Chapter – V: Analysis of the Judicial Trends related to EIA

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5.1. The Importance of Judicial Interpretation in Evolution and Implementation of Law

It was very rightly said that;

“Making innumerable statutes, men merely confuse what God achieved in ten.”

As we know, that the three vital organs of the state i.e., the legislative, executive and the judiciary, which have been respectively assigned with their designated roles of drafting and enacting of the legislations, executing these legislations and in case of any conflict to render its judicious resolution as per the law of the land. The legislature, being the representative of the citizens of the state, takes into account the will and aspirations of the citizens while enacting any requisite law. While executing these laws through the executive machinery of the state, any ambiguity arises or any violation occurs, then court of law tries to interprete the respective law to derive its contextual and suitable meaning, keeping in mind the intention of the legislator.

The real challenge in drafting of the law for the legal draftsman is that is ‘to be precise without being obscure.’ The further complication is posed when differences appear between the ordinary phraseology, the plain meaning of the terms used in statute, versus the legal phraseology that demands a certain meaning while interpreting the provisions of any statute. What should the judges and lawyers do in such situations? In this context Lord Chancellor advised that;

“Judges ought to remember that their office is jus dicere, and not jus dare—to interpret law, and not to make law or give law.”

It has been a perpetual debate to determine the role and the limits of the judiciary vis-à-vis its counterparts, i.e., the legislature and the executive. Thus, to harmonize the conflict among the three vital organs of a state, the *Doctrine of Separation* was crafted. Whenever the legislature or the executive appears to be in-active or negligent, it is the judiciary which plays a supplementing roles by filling the said gap in governance.

Although, framing of legislative policy and its enactment, is by and large a prerogative of the legislature and the executive, yet the judiciary from time to time has played a significant role in ensuring the effective implementation of the laws by giving appropriate interpretations of the legal text, as well as striking the invalid legislative proposition in the interest of justice. The contribution of the judiciary in shaping the environmental jurisprudence in India is also noteworthy. In this regard, it was very aptly held that;

“The defect of the bureaucratic model of EIA has to a large extent been cured by the judicial activism in a variety of cases.”

There are several cases where the court took proactive role, in all such cases, wherever it apprehended any scope of potential damage to the environment by appointing either a high level committee or expert group to review the matter or by issuing strict directions and guidelines to save the environment. This trend of judicial activism is the evidence of the judicial willingness towards the protection of environment in India.

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As famous jurist Salmond has held that;

“The essence of law lies in its spirit not in the letter.”

For the interpretation of any statutory enactment or legislation, the language used in its text is considered to be the most crucial factor for the determination of the true legislative intent behind it. In this context, the judiciary has evolved few tools, like judicial interpretations and construction, etc to derive the contextual meaning of any provision of a statute for resolving either the question of law or fact brought before it. Through interpretation, the statutory texts have significantly evolved from the narrow proposition of ‘law as it is’, to the liberal proposition of ‘law as it ought to be’.

This chapter focuses on the area of examining the adequacy of the EIA laws in India and in few other countries as well with the help of various judicial interpretations. In India, the ultimate intent, behind legislating the EIA laws was, not only to fulfil the technical requirements of law in letters, but also to synthesize, in true spirit, the developmental process with environmental protection. Thus, the objective is to observe how far the judicial interpretations have been able to expand the scope of the existing EIA laws. The researcher aims to draw a nexus between the judicial interpretations vis-a-vis the development of the jurisprudential aspects of the EIA laws.

5.2. The Discussion and Analysis on the Judicial Trends of EIA Globally

Hereinafter, we would analyse the worldwide judicial trend of EIA by looking into various judicial decisions from India and few other countries to understand the judicial trend and the scope their interpretations.

5.2.1. Giacomelli vs. Italy Case

The first case belongs to Italy, where the applicant, Ms. Piera Giacomelli, was living in a place called Brescia. She lived 30 mtrs., away from a plant which was operating in treatment and storage of some “special waste,” which was partly hazardous. The local authority of Lombardy Regional Council began to grant licenses in 1989 that permitted toxic waste treatment at the rate of 75,000 m³ annually. Later, the EIA decrees issued by the Ministry of the Environment held that the said waste is potentially toxic and can contaminate groundwater, and is in violation of environmental regulations. However, the officials did not release these findings until 2000 and 2001 which was more than a decade after the said hazardous waste treatment had begun. Thereafter, in the year 2002, as per the report from a local health authority, it was concluded that the said waste treatment plant might have caused adverse health effects among local residents. In the light of the above facts, the applicant brought proceedings challenging the decisions of the Lombardy Regional Council for granting the license way back in 1989 without any proper EIA study.

In 1998, the Regional Administrative Court dismissed the applicant’s proceedings, and later in subsequent court decision in 2003 the plant’s operation was ordered for

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suspension. However, the authorities did not enforce the court’s decision. The government contended that, the significant benefit arising from treating waste and boosting the economy, justifies the plant’s operations under Article 8 and 2 of the European Human Declaration (hereinafter referred as ECHR or said convention). The applicant contended that the government failed to take affirmative steps to protect the applicant from noise, odours and emissions in violation of Article 8 of ECHR.

**Issues Raised:**

The applicant alleged, in particular, of an infringement of her right to respect her home and private life, as guaranteed by Article 8 of the said convention. In response to the said issue, the company held that it has already conducted an EIA after establishment of the company.

Keeping in mind the above stated facts, the issues in the said case are as follows:

- Whether such EIA is valid?
- Whether such license granted after such EIA is valid or not?

**Judgment:**

The Court unanimously ruled that there was a violation of Article 8 of the ECHR. The Court first decided that the hazardous waste treatment constituted a serious interference to the rights arising out of Article 8. Furthermore, the Court ruled that the government failed to justify this interference, since they did not strike a fair balance between the interests of the individual occupier and those of the whole community.

The Court reasoned that as per the existing law required an EIA to be conducted prior to licensing process of toxic waste treatment facility; however, in the said case no

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232 Article 8 of the European Human Rights Act – Right to Private and Family Life and Home, ECHR.
such study was done until years after authorities granted the license to operate. Even then, the EIA decree found violations of existing environmental regulations. The court also noted that authorities failed to enforce an Italian administrative court decision to suspend the plant’s operation. Overall, the authorities failed to take reasonable and appropriate steps to uphold Article 8 in favour of the local residents. However, as relief the court only granted under Article 41 (just satisfaction), the applicant 12,000 euros (EUR) for non-pecuniary damage and EUR 8,598 as costs and expenses.

**Principle Laid Down:**

This case demonstrates that, if the conditions required to grant a license for an environmentally harmful process which are not met in the said case and if individuals were unable to enforce this process, this is strong evidence which shows how the authorities failed in their obligation to take reasonable and appropriate steps in securing Article 8 rights. Had the government enforced the relevant court orders and ensured the application of the mitigation measures to reduce pollution, perhaps the interference would have been justified.

### 5.2.2 A Case Concerning Local Pollution in the City of Copșa Mică

The said case was filed in 2004 by the petitioner, a citizen of the state of Romania. The facts and issues had originated way back in 1998, when the metallurgy company *Sometra* (herein after referred as the ‘company’) was accused of causing pollution in the area around the city of Copșa Mică having a total population of 6,000 local inhabitants.

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residents. The petitioner had alleged that due to the pollution caused by the company, the residents of the Copșa Mică were suffering from several health complications. The petitioner had submitted in her complaint that she herself had lived in the said city since her birth in 1964. Thereafter, by 1973, she was forced to leave the city as both she herself and her children were having serious health issues due to the rising pollution levels. According to her, the said company was emitting pollutants in the atmosphere like CO\textsubscript{2}, SO\textsubscript{2} and other toxic colourless gases and along with heavy metals like Pb, Cd, etc., thus, polluting the local environment to a great extent.

In September, 1998, by the said Regional Agency for Environmental Protection (hereinafter, "the Regional Agency") in streams of the city, that the amount of heavy metals present in the samples exceeded the permitted limits. These metals were also found in air, soil and vegetation in quantities upto seven times more than the maximum permissible amounts. Interestingly, the EC was issued by the respective regulatory authority of the w.i. the Regional Agency for Environmental Protection of the state of Romania in favour of the said company.

**Issues Involved:**

The main issues of the case are as follows:

- Whether the application filed by the petitioner is maintainable under the law of the state?
- Whether the authorities of the states have fulfilled their duties of protecting the interest of the complainants under Article 8\textsuperscript{234}?

\textsuperscript{234}Section I – Rights and freedoms - Article 8 - Right to respect for private and family life, of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred as 'the Convention').

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
Whether Article 41\textsuperscript{235} of the said convention would be applicable to provide relief to the complainant?

