CHAPTER - 4

ENVIRONMENT PROTECTION UNDER COMMON LAW REGIME: A CONSPECTUS OF JUDICIAL CONTRIBUTION
The preceding chapter has demonstrated the development of International environmental law since the period of Stockholm Conference on human environment till the Johannesburg world summit on sustainable development. During this period, various conventions, protocols, treaties, declarations, agreements and conferences have taken place and have strengthened the international legal regime in developing effective legal control over the environmental pollution in this modern age with the help of effective Judicial response to modern international regime. Ultimately the development of environment jurisprudence in modern regime in India got its strength very effectively from the development of legal control over environmental pollution at International level. But in addition to this Environment protection measures under modern international regime, principle of common law which has been developed in United Kingdom (UK) and based on the customary law of that country, has also played a very significant role in developing legal principle for environment protection in India under Judicial perception. Therefore it is essential to discuss the principles of environment protection under common law regime and a conspectus of Judicial contribution in developing such principles and this chapter is devoted to that objective.
4.1 Common Law Actions

4.1.1. General Overview

According to the Osborn’s Law Dictionary, Common Law is – “That part of the Law of England formulated, developed and administered by the old common Law courts, based originally on the common customs of the country, and unwritten. It is opposed to equity (the body of rules administered by the court of chancery); to statute law (the Law laid down in Acts of parliament); to special law (the law administered in special courts such as ecclesiastical Law, and the Law merchant); and to the civil Law (the Law of Rome).” Common Law has been also explained in Black’s Law Dictionary in following manner - " As distinguished from statutory law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action, relating to the government and security of person and property, which derive their authority solely from usages and customs of immemorial antiquity, or from, the judgments and decrees of the court recognising, affirming, and enforcing such usages and customs ; in this sense, particularly the ancient unwritten law of England. In general, it is a body of law that develops and derives through judicial decisions as distinguished from legislative enactments”.

In broad sense, "Common Law" may be designated as that part of the positive law, juristic theories and ancient customs of any state or nation which is of general and universal application. Actually common

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Law is neither a Local Law, nor the result of legislation. It is crystallised and formulated out of common sense of the community. This common Law has been originated in England as a customary Law based on judicial decision, but not on the basis of any legislative work. The most important part of the common law, as practiced in England is the law of Torts i.e. the law of civil wrong.

The Rules of Law of Torts had been introduced in India under British rule. Initially Law of Torts had not been practiced outside the Presidency towns. Like, Calcutta, Madras and Bombay. Ultimately all the Indian Courts at all level outside those Presidency Towns began to reconcile disputes with the help of equity, justice, and good conscience, the basis of common law, while there was no availability of any provisions of statute for application. Courts began to follow the English Common Law in deciding suits for damages against tort, the civil wrong in India. During eighteenth century, Indian courts had evolved certain principles of Law of Tort acceptable under Indian conditions and those principles of Law still Prevail even after independence and Indian constitution coming into force. Actually Article 372(1) of the constitution of India\(^3\) has made the principle of law of Tort, based on common law in operation, Since the provision of Article 372 of the constitution of India has ensured the continuance of all the existing laws in India at the time of constitution coming into force, including the principle of common Law.

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3. Article 372(1) of the constitution of India says as follows: "Notwithstanding the repeal by this constitution of enactments referred to in article 395 but subject to the other provisions of this constitution, all the law in force in the territory of India immediately before the commencement of this constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority."
Law of Torts is an instrument by which rights and interests of the people can be protected from its infringement by the wrong doers and it can provide remedies to the said infringement of a legal right of a person and violation of a legal duty.

The principle of Law of Torts can be invoked as the common Law remedies in connection with various environmental problems. Actually it can provide remedies against the damage, as sustained by any person or a body corporate either in respect of his body or his property, due to pollution, caused by the activities of another person. Remedies are usually available in the form of compensation or damages within the domain of this common law action. In addition to this type of remedy, other remedies are also available, such as injunction, abatement, etc. It may be mentioned here that the common Law action is mainly a reactive and compensatory mechanism, but in some cases it is also invoked as a preventive measures in the form of injunction.

An award of damages to the claimant, who had sustained injury due to act of others, is available under common law action only to put such person in the same original position where from it would have been appeared that no tort had been committed against him. Claimant may also seek an injunction to restrain the wrong doer who is causing injury to the claimant’s interests as common law remedy under the principle of Law of Torts. Actually this common Law remedy is required only to stop or to restrict the wrong doer from continuing activities detrimental to the interest of the claimants.
The common Law action under the perview of Law of Torts provides various kind of reliefs, as discussed below.

