PART III
CHAPTER VI

JUDICIAL CONTROL OF INDUSTRIAL POLLUTION

Environmental protection—slogan entertained by Indian even centuries before the western world realised the need for preserving it. Our history throws not glimpses but really flash of light towards this truth. The duty to maintain a clean environment can be found in various ancient laws where Manu and Kautilya stressed the need to live in harmony with nature. People were restricted in their actions from assaulting nature. But this friendly attitude of ours had to struggle much to attire itself in its present form and splendour. Our legal system is the example of how this struggle took place in the face of the inevitable good and bad consequences of western rule in our country. The contradictions are writ large in the host of judicial decisions during the period of India’s march towards industrialisation and of late liberalisation and globalisation.

Owing to the complexity of modern conditions, the delegation of quasi-legislative and quasi-judicial functions to a number of administrative authorities and tribunals has become unavoidable. But if Rule of law and conformity to the provisions of the Constitution is to be maintained, these multitudinous administrative authorities having multifarious activities must be brought under the control of the courts of law.

Environmental protection, at present being the task of the welfare state, administrative functions envisaged are many. Administrative authorities are dragged to the courts of justice when they fail to protect the environment. Environmental assaults are caused by human activities and in some cases by individual activities. Who is the actual culprit? Are not the people who endanger the biosphere in diversing ways? Thus the lethargic administrators and reckless offenders—whether corporations or individuals are equally involved. Necessarily the weapon of judicial action is turned against them all.

Judicial activism today is a feat achieved after a long journey in the past. The scattered provisions of the past law have meaningfully been used by the judiciary in order to block the mounting environmental assault.

To preserve is the path of progress and to pollute is the route to destruction is well recognised in this last decade of the century. Judiciary has contributed much for realising this slogan and attributing the meaning. Indian judiciary had inspiration from both national and international developments towards environmental issues and looked at the problem widely, shedding the traditional concepts or liberally interpreting the provisions. Attempt in this Part III containing three chapters is to analyse the judicial trend in safeguarding environment from hazards of pollution.
The transition from laissez faire to welfare concept has brought under its fold many inevitable transformations not only in the manner and matter of legislation but also in dispensing justice by the higher judiciary. The nature of the judicial process is no more purely adjudicatory nor is it functionally that of an umpire only. Affirmative action to make the remedy effective being the essence of the right which otherwise becomes sterile, the higher courts have become the guardian of public interest and individual liberties and attained the status of a supervising authority over and above its traditional function of resolving disputes and redressing grievances. However there are occasions when the judiciary withdrew itself into its shell when it tried to approve industrial strides by reconciling the conflict between development and environment. Sachidananda Pandey's case is perhaps an example when tourism industry is reconciled with preservation of ecology.

At present both civil remedies and criminal sanctions are available through the courts of law against pollution caused by industries. The vast and wide nature of pollution caused by


4. Sachidananda Pandey v. The State of West Bengal, A.I.R. 1987 S.C. 1109 at p. 1136. "If courts do not restrict the free flow of such cover in the name of Public Interest Litigation, the traditional litigation will suffer and the courts of law, instead of dispersing justice will have to take upon themselves administrative and executive functions".
industries attract judicial remedies of all nature. In this event the citizen has a choice from among three civil remedies: 1) a common law tort action against the polluter, 2) a writ petition to compel the agency to enforce the law, 3) a citizen's suit, when permissible, to enforce statutory compliance.

In addition, if the pollution amounts to 'public nuisance', a remedy under the Code of Criminal Procedure of 1973 is also available. 6

Environmental law is an amalgam of both common law and statutory law. 7 Common law has been administered by the common law courts of England since the middle ages. 8 A right to bring an action in common law jurisdiction with consequent right to damages is invariably present where a tort is committed. 9 This aspect of tort law enabled common law courts of England to extend common law remedies to abate pollution. 10


"Tort is the branch of law governing actions for damages for injuries to certain kinds of rights, like the right to personal security, property and reputation. It is the breach of duty imposed by law, by which breach some one become entitled to sue for damages. It is a private right of action and every member of a civilised common wealth is entitled to require of others a certain amount of care and caution when they go about undertakings attended with risk to their neighbours".
The rules of tort law were introduced in India under the British rule and Indian courts evolved a blend of tort law adapted to Indian conditions. Common law based tort rules continue to operate under article 372 of the Indian Constitution which ensured the continuance of existing laws. However, in India the tort law is yet to develop. Even in Bhopal case the Government of India put up the plea that Indian tort law was not developed and hence they approached the U.S. court for quick tort remedy for Bhopal victims. The Government had to come back humiliated by Justice Keenan who said that Indian courts have the proven capacity to meet out fair and equal justice. To deprive the Indian Judiciary of its opportunity to stand tall before the world and to pass judgement on behalf of its people would be to revive a history of subservience and subjugation from which India has emerged.