**Outcome of the case:**

With regard to the first issue the court made reference to the *Rule of Exhaustion*. According to Article 35\textsuperscript{236} of ECHR (hereinafter referred as said convention), the plaintiff is required to exhaust the remedies available at the local and domestic level for the redressal for their complaint before addressing it at higher level. The court also stated that to make this facility available to the common citizens of a state, the real obligation lies on the state to prove that the opportunity for the exhaustion of the

\begin{footnotesize}
\begin{enumerate}
\item There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others, retrieved from http://conventions.coe.int/treaty/en/treaties/html/005.htm [visited on June 5th, 2012.]

\textsuperscript{235}Article 41 – Just satisfaction- If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party, the Convention for the Protection of Human Rights and Fundamental Freedoms, available at http://conventions.coe.int/treaty/en/treaties/html/005.htm, [visited on June, 2012].

\textsuperscript{236}Article 35 – Admissibility criteria:
1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.
2. The Court shall not deal with any application submitted under Article 34 that
   a) is anonymous; or
   b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.
3. The court shall declare inadmissible any individual application submitted under article 34 if it considers that:
   a) the application is incompatible with the provisions of the convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or
   b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the convention and the protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.
4. The court shall reject any application which it considers inadmissible under this article. It may do so at any stage of the proceedings, the convention for the protection of human rights and fundamental freedom, available at http://conventions.coe.int/treaty/en/treaties/html/005.htm, [visited in December, 2012].
\end{enumerate}
\end{footnotesize}
remedy was available both in policy and practice, and it is adequate to satisfy the complainant’s grievances and grant relief as per the mandate of this said convention.

The said petitioner had already rejected similar exceptions to those that the government reiterates in this case, regarding the procedure to criminal and administrative related issues. But the government did not provide any examples of case law or other evidence justifying their reason for departing from the said legal precedents in the given case. Moreover, the respondent state had even failed to present before the court, any such legal precedent to support their decision of not allowing any actions taken against the polluters. Further, the local authorities were under complete statutory obligation for any kind of pollution or nuisance which has caused consequential damage to health and life of the local residents.

The court rejected the government's objection and held that the cancellation of the permit to operate was not the issue raised by the petitioner in the said case. Rather, the main objective of the petitioner was to draw the attention of the court towards the lethargies of public authorities, who have been failing in duty to protect the rights of the locals of *Copșa Mică*. Lastly, the court on its merit, held that the said complaint has been primarily instituted very much within the scope and legal mandate of Articles 35 and 3 of the said convention and also that the petitioner has a *bona fide* cause of action against the polluting company and the negligent state authorities.

With regard to the second issue the court showed its concerned towards the rising pollution levels in the city of *Copșa Mică*, which is detrimental for the all the locals residing there and thus clearly violates their rights of well-being under *Article 8* of the said convention. In its observation, the court stated that the state, under the said *Article 8* of the said convention has an inherent statutory duty which is two folds:
Firstly, a positive duty to protect the welfare and right to enjoy pollution free life for the local families by adopting right kind of preventive measures.

Secondly, a negative compulsion on the state to ensure that there is no arbitrary intrusions by the state and its authorities.

The court further explained that under the said statutory duty, whenever there is any nuisance caused by pollution or any hazardous activity, the state is expected to take a proactive approach towards the issue and take adequate as well as preventive measures to prevent damage to life and welfare of the local citizens. This obligation is to govern the authorization, putting into operation, security and control of the activity in question, and they may impose on any person, affected by its adoption, practical measures to ensure effective protection of citizens whose lives may be exposed to the dangers inherent to the field in question.\(^{237}\)

In this regard, the court also added that in all such afore stated situations it is mandatory that the decision making process above, must first include conducting surveys and relevant studies in order to prevent and assess, in advance, the effects of activities that can harm the environment and the rights of individuals, and thus, allow the establishment of a fair balance between the various competing interests at stake.\(^{238}\)

The court also held that it is pertinent to place on record, the most crucial facts of the case like - there is a significant size of the population residing in the vicinity of the Sometra factories. Additionally, the said respondent factories have been found on record to have constantly caused pollution by releasing many pollutants in the local atmosphere. This was further supported by the credible medical documents submitted by the petitioner to prove the cause and effect nexus between the cause of local

\(^{237}\) Mutatis mutandis, Öneryildiz c. Turkey [GC], no 48939/99, § 90, ECHR, 2004-XII.

\(^{238}\) Giacomelli vs. Italy, no. 59909/00, § 83, ECHR 2006-XII.
pollution and its consequential adverse effects on the local environment, as well as the health of the local residents, especially the poisoning caused by Pb and SO$_2$. Thus, there is a clear violation of right to of respect for private and family life within the scope of the said Article 8 of the said convention.

However, the court expressed that the Romanian state authorities, including the local municipality of Copșa Mică may not directly responsible for the harmful emissions in question. In view of the impact studies conducted at the time of granting EC in 2006 and public debate that preceded it, the court is not in position to question the seriousness of the decision making process and the willingness of authorities to involve local people in Copșa Mică in this process and improve their living environment.\textsuperscript{239} At the same time, the court made it absolutely clear that the said petition very specifically highlights the inaction of the state authorities, which is a great concern for the court. The court also recorded that the respondent company has been found to be negligent towards fulfilling its responsibility of reducing the pollution load. This allegation is more concretely proved by the fact that the both the permits issue to the said industry in the years 1998 and 2006, were conditional in nature, which required the reduction in the existing pollution levels by adopting effective measures within a stipulated time frame, which has remained unfulfilled. The violative actions of the industry went to the extent between the periods from 6th May, 2003 to 12\textsuperscript{th} June, 2006, however the industrial operation of the plant still continued without seeking any sort of environmental clearance and this was recorded by the court as a serious charge against the respondents.

The court concluded, stating, that it is clear that the state has failed to strike a fair balance between the interests of economic well-being of the city of Copșa Mică, i.e.,

\textsuperscript{239}Tatar vs. Romania, No. 67021/01, § 116, ECHR, 2009.
preserving the activity of the main employer in the city and the realization of the applicant’s right to respect for his home and his private and family life, health, etc. Hence, the state was held responsible for violating the Article 8 of the said convention. Further, with regard to the third and final issue, the court rejected the applicant’s (as represented by a Romanian non-governmental human rights organization) claim for financial aid and held that, the said petition does not make a claim for just satisfaction within the time allotted to him. Therefore, the court declined to grant any sum on that account as relief.

**Analysis:**

The case involves some very important provisions of the said convention relating environment and its protection. Further, Article 5\(^{240}\) recognizes the right to healthy environment.

It also recognizes the state’s duty to protect the environment under Article 6\(^{241}\). Further, in Article 7\(^{242}\) of the said convention Inter-state coordination has been mandated. And lastly in Articles 9 and 2\(^{243}\) of the said convention signify the procedure of granting authorization and the maximum period of validation of the

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\(^{240}\) Article 5- “The state recognizes that everyone has the right to a healthy environment, while ensuring:

a) access to information about the quality of the environment (...) 
b) the right to participate in making decisions that concern the development of policy and environmental legislation, the granting of licenses, including plans for land use and planning; c) the right to address, directly or through associations, administrative or judicial authorities for the purpose of preventing, or in the case of a direct or indirect damage; d) the right to compensation for damage suffered.”

\(^{241}\) Article 6- “The environmental protection is a requirement of central government authorities, as well as all natural and legal.”

\(^{242}\) Article 7- “The responsibility for coordination and control of environmental protection equivalent to the central authority for environmental protection and its territorial agencies.”

\(^{243}\) Article 9 & 2- “The authorization may be granted only if there is a project for compliance of these activities with the legislation and the elimination of negative impacts on the environment (...) The competent authorities shall ensure that the conditions imposed by the authority (...) The validity of the license is 5 years maximum.”
license. The said convention vide Article 12244 also emphasised for the states to include the public in the decision-making procedure for to address their concerns and grievances judiciously. Hence, the said case stands as a prominent precedent in upholding the rights of the local residents against the polluting industries.

5.2.3. *Tatar vs. Romania*245

In this illustrated case of *Tatar vs. Romania*, another example of a causal link between environmental pollution and its consequential actual damage caused to the health of the applicant. In short, the said issue is the causal link between two series of events. However, unlike in the previous case, in the said case, the above mentioned link had apparently not been properly established. In both cases, the conclusions are clearly subject to some notion of causality as it is broadly defined in law.

