filed in this Court, the following order was passed on 3-2-1997:

"IA is allowed. Permission to file SLP is granted in both the matters. Issue notice on special leave petitions as well as on stay application returnable on 3-3-1997. Dasti service in addition. Notice may also be issued to the Divisional Manager, Railways, Jabalpur. The learned counsel for the petitioner states that the petitioners would not allow cow dung or urine to accumulate within 20 feet of the pipeline in question on both sides. There shall be interim stay of the impugned direction regarding shifting of the dairies of the petitioners for six weeks."

5. On 5-9-1997, a Bench comprising Hon. S.C. Agrawal and G.T.Nanavati, JJ., passed the following order:

"The learned counsel appearing for the Jabalpur Municipal Corporation and the State of Madhya Pradesh prays for eight weeks' time to file an additional affidavit indicating the response of the authorities to the proposal of the petitioners to construct a wall around their dairies so as to prevent the cow dung spreading near the pipeline. They will also show the plan of the pipeline as it passes from near the dairies of the petitioners. Time prayed for is allowed.

Put up after eight weeks."

6. The following order was passed by the same Bench on 7-11-1997:

"One of the questions that arises in these petitions is whether the cow dung and urine from the cattle maintained by the petitioners in their dairy farms can be dealt with so as to prevent contamination of the water being carried through the pipeline as well as the soil surrounding the pipeline. Since there is no material on record on this aspect, we consider it appropriate to direct the Central Water Pollution Control Board to depute a specialist who may, after inspecting the site, suggest measures which can be taken for treatment of cow dung and the urine of the cattle to prevent it from flowing above the pipeline and exclude the possibility of contamination of the water passing through the pipeline.

The Central Water Pollution Control Board shall submit the said report within a period of two months. The petitioners will jointly pay the charges for such inspection and the report.

A copy of this order may be sent to the Secretary, Central Water Pollution Control Board."

7. On 16-1-1998, a notice was directed to be issued to the State Pollution Control Board.

8. Thereafter, on 20-2-1998, the following order was passed:

"Notice on Central Pollution Control Board has been served but nobody enters appearances on behalf of the Central Pollution Control Board and, therefore, we do not know as to what steps have been taken by the Central Pollution Control Board in pursuance of the directions contained in our order dated November 7, 1997.

Put up on March 27, 1998.

In the meanwhile a communication be sent to the Secretary, Central Pollution Control Board to be personally present before this Court on March 27, 1998."

9. The order passed by this Court on 27-3-1998 is as follows:

"An affidavit of Dr. S.P. Chakrabarty, Member-Secretary, Central Pollution Control Board, has been filed in response to the directions given by this Court in the order dated November 7, 1997. In the said affidavit measures have been suggested for treatment of cow dung and the urine of the cattle and other-waste water from the dairies so as to exclude the possibility of contamination of the water flowing through the pipeline. An affidavit has also been filed by Dr. S.N. Nema, Zonal Officer, M.P. Pollution Control Board agreeing with the said affidavit of Shari Chakrabarty. In these circumstances, the Central Pollution Control Board is directed to prepare a project report in respect of the measures which are required to be taken as per the affidavit of Shri Chakrabarty. The petitions will bear the cost of the preparation of the said project report. The learned counsel for the Central Pollution Control Board prays for four weeks' time to submit the project report.

Put up in the first week of May 1998."

10. On 31-8-1998, Shri Vijay Panjwani, learned counsel appearing on behalf of the Central Pollution control Board stated that the project report would be submitted within two weeks. On the submission of the project report of the Central Pollution Control Board, it was stated by learned counsel appearing on behalf of the petitioners that the recommendations made by the Central Pollution Control Board and the measures suggested by them would be implemented and carried out. The Court, therefore, passed the following order on 6-10-1998:

"It has been stated by the learned counsel for the parties that the recommendations made by the Central Pollution Control Board and the measures suggested shall be implemented and carried out. The cost amounting to Rs. 93,000 incurred by CPCB shall be paid to CPCB by equal shares within 6 weeks. List after 3 months."

11. When the matter was taken up on 8-1-1999, the Court passed the following order:

"*The cost of Rs. 93.000 (rupees ninety-three thousand) has been deposited with the Central Pollution Control Board. In the affidavit dated 3rd January, 1999 of Shri Ramji Patel filed on behalf of the petitioners, it has been stated that they have entered into an agreement with Sunraj Construction Company for the construction of the biogas plant of forty-fine-cubic-metre capacity and that the Executive Engineer of Madhya Pradesh Urja Vikas Nigam Ltd. has also been informed. The petitioner has also applied for the subsidy for the construction of the biogas plant.*

The Madhya Pradesh Urja Vikas Nigam Ltd. shall monitor the construction of the biogas plant on the spot and submit a report to this Court after 2 months. The other recommendations of the Central Pollution Control Board contained in its report dated 27th March, 1998 shall also be complied with by the petitioners. List after 2 months."

12. Thereafter, time for completing the work for the construction of a biogas plant etc. was extended from time to time and the Union of India, through the Ministry of Agriculture, was also directed to release the subsidy amount of Rs. 64,000 for the biogas plant, to the petitioners.

13. In the meantime, an affidavit of Dr. M.R. Tiwari, Health Officer, Municipal Corporation, Jabalpur, dated 25-3-1998, was filed in which it was, *inter alia*, stated as under:

"4. That a meeting was held on 21-10-1997 and following decision has been taken.

'This is determined by full majority that to keep environment of the city neat and clean due to earthquake and from the point of view of pollution all dairies within the municipal corporation limits must be removed from the city limits up to end of November 1997.

Simultaneously dairies which are running in Lalpur near Public Health Engineering Pipeline should also be removed because some complaints regarding the pollution in drinking water pipeline are received.

This action is very necessary from the health point of view of the citizens.'

5. That as per the resolution of Standing Committee, Municipal Corporation, Jabalpur some of the dairies have been removed and the proceeding of removal of dairies is still under process."

14. The proceedings of the meeting of the Municipal Corporation which adopted a resolution on 21-10-1997, was also annexed which indicated that the Municipal Corporation had adopted a resolution that all dairies within the municipal limits must be removed from the city of Jabalpur by the end of November 1997. It was also resolved that dairies at Lalpur near the Public Health Engineering Pipeline should also be removed because a number of complaints regarding pollution caused in the drinking water pipeline were received.

15. It may be stated that the Madhya Pradesh Cattle (Control) Act, 1978 was enforced within the municipal limits of Jabalpur with effect from 27-01-1998, and in the notification issued by the Commissioner, Municipal Corporation, Jabalpur on 24-09-1979, it was stated that the cattle could not be kept within the limits of Jabalpur Municipal Corporation, except in the villages which were specified in the list set out in the notification. This list included Gwarighat and Lalpur Villages also but in pursuance of the resolution adopted by the Municipal Corporation on 21-10-1997, both the villages, namely, Gwarighat and Lalpur, were taken out of the list of "excepted villages" vide notification published in the Government Gazette on 19-03-1999.

16. In view of the above notification, by which the villages of Gwarighat and Lalpur were excluded from the "excepted villages", where cattle could be kept, it is contended by Mr. Anoop G. Choudhary, learned Senior Counsel appearing on petitioners have to shift outside the municipal limits of Jabalpur city, if they, at all, intend to keep their dairies, but the dairies, particularly at the spot at which they have established their business cannot be permitted to be run or maintained, not only for the reason that both the villages, namely, Gwarighat and Lalpur fall within the limits of the Municipal Corporation and have, in the meantime, become densely populated, but also for the reason that keeping of cattle in close proximity of the main pipeline which supplies drinking water from Lalpur Filtration Plant to the city of Jabalpur, would be hazardous to the health of the people on account of the possibility of the water carried through that pipeline being contaminated by the gobar (cow dung) as also the urine of the hundreds of cattle kept there by the petition. This is also the stand of the Municipal Corporation, Jabalpur, on whose behalf Mr. Ranjan Mukherje, learned counsel made submissions, that in the face of the exercise of statutory power by the Municipal Corporation, Jabalpur, by which the establishment of dairies or the keeping of cattle within the limits of the Municipal Corporation, has been totally prohibited, the petitioners cannot contend that they are still entitled to retain their dairies at the disputed sites.

17. Dr. Rajeev Dhavan, learned Senior Counsel appearing on behalf of the petitioners has, on the other hand, contended that the resolution dated 21-10-1997, which was adopted by the Municipal Corporation, Jabalpur, was a colourable exercise of power, inasmuch as the exclusion of Gwarighat and Lalpur from the "excepted villages" as detailed in the notification issued in 1978, has been done only during the pendency of the present petitions in this Court in which an interim order was also granted that the judgment of the High Court would not be run in Gwarighat and Lalpur villages. It is contended that since the resolution was adopted only to harm the interests of the petitioners whose rights were under adjudication by this Court in the present proceedings, the same is liable to be quashed and cannot be given effect to. It is also contended that the list of "excepted villages" set out in the notification of 1978 contained many villages, but the resolution was adopted only in respect of Gwarighat and Lalpur Villages where the present petitioners are running their dairies. No reason, it is contended, has been shown by the Municipal Corporation why dairies are still permitted to be run in other villages although those other villages also fall within the municipal limits of Jabalpur.

18. It appears that there has been previous litigation between the parties with regard to the running of dairies which, at that time, were being run by the petitioners within the municipal limits of Jabalpur. In 1971 a writ petition for the shifting of dairies was filed in the Madhya Pradesh High Court which by its judgment dated 6-2-1976 framed a scheme directing the Corporation to reserve three plots outside the municipal limits of Jabalpur where the dairy-owners would shift their dairies. On account of the dispute having arisen between the Municipal Corporation, Jabalpur and the dairy-owners with regard to the development charges which the dairy-owners were required to pay, another writ petition was filed in the Madhya Pradesh High Court by about 89 dairy-owners. Since a choice was given to the dairy-owners to make their own arrangement for establishing and running their dairies outside the municipal limits of Jabalpur, the writ petition was dismissed by the High Court on 2-1-1976. It was, thereafter that the dairy-owners purchased plots of land outside the municipal limits and established their dairies. The plots of land were purchased by the petitioners in Villages Lalpur and Gwarighat in 1982 and they shifted their dairies to those villages which had already been excepted from the operation of the Madhya Pradesh Cattle (Control) Act, 1978.

19. The petitioners have set out in the present petition that one Shri K.K. Nayakar, a mimicry artiste of repute, purchased a plot of land and constructed a house at Gwarighat which was at a distance of about 500 metres from the dairy of one of the petitioners and as Shri Nayakar did not like the presence of dairies near his house, he filed a complaint under Section 133 of the Code of Criminal Procedure before the sub-Divisional Magistrate Jabalpur, for the removal of nuisance created by the petitioners. While the proceedings were pending before the Sub-Divisional Magistrates under Section 133 of the Code of Criminal Procedure, a writ petition was filed in the Madhya Pradesh High Court which ultimately resulted in the judgment which is being impugned before us.

20. From the facts set out above, it will be seen that when the special leave petitions were filed in this Court, Villages Lalpur and Gwarighat were in the list of "excepted villages" where dairies could be established and run and cattle could be kept. Since it was stated in the writ petition that the main water pipeline from the filtration plant at Lalpur passed near the dairies set up by the petitioners on account of which the drinking water was likely to be contaminated by the gobar (cow dung) and urine of hundreds of cattle kept there, this Court while entertaining the special leave petitions, considered the possibility of a project being devised so as to prevent altogether the possibility of pollution/contamination of water carried through pipelines already embedded about four feet below the surface of the earth. It was for this reason that this Court by its order dated 7-11-1997 directed the Central Pollution Control Board to consider this matter and to report whether the likelihood of pollution to the drinking water carried by the pipeline in question could be ruled out by any device suggested by it. On the submission of the report of the Central Pollution Control Board, which was also supported by the State Pollution Control Board, the Court directed a project to be prepared for that purpose. On the submission of the project report, since it was given out by the petitioners that they would implement the project and carry out all other recommendations made by the Central Pollution Control Board, the Court directed the petitioners to implement the project which included, *inter alia*, the setting up of a gobar gas (biogas) plant. The

petitioner, apart from making a payment of Rs. 93,000 to the Central Pollution Control Board towards its inspection fee etc., also took up the construction of a gobar gas plant and entered into an agreement for purchase of certain additional land as suggested by the Central Pollution Control Board. Time to complete the construction of the gobar gas plant was extended from time to time by this Court and ultimately an affidavit was filed on behalf of the petitioners that the gobar gas plant has been constructed and established. The construction was carried out under the supervision of the Madhya Pradesh Urja Vikas Nigam as directed by this Court and the Madhya Pradesh Urja Vikas Nigam also submitted its progress report. An affidavit to the effect that the gobar gas plant had become functional was also filed before the Court. The cost of construction of the gobar gas plant which was incurred by the petitioner is more than Rs. 5 lakhs.

21. While these proceedings were pending in this Court, the Municipal Corporation adopted a resolution to exclude from the list of "excepted villages" the two villages where the dairies in question are situate, namely, Lalpur and Gwarighat, so that the dairies may be shifted from these two villages and established elsewhere outside the limits of the Municipal Corporation, Jabalpur. An affidavit to this effect was, for the first time, filed on behalf of the Municipal Corporation, Jabalpur in March 1998. But the notification issued on the basis of that resolution was still not filed before the Court and this has been placed before the Court during the course of the agreements.

22. While it is contended on behalf of the petitioners that the resolution adopted by the Municipal Corporation, Jabalpur, and the consequent gazette notification issued on its basis were liable to be quashed on account of the abuse of power, or to put it differently, on account of colourable exercise of power, it is maintained on behalf of the State Government as also the Municipal Corporation, Jabalpur, that the resolution was adopted in the interest of the public health and control not be said to be a colourable exercise of power merely because the proceedings were pending in this Court.

23. Supply of pure drinking water is the statutory duty of the Municipal Corporation and the supply of such water has to be ensured to every citizen. In a situation, where the interest of the community is involved, the individual interest must yield to the interest of the community or the general public. Since the Cattle (Control) Act, 1978 is already in force within the municipal limits of Jabalpur city, the dairies cannot be established and cattle cannot be kept so as to cause public nuisance in contravention of the statutory provisions. But the Court cannot also overlook the fact that the petitioners, who had already been uprooted from one place, and that too, at the dictate of the judiciary, had established dairies at a place at which such activity was not prohibited. In the list of villages appended to the notification issued under the Cattle (Control) Act, 1978, Lalpur and Gwarighat were the villages, besides other villages, where such activity could be legally carried on. These villages were taken out of that list during the pendency of the present proceedings by virtue of a resolution adopted by the Municipal Corporation on 21-10-1997. The petitioners have already invested huge sums in setting up a gobar gas plant at an expense of more than Rupees five lakhs and have also incurred an expense of Rs. 93,000 towards inspected fee of the Central Pollution Control Board in pursuance of the order passed by this Court.

24. The validity of the resolution dated 21-10-1997 as reflected in the gazette notification dated 19-3-1999 cannot be legally adjudicated upon in these proceedings on the oral submissions made by Dr. Rajeev Dhavan, learned Senior Counsel who also pointed out that although the resolution was adopted only in respect of Lalpur Village, the notification published in the Gazette mentions Gwarighat Villages also. If the notification is intended to the challenged by the petitioners, they have to initiate appropriate proceedings in which they have to set out the foundation for such challenge so that the State Government or, for that matter, the Municipal Corporation may have adequate opportunity of submitting their reply, particularly as they have also to explain why only these two villages were taken out of the list of "excepted villages" set out in the notification of 1978 and why the activity of establishing dairies in other villages was not prohibited, although those other villages were also within the municipal limits of Jabalpur city.

25. Having regard to the facts and circumstances in this case, we dispose of these special leave petitions by providing as under:

(a) In view of the notification published in the Government Gazette on 19-03-1999, milk dairies and the keeping of cattle at the place in question, or for that matter, in Villages Lalpur and Gwarighat, cannot be permitted to continue nor can anyone be permitted to establish it in those villages specially in the proximity of the main pipeline through which drinking water is supplied to the city of Jabalpur.

(b) Whether the notification in the Government Gazette dated 19-03-1999 is valid or not cannot be decided in the present proceedings as there are no pleadings in that regard. It will be open to the petitioners to challenge the notification by instituting appropriate proceedings questioning its validity on all the grounds which have been orally urged before us, including the ground that the notification reflected a colourable exercise of power in the hands of the Municipal Corporation, or that it intended to interfere with the proceedings pending in this Court, but such proceedings shall have to be instituted by the petitioners within three months from the date of this judgment. The interim orders passed by this Court in these petitioners shall continue for another period of three months and two weeks thereafter, to enable the petitioners to approach the High Court and make appropriate application for interim relief.

(c) Since the notification dated 19-03-1999 was issued by the Municipal Corporation during the pendency of these proceedings at a stage when this Court had already allowed the petitioner to set up the biogas plant and the petitioner in SLP (C) No. 2927 of 1997 has incurred an expenditure of Rs. 5,86,000, the Municipal Corporation, Jabalpur, shall, after deducting the amount of subsidy as may have already been paid by the Government, pay that amount to the petitioner in Special Leave Petition (C) No. 2927 of 1997 at the time of their shifting to the new locations pursuant to the notification dated 19-03-1999 and in the event of their challenge to the said notification being turned down by the High Court, he and Petitioner 1 in special Leave Petition (c) No.

2926 of 1997 will also be entitled to all the benefits indicated by the High Court in the impugned judgment while dealing with the individual cases of the petitioners.

(d) The petitioners, namely, Mr. Shiv Kumar Patel and Hariram Rajak in SLP (C) No. 2926 of 1997 have indicated their willingness to shift to new locations in terms of the judgment passed by the High Court. Consequently, the special leave petition on their behalf shall be treated to have been dismissed as not pressed.

T.N. Godavarman Thirumulpad v. Union of India
Interlocutory Applications 477 & 480 in Interlocutory Applications 474 in Writ Petition (Civil) No. 202/1995, decided on 13-01-2000
B.N. Kirpal, V.N. Khare & M.B. Shah, JJ.

Ministry of Environment and Forest - Seizure of wagons carrying illegal Timber/Saw Mills - Power of the Ministry of Environment & Forests with respect to detention seizure and investigation examined - Court ratifies various actions taken by the Ministry of Environment & Forest with respect to the above matter and specifies the actions that can be taken - Power of Courts and other Authorities - No Courts/Authority in the Country to entertain any petition, suit/application with respect to cases of timber seized by MoEF - MoEF to have power and jurisdiction to suspend licenses of saw mills dealing in illegal timber and sealing of delinquent units.

Madhya Pradesh - Damoh - Assault on Santosh Bharati - Affidavit filed by Collector, Damoh - Affidavit indicates encroachment of Government land and felling of trees.

Modification of order dated 17-12-99 - Court permit inter-state movement of timber through the State of Madhya Pradesh - No timber to be exported from Madhya Pradesh - Permit to be issued by the Collector certifying that timber is moving from one state to another in course of inter-state sale/movement - Government to notify points of entry into the State for timber - Imported timber allowed to move into the State for its consumption.

ORDER

IA ...../2000

An application has been filed by the Ministry of Environment and Forest. The same is taken on Board, Issue notice to the *Amicus Curiae.*

The *Amicus Curiae* accepts notice and waives filing any response and, in fact, he submits that the application should be allowed as prayed for.

In this application it is mentioned that the officers of the Ministry of Environment and Forest have detected and detained 66 wagons at Nangioi Railway Station and 28 wagons at Rajpur Railway Station have similarly been detained, containing (illegal) timber.

This Court, by its judgment in *T.N. Godavarman Thirumulpad v. Union of India, (1997 (2) SCC 267)* had issued various directions in an effort to preserve and maintain the forest cover. A High Power Committee had been established but there was no authority, other than the said High Power Committee who could take action in the manner which has been done in the present case by the applicant of the detention of the said wagons Action has been taken, in the present case, according to the Solicitor General under para 35 of this Court's order dated 15th January, 1998 whereby Ministry of Environment and Forest has been given liberty to issue suitable directions for the proper at effective implementation of the orders of this Court.

In furtherance of the order of 15th January, 1998 and other orders passed by this Court, we allow this application and ratify various actions taken by the Ministry of Environment and Forest (MoEF) for detention, seizure and investigation of the above mentioned cases.

We also authorise MoEF to take such steps as it deems proper for necessary/appropriate investigation, storage, disposal etc. of the detained timber and also to carry out such actions in future for detention, seizure and investigation of timber which may include:

(i) Seizure of timber during investigation and or confiscation or unclaimed timber or claimed timber for which complete details sought by MoEF are not furnished within stipulated period.

(ii) Directing State Governments/Railways/any other authority/ consignees/ consignors to furnish details/ documents required for investigation.

(iii) Directing State Government/Railways/consignees/consignors to keep custody of the timber

(iv) Disposal of seized/confiscated timber through auctions/sealed tenders either directly or through State Governments or any other agency.

(v) Constitution of a multi-disciplinary team to carry out investigations including from investigating agencies of Centre/ State Governments.

(vi) Issue comprehensive guidelines and working instruction issued for regulating movement of timber and timber products standardization of transit passes and reconciliation of movement of timber with its origin for inside North-East as well as outside North East.

(vii) The applicant may delegate any of its powers to such officer or authority as it may deem necessary for giving effect to its orders.

(viii) Any other action deemed necessary in this regard.

We further direct that no other court/authority in the country will entertain any petition, suit/application with regard to the above mentioned cases of timber which have been seized. The applicant MoEF will also have the power and jurisdiction to not only to suspend the licences of the saw mills which are or have been dealing in illegal timber but it also has the powers to order the sealing of the delinquent units as well as the authority to order cutting off of the electricity to such units.

The seized timber, to the extent which is illegal or in respect of which there is no lawful claimant will also be said by public auction by the MoEF or by sealed tenders and the sale proceeds thereof shall be kept in a separate bank account. Any sale so made shall be reported to this Court for further orders regarding the utilization of the sale proceeds.

If any person is aggrieved by the seizure so made, he shall be at liberty to apply to this Court in these proceedings for appropriate orders. This application is disposed of.

IA 424

An affidavit on behalf of Shri Sheo Narain Mishra, Collector, Damoh has been filed in which he has *inter alia* stated that when he joined the office of the Collector he had found serious lapses on the part of the officers/officials who had not reacted/acted immediately. In paragraph 9 of the affidavit he has dealt with the question of the stamp duty in case no. 468/105/98-99 and in the same paragraph he has also given particulars about the land of Mr. Soloman on which trees of all sizes were found. The contents of the said affidavit seem to indicate that there has been an encroachment on Government land and though the area of land which has been bought by Mr. and Mrs. Soloman was the hectares there is, in fact, a parcel of 2.20 hectares of land which has been fenced. The said affidavit also indicates that on the land in question there are more than 150 marks of trees which have been cut and that no permission had ever been given in the last ten years for the felling of any tree on the land in Khasra No. 13.

Mr. K.K. Venugopal learned Senior Counsel appearing for Mr. Soloman wants to file a reply / response to the said affidavit within three weeks. Affidavit be filed within three weeks within that period the State of Madhya Pradesh also, if it so desires, may file its response. The *Amicus Curiae* may file his response within five weeks from today. Mr. Salve, Solicitor General (A.C.) will be at liberty to consult the officials of MoEF including Mr. Sharma.

IA 513/1999

Issue notice. Reply/response be filed by MoEF and A C within two weeks

List this matter on 24-1-2000

In the meanwhile in modification of this Court's order dated 17th December, 1999 we permit inter state movement of timber through the State of Madhya Pradesh *i.e.* the timber moving from one state to another state but no timber should be exported

from the State of Madhya Pradesh itself. Such movement shall be allowed only on the basis of permits being granted by the Collector certifying that the timber in question is moving from one State to another in the course of inter State Sale/movement. The State Government will within two days from today notify the points of entry into the State and it will be the responsibility of the Collector of that District in which such point of entry falls to issue the necessary permits.

It is represented that some trucks which are already in the course of inter State movement are stranded inside the State of Madhya Pradesh. The movement of such trucks will be permitted only on certificates being issued by the respective collectors themselves to the effect that the said trucks are only transiting through the State of Madhya Pradesh with legal timber and that no part of the timber contained in the trucks is of Madhya Pradesh origin.

We also modify our earlier order to the extent that timber imported from outside India is allowed to move into the State of Madhya Pradesh for its consumption.

Movement of rubber wood, duly certified by the Collector into the State of Madhya Pradesh is also permitted.

We also permit in modification of the earlier order, the three cable factories in the State of Madhya Pradesh to use, in their factories Eucalyptus and Mango tree wood. This wood would be transported to the factories in their own trucks hired by them after getting certificates from the respective Collectors in which the factories are situate to the effect that such wood would be utilised in those factories only for the purposes of making cable drums and for no other purpose.

T.N. Godavarman Thirumulpad v. Union of India
Decided on 14-02-2000
B.N. Kirpal, V.N. Khare & M.B. Shah, JJ.

Clarification of order dated 12-12-1996 - Whether it contained a ban on removal of any diseased or dry standing trees from areas notified under the Wildlife (Protection) Act, 1972 - Order - No removal of dead, diseased, dying or wind fallen trees, drift wood and grasses etc. from any national park or game sanctuaries or forest - Orders to the contrary passed by State Government to be immediately stayed.

Himachal Pradesh - Press reports that State has passed orders lifting ban on felling of trees in the State - Notice issued. Madhya Pradesh - Damoh - Assault on Santosh Bharati - State to show cause as to why the conditions stipulated for granting permission for diversion of non-forest land has not been fulfilled.

ORDER

IA 548 (filed by Mr. P. K. Manohar, Adv.): An application has been filed through the *Amicus Curiae* in Court, inter alia, praying for clarification that the order dated 12th December, 1996 contained a ban against the removal of any fallen

trees or removal of any diseased or dry standing tree from the areas notified under section 18 or 35 of the Wildlife (Protection) Act, 1972. Let the same be taken on record.

Issue notice to all the respondents. In the meantime, we restrain respondents Nos. 2 to 32 from ordering the removal of dead, diseased, dying or wind-fallen trees, drift wood and grasses etc. from any National Park or Game sanctuary or forest. If any order to this effect has already been passed by any of the respondent-States, the operation of the same shall stand immediately stayed.

Reply be filed within three weeks.

The Union of India will also indicate in its reply affidavit as to what safeguards or steps should be taken in relation to such trees.

The Registry should communicate this order of stay to the Chief Secretaries of all the States immediately without payment or process fee.

It is submitted by the *Amicus Curiae* that it has been reported in the Press that the State of Himachal Pradesh has passed some orders lifting the ban on felling of trees in that state. It is submitted that by order dated 12th December, 1996 of this Court in WP (C) No. 202/1995 felling of trees in any forest, public or private, has been banned and this order has not been varied so far. He, therefore, submits that if there is any order issued by the State of Himachal Pradesh giving permission to the felling of trees, that would amount to contravention of this Court's order dated 12th December, 1996 and would, therefore, be bad in law.

We issue notice to the State of Himachal Pradesh to file an affidavit within three weeks so as to inform the Court whether any such order has been passed. We make it clear that if any such order has been passed, the operation of the same shall remain stayed till further orders by this Court.

IA 513: An affidavit is stated to have been filed on behalf of the Ministry of Environment in reply to this IA. The Chief Secretary, State of M.P. should file his response to this affidavit within two weeks from today. In particular, the court would require information with regard to paragraph 5 of the said affidavit. If the said affidavit affirms that the land records of Damoh for the period 1910-11 to 1954-55 are missing, then the said affidavit must indicate as to when was it known that the said records are missing and what steps have been taken to trace the said records. Explanation should also be given as to why compensatory afforestation in respect of 1.03 lakh hectares as stipulated in the Ministry's order of 1990 has not been carried out. The State should show cause that as the condition which was stipulated for granting permission for diversion of 1.03 lakh hectares for non-forest use has not been fulfilled, *i.e.* compensatory afforestation not having taken place, why should the State not be directed to reclaim the encroached land which had been allowed to be diverted.

It has been stated in the affidavit of the Ministry that there is some timber which is felled and is lying in the Government Depots which this Court may consider allowing it to be

moved in public interest due to the dependency of the local population on the said timber. We are informed at the Bar, on instructions, that approximately 3 lakh cubic meters of timber is lying in the Government Depots. This quantity of timber would represent approx. 15 lakhs natural grown trees which have been cut. Be that as it may, as per the additional affidavit filed on behalf of the State of M. P. lying in the Government Depots are wooden poles and fuel stacks, apart from cut teak and sal trees. We do not have on Court's record details of the felled timber lying in the Government Depot as, it is stated, the inventory has not been carried out in toto. Considering the need of the local population, we permit the State to remove 50 per cent of the poles having a girth of not more than 60 cms each and 50 percent of the fuel stacks which are already stored in the Government Depots. We do not permit the removal of any other type of timber from the Government Depots till further orders except that the State Government may supply 10,000 cubic meters of sal wood for small scale industries, workshops furniture makers, etc. out of its said stock.

T.N. Godavarman Thirumulpad v. Union of India
Decided on 21-02-2000
B.N. Kirpal, V.N. Khare & M.B. Shah, JJ.

Railways - Use of sleepers already procured - Allowed - Application disposed off.

Rajasthan - Alwar District - Mining - Stay order passed by Civil Judge, Alwar.

IA 501

After hearing learned counsel for the parties we permit the Railways to use the sleepers which are already procured and are lying in the Railway Stores, particulars of which are detailed in two applications. The application is disposed of.

IA 503

This application was filed seeking to quash and set aside the stay orders passed by the Civil Judge Junior Division and Judicial Magistrate First Class, Alwar which was stated to be followed by our order dated 12th December, 1996 whereby mining activities were permitted in the forest area.

The learned *Amicus Curiae* brings to our notice the fact that subsequently the State of Rajasthan has filed Revision Petition against the said order and the High Court allowed the said applications and set aside the orders of injunction which has been granted.

Learned *Amicus Curiae* informs us that appeals filed by the State of Rajasthan were allowed by the District Judge, Alwar who set aside the injunction which was granted by the civil revision filed by the mines owners against the orders of the District Judge were dismissed. We are further informed that the court dismissed the special leave petitions against the said order of the High Court dismissing the civil revisions. It is indeed gratifying to note that at least one State

Government has woken to the danger of deforestation and has taken up an appropriate step whereby any action is taken by the forest owner. This applicant is disposed of.

T.N. Godavarman Thirumulpad v. Union of India
For directions and modification, decided on 28-02-2000
B.N. Kirpal, V.N. Khare & M.B. Shah, JJ.

Madhya Pradesh - Damoh - Assault on Santosh Bharati - Report of CBI submitted - Order - Action taken report by CBI to be filed.

Modification of Order dated 14-02-2000 - Word "Forest" to be deleted from the order - Modified order to include only National Parks and Sanctuaries.

ORDER

I.As 477 and 480

Pursuant to the orders of this Court, the CBI has submitted a Report which is taken on record. Copies of this Report dated 20th January, 2000 be given to the counsel for the State of Madhya Pradesh and Shri Prashant Bhushan Advocate.

No further orders need be passed except that we direct further action be taken as contained and stipulated in paragraphs 74 and 75 of the said Report. Action Taken Report by the CBI and the State Government will be filed within eight weeks from today.

I.As stand disposed of.

IA 424

Having heard the learned counsel for the parties, we are of the opinion that copy of the affidavit of Shri K.S. Sharma Chief Secretary, Government of Madhya Pradesh filed in this Court on 10th January, 2000 and all other affidavits filed in this court in response to this application should be given to Shri N. K. Sharma, for his consideration. Shri N. K. Sharma should then meet Shri K. S. Sharma Chief Secretary, after the discussion between the Chief Secretary and Shri N. K. Sharma and members of his team, Shri N. K. Sharma will file a report in this court. Shri N. K. Sharma should meet the Chief Secretary, subject to the latter's convenience, within a fortnight.

The Chief Secretary should also file a further affidavit to supplement the earlier affidavit filed in response to this application. It will be appropriate, in our opinion, if Shri N. K. Sharma and Shri K.S. Sharma, Chief Secretary also have a discussion with each other before Shri K. S. Sharma files his further affidavit in this Court. We leave it to both of them to work out the modulations of the meeting.

Report/Affidavit be filed by the respective officers within six weeks from today. It is needless to add that each authority will cooperate with the other. Copies of the Report and the affidavit be given to the *Amicus Curiae,* counsel for the State of Madhya

Pradesh and also to Mr. K.K. Venugopal, Sr. Advocate.

IA 478

Dismissed as having become in fructuous.

IA 511

I.A. for impleadment on behalf of M. P. Rajya Van Vikas Nigam Ltd, is allowed.

IA 512

In response to this application, an affidavit of Shri A.R. Chadha, Deputy Inspector General of Forests, Government of India Ministry of Environment and Forests has been filed in court today. In the said affidavit on behalf of the Ministry, it has been stated that the application be favourably considered and allowed in terms of the submissions made in paragraph 3(a) and (b) of the said affidavit.

After hearing the learned counsel and pending disposal of the application, the applicant-Corporation is permitted that the felled timber and fuel stacks lying in the forest can be transported to its depots located in other districts. The State Corporation is also permitted to cut stumps while clearing the areas for plantation for the areas already earmarked for the plantations for monsoon 2000.

Similar permission, as suggested by the Ministry of Environment & Forests, is also granted to the Forest Department of the State.

IA 513

An additional affidavit of Shri N. K. Bhagat, Conservator of Forest (Admn.)Government GZT) has been filed in Court today. In paragraphs 11 and 12, details of materials which have been fully paid for and which have been partly paid for and other timber, etc. which is lying in the depots of the Government are given. In modification of the earlier orders, we permit the movement of the material mentioned in paragraph 11 and we also permit the sale and movement of the material mentioned in paragraph 12 of the affidavit.

The *Amicus Curiae* seeks time to consider the affidavit now filed.

To come up for further orders on 6th March, 2000.

IA 514

The State of Madhya Pradesh should respond to the affidavit dated 7th February, 2000 of Shri Santosh Bharati filed in IA 513, to come up on 6th March, 2000.

I.As 530 and 531

Issue notice returnable on 6th March, 2000.

Remaining I.As on board

List on 6th March, 2000

In the order dated 14-2-2000 the words for forest in the 2nd line from bottom at page 4, are ordered to be deleted. The sentence would read thus:

"..... In the meantime, we restrain respondents Nos. 2 to 32 from ordering the removal of dead, disease, dying or wind-fallen trees, drift wood and grasses, etc. from any National Park or Game sanctuary ....."

T.N. Godavarman Thirumulpad v. Union of India
Decided on 03-04-2000
B.N. Kirpal, V.N. Khare & M.B. Shah, JJ.

Rajasthan - Clarification of order dated 14-02-2000- Order will have no application so far as plucking and collection of Tendu leaves is concerned - Mining - NMDC - Only 10% afforestation carried out - Held - No excuse for not carrying out mining operation - Ministry to ensure that conditions stipulated are fulfilled - Held - Ministry of Environment and Forest has clearly been remiss in this respect - Show cause notice to NMDC why mining operations should not be suspended - Madhya Pradesh - Inter District Transport of forest produce permitted.

Clarification of Order dated 13-01-2000 - Collector as mentioned in the order does not imply not just the Collector but any person authorized by the Collector - Ultimate responsibility to be of the Collector.

ORDER

IA548

Response of only 9 States/Union Territories has been filed. Replies by the other States/Union Territories be filed within two weeks. Rejoinder, if any, be filed within two weeks thereafter, list on 1st May, 2000.

In clarification of our order dated 14th February, 2000, on representation being made on behalf of the State of Rajasthan, it is clarified that the said interim order will have no application in so far as plucking and collection of Tendu leaves is concerned.

IA 276

It is stated on behalf of the Union of India that the Survey Report has been received. Copies will be made and given to the *Amicus Curiae* as well as to the State of Karnataka who may file their response within two weeks. To come up on 1st May, 2000.

IA 419 and 420

From the affidavit which has been filed on behalf of Ministry of Environment and Forests, it is evident that only 10 percent of afforestation which was required to be done by the NMDC has been carried out. It is represented that the rest of the afforestation is required to be carried out in an area which is not within the immediate vicinity/ of the mines. In our opinion, that is no excuse for not carrying out the compensatory afforestation. If the conditions for grant of the mining leases are not fulfilled, there is no reason as to why NMDC should be permitted to carry on with the mining operations. This aspect should, in fact, have been overseen by

the Ministry of Environment & Forests. After grant of such permissions, we expect the said Ministry to monitor and see whether the conditions stipulated by them have been fulfilled or not rather than to leave it to the court to point out that the conditions contained in letters granting permissions have not been fulfilled. The Ministry of Environment has clearly been remiss in this respect.

Now it has come to the notice of this Court that the conditions stipulated in the permission which was granted have not been carried out. The NMDC is required to show cause why their mining operations should not be ordered to be suspended forthwith.

Copy of this order be served on the Advocate-on-Record for the NMDC.

To come up on 17th April, 2000 by which time the reply should be filed by the NMDC.

IA 512

Along with the additional affidavit of Shri Narendra Kumar on behalf of the M.P. Rajya Van Vikas Nigam Ltd. are Annexures A-6 and A-7. Annexure A6 contains the details of the forest produce which is to be sold by public auction and which requires inter district transport. The produce referred to therein consist of 60013 cubic meters of timer and 71220 fuel stacks. In Annexure A7 are the details of sold material requiring inter-district transport.

It is represented by Shri Mukul Rohtagi, ASG appearing on behalf of applicant-Nigam that the functioning of the said Nigam is to take on the degraded forests, raise plantations and then dispose of the produce as per the working plane. It is in this way that large quantity of forest produce is lying in the various depots of the Nigam, some of which have been sold and some of which have not been sold.

With the concurrence of the *Amicus Curiae* as well as the counsel for the Ministry of Environment & Forests, the said Nigam is permitted to sell and/or transport the quantity of various produce specified in Annexure A6 and also to effect inter-district or out-of state movement of the timber and fuel stacks referred to in Annexure A 7 of the said additional affidavit.

List on 17th April, 2000

IA 513

Additional affidavit has been filed on 29th March, 2000 of Mr. N. K.Bhagat, Conservator of Forests. In paragraph 4, details have been given of the unsold material lying in the depots of the State of Madhya Pradesh. Paragraph 5 contains the figures and particulars of the sold and fully or partly paid material which are also lying in the depots of the State. With the consent of the *Amicus Curiae* as well as counsel for the Ministry of Environment and Forest, the State of Madhya Pradesh is permitted to sell, remove and transport the material referred to in paragraphs 4 and 5 of the said additional affidavit. Similar permission is also granted for the removal and transportation of the fuel wood stated to be lying in the depots of the State.

List on 17th April, 2000

IA 514

List on 17th April, 2000

IA 516

Let the Union of India file a reply.

List on 24th April, 2000

In the order dated 13th January, 2000 permission has been granted for the rubber wood to be imported on being certified by the Collector. It is obvious that the term 'Collector' mentioned in the said order does not mean that the Collector himself is to certify. It means that a person duly authorized by the Collector would be entitled to certify and the applications in this regard will always have to be made before the Collectors, it goes without saying that the ultimate responsibility will be of the Collector himself.

T.N. Godavarman Thirumulpad v. Union of India
Decided on 12-04-2000
B.N. Kirpal, V.N. Khare & M.B. Shah, JJ.

Mining - NMDC - Order - State Government to file affidavit on steps taken for afforestation after receiving Rs. 40 cores from NMDC.

Compensatory Afforestation - Total shortfall of 36% after compensatory afforestation has been done - Notice issued to States to explain why money realized have not been spent on carrying out afforestation.

Reconstitution of High Power Committee - New Chairman and members appointed - Powers and Functions specified.

ORDER

I.As 419 & 420

It has been explained by Mr. Mukul Rohtagi that as far as NMDC is concerned it has complied with its obligation in as much as about 1300 hectares were required to be afforested by NMDC over a period of ten years and the same is being done with regard to the balance area of 7000 hectares Rs. 40 cores have been paid to the State of Madhya Pradesh for carrying out afforestation in the degraded forest area which is not under the control of NMDC and which is revenue land.

The State of Madhya Pradesh will file an affidavit indicating as to what steps it has taken with regard to afforestation on its having received the said Rs 40 cores. The state might consider entrusting the job to the M.P. Rajya Van Vikas Nigam Limited with the task of afforestation specially in areas like waste land which are in plenty in the State of M.P.

During the course of hearing of this IA, Mr. Raval on behalf of Central Government has placed on record a statement showing the position of the cases approved for diverting 'forest land' stipulation for compensatory afforestation under the Forest Conservation Act and the compensatory afforestation done, funds to be utilised and actually utilised.

This statement is to be considered as an IA and we take *Suo Motu* action thereon. The same may be separately numbered. This statement reflects the position as on 29th March, 2000 and provides dismal reading. In short, after the total afforestation compensatory and otherwise which was required to be done by all the States put together there is a shortfall to the extent of 36 per cent. This statement further reflects that though funds have been realised by all the States in connection with such afforestation a very large number of States have not utilized the amount or less amount thereon. These States are Arunachal Pradesh, Assam, Bihar, Haryana, Himachal Pradesh, Jammu & Kashmir, Madhya Pradesh, Mizoram, Orissa & Tamil Nadu. Notice to issue to all these States to explain as to why monies realised have not been so far spent on carrying out afforestation. Replies to be filed will indicate the heads under which the monies have been spent. Notice to also to go to those States who have not submitted Quarterly Performance Reports upto September, 1999. The Registry will send along with the notice a copy of the statement placed by Mr. K. N. Raval. Notice will be returnable after eight weeks. Affidavit to be filed on the reopening day after summer vacation.

Application through *Amicus Curiae* for Re-constitution of the High Power Committee

An IA has been filed *by Amicus Curiae* in Court for reconstitution of the High Power Committee

Notice: Mr. Raval accepts notice

As of today because of the resignations of other member only Mr. Givarajika remains on the Committee as Member Secretary. It is agreed by the *Amicus Curiae* as well as the Additional Solicitor General that the application be allowed. Shri N. K. Sharma, be appointed as the Chairman of the Committee with Mr G. K. Pillai, Joint Secretary, N E in the Ministry of Home Affairs being its other Member. Ordered accordingly. They shall undertake the task which the High Power Committee was required to take up and in addition thereto, it also will look into the following:

(a) Supervising the transportation of all the illegal timber since none of it has been sold despite orders made by this Hon'ble Court from time to time.

(b) Overseeing investigation into specific cases of illegal felling and certain other matters referred to in the confidential report given by the HPC to this Hon'ble Court.

(c) Re-examining the matter of licensing of the units in the light of events which had occurred in the interregnum particularly the seizure of a very large quantity of timber originating from North Eastern States - Nangloi, Rajpura and Tinsukia.

The Ministry of environment will inform Mr. S. C. Sharma and Mr. G. K. Pillai of their appointment to the High Power Committee asexpeditiously as possible.

An Application through Amicus Curiae in Relation to the Working of the High Power Committee Constituted by this Hon'ble Court

Another application has been filed by the *Amicus Curiae* relating to the working of the High Power Committee

Notice: Mr. Raval accepts notice

Reply to be filed within two weeks. Any party which may be affected by the prayers made in paragraph 10 of the application which reads as follows is at liberty to file an affidavit.

(a) Direct that the orders passed by the HPC imposing a penalty based on actual adjudication at the behest of the unit, even if it results in the imposition of penalty larger than the penalty originally imposed are valid and permissible.

(b) Clarify that no unit in respect of whom an order had not been made by HPC on or before 15-1-1998 would be permitted to shift to the industrial estate or to revive and/or restore its license and

(c) Pass such other and further orders which this Hon'ble Court may deem fit and proper under the circumstances."

I.As 530 and 531

In view of the fact that on an earlier occasion this Court has rejected the prayer for use of wooden sleepers and has prohibited the railways from using wooden sleepers these applications are dismissed.

T.N. Godavarman Thirumulpad v. Union of India
Decided on 13-04-2000
B.N. Kirpal, V.N. Khare & M.B. Shah, JJ.

Constitution of State and Central Level Authorities under the Environment (Protection) Act, 1986 - Central Government should consider putting in place a national level authority with technical expertise to deal with problems currently handled by High Courts and Supreme Court - Expeditious disposal of cases keeping in mind principles of sustainable development.

ORDER

I.A. No. 558

I.As 399, 421, 422, 465, 495 and 496

Background information which has been furnished by the Principal Secretary of the High Powered Committee *inter alia* provides that norms are fixed by the High Powered Committee with regard to the production of veneer at a figure of 75% of the volume of the round timber used by a unit which was to be treated as normal production. Copy of this background information be given to the counsel for the applicants for their consideration and response. The Ministry of

Environment should also give its response and these applications be listed on the top of the list on 17-4-2000.

IA 296

In this Court's order dated 10th December, 1998 it is stated that the Additional Solicitor General would seek instructions about the feasibility of constituting State Level Authorities under Section 3(3) of the Environment (Protection) Act, 1986 in line with the Authority which had been constituted in the State of Arunachal Pradesh known as 'Arunachal Pradesh Forest Protection Authority'. This court had also observed that it would be worthwhile for the Central Government to consider a committee under Section 3(3) of the Said Act at the national level in the nature of a supervisory or appellate authority over the State Authorities. Even if some time is taken in constituting the State Level Authorities the Central Government should consider putting in place a National Level Authority which will have the technical expertise to deal with the problems which are at present handled by the High Courts and this Court and dispose them expeditiously keeping in mind the principle of sustainable development. Mr. Raval submits that he will seek instructions and inform the court after three weeks. List this IA for further orders on 5th May, 2000.

Communication to learned *Amicus Curiae* in connection with C.R. No. 5920/1997 pending in the High Court of Gauhati.

In the office report dated 7-4-2000, there is reference to the order dated 6th August, 1998 wherein it had been directed that the High Court of Gauhati should furnish particulars to this Court with regard to C.R. No. 5920/1997 stated to be pending in that Court. No information or communication has been received from the Registrar of that Court so far. A reminder should be sent by the Registry requiring the Registrar of the High Court to furnish the necessary particulars and information.

T.N. Godavarman Thirumulpad v. Union of India
Decided on 24-04-2000
B.N. Kirpal, V.N. Khare & M.B. Shah, JJ.

Uttar Pradesh/Uttaranchal - Rajaji National Park - Felling and extraction of 203 Sal trees - Sal Borer Epidemic - Felling to be done by Forest Research Institute, Dehradun.

ORDER

An IA has been filed on behalf of the State of U.P., before this Court relating to felling and extraction of 203 sal trees the Rajaji National Park, Dehradun. Let the same be registered and numbered.

Issue notice. Mr. Salve, learned *Amicus Curiae* accepts notice. He submits that in

view of the averments made in the application and especially in paragraph 4 the application be allowed.

We direct that the State of U.P. may take appropriate steps for felling and extracting 203 sal trees from the Rajaji National Park which are stated to have been attacked by sal borer. This exercise will be undertaken by the State under the supervision of the scientists of Entomology Division of the Forest Research Institute, Dehradun. The exercise be completed within a period of four months and the report be then submitted by the State as well as the Forest Research Institute. List thereafter.

IA 424

It is stated that a meeting has taken place between Shri K.S. Sharma, Chief Secretary, Government of Madhya Pradesh and Shri N. K. Sharma and a report will be submitted by the next date of hearing. Let the report be submitted within one week.

List on 1st May, 2000.

T.N. Godavarman Thirumulpad v. Union of India
Decided on 01-05-2000
B.N. Kirpal, V.N. Khare & M.B. Shah, JJ.

Madhya Pradesh - Regularisation of encroachment - Order - Affidavit indicating concrete proposal of State Government in dealing with problem of encroachment to be submitted.

ORDER

IA 548

According to the Office Report, no affidavits have been filed by the States of Jammu & Kashmir, Haryana, Tamil Nadu, Kerala, Orissa, Bihar, Sikkim, Nagaland and Arunachal Pradesh. These States through the Chief Secretaries are directed to file their affidavits within eight weeks from today. Each of the States shall also pay Rs. 5,000 by way of costs. Costs be paid to the Supreme Court Legal Services Committee. List thereafter.

IA 565

I.As 421, 399, 422, 465, 495, 498, 428, 409, 426 and 429

These I.As are also disposed of in terms of the signed order passed in IA 565. Pending disposal of the revised applications, there will be stay of recovery.

IA 424

The State Government of Madhya Pradesh will as soon possible but not later than eight weeks from today file in a Court affidavit relating to regularisation of encroachment and compensatory afforestation. It should be indicated as to what is the concrete proposal of the State Government in dealing with the question of encroachment. The nature and type of encroachment should be seen and appropriate and workable plans prepared the affidavit will also deal with all the other points on which decision has been taken by the Chief Secretary and the Inspector General of Forests as reflected in the minutes annexed to affidavit of Mr. A. R. Chadha, DIG (Forests). This aspect of matter to come up after eight weeks.

Su-rejoinder is permitted to be filed List on 8th May, 2000.

T.N. Godavarman Thirumulpad v. Union of India
Interlocutory Application 565 of 2000 Writ Petition (Civil) No. 202/95, decided on 01-05-2000
B.N. Kirpal, V.N. Khare & M.B. Shah, JJ.

High Power Committee - Imposition of penalty and additional penalty - HPC entitled to look into records and pass orders in every case where documents and materials have been placed before the HPC by 15-01-1998.

Modification of para 14 of order dated 12-12-1996 - Permission to any unit on which penalty or additional penalty has been levied to approach HPC for reconsideration.

Held - HPC performs quasi judicial function and hence may briefly indicate reasons in support of orders passed by it.

ORDER

This is an application by the Learned *Amicus Curiae* seeking clarification in relation to the working of the High Power Committee which was constituted by this Court.

The first clarification which is sought is with regard to the orders passed by the High Power Committee (HPC) imposing a penalty based on actual adjudication at the behest of the units even if it results in the imposition of penalty larger than the penalty originally imposed. The question is whether such a penalty and/or additional penalty which is imposed on the basis of the documents produced by the units is valid and permissible.

The HPC fixed normal recovery norms after obtaining data and expert advice from different sources. The norms so fixed showed as to how much veneer etc. could be recovered from the timber and it is on that basis that it proceeded to examine the records of the different units and then determined whether there has been excess production indicating use of illegal timber and thereby justifying imposition of penalty and/or additional penalty.

After hearing the learned counsel for the parties, we are in agreement with the norms adopted by the HPC. We also hold that on the basis of the documents and records produced by the units, the HPC was and would be entitled to impose penalty larger than the penalty originally imposed, as long as this penalty is based on the records so produced.

A question has arisen with regard to cases where orders had not been made by the HPC on or before 15th January, 1998. This Court's order dated December 1996 had contemplated documents being filed and orders being passed by 15th January, 1998. It is possible that due to volume of work, the HPC may not have been able to pass orders by 15th January, 1998 even though papers and other relevant material had been submitted to the HPC by that date. We therefore, make it clear that the HPC would be entitled to look into the records and pass orders in every case where documents and material had been placed before the HPC by 15th January, 1998. We further make it clear that wherever any penalty and/or additional penalty has been imposed by the HPC, the unit concerned will have a right to approach the HPC to examine the matter afresh. In modification of paragraph 14 of the order of December 1996, we permit any unit in respect of which penalty and/or additional penalty has been levied by the HPC to approach the HPC for reconsideration on the basis of the material which it may choose to produce provided such a request is made by the unit within one month of the passing of the order by the HPC or, in those cases where orders have already been passed, within one month from today.

In as much as the HPC would in effect be discharging quasi-judicial functions, it will be appropriate that the HPC may briefly indicate the reasons in support of the order passed by it.

It is further clarified that wherever the HPC has given clearance to a unit after 9th February, 1998 the unit will be entitled to relocation.

It is however, made clear that no unit which had not furnished the record and particulars before 15th January, 1998 will be entitled to the benefit of this order.

This IA stands disposed of.

T.N. Godavarman Thirumulpad v. Union of India
Decided on 09-05-2000
B.N. Kirpal, V.N. Khare & M.B. Shah, JJ.

Madhya Pradesh - Issue of transit passes to timber obtained through legal sources - Allowed.

ORDER

IA 514

This is an application to direct the State Government to issue transit passes in respect of timber from notified depots to the establishments of the members of the applicant. In the affidavit in reply filed on behalf of the State of Madhya Pradesh it is stated in paragraph 3 that in all the 22 forest circles the stocks lying in saw mills as on 31st December, 1999 is given in the said paragraph has been verified. Particulars of the timbers in fuel wood found in the saw mills are given in the said paragraph. There is nothing to indicate in the affidavit whether the quantity of timber and fuel wood mentioned therein is from legal sources or not. On a query being put Mr. Vivek Tankha, Advocate General appearing on behalf of the State of M.P. states that he is satisfied, on instructions, that the timber mentioned at Item Nos. 1 and 2 is legal timber representing timber purchased from the Government/Authorised Departments and/or it is imported from other countries. He, therefore, submits that this timber may be allowed to be processed and transported. Ordered accordingly, with regard to the rest of the timber the State Government will verify and file an affidavit affirming whether the same is legal timber or not. This clearance is given (for item nos. 1 and 2) subject to the safeguards as may be pointed out by the Regional Chief Conservator of Forests.

T.N.GodavarmanThirumulpad v. UnionofIndia
Decided on 04-08-2000
B.N. Kirpal, V.N. Khare & M.B. Shah, JJ.

North-eastern States - Show cause notice to Chief Secretaries of North-eastern States as to why transport of timber outside the region should not be prohibited - Revise guidelines of order dated 22-05-2000 to be complied.

ORDER

Copy of the Action Taken Report about the detention of the wagons, which has been filed in Court today on behalf of the Ministry of Environment & Forests, be forwarded to the Chief Secretaries of the North Eastern States requiring them to respond to the said Report and to show cause as to why transport of timber outside that region should not be prohibited as they are unable to see that the orders of this Court permitting only the hammer mark and legal timber to be transported are not complied with. Pending further orders, the Chief Secretaries will ensure that the revised guidelines dated 22nd May, 2000, copies of which should also be sent to the Chief Secretaries, shall be complied with.

T.N. Godavarman Thirumulpad v. Union of India
Decided on 08-09-2000
B.N. Kirpal, V.N. Khare & M.B. Shah, JJ.

Permission for felling of trees on forest land - South-eastern Coal Fields Ltd. - State of Madhya Pradesh and South-eastern Coal Fields to file affidavit indicating survival rate of tree - Explanation of provision of Forest (Conservation) Act, 1980 - Section II places restriction on dereservation of forest land for non-forest purpose - Restrictions can be removed only with prior approval of Central Government - Procedure of forest clearance explained - Responsibility for afforestation should be with the party which is going to use the dereserved forest - Central Government must specify period within which afforestation must commence and be completed - Necessity of environmental audit to ensure that after saplings have been planted the survival rate is high - Government to consider requiring every applicant to publish the results of environmental audit in a newspaper every year and forward the same to the Central Government - A minimum survival rate must be prescribed and if below this level non-forest activity will have to be stopped - Applicant responsible not only for planting trees but also to ensure its survival and full growth.

ORDER

IA 574

In this application, the applicant M/s. South Eastern coal fields Ltd. wants permission to fell trees standing on the forest land which has been released in its favour for the purpose of carrying out mining operations. According to the applicant, by orders dated 13th October, 1998 and 25th January, 2000, 160.234 hectares in Chirmiri Colliery in District Manendragarh and 9.6 hectares in West Chirmiri Colliery in District Manendragarh were permitted to be utilised for carrying out open cast mining operations. One of the conditions of the permission granted was that compensatory afforestation should be carried out on 89 hectares of degraded forest land and 125.734 hectares of non-forest waste land. According to the applicant, the amount of expense involved has been deposited with the State of Madhya Pradesh who is taking steps to comply with the requirement of reforestation and, therefore, the permission sought for should be granted.

Section 2 of the Forest (Conservation) Act, 1980 places a restriction on dereservation of forests of use of forest land for non-forest purposes. This restriction which is placed can be removed if prior approval of the Central Government is obtained whenever the State Government is of the opinion that the forest land should be dereserved and non-forest activity permitted, it is required to get the prior permission of the Central Government. An application in respect thereof has to be made under Rule 4 of the Forest (Conservation) Rules, 1981. The Form prescribed under Rule 4 gives the details of what the application

should contain. Apart from the details of the forest land involved which is required to be dereserved, Clause 6 of the Form requires details of compensatory afforestation scheme to be given. The area which is identified for compensatory afforestation has to be indicated maps in respect thereto on which afforestation is to take place have to be annexed and total financial outlay specified. We are not referring to the other particulars which are required to be given. But all that we wish to emphasise is that the provisions of the Rules as well as the information which is sought for by the Form have to be complied with and given before the Central Government takes up the proposal under Rule 5 of the said Rules.

When an application is received from the State Government the Central Government under Rule 5 is required to refer such proposal to a Committee for advice if the area of forest land involved is more than 20 hectares. Where, however, the proposal involves clearing of naturally grown trees in forest land or portion thereof for the purpose of using it for reafforestation then the matter is not referred to the Committee for advice. After the advice of the Committee is received, the Central Government may under Rule 6, after making such further inquiry as it may consider necessary, grant approval to the proposal for dereservation with or without conditions or it may reject the said proposal.

As we wee it, even though the proposal for dereservation is mooted by the said State Government, as far as the Government of India is concerned, this is done because of an application for dereservation which is received from an industry like the applicant in the present case. The Central Government while granting permission specifies the area on which compensatory afforestation is to take place. The question which arises is whether the present practice, which is being followed, namely, of that compensatory afforestation should be carried out on 89 hectares of degraded forest land and 125.734 hectares of non-forest waste land. According to the applicant, the amount of expense involved has been deposited with the State of Madhya Pradesh who is taking steps to comply with the requirement of reforestation and, therefore, the permission sought for should be granted.

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We prima facie feel that in order to ensure reforestation by reason of the release of reserved forests, the primary responsibility of carrying out the afforestation should be of the applicant concerned, the party which is going to use the dereserved forest, M/s South Eastern Coal Fields Ltd. in the present case. Mr. K. N. Raval, the learned Addl. Solicitor General States that the Rules and guidelines which have been framed will be upgraded in the light of the experience so far. In this connection, it appears that not only should it be mandatory for the Rules and the Form provided therein to be complied with but while granting permission the Central Government must specify the period within which the afforestation must commence and be completed. Furthermore, there should be a requirement of environmental audit in order to ensure that after the saplings have been planted the survival rate is high. The Government might consider requiring each applicant who is under an obligation to carry out the afforestation to publish the results of the environmental audit every year in a newspaper and forward the same to the Central Government. It should be specified that if the survival rate of the trees planted is not up to a specified percentage, the permission which is granted shall automatically cease and the non-forest activity will have to be stopped. In other words, the applicant is not only to be

responsible for planting trees but it should be its responsibility to look after and maintain the same and ensure its survival and full growth. The Union of India before granting permission to dereserve the forest should be satisfied that the applicant to whom the permission is ultimately being granted is such who will be in a position to carry out the afforestation as prescribed.

It should be one of the conditions imposed that if at any point of time there is non-compliance with the Rules or Regulations or terms of the conditions, then the permission granted under Rule 6 by the Central Government would stand withdrawn.

It has been brought to our notice that in paragraph 3, 5 of the existing guidelines the State Government is required to create a special fund to which the individual user agency is to make deposit for compensatory afforestation. In as much as the primary responsibility of carrying out the afforestation programme is to be of the individual user agency, perhaps it will not be necessary for any such deposit to be made. If, however, in a particular case circumstances exist where it may to be possible for the individual user agency to carry out the afforestation itself, such cases should be very exceptional and not the norm. Then the money which is deposited with the state Government should not form part of the general budget but should be kept in a separate account to be utilised as and when required without undergoing any undue formalities.

Learned Addl. Solicitor General wants eight weeks time to take appropriate action of considering and amending the Rules and Guidelines. Time is granted.

As far as the present application is concerned, the Advocate General, Madhya Pradesh states that pursuant to the filing of the affidavit on behalf of the State Government, on the entire area except for 20 hectares the plantation has been effected and in respect of 20 hectares of degraded forest land the site preparation will be completed in the year 2000-2001 and afforestation will be completed in 2001-2002. It is further stated that the afforested areas would be maintained for the next five years. As we have already noticed, the user agency in this case is the applicant M/s. South Eastern coalfields Ltd. It is their responsibility to see that the afforestation takes place in accordance with the permission which has been granted by the Union of India. The State Government will be at liberty to give the task of maintenance and looking after of the afforested area to M/s. South Eastern coalfields Ltd, and in case there is no proper maintenance or looking after and the survival rate of the trees planted is less than 75 per cent, the Central Government will be at liberty to give notice and cancel the permission granted. The permission sought for is granted subject to the aforesaid condition. As far as the balance 20 hectares is concerned, this will be the immediate responsibility of M/s. South Eastern Coalfields Ltd, to carry out the afforestation itself or through its agent.

Before concluding, we would like to observe that the Government should consider as to what safeguards should be ensured in order to see that after the permission is

granted, a project is not abandoned after the cutting of the trees.

I.A. to come up for further orders along with I.A. 566 after eight weeks. The state of Madhya Pradesh as well as M/s. South eastern Coalfields Ltd. will also file an affidavit indicating what is the survival rate of the trees so far.

T.N. Godavarman Thirumulpad v. Union of India
Decided on 22-09-2000
B.N. Kirpal, V.N. Khare & M.B. Shah, JJ.

Seizure of Wagons - Directions issued.

ORDER

IA 580

Consequent to the seizure of the railway wagons show cause notice dated 6th July, 2000 had been issued to the applicant by the investigating team. The applicant has chosen not to file a reply to the said show cause notice, as according to Mr. Rohtagi, present application has been filed. In our view, it is more appropriate that the questions of fact involved in this application are decided by the S.I.T. who have issued the aforesaid show cause notice. Counsel for the applicant want ten days time to file reply to the show cause notice. We grant three weeks time to reply- to the show cause notice. On the reply being filed the S.I.T. will, after giving reasonable opportunity to the applicant of being heard and producing evidence if necessary, take a decision within four weeks thereafter. This IA is disposed of

IA 604

This is an applications seeking modification of the directions issued by the Ministry of Environment & Forests with regard to movement of timber through railways from North Eastern States. If there is any difficulty felt by any consignor with regard to the applicability of the said guidelines, it is open to the consignor, like the applicant, to make a representation to the Ministry of Environment & Forests who will consider the same. This application is misconceived. Liberty is granted to make a representation. IA is disposed of.

IA 609

It is stated by the learned counsel that the applicants have received a show cause notice dated 6th August, 2000 with regard to the seized .wagons. He further states that a reply has already been filed. A decision in respect thereof shall be taken by the SIT within six weeks from today after giving an opportunity of hearing to the applicants and taking such evidence as necessary. IA stands disposed of.

IA 569-570

IA 570 for exemption from filing O/T is allowed.

IA 569: It is explained by the learned Advocate General for the State of Madhya Pradesh that the mining lease of the applicant has been cancelled not on the ground that the mining activity was being carried on in forest land but for other reasons. It is admitted by the counsel for the applicant that pursuant to the cancellation of the lease a revision petition has been filed before the Central Government. This being so, the IA is dismissed.

IA 424

Certain directions regarding felling & regeneration, regularisation of encroachments and authority competent to write a CR of Forest Department Officer, are issued which are contained in the Signed order.

IA 603

Mr. Mukul Rohtagi states that the applicant will comply with any condition with regard to reforestation as may be imposed by this Court and the permission for mining may be granted. In view of the said undertaking, the ad interim permission is granted and the State of M.P. may release the land required for the Dudichua Open Cast Project and Jayant Open Cast Project in respect of which decision has been taken by the Ministry of Environment and Forests. To come up for further orders along with the case of Southern Coalfields Ltd. (IA 574 in WP (C) 202/ 95).

IA 605

Issue notice. Respondents to file reply within four weeks thereafter.

IA 521, 606 & 607

Application for impleadment (IA 607) is dismissed.

In these applications, the only prayer is that the applicants may be permitted to cut and transport the plantation rood.

It has always been the intention of the orders of this Court that social forestry should be encouraged. There should be more plantation and it is that wood which should be used. However, in the transport of bamboo, eucalyptus and plantation wood, it is said that natural wood is also transported. In order to prevent that, the state of M.P. is in the process of framing Transit Rules which we are informed will be in place within one month from today. We accordingly, direct that on the Transit Rules being framed, approved and brought into force applicants would be at liberty to cut and transport plantation wood in accordance with the said rules.

IA are disposed of.

NEPAL[1]

Solraj Paudel v. His Majesty's Government, Ministry of Forest and Soil Conservation
Writ No.1283 of 2047 B.S. (1990)
Supreme Court, Full Bench
Shree Surendra Prasad Singh and Shree Krishna Jung Rayamajhi, JJ.

Sub: Mandamus with Certiorari

The main cause of deforestation in Nepal is due to forest fire that causes several ecological hazards. The Government has done little to control this. The petitioner seeks an order against the Ministry concerned directing it to properly manage forest fires. A report on the hazards and ecological imbalance caused by forest fires has been submitted to the Ministry on 2057-4-25. Getting no response from the Ministry, the report was published in several papers for notification. Having received no response even after the publications, the writ has been filed in accordance with Civil Act 2012 pursuant to the right of the petitioner given by Clause 88 of the Constitution of Nepal 2047. As the Ministry has not performed its duty, judicial intervention has been sought to ask the Ministry in writing as to why it was not performing its duties to protect the flora, fauna and overall environment of the country in faliling to take cognizance of the dangers spelt out in the report.

A written direction was given to the Ministry by the Court (single judge bench) on 2048-4-22 giving 35 days to reply.

The answer given by the Ministry in writing is as follows: "The main aim of the Opposition seems to get only the reply in writing from the Ministry about the negligence and misinterpretation of the report that mentioned the preventive measures for deforestation. The writ also mentions about hurting the personal feelings and "Right of Suggestion" of a citizen to the Government and Ministries. But it is hereby notified that the Government has not given the supreme power to any of its citizen to compel any Ministry into action. Hence the writ is not maintainable and liable to be rejected."

The writ was taken up for decision.

The defendant for the writ petitioner was Advocate Shree Prakash Mani Sharma and for Ministry of Forest and Soil Conservation was Acting Attorney General Shree Krishna Prasad Shrestha. World Health Organization also gave valuable opinion as to the maintainability of the writ.

While the petitioner cited fire as the principal cause of deforestation, effective ways to counteract the same were recommended in a report given to the Ministry of Forest and Soil Conservation on 2047-4-24. The petitioner wanted written answer from the Ministry and further wanted it to issue the suitable orders to prevent deforestation. It was held that the petitioner has failed to establish any legal right of his that has been violated simply

[1] Unofficial English version of all judgements

because no decision was taken on the basis of his report. Hence there is no reason to issue the mandamus or certiorari. The writ is rejected on account of the ambiguity in respect of relevant laws and the Constitution.

Please submit the file as per rule.

S.P. Singh
Judge

I agree with the decision.

Krishna Jung Rayamajhi
Judge

Surya Prasad Sharma Dhungle v. Godawari Marble Industries
Writ No. 35 of the year 2049 BS (1992)
Supreme Court, Full Bench
Trilok Pratap Rana, Laxman Prasad Aryal and Gobinda Bahadur Shrestha, JJ.

As per the judgment dated 049-5-8 (Aug. 24 1992) of the Division Bench of this Court, the facts of this writ petition presented before this Bench, pursuant to Rule 3(a)of Supreme Court Rules, 2049(1991) are as follows:

Legal and Environmental Analysis for Development and Research Service (Pvt.)Ltd. which is called as LEADERS Ins., is an institution, registered under the Companies Act 2021, with the objective of conducting research, study, analysis in the area of environment and law as well as promoting environment conservation.

It has been found that the respondents' activities have caused and have been causing, violation of the constitution and law, a very serious environmental degradation to Godawari forest and its surrounding which is rich in natural grandeur and historical and religious enshrinement with the area of 15 sq. miles occupying within Godawari Adarsha Village Panchayat situated North West to Phulchowki Hill of South East Lalitpur District lying within Kathmandu valley. Since such activities of the respondents have hindered to conserve appropriate natural heritage and protect from the danger, to be caused on the property, life and health of the people and since respondents have also prohibited to study and research to this (Pvt.) Ltd. on the said area and they have infringed the rights of the petitioner, this writ petition is hereby submitted for protection of public interest and enforcement of the rights of the applicant. Since the aforesaid deeds of the respondents are against the responsibility entrusted by the Articles 9 (b), (c) and (d) of the Constitution and they have not fulfilled the constitutional responsibilities and undermined the constitutional rights guaranteed under Articles 2, Article 10, Article 11 (1) (2) and Article 15 of the Constitution, the petitioner has submitted this writ petition under Section 10 of Court Proceedings of the Country Code, Section 5 of the Forest Conservation (special provision) Act 2024 and in accordance with principles propagated by the Supreme Court. The following unconstitutional and illegal activities of the respondent Godawari Marble Industries, have caused a huge public loss. Good environment is one of

the prerequisites for a personal life. But the dust, minerals, smoke and sands emitted by the said factory have excessively polluted the springs water and nearby water bodies, land and atmosphere of the said area, thus continuously deteriorating the health, life, education and profession of the research experts of the petitioner institute, the students of St. Xaviers school, the labours working in the industry and their family members and ultimately the local inhabitants. While blasting dynamites, crushing stones and transporting boulders and marble, even the minimum security measures have not been adopted or granted neither by the industry nor the government. No measure has been adopted to halt the negative impact and loss on the environment. The respondent industry has no constitutional and legal right to endanger others' life. The local panchayat including all the respondents are equally responsible for keeping quiet and not implementing any legal measure to thwart this type of unauthorized activity of the industry. As the 11th and 12th Village Assembly of the Local Village Assembly had requested the Department of National Parks and Wildlife Conservation, Department of Forest and the Royal Palace to declare the Godawari area a National Park and to halt the deforestation and environment pollution thus created by the said industry. Since the villagers' committee has appealed to the Prime Minister and the Forest Minister to this end, it has been proved that the respondents have shown no interest and alertness to ensure public welfare and security of life and to halt the environmental degradation. From the above mentioned facts, it is clear that the subject is of public interest and concern.

