Chapter – V

Legal Aspects of Water Pollution
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LEGAL ASPECTS OF WATER POLLUTION

5.1. INTRODUCTION:

Our legal system has provided a number of sources to fight against the water and other pollution. We have had some 200 legislations dealing with the various aspects of environmental protection. But the concern legislative activity in the backdrop of drawbacks of such dissipated, piecemeal and earlier legislation and inadequacy of such legislations to meet the evolving challenges of pollution, started after 1970 with the enactment of some specific legislations dealing exclusively with the pollution problem. The important legislations that have been enacted for controlling/preventing water pollution are as follows:-

1. Law of Torts or the principles of the Common Law,
2. The Shore Nuisance (Bombay and Kolaba) Act, 1853,
3. Indian Penal Code, 1861,
4. The oriental Gas Company Act, 1857,
5. The Sarais Act, 1867,
6. The North Indian Canal and Drainage Act, 1873,
7. The Obstruction in fairways Act, 1881,
8. The Indian Easement Act, 1882,
9. The Indian Fisheries Act, 1897,
10. The Indian Ports Act, 1908,
11. The Inland Vessels Act, 1917,
12. The Indian Forest Act, 1927,
13. The Damodar Valley Corporation Act, 1948,
14. The Factories Act, 1948,
15. Orissa River Pollution and Prevention Act, 1953,
16. The River Board Act, 1956,
17. The Merchant Shipping Act, 1958,
18. The Maharashtra Prevention of Water Pollution Act, 1969,
19. The Public Nuisance under the Criminal Procedure Code, 1973,
20. The Water (Prevention and Control of Pollution) Act, 1974,
21. The Water Cess (Prevention and Control of Pollution) Act, 1977,
22. The Environment (Protection) Act, 1985,
23. The Public Liability Insurance Act, 1992,
24. The National Environment Tribunal Act, 1995,

Out of these, the Water Act is the most comprehensive scheme of administrative regulations through the permit system directly dealing with the water pollution. In addition to this, the Department of Environment, Forest and Wild Life of the Government of India has formulated a scheme and comprehensive plan for the prevention and control of the Ganga and a National River Conservation Plan. The Judiciary has added the force of these laws through a number of the Public Interest Litigation.

The legislative sources can be divided into two categories;

i) Non-statutory sources and

ii) Statutory sources.

Non-statutory sources are the common law sources, under the heading Law of Torts.

5.2. COMMON LAW:

The term “common law” is derived from Latin words Lex Communis.

It is body of customary law of England which is based upon judicial decisions. The common law continues to be in force in India under Article 372 of the Constitution in so far it is not altered, modified or repealed by statutory law.

The Common Law remedies against the environmental pollution are available under the law of Torts. Tort is a civil wrong other than breach of trust or contract. Any tortious action results in damage to property, person or reputation of another person and the affected party can claim damages, compensation or injunction or both.

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1Environmental Law and Policy in India, cases, Materials, and Statutes, 2nd Ed, Shyam Diwan and Amin Rosenerantz, Oxford University Press, New Delhi, P.167.
The Supreme Court in the case of M.C. Mehta v. Kamal Nath,\(^2\) rightly observed that environmental pollution amounts to civil wrong and by its nature it is a tort committed against the whole community. The court observed:

"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 suffered loss on account of the act of the offender... In addition to damages.... 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.\(^3\)

The simplest definition of the law of Tort in English law is that it is a civil wrong which infringes a *right in rem* and is remediable by an action for damages, but historical definitions render it difficult to discover any form of words accurate and concise. Some definitions tell us what a tort is not, but leave us in doubt as to what it is\(^4\). The law of torts concerns the obligations of persons living in a civilized and crowded society. The obligation is to respect the safety, property and the personality of their neighbors, both as an a priori matter and as a duty to compensate for wrongfully caused harm, *ex post*. A leading jurist observed that both the moral and political philosophy is intensively involved in the principles of conduct, object of which is to search for the norms of proper behaviour of the social human being\(^5\). Thus the conduct is a core element in the law of torts. Another celebrated jurist explained that the core element of the tort involves the breach of the legal duty, a primary obligation, which generates a further duty to compensate the victim, in case of its violation causing harm, a secondary obligation. He further opined that the core tort includes three primary elements: harm, conduct, and blameworthiness.\(^6\)

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\(^2\) (2000) 6 SCC 213.
\(^3\) Id., at 224.
\(^6\) Peter Birks, The Concept of a Civil Wrong, Edited by Owen, ibid. Pp. 31-51.
Ton Honore has explained the concept of tort liability in a logical manner in The Morality of Tort Law - Questions and Answers⁷ as:

“Liability in tort is imposed, if the dispute cannot be resolved without litigation, by the courts of the legal system having jurisdiction at the instance of the individual whose rights have been infringed by a person who has committed a civil wrong (tort) against that person and normally imposes on one who has committed the wrong an obligation to pay money by way of compensation to the person whose right has been infringed.”

Under the provisions of the private law the standard is specific based on the scientific observation. For example, whether a particular pollutant pollutes particular water, it will be determined whether the presence of that pollutant is in excess of the prescribed limit. In our country the Environment (Protection) Rules prescribes the amount, character, and nature of various pollutants. If such rules are violated, then it will be said that there is pollution. Thus the monitoring of sewage, industrial and domestic effluents etc, will not be barred by the public law unless they offend the prescribed rules. The scientific, quantitative and qualitative monitoring only effectively deal with the problems. In tort, these mechanisms are not met.

‘... generally the common law is based upon the imprecise standards unrelated to specific levels. In attempting to balance competing private interests, the common law looks to the reasonableness of actions rather than restricting conduct to specific levels’.⁸

In our country, according to Art.21, the judiciary, through the interpretation of the constitution, has made the basis of environmental jurisprudence, and also the Constitution itself provides for the Fundamental Duties and also as the Directive Principles, the action to protect the environment with the help of the law of tort is very uncommon.

The liability of the polluter under the law of tort is one of the major and oldest legal remedies to abate the pollution. The most important tortious liabilities for environmental pollution are under the following heads:

⁷David G. Owen, Philosophical Foundations of Tort Law, ibid, P.76.
i. Nuisance,
ii. Trespass,
iii. Negligence, and
iv. Strict Liability.

5.3. NUISANCE:

The law of nuisance covers various kinds of activities, which pollute the environment. It means an unlawful interference with the use and enjoyment of land or property, or some right over, or in connection with it. The word ordinarily means anything, which annoys hurts, or that which is offensive. To be actionable an element of 'unreasonableness' should be there in the conduct of the defendant. The plaintiff may be owner himself or the occupier.

According to Pollock the nuisance is the wrong to a man unlawfully disturbing him a) the enjoyment of his property, or, in some cases, b) in the exercise of a common right. A nuisance would include the offensive smell, noise, air pollution or water pollution. Thus escape of dirty water, poisonous or any other hazardous, both solid, liquid or gaseous, or any other polluting substances into any stream or water body, fume smoke heat vibrant, electricity, disease, germs, trees etc., may cause the ground for this action. Thus apart form any action available under any statute nuisance is a common remedy. The focal point of the Laws of Nuisance is the material inference with the ordinary comfort of the human existence and for this the following are the material points:

i. Degree of intensity,
ii. Duration,
iii. Locality,
iv. The mode of using the property.

In modern times, nuisance is that branch of law of tort which is mostly connected with 'protection of environment'. Thus pollution by oil, obnoxious fumes, interference

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10 S.C Shastri, Environmental Law, Eastern Book Company, Lucknow, p.64.
with leisure activities, offensive smell from premises used for animal keeping or noise from industrial installations are all nuisance.\textsuperscript{11} It does not mean that the other actions having no environmental flavour are not within this category of tort, e.g., obstruction of highway, protection of private rights on land etc.

Nuisance can be divided into two categories. These are (i) Private nuisance and (ii) Public Nuisance. Private nuisance can be defined as an unreasonable interference with person's right over wholesomeness of land due to emission of dust, offensive smell, fumes or noise, air or water and effluents. Whereas the public nuisance can be defined as unreasonable interference with a general right of the public by above mentioned methods.