Despite the above stated difficulties and regardless of the various criticisms as to the failure of the court to take full advantage of all the options offered by its own statute (such as Article 50) *Pulp Mills* case can, nevertheless, stakes a claim to jurisprudential fame due to its unequivocal recognition of the customary status of the requirement to undertake an EIA. Whenever there is risk of pollution which may have transboundary effects. In both these cases, *i.e.* the clarification of the notion of EIA and the use of

244 Article 12- "The opportunity for the public to learn about and participate in decision making is provided by the authority responsible for the protection of the environment which interacts with other structures of central and local government (...) An applicant for an authorization is required, under the supervision of the competent authorities for the protection of the environment, to inform the public projects and activities for which authorization is sought. Public consultation is mandatory for grant of authorization. "

245 No. 67021/01, § 116, ECHR, 2009.
the process mentioned in Article 50 of the ECHR, it remains to be seen in which direction the court will proceed.\textsuperscript{246}

\section*{5.2.4 The Australian case\textsuperscript{247} for the Species Loss of Flying Fox}

The next is related to the loss of a native species \textit{Spectacled Flying Foxes}\textsuperscript{248} are populated in the Wet Tropics (World Heritage Area) in \textit{Australia}. Even though they are considered to be a rare species, yet they are not listed as a threatened species under the \textit{Environment Protection and Biodiversity Conservation Act} (hereinafter referred as the ‘Act’).\textsuperscript{249} The said respondent, \textit{Rohan Brien Bosworth}, was the owner of a \textit{Lychee} orchard\textsuperscript{250} located next to the said Wet Tropics World Heritage Area, use to grow \textit{Lychee} and \textit{Sugarcane}. It is pertinent to note that the said respondent in his 160 hectares of \textit{Lychee} farm was using automatic electrical fences during the harvest season to save his harvest from the said \textit{Flying Foxes}. They turned on automatically in the evening and cease to operate automatically at daylight.

The cause of action arose when the petitioner, who was a researcher as well as a biodiversity conservation activist, received complaints from the local residents regarding the killings of a large numbers of \textit{Flying foxes} near the respondent’s orchard. Then,

\begin{itemize}
\item \textsuperscript{246} Dr. Panos Merkouris, Hague Justice Portal, \textquotedblleft \textit{A case of Pulp Mills on the River Uruguay between Argentina and Uruguay\textsuperscript{248}}
\item \textsuperscript{247} Carol Jeanette Booth vs. Rohan Brien Bosworth [2001] FCA 1453
\item \textsuperscript{248} Biologically known as \textit{Pteropus conspicillatus}.
\item \textsuperscript{249} Environment Protection Act and Biodiversity Conservation Act, 1999 u/Cth, S 3, S 12, S 13, S 171(3), S 475(5), S 522B, S 523 of the Australia.
\item \textsuperscript{250} Located at the property lots bearing no 107 & 108, of the Crown Plan CWL652 at the Parish of Meugna, in the Cradwell County of Queensland state, Australia.
\end{itemize}
the said researcher did a ground survey of said area and found that there were dozens of *Flying foxes* lying dead on the electric fences of the respondent’s *Lychee* farm. The petitioner made a video of the situation and presented it before the court as evidence. A table is referred herein below to show the status of the said issue.

### 11 The statistics of the killings of the *Flying Fox*

<table>
<thead>
<tr>
<th>Date of Count</th>
<th>Dead flying foxes per km wire</th>
<th>Extrapolated total for farm</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>21 Nov</td>
<td>62</td>
<td>409</td>
<td>2 grids of total 1.64 km length were counted</td>
</tr>
<tr>
<td>22 Nov</td>
<td>76</td>
<td>499</td>
<td>1 grid of total 0.8 km was counted</td>
</tr>
<tr>
<td>29 Nov</td>
<td>46</td>
<td>305</td>
<td>4 grids of total 3.16 km were counted</td>
</tr>
<tr>
<td>3 Dec</td>
<td>45</td>
<td>297</td>
<td>6 grids of total 4.16 km were counted, including the 4 grids previously counted. 2 grids were counted quite early and so would have been an underestimate</td>
</tr>
</tbody>
</table>

In his defence, the respondent submitted before the court that the statistical details, which may point the needle of culpability towards him, but the fact is that due to the coinciding of the peak harvest season of the orchard with the breeding time of the *Flying foxes*, the numbers of casualty may appear a bit high. Thus, the figures presented in the above statistical table should be considered as natural cause of casualty which can be related to the lactation season wherein such as foetal deaths, abortions, etc are common at times. However, he pleaded that this year he expects a lower harvest of only 70 to 75 tonnes of fruit, compared to an average of above 250 tonnes, due to the adverse impact of said *Flying fox* invasions.
Issues Involved:

Keeping in mind the above stated facts the issues before the court were as follows:

➢ Whether the electric fences operated by Mr. Bosworth in his orchard have or will have, or is likely to have a significant impact on the World Heritage values of the Heritage Area under Section 12251?

➢ Whether the Spectacled Flying Foxes, as a rare species, contribute to the biological diversity of the world heritage values of the Wet Tropics World Heritage Area?

Outcome of the case:

With regard to the second issue the court accepted the position that the Flying Fox is a rare species and part of the Australia’s unique bio-diversity and the Wet Tropics World Heritage Area, have inhabited here due prior to the disintegration of the Australian plate from the Pangaea. Thus, their survival in the said natural region has a significant impact to their in-situ conservation and in maintaining the local species diversity.

Further, the court found that the operating of the electrical fences by the respondent close to the natural habitat of the Flying foxes is responsible for the large number of their deaths. Furthermore, the court issued a precautionary note stating that if the grid is allowed to continue on an annual basis, only during the Lychee harvest seasons, yet the probable impact of this may result in the dramatic decline in the Spectacled Flying

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251Environment Protection and Biodiversity Protection Act, 1999 -Requirement for approval of activities with a significant impact on a declared World Heritage property : (1) A person must not take an action that: (a) has or will have a significant impact on the world heritage values of a declared World Heritage property; or (b) is likely to have a significant impact on the world heritage values of a declared World Heritage property.
Fox’s population. Thus, as close to next five years the population of Spectacled Flying Foxes may become almost half.

Initially, the application was filed for issuing an interim injunction under Section 475 of the said act, however, it was refused as only the last phase of the harvest remained and granting injunction in this situation would cause unrecoverable financial loss to the said respondent. Thus, after considering the said ground, the court only granted a conditional order instead of a prohibitory order. The court also held that it constitutes a contravention of the said act only when there is no approval regarding the action untaken by the respondents in operation under Part 9 of the said act, Section 54 para 12(2)(a) of the act. The court in its order also issued directions asking the respondent to pay cost only limited to the final proceeding. However, again in 2002 an application was filed by the respondent for granting permission for killing almost 5500 the Spectacled Flying Foxes to the ministry of environment, which was rejected.

Analysis:

Thus, from the aforesaid discussion of the facts and issues, and the judgment given in the Australian case, we can conclude that the there was no precautionary approach taken, neither by the said respondent, while using the hazardous electrical fences next to the Wet Tropics World Heritage Area, which was the natural habitat of the rare Flying foxes, nor by the officials while granting permission for the operation the of the same. This clearly shows the apathy on the part of the officials of the state as well as individuals who have shown no concerned towards the mass casualty caused to this exotic wildlife and consequentially causing the loss of local species diversity.
5.2.5 The case of Formaldehyde Fumes from a Board Factory

The next case\textsuperscript{252} we are taking up for the discussion is from the North Carolina State of the United States. Here, the petitioner Mr. Wright, as a citizen was residing in the Davison County of North Carolina. Whereas, the respondent, named Masonite Corporation, also belonged from Davison County of North Carolina, was engaged in the operation of a finishing plant. During January, 1963, the customers at the plaintiff's grocery shop located approximately 200 ft. from the defendant's Masonite Board Factory, started complaining that the groceries had a bad taste and may be due to the some odour. The plaintiff was operating prior to the December 1962, but he had never experienced any such odour of any consequence in the vicinity of the plaintiff's grocery. Thereafter, by the end of December month, the noxious odour became very apparent in and around the said grocery. It was discovered that the last phase of the defendant's production process involved spraying some of the boards with a lacquer or varnish containing a Urea-Formaldehyde resin.\textsuperscript{253} Thus, the fumes created during the said spraying process were spreading fast in the local vicinity from the factory through the two large exhaust fans. Finally, by the end of January, 1963, the odour affected almost every item in the plaintiff's store. Consequently, by early February, the said plaintiff forced to close his business.


\textsuperscript{253} The Formaldehyde (gas) is reasonably anticipated to be a human carcinogen based on limited evidence of carcinogenicity in humans and sufficient evidence of carcinogenicity in experimental animals (IARC 1982, 1987, 1995) as held by Mr. M. Chari, Senior Environmental Manager-Air, Rohm and Haas Company), Regulatory Road Map for Formaldehyde Emissions and other Hazardous Air Pollutants in Fiberglass Insulation Materials in the United States, 41 INJ Spring 2005).
On the complaint from the plaintiff, the state health officials tried to locate the source of origin of the said odour but they failed. At last, in February, 1963, a professor of chemistry concluded after local research that the odour in and around the said plaintiff's store was due to Formaldehyde gas used by the respondent in his factory.

**Issue Involved:**

- Whether the defendant’s act constitutes nuisance?
- Whether defendant is liable to compensate the plaintiff for causing any kind loss?