Henceforth the petition has been filed seeking mandamus or any appropriate order in the name of the respondents, to enforce the right of the people to live in healthy environment, security of life and property and live a peaceful life.

An order has issued by the single bench of this Supreme Court for a show cause notice to the respondents and to present the affidavit of the same before the bench.

The written statement submitted by Mr. Mukti Prasad Kafle, the Secretary of the Ministry of Works and Transport Contended that the Ministry is not engaged in any sort of works and proceedings which caused any negative effect and destruction to the nature and natural flora and fauna as well as the Ministry has not thwarted the legitimate rights of concerned people as provided by the Constitution. Since the Ministry has not caused destruction of the nature, the petition filed in the respected court by making respondent to this Ministry is baseless and ill-motivated. In that view of the matter I request the respected court to dismiss the petition.

The written statement submitted by Mr. Ashok Kumar Todi, the chairman of the Board of Directors, an authorised person on behalf of the Godawari Marble Industry contended that while studying the writ petition, it is found clear that this petition is filed with ill motive and vested interest to cause negative impact on the goodwill of this company gained in the industrial arena within prevailing Law and Regulations. This company has obtained the license on 2034/7/24 (Nov. 9, 1977) from the HMG Department of Industry, for expansion and modernisation of the marble industry. The question of the legality of its activity does not arise since it has been conducting its works under the norms of the existing rules and regulations after obtaining the incorporation certificate and certificate of mining from the Department of Mines. Since the applicant has lodged this petition on

the ground of public interest in accordance with extra ordinary jurisdiction without obtaining permission from HMG or the court thus violating the Legal Provision of section 10 of Court Proceedings of the Country Code and therefore, there is no such situation on which there can be taken any action on this petition. As the company enjoys no special facility from HMG Nepal and has obtained the facilities similar to that given to other companies, and it has been provided license to operate mining to the other person, the allegation that other persons have been deprived of the business and profession related to the natural resources is completely misleading and is without any grounds. Hence, I hereby request the respected court of dismiss the petition.

The written statement submitted by Mr. Yogendra Nath Ojha, Acting Secretary of the Home Ministry states that since the write petition filed by the petitioner Mr. Surya Prasad Sharma Dhungel has nowhere mentioned the order of this Ministry that could endanger the public interest and since this Ministry has issued no such order and also the petitioner hasn't been able to produce any evidence of the misdeed of this Ministry to this end, I duly request the respected court to dismiss the writ petition filed against this Ministry.

The written statement submitted by Mr. Ananda Bilash Upadhyaya, Deputy Director General of the Royal Botanical Garden, Godawari, Lalitpur states that it has not been permitted for illegal land acquisition in the outside area except as obtained license from Department of Mines and Geology. This garden has been keeping vigilance on the same and conserving the area. Since, this garden is committed to conserve and preserve its natural resources, the petitioner hasn't been able to produce and evidence in support of its allegation that this Botanical Garden has failed to carry out its responsibility. Moreover, the writ petition filed against this botanical Garden and Ministry of Forest and Soil Conservation in relation to the license duly issued by the Department of Mines and Geology of His Majesty's Government is itself contradictory and thus appears void. I therefore, hereby duly request the respected court to dismiss the writ petition.

The written statement submitted by Mr. Lok Bahadur Shrestha, Chief Secretary of the Cabinet Secretariat states that the applicant, in his writ petition, hasn't been able to produce any evidence as to which decision of the Cabinet Secretariat on what grounds has violated the petitioner's rights. On top of that, the Cabinet hasn't taken any decision so far to undermine the public interest. Hence, I duly request the respected court to dismiss the writ petition filed without having any base against this Secretariat.

The written statement submitted by Mr. Sushil Bahttarai, Acting Director General of the Department of Soil and Watershed Conservation has contended that it is the responsibility of each and everybody to preserve and conserve the greenery and natural flora and Fauna in Godawari, Phulchowki area and this Department is committed to protect the environment in overall, including that of Godawari, Phulchowki and its surrounding. Hence I duly request the respected court not to issue order as asked by the petitioner against this Department.

The written statement submitted by Mr. Bhuaneshwor Khatri, the Secretary of the Ministry of Industries states that while thoroughly reading out the writ petition the writ petitioner hasn't able to provide any evidence as to which decision of his Ministry, on

what ground has violated the legitimate rights of the applicant. Moreover the petitioner hasn't been able to elicit any proceedings of this Ministry as liable to guilty indictment. On top of that, the Ministry has undertaken no decision as to undermine the public interest so far. In view of that matter, I duly request the respected court to dismiss the writ petition filed against this Ministry.

The written statement submitted by Mr. Santa Bahadur Rai, the Secretary of the Ministry of Housing and Physical Planning state that the incense for the establishment of the Godawari Marble industries wasn't issued by this Ministry as this Ministry was created after the establishment of the said industry. Hence I duly request the respected court to dismiss the writ petition filed against this Ministry.

The written statement submitted by Mr. Purushottam Silwal, The Chairman of Godawari Village Panchayat, Lalitpur states that Marble Factory has contributed to local development which has created more employment opportunities to the local people. Local people have not faced any inconvenience and insecurity because of the factory. Due to the very fact this Village Panchayat on is decision dated more employment opportunities to the local people. Local people have not faced any inconvenience and insecurity because of the factory. Due to the very fact this Village Panchayat on its decision dated 2045/5/18 B.S. (Sept. 3, 1989) had replied the letter sent on 2045/4/32 B.S. (Aug. 16, 1988) by the Lalitpur District Forest Office, Godawari Area, deciding to allow the said industry to continue its operation. This also substantiates that the allegation put forward by the petitioner is insubstantial and baseless. Hence I request the writ petition be dismissed.

The written statement submitted by Mr. Mahendra Narashingh Rana, the Director General of the Department of Mines and Geology states that Section 3 of the Nepal Mines Act, 2023 B.S., stipulates that all the minerals lying under or found in any part of the territory of the Kingdom of Nepal are the assets of HMG. The Mine Act and Rules were promulgated with the objective of timely mobilisation, and development of Minerals which are the property of HMG by managing mines and appropriate management of the minerals. The Godawari Marble industries which has obtained a license on 2021-1-30 (May 12, 1964) from Department of Industries to operate the industry, this Department on 2021/3/18 B.S. (July 1, 1964) has provided a lease of mining marble around the area extending 1760 ft, 4790 ft, 174 ft and 625 ft to the East, West, North and South, respectively, of the bridge situated in Godawari Road in front of the mine lying in Godawari, located at Ward No. 5, Kitni Village Panchayat on the basis of the power entrusted to it by Rule 15 of the Minerals Rules of 2013 B.S. and Section 7 of Nepal Mines Act 2023 B.S. Since the mineral resources are the economic backbone of the country, and the decision undertaken by this department was targeted for the overall national upliftment, I hereby request that the writ order shouldn't be issued to the respondent on the baseless allegation of environmental pollution.

The written statement submitted by Mr. Shambhu Silwal, on behalf of Lalitpur District Panchayat, Lalitpur states that due to the Marble Industry and other industries operating in this area, the local people have secured job opportunities which have resulted into the local development as well as national economic development. On consideration of this

matter, the village panchayat has also recommended for renewal of the certificated of the Godawari Marble industry to the respective authority. As the said area has been developed with the help of the industries operating in that area, establishment of governmental and non-governmental offices and religious institutions, is generating the employment opportunity to the local people and are utilizing such facilities, the 13th session of village panchayat meeting also proposed to declare all the forest areas except, the area currently operating industries, government and non-governmental offices and religious institutions, is generating the employment opportunity to the local people and are utilizing such facilities, the 13th session of village panchayat meeting also proposed to declare all the forest areas except, the area currently operating industries, government and non-government offices and religious institutions, as the National Park. Thus, I duly request the respected court to dismiss this writ petition, which is insubstantial and motivated by misleading and false rumours.

As there has been no clear legal provision for the subject matter of environment, it might not be wise enough to imitate some of the principles of foreign countries in our country. It is most important for the concerned authority to undertake appropriate measure in order to safeguard environment. But the mere interest and concern of an organization is still inadequate for the establishment of environmental rights by law. The respondent Godawari Marble industries seem to be a licensed industry, registered under law by the concerned Department. Hence there is no doubt on the Hon'ble Judge Mr. Gajendra Keshari Bastola's decree of rejecting the writ petition and the constitutional obligation of this court to ensure public interest through the use of its extraordinary jurisdiction are unquestionable.

Thus at the instance of the facts present in the writ petition including those present in the report of Mr. Bhairab Risal's team; the writ of Mandamus is to be issued calling upon the respondent Ministry and Mining Department to carry out necessary investigations before renewal of the industry for the sake of safeguarding the environment in and around Godawari are. If the environment isn't maintained despite these measures and the environmental degradation is going to worsen due to the lease given to the respondent industry, the contract has to be cancelled in the view of public welfare. The latter shall be done after providing adequate compensation to the respondent industry as provided for rule 25 (1) of the Minerals Rules (Amendment and Renewal) 2018 B.S.. If the amendment in the contract is feasible, then the appropriate amendments shall be done to control the environmental degradation. Further, it has been viewed by Hon'ble Justice Kedar Nath Upadhyaya in his dissenting judgement delivered on 2049-5-8 (Aug. 24, 1992) that the writ of mandamus should be issued on the respondents Department of Mines and Geology and Ministry of Forest and Soil Conservation stating that all appropriate measures must be taken to maintain environmental balance in Godawari area.

Mr. Prakash Mani Sharma and Mr. Upendra Dev Acharya, the learned advocates, appearing on behalf of the petitioner have put forward the Article 11 (1) of the Constitution of Nepal, 2019 B.S. which provides that no person shall be deprived of his life and personal liberty save is accordance with law. The works carried out by the respondent Godawari Marble Industries have been disbalanced to the environment. The

dust and send produced during the explosions which is being undertaken in the mining process has polluted the atmosphere and water of the area and caused deforestation. Due to the continuing environmental degradation and pollution created by the said industry, Right to Life of the people has been violated. The absence of appropriate environment caused diminution of human life. There are plenty of examples that various types of animals and birds have disappeared from the earth due to the negative effect on the environment. Human being may also be extinct if there is no conducive environment. Environmental issue is not the related matter of a specific person, it is the matter of all and public as interest. Environmental degradation imparts its untoward effect not only to a limited area but encroaches upon the surroundings and the entire nation. The petitioner LEADERS Inc. does have *locus standi,* as protection and conservation of the environment is the objective of the petitioner and environmental problems in Godawari area has adverse impact on the petitioner as well. The Supreme Court of India, while delivering its judgement in various environmental cases, has interpreted the constitutional provision that no person shall be deprived of his life except in accordance with law, liberally and established various precedents that where polluted environment is likely to damage life of individuals, any person can file writ petition.

Substantially an environmental issue is a matter of public interest and the term public rights used in the Article 88 (2) of the Constitution of the Kingdom of Nepal, 2047 (1990) B.S. implies to the common right provided by any law or constitution in any community or people of the Kingdom of Nepal. This fact has been established in the writ petition of Radheshyam Adhikari Vs. Kalyan Bikram Adhikari. As the present writ petition represents both the public interest and public right, it cannot be said that the petitioner does not have *locus standi.* Since the petitioners' *locus standi* in a case of public interest is very broad, the question of *locus standi* in the present case can't be limited. In Ajit Kumar Vs Krishna Narayan Shrestha (writ petition No. 3092) the Supreme Court has formulated the principle that if the public property is not preserved properly, anybody concerned with the public property can approach the Court with the aim of preserving that property. Similarly, the present issue is also a matter of public interest, any concerned person can file a writ petition.

Article 26 (4) under the Director Principles and polices of the Constitution of the Kingdom of Nepal, 2047 (1990) B.S. there has been a constitutional provision which states that the State shall give priority to the protection of the environment and prevent its further damage from various physical development activities by creating awareness to the people on cleanly environment. Since the Indian Supreme Court in Shree Sachidananda Pandey Vs State of West Bengal (AIR 1987 section 1109), has propagated a principle based on the very Directive Principles of the State and as the Directive Principles of our Constitution also comprises of the matter of the environmental cleanliness, the existence of *locus standi* of the petitioner in the present case can not be ruled out.

So far the environment is concerned, the frequent explosions during the mining operation of the respondent Marble Industry have created an environmental hazard in that area. Due to the pollution of sound and the overall atmosphere, the rare species of birds and butterflies are disappearing at an alarming rate. There are plenty of species of bird and

butterflies in the Godawari area which are rare. This is the area which is famous for flora and fauna. But flora and fauna have been badly affected by the explosion of dynamite. Due to continuing deforestation, the productivity of fertile lands has decreased a lot. Huge stones that have been pelted during the frequent explosions have created a panic amongst the local inhabitants and the students of St. Xavier's school. There is a Godawari Pond in this Godawari area. Godawari area is one of the religious places and it has cultural, archaeological and biological importance 600 species of butterflies and 29 species of birds in Godawari area. However, the respondent Marble Industry has created an overall deterioration in the natural flora fauna of that marvellous area. Some taps of the `Nau Dhara' (Nine taps) are on the verge of drying and the water of Godawari Pond has been effected by the said industry.

Even from the economic point of view, the activity of respondents is against the economic welfare of the nation. It has been caused unbearable loss of the natural flora and fauna and butterflies, decreased fertility of the soils by erosion and polluted the water of river and air of the atmosphere, and it is a gross economic loss which is many times greater than the royalty it pays back to HMG to Nepal. Neither new technology nor any equipment have been installed in minimize the air, water and sound pollution. There has been no security measure undertaken for the workers of the said industry. Since the respondent industry is a capital intensive rather than labour intensive one, it has not been able to make any contribution in providing employment opportunity. The negative impact caused by the Godawari Marble Industries on the environmental, natural and cultural heritage is much more greater than the royalty Rs. 20,000/- it pays annually to HMG/N. During mining of the marble, 1400 hectares land has be contaminated with soil, sand and lime thus reducing the productivity of said land. Because of the marble and bolder, the water source of the Phulchowki hill has declined a lot and the source of drinking water and irrigation has been drying up. Moreover, the quality of the drinking water has declined due to the operation. Different reports about the effects of the respondent industry on the environment of the Godawari area have been published. Review of the environment of Godawari area undertaken during Shrawan 2045 (1988) B.S. by the Environmental Impact Study Project, Thapathali; the report put forward by a research group led by Mr. Bhairab Risal; and the investigation report projected by a research group led by Dr. Narasingh Narayan Singh have been published. Sufficient discussions on the environmental hazards poised by the Marble Industry along with their appropriate solution can be obtained from those reports. United Nations Conference on Environment Development, Rio de Jenerio, has taken the environmental problem as a serious threat to the mankind and HMG has expressed its commitment in environment conservation by ratifying the Conventions passed in Rio. In this context, conservation of environment has become an important obligation of the government. When an industry, targeted at a specific economic benefit, has more adverse effects than the services; has negative effect on the rare species of birds, insects, flora and fauna and ultimately the whole mankind, it is inappropriate to operate such industry. It may be mentioned herein that the Indian Supreme Court in an environmental case between R.L.E. Kendra, Dehradun Vs State of UP and others had put a halt to the mining operation. Since the respondent industry is the cause of environmental degradation in the aforesaid area, the learned advocates on behalf

of the applicant demanded that the writ of Mandamus be issued for immediate closure of the respondent industry and submitted a written note also.

Mr. Akbar Ali Mikrani, the Learned Government Advocate clarified on behalf of the respondents including Ministry of Forest and Soil Conservation and others that HMG, itself is well aware to keep environmental balance in Godawari area. The writ of Mandamus is issued if HMG has not undertaken any of its responsibilities but the HMG, in the context of Godawari Marble Industry, has issued various directives to safeguard the environment of Godawari area and those directives have been implemented. In case there has been environmental pollution due to the Godawari Marble Industry, the measures to safeguard environment should be implemented rather than closing the industry. If the latter be proceeded, the country will be industry-less in the future.

The petitioner is an organisation registered under the Companies Act. As only the affected party can file a writ petition, the aforesaid organization bears no *locus standi* at all. The petitioner has not been able to show the right that has been violated as alleged in the petition. In such situation there is no question is arises to issue the writ. Hence Mr. Akbar Ali Mikrani, the learned government advocate, demanded that the petition be dismissed.

Mr. Shambhu Prasad Gyawali, the learned senior advocate, on behalf of the respondent industry, mentioned that there is no difference of opinion between honourable justices as to *the locus standi* of the respondent is the Division Bench. It is important to see the legislation which Hon'ble Judge Mr. Kedar Nath Upadhyaya has cited while establishing *locus standi*.

After repealing of the Nepal Mines Act B.S. 2013; Nepal Mines Act B.S. 2023 has been promulgated. Section 9 of Nepal Mines Act 2023 empowers HMG to direct the mine owner or issue necessary orders or instructions in accordance with the Rules Formulated under the Act. But the Rules have not been formulated under the Nepal Mines Act B.S. 2023, rather the Minerals (Amendment and Consolidation) Rules B.S. 2018 were formulated under the Nepal Mines Act B.S. 2013. Rule 6 of the said Rules provides the contents of license and the rule 23 stipulates the conditions which the contractor for the mining must abide by.

Nepal Mines Act 2024 (1985) B.S. which has not come into force yet, should not be considered for the authority. There is not clearly mentioned in the petition that which provision of which Act is violated by the respondent. If a section of law is violated, then the writ of Mandamus is issued. But such condition has not arisen in the current writ petition. Nepal Mines Act 2023 B.S. has no provision for environment. Though Rule 23 of the Minerals (Amendment and Consolidation) Rules 2018 B.S. provides for the preconditions, it does not stipulate any condition relating to environment.

Similarly, Rule 25 of the said Rules has vested HMG the discretionary power to cancel any mining contract, whether to use such discretionary power solely lies on the government. To prevent or stop anything, one needs law. This is the principle of the Rule of Law and hence the writ of Mandamus can not be issued upon the respondents. The

learned senior advocate Mr. Ratan Lal Kanaudiya on behalf of the respondents stated before the bench that if person does not perform any duty as specified by Law, this is the matter of public interest. In the decision no 4895 it has been propounded that whether any matter is of public interest. Since the Hob'ble Judge Mr. Gajendra Keshari Bastola has expressed in his opinion that there is absence of environmental law which is necessary. Since there is absence of the environmental law it can not be done as contented by writ petitioner. The opinion of Hob'ble Judge Mr. Kedar Nath Upadhyaya appears to base on Minerals Act 2024 B.S. But this Act is yet to come into effect and the provision of the Act can not be enforced. Even though HMG has shows its consent by signing the limited Nation's Conference on Environment and Development, Rio de Jenerio, nothing can be done in the absence of the environmental law. Environmental law should be enacted. If a norm, as directed by the law, is violated, only then the writ of Mandamus is issued, otherwise it can not be issued. The Mining Act 2023 B.S. has no any provision for environmental issue and the Minerals Act 2042 B.S. has not come into force yet, thus the writ of Mandamus issued on the basis of such Act by Hon'ble Judge Mr. K.N. Upadhyaya is not harmonious with the existing laws. The respondent has not violated any kind of Act or Rule.

Though HMG may cancel the contract under rule 25 of Minerals (Amendment and Consolidated) Rule 2018 B.S. in public interest, this is not feasible as such. Though the petitioner enlisted a number of committees who have published reports about the environment of Godawari, those committees were not constituted under any law, HMG is itself well aware of maintaining clean and good environment in Godawari area. There is no question of limiting itself on the opinion and contention of the Hon'ble Judges who have the dissenting opinions in the division bench. If and only if HMG couldn't perform its duty under the law, then to make HMG perform that duty, the writ of Mandamus can be issued upon. In the present writ petition, such relevance is not found.

The contention of the petitioner is not based on the reality. The petitioner alleged that boulders fall that on St. Xaviers school and villages in the vicinity because of the dynamite explosion but the petitioner himself has made the St. Xaviers' School and the local inhabitants as respondents. The petitioner has not been able to demonstrate the level of environmental pollution, as alleged in the writ. The respondent industry has been abiding all the rules and guidelines issued by HMG for protection of ecology of Godawari area. In such situation the decision of Hon'ble Justice Gajendra Keshari Banstoal who expressed the view that the writ can not be issued and it is dismissed, was reasonable. Mr. Kusum Shrestha, learned Senior Advocate representing the respondent Marble Industry, argued that respondent industry has been operating Mines by limiting itself within the laws and regulations. It has been implementing the directions given by the government in time to time. There is not clearly mentioned is the petition that what sort of works of the industry has degraded the environment. No doubt, the environmental issue needs utmost importance but in the current context of Nepalese law, we do not have adequate and appropriate environmental laws. In this sense, the extent of seeking litigation is open to consideration to the Court. The petitioner has demanded that Godawari area be declared the National Sanctuary, but the absolute power to this context is vested within HMG. If there is threat to the mankind due to the environmental

degradation, caused by the dust produced from any industry, the modern equipments can be used to safeguard the environment and life of the people. If it is possible to protect the environment by using modern equipments, stoppage of the industry is not suggestive. The respondent industry is not responsible for illegal deforestation of the Godawari area. It is the responsibility of the concerned authorities to prevent from such situations.

To close the mining is the discretionary power of HMG, vested under the rule 25 of the minerals Rules 2018 B.S. Moreover, HMG is not obliged to exercise this discretionary power under any circumstances. The Minerals Act 2042 B.S., as used by Hon'ble Judge Mr. Kedar Nath Upadhyaya has not been promulgated yet. Such Act can not be enforced. The respondent industry has installed seltitanks to safeguard water pollution and undertaken plantation program in empty space to safeguard deforestation. Though our country has accepted the environmental issues adopted in the international conference, the need for the environmental law is immensely felt. The rationality of any plan or project in relevant to the environment is decided by concerned authority, not by court. During instalments of new industries, the expected effects to the environment can be analyzed but for the old industries, standard holding without causing environmental pollution can be determined. If the standard holding is not maintained, only then the 2nd step towards closure of the industry may be proceeded. Before closing the industry, an opportunity for using various technologies to prevent environmental pollution should be granted. The court can review as to whether the activities of the industry are as directed by authority. The international affairs about the environmental aspect might be imitable but should be rethought in the context of Nepal. There were hints about the formulation of environmental law in our 7th and 8th plan. On 049/3/27 B.S. (July 11, 1992) in the Section 42 of the Nepal Gazette, formation of the Environment Conservation Committee is also found. But the appropriate law regarding this vital aspect is still absent in our country. The petitioner has mentioned the Mining Act 2023 B., Mines Act 2018 B.S., Minerals Rules 2024 B.S. in his statement. But the Mines Act 2024 B.S. and the Minerals Rules 2018 B.S. Any act shall be carried out is accordance with law but in the absence of law it can not be performed. Here the petitioner has introduced the Right to Life in the writ. Though it is a dynamic concept, one should acknowledge that this should be as regulated by law when approaching the environment. Until and unless the constitutional and legal right has been violated, the writ of mandamus can not be issued by a court. Even for issuing the writ, one can not rule the principle of the Judicial Restraint. Though the petitioner has demanded that water pollution, sound pollution and air pollution be mitigated, the functioning of the type of technology to be applied for the mitigation of above environmental hazards is yet to be determined. It pollution caused by industry is prevented by using new technology, the situation does not arises to close the industry. The reports published on the issue are not reported under any law and have no legality. The writ petition should be adjusted with meaningful relation. Analysis of the direct intervention to the petitioner so far should be undertaken and the *locus standi* should then be determined prior to issuing upon the writ of mandamus. All the allegations brought about by the petitioner are not related with the respondent industry and the issuance of the writ of mandamus in absence of the appropriate law by the Hon'ble judge Mr. Kedar Nath Upadhyaya doesn't appear to be an appropriate step.

The petitioner in his writ petition dated B.S. 2046/2/30 (June 12, 1989) under the Articles 1, 10, 11 (1) (2), 15 of the then constitution of Nepal has alleged, inter alia, that since the environmental degradation produced due to the presence and the activities of the respondents have violated the public interest including the petitioner's constitutional and legal right the environmental degradation and its untoward impact on the public life, health and property shall immediately be abandoned; incorporation policy as such to maintain the environmental balance after undertaking the research about to be effects of newly licensed industry shall be implemented, the petitioner went ahead demanding that a scientific team from the RONAST or the university be constituted to undertake the research about the environmental degradation so far created by the respondents and an adequate compensation be provided for the loss it has produced. The petitioner, further demanded in the writ petition that the natural and historical resources be maintained as it is, without causing any kind of impairment to them, adequate equipments and security measures be implemented for the workers; the illicit transaction of the natural flora and fauna be immediately halted; the freedom of movement of the professionals engaged in the research of the subject be ensured through order of the court. The petitioner also demanded that to ensure a peaceful and healthy life in a hygienic environment, the writ of mandamus be imposed upon the respondents. Further more, the writ petitioner has mentioned different types of demand from Para 5 (a) to (i) of the writ petition.

While summing up the demand of the petitioner, it is appeared mainly that the respondent industry has degraded the environment and from the negative effect of which has infringed the right to live is the healthy environment of the person, and among the respondent the governments' authorities have not prohibited the works of the respondent Marble Industry and not made surveillance which caused such environmental degradation and therefore helped to the same. It is seem to be requested to issue an order that the environmental degradation activity caused by the respondent Marble Industry shall be controlled as per the Constitution and other Laws and Regulations.

It appears that the petitioner while lodging the petition on 2046-2-30 B.S. (Jun 12, 1989) has taken the grounds of Articles 11 (1) (2) and 71 of the then Constitution of Nepal 2019 B.S. and Sections 10 (A), and 83 of chapter on Court Proceedings of the Country Code for the introduction of the public interest.

Article 11 (1) of the Constitution of Nepal 2019 has guaranteed the right to life save in accordance with law. The life of is threatened in polluted environment. Right to life of a person is ceased to exist by pollution of environment. It is the legitimate right of an individual to be free from polluted environment. As the protection of environment is directly related with life of human being, it should be accepted that this matter is included in Article 11 (1) of the Constitution of the Kingdom of Nepal 2047 (1990). There is no doubt the applicant has a profound interest in the present environmental issue. In fact an environmental problem is a matter of public interest and concern. And as such, the petitioner, involved in the environmental subject that has been proved to be of public interest, has a strong relationship with the subject of the present dispute. The promulgation of the Constitution of the Kingdom of Nepal 2047 (1990) repealed the then constitution, and Article 88 (2) of the newly promulgated constitution has protected the

public interest. There was situation where the question whether the applicant has *locus standi* could be raised under the previous constitution. However as the present constitution has established interest as a protectable fundamental right, there is no question of *locus standi*.

Since clean and healthy environment is an indispensable part of a human life, right to clean, healthy environment is undoubtedly, embedded within the Right of Life. It is clear that the constitutional perimeter in which the applicant had filed the writ petition, has been substantively changed form commencement of Article 26 (4) of the Constitution of the Kingdom of Nepal 2047 (1990), because this Article has taken environmental conservation as one of the basic Directive Principles of the State. Thus, as the environmental conservation is one of the objectives of the applicant 'LEADERS Inc.', it needs to be accepted that the applicant has the locus standi for the prevention of the environmental degradation.

Since the Industrial Enterprises Act 2049 B.S. (1992) requires for assessment of the likely untoward effects to the environment before providing the license for the establishment of an industry, not only the government policy but a clear legal provision has been developed to this end. Thus one of the contention made by the petitioner that adequate measures regarding protection of the environment shall be undertaken before providing the license for the establishment of an industry has been converted into a legal procedure. The demand for creating an investigative committee of either RONAST or the university seems to be fulfilled to some extent as there have been constituted various committees, task forces in this regard since B.S. 2040 to study the matter whether the Godawari Marble industry has caused negative impact on the environment of the Godawari area and they have been submitted their respective reports as well. Amongst the reports published by these committees and taskforces, the petitioner in verbal and written submission has mentioned one, suggesting the marble industry should be closed to safeguard the environmental degradation. The applicant has not categorically asked for the closure of the marble industry in the writ petition rather has emphasized on the regulatory and remedial side for adoption of effective measure to stop or reduce negative environmental effect.

After the Stockholm Conference of 1972 the every ones attention is on environmental degradation. In developed countries including the United Sates, separate legislation have been enacted for environment conservation since the seventies. Recently developing and underdeveloped countries have begum the formulation of or are in the process of formulating separate law for environment. In our country also, there has not yet been a separate environmental law but all the necessary frameworks for this goal have been drafted. To declare environmental conservation as a state policy, under the Article 26 (4) of the constitution, to form of the environmental conservation commission led by the prime minister on 2049/9/27 B.S. (Jan 11, 1993), environmental effect evaluation has prepared on 2050/2/4 B.S. (May 17, 1993) by the aforesaid environment Conservation Commission; the Ministry of Environment is established, the matters of the environmental reforms are incorporated in its 8th 5-year plan of the planning commission; among the committees of the parliament an environmental committee is in existence in

the house of representatives; and participated in to the world environmental conference in Rio de Jenerio, 1992 and has signed the same are some of the instances indicating a deep concern of HMG towards the conservation of the environment. But these are only some of the attempts but not creative works. But still the lack of a specific law has hindered the dynamism needed in this regards. It's no doubt, nothing can be properly managed without any law and for the systematic provision of the environment related crimes and subsequent punishment, an appropriate law is indispensable. Without law it is not possible to issue an order for punishment and closure of the industry. As the present laws are currently in scattered forms and also inadequate and ineffective, an appropriate, separate law encompassing all aspects of the environment is deem necessary to be formulated and promulgated and promulgated as soon as possible.

Though the Minerals Act 2042 B.S. and clause 11 (a), added by the amendment of 2052/2/5 B.S. (May 19, 1995) are important landmarks in safeguarding the environment, the Act has not yet been promulgated by the government but the Act was amended on 2052-2-5 (May 19, 1995). If the executive does not implement whatever the legislation has enacted by the legislature, it can not be said that the executive has been performing its works in accordance with spirit of the legislature. Hence it appears that the executive has shown ken interest in petty things but overlooked the constitutional beckoning and national-international public interest; Henceforth it is revealed that the time has came to mitigate the uncertainty prevailing presently and to fulfil national and international responsibilities towards the environment by promulgating a separate environmental law.

Since after the respondent Marble Industry in the present case got permission on 2024/7/2 B.S. (Oct. 19, 1967) with the conditions of modernization and expansion, various reports published by different governmental and non-governmental organizations have indicated that the complaint about the negative impact to the environment of Godawari area has surfaced and this controversy has been gradually proceeding towards the explosive stage. But no official scrutiny has been undertaken despite so many reports and controversies. So far as the environmental degradation of Godawari area is concerned its extent is yet to be explored in a scientific and official manner. The respondents in their discussions and submission have mentioned various remedy measures like afforestation, silt satellite construction, distribution of mask to the workers during working period in order to curb the environmental degradation. It appears quite essential to investigate the effectiveness of those regulatory and remedy measures as well as the ratio between the pollution rate and the permissible limit.

So far the explosion during mining is concerned, permission for the explosion during mining has been mentioned in the conditions of the license but since the frequency and power of explosion have not been clearly defined there arises the likelihood of unlimited accounts of the explosion. Irregular unlimited explosions not only create the sound pollution but also attribute to the geological micro side effects that ultimately lead to the geological and botanical disasters. Thus it is indispensable to find out an appropriate and practicable alternate to the explosion and the government with its deep commitment must take an appropriate measure to this end. As indicated from the various reports that the grit production has been overshadowing the marble mining, there is possibility of greater

number of explosions and subsequent sound pollution at the alarming rate. Hence the environmental degradation can be minimized to some extent provided the prime objective of marble production be given upper hand.

It is beyond doubt that industry is the foundation of development of the country. Both the country and society need development however, it is essential to maintain environmental balance along with industry. It is essential to establish balance between the need to provide continuity to developmental activities and priority to the protection of the environment. Stockholm Conference has developed the concept of "Sustainable Development" along with the report of the United Nations Commission on Environment, this matter has been substantiated there has always been more or some adverse impact on the environment form industries. Therefore where there is development activity, there is adverse impact on the environment. First remedial and then regulatory measures need to be adopted to mitigate such negative effects. If these measures are unable to protect the environment, the activity which is causing environmental pollution needs to be closed. Development is for the interest, prosperity of human being. Therefore, life of human being is the end. Development is the means to live happily, human being can not live clean and healthy life without clean and healthy environment. Therefore, safety of the environment is the means. Environment protection measures should be initiated taking into account this fact.

In the opinion of Hon'ble Judge Mr. Kedar Nath Upadhyaya, it has directed that alternative remedy measures should be undertaken at first. If this is not possible the renewal of the license is allowed in such a way that the concerned industry will have to concentrate on the environmental conservation. Even if this measure fails, then for the sake of public welfare the contract shall be cancelled under the Contract Unification and Amended Rule 25 (1). It is indicated by this views that the remedy measures shall be adopted at first and if it fails then the extensive measures like closure of the Mines shall be adopted.

Hon'ble Judge Mr. Gajendar Keshari; opinion has also pointed towards the remedy measures. He has viewed that environment is a matter of public interest and therefore there shall be appropriate management on this. Since the applicant in his writ petition has demanded the environmental degradatory activity be abandoned not that the marble industry at once be closed; it is mandatory to implement effective remedy measure at first to surmount the environmental degradation. If the problem still persists, then the 2nd step shall be proceeded. In the discussion on behalf of the applicant the opinion of closing the marble industry as mentioned in some reports, has been taken as a base and the instance of demanding full judgment of the some ground have been found. In the writ petition being unable to demand the closures of the industry due to the lack of sufficient legal ground, the claimant appears to aim at mitigating the environmental degradation and receiving other compensations. It is not mandatory herein to stick to the principle of traditional give and take policy in the public interest matter like environment. This fact shall be taken into consideration while discussing about the efficiency and degree of Judgment.

In relation to the submission of the applicant that lease can be cancelled on public interest under Rule 25 (1) and accordingly mandamus can be issued for terminating the lease, and submission of the lawyers of the respondents that it is the job of the government to determine public welfare but not the court, Rule 25 (1) is the discretionary power of His Majesty's Government. One cannot be compelled to use its discretionary power. The writ of mandamus is issued for the obeyance of the legal responsibility. The petitioner has not been able to clearly point out a specific section of the law that has not been obeyed or followed, where someone claims that legal duty has not been fulfilled, such person needs to specifically indicate that such and such agency or official did not fulfil such and such legal duty. For the purpose of mandamus, legal duty must be definite and fixed. Therefore mandamus cannot be issued on the basis of general claim that public interest has not been fulfilled in the absence of clear statement of respondents legal duty. Taking into account the sensitive, humanitarian issue of national and international importance such as the protection of the environment of Godawari area, we found that effective and satisfactory corrective activity has not taken place. Therefore, it is appropriate to issue this directives in the name of respondents to enforce the Minerals Act 2042 (1985), enact necessary legislation for protection of air, water, sound and environment and to take action for protection of the environment of Godawari area. Send a copy of the order to the respondent His Majesty's Government also for implementation of the order.

Sd.
(Justice Laxman Prasad Aryal)

We agree with the aforesaid opinion.

Sd. Sd.
(Justice Govinda Bhadur Shrestha) (Justice Trilok Pratap Rana)

Saint Narahari Nath, President, Pashupati Mrigasthali Gorekeshanath Spiritual Font v. Honorable Prime Minister Shree Girija Prasad Koirala
Writ Petition No. 2346 of 2050 B.S. (1993)
Supreme Court, Full Bench
Shree Surendra Pratap Singh, C.J. and Shree Narendra Bahadur Neupane, J.

The citizens of Nepal believe that the citizens have a right in the Country's Constitutional monarchy and public property, and that together they have to preserve it for the development of the country.

The site of North of Narayanghat is bounded by Devighat Dham in the North, Narayani Mai in the West and Royal Palace, National Park and dense forest in the South. The site is considered to be a sacred place, where several old statues of archaeological importance and rare varieties of some nearly extinct herbs have been discovered. This place is also a habitat of rare wild animals. It is a public heritage and is protected by His Majesty's Government (HMG).

The government has planned to provide 42 *bighas* of public land within the said boundary to the International Institute of Medical Sciences that is working in collaboration with India and with technical support and co-operation from the Virginia University USA. News to this effect was published in the weekly named *Saptahik Bimarsha* on 7 *Shrawan*, 2051 and the weekly magazine called *Deshantar* on 26 *Asar*, 2050. While it is feared that such arrangement of handing over public land within the protected area can have negative effect, no government office could provide any copy of the decision despite being approached.

The place is known for its spiritual and religious appeal. During the excavation work of the Bageshori temple several old sculptures were found there. The religious importance of this area is well known to the officers who undertook the excavation. Besides, the religious heritage connected to the temple, the dense forest around it is rich in green and inhabited by different wild animals. If the Institute set up college there, it will result in unauthorized entry and the wild life and the forest will be destroyed. Also destruction of the forest will lead to swelling of the Narayani River causing land erosion. These environmental threats violate Article 26 (4) of the Constitution that requires the State to preserve the environment. Preservation of environment is also mentioned in the Directive Principles of the State Policy. The decision by HMG to give the disputed area to a private institute is also against the Mines and Minerals Act, 2042 and Article 18 (2) of the Constitution of Nepal that requires places of religious and historical importance to be preserved.

HMG's District Development Committee (DDC), Chitawan was asked whether the site was suitable for such construction. The DDC mentioned that since the site was within the four sided demarcation boundary inside the forest, it could not be given to the Institute. Instead the Institute could be given a site at the place called Jagatpur. Hence it was decided by the Committee on 2050-6-7 that the site was to be protected.

Again, the Committee formed under the chairmanship of the Honorable Minister for Local Development, Mr. Ram Chandra Paudel decided on 2050-12-7 that the site was under the Devighat Development Sector and the Devighat Development Sector was given the responsibility of conservation of the site. In total disregard to this decision the site was provided to a private campus for commercial gain. The government has acted in an irresponsible fashion by breaking the law in this regard.

Under section 68 of the Forest Act, 2049 right of using forest land for priority projects is allowable only if other sites are not available. Establishment of the Institute is not a project of national priority; rather preservation of the area having religious importance is mandated under the Constitution that has been undermined by the respondents.

Hence, the petitioner relying on Articles 22 and 88 (2) of the Constitution of Nepal 2047 challenged the decision to give 42 *bighas* of land to the International Institute of Medical Sciences.

The respondents claim that the allegations of the Petitioner are baseless. The Nepalese Mines Act, 2033 does not in any way prohibit the questioned activities of the respondents. Moreover, the Rules under the Mines and Minerals Act, 2042 as has been

referred to has not yet come into force. Consequently, they have no relevance to the issue at hand.

The writ Petitioner's claim that the site has been provided free of cost to the Institute is baseless. There has been a memorandum of understanding dated 13 August 1993 between HMG, Ministry of Education, Culture and Social Welfare and the International Society for Medical Education, USA regarding the establishment of the college on Debighat. According to the understanding HMG has promised to provide appropriate site for the college and hospital on a lease basis for a period of 49 years with a reservation that the land site remains under the ownership of the HMG Government. The establishment of the college has been approved but the sole right to land remains with the Government which is permissible under the Forest Preservation (Special Act), 2024 and the Forest Act, 2049. Hence the writ petition filed on the basis of newspaper reports have no justification. Further the establishment of the Institute shall in no way affect any of the fundamental rights of the Petitioners. The Petitioners have failed to establish meaningful relationship with the subject and hence should be debarred to raise questions on public interest and bring cases under writ under Article 88(2).

The issues for decision were two-fold:

-Whether the petitioners have right to make such application, and

-Whether order should be passed as prayed for by the petitioners?

Since protection of environment and places of religious and archaeological sites are matters of national interest, we hold that the petitioners have right to file the case.

On the second issue, there is no debate regarding the lease of the site. The site that has been leased by the Government is important from cultural, religious and archaeological view point and hence the Government has to consider the national interest issues and duly exercise its authority given under Article 26 (3) of the Constitution of Nepal 2047 for proper utilization of the natural resources and heritage. The Government is also to be mindful of its obligation to increase awareness on environmental matters and protect environment from the harmful effect of physical development. One cannot disagree that once the forest land is used otherwise for 49 years, the forest would be destroyed. Although the HMG and Department of Forest has not given any right to cut trees, it has also not restricted clearing the herbs, weeds and small trees for the construction. Hence deforestation is inevitable.

The construction of a medical college shall adversely affect the Sapta Gandaki multi sectored project by allowing the canal to be used by the Institute and on the project for production of electricity. The DDC of Chitawan has mentioned that the site that has been provided by the Government for the college lies within the forest area and hence the DDC has recommended an alternative site. The Forest Preservation Act, 2018 (Special Provision) and 2024 require preservation of forest and bar registration of forest land for any other purposes. Under Sections 9 and 10 of the Old Monuments Act the Archaeological Department has recommended for protection of the Jayabageshwori temple area that falls within the disputed 42 *bighas* of land.

Under the circumstances, it is not clear why the forest land has been chosen as site for the construction.

The decision to give 42 *bighas* of land in Debighat to the International Institute of Medical Sciences for building a medical college is not reasonable considering the facts that the area in question is forest land and it has religious and archaeological importance. Hence, we direct cancellation of the decision by the order of "UTPREN".

Advocate Prakash Mani Sharma v. His Majesty's Government, Cabinet of Ministers
Writ Petition No. 2539 of 2051 B.S. (1994)
Supreme Court, Full Bench
Shree L. P. Aryal and Shree Hari Prasad Sharma, JJ.

The Ministry of Health has decided to import to Nepal 100 metric tones of DDT from Indonesia for which the World Health Organization (WHO) is to bear the cost of freight. It is known that DDT has a direct effect on the environment. It destroys the nervous system of human being. It also decreases the reproductive capacity of males and has other negative impacts. The intended use of DDT was to destroy the wild cats in the *Terai* belt. The decision made by the Ministry has overlooked the decision made by the National Environmental Directorate a year ago in 2050 and also the environmental hazards that may directly result from such activity. The decision made by His Majesty's Government and the Committee formed under the Insecticide Prevention Act, 2050 whose duty is to prevent these types of activities, is both irresponsible and negligent to life. It also violates and impedes constitutional mandate for protecting the environment and upholding rule of law.

According to the Constitution of Nepal protection of the health of the people and conversation of environment are the responsibility of His Majesty's Government. However, the Government has failed in this regard and acted against the Constitutional right of general public by importing 100 metric tons of DDT from Indonesia. The applicant has therefore, come before the Supreme Court for issuance of order as mentioned earlier.

The Jakarta Post of Jakarta, in its issue of 22 September, 1994 published the details of the news regarding the import. The paper mentioned that the export of DDT was being made in accordance with the request from His Majesty's Government, Ministry of Health of Nepal. The use of DDT has been banned in Indonesia since 1990. The DDT that is banned in its country of origin itself has found Nepal a safe dumping site for the disposal of the deadly chemical.

The writ petitioner is an NGO that has filed the writ against the Ministry of Health for contravening the law and order. This writ has been filed within the boundary of the decisive rights of the Supreme Court.

According to the Government lawyers, following discussion between the Nepalese Health Minister and the Indonesian Health Minister at the 10th Ministerial Meeting of

World Health Organization held in Kathmandu in September, 1992, and after exchange of various letters issued at different dates, the Indonesian Government decided to give 300 metric tones of the DDT to Nepal as gift. The World Health Organization earlier helped to import of 200 metric tones of DDT at their own cost including insurance. The imported DDT was used for spraying on the inner walls of the houses for the prevention of epidemic *Kalazar* in the inner belts of Terai. This work has been done under the supervision of expert professionals trained by HMG. The remaining 100 tons that was due to be imported by the World Health Organization at their own cost was in the process of being transferred. The import and use of the DDT is safe and hence the writ is liable to be rejected.

Further the Life Destructive Insecticide Act, 2048 and Life Destructive Insecticide Rule, 2050 are yet to be implemented. Section 7 of the Life Destructing Insecticide Act, 2048 has mentioned Crop Protection and Management Division as the Insecticide Classifying Authority and all the works regarding the same is done by the same authority. Hence the Ministry has no liability in this regard and the Writ amount to be discharged.

As per the statements of the Insecticide Committee, the Life Destructive Insecticide Act, 2048 and Life Destructive Insecticide Rule, 2050 require any person or agency willing to import, export, produce, use or trade insecticide to take the certificate of insecticide classification. The DDT which is being imported by Ministry of Health has not fulfilled the classification requirement. The Ministry of Health was also advised the use of alternative insecticide since no permission has been granted for the import of 100 metric ton of DDT. The Indonesian Government has itself cancelled the consignment. Hence the writ is liable for cancellation.

Upon consideration of the submissions made by the learned lawyers of both sides, decision is to be given whether order can be passed as prayed for in the writ application. With regard to the application of the writ, it is to be verified whether the applicant has *locus standi* or not. Since the Writ questions the basis for the import of the DDT that has adverse effects on human health, the petitioner cannot be said not having *locus standi*. Section 3 of the Life Destructive Insecticide Act, 2048 talks about the formation of Insecticide Control Committee. As per the said Act, import, export, production, use, trade etc. of life destroying insecticide must have a certificate of insecticide classification. But according to the writ, the classification of DDT, which is being imported from Indonesia, has not been done. As per the written answer of Insecticide Committee it has not given any permission regarding the present import of DDT and the DDT that was imported earlier.

Letter of the Ministry of Health dated 2052-4-31 has already cancelled the importation of the DDT and hence no order on the same is necessary. Hence the present writ is cancelled.

Advocate Prakash Mani Sharma for Pro Public v. His Majesty Government, Cabinet Secretariat
Writ Petition No. 2991 of the year 2052 B.S (1995); D/-09-06-1997
Supreme Court of Nepal, Joint Bench
Keshab Prasad Upadhayay and Kedar Nath Acharya, JJ.

Case: Certiorari with Prohibition

Constitutional/Legal Issues

1. Whether the directive principles incorporated under Part Four of the Constitution are enforceable?

2. Whether there is locus standi of the petitioner to invoke the extraordinary jurisdiction of the Supreme Court in regard to heritage conservation?

3. Whether the court can issue any order to give effect to the Convention for the Protection of the World Cultural and Natural Heritage 1972?

ORDER

Concerning the question of petitioner's standing to file the case in the Court, the Court stated that the respondents seemed to agree in their written statement about the fact that the historical religious and cultural importance of the Kathmandu Valley has been maintained due to the existence of Rani Pokhari, built by Pratap Malla by bringing holy water from various pilgrimages, and the statues, temples and monuments surrounding it. The fact that for day-to-day guarding of this area and the pond, it has been encircled by iron bars for security purpose. The Rani Pokhari is a public property that has maintained the historical and cultural importance of that area. As such, the words "public right" or "concern" under Article 88(2) of the Constitution signifies the collective right of the general public under the constitution and law. That is why it cannot be said that a public-spirited individual has no right to be concerned about such public property. Previously, in various cases this court has ruled that any individual has *locus standi* to bring suit in the Supreme Court concerning matters of public importance. Here it is not necessary to further consider *locus standi* as the court has granted broad interpretation in many cases: Radhye Shyam Adhikari v. Kalyan Bikram Adhikari (NLR 2048, JN 4420), Surya Prasad Dhungel v. Godavari Marble Industries Pvt. Ltd. (NLR 2052, Silver Jubilee Issue Page 169), Balkrishna Neupane v. His Majesty Government, Cabinet Secretariat (SC Bulletin 2049 No 11, P. 1) Yogi Narahari v. HMG Ministry of Education Culture and Social Welfare (NLR 2053, JN 5127). Hence, the court disagrees with the argument put forth by Learned Government Attorney Balaram K.C. and the written statement of the respondent that the writ petition filed in court on behalf of Forum for Protection of Public Interest lacks *locus standi*.

In regard to the second question raised by the petitioner, Directive Principles were already considered in Yogi Narahari v. HMG Ministry of Education Culture and Social Welfare (NLR 2053, JN 5127). The precedent propounded in that case that despite the unenforceability of a Directive Principle, the court could intervene if government decisions are contrary to Directive Principles. Directive Principles are highly valued as

these are incorporated under the Constitution itself. To declare the Directive Principles unenforceable in the Constitution doesn't necessarily mean that these principles and policies are worthless and meaningless. Art 24(2) or the Constitution of the Kingdom of Nepal itself clarifies the explicit concept concerning Directive Principles. Art 24(2) states that the principles and policies contained in this Part shall be fundamental to the activities and governance of the state and shall be implemented in stages through laws within the limits of resources and the means available in the country. Because of this, these principles should be deemed as an open order from the Constitution to the legislature and the executive branch. Directive Principles comprise the goal and objectives that the leadership of the country has to adopt in order to shape the framework of the country in the future. That is why the state has a moral obligation to follow the Directive Principles in course of its functioning. To run government as per the objectives and policies enshrined under the Constitution is an indispensable fact. No one is entitled to do any thing against said Principles and Policies under the Constitution. If any action is done against Directive Principles, the Court does not keep silent. Like our Constitution, the Constitution of India also provides Directive Principles. In Sachidananda Pandye v. State of West Bengal (AIR 1987 SC 1109), the Supreme Court of India has held that whenever an environmental issue is brought before the Court, the Court is bound to bear in mind Art 48A (Directive Principles) of the Constitution. When the Court is called upon to give effect to Directive Principles and Fundamental Duties, the Court may not shrug it's shoulders and say that priorities are a matter of policy and so it such matters are relegated to policy making authorities … in appropriate cases the Court may go further but how much further must depend on the circumstances of the case. The Court may always give necessary directions.

Henceforth, the Directive Principles and State Policies under Chapter Four of the Constitution are not worthless provisions and these provisions cannot be abrogated. If these provisions are violated, at such time the Court can issue necessary order in order to give effect to the Directive Principles.

With regard to the question whether or not the court should issue an order as demanded by the Petitioner: the facts concerning the historical, religious and cultural significance of Rani Pokhari have been unquestionably established; the written statement of the respondents further supports them. His Majesty's Government has also adopted various measures for the conservation of things of cultural and religious importance. Prior to the approval by Government of the Kathmandu Valley City Development Plan in 1975, the Master Plan for the Physical Development of the Kathmandu Valley was adopted in 1969, which had an objective to protect cultural and historical features of the Valley. Section 5(1)(b) of the Town Development Plan Implementation Act, 1970, relates to places of archaeological, religious and historical importance; and Section 5(1)(e) empowers a committee for protection of the environment. The Town Development Plan of 1976 has an objective to conserve and promote historical places, and there was also an objective to renovate and protect archaeological and natural places. Many studies have also been done concerning the environmental consequences and the complexities to be created in promoting the well-being of the people due to the unplanned construction of housing. According to the Section 11 of Village Development Act, 1990, Village

Development Committees are charged with the responsibility to achieve well-rounded development and maintain religious, cultural and the historical heritages. The Municipality Act, 1990, imposes legal duties on municipalities to conserve natural and archaeological heritages; to declare particular places as protected areas; to protect rivers, streams, ponds, wells etc. Section 2(a) of the Ancient Monuments Protection Act 1956 defines 'Ancient Monument' as Devalaya (Palace/of God), Shivalaya (Place/Palace of God Shiva), Math (religious houses) Gumba (Monastery) etc. Section 9 emphasises the rights and duties of the His Majesty's Government to make proper arrangement for their protection by preventing any misappropriation and misuse of Devalaya, Shivalaya and places of historical and archaeological importance or any other place. According to the abovementioned legal provisions it is revealed that the relevant government authorities are entrusted with the legal obligation to protect places of religious, archaeological and historical importance. Accordingly, there is no question that the respondents have a legal obligation to protect Rani Pokhari and the temples and statues of god and goddesses that exist in that area. The precedent that the government has a duty to protect places of religious, cultural and historical significance was propounded in Yogi Narahari Nath v. His Majesty's Government Ministry of Education Culture and Social Welfare and Others. It is not sufficient to state, in its written statement, that the government is alert about protection. Commitment should also be reflected by action and creation of public awareness. Plans adopted since 1954 should be evaluated for how successful they have been.

Concerning the question of environment: it is an established fact that the environment of Kathmandu Valley is getting polluted due to the adverse effect created by many factors: rapid urbanization, over population, lack of tree planting, operation of factories and industries, pressure of diesel and petrol run vehicles, unplanned settlements, construction of large buildings for various purposes. Though all the relevant stakeholders seem concerned to find solutions, it seems that there is the need for cooperation, collaboration and coordination among them to secure success. In regard to the environment, Article 26(4) of the Constitution of the Kingdom of Nepal states that the state shall give priority to the protection of the environment and also to the prevention of the further damage due to physical development activities by increasing awareness of the general public about environmental cleanliness; therefore, it is expedient to take effective steps towards environmental protection on a priority basis by making serious considerations and contemplations. Nepal has also expressed its commitment towards the protection of environment at the Rio de Janeiro Conference (United Nations Conference on Environment and Development 1992). In this regard, the recently enacted Environment Protection Act 1997 has not received full-fledged implementation, so special attention must be paid towards the implementation of laws.

The petitioner's contentions, the written statements of respondents, the arguments presented to the bench by learned advocates of both sides unquestionably prove the historical, religious and cultural importance of Rani Pokhari and the temples and statues of various god and goddesses surrounding that area. There is a consistency in this regard between both sides. There are also other established facts that Rani Pokhari is encircled by iron bar; many buildings surrounding Rani Pokhari have existed for a long time. On

the site of the recently constructed Mid Region Police Office building there previously stood the Chief Zone Officer building, and prior to that there stood a building of the Supreme Court that was occupied for many years. There were no prior allegations about the adverse impact upon the religious, cultural and historical attributes of Rani Pokhari due to the long-standing existence of these buildings. In addition, the petitioner also has not put forth clear concepts about how constructing the Mid Region Police Office building affects these religious, cultural and historical attributes. As for the petitioner's contention that the existence of the building causes negative environmental consequences: Rani Pokhari is situated at the middle of Kathmandu Valley and there is no reason to assume that the building causes more environmental degradation to Rani Pokhari than vehicles and people on the roads surrounding Rani Pokhari. Construction of the Mid Region Police Office building is completed. In this perspective also, there is no rationale for issuing an order as demanded by the petitioner.

So far as the issue concerning the religious, cultural and historical recognition and environmental protection raised in the petition: these are the matters of national and international importance and of humanity as well. Nepal has ratified the Convention Concerning the Protection of World Cultural and Natural Heritage, 1972. Accordingly, His Majesty's Government also initiated some tasks to develop Kathmandu Valley in a planned way as per the Physical Development Project of Kathmandu Valley, 1972, and the Kathmandu Valley Town Development Plan, 1975. Nevertheless, in recent times, many decisions seem to have been made time and again without making proper evaluation and monitoring of the national policies previously adopted concerning religious, cultural and historical subjects. The reluctance of concerned authorities towards performing their obligation as per legal provisions cannot be viewed as a healthy practice. This judicial principle has also been established in Yogi Narahari Nath v. His Majesty's Government Ministry of Education, Culture and Social Welfare and Others. Therefore, taking into account the necessity of concrete and effective measures, a directive order issued to His Majesty's Government Cabinet Secretariat to monitor whether the concerned authorities are complying with commitments expressed in the Convention Concerning the Protection of World Cultural and Natural Heritage, 1972, as well as Nepalese laws, and then to take actions for maintaining uniformity in protecting all areas by formulating national policies regarding objects of religious, cultural and historical importance.

A copy of this order to be sent to the respondent His Majesty's Government Cabinet Secretariat via Office of the Attorney General.

Justice: Kedar Nath Acharya

I concur with aforesaid opinion. Justice Keshab Prasad Upadhyay

Done on the 27th day of the month Jestha 2054 B.S.

(9th June 1997)

(Translated from Nepali to English Language by Mr. Raju Prasad Chapagai)

PAKISTAN

Government of the Panjab through Secretary, Health Department, Lahore v. Salamat Ali Khan
PLD 1991 Supreme Court 699
Civil Appeal No. 1 of 1990, decided on 9th April, 1991 (On appeal from the judgement dated 8-11-1989 of the Lahore High Court, Lahore in R.S.A. No. 154 of 1988)
Muhammad Afzal Zullah, C.J. and Abdul Qadeer Chaudhry, J.

Tort

Damages-Allegation of death of ailing child in a hospital due to negligence of the medical staff-Benefit of doubt-Functionaries of the hospital appeared to have failed to save the life of the ailing child and a strong possibility could not be excluded that the death was due to the gross negligence of the hospital functionaries namely the doctors who purported to have dealt with the case but on account of certain procedural difficulties faced by the Trial Court in procuring and entertaining the most vital evidence, oral and documentary, it had become possible to give benefit of doubt to the hospital in so far as the conduct of its functionaries was concerned and that was so because relevant vital evidence had not been brought on record-Had the needful been done in this behalf and said evidence had been admitted there would have been both the possibilities of either confirming the findings against the hospital or to set them aside and the letter could have been an equally strong possibility-Held, one of the procedural consequences amongst others i.e. extension of benefit of doubt was that neither of the two alternatives would be deemed to have been established and further that either of those conflicting positions could be deemed to have existed-Hospital thus was given only the benefit of jurisprudential effect of benefit of doubt-One position going in favour of the child side could also be correct, therefore, while the hospital would succeed on a legal and technical ground of extension of benefit of doubt on merits it remained a partial success and stigma-Finding of guilty though was removed from the hospital's own functionaries but at the same time child's side was allowed to retain the amount of damages which had already been paid to him and he had utilized the same-Even if the amount had not been paid to the child side and there had not been any additional factor of money having been utilized by child side, Court would have still allowed to him the benefit of receiving the amount as the appeal had been allowed only on benefit of doubt-Supreme Court directed that decretal amount which had already been paid to the child side was to be recovered from him. – [Benefit of doubt]

State v. Senior Superintendent of Police, Lahore
PLD 1991 Lahore 224
Criminal Misc. No. 1774-M of 1989, decided on 2nd April, 1991
Muhammad Munir Khan, J.

(a) Constitution of Pakistan (1973)

Art.2-A-Letters Patent(Lahore),Cl.22-Civil Procedure Code S.151-Criminal Procedure Code (V of the 1898),S.561-A-High Court, could assume suo motu jurisdiction in order

to find out actual background of the episode involving death of women from blast of oil stoves and to lay down liability on individuals or institutions ultimately found to be responsible for such episodes-Directions for strict compliance were issued to police and hospital authorities with regard to measures to be taken when victims of oil stove bursts were brought to hospitals. [pp.226, 228, 229] A, E & F

(b) Criminal Procedure Code (V of 1898)

S. 561-A-Constitution of Pakistan (1973), Art.2-A-Letters Patent(Lahore),Cl.22-Civil Procedure Code(V of 1908),S.151-High Court has vast authority to undertake suo motu assumption and/or to exercise its jurisdiction in accordance with law to secure the ends of justice and to protect the life,liberty,honour and property of the citizen in cases of cruelty, atrocities and highhandedness and to save people from deaths/injuries from stove bursts-When the matters come to the notice of High Court through news reports or otherwise, High Court does not need any formal application from an individual or groups of persons for directing preliminary investigation into such matters by an agency or Investigation Officer other than the concerned one and High Court as a result of preliminary investigation may pass appropriate order or grant any other consequential relief. [p.226]B

(C) Criminal Procedure Code (V of 1898)

S. 561-A- Constitution of Pakistan (1973), Art.2-A-Letters Patent(Lahore),Cl.22-Civil Procedure Code(V of 1908),S.151-Judge of a High Court can exercise all the powers vested in the High Court at any time and at any place within its territorial limits-In case of emergency citizens, apprehending danger to their lives, liberty, dignity and other fundamental rights guaranteed by the Constitution, can present petitions at the residence of the Chief Justice of High Court or in his absence at the residence of the Senior Puisne Judge of the Principal Seat and the Senior Judge on the Benches at Bahawalpur, Rawalpindi and Multan at a place other than the High Court premises even at mid night to seek speedy and effective remedy-High Court thus remains open all the time even if its building or office is closed after Court hours or during holidays. [p.226]C

(d) Criminal Procedure Code (V of 1898)

S. 561-A- Constitution of Pakistan (1973), Art. 2-A-Letters Patent (Lahore),Cl.22-Civil Procedure Code (V of 1908),S.151-When State functionaries do not discharge their obligations towards the citizens or they are not prepared to realise their duties towards the nation, then the High Court must come to the rescue of citizens by assuming suo motu jurisdiction. [p.227]D

(e) Court Fees Act (VII of 1870)

S.35-Suit for damages resulting from death or injury from oil stove bursts-To serve as deterrent to the manufacturers of oil stove and to create sense of fear in them about their accountability before law and to encourage victims to seek relief from Courts against manufacturers of defective oil stoves, exemption notification under S.35 from court-fee on such suits was the urgent need-High Court desired issuance of exemption notification in this regard. [p.229] F

(f) High Court

Inherent powers of-Inherent powers of High Court-Exercise of suo muto powers by High Court-Genesis and basis of such authority traced. [p.229] G

General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khewra, Jhelum v. The Director, Industries and Mineral Development, Punjab, Lahore
1994 SCMR 2061 [Supreme Court of Pakistan]
Human Right Case No. 120 of 1993, decided on 12th July, 1994
Muhammad Rafiq Tarar and Saleem Akhtar, JJ.

(i) Constitution of Pakistan (1973)

Arts. 184(3), 9 & 14-Human rights case-Constitutional petition-Maintainability-Petitioners seeking enforcement of the right of the residents to have clear and unpolluted water, their apprehension being that in case the mining were allowed to continue their activities, which were extended in the water catchment area, the watercourse, reservoir and the pipelines would get contaminated-Held, water which was necessary for existence of life if polluted, or contaminated, would cause serious threat to human existence and in such a situation, persons exposed to such danger were entitled to claim that their fundamental rights of life guaranteed to them by the Constitution had been violated-Case for enforcement of fundamental rights by giving directions or passing any orders by Supreme Court restraining the parties and Authorities from committing such violation or to perform statutory duties was made out and petition under Art. 184(3) of Constitution of Pakistan was maintained.

The claim of the petitioners in the present case though formed is general terms basically seeks enforcement of the right of the residents to have clean and unpolluted water. Their apprehension is that in case the miners are allowed to continue their activities, which are extended in the water catchment area, the watercourse, reservoir and the pipelines will get contaminated. [p. 2068] A

With the passage of time, population has grown and number of mining leases in the catchment areas has increased, but the water source remains the same and water catchment area has been reduced. The mining operations in this area pose serious danger of cracks, punctures and leakage in the rocks and ravines which may lead to contamination or drying up of the springs. These are well-known and acknowledged dangers to the water source and have been mentioned in the report submitted by the Committee. In such a situation where the water catchment area and are extending nearer to the source spring, it seems necessary to immediately take measures to protect the water sources and springs. It is fortunate that so far no major mishap has occurred, but the more mining activities increase and the catchment area is reduced, the danger of bursting, leaking and contamination also increases. In this situation, if the petitioners complain, are they not justified to seek protection of their right to have clean water free from contamination and pollution. Article 9 of the Constitution provides that "no person shall be deprived of life or liberty save in accordance with law". The word 'life' has to be given an extended meaning and cannot be restricted to vegetative life or mere animal

existence. In hilly areas where access to water is scarce, difficult or limited, the right to have water free from pollution and contamination is a right to life itself. This does not mean that persons residing in other parts of the country where water is available in abundance, do not have such right. The right to have unpolluted water is the right of every person wherever he lives. [p. 2069] B

The word 'life' in the Constitution has not been used in a limited manner. A wide meaning should be given to enable a man not only to sustain life but to enjoy it. Under the Constitution, Article 14 provides that the dignity of man and, subject to law, the privacy of home shall be inviolable. The fundamental right to preserve and protect the dignity of man under Article 14 is unparalleled and could be found only in few Constitutions of the World. The Constitution guarantees dignity of man and also right to life under Art. 9 and if both are read together, question will arise whether a person can be said to have dignity of man if his right to life is below bare necessity line without proper food, clothing, shelter, education, health care, clean atmosphere and unpolluted environment. [p. 2070] C

In cases where life of citizens is degraded, the quality of life is adversely affected and health hazards are created affecting a large number of people, the Court in exercise of its jurisdiction under Article 184(3) of the Constitution may grant relief to the extent of stopping the functioning of factories which create pollution and environmental degradation. [p. 2070] D

Water has been considered source of life in this world. Without water there can be no life. History bears testimony that due to famine and scarcity of water, civilization have vanished, green lands have turned into deserts and arid goes completely destroying the life not any of human being, but animal life as well. Therefore, water, which is necessary for existence of life, if polluted, or contaminated, will cause serious threat to human existence. In such a situation, persons exposed to such dangers are entitled to claim that their fundamental right or life guaranteed to them by the Constitution has been violated and there is a cause for enforcement of fundamental rights by giving directions or passing any orders to restrain the parties and authorities from committing such violation or to perform their statutory duties. The petition was found maintainable. [p.2071] E

Shehla Zia v. WAPDA PLD 1994 SC 693; M. C. Mehta v. Union of ++ AIR 1988 SC 1115 and M.C. Mehta v. Union of India AIR 1988 SC 37 ref.

(ii) Constitution of Pakistan (1973)

Art. 184 (3)-Scope and extent of jurisdiction of Supreme Court under Art. 184 (3) of the Constitution of Pakistan.

The scope and extent of the jurisdiction exercised by Supreme Court under Article 184(3) under which, in cases where question of public importance reference to the enforcement of fundamental rights is involved, direction or of the nature as mentioned in Article 199 can be given or passed. [2071] F

In human rights cases/public interest litigation under Article 184(3), procedural trappings and restrictions of being an aggrieved person and other similar technical objections cannot bar the jurisdiction of the Court. Supreme Court has vast power under Article

184(3) to investigate into question of fact as well independently by recording evidence, appointing commission or any other reasonable and legal manner to ascertain the correct position. Article 184(3) provides that Supreme Court has the power to make order of the nature mentioned in Article 199. This is a guideline for exercise of jurisdiction under this provision without restrictions and restraints imposed on the High Court. The fact that the order or direction should be in the nature mentioned in Article 199, enlarges the scope of granting relief which may not be exactly as provided under Article 199, but may be similar to it or in the same nature and the relief to granted by Supreme Court can be moulded according to the facts and circumstances of each case. [p. 2071] G

(c) Constitution of Pakistan (1973)

Arts. 184(3), 9 & 14-Human rights case-Petitioners seeking enforcement of the right of residents to have clean and unpolluted water, their apprehension being that in case the miners were allowed to continue their activities, which were extended in the water catchment areas, the watercourse, reservoir, and the pipelines would got contaminated-Supreme Court while entertaining the petition filed under Article 184(3) of the Constitution pf Pakistan issued number of directions to the concerned departments and directed the miners to shift within four months, the location of the mouth of the specified mine at a safe distance from the stream and small reservoir in such a manner that they were not polluted by mine debris carbonised material and water spilling out from the mines to the satisfaction of the Commission appointed by the Supreme Court for the purposes. [p. 2072] H

JUDGMENT

SALEEM AKHTAR, J. - This petition under Article 184(3) of the Constitution was filed complaining against the pollution of water supply sources to the residents and mine workers of Khewra. They claim to be settled there for generations and the water supply was arranged by Pakistan Mined Development Corporation (PMDC) through a pipeline connecting the spring for taking water to the reservoir. It has been alleged that although water catchment area was reserved and no lease for coal mines was to be granted, the authorities concerned particularly the Director, Industries and Mineral Development Government of the Punjab, granted lease and reduced the water catchment areas and the result was that the poisonous water coming out of the mines pollutes the water reservoir and is a health hazard.

Ms. Shehla Zia v. WAPDA
PLD 1994 Supreme Court 693
Human Rights Case No. 15-k of 1992, heard on 12th February, 1994
Nasim Hasan Shah, C.J., Saleem Akhtar and Manzoor Hussain Sial, JJ.