4.1.1.a Damages

Damages are the pecuniary compensation as payable to the complainant in case of infringement of a legal private right amounting to legal damage or actual damage caused due to the wrongful act committed by the wrong doer.

The most common form of damages, as awarded by the court to the complainant, are compensatory damages which are usually awarded to the claimant, who sustained injury for the loss as suffered.

Amongst other forms of damages, some times aggravated damages are also awarded when the court desires to express disapproval of the defendant's/wrong doer's conduct and to compensate the claimant for the damage what he suffered more than normal expectation.

In addition, court can also award punitive/exemplary damages when court intends to punish the tort feasor by awarding some additional award of compensation along with compensatory damages. Actually it is an effort to prevent others from committing from similar wrong act in similar fashion. Awarding this particular form of damages may be appropriate in environmental cases, where industrial operators may feel that it would be more profitable to continue their industrial operation being perpetual source of pollution in the locality and to the compensatory damages as awarded for his tortious act as its consequence, rather to cease production or to operate his industrial unit.
with such technique having its minimum pollution effect.

Award of exemplary damages is usually guided by the principle as settled in an English reported case, *Rookes vs. Barnard*\(^4\) where it has been held that exemplary damages can only be awarded in the following case—

1. Where servants of the Government act in an oppressive, arbitrary or unconstitutional way;

2. Where the defendant’s conduct is calculated to profit from the tort;

3. Where the statutory provision, expressly permits the payment of exemplary damages.

Exemplary damages are intended to punish the defendant for outrageous nature of his or her conduct, as for instance when he or she persists in causing a nuisance after being convicted and fined for it, as it had been held in an early case in India, *J. C. Galstaun vs. Dunia Lal Seal*.\(^5\) Recently Indian Supreme Court recognised deterrent objective in awarding exemplary damages by the Court against the wrong doer. In the shriram Gas Leak case (M.C. Mehta vs. Union of India)\(^6\), Supreme Court observed that compensation must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect.

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4. \([1964]\) 2 WLR 269.
5. \([1905]\) 9CWN 612 (617)
4.1.1.b Injunction

Claimant may also seek an injunction as remedial measures for damage as sustained by the claimant due to the tortious act of the defendant under the common Law action.

An injunction is a judicial order to restrain the commission, continuance, or repetition of some wrongful act of the party. Injunction usually allows the court to require the defendant, who continues the commission of wrongful acts, to stop offending operations. It may be stated have that for obtaining an order of injunction the claimant just have a strong case in his favour. Unless it is proved in the court that defendant’s activities are having an adverse impact upon the claimant/plaintiff, court would be reluctant to grant injunction. If claimant/plaintiff able to prove it, only in that case court would restrain the defendant’s activities amounting to nuisance either totally or partially. It appears from an English case, *Halsey vs. Esso Petroleum Co. Ltd.* how the plaintiff successfully obtained an injunction relating to noise from the defendant’s boilers and vehicle movements to and from the plant.

Injunction always appears as a powerful common Law weapon against the polluters and their activities causing environmental harm. Actually injunctive relief are more effective than any other relief available under common law action in abating pollution. Injunction can mainly be classified as mandatory injunction and prohibitory injunction, based on its nature.

By passing the order of *Mandatory injunction*, Court will prevent
the defendant from making further damage. Actually, in this case, court would order the defendant to undo or remedy the damage.

On the other hand, by passing the order of prohibitory injunction court use to order the defendant not to continue any wrongful act and duration of such prohibitory injunction is determined by the court considering the offending act and its effects. In addition, order of Interlocutary injunction can also be allowed by the court to compel the defendant to take appropriate action to stop its operation responsible of damage as sustained by the claimant/plaintiff or remedy the damage pending the full hearing of the dispute.

A court way permanently restrain the defendant by granting permanent injunction against the defendant who has been continuing a tortious act. In a reported case, Ram Baj Singh vs. Babulal, defendant had been permanently, restrained from using a brick grinding machine polluting the air of a neighbouring medical practitioner's consulting room by way of discharging hazardous dust. This is the glaring example where Indian Judiciary tried to restrain the polluter permanently from polluting the environment by passing an order of permanent injunction.

In granting permanent injunction test of ‘balance of convenience’ must be proved. Court of Law must be satisfied before granting permanent injunction that the damage as to be suffered by the plaintiff due to refusal of injunction would overweigh the damage what may be suffered by the defendant due to granting of injunction against him.