The underdeveloped state of Indian tort law can be attributed to the fact that the attainment of a high environmental quality was not so far regarded as society's concern. In common law pollution cases fall under four categories—nuisance, negligence, trespass and strict liability.

Nuisance

Common law relating to nuisance was the first strong weapon used for combatting industrial pollution. A nuisance is an unlawful interference with the plaintiff's use or enjoyment of land. To the common man, it means anything that annoys, hurts or offends. According to Pollock, "Nuisance is the wrong done to a man by unlawfully disturbing him". In modern parlance, nuisance is that branch of law most closely concerned with 'protection of the environment'. Nuisance includes any act, omission, injury, damage, annoyance or offence to the sense of sight, smell or hearing or which is or may be dangerous to life or injurious to health or property.

While industrial processes are being carried, it may be possible that nuisances of noise, pungent smell that may affect lungs, letting of effluents polluting the property of water and above all poisonous gas that may affect human life are caused. The person affected can approach a court on the plea of nuisance. Nuisance are of two types - public nuisance and private nuisance. A public nuisance can be defined as an unreasonable interference with the right common to general public whereas a private nuisance is a substantial and unreasonable interference with the use and enjoyment of land.

14. Infra, n.64
15. Winfield and Jolowicz on Torts (11th ed) p.352.
16. The Cantonment Act of 1924, Section 2 (xxii)
17. Supra, n.7 at p.102.
A public nuisance is a crime and statutory recognition of this principle can be found in the early major Codes of Indian legislature.

Nuisance provisions were being utilised time and again for redressing the harm caused by industrial activities. Moreover the distinction between private and public nuisance has been considerably diluted due to the public nature of the harm included, i.e., in any private nuisance caused by industries, the presence of nuisance to the public is an undisputed question. In Datta Mal Chiranjilal v. Ladli Frasad the court held that public and private nuisances are not in reality two species of the same genus. When an electric flour mill within a busy locality caused much inconvenience by way of rattling and vibration, a permanent injunction was a must.

A private individual to be competent to bring an action in respect of a public nuisance has to prove that he has sustained some 'special damage' over and above that inflicted on the community at large. Industrial activities were mostly challenged from the very beginning using this provision and would include offensive smells, noise, air pollution and water pollution.

An act against which a plea of nuisance is taken is not wrongful in itself. Therefore, in order to constitute an

19. Supra. n.15 at p.354.
actionable nuisance the act should be an unreasonable interference. It is a relative term and gravity of this unreasonableness is measured by the courts considering factors like the locality where the nuisance occurred, continuance of the action. 21

In India as early as in 1905 pollution caused by an uncontrolled industrial activity was complained of as a nuisance to the neighbour. 22 The plaintiff alleged that the refuse liquid from a shellac factory is foul smelling and noxious to the health of the neighbourhood. It has damaged him in health and comfort. The damage caused by the loss of market value of his garden property was the special damage which he had suffered over and above the others in the locality. The plaintiff prayed for perpetual injunction and damage and the court held that there being persistence in a proved nuisance, 23 an injunction for permanent stoppage of nuisance is the only effective remedy. The court also held that it is a case in which the damages awarded should not be normal but exemplary.

The general nature of early cases of industrial nuisance shows that the alleged nuisance was mostly caused by noise pollution. 24 But in none of these cases the word 'pollution' is

21. Supra. n.7 at p.112.
23. Id., p.699. Therefore an award of Rs. 1000/- in damages was ordered as early as in 1905.
used. In all these cases the discomfort caused by the activity was sought to be remedied by an injunction.

Thus in Krishna Mohan Banerjee v. A.K. Guha nuisance caused by the intolerable noise affected the physical comfort of the community. The court held that noise even if incidental to the lawful trade, if injurious to the comfort of community, amounts to nuisance. The word community means the same as neighbours or public. Hence, an act found to be injurious to the physical comfort of the neighbours must be held to be so to the physical comfort of the community.

Sleep at night and concentration on their work during the day are ingredients of physical comfort. Therefore if it is a serious nuisance and is sufficient to prevent neighbours from sleeping at night and from concentrating on their work during the day, it must undoubtedly be held to be injurious to their physical comfort. The right of the people for not being deprived of their sleep at night was recognised even at such an early occasion. Sleep is not a luxury of a few but it is a necessity of mankind generally and repeated disturbance of natural sleep must necessarily cause a great deal of discomfort and even suffering.

27. Ibid.
In Dhanna Lal v. Chittar Singh the Madhya Pradesh High Court enumerated certain principles with regard to physical comforts which will amount to nuisance. These principles were followed in evaluating the physical discomfort caused by industrial nuisance. Thus it is important to notice that a person can claim injunction to stop nuisance even in a noisy locality where substantial addition to the noise by introducing some machine, instrument or performance at the defendant's premises materially affects the physical comforts of the occupants of the plaintiff's house.

The question of physical discomfort caused by nuisance was thoroughly examined by Punjab High Court. It was held that substantial extent of discomfort has to be determined not merely with reference to the plaintiff, but from the point of view of any person occupying the plaintiff's premises irrespective of his position in life, age or state of health.