(a) Constitution of Pakistan (1973)

Arts. 184(3), 9 & 14-Public interest litigation-Human rights-Apprehension of citizens of the area against construction of grid station by authority-Supreme Court, on receipt of letter from citizens in that respect, found that the letter raised two questions namely

whether any Government agency had a right to endanger the life of citizens by its actions without the latter's consent and whether zoning laws vest rights in citizens which could not be withdrawn or altered without the citizen's consent-Citizens, under Art . 9 of the Constitution of Pakistan were entitled to protection of law from being exposed to hazards 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-Article 184 of the Constitution, therefore, could be invoked because a large number of citizens throughout the country could not make such representation and may not like to make it due to ignorance, poverty and disability-Considering the gravity of the matter which could involve and affect the life and health of the citizens at large, notice was issued by Supreme Court to the Authority-Trend of opinion of scientists and scholars was that likelihood of adverse effects of electromagnetic fields on human health could not be ruled out-Subject being highly technical, Supreme Court declined to give definite finding particularly when the experts and technical evidence produced was inconclusive-Supreme Court observed that in such circumstances the balance should be struck between the rights of the citizens and also the plans which were executed by the Authority for the welfare, economic progress and prosperity of the country and if there were threats of serious damage, effective measures should be taken to control it and it should not be postponed merely on the ground that the scientific research and studies were uncertain and not conclusive-With the consent of both the parties Court appointed Commission to examine the plan and the proposals/schemes of the Authority in the light of complaint made by the citizens and submit its report and if necessary to suggest any alteration or addition which may be economically possible for construction and location of the grid station...Supreme Court further directed that Government should establish an Authority or Commission manned by internationally known and recognized scientists having no bias and prejudice, to members of the Commission whose opinion or permission should be obtained before any new grid station was allowed to be constructed-Authority, therefore, was directed by the Supreme Court that in future, prior to installing or constructing any grid station and/or transmission line, it would issue public notice in newspapers, radio and television inviting objections and finalize the plan after considering the objections, if any, by affording public hearing to the persons filing objections-Such procedure was directed to be adopted and continued till such time the Government constituted any Commission or Authority as directed by the Court.

In the present case, citizens having apprehension against construction of a grid station in residential area sent a letter to the Supreme Court for consideration as a human rights case raising two questions; namely, whether any Government agency has a right to endanger the life of citizens by its actions without the latter's consent; and secondly, whether zoning laws vest rights in citizens which cannot be withdrawn or altered without the citizens' consent. Considering the gravity the matter may involve and affect the life and health of the citizens' at large, notice was issued to the Authority. [p. 700]A

So far no definite conclusions have been drawn by the scientists and scholars, but the trend is in support of the fact that there may be likelihood of adverse effects of electromagnetic fields on human health. It is for this reason that in all the developed countries special care is being taken to establish organizations for carrying on further

research on the subject. The studies are, therefore, not certain, but internationally there seems to be a consensus that the lurking danger which in an indefinite manner has been found in individual incidents and studies cannot be ignored. [p. 708] B

In the present-day controversies where every day new avenues are opened, new researches are made and new progress is being reported in the electrical fields, it would be advisable for Authority to employ better resources and personnel engaged in research and study to keep themselves up-to-date in scientific and technical knowledge and adopt all such measures which are necessary for safety from adverse effect of magnetic and electric fields. [p. 709] C

There is a state of uncertainty and in such a situation the authorities should observe the rules of prudence and precaution. The rules of prudence are to adopt such measure which may avert the so-called danger, if it occurs. The rule of precautionary policy is to first consider the welfare and safety of the human beings and the environment and then to pick up a policy and execute the plan which is more suited to obviate the possible danger or make such alternate precautionary measures which may ensure safety. To stick to a particular plan on the basis of old studies or inconclusive research cannot be said to be a policy of prudence and precaution. [p. 709] D

It is highly technical subject upon which the Court declined to give a definite finding particularly when the experts and the technical evidence produce is inconclusive. In these circumstances the balance should be struck between the rights of the citizens and also the plans which are executed by the power authorities for welfare, economic progress and prosperity of the country. [p. 709] E

If there are threats of serious danger, effective measures should be taken to control it and it should not be postponed merely on the ground that scientific research and studies are uncertain and not conclusive. Prevention is better than cure. It is a cautious approach to avert a catastrophe at the earliest stage. Pakistan is a developing country. It cannot afford the researches and studies made in developed countries on scientific problems. However, the researches and their conclusions with reference to specific cases are available, the information and knowledge is at hand and Pakistan should take benefit out of it. [p. 710] G

It is reasonable to take preventive and precautionary measures straightaway instead of maintaining status quo because there is no conclusive finding on the effect of electromagnetic fields on human life. One should not wait for conclusive finding as it may take ages to find it out and, therefore, measures should be taken to avert any possible danger and for that reason one should not go to scrap the entire scheme but could make such adjustments, alterations or additions which may ensure safety and security or at least minimise the possible hazards.

The issue raised involves the welfare and safety of the citizens at large because the network of high tension wires is spread throughout the country. One cannot ignore that energy is essential for present-day life, industry, commerce and day-to-day affairs. The more energy is produced and distributed, the more progress and economic development

become possible. Therefore, a method should be devised to strike balance between economic progress and prosperity and to minimise possible hazards. In fact a policy of sustainable development should be adopted. It will thus require a deep study into the planning and the methods adopted by Authority for construction of the grid station. Certain modes can be adopted by which high tension frequency can be decreased. This is purely scientific approach which has to be dealt with and decided by the technical and scientific persons involved in it. It is for this reason that both the parties have agreed that NESPAK should be appointed as a Commissioner to examine the plan and the proposals/schemes of Authority in the light of the complaint made by the citizens and submit its report and if necessary to suggest any alteration or addition which may be economically possible for constructing a grid stations. The location should also be examined and report submitted at the earliest possible time.

In all the developed countries great importance has been given to energy production. Pakistan's need is greater as it is bound to affect the economic development, but in the quest of economic development one has to adopt such measures which may not create hazards to life, destroy the environment and pollute the atmosphere. [p. 710] H

While making such a plan, no public hearing is given to the citizens nor is any opportunity afforded to the residents who are likely to be affected by the high tension wires running near their locality. It is only a one-sided affair with the Authority which prepares and executes its plan. Although Authority and the Government may have been keeping in mind the likely dangers to the citizens' health and property, no due importance is given to seek opinion or objections from the residents of the locality where the grid station is constructed or from where the high tension wires run. [p. 711]I

It would, therefore, be proper for the Government to establish an Authority or Commission manned by internationally known and recognised scientists having no bias and prejudice to be members of such Commission whose opinion or permission should be obtained before any new grid stations is allowed to be constructed. Such Commission should also examine the existing grid stations and the distribution lines from the point of view of health hazards and environmental pollution. If such a step is taken by the Government in time, much of the problem in future cane be avoided. [p. 711] J

Article 9 of the Constitution provides that no person shall be deprived of life or liberty save in accordance with law. The word 'life' is very significant as it covers all facts of human existence. The word 'life' has not been defined in the Constitution but it does not mean nor can be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities that a person born in a free country is entitled to enjoy with dignity, legally and constitutionally. A person is entitled to protection of law from being exposed to hazards of electromagnetic fields 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. Under the common law a person whose right of easement, property or health is adversely affected by any act of omission or commission of a third person in the neighbourhood or at a far-off place, he is entitled to seek an injunction and also claim damages, but the Constitutional rights are higher than the legal rights conferred by law be it municipal law or the common law.

Such a danger as depicted, the possibility of which cannot be excluded, is bound to affect a large number of people who may suffer from it unknowingly because of lack of awareness, information and education and also because such sufferance is silent and fatal and most of the people who would be residing near, under or at a dangerous distance of the grid station or such installation do not know that they are facing any risk or are likely to suffer by such risk. Therefore, Article 184 can be invoked because a large number of citizens throughout the country cannot make such representation and may not like to make it due to ignorance, poverty and disability. Only some conscientious citizens aware of their rights and the possibility of danger come forward. [p. 712] K.

The word 'life' in terms of Article 9 of the Constitution 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 under Article 184 (3) of the Constitution of Pakistan, 1973 is maintainable. [p. 713] L

The word 'life' in the Constitution has not been used in a limited manner. A wide meaning should be given to enable a man not only to sustain life but to enjoy it. [p. 714] M.

Article 14 provides that the dignity of man and subject to law the privacy of home shall be inviolable. The fundamental right to preserve and protect the dignity of man under Article 14 is unparalleled and could be found only in few Constitutions of the world. [p.714] N.

Where life of citizens is degraded, the quality of life is adversely affected and health hazards are created affecting a large number of people the Court in exercise of its jurisdiction under Article 184 (3) of the Constitution may grant relief to the extent of stopping the functioning of units which create pollution and environmental degradation. [p. 715] O

In these circumstances, before passing any final order, with the consent of both the parties Court appointed Commissioner to examine and study the scheme, planning device and technique employed by Authority and report whether there was any likelihood of any hazard or adverse effect on health of the residents of the locality. Commissioner might also suggest variation in the plan for minimizing the alleged danger. Authority was to submit all the plans, scheme and relevant information to the Commissioner. The citizens will be at liberty to send to the Commissioner necessary documents and material as they desired. These documents were to reach Commissioner within two weeks. Commissioner was authorised to call for such documents or information from Authority and the citizens which in its opinion was necessary to complete its report. The report should be submitted within four weeks from the receipt of the order after which further proceedings were to be taken. Authority was further directed that in future prior to installing or constructing any grid station and/or transmission line, it would issue public notice in newspapers, radio and television inviting objections and to finalise the plan after considering the objections, if any, by affording public hearing to the persons filing objections. This procedure shall be adopted and continued by Authority till such time the Government constitutes any Commission or Authority as suggested. [p. 715] P

The News International, September 18, 1991 entitled 'Technotalk' by Roger Coghill; Newsweek, July 10, 1989; Magazine 'Nature', Vol. 349 entitled 'Killing field', 14th February, 1991 entitled 'E.M.F.....Cancer Link Still Murky; Electronics World & Wireless World, February 1990, American Journal of Epidemiology, Vol. 138, p.467; Villanora Law Review, Vol.36, p.129 in 1991; Electromagnetic (EM) Radiation – A Threat to Human Health by Brig. (Rtd.) Muhammad Yasin; Oxford Dictionary; Black's Law Dictionary; Kharak Singh v. State of U.P. AIR 1963 SC 1295; Munn v Illinois (1876) 94 US 11; Francis Corali v. Union Territory of Delhi AIR 1981 SC 746; Olga Tellis and Others v. Bombay Municipal Corporation AIR 1986 SC 180; State of Himachal Pradesh and another v. Umed Ram Sharma and others AIR 1986 SC 847; Rural and Litigation and Entitlement Kendra and others v. State of U.P. and others AIR 1985 SC 652; AIR 1987 SC 359; AIR 1987 SC 2426; AIR 1988 SC 2187; AIR 1989 SC 594; Shri Sachidanand Pandey and another v. The State of West Bengal and others AIR 1987 SC 1109; M.C. Mehta v. Union of India AIR 1988 SC 1115 and M.C. Mehta v. Union of India AIR 1988 SC 1037 **ref.**

(b) International agreement

Value-International agreement between the nations if signed by any country is always subject to rectification, but same can be enforced as a law only when legislation is made by the country through its Legislature-Without framing a law in terms of the international agreement the covenants of such agreement cannot be implemented as a law nor they bind down any party-Such agreement, however, has a persuasive value and command respect. [p. 710] F

(c) Constitution of Pakistan (1973)

Art.9-Word 'life' in Art. 9 of the Constitution covers all facets of human existence.

Article 9 of the Constitution provides that no person shall be deprived of life or liberty save 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 that a person born in a free country is entitled to enjoy with dignity legally and constitutionally.

[p. 712] K

The word 'life' in the Constitution has not been used in a limited manner. A wide meaning should be given to enable a man not only to sustain life but to enjoy it. [p. 714] M

Oxford Dictionary; Black's Law Dictionary; Kharak Singh v. State of U.P. AIR 1963 SC 1295; Munn v. Illinois (1876) 94 US 113 at page 142; Francis Corali v. Union Territory of Delhi AIR 1981 SC 746; Olga Tellis and others v. Bombay Municipal Corporation AIR 1986 SC 180; State of Himachal Pradesh and another v. Umed Ram Sharma and others AIR 1986 SC 847; Rural Litigation and Entitlement Kendra and others v. State of U.P. and others AIR 1985 SC 652; AIR 1987 SC 359 AIR 1987 SC 2426; AIR 1988 SC

2187; AIR 1989 SC 594; Shri Sachidanand Pandey and another v. The State of West Bengal and others AIR 1987 SC 1109; M.C. Mehta v. Union of India AIR 1988 SC 1115 and M.C. Mehta v. Union of India AIR 1988 SC 1037 ref.

(d) Constitution of Pakistan (1973)

Art. 14-Fundamental right to preserve and protect the dignity of man under Art. 14 is unparalleled and could be found only in few Constitution of the world.

Article 14 provides that the dignity of man and subject to law the privacy of home shall be inviolable. The fundamental right to preserve and protect the dignity of man under Article 14 is unparalleled and could be found only in few Constitutions of the world. [p. 714] N

(e) Constitution of Pakistan (1973)

Art. 184(3)-Public interest litigation-Pollution and environmental degradation-Where life of citizens is degraded, the quality of life is adversely affected and health hazards are created affecting a large number of people. Supreme Court in exercise of its jurisdiction under Art. 184(3) of the Constitution of Pakistan may grant relief to the extent of stopping the functioning of such units that create pollution and environmental degradation. [p. 715] O

ORDER

SALEEM AKHTER, J:- Four residents of Street No. 35, F-6/1, Islamabad protested to WAPDA against construction of a grid station in F-6/1, Islamabad. A letter to this effect was written to the Chairman on 15-1-1992 conveying the complaint and apprehensions of the residents of the area in respect of construction of a grid station allegedly located in the green-belt of a residential locality. They pointed out that the electromagnetic field by the presence of the high voltage transmission lines at the grid station would pose a serious health hazard to the residents of the area particularly the children, the infirm and the Dhobi-ghat families that live; the immediate vicinity. The presence of electrical installations and transmission lines would also be highly dangerous to the citizens particularly the children who play outside in the area. It would damage the greenbelt and affect the environment. It was also alleged that it violates the principles of planning in Islamabad where the green belts are considered an essential component of the city for environmental and aesthetic reasons. They also referred to the various attempts made by them from July 1991 protesting about the construction of the grid station, but no satisfactory step has been taken. This letter was sent to this Court by Dr. Tariq Banuri of IUCN for consideration as a human rights case raising two questions; namely, whether any Government agency has a right to endanger the life of citizens by its actions without the latter's consent; and secondly, whether zoning laws vest rights in citizens which cannot be withdrawn or altered without the citizens' consent. Considering the gravity of the matter which may involve and affect the life and health of the citizens at large, notice was issued to the respondents who appeared and explained that the site of grid station was not designated as open space/green area as stated in the layout plan of the area. It

was further stated that the site has been earmarked in an incidental space that was previously left unutilized along the bank of nallah and was not designated as open space or green area. It is about 6-10 feet in depression from the houses located in the vicinity of the grid station site. The grid station site starts at least 40 feet away from the residences in the area and construction of grid station does not obstruct the view of the residents. It was further stated that the fear of health hazard due to vicinity of high voltage of 132 K.V. transmission lines and grid station is totally unfounded. Similar 132 KV grid stations have been established in the densely populated area of Rawalpindi, Lahore, Multan and Faisalabad, but no such health hazard has been reported. It was also claimed that not a single complaint has been received even from the people working in these grid stations and living right in the premises of the grid stations. The installations are made in such a way that the safety of personnel and property is ensured. It was further stated that electromagnetic effects of extra high voltage lines of voltage above 5000 KV on the human and animal lives and vegetation is under study in the developed countries, but the reports of results of such studies are controversial. In support of the contentions, CDA submitted extract from the opinion of Dr. M. Mohsin Mubarak, Director, Health Services, which reads as follows:.....

> "The fears of the residents about the effects of high voltage transmission lines are also not considered dangerous for the nearby residents. Even a small electric point with 220 volts current or a Gas installation in the kitchen can prove to be extremely dangerous if specific precautions are not undertaken and maintained. The high tension wires are not likely to harm the residents if due protection criteria are properly planned and executed. The concept of dangerous and offensive trades and civil defence is not that the candle should not be lit. A candle must be lit to remove darkness and make the things more productive but care must also be taken not to let the candle burn every thing around".

The comments of Government of Pakistan, Ministry of Water and Power recommending the construction of grid station were also filed in which the following points were noted on the effect of electrical light and wiring on health of human beings:.....

> "(c) Although the studies of effects of electric lines and wiring on the health of human beings are being carried out by different agencies/institutions of the world, there are no established and conclusive findings about any serious effects of electric lines/wiring on the health of human beings.
>
> (d) The effects of electricity can be considered on account of its two fields namely the electric field and the magnetic field and in this regard, extracts of section 8.11 and 8.13 of Transmission Line Reference Book of Electric Power Research Institute, California, USA on Biological Effects of Electric and Magnetic fields on people and animals are enclosed which indicate that there is no restriction on permissible duration of working if the electric field intensity is up to 5KV/m whereas in the case under consideration the electric field intensity would certainly be lesser than O.KV/m which value as indicated in the said extract is for a location at a distance of 20m from a 525KV Line.

The nearest present live conductor is of only 132KV and that too would be at a distance of more than 20m from the nearest house's boundary wall as shown in the enclosed map. This clearly shows that the nearby houses fall in a quite safe zone. As regards the magnetic fields, the intensity of the magnetic field at ground level close to transmission line varies from 0.1 to 0.5 gauss which values are less than those in industrial environments especially in proximity to low voltage conductors carrying currents as mentioned in the above extracts. In view of the above details, there should be no concern about the health of residents of nearby houses.

(e) The apprehension that the grid station would generate and transmit excessive heat to houses is unfounded as the main equipment i.e. power transformers are properly cooled by circulation of oil inside transformers tanks and by means of cooling fans."

These opinions of the WAPDA and CDA are based on Transmission lines. Reference Book, 345KV and above/2nd Edition, extract of which had been filed and relevant parts of which are reproduced as follows:.....

> "Although health complaints by substation workers in the USSR were reported (40.41), medical examination of linemen in the USA (38.39), in Sweden (19) and in Canada (56.58), failed to find health problems ascribable to electric fields. As a result of unclear findings and research in progress, no rules for electric-field intensity inside and outside the transmission corridor have been universally established. In some cases, design rules have been established to allow construction of EHV transmission lines to proceed with the maximum possible guaranteed protection of people from possible health risks.
>
> Many studies of magnetic-field on laboratory items have been performed. A good review and discussion offered by Sheppard and Eisenbud (59). Magnetic fields have been reported to affect blood composition, growth, behaviour, mune systems and neural functions. However, at present there is a lack of conclusive evidence, and a very confusing picture results from the wide variation in field strengths, frequency, exposure durations used in different studies."

WAPDA also submitted extracts from A.B.B. literature regarding insulation and coordination/standard clearances data based on LEC specification in which minimum clearance for 500 KV equipments and installation has been given 1,100 ft. and 1,300 ft. for phase-to-phase air clearance and phase-to-phase earth air clearance.

2. The petitioners were also asked to furnish material in support of their claim. They have filed news clippings from magazines, research articles, and opinions of scientists to show that electromagnetic radiation is the wave produced by magnetism of any electrical current and thus electromagnetic fields can affect human beings. The first item is a clipping from the magazine The News International, September 18; 1991, entitled "Thechnotalk". It refers to a book 'Electro pollution - How to protect yourself against it' by Roger Coghill. It has been observed that "now researchers are asking whether it is more than coincidence that the increase in diseases like cancer, ME, multiple scleroses, hyperactivity in children, allergies and even AIDS have occurred alongside enormous

growth in the production and use of electricity". It further states that "the first warning sign came from the USA in 1979 when Dr. Nancy Wertheimer and Dr. Ed Leeper found that children living next to overhead electricity lines were more likely to develop leukaemia. Since then, further studies have shown links with brain tumours, depression and suicide".

One US researcher found that electrical utility workers were 13 times more likely to develop brain tumour than the rest of the population. A midlands doctor discovered a higher than average rate of depression and suicide in people living near electric power cables.

Photocopy of an article published in Newsweek, July, 10, 1989, entitled 'An Electromagnetic Storm' has been filed. In this article the apprehensions and problems considered by the scientists have been discussed and reference has been made to the researches in this field in which, finally it was concluded as follows:-

> "The question is whether we know enough to embark on a complete overhaul of the electronic environment. Avoiding electric blankets and sitting at arm's length from one's VDT screen (their fields fall off sharply after about two feet) seem only prudent. But drastic steps to reduce people's involuntary exposures might prove futile. For while research clearly demonstrates that electromagnetic field can affect such process as home growth, communication among brain cells, even the activity of white blood cells, it also shows that weak fields sometimes have greater effects than strong ones. Only through painstaking study will anyone begin to know where the real danger lies. On one point, at least, Brodeur and many of those he criticizes seem to agree: we're not quite sure what we're up against, and we need urgently to find out."

3. An article published in the magazine 'Nature', Volume 349, 14 February 1991 entitled 'EMF - Cancer Link Still Murky' refers to a study made by epidemiologist John Peters from the University of Southern California, who released his preliminary results from a case control study of 232 young leukaemia victims. The results implied that leukaemia reasons are co-related to electromagnetic field (EMF) exposure and that they are not dependent on how exposure is estimated.

4. In an article from Electronics World & Wireless World, February 1990 entitled 'Killing Fields', the author has discussed and produced a large number of case studies from which it was observed that at least there was two-fold increase in adult leukaemia link to fields from wires near human beings. It was further observed that if one accepts a casual link to power line electromagnetic fields as much as 10-15% of all childhood cancer cases might be attributed to such fields. There has been a growing concern and research in the US and seven American States have adopted rights of way, but no such step has been taken in UK. The case studies also showed that:

> "Among recent residential studies, GP Dr. Stephen Parry published correlations between the magnetic-field exposure of people living in multi-storey blocks (of nine storeys or more). Wolverhampton with the incidence of heart disease and

depression. Magnetic field strengths measured in all 43 blocks with a single rising cable showed very significantly higher readings (p 0.0002) in those apartments categorized as 'near' the cable; averaging 0.315 T (highest: 0.377 T) against 0.161 T (lowest: 0.148 T) in the 'distant' apartments. In line with these measures, significantly more "...myocardial infraction, hypertension, ischemic heart disease and depression...' was reported in those living near the cable."

Other article in the same magazine were entitled 'Killing Fields, the Epidemiological Evidence" and "Killing Fields, the Politics" in which suggestion was made that "until results of this research become available more thorium should be placed on all new buildings or routing of power lines which causes 50 Hz fields in houses to exceed every cautiously set limit".

In an information sent by Mark Chernaik, Environmental Law US to Brig. (Rtd.) Muhammad Yasin, Projects Coordinator, Sustainable Development Policy Institute (SDPI), it is stated that "when electric current passes through high voltage transmission lines (HVTLs), it produces electric and magnetic fields. Although both can affect biological systems, the greatest concern is the health impacts of magnetic fields. A magnetic field can be either static or fluctuating Magnetic field from HVTLs fluctuates because the electric currents within HVTLs are alternating currents (AC) that reverse direction 50 to 60 times per second (50 to 60 Hz).

M.D. Tahir, Advocate v. Provincial Government through its Secretary, Forest Department, Lahore

1995 CLC 1730 [Lahore]

Writ Petitions Nos. 984, 17554 and 4714 of 1993 and 11204 of 1994 and Criminal Order No. 269-W of 1994, heard on 16th March, 1995

Ch. Mushtaq Ahmad Khan and Ch. Khurshid Ahmad, JJ.

(i) Wild Birds and Animals Protection Act (VIII of 1912)

S. 3 & Sched., Item 1-Punjab Wildlife (Protection, Preservation, Conservation and Management) Act (II of 1974), Preamble & S. 9-Constitution of Pakistan (1973), Arts. 18 & 199-Constitutional petition-Prayer for issuance of direction to Authorities to refrain public from bunting/killing/catching/confining/caging/trading and eating of meat/beef of Houbara Bustard (Tilor), Partridge and all kinds of other birds, animals and to direct them to act strictly in accordance with law-Blanket prohibition whether desirable-Injunctions of Islam prohibit unnecessary hunting and killing of birds/animals; as per the same injunction, however, animals and birds on earth were meant for the use of human beings for purposes of transportation, cultivation of land and for eating-Blanket prohibition for bunting/slaughtering animals/birds could not be granted as being against Injunctions of Islam and the Constitution-Reasons elaborated.

Injunctions of Islam as contained in Holy Qur'an and Sunnah, which prohibit unnecessary hunting and killing of birds/animals, nevertheless as per the same

Injunctions ordain that animals and birds on earth are meant for the use of human beings for the purposes of transportation, cultivation of land and for eating. God has made hunting/slaughtering of certain birds/animals as "Halal" whereas that of others are as "Haram". Hunting is only prohibited during days of pilgrimage. Refer verse No.1 of Sura Al-Maida. The mode of slaughtering/hunting has also been laid in the Holy Qur'an and Sunnah and the laws of the country. Human beings have been permitted to eat beef/meat by hunting/slaughtering of birds/animals which are "Halal". Therefore, if directions are issued by the court it would amount to going against the Constitution, the laws and injunctions of Islam as contained in Holy Qur'an and Sunnah and would amount to making "Halal" as "Haram". As regards killing/hunting of those animals which have been declared as "Haram', some of the categories are necessarily to be killed in the interest of mankind, whereas the others have to be sometimes kept in cages. Hunting and trading of animals and birds is not completely prohibited by the Constitution or any other law/directive issued by the government, or any Injunction of Islam. [p. 1737]A

Every citizen of Pakistan has a fundamental right to enter into any trade or profession he likes, unless the same is prohibited by law. No law or injunction of Islam which prohibits trading of animals and birds has been pointed out. Therefore, no relief can be granted, merely on the basis of any person's whim and wish, who is one out of twelve cores of persons, majority of whom, who are not even parties to Constitutional petition might not agree with him on lot many issues raised by him. [p. 1737] B

(b) Wild Birds and Animals Protection Act (VIII of 1912)

S. 3 & Sched-Punjab Wildlife (Protection, Preservation, Conservation and Management) Act (II of 1974), S. 9-Constitution of Pakistan (1973), Arts 23 & 199-Constitutional petition-Adherence to provisions of relevant laws on the subject in question-Authorities making categorical statement that they were already observing the law and would strictly follow the same in future-General order could not be issued to Authorities that they should adhere to provisions of relevant laws on the subject in question-If authorities commit any illegal act in performance of their duties affecting rights of any individuals, such individuals could always seek direction of Court to that effect. [p. 1739] C

Ghulam Haider and 7 others v. S.H.O., City Police Station, Quetta and 9 others PLD 1989 SC 479 rel.

Petitioner in person.

JUDGMENT

CH. MUSHTAQ AHMAD KHAN, J.- Through this Constitutional Petition, Mr. M.D. Tahir, a citizen of Pakistan, has prayed for issuance of directions to the respondents to restrain the public from hunting/killing/catching/confining/caging/trading and eating of meat/beef, of Honbara Bustard (Tilor), Partridge and all kinds of other birds, animals, and to direct them to act strictly in accordance with the provisions of Wild Birds and Animals Protection Act, 1912, and the Punjab Wildlife (Protection, Preservation, Conservation and Management) act, 1974.

2. In the writ petition report and para-wise comments were called from the respondents which are reproduced as under:-

"PARAWISE COMMENTS ON WRIT PETITION NO. 984/93 ENTITLED MR. M.D. TAHIR, ADVOCATE, ETC. V. PROVINCIAL GOVERNMENT ETC. ON BEHALF OF DIRECTOR-GENERAL, WILDLIFE AND PARKS, PUNJAB, LAHORE.

1. Agreed as far as their migration is concerned. No ring has ever been found on Houbara Bustard.

2. Denied to the extent that the bird is quite a fast-flier and medium in weight, Houbara Bustard falls in Schedule I, thus there is no ban on their hunting. The Department has no knowledge of their sale as no such incidence has ever been recorded in the Punjab.

3. Denied. Law is applicable to all citizen of the Punjab and there are many examples where people of the highest rank have been prosecutd.

4. Admitted.

5. Permission to hunt to foreign dignitaries is granted by the Federal Government with bag limits of 200 birds per party. As far as Press Reports are concerned, these are exaggerated.

6. No comments.

7. Government of Pakistan allows hunting of Houbara Bustard as provided in the Act/Rules.

8. The birds/animals have been categorized as protected or otherwise and the list is given in Schedules appended with Wildlife Act, 1974. The birds which are not covered in the Schedules are allowed to be caught and traded. This is untrue that the Department is not conscious of it. There are recorded facts that people dealing unlawfully in birds which are protected or where their netting is not allowed to have been prosecuted in the Court of law. Punjab Wildlife Department is doing its utmost to enforce the law of the land.

9. According to Qur'an, certain birds and animals are Halal, meaning thereby that these could be hunted as a sport and their meat could be consumed. The Punjab Wildlife Act of 1974 has been enacted keeping in view this permission granted by Allah the Almighty and it is because of this that various Schedules granting permission to hunt or protecting them from ruthless hands have been prepared. The Department within its major resources is doing every thing to protect wildlife and classes of people are being prosecuted in the Courts of law.

10. No comments.

As stated in foregoing paragraphs blanket prohibition is not desirable. In fact the Punjab Wildlife Act, 1974 is self-sufficient in every regard and deterrent punishment are provided for law-breakers.

(Sd.)

(N.R. Tariq)."

3. Mr. M. D. Tahir, petitioner has himself argued the petition whereas from the respondents' side, arguments have been addressed by M/s. Faqir Muhammad Khokhar and Masood-ur-Rehman Mirza, learned Deputy Attorneys-General of Pakistan and Mian Abdul Sattar Najam, Advocate-General, Punjab, who is assisted by Mr. Muhammad Asghar Kharal, Advocate. In support of this petition, M.D. Tahir petitioner has contended that hunting/killing/caging/trading and eating of meat/beef of Houbara Bustart (Tilor), Titar and other birds and animals, is illegal, cruel, unjust and un-Islamic and, therefore, respondents may be directed to ban the aforementioned activities completely without there being any concession even in favour of guests from foreign countries including the princes from Saudi Arabia, U. A. E. and other brotherly Muslim countries, who according to him should not be issued hunting licence at all.

4. Elaborating his argument, the petitioner has referred us to various news items annexed to this petition in order to demonstrate that hunting of birds and animals, whose species is going to become extinct in Pakistan, excessive and cruel. He has further referred to a directive issued by the Federal Government which is mentioned in a news item appearing in Daily Mashing dated 22-12-1971 whereby hunting of Titar, even by President of Pakistan, was prohibited and has contended that as per his information the said directive has not so far been withdrawn, therefore, hunting of the said birds is not permissible under the law. He has also made a reference to few verses from Holy Qur'an and Hadith in support of his contentions referred to above. According to the learned counsel killing of birds and animals amounts to their stoppage from prayers of God Almighty, and, therefore, keeping in view the injunctions of Islam, which are now a part of the Constitution of Islamic Republic of Pakistan, 1973 as per Article 2A of the said Constitution, it is the lawful duty of the respondent to completely ban hunting/killing, etc, of all kinds of birds and animals.

5. Learned Law Officers appearing on behalf of the respondents have controverted the contentions raised by the petitioner and have contended that all possible measures to protect wildlife are being taken by the relevant departments of the Governments, who are very much conscious and concerned of the problems highlighted by the petitioner which according to them are just imaginary, and are very well-looking after the welfare and protection of the birds and animals; that the writ petition contains reliefs which are general in nature and not suggestive of any feasibility for grant of reliefs claimed therein; that the reliefs asked for cannot be granted as being against the Injunctions of Islam; that the directive referred to by the petitioner which was issued in the year 1971 is no more in force, therefore, the writ petition is liable to be dismissed as being frivolous and vexatious. Learned Law Officers, however, state that the Government has been and shall strictly enforce the laws which regulate hunting/slaughtering/caging/trading of animals/birds, etc., and, if any violation of the law comes or is brought to the notice of the Government, it shall be dealt with strictly in accordance with law with a vary heavy hand.

6. Before embarking upon the decision of the issues raised in this petition, it will be appropriate if the relevant verses from Holy Qur'an and Hadith, are reproduced in this judgment:

...

Whosoever kills a bird or a creature bigger than that for no gain, shall be asked (by God) to explain for his action. When asked, "O prophet of Allah, what is its (bird's) right". He said, "it should be properly slaughtered for eating and not that its head should be chopped off and thrown away for fun", that is it should be hunted for food only. (To hunt just for fun not permissible, as has been explained in the previous Hadith)-

The Prophet has prohibited the use of any living creature as a target. (It is not right to make a living creature a target for the sake of recreation alone).

7. We have considered the arguments addressed by the learned counsel for the parties and have perused the record. There is no cavil with the propositions Injunctions of Islam as contained in Holy Qur'an and Sunnah, which prohibit unnecessary hunting and killing of birds/animals. However, as per the same injunctions the animals and birds on earth are meant for the use of human beings for the purposes of transportation, cultivation of land and for eating. God has made hunting/slaughtering of certain birds/animals as 'Halal' whereas that of others are as 'Haram'. Hunting is only prohibited during days of pilgrimage. Refer verse No. 1 of Sura Al-Maida. The mode of slaughtering/hunting has also been laid down in the Holy Qur'an and Sunnah and the laws of the country. Human beings have been permitted to eat beef/meat by hunting/slaughtering of birds/animals which are "Halal". Therefore, if directions as prayed for are issued by this Court it would amount to going against the Constitution, the laws and Injunctions of Islam as contained in Holy Qur'an and Sunnah and will amount the making "Halal" as "Haram". As regards killing/hunting of those animals which have been declared as "Haram", some of the categories are necessarily to be killed in the interest of mankind, whereas the others have to be sometimes kept in cages. Hunting and trading of animals and birds is not completely prohibited by the Constitution or any other law/directive issued by the Government or any Injunction of Islam. Therefore, the directions as prayed for if granted, will be illegal and no writ can be issued to be faster an illegality.

Viewed the case from another angle, every citizen of Pakistan has a fundamental right to enter into any trade or profession he likes, unless the same is prohibited by law. The petitioner has not been able to point out any law or Injunction of Islam which prohibits treading of animals and birds. Therefore, no relief can be granted to the petitioner, merely on the basis of his whim and wish, who is one out of twelve cores of persons, majority of whom, who are not even parties to this petition, may not agree with him on lot many issues raised by him and who may be interested in their "protection" from the so-called "protector of their rights" as held in case of Chhetriya Pardushan Mukti Sangharsh Samiti. v. State of U. P. and others (AIR 1990 SC 2060) in which report at page 2062-2063, it has been held as under:-

8. Article 32 is a great and salutary safeguard for preservation of fundamental rights of the citizens. Every citizen has a fundamental right the have the enjoyment of quality of life and living as contemplated by Article 21 of the Constitution of India. Anything which endangers or impairs by conduct of anybody either in violation or in derogation of laws, that quality of life and living by the people is entitled to be taken recourse of Article 32 of the Constitution. But this can only be done by any person interested genuinely in the protection of the society on behalf of the society or community. This weapon as a

safeguard must be utilised and invoked by the Court with great deal of circumspection and caution. Where it appears that this is only a cloak to 'feed fact ancient grudge' and enmity, this should not only be refused but strongly discouraged. While it is the duty of this Court to enforce fundamental rights, it is also the duty of this Court to ensure that this weapon under Article 32 should not be misused or permitted to be misused creating a bottleneck in the superior Court preventing other genuine violation of fundamental rights being considered by the Court. That would be an act or a conduct which will defeat the very purpose of preservation of fundamental rights.

9. Having regard to the ugly rivalry here, we have no doubt that between the contestants the Court was misled and we must therefore proceed with caution. There was no fundamental right violation or could be violative if the allegations of the so-called champions on behalf of the society are scrutinised. We must protect the society from the so-called 'protectors'. This application is legally devoid of any merit or principles of public interest and public protection. This application certainly creates bottlenecks in Courts, which is an abuse of process of this Court. We have, therefore, no hesitation in dismissing this application with the observations made herein."

The petitioner in fact in pleading for "Budhism" rather than following of Injunctions of Islam and achievement of this result, hence, cannot be procured by resort to the Constitutional jurisdiction of this Court by filing of this frivolous petition which amounts to clear abuse of process of Court and sheer wastage of valuable public time.

10. As regards the prayer made in this petition that the respondents may be asked to adhere to the provisions of relevant laws on the subject, particularly issuance of permits, etc. suffice it to say that the learned Law Officers appearing on behalf of the respondents have made a categorical statement that the Government is already observing the law and will strictly follow the same in future as well, therefore, this part of the prayer also cannot be granted in view of the law declared in case of Guhlam Haider and 7 others v. S.H.O. City Police Station, Quetta and 9 others (PLD 1989 SC 479) at page 482 of the report, it has been held as under:-

> "Accordingly the learned counsel urged that the Police should refrain from interfering with the petitioners' business in any manner except in accordance with law. And further that if an illegal action is taken against the petitioners they should be at liberty to proceed against the persons concerned.
>
> 6. If the petitioners were not committing any illegality and/or offence they should take up this plea before the forum where they are arraigned to answer an allegation, accusation or to face a criminal trial. Similarly, if the petitioners are not committing any cognizable offence the police will not treat so and would proceed accordingly. If despite this the petitioners have any complaint against any individual functionary of the State they can proceed against him in accordance with law for infringement of any right.
>
> 7. The second argument of the learned counsel also is too wide to be accepted as such. Petitioners cannot claim an uncontrolled unregulated right to exhibit anything/film in any manner before any audience in their business premises.

Learned counsel admits that if the allegations made against the petitioners are kept in view their conduct might fall under the definition of several offences and other illegalities. He is, however, right that no accused or offender should be dealt with except in accordance with law. The argument that the police have not power to stop-prevent any illegality amounting to an offence if it is being done in their presence or within their view or knowledge cannot be accepted as presented. If, however, in so doing, they (police) themselves commit an illegality offence, this can be brought to the notice of the higher law enforcing agencies, the so-called police highhandedness. This might, if other remedy fails, include at proper sage a private complaint against a Police Officer who commits any offence, of course in accordance with the prescribed procedure. The plea that the action to be taken against the petitioners has to be by a competent Authority and in a competent manner again involves questions of fact which when arising, would be dealt with by the forums and Courts concerned. It is not possible to issue a general order or writ in favour of the petitioners in this case."

Asfand Yar Khan v. Chief Commissioner Islamabad Capital Territory, Islamabad
1996 SCMR 1421 (Supreme Court of Pakistan)
Civil Petition for Leave to Appeal No. 181 of 1996, decided on 12th May, 1996. (On appeal from the order of the Lahore High Court, Rawalpindi Bench, Rawalpindi, dated 31-10-1995 passed in Writ Petition No. 965 of 1995)
Saiduzzaman Siddiqui, Raja Afrasiab Khan and Muhammad Bashir Khan Jehangiri, JJ.

Pakistan Mining Concession Rules, 1960

Sched. II Cls (15) & (72)-Islamabad Wildlife (Protection, Preservation, Conservation and Management) Ordinance (LXX of 1979), S. 21-Termination of lease for quarrying of lime stone-Petitioner challenged termination of lease in High Court in its Constitutional Jurisdiction-High Court on basis of material on record found that termination of lease was justified on the ground that Authorities having demarcated area which was declared to be 'Margalla Hills as National Park' under S. 21, Islamabad Wildlife (Protection, Preservation, Conservation and Management) ordinance, 1979, breaking up of earth or digging or removal of stone etc. was prohibited from area in question, therefore, proceedings in the case had been taken in accordance with the provision of law as well as terms and conditions of lease granting letter; that objection that area list out to petitioner did not fall within National Park Area being question of fact had been determined twice and had been found to have fallen within territorial limits of National Park Area; and that question of fact could not be subject-matter of Constitutional petition-Validity-Order of termination of lease having been passed under CI. (15), Pakistan Mining Concession Rules, 1960, which empowers lessor to determine lease as provided therein, High Court had rightly found that in terms of CI. (15), Pakistan Mining Concession Rules, 1960, where it was found that area or any part thereof, was not free and was granted to lessee by inadvertence, lessee would release the same unconditionally as and when required to do so-Leave to appeal was refused in circumstances. (p.1424) A.

ORDER

MUHAMMAD BASHIR KHAN JEHANGIRI, J.: This petition for leave to appeal arises out of an order of a learned Judge in Chamber of Lahore High Court, Rawalpindi Bench, Rawalpindi, dated 31-10-1995 (Writ Petition No. 965 of 1995) whereby lease to challenge the order of revocation of mining lease of quarrying of lime stone within the area of Islamabad Capital Territory granted to the petitioner was dismissed in limine.

2. The petitioner was granted lease by the respondents for a period of ten years with effect from 14-3-1986 for quarrying of lime stone on the western side of G.T. Road in Islamabad District; he also acquired the lease of land from private owners for superficial use and occupation for the purposes of operations to be conducted under the mining lease on payment of surface rent; and obtained powers connection from WAPDA.

3. Respondent No. 2 had earlier revoked the lease of the petitioner as aforesaid by virtue of his communication dated 19-8-1991 which was assailed in Writ Petition No. 956 of 1991 along with few others also in the Rawalpindi Bench of Lahore High Court. Those writ petitions were accepted and the impugned orders of revocation of mining lease were declared to be illegal and without lawful authority and having been passed without issuance of a show cause notice. In consequence, the respondents after issuing show cause notice on 6-7-1994 admittedly determined the lease on 13-4-1995. On behalf of the petitioner it was, inter alia, contended before the High Court that the lease in favour of the petitioner could only have been terminated after the expiry of lease period as originally fixed or by revocation thereof in terms of the lease agreement between the parties and in accordance with the provisions of clause 72 of Schedule II to part II of the Mining Concession Rules, 1960 (hereinafter called as the Rules) and as the lease has not been determined in accordance therewith but has been revoked under the provisions of the Islamabad Wild Life (Protection, Preservation, Conservation and Management) Ordinance (LXX of 1979) (hereinafter called as the Ordinance), it was without lawful authority and of no legal effect.

4. It was next contended before the High Court that the area which formed part of the lease of the petitioner did not fall under the Margalla Hills National Park within the contemplation of Section 21 of the Ordinance, therefore, the lease could not have been terminated under the purported authority vested under section 21 (ibid)

On behalf of the respondents it was urged before the High Court that the petitioner had been granted a mining lease for quarrying lime stone from the area forming part of the National Park which had been verified after demarcation strictly in accordance with law and, therefore, the breaking up of land within the area inter alia for mining was rightly prohibited. It was next argued on behalf of the respondents that the lease could not have been granted to the petitioner from the area in dispute and when it came to the notice of the authorities the lease was terminated in accordance with the terms of the lease which, inter alia, provided that in case any area was not legally available for leasing out, the lease shall be terminated and that therefore, the impugned order passed by the respondents was neither unlawful nor was violative of the terms of the lease.

5. The learned Single Judge in the High Court invoked the provision of clauses (14) and (15) of the Lease Agreement and held that "the authorities demarcated the area which was declared to be Margala Hills National Park under section 21 of the Ordinance and as the law had specifically prohibited the breaking up of the earth or digging or removal of stone etc. from this area, the petitioner was issued a show cause notice on 20-7-1994." According to the learned Judge, it was specifically mentioned in the show-cause notice that the lease granted to the petitioner was for an area which fell within the National Park Area and for prevention of environmental pollution the blasting or quarrying of limestone in the National Park Area could not be permitted to which the petitioner had put in a reply denying that the site in dispute fell within the territorial limits of National Park Area. The learned Judge reached the conclusion that the proceedings in the case had been taken in accordance with the provision of law as well as the terms and conditions of the lease granting letter; that the objection that area leased out to the petitioner did not fall within the National Park Area was a question of fact which had been determined twice and had been found to have fallen within the territorial limits of National Park Area and, therefore, being a question of fact could not be the subject-matter of writ petition. In consequence, the petition was dismissed.

6. Mr. Tanvir Bashir Ansari, learned counsel appearing on behalf of the petitioner, has reiterated before us the contention that the lease granted to the petitioner was liable to termination after the expiry of lease period or on the ground of violation of any one or more of the terms and conditions of the Lease Agreement in accordance with the provision of clause (72) of Schedule ii ibid which has an overriding effect and, therefore, the lease could not have been legally terminated under section 21 of the Ordinance. In this context, the learned counsel has vociferously argued that the provisions of the Ordinance could not have been invoked in terminating the mining lease in favour of the petitioner and emphasised that the Mining Concession Rules, 1960 framed under the Regulation of Mines and Oilfields and Mineral Development (Government Control) Act (No XXIV of 1948) (hereinafter called as the Act) have the overriding effect qua any other law for the time being in force and, therefore, no recourse could be had to be provision of the Ordinance. In support of this proposition, the learned counsel made reference to section 4 of the Act which reads as under.

"Effect of rules etc. inconsistent with other enactment. - Any rule made under this Act, and any order made under any such rules, shall have effect notwithstanding anything inconsistent therewith contained in any enactment or in any instrument having effect by virtue of any enactment other than this Act."

The contention is untenable on two-fold grounds: firstly, because the period of lease has admittedly expired and secondly, because the lease was terminated under clause (15) of the lease Agreement.

7. The learned counsel for the petitioner then maintained that the High Court should have granted a lease for the additional year during which the petitioner had been restrained from quarrying the mining area. We have not been impressed by this submission of the learned counsel. If the petitioner has suffered any monetary loss on account of violation of the Lease Agreement, the High Court could not have granted any relief to the

petitioner under the extraordinary Constitutional jurisdiction on the ground that it was a contractual obligation and if any of the terms and conditions of the Lease Agreement has not been violated, the remedy lay in claiming damages by filing a suit and not invoking writ jurisdiction of the High Court. The learned Single Judge has rightly made a reference to the provision of clause (15) of the Lease Agreement which provides that in case it is found that the area or any part thereof was not free and was granted to the lessee by inadvertence, the lessee would release the same unconditionally as and when required to do so. We are, therefore, of the considered view that the provisions of clause (72) of Schedule II ibid shall have no overriding effect as envisaged by section 4 of the Act, in that, the impugned orders had been passed under clause (15) of the Lease Agreement which empowers the lessor to determine the lease as provided therein. The overriding effect of clause (72) of Schedule II (ibid) with reference to Section 4 of the Act has, therefore, been diluted qua the lease herein which had not been determined under section 21 of the Ordinance but had been revoked under clause (15) of the Lease Agreement. This contention of the learned counsel for the petitioner is, therefore, not tenable.

8. For the foregoing reasons, we are of the considered opinion that there is no substance in this petition which is, accordingly dismissed and leave is not granted.

In re: Pollution of Environment Caused by Smoke Emitting Vehicles, Traffic Muddle
1996 SCMR 543 (Supreme Court of Pakistan)
Saleem Akhtar, J.

Constitution of Pakistan (1973)

Art. 184-Pollution of environment and noise pollution caused by smoke emitting vehicles, traffic muddle etc.-Supreme Court passed interim order for taking effective and remedial measures in order to streamline the process of checking as a first step in eliminating the pollution from Karachi.

In order to streamline the process of checking as a first step in eliminating the pollution caused by the smoke emitting vehicles, the following interim order was passed by the Supreme Court:-

(a) A minimum of two mobile checkings per week per district for at least 2-1/2 hours duration should be arranged in terms of the earlier order which is being practised. Henceforth the Honorary Magistrates appointed by the Provincial Government with the approval of the Chief Justice, High Court of Sindh, be associated with the checking team and if S.T.Ms. are not available, the Honorary Magistrate shall try and dispose of summary cases at the time of checking.

(b) The monthly schedule of the mobile checkings shall be issued by the S.T.M. or any person authorised by the Commissioner without mentioning the checking locations which shall be decided by the checking team at the time of starting the checking on that day.

(c) A weekly report of such checking shall be submitted by the S.T.M./Honorary Magistrate to the C.P.L.C. Central Reporting Cell, which shall compile the same and submit a consolidated report with comments and suggestions to the Assistant Registrar, Supreme Court, Karachi after every three months.

(d) Report shows that M.T.C. Government vehicles including police vehicles and certain "marked" Private transport vehicles are not challaned. This discrimination should end and all vehicles irrespective of their owners/drivers should be brought to book in case they violate the law. On query what is meant by "marked" transport private vehicles it was disclosed that these vehicles bear a particular mark, inscription, insignia or certain words which are understood by certain persons involved with the traffic checking and they just allow them to pass without checking saying that they belong to influential persons. This is a deplorable attitude. The authorities concerned are directed to check vehicles irrespective of fact whether they are marked or not but if this policy of not challaning marked vehicles persists, the representative of C.P.L.C. associated with the checking team should note down the number of such vehicles and report it to the C.P.L.C. Reporting centre which shall forward it to the Assistant Registrar, Supreme Court, Karachi.

(e) Motor vehicle inspection procedure should be totally overhauled and every wheel D.I.G. T & T, shall obtain the particulars of such vehicles to which fitness certificates have been issued by M.V.Is according to rules and forward them to C.P.L.C., Central Reporting Cell which shall submit with comments to the Assistant Registrar, Supreme Court, Karachi along with the quarterly reports. (p. 546) A

As regards noise pollution the following interim order is passed:-

(i) As required by the Motor Vehicles Ordinance the Concerned authorities should ensure that the motorcycle rickshaws are not allowed to ply without silencers. It has been pointed out that there has been a practice in Karachi that the silencers are not fitted in the motorcycle rickshaws. Such practice, however cannot override the provisions of law, particularly rules 155 and 158 of the Motor Vehicles Rules, 1969. In the existing circumstance, all the persons owning or plying motorcycle rickshaws should be given one month's time to get the silencers fitted in their motorcycle rickshaws. A wide publicity should be made through press, radio and television. Such notices should also be displayed at public places. After expiry of one month action shall be taken against motorcycle rickshaws plying without silencers.

(ii) Many vehicles are found fitted pressure horns or multi-tone horns giving unduly harsh shrill loud or alarming voice. Rule 154 of the Motor Vehicles Rules, 1969 prohibits fitting of such horns. The practice seems to be that such vehicles are challaned and pressure horns are disconnected or seized by the police. However, in order to make it more effective whenever any authority seizes such horn, it should deposit it with Central Nizarat situated opposite Civic Centre, Karachi. (p-548) B

ORDER

SALEEM AKHTAR, J: All the persons present have submitted their reports which were examined on 26-9-1993. From the reports, common points collectively which are not in dispute can be summarized as follows:

(i) In compliance with this Courts orders passed earlier, mobile checking was conducted. During the period of one year ending 15th September, 1993, 128 mobile checkings were organised. Besides these, mobile checkings organised by the police authorities were also conducted and the total checkings of all the four districts of Karachi comes to 242. 3143 persons were challaned and 1306 fitness certificates were suspended.

(ii) The encroachments in Sadar area were removed and cleared and vacant possession of such land was delivered to the land owners, but thereafter encroachments have again appeared.

(iii) The inspection and issuance of fitness certificate by the Motor Vehicles Inspectors is far from satisfactory.

(iv) One of the causes for pollution by smoke emitting vehicles is adulteration in petrol, diesel and engine oil.

(v) Although Pakistan Environmental Protection Agency has fixed the National Environmental Quality standards for motor vehicles Exhaust and Noise, none of the Government agencies have the instrument for its measurement and, therefore, the standards so prescribed cannot be implemented nor can its breach be tested.

(vi) The motor rickshaws are plying without silencer and are source of causing noise.

(vii) Pressure horns are found fitted in the vehicles and have not effectively been checked.

(viii) As no model restriction has been imposed for the buses plying in Karachi, there are breakdowns and problems in maintaining them in proper and fit condition.

(ix) The system for checking and disposal of the traffic cases requires to be streamlined in an effective manner.

(x) There seems to be random checking of the vehicles by the team consisting of S.T.M Traffic Police, Motor Vehicle Inspector and the representative of the C.P.L.C. It was pointed out that the cheeking schedule disturbed due to the frequent transfers of S.T.Ms. and lack of interest on their part. The commissioner has assured that the S.T.Ms. will be made available for checking and if anyone of them has been transferred, alternate arrangement shall be made immediately.

2. In order to streamline the process of checking as a first step in eliminating criminating the pollution caused by the smoke emitting vehicles , the following interim order is passed:-

(a) A minimum of two mobile checkings per week per district for at least 2-1/2 hours duration should be arranged in terms of the earlier order which is being practised. It may, however, be added that henceforth the Honorary Magistrates appointed by the Provincial Government with the approval of the Honourable Chief Justice. High Court of Sindh, be associated with the checking team and if S.T.Ms. are not available, the Honorary Magistrate shall try and dispose of summary cases at the time of checking.

(b) The monthly schedule of the mobile checkings shall be issued by the S.T.M or any person authorised by the Commissioner without mentioning the checking locations which shall be decided by the checking team at the time of starting the checking on that day.

(c) A weekly report of such checking shall be submitted by the S.T.M/ Honorary Magistrate to the C.P.L.C Central Reporting Cell, which shall compile the same and submit a consolidated report with comments and suggestions to the Assistant Registrar, Supreme Court, Karachi after every three months.

(d) It has been revealed from a report that K.T.C. Government vehicles including police vehicles and certain "marked" private transport vehicles are not challaned. This discrimination should end and all vehicles irrespective of their owners/ drivers should be brought to book in case they violate the law. On query what is meant by "marked" transport private vehicles it was disclosed that these vehicles bear a particular mark, inscription, insignia or certain words which are understood by certain persons involved with the traffic checking and they just allow them to pass without checking saying that they belong to influential persons. It is a deplorable attitude. The authorities concerned are directed to check vehicles irrespective whether they are marked or not, but if this policy of not challaning marked vehicles persists, the representative of C.P.L.C associated with the checking team should note down the number of such vehicles and report it to the C.P.L.C Reporting Centre which shall forward it to the Assistant Registrar, Supreme Court, Karachi.

(e) Motor vehicle inspection procedure should be totally overhauled and every week D.I.T., T&T, shall obtain the particulars of such vehicles to which fitness certificates have been issued by M.V.Is. according to rules and forward them to C.P.L.C., Central Reporting Cell which shall submit with comments to the Assistant Registrar, Supreme Court, Karachi along with the quarterly report.

3. So far encroachment is concerned, according to the Commissioner unless the owners of the land, namely, K.M.C. and K.D.A. take proper action according to law, the authorities responsible for clearing such encroachments cannot succeed in removing them. According to the Commissioner and the Chief C.P.L.C, K.D.A. and K.M.C. must discharge their duties and cooperate with the authorities. In these circumstances, notice be issued to K.D.A and K.M.C Land Departments to find out their view point to be submitted on or before 30-11-1993.

4. D.I.G. Traffic has pointed out that a large number of public transport vehicles plying in Karachi city are very old and emit excessive smoke due to poor condition. According to him to prevent smoke pollution effective transport policy which aims at rational fares and incentives should be made by the Ministry of Transport with a view to encourage induction of new buses replacing old vehicles. The Commissioner, however, did not agree that present fare structure is less profitable and does not provide incentive. The Government must formulate realistic transport policy taking in view the transporters and commuters both. However, even in the absence of such a policy it will not be permissible to allow smoke emitting vehicles to pay without checking or taking any action. While strictness should be shown in checking such vehicles, the Commissioner should arrange meeting with the transporters, public representatives and recognised members of NGOs. to solve the problem and submit his report to this Court as well as to the Government.

5. All present were of the view that the penalty and punishment provided by law is so lenient that the checking and challan loses its deterrent effect. This submission has weight but so long law is not amended it need not be enforced. It has to be enforced as it stands. A strict checking and enforcement of traffic laws is itself a great deterrent except for the hardened criminals. The Chiefs of C.P.L.C and Shehri were of the view that the fault mainly lies with the traffic police which does not perform its routine duty effectively which encourages violation of law. It was also stated that the high officials of law of the traffic police are seen confined in their office rooms instead of on the roads. There seems to be a lot of truth in it and the I.G.P., D.I.Gs and S.Ps. should take serious note of theses facts and streamline the working and administration of the Traffic Police.

6. The Director-General, Environmental protection Agency (E.P.L.A) Sindh has submitted that as emission standards for motor vehicles have been adopted and notified, the Police Department may now enforce it in coordination with E.P.L.A. Presently difficulty is that none of the agencies, Government Departments and functionaries have so far acquired the testing equipment. The concerned authorities particularly D.I.G Traffic, Police Department and E.P.L.A. must obtain the equipment on urgency basis to avoid further environmental hazards. They are directed to submit their report in this regard on or before 30-11-1993.

7. Adulteration in petrol and oil also causes emission of smoke by the vehicles. There are certain points of adulteration which must be checked. The adulteration can be made in (1) the refineries, (2) oil companies, (3) during transit and (4) in the tanks of the petrol pumps. The Commissioner has informed that he had attempted to check adulteration in petrol but resentment was shown by the Petrol Pump Owners Association. He has arranged a meeting with them, the refineries and the oil companies to deal with this problem. However, in order to deal with this growing problem notice be issued to the oil companies, refineries and the Petrol Pump Owners Association and also to the authority dealing with weights and measures responsible for checking the petrol quality wise as well as measurement. The Commissioner may continue his efforts and report in due course before 30-12-1993.

8. As regards noise pollution the following interim order is passed:-

(i) As required by the Motor Vehicles Ordinance the concerned authorities should ensure that the motorcycle rickshaws are not allowed to ply without silencers. It has been pointed out that there has been a practice in Karachi that the silencers are not fitted in the motorcycle rickshaws. Such practice, however, cannot override the provisions of law, particularly rules 155 and 158 of the Motor Vehicles Rules, 1969. In the existing circumstances, all the persons owning or plying motorcycle rickshaws should be given one month's time to get the silencers fitted in their motorcycle rickshaws. A wide publicity should be made through press, radio and television. Such notices should also be displayed at public places. After expiry of one month action shall be taken against motorcycle rickshaws plying without silencers.

(ii) Many vehicles are found fitted with pressure horns or multi-tone horns giving unduly harsh shrill loud or alarming voice. Rule 154 of the Motor Vehicles Rules, 1969 prohibits fitting of such horns. The practice seems to be that such vehicles are challaned and pressure horns are disconnected or seized by the police. However, in order to make it more effective whenever any authority seizes such horns, it should deposit it with Central Nizarat situated opposite Civic Centre, Karachi.

A copy of this order should be sent to the Governor and Chief Minister of Sindh.

Order accordingly.

Mst. Ameer Bano v. S.E. Highways
PLD 1996 Lahore 592
Writ Petition No. 1811 of 1996, decided on 11th June 1996
Muhammad Aqil Mirza, J.

Constitution of Pakistan (1973) - Arts. 9 & 199 Enforcement of Fundamental Right-Constitutional petition-Public interest litigations-Scope-Complete breakdown of sewerage system-Protection to live guaranteed under Art. 9 of the Constitution stood denied to large number of citizens-Constitutional petition was, thus, treated as public interest litigation for enforcement of fundamental rights-Jurisdiction of High Court while dealing with Constitutional petitions for enforcement of fundamental rights was not controlled by any limitation-High Court, for purpose of enforcement of Fundamental Right guaranteed under the Constitution, can give direction to any person or Authority, including any Government within its territorial jurisdiction, which it deemed proper for securing Fundamental Rights or to avoid their violation-Any act which was required to be done by public Functionaries on the direction of the Court in terms of Art. 199 (1) (c) of the Constitution might not normally be allowed to be taken by them under law/rules but in pursuance of direction given by the Court, Person/authority/Government so commanded by the High Court would be bound to perform the act so that Fundamental Rights of Citizens were enforced-To alleviate miseries of large number of citizens and to secure them their fundamental right guaranteed under Art. 9 of the Constitution with

regard to protection of their life from diseases and inconvenience, High Court issued suitable directions to ensure restoration of sewerage system in the city-Respondents Claimed that they required additional workmen for carrying on the job but due to ban on fresh recruitment their hands were tied. High Court taking judicial notice of appointments which were being made in relaxation of rules and the ban directed that necessary appointments be made for carrying out work of sewerage in the city by ignoring the ban-Requirement of public Notice through press before making appointments was also dispensed with to meet the emergency. (Pp. 596, 597, 598) A, B, C, & D

ORDER

This constitutional petition came up before me yesterday as an urgent matter. Since question of enforcement of fundamental rights of a large number of citizens was involved, therefore notices were issued to the concerned functionaries for hearing of the case for today. All the concerned public functionaries and the representatives of the public and the learned counsel for the parties have been heard.

2. This petition has been filed by an owner of a house at Multan Road, Bahawalpur. She has raised the grievance that sewerage system in Bahawalpur has become totally unserviceable with the result that the dirty water has collected in the form of ponds, in some cases it has entered the dwelling house and the roads too have become impossible due to overflow of the gutters.

3. It is also lamented that the Highway Department is constructing the roads at very high level and if it is allowed to be done, the dirty water overflowing the gutters will enter the residential houses.

4. It appears that the sewerage system in most parts of Bahawalpur City has completely broken down in the past few days. Public protests have also been lodged. On account of the presence of dirty water coming out of the gutter in the residential and commercial areas of Bahawalpur City, it is apprehended that residents will contact many diseases which in turn will mean that human life in the area will be endangered. Thus, Protection to life guaranteed under Article 9 of the Constitution will stand denied to a large number of citizens, therefore, I have treated the present petition as public interest litigation for enforcement of the fundamental rights, and it was on this account that I have decided to dispose of this petition immediately, dispensing with the normal procedure of admitting the cases in the first instance.

5. The root cause of the ugly situation prevailing in the city, detailed above, is on account of the failure of the sewerage system in the city. Therefore with the assistance of the heads of various Departments and the representative of the community and of course with the assistance of the learned Assistant Advocate General and the counsel for the parties, I have tried to resolve the dispute through consensus.

6. The sewerage system was laid in 1963 by the Public Health Engineering Department. After its completion the duty to maintain the sewerage is that of the Municipal Corporation, Bahawalpur. The roads are being constructed by the Highway Department. The Administrator of the Municipal Corporation assisted by the Chief Corporation Officer has admitted that this is duty of the Corporation to maintain the sewers. The Chief

Corporation Officers has pointed out that sewer lines have become completely choked, presumably because they have not been properly maintained in the past. Unless these are desilted the sewer lines will not intake the waters from the residential house and other premises. He has stated that efforts are being made for desilting the sewer pipe lines. However, he has expressed some difficulties on account of which it may not be possible to properly and expeditiously desilt the system. In this behalf he has explained that in addition to the sewer men/sanitary workers he has, he requires services of fifty additional sewer men sanitary workers for the purpose. He cannot make recruitment on account of the ban imposed by the Government on fresh recruitment, even on ad hoc basis. He has further stated that the salary emoluments which are paid to sewer men/sanitary workers are so small that the trained persons are not attracted to join the service, though they are paid Rs. 200 by way of additional allowance. He has also pointed out that at some points the water may have to be lifted through tankers but no tanker is available with the Municipal Corporation. A large number of shopkeepers led by their General Secretary have also narrated their miseries, the root cause whereof is also the sewerage system in the city. Their grievance is that dirty water from gutters has collected in front of their shops which have become totally inaccessible which has ruined their business on the one hand and their health on the other. All the shopkeepers and every other person present in Court agree that the roads which are being constructed near the Fawara Chowk are in level of the roads leading to the Railway Station and Sadiq Public School. Therefore, they agree that the roads may be constructed at the designed level but something must be done about the sewerage system. It was emphasised during the course of arguments and agreed to by the shopkeepers and the petitioner in the writ petition that the roads level had to be higher than the ground level so that the water may flow down the roads otherwise the roads cannot remain intact due to rainy and other water.

7. The shopkeepers and some other persons from the public made a very serious complaint that in charge of the sanitation in the city is a doctor by profession who is holding the post of Health Officer. He is posted in the city for the last ten year and on account of his long stay in the city he has become indifferent towards the maintenance of sanitation, though he does not attend the patients in the dispensary and solely looks after the sanitation. Their demand is that this officer should be transferred from the city and some other vigilant officer may be posted in his place. No order is required from this Court in this behalf. This matter should be attended to by the Secretary, Local Government and Rural Development Department who is competent to deal with each matter. A copy of this order shall, however, be sent to him.

8. A complaint has also been voiced against the Municipal Corporation that there are about 150 manholes in various parts of the city and life of the citizens is in constant danger on account thereof. This position is admitted by the Chief Officer. He has made a complaint about the general public that they throw rubbish and garbage in the uncovered manholes which directly results in blockage of the gutters. This situation is caused because the people are not properly ware of their civic duties. It is the duty of the press and the electronic media to educate the people especially in the urban areas that they should not throw the garbage in the gutters and the plastic shopper bags should not be used, as far as possible. Such bags indeed are extremely dangerous to human and

vegetative life. In large number of advanced countries their use has been banned. It is also the duty of the shopkeepers that they should supply goods to their customers in paper bags instead of plastic/ polythene bags. It is now well established fact that after use of the shopping bags they find their ways into the gutters which result in complete-break down of the sewerage system.

9. While exercising powers under Article 199 of the Constitution, in normal cases, the jurisdiction of this Court is restricted to making an order directing a person performing, within the territorial jurisdiction of the Court, functions in connection with the affairs of the Federation, a province or a local authority, to refrain from doing anything he is not permitted by law to do or to do anything he is required by law to do; or declaring that any act done or proceeding taken within the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of the Federation, a province or a local authority has been done or taken without lawful authority and is of no legal effect. However, when dealing with Constitutional petitions for the enforcement of fundamental rights, as is the case in hand, the jurisdiction of this court is not controlled by any limitation. The jurisdiction regarding the enforcement of fundamental right finds mention in clause (c) of sub-article (1) of Article 199 of the Constitution, which is reproduced below:-

> "(c) on the application of any aggrieved person, make an order giving such direction to any person or authority, including any Government exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II.

Therefore, it is clear that for the purpose of enforcement of any of the fundamental rights guaranteed under the Constitution, this Court can give a direction to any person or authority, including any Government within its territorial jurisdiction, which may be deemed proper for securing the fundamental rights or to avid their violation. The act which is required to be done by the public functionaries by the Court under the above clause may not normally be allowed to be taken by them under law/ rules or in normal circumstances they may even be not permitted specifically to perform such act under the existing law or rules. But in pursuance of a direction given by the Court under sub-clause (c) (Supra), the person/ Authority/ Government so commanded by the High Court–shall be bound to perform the act so that the fundamental rights of citizens are enforced. The reason why unlimited powers have been granted to the High Court for issuing appropriate directions is that every other laws/ rules/ instructions have to yield to the fundamental rights enshrined in the Constitution. Any law or any custom or usage having the force of law which is inconsistent with the fundamental rights to the extent of inconsistency is void, as per dictates of Article 8 of the Constitution which reads as follows:-

> **"8. Laws inconsistent with or in derogation of Fundamental Rights to be void**.-
>
> (1) Any law or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall to the extent of such inconsistency, be void.

(2) The state shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void.

(3) The provisions of this Article shall not apply to-
  (a) ……
  (b) ……
    (i) ……
    (ii) ……

(4) ……

(5) The rights conferred by this Chapter shall not be suspended except as expressly provided by the Constitution".

10. The position that emerges, therefore, is that to alleviate the miseries of the large number of citizens of Bahawalpur and to secure them their fundamental right guaranteed under Article 9 of the Constitution with regard to protection of their life from diseases and inconvenience, it will be just and proper to issue suitable directors which will ensure the restoration of sewerage system in the city of Bahawalpur. Accordingly the following directions are made:-

(i) The Municipal Corporation will recruit on ad hoc basis or otherwise fifty sewer man/sanitary workers with normal salary and other suitable allowance/honoraria, for the purpose of desilting and cleaning the sewerage in the area of Multan Road, near about the Fawara Chowk and other affected areas in the city, on emergency basis. These persons shall be recruited irrespective of and by passing the general ban imposed by the Government on fresh recruitment in the Province. No one including the audit people will raise objection on the appointments made for the above purpose;

(ii) In addition to above, the Municipal Corporation may also hire water tanks for the purpose of removing dirty water from the sore points in the city so that expeditious relief is made available to the citizens; and

(iii) The uncovered manholes in the city will be properly covered without any delay. The Chief Corporation Officer, with the consent of the Administrator of the Municipal Corporation has given an undertaking that all the manholes shall be covered within the next fortnight. The administrator of the Municipal Corporation shall pay personal visit in the affected area after every fortnight with a view to checking the work of desilting of the sewer lines. The Chief Corporation Officer shall pay such a visit every three days. These visit shall be the minimum and on their own they must visit more oftenly.

11. Similarly the Executive Engineer Highway in the presence and with the consent of his superintending Engineer who is present in Court has given an undertaking that the roads particularly near the house of the petitioner shall not be more than 21 inches higher than the ground level. This undertaking shall be faithfully complied with.

12. In addition to the restoration of the existing sewerage system in the city, the Government is stated to have already accorded a long term plan providing for supplementing the sewerage system in the city. The case has already gone to the Planning and Development Department for approval. The Highway Department is also constructing drains alone the roads for the outlet of extra water. It is hoped that by way of short measures detailed above and the long measures, that will be taken in future, the people of Bahawalpur will be able to utilise more efficient sewerage system in the city.