However, the main difference between private and public nuisance lies in the remedies sought, Public nuisance is both a tort and crime. Different standards are used to determine the nuisance in different areas. For example, if the boiler of a factory is generating lot of noise, but located in the industrial area, it may not amount to nuisance. On the other hand, if the same boiler is in the residential area, then the noise created by it will amount to nuisance.

(a) Private Nuisance:

The private nuisance is the using or authorizing by use of one's property or anything done under one's control, so as to injuriously affect an owner or occupier of the property by physically injuring his property or by interfering materially with his health, comfort or convenience.\textsuperscript{12} In short, it is an unlawful interference with a person's use or enjoyment of land or some right over, or in connection therewith.\textsuperscript{13} The basis of action is usually the pivotal question in nuisance cases. In determination of the 'reasonableness', the courts are generally guided by the ordinary standard comfort prevailing in the neighbourhood. Minor discomorts that are common in crowded cities are not viewed as nuisance by the courts.

\textsuperscript{11} W.V.H. Rogers, Winfield and Jolowicz, on Tort, 16\textsuperscript{th} Edition, 2002, Sweet and Maxwell, London, p.503.
\textsuperscript{12} Ratanlal quoted in Kailash Thakur, Environmental Protection Law and Policy in India, 1999, Deep and Deep Publications, New Delhi, P.186.
\textsuperscript{13} W.V.H. Rogers, Winfield and Jolwicz on Torts, Ibid.
To be a nuisance an act must satisfy certain conditions. It must not arise on premises of the plaintiff’s occupation; it must take place outside the plaintiff’s land and then proceed to affect that land or its use. It must be long standing, not a trifling one, i.e., a continuing wrong. A single instance of deleterious affectation may be the evidence of continuing unreasonable use of land, or so serious and grave an occurrence in itself amounting to an act of nuisance. The damage suffered must be real or sensible in that it can be measurable in some way.¹⁴

The operation of nuisance in relation to pollution is quite wide. It covers a wide range of interference with the use and enjoyment of one’s land or property coming from pollution of water, air, smells etc. as regards the water pollution, injunctive and damages relief can be granted to prevent the pollution or compensate the plaintiff of the injury suffered by him on account of pollution of surface, underground and tidal waters caused by the defendant. In Pride of Derby and Derbyshire Angling Association v. British Celanese Ltd.¹⁵, injunction was granted restraining the defendant, the local authority from polluting the river on account of discharge of insufficiently treated effluents of sewers controlled by legislation.

‘In fact the whole law of private nuisance represents an attempt to preserve a balance between two conflicting interests, that one of the occupier in using his land he thinks fit, and that of his neighbour in the quiet enjoyment of his land¹⁶. A balance must be maintained between the interest of the occupier and the owner of the land and that of the neighbour.¹⁷

The balancing factors are given below:

A. Locality Doctrine:

The locality doctrine is usually traceable in a famous case, St. Helen’s Smelting Co. v Tripping¹⁸, wherein the company was running a alkaline factory and thereby caused heavy damage to the environment resulting death of vegetation and health

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¹⁴ Kailash Thakur, ibid.
¹⁵ 1953, Ch. 149, quoted in the Kailash Thakur, ibid, P.187.
¹⁶ Winfield and Jolowicz, supra P.508.
¹⁷ Sedleigh-Denfield v O’Callaghan (1940) A.C. 880 at P. 903.
¹⁸ 1865) 11 FL Cas 642.
hazards to the cattle in the locality. The court drew the distinction between the actual damage and the nuisance caused by personal physical discomfort. In the latter situation the locality of the nuisance would be a material factor in assessing the balancing exercise. Although there is a distinction between the actual physical damage and the interference to the personal right, there is an overlap. Though a house having the cattle in an agrarian belt may be a source of some obnoxious smell causing diminution in value of the neighbouring property; the locality doctrine demands that in an agrarian area such smell is not uncommon. It is also true that in most industrialized area the absolute right to pollute is not recognized.19

B. The duration and intensity:
The actionable nuisance should be something more than temporary. Isolated incidents can give rise to the risk of that isolated nuisance is of itself a continuing use. Where there are isolated incidents occurring regularly then the use of the land for that purpose is of itself a nuisance. The more isolated the occurrence, the less likelihood that the use being carried out as nuisance.20 the temporary action may be actionable if any unreasonable methods are adopted, unless physical damage is caused.21

C. The Hypersensitive claim:
In considering what is reasonable the law does not take account of abnormal sensitivity in either persons or property22.

Not only must the use of land, which is complained of,23 be unreasonable, but the plaintiff's use of land to which the nuisance applies must also be reasonable. The standard of a reasonable person is applied here. The English court of Appeal held that a man who carries on an exceptionally delicate trade cannot complain because it is injured by its neighbour doing something which would not injure

19 Rushmer v Polsue and Alfieri Ltd. (1906) 1 Ch. 234.
20 Ball and Bell, ibid, P.260.
21 Harrison v Southwork and Vauxhall Water Co. (1894) 2 Ch. 409.
22 Winfield & Jolowicz on Tort, ibid, P.513.
anything but an exceptionally delicate trade. In a Canadian case the defendants ran a motorcar plant emitting obnoxious gas. The plaintiff who was growing orchids for sale complained the destruction grass due to such emission caused his loss of stock. The defendant contended that the growing of orchid was hypersensitive activity and any damage suffered was not the result of unreasonable use of the land. The court disagreed and held that the nuisance was independent of the special sensitivity of the claimant.

Here the pollution complained of would be itself a cause of action, which can cancel out any argument of hypersensitivity.

In our country, the Supreme and the High Courts have accepted the environmental petitions in the name Public Interest Litigations exercising the writ jurisdictions under the Art.32 and Art.226 from the persons who were not directly victims in many cases.

(b) Public Nuisance:

The Indian Penal Code, 1860, makes various acts affecting environment as offences, Chapter XIV of the Indian Penal Code containing sections 268 to 294-A deals with the offences affecting the public health, safety, convenience, decency and morals. The sole object of Chapter XIV is to safeguard the public health, safety and convenience by causing those acts punishable which make environment polluted or threaten the life of the people.

While a private nuisance is a tort, a public nuisance is a crime. A public nuisance or a common nuisance is one which materially affect the reasonable comfort and convenience of life of a class of the public who came within the sphere or the neighborhood of its operation, the question whether the number of persons affected is sufficient to constitute the class is one of fact in every case, and it is sufficient to show that a representative cross-section of that class has been so affected for an injunction to issue.

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24 Mc Kinnon Industries Ltd v. Walker, (1951) 3 DLR 577.
26 Att-Gen v. P.Y.A. Quarries Ltd. (1957) 2 Q B 169 at 184, per Lord Romer.
It is one which is, which is widespread in its range or so indiscriminate in its effect that it would not be reasonable to one person as distinct from the community at large\textsuperscript{27} to take proceedings to put a stop to it. This definition is vague and it has been rightly said that nuisance "covers a multitude of sins, great and small"\textsuperscript{28}. Public nuisance at a common law include such diverse activities as carrying on an offensive trade, keeping a disorderly house, selling food unfit for human consumption, obstructing public highways, throwing fireworks in the street and holding an ill-organized pop festival\textsuperscript{29}.

It is an important tool against the environmental pollution, under the Easement Act in Section 7 guarantees the beneficial enjoyment to the owner of the land, free from pollution. Under this Act cases of the public nuisance can be instituted under the civil Procedure Code. In case of public nuisance, a lot of people is suffered, or the extent of harm cannot be ascertained, nor the court can quantify the damage, the Civil Procedure Code provides that the Advocate General, or with the leave of the court, two more persons, can institute a suit, whether or not special damage is caused to them.

Previously, it was with the leave of the Advocate General, but after the 1976 amendment of the CPC, if the members of a class suffer some special damage, the action maintainable even without the consent of the Advocate General, but with the consent of the court.\textsuperscript{30}

Under the Section 268 of the Indian Penal Code, the punishment for committing the offence of nuisance is as follows:-

"A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. A common nuisance is not excused on the ground that it causes some convenience or advantage."