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8 AIR 1982 All 285.
It may be mentioned here that court may grant order of injunction to restrain anybody from doing any action, if complaint, as made against such activity, is of substance and reasonable. So in that sense, injunctions are restricted in nature. It can not be considered as unlimited. It is the discretionary power of the court whether it would award damages and would pass a order of injunction, if it is felt necessary by the court.

4.1.1.c Abatement

Under common Law action, another remedy against tortious act of other people is ‘abatement’ which is known as ‘self help’ remedy. Actually sometimes it requires an immediate remedy against the damage caused by injury as sustained by the affected person and such person can not wait for other kind of remedy which would be provided slow progress of the ordinary forms of Law, because of gravity of the damage demands such early relief and immediate remedy.

In an English case, Burton vs. Winters\(^9\), principle, as well as the implication of remedy of abatement, as sanctioned under the common Law action against tort, specially statutory nuisance, had been well clarified. It was stated there that abatement had been a summery remedy which had been only justified in such case, where the nuisance or trespass would not justify the expense of legal proceedings or in such case where an urgent remedy is required. Such type of remedy is actually meant for abating the tortious act which is responsible for pollution amounting to harm to the health and well being of the people to such an extent that it requires urgent remedy.

\(^9\) [1993] 1 WLR 1077.
This principle of common law remedy in the form of Abatement had been well invoked in the ‘Bhopal Gas Leak’ case (Union Carbide Corporation vs. Union of India and Others)\textsuperscript{10}. In this case, Damages were sought on behalf of the victims of Bhopal Gas Leak mass disaster and immediate relief to the victims was required. Here Supreme Court had examined the prima facie materials as to the basis of quantification of damages including the prospect of delays inherent in the judicial process in India.

After realising the intense and unrelieved suffering of the victims of Bhopal Gas Leak disaster and the compelling need for urgent relief for them, supreme court had settled the amount of damages and issued the direction for payment of such settled amount immediately to the victims.

So tremendous suffering of thousands of persons had compelled the court to move into the direction of immediate relief, since there was an urgent necessities to remedy the tort act which caused the immense damage to the victims. Actually such type of remedy is meant for abating the tortious act which is responsible for pollution.

As it has been mentioned earlier that action brought under the Law of torts within the domain of principle of common law, is the oldest legal remedy, as introduced by the British Government, in British India. This principle of Law had been invoked by the court of laws to abate pollution and to prevent degradation of quality of environment within the traditional frame work of adjudication system. Provisions of various legal sanctions within the domain of the law of tort, particularly with regard to public and private Nuisance, Negligence, strict and absolute liability are of

\footnotesize{\textsuperscript{10.} AIR 1990 S.C. 273}
immense importance, even in the present Indian Legal scenario for the protection of environment, as discussed under the following heads.

4.1.2 Concept of Nuisance And Remedies

4.1.2.a Concept of Nuisance

Black describes Nuisance as something that — "activity which arises from unreasonable, unwarranted or unlawful use by a person of his own property, working obstruction or injury to right of another, or to the public, and producing such material annoyance, inconvenience and discomfort that law will presume resulting damage."11

Ordinarily nuisance means any act which offends others and creates annoyance. Actually a 'nuisance' is an inconvenience materially interfering with the ordinary comfort of human existence. Nuisance is of two kinds, one is public nuisance and other is private nuisance.

A public nuisance can be defined as an unreasonable interference with rights which members of the community might otherwise enjoy. In Attorney General vs. K. PYAO quarries Ltd.12, it has been held that any nuisance is 'public' which materially affects the reasonable comfort and convenience of life of a class of her Majesty's subjects. According to Ratanlal and Dhirajlal, "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

12. (1957) All ER 894 CA.
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."13

Commission of an actionable wrong having some material effect on a large number of people is considered as public nuisance. In an early case, *Malton Board of Health vs. Malton Manure Co.*,14 it had been held that acts, which would seriously interfere with the health, safety, comfort or convenience of the public generally or which tend to degrade public morals, would have always been considered as public nuisance, e.g. carrying on trades which cause offensive smells, or 'intolerable noises'.15

The activities, amounting to public nuisance in connection with the environmental pollution, may include carrying of Trade and business causing offensive smells, intolerable noise, vibration and also generating dust and rubbish and discharging the filthy and trade refuse what would affect the health and hygiene of the people of the locality.

In a reported case in England, *R vs. South West water Authority*16, supply of water contaminated with aluminium sulphate which endangered the health and comfort of the public has been held as public nuisance.