**Outcome of the case:**

The plaintiff brought a diversity action for nuisance in the *United States District Court* and the court found that the defendant company was the source of the harm and damages were fixed at $12,000. However, the court also found that the plaintiff had failed to prove a cause of action for damages under the law of *North Carolina* as the invasion was unintentional. The plaintiff further appealed to the decision of the lower court to the US Court of Appeals of 4th Circuit. However, the decision of the lower court was affirmed by the said Court of Appeals, on the ground that held that for an invasion to be intentional the actor must act for the purpose of causing the harm or know that it is resulting or is substantially certain to result from his conduct. Thus, the court in its decision concluded that any nuisance created by the defendant must be classified as unintentional. However, in the given case, there is no evidence to support that the defendant was operating his business in an unreasonable manner, or any substantial evidence to show that its conduct was negligent, reckless or ultra-hazardous.
The defendant had no way of knowing or being substantially certain that the method employed to give finish look to the products and to exhaust fumes from its plant, would eventually cause harm to the plaintiff or others in the area. While it has been found that *Urea-Formaldehyde* fumes exhausted, from the defendant's plant, resulted in the plaintiff having to close his business and suffer a substantial monetary loss. It’s an unfortunate occurrence but at the same time it was not foreseeable by the defendant and was purely accidental in nature. Hence, in the given circumstances, no legal liability can be imposed on the defendant for the damage sustained by the plaintiff. This case represents an era where the awareness towards the potential hazard due to abuse of such chemicals in the early 70’s in *US* was non-existent. Hence, the case was judged on the technical basis of proving the liability and the liability imposed was only limited to financial damages, whereas the legal liability was exempted.

**Analysis:**

However, in contrast to this situation, the law has now changed substantially. As per the EPA *Toxic Substance Control Act, 1976*, *Formaldehyde* is a colourless, pungent-smelling gas, which can cause watery eyes, burning sensations in the eyes and throat, nausea, and difficulty in breathing in some humans exposed at elevated levels (above 0.1 parts per million). Even it is said that at high concentrations these substance may trigger *Asthma* attacks in people. There is evidence that some people can develop sensitivity to *Formaldehyde*. It has also been shown to cause cancer in animals and hence may cause cancer in humans too. Health effects include eye, nose, and throat irritation, wheezing and coughing, fatigue, skin rash, severe allergic reactions, etc. It
also may cause cancer and may also cause other effects\textsuperscript{254} and listed as “organic gases.”

\section*{5.3 The Discussion on the Judicial Trends of EIA in India}

The focus of this chapter being the analysis of the contribution of the judicial interpretation towards the development of the EIA jurisprudence in India too, we need to look at the various judgments delivered by the Indian courts, from time to time. While in most cases, the executive and the legislature plays a major role in the governance process, but in the case of environmental governance in India, the judiciary has also played a significant role in resolving environmental disputes and shaping the environmental jurisprudence\textsuperscript{255}. Hereinafter, we would look a few cases to understand the scope for judicial interpretation and the prevailing judicial trend in India related to process of EIA.

\subsection*{5.3.1 Narmada Bachao Case}

In this regard it will be quite apt to initiate the discussion with the classic case of \textit{Narmada Bachao}\textsuperscript{256}. The brief facts reveal that the 1\textsuperscript{st} EC, in this case, was given way back in 1983 by the Dept. Science & Technology, Government of India. The most critical aspect of the said clearance was that the requisite data was still pending on several issues like catchment area treatment, impact on wildlife, health impacts, water

\begin{thebibliography}{99}
\bibitem{254} An Introduction to Indoor Air Quality (IAQ), US Environmental Protection Agency, available at http.epa.gov/iaq/formalde.html, [last visited on June, 2011]
\bibitem{30} As quoted in http://www.allacademic.com/meta/p_mla_apa_research_citation/3/6/2/0/0/p362007_index.html, [accessed October, 2011]
\bibitem{256} \textit{Narmada Bachao Andolan Samiti vs. U.O.I.}, AIR 2000 SC 3751.
\end{thebibliography}
logging, etc. Thereafter, the Water Resources Ministry at that time sent a note suggesting several safeguards on the environmental aspects which needed urgent attention. However, there was also difference of opinion between the Water Resources Ministry and the MoEF, the latter being in favour of preparation and implementation of the Environmental Management Plan vis-à-vis application of the concept of pari passu.

The apex court in its judgment explained the scope of application of the concept of pari passu in the said case. The court, citing an example, held that;

“If we propose to raise the existing height of the dam up to 90 mtrs., then it must be correspondingly done along with the implementation of the relief and rehabilitation measures.”

The objective of the court was also to set an exemplary precedent that in such cases, where there is a potential of adverse environmental consequences, it must be in balance with certain remedial actions to mitigate those potential adverse impacts. Further, analysis of the said judgment also hints that there was a bit of controversy which was played by the then PMO’s office, which ultimately issued the final clearance, setting a rare precedent in the field of environmental clearances in India. Finally, the judgment delivered by the court, emerged from the difference in opinion of the majority versus that of the minority judges.

The majority of the judges technically opined that EIA laws have no retrospective effect. Thus, the Narmada project, seeking clearance way back in 1987, was not required to comply with the EIA laws, which was implemented much later in 1994.

257 Ibid, pg. 3791.
258 Concept of pari passu means: “By equal progress/ equably/ ratably/ without preference”. According to the Black Law Dictionary: pari passu means “clearing all doubts”.
Another defense, pleaded by the majority side, was that any change or alteration in the existing environment, cannot be interpreted as the violation of the “right to live” within the scope of Article 21 of the Indian Constitution, 1950, especially when the concept of pari passu has already been incorporated to mitigate the adverse consequences of the said project.

The petitioners tried to draw the attention of the court towards the persuasive precedent of the Tennessee Valley Case\textsuperscript{259} from US, in which the construction of dam on the Little Tennessee River was objected on the ground of loss a small fish known as “Snail Darter” belonging to the endangered category under the Endangered Species Act, 1973. Although a major part of the construction of the dam was over, yet the U.S. Supreme Court held that, if further construction is carried on then, it will result into loss of an endangered species, and thus, the court restrained the further impounding of the reservoir. But the Apex Court declined to accept this precedent stating that there is no scope for application of such precedent in the context of the Narmada case, as the petitioner has failed to show either existence or loss of any such endangered species on account of the said project. In contrast to this, the minority judges opinion that the said clearance of the Narmada Project given in 1987 on the basis of ‘next to no data,’ \textsuperscript{260} but they still failed to convince the court and at last the case was decided in the favour of the defendant. The case was technically lost by the petitioner, yet the minority opinion, as a persuasive factor paved way for the promotion of environmental activism in India.


\textsuperscript{260} AIR 2000 SC 3751, pg. 3769.
5.3.2 Tehri Dam Case

The next few cases represent diverse developmental projects in India, relating to the hydro-electric power, development of railways, lying of pipelines, etc. In most of these cases the executive decision-making for granting EC was challenged and was judicially reviewed by the courts later. To illustrate this aspect further, the Tehri Dam case\textsuperscript{261} can be cited here. The said case stands as another example of the violations of the EIA laws as the clearance in the said project was granted by ignoring the adverse effects on the local ecology. In chapters nine and thirteen\textsuperscript{262} of the said project’s EIA report it was revealed that the proposed project being located in the seismic region, the risk factor involved is increased manifolds. Thereafter, a High Level Committee appointed by the court, gave its study report and on the basis of the said report, the conditional clearance was given. However, the court also added a precautionary note stating that;

"the overarching projected benefits from the dam should not be counted as an alibi to deprive the fundamental rights of the outsees. They should be rehabilitated as soon as they are uprooted and none of them should be allowed to wait for rehabilitation. Rehabilitation should be before six months of the submergence.....Without the completion of the rehabilitation there shall not be any impoundment."

Further the court retried on the compliance of the concept of the pari passu and laid down that;

\textsuperscript{261} N.D. Jayal v. UOI, AIR 2004 SC 1 (Supp) 867.

\textsuperscript{17} P Leelakrishnan, Environmnetal Law Case Book, 2nd Ed. Lexis Nexis Butterworths India, 2006, pg. 434.

\textsuperscript{260} Supra, pg. 886.
“…when pari passu conditions have been imposed, it is necessary that condition are fulfilled along with the engineering works.”

The minority view expressed their critical opinion that no monitoring was carried at the site and even though, a conditional clearance was granted, none of those conditions were fulfilled. It was very disheartening to see the hands-off approach adopted by the government in the end.