30. Ibid.,
1) Constant abnormal or unusual noise (2) Actual local standard of comfort (3) Disturbance to sleep during night and concentration during day time (4) Substantial addition to the noise (5) Defence of reasonable use will be ineffective.

31. Radhey Shyam v. Gur Prasad Sharma, A.I.R. 1978 All.86. Referring to Dhanna Lal v. Chittar Singh the court observed that the principle No.4 set forth in this case can be applied here.

32. Supra. n.21.

33. Id., p.402; Beharilal v. James Mclean and Others, A.I.R. 1924 All.392.
In order to be actionable a nuisance must materially interfere with the comfort or convenience of the ordinary persons judged by the standard of an average man.

But Ram Rattan v. Munna Lal\(^\text{34}\) is a case where though the trial court as well as high court admitted the nuisance caused by power loom, did not allow permanent injunction. The court acknowledged the locality a sort of manufacturing and industrial area and so the essential test is to see whether there has been a serious addition to noise by the working of a second power loom. In the opinion of court a person living in the heart of the large manufacturing town cannot expect the same freedom from noise as in a secluded country side.\(^\text{35}\) If the nuisance complained is in addition in an industrial locality, the test is to see whether there has been a serious addition by the working of the power loom in dispute to the noise which already prevailed in the locality. The court preferred to follow the stand taken in Convex v. Ladbitter\(^\text{36}\) where it is said that the affairs of life in a dense neighbourhood cannot be carried on without mutual sacrifices of comforts.

Noise, if unusual or abnormal, interfering with one's physical comforts is an actionable nuisance, the test

\(^{34}\) A.I.R. 1959 Punj. 217.

\(^{35}\) Supra. n.21 at p.402; Behari Lal v. James Mclean and Others, A.I.R. 1924 All. 392.

\(^{36}\) (1863) 134 R.R. 610.
is whether it causes personal discomfort according to the standards of comforts in the locality. Thus it can be said that in order to constitute a nuisance, an unreasonable interference with comfort and enjoyment of property is enough, no need for showing any physical injury to the health of the complaining party or his family. In the words of Knight Bruce, V.C.

"Such an interference must be an inconvenience materially interfering with the ordinary comfort physically of human existence".37

Smoke, fumes and smell which materially interfere with the ordinary physical comfort of human existence constitute a nuisance in law. They need not be actually noxious or injurious to health.

Nuisance is a state in which one feels something different from the normal. It is a subjective feeling and its gravity varies from person to person or from place to place. It is always a question of degree whether interference with comfort of convenience is sufficiently serious to constitute a nuisance.38

So in order to be an actionable nuisance there are several factors to be taken into consideration by the court. That is, to be actionable, a nuisance has to be primarily unreasonable and substantial and that is governed by time, place, extent or the manner of performance of operations that are said to have


become a nuisance. In our modern society and in the machine age every one must put up with certain amount of discomfort resulting from legitimate activities of one's neighbours. Nuisance also consists not only the excessive noise produced by the machines but also the vibrations, jarring and shaking of the plaintiff's house caused by the working of the defendant's machines. 39

There is a distinction between an action for nuisance in respect of an act producing material injury to property and one brought in respect an act producing personal discomfort. 40

Thus it can be seen that the attempts by the courts to remedy nuisance caused by various industrial activities made wider use of various aspects of the term nuisance and the conditions essential for the same.

Negligence

The common law tort of negligence also can be used to prevent pollution resulting from industrial operations if it is proved that the defendant who was under a duty to take reasonable care to avoid consequences has failed to do so and that the failure resulted in a breach of duty causing damage. The casual connection between the negligent act and the plaintiff's injury is often the most problematic link in pollution cases. 41

39. Ibid.
Negligence is invariably a nuisance if the act continues for a substantial length of time.\textsuperscript{42} It becomes a breach of the rule of strict liability if the act allows the escape of anything dangerous which the defendant has brought on to the land.\textsuperscript{43}

Due to the nature of industrial pollution, mostly negligence will result in either nuisance or a breach of strict liability because activities are usually a continuing process and industrial pollutants are invariably highly toxic with immediate effect as in the case of Bhopal Gas Tragedy. The fact that sometimes it is very slow in the process of harming and the resultant effect of the injury remain latent over long periods of time makes the plea of negligence least effective. \textit{Mukesh Textile Mills (P) Ltd v. H.R. Subramanya Sastry}\textsuperscript{44} is a case in which the court strongly criticised the negligence on the part of the plaintiff in not foreseeing the danger inherent in the act. Though it was virtually admitted that the rodents had burrowed holes into the earthen embankment of the tank, the defendant who had stored large quantities of molasses in a mud tank had the duty to take the responsible care in the matter of maintenance. The court applied the foreseeability test in holding the appellant defendant liable. Storing of such large quantities

\begin{itemize}
    \item \textsuperscript{42} \textit{Stone v. Bollom} 1950 1 K.B. 201 (CA).
    \item \textsuperscript{43} \textit{Attorney General v. Carg Brothers Ltd} 1921 AC 521 (HL).
    \item \textsuperscript{44} \textit{A.I.R. 1987 Kant.} 87. It is a case of strict liability.
\end{itemize}
of molasses invariably attract the application of the rule of Ryland v. Fletcher as the defendant by his act had made a non-natural use of the land.