This case was started under the following circumstances, when in July, 1988, 20 tonnes of Aluminium sulphate was put into the wrong tank at a water treatment work. After the incident, although the alarm was

13. See the note Supra 11.
15. Lambton vs. Mellish [1894] 3 Ch. 163.
raised almost immediately, but remedial measures had not been taken for several hours and in the mean time, there had been reports of water smelt and tasted foul, and black in colour. It were also reported that water burnt the mouths and hair and stuck fingers together. Later it was reported that the water had caused considerable personal injury in the form of hair loss, nail deformities, rheumatism, diarrhoea and memory loss. So that act caused considerable damage and harm do the public.

Considering aforesaid facts and circumstances, in this case\textsuperscript{17}, ultimately court found the authority guilty of committing a public nuisance by supplying water contaminated with aluminium sulphate which endangered the health or comfort of the public. Ultimately in this case,\textsuperscript{18} the authority was fined £10,000 and was ordered to pay costs of £25,000. So this English case is the glaring example where public Nuisance amounting to environmental pollution has been dealt with under the domain of Law of Torts and provided with the damages as remedy.

In an early case in India, the \textit{Land Mortgage Bank of India vs. Ahmed Bhoy and Kesow Ram Ramanand}\textsuperscript{20}, it was held that smoke, cotton fluff and noise of machinery, comming out of a cotton mill causing discomfort to the neighbouring householders had been the example of public nuisance. In \textit{Dwarika Prasad vs. Dr. B. K. Roy Chowdory}\textsuperscript{21}, it has been held that there can be no public nuisance unless the general public of the locality is affected by the nuisance.

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\textsuperscript{17} R. vs. South West Water Authority [1991] LMELR 2(3) 65.  \\
\textsuperscript{18} Ibid.  \\
\textsuperscript{19} Ibid.  \\
\textsuperscript{20} (1883) ILR8 Bom 35.  \\
\textsuperscript{21} AIR 1950 Cal 342.
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In the famous Ganga Pollution case supreme court held— "The nuisance caused by the pollution of the River Ganga is a public nuisance, which is wide spread in range and indiscriminate its effect and it would not be reasonable to expect any particular person to take proceedings to stop it as distinct from the community at large."22 In this case supreme court justified the maintainability of public interest litigation as a remedial measure against such public nuisance.

In this case, dischargeing of untreated effluent into the river water causing water pollution had been held as an act of public nuisance, since by this act, common people suffered wide spread damage in respect of their health and hygiene. In this case as remedial measures Supreme Court issued various directions upon the Kanpur Nagar Mahapalika to maintain the wholesomeness of the water of river ganga.

In addition to public nuisance, there is also another kind of nuisance and that is private nuisance.

According to Ratanlal and Dhirajlal, "Private nuisance is the using or authorizing the use of one's property or of anything under one's control, so as to injuriously affect an owner or occupier of property by physically injuring his property or by interfering materially with his health, comfort or convenience."23

Private nuisance was defined in Read vs. Lyons & Co. Ltd.24 as unlawful interference with a person's use or engagement of Land or some right over, or in connection with it.

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24. [1947] Ac 156; [1946] 2 All ER 471
Actually Private nuisance in an act affecting some particular individual or individuals as distinguished from the public at large. Private nuisance is in the nature of injuries caused to the property by infringing the easement rights, such as the obstruction of light or of rights of way or of the diversion of water course etc. or infringing other rights attached do the property. Such infringement can also be happened by creating noise, discharging noxious vapours, smoke and things of that type.

Activities amounting to private nuisance in relation to environmental pollution can also be taken into the cognizance within the domain of common Law action. It covers a wide range of interference with the use and enjoymnt of one's land or property due to pollution of water, air including creation of obnoxious smell and generating of undesirable noise, etc. In case of an action against private nuisance injunctive relief, as well as damages can be available as remedial measures.

In a reported case, Dhannal Lal and another vs. Thakur Chittar Singh, Mehtap Singh25, it was held by the court that constant noise, which was abnormal or unusual, could be actionable as private noise if it would interfere with another physical comfort. It had been also held in this case26, that the person causing nuisance might be restrained by injunction, although he might be conducting his business in a proper manner according to rules framed in this behalf either by the municipality or by the state.

It has been also held that a man is entitled to the confortable enjoyment of his dwelling house and to carry on ordinary conversation

25. AIR 1959 MP 240.
26. Ibid.
in that house without substantial interruption from any abnormal noise and if his neighbour makes such a noise as to interfere with the ordinary use and enjoyment of his dwelling house so as to cause serious disturbance to the ordinary conversation amongst the occupiers of the dwelling house, the owner or the occupier is entitled to be protected from it by means of an injunction.