5.3.3 **Konkan Railway Case**

The next case, we are referring for the further discussion, is related to the EIA clearances given in the famous *Konkan* Railway project. The petitioners, in this case, had submitted before the court that there were a few potential ecological hazards from the said projects to the local environment in the state of *Goa*, such as the adverse on the local physiography, erosion of soft rocks, chances of adverse effect to the unique ecosystem of the mangroves in the coastal areas, archeological and ancient heritage sites of *Goa* and the deterioration of land quality, etc. However, in contrast to the said pleadings of the petitioner, the judgement delivered by the Bombay High Court, relied upon the judicial interpretation of the “non-obstinate” under clause u/s. 11 of the *Indian Railways Act, 1989*. Thus, the court accordingly held that it is not necessary to insist or apply for EIA for lying railway lines.

In its judgment the court further held that;

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“……it should be remembered that the project of such gigantic magnitude has become available after the people fought over the centuries and the petty interest of the local area should not defeat the project in respect of which the Central Government has already spent a huge amount.”

This case also raised a very fundamental question that whether we need to distinguish between the developmental activities versus industrial activities, for the purpose of granting the EIA clearances in India?

5.3.4 *Essar Pipeline Case*

Another important judicial precedent related to the EIA process was laid down in the case of laying of a pipeline project in 2004. The case revolves around a very crucial issue, that whether by allowing laying of a pipeline through a wildlife sanctuary, would there be cause any adverse effect on the ecology and wildlife of the said sanctuary? Additionally, the bigger issue was that in such cases of conflicting interest, what should be the approach towards granting the EIA clearances?

The court, adopting a pro-environmental approach, laid down that the submission of an EPM as a compulsory requirement in all such cases, even before the EC can be granted by the respective authority. The apex court also stressed on the need for the publication of the project proposals for the purpose of public information, stating its importance for people’s ‘right to know’. Lastly, the court also appreciated the role of the NGOs, voluntary organizations and activists in the preservation and conservation

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267 *Supra*, pg. 477.

of the environment and also for creating the public awareness towards the EIA laws in India.\textsuperscript{269}

\textbf{5.3.5 PIL Case by \textit{Janvikas}}

Another important milestone in the field of shaping the EIA jurisprudence was contributed by a PIL case filed by an NGO named \textit{Center for Social Justice (CSJ or Janvikas)} and decided by the local Gujarat High Court in 2001.\textsuperscript{270} The said high court laid a significant precedent by declaring the clearance granted by the Gujarat State Pollution Board to the Gujarat State Electricity Board as \textit{void} on the ground of an invalid public hearing. Although the law regarding the public hearing was laid under the EPA, 1986 to be r/w the EIA Notification, 1994, where subsequent amendments to the said notifications have resulted in rendering the said public hearing just a mere legal formality in on paper.

In the said case, the court laid the precedent and issued exhaustive guidelines for promoting public participation in the public hearings, conducted for the purpose of environmental clearances in India. The guidelines included every crucial detail for conducting an effective public hearing, such as the time for issuing the notice for conducting the public hearing, its suitable publication, appropriate venue for conducting the same, composition of the panel for the hearing, details of its proceeding, publication of the final clearance report, etc, were made as mandatory requirements for a valid public hearing. Thus, where the implementation of laws was lacking even after its enactments, due to executive inactions, the judiciary tried to ensure its strict and effective compliance.

\textsuperscript{269} \textit{AIR 2004 SC 1845.}

\textsuperscript{270} \textit{Centre for Social Justice vs. U.O.I.}, \textit{AIR 2001 Guj. 71.}
5.3.6 Case related to Solid Waste Facility Project

There is another EIA related case, which involves the issues of the interpretation of the ‘No Objection Certificate’ (hereinafter referred as the NOC). In the said case the NOC was issued on 29th October, 2008, in the state of Tamil Nadu for operating the Solid Waste Management Plant. As per the existing EIA Notification, 2006, for operating the Common Municipal Solid Waste Management Facility, it requires EC from State Environment Impact Assessment Authority. The NOC was issued by the local Pollution Control Board. However, the said NOC was limited in nature and was only for the purpose of acquiring the land for establishing the Solid Waste Management Facility and it was not for the initiating the waste treatment facility. Hence, a writ was filed in the court challenging the nature of the said NOC.

In his arguments the learned counsel for the Kuthambakkam Panchayat made extensive submissions with respect to the violation of non-est in law. The learned counsel by placing reliance on various judgments of the Hon. Supreme Court on environmental degradation and Sustainable Development and contended that the subject land in the given project also consists of many physical features such as water body and grazing land and as such, as stated in the impugned government order. Hence, the said matter requires an evaluation from the ecological conservation approach.

However, according to the learned advocate general, it was submitted that everything depends upon the clearance to be given by the said Environmental Assessment Authority and the NOC issued by the local Pollution Control Board is only tentative in nature. It was further submitted that, it was the Environmental Assessment Authority

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271 Nandakumar &Anr. vs. Secretary, Department of Environment and Forest & Ors, 2010 Indlaw MAD 2245.
came to the conclusion that the subject site is not fit for establishing the Solid Waste Management Plant. Thus, the establishment of the common solid waste management system is permitted only after the permission is granted by the respective Environmental Assessment Authority. Lastly, everything depends upon the final approval given by the Environmental Assessment Authority.

Additionally, even the Tamil Nadu Pollution Control Board has clarified on record on the actual position of their NOC is only tentative and the ultimate authority only lies with the Environmental Assessment Authority. The writ petition challenging the NOC is, therefore, closed with the above observation invalidating the order passed by the District Collector dated 10th March, 2009. Thus, the interpretation given by the court with regard to the EIA Notification, 2006, clearly shows that, for any common solid waste management facility, it is compulsory that the EC is obtained from the relevant regulator, i.e. the Environmental Assessment Authority.

In this context we may conclude that, the court laid down a very crucial point that before giving such clearances, in order to achieve the object to the EIA legislation, the said Environmental Assessment Authority is expected to conduct a study including the impact of the project on the water, air, noise and local environment. The authority is also expected to study the negative impacts and before coming to a conclusion, it should give suggestions regarding the remedial measures in the form of an Environment Management Plan. Lastly, the learned advocate general submitted that, any environmental issues and threats which would be detrimental to the ecology could be raised by the learned counsel for the petitioner before the said Environmental Assessment Authority.
5.3.7 Karnataka Industrial Areas Development Board’s Case

At this juncture of our discussion it is noteworthy to mention the Supreme Court’s directives delivered in a case related to the EIA process in the State of Karnataka. The petitioners were agriculturalists by occupation, who filed this petition challenging the allotment of the Gomal Land by the local regulating authority - Karnataka Industrial Areas Development Board, to GEE India Tech. Centre Pvt. Ltd., for setting up a world class Health Care Research Institute. It is interesting to note that, the said land also overlapped part of the ‘Green Belt’ and the plots were reserved for residential purpose. The said land allotment was done under section 3(1) of the Karnataka Industrial Areas Development Act, 1933. The petitioner objected the said allotment on the basis of violation of right to life and equality, under Articles 14 and 21 of the Constitution of India, 1950, loss of grazing land and agricultural land and lastly, adverse effect on the local ecology. The local high court of Karnataka quashed the said allotment.

However, when the state government appealed before the Hon. Supreme Court, and held that there had been no procedural violations as suggested by the petitioners has taken place and the land was very much allotted according to the existing legal norms. Thus, the apex court allowed the appeal by setting aside the impugned order of the High Court and laid down that, it is essential to conduct an EIA before the proceedings for allowing any such land acquisition process. Additionally the court

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272 Karnataka Industrial Areas Development Board vs. C. Kenchappa, AIR 2006 SC 2038, 2006 INDLAW SC 5430)

273 The said plots were located at the Nallurahalli village in Karnataka, bearing Survey Nos. 79-80.

274 S 28-31 of the Karnataka Industrial Areas Development Act, 1933 was referred for the said land allotment and the scope of the power of the regulating body w.e. Karnataka Industrial Areas Development Board was wider enough for the allowing such land acquisitions for the industrial development).
also referred to the importance of balancing the needs of industrial development and the protection of ecology to achieve Sustainable Development.

Thereafter, on 19th March, 2010, the Madras High Court decided another case involving the issue of the interpretation of EIA law, by following the landmark precedent laid in the said Kenchappa’s case. For the purpose of statutory interpretation, the court further went on to use the concept of pari materia to read the nexus between the parent statute of the EPA and the EIA notifications issued under it. In this case, the issue was of conversion of agricultural land for the purpose of non-agricultural use under the existing land acquisition legislation. In this case a writ petition was filed under Article 226 of the Constitution of India, 1950, praying to issue a writ of mandamus to prevent the state from allowing the conversion of land use for an area which is covered by the lakes, etc. The petitioner was the Councillor of District Panchayat in Kancheepuram district and was involved in the welfare of poor agriculturists of the district. He filed this case to prevent the conversion of the agricultural land for industrial use and to protect the said lands its local water bodies.

The objective of the land statute was to facilitate the land acquisition for industrial purposes in the state of Tamil Nadu. This statute was a special statute by nature, as it was enacted for accelerating the process of land acquisition to boost rapid industrial growth which is the need of the hour. While deliberating upon the issues the court

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275 M. Velu vs. State of Tamil Nadu, represented by its Secretary Public Works Department & Ors, 2010 Indlaw MAD 1217.