**Trespass**

Trespass is the intentional invasion of another person's interest in the exclusive possession of property. Substantial injury need not be shown to succeed in action for trespass. The only requirement is the intentional unprivileged physical entry by a person or object. It can extend to airborne liquid and solids deposited upon a land or an invasion by visible or invisible substances. However trespass theory is inadequate to control instances of industrial pollution. It is mainly because pollution by the industries is not an intentional act as envisaged in the traditional definition of trespass and proving the intention, in many cases is not an easy task.

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45. **Infra**, n.49.
46. **Supra**, n.13 at p.107.
Strict Liability

The rule in *Ryland v. Fletcher*\(^{49}\) holds a person strictly liable when he brings or accumulates on his land something likely to cause harm if it escapes. Exceptions listed in the case itself resulted in the total dilution of the principle. An 1868 pronouncement regarding the storing of water in a reservoir which caused damage to the neighbour's property has been tested in several cases on several occasions.\(^{50}\) Non-natural use of land and 'escape' of something being a precondition for the application of this rule,\(^{51}\) it was being applied to a variety of circumstances. The term non-natural use of land has been interpreted to test the viability of this rule.\(^{52}\)

*Cambridge Water Co. v. Eastern Countries Leather Plc*\(^{53}\) a House of Lords decision considered the rule in *Ryland v. Fletcher* and environmental pollution, specifically ground water contamination.\(^{54}\) The present position seems to be that the viability of the rule as a common law action to impose liability is getting more and more

\(^{49}\) *Ryland v. Fletcher* (1868) L.R. 3H.L. 330.

\(^{50}\) For a list of cases see Stallybrass, "Dangerous Things and Non-natural Use of Land", 3 Camb.L.J. 373 at pp.382-385(1929)


\(^{52}\) Reed v. Lyons & Co.Ltd. 1947 A.C. p.156 at p.173. In this case Lord MacMillan held that in these days and in an industrial community it was a non-natural of land to build a factory on it and conduct there manufacture of explosives. Lord Porter on the other hand made a striking comment that non-natural use is a question of fact and circumstances of time and practice of mankind must be taken into consideration in defining non-natural use, *Id.*, p.176.

\(^{53}\) 1994 2 W.L.R. 53. In this case Cambridge Water Co., a private water supplier brought an action against Eastern Countries Leather for contaminating with a chlorinated solvent, Perchloroethylene (PCE) which made water not 'wholesome' under U.K. Water Act.

For instance the House of Lords, Lord Goff preferred to consider Ryland v. Fletcher only as a type of action in nuisance and rejected the notion of the rule being a separate doctrine in relation to hazardous activities. Considering the inherent limitations of the rule in extending the same to pollution cases, Lord Goff expressed his preference for a legislation for strict liability rather than for it to be a part of the common law. The case signified another restriction on the viability of the rule as a common law action to impose liability. A more generalised revival of this rule is now proposed in the law reform proposals.

**Strict Liability rule in India**

Indian Supreme Court preferred to make a remarkable deviation from the English judicial attitude when it modified the rule of strict liability to that of absolute liability. Pressed and encouraged by then prevailing situations the highest court openly declined to accept the British position as such and stressed the need for incorporating a wider application of the rule by rejecting the exceptions to the rule. According to the court the rule given in Rylands v. Fletcher is an out dated one.

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55. Ibid.
56. Ibid.
57. Ibid.
and not effective in these days of scientific and technological developments. The court therefore felt the need for evolving new principles and laying down new norms which would adequately deal with the new problems which arise in a highly industrialised economy.59

The court concluded:

"Where an enterprise is engaged in a hazardous or inherently dangerous activity resulting for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in Rylands v. Fletcher."60

M.C.Mehta decision is criticised as a departure from the common sense notion of causation as a pre-requisite for liability.61 Workman's Compensation Act incorporated this rule in the Act to make the employer liable for any personal injury caused to a workman by accident arising out of and in the course of employment.62

Remedies

A nuisance can be remedied primarily by abatement without recourse to legal proceeding. But if one opts for a legal

60. Ibid.
62. See infra n.67
proceeding, the available remedy is a civil proceeding for
damage or injunction. According to Rodgers, remedial opportu-
nities often fall into four broad categories namely (1) damages
(2) land use accommodation (3) technological accommodation and
(4) operational controls.\textsuperscript{63}

Considering the health hazard hidden in industrial nuisance
and toxic nature of pollutants, abatement of pollution is the
first step to be taken. This can be done either by an order
of injunction or by directing the installation of best control
technology. But when the act has already resulted in loss of
any kind, damages are resorted to.