Before parting with the case, it may be stated that the ban imposed by the Government of fresh recruitment is not absolute. The Court can take judicial notice of the appointments which are being made in relaxation of the rules and the ban. It has, therefore, been thought appropriate by me to direct the appointments by ignoring the ban imposed by the Court. Similarly the requirement of public notice through press before making appointments is also to be dispensed with to meet the emergency. It must be stated that financial constraints were not pleaded before me on behalf of the Municipal Corporation regarding the fresh appointments of the sewer men/sanitary workers.

For what has been stated above, the writ petition stands accepted in the above terms. No order as to costs.

Petition accepted.

Begum Saida Qazi Issa v. Quetta Municipal Corporation through Administrator
PLD 1997 Quetta 1
Civil Petition No. 125 of 1995, decided on 11th July, 1996
Amir-ul-Mulk Mengal and Javed Iqbal, JJ.

(a) Quetta Municipal Earthquake Proof Building Code, 1937...

.....Ss. 44 & 50 ...Quetta Municipal Earthquake Proof Building Code, 1937... Applicability ...Extent ...No rules, bye-laws and regulations have been framed which could be substituted for Quetta Municipal Earthquake Proof Building Code, 1937, therefore, same was applicable...In addition, Building Code having not been expressly repealed, would be deemed to be applicable to areas to which it was originally framed and made applicable. [p. 10] A

1982 SCMR 522 and 1995 SCMR 362 ref.

(b) Balochistan Building Control Ordinance (VI of 1979) ...

....S. 1 (2)...Applicability of Balochistan Building Control Ordinance, 1979 ... Provisions of S.1 (2) of the Ordinance provide that Ordinance would come into force from such date and in such areas, as Government may by notification specify…Government admittedly has not specified date and areas to be covered by said Ordinance, therefore, same was not applicable as yet. [p. 10] B

(c) Quetta Municipal Earthquake Proof Building Code, 1937 ...

....S. 50..Balochistan Local Government Ordinance (II of 1980), S. 74-A, Fifth Schedule Clauses 24 & 25...Quetta Municipal Earthquake Proof Building Code, 1937, having never been repealed through any Ordinance, legislation or rules, was thus, still applicable .....Building Code of 1937 was even amended on 20th September, 1986...Power to amend Building Code was exercised under S. 50 (b) of the Code as also under Clauses 24 & 25 of Fifth Schedule (of compulsory functions) of Balochistan Local Government Ordinance, 1980...Quetta Municipal Earthquake Proof Building Code, 1937, was thus, still in existence and applicable. [p. 12] C

PLD 1992 Kar. 54 ref.

(d) Quetta Municipal Earthquake Proof Building Code, 1937....

....Ss. 44 & 50...Easements Act (V of 1882), Preamble...Constitution of Pakistan (1973), Art. 199...Constitutional jurisdiction, exercise of....No controversial question of fact was involved as regards construction of buildings and provisions of Quetta Municipal Earthquake Proof Building Code, 1937.... Court declined to consider question of privacy in Constitutional petition which was domain of Civil Court under Easements Act, 1882....Question involved in Constitutional petition was whether multi-storeyed buildings so constructed were in accordance with Building Code or Master Plan or not...Quetta Municipal Earthquake Proof Building Code, 1937 being still intact and operative which regulated construction of private building in Municipal Area of Quetta, whereby height of building must not exceed 30 feet from ground floor to top of roof, such question could be determined by High Court whether same was being adhered to by respondent or was being flouted...Constitutional petition was thus, competent in circumstances [p. 13] D

PLD 1992 Kar. 54 and 1991 MLD 1112 ref.

(e) Quetta Municipal Earthquake Proof Building Code, 1937.....

....Ss. 44 & 50... Constitution of Pakistan (1973), Art. 199...Constitutional petition...Multi-storeyed buildings constructed by private persons would fall in three categories i.e. multi-storeyed buildings already constructed in town; multi-storeyed building which were under process of construction; and multi-storeyed buildings which were planned to be constructed in future but no construction work had started so far....High Court refused to order demolition of first category buildings on account of those having been completed and because owners of those buildings were not party in Constitutional petition....As regards those buildings which were in process of construction, High Court directed Chief Secretary to issue directions to Administrator, Municipal Committee to find out total number of under-construction multi-storeyed buildings in town and to issue notices to owners/builders and after granting them opportunity of hearing order such amendments/alterations in building's plans which would commensurate with Quetta Municipal Earthquake Building Code, 1937 particularly so far as height of building was concerned, and no concession would be given to builders...As regards those buildings construction whereof had not yet started,

officials (respondents) were directed not to allow construction of multi-storeyed building in future within local limits of Quetta city as against provision of Quetta Municipal Earthquake Proof Building Code, 1937.... infrastructure of building in question, was completed during pendency of Constitutional petition...Court although declined in order its demolition, yet directed respondents not to use the same for commercial purposes for area wherein same was constructed was not commercial area.

[pp. 15, 16] E, F, G & H

Judgment

Amir-ul-Mulk Mengal, J....The petitioners are the legal heirs of late Qazi Muhammad Issa who inherited the property known as 2-Zarghoon (Lytton) Road, Quetta after his death. A portion of the said property was sold which eventually was purchased by respondents Nos. 5 and 6 on Khasra No. 238/140, 141/142-143 comprising of 15618 sq. ft.

On the property of late Qazi Muhammad Issa a house was built where he and his family including the petitioners used to reside. According to the petitioners, father of the Nation Quaid-e-Azam Muhammad Ali Jinnah resided in the said house on various occasions whenever he visited Quetta, therefore, the petitioners made all attempts to preserve the said house in its original condition.

After purchase of the portion of the plot adjacent to the said house respondents Nos. 5 and 6 applied to respondent No. 1 i.e. the Municipal Engineer for permission to raise construction over the said site. The respondent No. 1 vide as letter No. 1158 dated 2-2-1993 issued Building Permit to the respondents to build 'Flats and Rooms' in Type I-III in strict conformity with all requirements of Quetta Municipal Earthquake Proof Building Code, 1937 (hereinafter referred to as Building Code) and all other bye-laws of the Municipal Corporation. According to Rule 44 of the Building Code all buildings must conform to one of the following types which have been designated to give sufficient variety in cost and quakeproofs to suit the pockets of all classes.

Similarly according to Rule 50 of the said Building Code following provision was made:

> "No residential building with its outhouses, garages, latrines etc., may cover more than 60% of the site allotted to it. In other words, open spaces in the form of suitably placed courtyard etc. must invariably be provided amounting in area to at least 2/3rd of the area covered by the buildings."

It is case of the petitioners that the builders submitted two sets of buildings plans. In one plan the proposed building was shown to be "Flats and Rooms." In another proposed construction was shown as "Flats". By this methodology they, in fact, wanted the authorities to believe that purely a residential building is being built. They, however, submitted a revised plan. Under the garb of 'residential building' when the builders started excavating a basement for raising commercial offices on the site, respondent No. 1 directed the builders to stop all construction failing which action, according to law, shall be taken against them.

According to the petitioners, since builders were influential persons, they managed, in connivance with certain officers to get a "Technical Committee" appointed. This, in fact, was in utter violation of the Building Code which did not have any provision of so-called Technical Committee or Building Control Board. The Committee was being chaired by Superintending Engineer C&W Department and 2 members. However, the Municipal Engineer of Quetta Municipal Corporation was not a member of the so-called Technical Committee. The said 'Technical Committee' issued an 'Inspection Report' stating therein that after visiting the site along with builders they found that the specifications are followed properly, as instructed by the Municipal Engineer during approval of the project. The case of the petitioners is that all such proceedings were undertaken at the behest of builders in utter violation of the Building Code. Despite the clear directions by the Municipal Engineer to stop the work, the builders have started construction work at a very rapid pace. According to the petitioners the builders submitted different plans to deceive the authorities and thus they overnight redesigned the plan to construct commercial building in a residential area without seeking permission from the competent authority. They have not obtained 'NOC' from the Authority under Balochistan Building Control Ordinance, 1979.

The second limb of the argument was that the petitioners are residents of Quetta and as a citizen of this country they are interested to bring to the notice of the Court the fact that Quetta Town is situated on a highly sensitive seismic zone and one of the most devastating earthquake jolted Quetta in 1935 killing about 60,000 persons. In order to avoid any future disaster of earthquake after 1935 the then authorities decided to put a ban on multi-storeyed buildings. They after taking into consideration the expert opinion promulgated "Quetta Building Code" hereinafter referred to as the "Code" as back as in 1937 with a view to prevent future destruction of buildings and population and for safety of the citizens.

Giving background of this Code it was stated that the object for which the Code was prepared was to provide a set of rules and regulations for designing of buildings so as to afford a reasonable degree of safety both to the occupants and to passers-by in the event of earthquake. The Code contains in addition of designing the buildings certain other instructions to minimize the chances of complete destructions. A specific method for obtaining building permits was formulated and there were plans and specifications of different types of buildings. There was specially a system of inspection of the buildings, and there was also a provision that every building shall have its parts tied together in such a manner that the structure will act as a unit. In short it was a complete code which has been devised keeping in view the fact that this town is built on a highly seismic zone. With the passage of time other laws, Rules, Ordinances etc. were promulgated but the Building Code was never repealed. The petitioners argued that in recent past the builders have altogether ignored this Code and have successfully manipulated to erect multi-storeyed buildings in the town having no regards to the safety of passers-by or occupants of the buildings. Some of multi-storeyed buildings are nothing more than standing graves or cages to trap human lives in case there is any earthquake because there is no open space left in the design of buildings where the citizens take shelter in case of earthquake. The petitioners explained that certain officers out of sheer greed raised no objection. So

much so that Chairman of so-called “Board” formed for inspection of buildings himself got a multi-storeyed buildings constructed having no regard for the Building Code.

Mr. Basharatullah appearing on behalf of petitioners divulged the historical background of different laws applicable to Quetta Municipal Corporation. While giving the history, the counsel submitted that in 1896 Quetta Municipal Laws were enacted. The Quetta Municipal Laws, 1896 was repealed by Quetta Municipal Laws of 1946. Similarly Federal Government promulgated Municipal Administration Ordinance IX of 1960. Thereafter Ordinance I of 1972 known as Balochistan People’s Local Government Ordinance, 1972 was promulgated followed by Balochistan Local Government Act, 1975. Subsequent thereto Balochistan Local Government Ordinance, 1979 and then Balochistan Local Government Ordinance II of 1980 have been made applicable.

Attending to Building Control laws the learned counsel submitted that besides the Building Code, Balochistan Building Control Ordinance, 1979 was framed which, however, could not be made applicable as it contained provision that the same shall take effect only from the date when notification is issued. However, main argument was that with this background of laws the Building Code was saved throughout. So much so that at one time the Government though to devise Quetta Master plan which also contains provision in consonance with the Building Code.

According to Mr. Basharatullah the builders have to file an application seeking permission and then the plans shall have to be submitted to Quetta Municipal Corporation. This would be scrutinized and every building shall have to be constructed in accordance with the provisions of Building Code in order to avoid any disaster on account of any future earthquake.

Mr. Faez Qazi proposed that Quetta city ought to be horizontally expanded and not vertically developed. According to him, construction of multi-storeyed buildings means nothing but expansion of Quetta city vertically. In fact, instantaneously, it may fulfil residential requirements of mushroom population growth. But ultimately it would be responsible for the total destruction and devastation of the entire population. It was argued that personal and individual benefits of builders must be subservient to the safety of lives of millions of citizens.

Learned Additional Advocate-General, Balochistan argued that the Government of Balochistan promulgated Ordinance known as 'Balochistan Building Control Ordinance, 1979'. According to section 2 of the said Ordinance the same shall be effective only from the date specified in the notification. But no notification was ever issued. Thus the said Ordinance is not operative. Besides, he made distinction between Building Code and Building Control Ordinance, 1979 saying that the former is a specific law for Quetta; whereas the later is a law for the entire Province and not specific for Quetta which is situated on a highly sensitive earthquake zone. He, therefore, supported the petitioners’ plea that Building Code is still in vogue and applicable for building in Quetta Town and it is the only law which is operational and regulating construction of private buildings. He, therefore, did not oppose if the prayer made in petition is granted to such extent by the Court.

However, the above contentions were emphatically opposed by respondents' counsel Mr. Tariq Mehmood. He firstly challenged maintainability of this petition on the ground that prayer is vague and in general terms involving several buildings, but builders not being party, therefore, the same cannot be granted. According to Mr. Tariq Building Code is no more applicable. He made an attempt to meet the arguments of Mr. Basharatulla according to whom in all the laws there has been a saving clause as regards application of Building Code. Mr. Tariq submitted that such saving clause could provide immunity to the Building Code only if there has been no inconsistency between the present laws and the old law. While reading from the provisions of different laws Mr. Tariq argued that as there are inconsistencies and differences in similar provisions, therefore, law which is subsequent and is in existence shall supersede provisions of old law which shall be deemed to have been repealed. In order to fortify his point of view he invited our attention to 1982 SCMR 522 and 1995 SCMR 362.

Besides, he argued that the Government was conscious about the sensitivity of the area to earthquake and therefore, it constituted a 'Technical Committee'. The role assigned to the Committee was to examine suitability of such buildings and plans. In order to do the job, the 'Technical Committee' visited the site of respondents building and after inspection approved construction of said building. The counsel canvassed that this Technical Committee comprised of highly qualified Engineers, therefore, it cannot be questioned that such building in future shall be dangerous to human lives in case of earthquake. The counsel praised the technical know-how of the members and also highlighted the advanced Engineering Technology saying that the old days are gone when the buildings were used to be built without following the ratio of cement, iron bars etc.

It was also argued by the learned counsel that the petitioners voluntarily sold major portion of the land to respondents, therefore, now petitioners have no *locus standi* to challenge construction of building on the ground of privacy. The counsel further submitted that on the same road in the near vicinity another multi-storeyed building which is ostensibly used as Hotel has been constructed and respondents' multi-storeyed building provides a shelter to privacy of petitioners.

The counsel invited our attention to a number of photographs of multi-storeyed buildings constructed on different roads of Quetta Town and submitted that it would be harsh if all such buildings are not demolished and only orders regarding respondents' building are passed because no body has ever filed any complaint on construction of such multi-storeyed buildings.

We have given our anxious consideration to the arguments so advanced. It may be observed that this case has a unique feature which involves question of construction of multi-storeyed buildings in Quetta Town which admittedly is situated on a sensitive earthquake zone. We have been reminded that in 1935 as many as 60,000 people were killed in earthquake. Thereafter the then authorities pondered over the situation and promulgated Building Code. It was decided that no private building shall be constructed in Quetta Town as against the provisions of Building Code. Different specifications and classes of building with specified material to be used in each type of building have been mentioned. A procedure has been laid down how such buildings are constructed and that

no building shall be constructed without a certificate issued by Municipal Engineer. It is clearly laid down in rule 44 of the Building Code of Type I that the height of buildings of this class must not exceed 30 feet from the ground floor to the top of the roof in case of buildings having a flat reinforced concrete roof or 28 feet from the ground floor to caves in the case of buildings having a pent roof subject always conformity ...with the building angle as defined in Rule 48. Before proceeding further the first question which requires consideration is whether the Building Code for Quetta Municipal Corporation has been impliedly repealed and substituted by any other law or in the alternate the same is still effective and operative. In this regard we have to take into consideration different laws as pointed out by counsel for the parties. This Building Code was formulated after the Quetta earthquake of 1935, therefore, the laws subsequent thereto shall be relevant for the purpose of disposal of this petition and questions raised therein.

Mr. Faez Qazi argued that there has been no objection that Quetta Building Code is no more applicable; therefore, the Court may presume that the same is still effective. In this regard he argued that private respondents submitted their application under the Building Code, 1937 and they obtained permission from Quetta Municipal Corporation in accordance with Building Code. But since private respondents wanted to construct building against the provisions of Building Code, therefore, instead of Engineer of Quetta Municipal Corporation they managed constitution of a 'Technical Committee' which in fact, has no legal sanction behind it. It was emphatically urged that in presence of Quetta Building Code, there was no need at all for constitution of a Technical 'Committee' by the Chairman of Board. The Committee instead of following the provisions of Building Code, for ulterior motives allowed construction of multi-storeyed building so much so that allegedly Chairman of the Board is a co-sharer in a multi-storeyed building at Jinnah Road, Quetta.

The petitioner's counsel Mr. Basharatullah argued that under section 194 of Quetta Municipal Law, 1946 earlier law of 1896 was repealed. But there was a saving clause which protected Building Code. Section 194 is reproduced as under: ....

> "194 Repeal and saving ...The Quetta Municipal Law, 1896 is hereby repealed.
>
> Provided that, the Municipality constituted, Committee established, limits defined, appointments rules, regulations, bye-laws and orders made, any Town Planning Scheme drawn up and sanctioned, notifications and notices issued, taxes, ceases, rates and fees imposed, or assessed, rates recovered, contracts entered into, suits instituted and all acts and things whatsoever done under the said law, shall, continue in force and operation and deemed to have been respectively constituted, established, defined, made, drawn up and sanctioned, issued, imposed or assessed, recovered, entered into, instituted and done under this law until superseded by appropriate action under this law."

Similarly when Federal Government promulgated Municipal Administration Ordinance, 1960 the same repealed Municipal Law of 1946 by virtue of section 4 of the said Ordinance. Subsection (2) of section 4 however, again saved earlier laws including Building Code in the following terms: ....

"(2) Where an enactment stands repealed under subsection (1), any appointment, rule regulation, or bye-law made, notification, order or notice issued, tax imposed or assessed, contract entered into, suit instituted or action taken under such enactment shall, so far as it is not inconsistent with the provisions of this Ordinance and the rules, be deemed to have been respectively made, issued, imposed or assessed, entered into, instituted or taken under this Ordinance."

Likewise when Ordinance 1 of 1972 known as Balochistan People's Local Government Ordinance, 1972 was in similar terms, under section 3 (2), the Rules, regulations, scheme or bye-laws made were protected until superseded under the said Ordinance. The Government of Balochistan then promulgated Balochistan Local Government Act, 1975 which again provided a saving clause in exact terms as stated in the preceding laws. Exactly in the same terms Balochistan Local Government Ordinance, 1979 also provided under section 4 an identical provision of saving. Subsequently Ordinance II of 1980 was issued whereby section 4 was introduced providing for repeal and savings in particular. The British Balochistan Bazar Fund Regulation, 1910 in respect of Rural Councils and Town Committees, and Balochistan Local Government Ordinance, 1979 were repealed but rules, regulations, or bye-laws were saved in almost identical terms.

From the survey of above laws it becomes abundantly clear that the legislature intended to protect the rules, regulations, scheme, bye-laws. But Mr. Tariq Mehmood contended that this saving clause provide immunity only if there is no inconsistency or difference of laws, rules, regulations with the provisions of subsequent laws. He referred to 1982 SCMR 522. We have gone through the said case in which a contention was raised that a rule made under statute cannot override or prevail upon provisions of parent statue. In case of inconsistency between a rule and statute the same must be reconciled. The provisions of parent statute prevail only if conflict is incapable of being resolved. In this ratio the word market and agreements of sale as well as other items were discussed and it was held that Rule 4 was not inconsistent with the same words used in Fifth Schedule to Order, rule 4 was held *intra vires* of the main statute.

Applying the ratio of this judgment we have to see whether there was any inconsistency of similar provisions in laws, regulations, bye-laws promulgated-subsequent to Building Code 1937. Our attention was drawn to Chapter VI, section 77 of Municipal Administration Ordinance, 1960 which deals with erection and re-erection of buildings. We have carefully examined section 77 (2) of the Ordinance which reads as under: .....

"77. Erection and re-erection of Buildings : ... (1) .....

(2) A person intending to erect or re-erect a building shall apply for sanction in the manner provided in the bye-laws, and shall pay such fees as may be levied by the Municipal Committee with the previous sanction of the Controlling Authority."

This section is to be read with section 121 of the Ordinance which prescribes power to make rules. Both those sections are to be read with item 37 of the Fourth Schedule as regards buildings control and reads as under : ....

"Fourth Schedule:

37. Building Control .... The manner in which a Municipal Committee shall exercise control and regulate the erection and re-erection of buildings in a municipality."

From these provisions Mr. Tariq Mehmood, attempted to argue that since under section 77 of the said Ordinance a different mode has been prescribed, therefore, the saving clause will not provide any immunity to the Building Code in view of the ratio of the aforementioned judgment of the Supreme Court. We have perused section 77 minutely and we have also reproduced subsection (2) which lays down that a person shall apply for sanction in the manner provided in the bye-laws, all such applications shall be registered in the manner provided under bye-laws, all such applications shall be registered in the manner provided under bye-laws. It also provides that a Municipal Committee may for reasons to be stated in writing reject a site plan or a building plan. The counsel failed to produce before us whether any bye-laws except Building Code has been promulgated by the Federal Government or Provincial Government the provisions of which are different than the Building Code. Therefore it is not easy to say that the Building Code has not been saved on the ratio of the judgment stated herein above. The provisions as mentioned in section 77 are not in conflict or inconsistent with the Building Code.

We have also perused section 50 of Balochistan Local Government Ordinance, 1980 which has prescribed the functions of a local council. But again section 50 (2) clearly lays down that a local council may, subject to Chapter XI and to rules, regulations and through its bye-laws and if the Government so directs shall subject to allocation of funds undertake all or any of the functions enumerated in Fifth Schedule. Items Nos. 24 and 25 of Fifth Schedule are regarding Building Control. But again no bye-laws have been placed before us different from Building Code for erection or re-erection of Building in Quetta Town.

From the above discussion we have come to the conclusion that since all the bye-laws, rules and regulations have been saved continuously in all subsequent legislation and no rules, bye-laws have been framed which could be substituted for Building Code, therefore, this argument of respondents' counsel that there has been inconsistency in the provisions of subsequent laws with Building Code is devoid of force.

Another argument raised was that the Government of Balochistan promulgated Ordinance VI of 1979 known as Balochistan Buildings Control Ordinance, 1979. Section 2 of said Ordinance declares that nothing contained in any other law for the time being in force shall apply to any matter regulated by this Ordinance. But subsection (2) of section 1 of this Ordinance has made it clear that it shall come into force from such date and in such areas as Government may, by notification, specify. The admitted position is that the Government has not notified the date and the areas to be covered by the said Ordinance, therefore, it has no applications as such.

However, it is interesting to note that Ordinance X of 1960 (Municipal Administration Ordinance, 1960) provides for Master Plan or Town Planning. Section 74 of the said Ordinance reads as under: ....

"74. Master Plan. ... A Municipal Committee may, and if so required by the Controlling Authority shall, draw up a Master Plan for municipality which shall, among other matters, provide for...

(a) a survey of the municipality including its history, statistics, public services and other prescribed particulars;

(b) development, expansion, and improvement of any area within the municipality;

(c) restrictions, regulations and prohibitions to be imposed with regard to the development of sites, and the erection and re-erection of buildings within the municipality."

In pursuance whereof the Government of Balochistan in fact has made a Master Plan and the petitioner has reproduced the relevant excerpts of the Master plan in the petition which reads as under : ...

"The historical as well as the instrumentally recorded data since 1905 indicate that all severe earthquakes are located within 240 kms radius of Quetta. About 15 earthquakes between 1852 and 1935 are known to have occurred in Balochistan which were strong enough to cause damage to structures. Some of the destructive earthquakes have been related to know active faults. (Quetta Master Plan at page 10).

Field observations and association of the 1935 earthquake suggest that this is an active fault capable of producing a major earthquake and presents the most critical seismic risk consideration to Quetta. (Quetta Master Plan at pages 10 and 11).

...The whole of Quetta Valley is either situated in a very high seismic zone or a high seismic zone indicating that the city is not ideally located and peril prevails all over the valley like a dark clouds. (Quetta Master Plan at page 148).

Quetta Valley lies within an active seismic region which has experienced several destructive earthquakes in the past resulting in immense loss of life and property. The proximity of faults and peculiar regional tectonics render this area prone to high seismic activity in the future." (Quetta Master Plan at page 194).

This report or Master Plan is consistent with Building Code. It has been observed that about 15 earthquakes between 1852 and 1935 were known to have occurred in Balochistan which were strong enough to cause damage to structures. It has further been observed that whole of Quetta Valley is either situated in a very high seismic zone or a high seismic zone indicating that the city is not ideally located and peril prevails all over the valley like a dark cloud.

From above observations irresistible conclusion would be that Government of Balochistan never repealed Building Code through any Ordinance or legislation or rules. So much so that Building Code for Quetta Municipality was amended on 28th of September 1986 vide Gazette Notification No. 6-225/81 (PLGB) AO. III, dated 14.9.1986. What is important in this amendment is that after Clause 8 of the Building Code some new provisions were enacted but much more important is the fact that this power has been exercised under subsection (2) of section 50 read with clauses 24 and 25 of Fifth Schedule of compulsory functions of Local Government Ordinance, 1980

(Ordinance II of 1980). This is a complete answer to the arguments of Mr. Tariq Mehmood that by such Ordinance different provisions have been introduced which are inconsistent with the Building Code. On the other hand the Government has never framed any bye-laws or regulations because Building Code was there and it was only amended in 1986. In such circumstances it is not fair on the part of private respondents to say that Building Code has been repealed or the same is deemed to have been repealed by changes or inconsistency in subsequent legislation. The Government of Balochistan was very much conscious of this fact that Building Code is in existence, effective and operative, therefore, when Master Plan was ordered under section 74 of Municipal Administration Ordinance, the same also was in line with Building Code.

We, therefore, unhesitatingly hold that the Building Code is still operative to regulate construction of buildings in Quetta Valley in the area of Quetta Municipal Corporation.

Mr. Tariq Mehmood, however, contended that this petition is not maintainable because no writ can be issued to redress an individual injury. Reliance was placed on PLD 1992 Karachi-54. We have carefully perused the said judgment. While discussing "public interest litigation" it was observed that public interest litigation can be initiated for judicial redress for public injury by a person not personally hurt. This principle would not apply where an association or organisation or a registered society seeks to enforce a personal right or private right of another, as distinguished from public injury. We are fully confident that the ratio renders no help to the respondents because in the same judgment it has been specifically observed that whenever the conscience of the Court was shocked on account of action or inaction on the part of the Federation or Province, the Court would exercise its jurisdiction under Article 199 of the Constitution. It has been similarly observed that an aggrieved person within the meaning of Article 199 of the Constitution would not necessarily mean a person having a strict legal right. Even a person who was deprived of benefit, privilege etc. by an illegal act or omission, could be considered as an aggrieved person. In the instant case the petitioners have invoked Constitutional jurisdiction seeking direction from the Court to order respondents not to allow any construction of private buildings in Quetta Town as against the provisions of Building Code as it would be detrimental to the precious lives of inhabitants of Quetta Town. Thus we do not see any force in the contention raised by Mr. Tariq Mehmood.

Another point raised was that question of facts are involved which require thorough probe as regards easement rights of the petitioners are concerned. It was contended whether on account of the building constructed on the site the air, light or right of privacy was at all affected. The counsel argued that this requires recording of evidence. He relied on 1991 MLD 1112. It was further argued that it is only the Civil Court which is competent to decide all such issues.

As far as prayer in the present Constitutional petition is concerned, we do not consider that any controversial question of fact is involved as regards construction of buildings and provisions of Building Code because we are not inclined to consider question of privacy in this petition which of course is the domain of Civil Court under Easements Act but we proceed to determine the question whether multi-storeyed buildings so constructed are in accordance with the Building Code or Master Plan or not? This question we have already discussed in detail and we have drawn conclusions that keeping

in view the past history of the town and chain of legislation on the point, the Building Code is still intact and operative which regulate construction of private buildings in Municipal Area of Quetta Town. We have also quoted Rule 44 and amendment of the same, according to which the height of the building must not exceed 30 feet from the ground floor to the top of the roof in case of building having a flat reinforced concrete roof. This question does not require any further probe.

We appreciate that petitioners have come before the Court to invoke Constitutional jurisdiction of this Court as regards the dangerous situation which has arisen due to construction of multi-storeyed buildings in Quetta Town without observing provisions of Building Code, thus putting into peril the lives of inhabitants and passers-by. The entire population of Quetta cannot be allowed to be put in danger for the benefit of few builders who are constructing plazas and multi-storeyed buildings as against provisions of Building Code, 1937. We may reiterate that Government of Balochistan constituted a high-level Board vide Notification No. SOI(LG) 5-5/93 dated 4th December, 1993 to check the mushroom growth of commercial plazas/building in the city limit and Quetta District excluding Panjpai. This exercise though devised for noble cause of checking Mushroom growth of such commercial plazas/buildings but unfortunately the process of such construction accelerated to the utter dismay of citizens. Secondly there is no legal sanction or authority under which the said Board has been constituted. In fact the Building Code holds the field and during its existence such an action is otherwise illegal. As far as practical aspect is concerned, from the evidence quoted by the respondents, it is prima facie proved that not only one but several multi-storeyed buildings have been constructed. Thus the Board has been totally ineffective to check mushroom growth of multi-storeyed buildings. We are at pains to note, provided the allegations of petitioners are correct, that even the Chairman of the Board has got share in one of the multi-storeyed buildings at Jinnah Road, Quetta. The population of Quetta, if constructions of such buildings are allowed, shall be put to the threshold of horrible destruction in case, God forbid, any earthquake of high grade jolts the Town. In such circumstances we are inclined to hold that the petitioners have rightly approached this Court.

The next question would be, what sort of relief can be granted to the petitioners. The prayer of the petitioners is reproduced hereunder: ....

> "It is, therefore, prayed that this Hon'ble Court may be graciously pleased to:
>
> (i) Direct the respondent No. 1 to demolish the illegal construction raised on plot bearing Khasra No. 238/140-141/142-143, situated at Zarghoon (Lytton) Road, Quetta and take all necessary measures to ensure that no further illegal construction activity is carried on thereon:
>
> (ii) Direct the respondents Nos. 1 to 4 to strictly enforce the provisions of the Building Code, and particularly ensure that no building is constructed of a height and covering an area greater than as stipulated therein;
>
> (iii) Direct the respondents Nos 1. to 4 to take immediate and effective step for the implementation of the Quetta Master Plan, particularly provisions therein in respect of parks, open spaces and ensuring the horizontal growth of Quetta and to desist from taking any step which would deplete the available open spaces, parks or encourage the vertical growth of Quetta;

(iv) Declare that the document entitled 'Inspection Report' issued by the 'Technical Committee' constituted by the Chairman of the Building Control Board and any permission/approval/recommendation issued there under is *ultra vires,* illegal, void *ab initio* and of no legal effect ;

(v) (a) Direct respondents Nos. 5 and 6 to stop all construction activity being carried out by them, their agents, engineers, architects, servants on plot bearing Khasra No. 238/140-141/142-143, situated at Zarghoon (Lytton) Road, Quetta; or alternatively.

(b) Direct respondents Nos. 5 and 6 not to construct more than a maximum of two storeys (ground plus one floor), leave a minimum of 60% of the total site area open and un-built, ensure that privacy and comfort of the neighbours is not interfered with and comply with all provisions of the Building Code in respect of any building/construction that they, their agents, engineers, architects, servants or successors may decide to raise on plot bearing Khasra No. 238/140-141/142-143, situated at Zarghoon (Lytton) Road, Quetta.

(vi) Any other, further and/or better relief that this Hon'ble Court may be pleased to grant in the facts and circumstances of the case;

(vii) Exemplary costs may be awarded against each of the respondents separately."

Learned Additional Advocate-General appearing for the Government of Balochistan acceded to prayers (ii) and (iii) that official respondents be directed to strictly enforce the provisions of Building Code and particularly ensure that no building is constructed against the provisions of Building Code and secondly that immediate steps be taken for implementation of Quetta Master Plan. However, he opposed the first prayer.

Besides the building of private respondents 5 and 6 we may categorize for the purpose of disposal of this petition the multi-storeyed buildings as under act: ...

(1) Multi-storeyed buildings already constructed in the Town;

(2) Multi-storeyed buildings which are under process of construction;

(3) Multi-storeyed buildings which are planned to be constructed in future but no construction work has started so far.

As regards category (1) it is difficult to order demolition of the same at this sage, firstly because such buildings have already been completed. Secondly the builders/owners of such buildings are not party before us, therefore, no orders can be passed against their interest, in their absence and without hearing them. Despite objection raised by Mr. Tariq Mehmood in this regard the petitioners did not implead builders/owners of such multi-storeyed buildings already constructed in Quetta City. Therefore, we are not inclined to issue any direction with regard to such multi-storeyed buildings.

As regards category (2) although the position of such buildings is similar to category No. 1 but since such buildings are in the process of construction, therefore, we direct the Chief Secretary, Government of Balochistan to issue directions of Administrator, Quetta Municipal Corporation to find out the total number of under-construction multi-storeyed buildings in Quetta Town and to issue notices to the owners/builders, and after

opportunity of hearing to them, order such amendment/alteration at the building plans, which commensurate with the Building Code particularly as far as height of the building is concerned, no concession shall be given to the builders. However, they shall be allowed to otherwise complete the building to the level of height already raised. We expect that the discretion shall not be exercised as against the Building Code and strict vigilance shall be required not to allow any builder to raise the height of buildings beyond limit prescribed under Building Code. The Administrator shall report number of such under-construction multi-storeyed buildings within two weeks of passing of this order to the Chief Secretary, so that such builders who have plans to construct multi-storeyed building but so far have not started construction work, may not take undue benefit of this order.

As far as category (3) is concerned, we hereby direct respondents Nos. 1 to 4 not to allow construction of any multi-storeyed building in future within local limits of Quetta City as against the provisions of Building Code, 1937.

It will be appreciated, subject to availability of funds, if the official respondents implement Quetta Master Plan particularly provisions therein in respect of parks, open spaces and ensuring horizontal growth of Quetta and in order to meet the residential requirements of the inhabitants vertical growth of the Town, be adopted.

As regards construction raised on plot bearing Khasra No. 238/140-141/142-143 situated at Zarghoon Road, Quetta the same is admittedly not, constructed on a commercial area but on a residential area i.e. Zarghoon Road, Quetta where the Governor's House and Chief Minister's House besides the Ministers houses are situated. According to Mr. Faez Qazi the builders submitted two plans in order to deceive the authorities that this building shall be used for residential purposes although in fact it is designed to be used as a commercial unit.

We have been informed that during pendency of the petition the builders have completed construction of infrastructure of the building and it will be very difficult to order demolition of the same at this stage, because it will be discriminatory to direct demolition of this building alone out of all. However, we make it clear that the respondents shall not use this building for any commercial purpose because Zarghoon Road is not a commercial area. However, this building shall be used only as residential flats. In this regard we direct the Municipal Engineer to take all necessary steps to ensure that building is safe and take such further steps as to ensure that the building is used for residential purposes alone.

The upshot of the above discussion would be that we allow this petition in the aforesaid terms with clear directions that the Building Code is applicable, effective and operative and official respondents shall strictly enforce the provisions of Building Code and ensure that no building in future shall be constructed in the area of Quetta Municipal Corporation against the provisions of the Building Code.

There shall be no orders as to costs.

Order accordingly.

Tanvir Arif v. Federation of Pakistan
1999 CLC 981 [Karachi]
Constitutional Petition Nos. D-25 and D-26 of 1993, heard on 12th August, 1998
S. Saeed Ashhad and S. Ahmed Sarwana, JJ.

Sindh Wildlife Protection Ordinance (V of 1972)-J

Ss. 2 (j), 7 & 17-Constitution of Pakistan (1973), Art. 199-Constitutional petition-Hunting of protected animals-Chief of Protocol, Ministry of Foreign Affairs, addressed letter to provincial Chief Secretary Informing him that area mentioned in letter had been allocated to a dignitary of United Arab Emirates for bunting "Houbara Bustards" during relevant hunting season-Said letter had been challenged by petitioner in Constitutional petition being violative of S. 7 of Sindh Wildlife Protection Ordinance, 1972-"Houbara Bustards had been declared protected animals" under S. 2 (j) read with second schedule. of Sindh Wildlife Protection Ordinance, 1972 and hunting thereof had been made punishable under S. 17 of the said Ordinance High Court in its earlier Judgment had declared that licence granted by Authorities to foreign dignitary for hunting in contravention of aims, objectives spirit of Sindh Wildlife Protection Ordinance, 1972 and Authorities were directed to refrain from acting under said licence Said judgment of High Court, which held the field was, binding on all persons including respondents, but Authorities despite said judgment issued letter granting permission for hunting of "Houbara Bustards" which otherwise were protected animal-On assurance of Deputy Attorney General that in future Authorities would take care that orders of the Courts would be respected and obeyed in letter and spirit fully, High Court, while deprecating violation of in order by the concerned authorities in a very strong terms, refrained to take any action against them in the hope that such acts would not be repeated in future Period of licence whereby order granting hunting was granted, having since expired , Constitutional petition was disposed of as having become infructuous. [Pp. 982, 983] A, B & C.

JUDGMENT

S. AHMED SARWANA, J: Petitioners have filed these two petitions, inter alia seeking a declaration that the Letter No. P(3) 18-6-1992-93, written by Col (Rtd.) S.K. Tressler, Chief of Protocol, Ministry of Foreign Affairs, Islamabad, addressed to the Chief Secretary of Sindh informing him that the District Sanghar Minus game sanctuary has been allocated to Sheikh Muhammad Bin Khalid Al-Nahya, a dignitary of United Arab Emirates, for hunting Houbara Bustards during the hunting season 1992-93, is violative of Section 7 of the Sindh Wildlife Protection Ordinance, 1992 (hereinafter referred to as the "Ordinance", it has been issued without legal and lawful authority and, therefore, is void and of no legal effect. Petitioners have also prayed that a direction be issued to the Federation of Pakistan (respondent No-1), Government of Sindh through Secretary Department of Wildlife Sindh (respondent No-2) and the conservator (Wildlife),

Government of Sindh (respondent No-3) to perform their duty of protection and preservation of wildlife in Pakistan and particularly in respect of Houbara Bustards and restrain them from enforcing the Impugned Licence during the hunting season 1992-93.

On perusal of the provision of the ordinance, we find that all member of OTIDAE, i.e. all Bustards which include Houbara Bustards have been declared as "protected animals' under section 2(j) read with the Second Schedule of the Ordinance and hunting thereof has been made punishable under section 17 with imprisonment which may extend to two years or with fine which may extend to one thousand rupees, or with both. Mr. Kamil Sheikh learned Counsel for the petitioners has drawn our attention to Annexure "F" of the petition which is a copy of the judgment dated-16-8-1992 in Constitution Petition No. 1403 of 1991 filed by the Society for Conservation and protection of Environment seeking similar relief for the conservation and protection of all Bustards. A learned Bench of this Court after a thorough examination of the relevant law allowed the said Constitution petition by Judgment, dated 16-8-1992 and the licence granted by the Secretary, Agriculture and Wildlife Department, Government of Sindh under the title "Hunting by Dignitaries from Dubai" to Naseer Abdulla Hussain Lotah, Director in the office of the Prime Minister of UAE and Ruler of Dubai for the area of Thatta Director excluding wildlife sanctuary and National Park Area for hunting purposes and training of falcons for the years 1991 to 1995 was declared to have been issued" in clear contravention of the aims, objectives, spirit and even the letter of Sindh Wildlife Protection Ordinance, 1972' and the Federation of Pakistan, Ministry of Foreign Affairs, Government of Sindh and Conservator (Wildlife) etc. were directed to refrain from acting under the said Circular/Licence for the purpose of training of falcons or for hunting. Mr. Naeemur Rehman, leaned Deputy Attorney General did not controvert this judgment. It is, therefore, obvious that the said judgment holds the field and is binding on all the persons in general and the respondents in particular.

We regret to note that in spite of the aforesaid clear judgment the Respondents issued the impugned letter dated 11-10-1992 granting permission for hunting of Houbara Bustards for the hunting season 1992 to 1993. As responsible officers of the Government it was their duty to uphold the law and the judgment of this Court. It is needless to emphasize that Pakistan is an Islamic State where all persons are equal in the eyes of law and no person including the Caliph is above the law. It is the duty of every member of a Muslim society obeys to all laws and ensures that all laws are implemented fully and without any discrimination. This principle of obedience to law and equality before law was preached, practiced and finally declared by the Holy Prophet (p.b.u.h) in the Khutba-e-Hajatul Wida. These principles have also been incorporated in the Constitution of the Islamic Republic of Pakistan, 1973 and are binding on every citizen and person resident or presents, in Pakistan. It is hoped that in future while granting any permission or exemption to any person the concerned authorities shall keep this principle in mind so

that a true Islamic society based upon the principles laid down in the Holy Qur-an and Sunnah of the Holy Prophet (p.b.u.h.) is established in this country.

The learned Deputy Attorney General has pointed out that the impugned order granting hunting permission to the dignity of United Arab Emirates was for the hunting season 1992-93 which period has expired and the petitions have become infructuous. On perusal of the record of these petitions, we find that they were filed on 5-1-1993, admitted on 7-1-1993 and have been coming up for regular hearing in Court since then. It is unfortunate that counsel did not draw the attention of the Court to the importance and urgency of the matter and the fact that the judgment dated-16-8-1992 of this Court passed in Constitutional Petition No. D-1403 of 1991 was being defied by the respondents. This is a very serious matter. The Deputy Attorney-General explained that the licence was issued by the respondents in ignorance of the order of this Court and assured that in future the respondents would take care that the orders of all Courts are respected and obeyed in letter and spirit fully. In view of the assurance given by the learned Deputy Attorney-General we do not propose to take any action against the respondents in the present case and expect that such acts would not be repeated in future.

As the period of the impugned licence has expired, we dispose of the petitions as having become infructuous with the above observations.

The office is directed to send a copy of this Judgement to the learned Deputy Attorney-General and Advocate-General, Sindh for onward transmission to the relevant authorities for future reference and guidance to act in accordance with law and protect and preserve the sacred environment.

Order accordingly.

M.D. Tahir, Advocate v. WAPDA through Chairman, WAPDA
2000 MLD 851 [Lahore]
Writ Petition No 16888 of 1998, decided on 6th December, 1999
Tassaduq Hussain Jilani, J.

Constitution of Pakistan (1973) - Art. 199 Constitutional Petition - Protection of environment - Contention by the petitioner was that protection of environment be made by plantation and a ban on the use of air-conditioners, refrigerators and deep-freezers be imposed – Validity - Federal Government was concerned about the issues and was making efforts within the available means to protect the environment and the Ozone layer - Oxygen was not depleted by air conditioners, refrigerators and deep-freezers, and the beneficial effect of such modern gadgets were much more than their adverse effects, if any - Use of such gadgets prima facie did not infringe

any fundamental right of the petitioner to warrant interference under Art. 199 of the constitution Petition being without merit was dismissed in limine. [P.825] A & B

Order

The petitioner who is an Advocate of this Court , through this constitutional petition, has sought a direction to respondents Nos. 3,4 and 6 plant trees in the country; to impose a ban on the air-conditioners; refrigerators and deep-freezers which according to him, are causing environmental pollution.

2. The parawise comment submitted by respondents Nos. 3 and 4 are to the effect that forestry is basically a Provincial subject; that the Federal Government, had, however, imposed a ban on commercial exploitation of forests for a period of two years from 1993 to 1995 which was further extended till 1997; that the air-conditioners and refrigerators do not suck oxygen and spread nitrogen and that the Government has been encouraging maximum plantation through the Provincial Government and is making every effort to protect this Ozone layer in terms of the Montreal Protocol.

3. Having gone through the comments, I am of the view that the Federal Government is indeed concerned about the issues which have been highlighted through this petition and is making efforts within the available means to protect the environment and the Ozone layer. So far as contentions that air-conditioners and refrigerators and depleting Oxygen is concerned the same has been controverted by the respondents and there is no scientific material and record to disagree with the stand taken on this issue in the comments. In any case, this aspect may require factual inquiry which exercise cannot be undertaken in a Constitutional petition.

4. For what has been discussed above, the writ petition in so far as relates to the direction for forestation is concerned, is disposed of with an observation that no further action is called for by this Court as the respondent-Government is itself keen to promote this. Coming to the question of band on the air conditions and refrigerators because they allegedly deplete oxygen, besides the allegation having been controverted by the respondents, the prayer loses sight of the beneficial effect of these modern gadgets which are much more than its adverse effect if any. This use prima facie does not infringe any fundamental right of the petitioner to warrant interference under Article 199 of the Constitution. I, therefore, see no merit in this petition which is dismissed in limine.

SRI LANKA

Environmental Foundation Limited v. The Attorney-General
S. C. Application No. 128/91; D/-11-12-1992
Supreme Court of Sri Lanka
G.P.S De Silva, C. J., K.M.M.B. Kulatunga J., P.Ramanathan J.

Application under Article 126 of Constitution-alleged infringement of fundamental rights under Articles 3, 11, 14(1) (g) and (h) read with Directive Principles of State Policy - blasting operations at quarry - damage to health and property and threat of serious injury to 2nd to 21st petitioners and other persons of the area-class action by 1st petitioner on behalf of unrepresented residents of the area - failure of 2nd to 5th respondents who were state officers and authorities to take action as empowered by law - settlement by mediation - times, frequency and strength of blasting to be regulated - appointment of Monitoring Committee.

The 2nd to 21st Petitioners were residents of the Nawimana and Weragampita villages in the South of Sri Lanka who claimed to be suffering serious injury to their physical and mental health and serious damage to their property and means of livelihood, as well as a constant threat to their safety as a result of large-scale blasting operations which had commenced in 1987 at a rock quarry close to their villages. The 1st Petitioner was a company limited by guarantee engaged in the protection of the environment through law and brought this section as a class action on behalf of all unrepresented residents of the area.

This quarry had been operated prior to 1987 by others without giving rise to complaint, but the Petitioners alleged that after the 6th Respondent (one Tilak Pathirana carrying on business as "The Southern Group") took over the quarry in 1987 the frequency and the scale of the blasting had increased considerably and included simultaneous blasting of several bore holes. They stated that as a result, pieces of rock 20 centimetres in length were projected onto their villages which were 300 metres away, posing a serious danger to life and property. In addition they complained of unbearable noise both from the blasting and from a stone-crusher which operated at the same time, as well as severe vibrations and thick smoke caused by the explosions.

Among the specific incidents alleged by the Petitioners were the falling of piece of rock weighing about 2 kilograms onto the roof to the 15th petitioner's house; respiratory problems caused to several Petitioners by the smoke; a miscarriage suffered by the 15th Petitioner which she attributed to the effects of the blasting; hearing problems due to the noise; children suffering from frequent headaches and dizziness as well as bad dreams; structural damage to the houses of the Petitioners caused by the vibrations; damage to the water table as a result of the deep bore holes dug by the quarry workers, causing the village wells to dry up; consequent inability to cultivate crops.

The Petitioners stated that despite their complaints the Government Agent, Matara, (2nd Respondent) had renewed the license for the quarry without giving the petitioners a

hearing and had also failed to regulate the blasting in any meaningful way which he had jurisdiction to do. The Petitioners claimed that the 3rd Respondent (the Superintendent of Police, Matara) had failed to exercise his powers to abate a public nuisance despite the Petitioners' complaints. The 4th Respondent (the Central Environmental Authority) was alleged to have failed to exercise its powers under the National Environmental Act No. 47 of 1980 as amended by At No. 56 of 1988 which provided for the licensing and regulation of the emission of pollutants into the environment. The operator of the quarry had not obtained a license from the CEA. The 5th Respondent (Director, Geological Survey Department) and the 7th Respondent (the Grama Sevaka of the area) were also alleged to have failed to take action which they were empowered to take under the law, despite repeated complaints from the Petitioners. The Petitioners claimed that the 6th Respondent, as the party who had benefited from the executive action or inaction of the other Respondents, should bear the financial cost of restoring to the Petitioners their physical quality of life.

The Petitioners claimed violation of their rights under the following provisions of the Constitution:

(1) Article 3: ".....sovereignty is in the people and is inalienable and includes fundamental rights".

(2) Article 11: "No person shall be subjected to torture or to cruel, inhuman or degrading treatment".

(3) Article 14(1) (g): "Every citizen is entitled to the freedom to engage ..... in any lawful occupation ".

(4) Article 14(1) (h): "Every citizen is entitled to the freedom of movement and of choosing his residence within Sri Lanka".

Following the institution of this action, officials of the Central Environmental Authority (CEA) together with scientific experts visited the site of the quarry, watched the operations and measured the vibrations and noise levels from the blasting. Thereafter a series of meeting were convened by the CEA with representatives of all the parties to work out a scheme for the regulation of the quarry. On 11 December 1992 Counsel informed Court that a settlement had been reached, the terms of which would be filed in Court, and moved to withdraw the application. The Court accordingly dismissed the application without costs.

The **terms of settlement** filed in Court were as follows:

We, the above parties, beg to bring to Your Lordship's notice that the parties to Supreme Court Application 128/91 have agreed to abide by the following conditions which have been laid down by the Chairman of the Central Environmental Authority in respect of the operation of the metal quarry at Nawimana. It is further agreed by the Petitioners that they will withdraw their application in view of the mediated settlement.

1. Number of blasting

1.1 Blasting to be conducted on 03 days of the week, namely, Monday, Wednesday and Friday.

1.2 However, in case there is a necessity to increase the number of blasting per week, i.e. exceeding the stipulated number of blasting at 1.1 above, approval of the Committee, mentioned at Item (11) below should be obtained.

2. Alternative Day for blasting

2.1 In the event the blasting could not be done on any one of the three days mentioned in 1.1 above, a blasting could be done on an alternative day, suitable to the 6th Respondent, during the same week or the following week, in consultation with the Committee, mentioned at Item (11) below.

2.2 However, 24 hours written notice of such intention should be given to the *Grama Niladharis*, who could put up written notices on the office notice boards.

2.3 Contingencies which could prevent a scheduled blasting will include bad weather, inability of the police to be present and such other like conditions beyond the control of the 6th Respondent.

3. Time for blasting

3.1 Blasting will be confined to the hours between 10.00 a.m. and 5.00 p.m. inclusive.

4. Time-space between blasting

4.1 There should be at least a time lapse of 20 seconds between each blasting. Simultaneous blasting is not permitted. Electronic detonators may be used with the approval of the Central Environmental Authority.

5. Depth of bore hole

5.1 The maximum depth of a bore hole should not exceed 8 feet.

6. Number of blasting per day

6.1 It is agreed not to stipulate the number of blasting per day.

7. Quantity and type of explosives

7.1 100 g dynamite and 300 g ammonium nitrate, provided however that the total quantity in any given bore hole should not exceed 350 g.

8. Method of blasting

8.1 Blasting will be done using the safety fuse method.

8.2 Use of Dyna-cord is subject to the approval of the Central Environmental Authority.

9. Report of the police officer

9.1 It is agreed that a monthly report containing the following information be maintained at the premises of the quarry by the 6th Respondent:

(a) Total quantity of explosives used.
(b) Depth of bore holes.
(c) Dates on which blasting were carried out.
(d) Commencement and close of blasting.
(e) Method used for blasting.
(f) Number of bore holes on each day.
(g) Complaints by petitioners, if any.

9.2 Item (c) of the report should be certified by the manager of the site.

9.3 The entirety of the report should be certified by the police officer/s in attendance during the blasting operations.

9.4 The report will be made available for reference by the Government Agent of the district or his authorized officer, and the Central Environmental Authority.

10. Secondary blasting

(a) Drilling will be manual or with the driller/compressor with a one inch drill (or equivalent in millimetres).
(b) Depth of bore hole not to exceed three (03) feet.
(c) Secondary blasting can continue only till 5.00 p.m. on the days of blasting.
(d) Diameter of a bore hole should not exceed one (01) inch.

11. Monitoring Committee

11.1 It is agreed that a Committee consisting of the following members be appointed to monitor the blasting operations:

(a) two (02) persons nominated from among the Petitioners and Intervening Petitioners nominated by the first Petitioner;
(b) two (02) persons from Southern Group Ltd;
(c) *Grama Niladhari* of the village of Nawimana;
(d) *Grama Niladhari* of the village of Weragampita;
(e) The Government Agent, Matara or an officer nominated by the Government Agent, Matara who shall be the Chairman of the Committee.

11.2 The Committee shall meet at least once in three (03) months.

11.3 The Committee shall decide on the procedure for the conduct of their business, subject to the terms and conditions given herein.

12. Operation of the crusher

12.1 A continuous wet process should be used for the crusher operation.

12.2 The CEA shall include a condition in the Environmental Protection License with respect to the construction of a sound barrier, within a time period of one (01) year.

13. Siren

13.1 The Siren should be sounded three (03) times before commencement and after completion of blasting operations.

14. Maximum noise and vibrations permissible

14.1 The following noise and vibration levels should be maintained at the perimeter of the quarry:

(a) Maximum air blast over pressure level – 105 DB;

(b) Ground vibration – Peak particle velocity below 5 mm/second; and

(c) Sound level – 5 DB.

Signed on the 10th day of December 1992.

S. C. Amarasinghe v. The Attorney-General and three others
Supreme Court of Sri Lanka
S.C. (Special) No. 6/92, D/-15-3-1993
Mark Fernando J., S.B. Goonewardena J., Priyantha Perera J.

Writs of certiorari and prohibition – order under section 2 of Urban Development Projects (Special Provisions) Act No. 2 of 1980 – land urgently required for urban development project – effect of order – whether Section 3 of the Act took away jurisdiction of the superior courts to grant remedies other than compensation or damages – interpretation of Section 7 of the Act – requirement for environmental impact assessment report under provisions of National Environmental Act No. 47 of 1980 as amended by Act No. 56 of 1988.

The Petitioners sought to quash an Order of the President dated 21.10.1992 made under Section 2 of the Urban Development Projects (Special Provisions) Act No. 2 of 1980 declaring that upon the recommendation of the Minister in charge of urban development he was of opinion that the lands described in the schedule to the order were urgently required for an urban development project. The Attorney-General, the Road Development Authority, the Central Environmental Authority and the Urban Development Authority were made respondents. It was common ground that the lands in question were to be acquired in connection with the construction of an "expressway" from Colombo to Katunayake with Japanese Government assistance.

The Petitioners contended that there had been a failure of natural justice as there had been no hearing prior to the recommendation and the opinion referred to in the order despite the fact that under Section 2 of the Act the urban development project had to be one "which would meet the just requirements of the general welfare of the people".

The Petitioners made two specific contentions with regard to the interpretation of the Urban Development Projects (Special Provisions) Act, namely that Section 3 took away the jurisdiction of the courts including the superior courts to grant any relief other than compensation or damages; and that in terms of Section 7 of the Act, once a Presidential

Order under Section 2 was made the State could without further formalities take possession of the land to which the order related by invoking the State Lands (Recovery of Possession) Act. The Petitioners submitted that in order to determine the character of an Order under Section 2 it was necessary to consider these consequences.

The Petitioners also cited Sections 23AA and 23BB of the National Environmental Act No. 47 of 1980 as amended by Act No. 56 of 1988 which require that approval for all "prescribed projects" should be obtained from the appropriate "project approving agency" which is first required to call for an "environmental impact assessment report" (EIA). They contended that the Presidential Order under Section 2 of the Urban Development Projects (Special Provisions) Act could not be made until the EIA had been prepared.

Held: (1) As the Order under Section 2 of the Urban Development Projects (Special Provisions) Act has of itself no adverse impact on a citizen's property, liberty or livelihood and does not deprive him of or affect title to or possession of property, a public hearing was not required at that stage.

(2) The available material did not indicate that the decision to build the expressway was unreasonable and therefore the Court would not interfere.

(3) Section 3 of the Urban Development Projects (Special Provisions) Act did not take away the powers of the superior courts which were enshrined in the Constitution itself.

(4) Section 7 of that act did not empower the State to take over privately owned land under the State Lands (Recovery of Possession) Act without first acquiring the land under the Land Acquisition Act.

(5) The provisions of Sections 23 AA and 23 BB of the National Environmental Act as amended were not applicable as no orders had yet been made listing any "prescribed projects". However the Central Environmental Authority had poser to call for an EIA in respect of any new project under Section 10(h) of the Act and the Court took note that the Respondents had given an undertaking that an EIA would be prepared and made available for public scrutiny for 30 days, which would be the appropriate stage at which to consider public representations on environmental factors.

Cases cited: **Hirdaramani v. Rathnavale** 75 N.L.R. 67
Visuvalingam v. Liyanage (1984) 2 Sri L.R. 123
Wickremabandu v. Herath (1990) 2 Sri L.R. 348
Weeraratne v. Colin Thome (1988) 2 Sri L.R. 151
Fernandopulle v. Minister of Lands and Agriculture 79 (2) N.L.R. 115

Fernando J.

On 21.10.92 the President made an Order ("P1") under Section 2 of the Urban Development Projects (Special Provisions) Act No. 2 of 1980.

> "By virtue of the powers vested in me under Section 2 of the Urban Development Projects (Special Provisions) Act, No. 2 of 1980, I, Ranasinghe Premadasa, President, upon the recommendation of the Minister in charge of the subject of Urban Development being of opinion that the lands specified in the Schedule hereto are urgently required for the purpose of carrying out an urban development project, do by this Order declare that the said lands are required for such purpose".

The Schedule to that Order referred to all the lands situated within several specified *Grama Seva Niladhari* Divisions, which fell within six different A. G. A's Divisions. The Petitioners are residents of, and owners of lands and buildings within the areas described in P1: they say that they are some among about 2,500 families affected by P1. They seek Certiorari to quash the Minister's recommendation referred to in P1, and the President's declaration contained in P1, as well as Prohibition to restrain the Road Development Authority (the 2nd Respondent) from taking steps to construct the Colombo-Katunayake expressway ("the expressway") connecting the Port of Colombo with the Katunayake International Airport along the route depicted in the Plan marked P2A. That expressway is the urban development project referred to in P1. The Order P1 having been made by the President, the Attorney General (in terms of Article 35(3) of the Constitution), has been made the 1st Respondent. The Central Environmental Authority established under the National Environmental Act, No.47 of 1980, and the Urban Development Authority established under the Urban Development Authority Law, No. 41 of 1978 have been made the 3rd and 4th Respondents, but no relief has been sought against them.

History of the Expressway Project

In 1982, at the request of the Government of Sri Lanka, the Government of Japan agreed to conduct a feasibility study in regard to the expressway, and entrusted that study to a Japanese Agency; that Agency, in its report made in January 1984 recommended the construction of an expressway to the east of the existing Colombo-Negombo road. The Petitioners have annexed ("P2") the contents pages of that report, and no more; although they say that "the said report was never made public nor was the public given free access to the same", they add that they "have gained access to parts of this report only very recently". They state that the report dealt with traffic surveys and projections, and included a project financial and economic evaluation, and contained "final route drawings" for the proposed expressway; but did not contain "a socio-economic analysis wherein data collected through field surveys, of the people affected by the proposed expressway was analyzed"; nor did the economic and financial evaluation consider or take into account the social and environmental costs involved in the construction of the expressway nor were fundamental alternatives to the proposed expressway considered ..... what was shown as alternatives were route alternatives which did not depart significantly from the pre-determined final alignment".

The Director, Special Projects, of the 2nd Respondent and the Chairman of the 4th Respondent, have sworn affidavits to the effect that the report was a feasibility study not intended for publication; that it contained a socio-economic analysis to arrive at traffic

projections for the future; that "four alternative routes were considered ... after careful field reconnaissance, collection of data and information, detailed study of the relevant conditions, including topography, sociology, land use and distribution of facilities"; that "the final alignment was not pre-determined but was chosen after considering the four alternatives"; that "social and environmental effects of the construction were considered in the evaluation of the project", and that the report was prepared under the guidelines set by an Advisory Committee which consisted of a large number of Sri Lanka Government officials and other experts (Whose names were set out in the report). Some extracts from the report were produced in support.

It is unfortunate that the entire report (running into about 200 pages), or at least more substantial extracts, were not produced. It was open to the petitioners to have asked for an order for production, if they had not had sufficient access to the report. From the contents pages (P2) it appears that the feasibility study covered *inter alia* "present transport conditions", "projection of traffic demand", "relationship of expressway and railway", "survey of alternative routes", "environmental consideration", "economic cost", "benefit calculation", "economic analysis", conclusions and recommendations. According to the extracts produced by the Respondents, the Chapter on "Environmental Consideration" considered *inter alia* "Physical indicators of assessment":

(a). Topography and geology
(b). Hydrology (drainage, floods)
(c). Meteorology (climate and weather)
(d). Traffic nuisances (noise, air pollution, vibration and other nuisances)
(e). Traffic accidents
(f). Construction nuisances

as well as social and economic indicators of assessment:

(g). Transport mobility and accessibility
(h). Land use potentiality
(i). Population distribution
(j). Tourism
(k). Regional spectacle
(l). Community cohesion
(m). Resident displacement
(n). Industrial and agricultural production
(o). Land price
(p). Prices of commodities.

It was for the Petitioners to substantiate their allegations that the report was defective; the available material neither indicated that the above factors were not adequately considered, nor suggests that there was any significant error.

On 3.5.91 the 2nd Respondent signed a consultancy agreement with the Japan Bridge Structure Institute Inc. ("JBSI") which was required to provide certain services, including the review and update of the previous feasibility study, the preparation of the detailed design, the carrying out of a comprehensive environmental impact assessment ("EIA") of the project, and the preparation of the implementation program and tender documents.

The 3rd Respondent issued the terms of reference ("P4") for the EIA. A note at the end of P4 refers to "a number of meetings" held to discuss the terms of reference, the outcome of which was reported at the Eighth Coordination Meeting for the project. The minutes of the Thirteenth Coordination Meeting held on 21.08.92 have been produced as ("4R4"), and from this it appears that a large number of Government agencies, including the 3rd Respondent, were represented on that committee; and EIA prepared by JBSI was considered at that meeting, at which it was confirmed that the Cabinet had approved the project and that the 2nd Respondent had been requested to go ahead with the work schedule.

Further-

> 'The General Manager stated that priority will have to be given to carry out the surveys and finding alternative accommodation for people who will be affected .....'
>
> 'The General Manager also requested the RDA to immediately commence work to peg the centre line and based on the centre line to define a corridor (the normal section required will be 100 m but expected borrow area will require extra land) for the Survey Department to commence the survey .....'
>
> 'The General Manger requested the UDA to look at the development plan in the area and in relation to this how settlement of families is going to take place and NHDA to do the infrastructure work ....'
>
> 'Acting Director (NRM) of the CEA stated that the Environmental Assessment Report prepared by the Consultants, which is due to open for a 30 days period of public comments lacks certain information. She was of the opinion that the report should be updated prior to making it available for public comments. She stated that:
>
> - The resettlement aspect has not been covered adequately.
>
> - How to deal with the various categories of people coming under this project and the assurance given will have to be incorporated in this report.
>
> The General Manager requested CEA to initiate a letter indicating their comments and inadequacies observed by them, and RDA will identify ways of dealing with the suggestions. The EAR will not be open for public comments pending these alterations.
>
> However, the General Manager stated that the Consultants may proceed with their work, pending the results of the EAR'.

By letter dated 4.9.92 (4R5') the 3rd Respondent sent to the 2nd Respondent the terms of reference ('4R5A') for resettlement aspects which had not been adequately addressed in the EIA, and called for a supplementary report. Those terms required a detailed study of the area affected by the development and the sites involved in resettlement of the people the major economic activities in the area, rehabilitation policy, land availability for relocation, and alternative sites for relocation.

The affidavit of the Director, special Projects, of the 2nd Respondent states.

> "From October to December, 1992, National Housing Development Authority carried out an enumeration of all the householders that would be affected by the expressway. It was reported that the first Petitioner has not co-operated with the enumerators and has refused to provide any information to them. It was the intention of the 2nd Respondent to hold meetings with affected parties and two meetings were held in December, 1992. More meetings are expected to be held. 3rd Respondent has examined the Environmental Assessment Report prepared in March, 1992, as part of Detail Engineering, and had recommended that human settlement aspects should be studied in further detail. This supplementary environmental impact assessment study has been entrusted to a firm of consultants and it is still under preparation. Once completed, the Report of this study will be submitted to 3rd Respondent for comments and if satisfactory, the report will be available for scrutiny by members of the public".

He, as well as the Chairman of the 4th Respondent, state that proceedings will be taken under the land Acquisition Act to acquire the required lands. The learned Deputy Solicitor General categorically assured us, in the course of his submissions, that the supplementary EIA would be submitted to the 3rd Respondent, and if found satisfactory, would be made available to the public; and that no action would be taken to obtain possession of the lands required (e.g. by means of an Order under Section 38, Provision (a) of the Land Acquisition) Act until the lapse of 30 after the EIA is made available for public scrutiny.

The Section 2 Order was published in the Gazette Extraordinary No. 738/4, of 26.10.92 and the Petitioners filed this application on 25.11.92. It was supported on 4.12.92, but fixed for hearing only for 21.01.93; although it was taken up for hearing on that day and concluded on 22.01.93, it was not possible, because many complex questions arose, to make our Order within the period of two months stipulated by Section 4 (2) of the Urban Development Projects (Special Provisions) Act.

Justifiability

Learned Counsel for the Petitioners submitted that although Section 2 referred to the President's "opinion" in subjective terms, it was nevertheless subject to review on the basis set out in **Hirdaramani v. Ratnavale, 75 N.L.R. 67, Visuvalingam v. Liyanage, (1984) 2 Sri L.R. 123, and Wickramabandu v. Herath, (1990) 2 Sri L.R. 348.** He did not contend that that opinion had not in fact been entertained by the President, or had been formed in bad faith, or was a mere pretence. His submission was that-

(a) there was a failure of Natural Justice, in that there had been no hearing prior to the recommendation and the opinion referred to in Section 2, and

(b) there has been an excess of jurisdiction and/or a failure to consider relevant material and/or that the President did not have adequate material on which he could properly have formed an opinion.

As the learned Deputy Solicitor-General did not contend that the Order was not justifiable, we do not have to consider that question.

Learned Counsel for the Petitioners contended that in order to determine the character of an Order under Section 2 it was necessary to consider its consequences : firstly, the ouster of jurisdiction effected by Sections 3 and 4, and secondly, the liability of an owner to summary deprivation of possession under Section 7.

A valid Order under Section 2 requires the following elements:

(1) a recommendation by the Minister (and it is common ground that the President was himself the Minister concerned);

(2) an opinion formed by the President-
   (i) in relation to an urban development project,
   (ii) that lands are required for the purposes of such project,
   (iii) that this requirement is urgent, and
   (iv) that such project would meet "the just requirements of the general welfare of the People".

Whether the expressway project is desirable, prudent or otherwise, undoubtedly it is an "urban development project", and it is clear that for the particular expressway that has been proposed, some parts of the lands, described in the schedule to the Order, are required. I need therefore to consider only the remaining elements.

It is convenient to reproduce here the relevant sections:

2. Where the President, upon a recommendation made by the Minister in charge of the subject of Urban Development, is of opinion that any particular land is, or lands in any area are, urgently required for the purpose of carrying out an urban development project which would meet the just requirements of the general welfare of the People, the President may, by Order published in the Gazette, declare that such lands is or lands in such area as may be specified, are required for such purpose.

3. No person aggrieved by an Order made or purported to have been made under Section 2 of this Act, or affected by or who apprehends that he would be affected by any act or any step taken or proposed to be taken under or purporting to be under this Act or under or purporting to be under any other written law, in or in relation to any particular land or any land in any area, shall be entitled-

   (a) To any remedy, redress or relief in any court other than by way of compensation or damages :

   (b) to a permanent or interim injunction, an enjoining or a stay order or any other order having the effect of staying restraining, or impeding any person, body or authority in respect of-
      (i) any acquisition of any such land or any land in such area;
      (ii) the carrying out of any work on any such land or in any land in any such area;
      (iii) the implementation of such project in any manner whatsoever.

4.(1) The jurisdiction conferred on the Court of Appeal by Article 140 of the Constitution shall, in relation to any particular land or any land in any area in respect of which an Order under or purporting to be under Section 2 of this Act has been made, be exercised by the Supreme Court and not by the Court of Appeal.

(2) Every (such) application .... shall be made within one month ... and the Supreme Court shall hear and finally dispose of such application within two months.

7(1) Where it becomes necessary for the Government or any person, body or authority, for the purpose of carrying out or assisting in the carrying out of an urban development project, to take possession of any particular land or any land in any area in respect of which an Order under or purporting to be under Section 2 of this Act has been published, it shall be lawful for the Government or any such person, body or authority, to take steps under the provisions of the State Lands (Recovery of Possession) Act, and accordingly-

(a) the expression "State land" as defined in such Act shall include any land vested in or belonging to any such person, body or authority is entitled to dispose of; and

(b) the expression "competent authority" shall include such person or the principal executive officer of such body or authority.

(2) Every application under the State Lands (Recovery of Possession) Act, in respect of any particular land or any land in any area in respect of which an Order under or purporting to be under Section 2 of this Act has been published, shall be finally disposed of within thirty days ... and the Court shall make all such orders as are necessary to ensure that all persons are ejected from that land within sixty days of the making of such application".