\textsuperscript{27} P.Y.A. Quarries at P.191, per Lord Denning.
\textsuperscript{28} Southport Corporation v Esso Petroleum Co. Ltd. (1954) 2 Q B 182 at 196, per Lord Denning.
\textsuperscript{30} Faquirchand v. Sooraj Singh, AIR 1949 All 467.
Similarly the section 269 makes it an offence if anybody, unlawfully or negligently does any act, or which he knows or he has reason to believe to be, or likely to spread to infection of any disease dangerous to life, and under Section 270 malignant activities which the actor knows or has reason to believe to be, likely to spread infection of any disease dangerous to life are offences punishable with imprisonment and, or, with fine.

The contamination of water in any public spring or reservoir is also an offence under the Section 277 of the IPC, which runs as follows:-

"Whoever voluntary corrupts or fouls the water of any public spring or reservoir, so as to render it less fit for the purpose for which it is ordinarily used, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five thousand rupees, or with both.”

This section has been interpreted narrowly to include only the flowing canals of rivers, canals and streams and well in terms of public spring or reservoir. The scope of it is very limited, and covers only the voluntary fouling of water and does not cover an act committed involuntarily whatever the consequences of such act may be.

The terms ‘corrupt’ and ‘foul’ used in this section simply takes care of the purity of water. But the pollution, in modern terms, implies something more than the purity of water. ‘Pollution’ is legal, as well as technical term dealing with the quality and standards of water with respect to their legitimate uses with reference to specific purposes. It may be submitted that the section 277 of the IPC is not capable of taking care of such a broad spectrum of water pollution.

Chapter XIV of the IPC deals with other offences affecting the public health, safety. Convenience, decency and morals, some of which directly related to the other segments of the environment, e.g., adulteration of food and drug, poisoning of atmosphere, negligence in the use of the poisoning substance, fire and combustible matter, explosives, machinery, disobedience of the public order etc. As these are offences, the ordinary criminal procedure should be followed.

31 Susai v Director of Fisheries, 1965 MLJ 35; Emperor v Nama ram 1905, 6 Bom LR 52.
Chapter X, Part B and C from Sections 133 to 144 deal with the Public Nuisance. Section 133 of the Criminal Procedure Code, deals with the conditional order for the removal of the public nuisance procedure, of which is very simple. The district Magistrate, the sub-divisional Magistrate or any Executive Magistrate specially empowered for this purpose by the state government has the power to take cognisance of the following, either or on a complaint or on the basis of a police report:

(a) Any unlawful obstruction or nuisance in any public place or way, river, or channel which is or may be lawfully used by the public, and it should be removed,

(b) Injurious conduct of any trade or occupation, or the keeping of any goods or merchandise is injurious to health or physical comfort of the community and such trade or occupation should be prohibited or such goods or merchandise should be removed or the keeping should be regulated.

(c) Construction of any building, or disposal of any substance, as is likely to occasion any conflagration or cause explosion,

(d) Existence of any building, tent, or structure, or any tree in such a condition as was having likelihood of falling and thereby causing injury to persons living or carrying on business in the neighbourhood or passing by and the removal, repair, or support of such building, tent or structure, or the removal or support of such tree is necessary,

(e) Requirement of fencing in such a manner as to prevent danger to any tank, well or excavation to any such public place,

(f) Necessity of destruction, confinement or otherwise disposal of any dangerous animal.

The person responsible for causing such nuisance or obstruction or any of the acts may be conditionally ordered within the fixed time limit.
The procedure under the Section 133 of the Criminal Procedure Code is very simple, cheap, and free from legal complications. It is one of the cheapest remedies for the prevention of pollution. In an earlier reported case, in two sugar mills liquid effluents were discharged into the river. The Sub-divisional Officer, on the request of about one hundred persons, issued the order of discontinuance of draining dirty and toxic water reach of the common people. On appeal, the Patna High Court, when acknowledged the applicability of the Sec.133 of the Cr. P. C. Pollution cases, and the power of the Magistrate to apply the law, quashed the order on the ground that the order was not based on sufficient scientific enquiry. This decision has been severely criticized by many authors. According to P.Leelakrishnan, 'The Patna High Court was specific on the point that Sec. 133 of the Cr.P.C. could be used for preventing public nuisance caused by pollution of water. However, reluctance of the court to keep alive even a conditional order is appropriate in the light of the provision that the Magistrate need take only such evidence (if any) as he thinks fit. The decision to decide what type or quantum of evidence should support the decision is left to the Magistrate. Preponderance of evidence is not necessary for such a conditional order, this can be made absolute or vacated after taking such evidence as is necessary. Insistence of foolproof evidence, to support a conditional order may place the Magistrate in a predicament. He may not be in a position to render speedy justice...the court would not have interfered but would have left the matter to the discretion of the magistrate to decide whether or not the order be made absolute or vacated after taking further evidence.'

The efficacy of this section should be applied in case of potential pollution. Though the M.P High Court tried to limit the applicability of this law only in case of actual nuisance, the same author has criticized validly that in present days, the unpredictability of pollution is of so high magnitude, prevention should be the best way than the cure. "One may find no reason why such preventive action is not allowed in all types of public nuisance".

32Deshi Sugar Mills v. Tupsi Kumar, AIR 1926 Pat. 506.
33 P.Leelakrishnan, Environmental Law in India, 1st reprint, 2000, Butterworths India, New Delhi, P-36.
34 Ibid, P-37.
But in another remarkable case Municipal Council, Ratlam v Vardichand\textsuperscript{35}, in the eighties of the last century, where the highest court not only added strength and vigour to this section making it a powerful and potential tool in fighting the pollution, but also used to compel the other public or statutory bodies to perform statutory duties and thus developed a new law of nuisance.

The residents of Ratlam municipality were suffering from obnoxious and pungent smell for a long time from the open drains caused by public excretion in slums and liquid flowing on to the street from the distilleries. The magistrate ordered for the removal of such nuisance and for this a time limit of six months were fixed for constructing public latrines and drainage system. The municipality, instead of carrying out the order, opted for challenge. Ultimately the case came to the Supreme Court. One of the grounds was the financial inability. The apex court emphasized, on the point that the municipality should not be allowed to raise the ground of financial inability. When the question of environmental hazards causing the sufferings of the people is involved, it is the duty of the municipality to fulfill the statutory obligation. 'Decency and dignity are non-negotiable facets of human rights and are a first charge on the local self-governing bodies. Similarly, providing drainage systems – not pompous and attractive, but in working condition and sufficient to meet the needs of the people – cannot be evaded if the municipality is to justify its existence'.\textsuperscript{36} But the rejection of the plea of the financial inability is not above criticism, because of local Government can hardly take a development programme independently, in spite of having the 73\textsuperscript{rd} or 74\textsuperscript{th} Amendments of the Constitution, without the Government help. The most important aspect of the Ratlam is that it gave a new meaning to Sec. 133, which provides the cheapest and quickest remedy.

Subsequently in other cases\textsuperscript{37}, this section has been strengthened. But in Tata Tea Limited v. State of Kerala\textsuperscript{38}, the court tried to limit the applicability of this section. Tata tea was decided four years after the Ratlam. Here the question was whether the District Magistrate had the power to prevent the discharge of the effluents to the river from a

\textsuperscript{35} AIR 1980 SC 1622.
\textsuperscript{36} J.V.R. Krishna Iyer in the Ratlam, P.1929.
\textsuperscript{38} 1984 K L T 645
factory after the consent was accorded by the appropriate authority, i.e., the Pollution Control Board, under the Water Act and the Act itself contains the exhaustive and exclusive remedies. Not only this, the appellant raised that Sec. 133 has lost its legality after the enactment of the Water Act. So resort to an action of public nuisance is barred in so far as the action relates to the water pollution and the Sec. 133 has lost its legality after the enactment of the Water Act. So resort to an action of public nuisance is barred in so far as the action relates to the water pollution and the Sec. 133 of the Cr.P.C. is impliedly repealed, so far as water pollution is concerned, by the enactment of the Water Act, which is more comprehensive. The court accepted this view, and this decision was also criticized on various grounds. The Section 133 is an expeditious, quick, cheaper remedy. Presumption of implied repeal is not a good law, Ratlam was the decision of the highest court, Tata was the decision of the single bench of the High Court. Law of public nuisance is the general, whereas the Water Act is specific in nature, A specific law cannot repeal the provision of general law.