\textbf{Damages}

\textit{Damages are the pecuniary compensation payable for the}
commission of a tort. It may be substantial or exemplary.
Substantial damages are awarded to compensate the wrong suffered
whereas exemplary damages are of a deterrent nature aimed at
punishing the wrong doer for his act. In industrial offences
exemplary damages have received more judicial recognition.
It has been elevated to a high pedestal with a view to reduce
the tendency of polluters to pay and pollute. Persistence in
a proved nuisance has been held in England to be a just cause
for giving exemplary damages.\textsuperscript{64} And in India an early as in

\begin{itemize}
\item \textsuperscript{63} Supra. n.7 p.143.
\item \textsuperscript{64} Pollock's Law of Torts, (6th ed.) p.407.
\end{itemize}
1905 the Calcutta High Court\textsuperscript{65} ordered the exemplary damages for causing pollution that affected the plaintiff by reducing the market value of his garden products. In the Shriram Gas Leakage,\textsuperscript{66} the Supreme Court projected a new dimensions to judicial review and justified the need for compensation under Article \textsuperscript{32}\textsuperscript{67} of the Constitution. The Court observed that in such cases, compensation must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation.\textsuperscript{68}

Statutory recognition of this provision can be found in Workman's Compensation Act.\textsuperscript{69} Public liability insurance provision introduced for providing interim compensation to the victim of industrial hazards other than industrial workers can be proclaimed a novel step in the statutory recognition of the need for compensating pollution victims.\textsuperscript{70} The principles of

\textsuperscript{65} Supra. n. 22.

\textsuperscript{66} Supra. n.59.

\textsuperscript{67} Id., p.1091. See also infra chapter 7 pp.36,37.

\textsuperscript{68} This conclusion of the court is being criticised by raising the question "will the court stick to the formula in cases of multinations and enterprises, in the public sector and enterprises wholly owned and controlled by the State?" D.C.Jain, "Case Analysis of M.C.Mehta & Another v. Union of India, A.I.R. 1987 S.C. 1086" in A.I.R. 1988 Journal 53.

\textsuperscript{69} The Workman's Compensation Act, 1923(Act No.8 of 1923). Section 3(1) states: "If personal injury is caused to a workman by accident arising out of land in the course of his employment, his employer shall be liable to pay compensation".

\textsuperscript{70} Public Liability Insurance Act, 1991. For details see supra. Ch. 4 pp.144,150
injunction and damages have got statutory recognition today. 71

Thus it can be seen that the attempts by the courts to remedy nuisance caused by industrial activities made wider use of various aspects of the term nuisance and conditions essential for the same. But all these tests formulated in the course of judicial activism failed to give a precise and exhaustive definition for industrial nuisance. This was due to various factors. Firstly, industrial pollution being on the line of engulfing the whole universe, it has become difficult to prevent its consequences by expanding a provision like nuisance. It significance is great as it has the deepest doctrinal roots of modern environmental law. It has paved the way for enthusiastic judicial activism and substantially helped in developing the statutory control mechanisms.

Dilemma in Nuisance

There is a dilemma felt in using the common law tort of 'nuisance' liability. The courts are to deduce the unreasonable nature of the cause of action in individual instances. It is not an easy task. The principles laid down by the courts in different cases lack in a precise final common nature and therefore abatement of the same depends on those varying factors. It is a balancing of issues in hand. Because a just

71. The Amendments to Water (Prevention and Control of Pollution) Act, 1974 and Air (Prevention and Control of Pollution) Act, 1981 in 1988 and 1987 added Section 33 A and Section 31 A respectively which empowered the Pollution Control Boards to order for the closure of an industrial unit. Similarly Public Liability Insurance Act, 1991 provides for paying interim compensation to the victims of pollution.
balance must be struck between the rights of the defendant and the plaintiff to use property for his each other’s lawful enjoyment. In making such a balance, courts usually adopt a relative utility test. In cases where major polluters are large industrial firms, it is often difficult to prove unreasonableness in the conduct of their business having regard to their high economic and social status.

Another thing is that in nuisance cases by private individuals 'special damage' suffered by the plaintiff is tested and success depends mainly on adducing evidence for the same. Raw Baj Singh v. Babulal,\textsuperscript{72} is an example. The trial court and the appeal court admitted the presence of dust in the plaintiff’s chamber. However, that did not deter the court asking for clear evidence of special damage to the plaintiff because of the dust in his chamber. The petitioner’s plea was rejected on the ground that he failed to adduce the evidence of his patients to prove the special damage suffered by him.\textsuperscript{73} If that is the plight of the case where presence of dust particles could very well be felt, what about those enormous air pollutants that can neither be seen nor felt? Industrial pollutants are of vast varieties and nature. So what about those instances where the pollutants as well as its effects are felt in the course of time? What about radiation pollution?