Ouster of Jurisdiction: Sections 3 and 4

It was contended on behalf of the Petitioners that Section 3 not only took away the jurisdiction of the District Court to grant declarations and injunctions in respect of an Order under Section 2, but even the jurisdiction of the Superior Courts; that "any court" included the Supreme Court. My observations in **Weeraratne v. Colin Thome**, (1988) 2 Sri L.R. 151, 167-169, were referred to: that the scope of the ouster provided for by Section 9 (2) of the Special Presidential Commissions Law, No. 7 of 1978, he was enlarged by Section 18 (A) 2 of the amending Act No. 4 of 1978 so as to preclude "any court"- and this would include the Supreme Court-from staying, suspending or prohibiting the holding of any proceeding". Those observations were only obiter, as the power of this Court to make an interim Order was not in issue. However, Law No. 7 of 1978 (and Section 9 (2) in particular) was pre-Constitution legislation which was kept in force by Article 168 (1), and the Bill in respect of Act No. 4 of 1978 was referred to this Court with a certificate that it was intended to be passed by the special majority required by Article 84, (and thus would have effect notwithstanding inconsistency with Article 140). Further, Section 18A (2) of that statute disclosed an intention to affect the jurisdiction conferred by Article 140, quite unlike Section 3 which is phrased in very different terms. Section 3 must therefore be interpreted, as far as possible, in a manner consistent with Article 1. If "any Court" in Section 3 (a) is interpreted as including the Supreme Court, the only relief which that provision permits would be compensation or

damages; that view would render Section 4 nugatory because Article 140 does not refer to those remedies. Clearly therefore Section 3(a) read with Section 4-quite apart from the constitutional question-was not intended to apply to the Superior Courts. Section 6 puts this beyond doubt, because "nothing contained in Section 3 .... shall affect the powers which the Supreme Court may otherwise lawfully exercise (under) Section 4 (1)" i.e. the jurisdiction (conferred by Article 140) and transferred by Section 4 (1) to the Supreme Court. The learned Deputy Solicitor General conceded that Section 3 did not affect the jurisdiction conferred by Article 140.

I hold that Section 3 does not affect the jurisdiction entrenched by Article 140, which has (in terms of the Final Amendment), been transferred to this Court by Section 4 (1).

Summary Deprivation of Possession: Section 7

Learned Counsel for the Petitioners submitted that Section 7 (i) empowers the Government, or any other person to obtain possession of any lands, in respect of which a Section 2 Order has been made, under the State Lands (Recovery of Possession) Act: a landowner could thus be summarily dispossessed at any time after a Section 2 Order. However, Section 7 merely authorized the Government or any other person "to take steps" under that Act. In view of the definition of "State land" at that time notices could have been issued under that Act only in respect of land of which the State was lawfully entitled or which may be disposed of by the State and lands under the control of certain specified authorities; and it was only a "competent authority" who could issue such notices and take other steps. The effect of Section 7 (i) was to enable a "person, body or authority" to take steps, even though not a "competent authority" and paragraph (a) was enacted in order to widen the description of "state land" to include "any land vested in or belonging to any such person, body or authority.", hence notices can be issued and possession obtained only after the lands referred to in the Section 2 Order became duly vested in the State or such other person, body or authority. The learned Deputy Solicitor-General agreed with this construction of Section 7, and submitted that possession could not be taken under that Act before the lands were vested by virtue of proceeding under the Land Acquisitions Act or other statutes.

A Section 2 Order thus does not have the drastic consequences suggested by learned Counsel for the Petitioners, and it is on that basis that the validity of the Section 2 Order has to be examined.

Minister's Recommendation

Learned Counsel for the Petitioners submitted that although the President was also the Minister concerned, there should nevertheless have been a recommendation, and that this should have been made after hearing the views of those affected by and/or opposed to the project; and also that the recommendation should have made reference to those views in order to enable the President to form an opinion after considering every aspect of the matter.

I hold that a hearing was not a pre-requisite for making a recommendation, for the same reasons which I have set out later in this judgment for holding that the President was entitled to form an opinion without a prior hearing. It is constitutionally permissible for

the President to refrain from assigning a particular subject or function to a Minister, whereupon it would remain in his charge (under Article 44 (2). I cannot interpret Section 2 as requiring the President to make a recommendation to himself, and thereafter to form an opinion upon the same matter; if his opinion was the same as his recommendation, the latter would be superfluous; and it is absurd to think that his opinion could have differed from his recommendation. I hold that the President was not legally required to make a recommendation to himself, and it was sufficient for him to form an opinion on the available material. The Order has been drafted with less than ordinary care and precision and mistakenly refers to a non-existent "recommendation of the Minister ....."; however, in the circumstance this is a superfluity which does not vitiate the Order.

Urgency

Urgency is always relative; sometimes action may be required within hours; for an enormous project, such as this expressway, urgency may be a matter of months or years. Considering that the project had been in contemplation at least from 1983, and had already been delayed for almost ten years, it is not unreasonable to consider, in the light of increases in population, traffic, economic activity, etc. that speedy implementation was imperative. I hold that the President's opinion as to urgency was not vitiated by an excess of jurisdiction or error of law; and that there was adequate material on which that opinion could have been formed.

Just Requirements of the General Welfare of the People

Learned Counsel for the Petitioners submitted that in forming an opinion that the expressway would meet the just requirements of the general welfare of the people the President was obliged-

(a) to give a hearing to the people likely to be affected by the project;
(b) to consider alternatives to the project;
(c) to consider environmental and socio-economic factors and
(d) to have regard to the large number of people affected and the need for their relocation.

The "People" referred to in Section 2 includes not only such "People" as may be affected by the project, but the "people" of Sri Lanka. The phrase under consideration is virtually identical to that occurring in Article 15 (7) of the Constitution. It must include the national interest in general. In any event, any supposed requirement of a hearing must apply also to those likely to benefit from the project. This hearing is obviously impractical, as some sort of a local referendum would be needed to ascertain the views of all those having a legitimate interest in the project. The Order has of itself, no adverse impact on the citizen's property, liberty or livelihood; it does not deprive him of or affect the title to, or possession of his property; his legal remedies under Article 140 are unimpaired; he is not subjected to any disadvantage whatsoever; and he will have an opportunity of submitting objections when steps are taken under Section 4 of the Land Acquisition Act. I am of the view that the Minister in making a recommendation, and the President when making an Order, under Section 2, are determining policy, based on evidence of a general character; there is no list. The obligation to give a hearing arises

only later, when objections are submitted, and when there is a list; at that stage evidence as to the local situation, and the effect on individuals, has to be adduced and weighed.

It is of course possible that land owners may be deprived of their rights submit objections if, instead of making an Order under Section 4, the relevant Minister makes an Order under Section 2 of the Land Acquisition Act, and soon thereafter an order under Section 38, proviso (a). However, in the present case the land that is actually required for the expressway (and therefore land the possession of which is urgently required) cannot be determined from the schedule to the Section 2 Order, since that schedule admittedly includes more land than needed. To determine what portions of land are required, it will be necessary to enter those lands, survey and take and mark levels, set out and mark the boundaries of the proposed expressway, and do other necessary acts. An Order under Section 2 of the Land Acquisition Act would be needed to do all this. It is only thereafter that the Minister would know which particular lands are required, and that possession must be taken urgently. The learned Deputy Solicitor-General concedes that an Order under Section 38, provision (a) can be challenged by Certiorari, as held in **Fernandopulle v. Minister of Lands and Agriculture (1978) 79 (2) N.L.R. 115.**

The extracts produced from the 1984 report show that alternatives were considered-not only the alternative routes but the railway as well. In the absence of other relevant portions of the report, it is impossible for us to say either that the material was inadequate or that the rejection of the alternatives was unreasonable. Learned Counsel for the Petitioner further submitted that one of the alternatives that should have been considered was the "no action" alternative-to leave the status quo unchanged. Our jurisdiction is not to determine whether or not the expressway is necessary, and if so, which alternative is the most suitable. It is for the Executive, under the laws enacted by Parliament, to make those decisions. The writ jurisdiction authorizes this Court to examine whether jurisdiction has been exceeded, whether there is error of law, and whether there has been procedural due process. The merits of a decision cannot be questioned merely because we consider that some other decision would have been better; we can interfere only if it is unreasonable.

The available material does not in any way indicate that the decision to build the expressway was unreasonable; but on the contrary, that it was necessary and urgent; and there is nothing whatever to suggest that the selection of the particular route, or the rejection of the alternative options, was unreasonable.

Any expressway would inevitably cause a certain amount of inconvenience, (or loss or prejudice) to one group of citizens or another, depending on its location. Neither the fact that a particular route causes inconvenience, to some people, nor the selection of one route (which causes inconvenience, or inconvenience to a great number of people), in preference to another route, constitutes proof of unreasonableness. In any event, the Petitioners have not even attempted to show that some other route would be better for any reason whatsoever.

The next contention on behalf of the Petitioners was based on Part IV C of the National Environmental Act, No. 47 of 1980, introduced by amending Act, No. 56 of 1988. Section 23AA required that approval be obtained for the implementation of all

"prescribed projects" from the appropriate "project approving agencies". Under Section 23BB, for the purpose of granting such approval project approving agencies are required to call for an Environmental Impact Assessment report ("EIA"), which is defined in Section 33. It was submitted that a Section 2 Order could not have been made in respect of the expressway before an EIA had been prepared, and that an essential component of an EIA was an "environmental cost-benefit analysis"- something much more than mere financial cost-benefit analysis. This contention cannot succeed. Those provisions apply only to "project approving agencies" and "prescribed projects" as determined by the Minister by Orders under Sections 23Y and 23Z; no such Orders had been made. Further, Section 33 makes it clear that the submission of an environmental cost-benefit analysis is required only if such an analysis has in fact been prepared.

It was then urged that draft regulations under Section 32, covering these matters, have been prepared and that the Section 2 Order had been made hastily before the regulations could be gazetted, not because of any real urgency, but simply to prevent the expressway project becoming subject to those regulations. This is highly speculative, and is not supported by any evidence. The implementation of the project could reasonably have been considered urgent; even if regulations had been made the expressway might not have been declared to be a prescribed project; and finally the scheme of the Act does not contemplate that an EIA should have been prepared and finalized before a Section 2 Order in respect of the project. Section 23 AA and 23BB adequately project the public interest in regard to the environmental considerations by preventing the implementation of a project until an EIA is submitted and approval obtained.

However Section 10 (h) does provided certain safeguards, even though the expressway is not a prescribed project. One of the powers, functions and duties of the Central Environmental Authority (CEA) is to require the submission of proposals for new projects "for the purposed of evaluation of the beneficial and adverse impact of such proposal on the environment". Section 24 B authorizes the CEA to issue directives in respect of a project "which is causing, or is likely to cause damage or detriment to the environment, regarding the measures to be taken to prevent or abate such damage or detriment" upon failure to comply with such directives the CEA may apply to the Magistrate to order the temporary suspension of such project until such measures are taken. The respondents have stated that no action will be taken to obtain possession of the land required for the project until an EIA, satisfactory to the CEA, had been prepared and made available for public scrutiny for 30 days. While that would be the appropriate stage at which to consider public representations as to environmental factors, I must emphasize that the documents produced indicate that some consideration has already been given to these matters. Noise fumes and other forms of air pollution are inevitable with any road or railway; the "no action" alternative which would leave the existing road as it is, will as traffic increases with time, increase pollution, as well as expense, delay and inconvenience to all users of that road and residents; widening that road will entail much greater expense for land acquisition, will affect a much larger number of residents with no appreciable reduction in pollution. The construction of an alternative road will necessarily reduce traffic, and consequently also pollution, congestion and delay in respect of the existing road. While the expressway will inevitably cause some amount of

noise, pollution and inconvenience to residents in the vicinity, yet these will be comparatively very much smaller in number; the documents produced also show an awareness of the need to reduce noise and pollution by preventing the construction of buildings immediately adjacent to the road and by erecting suitable fences and barriers. It appears to me therefore that environmental factors have already been considered, and that there will be a further opportunity for all interested persons to raise such matters when the amended EIA is made available for public scrutiny. The Section 2 Order cannot therefore be impugned on this ground.

Learned Counsel for the Petitioners focused attention on one factor in particular: the need for resettlement of a large number of persons who would be displaced from their homes by the expressway. This has already been considered, and in 4R4 inadequacies have been specifically pinpointed, and a supplementary EIA has been called for in accordance with the terms of reference 4R5A. The Petitioners contend that 2500 families will be affected in the context of population of the district, and the areas concerned that cannot per se be regarded as unduly high, particularly if satisfactory steps are taken for resettlement.

It is not for this Court to determine whether, upon a consideration of all these factors, the disadvantages outweigh the advantages of the expressway, or whether in its view the expressway meets the just requirements of the general welfare of the people. There is adequate materials to show that these factors have been considered, and will be considered further in accordance with the relevant statutory provisions: that the public will have an opportunity to express their views; and that it was not unreasonable for the President to have concluded, when he made the Section 2 Order, that the expressway is in the national interest.

For these reasons the Petitioners' application for Certiorari and Prohibition is refused. The question raised by the Petitioners in regard to the environmental considerations demonstrate that they have been motivated primarily by concern for the public interest, and for that reason I make no order for costs.

The first Petitioner has another grievance personal to himself. It appears from his correspondence with some of the Respondents that at the time of the 1984 study surveyors had demarcated the centre line of the proposed highway by means of cement pegs: his property was not affected. However, a priest who had thereafter been expelled from a nearby temple then put up a building upon a land which was affected by the centre line: in 1988 the pries planted a Bo sapling next to the centre line pegs upon that land. In February 1992 the surveyors entertained the protests of the priest, and moved the centre line on to the first petitioner's land. These matters are not relevant to the questions which arose for determination, and quite properly were not agitated by learned Counsel for the Petitioners: the first Petitioner will be free to raise these matters in the appropriate proceedings.

Gunawardena J. - I agree.

Perera J. - I agree.

Mohamed Faiz v The Attorney-General
S.C. Application No. 89/91, Decided: 19 November 1993
Supreme Court of Sri Lanka
Mark Fernando, S.B. Goonewardena and Priyantha Perera JJ.

Application under Article 126 of the Constitution - alleged infringement of fundamental rights under Articles 11, 12 (1), 13 (1) and 13 (2) of the Constitution - assault on Wild Life Ranger following arrest by him of person unlawfully felling timber - whether subsequent arrest and detention of Petitioner by Police was unlawful - refusal by police to record Petitioner's complaint - further assault on Petitioner by two Members of Parliament and a provincial Councillor while in Police custody - whether Police inaction during the assault amounted to violation of Petitioner's rights - mala fides of Police - whether assault by two Members of Parliament and a Provincial Councillor gave rise to a cause of action under Article 126 which related to "executive or administrative action" - whether Petitioner had been deprived of equal protection of the law and subjected to cruel and degrading treatment.

The Petitioner was a Wild Life Ranger in the Department of Wild Life Conservation who on 26 April 1991 detected and arrested certain people who were illegally felling timber in a nature reserve. While he and his guards were taking these suspects, together with the felled timber, to the office of the Assistant Director of Wild Life Conservation, they were accosted by group of persons who included the 6th Respondent (a Member of Parliament) and 7th Respondent (a Provincial Councillor). According to the Petitioner the 6th Respondent asked him to release the suspects and when he refused the 6th and 7th Respondents assaulted him causing him serious injury and allowed the suspects to escape.

When the Petitioner subsequently went to the Police Station to lodge a complaint, he found the 6th and 7th Respondents already there and he himself was not allowed to make a complaint but was arrested and detained without being given any reasons for his arrest.

Shortly afterwards, the 5th Respondent (another Members of Parliament) together with the 6th and 7th Respondents entered the room where the Petitioner was detained and assaulted the Petitioner while the Police apparently took no action. The Petitioner's own complaint was eventually recorded the next day and on 29th April he was released following intervention by his departmental superior.

The original suspects who had been apprehended by the Petitioner and then escaped were subsequently re-arrested and pleaded guilty to offences under the Fauna and Flora Protection Ordinance.

The Petitioner brought this fundamental rights application under Article 126 of the Constitution alleging unlawful arrest in breach of Article 13 (1); unlawful detention in breach of Article 13 (2); cruel and degrading treatment in violation of Article 11; and violation of his right to equal protection of the law under Article 12 (1). He named as Respondents the Attorney-General, the Headquarters Inspector and two constables of the

Polonnaruwa Police Station, and the two Members of Parliament and the provincial Councillor who had attacked him.

Held : (1) That there had been a violation of the Petitioner's fundamental rights on all the counts alleged, save that S.B. Goonewardne J held that there had been no detention beyond the period allowed by law and hence no violation of Article 13 (2).

(2) That the Petitioner was entitled to an aggregate sum of Rs. 50,000 as compensation, payment of which was apportioned between the State and the individual Respondents, together with Rs. 5,000 as costs to be paid by the State.

(3) On the question as to whether mere inaction by the Police in the face of an assault on the Petitioner by third parties could render the Police liable for violation of the Petitioner's rights, that the failure of the Police to take steps to protect the Petitioner at the Police Station appeared to have been motivated by extraneous considerations (undue deference to the 5th, 6th and 7th Respondents) and was therefore *mala fide* and actionable.

(4) On the question of whether the Court had power to grant relief against the 5th, 6th and 7th Respondents in view of the reference to "executive or administrative action" in Article 126 of the Constitution, that in terms of Article 126 (4) the Court had power to make an appropriate order even against a Respondent who had no executive status where such Respondent is proved to be guilty of impropriety or connivance with the executive in wrongful acts violative of fundamental rights.

Cases cited:

Associated Provincial Picture Houses Ltd. v Wednesbury Corporation (1948) 1 KB 223

Christy v Leachnisky (1947) AC 573

Dumbell v Roberts (1944) 1 AER 326

Muthusanmy v Kannangara 52 NLR 324

Burton v Wilmington Parking Authority [345 US 715 (1961)]

Lynch v USA 189 F 2nd 476 (5th Cir 1951)

Shaul Hammed v Ranasinghe (1990) 1 Sir L R 104

Ramupillai v Perera (1991) 1 Sri L R 11

Jayathevan v Attorney-General SC Application No. 192/91 SC Minutes 17.09.92

R v. Liyanage 64 NLR 313

Alwis v Raymond SC Application 145/87 SC Minutes 21.07.1989

Wimalagune v Widanagama SC Application 11/90 SC Minutes 05.02.1991

Somawathie v Weersinghe (1990) 2 Sri L R 121

Environmental Foundation Ltd. v. The Land Commissioner
C.A. Application No. 573/92, D/-30-0-1992
Court of Appeal of Sri Lanka
S.N. Silva and D.P.S. Gunasekara JJ.

Application under Article 140 of the Constitution for writs of Certiorari and Mandamus against Land Commissioner and Minister of Lands - Petitioner claiming to act in public interest - application for interim relief against these same Respondents and 3rd Respondent which was a limited liability company - whether lease of State land had been granted to 3rd Respondent - failure to comply with Section 96(6) of Crown Lands Ordinance and Regulation 21(2) made there under - requirement of publication of proposal to grant lease and opportunity for objections from public - whether Court had power to grant interim relief against 1st and 2nd Respondents in view of Section 24(1) of Interpretation Ordinance - whether interim relief against 3rd Respondent could be sought in an action for judicial review.

The Petitioner was a limited liability company whose main objects were related to the preservation of the environment. The three Respondents were the Land Commissioner, the Minister of Lands, and a private company called Aitken Spence Hotel Management (Pvt.) Ltd. This company was a subsidiary of Aitken Spence Hotels Ltd. which in February 1992 has issued a prospectus inviting the public to buy shares in the company, stating that 50 acres of land at Kandalama, Dambulla, had been leased to the 3rd Respondent for 50 years by the Ministry of Lands for the purpose of construction of a 150-room four star hotel.

The Petitioner, after receiving no reply to its letters to various relevant authorities seeking to find out whether such a lease had been granted, filed this action claiming that in terms of Regulations 21(2) made under Section 96(6) of the Grown Lands Ordinance a notification of every proposal to grant a lease of State land on preferential terms should be published in the Government Gazette and the public given an opportunity to make objections. The Petitioner filed documentary evidence that such procedure had been followed in respect of over a dozen other applications for such leases including one for the purpose of constructing a guest house at Kandalama village.

The 3rd Respondent did not produce any lease document but produced a letter from the Secretary to the Ministry of Lands purporting to put the 3rd Respondent in possession of the land. It was argued in the alternative that a lease of State land may be granted directly by the President under Section 2 of the Crown Lands Ordinance.

Held: (1) The Petitioner had established a prima facie case that a lease of the nature that was proposed to be granted to the 3rd Respondent will attract the provisions of Regulation 21(2) of the Regulations under Section 96(6) of the Crown Lands Ordinance.

(2) In any event the documents produced by the Petitioner were evidence of previous administrative practice and there appeared to be no basis to make an exception in this case.

(3) In these circumstances it was obligatory on the 1st Respondent (Land Commissioner) to publish a notification specifying *inter alia* the date by which objections could be filed to the proposed lease.

(4) Section 24 (1) of the Interpretation Ordinance did not take away the inherent power of the Court of Appeal to make an interim order in the nature of a Stay Order restraining an administrative authority from proceeding with a particular course of action, pending the determination of the application, where that final relief would otherwise be rendered nugatory.

(5) In view of the matters pleaded in the petition and in particular having regard to the environmental impact of the proposed lease of State land adjacent to the Kandalama tank, the 2nd Respondent (Minister of Lands) should be restrained pending the determination of the application from executing a lease of that land without complying with Regulation 21(2).

(6) No interim order would be made against the 3rd Respondent as that Respondent was a private company which could not be directly affected by judicial review in an application of this nature.

(7) The documents produced by the 3rd Respondent did not disclose the legal basis on which the Secretary to the Ministry of Lands had directed the 3rd Respondent to be placed in possession of the land prior to the execution of the lease, and there was no provision in the Crown Lands Ordinance or Regulations made there under which empowered the Secretary to take such action. Therefore if the 3rd Respondent continued to work on the land it would do so at its peril.

(8) With regard to the alternative submission that a lease may be granted by the president under Section 2 of the Crown Lands Ordinance, there was no evidence that there had been any decision by the President to do so and the hotel company's prospectus had stated that the lease had been granted by the Ministry of Lands.

Order:- The Petitioner has filed this application for Writs of Mandamus and Certiorari against the Land Commissioner and the Minister of Lands. The Petitioner has also sought interim relief against these Respondents and the 3rd Respondent being a private company engaged in hotel management. The Petitioner is a company and claims to file this application in the public interest in keeping with the objects of the company that are directed mainly at the preservation of the environment. The Petitioner has issued notice of this application as required by the Rules, in view of the interim relief that is prayed for. Mr. Choksy, P.C., is appearing for the 3rd Respondent pursuant to this notice. He has objected to the grant of interim relief against the 3rd Respondent and also against the 1st and 2nd Respondents. The 1st and the 2nd Respondents have not appeared before Court although the same notice has been issued on them. They have also tendered no objection to the grant of interim relief against them.

The case of the Petitioner is that Aitken Spence Hotels Ltd., issued a prospectus in February, 1992 (PA) whereby the public were invited to subscribe to shares in the company. The prospectus contained a section titled "Profile of the Company." In this section it is stated that the company plans to construct a 150-roomed four star class hotel at Kandalama, Dambulla by a fully owned subsidiary. It is stated further, under the sub-heading "Lands and Buildings" that "50 acres of lands at Kandalama, Dambulla (which) will be utilized for the construction of the new hotel. This land has been leased to Aitken Spence Hotel Management (Pvt.) Ltd. for a period of years (which is renewable) by the Ministry of Lands, Irrigation and Mahaweli Development". On receiving this information, the Petitioner being concerned with the environmental impact of the construction of the proposed hotel made representations to the relevant authorities to ascertain whether such lease has been given and if so the conditions of the lease. The Petitioner has produced copies of the letters addressed not only to each of the Respondents but also to the Secretary/Ministry of Mahaweli Development, Secretary/Ministry of Lands, Minister for Environment and Parliamentary Affairs and the Surveyor-General, in this regard. There has been no response to these letters specifying whether any lease has been granted as claimed in the prospectus (P4) and the conditions to be included in such lease. Learned President's Counsel for the Petitioner submitted that if such lease is to be granted the provisions of Regulation 21, made in terms of Section 96 (6) of the Crown Lands Ordinance, that relate to "Sales, leases and other dispositions" of Crown land should be complied with. In terms of Regulation 21 (2), the Land Commissioner is required, unless otherwise directed by the Minister, to cause a notification of every proposal to make a grant or lease of any Crown land on preferential terms, to be published in the Gazette. The Regulation also provides for the matters to be specified in the notice, which includes the date on or before which objection to the proposal will be received by the Land Commissioner. The Petitioner has produced marked P34 to P50 notices that had been published under this Regulation with regard to other proposed leases. In particular, P39 relates to a notice published in terms of this Regulation with regard to the proposed lease for a period of 30 years of an extent of about 2 acres for the purpose of constructing a Tourist Guest House and cultivating fruit trees, in the Kandalama village at Dambulla. On this basis, it is submitted that no exception should be made if a lease is to be given to the 3rd Respondent of 50 acres of land for the construction of the proposed hotel. The Petitioner therefore, submits that he is entitled in law to a Writ of Mandamus as prayed for in the prayer requiring the 1st Respondent being the Land Commissioner to cause a notification to be published in accordance with Regulation 21(2) regarding the lease of that land.

Learned President's Counsel appearing for the 3rd Respondent submitted that not interim relief could be granted against the 3rd Respondent since the 3rd Respondent is a private company and his action is not subject to review in an application for a Writ of Mandamus or Certiorari. Learned President's Counsel also submitted that the 3rd Respondent was placed in possession of the land in question pursuant to a decision of D.G. Premachandra, Secretary, Ministry of Lands. In this connection he has produced letter dated 12.5.92 marked 3R3. As regards the interim relief sought against the 1st and the 2nd Respondents, learned President's Counsel submitted that this Court has no jurisdiction to

grant such interim relief in view of the provisions of Section 24 (1) of the Interpretation Ordinance, as amended.

We have considered the submissions of learned Counsel and the contents of the documents that have been filed and produced. We are of the view that the Petitioner has established a *prima facie* case that a lease in the nature of what is proposed to be given to the 3rd Respondent Company will attract the provisions of Regulation 21 (2) of the Regulation referred above. In any event, notices P34 to P50 constitute evidence of an administration practice and there appears to be no basis to make an exception in the case of the 3rd Respondent. In the Circumstances, it would be obligatory on the 1st Respondent to publish a notification specifying *inter alia* the date by which objections may be field to the proposed lease.

We have also considered the submission of learned President's Counsel for the 3rd Respondent with regard to the application of Section 24 (1) of the Interpretation Ordinance, as amended. We are of the view that this provision does not remove the inherent power of the Court to make an interim order in the nature of a Stay Order restraining an administrative authority from proceeding with a particular course of action, pending determination of an application, where the final relief will otherwise be rendered nugatory.

Considering the matters that have been pleaded in the petition, in particular with regard to the environmental impact of the proposed lease of State land adjacent to the Kandalama tank, we are of the view that the 2nd Respondent should be restrained, pending the determination of this application from executing a lease of that land without complying with Regulation 21(2).

As regards the interim relief sought against the 3rd Respondent, we have considered the submission of learned President's Counsel that the 3rd Respondent is a private company and cannot to directly affected by judicial review exercise in an application of this nature.

The documents marked 3R3 produced by learned President' Counsel do not disclose the legal basis on which D.S Premachandra, Secretary, Ministry of Lands, Irrigation and Mahaweli Development directed that the 3rd Respondent be placed in possession of the land in question prior to the execution of the proposed lease. Certainly, there is no provision in the Grown Lands Ordinance or the Regulations made there under that empowers the Secretary to take administrative action to place any party in possession of State and pending grant of a lease. Such action militates against the provisions of Regulation 21(2) which requires a notice to be published inviting objections. No useful purpose will be served by such a Regulation if the Secretary could arrogate to himself the power to place a private party in possession of State land pending the completion of statutory procedures.

Learned President's Counsel submitted that a lease may be granted in terms of Section 2 of the Crown Lands Ordinance. We are mindful that Section 2 grants complete power to the President to effect, *inter alia* leases of State land. However, the documents marked 3RI to 3R3 do not disclose that there has been any decision by His Excellency the President to grant a lease in terms of Section 2, to the 3rd Respondent. Furthermore, we

note that according to the prospectus (P4) it has been claimed by the 3rd Respondent that the lease has been granted by the Ministry of Lands and Mahaweli Development. In the circumstance, we are of the view that the documents produced by learned Counsel do not establish an authority under the law for the 3rd Respondent to be in possession of State land. However, we are inclined to agree with the submission of learned President's Counsel that the 3rd Respondent being a private company could not directly be affected by relief that will finally by granted in an application for judicial review. In the circumstance, we are not inclined to grant interim relief prayed for in prayer (e) of the prayer to the petition. However it has to be noted that the 3rd Respondent, if it continues with any construction work on the land in question, it will do so at its peril.

We direct the issue of notice on the 1st and 2nd Respondents (who are not before Court today pursuant to notices that have already been sent), stating that they may file objections, if any, on 18.8.92. Mr. Choksy, P.C., takes notice on behalf of the 3rd Respondent but reserves his right to file objections after the objections, if any, of the 1st and the 2nd Respondents have been filed.

In view of the reasons stated above we grant the Petitioner the interim relief prayed for in paragraph (f) of the prayer to the petition on the 1st and the 2nd Respondents operative till the final determination of this application. This Order will restrain the 1st and 2nd Respondents from executing any lease of the State land in question, without complying with the requirements of Regulation 21(2) referred above.

(Approved by His Lordship S.N.Silva J.)

Keangnam Enterprises Limited v. E.A. Abeysinghe
C.A. Application No. 259/92; D/-26-8-1992
Court of Appeal of Sri Lanka
Ananda Grero J.

Application for Revision of an Order of the Magistrate's Court of Kurnegala - injunction restraining operation of petitioner's quarry and conditional order for removal of a public nuisance - Sections 98 (1) and 104 (1) of Criminal Procedure Code - whether these sections had been superseded by National Environmental Act No. 47 of 1980 as amended by Act No. 56 of 1988.

The Petitioner-Company sought revision of two orders of the Magistrate's Court of Kurunegala delivered respectively on 18.12.1991 and 26.03.1992. The order delivered on 26.03.1992 merely affirmed after an inter parties inquiry the order made *ex-parte* on 18.12.1991 restraining the Petitioner-Company under section 98 (1) of the Criminal Procedure Code from operating a quarry on land it had leased and directing the removal of a public nuisance under Section 104 (1) of the Code.

The Petitioner-Company was engaged in the rehabilitation of the Ambepussa-Dambulla-Anuradhapura road and was extracting stone from the quarry for that purpose. The Informants who obtained the Magistrate's Court order were a group of residents of the area who claimed to be affected by the blasting operations carried out by the company.

During the course of the proceedings the Court allowed separate applications from the Road Development Authority and four workers from the quarry who claimed that their livelihood would be affected if the quarry was shut down, to be added as parties.

The main argument of the Petitioner-Company was that the Magistrate's power to make orders under Chapter IX of the Criminal Procedure Code (Sections 98 to 106) had been taken away by the provisions of the National Environmental Act No. 47 of 1980 as amended by Act No. 56 of 1988. Under Section 23A of the amended NEA no person was allowed to discharge, deposit or emit waste into the environment which would cause pollution except under the authority of a license issued by the Central Environmental Authority (CEA) and in accordance with such standards and other criteria as may be prescribed under the Act. Section 29 of the Act declared that "The provisions of the Act shall have effect notwithstanding anything to the contrary in the provisions of any other written law."

At the time that the Magistrate made his orders the Petitioner-Company had applied for but had not obtained a license from the CEA. It had commenced blasting operations on 1.9.1991 on the strength of a letter dated 10.07.1991 from the Director, CEA, to the Kurunegala Pradeshiya Sabha which stated that an environmental protection license "shall be obtained by the developer" and that "the developer shall submit an application for the said license to the CEA one month prior to the commencement of manufacturing operations".

A permit was eventually issued to the Petitioner-Company on 19.06.1992 after the Magistrate made his restraining and conditional orders and after the Petitioner Company had filed this revision application.

Held: The mere application for a license was not sufficient compliance with Section 23A of the Act and the Petitioner-Company had also acted in violation of the conditions stipulated in the letter of 10.07.1991 from the Director, CEA. Since the Petitioner-Company was not in possession of a license from the CEA as required by the Act he could not invoke the provisions of the Act to defeat the action in the Magistrate's Court. The Magistrate had jurisdiction to make orders under Chapter IX of the Criminal Procedure Code if satisfied with the information furnished by the Informants regarding the nuisance which they complained of. Therefore the revision application would be dismissed but since the Petitioner Company had subsequently obtained a license from the CEA it was at liberty to revert to the Magistrates Court where the main inquiry under Section 101 of the Code was still pending and make submissions based on the provisions of the National Environmental Act as amended.

Case cited: **Kiriwantha and another v. Navaratne and another** (S.C. Application No. 628/88) on the question of whether the petitioner had filed the necessary documents in terms of Rule 46 of the Rules of the Supreme Court.

Ananda Greor J.

This is an application for revision made by the Respondent-Petitioner to this Court seeking the following reliefs:

(I) To set aside the Orders made by the learned Magistrate of Kurunegala dated 18.12.91 and 26.03.92.

(II) To dismiss the application of the Informant-Petitioners.

(III) To stay the operation of the *ex-parte* injunction dated 18.12.91 and inquiry fixed for 30.04.92 pending the hearing and determination of this application.

When this matter came up for the first time before this Court on 02.04.92, the Petitioner reserved his right to pursue the interim relief he sought in paragraph (d) of the prayer, (i.e. to stay the operation of the ex-parte injunction dated 18.12.91, and the inquiry fixed for 30.04.92 till the determination of this application) to the petition on a future date. On that day, this Court issued notices on the Informants-Respondents.

On 22.04.92, when this matter came up before this Court, on an application made by the Counsel for the Petitioner, an Order was made, directing the Magistrate of Kurunegala not to hold the inquiry fixed for 30.04.92, until the final determination of this application. But up to date, no Order has been made to stay the operation of the *ex-parte* injunction issued by the Magistrate of Kurunegala dated 18.12.91.

The Respondent-Petitioner (also referred to as Petitioner Company) has established a metal quarry, a metal crusher, and a premix plant, at a site taken on a lease by the Petitioner-Company in July 1991. Thereafter, the Petitioner-Company states that after obtaining the requisite permits and/or license from the various statutory authorities it commenced blasting operations on 01.09.91, and had employed about 850 employees and the metal obtained from the said quarry was used for the purpose of developing and rehabilitating the Ambepussa-Dambulla-Anuradhapura road.

The Informant-Respondents on 18.12.91, filed papers in the Magistrate's Court of Kurnegala complaining of a public nuisance created by the Respondent-Petitioner, by the operation of the said quarry, and sought reliefs under Sections 98 (1) and 104 (1) of the Code of Criminal Procedure Act No. 15 of 1979. The learned Magistrate having heard the Counsel for the Informant-Respondents, and after considering the affidavits and the petition filed by them, and also after examining the documents filed along with the petition, granted an injunction restraining the operation of the quarry (under Section 104(1) of the Code) for the removal of a public nuisance caused by the said quarry.

Thereafter, on 31.12.91 the Administration Manager of the Respondent-Company filed his objections which is marked and produced as P8, and for the reasons contained therein, stated that the Magistrate had no jurisdiction to make any Order under Chapter IX of the Code of Criminal Procedure Act No. 15 of 1979, and that the application made to the Magistrate's Court was misconceived.

On 16.01.92, when the conditional order made under Section 98(1) and the injunction issued under Section 104(1) of the Code of Criminal Procedure Act were served on the Petitioner-Company, it filed its objections on 17.01.92 which is marked and produced as P10, and for the averments stated therein took up the position that the Magistrate had no jurisdiction to make any Order under Chapter IX of the Code, and that he should not consider the application of the Informant-Respondents.

The Road Development Authority at a later stage sought to intervene as a party, and its intervention was allowed by the learned Magistrate, and the said Authority was made an Added Respondent-Respondent to the case before the Magistrate. Further at a later stage four workmen under the Petitioner-Company, sought the permission of the learned Magistrate to intervene, and he by his Order dated 06.03.92, allowed their application, and they were added as 9th, 10th, 11th and 12th Aggrieved Party-Respondents to the case before him.

Thereafter, on 14.02.92, submissions were made on behalf of the Petitioner-Company regarding the question of jurisdiction of the Magistrate's Court to make orders under Chapter IX of the Code of Criminal Procedure Act. The added-Respondent-Respondent and the Aggrieved-Party-Respondents too agreed with the submissions made by the Counsel for the Petitioner-Company, that the Magistrate's Court had no jurisdiction to inquire into the application of the Informants-Respondents.

It appears from the submission made before the learned Magistrate by the learned Counsel for the Petitioner-Company, that he had relied upon the provisions of the National Environmental Act No. 47 of 1980 as amended by Act No. 56 of 1988. According to him, the provisions of the said Act had taken away or ousted the ordinary jurisdiction of the Magistrate under Chapter IX of the Code of Criminal Procedure Act and with regard to any environmental damage caused, then the remedy available for the Informants-Respondents is to resort to the remedies provided by the said Act, and not to resort to the provisions of Chapter IX of the Code. It appears that the attention of the learned Magistrate had been drawn to Section 29 of the said National Environmental Act by the learned Counsel for the Petitioner-Company when he made his submissions. The said Section reads as follows:-

> "The provisions of the Act shall have effect notwithstanding anything to the contrary in the provisions of any other written law, and accordingly in the event of any conflict or inconsistency between the provisions of this Act and the provisions of such other written law, the provisions of this Act shall prevail over the provisions of such other written law."

There had been some other submissions made by the learned Counsel for the Petitioner-Company before the learned Magistrate as averred in its petition; but the central or the main submission was that the learned Magistrate had no jurisdiction to make orders under Chapter IX of the Code of Criminal Procedure, in view of the provision of the National Environmental Act.

The Informants-Respondents in reply to the submissions made on behalf of the Petitioner-Company, submitted to Court written submissions (marked P11) and had taken up the position that the Magistrate Court has jurisdiction to hear, determine, and to make orders, under Chapter IX of the Code of Criminal Procedure Act and its jurisdiction has not been ousted by the National Environmental Act.

It must be noted that the aforesaid submissions were made by the respective parties, not before the Magistrate who made the orders under Section 98(1) and Section 104(1) of the Code dated 18.12.91, but before his successor in office. The said Magistrate by his Order

dated 19.03.92 had rejected the objection raised by the Petitioner-Company and the other parties that the Magistrate's court has no jurisdiction to make orders regarding the application of the Informants-Respondents, and fixed the matter for inquiry under Section 101(1) of the Code of Criminal Procedure Act.

Thereafter the Respondent-Petitioner made an application for Revision to this Court and sought the reliefs mentioned earlier in this order. The Informants-Respondents filed their objections and for the averments contained therein prayed that the application of the Respondent-Petitioner be dismissed with costs. The Aggrieved-Party-Respondents too filed an affidavit and sought the assistance of this Court to have the matter resolved very early so as to enable them to continue in their employment.

At the inquiry before this Court, the primary issue that arose for determination was, whether the Magistrate's jurisdiction to entertain the information of the Informants-Respondents and to make orders under Chapter IX of the Code of Criminal Procedure Act had been ousted by the provisions of the National Environmental Act.

In regard to the said issue, the parties concerned made their submissions both oral and written through their Attorney-at-Law.

In the statement of objections filed by the Informants-Respondents they have taken up the position that contrary to the instructions issued by the Central Environmental Authority as indicated in P5, the Petitioner-Company had commenced quarrying without an Environmental Protection License as required by Law; that no Environmental Protection License has been issued by the Central Environmental Authority even at the date of filing their objections and in proof of that fact they had tendered to this Court a letter dated 06.05.92 from the said Authority marked 1R1. They further stated in their statement of objections, that in paragraph 10 of the complaint made to the Magistrate's Court dated 18.12.91, they had clearly stated though the Authority had only granted a site clearance for the project, it had not issued an Environmental Protection License to the Petitioner-Company.

When this matter came up for inquiry on 20.06.92 before this Court, the learned Counsel for the Petitioner-Company submitted a letter from the Central Environmental Authority dated 19.06.92, marked X(1). The learned Counsel for the Informants-Respondents objected to the said license being produced at that stage; but this Court accepted the same subject to this objections.

The said license had been issued to the Petitioner-Company by the aforesaid Authority to be in force from 19th June 1992 to 18th June 1993.

The learned Counsel for the Informants-Respondents submitted to this Court that at the time the learned Magistrate made his conditional order with regard to the removal of nuisance under Section 98(1) of the Code, and granted an injunction under Section 104(1) of the Code restraining the operation of the quarry in question, there was no license granted by the Central Environmental Authority to the Petitioner-Company.

He also drew the attention of this Court to P5, a letter that has been sent to the Special Commissioner, Kurunegala Pradeshiya Sabha, by the Director, Central Environmental

Authority dated 10.07.91 and said that the Petitioner-Company had violated or acted contrary to condition 14 of the said letter. The said condition 14 says:-

> "In accordance with Section 23 (A) of the National Environmental Amendment Act No. 56 of 1988, an Environmental Protection License shall be obtained by the developer to carry out operations. The developer shall submit an application for the said license to the Central Environmental Authority one month prior to the commencement of manufacturing operations".

He further contended that the Petitioner-Company had acted contrary to Section 23 (A) of the National Environmental Act. The said Section reads as follows:-

> "With effect from such date as may be appointed by the Minister by Order published in the Gazette (hereinafter referred to as the "relevant date"), no person shall discharge, deposit, or emit waste into the environment which will cause pollution except-
>
> (a) under the authority of a license issued by the Authority, and
>
> (b) in accordance with such standards and other criteria as may be prescribed under this Act."

He therefore contended that the commencement of metal manufacturing operations by the Petitioner-Company without obtaining the requisite license from the Authority was an act contrary to the aforesaid provisions of Section 23 (A) of the Act, and condition 14 of P5, and such operations are illegal.

The learned Counsel for the Petitioner-Company, when he made his oral submissions submitted that there is a breach of condition 14 of P5, but contended that it is not a thing that the Informants-Respondents could complain of a nuisance, as they have done in this case.

It is crystal clear, that at the time the Informants-Respondents complained of a public nuisance to the learned Magistrate under Chapter IX of the Code of Criminal Procedure Act, there was no Environmental Protection License issued to the Petitioner-Company by the Central Environmental Authority. Even at the time the learned Magistrate considered the application of the Informants-Respondents, and made orders under Sections 98 (1) and 104 (1) of the Code of Criminal Procedure Act, the Petitioner-Company was without a license granted by the Authority. Even when the learned Magistrate made his subsequent Order dated 19.03.92 (which was delivered on 26.03.92), the Petitioner-Company was still without a license issued by the Authority. It is only after the application for Revision was filed before this court, the Petitioner-Company was able to get a license from the Authority. No doubt the Petitioner-Company had made an application for such a license on 03.07.91. But making an application does not mean that there was sufficient compliance with Section 23 (A) of the Act. The License issued by the Authority X(1) is in force from 19.06.92 to 18.06.93, and it does not relate back to the date of application, i.e. 03.07.91. Therefore, it could be seen that when the Petitioner-Company commenced metal manufacturing operations it was without a license granted by the Authority in terms of Section 23 (A) of the Act.

The necessity to have a license from the authority to carry out operations is further established when this Court considers condition 14 of P5. The said P5 is a letter sent by the Director, Central Environmental Authority, to the Special Commissioner, Kurunegala Pradeshiya Sabha, informing him that the Authority has no objection to the establishment of a project (i.e. a metal quarry, metal crusher and a premix plant) at the proposed site subject to 14 conditions stated therein. One of such conditions is that in accordance with Section 23 (A) of the National Environmental Amendment Act No. 56 of 1988, the Environmental Protection License shall be obtained by the developer to carry out operations.

To obtain a license from the Authority is mandatory both under the provision of Section 23(A) of the Act, and condition 14 of P5, in order to carry out operations of the quarry in question. But no license had been obtained by the Petitioner-Company from the Authority as aforesaid, when it commenced the operations of the metal quarry.

The Petitioner-Company relies more particularly on P5 and P6 in order to show that it commenced operations with the leave and license of various authorities. P3 is a permit granted by the Government Agent, Kurunegala under the Explosives Act No. 21 of 1956 to the Petitioner-Company to possess and use the quantity of explosives stated in the said permit. P6 is a letter issued by the Chairman of the Kurnegala Pradeshiya Sabha, dated 10.07.91, whereby he had given permission to the Petitioner-Company to have and maintain a metal quarry and a metal crusher at the proposed site for the year 1991 subject to 16 conditions of the Pradeshiya Sabha, is a sequel to the application made by the Petitioner-Company for a permit to have a quarry and a metal crusher for the year 1991. Now here in P6, it is stated that permission is given to the Petitioner-Company to have and maintain a metal quarry and a metal crusher by virtue of the power delegated to the Pradeshiya Sabha by the Authority. Pure and simple, P6 grants to the Petitioner-Company, the Pradeshiya Shobha's permission to have and maintain a metal quarry and a metal crusher, at the prepared site as the Sabha had been satisfied with the application of the Petitioner-Company. The said documents (P3, P5, P6) and other documents like P7A, P7B, and P73 cannot be equated to the license granted by the Authority as in Section 23(A) and 23(B) of the Act.

The commencement of operations of the quarry and the metal crusher on the strength of P6 cannot be equated to such commencement of operations after the receipt of a license granted by the Authority under the provisions of Sections 23(A) and 23 (B) of the Act. The most fundamental requirement is to get a license from the Authority, because according to the provision of the Act to have such a license is mandatory. This Court is of the view that in order to invoke the provisions of the Act, the Petitioner-Company should possess a license granted by the Authority. It is only the license granted by the Authority in terms of the Act which paves the way for the Petitioner-Company to rely upon the provisions of the Act, when it appeared before the learned Magistrate, through its Administration Manager in connection with the application made by the Informants-Respondents, and made its submissions (before the Magistrate) that the learned Magistrate had no jurisdiction to act under Chapter IX of the Code, and make the orders under Sections 98(1) and 104(1) of the Code.

As stated earlier the Petitioner-Company was not possessed of a license granted by the Authority at the time the learned Magistrate made his orders under Chapter IX of the Code. It did not possess such a license granted by the Authority when submissions were made on its behalf before the learned Magistrate that his ordinary jurisdiction under Chapter IX of the Code had been ousted by virtue of Section 29 of the Act. Even at the time the learned Magistrate made order rejecting the objection raised by the Petitioner-Company it did not have a license granted by the Authority. No doubt P6 was in force at that time; but based on that the Petitioner-Company cannot invoke the provisions of the Act. If the Petitioner-Company had the license granted by the Authority at the time the Informants-Respondents made their application to the Magistrate's Court, and at the time the learned Magistrate made his orders, and when submissions were made on behalf of the Petitioner-Company that the learned Magistrate had no jurisdiction to entertain and make a determination on such application, then it could be held that the Petitioner-Company was entitled to invoke or rely upon the provisions of the Act; but not otherwise. In the circumstances, it could not be held that the learned Magistrate had no jurisdiction to entertain and make orders under Chapter IX of the Code in view of the provisions of the Act and more particularly in view of Section 29 of the Act.

Even under P6 the Petitioner-Company had been allowed to have and maintain a quarry and a metal crusher and to carry out operations, strictly according to the conditions stated therein. If a condition is violated or conditions are violated and such violation becomes a nuisance to the people living in their neighbourhood, would it then not be possible for such people to make an application under the provisions of Chapter IX of the Code to abate such nuisance ? This Court is of the view that they can.

According to IR 16, an Informant-Respondent (1st Informant-Respondent) had written to the Director of the Central Environmental Authority complaining that the metal crusher operates till 10 p.m., and as a result it has become a nuisance to the people living in that area. The same informant-Respondent had written a letter (IR 17) to the Chairman, Pradeshiya Sabha complaining that the metal crusher operated till late at night. In fact, according to condition 2 of P6, the operations could only be carried out between 6 a.m. and 6 p.m., and the requirement had to be compulsorily adhered to. The aforesaid IR16 and 1R17 reveal that the said condition had been violated. An examination of the affidavits submitted to the Magistrate's Court (marked and produced 1R3 to 1R8) by the Informants-Respondent reveal that they were complaining of a nuisance that arose as a result of an environmental pollution created due to the commencement of operations by the Petitioner-Company. This environmental pollution had taken place at a time when the Petitioner-Company had not obtained an Environmental Protection License from the relevant Authority under the provisions of the Act. In other words when it had acted contrary to condition 14 of P5. 1R16 reveals that on behalf of the affected parties (people who suffered due to the environmental pollution) the 1st-named Informant-Respondent had complained about this to Environmental Authority to take necessary action. At last the Informants-Respondents had gone before the Magistrate's Court of Kurunegala and sought relief under Chapter IX of the Code. This in short is the history of this Case.

All the aforesaid steps have been taken at a time when the Petitioner-Company did not possess a license issued by the Authority under the provisions of the Act. Under such

circumstances, the learned Magistrate is not prevented from making orders under Chapter IX of the Code if he is satisfied with the information furnished by the Informants-Respondents regarding the nuisance which they complained of. The learned Magistrate had acted under the provisions of Chapter IX of the Code. At a time when the Petitioner-Company could not invoke or rely upon the provisions of the Act as it had not got the required license from the Central Environmental Authority. In the circumstances, it can not be held that the learned Magistrate had made the orders in question without jurisdiction to do so. Also for the reasons stated above, this court cannot agree with the contention of the learned Counsel for the Petitioner-Company that although there was a breach of condition 14 of P5, yet it is not a ground for the Informants-Respondents to have complained of a nuisance as done by them in this case.

The Petitioner-Company is now in possession of the license granted by the Authority as contemplated in Sections 23(A) and 23(B) of the Act. It could now go before the learned Magistrate and place it before him, and make submissions based on the provisions of the Act, and would be able to ask him to annul the orders made by him. For that, the opportunity is already given by the learned Magistrate by fixing the matter for inquiry under Section 101 of the Code of Criminal Procedure Act.

In the aforesaid circumstances, I do not think that this Court should exercise its reversionary powers to revise the orders made by the learned Magistrate, and the application of the Petitioner Company for revision is hereby dismissed with costs.

In view of the aforesaid decision arrived at by this court on the basis of the reasons stated earlier in this Order, this Court is of the view that the necessity does not arise at this stage to consider other matters raised at this inquiry by the respective parties (including the Added-Party Respondents) to this application except one matter raised by the Informants-Respondents.

The learned Counsel for the Informants-Respondents submitted to this Court that the Petitioner-Company has failed and neglected to file 17 documents marked along with its revision application. He says that these documents marked P1 to P17 by the Informants-Respondents in the Magistrate's Court of Kurunegala, have been suppressed by the Petitioner-Company in violation of Rule 46 of the Rules of the Supreme Court and the current Rule 3 of the Court of Appeal. He cited a few decisions of the Supreme Court and the Court of Appeal to show that this Court has the power to dismiss the revision application of the Petitioner-Company in limine for non-compliance with the said Rule.

Rule 46 of the Supreme Court requires that an application for Revision should be made by way of a petition and affidavit accompanied by originals of documents material to the Case or duly certified copies thereof in the form of exhibits.

In a more recent case namely **Kiriwantha and another v**. **Nawaratne and another** (S.C. Application No. 628/88) the Supreme Court held that all these rules must be complied with, and the law does not require or permit an automatic dismissal of the application or appeal of the party in default. The consequence of non-compliance is a matter falling within the discretion of the Court to be exercised after considering the

nature of the default, as well as the excuse or explanation thereof, in the context of the object of the particular Rule.

The learned Counsel for the Petitioner-Company submitted to this Court that the issue before this Court is to find out whether the Magistrate had no jurisdiction to entertain the information of the Informants-Respondents, having regard to the provisions of the National Environmental Act. To decide that issue, he contended, that the documents referred to by the learned Counsel for the Informants-Respondents are not material, and are unnecessary. Therefore, he said that those documents were not filed along with the application for revision. This Court agrees with the said contention of the learned Counsel for the Petitioner-Company and considering the purpose of the said Rule 46, and the decision of Kiriwantha's case, I am of the view that there is a substantial compliance with this Rule by the Petitioner-Company when it filed its application before this Court. In the circumstances, the application for Revision should not be dismissed in limine. But for the reasons stated earlier, the application for Revision is hereby dismissed with costs.

Anura Lamahewa v. Habaraduwa Pradeshiya Sabha
Writ Application No. 27/95; D/-3-10-1996
Provincial High Court, Galle (Sri Lanka)
I. M. Liyanage, J.

Application by petitioner for writ of certiorari to quash orders from the Habaraduwa Pradeshiya Sabha requiring him to cease the operation of his quarry - Application for writ of mandamus requiring Respondents to perform their legal duty by issuing the required permit to the Petitioner.

The Petitioner was the proprietor of a business called “Ceylon Granite” and had recently purchased a business called “Southern Metal Works” from one P.L. Sirisena who had first given notice of the closure of his business to the Pradeshiya Sabha (Town Council) and subsequently informed the Pradeshiya Sabha that he had transferred the business to the Petitioner.

The Respondents were the Habaraduwa Pradeshiya Sabha, its Chairman and its Secretary.

The Pradeshiya Sabha in issuing an order to the Petitioner to shut down his quarry, had acted on the strength of petitions from the public of the area complaining of hardship and damage to their health. With regard to the matter of the permit, the Respondents maintained that no application had been made by the Petitioner.

Held:

(1) The Petitioner, not having complied with the law relating to applications for permits, was not entitled to ask for a writ of mandamus compelling the Respondents to grant him a permit.

(2) A writ of certiorari would be refused because there was no evidence that the Pradeshiya Sabha had acted in excess of jurisdiction

and it was entitled to give priority to the welfare of the people of the area.

Order

The Petitioner has instituted this action against the 1st, 2nd and 3rd Respondents for the following reliefs:

(1) A writ of certiorari to quash the orders of the 2nd Respondents contained in letters dated 28.05.1993 and 28.04.1994.

(2) A writ in the nature of mandamus to compel the Respondents to perform their legal duty by issuing the required Pradeshiya permit to the Petitioner.

According to the Petitioner, while he was carrying on business under the name of "Ceylon Granite", the Respondents by letter marked "P3" stopped the operations of the said business. In addition the Petitioner had been sent a further order "P10". The Petitioner states that although he had been issued an environmental protection license on 05.11.1993, he had not yet been issued a permit by the Pradeshiya Sabha. However he states that a number of other individuals in the area had been given permits. The Petitioner further states that this action of the Respondents is a malicious act and not only causes loss to the country's economy but causes hardship to the workers at the Petitioner's plant.

The Respondents say they have taken this action after studying a large number of petitions from the general public. The Petitioner further states that the Respondents have taken action without holding an inquiry or hearing both sides as required by the basic principles of natural justice. However the Respondents state that the Petitioner has not filled out the required application form and applied for a permit in the proper way.

The Petitioner making further submissions states that if a factory is causing environmental pollution, it is the Magistrate of the area who can take steps in that regard. In these circumstances the Petitioner submits that the Pradeshiya Sabha has acted in excess of its jurisdiction. The Petitioner states that to have acted on public petitions without an inquiry is a violation of the principles of natural justice.

When the facts of this case are considered, what the Respondents have conveyed to the Petitioner by their orders marked "P3" and "Pl0" is that his business is polluting the environment and must be shut down, and that if he does not do this, action will be taken under Section 106 (1) of the Pradeshiya Sabha Act No. 15 of 1987. Before the Pradeshiya Sabha takes any steps against him under the law, the Petitioner has come to this Court asking for a writ in respect of the non-issue of a permit to him.

Examining the facts of this case: The Petitioner had purchased a business called "Southern Metal Works" from one P.L. Sirisena. The premises of the Petitioner's business called "Ceylon Granite" is located not at the premises of this "Southern Metal Works" but at another place. According to the letter "V" produced to Court, the owner of

"Southern Metal Works" sent a letter to the Habaraduwa Pradeshiya Sabha notifying them that the business called "Southern Metal Works" had ceased to operate. Accordingly, the new owner who had purchased had to obtain a fresh permit. The Respondents state that without doing so, the new owner could not obtain a permit for "Ceylon Granite". While "V1" shows that P.L. Sirisena had given notice of the closure of this business, he had subsequently by letter "P15" given notice that he had transferred the business to the Petitioner. However that was a later notification.

It is clear from the facts disclosed in this case that the Petitioner had failed to fill out the required from and make an application. The question then arises as to whether, in the circumstances, he is entitled to ask for a writ of mandamus.

The next matter I must examine is whether the Pradeshiya Sabha has a responsibility for the health and welfare of the people living within its area of jurisdiction. If, within the Pradeshiya Shobha's area of jurisdiction, a person is carrying on a pollution-causing industry or other work, it is the duty of the Pradeshiya Sabha to send a competent officer to inspect and report. There can be no debate that the Pradeshiya Sabha must give priority to the welfare of the people of the area.

A further point to be noted is that the permission of the Central Environmental Authority must be obtained for the carrying on of a business of this nature. Even once such a permit is obtained, the responsibility of the Pradeshiya Sabha does not end there. It is the duty of the Pradeshiya Sabha to see to the welfare of the people, young and old, who live in the vicinity of a quarry of this nature. To this extent the Respondents do not appear to have exceeded their powers under the Pradeshiya Sabha Act.

It is stated in the letter marked "P22" that if the Pradeshiya Sabha fails to issue a permit to the Petitioner, a large number of workers will lose their jobs. However, as pointed out by the Respondents, the petition gives the Petitioner's address as 146 Matara Road. It should be noted that this appears to be the address of another of the Petitioner's businesses though it is not possible to reach a definite finding on this point. Although workers may lose their jobs, the primary consideration must go to the bodily harm and damage to health that will be suffered by the people, young and old, who live in the vicinity owing to the dust caused by the stone-crushing operation.

Having considered these matters, I refuse to grant a writ of certiorari to quash the orders contained in "P3" and "P10" or a writ of mandamus for the issue of a permit as prayed for.

The Petitioner shall pay costs of Rs. 2500 to the 1st Respondent.

(Sgd) I.M. Liyanage

Judge of the Provincial High Court

(The foregoing is an English translation of the High Court judgment which was delivered in Sinhala.)

Appeal under Section 23E of the National Environmental Act by E.M.S. Niyaz
Before: D. Nesiah, Secretary, Ministry of Environment
Decided: 6 January 1995

This matter was decided on the basis of written representations by the 15th Appellant, the Pradeshiya Sabha (local authority) and the Central Environmental Authority (CEA), without a formal hearing.

Cancellation by Pradeshiya Sabha of Environmental Protection License issued to Appellant - no hearing given to Appellant before cancellation - whether breach of "audi alteram partem" rule - duty of administrative agency to act judicially - duty to hold proper inquiry.

Cases cited:
Abdul Thassim v. Rodrigo; 48 NLR 121
Buhari v. Jayarathne; 48 NLR 224
Mohamed & Company v. Controller of Textiles; 48 NLR 461
South-Western Bus Company Ltd. v. Arumugam; 48 NLR 385

Final Decision

E.M.S. Niyaz (hereinafter referred to as the "Appellant") of 206, Bulugahatenna, Akurana has lodged this appeal against the decision taken by the Poojapitiya Pradeshiya Sabha, cancelling the Environmental Protection License (EPL) which was duly issued to him under Section 23B of the National Environmental Act (NEA) by the said Pradeshiya Sabha (PS).

Under Section 26 of the NEA the Central Environmental Authority (CEA) has delegated the power to issue EPLs in respect of certain industries (including saw mills) to local authorities.

The Appellant is the operator of the saw mill at Attaragama Road, Mullegama. The said PS, after holding an inquiry into neighbourhood objections, issued an EPL to the Appellant bearing No. 2863 on 11 August 1994, covering the discharge of waste and transmission of noise in respect of the said timber mill.

Subsequently, on or about 06 September 1994 the Appellant received a letter from the Poojapitya PS (dated 01 September 1994) informing him that the aforementioned EPL had been revoked due to the protest of two PS members regarding the said timber mill.

The Appellant then lodged this appeal (within a period of one month of such notice) against the said decision, by a letter dated 03 October 1994 addressed to the Secretary, Ministry of Transport, Environment and Women's Affairs.

Responding to the appeal the Director-General of the CEA has stated that it had informed the PS in writing that it was environmentally inappropriate for some other timber mill to be continued. The PS responded to the appeal on 18 November 1994 stating that the EPL was suspended till an inquiry was held into the objection of the PS members.

By a letter dated 05 December 1994, the Secretary, Ministry of Transport, Environment and Women's Affairs requested the Appellant-

1. to send him, his written responses regarding
   (a) The report sent by the PS dated 15 November 1994
   (b) The report sent by the CEA dated 18 November 1994

2. to inform him whether he desired to have a formal hearing so that the Appellant could make oral submissions.

By letter dated 19 December 1994 addressed to the Secretary, Ministry of Transport, Environment and Women's Affairs, the Appellant stated that the reasons adduced by the PS for the cancellation of the EPL are inadequate/illegal and that the CEA's comments appear to relate to some other timber mill.

Judicial decisions have repeatedly laid down that once a license of this nature is granted it creates legal rights/obligations in the license holder. Thereafter, the license can be cancelled/suspended only after a 'fair hearing'.

An EPL issued under the NEA gives the license holder the right to discharge waste and/or transmit noise into the environment subject to conditions. The license involves an authorization to do certain acts which would otherwise be illegal. The doing of these acts is very often inextricably linked with the operation of an industry or other occupation or trade. An EPL often involves the environment, the community and the livelihood of the license holder. The issue, suspension or cancellation of an EPL, is therefore an act which affects the rights of citizens and subjects, be they license holders, prospective license holders or members of the community.

In my view an analysis of the scheme of the NEA and the EPL provisions makes it manifest that the CEA and those institutions to which the CEA has delegated its power to issue, suspend and cancel EPLs, have a duty to act judicially when performing these acts. The CEA and other delegate institutions have a legal duty to follow the principles of natural justice when issuing, suspending and cancelling EPLs. This does not mean that the CEA and such institutions have to conduct proceedings like in a Court of Law. Natural justice and the duty to act judicially simply require that the CEA and the institutions to which it has delegated that power must act "fairly" giving affected parties a fair opportunity to place their case before the CEA/the delegate institutions and making EPL decision only on relevant data, evidence and facts.

Thus, in my view the CEA/the delegate institutions would have, *inter alia,* a legal obligation to:-

1. hear neighbourhood objections and carry out appropriate investigations prior to the grant of an EPL;

2. entertain, investigate and inquire into community complaints about EPL violations or situations in which waster/noise is being discharged contrary to the NEA;

3. grant EPL holders a reasonable opportunity of knowing the case against them and of placing their defence before the CEA/the delegate institutions prior to the cancellation/suspension of an EPL unless situations of emergency dictate urgent action to suspend an EPL.

In this case the PS has not given the Appellant any hearing or opportunity to make representations prior to the cancellation/suspension of the EPL. The PS has not held an inquiry and has acted in breach of the 'Audi Alteram Partem' rule (i.e. each party to the dispute should be given a hearing).

Section 23D of the NEA states thus:-

> "Where a license has been issued to any person under Part IV A of the NEA, and such person acts in violation of any of the terms, standards and conditions of the license, the receiving environment has been altered or changed due to natural factors or otherwise, or where the continued discharge, deposit or emission of waste into the environment under the authority of the license will or could affect any beneficial use adversely, the authority may by order suspend for any period specified in such order or cancel such license".

Section 23E of the NEA states thus:-

> "(1) Any applicant for a license under Part IV A who is aggrieved by the refusal of the Authority to grant a license or any holder of a license issued under this Part and who is aggrieved by the suspension or cancellation or refusal to renew a license so issued may within 30 days after the date of the notification of such decision, appeal in writing against such refusal, suspension, cancellation or refusal to renew as the case may be to the Secretary to the Ministry of the Minister.
>
> (2) The decision of the Secretary to the Ministry of the Minister on any such appeal shall be final".

In this case, the appellant has not asked for a formal hearing and is satisfied that a decision be made by the undersigned without such hearing on the appeal. The PS and the CEA have responded to the appeal and the Appellant has responded to the PS and the CEA.

In these circumstances, I hold that the decision taken by the Poojapitiya PS to cancel the said EPL is contrary to law and the NEA since the PS has acted in breach of the *'Audi Alteram partem'* rule. This rule is a more far reaching principle of natural justice which embraces almost every question of fair procedure or due process before a decision should be taken. Although the NEA does not state so explicitly it has been said on high judicial authority that “the justice of the common law will supply the omission of the legislature" and administrative agencies have a duty to act judicially and follow the principles of natural justice in situations such as these. I therefore set aside the said cancellation contained in the PS letter dated 01 September 1994.

It is open to the PS to hold a proper inquiry with the participation of the Appellant and complainants and made a fresh decision, within the law until then the said EPL remains valid and operative for the period of its issue.

D. Nesiah
Secretary
Ministry of Transport, Environment and Women's Affairs

Appeal under Section 23E of the National Environmental Act by G.L.M. Kamal Fernando
Appeal No. 1/95; D/-27-4-1995
D. Nesiah, Secretary, Ministry of Environment

Appeal against refusal of Divulapitiya Pradeshiya Sabha to issue Environmental Protection License (EPL) in respect of brick kiln - conditions imposed by Central Environmental Authority (CEA) when appellant had sought site clearance - whether unreasonable and illegal - failure by appellant to make formal application for EPL - whether Secretary accordingly had jurisdiction to entertain appeal under Section 23E - effect of application for site clearance - intention of legislation.

This was an Appeal to the Ministry Secretary under Section 23E of the National Environmental Act (NEA) read with the relevant regulations, against the refusal of the Divulapitiya Pradeshiya Sabha to issue an Environmental Protection License (EPL) to the Appellant in respect of a brick kiln.

The Appellant had not made a formal application for an EPL but its application for site clearance has been met by a letter from the Central Environmental Authority (CEA) imposing two conditions on the granting of clearance, namely that the kiln be situated at least 200 metres distance from the residence of the 3rd Respondent and that the smoke from the kiln be disposed of by means of a chimney 30 feet high. As the Appellant was unable to comply with the distance requirement, the Pradeshiya Sabha (to whom the CEA had delegated its power of issuing licenses in respect of brick kilns of the size in question) informed the Appellant that a license could not be issued.

The Appellant appealed to the Secretary on the grounds that the 200 metre distance requirement was unreasonable and illegal.

A preliminary objection was taken that since there was no formal application for an EPL in terms of Section 23B of the NEA, there could be no appeal in terms of Section 23E.

Held: (1) The site clearance process was a part and parcel of the EPL process and a party to whom site clearance had been denied should not thereafter be required to make a formal application for an EPL before appealing.

(2) There was no technical basis for the stipulation of a 200 metre distance requirement. It was not the subject of guidelines adopted by the CEA nor was it a recommendation of any of its inspecting officers. The distance had

been suggested by the 3rd and 5th Respondents and adopted without examination by the CEA and was therefore arbitrary.

(3) As the CEA had stated that it had no general guidelines regarding the distance to be maintained between brick kilns and residential premises, the Secretary, with the consent of the parties, caused the CEA to prepare a guideline for the location of brick kilns and the guideline proposed a distance of 100 metres as a general rule, subject to any variations made necessary by special circumstances. Therefore in this case the 100 metre limit should be applied, subject to any variation made on scientific or environmental grounds after inspection of the site by the CEA and the Pradeshiya Sabha and after giving the parties an opportunity of being heard.

(4) The condition stipulating a 30 ft chimney was based on a general guideline adopted by the CEA and was therefore not arbitrary and should be allowed to stand.

(5) The decision of the Pradeshiya Sabha refusing a license to the Appellant was accordingly set aside and the Appellant was free to make a formal application for an EPL. The Appellant was advised that in the meantime the discharge of smoke into the environment without a license would be illegal.

Final Decision

This is an appeal under Section 23E of the National Environmental Act, No. 47 of 1980 (NEA). The regulations relevant to this appeal are the National Environmental (Protection and Quality) Regulation No. 1 of 1990 published in Gazette Extraordinary No. 595/16 of 2 February 1990 and the National Environmental (Appellate Procedure) Regulations of 1994 published in Gazette Extraordinary 850/4 of 20 December 1994.

In this appeal Mr. G.L.M Kamal Fernando has appealed against a decision of the Divulapitiya Pradeshiya Sabha (PS) contained in their letter of 9 February 1995 addressed to the Director of the Central Environmental Authority (CEA) with copy to the Appellant. By the said letter the PS has intimated that “a license cannot be issued”. The PS's letter has been sent in pursuance of a letter dated 28 January, 1995 sent by the CEA to the PS wherein the CEA has granted authority for the erection of a brick kiln by the Appellant subject to several conditions.