In Krishna Pannicker v Appukatam Nair, the Division Bench of the Kerala High Court resolved the conflict of jurisdiction so created by the Single Bench. Rejecting the "repeal" theory the court held that repeal is the legislative act. Implied repeal is not permissible. A special law overrides the general law, only if they operate in the same field. Here the Sec. 133 and the Water Act do not operate in the same field. The water act is a special legislation dealing the prevention and control of water pollution only, whereas the Sec. 133 of the Cr. P. C. is a general legislation dealing with all types of nuisances, whether arising from water, air or noise pollution or any matter.

5.4 TRESPASS:

It means intentional or negligent direct interference with personal or proprietary rights without lawful excuse. The tort of trespass is actionable \textit{per se} and there is no need to show damages as a result of trespass. There are two things which are required to be proved for constituting the tort of trespass, which are

i. there must be intentional or negligent interference with the personal or proprietary right, and

ii. Such interference must be direct rather than consequential.
The doctrine of Trespass is closely related to nuisance but it is distinct and occasionally invoked in the environmental cases. It is remedy available to the victim of pollution under the tort of trespass. It requires an intentional invasion of the plaintiff's interest in the exclusive possession of property. Invasion may be direct or through some tangible objects. Thus, deliberate placement of waste in such circumstances as well carry it to the land of plaintiff natural forces, emission of gas,\textsuperscript{39} or invisible fumes or particulates\textsuperscript{40} constitute trespass.\textsuperscript{41}

The wrong of trespass to land consists in the act of

(1) Entering upon land in possession of plaintiff, or

(2) Remaining upon such land, or placing or projecting any material upon it – in each case without lawful justification.\textsuperscript{42}

According to Lord Pearson, 'trespassing is the form of misbehaviour, showing lack of considerations for the rights of others. It would be unfair if trespassers could by their misbehaviours impose onerous obligations to others'\textsuperscript{43}. Thus trespass is actionable per se, (without proof of damage). 'Every invasion of property, be it ever so minute, is a trespass'\textsuperscript{44}. 'If the injury is direct, it is trespass and if it is consequential it is nuisance'\textsuperscript{45}. Thus intention and physical entry by person or an object ought to prove.

It is difficult to prove the direct interference of environmental disputes. In Esso Petroleum v. Southport Corporation\textsuperscript{46} when an oil tanker stranded in an estuary jettisoned oil to lighten the ship and to try refloat, some oil drifted ashore and polluted the sea and the claimant’s foreshore.

\textsuperscript{40} Martin v. Reynolds Metal Co. (1959) 221 Ors. 86, 342 P (2d) 790.
\textsuperscript{41} Kailash Thakur, ibid, P. 190.
\textsuperscript{44} P.V. Heuston, ibid, P. 49.
\textsuperscript{45} Kailash Thakur, ibid, P. 190.
\textsuperscript{46} (1956) AC 218.
The claimant demanded the cost of cleaning. The action of trespass to discharge oil at sea which was then washed onto foreshore was not brought. The two judges of the House of Lords thought it would have failed since pollution was not inevitable.

In George v Piper, the claimant, occupied the Rising Sun in New market, and he owned a wall, which separated his yard from that of the defendant. In course of dispute about a right of way, the defendant ordered his employee to dump rubbish so as to block the way but not to touch the wall. The rubbish was loose and as dried out some of it rolled or settled against the wall. It was held that ‘The defendant was the person who caused the act to be done, and for necessary and natural consequences of his own act he is responsible as a trespasser’.

In another case, when the sewage was accidentally released and polluted the banks of the river downstream, the interference was held to be direct considering the natural flow of the river. By contrast, in Esso Petroleum case, there was no inevitability about the deposit of the oil on the foreshore, which depended on the action of the wind, wave and tide. Because of the requirement of directness the action of trespass to a person has not been developed properly in the pollution cases, although, in theory making someone inhale toxic fumes could give rise to an action of trespass.

The action of trespass has an advantage over the action of nuisance. But in environmental cases, this tort was rarely invoked. Court’s tendency has been given to give relief under his head of tort. In Martin v. Reynold Metal Company, the court modifies the traditional definition of trespass to bring industrial pollution within the ambit of liability. It defined trespass as “the invasion of landowners right to exclusive possession, whether by visible or invisible substance” and held that mere setting of fluoride deposits upon the plaintiff’s and was sufficient to constitute the actionable trespass. So far as water pollution is concerned, trespass is a unique action for remedy. Because, whether by direct entry of fouling or toxic liquid or other pollutants form the defendant’s land or from other’s land at the instance of defendant, or entry of run-off.

47 109 E R 220 in the Court of King’s Bench.
48 Jones V Llanrwst Urban District Council, (1911) 1 Ch. 393.
49 Stuart Bell and Donald McGillivray, Ibid, P-267.
50 (1959) 221 Ore 86.
51 Kailash Thakur, ibid, Pp. 190-191.
form pollutant solids into the plaintiff's land may be easy to established. But in air pollution, it is difficult to establish such entry because of its requirement of 'directness'.

'As the tort of trespass is little used with regard to environmental claim, its scope is perhaps uncertain'.\(^{52}\) In M.C. Mehta v Union of India (Span Motel Case), though the ground of trespass was not raised, it fulfilled all the requirements for the action of trespass.

5.5 NEGLIGENCE:

When there is a duty to take care and the care is not taken which results in some harm to another person, we can say there was negligence. It is based on the principle of fault. In order to succeed for negligence, there has to be some fault of the defendant. In environmental cases, the tort of negligence is utilized when other torts of nuisance or trespass are not available. In order to succeed in action for negligence, it must be established that there was direct link between the negligence and the harm caused. Further, it has to be proved that the person guilty of negligence has not taken due care which he was required to take under the law.\(^{53}\)

There are three main principles governing the tort of negligence:

i. the defendant owes a duty to take care to the claimant,

ii. the defendant has breached that duty,

iii. there has been foreseeable damage to the claimant resulting from the breach.

In Cambridge Water Company case the action for negligence failed because the plaintiff could not show that the effects of spillage on the groundwater below was foreseeable by the defendant company and its employees. The court held that: "the court must be careful to place itself in the position of the person charged with the duty and to consider what he or she should have reasonably anticipated as a natural and probable consequence of neglect, and not to give undue weight to the fact that distressing accident


Foreseeability also depends upon any knowledge of the defendant, or the knowledge, which the defendant ought to have, about the claimant’s vulnerability.

Failure to warn about the environmental damage was held to be negligent. It was held that in this case, there was a common law duty of care on a water company to warn consumers of potentially unwholesome water and damages in negligence was recoverable.

In another case, the defendants discharged a chlorine solution into a river. As there was drought, insufficient water to dilute the strength of the pollutant, causing damage to the crop of the plaintiff. The second defendant, a water regulatory authority, was held liable for failing to warn the farmers of the potential danger from the conditions of the water it knew was being abstracted. This principle can be extended to bring an action against an environment regulatory authority on the ground of negligence if it can be shown that a failure to warn led to damage.

In our country this common law action was invoked with limited success to get damages in both water and air pollution cases. In Mukesh Textiles Mills (P) Ltd. vs H.R. Subramania Shastry, the respondent-plaintiff suffered damage to their standing paddy and sugarcane crop in their fields from inundation of water, polluted with some 8000 tonnes molasses belonging to the appellant-defendant’s factory. Molasses was stored in earthen tank, which had become dilapidated having been dug into by rodents and as a result the embankment had collapsed and a large quantity of molasses overflowed into the water channel that passed into the plaintiff’s land. The High Court of Karnataka held the defendant liable on the ground of foreseeability and strict liability, a duty situation as well as failure to discharge the duty.