\textsuperscript{73} Id., p.286.
It is true that presently diminishing freshness of the air cannot be allowed to deteriorate further. Moreover, the theory of 'special damage' can no more survive in the era of public interest and social justice.

Public nuisance under the law of criminal procedure

A public nuisance results from an interference with the right of the public generally and attracts judicial interference for the removal. A tort action for public nuisance found statutory recognition in Section 133 of the Code of Criminal Procedure. The section provides an independent, speedy remedy against public nuisance. It is the oldest remedy for checking pollution that caused nuisance to others and is still in use years after the enactment of specific legislation for the prevention and control of pollution. Under this provision the Executive Magistrate can act on information received from a police report or any other source including a complaint made by a citizen. This power of the Magistrate covers environmental exigencies where the complaint is from a single individual about his or her personal grievance. This is elaborated and justified by the High Court in the following words:

"It is not the intent of law that the community as a whole or a large number of complainants come forward to lodge their complaint or protect against the nuisance; that does not require any particular number of complainants".

76. Id., p.399.
The provision under the Code of Criminal Procedure existed prior to the adoption of constitutionalism in the country. Probably because environmental problems were not that gigantic in those days, the provision was rarely used for pollution abatement in the post constitutional period. Judicial enthusiasm to discuss the provisions from all dimensions is reflected in 1979 Supreme Court decision, Gobind Singh v. Shanti Sarup. The complaint raised was against public nuisance caused by an oven and chimney of the bakery. The Executive Magistrate made a conditional order for its demolition within ten days. On reaching before it, the Supreme Court tried to identify the public nature of the nuisance and approached the issue from a wider perspectives. The threat to health, safety and convenience of the public at large was looked from the social justice angle and Supreme Court accepted the view of Magistrate.

Evidently, Municipal Council, Ratlam v. Vardhichand is a land mark in the path of Supreme Court's attempts to evaluate social significance of irradiating public nuisance. It is also the first instance where a public authority namely a municipality, was compelled to face a public nuisance litigation. The facts are interesting. Pollution resulted not only by stench and

78. Id., p. 145
stink caused by open drains and public excretion but also by
the discharge of malodorous liquids from the Alcohol plants,
for which the city was famous. The residents of the Ratlam
became frustrated by the do nothing policy of the Municipal
authorities. They approached the District Magistrate complain-
ing under the provision in criminal procedure against to Munici-
pality who thoroughly failed to perform its duty to keep the
territory clean. After going through many stages the legal
matter reached the Supreme Court who found the responsibility
the Magistrate under section 133 as a public duty implicit in the
public and pursuant to a public proceedings\(^\text{80}\) and described it as
a mandatory duty and an instance of social justice due to the
people.\(^\text{81}\) The key points that elevate the judgement to a high
pedestal include recognition of the Magistrate's power under
Section 133 of Code of Criminal Procedure,\(^\text{82}\) emphasis of the
court's power to force public bodies under public duties to
implement special plans in response to public grievances\(^\text{83}\) as
well as open and vehement criticism of public body like municipa-
ality for the irresponsibility.\(^\text{84}\) Criticising the attitude of

\(^{80}\) Id., p.1628.
\(^{81}\) Id., p.1628.
\(^{82}\) Id., p.1623. "The Magistrates responsibility under
Section 133 of the Code of Criminal Procedure is...a
public duty implicit in the public power to be exercised
on behalf of public and pursuant to a public proceeding".
\(^{83}\) Id., p.1627. "The imperative tone of Section 133 of
Code of Criminal Procedure read with the punitive temper
of Section 188 of Indian Penal Code makes the prohibitory
act a mandatory duty".
\(^{84}\) Id., p.1629.
Municipal authorities and directing them to take immediate steps within its statutory powers to stop the effluents from the Alcohol Plant flowing into the streets and make other measures against environmental degradation. Supreme Court looked at the emissions of both industries and concerned municipal authorities as a challenge to the social justice component of the rule of law.

In the words of Justice Krishna Iyer, who spoke for the court, the case involved:

"a few profound issues of procedural jurisprudence of great strategic significance to our legal system and the court must zero-in on them as they involve problems of access to justice for the people beyond the blinkered rules of standing British Indian vintage".

Krishna Gopal v. State of M.P. relates to a nuisance created by a glucose saline factory in a residential locality. The complaint was by a lady resident saying that her husband, a heart patient, had been disturbed by the noise produced by the booming boiler in the factory day in and night. One of the crucial questions answered by the Court was whether Section 133 of Code of Criminal Procedure can be invoked by a single person for personal grievance. On police report it was found that it is not private nuisance but public nuisance affecting many.

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85. Ibid.
86. Id., p.1629.
87. Id., p.1623.
88. Supra. n.75.
Recognising every man's home to be his castle which cannot be invaded by toxic fumes or tormenting sounds the court expressed its annoyance for the neglect and disregard of the society towards environmental crimes. Environmental crimes, more serious than murder are dealt casually without much importance. The act of granting licence within the residential locality was prima facie violative of the law, the court felt.