The Appellant's complaint is that conditions No. 2 and 4.5 contained in the CEA letter are unreasonable and illegal. Condition No. 2 stipulates that the brick kiln should be erected at least 200 metres from the residence of the 3rd Respondent M.R. Fernando. Condition No. 4.5 stipulates that a chimney of at least 30 feet should be constructed and that the smoke from the brick kiln should be disposed of via this chimney.

Notices were served on Ms. M. R. Fernando and Mr. Somapala Fernando (the 4th Respondent), the PS and the CEA to respond to this appeal. The 3rd Respondent's wife (the 5th Respondent) was also heard in this appeal. They have each filed their comments

and submissions. The appellant was afforded an opportunity to respond to these comments which he has done by letter dated 8.4.95.

I have considered the appeal, the comments of the Respondents including the comments of Ms. M.R. Fernando, the response of the Appellant and all the documents annexed to their written comments. I have also carefully considered the submissions made at the hearing of this appeal held on 25.4.95 and 27.4.95 and documents marked R1 to R6 (all marked with the consent of all the parties).

Finding on the facts

Having considered the above material, I find the facts as follows:-

1. Prior to the dates material to this appeal, Mr. Somapala Fernando, the father of the present Appellant, had constructed a brick kiln on a land belonging to him. R1 shows that this land was close to the 3rd Respondent's residence and that the brick kiln was approximately 180 feet away. Two inspections have been carried out by the CEA in respect of this first brick kiln. The reports are market R4 and R5. R5 dated 1.11.91 states that no steps have been taken to construct the brick kiln as yet. R4 dated 20.05.92 also speaks of the first brick kiln as a "proposed brick kiln". R5 indicates that the proposed brick kiln would be located in a "residential area". R4, while confirming this position, states that each residence in the area has approximately 1/2 acre of contiguous land and that these residences are scattered. R4 also states that a large number of brick kilns are located in and around this locality and that it is estimated by the Chairman of the PS that over 2000 such kilns exist in that locality.

   R4 also indicates that the smoke emitted from the burning of a brick kiln on the first day could become a nuisance to the neighbourhood though this will abate by the second and third day. But R4 also cautions that the pollutants emitted from a brick kiln are of CO2 and water vapour and that these are not as dangerous to human health as some other pollutants such as vehicle exhausts. R4 recommends that the brick kiln be permitted subject to conditions necessary to minimize smoke pollution, particularly on the first day of burning. It suggests a 30 ft. chimney and a complete cover of the brick kiln to channel the smoke through the chimney.

   Subsequent to these two inspections it would appear that a discussion has ensued at the CEA. By a letter, the 3rd Respondent, together with his wife, appears to have suggested a 200 yard distance from their residence.

   Subsequently there appears to have been litigation between the 3rd Respondent's wife, Ms. M.R. Fernando and the 4th Respondent in the Magistrate's Court of Negombo where Mr. Bandaratilake, Deputy Director General (Technical) of the CEA has given evidence stating that 200 m distance should be maintained.

   The Court appears to have accepted that distance and ordered the closure of the first kiln on the basis that this condition could not be satisfied. This matter is now in appeal before the Supreme Court.

On a later date in 1994 the Appellant, who is the 4th Respondent's son, has made a site clearance application to the CEA for the construction and operation of a brick kiln on a land belonging to him which is adjoining the land of the 4th Respondent, his father. The Appellant proposed to construct a brick kiln approximately 240 ft. away from the residence of the 3rd and 5th Respondents. The CEA at the request of the PS inspected the brick kiln which had already been constructed by the Appellant on 12.12.94. This report is marked R6. The inspecting officer has stated that there is "no objection to this industry. Clearance can be granted under strict conditions".

However the CEA by its letter of 28.01.95 has imposed the conditions of 200 metres distance and a 30 foot chimney on the Appellant as well. The CEA's explanation is that since the Negombo Magistrate's Court (later decided in appeal by the Provincial High Court of Negombo) has imposed the 200 metre limit on the 4th Respondent's father, the CEA decided to impose this limit on the Appellant was well, since the industry is the same and is situated in the same area. The 3rd Respondent further submitted that the decision of the Court would apply to the Appellant as well.

On being questioned by me, the CEA admitted that there was no technical basis for the fixing of the 200 metre limit and that it was the result of a discussion held at the CEA with the 3rd and 4th Respondents. The CEA also stated that they had no general rule regarding the distances that had to be maintained between brick kilns and residential premises. At my request and with the consent of parties the CEA submitted R3 which is a general rule of thumb for the future location of brick kilns. R3 proposes a 100 metre distance between brick kilns and residences "depending on the location and the magnitude of the industry". Therefore a 100 metre rule of thumb will be applied to future brick kilns subject to variations justified on technical grounds by special circumstances of location and magnitude and other relevant environmental considerations.

It also transpired that the Appellant had not made a formal application for an Environmental Protection License in keeping with Section 23B read with the National Environmental (Protection and Quality) Regulations of 1990. However, both the Appellant and the PS appear to have proceeded on the basis that the site clearance application was an EPL application.

Hence the PS by its letter of 9.2.95 has refused the license.

Issues that Arise for Decision

To my mind there are 2 preliminary issues that arise for decision:

1. In the absence of a formal EPL application, do I have jurisdiction to entertain and determine this appeal under Section 23E of the National Environmental Act?
2. If I do possess jurisdiction should I interfere with the decision of the Pradeshiya Sabha?

The CEA and the 3rd Respondent both submitted that there is no right of appeal under Section 23E in this particular case. They submit that where there is no application for an

Environmental Protection License under Section 23B, read with Regulation 7, there cannot, in law, be a refusal of such an absent application. Hence no right of appeal would accrue under Section 23E. They urged me to reject this appeal on that basis.

I find myself unable to agree with these submissions. The EPL process instituted by the NEA impacts upon the citizenry and their rights in a multitude of ways. An EPL affects the industrialist and his right of occupation as much as it affects his neighbours and their right to life and health. Industrialists often wish to know whether they can invest in and construct an industrial establishment, with a particular design at a particular place, even before they apply for an EPL. It would be a tremendous waste of resources if at the end of the establishment of an industrial plant an EPL application is made and denied. The virtual effect of such a denial would be to render the operation of and discharge of waste from such an industrial establishment wholly illegal. To overcome this problem, the CEA, together with the Local Authorities and other relevant agencies have designed a pre-EPL procedure called site clearance. An industrialist would obtain a site clearance through the Local Authority or the CEA by filling up a site clearance questionnaire followed by a CEA inspection. Such a site clearance allows the industrialist to obtain building approvals and other necessary legal authorizations, to construct the industry and to make the necessary investment of resources, with a reasonable degree of certainty that an EPL would be granted when formally applied for, if site clearance conditions are complied with.

The site clearance, pre-EPL procedure, in a sense prejudges the issuance of an EPL. Technically, the EPL process commences with a formal application. But, for an industry which has received site clearance and EPL application is only a formality, triggering the necessary process to obtain an EPL.

What is the situation of a person to whom site clearance is denied? Would there be any purpose served in such a person making a formal EPL application with the full knowledge that it would be, in all probability, refused. What remedy would such a person have? Would the right of appeal under Section 23E be available to such a person? Can the authorities by an administrative device, such as the site clearance process, effectively pre-empt legal procedures and rights of appeals established by parliament? Would a person to whom site clearance is denied have to make a formal EPL application and obtain a formal refusal before the exercise of his right of appeal. This to my mind would be to reduce the law to the ridiculous.

I would rather see the site clearance process as a part and parcel of the EPL process. If the refusal of a site clearance is in such tenor as to be tantamount to a refusal of an EPL, the right of appeal under Section 23E must accrue to the applicant. To say otherwise would be to thwart the intention of the legislation.

The power to issue an EPL for brick kilns of this magnitude has been delegated by the CEA under Section 26 of the National Environmental Act to Local Authorities. The Pradeshiya Sabha by its letter of 9.2.95 has in unambiguous terms refused to issue a license, even before an application had been formally made. The reason for the refusal of an EPL is that the Appellant is unable to comply with the 200m in distance stipulated in

the site clearance by the CEA. If site clearance is not considered to be part of the EPL process, such a refusal would, in all probability, be a nullity in law.

I hold that there is in this case a refusal to grant an EPL, within the meaning of Section 23E of the National Environmental Act. I therefore hold that the Appellant has a right of appeal to the Secretary of this Ministry and that I have jurisdiction to entertain and determine this appeal.

A careful examination of the material before me indicates that there is no technical basis for the stipulation of the 200 metre distance. That stipulation was not the subject of general guidelines adopted by the CEA, nor was it a recommendation of any of the 3 inspecting officers of the CEA. It appears to me to have been placed in the arena of decision-making by the 3rd Respondent and/or his wife, the 5th Respondent, and adopted without examination by the CEA. To my mind this condition smacks of a high degree of arbitrariness. The law expects the CEA to stipulate EPL conditions on the basis of scientific data and technical and environmental considerations. Such arbitrary conditions cannot be admitted to the realm of environmental regulations.

It is settled law that the judgement of a Court ordinarily binds only the parties thereto. There are exceptions to this rule. But none of them have been shown to apply in this case. I do not think the litigation and the judgements of the Negombo Magistrate's Court and Provincial High Court, between Ms. M.R. Fernando, the 5th Respondent and Mr. Somapala Fernando, the 4th Respondent, will bind the Appellant. The Appellant is a separate person. The material before me shows that his father has no interest in the Appellant's land and that the Appellant's brick kiln is separate from his father's brick kiln. There is no adequate material placed before me to demonstrate conclusively that the Appellant is a front for his father.

On the other hand, the material before me suggests that the conditions stipulating the 30 ft. chimney is a general guideline adopted by the CEA for brick kilns and other such industries. There is no evidence to suggest that this condition was arbitrary. I would therefore uphold condition 4.5 and declare condition 2 to be arbitrary and therefore unreasonable and unjustifiable.

The CEA must establish general guidelines for industrial setting and stipulation of conditions in EPLs. General conditions may have to be varied where exceptional circumstances justify such variations on sound scientific grounds. R3 is such a guideline for the future. A general distance of 100 metres between brick kilns and residences should be observed in all future cases subject to variations in exceptional circumstances justified on sound scientific grounds.

In this case too the 100 metre limit should be applied. But the CEA and the PS should inspect the site, gather scientific and environmental data, give the parties an opportunity to be heard and then make a variation, if so justified, as indicated above. In the absence of such justification the 100 metre rule must apply.

Decision

For the above reasons I hereby set aside the decision of the Divulapitiya Pradeshiya Sabha, dated 09.02.95 refusing to issue an EPL to the Appellant.

The Appellant is free, if so advised, to make a formal application for an EPL to the Divulapitiya PS. If and when such an EPL application is made by the Appellant, the PS and the CEA should process it, according to law, applying the 100 metre rule set out in R3, subject to any variations of that rule and the imposition of other conditions to be clearly substantiated on technical and scientific grounds, after inspection and consultation with the parties.

In the meantime the Appellant is reminded that the discharging of smoke to the environment by the operation of his brick kiln without an EPL is illegal, and subject to prosecution.

D. Nesiah
Secretary
Ministry of Transport, Environment and Women's Affairs,

Appeal under Section 23DD of National Environmental Act by Ceylon Electricity Board
Decided: 03 August, 1995
Before: Cecil Amarasinghe, Secretary, Ministry of Environment

Appeal by Ceylon Electricity Board (CEB) against refusal of Project Approving Agency (PAA) to approve hydropower project - Appointment of panel of experts to advise Secretary on technical issues - Subsequent hearing to enable parties to comment on report of panel - Duty of PAA to act in quasi-judicial capacity when evaluating environmental impact assessment (EIA) report - Need for PAA to give its mind to issues not addressed in EIA - Consideration of alternatives.

A number of sites were available for the Upper Kotmale Hydropower Project proposed by the Ceylon Electricity Board (CEB). Following a feasibility study the CEB selected a site that would impact on seven waterfalls in Sri Lanka's central mountain zone. The site was selected as being "technically and economically feasible". The EIA prepared by the CEB contained an admission that the feasibility study was inadequate on environmental issues.

The Ministry of Irrigation, Power and Highways which had been planning a project of this nature for many years prior to the introduction of EIA procedures in Sri Lanka, was appointed the Project Approving Agency (PAA) under the National Environmental Act. Its own Technical Evaluation Committee (TEC) found that the threatened waterfalls had not been assigned an economic value and consequently that there had been no evaluation of the environmental costs of the project. The TEC evaluated other options including the "Yoxford" option which it recommended. The Ministry overruled the TEC on the grounds that alternative sites were "technically and economically" not viable, but was

unable to approve the project as PAA because the Central Environmental Authority (CEA) refused to concur in its decision.

The PAA accordingly wrote to the CEB by letter of 24.02.1995 refusing approval for the project. The CEB lodged this appeal under Section 23DD of the National Environmental Act which gave it a right of appeal to the Secretary.

Held: 1. There was no evidence of any responsible evaluation of the Yoxford option by the CEB.

2. In order for a project to be acceptable it would have to satisfy technical, financial and environmental evaluations.

3. The EIA failed to give adequate consideration to the Yoxford option.

4. Therefore the CEA's reasons for refusing to concur in the Ministry's decision were justified.

5. The PAA had failed to give substantive and accountable reasons for overruling its own TEC.

6. The PAA had displayed bias and had failed to act in the quasi-judicial manner require of a PAA.

7. The CEB was at liberty to apply for a fresh approval after addressing the various omissions in the original EIA but a different PAA should be nominated.

Cases cited:
Natural Resources Defence Council Inc. v Morton; 148 US app D C 5 and 2 ELR 20029 (1972)
Monroe Country Conservation Council v Volpe; 3 ELR 20006 and 20007
Environmental Defend Fund Inc v Falk; 3 ELR 20001
Sierra Club v Mason; 2 ELR 2694
Calvert Cliffs Co-ordinating Committee Inc. v. Atomic Energy Commission; 1 ELR 20346
Libby Rod and Gun Club v Potcat; 8 ELR 20807
Sierra Club v Gallaway; 4 ELR 20731

FINAL DECISION

This is an appeal made by the Ceylon Electricity Board hereinafter referred to as the "CEB" against the refusal to approve the Upper Kotmale Hydropower Project (UKHP). The appeal is against the decision of the Central Environmental Authority hereinafter referred to as the "CEA" which refuse to concur in the decision of the Ministry of Irrigation, Power and Energy, the Project Approving Agency (hereinafter referred to as the "APP") to grant approval for the implementation of the said project as proposed by the CEB. The decision to refuse approval was made by letter dated 24th February, 1985, sent by the PAA to the CEB. The CEB lodged this appeal on 23rd March, 1995, in terms

of Section 23DD of the National Environmental Act (hereinafter referred to as the "NEA").

PROCEDURE ADOPTED

Since there were a large number of respondents at the public hearing held by the PAA in Nuwara Eliya on 6th February 1995, I decided to notify these respondents through a public notification, published in the "Ceylon Daily News", "Dinamina" and "Dinakaran" of 29th March 1995. In consequence of the said public notification, written comments were received from a large number of organizations and individuals. These written responses were then referred to the CEB and the CEB's counter responses were received on 16th May, 1995. Having notified the CEB and all the respondents, including the CEA, I held the first hearing of the appeal on 1st June, 1995, at which, all the parties present at the hearing (including the CEA and the CEB) agreed that there were several technical issues that had to be considered in the appeal and that it was desirable to appoint a panel of experts to study the documents, hear submission from all the parties and advise me on these issues. Accordingly with the consent of all parties concerned Terms of Reference (hereinafter referred to as the "TOR") consisting of 7 issues were formulated and the panel of expert advisors consisting of the following were nominated:
Prof. Lakshman Jayatillake (Mechanical Engineer)

Chairman
National Education Commission

Prof. Senaka Bandaranayake (Archaeologist)
Director
Post-Graduate Institute of Archaeology

Prof. P.W. Vithanage (Geologist)
Professor of Geology (Emeritus)
University of Peradeniya

Prof. Nimal Gunatillake (Ecologist)
Professor of Botany
University of Peradeniya

Dr. N. Sandaratne (Economist)
Chairman
National Development Bank

Mr. P.C. Senaratne (Hydrologist)
Deputy Director
Irrigation Department

Prof. S. Karunaratne (Electrical Engineer)
Professor of Electrical Engineering

The parties also agreed that I should appoint a sociologist and a civil engineer and left the nomination to be made by me. In response I appointed Prof. Tudor Silva, Professor of Sociology, University of Peradeniya and Dr. S. Wijesekara, Senior Lecturer, University of Moratuwa. Additionally Dr. Sandaratne, Chairman, National Development Bank was indisposed and as a result had to be replaced by Mr. Nimal Siripala, Deputy Director, Macro Economic Planning Division, Dept. of National Planning. In appointing Mr. Siripala an informal agreement was obtained by officials of my Ministry from the CEA and the CEB. Prof. Bandaranayake, Director, Post-Graduate Institute of Archaeology was also unable to participate as he was abroad in the latter part of June and he was not replaced by anyone. Accordingly, the final panel was as follows:-

Prof. Nimal Gunatillake (Ecologist)
Professor of Forestry
University of Peradeniay

Prof. Lakshman Jayatillake (Mechanical Engineer)
Chairman
National Education Commission

Prof. S. Karunaratne (Electrical Engineer)
Professor of Electrical Engineering
University of Moratuwa

Mr. P.C. Senaratne (Hydrologist)
Deputy Director
Irrigation Department

Prof. P.W. Vithanage (Geologist)
Professor (Emeritus) of Geology
University of Peradeniya

Prof. Tudor Silva (Sociologist)
Professor of Sociology
University of Peradeniya

Dr. S. Wijesekara (Civil Engineer)
Senior Lecturer
University of Moratuwa

Mr. Nimal Siripala (Economist)
Macro Economic Planning Division
Dept. of National Planning

With the consent of all the parties present at the hearing, Mr. Lalanath de Silva, Attorney-at-Law, Legal Consultant of the Ministry of Transport, Environment and Women's Affairs was appointed as the Technical Chairman of the Committee. He was responsible

for the conduct of proceedings before the panel, but was not to participate in the decision of the panel.

The TOR for the panel was:-

* The Panel is expected to consider all the documents forming part of this appeal. It should also give a hearing to the parties to this appeal, namely the CEB, the CEA, the PAA and the members of the public and NGOs that have sent in comments to this Appeal. The Panel is required to advise on the following issues:-

1. Has the CEB identified viable options to the UKHP?
2. Whether the EIA submitted to the PAA adequately examined alternative options and whether options less harmful to the environment were also adequately described?
3. If so, were adequate reasons given for rejecting such alternatives?
4. Did the EIA adequately predict and evaluate unavoidable environmental impacts?
5. Were there data or analytical inadequacies in the EIA report?
6. If so what were these inadequacies?
7. Are the reasons adduced by the Technical Evaluation Committee of the PAA and the CEA for denying approval to the UKHP acceptable on relevant technical grounds?

There will be a Technical Chairman of the Panel who will be responsible only for the conduct of the proceedings before the panel. The Technical Chairman will not participate in the decision of the panel. The Panel should render its advice by 30th June in the form of a written report which will be made available to all the parties.

The secretary will thereafter hold further hearing to give the parties an opportunity to comment on the report and make non-technical submissions, before he gives a final decision on the appeal.

The advice of the panel should be given on the basis of consensus. If consensus cannot be reached the majority and minority views should be reflected in the report with an indication of who voted in which way.

The panel of expert advisors having notified the CEB and all the respondents including CEA, considered all the documents in this appeal, and in particular the following:-

1. Appeal by the CEB with annexed documents and the EIA report
2. Public comments on CEB appeal including comments by CECB
3. Responses of the CEB top public comments
4. Report of the Technical Evaluation Committee of the Ministry of Irrigation, Power and Energy
5. CEA's refusal of concurrence

6. Extract of the NEA, with the EIA regulations and appeal procedure regulations

The panel also held hearings on the 26th, 27th and 28th June 1995, at which the CEB and other respondents made oral submissions and of consent considered the additional documents marked A1-A3 and R1-R3.

The panel of expert advisors gave a report containing its advice dated 30th June, 1995. This report was circulated among all the parties including the CEA and CEB, and a further hearing was held before me on 11th July, 1995. This hearing was postponed at the request of the CEB notwithstanding objections from the CEA and other respondents, to 24th July, 1995. On the 24th July, 1995, the CEB and other respondents including the CEA made submissions before me.

I have had the benefit of hearing the parties and of the ad verbatim proceedings before the panel of expert advisors, and the written advice of the panel of experts, in considering the Environmental Impact Assessment Report (hereinafter referred to as the "EIAR") on the Upper Kotmale Hydropower Project submitted by the CEB as well as the report of the Technical Evaluation Committee (hereinafter referred to as the "TEC") of the PAA, and the findings of the CEA in declining concurrence. I have also had the benefit of the minutes of the public hearing held in Nuwara Eliya, and the public comments received in response to the EIA. My decision is based upon the consideration of all this material.

THE PROJECT

The main structure of the Upper Kotmale Hydropower Project as set out in the EIAR by the CEB is as follows:-

- Concrete gravity dam at Talawakelle, 34 m height
- Regulation pond of capacity 0.8 MCM, at Talawakele
- Headrace Tunnel (0=4.3 m), 12.8 km long
- Underground type penstock 796 m long
- Underground type power house with units of 77 MW turbine/generator
- Six tributary diversion facilities

The salient features of the project are discussed in Section 2.1.5 of the EIAR and the components of the Upper Kotmale Hydropower Project are shown in Figure 2.1.1.-1.

In brief the objective of the Upper Kotmale Hydropower Project appears to be the Generation of an annual energy of 530 GWh. The project has a capacity of 150 MW.

The project site is located on the western slope of the Nuwara-Eliya mountain range which is the central mountain zone of the island. The project area extends over an altitude of 700-1200 m on the upstream of the Kotmale Oya, one of the largest tributaries of the Mahaweli Ganga (EIA Section 2.1.4).

The project appears to have a planning history which begins with the formulation of a master plan study for Mahaweli development by the FAO in 1968. This master plan study identified several possible dam sites including Caledonia, Lindula Talawakelle, Yoxford

and Wewahena. However the FOA did not recommend these dam sites in the Upper Kotmale area in its development plan. Thereafter the Japanese International Co-operation Agency (JICA) appears to have carried out a feasibility study of the project (1985-1987) at the request of the Government of Sri Lanka (GOSL). During this feasibility the following alternatives are stated to have been examined (EIAR) Section 2.3.1):-

a) One Step Development

Caledonia regulation pond-
Kotmale Reservoir
Lindula regulation pond-
Kotmale Reservoir
Talawakelle regulation pond-
Kotmale Reservoir
Caledonia reservoir-
Kotmale Reservoir
Lindula reservoir-
Kotmale Reservoir

b) Two Step Development

Caledonia reservoir-Talawakelle pond-
Kotmale Reservoir

c) Three Step Development

Caledonia reservoir-Talawakelle pond-
Yoxford pond-Kotmale reservoir

d) Four Step Development

Caledonia reservoir-Talawakelle
pond-Yoxford pond-Wewahena
pond-Kotmale reservoir

As a result of the feasibility study, two alternatives have been proposed as the most technically and economically feasible. These were the Caledonia (reservoir type) and Talawakelle (run of the river type alternative).

The EIA admits (Section 2.3.1) that this feasibility study, was "inadequate on environmental issues, including the issue of resettlement and waterfall aesthetics and on other natural resources". Subsequent to the feasibility study which recommended Caledonia and Talawakelle on technical and economic grounds only an engineering services study has been carried out in 1993-1994, which appears to have included an EIA. In this engineers services study three alternatives were considered. They were:-

Alternative I- Simultaneous development of Talawakelle and Caledonia

Alternative II- Talawakelle with provision for future development of Caledonia (see Section

2.3.2 of the EIA)

Alternative III-Talawakelle development only

Two other options referred to as alternatives IV and V also appear to have been examined in the engineering services study. Alternative IV appears to have been studied with a view to minimizing the environmental impacts. The scheme contemplates a run of the river type, with a 20 m high dam and a regulation pond at Caledonia with the outlet of the power generation discharge located downstream of St. Claire Falls, in order to save Devon Falls; the Yoxford dam of the St. Claire scheme would be located downstream of Devon waterfall.

Alternative V is said to have been studied since Alternative IV was found to be uneconomical. It consists of a combination of the Talawakelle scheme and the St. Claire scheme. Alternative V also affects St. Claire and Devon falls in a manner similar to Alternative I and III. The CEB in its EIAR concludes that Alternative III is the optimum development plan after careful examination in aspects of environment, economical and systems analysis. The EIA rejects Alternative IV as 'economically not feasible' and Alternative V as 'having significant environmental impacts on the waterfalls'.

The consideration of alternatives in the EIAR is confined to 10 pages of a total of 230 pages inclusive of diagram and is confined to a consideration of Alternatives I-V.

THE TECHNICAL EVALUATION COMMITTEE'S FINDINGS

The TEC of the PAA is a group of experts brought together by the PAA to advise it in the discharge of its functions under Part IV C of the NEA.

The TEC performs an advisory function. The decisions of the PAA are taken by an over-sight committee. The PAA for the Upper Kotmale Hydropower Project is the Ministry of Irrigation Power and Energy, and the over-sight committee is chaired by the Secretary to that Ministry. The TEC consisted of the following members:-

G.B.A. Fernando
(Chairman/TEC)
Director, Energy Planning
Ministry of Irrigation, Power and Energy

S. Somasiri
Consultant, Land Use Planner and Former Director of Natural Resources Management Centre

L. K. Seneviratne
Consultant, Geologist and Former Director of Geology
Survey Department

Senerath Bulankulama
Sociologist

N. Karunaharan
Consultant Hydrologist

T.L. Gunaruwan
Consultant, National Planning Department

B.M.P. Singhakumara
Ecologist/Senior Lecturer,
University of Sri Layawardenapura

Ms. Y.N.A Jayatunga
Senior Lecturer,
University of Colombo

Henry Gamage
Deputy Director,
Department of Agriculture

D.S. Athukorale
Asst. Director,
Ceylon Tourist Board

S.W. Dissanayake
Deputy Manager/Environment,
Mahaweli Economic Agency, MASL

M.M.S.R. Perera
Deputy Manager,
Mahaweli Economic Agency, MASL

S. Karunaratne
Director Head Works, MASL

N. Nuresh Kumar
Senior Environment Officer, CEA

The TEC in its report of 7th February, 1995 has identified several environmental impacts of the Upper Kotmale Hydropower Project. Foremost amongst these impacts are the impacts on seven of Sri Lanka's waterfalls. These waterfalls are:-

1. St. Claire's Falls

2. Devon Falls
3. Ramboda Falls
4. Puna Falls
5. Pundal Falls (Dunsinane falls)
6. St. Andrew's Falls
7. Holyrood Falls

The TEC states in its evaluation that these waterfalls "form an integral part of the national heritage and as such should be preserved for present as well as future generations". The TEC has found that adequate weight age has not been given to this aspect of the EIAR, and recommended that the waterfalls should remain in their natural conditions at least during day time.

Other things evaluated by the TEC include water quality impacts, the threat of upstream flooding, impacts due to tunnelling, reclamation, quarry sites, resettlements and the loss of Biodiversity.

The TEC in its report, Section 2.11, (Page 16), has evaluated the alternatives discussed in the EIA. The TEC (page 18) lists a further four options numbered 6-10. Alternative 6 appears to have been the one proposed by the Central Engineering Constancy Bureau (hereinafter referred to as the "CECB"). The TEC states that the CEB "has selected Alternative 3 purely on economic benefit-cost analysis based on power generation benefits and construction costs". The TEC also concludes that an extended (i.e. environmental) benefit-cost analysis has been included in the EIAR, taking into account some of the environmental implications.

The TEC concludes that the waterfalls have not been assigned economic values and states that "a contingent valuation exercise on waterfalls could have given better indications to the decision maker regarding the project". The TEC further states that "the costs of Alternative 3 with the environmental costs can be extremely high". The TEC has taken the CECB's proposed alternative very seriously (hereinafter referred to as the "CECB Yoxford option"). The TEC recommends that Alternatives 4, 6 and 7 should be considered further, and has recommended that the Upper Kotmale Hydropower Project as proposed by the CEB be rejected.

The TEC report has been considered by the over-sight committee at meetings held on 15th February, 1995 and 17th February, 1995, and a decision appears to have been taken to approve the project, notwithstanding the TEC's recommendations. A letter dated 25th February, 1995 written by the Secretary to the Ministry of Irrigation, Power and Energy states that "the project proponent indicated that the other alternative ways in which the waters of Upper Kotmale can be harnessed for power generation are technically and economically not viable" (underlining mine). The final paragraph of this letter states that "an OCEF mission is in Srilanka to appraise this project and it is much appreciated if your concurrence of this is given before 23rd February, 1995 to enable me to inform the OECF and the DER". Apart from these bare statements there is nothing on record to indicate why the oversight committee of the PAA rejected the findings of the TEC on the

question of evaluating the alternatives. Perhaps the response of the CEB to the TEC report might have carried more weight with the PAA.

The CEB in its response to the TEC states that the CECB alternatives cannot be considered at this stage and that the money allocated for engineering services is to study the three alternatives mentioned earlier (i.e. alternatives I-III). The CEB's refusal to study other alternatives is because it is now tied to Japanese financing and the CEB has not identified alternative funding to study other options, even if such options may be environmentally better.

At the hearing before the panel of expert advisors the CECB has outlined its alternative proposal. It is true that the CECB was one of the partners of the consortium of consultants which compiled the engineering studies including the EIA. At some stage the CECB appears to have pulled out of this partnership. At the hearing of this appeal, the CECB responded to the public notification, and has opposed the appeal of the CEB.

The CECB has identified several unfavourable aspects both technical and environmental on the Upper Kotmale Hydropower Project proposed by the CEB. These are set out in Section 3 of the CECB's responses.

The CECB states that it "used every available opportunity to raise the issues" regarding environment impacts with the consortium. The CECB's consultants state that at their own initiative they developed alternative proposals, which would avoid these contentious issues.

A modified version of this proposal is Alternative IV found in an inception report submitted to the CEB in November 1993 (produced as annex 9 with the CECB responses). Although the alternative scheme and the need for further studies was raised at several meetings, both within CNEC, the consulting consortium, and with the CEB, it would appear that no positive response was received. The CECB in its responses has presented an alternative proposal containing two phases, namely the Yoxford scheme and the Lindula scheme. Clearly the CECB's proposal or a variation thereof, (which includes Alternative IV as set out the EIA or Alternatives 6 and 7 in the TEC report), is environmentally friendlier. These options impact very little upon the seven waterfalls (other than St. Claire falls which is impacted in different degrees). This alternative also has the benefit that it displaces a much smaller number of people.

The CEA has followed a similar line of thinking found to that in the TEC report, and its refusal to concur with the decision of the PAA is based largely upon the TEC evaluation. When this issue was referred to the panel of expert advisors, it was to elicit technical advice on the question of alternatives. The panel has advised that Alternatives I-V have been recognized by the CEB in the EIAR. Certainly by the time this appeal was lodged the CEB was aware of all the ten options listed in the TEC report.

RELEVANT LAW

The EIA process has been instituted under Part IV C of the NEA No 47 of 1980 as amended by Act. No. 56 of 1988. The orders and regulations necessary to bring these

provisions into operation are found in Gazette Extraordinary 772/22 of 24.06.1993, as amended by Gazette Extraordinary 859/14 of 23.02.1995. The scheme of the NEA was examined in some details by my predecessor in office Dr. D. Nesiah in a ruling that he delivered on a preliminary objection in respect of an appeal on the Rajawella Golf and Hotel Project. In his ruling, Dr. D. Nesiah summed up the EIA scheme as follows:-

"The NEA (as amended in 1988) introduced the EIA as a tool for decision making. It is a tool that is used throughout the world and has come to find a place in the Rio Declaration of 1992 and in Agenda 21. An EIA is defined in the NEA. It is basically an environmental assessment that looks at impacts of the project and analyses alternatives (options) for the project that might be less harmful to the environment. The analysis of alternatives is in my view at the very heart of process.

The EIA is a helpful tool to decision makers (be they government agencies, the project developer or the affected public) since, unlike before they now have a clearer picture of what impacts the project would have on the environment and what alternatives are possible in order to avoid/mitigate those impacts.

The usefulness of an EIA increases if the process is integrated from an early stage into the planning and design of a project. The earlier the process is integrated the greater the chance that the project sitting and design would be the best alternative and that most, if not all, environmental concerns would have been addressed by the time the EIA is made public and comments sought. That is the ideal. However, the EIA process is barely a year old and many projects, including the present one, have been in the pipeline prior to the EIA regulations of July 1993. In these circumstances the ideal situation does not, and will not, for some time, exist.

For a time, projects which were under planning, will have entered into the EIA process at a much later stage than ideal. In these circumstances, all environmental issues may not have been fully addressed and the best alternative may not have been selected. Thus, at the time the EIA for these projects is opened for public comment, there may be unaddressed environmental question and environmentally friendly alternative which may not have been sleeted.

A PAA faced with this scenario, has a special obligation in law. In evaluating the EIA, public comments and the project proponents' responses, a PAA would have to give its mind to the many unaddressed, or inadequately addressed environmental issues. The PAA would have to ask itself the question, "Is there a better more environmentally friendly alternative to this project?"

I cannot over-emphasize that an adequate and a rigorous consideration of alternative is at the heart of the EIA decision making process. It is through such a rigorous consideration of alternatives that are environmentally more friendly, that decision makers, project proponents and the public can reach a conclusion on the sustainable way in which development projects can be evolved. The consideration of alternatives can not be taken lightly nor reduced to a superficiality. What is required is an honest and a rigorous consideration of feasible and reasonable alternative that are environmentally better.

The definition of an EIA is contained in Section 33 of the National Environmental Act. An EIA is defined as "a written analysis of the predicted environmental consequences of a proposed prescribed project and containing an environmental cost-benefit analysis if such analysis has been prepared, including a description of the avoidable and unavoidable adverse environmental effects of the proposed prescribed project; a description of alternatives to the activity which might be less harmful to the environment together with the reasons why such alternatives were rejected, and a description of any irreversible or irretrievable commitments of resources required by the prescribed project.

The concept of an EIA was first legislated upon in the USA by the National Environmental Policy Act of 1969 (hereinafter referred to as "NEPA"). NEPA required the preparation of an Environmental Impact Statement for every major federal action significantly affecting the environment. It requires the Environmental Impact Statement to consider "alternatives to the proposed action".

The NEA and NEPA provisions are identical in concept, context and effect. In the absence of Sri Lankan judicial decisions, I have sought guidance on the interpretation of this requirement, from judicial decisions of the USA.

William Rodgers in his treatise on Environmental Law (1977 edition) page 792 states as follows:

"A substantive evaluation of project is utterly dependent upon an understanding of the other possible courses of conduct and adequate discussion of alternatives can bring out mitigation measures that can be made part of the project".

In **Natural Resources Defence Council Inc. v. Morton** 148 US App. D.C. 5, 458 F. 2d 827, and 2 EIR 20029 (1972) a rule of reason was laid down for the discussion of alternatives in impact assessments thus:

"This requirement in NEPA of discussion as to reasonable alternatives does not require 'crystal ball' inquiry. Mere administrative discovery does not interpose such flexibility into the requirement of NEPA as to undercut the duty of compliance to the fullest extent possible. But if this requirement is not rubber, neither is it iron. The statute must be constructed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible, given the obvious, that the resources of energy and research-and time-available to meet the nation's needs are not infinite" (page 792).

Analyzing case law, William Rodgers states that a discussion of alternatives is not precluded "because implementation is dependent upon action by another agency or official or because they do not offer a complete solution to the problem; or because they require radically new approaches to the agency mission; or because they take time to implement" (supra).

Rodgers states further that "the EIS discussion of alternatives must make clear the reason for the Agency's choice, address the environmental effects of the alternatives, compare them, explain how future options may be narrowed by present decisions and respond to the recommendations of responsible critics" (supra).

On the other hand, a EIA "need not discuss, or need mention only briefly, remote and speculative alternatives, dependent upon major research break-through or revolutionary legislative changes ...; those shown by the record to be unrealistic; ..... a discussion of alternatives may be circumscribed by scientific realities or impossibility of implementation" (page 794).

The EIAs must produce information sufficient to permit a reasonable choice of alternatives, so far as environmental aspects are concerned (see NRDC vs. Morton Supra). It is not sufficient to make passing or superficial mention of possible alternatives "in such a conclusive and an unfortunate manner that (Environment Impact Statement) affords no basis for a comparison of a problem involved with the proposed project and the difficulties involved in the alternatives". **(Monroe Country Conservation Council v. Volpe;** 3 ELR 20006 and 20007). What is required is substance not superficiality. A greater depth of analysis is required for large projects such as the UKHP and for projects that have been in planning stages for many years. (**Environment Defend Fund Inc. v. Falk;** 8 ELR 20001). Similarly, deeper analysis is required in the case of projects where other courses of conduct or mitigation measures are strongly indicated (**Sierra Club v. Mason;** 2 ELR 2694). Conversely less discussion and analysis might be sufficient for small projects of limited scope and inflexible design.

There is a natural tension between the desire to get a project under way within a reasonable time and to make commitments of resources to investigate alternatives. To my mind however there are some question that are so central to the technical, financial or environmental viability of a project (e.g. the safety of a dam or the disappearance of nationally significant waterfalls or large commitments of funding) that adequate study is a pre-requisite to action, while peripheral issues may be suitably addressed over time.

In a case cited to me by Environmental Foundation Ltd., a respondent to this appeal, **Calvert Cliffs Co-ordinating Committee Inc. v. Atomic Energy Commission** 1 ELR 20346, the Court stated as follows:

> "The sort of consideration of environmental values which NEPA compels is clarified in Section 102 (2) (A) and (B). In general, all agencies must use a "systematic interdisciplinary approach" to environmental planning and evaluation "in decision making which may have an impact on man's environment". In order to include all possible environmental factors in the decisional equation, agencies must "identify and develop methods and procedures which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical consideration. "Environmental amenities" will often be in conflict with "economic and technical considerations". To "consider" the former "along with" the latter must involve a balancing process. In some instances environmental costs may outweigh economic and technical benefits and in other instances they may not. But NEPA mandates a rather finely tuned and "systematic" balancing analysis in each instance" (underlining mine).
>
> To ensure that the balancing analysis is carried out and given full effect, Section 102 (2) (C) requires that responsible officials of all agencies prepare a "detailed

> statement" covering the impact of particular actions on the environment, the environmental costs which might be avoided, and alternative measures which might alter the cost-benefit equation. The apparent purpose of the "detailed statement" is to aid in the agencies' own decision making process and to advise other interested agencies and the public of the environmental consequences of planned federal action".

In another case cited before the Panel of Advisors, namely **Libby Rod & Gun Club v. Potcat** 8 ELR 20807 Court states thus:

> NEPA requires federal agencies to develop and thoroughly consider alternatives to proposed actions. 42 U.S.C Section 4332 (2) (C) (iii) and (E). The Council on Environmental Quality (CEQ) regulations define this responsibility with even greater detail, establishing that all reasonable alternatives must receive a "rigorous exploration and objective evaluation". 40 C.F.R. Sections 1500.8 (a) (4). The performance of this duty requires substantive good faith consideration of alternatives "to the fullest extent possible", a very high standard. **Calvert Cliff's Coordinating Committee Inc. v. United States Atomic Energy Commission**, 449 F. 2d 1109, 1114 [ELR 20346] D.C. Cir. 1971. Furthermore, the discussion of alternatives in the EIS is not be limited to those alternatives available to the particular agency preparing the EIS, but must consider options available to the government as a whole. 40 C.F.R. Sections 1500.8 (a) (4); **Natural Resources Defence Council Inc. v. Morton,** 458 F. 2nd 827, 834 [2 ELR 20029] (D.C. Cir. 1972)

Under NEPA, a court is empowered to review the benefit-cost analysis in the EIS. **Sierra Club v. Callaway**, 499 F. 2d 982, 991-992 (4 ELR 20731) (5th Cir. 1974). In addition, NEPA requires that all environmental amenities be quantified to the fullest extent reasonably possible. That is, where environment or non-environmental factors are reasonably susceptible of being quantified in dollars such must be done, where such factors are not reasonably susceptible of being quantified in economic terms, but can be quantified in terms other than economic, such must be done; where a particular factor cannot be quantified in any terms, all that NEPA requires is full disclosure of that factor in a manner sufficient to permit the decision maker to weigh that factor. The testimony of Dr. Duffield indicates that recreation costs are susceptible of economic quantification under the relatively new science of "environmental economics". As such they must be included in the EIS.

FAILURE OF CEB TO EVALUATE ALTERNATIVES

On the material placed before me I find it extremely difficult to conclude that there has been a rigorous and responsible evaluation by the CEB of the Yoxford option. By the Yoxford option I mean the CECB's proposal and its many variants including Alternatives 6 and 7 identified by the TEC and Alternative IV set out in the EIA. The CEB in its submissions before me agreed that the alternatives must be evaluated on technical, financial and environmental grounds. But an examination of the material indicates that the Yoxford option (whether in the form proposed by the CECB or as an independent option) has not been evaluated on economic, technical and environmental grounds with

the same rigor as Alternatives I, II or III referred to in the EIA. The original selection of the Caledonia and Talawakelle options in the JICA feasibility study (1985-87) from among some five options, including (Yoxford identified in the 1968 FAO study) has clearly been made on economic and technical grounds. The EIA itself admits [page 2-9 (1)] that the JICA feasibility study was inadequate on environmental issues.

An option may be evaluated purely in financial terms and may be shown to be financially viable. Similarly a project may be technically viable but financially unviable. A project may be financially and technically viable but environmentally disastrous. In order that a project may be acceptable, it would have to satisfy all three evaluations. The important point, however, is that in carrying a financial or technical evaluation environmental costs and benefits should be brought into the picture.

Extended environmental cost-benefit evaluations must become part of the financial/economic evaluation. Environmental assets such as waterfalls, water quality, resettlement issues, soil erosion etc., can be costed with available economic tools and methodologies, however insufficient or imperfect these be. Such an evaluation helps decision-makers to get closer to the true picture, though it may be an inadequate or imperfect one.

If the Yoxford option is costed in this way, the saving of the waterfalls would be seen as a benefit and may far outweigh the cost of losing them through the implementation of Alternative III. The failure of the CEB to carry out such a rigorous evaluation leaves the decision-maker in serious doubt whether Alternative III proposed by the CEB is environmentally, financially and technically the better option. The EIA is deficient in material that gives adequate reasons for the rejection of the Yoxford option, both as proposed by the CECB and as conceived by the CEB. The CEA's reasons for refusing to concur therefore appear to me to be justified.

The CEA has refused to concur in the PAA's decision stating that other options which are environmentally friendly should be investigated and pursued. The CEB's statement that the option to the UKHP is thermal is not acceptable, especially in the light that it has failed to rigorously evaluate the Yoxford option. If the CEB, made that statement, having rigorously examined the Yoxford option, then I may have been inclined to agree. But this is not the case. In my view, the most responsible thing for the CEB to do would be to investigate the Yoxford option with the same rigor that it examined Alternatives I, II, and III and to apply for approval under Part VI C as appropriate. On this however, the CEB must advise itself.

BIAS OF PAA

I was also perturbed about the conduct of the PAA in this matter. I find it disturbing that the over-sight committee of the PAA decided to give approval when its own TEC had recommended against the project. While I concede that the over-sight committee of the PAA has power to reject the TEC's advice, such a rejection must be based upon a careful evaluation of that advice and supported by substantive and accountable reasons. The reasons adduced by the over-sight committee are not of this nature. The position is

aggravated by the fact that the PAA attended these appeal hearings and canvassed the validity of its own decision.

In my view, the NEA requires the PAA to act in a quasi-judicial capacity. A PAA is subject to the principle of *natural justice nemo judex re sua* (No man shall judge his own case). If the PAA in this case found it difficult, because of commitments it had to the CEB's UKHP, it should have indicated its interest and withdrawn from acting as the PAA. In such a situation the CEA could have nominated another PAA under the relevant EIA regulations and the NEA. If the PAA chose not to do so, then it must exercise and independent and unbiased judgement over the CEB's application for approval under the NEA. We have it on high judicial authority that justice must not only be done but must manifestly be seen to be done. The conduct of the PAA in this case leaves much to be desired. Such conduct it not condemned will seriously erode public confidence in the EIA process and system.

CONCLUSION

For the foregoing reasons I hold that the CEB's EIA on the UKHP is seriously flawed in law and the fact that it has failed to adequately address itself to alternatives to the projects. The CEB has also failed to adduce adequate reasons for rejecting environmentally friendly alternatives. I further hold that the PAA in this instance has failed to discharge its quasi-judicial duties under the NEA in keeping with settled legal and administrative standards. I therefore dismiss this appeal with liberty for the CEB to seek approval for the UKHP, if so advised, with an EIA that addresses the above omissions. I further direct in the interests of justice, that should the CEB make such an application, the CEA should nominate another suitable PAA to conduct the EIA process.

Cecil Amerasinghe

Secretary
Ministry of Transport, Environment and Women's Affairs
Colombo, this 3rd day of August, 1995

L. Escale Pvt. Ltd. v Director, Department of Coast Conservation and Secretary, Ministry of Fisheries and Aquatic Resources
C.A. Application No. 221/95, D/-30-04-1996
Court of Appeal of Sri Lanka
Dr. R.B. Ranaraja, J

Application for writ of certiorari – Coast Conservation Act No. 57 of 1981 – issue of permit by Director of Coast Conservation – conditions attached thereto – finding by departmental officers of unauthorized construction – order for demolition – failure of Petitioner to exercise statutory right of appeal – consequent refusal of prerogative writ.

The Petitioner, who had submitted an application to the Director of Coast Conservation for permission to modify a beach house on 06.04.1992, was issued a permit to construct four pillars. When departmental officers inspected the premises on 10.07.1994 they found construction work going on despite the permit having expired seven months previously. The extent of the work also exceeded that stipulated in the permit.

Upon the recommendation of the investigation officer, the Director of Coast Conservation, acting under Section 31 of the Coast Conservation Act No. 57 of 1981, gave the Petitioner two weeks notice to demolish the unauthorized structure. The Petitioner was informed of his right of appeal to the Secretary, Ministry of Ports and Shipping under Section 31 (3) of the Coast Conservation Act.

The Petitioner's Attorney addressed letter to the Secretary who subsequently wrote back to the Petitioner directing him to remove the unauthorized structure, failing which the State would do so.

The Petitioner applied for writ of certiorari to quash the notice from the Director and the letter from the Ministry of Secretary.

Held: (1) The letter written by the Petitioner's Attorney to the Ministry Secretary was not an appeal within the meaning of Section 31(3) of the Act.

(2) Having failed to avail himself of a statutory remedy, the Petitioner cannot be granted relief by way of prerogative writ.

(3) In any event the photographs filed with the petition demonstrated that the Petitioner had acted contrary to his permit, the terms of which he had admitted.

(4) The application was accordingly dismissed with costs.

Relevant provisions of Coast Conservation Act:

31 (1) - No person shall, with effect from the appointed date, erect or construct any unauthorized structure, house, hut, shed or other building on any part of the Coastal Zone.

31 (2) - The Director may, by giving notice to the owner or occupier, as the case may be, by affixing a notice to some conspicuous part of such structure, house, hut, shed or other building, direct such owner or occupier to take down and remove such unauthorized structure, house, hut, shed or other building within such time as the Director may specify in the notice.

31 (3) - Any person aggrieved by any direction of the Director made under sub-section (2) may, within three days from the affixing of the notice, appeal therefrom to the Secretary of the Ministry of the Minister in charge of the subject of Coast Conservation. The decision of the Secretary on any such appeal shall be final.

31 (4) - Where any such structure, house, hut, shed or other building is not taken down and removed within the time specified in the notice or within such time as may be specified by the Secretary when rejecting appeal, the Director shall cause the structure, house, hut, shed or other building to be taken down and removed, and the expenses

incurred by the Director in doing so shall be recovered from the owner or occupier as a debt to the State.

Dr. Ranaraja, J.

Any person engaging in development activity within the coastal zone has to apply for a permit to the Director of Coast Conservation. Development activity includes the construction of buildings. The Petitioner submitted an application on 06.04.1992, with a construction plan to modify a beach house to make it "strong and nicer". A permit was issued to construct four pillars only as indicated in plan.

The Director has the power to attach any conditions, as he may consider necessary for the proper management of the coastal zone. One such condition attached to permit was that the building should not be used for any commercial activity.

On inspection of the premises by the officers of the Department of Coast Conservation on 10.07.1994, it was found that construction work was being carried out despite the permit having expired on 02.12.1993. The Petitioner had without authorization constructed a masonry wall, a concrete roof and extended the length of the building. The Planning Officer who conducted the investigation directed the stoppage of construction work and recommended that a demolition order be issued to remove the unauthorized constructions. The Director acted within the powers conferred on him by Section 31 (1) and (2) of the Coast Conservation Act.

Act No. 57 of 1981, gave notice to the Petitioner to remove the unauthorized structure within 2 weeks from 16.07.1994. The Petitioner was also informed that he could within 3 days from the receipt of the notice appeal against the order to the Secretary, Ports and Shipping Ministry. The Petitioner's Attorney has addressed letter dated 08.08.1994 to the said Secretary. This cannot be considered an appeal under Section 31 (3) of the Act. However, the Secretary himself informed the Petitioner by letter dated 24.01.1995 that he should remove the unauthorized structure before 28.01.1995, failing which, the State would do so and recover the costs incurred from the Petitioner. Since the Petitioner has failed to avail himself of a statutory remedy, he cannot be granted relief by way of prerogative writ.

The Petitioner has filed this application for a writ of certiorari to quash order given by the Director of Coast Conservation to the Petitioner to demolish the unauthorized structure and order of the Secretary directing the Petitioner to remove the same.

The grounds adduced in support of the application are:

(a) The modifications are in accordance with the permit
(b) The building has been in existence even prior to the coming into operation of the Act No. 57 of 1981.
(c) The Respondents have no power to act as planning authorities in terms of the Act.

All what the Petitioner has alleged is belie by the photographs filed with this application. It is perhaps for that reason that in his written submissions ha has taken the stance "The Petitioner respectfully submits that if the respondents still insist a portion of the building

is unauthorized it is for them to physically point out to the Petitioner, the "unauthorized part" of the building so that the Petitioner could satisfy himself whether what is claimed to be unauthorized is in fact unauthorized having regard to the permit granted."

What the Petitioner has forgotten is that he has acted contrary to the terms of the permit that he himself has blithely admitted.

There is no merit in this application, which is dismissed with costs.

Environmental Foundation Limited v. Ratnasiri Wickramanayake, Minister of Public Administration
C.A. Application No. 137/96, Decided: 17 December 1996
Court of Appeal of Sri Lanka
Dr Ranaraja J.

Application originally filed by Petitioner for writ of certiorari to quash order of 2nd Respondent (Director, Department of Wildlife Conservation) permitting 3rd Respondent to display 30 species of animals at a private zoo - subsequent cancellation of license due to alleged violation of terms and conditions-appeal by 3rd Respondent to 1st Respondent (the Minister) - decision of 1st Respondent, purportedly exercising his power under the Fauna and Flora Protection Ordinance, to restore the license provided conditions were adhered to - application by Petitioner to quash this subsequent order as being illegal - question of Petitioner's locus standi.

The Petitioner was a public interest law firm dedicated to the protection of nature and the conservation of its riches. It had previously filed an application No. 993/94 for a writ of certiorari to quash the order of the 2nd Respondent, the Director, Department of Wildlife Conservation, permitting the 3rd Respondent to possess and display 30 species of mammals, reptiles and birds at a private zoo. Subsequent to the filing of that application, the 2nd Respondent had revoked the permit, allegedly for breach of the conditions on which it had been issued. However the 3rd Respondent appealed to the 1st Respondent Minister, who restored the permit on condition that its terms and conditions would be adhered to.

The Petitioner then withdrew its earlier application and filed the present application, repeating the prayer in its earlier application (relief "a") and adding a further prayer for a writ of certiorari to quash the decision of the 1st Respondent restoring the permit (relief "b"). The Petitioner also prayed for a writ of mandamus compelling the 2nd Respondent to seize the animals at the zoo which may be produced in evidence in terms of the Fauna and Flora (Protection) Ordinance (relief "c"), and a writ of mandamus compelling the 2nd Respondent to prosecute and otherwise enforce the law against the 3rd Respondent for the commission of offences under the Fauna and Flora (Protection) Ordinance as amended by Act No. 49 of 1993 (relief "d").

The Petitioner's contention was that Section 55 of the Ordinance which allows the Director of Wildlife Conservation to authorize any person to do an act which is otherwise prohibited under the Ordinance, related only to acts for the protection, preservation or

propagation, or scientific study and investigation, or for the collection of specimens for a national zoo, museum or other similar institution, of the fauna and flora of Sri Lanka. The word "national" had been added before the word "zoo" only by the Fauna and Flora Protection (Amendment) Act No. 49 of 1993 which was certified on 20 October 1993.

The Respondents at the outset took up a preliminary objection that the Petitioner had no locus standi to make this application. The 1st Respondent also stated that his restoration of the 3rd Respondent's permit had been made prior to the certification of the Fauna and Flora Protection (Amendment) Act, which statement was not challenged by the Petitioner.

Held: (1) As the Petitioner was a party genuinely interested in the matter complained of, it had locus standi to make this application.

(2) In terms of Section 56 (2) of the Fauna and Flora Protection Ordinance, the 1st Respondent was the proper authority to whom a person aggrieved by the revocation of a permit or license had a right of appeal.

(3) The section provides that the decision of the Minister shall be final and conclusive, and accordingly, in terms of Section 22 of the Interpretation Ordinance, the Court could not interfere unless the order made was ex facie not within the power conferred on the person making it, or the person making the decision had not followed some mandatory rule of law or had failed to observe the rules of natural justice. The Petitioner had not satisfied Court that either the 1st or 2nd Respondents had acted in such a fashion.

(4) If the 3rd Respondent, as alleged by the Petitioner, had breached he conditions of his permit, the Petitioner had the right to make representations to the 2nd Respondent for necessary action. Since the Court was not in a position to monitor the breach of conditions of the permit, it would not make orders it could not effectively enforce.

(5) The Petitioner had accordingly failed to establish sufficient grounds for the grant of the reliefs prayed for in prayers "a" and "b" and the other reliefs claimed by the Petitioner stemmed for these prayers. The application was therefore dismissed without costs.

Cases cited:
Premadasa v. Wijewardena (1991) 1 S.L.R. 333
Simon Singho v. Government Agent, W.P. 47 N.L.R 545
Wijesiri v. Siriwardena (1982) 1 S.L.R. 171
R v. Paddington Valuation Officer (1966) 1 Q.B. 380
R v. Thames Magistrates Court (1957) 55 L.G.R. 129
Re Forster (1863) 4 B & S 187
Samalanka Ltd v. Weerakoon (1994) 1 S.L.R. 405

Dr Ranaraja J.

The Petitioner Environmental Foundation Ltd, a public interest environmental law and advocacy organisation, has filed this application, inter alia:

(1) for a writ of certiorari quashing the authorization (1R1) issued by the 2nd Respondent, the Director, Department of Wildlife Conservation, to the 3rd Respondent, Masahim Mohamed, to possess and display 30 species of mammals, reptiles and birds specified therein;

(2) for a writ of certiorari quashing the decision of the 1st Respondent, the Minister of Public Administration, conveyed by letter dated 22.09.1995 (2R17) to restore permit No. Va/Sa/San 1/5/62, dated 27.08.1993 (1R1), subject to the restriction of species and number of animals which could be kept by the 3rd Respondent under the conditions stipulated in the permit.

The 3rd Respondent is the owner of a private zoo called "Crocodiles and Mini Zoo", Galle Road, Ahungalla, on 1R1 issued by the 2nd Respondent. The zoo is open to the public on payment of an entrance fee or Rs. 15/- and Rs. 100/- from local and foreign visitors respectively. The permit lists 30 species of mammals, reptiles and birds and the number of each species that could be possessed and exhibited. 1R1 also lists six conditions under which it is issued. The Petitioner states that it is an offence to take and to have in one's possession 26 species of mammals, reptiles and birds listed in 1R1, except for the purpose of protection, preservation, propagation of for scientific study or investigation. Only a national zoo, it is submitted, may be allowed such an exemption. The Petitioner contends that in the circumstances, 1R1 that has been issued by the 2nd Respondent is illegal, null and void. The Petitioner has also alleged that the 3rd Respondent has in his possession a sloth bear not included in the permit, and five pythons in excess of the number permitted by 1R1, and that the permit should be revoked in terms of conditions no. 6.

The Petitioner filed an earlier application No. 933/94 before this Court, seeking, inter alia, a writ of certiorari quashing 1R1. While that application was pending, the permit 1R1 was revoked by letter dated 27.07.1995 (B), sent by the 2nd Respondent to the 3rd Respondent. The 3rd Respondent appealed to the 1st Respondent against order (B), by letter dated 01.08.1995 (3R2/1R1). The 1st Respondent, after calling for and considering the reports from the 2nd Respondent, the Secretary and the Additional Secretary of his Ministry, had decided to restore 1R1 on condition that the species and the number of animals kept in the 3rd Respondent's possession should be restricted to the species and number specified in the permit. That decision was conveyed to the 3rd Respondent by 2R17/3R3. On an application made by the petitioner to withdraw Application No. 933/94, which was allowed, that application was dismissed.

Counsel for the 1st and 2nd Respondents have taken a preliminary objection that the Petitioner has no locus standi to make the present application. He submits that "the law as to locus standi to apply for certiorari may be stated as follows; the writ can be applied for by an aggrieved party, who has a grievance, or by a member of the public. If the applicant is a member of the public, he must have sufficient interest to make the application." : **Premadasa v. Wijewardena, (1991) 1 S.L.R. 333 at 343.** Locus standi in relation to mandamus is more stringent. The petitioner must have a personal interest in the subject matter of the application: **Simon Singho v. Government Agent,** W.P., 47 N.L.R. 545.

Counsel for the Petitioner, on the other hand, submits that the Petitioner has as its objectives the protection of nature and the conservation of its riches. (Vide P1, P2, P3). It is genuinely concerned with the implementation and enforcement of the law relating to nature, its conservation and the environment in general, and is performing a duty cast on it by Article 28 (f) of the Constitution of Sri Lanka, to protect nature and conserve its riches. It is to be noted, however, that Article 29 of the Constitution provides that the provisions of Chapter VI do not confer or impose legal rights or obligations and are not enforceable in any court or tribunal.

However, there are decisions both here and abroad which have expanded the principle of locus standi to include an applicant who can show a genuine interest in the matter complained of, and that he comes before court as a public spirited person, concerned to see that the law is obeyed in the interest of all: See **Wijesiri v. Siriwardena**, (1982) 1 S.L.R. 171. Unless any citizen has standing, therefore, there is no means of keeping public authorities within the law, unless the Attorney-General will act-which frequently he will not. That private person should be able to obtain some remedy was therefore "a matter of high constitutional principle". : Lord Denning, MR,- **R v. Paddington Valuation Officer**, (1966) 1 Q.B. 380. Nevertheless, the Court would not listen to a mere busybody who was interfering in thing which did not concern him, but will listen to anyone whose interests are affected by what has been done: See **R v. Paddington** (supra). In any event, if the application is made by what for convenience one may call a stranger, the remedy is purely discretionary : See Parker J in **R v. Thames Magistrates Court,** (1957) 55 L.G.R. 129. Court retains a discretion to refuse to act at the instance of a mere stranger, if it considers that no good would be done to the public: See **Re Forster**, (1863), (1863) 4 B. & S. 187. As a party genuinely interested in the matter complained of, the Petitioner has the *locus standi* to make this application.

The Petitioner's complaint is that Section 55 of the Fauna and Flora Protection Ordinance No. 2 of 1937 permits the 2nd Respondent by a writing under his hand, to authorize any person to do any act otherwise prohibited or penalized under the Ordinance or any regulation made thereunder, if, in the opinion of the 2nd Respondent, such act should be authorized for the protection, preservation or propagation, or for specific study or for the collection of specimens for a zoo, museum or similar institution, of the fauna and flora of Sri Lanka. By the Fauna and Flora Protection (Amendment) Act No. 49 of 1993, certified on 20.10.1993, the words "for a zoo" have been replaced by the words "for a national zoo". The 3rd Respondent's zoo is a private zoo. Therefore, it is contended, the permit 1R1 issued by the 2nd Respondent is illegal, null and void. It is submitted that the restoration of permit 1R1, in the purported exercise of the Power under Section 56 of the Ordinance by the 1st Respondent, is also made without jurisdiction and therefore null and void.

The 1st Respondent has affirmed that the permit 1R1 was issued prior to the certification of the Fauna and Flora Protection (Amendment) Act. This statement of the 1st Respondent has not been challenged by the Petitioner by way of affidavit. Upon the revocation of 1R1 by the 2nd Respondent, the 3rd Respondent has appealed to the 1st Respondent, who, as submitted by the Petitioner in paragraph 6 of the petition, is the

appellate authority for the purpose of permits and licenses under Section 56 of the Ordinance. In paragraph 8 of the petition filed in Application No. 933/94, "(A)", the Petitioner has admitted that 1R1 was a "permit" issued by the 2nd Respondent to the 3rd Respondent to possess and display 30 species of mammals, reptiles and birds specified in the said permit, (vide clause 6 of 1R1).

Section 56 (2) gives any person aggrieved by the revocation of a permit or license the right of appeal against such revocation to the Minister, and a decision of the Minister on any appeal under Section 56 (2) shall be final and conclusive in terms of Section 56 (4). In view of the preclusive clause, this Court will not and cannot interfere with such an order except in the circumstances set out in Section 22 of the Interpretation Ordinance. That is, where (a) the order made is ex facie not within the power conferred on the person making such decision; (b) the person making such decision has not followed a mandatory rule of law; or (c) failed to observe rules of natural justice in the process of making such decision : See **Samalanka Ltd v. Weerakoon**, (1994) 1 S.L.R. 405. The Petitioner has not satisfied this Court that either the 1st or 2nd Respondent has acted contrary to (a) to (c) above. Reliefs "c" and "d" claimed by the Petitioner stem from reliefs "a" and "b". If the 3rd Respondent has breached the conditions in 1R1, by either possessing mammals, reptiles and birds in excess of the number permitted by 1R1 or keeping the sloth bear without authorization of the 2nd Respondent, the Petitioner will in any event have the right, as it has already done, to make representations to the 2nd Respondent for necessary action in terms of clause 6 or 1R1. Since breach of the conditions in 1R1 is a matter which Court is not in a position to monitor continuously, primarily because of the natural increase by breeding- (vide 3R4), it will not make orders it cannot effectively enforce. Reliefs "e", "f" and "g" are matters preliminary to the hearing of the application. Since the Petitioner has failed to establish sufficient grounds for reliefs "a" and "b", the application is dismissed without costs.

(Sgd)

Judge of the Court of Appeal

Note : Shortly after this decision, a boy visiting the 3rd Respondent's zoo was mauled to death by a lion. The public outcry that followed led the authorities to cancel the zoo's permit once again and the zoo was closed down, with the animals being transferred to Sri Lanka's premier zoological gardens at Dehiwela, on the outskirts of Colombo.

M. M. Khalid v. Chairman, Sri Jayawardenapura-Kotte Urban Council
Case No. 68114/4, D/-1-8-1996
Colombo Magistrates Court (Sri Lanka)
Ms. A. D. Wijewardena, Additional Magistrate

Action by residents of urban council area against public nuisance caused by dumping of refuse (garbage) in close proximity to their residences - application for conditional order (Section 98 (1)) together with interim and mandatory injunctions under Chapter IX of Code of Criminal Procedure Act No. 15 of 1979 - refuse

dumped by council workers despite public opposition - danger to health and physical comfort of community - pollution of environment - danger of disease being spread by flies - Residents affected by foul stench - danger of flooding in the event of rain due to filling of low lying land with refuse - duties of urban council under Urban Councils Ordinance No. 61 of 1939 - duty to provide places for proper disposal of refuse under Section 120 of Ordinance - requirement under Section 220 (1) of Ordinance to give one month's notice of action, whether applicable - objection to action being filed against Chairman of Urban Council.

This action was filed as a private plaint by four residents of the Sri Jayawardenapura-Kotte Urban Council area against the dumping of refuse (garbage) by the Urban Council at a location in close proximity to their houses which was classified as a residential area. They claimed that due to the foul stench emanating from the refuse dump as well as the flies and animals that used to collect around the refuse they were being subject to considerable discomfort and danger to their health. They also claimed that there was a danger of flooding of their area owing to the blocking up of a piece of low-lying land with rubbish. They stated that the Council had previously commenced dumping refuse at the site in question in 1995 but had halted that operation in the face of public protest. They prayed for a conditional order under Section 98 (1) of the Code of Criminal Procedure prohibiting this activity as being dangerous to the health and physical comfort of the community and for an interim injunction restraining the dumping of refuse at this location until the hearing and determination of the case, and a mandatory interim injunction requiring the Council to cover up the refuse already dumped. They also pleaded in aid Section 120 of the Urban Council Ordinance which requires councils to provide proper places for the disposal of refuse and casts on them a duty to dispose of refuse in such a way as not to cause a nuisance.

The Plaintiff's obtained a conditional order prohibiting the dumping of refuse at the site in question and the Respondents was given notice to show cause why the conditional order should not be made absolute.

The Respondent Chairman of the Urban Council filed written objections taking the procedural objection that he had not been served with notice of action as required by Section 220 of the Urban Councils Ordinance as well as the substantive objections that the refuse was being disposed of in conformity with Section 118 of the Ordinance; that the site in question was the only available location for the Urban Council to dump refuse; that the refuse brought to the site each day was being properly levelled and covered up; that there was no danger to the Plaintiffs' health and well-being; and that it was intended that the land thus filled would be used for a children's play ground and a sports ground which would be of public benefit.

The Plaintiffs placed in evidence a report made after inspection of the site by the Central Environmental Authority, while the Respondent led the evidence of one of his Public Health officers.

Held: (1) Section 220 of the Urban Councils Ordinance relating to notice of action did not apply to actions under Section 98 of the Code of Criminal Procedure.

(2) The evidence from the Central Environmental Authority (CEA) confirmed the dumping refuse, the foul smell, and the increase in the numbers of flies and mosquitoes as a result of which the residents of the area were undergoing suffering, and also the fact that the CEA had previously prohibited the dumping of refuse at this location but the Urban Council had failed to comply with the direction thus issued.

(3) Under Section 261 of the Penal Code dealing with public nuisance, the nuisance was not to be excused merely because it also caused some convenience or advantage, hence the Council's claim that it was intending to convert the filled up site into a children's playground and a sports ground was not relevant.

(4) The Respondent had therefore failed to show any reason why the conditional order should not be made absolute, and order absolute would accordingly be issued.

(5) The Urban Council Chairman was accordingly required to cause the Urban Council to cease dumping refuse on the said site and to cover up the refuse already dumped within a period of three months from the date of order.

(6) If the Council failed to comply, the Respondent would be subject to the criminal penalties referred to in Section 100 of the Code of Criminal Procedure read with Section 185 of the Penal Code.

Urban Councils Ordinance Section 120:

Every Urban Council shall from time to time provide places convenient for the proper disposal of all street refuse, house refuse, night-soil and similar matter removed in accordance with this Part, and for keeping all vehicles, animals, implements and other things required for that purpose or for any other purpose of this Ordinance, and shall take all such measures and precautions as may be necessary to ensure that no such refuse, night-soil or similar matter removed in accordance with the provisions of this Part is disposed of in such a way as to cause a nuisance.

Order:

This action has been filed as a private plaint under Section 98 of the Code of Criminal Procedure by Mulafer Mohamed Khalid, Don Rohan Shiral Madappuli, Chandana Munasinghe and Ratna Sir Weerasinghe living respectively at Nos. 134, 175/34N, 105/14A and 105/6A, Senanayake Avenue, Nawala, Rajariya, against the Chairman, Sri Jayawardenapura-Kotte Urban Council, Nawala Road, Rajagiriya.

The Plaintiffs have stated in their plaint that during 1995 the Kotte Urban Council had commenced dumping refuse in the vicinity of Senanayake Avenue which is a residential area where they live; that due to their opposition this activity had been temporarily halted; that it had resumed as before in January 1996; that due to the dumped refuse remaining on the site for a long time a foul stench had emanated to the surroundings; that crows and other animals were causing the refuse pollution to spread over a wider area; that the stench was affecting the lives of the residents of the area and preventing them from enjoying normal eating habits; that flies were multiplying, risking the spread of disease; that as a result small children were frequently falling sick; and that owing to the

filling-up of an extent of low-lying land with the dumped refuse there was a danger of flooding in the event of rain. They have applied to Court for an order under Section 98 of the Code of Criminal Procedure on the ground that the Respondent's activities constitute a threat to the health and physical comfort of themselves and other residents of the area.