276 Section 3(2), The Tamil Nadu Acquisition of Land for Industrial Purposes Act, 1997.

277 The proposed land also included few water bodies viz., Anderi also known as Sulleri and Sundal eri, Karanaipattu Lake, Chennappanaicker Lake, Kalkulam, Vallakkottai Ponds, situated in Survey Nos.268, 285, 274 and 156 of Vallam Revenue Village, its catchment area, feeding canals and punjai and nanjai agricultural lands lying around the aforesaid lakes situated within the four boundaries viz., on the North by Sriperambudur and Vallakkottai, east by Sriperambudur and Singaperumal Koil Road and West by Mettupalayam-Vallamkandigai Villages and Vallakkottai Murugan Temple tank.
went into thread bare analysis of the statutory mandate of the relevant law and held that, the statute also lays emphasis on the observation of both, the procedural as well as substantial fairness\textsuperscript{278} is \textit{sine qua non} for any valid land acquisition.

The learned counsel for the petitioner also added that the respondents have no concern for the loss of ecology and their proposal would ultimately destroy the natural water bodies like streams, ponds, lakes and wet lands, etc and eventually the entire area would become barren lands susceptible to flood and other natural calamities. The counsel for the petitioner pleaded that before any taking steps for the proposed acquisition of the said land, the government should have conducted a proper EIA study. The petitioner also drew the attention towards the EIA report submitted in this case. The credibility of the said EIA report, prepared by a consultant named \textit{ITCOT Consultancy and Services Ltd.}, a private consulting agency was questioned by the petitioners. Further, the learned counsel for the petitioner wanted the state to conduct an EIA before taking further action in the matter of land acquisition. It was very interesting to note that, the state even after being the custodian of the natural resources, did not file a counter affidavit on behalf of the government.

The aforesaid facts suggests that the core issue before the court was whether the government is bound to conduct an EIA before proceeding further with the process of acquisition of such large extent of land, which includes canals, ponds, other water bodies as well as wet lands, etc. The court emphasized upon the need for reconciling between development and environmental protection, to achieve the path of

\textsuperscript{278} The Government must provide the opportunity to hear the landowner before issuing the notice under Section 3(1) of the Industrial Purposes Act. Further under Section 3(2) of the said act provides for issuance of notice by the Government calling upon the owner of the land it proposes to acquire or interested in such land to show cause as to why the land should not be acquired. Similarly, Section 4 provides that when a notice under \textit{sub-section (1) of Section 3} is published in the Tamil Nadu Government Gazette, the land to which the said notice is issued, on and from the date of such publication; vest absolutely in the Government free from all encumbrances.
Sustainable Development as enshrined in our constitutional mandate.\textsuperscript{279} The court took a progressive approach by accepting that the state needs more and more industries so as to solve the ever increasing problem of unemployment in the present era. This will also help the state to earn foreign exchange and nobody is against the industrialization of the country as a whole and the state in particular. The state of Tamil Nadu in the recent past has made substantial growth in the field of industrialization. Therefore, keeping in view the direction given by the apex court in the said Karnataka Industrial Areas Development Board case,\textsuperscript{49} the writ petition was allowed without awarding costs.

However, the court issued the certain directions in the interest of justice, which are as follows:

- The petitioner was granted liberty to make a comprehensive representation within fifteen days from the date of receipt of a copy of this order before the statutory authority constituted to hear objections relating to the land acquisition in question in pursuance to the notice issued under Section 3(2) of the Tamil Nadu Acquisition of Land for Industrial Purposes Act, 1997. Similar liberty is granted to the fifth respondent.

- The statutory authority exercising powers under the Industrial Purposes Act, simultaneously with the process of hearing the objections from the land owners, petitioner, fifth respondent and other interested persons should approach the concern State Level Environmental Impact Assessment Authority for prior

\textsuperscript{279} Article 51-A(g) of Indian Constitution, 1950- contains a Constitutional mandate to protect and improve the natural environment including forests, lakes, rivers and wild life. The Supreme Court of India by way of series of judgments, interpreting Article 21 of the Constitution evolved the concept of 'Sustainable Development', in the interest of our economy as well as environment.
environmental clearance before proceeding further in the matter of issuance of notice under section 3(1) of the said Act.

- In case the State Environmental Impact Assessment Authority gives clearance for the project in question, it would be open to the Government to proceed further with the acquisition of property.
- As undertaken by SIPCOT in their counter affidavit dated 6th February, 2007, appropriate provisions should be incorporated in the Lease Agreements of the proposed project for the preservation of ecology and to maintain the ponds and other natural streams, etc by the concerned industrial units and the same must be fulfilled.

5.3.8 Construction of park near Okhla Bird Sanctuary Case

In the next case we would try to analyse the scope for the application and judicial interpretation of the EIA laws in India. In the said case, which relates to the construction of a housing project at Noida near the Okhla Bird Sanctuary in UP, the Hon. Supreme Court in the said case had given an interpretation on the scope for the application of the EIA Notification, 2006. The petitioner filed a petition raising the objections related to the construction of housing project, apprehending the adverse impact on the Okhla Bird Sanctuary. It was further alleged, that the said project was undertaken at the instance of Uttar Pradesh Government, was a “huge unauthorized construction” as it has violated several provisions of the existing laws related to the environment protection; such as:

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Firstly, it was alleged that a large number of trees were cut down for clearing the land to begin the construction of the said project. Thus, the utilization of forest land for the non-forest activities, can be considered as a violation of S. 2 (ii) of the *Forest Act, 1980*. In this regard it was contended that, the trees felled for the project formed a ‘forest’ as the term was construed by the apex court, in its order pertaining to the *Godavarman* case\(^281\) and held the restriction imposed by *Section 2 (ii)* is in respect of forest land. However, the CEC on a consideration of all the materials made available to it, including the report of the FSI,\(^282\) held that as per the interpretation given by the Supreme Court, the project site was neither a forest nor a deemed forest nor a forest like area. Hence, the project site is technically not forest land, accordingly, the construction of the project without the prior permission from the Central Government has not contravened *u/s. 2* of the *Forest Act, 1980*\(^283\), as alleged by the said petitioner.

The second issue was related to the violation of the existing EIA Notification, 2006.\(^284\) It was alleged that the respondent failed to show that they have taken any precautionary measures to protect the environment. Moreover, the respective *U.P.* Government had not taken any prior permission, neither from the Central Government nor from the State Level Environmental Impact

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\(^282\) FSI –Forest Survey of India Report on the forest cover on the disputed land.

\(^283\) Forest Act, 1980- *Section 2:* “Notwithstanding anything contained in any other law for the time being in force in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing.”

\(^284\) The EIA Notification of 2006 issued *u/s. 3 (3)* of the EPA, 1986 - EIA notification provides that all projects and activities enumerated in its Schedule would require prior environmental clearance before any construction work or preparation of land for the project is started on the project or activity.
Authority and yet the construction was underway. In response to the aforesaid issue, the state drew the court’s attention towards the scope of the applicability of the EIA Notification, 2006, to be r/w along with the Item 8(a) and (b) of its annexed Schedule.

- Further, it argued that, with the assistance of the application of “Common Parlance” the project could only be categorized under Item 8(b) of the Schedule as a ‘Township and Area Development Project’.

- Lastly, under that category it does not come up to the threshold marker inasmuch as the total area of the project (33.43 hectares) is less than 50 hectares. Its built-up area, even if the hard landscaped area and the covered areas are put together, comes to 1,05,544.49 m², i.e., much below the threshold marker of 1,50,000 m². Thus, project cannot fall within the ambit of the EIA Notification, 2006.

- Thirdly, the petitioner had raised the issue that said housing developmental project will adversely affect the Okhla Bird Sanctuary, which is closely located near the said project. The court held that the petitioner has failed to present any concrete evidence to support their contention of adverse impact on the sanctuary due to the proposed housing project. Even the expert bodies have not recommended the abandoning of the said project. Rather, by adopting the Precautionary Principle, the expert bodies have allowed the completion of the project and suggested certain measures to be followed in the interest of the local environment including the bird sanctuary. Thus, the petitioner’s prayer for the demolition of the project is denied and order was passed accordingly.

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285 EIA Notification, 2006, Schedule enumerates - Item 8(a) deals with Building and Construction projects and Item 8(b) deals with Townships and Area Development projects.

286 ‘Common Parlance’ test, i.e. how a common person using it and enjoying its facilities would view it.
Thus, the said judgement can be cited as a good example, where the effort was to achieve reconciliation between the environment and the development.