54 Glassgow Corporation v Muir, (1943) AC 448, per Lord Thankerton.
55 Barnes v Irwell valley Water Board, (1930) KB 21.
57 AIR 1987 Kart 87.
In case of Naresh Dutt Tyagi v. State of U.P. chemical pesticides were stored in godown in residential area. Fumes emanating from the pesticides leaked to the contiguous property through ventilators which resulted in death of three children and an infant in the womb of the mother. It was held that it was a clear case of negligence.

In B. Venkatappa v. B. Lovis, the Andhra Pradesh High Court while upholding the lower court’s mandatory injunction directing the defendant to close the holes in a chimney facing the plaintiff’s property observed that the smoke and fumes that materially interfered with ordinary comfort were enough to constitute an actionable nuisance and that actual injury to health need not be proved. The fact that the nuisance existed long before the complainant occupied his premises, does not relieve the offender unless he can show that as against the complainant he had acquired a right to commit nuisance complained of.

5.6 STRICT LIABILITY:

The rule of strict liability was enunciated in the famous case Ryland v. Fletcher by Justice Cairns. The defendant had owned the Ainswirth Mill in Lancashire and the claimant owned the Red House Colliery nearby.

In 1860, the defendant constructed a reservoir for his own mill on land belonging to Lord Wilton and employed engineers and the contractors to build it. During construction they found a number of old shafts, but it was not realized that these were indirectly connected with the colliery. The contractors were negligent in not ensuring that the filled-in-shafts could bear the weight of the water, and on December 11, 1860 the partially filled reservoir burst through into the claimant’s colliery. It was held that the defendant was liable. The rule declared in this case was that a person is strictly liable when he brings or accumulates on his land something likely to cause harm if it escapes damage arises as natural consequences of such escape. The rule of strict liability is subject to a number of exceptions that considerably reduce the scope of its operation.

The rule of strict liability is subject to the following exceptions:

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58 1995 Supp. (3) SCC 144.
59 A.I.R 1986 A.P. 239.
60 House of Lords (1868) LR 3 HL 330; 37 LJ Ex 161.
1. an act of God, (natural disasters flood or earthquake)
2. an act of third party, (Sabotage)
3. the Plaintiff's own fault,
4. the plaintiff's consent,
5. the natural use of land by the defendant, i.e., only in use of the non-natural use of land this principle is applicable; and

The doctrine of rule of strict liability is very useful in cases of environmental pollution, particularly, in those cases where the harm is caused by the leakage of hazardous substances. In order to have the applicability of this rule, two conditions must be satisfied. They are

i) Firstly, there must be non-natural use of the land, and

ii) Secondly, there must be escape from the land of something which is likely to cause some harm or mischief if it escapes.

This principle is often applied in the circumstances leading to damage either due to escape of fire, gas, explosives, electricity, obnoxious fumes, and vibrations and so on. In India, the rule of strict liability has been applied in limited situations relating to escape of water causing mischief to landed property and chattels61 or fire62.

5.7 ABSOLUTE LIABILITY:

The doctrine of strict liability is applicable only in case of non-natural user of land. But with expansion of chemical and other industrial activities in India, there are increasing the number of enterprises, which store and handle various hazardous substances. These activities cannot be declared illegal, because they have social and economic utility. The doctrine of strict liability as enunciated and also subsequently developed in various cases like Cambridge Water Companies etc cannot tackle the situation. Traditionally the doctrine of strict liability was considered adequate to regulate such hazardous industries.

61 Becharam Choudhury v Pububrath, (1869) 2 Beng LR 53.
The situation changed after the disastrous accidental taken place in Bhopal due to escape of Methyl Isocyanide gas from the factory premises of Union Carbide and thousands of people died, several thousands of other people were physically and mentally injured and in this case the traditional doctrine was replaced by the rule of Absolute Liability, a standard which is stricter than ‘strict liability’.

The foundation stone of the doctrine of absolute liability was laid in the Shriram Gas Leak, disaster case by the Supreme Court of India. A hazardous chemical factory was there in the densely populated area in Delhi. The highly toxic gas escaped from the hazardous factory and injured several people in the locality. An eminent environmentalist and lawyer M. C. Mehta brought the public interest litigation before the court seeking relocation of the factory from the thickly populated part of Delhi. When this case is being decided in the Supreme Court, more important Bhopal Gas leak case was also pending. The Court observed that the principles and norms of determining the liability of large enterprises engaged in the manufacture and sale hazardous products were questions greatest important, particularly following upon the leakage of MIC gas from the Union Carbide Plant in Bhopal. The Court was concerned as to what control, whether by way of the relocation or by way of installation of adequate safeguard will be imposed upon such hazardous industries, what is the extent of liability of such corporations and what remedies can be devised for enforcing such liability with a view to securing the payment of damages to the person affected by such escape of liquid or gas. The factory authorities raised the plea of ‘sabotage’ to shield it from the claims of Bhopal Gas victims. It was suggested by the factory authority that a disgruntled employee working in the pesticide factory owned by Carbide Indian subsidiary might have triggered the escape of the gas. Act of ‘sabotage’ is ground of defense under the principles of Ryland. The court rejected the principles of strict liability, rather modified it into the present doctrine of absolute liability. The Madhya Pradesh High Court applied this doctrine first in the Bhopal victims’ cases.

63 M.C. Mehta v. Union of India, AIR 1987 SC 1086.
64 Union Carbide Corporation v Union of India Civil Revision No. 26 of 1988.
In the latter Bhopal settlement cases the wisdom of this doctrine was questioned, in which the Chief Justice R.N. Mishra held it to *obiter dicta*.\(^{65}\)

The terms 'strict liability' and 'absolute liability' are used interchangeably. It is questioned whether the moral values permit it, as it is divorced from the elements, 'fault' or 'negligence'. In the context of the present scenario where we are living in a society whose economy is dominated by industrial and other hazardous activities, and common people are subjected to these without their consent, it can scarcely be said that there is less moral point of view in the principles of the 'absolute liability'.

5.8 RIPARIAN RIGHTS:

Owners of the land adjoining to a watercourse including estuaries, termed as Riparian owners, normally owned the riverbed, but not the water itself. However, as a natural incident of the soil itself, they have the right to receive the water in its natural state, subject only to reasonable usage by an upstream owner for ordinary purpose. Owners of other property rights such as fisheries have the same right.\(^{66}\)

Lord Macnaghtan, in John Young & Co. v. Bankier Distrellery Co.\(^{67}\), has given the most authoritative concept. According to this decision a Riparian is entitled to have the water of the stream, on the bank of which this property lies, flow down as it has been accustomed to flow down to his property, subject to the ordinary use of the flowing water by upper proprietors, and to such further use, if any, on their part in connection with their property as may be reasonable in the circumstances. Every riparian owner is thus entitled to the water of his stream, in its natural flow, without sensible diminution of increase, and without sensible alteration in its character or quality. This means that any interference with the natural quality or quality of the water is an actionable nuisance.

In this case an upstream mine owner who discharged water into a stream from a mine, which altered the chemistry of water from soft to hard and thus altered the quality of the downstream distillery's whisky. The water had not been made impure, but the distillery obtained an injunction because the nature of the water had been changed. This

\(^{65}\) Union Carbide Corporation v. Union of India, AIR 1992 SC 248.

\(^{66}\) Chase more v Richards, (1959) 7 HL Cas 349, quoted in Bell, Ibid, P.607.

\(^{67}\) (1893) AC 691-698.
case illustrates the related nature of the definition of water pollution and indeed emphasizes that the common law does not lay down any absolute standards in relation to water quality. It is noting that this test only applies where upstream usage is not ordinary; a good example of the balancing presses the law of nuisance tries to carry out.