Along with their plaints marked "P1" to "P4" the Plaintiffs have produced 12 affidavits marked "P5" to "P16" from residents of the area in support of the averments in their plaints. They have also produced as "P17" a letter sent by the Central Environmental Authority to the Respondents following representations made by the Plaintiffs to the Authority. They also state that since they filed plaint in Court on 21.01.1996 and brought this matter to the Respondent’s attention, the Respondent has taken no steps in regard to this matter.

After the filing of plaint, Court verbally examined the Plaintiffs and thereafter issued a conditional order on the Respondent. The Court ordered the Respondent to cause the Kotte Urban Council to change its methods of refuse disposal; to cover up the refuse already deposited; and to take immediate steps to see that a stench did not emanate from the site. After the aforesaid conditional order was served on the Respondent, the Respondent appeared and filed written objections stating that the Plaintiffs could not maintain this action as they had not given 30 days' notice as required by the Section 220 of the Urban Councils Ordinance; that refuse was being deposited at the site complained of under the provisions of Section 118 of the Urban Councils Ordinance; that the only site available to the Urban Council to dump refuse was the land referred to by the Plaintiffs; that the Council was gradually introducing systematic methods of hygienic refuse disposal; that each load of refuse that was brought to the site daily by lorries was levelled and every endeavour made to cover the previous layer; that the Urban Council had previously dumped refuse on the same site with a view to building it up to become a children's play ground and sports ground; that if the Court prohibited this disposal of refuse the collection of refuse throughout the Urban Council area would come to a halt; and that there was no danger to the health and well-being of the Plaintiffs.

The Respondent prayer that the Plaintiffs' application be dismissed and that the conditions imposed by Court be removed or varied.

The Court has already issued an order holding that Section 220 of the Urban Councils Ordinance has no application to Section 98 of the Code of Criminal Procedure and rejecting the Respondent's objection. The Court had called for a report from the Central Environmental Authority on the matters alleged by the Plaintiffs and a report from the Authority including notes of measurements and inspection has been submitted to Court and filed of record. When the Court called for oral evidence from the Respondent in support of his objections, the Chief Public Health Inspector of Sri Jayawardenapura-Kotte Urban Council was called as a witness by the Respondent. In the course of his evidence, while admitting that the Kotte Urban Council had dumped refuse at the site in question, he stated that from about two weeks prior to the date on which he gave evidence the Council had started dumping refuse at a different site and that refuse was no longer brought to the site in question. However in the course of cross examination he admitted that refuse had been dumped at the site for the last time about one week previously, but in reply to a question asked on behalf of the Plaintiffs as to whether refuse had been dumped

at the site after the issue of the conditional order on 13 May he reiterated that no refuse had been dumped there after receipt of the Court order.

The report dated 04.07.1996 submitted to Court by the Central Environmental Authority states that the area in question is a residential area; that because of the dumping of refuse and the foul stench that emanates therefrom, as well as the increase in the number of flies and mosquitoes, the residents of the area are being subjected to a nuisance; and that after inspecting the site on an earlier the Central Environmental Authority, acting under Section 12 of the National Environmental Act, had issued a direction to the Kotte Urban Council dated 12.08.1995 bearing reference no. 16/7/UGK 02 prohibiting the dumping of refuse at the said location with immediate effect but that the Kotte Urban Council which was the local authority for the area had not taken the necessary steps.

After considering the averments in the Plaintiffs' plaint, the Court issued a conditional order on the Kotte Urban Council and the Urban Council filed a written statement styled as "objections" in which it was stated that by filling up the said land with refuse it was intended to create a children's playground and a sports ground for the public benefit. A consideration of Section 120 of the Urban Councils Ordinance reveals that refuse must be disposed of in a manner that does not cause a nuisance. Furthermore, under Section 261 of the Penal Code dealing with public nuisance it is stated that a public nuisance is not excused on the grounds that it causes some convenience or advantage. The basis of the Urban Council's case is that the disposal of refuse was intended as a means of securing some convenience to the public in the form of a sports ground and children's playground.

More particularly, according to the averments in the Plaintiff's plaint as well as the report submitted to Court by the Central Environmental Authority, the disposal of refuse by the Respondent is causing pollution of the environment of the area where the Plaintiffs reside.

By reason of the matters stated above, the Respondent party has not been able, either in his written objections or oral evidence, to show any reason to vacate the conditional order issued by the Court. I therefore make the conditional order absolute.

By reason of the above matters I issue order absolute on the Chairman, Kotte Urban Council, to cause the Urban Council to cease with immediate effect the dumping of refuse at the location on Senanayake Avenue referred to in the Plaintiffs' plaint and to cover up the refuse already dumped within three months from today.

Furthermore the Respondent is given notice that in terms of Section 102 of the Code of Criminal procedure, if the Kotte Urban Council fails to comply with this order, Section 100 (2) of the Code of Criminal procedure prescribes that the Respondent will be subject to the penalties set out in Section 185 of the Penal Code.

I further direct the Registrar of this Court to convey this order absolute to the Respondent by registered post.

(Sgd)

Additional Magistrate, Colombo

Note: This is an English translation of the Order which was delivered in Sinhala.

Singalanka Standard Chemicals Ltd. v. T. A. Sirisena and others
H. C. Avissawella No. 30/39, M. C. Homagama No. 31286; Decided: 27-8-1996
High Court of the Western Province-Avissawella (Sri Lanka)
K. Sarath Gunatilleke, J.

Petition to revise conditional order of Magistrate halting operation at Respondent - Petitioner's chemical factory - prayer for interim relief to suspend operation of the Magistrate's order until the hearing and determination of revision application whether Magistrate's order had been made under Section 98 (1) of Section 104 of Code of Criminal procedure - remedies available to aggrieved party to vary the order in Magistrate's Court itself.

The Respondent-Petitioner (the Respondent in the Magistrate's Court) was a company which owned a factory producing sulphuric acid. The ten Petitioners-Respondents (the Petitioners in the Magistrate's Court) were residents of the area who instituted this action under Chapter 9 (Public Nuisances") of the Code of Criminal Procedure praying for orders under Sections 98 (1) and 104 to halt the operations of this factory on the grounds that it constituted public nuisance by polluting the well-water and the environment generally.

The Magistrate issued an ex-parte temporary order to that effect and directed notice to be served on the company to show cause why it should not be made permanent. The Respondent company subsequently filed papers in the Magistrate's Court and, after inter-partes inquiry, obtained a variation of the orders so as to permit it to operate its machinery without production, in order to mitigate the damage that it would suffer if the machinery was kept completely idle.

The Respondent company filed petition in the High Court to revise the order of the Magistrate's Court and also prayed for an interim order suspending the operation of the said order until the hearing and determination of its revision application. The Petitioners opposed the application. Both parties proceeded on the basis that what had been issued was an injunction under Section 104 of the Code of Criminal Procedure, albeit read together with Section 98 (1) of the Code.

Held: (a) Despite the apparent confusion in terminology, the order that had been issued was in form and substance a conditional order under Section 98 (1) of the Code.

(b) The magistrate had never intended to issue any order under Section 104.

(c) Since there was provision to seek a variation or setting aside of such an order in the Magistrate's Court itself, the High Court would not exercise its powers of revision which should be exercised only in exceptional circumstances.

(d) The proper procedure was to call evidence and hold an inquiry under Section 101, which should be done as a matter of priority as soon as the case was remitted back to the Magistrate's Court.

(Because the Magistrate who made the order under review was also an Additional District Judge, the High Court Judge has referred to her throughout his judgement as "Judge".)

The relevant sections of the Code of Criminal Procedure referred to in the judgment are as follows:

98 (1) Whenever a Magistrate considers on receiving a report or other information and on taking such evidence (if any) as he thinks fit-

(b) that any trade or occupation or the keeping of any goods or merchandise should by reason of its being injurious to the health or physical comfort of the community be suppressed or removed or prohibited;

such Magistrate may make a conditional order requiring that the person ....carrying on such trade or occupation ..... shall within a time to be fixed by such order-

ii) suppress or remove such trade or occupation;

98 (2) Any person against whom a conditional order has been made under subsection (1) may appear before the Magistrate making that order or any other Magistrate of that Court before the expiration of the time fixed by that order and move to have the order set aside or modified in the manner hereinafter provided.

101(1) If such person appears and moves to have the order set aside or modified the Magistrate shall take evidence in the matter.

101(2) If the Magistrate is satisfied that the order is not reasonable and proper he shall either rescind the same or modify it in accordance with the requirements of the case, and in the latter case the order as modified shall be made absolute.

101(3) If the Magistrate is not so satisfied the order still be made absolute.

101(4) If the Magistrate making an order under section 98 considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public he may issue such and injunction to the person against whom the order was made as is required to obviate or prevent such danger or injury.

Note - An injunction under Section 104 would appear to be redundant when an order has already been made for the suppression of any trade or occupation under Section 98 (1) (b) since the effect of the two remedies would be the same. Such an injunction could however complement orders under some of the other subsections of Section 98 (1) which deal with such matters as disposal of dangerous substances and the fencing of excavations sites.

Order:

The Respondent-Petitioner company has filed this revision petition praying, principally, to quash the order made in this case by the learned Additional District Judge of Homagama in the exercise of her powers as Magistrate, and for the issue of an order staying further proceedings in that Court. At the same time by the way of interim relief it

prayed that the interim order dated 18.06.1996 issued by the said Judge which is being extended every two weeks be suspended until a final determination of this revision application.

I have examined very carefully the material placed before the learned trial Judge and the order made by her on 18.06.1996.

In the first paragraph of the prayer to the original petition of the Petitioners-Respondents (marked "A1") there is an application for a conditional order under Section 98 (1) of the Code of Criminal Procedure to shut down the Respondent Petitioner company's sulphuric acid factory on the grounds that it constitutes a public nuisance to the people of the area. In the second paragraph there is a prayer for an interim injunction under Section 104 of the Code of Criminal Procedure restraining the working of the said factory until the final determination of this application.

According to the journal entry of 18.06.1996, the order made by the learned trial Judge on that day is as follows (the said order marked "A3" being filed of record) :

"Respondents: Singalanka Standard Chemicals Ltd., Ranala Documents P1 to P5 are marked.

Government Analyst's Report is produced. I make order that the factory under the control of the Respondent be closed for two weeks from today. Issue notice of this order and notice to show cause why the said order should not be made permanent, to the Respondent.

Call on 02.07.96

(Signed)
District Judge."

In terms of the said order it was clear that it was limited to a period of two weeks and that the Respondent-Petitioner company was given notice to show cause as to why the said order should not be made permanent. It was therefore a conditional order issued under Section 98 (1). It cannot be described as an injunction issued under Section 104 of the Code of Criminal procedure.

Next it is necessary to examine whether the learned trial Judge who had issued the said conditional order under Section 98 (1), on that day or on any occasion thereafter, issued an order under Section 104. Firstly, it is necessary to consider the learned Judge's order in the light of the oral submissions of Mr. Surein Peiris, Attorney-at-Law for the Petitioners-Respondents, recorded in the proceedings connected with the journal entry of date 18.6.96. Mr. Peiris, who made his submissions at length, asked for an order Section 98 (1) and an interim order under Section 104 of the Code of Criminal Procedure until the hearing and determination of the action. (See document marked "A6") (In fact under Section 104 what can be asked for is not an interim order until the hearing and determination of the action but an injunction). The learned Judge, having considered the submissions of the said Attorney, had issued an order under Section 98 (1) valid for two weeks. That is a temporary ex-parte order which, if no reasons are adduced to the contrary, will become permanent. Although an order under Section 104 had been asked

for, only an order in consonance with Section 98 (1) had been made, or else an order under Section 104 had been refused. Although the order marked "A4" bears the caption "An injunction issued under Section 98 (1) read with Section 104 of the Code of Criminal Procedure" and was drafted by Mr. Surein Peiris, I accept it as a signed order of the learned Judge. But although the caption states that it is an order under Section 104, it is actually not an order under Section 104. That becomes clear on an examination of the order. The passage is as follows:

> " ..... An injunction has been ordered against you on the following terms, namely that in as much as a public nuisance to the residents of the area is being caused by yourselves, the Respondent company Singalanka Standard Chemicals Ltd., it is hereby ordered that the activities of the said trade be closed down for a period of two weeks from date hereof, that is from 18.06.1996 to 02.07.1996."
>
> (It was an order limited to two weeks.)
>
> "Furthermore, you are given notice to appear in this Court at 9.00 o' clock in the forenoon and show cause as to why the said company's activities which are injurious to the health and physical comfort of the community should not be suppressed or prohibited."
>
> (The idea being that if cause was not shown, the order would be made permanent).

Accordingly, although described in the caption as an order under Section 104, it did not take effect as an order under Section 104. It was clearly a conditional order under Section 98 (1). It has been extended from time to time up to date. I therefore hold that no order under Section 104 was issued on 18.06.1996.

Next I will consider the submission made on behalf of the petitioners-Respondents that the order made by the learned trial Judge on 27.06.1996 was an order under Section 104. It is recorded in the journal entry as follows:-

> "27.06.1996.
>
> Respondent's Attorney-at-Law has filed a motion asking that this case be called in court today.
>
> Respondent Singalanak Standard Chemical Company present.
>
> I order that the interim order be varied to allow the machinery at the factory to be operated only.
>
> Inquiry 02.07.1996.
>
> Issue summons for the Government Analyst to be present to give evidence on the next date.
>
> (Signed)
>
> Additional District Judge."
>
> (This is included in "A3") The proceedings connected with the Journal Entry are found in the document "A6". (See page 187 thereof). Although the said order

appears to have been made only on the basis of oral submissions by the Respondent Petitioner company, an examination of the proceedings reveals that it was an order made inter-partes. Although the journal entry only records that the Respondent-Petitioner company had filed a motion, according to the proceedings it is clear that the Respondent-Petitioner filed "petition and/or affidavit together with R1 to R16" by way of documentary evidence in support of its case. The Respondent-Petitioner company by this means was asking that the matter be fixed for inquiry so as to enable it to make application to operate its machinery, without producing anything, so as to mitigate to some small extent the immeasurable loss it was suffering. In reply the Petitioners-Respondents' Attorney stated that "In this case, namely where an injunction has been issued under Section 104 and a conditional order made under Section 98 (1), it was open to the Respondent to move Court under Section 98 (2) to have the order set aside and to have evidence recorded under Section 101 (1)."

Accordingly, the position taken by the Petitioners-Respondents on that occasion was that an order under Section 104 had been issued on 18.06.1996. However, thereafter, on 23.08.1996, in the written submissions filed by them, the order under Section 104 is said to be an order of 27.06.1996. This factory was ordered to be closed (albeit by an order under Section 98 (1)) not on that day but on 18.06.1996. On that day they were asking that the machinery not be allowed to operate even without production. The order made by the learned trial Judge after taking note of the submissions made by both sides was as follows:

"I have studied the matters raised by both sides. A study of the reports submitted by the Petitioners and the Respondent regarding the PH content of the well-water reveals that they are flatly contradictory. The question then arises as to which of these Reports the Court should accept. Meanwhile according to the Respondent party, it has been operating this factory from 1984. The documents filed show that the Petitioners have been complaining to the authorities from 1993 and finally sought relief from Court. It is also evident that this factory has of late failed to obtain a permit form the Environmental Authority. Nevertheless my attention is drawn to the consequences of shutting down the factory. At the same time, taking note of the Petitioners' application, I amend the order already given to the extent of allowing the machinery only of the factory to operate, without production, until the next date. While permitting the Respondent to sell its produce upto date, I direct the Respondent to submit to Court by the next date an inventory of the stocks collected in the factory. If it becomes necessary to ascertain whether the Respondent is complying with the said orders, I authorize the Navagamuwa Police to carry out inspection. I fix the next date as the date for inspection of the site and direct that summons be issued to the Government Analyst to give evidence regarding the inspection."

Accordingly, the order was not one made under Section 104 but only an amendment to an order previously made under Section 98 (1). It is very clear that the amendment was made for the purpose of mitigating the damage that could occur to the Respondent-Petitioner company's machinery, and that it was a variation in favour of the Respondent-

Petitioner of the original order and not an injunction issued in favour of the Petitioners-Respondents under Section 104. Thus not only was the order of 27.06.1996 not made under Section 104 but there is nothing in the language of the order to suggest that it was made under Section 104. There is no indication whatsoever that the learned trial Judge was intending to make an order under Section 104. It is quite evident from the final sentences of the order that she was intending finally to dispose of the matter by recording evidence under Section 101 (1) and making an order under Section 101 (2) or Section 101 (3).

In view of the above matters I hold that the learned trial Judge has not at any time made an order under Section 104. Although the Petitioners-Respondents prayed for such an order from the start, I think the learned Judge has been careful not to issue such an order. On the other hand, from the Respondent-Petitioner company's point of view, when one considers the measures available for vacating an order under Section 98 (1) it will be seen that it is much easier to vacate an order under Section 104. In this connection it is clear that both parties had taken up the position that an order had been made under Section 104. I must say with the greatest respect to both sides, that I cannot accept that position.

At this point my attention is drawn to another important matter, namely, whether the learned trial Judge has power to close down this factory under Section 98 (1). According to the word of Section 98 (1) (b) read with Section 98 (1) (ii), the only way to avert a public nuisance is to stop the means of production, and the only way to stop the means of production is by ordering the closure of the factory, and the learned Judge may have thought in this fashion. Yet thereafter, after considering the matters raised by the Respondent-Petitioner Company, the learned Judge has amended the original order by her subsequent order permitting the factory machinery to be operated. Yet I am of opinion that the learned Judge considered that the only way to arrest the public nuisance was to issue an order closing the factory for a limited period under Section 98 (1). The learned Judge has placed reliance on the Analyst' Reports “P1” to “P5”, the Report of the University Chemical Analysis Department “P17”, and documents “P7” to “P12” showing that by reason of the systems in use at the chemical plant, the well-water and the environment have become polluted and the water has become unfit for human consumption. Furthermore the learned Jude has clearly pointed out that this factory is carried on while causing damage to the health and physical comfort of the Petitioners and the community. Wherefore the learned Judge has held that there were sufficient grounds to suppress this condition by an order under Section 98 (1) (b) of the Code of Criminal procedure. Although such a suppression is usually brought about by an injunction, that term is actually found at two places in Section 98 (1). I hold that there is no legal impediment to the issue of an order under Section 98 (1) for the purpose of shutting down a factory.

Another matter that should be kept in mind is that this petition of the Respondent-Petitioner Company is a revision application. It is only in exceptional circumstances that this Court can interfere with the findings of fact made by the learned trial Judge in the process of giving the order of limited duration under Section 98 (1) of the Code of Criminal Procedure. In any event, since the said order may be confirmed or varied or

vacated after an inquiry under Section 101, I am not disposed to interfere with the learned trial Judge's order by way of revision. (In fact the application is to revise an order under Section 104). For that reason this revision petition is dismissed without costs.

Convey this order to the learned trial Judge forthwith. I recommend that upon receipt of this order this matter be given priority and the relevant legal steps taken as soon as possible to enable an appropriate order to be made under Section 101 of the Code of Criminal procedure.

Convey this order forthwith to the said Court.

(Sgd) **K. Sarath Gunatilleke**
High Court Judge
Avissawella

Note: This is an English translation in of the High Court order delivered in Sinhala.

Bulankulama and six others v. Secretary, Ministry of Industrial Development and seven others (Eppawala case)
S.C. Application No. 884/99 (F/R); D/-02/06/2000
Supreme Court of Sri Lanka
Amarasinghe, Wadugodapitiya and Gunesekara, JJ.

Mineral Investment Agreement to be entered into between Government and private company for rapid exploitation of rock phosphate reserves at Eppawala in Sri Lanka's agriculture rich North Central Province - High intensity mining operation plus establishment of a processing plant on Trincomalee coast which would produce phosphoric and sulphuric acid - Indefinitely large exploration and mining area - Petition by six residents of the area whose agricultural lands stood to be affected - Seventh Petitioner Viharadhapathi (Chief Incumbent) of ancient temple which was at risk together with the paddy lands that sustained it - Petitioners claimed project was not for a public purpose but for the benefit of a private company and would not bring substantial economic benefits to Sri Lanka - Also claimed Government was so heavily committed to the project that no proper unbiased environmental impact assessment would be carried out after agreement was signed - Petitioners claimed imminent infringement of their fundamental rights under Articles 12(1) and 14(1)(g) and (h) under Constitution - Attempt by parties to the project to contract out of obligation to comply with the law - Bypassing of provisions of National Environmental Act and Regulations framed thereunder relating to Environmental Impact Assessment.

In 1971 a substantial deposit of apatite or rock phosphate was discovered by Sri Lanka scientists at Eppawala in the Anuradhapura District in the North Central Province. This area was the cradle of Sri Lanka's ancient civilization and of its agricultural economy based on artificial irrigation through an extensive system of man-made tanks, canals and

streams. Feats of hydraulic engineering such as the "Jaya Ganga" built in ancient times are still in use today.

Initially this mineral deposit was exploited for the production of phosphate fertilizer on a small scale by a Government-owned company, Lanka Phosphate Limited (6th Respondent) but in December 1992 proposals were invited worldwide for the establishment of a Joint Venture company. Out of six proposals said to have been received, the Cabinet approved the proposal of Freeport MacMoran Resource Partners of the U.S.A. on the basis that it was one of the "leading phosphate fertilizer firms in the world". A Negotiating Committee comprising a team of government officials conducted several rounds of negotiations which led to Freeport submitting a draft Mineral Investment Agreement and other related agreements. The drafts were studied by the Attorney-General's Department which wanted certain amendments "on the basis of the parameters laid down by the Cabinet and the applicable law". Freeport MacMoran went directly to the President of Sri Lanka who thereupon directed a Committee comprising the Secretary to the Treasury, the Attorney-General, the Secretary to the Ministry of Industrial Development, the Chairman of the Board of Investment of Sri Lanka (BOI) and a Senior Adviser to the BOI to conduct one final round of negotiations and clear any outstanding issues. IMC-Agrico as the business successor to Freeport MacMoran became the chief foreign negotiating party.

A project company, Sarabhumi Resources (Pvt.) Limited (5th Respondent) was established in Sri Lanka with IMC-Agrico and Tomen Corporation of Japan between them owning ninety per cent of the shares, and the Government of Sri Lanka through Lanka Phosphate Limited owning the remaining ten per cent. Details of the proposed project which would lead to a high-intensity mining operation and the export of most of the phosphate by the project company became known and the National Academy of Sciences, among others, published a highly critical report on the project. Among their objections was the fact that the size and quality of the deposit had yet to be properly established.

In the face of mounting public controversy and opposition from the residents of the area, Sri Lanka's Minister of Science and Technology called for a report from the National Science Foundation which was also critical, commenting adversely on the economically disadvantageous nature of the project and the highly adverse environmental impacts which they said would result.

When newspaper reports suggested that the Government was nevertheless going ahead with the project, the Petitioners filed application in the Supreme Court in October 1999 claiming an imminent infringement of their fundamental rights. They claimed that they were in danger of being arbitrarily deprived of their lands and livelihood due to this project which they said would not in the public interest and therefore claimed an imminent infringement of Articles 14(1)(g) and (h) of the Constitution guaranteeing them the right to chose their place of residence within Sri Lanka and to practice the trade or occupation of their choice.

Despite the drawing up of detailed agreements, there had yet been no environmental impact assessment (EIA) carried out although this project was of a type that required one

in terms of Regulations framed under the National Environmental Act. The Petitioners claimed that the wording of the Mineral Investment Agreement bound the Government to assisting the company to carry out the project and that once it was signed their would be no prospect of an unbiased EIA process in which they as citizens would have been entitled to participate. Accordingly they also claimed an imminent infringement of their fundamental right to equality before the law and equal protection of the law under Article 12(1).

The Respondents to the application were the Secretary to the Ministry of Industrial Development who was the official who would have to sign the agreement on behalf of the Government, the BOI, the Geological Survey and Mines Bureau which was the authority for granting exploration and mining licenses, the Central Environmental Authority (CEA), the project company Sarabhumi Resources (Pvt.) Limited, Lanka Phosphate Limited and another Sri Lankan company whose exploration and mining licenses were to be transferred to the project company, and the Attorney-General.

The Respondents claimed that the terms of the Mineral Investment Agreement required them to comply with all Sri Lankan laws and that the application of the Petitioners was premature. The agreement had its own clauses for safeguarding the environment including the compulsory deposit of a bound and the establishment of an escrow account. They also argued that the Government was the "trustee" of the natural resources of Sri Lanka and that the mere fact that the Court may not agree with the Government's decision did not give it the jurisdiction to intervene.

It was common ground that the final draft agreement had been initiated but not formally signed, and by a separate argument the 5th and 7th Respondents also argued that the Petitioners were out of time since more than one month had elapsed since the initiating.

Held:

(1) What was before the Court was a fundamental rights application in respect of which the Court clearly had jurisdiction under Article 126 of the Constitution.

(2) The public trust doctrine as applied in the United States was too restrictive in scope and the present matter should be looked at in the light of Sri Lanka's ancient traditions and its present Constitution which placed a shared responsibility for safeguarding the environment on the Government and the people.

(3) The application was not time-barred. There had been much uncertainty about the project following public protests and criticisms from scientists, and when the National Science Foundation made critical observations about the project in their report to the Minister in July 1999, it was reasonable for the Petitioners to expect that the Government would not proceed with the project. It was only when they saw a news report in September that they realized that the project was still going ahead and they had come to Court within one month thereof.

(4) The Petitioner's application was not premature either. Although the Respondents had argued that the initial exploration stage was of a non-intrusive

nature, the Petitioners were entitled to ask Court to consider all stages of the proposed project and the total effect of the project in determining whether their rights were about to be infringed.

(5) Although the introduction to the agreement itself pledged the Government to the "rational exploitation and development" of the country's phosphate resources, the agreement was open-ended in terms of both its duration and the area it would cover, both of which were extendable at the option of the project company. The proposed rate of mining which would account for 26.1 million metric tons of phosphate rock within thirty years would exhaust the confirmed reserves. Scientists had detailed the environmental damage that was likely to occur both from the intensive mining and from the deposit of harmful by-products such as phospho-gypsum and other radio-active substances which would grossly exceed the assimilative capacity of the environment. The Petitioners in the exercise of their individual rights and in the context of the rights guaranteed to them as members of the "citizenry of Sri Lanka" were entitled to plead for sustainable development of natural resources and their conservation for the benefit of future generations on the principle of inter-generational equity. This principle was also recognized in Section 17 of the National Environmental Act.

(6) The provision in the Mineral Investment Agreement for the project company to prepare a Feasibility Study Report and a Development Plan, both of which had to meet with the approval of the Ministry Secretary (1st Respondent) was no guarantee that the Petitioners' rights would be safeguarded, especially in view of the confidentiality clauses in the agreement which effectively precluded public awareness and participation.

(7) The salutary provisions of the National Environment Act and the Regulations framed thereunder relating to the EIA process had not been observed. The parties to the agreement had sought to substitute an extraordinary procedure which contravened the provisions of the Act. The Petitioners were also entitled to be apprehensive that even if there was an EIA at this stage, the CEA might not have been able to act independently and impartially.

(8) There had been an attempt by the parties to the agreement to contract out of the obligation to comply with the law.

(9) Although the rights set out in Articles 12 and 14 of the Constitution may be subject to restrictions prescribed by law for, amongst other things, "meeting the just requirements of the general welfare of a democratic society", the Court was not satisfied that the present project was necessary to meet such requirements. Accordingly there was an imminent infringement of the Petitioners' rights under Articles 12(1), 14(1)(g) and 14(1)(h).

(10) Acting under the powers given by Article 126(4), the Court directed the Respondents to refrain from entering into any contract relating to the Eppawala phosphate deposit prior to the carrying out of a comprehensive exploration and

study of the locations, quantity and quality of the appetite or other phosphate minerals in Sri Lanka by the 3rd Respondent (Geological Survey and Mines Bureau) in consultation with the National Academy of Sciences and the National Science Foundation and the publication of the results of the same.

(11) Before entering into any contract, any project proponent was also required to obtain CEA approval which should be given according to law including the decisions of the Superior Courts of Sri Lanka.

(12) The State was ordered to pay each of the Petitioners Rs. 25,000 as costs, while the 5th and 7th Respondents were each ordered to pay each of the Petitioners Rs. 12,500 as costs.

Cases Cited:

(1) Hungary v. Slovakia, I.C.J. 1997 September 25 General List No. 92.
(2) Gunaratne v. Homagama Pradeshiya Sabha, (1998) 2 Sri. L.R. 11.

Cases referred to:

(a) M.C. Mehta v. Kamal Nath (1997), 1 SCC 388.
(b) Illinois Central R. Co. v. Illinois, 146 U.S. 387 at 452, 135 S.C. 110 at 118 (1892)

THE BACKGROUND

After solid surveys conducted by a team of scientists at Kiruwalhena, which had been selected as a prototype site of dry zone, high elevation laterite, the team informed the Director of Geological Survey about some peculiar weathered rock they had found. Early, in 1971, during the Geological Survey of the Anuradhapura district, it was found that what had been supposed by the scientists during the soil surveys to be "high level fossil laterite" was really an igneous carbonate apatite. The Department of Geological Survey had thus come to "discover" a deposit of phosphate rock occurring in the form of the mineral apatite at Eppawala in the Anuradhapura district.

Having regard to the policies of the Government at that time, it was decided in 1974 that the use of the Eppawala deposit should be entrusted to a Divisional Development Council. (D.D.C)

Although a trial order for the supply of 500 tons was placed by the Ministry of Industries and Scientific Affairs and the order was fulfilled within about four months, no further orders for phosphate rock were placed. The D.D.C. project was later taken over by Lanka Phosphate Ltd., a company fully owned by Government, which was set up by the Ministry of Industries.

In December 1992, a notice calling for proposals to establish a Joint Venture for the manufacture of Phosphate fertilizer using the apatite deposit at Eppawala was published in local and foreign newspapers. Six proposals were received. A committee appointed by the Cabinet, after the having considered an evaluation report decided with the approval of the Cabinet to undertake negotiations with Freeport MacMoran Resource Partners of

USA (hereinafter referred to as Freeport MacMoran). One of the factors that appeared to have been in favour of Freeport MacMoran was that it was "one of the leading phosphate fertilizer firms in the world". (P4 page 2). Another was that "IMCO Agrico (Sic.) and affiliate of M.S. Freeport MacMoran, had done studies and worked on the utilization of this particular phosphate deposit several years ago and therefore, they had the benefit of that research." (P4 page 2)

The negotiation committee was assisted by representatives from various Government Departments and Ministries and by a team of experts.

The first round of negotiations was held from 17-22 March, 1994. Thereafter, when the present government took office, the Minister of Industrial Development, in a Memorandum dated the 28th of January, 1995, reported to Cabinet the progress made and sought and obtained the approval of the Cabinet to continue with the negotiations. A second round of negotiations were held from 27-31 march, 1995. "Major issues" relating to the availability of land for a plant at Trincomalee, and "the resettlements and payment of compensation to Mahaweli settlers presently living in the exploration area identified for the project", were discussed with local institutions and authorities (P4)

On 26th of September, 1996 the Minister of Industrial Development reported to Cabinet on the progress made and sought approval "for certain parameters in respect of some key issues which continued to remain unresolved." No information was furnished to court on what these issues were and what had been decided. We were merely informed that Cabinet approval was received on the 2nd of October, 1996 and that the third round of negotiations were held from December 21st, 1996. Thereafter, Freeport MacMoran submitted drafts of the Mineral Investment Agreement and other subsidiary agreements. These were studied by the negotiating committee and lawyers from the Department of the Attorney-General "on the basis of the parameters laid down by the Cabinet and the applicable laws." (P4) The Freeport MacMoran draft was returned to them with amendments. Freeport MacMoran then raised "several issues regarding the interpretation of the key parameters and also the language in the draft as amended by the Attorney-General's Department". (p4) Subsequently, Freeport MacMoran met Her Excellency the President who thereupon directed Mr B.C. Perera (Secretary, to the Treasury), Hon. Sarath N Silva, (Attorney-General), Mr. K. Austin Perera (Secretary, Ministry of Industrial Development), Mr. Thilan Wijesinghe (Chairman/Director-General, Board of Investment of Sri Lanka), and Mr Vincent Panditha (Senior Advisor, Board of Investment of Sri Lanka and Consultant, Ministry of Industrial Development) (P4), "to conduct on final round of negotiations and clear any outstanding issues along with the texts of the Mineral Investment Agreement and subsidiary agreements". (P4) The final round of negotiations was held from the 28th of July, 1997 to the 04th August 1997 and the final drafts of the Mineral Investment Agreement and subsidiary documents were agreed upon and initiated by the Secretary, Ministry of Industrial Development and the representatives of Freeport Mac Moran and IMC Agrico.

On 17th of May 1998 the President of the National Academy of Sciences, Prof. V.K. Samaranayake wrote to the President of Sri Lanka with copies to the Minister of Science

Technology and Human Resource Development and the Minister of Industrial Development (P10) stating that the council of the Academy was of the view –

> "that the proposed project in its present form is premature as some of the vital data relating to the actual size and quality of the mineral deposit have not been adequately surveyed and established. This shortcoming had also been highlighted in the Report of May, 1996 of the Presidential Committee appointed by Your Excellency. The feasibility of the Project can be comprehensively appraised only when this vital data are available. Accordingly, we respectfully request Your Excellency to defer the grant of approval for the Project until a comprehensive appraisal is undertaken".

In the same letter, the President of the National Academy of Sciences stated that the Council had also examined other related issues and that the recommendations, including options, were elaborated in the report of the National Academy of Sciences which was forwarded to the President of Sri Lanka.

In a newspaper article entitled "Exploitation of Eppawala rock phosphate deposit", (P10 (a)) Prof. V.K.Samaranayake stated as follows:

> "the National Academy of Sciences is the highest multi-disciplinary scientific organisation in Sri Lanka. Its mandate includes, "to take cognizance and report on issues in which scientific and technological considerations are paramount to the national interest" and "too advise on the management and rational utilization of the natural resources of the island so as to ensure optimal productivity, consistent with continued use of the biosphere on a long term basis taking into account the repercussions of using a particular resource on other resources and the environment as a whole and to help in making use of resources of the country in national development".
>
> Prof. Samaranayake went on to say that,
>
> "Accordingly, the Academy studied the proposal from all angles and submitted its report to Her Excellency the President in May 1998. The project proposal was examined in relation to (a) the deposit and proposed rate of exploitation; (b) proposal to manufacture fertilizer locally; (c) environmental considerations; and (d) economic and social considerations".
>
> On 23rd of July, 1999 a committee of twelve scientists of the National Science Foundation submitted a report under the title "The Optimal use of Eppawala rock phosphate in Sri Lankan agriculture" (P12). Having observed that the proposal of the U.S. Mining company "in the view of many of the Professional Associations in the country, e.g. the Institution of Engineers, Institute of Chemistry, National Academy of Sciences and most individual scientists and engineers is highly disadvantageous to the country and with highly adverse environmental impacts", the committee examined various proposals made and suggested options which in its view "are more advantageous to the country".

On 8th of October, 1999 the seven Petitioners filed an application in this court under Article 17 read with Article 126 of the constitution. The Court (Fernando, Wadugodapitiya and Gunesekara, JJ.) on 27th of October 1999 granted the seven Petitioners leave to proceed with their application for declarations and relief arising from the alleged infringement of their fundamental rights guaranteed by Articles 12 (1), 14(1) (g), and 14 (1) (h) of the Constitution.

JURISDICTION

In the proposed agreement, it is acknowledged in the "Introduction" that "The mineral resources contained in the territories of Sri Lanka constitute a part of the national wealth of Sri Lanka.

Learned counsel for the 5th and 7th Respondents with whom, the Deputy Solicitor-General associated himself, submitted that the Government, and not this court, is the "trustee" of the natural resources of Sri Lanka. "Thus, as long as the Government acts correctly the court will not put itself in the shoes of the Government. That is to say the court may or may not agree with the final outcome. However, if the Government has correctly acted as trustee the court will not interfere". It was further submitted that the petitions should be dismissed *in limine*, since the petitions had invoked the fundamental rights jurisdiction of the court in a matter that was "either a public interest litigation or breach of trust litigation".

I am unable to accept those submissions.

The Constitution declares that sovereignty is in the people and is inalienable (Article 3). Being a representative democracy, the powers of the people are exercised through persons who are for the time being entrusted with certain functions. The Constitution states that the legislative power of the People shall be exercised by Parliament, the executive power of the People shall be exercised by the President of Sri Lanka and the judicial power of the people shall be exercised, *inter alia*, through the Courts created and established by the Constitution (Article 4). Although learned Counsel for the Petitioners, citing *M.C. Mehta v. Kamal Nath(a),* agreed with learned Counsel for the 5th and 7th Respondents that the natural resources of the people were held in "trust" for them by the Government, he did not subscribe to the view that the Court had no role to play. In any even, he challenged the Respondents' claim that the Government had in fact acted "properly" in discharging it role as "trustee".

The organs of State are guardians to whom the people have committed the care and preservation of the resources of the people. This accords not only with the scheme of government set out in the constitution but also with the high and enlightened conceptions of the duties of our rulers, in the efficient management of resources in the process of development, which the Mahavamsa, 68.8-13 sets forth in the following words.

> "Having thus reflected, the king thus addressed his officers.
>
> In my Kingdom are many paddy fields cultivated by means of rain water, but few indeed are those which are cultivated by perennial streams and great tanks.
>
> By rocks, and by many thick forests, by grate marshes is the land covered.

> In such a country, let not even a small quantity of water obtained by rain, go to the sea, without benefiting man.
>
> Paddy fields should be formed in every place, excluding those only that produce gems, gold, and other precious things.
>
> It does not become persons in our situation to live enjoying our own ease, and unmindful of the people ….. ".

Translation by Mudaliyar L. de Zoysa, *Journal of the Royal Asiatic Society* (C.B), vol. III No IX, (The emphasis is mine)

In the case concerning the Gabcikovo-Nagimaros project (Hungary/Slovakia) - the Danube case –before the International Court of Justice, the Vice-president of the Court, Judge C.G. Weeramantry, referred at length to the ancient irrigation works of Sri Lanka which, he said "embodied the concept of development *par excellence*". He said:

> "Just as development was the aim of this system, it was accompanied by a systematic philosophy of conservation dating back to at least the third century BC. The ancient chronicles record that when the King (Devanampiya Tissa) 247-207 BC. was on a hunting trip (around 223 B.C.) the Arahat Mahinda, son of the Emperor Asoka of India, preached to him a sermon which converted the King. Here are excerpts from that sermon: "O great King, the birds of the air and the beasts have as equal a right to live and move about in any part of the land as thou. The land belongs to the people and all living beings; thou art only the guardian of it …." The juxtaposition in this heritage of the concepts of developments and environmental protection invites comment immediately from those familiar with it. Anyone interested in the human futures would receive the connection between the two concepts and the manner of their reconciliation. Not merely from the legal perspective does this become apparent, but even from the approaches of other disciplines. Thus Arthur C. Clarke, the noted futurist, with the vision that has enabled him to bring high science to the service of humanity, put his finger on the precise legal problem we are considering when he observed: "the small Indian Ocean Island …. provides textbook examples of many modern dilemmas: '*development versus environment'*, and proceeds immediately to recapitulate the famous sermon, already referred to, relating to the trusteeship of land, observing , "For as King Devanampiya Tissa was told three centuries before the birth of Christ, we are its guardians – not its owners. "The task of the law is to convert such wisdom into practical terms…."

I have not been able to find the sermon referred to. However, Tissa, who depended on the support of Emperor Asoka, and even added to his name the title of his patron, "Devanampiya", would have had little or no hesitation in accepting the advice of Asoka's emissary, Mahinda. The subject of land tenure in Sri Lanka, including the status, claims, and rights of the Monarch with regard to the soil, is an extremely complex one as, for instance, the debates on various matters between H.W. Codrington and Julius de Lanerolle showed (see Journal of the Royal Asiatic society (Ceylon Branch), Vol. XXXIV, p, 199 s.q. p. 226 sq.). For the present limited purpose, what I do wish to point out is that there is justification in looking at the concept of tenure, not as a thing in itself, but rather a way of thinking about rights and usages about land. H.W. Codrington,

Ancient Land Tenure and Revenue on Ceylon, pp. 5-6 refers to the fact that the King was *bhupati or bhupala* "lord of the earth", "protector of the earth" – lord *"adhipathi"* of the fields if all'. He quotes Moreland with approval in support of the view that at first, the question of 'ownership' was if little or no significance. Moreland wrote as follows.

> "Traditionally there were two parties, and only two, to be taken into account; these parties were the ruler and the subject, and if a subject occupied land, he was required to pay a share of its gross produce to the ruler in return for the protection he was entitled to receive. It will be observed that under this system the question of ownership of land does not arise; the system is in fact antecedent to that process of disentangling the conception of private right from political allegiance which has made so much progress during the last century, but is not even now fully accomplished ….."

Later, grantees, in general, it seems were given the enjoyment of lands for services rendered on to be rendered in consideration of their holdings, or lands were given for pious and public purposes unrelated to any return. For their part grantees were under an obligation to make proper use of the lands consistent with the grant or, in default, suffer their loss or incur penalties.

The public trust doctrine, relied upon by learned counsel on both sides, since the decision in *Illinois Central R.. Co. v. Illinois(b)*, commencing with a recognition of public rights in navigation and fishing in and commerce over certain waters, has been extended in the United States on a case by case basis. Nevertheless, in my view, it is comparatively restrictive in scope and I should prefer to continue to look at our resources and the environment as our ancestors did, and our contemporaries do, recognizing a shared responsibility.

The Constitution today recognizes duties both on the part of Parliament and the President and the Cabinet of Ministers as well as duties on the part of "persons", including juristic persons like the 5th and 7th Respondents. Article 27(14) states that "The State shall protect, preserve and improve the environment for the benefit of the community". Article 28(f) states that the exercise and enjoyment of rights and freedoms (such as the 5th and 7th Respondents claimed in learned counsel's submissions of their behalf to protection under Article 12 of the Constitution relating to equal protection of the law) "is inseparable from the performance of duties and obligations, and accordingly it is the duty every person is Sri Lanka to protect nature and conserve its riches".

The loose use of legal terms like "trust" and "trustee" is apt, as this case has shown, to lead to fallacious reasoning. Any question of the legal ownership of the natural resources of the State being vested in the Executive to be held or used for the benefit of the people in terms of the Constitution is at least arguable. The Executive does have a significant role in resource management conferred by law, yet the management of natural resources has nor been placed entirely in the hands of the Executive. The exercise of Executive power is subject to judicial review. Moreover, Parliament may, as it has done on many occasions, legislate on matters concerning natural resources, and the Courts have the task of interpreting such legislation in giving effect to the will of the people as expressed by Parliament.

In any event, the issue before me is not the question whether this Court or the "Government" is a "trustee", and whether there has been a breach of trust, but whether in the circumstances of the instant case the rights of the Petitioners guaranteed by Articles 12(1), 14(1) (g) and 14(1) (h) of the Constitution have been violated. And in that regard the jurisdiction of this Court is put beyond any doubt by Article 126(1) of the Constitution which states, among other things, that the Supreme Court has "sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right …." The Court is neither assuming a role as "trustee" nor usurping the powers of any other organ of Government. It is discharging a duty which has in the clearest terms been entrusted to this Court, and this Court alone, by Article 126(1) of the Constitution.

Learned Counsel for the 5th and 7th Respondents submitted that, being an alleged "public interest litigation" matter, it should not be entertained under provisions of the Constitution and should be rejected. I must confess surprise, for the question of "public interest litigation" really involves questions of *standing* and not whether there is a certain kind of recognized *cause of action*. The Court is concerned in the instant case with the complaints of individual Petitioners. On the question of standing, in my view, the petitioners, as individual citizens, have a constitutional right given by Article 17 read with Article 12 and 14 and Article 126 to be before this Court. They are not disqualified because it so happens that their rights are linked to the collective rights of the citizenry of Sri Lanka – rights they share with the people of Sri Lanka. Moreover, in the circumstances of the instant case, such collective rights provide the context in which the alleged infringement or imminent infringement of the Petitioners' fundamental rights ought to be considered. It is in that connection that the confident expectation (trust) that the Executive will act in accordance with the law and accountably, in the best interests of the people of Sri Lanka, including the Petitioners, and future generations of Sri Lanka, becomes relevant.

MAY THE SEVEN PETITIONERS JOIN IN A SINGLE APPLICATION?

Learned Counsel for the 5th and 7th Respondents submitted that "several Petitioners cannot join in one application in terms of Article 126 of the Constitution". Admittedly, Article 126(2) refers to "any person", "such person" and "he may himself". However, the court has not construed these phrases so as to preclude the joining of several Petitioners where their individual rights are based on the same alleged circumstances; in fact, the practice of the court points in the other directions. I therefore hold that the Petitioners are not non-suited on the ground of misjoinder.

IS THE APPLICATION OUT OF TIME?

The Respondents submitted that the application must be rejected, since it has been made out of time. However, no indication was given by the Respondents of the date from which the period of one month specified by Article 126(2) is to be reckoned. The Respondents at the same time maintain that there can be no complaint of an infringement or imminent infringement of rights "unless and until the Development Pant is in place", for it is that document which would show what rights, if any, have been or are about to be

infringed. If there has been no infringement or imminent infringement it seems to me that the Respondents are entitled to call for the dismissal of the petition on the ground that the Petitioners have failed to establish their case. It cannot, however, be maintained that the petition is too late, unless it is conceded that the case was ripe or mature for hearing. The petition cannot be premature and too late at the same time, for the latter position assumes that although the matter was ripe or mature for consideration, the Petitioner failed to act within the prescribed time. A substantial part of the Respondents' case was based on the submission that the Petitioners' case was premature and "conjectural". I shall deal with the Respondents' submissions in that regard later on. But for the present, in dealing with the threshold question of whether the petition is out of time, what I have already stated and what I shall state in the next paragraph, should, I think, be sufficient to meet the submission of the Respondents.

In addition to pointing out the inconsistent positions of the Respondents on the question under consideration, namely, whether the petition was out of time, the Petitioners explained that there was considerable uncertainty about the status of the project in question, with "inconsistent signals" being given by the Government from time to time on that matter, both in response to public protests, and critical observations from scientists, including those of the National Science Foundation in their report to the Minister of Science and Technology in July 1999. The Minister had asked the National Science Foundation for advice, and having regard to the observations made by the Foundation, it was not unreasonably expected that the Government would not proceed with the project. There was such uncertainty about the matter that it might have been premature for the Petitioners to come into court earlier. However, when a newspaper report (Document p13) dated the 26th of September 199, announced that the proposed agreement relating to the project, which had been initiated in 1997, following negotiations that had gone on since 1994, was expected to be signed within two months, the Petitioners filed their petition on 08 October, 1999. The impending or threatening danger of the violation of the Petitioners' rights reached a sufficient fullness on the 26th of September, 1994.

In the circumstances, I hold that the application was filed in time within the meaning of Article 126 (2) of the Constitution.

LEAVE TO PROCEED WAS FOR INFRINGEMENT NOT FOR IMMINENT INFRINGEMENT

The Petitioners were granted leave to proceed for the alleged infringement of Articles 12(1), 14(1) (g) and 14(1) (h) and not for the alleged imminent infringement of their rights. The fact that leaves to proceed was granted for "infringement" does not preclude the court from considering whether there was an *imminent infringement for omne majus continet in se minus* – the greater contains the less. This court, having granted leave to proceed for the alleged infringement of a fundamental right, and thereby being empowered by the constitution to do the more important act of considering whether an infringement had taken place, cannot be debarred from doing the less important thing of considering whether there is an imminent infringement, for *non debet cui plus licet quod*

minus est non licere or, and it is sometimes expressed, *cui licet quod majus no debet quod minus est non licere* – a doctrine founded on common sense, and of general application.

THE ALLEGED IMMINENT VIOLATION OF ARTICLES 14(1) (g) AND 14(1) (h) OF THE CONSTITUTION

Article 14(1) (g) of the Constitution states that every citizen is entitled to the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise. Article 14(1) (h) states that every citizen is entitled to the freedom of movement and of choosing his residence within Sri Lanka. The Petitioners are citizens of Sri Lanka and residents of the area called Eppawala in the Anuradhapura District in the North Central Province. The first to fifth Petitioners are land owners and/or paddy and dairy farmers in the Eppawala area. The sixth Petitioner is a teacher and the owner of an extent of coconut land in the Eppawala area. The first to sixth Petitioners state that they are in danger of losing the whole or some portion of their lands and their means of livelihood if the proposed mining project is implemented. The seventh Petitioner is the Viharadhipathi of the Galkanda Purana Viharaya where he has resided for over 35 years. He states that the Viharaya and the paddy lands that sustain it are in danger of being destroyed if the proposed mining project is implemented. The Petitioners complain of an imminent infringement of their fundamental rights guaranteed by Articles 14(1) (g) and 14(1) (h).

THE AREA AFFECTED

The Petitioners' state that the initial exploration area will be 56 square kilometres with a ten kilometre buffer zone on each side, bringing to about 800 square kilometres the area potentially affected. They state that about 2,600 families or 12,000 persons, including themselves, are likely to be permanently displaced from their homes and lands.

There are only seven persons who have filed this application; but it must now become clearer why I said that their claims were linked to the collective rights of others and that the alleged infringement of the Petitioners' individual rights need to be viewed in the context of the rights guaranteed to them not only as falling within the meaning of "all persons" as for instance within the meaning of Article 12(1) of the Constitution, but in particular as member of the *citizenry* of Sri Lanka.

The Negotiating Committee appointed by the President states in its report to the President (p4 at p.5) that "the exploration area will cover approximately 56 sq. miles (sic.) of land situated in Eppawala in the Anuradhapura District" and that the Buffer Zone Area "will comprise of a land area extending to 10 kilometres from the boundaries of the exploration area". That is a misleading statement, for in terms of the Agreement the "exploration area", is far in excess of 56 sq. miles. Indeed, as we shall see, the President's committee accepts the fact that the exploration area was not absolutely limited to 56 sq. miles. It was contractually elastic and extendable.

I agree with learned Counsel for the Respondents that there is as yet no "Agreement" *stricto sensu.* Article 2.1 of the proposed Mineral Investment Agreement, sometimes hereinafter referred to for the sake of convenience as the "Agreement" describing the

"basic" rights of the company, states, inter alia as follows: "without limitation on the other rights conferred on the company by this Agreement, the Company shall have, and the Government hereby grants to the company, subject to the other terms and conditions specified in this Agreement, the sole and exclusive right (a) to search for and explore for phosphate and other minerals in the Exploration Area …. (b) to conduct pilot or test operations as appropriate at any location within the contract Area (without limiting the company's option of conducting such pilot r test operations entirely or partially at other locations): (c) to develop and mine under Mining Licences any phosphate deposit (including phosphate minerals and Associated Minerals) found in the Exploration Area …."

Article 1 of the Agreement defines "Exploration Area" as "that certain area of land which forms part of the contract Area and which initially covers approximately 56 sq. kms. of land and is set forth and described as the Exploration Area on Annexes "B-1"and "C-1" hereto in respect of which Exploration Licences have been issued under the Act to Lanka Phosphate and/or Geo Resources Lanka (Pvt.) Ltd as such area may be reduced or extended as specifically provided for in this Agreement." "Exploration" is defined in the Agreement as "the search for apatite and other phosphate minerals using geological, geophysical and geo-chemical methods and by bore holes, test pits, trenches, surface or underground headings, drifts or tunnels in order to locate the presence of economic apatite or other phosphate mineral deposits and to find out their nature, shape and grade, and this term includes "Advanced Exploration" in terms of the Mining (Licensing) Regulations No. 1 of 1993. The verb "explore" has a corresponding meaning.

The various activities falling within the definition of "Exploration" is, in terms of the Agreement, not confined to an area of 56 sq. kms. That, in terms of the definition, is the area covered "initially", but one that may be "extended as specifically provided for in this Agreement". It is stated in Article 2.1 of the Agreement to be a "basic right" of the Company "to conduct pilot or test operations as appropriate at any location within the contract Area without limiting the company's option within the contract Area test operations entirely or partially at other locations". So, Exploration may extend to the Contract Area. The Agreement defines "Contract Area" to mean "the lands included within the Exploration Area and the processing Area as included within the Exploration Area and the Processing Area as described in Annexes "B-1" and "B-2" hereto and depicted on the maps set forth as Annexes "C-1" and "C-2" hereto, within which the activities of the enterprises are to take place, as from time to time reduced or extended in accordance with this Agreement."

"Processing Area" is defined in the Agreement to mean "that certain area of land which forms part of the Contract Area and which is set forth and described as the Processing Area on Annexes "B-2" and "C-2" hereto, as such area may be amended, revised or replaced on accordance with the provisions of this Agreement, which area may be used for Processing, shipping, docking, terminalling, storage, stockpiling and all other related activities and operations". "Processing" is defined in the Agreement as "the crushing, benefication, concentration or other treatment of phosphate minerals and Associated Minerals by physical, chemical, or other process in connection with the manufacture of

products but does not include the smelting and refining of metals. The verb "process" has a corresponding meaning."

Thus, in terms of the Agreement, the activities falling within the definition of "Exploration", may take place, not only within the 56 sq. kms., not only within the "Exploration Area", but also within the "Processing Area" which even includes Trincomalee. In fact, the report of the President's Committee states at p.6 that the "Processing Area will be Trincomalee where the processing plant, ware-house, dock, terminal and shipping are located".

It might be noted that in terms of Article 2.5, if the Processing Area identified at the time of the signing of the Agreement was found to be unsuitable after the feasibility study, the Government pledges to use "its best efforts" to locate other lands that are suitable.

Article 2.4 of the Mineral Investment Agreement states as following:

> "Notwithstanding the existence of this Agreement and the fact that the company will control a significant area of land for the exploration for and possible development of phosphate mineral deposits as a result of this Agreement, the company shall remain eligible to apply for and obtain Exploration and Mining Licences on lands outside the Exploration Area…. In the event the Company does obtain Exploration and/or Mining Licences … covering lands within the Buffer Area such lands shall be added to the Exploration Area and treated in all respects as part of the Exploration Area (and Mining Area, if a Development Plan is approved) and as licences which are subject to the provisions of this Agreement."

The report by the President's Committee states: "The Company will have a right to extend their activities into the buffer zone as well, if found necessary." There is no definition in the Agreement of "Buffer Zone". However, the report of the President's Committee states at p6 that "Buffer Zone Area" will comprise a land area extending to 10 kilometres from the boundaries of the exploration area. The Company will have a right to extend their exploration activities into the buffer zone as well, if found necessary." Indeed, (1) since the "Exploration Area" in terms of the Agreement, as we have seen, extends to the "Processing Area", and (2) since in terms of Article 2.1 of the Agreement it is acknowledged that the Company shall have the "basic" right not only to conduct pilot or test operations at any location within the Contract Area but without limiting the Company's option of conducting such pilot or test operations entirely or partially at other locations", the area of operation even at the "Exploration" stage is very vast indeed and extendable, in terms of the Agreement, in "the Company's option." Reference is made to the reduction or extension of Exploration or Processing Areas, however, reduction in terms of Article 6.3 is a matter for the Company to decide. The Government has no say in the matter. Regardless of maps demarcating the "Exploration Area" drawn on the basis of what Government officials were given to understand, the terms o the agreement view the area of "Exploration" wide and practically unrestricted. No exploration may be contemplated in any area outside the areas demarcated in the maps, but the terms of the agreement made "Exploration Area" at least an arguable matter. If the proposed

agreement is signed, it would leave the resolution of a dispute on that matter to be settled by arbitration in terms of Article XX of the Agreement.

SETTLERS AND THE AFFECTED AREA

In their final written submissions on behalf of the 1st-3rd, 6th and 8th Respondents, made after the oral hearing, learned counsel submitted that "During the exploration period the inhabitants of the area will not be displaced nor their lands will be affected". A map (Document X), prepared by the Director of the Geological Survey and Mines Bureau was annexed to the submissions under the caption. "The area reserved for mineral explorations up to (the) 31st July, 1999". The map is a map of Sri Lanka showing three areas of demarcation:

> "(1) The area of 56 sq. km reserved for the proposed phosphate project;
> (2) Areas reserved present for mineral explorations (8514 sq.km);
> (3) The areas where detail explorations have been carried out during the past three years (1839 sq.km). "*Neither any complaints or damage to the environment have been received nor any person has been displaced due to exploration activities".* (The emphasis is mine)

That map was not produced until after the conclusion of the oral submissions. When and why was it prepared? On the basis of Document X, the Deputy Solicitor-General said: "One could see from 'X' that the whole of Chilaw town has been part of the exploration area (sic). Therefore, it is respectfully submitted that no harm will occur either to the inhabitants of the area or to the environment during the exploration period. In the circumstances, it is respectfully urged that the application of the Petitioner at this moment is pre-mature".

What is the fate of Chilaw and other areas referred to in document X? Was the agenda of the Geological Survey and Mines Bureau made known to the people of the affected areas? The Deputy Solicitor-General has not stated that the people of the areas demarcated in Document X have been made aware of the intentions of the Geological Survey and Mines Bureau, and, in the circumstances, his submissions that the people living within the proposed exploration areas in document X have made no protests, and that therefore the Petitioners cannot object to exploration is unsound, for they are not comparable situations. Has it been publicly announced that exploration, as defined in the proposed agreement, will be carried out in Chilaw and other areas shown in Document X?

In his affidavit, the 1st Respondent states, "4. (a) The apatite deposits were discovered in 1971 and part of the deposit is to the North of the Jaya Ganga, which consist of Crown lands (sic.) only; (b) the area to the south of Jaya Ganga has been excluded from the Mahaweli Settlement Scheme and reserved for the apatite/Phosphate Project in view of the said discovery in 1971. Accordingly there are no legal settlements in the area". This, as we shall see, is flatly contradicted by Article 17.3 of the proposed agreement which I have quoted below. At the hearing, he produced a map through the Deputy Solicitor-General. With his affidavit he submitted a Plan of "the known deposit area" prepared by

the Geological Survey Department and stated that the 7th Petitioner's temple was not within the known deposit area".

According to the map, there do not appear to be inhabitants on what is marked as the "Known Deposit Area" south of what is marked as the "Kalawewa R.B. Main Channel", which the Deputy Solicitor General confirmed is the Jaya Ganga referred to by the 1st Respondent. Learned Counsel, for the 5th and 7th Respondents and the Deputy Solicitor-General stated that no one was living on the reserve and that, therefore, on the known data, there will be no relocation.

However, the question as far as the 7th Petitioner and the other Petitioners are concerned is not whether their lands were on the "known deposit area", but whether they were within the "Exploration Area", including the area south of the Jaya Ganga. Having regard to the Grid map (p6 and 5 R2), the Petitioners' lands are in the following squares and fall within the exploration area: 157332 (1st Petitioner); 157329 (2nd Petitioner); 157327/156329 (4th Petitioner); 157329 (5th Petitioner); 157327/158327 (6th Petitioner); 157328 (7th Petitioner).

The 1st Respondent suggested that, in view of the impending phosphate project, no settlers were located under the Mahaweli project in the area earmarked for the phosphate project. However, in the map furnished to us, there are "Mahaweli Settlers" within the demarcated "Exploration Area" south of what is marked as the "Kalawewa Main R.B. Channel". Indeed, the map it seems had been prepared for the very purpose of identifying Mahaweli Settlers, who are obviously not, as the 1st Respondent suggested, illegal occupants of lands. The caption of the map is "Phosphate Project at Eppawala – Area falling within system 'H' of Mahaweli Project." Another map produced by the Deputy Solicitor-General – the "Buffer Area map" - grid map – shows another "Known Deposit" north of what is marked as the "Kalawewa main R.B Channel." When that map is read with the "Phosphate Project at Eppawela etc. Map", Mahaweli Settlers' appear to be living in that area as well.

Learned Counsel for the 5th and 7th Respondents submitted that "there are no persons living in the Exploration Area", and that therefore there will be no need for relocation, and that no viharayas, homes or villages will be damaged. He stated that "As at present in terms of the known given reserves and inferred reserves no one at all will be relocated. Until the feasibility report is done there will be no way at all in finding out whether in terms of this project anybody will be relocated." The Deputy Solicitor-General stated that the application of the Petitioners was "premature", for the deposits had not been commenced. It was only after the feasibility study that the persons affected and extend of environmental damage could be assessed.

From the point of view of imminent infringement as distinguished from infringement their submissions are not supported by the evidence provided by the maps submitted to us especially when read with the definition and flexible description of "exploration area" in the Agreement referred to above.

Learned Counsel's submissions, as well as the assertions of the 1st Respondent in his affidavit, are also at variance with the report of the President's committee. At pp. 3-4 of that report, attention is drawn to the fact that during the first round of negotiations conducted by the negotiating committee previously appointed by the Cabinet, one of the "major issues" that had to be discussed with "local institutions and authorities" related to the resettlement and payment of compensation of Mahaweli settlers presently living in the exploration area identified for the project". The President's Committee notes that "Discussions have also been held with the Mahaweli Authority of Sri Lanka and will help to determine an exploration area which will least disturb the settlements. However, where re-settlement has to take place consequent to displacement, adequate compensation will be paid to the settlers and the costs will be met by the Joint Venture Company".

Article 17.3 of the proposed agreement acknowledges both the fact that there are settlers south of the Jaya Ganga and the fact that they and other persons may be affected by mining operations. The Article shows not only that the Petitioners and others may be affected but that if they are, the paramount consideration will be the interests of the company rather than those of the occupants of the affected areas.

> 17.3 "The Government and the Company acknowledge that if Mining is conducted within the portion of the Exploration Area, located *south of the Mahaweli District Authority's main canal which flows through the Exploration Area, the occupants of such land may be directly affected. Occupied areas are indicated on the map is attached hereto and made a part hereof as annex "K". To the extent that this area is included within the Mining Area and constitutes part of the area to be mined under the Company's Development Plan which is approved by the Government in accordance with the procedures set forth in Article VII, and the Company determines that it is necessary to relocate such occupants in order to accommodate Mining such area, then the company will pay the costs of such relocations and the Government will use its best efforts to facilitate the relocation of any inhabitants of such land as requested by the Company in a manner which does not create an undue financial burden on the company or delay the Company's development and operation of the Mining Area. The Government will also use its best efforts to co-ordinate with the Mahaweli Authority and any other Government authority having jurisdiction over such lands in order to implement such relocations in an orderly and efficient manner, to minimize or eliminate the settlement within this area, and to cause the removal at minimal cost to the Company of squatters having no legal or possessory rights. In connection with the foregoing, the Government shall use all reasonable efforts to minimize or eliminate the settlement within this area of new inhabitants during the term of this Agreement.*
>
> *As to other parts of the Mining Area where the Company determines that "resettlement" is necessary, the Government and the Company acknowledge that only small numbers of persons inhabit such lands. As to these other lands where relocation is determined to be necessary by the Company, the same relocation provisions as set forth above will apply and the Government will utilize its best*

efforts to minimize or eliminate any settlement of persons or families on such other lands during the term of this Agreement.

In the event that the Company wishes to relocate persons in occupation or possession of private land and not within the scope of the relocation specifically provided for above in this section 17.3 such relocation shall be effected on terms to be agreed between the company and the owners of such private land".

(The emphasis is mine)

Apart from the Mahaweli settlers in the more recent villages established as part of the Mahaweli Development System 'H' project, there are residents of numerous ancient villages (purana gam), both in the "Exploration Area" and the Buffer Zone . Admittedly, the scale of displacement will depend on the feasibility study. That does not mean that at the present time it can be confidently asserted, as learned Counsel for the Respondents did, that no relocation will take place, nor it can be denied that some displacement is likely, - a conclusion, as we have seen, that understandably troubled the negotiating committee appointed by the Cabinet, although they seem to have been preoccupied with the fate of the Mahaweli settlers.

PETITIONERS' FEARS UNFOUNDED?

Learned Counsel for the 5th and 7th Respondents analysed the Agreement and said there were five stages in the project; (a) exploration; (b) feasibility study; (c) construction; (d) operating; (e) marketing. Mining, which could cause damage, he said, "is done only at the operating stage". There was no need to feel any apprehension at the Exploration and Feasibility Study stages, which is what the signing of the proposed Agreement should lead to. It is only when the exploration and feasibility study are done, the approval of all the statutory authorities are obtained, and the Secretary accepts the feasibility report, that the company will be permitted to proceed to the construction and mining phases of the project. Exploration, he said, "only means search and location of the presence of economic apatite and other phosphate mineral deposits and to find out their nature and grade." The Deputy Solicitor-General expressed a similar view.

The exploration contemplated by the Respondents may, perhaps, be of a non-intrusive nature. However, the definition of "exploration" in the proposed Agreement, as we have seen, includes the search for certain minerals, and their location, nature and grade, inter alia by making "boreholes, test pits, trenches, surface or underground headings, drifts or tunnels." Mining may have comparatively more devastating consequences, but exploration can scarcely be said to be so harmless as to cause the occupants of the exploration area no reasonable apprehension of imminent harm to their homes and lands. In the circumstances, the Petitioners can hardly be blamed for not sharing the optimistic submission of learned counsel for the 5th and 7th Respondents that exploration "can do no harm whatever to anyone".

The Petitioners express concern not only about the harm that may be caused at the stage of exploration, but also at all stages of the project and by the total effect of the project as described in the proposed agreement. Admittedly, there is as yet no formally executed

agreement. Yet, the document may have caused reasonable apprehension leading to the application of the Petitioners, for (a) it has been initiated after a "final" round of negotiations between the parties to a proposed agreement; and (b) provides for each and every one of the "five stages" of the project referred to by learned counsel for the fifth and seventh Respondents in his analysis of the Agreement. The Petitioners' case is that, in the circumstances, the totality of the proposed agreement must be considered in deciding whether there is an imminent infringement of their constitutional rights.

There is nothing in the proposed agreement that supports the view that the signing of the proposed agreement will "only result in exploration and feasibility study". It is a comprehensive, all embracing document.

THE PROPOSED ACTIVITIES UNDER THE AGREEMENT

Following the exploration stage during which the company will locate the presence of economic apatite or other phosphate mineral deposits and find out their nature, shape and grade, a study would be made "to determine the feasibility of commercially developing the phosphate deposit or deposits identified by the Company" (Article 7.2). This is to be followed by the construction of "the mine, fertilizer processing plant and associated facilities" (Article 8.1). Article 9.4 states that "The Enterprise facilities shall include, among other things, the mine and related processing facilities, the fertilizer processing plant and associated facilities and may include port facilities, rail, road and pipeline transportation facilities, storage facilities, communication facilities, power supply and distribution facilities, gypsum and other waste disposal facilities, repair and maintenance facilities temporary or desirable in connection with the operation of the Enterprise …. " The next stage is the "operating period" when mining takes place. Article 9.1 states; "As the construction of the enterprise facilities are progressively completed", the company will "commence the operation of such facilities on the mining and processing areas and the conduct of all other activities contemplated by the Enterprise and shall achieve commercial production by no later than two years following the end of the construction period, and the company shall be authorized to continue such operations and activities for the duration of the operating period, as long as the company abides by its obligations under this Agreement and Applicable Law". "Operating Period" is defined in the Agreement to mean "the period commencing on the day following the end of the construction period and continuing for so long as the Company shall continue to conduct operations with respect to any phosphate mineral reserve within the Exploration and/or Mining Area and, provided the Company has not permanently abandoned or terminated its operations and given notice thereof to the Secretary, for a period of not less that 25 years following the commencement of Commercial Production, or such longer period as the Secretary, on the written application of the Company may approve." Finally, the product will be sold in the market. This is dealt with in Article X.

SUSTAINABLE DEVELOPMENT

In the introduction to the proposed Mineral Investment Agreement, it is stated, "The Government seeks to advance the economic development of the people of Sri Lanka and

to that end desires to encourage and promote the *rational exploration and development* of the phosphate mineral resources of Sri Lanka." (The emphasis is mine).

Undoubtedly, the state has the right to exploit its own resources pursuant, however, to its own environmental and development policies. (Cf. Principle 21 of the U.N Stockholm Declaration (1972) and Principle 2 of the U.N. Rio De Janeiro Declaration (1992) Rational Planning Constitutes an essential tool for recognizing any conflict between the needs of development and the need to protect and improve the environment (Principle 14, Stockholm Declaration). Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature (Principle 1, Rio De Janeiro Declaration). In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it (Principle 4, Rio De Janeiro Declaration). In my view, the proposed agreement must be considered in the light of the foregoing principles. Admittedly, the principles set out in the Stockholm and Rio De Janeiro Declarations are not legally binding in the way in which and Act of our Parliament would be. It may be regarded merely as 'soft law'. Nevertheless, as a Member of the United Nations, they could hardly be ignored by Sri Lanka. Moreover, they would, in my view, be binding if they have been either expressly enacted or become a part of the domestic law by adoption by the superior courts of record and by the Supreme Court in particular, in their decisions.