In a reported case, *Dr. Ram Baj Singh vs. Babulal*[^27], a permanent injunction had been issued against the defendant/respondent owner of the brick grinding machine restraining him from using his brick grinding machine considering the damage, sustained by the Plaintiff/Appellant, a practising doctor, as "special damage" or 'particular damage' i.e. the damage which had been personal to him as opposed to the damage or inconvenience caused to the public at large or to a section of the public, during the operation of a brick grinding machine operated by a naughbour.

*Actually in this case*[^28], an action was taken by a practicing doctor against the operation of brick grinding machine generating dust which used to make the atmosphere polluted and the inconvenience as suffered by the said doctor and his patients who used to come to his chamber due to such pollution. Ultimately, the court granted a permanent injunction against the defedant, the wrong doer, restraining him from running his brick grinding machine.

### 4.1.2.b Remedies

In both kind of nuisance act, i.e. public and private nuisance,
remedial action, as granted with the domain of common law action, is injunction. Injunction, a judicial process by which the person creating nuisance would be restrained from doing so and in that case, the proceeding of injunction may be regulated by the provision of order 39 of the Code of Civil Procedure (CPC) in a civil suit proceeding. It may be mentioned here that in case of relief available to private nuisance, damages are also provided in the civil court along with granting injunction.

Section 91 of the Code of Civil Procedure, provides (CPC) some remedial measures to combat public nuisance amounting to environmental pollution. Under the provision of this section 91 of the CPC, in case of public nuisance or other wrongful act affecting or likely to affect the public, a suit for declaration or injunction or for such other relief may be instituted by the Advocate General; or by two or more persons with the leave of the court, even though special damage has been caused to such persons by reason of such public nuisance. In this regard, in one reported case, *Md. vs. Municipal Commissioner*, opening of burial and burning ground near residential house had been treated as public nuisance by the court of law to attract the provision under sec. 91 of the Code of Civil Procedure.

Remedial measures against public nuisance can be also available under the provision of section 133 of the Code of Criminal Procedure

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29. Order 39 of the C.P.C. Says as follows:
"(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or no, the plaintiff may, at any time after the commencement of the suit, and either before or after judgement, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The Court may by order grant such injunction on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit."

30. ILR 25 Mad. 118.
(Cr. P.C.) where under an executive Magistrate can interfere and remove a public nuisance in the nature of environmental pollution. Under this provision of section 133 of the Code of Criminal Procedure, either on receipt of a report of a police officer or on other information and taking such evidence as he thinks fit, a district magistrate or Sub-divisional Magistrate or any other executive magistrate being specially empowered in this regard by the State Government, can make a conditional order to remove public nuisance. As per this provision of the Code of Criminal Procedure, if the wrong doer, the nuisance maker objects against enforcement of such order, executive magistrate will make such order absolute.

In this regard, Ratlam Municipal Council case\(^3\) is the glaring example. In this case, Supreme Court has confirmed the role of Executive magistrate to remove the public nuisance by invoking his power under the provision of section 133 of the code of criminal procedure. Here Supreme Court has considered that the processes, envisaged under the provision of section 133 of the Cr. P. C., have a social justice component. In this case\(^2\), Supreme Court held the view that statutory authorities should not neglect their duties by urging in self-defence, such as insufficiency of fund, etc, which may not enabling them to remove gurbage from the locality and to keep the environment clean, since decency and dignity are non-negotiable facets of human rights and are a first charge on the local self-governing bodies. So the decision of Supreme Court in Ratlam Municipal Council Case\(^3\)


\(^{32}\) Ibid.

\(^{33}\) Ibid.
confirmed the applicability of the provision of section 133 of the Code of Criminal Procedure, in protecting the environment from the hazardous effect from pollution treating it as a public nuisance.

4.1.3 Concept of Negligence and Remedies

4.1.3.a Concept of Negligence

Negligence is simply a neglect of care which are to be exercised compulsarily towards somebody.

According to winfield, Negligence—"as a tort is the breach of a Legal duty to take care which results in damage, undesired by the defendant to the plaintiff."

In an English case, Blyth vs. Birmingham Water Works Co. it has been held that “Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”

In Lochgelly Iron and Coal Co. vs. McMuslen, meaning of negligence has been given as "more than heedless and careless conduct." In view of the judgment of this case, negligent act properly connotes the complex concepts of duty, breach and damage thereby

35. (1856) L.R.11 Ex 781.
36. (1856) L.R. 11 Ex 781(784).
37. [1934] AC 1
suffered by the person to whom the duty was owing.

Any action may be considered as Negligent action if there is a breach of duty what is to be owed to the claimant/plaintiff by the defendant and such breach of duty will result damage which is foreseeable.