The technical difficulties of relating to the law of nuisance, such as the causation and the locality doctrine, have been neatly answered in the water pollution cases. An invasion of the natural right to water is treated as equivalent to damage to land, the circumventing the locality doctrine. A claim of reference to the riparian owner has been held to be equivalent to the trespass.\textsuperscript{68} it follows that an action can be brought against any upstream polluter, even if only one of many and responsible for only a part of the whole pollution. All that need to be shown was that the polluter has contributed to the pollution.\textsuperscript{69}

The Supreme Court recognized the right in M.C. Mehata v. Union of India, stating that in common law the municipal authorities can be restrained by an injunction in an action brought by a riparian owner who has suffered damage on account of the water pollution in a river caused by the municipality by discharging into the river the insufficiently treated sewage.\textsuperscript{70} This decision raises some contradictions, specially when a municipality or other body discharges such sewage or effluents into a river after compliance all the statutory formalities and even then the use of that water remains harmful. The Act says only about the ‘fouling water’, which may not be pollutant according to the standards fixed under the Water (Prevention and Control of Pollution) Act or the Environment (Protection) Act. The Supreme Court of India has held that the right to protect the environment is the inalienable common law rights of every person.\textsuperscript{71} The common law remedies are either damages or injunction.

5.9 DAMAGES:

Damages are the compensation payable by the defendant to the plaintiff for the commission of tort. Damages may be either substantial or exemplary. Substantial

\textsuperscript{68} Nicholls v Ely Beet Sugar Factory Ltd., (1936) Ch 343., qu. Bell, ibid.
\textsuperscript{69} Crossley and Sons Ltd. V Lightowler, (1867) LR 2 Ch. App 478, qu, Bell, ibid.
\textsuperscript{70} AIR 1988 SC 1115.
\textsuperscript{71} Vellore citizens’ Welfare Forum v. Union of India, AIR 1996 SC 2715.
damages are the monetary compensation awarded to the plaintiff with the object of restitution, i.e., to restore the plaintiff to the earlier position he or she would have been if the tort had not been committed. This damage normally corresponds to the actual injury. There is no penal attitude. But the exemplary damages are intended to punish the defendant for his outrageous conduct or act. In J.K. Galstaun v. Dunia Lal,72 the defendant discharged obnoxious refuse-liquid from his manufacturing unit into the municipal drain, which caused the nuisance to the plaintiff. The subordinate court issued the perpetual injunction against the defendant.

In appeal, the defendant was ordered to pay exemplary damages because of his conduct. Here the object is to deter the wrongdoer. Similar view was expressed in the Shriram Gas Leak case. The compensation was correlated to the magnitude and capacity of the unit and has a deterrent effect.

So far as the exemplary damages, as distinguished from substantial damages, are concerned, they are intended to punish the defendant for outrageous nature of his conduct more by way of deterrence. The Supreme Court in M.C. Mehata v. Union of India propounded a theory of far-reaching importance, particularly when it results in environmental hazard. The compensation must be correlated to the magnitude and capacity of enterprise because such compensation must have a deterrent effect.

5.10 INJUNCTIONS:

Injunction is the judicial process where a person, who infringes, or causes to infringe, the right of another by his acts or omissions, is restrained from doing such acts or omissions. Injunctions are granted at the discretion of the court. When it restrains anybody from doing certain acts, it is negative injunction, when it requires anybody to do something, it is positive injunction.

Injunction may be permanent, i.e., perpetual, or temporary. A perpetual injunction is guided by the Sections 37 to 42 of the Specific Relief Act. It permanently restrains the defendant from doing the act complained of at the discretion of the court after adjudging the merit of the case. It is granted when damages appear to be not sufficient relief. The court must be satisfied that the damage that the defendant would suffer by grant of

72 (1905) 9 CWN 612.
injunction is overweighed by damage the plaintiff would suffer if the injunction were refused. Impact upon the third party is also considered. In Shriram Case, the court did not order the closure of the factory, because that would throw more than 4000 persons out of employment.

The order 39 of the Civil Procedure Code guides temporary injunction. It may be granted on an interlocutory application also at any stage of the suit. Under rule 1, of the order 39 of the C. P. C. temporary injunction will be granted where it is proved:

i) that any property in dispute in a suit in danger of being wasted. Damaged, or alienated by any party to the suit, or wrongfully sold in execution, of a decree, or,

ii) that the defendant threatens, or, intends, to remove or dispose of his property with a view to defrauding his creditors, or

iii) that the defendant threatens to disposes the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit.

The Supreme Court held that the courts have an inherent power to grant temporary injunctions in circumstances not covered by the order 39, if the interest of justice so requires. Three guiding principles are there:

1. there must be, *prima facie*, a case;

2. there is likelihood of the irreparable damage of the plaintiff, if injunction is not granted,

3. the balance of convenience is in favour of the plaintiff (showing that the inconvenience to the plaintiff if temporary injunction is withheld exceeds the inconvenience to the defendant if he is restrained).

5.11 DOCTRINE OF PUBLIC TRUST:

In a famous environmental Pollution case\(^73\), this doctrine has been propounded by the Supreme Court of India and has been adopted in our legal system. The notion is that of the public has a right to except certain land and natural areas to retain their natural

\(^73\) M.C. Mehata v. union of India (Span Motel cases), 1997 (1) SCC 388.
characteristics. In this case vast area of forest area was granted to a Motel for construction of hotel in Kullu Valley in the river Beas. By various construction works, the flow of the river was diverted, forestland was destroyed and the ecological fragile area. It may be mentioned that there was no precedent in this aspect.

The ancient Roman Empire developed a legal theory known as the 'Doctrine of Public Trust.' It was founded on the ideas that the Government in trustship for the free and unimpaired use of the general public held certain common properties such as rivers, seashore, forests and the air. The Roman Law states these resources were either owned by no one (res nullious) or by every one in common (res communious). Under the English common law, however, the sovereign could own these sources, but the ownership was limited in nature, grant these properties to private owners if the effect was to interfere with the public interest in navigation or fishing. Resources that are suitable for this use were deemed to be held in trust by the Crown for the benefit of the public.

This doctrine rests on the principle that there are certain resources like air, sea, water and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them subject of private ownership. The said sources are the gifts of the nature. They should be made freely available to the general public rather than to making them subjects for the private ownership. According to Sax the three types of restrictions are applicable upon the governmental authority:

1. The trust property must not only be used for public purpose, but it must be held available for use by the general public,

2. The property may not be sold, even for fair cash equivalent,

3. The property must be maintained for particular type of use.

The reviewed a number of judgments including the Mono Lake case. In this case the environmentalists filed a suit against the Los Angles city authority, which was drawing water from Mono Lake, a large saline lake rich in brine shrimps and bird life. As a result of the diversion, the lake level was falling, marring the scenic beauty and imperiling the birds. Accordingly, the plaintiff's claim was upheld using the Public Trust Doctrine and the Los Angel's water diversion was superseded.
The court has no hesitation in holding that the Himachal Pradesh government committed the patent breach of public trust doctrine by leasing the ecological fragile land to the Motel management, set aside the lease transaction and further held the followings:

i) The Public Trust Doctrine will be the part of our legal system,

ii) Approval granted by the Central Government and the lease granted by the Himachal Pradesh Government who will take over the area and restore the area to its original natural conditions,

iii) The motel shall pay the compensation by way of cost for the restitution of the environment and the ecology of the area. The pollution caused by them shall be removed,

iv) The Motel shall show because why the pollution shall not be imposed upon them.

The Public Trust Doctrine has vast and may serve as a touchstone to test the executive action with a significant environment impact. It may also apply to unregulated areas such as the exploitation of groundwater.

5.12 THE SALIENT FEATURES RELATING TO WATER POLLUTION OF VARIOUS STATUTES:

The various statutory and non-statutory sources in controlling and abating the water pollution are given below in a chronological manner:

1. The Shore Nuisance (Bombay and Kolaba) Act, 1853:

   This Act was enacted to facilitate the removal of nuisance and encroachments below high water mark in the Islands of Bombay and Kolaba. The Act empowers the Collector of Land-Revenue at Bombay to serve notice requiring the removal of any nuisance, obstruction or encroachment are not removed as per notice, the Collector is empowered to remove or abate the nuisance.

2. The Oriental Gas Company Act, 1857:

   Under Section 15 of this Act the Company is liable to pay penalty, if it causes or suffers to be brought, or to flow into any stream, reservoir, aqueduct, pond, or place for water, or into any drain communicating therewith, any washing or other substances
produced in making or supplying gas and the water is fouled. The penalty will be Rs. 1000 and further Rs. 500 for each day, if continued, after the service of notice upon the company by the person whose water is so fouled.