During the hearing, learned Counsel for the 5th and 7th Respondents submitted that the project must go ahead; because the people would otherwise "starve". In his written submissions he stated that as "trustee of the natural resources of the country … the Government cannot sit back and do nothing. That would be a sin of omission and would be as such a breach of trust as if the Government did act wrongly … It is common ground that the phosphate has to be developed. All the experts are agreed that the phosphate cannot be permitted to lie underground".

While, as I must on account if its extravagance reject learned counsel's claim that people would "starve" if the project is not proceeded with, it might be pointed that there seems to be no disagreement that the phosphate deposit should be utilized. Indeed, an hypothesis has been advanced that the Eppawala deposit was not "discovered" in 1971, but was known to our rulers and people for thousands of years and shared the thought that the deposit should be utilized. The difference between them and us is how this should be done. The ingenuity of the rulers and people of Sri Lanka in times gone by, it is suggested, had created a stable and sustainable agricultural development system harnessing the key natural resources available within their natural habitat, including the Eppawala deposit. The natural processes of weathering, microbial activity and precipitation might have released plant nutrients which were carried overland by flowing into the reservoirs, channels and rivers as well as permeating into the soil matrix and possibly reaching underground aquifers (see Ivan Amarasinghe, Eppawala; Contribution to Nutrient Flows in the Ancient Aquatic Ecosystems of Rajrata).

In 1974, it was decided to use the Eppawala deposit through a District Development Council. The D.D.C. was an organisation aimed at harnessing resources at "grass roots"

level, utilizing locally available resources with the minimum use of foreign or imported expertise, techniques and technology, and providing maximum employment opportunities and the most favourable benefits to the locality. The annual production of the Eppawala D.D.C. projects was to be 50,000 tons, and at that rate of extraction, it was estimated that the deposit would serve the country for a very long time, perhaps a thousand years. Moreover, the D.D.C. project was designed to quarry the phosphate and not to mine it, and such quarrying operations were to be far from the Jayanganga.

It has been the policy of successive governments during the past three decades that the Eppawala mineral deposit should be put to use. In fact, Lanka Phosphate Ltd., the 6th Respondent, under a licence issued by the Geological Survey and Mines Bureau has been mining about 40,000 metric tons of rock per annum for crushing and marketing to enterprises making fertilizer. That modest operation, the Petitioners explain, caused them no concern. However, in view of the escalation of the amount to be mined under the proposed agreement to 26.1 million metric tons within thirty years from the date of the signing of the agreement, the Petitioners fear (a) that existing supplies will be exhausted too quickly, and (b) that the scale of operations within the stipulated time frame will cause serious environmental harm that would affect their health, safety, livelihood as well as their cultural heritage. The Petitioners do not oppose the utilization of the deposit. However, they submit that the phosphate deposit is a "non-renewable natural resource that should be developed in a prudent and sustainable manner in order to strike an equitable balance between the needs of the present and future generations of Sri Lankans".

In my view, due regard should be had by the authorities concerned to the general principle encapsulated in the phrase 'sustainable development', namely that human development and the use of natural resources must take place in a sustainable manner.

There are many operational definitions of 'sustainable development', but they have mostly been variations on the benchmark definition of the United Nations Commission on Environment and Development chaired by Fro Harlem Bruntland, Prime Minister of Norway, in its report in 1987….. development that meets the needs of the present without compromising the ability of future generations to meet their own needs".

Some of the elements encompassed by the principle of sustainable development that are of special significance to the matter before this court are, first, the conservation of natural resources for the benefit of future generations - the principle of inter-generational equity; second, the exploration of natural resources in a manner which is 'sustainable' or 'prudent' - the principle of sustainable use; the integration of environmental considerations into economic and other development plans, programmes and projects - the principle of integration of environment and development needs.

International standard setting instruments have clearly recognized the principle of inter-generational equity. It has been stated that humankind bears a solemn responsibility to protect and improve the environment for present and future generations (Principle 1, Stockholm Declaration). The natural resources of the earth including the air, water, land, flora and fauna must be safeguarded for the benefit of present and future generations

(Principle 2, Stockholm Declaration). The non-renewable resources of the earth must be employed in such a way as to guard against their future exhaustion and to ensure that benefits from such employment are shared by all humankind (Principle 5, Stockholm Declaration). The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations (Principle 3, Rio De Janeiro Declaration). The inter-generational principle in my view, should be regarded as axiomatic in the decision making process in relation to matters concerning the natural resources and the environment of Sri Lanka in general, and particularly in the case before us. It is not something new to us, although memories may need to be jogged.

Judge C.G. Weeramantry, in his separate opinion in the Danube case (Hungary v. Slovakia), (supra), referred to the "imperative of balancing the needs of the present generation with those of posterity". Judge Weeramantry referred at length to the irrigation works of ancient Sri Lanka, the Philosophy of not permitting even a drop of water to flow into the sea without benefiting humankind, and pointed out that sustainable development had been already consciously practiced with much success for several millennia in Sri Lanka. Judge Weeramantry said; "The notion of not causing harm to others and hence *sic utere tuo ut alienum non laedas* was a central notion of Buddhism. It translated well into environmental attitudes. "*Alienum* in this context would be extended by Buddhism to future generations as well, and to other component elements of the natural order beyond man himself, for the Buddhist concept of duty had an enormously long reach".

Contemporary law makers of Sri Lanka too have been alive to their responsibilities to future generations. Thus, section 17 of the National Environmental Act makes it a mandatory duty for the Central Environmental Authority to "recommend to the Minister the basic policy on the management and conservation of the country's natural resources in order to obtain the optimum benefits therefrom and to preserve the same for future generations and the general measures through which such policy may be carried out effectively."

The call for sustainable development made by the Petitioners does not mean that further development of the Eppawala deposited must be halted. The Government is not being asked, to use learned counsel's phrase to "sit back and do nothing".

In my view, the human development paradigm needs to be placed within the context of our finite environment. So as to ensure the future sustainability of the mineral resources and of the water and soil conservation ecosystems of the Eppawala region, and of the North Central Province and Sri Lanka in general. Due account must also be taken of our unrenewable cultural heritage. Decisions with regard to the nature and scale of activity require the most anxious consideration from the point of view of safeguarding the health and safety of the people, naturally, including the Petitioners, ensuring the viability of their occupations, and protecting the rights of future generations of Sri Lankans.

According to the Geological Survey Department (presently the Geological Survey and Mines Bureau), the 3rd Respondent, the Eppawala deposit is said to have a proven reserve of 25 million metric tons and an inferred reserve of another 35 million metric tons.

However, as a Director of the 5th Respondent, Mr. Gerry L. Pigg, and a Director of the 7th Respondent, Mr. U.I De Dilva Borelessa, state in their affidavits, "the actual extent of the phosphate reserves in Sri Lanka is not known today", and "it would take exploration to discover the new reserves which would move the inferred reserves into the proven category." The Secretary of the Ministry of Industrial Development, Mr. S. Hulugalle, in his affidavit states that "only 26.1 million metric tons of rock phosphate will be mined over the entire 30 year project period and the deposit contains 25 million metric tons proved reserve and 35 million metric tons of inferred reserve. Therefore after the 30 year period there would still be a substantial amount to phosphate reserve." The Deputy Solicitor- General stated as follows: "If the Mining Licence is given in terms of the Mines and Minerals Act No.33 of 1992, the project company will only be entitled to mine 26.1 million metric tons for the entire 30 year period. This amount when compared with the 'available resource' at Eppawala is somewhat negligible."

How could it be asserted with any degree of confidence at this time, when no exploration has taken place, that only a comparatively "negligible" quantity of the available deposits will be extracted so that at the end of the 30 year project period there would remain a "substantial" amount of phosphate? As Mr. Pigg and Mr. De Silva Boralessa, quite correctly in my view, point out, until exploration, we really do not know what the reserves are, except for the already proven reserve of 25 million metric tons.

The National Academy of Sciences in its report (P10) points out that in May 1995, a committee of five scientists and two economists appointed by the President of Sri Lanka recommended that "a more comprehensive geological reserve evaluation be undertaken in the light of recent research findings so that government can make a decision on the rate of exploration of such reserves. The decision on the rate exploration should be made taking into account the important concerns about the use of the resources in a manner that future generations can also benefit". No such survey has been done, although it should, for reasons I shall presently explain, have been done before the negotiating committee appointed by the President to conduct the final round of negotiations recommended the signing of the proposed agreement. The National Academy of Sciences calls attention to the fact that if after exploration is carried out under the proposed agreement it is found that the inferred reserves are less than presently anticipated, there is no provision in the proposed agreement to slow down the exploitation rate with the result that almost all of the National Reserves could very well be exhausted at the end of the 30 years. The importance of giving effect to the recommendation of the President's Committee which reported in May 1995 that a comprehensive geological evaluation should be done so that more certain information would be available on the quantity and quality of the phosphate at Eppawala cannot be overstated, for on it would depend reliable conclusions being reached on how best in the national interest the mineral resources should be utilized, from the point of view of the rate of extraction, having regard to consideration of sustainable development and the feasibility of alternatives, such as the production of single super phosphate fertilizer to meet only local requirements rather than producing Di-ammonium phosphate. It is also important from the point of view of accurately assessing the Government's contribution. In terms of Article 2.16 of the proposed agreement Lanka Phosphate is given a ten percent holding. What if the exploration reveals a deposit that in

terms of quantity and quality exceed the current assumptions? Government's contribution would then have been underestimated. And so, even if the Geological Survey is to be undertaken as a part of the proposed agreement, is it in the best interests of the country to limit the share holding to ten percent at this stage merely on the basis of a pessimistic guesstimate when better information can be had, and ought, on so important a matter, to be required and had before policy decisions are taken, let alone binding contracts being entered into?

The National Science Foundation's Committee stated as follows: "Mining of rock phosphate should be done at a controlled rate (e.g. 350,000 mt per year) so that the present deposit could be utilized by several generations. However, if more deposit are found, the rate of exploration could be revised, *the guideline being that the ore should last at least 200 years for use in Sri Lanka's Agriculture*." (The emphasis is mine).

Let us look at the matter in the context of the optimistic scenario predicted by the Secretary of Industrial Development and the Deputy Solicitor-General with regard to the quantum of deposits. Assuming that 26.1 million metric tons will be mined within the 30 year project period, and that the deposits will not be exhausted, is it prudent to enter into the proposed agreement from the point of view of the long term, future interests of the country, having regard to the fact that phosphate is a non-renewable resource? The report of the National Science Foundation (P12) points out that the Eppawala deposit is of considerable value to Sri Lanka because phosphate deposits are non-renewable and dwindling resources in the world like fossil fuel, and should be "wisely utilized". Citing Herring and Fantel's landmark study, the National Science Foundation points out that, on the basis of current information, the worldwide phosphate reserves will be exhausted in 100-150 years. Herring and Fantel state as follows:

> ".... the *ineluctable conclusion in a world of continuing phosphate demand* is that society, to extend phosphate rock reserves and reserve base beyond the approximate 100 year depletion in date must find additional reserves and/or reduce the rate of growth of phosphate demand in the future. Society must: (1) increase the efficiency of use known resources of easily minable phosphate rock; (2) discover new, economically-minable resources; or (3) develop the technology to economically mine the vast but currently uneconomic resources of phosphate that exist in the world. Otherwise, the future availability of present cost phosphate, and *the cost or availability of world food will be compromised, perhaps substantially*." (The emphasis is mine).

Adverting to learned counsel's submission about starvation, one might ask, should the lives of future generations of Sri Lankans be jeopardized?

The National Science Foundation states that "The irrefutable conclusion is that the Eppawala rock phosphate deposit should be exclusively reserved for the country's use for generations to come."

It indicates alternative methods to ensure the use of the deposit to meet the fertilizer demands of the country while conserving the reserves for the use of future generations.

The Secretary of the Ministry of Industrial Development has misunderstood the matter in making his averments in paragraphs 18(c) and 19(b) of his affidavit. It was no one's case that the New Zealand proposal should have been considered in deciding upon responsive bids to the Government's call for tenders. What is asserted is that at some time, in considering policy options, the Government ought to have taken or ought to take the New Zealand proposal into account as being more appropriate (having regard to the inter-generational principle and environmental considerations) in the matter of the development of the Eppawala phosphate deposit before adopting the course of action decided upon by the Government as expressed in the proposed agreement.

The Secretary of the Ministry of Industrial Development in his affidavit stated that "with the development of technology and market conditions, a mineral deposit may also cease to be a resource as has happened to the tin industry in the world with the advent of plastic.." Sustainable development requires that non renewable resources like phosphate should be depleted only at the rate of creation of renewable substitutes. What is the known renewable substitute for phosphate? Herring and Fantel, as we have seen, refer to a "continuing phosphate demand". Does the 1st Respondent assume that plants will need no phosphorous? On that matter, Prof. O.A Illeperuma of the Department of Chemistry, University of Peradeniya, with some asperity, had this to say (P11): "There are some wisecracks who say that scientists will develop new plants which will grow without phosphorous. Anyone with even a rudimentary knowledge of science knows that phosphorous is an essential component of our bone structure and when such varieties of cash crops are indeed possible then we will have humans with no bones who will probably move around like jellyfish!..."

If in fact the optimistic views of the Secretary of Industrial Development and the Deputy Solicitor-General are confirmed by exploration, learned counsel for the Petitioners submitted that it does not necessarily follow that at the end of the thirty years after the signing of the proposed agreement, the Government of Sri Lanka will be in control of the mining operations. I find myself in agreement with that submission of learned counsel for the Petitioners, for the proposed agreement defines "operating period" to be a "a period of not less than 25 years following the Commercial production, or such longer period as the Secretary, on the written application may approve." Article XXX of the proposed agreement states, inter alia, that the Agreement "will continue in force until the later to occur of the following dates: (a) the date which is 30 years following the date of the signing of the Agreement, or (b) the date on which the Operating Period expires. The Company may request the extension of this Agreement on terms to be negotiated..." If the Secretary approves the application of the company for the extension of the Operating Period, he thereby extends the Operating Period; there is then no need for the company to apply for the extension of the agreement on terms to negotiated.

The Petitioners also state that the Eppawala deposit is an agriculturally developed area which is also the location of many historical viharas and other places of archaeological value. It is also the area of the Jaya Ganga/Yoda Ela scheme which is considered to be among the greatest examples of Sri Lanka's engineering skills and forms an important part of the irrigation network of the North Central Provision. They allege that over 20

new and ancient irrigation tanks and about 100 kilometres of small irrigation canals are in danger of being destroyed. Five kilometres of the Jaya Ganga, they say, will be affected which could adversely affect the entire irrigation system of the North Central Province in which it is an important link. The Petitioners further allege that a factory for the production of phosphoric acid and sulphuric acid which are highly polluting substances will be constructed at Trincomalee using a 450 acre land next to Trincomalee Bay. The Petitioners also allege that the environmental pollution resulting from the said project will be massive and irreversible and will render the affected area unusable in the foreseeable future. Waste products from the large scale mining of phosphate as envisaged by the project include phospho-gypsum and other radioactive substances, while the mining operation will leave behind large pits and gullies which will provide a breeding ground for mosquitoes and lead to the spread of dangerous diseases such as malaria and Japanese encephalitis. The Petitioners further state that the past record of environmental pollution by Freeport MacMoran and IMC Agrico (the major share holder in the 5th Respondent company) is notorious even in their own home country, namely, the United States of America.

The National Academy of Science of Sri Lanka (see below) also makes critical comments about the past experience of Freeport MacMoran.

With regard to the gypsum as a by product, the 1st Respondent in his affidavit states: "The project is expected to produce approximately 1.2 metric tons (sic.) off phosphor gypsum per annum as a by products." He suggests that rather than being a problem, it would be a boon for which we should be thankful, for a part of this, he says, could be sold to local cement manufacturers and used in the manufacture of "pliers and boards". Have market studies been done? Gypsum may pose no danger if the quantities are manageable. The scale of operation is important if the by products are to be utilized without causing environmental damage. Could the amount of gypsum produced be absorbed by the cement manufacturers and others having regard to the fact that, according to the Academy of Science, there will be "a million metric tons of phosphor gypsum"? The National Science Foundation in its Executive summary states: " The U.S Mining Company proposal is not environment friendly: Mountains of phosphor gypsum will accumulate polluting the environment." Mr. Thilan Wijesinghe, in his letter dated March 30, 1998 (P7), notes that 2.1 metric tons per annum of rock phosphate would be mined and processed". The 1st Respondent seems to have been confused about the amount of rock phosphate to be mined and processed and the amount of phosphor gypsum left behind. If, the gypsum is not in fact absorbed in the way envisaged by the 1st Respondent, is it to lie somewhere? Not everyone is willing to form opinion on grounds admittedly inaccurate or insufficient. Prof. O.A Illeperuma stated as follows (P11): "This may not be problem for large countries such as USA where phosphor gypsum mountains are visible dotting the Florida landscape, since open and barren land is available in large countries such as the U.S.A. Sri Lanka, on the other hand, is one of the most overcrowded countries in the world where even finding a site to dump domestic garbage has become a serious problem." The evidence before us points to the fact that the quantity of phosphor gypsum would grossly exceed the assimilative capacity of the environment.

In the circumstances would the gypsum end up in the sea? The minutes of the meeting held on the 22nd of January 1998 at the CEA state as follows: "Mrs. Priyani Wijemanne, GM/MPPA highlighted the possible impacts on marine ecosystems at the Trincomalee site and requested that those should be carefully looked into during the Environmental Impact Assessment Stage. She submitted a report to the Chairman of issues that should be addressed."

I do not know what Ms. Wijemanne said in her report, but attention is drawn, especially of the 4th Respondent in applying the National Environmental Act and the regulation framed thereunder, to the principles of the Stockholm Declaration: "The discharge of toxic substances..... in such quantities or concentrations as to exceed the capacity of the environmental to render them harmless, must be halted in order to ensure that serious or irreversible damage is to inflict upon eco-system. The just struggle of the peoples' of all countries against pollution should be supported" (Principle 6). "States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea" (Principle 7). It might be noted, particularly by the 4th Respondent, that Principle 15 of the Rio De Janeiro Declaration marked a progressive shift from the preventive principle recognized in Principles 6 and 7 of the Stockholm Declaration which was predicated upon the notion that only when pollution threatens to exceed the assimilative capacity to render it harmless, should it be prevented from entering the environment. Principle 15 of the Rio De Janeiro Declaration stated: "In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." The precautionary principle acts to reverse the assumption in the Stockholm Declaration and, in my view, ought to be acted upon by the 4th Respondent. Therefore if ever pollution is discerned, uncertainty as to whether the assimilative capacity has been reached should not prevent measures being insisted upon to reduce such pollution form reaching the environment.

The National Academy of Sciences states in its report as follows:

> "Assuming that the ore reserves are as high as envisaged, and that the ore has a high content of iron and aluminium impurities, di-ammonium phosphate with its high phosphorous content and also containing some nitrogen is a good value added product for the export market. However the high technology required will include setting up ammonia, phosphoric acid and sulphuric acid manufacturing plants, which together with the liquid processing technology involved can lead to serious environmental hazards including the production for high toxic waste by products and release of toxic pollutants to water bodies and the atmosphere.
>
> If the economically exploitable ore reserves are not much higher than 30 million metric tons, and 70% of this is high quality, it might be more prudent to follow the advice of our scientists and accept the New Zealand Fertilizer Group's proposition (estimated to cost $ 20 million US Dollars) to produce 150,000 metric tons of single

super-phosphate per year to meet only local requirements even if in the short term it may appear to give less monetary benefits. This will preserve our ore reserves for a much longer period, involve simpler technology, leave no environmentally hazardous waste by-products such as a million metric tons of phospho-gypsum, and there will be no need for ammonia and phosphoric acid plants which produce toxic effluent. Of course the lower grade.... single super-phosphate would lose out on high transport cost per unit nutrient and may leave little export demand. Furthermore, under our free market liberal economy, locally produced single super-phosphate may be more expensive to our farmers than imported high phosphorous content fertilizer such as triple super-phosphate on unit nutrient value bases unless the local product is given fiscal protection. The decision on what fertilizer should be produced locally must await the results of the comprehensive exploration phase.

The report adds as follows:

"Mining and processing of the products as envisaged will be an operation of unprecedented magnitude in Sri Lanka, and the potential environmental impacts could be equally drastic. At the mining site there will be severe disturbances to the ecology of the area through, among others, the mining operation itself, the infrastructural activities and the discharge of pollutants to the atmosphere. At the processing site, the effluents and other pollutants that will be discharged would pose severe environmental threats unless adequate counter measures are adopted. Although the proposed arrangement with the prospector has provision to the effect that the operations will be carried out with due respect to the laws of the country, and the National Environmental Act does contain provisions to guard against adverse environment impacts, we are of opinion that for an operation of this magnitude additional safeguards should be adopted. This is particularly important as mining prospectors the world over are notorious for creating environmental disasters, and Freeport MacMoran is no exception. In fact, according to media reports, Freeport MacMoran, one of the largest fertilizer manufacturing companies in the world, has the dubious distinction of being also No. 1 polluter in the USA. It has also had a poor record in Indonesia and in the South Pacific island of New Guinea. It would also be prudent to check on the company's credibility pertaining to environmental matters by calling for the relevant reports from USA, New Guinea and Indonesia before project approval... Through study of such reports, we would be in a better position to insist on the incorporation of stronger and more effective measures in the Agreement to ensure environment safety. It should be expressly stated in the Agreement that the mining operations and the processing should be carried out in accordance e with the environment standards set by the Government of Sri Lanka. The Agreement should also specifically state the ecological restoration of the areas affected by the mining must be carried out by the prospector at his own cost progressively during the period of mining operations and as directed by the Government of Sri Lanka. The Agreement must be explicit that failure to observe these environmental protection measures could result in the termination of the project. We draw special attention to the fact that the Jaya Ganga which is within the area to be mined has been regarded as a wonder of the ancient world and a cultural

monument to be preserved by UNESCO's world Heritage Convention (D.L.O Mendis, The Island, 14 April 1998)".

The Petitioners' assertions with regard to apprehended harm from the proposed project also finds support in the report of the National Science Foundation (P12) which stated that the project -

> "in the view of many of the professional Associations in the country, e.g. The Institution of Engineers, Institute of Chemistry, The National Academy of Sciences and most individual scientists and engineers is highly disadvantageous to the country and with highly adverse environmental impacts.'

The report adds:

> "The proposal of exploitation of the apatite mine is beset with many problems. Mines always cause damage to [the] environment and minimization of such damage must be examined at length. Further, [the] Eppawala phosphate ore is located in an agriculturally developed system, in an area of extreme historical importance and of archaeological value in the proximity of [national] monuments close to the Cultural Triangle sites with the Sri Mahabodhi and Ruwanweli Saya. Within the bounds of [the] mining area are many ancient villages, which will be adversely affected. The immediate threat to the Jaya Ganga or Yoda Ela cannot be overlooked. If the mining of the ore damages the Jaya Ganga, it denigrates Sri Lankan history. Jaya Ganga is an engineering marvel that must be preserved for eternity as the heritage of mankind just as the Taj Mahal, the Pyramids or Ruwanweli Saya are preserved for posterity."

The Eppawala project, as the Petitioners, the National Science Foundation and the National Academy of Science point out, is in an area of historical significance. If I might adopt the words of Martha Prickett Fernando in her comments on another proposed project- the augmentation of the Malala Oya basin from Mau ara,

> "Unless development activities in area like this project are accompanied by proper EIA studies and [proposals for] mitigation of the [adverse impacts on] archaeological resources that will be damaged, vast numbers of sites-in fact, much of Sri Lanka's unrenewable cultural heritage and the raw data for all future studies on ancient Sri Lanka - will be destroyed without record, and an accurate understanding of life in ancient Sri Lanka will remain forever wrapped in myth and hypothesis." In that connection, the words of D.D Kossambi (The Culture and Civilization of Ancient India) come to mind: "To learn about the past in the light of the present is to learn about the present in the light of the past."

Ignorance of vital facts of historical and cultural significance on the part of persons in authority can lead to serious blunders on current decision making process that relate to more that rupees and cents. The 1st Respondent, the Secretary to the Ministry of Industrial Development, in paragraph 13 of his affidavit states as follows: "The Southern part of the Yoda Ela has been abandoned *after the construction of Jaya Ganga* in 1980's under the Mahaweli Scheme." (The emphasis is mine). Judicial restraint prevents me form suggesting why he might, perhaps, have through it was called "Jaya" Ganga.

The Kalaweva, which helped to supplement the supply of water to Anuradhapura and the area around that great and ancient city, was constructed by King Dhatusena (455-473 AD) and it is, therefore, supposed, though not conclusively established, that Dhatusena also built the Jaya Ganga which augmented the tanks at Anuradhapura and its environs such as Tissa, Nagara and Mahadaragatta, apart form irrigating a large area of land of about 180 square miles. (See K.M de Silva, History of Sri Lanka, p.30; R.L Brohier, Ancient Irrigation Works in Ceylon, Part II, pp.7-8)

The maps produced show that the Jaya Ganga passes through the Eppawala phosphate deposit region. It was, as Brohier says, a part of "an ingenious net-work of irrigation channels in this district... which, apart from affording edification to future generations, are monuments of the power and beneficicence of the ancient rulers of Ceylon." Whether it was built by Dhatusena or not, according to Chapter 79.58 of Mahawamsa, Parakrambahu I (1153-1186 AD) "had the ruined canal called Jaya Ganga restored. It branched off from Kalavapi and flowed to Anuradhapura." It is a 54 1/2 mile long contour channel that starts from a sluice in the bund of the Kala Wewa and ends in the Tissa Wewa and Basawakulama tank in the ancient city of Anuradhapura. Assuming that some people not only do not know the basic facts of history, but might also be ignorant of elementary geography so as not to be able to read the maps that were produced, it might be explained that the function of the Jaya Ganga in ancient times appears to be twofold: to intercept the drainage from the land to the east and issue it to cascades of smaller village tanks to the west, in the basin of the kala Oya; and, by trans-basin diversion, to augment the Anuradhapura city tanks and provide irrigation water in the adjacent Malwatu Oya basin. Brohier states that this ancient canal, which had again been restored in 1885-1888,

> "had a gradient for the first 17 miles of only six inches per mile... Such an ingenious memorial of ancient irrigation skill cannot be passed over without a reference to its peculiar features. It needs to be explained that the Jaya Ganga follows the high ground between the reservoir which serves as its source of supply and the Tissawewa. By this means it intercepts all the drainage between Elagamuwa and the western watershed of the Malwatuoya which otherwise would run to waste and it irrigates the country below the canal by a most perfect system of irrigation. In each of the subsidiary valleys on its course the water is diverted by channels into little village tanks or chains of tanks- the tanka lower down receiving the overflow from the tanks placed higher in each chain.
>
> The scheme was so perfect that the ancient canal afforded irrigation facilities over approximately 180 square miles of country on the east of the Kala-Oya, between Kalawewa and Anuradhapura. It today feeds no less than 60 villages and to the town of Anuradhapura.
>
> There is under such circumstances, little reason to dispute that the Jaya-Ganga must have been of incalculable benefit of Nuwarakalawiya in the days of the Sinhalese Kings, inasmuch as the restoration of the work is today but too aptly described as ‘the grandest experiment in irrigation ever undertaken in modern Ceylon’."

The Jaya Ganga, which the Petitioners, as well as the National Academy of Sciences and the National Science Foundation, have drawn attention to, is not merely a water course or transportation canal corridor, or even 'an amazing technological feat', as Prof. K.M De Silva describes it; it is also an integral part of a human-made water and soil conservation ecosystem. Its preservation is therefore not only of interest to the literati at a higher plane, as a matter concerning the heritage of humankind that must be preserved, but also, at the more mundane level of the Petitioners and thousands of others like them who depend on the continued and efficient functioning of that ecosystem *for the pursuit of their occupations and indeed for sustaining their very lives*, matter of grave and immediate personal concern.

The Respondents and their learned Counsel submit that environmental concerns have been sufficiently addressed in the proposed agreement.

The 1st Respondent in his affidavit stated that exploration and mining licences cannot be issued in respect of archaeological reserves. Plants for the production of phosphoric acid and sulphuric acid cannot be constructed before compliance with the Environmental Act. If and when the Agreement is entered into, the Project Company is required to carry out exploration and feasibility studies after which the project is required to submit itself to the EIA process before mining is commenced. A detailed Mine Restoration Plan and a Mine Restoration Bond are required. Moreover the company is required to comply with requirements of the Mines and Mineral Act, the National Environmental Act and the Mahaweli Authority Act and to conduct its operations so as to minimize harm to the environment, protect natural resources, dispose of waste in a manner consistent with good waste disposal practices and in general to provide for the health and safety of its employees and the local community and also be responsible for he "reasonable preservation of the natural environment within which the project company operates." The 1st Respondent further stated that the Government is empowered to suspend the operations of the Company "if is determines that severe environmental damage associated with the company's violation of applicable law is resulting from Company's operations which the company has failed to remedy". Attention is drawn to the maintenance of an Environment Restoration Escrow Account, the requirement to furnish a Mines Restoration Bond which, he states, "would be adequate to cover any environmental damage and to effect the necessary restoration work". In his opinion, since there are adequate safeguards in the proposed agreement "to make the Company responsible to take necessary steps to minimize and rehabilitate any damage to the environment and local community", the 1st Respondent concludes that "it is premature to form an opinion on the nature and extent of the environmental damage which may take place due to this project."

The Directors of the 5th and 7th Respondents stated in their affidavits that in introduction to the agreement it is stated as follows: "(D) In the process of developing mineral resources, the Government gives high priority to the protection of the environment and avoidance of waste and misuse of its resources. (F) The Company (5th Respondent) is ready and willing to proceed in these undertakings, and to assume the risks inherent therein in exchange for the rights and benefits herein provided, all pursuant to the terms and conditions set forth in the agreement." It is stated that until the Environmental Impact

Assessment and Feasibility Study are done, the concerns set out in the petition cannot be satisfactorily addressed. The Exploration Licences issued to the 6th and 7th Respondents are subject to the rights of the owner or occupant of the land covered by the licence and to the provisions of the Mines and Minerals Act and the regulations made thereunder. They state that they would bring to bear current technology for both phosphoric and sulphuric acid which have mitigated very nearly all of the pollution aspects of such plants. All this will be subject to the EIA and Feasibility Study. They submitted the IMC Global Environmental, Health and Safety Standards and Guidelines Manual in support of their averment that the Board of Directors of IMC had adopted a very specific and enforceable policy towards environmental, health and safety policies. They state that with the merger of MacMoran Inc. into IML-Global Inc., Freeport MacMoran ceased to exist. This was a part of the consolidation occurring in the fertilizer industry at the time and not an attempt to hide the former Freeport MacMoran Inc.'s involvement in Sri Lanka on the project. What troubles the Petitioners is that although Freeport MacMoran with a bad record on pollution has ceased to exist, its spirit roams doing important things, such as seeing the President (see P4) and initialling the final draft of the proposed agreement. While liabilities are placed on Sarabhumi, a small local company, whereas the decision to accept the tender was based on the size and capacity of the multi-national giant Freeport MacMoran.

Learned Counsel for the Respondents submitted that in terms of Article VII of the proposed agreement, there has to be a feasibility study and a report thereon. The report must have a section reporting the results of environmental impacts studies as described in Annex E to the Agreement. The section of the report will be prepared by an appropriately qualified internationally recognized independent consulting firm approved by the Government. The study must meet the requirements of Article 25. Article 25.2 provided as follows:

> "The Company shall include in the Feasibility Study an environmental study in relation to all enterprise activities in accordance with applicable law, and shall also identify and analyze as part of the Feasibility Study the potential impact of the operations on land, water, air, biological resources and social, economic, culture and public health. The environmental study will also outline measures which the Company intends to use to mitigate adverse environmental impacts of the Enterprise (including without limitation disposal of overburden and tailings and control of phosphate and fluorine emissions) and for restoring and rehabilitating the Contract Area and any project Areas at the termination of this Agreement. The Feasibility Study shall provide an estimate of the cost of such restoration and rehabilitation. The Feasibility Study shall also include procedures and schedules relating to the management, monitoring, progressive control, corrective measures and the rehabilitation and restoration of all Contract Areas and Project Areas in relation to all adverse effects on the environment as are identified in the Feasibility Study. The Study will also provide an estimate of the cost of such activities."

Article 25.1 provides as follows:

> "The Company shall in relation to all matters connected with the Enterprise comply with the Mines and Mineral Act, No. 33 of 1992, the National Environmental Act,

No.47 of 1980 (as amended by Environmental Act No. 56 of 1988, the Mahaweli Authority of Sri Lanka, Act No. 23 of 1979, the Regulations made thereunder and all other applicable law and generally prevailing standards for mining operations. Without in any way derogating from the effect of the above mentioned applicable law and mining standards, the company shall conduct all its operations under this Agreement so as to minimize harm to the environment (including but not limited to minimizing pollution and harmful emissions), to protect natural resources against unnecessary damage, to dispose of waste in a manner consistent with good waste disposal practices, and in general to provide for the health and safety of its employees and the local community. The company shall be responsible for reasonable preservation of the natural environment within which the company operates and for taking no acts without Government approval which may block or limit the further development of the resources outside the mining and processing areas....".

Learned Counsel for the Respondents submitted that until the feasibility study is done and the development plan is prepared, there is no way of finding out the location of the mine and method of mining and whether in terms of the project any body will be relocated. In terms of the agreement, after the preparation and submission of the feasibility study, if the company decides to proceed with construction, it must submit a development plan with its application for construction to the Secretary, who may withhold approval for proceeding with the project.

In terms of Article 7.7 "if and only if the Secretary determines that implementation of the Development Plan together with any modification thereof which may be reflected in the Company's application to construct and operate: (a) will not result in efficient development of the mineral resource, (b) is likely to result in *disproportionately and unreasonably* damaging the surrounding Environment, (c) is *likely to unreasonably limit* the further development potential of the mineral resources within the Mining Area, or (d) is *likely* to have a *material* adverse effect on the socio-political stability in the area *which is not offset by the potential benefits of the project* or by mitigating measures incorporated into the Development Plan. The decision shall not be unreasonably delayed and, in light of significant expenditure of time, effort and money which will have been undertaken by the Company, approval shall be granted in the absence of *significant and overriding justification*." The Article goes on to state that if the Secretary has any objections or suggestions, they should be communicated to the Company and in the event of any mutually acceptable resolution not been reached, the Company may refer the matter to arbitration under Article XX as to whether the Secretary has "substantial cause for withholding approval of the Feasibility Study Report, Development Plan and application to construct and operate, and if substantial cause is determined to have not existed, the Secretary shall promptly issue his (her) approval of such Report, Plan and application..." (The emphasis is mine).

Learned Counsel for the 5th and 7th Respondents submitted that if the Secretary wrongfully approved the feasibility study, it is "only at that stage, if at all" persons will be able to challenge matters in Court. How would the Petitioners know after the

Feasibility Study or Development Plan that they are likely to be affected, for in terms of Article 7.9, subject to the provisions of Article 5.5, the Feasibility Study and Development Plan are to be treated as "confidential". The Government *may* in terms of Article 5.5 disclose "data and information which the Government determines in good faith is necessary to disclose to third parties in order to protect the national interests of Sri Lanka"; but what is the guarantee that the Government will release the Feasibility Study and Development Plan when they are available? The Petitioners and other persons who may be affected will probably be no better informed than they were at the time of making this application. In my view, the Petitioners decided wisely in coming before the Court when they did. Moreover, who may seek judicial review if damage is caused cultural monument or cultural heritage landscape of Jaya-Ganga? Further, in my view, the words emphasised are so vague as to confer a practically unlimited discretion on the Secretary. They are so broadly framed so as to make judicial review very difficult indeed. In any event, what is the remedy available to anyone, if the Secretary's decision is pursuant to an arbitral award?

Learned Counsel for the Respondents stated that, since the proposed agreement expressly provides for compliance by the Company with Applicable Law, including the Mines and Minerals Act and the National Environmental Law and the regulations made thereunder, and since the Company will be subject to the "stringent" requirements of the licences issued for exploration and mining, the fears of the Petitioners are unfounded and "conjectural". Section 30 (1) of the Mines and Mineral Act states that no licence shall be issued to any person to explore for or mine any minerals upon, among other places, "any land situated within such distance of a lake, stream or tank or bund within the meaning of the Crown Lands Ordinance (Chapter 454) as may be prescribed, without the approval of the Minister in charge of the subject of Lands"; "any land situated within such distance of catchment area within the meaning of the Crown Lands Ordinance (Chapter 454) as may be prescribed, without the approval of the Minister and the Minister in charge of the subject of Lands". Section 31 of the Mines and Minerals Act provides that no licence shall be issued to any person to explore for, or mine any mineral upon" (a) "an land situated within such distance of any ancient monument situated on state land or any protected monument, as is prescribed under section 24 of the Antiquities Ordinance (Chapter 188); and (b) any land declared by the Archaeological Commissioner to be an archaeological reserve under section 33 of the said Ordinance."

One wonders whether the provisions of the Mines and Minerals Act relating to lakes, streams and bunds and catchment areas as defined by reference to the Crown Lands Ordinance sufficiently protect the water and soil conservation ecosystem of the area affected by the proposed project. No evidence was placed before this court as to whether any land in the exploration, mining, contract or project areas has been prescribed under the law as being land within prescribed distances from ancient monuments and what land has been declared to be an archaeological reserve. Moreover, no provision exists for the preservation of cultural heritage landscape, like the Jaya Ganga, as distinguished from a monument, lest there be some dispute about the word 'monument': No laws can expressly provide for all situations. However, the legislature has foreseen the need to provide against omissions and stated in Section 30 (2) as follows:

"In addition to any other condition that may be prescribed under this Act, the Minister or the Ministers...may, in granting approval for a licence under subsection (1), lay down such further conditions, as may be determined by such Minister or Ministers. Where approval is granted subject to any further conditions, the Bureau shall cause such conditions to be specified in the licence."

At the present time, when there has been no Feasibility Study and no Development Plan, and, moreover, when there is no guarantee that such study and plan will ever be made known to them, how could the Petitioners feel assured that their individual and collective rights will be protected? There may be conditions that may be prescribed under section (30) 2 of the Mines and Minerals Act to safeguard their interests and the interests of the people of Sri Lanka, and indeed of humankind. But how is this possible without a proper evaluation of the project? A report from an "appropriately qualified", "internally recognized independent environmental firm selected by the company and approved by the Government", is of little or no use to the Petitioners and concerned members of the public, having regard to the provisions in the proposed agreement regarding "confidentiality."

For the reasons set out above, I am of the view that there is, within the meaning of the Constitution, an imminent infringement of the Petitioner's rights guaranteed by Articles 14 (1) (g) and (h) of the Constitution.

ALLEGED VIOLATION OF ARTICLE 12(1) OF THE CONSTITUTION

The Chairman/Director General of the 2nd Respondent in a letter dated March 30, 1988 (P7) quotes the following from the Executive Summary of the report of the President's Committee dated the 9th of May 1995: "Any large-scale venture has the potential to cause an adverse environmental impact, yet it could generate substantial revenue to the country. It is also recommended that the rigorous EIA procedures laid down by the law be followed before any joint venture proposal is implemented because of the possible environmental risks associated with projects of this nature."

Learned Counsel for the Respondents submitted that Article XXV of the proposed agreement obliges the Company to comply with the National Environmental Act No.47 of 1980 as amended by Act, No. 56 of 1988 and the regulations made thereunder. In the circumstances the company is obliged to submit an Environmental Impact Assessment in terms of Part IV c of the Act.

The proposed agreement makes no reference to the preparation or submission of any Environmental Impact Assessment as required by the National Environmental Act and the regulations made thereunder. What the proposed agreement does, as we have seen, is to provide for an environmental study to be prepared by an international firm, selected by the company and approved by the Government, as a part of its Feasibility Study. (Article 7.6) "Feasibility Study" is defined in the proposed agreement as "a study to determine the feasibility of commercially developing any deposit or deposits identified by the company during the Exploration Period, including the items set forth in Annex "E". Annex "E" states that the Feasibility Study shall include "Environmental impact and monitoring

studies into the likely effects of the operations of the Enterprise on the Environment (such studies to be carried out in consultation with an appropriately qualified independent consultant and under the terms of reference set out in Article XXV of this Agreement)." (But cf. Article 7.6 where the study is to be "conducted by an internationally independent environmental consulting firm....")

Not surprisingly, therefore, although both the Deputy Solicitor General and learned counsel for the 5th and 7th Respondents agreed that an Environmental Impacts Assessment was a requirement of the Law, they were unable to agree when that assessment was to be made, and what its significance was in the context of the proposed agreement.

Firstly, therefore, in terms of Principle 17 of the Rio De Janeiro Declaration, there is no Governmental Impact Assessment subject to " a decision of a competent national authority". Nor is the approval of such an authority in terms of the National Environmental Act contemplated by the proposed agreement. What does exist in the proposed agreement is an assurance that the "Applicable Law", including the provisions of the National Environmental Act, will be complied with.

According to the Deputy Solicitor General, the Company's application to construct and operate the facility had to be made "after obtaining the approval for the feasibility report, inclusive of the EIA, and the Development Plan..." He stated that "In the event the project Approving Agency refuses to grant approval for the project, the project company will have to abandon the project subject to a right of appeal to the Secretary of the Ministry of Environment. Moreover, if the project is approved after a hearing and been given to the public, the persons who are aggrieved will have an opportunity to come before the Court to have the decision quashed. There are instance where the public have invoked the jurisdiction of the Supreme Court and the Court of Appeal to suspend development projects such as the project pertaining to the Southern Expressway and the Kotmale Power Project."

According to learned counsel for the 5th and 7th Respondents, "in the first place, after the feasibility report is prepared and the development plan is prepared, this project will be submitted to the project approving agency, in this case the Central Environmental Authority (CEA). The CEA, that is the statutory authority, may or may not give its approval. If it does not give its approval, the matter ends there." The permission and approval of the statutory authorities, including the CEA, is essential. If that is not obtained, the project comes to an end." If there is a threat to the environment or to the people, the Central Environmental Authority will not permit the project to go ahead. The CEA is the statutory authority vested by law to determine the matter." "The Central Environmental Authority can refuse to permit the project. That is final." If the Central Environmental Authority does give its approval, the feasibility study, development plan and the report of the international firm on environment, he said, is submitted to the Secretary of the Ministry of Industries, who may refuse it on the grounds specified in the proposed agreement. "It is only after the feasibility study inclusive of the Development Plan (sic.) is approved by all the statutory authorities including the Central Environmental Authority that the next stage will commence. The next stage is the construction stage." Referring to the Environment Impact Assessment and the

requirements under the National Environmental Act and the regulation framed thereunder, learned counsel for the 5th and 7th Respondents gave the assurance that "all those steps will be followed after the feasibility study is submitted to the CEA... Therefore the public will have every right of protest after the feasibility study report is submitted to the CEA." As we shall see, the submissions of learned counsel on that matter were, having regard to the statutory requirements of the National Environmental Act and the regulations framed thereunder, seriously flawed.

Learned Counsel for the 5th and 7th Respondents inquired whether, after bringing in scientific and technical expertise not available in this country, and investing U.S $ 15 million not available for investment by the Government, it was too much for the 5th Respondent to pray that it be permitted to proceed with the construction in the event of the statutory authorities granting approval, and the Secretary accepting the Feasibility Report and Development Plan. Learned counsel for the 5th and 7th Respondents said: "Equity, righteousness and fair play demands that the rights of all parties be equally protected; for all persons are equal before the law and such persons include the 5th and 7th Respondents." The Petitioners' state that their rights of equal protection under the law are in imminent danger of being infringed.

Learned Counsel for the 5th and 7th Respondents, on the other hand, submitted that the Court should not intervene "at this stage", for "the proceeding of the project", meaning probably the signing of the proposed Agreement, "will only result in (a) exploration, (b) feasibility study." He stated that "the only comfort (sic.) the 5th and 7th Respondents needs and the only comfort (sic.) the 5th Respondent gets from this Agreement is that after the exploration and feasibility study is done, and if (a) the statutory authorities grant permission; (b) the Secretary accepts the Feasibility Report, that the 5th Respondent will be permitted to mine subject to the terms and conditions of the Agreement and that they be permitted to mine as set out in the Feasibility Report subject to the approval of the Statutory Authority."

The proposed agreement is so framed that is generously strengthens, assists, supports, aids and abets the company's designs in respect of all of the matters referred to in the analysis of learned counsel in dealing with the various stages of the project. Article 17.3 I have quoted above is one example. There are others, e.g. see Articles 2(2)(b)(i) and (iii) and (iv) and (v), 6 (f), 6(g), 6(h); 2c.4; 2.5; 2.21; 3.2; 3.4 (a) and (b); 6.1; 7.1; 7.8; 8.2; 9.3' 9.4; 9.7; 16.5; 16.6; 17.1; 17.6; 27.7. Once the proposed agreement is signed and converted into a formal, binding contract, there is little else the do except, under Article 20.1 to resort to arbitration. And there will be much less the Petitioners, or for that matter any one else, who may be adversely affected, will be able to do. The Deputy Solicitor-General submitted that persons who are aggrieved will have an opportunity to come before the Court. There may be legal rights on paper; but how many individual people, including the Petitioners, if and when they are adversely affected by the proposed a project will be able to afford the luxury of litigation? If they are in fact adversely affected what are the chances that they will be adequately compensated? The liabilities will not be those of the multi-national giant whose standing in the world's fertilizer business scene it is said was a decisive facto in their selection (see P4 at p.2 and also cf. at p.5), but of

Sarabhumi Resources (Private) Ltd. a locally incorporated limited liability Company which presently has an issued share capital of only Rs. 58,000/-.

Moreover, Learned Counsel for the Petitioners drew attention to the inadequacy of the protection afforded by Articles 25.1 and 25.3 of the proposed agreement with regard to the repair of environmental damage. The Petitioners did not share the belief expressed by the 1st Respondent in his affidavit on the adequacy of the safeguards by way of the proposed Environmental Compliance Bond and Environmental Restoration Escrow Account and the undertaking given with regard to environmental compliance and restoration. It seems to be that the provisions in the proposed agreement on the matter are the product of outdated mainstream economic thought. They appear to be based on the views of persons who at best nominally recognize the environment or have considerable difficulty in placing a 'value' on it. Today, environmental protection, in the light of the generally recognized "polluter pays" principle (e.g. see Principle 16 of the Rio Declaration), can no longer be permitted to be externalized by economists merely because they find it too insignificant or too difficult to include it as a cost associated with human activity. The cost of environmental damage should, in my view, be borne by the party that causes such harm, rather than being allowed to fall on the general community to be paid through reduced environmental quality or increased taxation in order to mitigate the environmentally degrading effects of a project. This is a matter the Central Environmental Authority must take into account in evaluating the proposed project and in prescribing terms and conditions.

The signing of the proposed agreement may, in the circumstances please, and even delight the Company, but there is justification for examining the project as a whole at this stage in deciding whether those dangers referred to by the Petitioners might be permitted to hang threateningly over their heads and ready to overcome them in the event of the signing of the proposed agreement and the execution of the project. Fairness to all, including the Petitioners and the people of Sri Lanka as well as the 5th and 7th Respondents, rather than the company's "comfort", should be our lodestar in doing justice.

In terms of Part (I) (6) of the Order of the Minister on the 18th of June 1993 made under section 23 Z of the National Environmental Act (vide Gazette Extraordinary of 24.06.1993), the proposed project, since it related to mining and mineral extraction either concerned with inland deep mining and mineral extraction involving a depth exceeding 25 metres and/or inland surface mining of a cumulative area exceeding ten hectares, is a " prescribed project" within the meaning of section 23 Z of the National Environmental Act. As such, in terms of section 23AA of the National Environmental Act, it is a project that must have had the approval of project approving agency.

Project approving agencies were, on the 18th of June, 1993 (Gazette Extraordinary, 24.06.1993) under powers vested in him, designated by the Minister under section 23Y of the National Environmental Act, and includes the Central Environmental Authority. Learned counsel for the Petitioners, for stated reasons, urged that the Project Approving Agency in respect of the Project relating to the case before us ought to be the Central Environmental Authority. Learned Counsel for the 5th and 7th Respondents in his oral

submissions, and many times in his written submissions, stated or implied that the relevant project approving agency was the Central Environmental Agency. However, at one place he submitted that the preparation of the TOR (Terms of Reference), co-ordination and all activities would be undertaken by the CEA acting with (sic.) the PAA." According to the minutes of a meeting held on the 22nd of January 1998, submitted by learned counsel for the 5th and 7th Respondents,

> "During the discussion, it was emphasised that as this is the single largest investment which covers mining, transportation and manufacturing of phosphate fertilizer consisting of by-products, it is difficult to process this project as required under the EIA regulation by one single Project Approving Agency (PAA). Therefore it was suggested that the preparation of TOR (Terms of Reference) and co-ordination of all activities would be undertaken by the CEA acting as the PAA. Assessment of the EIA under main subsections of the project, i.e., mining, transportation and industry would be carried out simultaneously by GS & MB, Ministry in Charge of Transport and the CEA respectively. This mechanism would be drawn up at the next meeting to the concerned agencies."

This Court has no evidence as to what happened at "the next meeting", if there was such a meeting. I shall, for the purposes of this judgement assume that the decision to make the CEA the project approving agency stands. But in addition to the tentative decision on the modalities of cooperation between concerned agencies and the Central Environmental Authority acting as the Project Approving Agency, according to the minutes, it was also decided as follows at that meeting:

> "As the exploration area falls within the jurisdiction of various government agencies, it was suggested that these agencies too would wish to incorporate additional conditions if any to the exploration licence. Director/Gs & MB agreed to convene a further meeting with official of the FD, DWLC, MASL, BOI and CEA for this purpose."

It was stated at the meeting that "a project proposal and an exploration plan have been prepared by the project proponent. Hence Mr. Udaya Boralessa was requested to submit 10 copies of the proposal and 05 copies of the exploration plan to the CEA, for distribution among concerned agencies." Were the copies received and distributed? Were there any responses? This Court does not know, for no evidence was placed before it on those matters.

That meeting, I might observe, in passing, was attended by the representative of several government ministries, departments and agencies, and by Mr. S. Usikoshi and by Mr. Udaya Boralessa. According to the evidence on record, Mr. Usikoshi was the General Manager of Tomen Corporation which holds 25% of the shares in the project company. Mr.Udaya Borelessa was the Managing Director of Novel Int. and represented IMC-Agrico which holds an initial equity of 65% in the 5th Respondent. He is a Director of the 7th Respondent.

According to the minutes of the meeting submitted by learned Counsel for the 5th and 7th Respondents, the meeting was chaired by the Director-General of the Central

Environmental Authority who is supposed to have stated "the objectives of the meeting". Why was the meeting held? Was there an application for the approval of the project? On what date was such application made?

If an application for the approval of the project was made to the CEA or to any other project approving agency, why was no reference whatsoever made either in the pleadings or oral or written submissions of counsel for the Respondent? Why as stated in the minutes of the meeting, was Mr. Borelessa "invited... to make a presentation on the proposed project for the information of participants," If there was no project proposal before the Central Environmental Authority at the time?

In terms of the National Environmental (Procedure for approval of projects) Regulations No.1 of 1993 (Government Gazette Extraordinary of the 24th of June 1993), hereinafter referred to as the "NEA regulations", when the project proponent had the goal of undertaking the mining project at Eppawala and was actively preparing to make a decision in achieving that goal (see the definition of "project" in the NEA regulations), such proponent should have made an application to the Central Environmental Authority (CEA) for approval of the project as early as possible. The project proponent might then have been required to submit to the CEA preliminary information about the project, including a description of the nature, scope and location of the proposed project accompanied by location maps and other details (see the definition of 'preliminary information' in the NEA regulations). Such preliminary information would then have been subjected to "environmental scoping", that is, among other things, determining the range and scope of proposed actions, alternatives and impacts to be discussed in an Initial Environmental Examination Report or Environmental Impact Assessment. (See the definition of "environmental scoping" in the NEA regulations). A matter of significance is that in the process of 'scoping' a project approving agency such as the Central Environmental Authority is by law empowered to *"take into consideration the views of state agencies and the public."* (NEA regulation 6(ii)). Having regard to the concerns expressed from time to time, the Central Environmental Authority might have exposed themselves to a charge of being remiss in the duties of a project approving agency had they failed to invite and consider the views of the public. The purpose of all this was to set the Terms of Reference (ToR) either for an initial environmental examination report or an environmental impact assessment (EIA). With regard to the procedures to be followed in case the approval or rejection of a project based upon an initial examination report, attention is drawn to section 23 of the National Environmental Act read with regulations 6 - 9 framed thereunder.

The Central Environmental Authority was the 4th Respondent in this case and was represented by learned counsel. However, no affidavits were filed by the 4th Respondent nor were any oral or written submission made on behalf of the 4th Respondent. The Central Environmental Authority, the 4th Respondent, should nevertheless in carrying out its duties imposed under the order made in this judgment, have due regard to and give effect to the law, including the principles laid down or acknowledged by the Supreme Court in the matter before this Court.

It was assumed by all the other Respondents and the Petitioners that what would be required by the 4th Respondent for the purpose of considering whether the proposed project should be approved or not was an Environmental Impact Assessment, and that if an application had been made to the Central Environmental Authority for approval of the project, that Authority would in all probability, after the process of 'scoping' refereed to above, which might, as we have seen, including taking account of the views of state agencies and the public, have called for an Environmental Impact Assessment from the project proponent on the basis of the Terms of Reference determined by the Central Environmental Authority.

Attention is drawn, particularly that of the Central Environmental Authority, the 4th Respondent, to Principle 17 of the Rio De Janerio Declaration which stated as follows: "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority". This is an important procedural rule designed to facilitate the preventive (Principles 6 and 7 of Stockholm) and precautionary (Art. 15 of Rio) principle already mentioned above. I should like to remind the persons concerned, especially the Central Environmental Authority, that an environmental impact assessment exercise can identify the potential threats of proposed activity or project, and that this information can then be used to modify the proposed activity in order to take these threats into account. Remedial measures can also be introduced in order to mitigate or reduce any perceived detrimental impacts of the project. In this sense, therefore, an environmental impact assessment exercise contemplated by the National Environmental Act can be instrumental in establishing exactly which areas of the proposed project or activity require precautionary or preventive measures in order to ensure the overall environmental viability of the project.

Where the Central Environment Authority has required an Environmental Impact Assessment, the law requires such Authority to determine whether the matters referred to by the Terms of Reference have been addressed by the project proponent, and if the assessment is determined to be inadequate, the Central Environment Authority is obliged to require the project proponent to make necessary amendments and to re-submit the assessment. Upon receipt of the report required by law by "promptly notice published in the Gazette and in one national newspaper published daily in the Sinhala, Tamil and English languages" to "invite the public to make written comments, is any, thereon to the Central Environment Authority." The law requires that such notification "shall specify the times and places at which the [assessment] report shall be made available for public inspection." The Central Environmental Authority requires by law to make available copies to any person interested to enable him or her to make copies. The law provides that any member of the public may within thirty days of the notification published in the Gazette or newspapers referred to above, make his (sic.) comments thereon to the Central Environmental Authority. Since section 23BB(3) refers to making "his or its comments", having regard to the objects and scheme of the National Environmental Act, in my view, includes comments from statutory or other legal persons, as well other organizations whether incorporated or not and regardless of questions of legal personality, and by any individual, regardless of gender.

I might observe, in passing, that it is time, indeed it is high time, that the laws of this country be stated in gender-neutral terms and that laws formulated in discriminatory terms should not be allowed to exist, although protected for the time being as "existing law" within the meaning of Article 16 of the Constitution. The argument advanced that the provision in the law relating to the interpretation of statues that "his" includes her is clearly insufficient: it displays, in my considered opinion, a gross ignorance or callous disregard of such a matter of fundamental importance as the fact that there are two species of humans.

Where it considers appropriate in the public interest, and in the circumstance of this case, I cannot think that the Central Environmental Authority, having regard to what has been stated above, would really have had any choice in the matter, the Authority is by law obliged to afford all those who made comments an opportunity to be heard in support of such comments. The Central Environmental Authority is legally obliged to have regard to such comments, submissions and other materials, if any, elicited at a hearing in determining whether to grant its approval for the project. Upon completion of the period prescribed by law for public inspection or public hearing, if held, the Central Environmental Authority is, (having regard to the provisions of section 23BB, regulation 12 of the NEA regulations and the audi alteram partem rule - hear the other side) required by law to forward the comments it received and the representations made at any hearing to the project proponent for responses. The project proponent is required to respond in writing to the Central Environment Authority. Upon receipt of such responses, the Central Environmental Authority is by law required, either to grant approval for the implementation of the project, subject to specified conditions, if any or to refuse approval for the implementation of the projects, with reason for doing so. If approval is granted, the law requires the Central Environmental Authority to publish in the Government Gazette and in one national newspaper published daily in the Sinhala, Tamil and English Languages the approval as determined. Further, is approval is granted, there must be a place of the Central Environmental Authority to monitor the implementation of the project. (See section 23BB of the National Environmental Act and the NEA regulation 10-13.) Where the National Environmental Authority in its role as the project approving agency refuses to grant approval for a project submitted to it, the person or body of persons aggrieved have a right of appeal against such decision to the Secretary to the Ministry responsible for the administration of the National Environmental Act and the National Environmental Authority created under it.

There are also other project approving agencies designated by the Minister, but the National Environmental Authority is, the final authority in respect of environmental matters. (See also NEW regulations 6 (ii), 13, 14, 17 (ii) and 18).

As we have seen, learned counsel for the Respondents were all, in my view, correctly, agreed that if the Central Environmental Authority refuses to approve the project, that is an end of the matter, subject, of course, to the right of appeal.

These salutary provisions of the law have not been observed. In terms of proposed agreement, although there is an undertaking to comply with the laws of the country, which in my view, is an unnecessary undertaking, for every person, natural or corporate

must in our society which is governed by the rule of law, comply with the laws of the republic. What is attempted to be done is to contract out of the obligation to comply with the law. The Articles of the proposed agreement dealing with matters concerning environmental issues, read with the provision on confidentiality, in my view, attempt to quell, appease, abate or even, under the guise of a binding contract, to legally put down or extinguish, public protests. Learned counsel for the 5th and 7th Respondents stated that Sri Lanka "does not possess the scientific knowledge or the technical know-how or the finances to develop this natural reserve." I cannot accept the assertion that Sri Lanka does not have scientists who can guide the country. Picking on "yes" persons, or persons who might be suspected to be so, as interim Article 7.6 of the proposed agreement, is another matter, and that is why conforming to the law, as laid down by the National Environmental Act and the regulations framed thereunder is of paramount importance. As for funding, that would no doubt depend on the nature of project to be undertaken and identification of sources of assistance appropriate for the chosen level of operation. Quite different considerations will apply if the decision after due investigation and debate will be to produce a quantity of single super phosphate for local use rather than producing Diammonium phosphate for export.

If the genuine intention was, as claimed by the Respondents, to comply with the requirements of the law, it was, in my view, unnecessary to refer in the proposed agreement to a study relating to environmental matters as part of its feasibility report. The law is clearly laid down in the National Environmental Act and the regulation framed thereunder. What was being attempted by the proposed agreement was to substitute a procedure for that laid down by the law. It was assumed that by a contractual arrangement between the executive branch of the government and Company, the laws of the country could be avoided. That is an obviously erroneous assumption, for no organ of Government, no person whomsoever is above the law.

In his letter to Mr. Sarath Fernando dated March 30, 1998 (P7), Mr. Thilan Wijesinghe, the Director/Chairman of the 2nd Respondent, who was also a member of the Committee appointed by the President in 1997 to conduct the final round of negotiation, stated that "The Mineral Investment Agreement initiated by the FMRP and the Government incorporated most of the recommendation of the President's Committee which reported on the 9th of May 1995. The report of the Committee of the President on the 9th of May 1995 was not submitted to this Court. We can only go by Mr. Wijesinghe's account of the 1995 recommendations. And going by the accounts there was a failure to incorporate some of the most important recommendations of the Committee reporting on May 9th 1995, e.g. the need for a comprehensive geological evaluation and adherence to the rigorous EIA procedures. I am not for a moment suggesting that either Mr. Wijesinghe or any member of final negotiating Committee appointed by the President acted except in good faith. It might have been supposed that so as the geological survey fitted into the exploration process and the environmental studies proposed in the draft agreement formed a part of the Feasibility Study, all was well. It was not. Learned counsel for the 5th and 7th Respondents said that the final round of negotiations and who examined the proposals were "the most responsible and highest ranking officers of the country." I accept learned counsel's estimation without any hesitation, but I am constrained in the

words of Horace to say, Indignor quandoque conus dormitat Homerus - But if Homer, usually good, nods for a moment, I think it a shame.

In its "*Guide for Implementing the EIA Process, No. 1 of 1998"* (P20), issued by the Central Environmental Authority, it is stated as follows: "The purposes of environmental impact assessment (EIA) are to ensure that developmental options under consideration are environmentally sound and sustainable and that environmental consequences are recognized and taken into account early in project design. EIAs are intended to foster sound decision making, not to generate paperwork. The EIA process should also help public officials make decisions that are based on understanding environmental consequences and take actions that protect, restore and enhance the environment."

The proposed agreement plainly seeks to circumvent the provisions of the National Environmental Act and the regulations framed thereunder. There is no way under the proposed agreement to ensure a consideration of development options that were environmentally sound and sustainable at an early stage in fairness both to the project proponent and the public. Moreover, the safeguards ensured by the National Environmental Act and the regulations framed thereunder with regard to publicity have been virtually negated by the provision in the proposed agreement regarding confidentiality. I would reiterate what was said by the Court in Gunaratne v. Homagama Pradeshiya Sabha, (1998) 2 Sri. L.R. p.11, namely, that publicity, transparency and fairness are essential if the goal of sustainable development is to be achieved.

Access to information on environment issues is of paramount importance. The provision of public access to environmental information has, for instance, been a declared aim of the European Commission's environmental policy for a number of years. Principle 10 of the Rio Declaration calls for better citizen's participation in environmental decision-making and rights of access to environmental information, for they can help to ensure greater compliance by States of international environmental standards through the accountability of their governments. Principle 10 states as follows: "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 and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

In the matter before this Court, the proposed agreement makes no mention of an environmental impact assessment in terms of the National Environmental Act. The Respondents stated that under its undertaking in the proposed agreement to comply with the applicable laws, it would have submitted an environmental impact assessment, in due course, if it had been required to do so. In fact, learned counsel for the 5th and 7th Respondents gave an undertaking that it would provide such an assessment. However, the law, for good reasons, as I have endeavoured to explain, requires the prescribed procedures to be followed. The times prescribed are vital. Project proponents cannot decide when, if ever they will comply with the law. There are many things that have to be

done at the very earliest of stages for very good reasons. There is also a prescribed time if and when an environmental impact assessment has to be done. The parties to the proposed agreement attempted to substitute an extraordinary procedure for the proposed project. Such a procedure contravened the provisions of the National Environmental Act, and the regulations made thereunder and the guidelines prescribed by the National Environmental Authority. Thereby, reinforced by the confidentiality provision of the proposed agreement, the proposed agreement effectively excluded public awareness and participation, as contemplated by our legislature as well as by Principle 10 of the Rio Declaration. The proposed agreement ignores the Central Environmental Authority as the project approving agency although it was admitted by the Petitioners and the Respondents that the Central Environmental Authority in this matter was the project approving agency, and substitutes in its place, the Secretary to the Minister to whom the subject of minerals and mines is assigned for the purpose of approving the environmental study contemplated by the proposed agreement. Such Secretary is not a project approving agency in terms of the National Environmental Act. Nor is he or she therefore a "national authority" within the meaning of Principle 17 of the Rio Declaration. A "national authority" is an authority recognized by the law of a concerned State. In any event, having regard to the undertaking given in Article 27.7(b) that "The Government shall render all reasonable assistance to the Company to obtain all approvals, consents, grants, licenses and other concessions as may be reasonable be required from any Government Authority", what comfort may the Petitioners derive? They are, in my view, entitled to be apprehensive that even if there was an environmental impact assessment submitted to the Central Environmental Authority, such authority may not have been able to act impartially and independently. Of what use are biased decisions or decisions, reasonably suspected to have been made under pressure? Further, although the law of Sri Lanka provides for the judicial review of the acts of administrative authorities, and Principle 10 of the Rio Declaration calls for effective access to judicial and administrative proceedings, the proposed agreement substitutes arbitration for such proceedings, in which, of course, the public have no role.

For the reasons given, in my view, the proposed agreement seeks to circumvent the law and its implementation is biased in favour of the Company as against the members of the public, including the Petitioners. I am therefore of the view that the Petitioners are entitled to claim that there is an imminent infringement of their fundamental rights under Article 12(1) of the Constitution.

OVERALL ECONOMIC BENEFITS

The Respondents submitted that the proposed agreement if implemented would be highly beneficial to Sri Lanka and that "when one balances the purported complaints as are contained in the petition against the overall benefit that would accrue to Sri Lanka, the Petitioners' application cannot succeed in law."

The Director of the 5th Respondent, Mr. Garry L. Pigg, and the Director of the 7th Respondent, Mr. U. I. De S. Boralessa, state in their affidavits that the proposed project would result in economic benefits to Sri Lanka which they specify. The report of the Committee appointed by the President (P4) lists numerous financial benefits.

Learned Counsel for the Petitioners, however, submitted that the Eppawala project governed by the proposed agreement will not only be an environmental disaster but an economic disaster as well. They relied on the analysis of the social and economic considerations by Prof. V.K. Samaranayake (P10) (a); the comments of Prof. Tissa Vitarana (P9); the comments of Prof. O. A. Illeperuma (P11); the report of the National Academy of Sciences (P10); the report of the National Science Foundation (P12); and the financial analysis by Premila Canagaratna (P17). A study of the material submitted by the Petitioners shows that the question of benefits is a highly controversial matter, but one that must be gone into, for our democratic republic sets great store by the discovery of truth in matters of public importance in the market place of ideas by vigorous and uninhibited public debate. In the debate, perhaps, we need to consider whether income and economic growth on which the Respondents lay great emphasis are the sole criteria for measuring human welfare. David Korten, the Founder President of the People-Centred Development Forum, once observed:

> "The capitalist economy" [as distinguished from Adam Smith's concept of a market economy] "has a potentially fatal ignorance of two subjects. One is the nature of money. The other is the nature of life. This ignorance leads us to trade away life for money, which is a bad bargain indeed. The real nature of money is obscured by the vocabulary of finance, which is doublespeak…. We use the terms 'money', 'capital', 'assets' and 'wealth' interchangeably - leaving no simple means to differentiate money from real wealth. Money is a number. Real wealth is food, fertile land, buildings or other things that sustain us. Lacking language to see this difference, we accept the speculator's claim to create wealth, when they expropriate it…. Squandering real wealth in the pursuit of numbers is ignorance of the worst kind. The potentially fatal kind."

It is unnecessary for the purposes of the task in hand to enter into the matter of the alleged beneficial nature of the proposed agreement. The Petitioners' case is that there is an imminent infringement of their fundamental rights guaranteed by Articles 12(1). 14(1(g)) and 14 (1(h)). I have stated my reasons for upholding their complaint. The "balancing" exercise referred to by learned counsel has been already done for use and the Constitution sets out the circumstances when any derogations and restrictions are permissible. Article 15(7) of the fundamental rights declared and recognized by Articles 12 and 14 are "subject to such restrictions as may be prescribed by law", among other things, for "meeting the just requirements of the general welfare of a democratic society." In the light of the available evidence, I am not convinced that the proposed project is necessary to meet such requirements. In any event, the circumstances leading to the imminent infringements have not been "prescribed by law" but arise out of a mere proposed contract, and therefore do not deserve to be even considered as permissible.

ORDER

For the reasons set out in my judgement, I declare that an imminent infringement of the fundamental rights of the Petitioners guaranteed by Articles 12(1), 14(1) (g) and 14(1) (h) has been established.

There is no assurance of infallibility in what may be done: but, in the national interest, every effort ought to be made to minimize guesswork and reduce margins of error. Having regard to the evidence adduced and the submissions of learned counsel for the Petitioners and Respondents, in terms of Article 126 (4) of the Constitution, I direct the Respondents to desist from entering into any contract relating to the Eppawala phosphate deposit up to the time,

(1) a comprehensive exploration and study relating to the (a) locations, (b) quantity, moving inferred reserves into the proven category, and (c) quality of apatite and other phosphate minerals in Sri Lanka is made by the 3rd Respondent, The Geological Survey and Mines Bureau, in consultation with the National Academy of Sciences of Sri Lanka and the National Science Foundation, and the results of such exploration and study are published: and

(2) any project proponent whomsoever obtains the approval of the Central Environmental Authority according to law, including the decisions of the Superior Courts of record of Sri Lanka.

I make further order that (1) the state shall pay each of the Petitioners a sum of Rs.25,000 as costs: (2) the 5th Respondent shall pay each of the Petitioners a sum of Rs.12,500 as costs: (3) the 7th Respondent shall pay each of the Petitioners Rs.12,500 as costs.

R. Ammarasinghe, J.

Wadugodapitiya, J.

I agree.

Gunasekara, J.

I agree.