Under the domain of common law action, to prove the negligent act, it is necessary to go on to establish that the defendant was in breach of his duty of care and such breach of duty resulted in damage. In order to determine whether there has been any breach of duty of care or not, it is very much necessary to understand the conduct of the defendant and also to find out whether the defendant has achieved the standard of care which is required to establish him as not liable in such act under the perview of law of tort. It may be mentioned here that an action against negligence can only be taken when the negligent act will cause or contribute to personal injury or damage to the property and such damage must be reasonable foreseeable, since defendant will not be liable for the unforeseen consequences of his negligent act. So foreseeability of the harm or damage, which may be caused to the person individual or his property, is a necessary pre-requisite of liability in negligence.

4.1.3.b Remedies

The test of foreseeableability has been well established in an English case, *Cambridge Water Co. vs. Eastern Counties Leather Plc.*\(^39\) In this case\(^40\), remedy against negligence had been decided by invoking

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the test of foreseeability. Here it has been held that the supervisor, who was in charge of overseeing the operation of the defendant's tannery, would have foreseen the consequence of continuous spillages of solvents, which might result in generating solvent fumes affecting the breathing of the defendant's employers. So, here, court had confirmed the liability of the defendant in case not taking steps in possible damage which had been foreseeable. On the contrary, court did not hold the defendant liable, for the contamination of ground water due to migration of chemicals in sub-surface strata at the time of spillages of solvents, since such thing was not so well known and the supervisor could not reasonably have foreseen such harm or possible damage.

One reported case, Naresh Dutt Tyagi vs. State of U.P.41 is the classic example of a case related to the act of negligence in India. The fact of the case is that chemical pesticides were stored negligently in a godown in a residential area. Fumes of pesticides had been emanating from the said godown being leaked through the ventilators and caused the death of three children and an infant in the womb of a mother who had been living in an adjacent area of the said godown. Ultimately in this case, court had considered it a clear case of negligence and awarded appropriate relief of compensation to the victims who sustained emence damaged, due to fumes of pesticides emanated from the godown. So in this case court has provided an appropriate relief against damage caused by pollution as taken place due to negligent act of the defendant.

From the afore said decision of the Supreme Court, it appears that

41. 1995 Supp.(3) SCC 144.
under the domain of common law action, appropriate relief are available against the damage sustained by the plaintiff arising out of pollution caused by negligent act of the defendant, the wrong doer.

In another case, *M/s. Mukesh Textile Mills (P) Ltd. vs. H.R. Subramannya Sastri and Others*, a common Law action for negligence had been brought to prevent environmental pollution.

In the instant case, the defendant, the owner of a sugar factory adjacent to the large cultivation land owned by the plaintiff, stored large quantities of molasses, a bye-product in the manufacture of sugar, in a mud tank, situated very close to the plaintiff's land, separated only by a water channel. Here admittedly, rodents had burrowed holes into the earthen embankment of the tank which rendered its walls weak and ultimately at one night, there was a breach of the tank and large quantity of molasses, stored in the said mud tank, over flowed and emptied themselves into the said water channel, molasses spread over plaintiff's Land damaging the standing paddy and sugarcane crops raised by the plaintiff in his land. Here in this case, court has considered only one question, that whether the defendant can be held liable for damage caused to the plaintiff's crops due to the negligent act of the defendant.

In this case, the defendant was held wholly liable considering the violation of two principle one of which is the principle of reasonable care and other is non-natural user of the Land' by the defendant. It was held that defendant could reasonably have foreseen that damage was likely to be caused if there was a breach of the tank. There was clearly a duty

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42. *AIR 1987, Kant. 87.*
43. *M/s. Mukesh Textile Mills (P) Ltd. vs. H. R. Subramannya Sastry and others.*

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situations and the defendant had omitted to do what a reasonable man would have done in such circumstances. In the instant case, the damage what was likely to be occurred to the neighbouring land due to breach of a tank in which 8000 tonnes of molasses was stored, was reasonably foreseeable endangering a duty situation. The step, what should have been reasonably taken by the defendant in turn of his duty situation, was to keep the tank in a state of good repair, but the defended did not fulfil his such duty and he was held liable for non performing in his duty situation.

In the instant case, in addition to aforesaid ground of liability, the court also held the defendant liable for putting the land to a 'non-natural user' by storing a large quantity of molasses on the land adjacent to the land of the plaintiff and for collecting certain things, which were intrinsically dangerous or might become dangerous, on his land; since non natural user of land and collecting certain, hazardous and inherently dangerous article which may cause damage after being escaped, in the premises of the defendant will not help to buildup any defence against the liability in terms of the rules set in Rylands vs. Fletcher[^5].