Madhavi v. Thilakam concerned to noise made at night by automobile workshop. The Kerala High Court emphasised the need to abate nuisance under this section as a recognition of people's right to live. It is a constitutional reality to have personal autonomy, free from intrusion and appropriation. Recognition was given to the fundamental right to live, and to sleep in peace has been made a vital part of the right to live.

Ajeet Mehta v. State of Rajasthan is still another case where the higher court once again endorsed the order of Magistrate under Section 133 of the Criminal Procedure Code directing the removal of a business enterprise from a residential locality as in the case of Himmat Singh and Others v. Bhagwana Ram and Others.

89. Ibid.
90. 1989 Cri.L.J. 499.
91. Ibid.
92. Ibid.
93. 1990 Cri.L.J. 1596.
All these cases are instances of how the judiciary tried to read between the lines and brought to light the fundamental duty of everyone to protect and improve the natural environment. The courts have tried to recognize the solidarity of dwellers in cities and residential colonies against industrial pollution. Industrial activities are to be kept away from those areas where people take shelter after the day long tiresome activities. Krishna Gopal's is an instance when activities having the potential to pollute and harm instead of activities really harming, can be caught in the net of public nuisance under Section 133 of the Criminal Procedure Code. Only one person complained. Still the court held the activities as creating not private nuisance but as public nuisance even though it decided to on police report. The significance of this remedy is great and it restricts and even prohibit fundamental right to trade or occupation when the utilisation of the right becomes injurious to health or physical comfort of the community.

Common Law Remedies and Specific Statutes

Enactment of specific legislation for the prevention and control of pollution was the first legislative step after the Stockholm Conference. The Water (Prevention and Control of Pollution) Act, 1974, Air (Prevention and Control of Pollution) Act, 1981 and Environmental Protection Act, 1986 provide envisage steps to abate pollution. But even after these enactments use of common law remedies continued. The attitude of the courts towards this was not the same. In a few cases, the validity
of invoking the jurisdiction of Executive Magistrate under Section 133 was challenged. The High Courts were, in dilemma. 95

Existence of alternative remedy was raised in some of the earlier cases as well. In the case of Krishna McN Banerjee and Others v. A.K.Guha 96 the Calcutta High Court felt that the Magistrate could have acted more wisely in advising the complaint to set in motion the machinery provided by Act 3(II.c) of 1890. At the same time the court stressed that the existence of an alternative remedy does not deprive the Magistrate of his jurisdiction.

In Lalman v. Bishombhar Nath 97 the defendants invited the attention of the Court towards the first section of Criminal Procedure Code, 1898 which made it clear that it would not affect any special or local law then in force. It the opinion of the defendant this covered Municipalities Act as well although, it was passed after the code. The Court was to decide whether the

95. We see that High Court of Kerala which vehemently opposed existence the jurisdiction of Magistrate under Section 133 in pollution case when the specific legislation for the same has already been enacted in 1984. But in 1989 a notable decision in Madhavi v. Thilakam brought under Section 133 cheered the solemnity of the jurisdiction of Magistrate under Section 133 and said: "We recognise every man’s home to be his castle which cannot be invaded by toxic fumes and tormenting sounds. This principle expressed through law and culture, consistent with nature’s ground rules for existence has been recognised in Section 133 (1) (b)."

96. Supra. n.25.

97. A.I.R. 1932 All.59.
Magistrate has got power to declare a licensed industrial unit as public nuisance, where as under Municipalities Act, a person aggrieved by an order of the Board on a question of this nature has a right to appeal to the District Magistrate.\(^9\)  

The court opined that the Magistrate had jurisdiction to pass an order under Section 133 to regulate the manner in which Lalman conducted his business if he found that in doing so Lalman was acting in a manner injurious to the health or physical comfort of the community. But he continued to say that such an order by a Magistrate is open to general objection in so far as it must inevitably reflect on the orders of the Municipal Board.\(^9\)  

Rajagopala Chettiar v. Samdum Begam\(^10\) is still another instance where the question of using alternative remedy was raised. The facts are that the joint Magistrate of Trivandrum issued a preliminary order under Section 133 of Criminal Procedure Code calling upon the owner of a local rice mill to cease working the factory or remove it to some other place on the ground that it constituted a nuisance since it affected the health and comfort of the general public living in the locality. The court rejected the plea that by virtue of the corresponding

\(^9\) M.P. Municipalities Act, Section 318.
\(^9\) Supra. n.97.
\(^10\) A.I.R. 1943 Mad.357.
provision in the local Acts, the Magistrate had lost his jurisdiction to deal with nuisance of this character. The court found nothing conflicting in all these legislative provisions, the difference between them are only in the remedies provided. Moreover, code is an Act of Indian Legislature and its provisions cannot be in any way effected by a local act.