Under Sec. 17 of this Act, the Oriental Gas Company shall be liable to, whenever may water shall be fouled by the gas of the said Company, forfeit to the person whose water shall be so fouled for every such offence a sum not exceeding Rs.200, and a sum not exceeding Rs.100, for each day during which the offence shall continue, after the expiration of the twenty four hours from the service of notice of such offence.

3. The Indian Sarais Act, 1867:

It is a general law dealing with the water pollution. Section 7 of the Act, enjoined upon a keeper of a sarai or an inn to keep certain quality of water fit for the consumption by the persons and the animals using it to the satisfaction of the District Magistrate or his nominee. The act imposes a penalty of Rupees twenty for the failure to maintain the required standard of water. This Act is hardly used in practice. Moreover, the quantum of fine, in comparison to the recent money value, has made it almost obsolete.

4. The Northern India Canal and Drainage Act, 1873:

This Act is intended to regulate irrigation, navigation and drainage in the northern India using and controlling for the public purpose the water of all rivers and streams flowing in natural channels, and oil all lakes and other natural collections of still water. This Act lists certain offences under Sec. 780. This sub-section (3) of this provides that any interference with or alteration in the flow of water in any river or stream so as to endanger, damage or render less useful any canal or drainage work would be an offence.74

5. The Obstruction in Fairways Act, 1881:

The object of this Act is to empower the Government to remove or destroy obstructions to navigation, which may exist in the fairways leading to the ports, and to prohibit the creation of such obstructions for the future. As such, under Sec. 2 of the Act, whenever, in any fairways leading to any port, any vessel is sunk, stranded, abandoned,

74 Sec. 26 (1) and 32(f) of the Forest Act, 1927 may be referred to.
or any fishing stake, timber or other thing is placed, and the Central Government may, if in its opinion such thing is or likely to become an obstruction or danger to navigation –

a) Cause such things or parts thereof to be removed, or,

b) If such thing is not removable in the opinion of the Central Government, cause the same or any part thereof to be destroyed.

The Government has got the power to sell the thing in certain cases. Similarly under Sec.8, the Government has the power to prohibit, by notification, the placing of fishing-stake, casting or throwing of ballast, rubbish or any other things, likely to give rise to a bank or shoal, or the doing of any other act which will cause or likely to cause obstruction or danger to navigation.

6. The Indian Easement Act, 1882:

With regard to the Pollution of Water, the Indian Easement Act, 1882 is one of the earliest statues dealing with the rights of the individuals inter se. The common law doctrine of the riparian rights to the unpolluted water has been codified in this Act. But the other common law remedies under the torts of negligence, nuisance, trespass, and strict liability have not been abrogated. Illustrations 9(f) and (h) of the section 7 particularly refers to the Water Pollution.

Illustration (f) runs as:-

“The right of every owner of land, within his own limits, the water which necessarily passes or percolates by, or over though his land, shall not, before so passing or percolating, be unreasonably polluted by other persons.”

In common law doctrine such rights of riparian owners extend only up to the natural streams. But the scope under this Act is wider as it extends not only upto the natural streams, but also to the water percolating and flowing in an unidentified channel and the stagnant water such as sea, lakes or ponds. Section 7 defines a natural stream, whether permanent or intermitted, tidal or tireless, on the surface of land or underground, which flows by operation of nature only in a natural or known course. The term ‘pollution’ has not been defined in the Act, but it must refer to ‘any alteration of natural
quality of water whereby it is rendered less fit for any purpose for which in its natural state it is capable of being used \footnote{Kailash Thakur, Environmental Protection Law and Policy in India, Deep and Deep Publications, 1999, F-150, Rajouri gardes, New Delhi-110027, P.211.}

Under the illustration (j) of the Section 7 various uses have been mentioned. They are: drinking, household purposes, watering the cattle and sheep, irrigation, or other manufacturing purposes. The material injury to others like owners has been prohibited. A temporary or trifling pollution will not come under this Act as the words ‘unreasonable pollution’ appears.

The illustrative (h) of the Section 7 protects the rights of every riparian owner to get water of a natural stream, natural lake or pond into or out of which a natural stream flows from any material alteration in temperature of water.

Illustration (h) runs as:

“the right of every owner of land that the water of every natural stream which passes by, through or over his land, in a defined natural channel, shall be allowed by other persons to allow such owner’s limit without interruption or without material alteration in quantity, direction, force or temperature; the right of every owner of land abutting on a natural lake or pond into or out of which a natural stream flows, that the water of such lake or pond shall be allowed by other persons to remain within such owner’s limits without material alteration in quantity or temperature.”

The relief is the injunction or the damages from the polluter. The right of the upper land owner to discharge his surface water to the lower land is a natural right and neither is it lost for non-user nor can it be extinguished permanently \footnote{A 1992 Cal 261 (263).}. But the upper land owner has no right to discharge through drain foul refuse water of a factory to land situated on the lower level \footnote{1961 All L J 768 (DB): 1970 Raj L W 461 (463).}. A riparian owner can use water for irrigation, but cannot store water by constructing dam across the stream or channel.
7. The Indian Fisheries Act, 1897:

Poisoning of water and consequent destruction of fish is prohibited by this Act. Section 5 of the Act provided that if any person puts any poison, lime or any obnoxious material into any water with intention thereby to catch or destroy fish he shall be punishable with imprisonment which may extend to two months or with fine which may extend to two hundred rupees.

8. The Indian Ports Act, 1908:

The chapter III and IV of the Act, deal indirectly with the quality of water in course of dealing with the protection and safety of the ports. Sec.10 authorizes the conservator of the forest to remove or cause to be removed any timber, raft or other things floating or being in any part of such port, if these things obstruct the navigation. Any unlawful obstruction is removable under the Sec. 12 of the Act. Similarly under Sec.14 the conservator of the port has the power to raise, remove or destroy any vessel, which is wrecked, stranded, or sunk in the port. Sec. 21 prohibits improper discharge of ballast or rubbish or any other things, which are detrimental to navigation. The special provision is made to the effect that no oil or water mixed with oil shall be discharged in or into any port except in accordance with the rules made under Sec. 6 of the Act.

9. The Indian Steam Vessels Act, 1917:

The Inland Vessels Act does not deal with the water pollution directly. Section 44A imposes duty upon the State Government. If any mechanically propelled vessels or other vessels is wrecked or stranded or sunk in any inland water is a likely to become obstruction, impediment or danger to the safe and convenient navigation or users inland waters or the landing place or embankment or part or part thereof, the government is under duty to cause the vessel to be raised, removed or blown up or otherwise destroyed as the circumstances may warrant. The Government is authorized to recover the cost of such action by selling the property of the vessel in some cases. Not only can these, the government remove any other obstruction caused by any timber, raft, or other thing being in any part of the inland water.
10. The Indian Forest Act and Indian Forest (Conservation) Act, 1927:

Section 26 (1)(i) provides that any person who, in contravention of the rules made by the state government, inter alia, poisons water, shall be punishable with imprisonment for a term of one year or with fine which may extend to one thousand rupees or both.

11. The Damodar Valley Corporations Act, 1948:

The Damodar valley Corporation Act, 1948 authorises the Corporation to frame regulations for prevention of water pollution with the previous consent of the Central Government. The Corporation, in pursuance of the powers so conferred, has framed the Damodar Valley Corporation Regulation, 1957 for the prevention of pollution of water. The regulations provide for the control of pollution of water under the control of the Corporation by persons, local authorities and vessels.

12. The Factories Act, 1948:

The factories Act of 1948 also provides for the effective disposal of water and effluents of a factory by an amendment of 1976 to this Act, Section 12 states that:

"Disposal of waste and effluents- (1) Effective arrangements shall be made in every factory for the treatment of wastes and effluents due to the manufacturing process carried on therein, so as to render them innocuous, and for their disposal.

(2) The State Government may make rules prescribing the arrangements to be made under sub-section (1) or requiring that the arrangements made in accordance with sub-section (1) shall be approved by such authority as may be prescribed."