Ultimately in this case[^6], the defendant had been held liable on the basis of above discussed two grounds of liability and directed to pay damages of Rs. 12000/- to the plaintiff along with interest @6% on such amount from the date of suit till the date of realisation of such damages.

In this way, Indian judiciary has successfully invoked the common law action in tortious act in the nature of negligence causing

[^5]: (1868) LR 3 HL 330.
[^6]: Ibid.
environmental pollution resulting damage either to the person individual or to his property.

4.2 Common Law Liabilities in Environment Protection

4.2.1. Strict Liability

Any Tortious Act, either in the nature of Nuisance or negligence amounting to environmental pollution is actionable, if, due to such tortious act, any body sustain injury resulting damage either to the person himself or to his property.

So, being injured by the above mentioned tortious act amounting to environmental disorder, if a person wish to obtain relief against the damage as he sustained, he may sue for damages or injunction or both as a remedy for the loss suffered by the plaintiff against the defendant within the domain of common law action and court may bring action against the defendant if the court is satisfied that defendant is liable for the damage arising out of pollution as sustained by the plaintiff/claimant.

Regarding remedial measures to prevent pollution, sanctioned by the common law against the tortious act, principle of liability can be invoked. This principle of liability includes both, strict and absolute liability. Such rules are applied to a variety of circumstances where in plaintiff sustained damage either due to gas, oil, noxious fumes, explosion, vibrations, fire, etc.
The principle of strict liability has been originated in England in nineteenth century in the case of *Ryland vs. Fletcher*\(^47\). This principle is based on the following consideration of justice Blackburn – "That the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape."\(^48\) According to this principle of liability, as settled in *Ryland vs. Fletcher*\(^49\), if any body brings any thing which would not naturally come upon his land and which itself is dangerous in nature and may cause mischief if such thing is not kept under proper control, though he may act without any negligence or personal willfulness, such person will be liable to pay damages in case of any mischief occasioned therein and as such that person is strictly liable.

So this rule provides that a person who for his own purpose brings on to his land and collects and keeps there anything which is likely to do mischief after being escaped, must keep such article at his peril and if he fails to do so, he will be prima facie liable for the damage which is the natural consequence of its escape. The liability under this rule is strict and it will be no defence that the thing escaped without that person's willful act, default or neglect or even that he had no knowledge of its existence.

But this principle of strict liability is subject to a number of exceptions, such as the act of the God; the act of the third party; the

\(^{47}\) [1868] LR 3 HL 330.
\(^{48}\) Per Blackburn, J., in Fletcher vs. Rylands, (1866) L. R. 1 Ex. 265 (279).
\(^{49}\) See the note Supra 47.
plaintiff's own fault; the plaintiff's consent, the natural use of the Land by the defendant; sanctioned by the statutory authority. If any of such exceptions is attracted in case of tortious act causing harm and injury to the plaintiff as its natural consequence, the person, against whom damages is claimed, would not be liable to pay damages. So defendant can excuse himself from the liability in its strict sense if any article which is likely to do mischief, escape from his custody under the above mentioned exceptional circumstances and cause damage to the plaintiff as its natural consequential effect. But, if the said defendant fails to prove that such escape has taken place under any of such aforesaid exceptional circumstances, the defendant will be liable for damage caused due to escape of such inherently dangerous article.

This principle of strict liability as evolved in 'Ryland vs. Fletcher' case\textsuperscript{50} has been invoked by the Indian judiciary successfully in \textit{Mukesh Textiles Mills case}\textsuperscript{51}.

In this case,\textsuperscript{52} Karnataka High Court held that the Appellant / Defendant, the owner of sugar factory adjacent to the cultivation land of the Respondent / Plaintiff, is liable for damage in the strict sense. In the instant case, Appellant / Defendant stored molasses, a by product in the manufacture of sugar, within a mud tank situated very close to the plaintiff's land separated only by a water channel. Admittedly due to the burrowing activities of the rodents, the said mud tank containing 8000 tonnes of molasses collapsed and that large quantity of molasses escaped through the breach of the tank and spread over plaintiff's land.