In P.C. Cherian v. State of Kerala the act of proceedings by Executive Magistrate upon police report under Section 133 Criminal Procedure Code was challenged on the ground that it is not within the province of the Magistrate to see whether the conditions under statutes like Panchayat Act and Factories Act are satisfied. Moreover the plaintiff had already got an injunction against the Panchayat restraining them from cancelling the licence. The court upheld the power of Magistrate to invoke Section 133 if the exigencies warrant such an extreme course.

One can in the case, find that existence of nuisance or the abatement thereof will stand independent of the right of the petitioners to carry on the work of the factory unhindered by

101. Madras Public Health Act, Section 44 and Madras Local Boards Act, Section 195.
102. A.I.R. 1943 Mad. 357 at p.358.
103. Id., p.358-359.
the Panchayat authorities or the public and the Executive Magistrate's power for the same is an exclusive power.

In a later case Andhra Pradesh High Court reiterated this view\(^\text{105}\) by justifying the order of S.D.M. The court rejected the plea of obtaining N.O.C. from Pollution Control Board and paying the cess every year as constituting the jurisdiction of the S.D.M. The mere obtaining of a N.O.C. at an exterior point of time will not ensure the petitioners the benefit of not producing appreciation certificate required by S.D.M.

But the question of the scope of this section in dealing with pollution of water and air in the wake of specific legislation for the same are being enacted when came up before the High Courts of Kerala and Madhya Pradesh. They took a different stand and curtailed the wide amplitude of Section 133. In \textit{Tata Tea Ltd v. State of Kerala},\(^\text{106}\) the relevance of this section to deal with and prevent the discharge of effluents to the river when the Water (Prevention and Control of Pollution) Act, 1974 which is a code in itself came up for consideration. The court accepted the proposition that the provision of Section 133 stood impliedly repealed in so far as they related to prevention of water pollution. The court tried to substitute the Water Act for nuisance remedy by saying that all the remedies which could be provided by an


an Executive Magistrate under Section 133 could certainly by
provided by authorities contemplated under the Act.\(^{107}\) Similarly
the Madhya Pradesh High Court in *Abdul Hamid v. Gwalior Rayon
Silk Mfg (Wvg) Co.Ltd*\(^{108}\) held that the special statutes on
pollution of water and air have to prevail over Section 133
of the Criminal Procedure Code and the provision of I.P.C.\(^{109}\)
The court went to the extent of saying that bringing and labelling
the act as a public nuisance when the special act prevails is
just to evade the requirement of previous sanction under the
special Acts, and characterised the trend as colourable. The
court felt the urgent need for proper balance between the con-
flicting claims of nation's industrial progress and the hazards
to the health of the citizens.

The attitude of these courts in some way diminished the
prospective scope of the Criminal Procedure Code. It is
described as the lost opportunities for the courts to appreciate
the role of Section 133 in preventing pollution? The proposition
raised in favour of this argument is the availability of Magistrate
in every district as well as the sluggish speed of the wheels
of Pollution Control Board.\(^{110}\)

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110. *F.Leelakrishnan et.al.*, "Evolving Environmental Jurisprudence
The Role Played by the Judiciary" in *F.Leelakrishnan (Ed)*
*Law and Environment*, p.126.
But amendments brought to the Water Act as well as Air Act in 1988 and 1987 respectively has considerably widened the powers of Pollution Control Boards. It also makes citizen's suit possible giving sixty days notice. The fact that State Pollution Control Board has got their Pollution Control Board Office at the district level with environmental Engineers, solves both the difficulties to greater extent. Utility of the amended provisions of the special Acts has to be encouraged by the courts. But that should not mean automatic repeal of public nuisance provision under Section 133 Criminal Procedure Code with regard to air and water pollution. Its relevance can never be curtailed. It has to be there as a simultaneous option for the aggrieved persons. But ever increasing number of environmental litigation demand much more time and expertise which may not be possible for the Executive Magistrate. The fact that on several occasions solving environmental issues needed the constitution of commissions and committees, indicates the expertise in demand of. Secondly on many occasions the issues raised contains fundamental questions such as the fundamental right to live in a pollution free environment of the public including in workers on the one side and the

110. For details see supra. chapter 4 pp. 116, 117.

111. M.C.Mehta v. Union of India, A.I.R. 1987 S.C. 965; For details also see infra. chapter 7 pp. 241 244.
right to work and have livelihood of the workers. The court has on several occasions to weigh the danger that the general public has to face against the deprival of the workers of their means of livelihood by stopping the work of the factory.\textsuperscript{112}

Moreover the addition of new section 33 A and 31 A under the water and air act respectively enable the Pollution Control Board to take immediate action even without recourse to the courts. The Boards can not take immediate action to stop the functioning of polluting industries. But it is too much for the High Court.

Even after such a ruling of M.P. to look at pollution control laws as a means for the protection of industries ensuring a proper balance between the conflicting claims of the nation's industrial progress and the hazards the citizens. Whatever may be attitude of these High Courts, in Ratlam's case the Supreme Court has well recognised the role of Executive Magistrate in abating pollution in a locality.

\textsuperscript{112} For details see Id., pp. 256, 260