5.3.9 **Samarth Trust Case**

As we know that the with the further evolution in the EIA laws in India in 2006, the component of public hearing has emerged as crucial factor in the process for granting EIA clearances. Thus, to understand the judicial view on the interpretation on the various legal dimensions of public hearings within the scope of the EIA laws, the case referred hereinafter pertains to *Samarth Trust* case filed by its General Secretary *Manish Manjul and others* against the UOI. 287 The facts of the said case reveal that in the year 2003 the Ministry of Commerce and Industry (Department of Industrial Policy and Promotion) issued an office memorandum on the New Industrial Policy and other concessions for the states of Uttaranchal and Himachal Pradesh. Accordingly, the respondent no. 8, *Aqua Infra Projects Ltd.*, (hereinafter referred to as “Aqua”), apparently decided to establish an industry in the *State of Uttaranchal* in view thereof.

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288 The memorandum states that the Prime Minister, during a visit WP (C) No.9317/2009 Page 5 of 38 to the State of Uttaranchal from 29th to 31st March, 2003 announced that tax and central excise concessions to attract investments in the industrial sector would be worked out for special category states including Uttaranchal. The industries eligible for such incentives should be environment friendly with a potential of local employment generation and use of local resources.

289 Aqua Infra Projects Ltd. Proposed for setting up a unit for the manufacture of asbestos cement products and fiber reinforced plastic products. in Village Akbarpur Urd, Tehsil Laksar, District Haridwar in Uttarakhand.

290 Now the state of Uttaranchal.
As per the EIA Notification, 2006, the EAC, in its 78th meeting, approved the said proposal of Aqua and finalized the TORs were then finalized and spelt out for the preparation of a draft Environment Management Report to facilitate the public consultation. The petitioners had raised objection to the EC granted to Aqua, by the MoEF, for setting up a unit to manufacture asbestos cement products and fibre reinforced plastic products. The petitioners Shri. Manish Manjul, General Secretary of the Samarth Trust and Shri. Dutta Kinkar Joshi a public spirited citizen of Rishikesh, Uttrakhand, filed a PIL raising the following two issues:

- Whether the public hearing conducted in the present case conformed to the nature, scope and methodology as postulated in the EIA Notification of 2006?

- Whether the asbestos manufacturing unit can be still allowed to operate when most of the countries in world have imposed a ban on this hazardous substance?

291 The EAC in its 78th meeting held between 20 and 22 February, 2008.

292 A Registered Trust working for public good as a Non Governmental Organization (NGO) having its Central Office at H-136, Shiv Durga Vihar Lakkarpur, Faridabad, India – 121009.

293 PIL filed u/art. 226 Constitution of India, 1950.

294 On 18th May, 2006 the Union Cabinet approved the National Environment Policy and pursuant thereto, a Notification was issued by the Central Government on 14th September, 2006. This Notification was issued in exercise of power conferred by Section 3(1) and 3(2)(v) of the Environment (Protection) Act, 1986 read with Rule 5(3)(d) of the Environment (Protection) Rules, 1986. The Notification states, inter alia, that construction of new projects listed in the Schedule thereto shall be undertaken only after prior environmental clearance from the Central Government or the State level Environment Impact Assessment Authority, as the case may be, available at http://indiankanoon.org/doc/1050363/, [visited on June, 2012].

295 In March 2005 the UN High Commissioner for Refugees announced its decision to ban the use of asbestos in all its projects. Further in 2006 the ILO and WHO reversed its decades of ineffective asbestos policies by issuing the statement in support of the ban. Further, support to reduce the global impact of the asbestos was made in the UN treaty of Rotterdam Convention, 1989, available at http://ibasecretariat.org/prof_un.php. [visited on June, 2012].
Additionally few other sub-issues were also raised in the said petition with regard to the said public hearing. It has been alleged that the public hearing was completely staged and was a bogus affair, where the said proceeding was disrupted by the few miscreants. Thus, the sole purpose of the whole exercise was lost and the concerned stakeholders did not get any opportunity to express their views and opinion. This said case was decided by the Delhi High Court on 28th May, 2010 by the division bench comprised by the M. B. Lokur, J., and Mukta Gupta, J. The court also appointed Adv. Sanjay Parikh, as amicus curiae to assist the court in the said proceeding. After hearing the both, the petitioners and the materials placed before them, and having referred to the relevant provisions of law, which related to the second issue of imposing of bans on the manufacturing unit of asbestos, held that the said issue is already taken up at the Apex Court and it need not to be reconsidered. The court also clarified on record that they were concerned only with a part of the public consultation aspect and are not concerned with the process of screening, scoping or appraisal of the said project.

As far as the first issue is concerned, the court concluded that the public hearing was conducted and adequate opportunity was given to all who were keen to express their opinion and views. The reason for this is that if adequate time is not given for the preparation of views, comments and suggestions to those participating in the public hearing, that public hearing may not be meaningful enough. In this context the Hon.


298 WP (C) No.9317/2009 Page 36 of 38.
Supreme Court has laid down that time given for making a representation should be adequate and this is a facet of *Natural Justice*.\(^{299}\)

Further, while highlighting the legislative intent behind public hearing the court made reference to an important precedent laid down by the apex court and held that; the whole purpose of a public hearing would be lost if a free and frank expression of views is stymied by a handful holding a particular viewpoint. The Hon. Supreme Court, in one of its judgment\(^{300}\) has laid down that a proper hearing can only take place within its ambit where a fair opportunity to express views are given to the public concerned and this is an important aspect of *Natural Justice*.

As far as the procedural violation are concerned the court held that *EIA Notification, 2006*, states, *inter alia*, that construction of new projects listed in the *Schedule* thereto shall be undertaken only after prior environmental clearance from the Central Government or the respective State level Environment Impact Assessment Authority, as the case may be. However, there is no dispute that the asbestos based project requires prior environmental clearance from the Central Government. The said notification further goes on to provide a four-stage process (which are screening, scoping, public consultation and appraisal) before the final EC is granted. Further, the court reminded that it is essential for the EAC,\(^{301}\) prior to granting the EC, to determine and consider the detailed and comprehensive “TOR” addressing all environmental concerns of the EIA Report in respect of any project or activity for which the said clearance is sought. The most interesting outcome of this case is that the court has made detailed reference to the existing laws and its mandate with regard


\(^{300}\) *Biecco Lawrie Ltd. vs. State of West Bengal*, (2009) 10 SCC 32.

\(^{301}\) Expert Appraisal Committee for the purpose of EIA.
to the EIA norms and its various procedural requirements in its deliberation. The court held that as the *EIA Notification, 2006* mandates, the two most important aspect of environmental clearance process which are as follows:

- A public hearing at the site or in its close proximity - district wise, to be carried out for ascertaining the concerns of local affected persons; and
- Obtaining responses in writing from other concerned persons having a plausible stake in the environmental aspects of the project or activity.

With reference to the scope of the EIA, the court held that in this case the scope is limited and confined to those who may be locally affected persons residing in the close proximity of the project site. However, the court also opined that said notification is inclusive in nature, and thus, does not preclude or prohibit persons not living in the close proximity of the project site from participating in the public hearing - they too are permitted to participate and express their views and concerns for the proposed project/activity.

While giving the detailed reference to the guidelines of the said notification, the court held that the public hearing to be conducted by the local regulator such as the State Pollution Control Board or the Union Territory Pollution Control Board, as the case may be.\(^\text{302}\) Thereafter, the report of the public hearing must be sent to the EAC within 45 days of a request to that effect from the project proponent. In exceptional conditions, it is provided in the said notification, that the local situation does not permit to conduct a public hearing in the manner prescribed, the same should be informed to the concerned Regulatory Authority. Further, it is only in such exceptional cases the concerned Regulatory Authority may decide that public

\(^\text{302}\) *EIA Notification, 2006*, in its Appendix IV as it is specified.
consultation need not include a public hearing. Furthermore, the court gave detailed interpretation to the term “plausible stake” with reference to the public hearing. It held that the for the process of public hearing, which is confined to locally affected persons in the close proximity of the project site, this term *prima facie*, means that the responses are required to be invited from persons not necessarily in the close vicinity of the project site (and therefore at a distance). A condition attached, herein with, demands that those persons should have a plausible stake in the environmental aspects of the project or activity need to be given an opportunity to express their views and concerns. However, it is not clear who determines (and how) whether or not a person has a "plausible stake” in such cases.

Additionally, the court held that the law has been made more facilitating as the public consultation process merely not only allows the physical presence of locally affected persons at a public hearing, but also permits the affected people to give their responses in writing to the concerned authorities involved, even though they may not have attended the public hearing. The said notification does not bar any persons at a distance from attending a public hearing. Hence, the objective of the law is to provide a reasonable opportunity to all those who are likely to be adversely affected by the any proposed project.