\textsuperscript{50} See the note Supra 44.
\textsuperscript{51} M/s. Mukesh Textile Mills (P) Ltd. vs. H. R. Subramaya sastry and others, AIR 1987, Kant. 87.
\textsuperscript{52} Ibid.
after being carried through the water channel. Respondent /plaintiff had filed a suit for damages claiming Rs. 35,000/- as damages and in this case Appellant / Defendant took defence of “act of God”, a rule of exception to the principle of strict liability. Here the trial court held that damages was caused due to negligent act of the defendant and he was liable for it and awarded a damages of Rs. 14,700/-. Ultimately on Appeal, High Court only modified the quantum of damages by fixing it in a sum of Rs. 12,200/- alongwith interest @6% on the said, modified amount of damage from the date of filing the suit to till the date of realisation. Though in this case, High Court modified the quantum of damages but it appreciated the view of trial court regarding award of damages and upheld the order of trial court for awarding damages based on the principle of strict liability, as settled in *Ryland vs. Fletcher* case.

4.2.2. Absolute Liability

This principle of ‘strict liability’ has undergone immense changes in Indian legal scenario. It transformed into absolute liability having its new indigenous character. This new rule of absolute liability had been evolved for the first time in India in ‘Oleum Gas Case’ which is also popularly Known as ‘Shriram Gas Leak case’.

While formulating this doctrine of ‘absolute liability’ in ‘Oleum Gas Case’ chief justices P. N. Bhagwati declared in following unambiguous terms – “We can not allow our judicial thinking to be constricted by

53. See the Note Supra 44.
reference to the Law as it prevails in England or for the matter of that in any other foreign country. We no longer need the crutches of a foreign legal order. We are certainly prepared to receive light from whatever source it comes but we have to build up our own jurisprudence and we can not countenance an argument that merely because the new law does not recognise the rule of strict and absolute liability in cases of hazardous and dangerous liability or the rule as laid down in Ryland vs. Fletcher as is developed in England recognises certain limitations and responsibilities. We in India, can not hold our hands back and I venture to evolve a new principle of liability which English Court have not done.”

Actually it was the view of Justice P. N. Bhagwati as it was expressed in the instant case that Indian Judiciary had to develop its own law and if it had been necessary to construct a new principle of liability to deal with an unusual situation, which had arisen and was likely to arise in future on account of hazardous or inherently dangerous industries, concomitant to an industrial economy, there should not have any reason to hesitate to evolve such new principle of liability, irrespective of the fact that it had not been so done in England.

While deciding the case, Justice P. N. Bhagwati further held that — “We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable..."
duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standard of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part"57.

So from the aforesaid observation, as made by the Supreme Court in this Oleum Gas case, it appears that it is of the view of the Supreme Court that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to any one due to an accident at the time of operating such hazardous or inherently dangerous activity, the enterprise cannot escape its liability by showing that it had taken all reasonable care and there was no negligence on its part, since the duty, as attached to such enterprise carrying on such industrial activity, is absolute without any exception.

Finally in this case58, it has been held by the supreme court in the following manner "We would therefor hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all these who are affected by the accident and such

57. M. C. Mehta and another vs. Union of India and others AIR 1987 S.C. 1086. (1099)
58. See the note Supra 54.
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 vs. Fletcher (supra).”

Subsequently, Supreme Court has also invoked the principle of absolute liability, as evolved in the Oleum gas case, in another well known case, Indian council for Enviro-Legal action etc. vs. Union of India and others etc. In this case, the Supreme Court imposed absolute liability on the enterprises, which may be called “chemical industries”, situated in the Bichhri Village in Udaipur District of Rajasthan, carrying on hazardous and inherently dangerous activity as a result of which highly toxic sludge (iron based sludge and gypsum based sludge) besides other pollutants in the form of untreated waste water had been percolated deep into the bowels of the earth polluting the acquifers and sub-terranean supply of water, after being allowed to flow out freely from the chemical unit without any treatment and the water in the wells and the streams become dirty and unfit for human consumption.

In this case, while applying the rule of absolute liability, Supreme Court held that once, the hazardous or inherently dangerous activity was carried on, the person carrying on such activity was liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while had been carrying on his activity.

59. See the note Supra 57.
60. See the note Supra 54
62. Indian council for Enviro-Legal Action, etc. vs. Union of India and others etc, AIR 1996 S.C. 1446.
63. Ibid.
So in this way, rule of absolute liability has been introduced in the Indian legal system as a new type of tortious liability to remedy the injury caused by the environmental accident and ultimately a concrete shape has been given to the remedial measures available under the law of torts in case of injury sustained by the people due to environmental disorder.

It emerges from the foregoing discussion that the principle of common law, having its source of origin in British customary law, has been well invoked in the Indian legal framework in dealing with pollution problems with its different scope of remedy within the domain of tortious action. Ultimately the concept of nuisance, negligence and the principle of liability with new dimension as developed by the contribution of judiciary of both, India and England, become very much a part of the Indian legal system in dealing with various environmental issues within the domain of common law remedy.