Non-observance or non-compliance has been an offence under Sec. 92 of the Act. The occupier and manager of the factory shall be liable for the offences so committed and punishable with the imprisonment for a term, which may extend to two years or with fine, which extend to Rs. 1 lakh or with both. In case of continuing offence after the conviction another fine may be imposed.

13. The Orissa River Pollution Prevention Act, 1953:

This Act covers only the river pollution and its application is confined only within the State of Orissa.
14. The River Board Act, 1956:

The object of the River Board Act is to provide for the establishment of the River Board for the regulation and development of interstate rivers and river valleys. As such, under Section 2, the Central Government, in the public interest, should take control of the regulation and development of the interstate rivers and the River Valleys. Though this Act does not deal with anything about the water pollution, it has a bearing on the same. The development and regulation of the river and river valleys will obviously be to protect the natural resources and impliedly includes the issue of the water pollution. For this purpose, the Central Government is empowered to establish, on requesting from the State Government or otherwise, by notification in the official Gazette, establish the River Board for advising the government interested in the regulation and the development of any interstate rivers or river valleys and also about such other purposes, as may be specified in the notification.

15. The Merchant Shipping Act, 1958:

The International Convention for the Prevention of Pollution of Sea by Oil, 1954 has been ratified by India and to effect the provisions contained in the said convention has been given effect to pay Part XI A of the Act. The Convention intended for the ban on the discharge of oil and oily mixture anywhere into the sea except where the instant rate discharge does not exceed the prescribed limit. To give effect to this Convention, the Merchant Shipping Act of 1958 has been amended and many new provisions have been added to tackle oil pollution in seas.

Part XB of this Act, deals with the civil liability for the oil pollution damage. Under Sec. 352H(1)(d), Pollution damage means loss or damage caused outside the ship by contamination resulting from escape or discharge of oil from that ship, wherever such escape or discharge occurs and includes the cost of preventive measures and further loss or damage caused by preventive measures. Sec. 352 I impose the liability for any pollution damage caused by escape or discharge of oil upon the owner of any ship. The exceptions are:
i) if it is the result of any act of war, hostilities, civil war, insurgency or a natural phenomenon of an exceptional, inevitable and irresistible character, or,

ii) if it is the result of act or omission done with intent to cause such damage by any other person,

iii) if it is the result of negligence or other wrongful act of any government or other authority responsible for the maintenance of lights or other navigational aids in exercise of its functions in that behalf.

Under sub-section (3) if the owner can establish that the pollution is the result of the act or omission, wholly or partly, with an intention to cause such damage, of the person who suffers the damage, the owner will be exonerated, wholly or partly, as the case may be, from the liability.

If there is any pollution damage resulting from escaping or discharging oil from two or more ships, all such ships will be severally and jointly liable for all such damage, which are not reasonably separable.

Section 352 J authorizes the owner to limit the liability within a specified sum except in the case when the pollution damage is the result of the actual fault of the owner. But neither any ship of war nor any ship used by the Government of any country for any non-commercial purpose will be liable for the pollution damage as state above.

Part XI A of the Act deals with the Prevention and Contaminant of Pollution of the Sea by Oil. Sec. 356 C (1) prohibits discharging oil or oily mixture from any Indian tanker anywhere into the sea or from a foreign tanker anywhere within the coastal water in India. The following are the exceptions each of which is to be satisfied:

a) Tanker is proceeding en-route,

b) Rate of discharge is does not exceed sixty litre per mile,

c) Total quantity of oil discharged does not exceed 1/15000 part of the total carrying capacity,

d) Tanker is more than 50 miles from the land;

e) Tanker is not within the designated area.
Sub-section (2) also prohibits the discharge of any oil or oily mixture from an Indian ship other than a tanker anywhere into the sea or from a foreign ship other than a tanker within the coastal waters of India except where each of the following conditions is satisfied:

i) the ship is proceeding en-route;

ii) the instant rate of discharge does not exceed sixty litres per mile;

iii) the oil content is less than one hundred parts per million parts of the oily mixture;

iv) the discharge is made as far from nearest land as practicable;

v) The ship is not within the designated areas.

Of course, Sec. 356 D provides some cases where the prohibitions do not apply. Section 356 J authorizes the Central Government, in case of accidental pollution, to take such necessary actions as it may deems fit by serving notice to the owner, agent or master or chartered of the tank or ship etc. Such actions may include the direction for the prevention of escape of oil, or removing oil from tanker, ship etc, or removal of ship or tanker to any other place, or removal of land or dispersal of oil slicks on the surface of the sea.

Under Section 356 K of the Act, where any person fails to comply, or fails to comply in parts, with any notice served on him under Section 356 J, the Central Government may, whether or not such person is convicted of an offence under this Part by reason of his having so failed to comply, cause such action to be taken as it may deem necessary for:

i) carrying out the directives given in the notice issued under Section 356 J; and

ii) Containing the pollution already caused or preventing the pollution threatened to be caused, of coastal waters or, as the case may be, of any part of the coast of India by oil escaped or threatening to escape to from the tanker, a ship other than a tanker, a mobile off-shore installation of any other type.
For the purpose of taking any measures to prevent such pollution the Central Government may require the owner of any Indian ship, tug, barge or any other equipment to put into service for

1. Lightening or transporting any cargo or equipment from or to the polluting ship; or

2. Providing any assistance to any other ship or equipment encased in rendering services under Cl. (1)

Section 356 M, empowers the Central Government to impose Oil Pollution Cess upon every ship calling at any Indian port carrying oil as Cargo.

16. The Maharashtra Prevention of Water Pollution Act, 1969:

It is much more comprehensive statute covering the wide area of application extending not only to rivers but water courses (whether flowing or the time being dry), inland water (whether natural or artificial), subterranean streams or sea to such extent and tidal water to such point as the State Government may a specify in this behalf. The Act for the first time defined pollution in elaborated terms. The Water Board constituted under this Act was given power to control the existing and the new outlets and discharges. The Act provided a separate treatment of different offences, which included the non-compliance with the direction of the Board obstruction in the implementation of the Act.

5.13 Conclusion:

India has a number of legal sources to prevent and control the water pollution. Such legal rules can be divided into two groups: Non-statutory legal sources and statutory legal sources. The non-statutory legal rules are the common law principles under the law of tort.

The common law doctrines of nuisance, trespass, negligence, rule of strict liability and absolute liability, the riparian owners rights are in enforceable in India. Those doctrines enshrined the common law control for the liability for the escape of the noxious objects, careless use of noxious articles and pollutants and the infringement of property rights in water. A number of statutory sources are available to abate the water pollution.
They may be divided into two groups: Pre-Stockholm or the post-Stockholm period. The pre-Stockholm statutes contain the water pollution problems as the passing references. The post-Stockholm statutes have dealt with the water pollution problems and also air in a comprehensive and dedicated manner, through with some limitations.

A development of a citizen’s enforcement culture is therefore a very important step. In the face of administrative inefficiencies in environmental investigations and law enforcement, our present environment desperately needs citizen’s help. It is much cheaper and more efficient to develop citizen’s involvement in a fight against environmental crimes. Certainly, any citizen would know what is going in their locality. They can easily identify pollution situation and hence identify a pollution source. Citizens can work with the PCBs in obtaining documents on the suspect industries under the Right of Information provision; they can also check whether something is being done about an environmental problem in their locality. Since we have recognized environmental laboratories across the country, citizens can approach local or nearby environmental laboratories for identification of a pollutant its sampling and subsequent analysis. Contacts to various regulatory agencies such as the PCB can be established in case of pollution problem. Eventually, a citizen can proceed with legal action by exploring various judicial gateways.

Control of water bodies and organisms serving the purpose of water protection should be reinforced and carried out by all available means including legal enforcement under the provisions laid down in Water (Prevention and Control of Pollution) Act, 1974 and the Environment (Protection) Act, 1986.

Pre Stockholm Statutes regarding water pollution are discussed in this chapter. But Post Stockholm Statutes like the Water (Prevention and Control of Pollution) Act, 1974, the Water Cess Act, 1977 etc, have been discussed under the heading ‘The Prevention and Control of Water Pollution’ in the next chapter.