Thus, the court has very rightly remarked that;

“In our opinion, on-going through the above requirements of a public hearing, it is quite clear that it is intended to solicit views, comments and suggestions from the locally affected persons or persons in the vicinity of the project, that is, the local populace.”
The court explained that the next important requirement of the public hearing process is the documentation, which includes the preparation and submission of the draft EIA Report including a Summary EIA Report in English as well as in the local language. The said EIA report must essentially be in accordance with the TORs as communicated by the respective regulatory authority in the scoping stage. The law further mandates that since the EIA is inherently a participatory process by nature, so for the purpose of publicity, a summary draft of the EIA report submitted by the project proponent must be made available on the website of the MoEF or the local regulator like the SPCBs. The next important thing in the environmental clearance process is to give the due notice for the public hearing in a major national daily and one regional vernacular daily at least 30 days in advance of the date of the public hearing. There is also a deadline prescribed for conducting the public hearing within 45 days from the date of receipt of a request from the project proponent.

The law envisaged that the entire proceedings of the public hearing must be conducted under the supervision of concerned state officials and also need to be recorded. Thus, both the minutes of the said proceeding along with its video records need to submit as an official record. Although the quorum for attendance of the said proceeding is not fixed but the presence of all those at the venue needs to be maintained as the part of the said record. Generally, the representative of the project proponent initiates the proceedings by making a presentation on the project and its

303 Copies of these documents are required to be furnished to the District Magistrate, the Zila Parishad or the Municipal Corporation, District Industries Office and the concerned Regional Office of the MoEF.

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305 The public hearing shall be supervised and presided over by the District Magistrate or his representative not below the rank of an Additional District Magistrate. The Presiding Officer is required to be assisted by a representative of the State Pollution Control Board.
summary EIA Report. Thereafter, all the persons and locals present at the venue are
granted an opportunity to seek information or clarifications on the said project from
the project proponent. At the end, the whole proceeding must summarised including
the views and concerns expressed to the audience and all these must be explained in
the local vernacular language. The post public hearing requires the approved minutes
the public hearing shall be prepared and signed by the presiding officer\(^{306}\) or his
representative on the same day and should forward it to the respective SPCB. It is
essential, to maintain and display for public information\(^{307}\) in the annexure of the
proceedings including the views, concerns and also the comments expressed by the
each stakeholders whether in written or oral form. Lastly, all the said reports of the
public hearing must be sent to the MoEF within 8 days from the date of the
proceeding held.

Further, the court raised certain very fundamental queries related to the EIA process
in the said such as:

- “What is the purpose of a public hearing?
- Can largely rural people effectively articulate their concerns on (sometimes)
  complex environmental issues?
- Is a public hearing a procedural formality and motions that have to be gone
  through because of legal requirements?”

The Court rendering further explanation to the above issue held that;

\(^{306}\) The local District Magistrate.

\(^{307}\) The statement of issues raised by the public and the comments of the applicant are required to be
conspicuously displayed in the office of the Panchayat within whose jurisdiction the project is located,
the office of the concerned Zila Parishad, the District Magistrate and the State Pollution Control Board
as well as on the website of the State Pollution Control Board.
“A public hearing is a form of participatory justice giving a voice to the voiceless (particularly to those who have no immediate access to courts) and a place and occasion to them to express their views with regard to a project. Participatory justice is in the nature of a ‘Jan Sunwai‖, where the community is the jury. Such a public hearing gives an opportunity to the people to raise issues pertaining to the social impact and the health impact of a proposed project. Since a public hearing affects the rights of the parties, it must be conducted in a formal or at least in a semi-formal manner and the video-recording as well as the Minutes of the proceedings must be faithful to what has actually transpired so that the views of the participants are known. The advantage of a public hearing is that it brings about transparency in a proposed project and thereby gives information to the community about the project; there is consultation with the affected parties and they are not only taken into confidence about the nature of the project but are given an opportunity to express their informed opinion for or against the project. This form of a social audit, as it were, provides wherever necessary, social acceptability to a project and also gives an opportunity to the EAC to get information about a project that may not be disclosed to it or may be concealed by the project proponent.”

Further, the court summarised the said case stating that after taking the nature and scope of a public hearing process into consideration, as mentioned above for conducting a meaningful and purposive public hearing, added the following points;

i. Adequate notice must be given to all the concerned parties.

ii. A panel must be available to conduct the public hearing in a disciplined manner:

Further, the court summarised the said case stating that after taking the nature and scope of a public hearing process into consideration, as mentioned above for conducting a meaningful and purposive public hearing, added the following points;

i. Adequate notice must be given to all the concerned parties.

ii. A panel must be available to conduct the public hearing in a disciplined manner:

For illustration, the court suggested that if a District Magistrate or if he is not

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available, then his representative not below the rank of an Additional District Magistrate must preside over and supervise the public hearing.

iii. It is important that representatives of the State Pollution Control Board must assist by way of providing impartial technical inputs, if necessary.

iv. Additionally, the presence of the representatives from the local pollution control board is essential to ensure that the public hearing does not go out of control for if it does, then it may be scrapped if a report is given to the concerned Regulatory Authority that it is not practicable to hold a public hearing. Therefore, it is absolutely necessary for the participants to maintain discipline and decorum of the public hearing and it is the duty of the Presiding Officer of the public hearing to ensure this.

v. The court also stressed on the need to maintain the procedural fairness of the public hearing for all participants. This necessarily postulates that those who support the project should not be shouted down by those who oppose the project and vice versa. The whole purpose of a public hearing would be lost if a free and frank expression of views is stymied by a handful holding a particular viewpoint.

The Supreme Court has said in the case of *Biecco Lawrie Ltd. vs. State of West Bengal*³⁰⁹ that;

“...a proper hearing takes within its ambit a fair opportunity to express views. In a sense, this is an important aspect of natural justice."

The court additionally suggested that to avoid the proceedings being hijacked by local leaders who may have political or other considerations on their mind rather than

environmental considerations that since the public hearing may be quite prolonged depending on the number of speakers, in our opinion, it is absolutely necessary to structure the public hearing. Hence, it would be advisable if the District Magistrate collects information a day before regarding the number of speakers and makes a list of speakers at the public hearing and how long they propose to speak, etc then it will be very systematic and well organised.

So far as the issue of irregularities alleged in the said case are concerned, it will be pertinent to note the submissions made by the Learned Amicus Curiae, which revealed that the draft EIA as well as the summary EIA Report was not placed on the website of the respective SPCB. According to him, it has vitiated the public hearing process. After considering all the essentials facts mentioned in the above paras it clearly amounts to the violations of the ground norms of the EIA Notification, 2006, and further it has resulted in giving inadequate notice to the local populace.

However, the court gave the benefit of doubt to the project proponent, as after taking a close observation of the annexed affidavit showing the details of the website, it revealed that it was accessed on 26\textsuperscript{th} August, 2009 and it was last reviewed in May, 2009, which was much after the public hearing concluded and even after environmental clearance was granted to said Aqua. It is, therefore, quite possible that reference to the project may have been deleted from the official website of UEPPCB. For this reason, it is not possible to attach much weight to the affidavit filed by Samarth, and the benefit of doubt must go to Aqua.

\footnote{WP (C) No.9317/2009, Page 20 of 38.}

\footnote{Uttaranchal Environmental Protection and Pollution Control Board available at http://www.ueppcb.com/, [visited on June, 2012].}
Finally with regard to the issue, whether the said public hearing proceeding was unqualified? The other controversy revolves around the public hearing that took place in this case on 10th June, 2008, where it was alleged that a group of objectors were not given an opportunity of to place their views but were instead beaten up by the goons of *Aqua* and then sent away. It also was alleged that one, *Shri. Sanjay Chopra* was even hospitalized due to injuries sustained on being beaten by the alleged goons of *Aqua*. At this point, the court observed that one of the most crucial fact is that that no representative of *Samarth* was present at the public hearing. Nevertheless, the court proceeded further; relying on the basis of what is stated in the writ petition based on reliable and verifiable information. The court held that because of *Shri. Sanjay Chopra*, a large delegation comprising of locals had arrived at the venue of the public hearing while it was going on. The delegation had come to oppose the grant of EC for setting up the proposed project and to register their dissent. However, it is very pertinent to note that the said delegation arrived at the public hearing only after the ninth speaker had expressed his views. Thus, the court justifiably opined that arriving at the venue in the midst of the public hearing is by itself objectionable and held that;

“Anyone supporting or opposing the project must have the courtesy to be present when the public hearing commences rather than barging in whenever he so feels like it. If Shri. Sanjay Chopra and his retinue were earnest in their objections and had a meaningful point to make, they should have taken the trouble of punctually arriving at

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312 State President of National Human Rights Awareness Mission (an NGO).
the public hearing rather than arriving there ‘in a procession chanting slogans opposing the project’ while it was in progress.’

It was also admitted by the local UEPPCB on record that during the public hearing a few people arrived at the venue with some banners and hand-outs. Moreover, when they were asked by the presiding Chair to express their views before the participants but they simply walked out. It may be mentioned that the Minutes of the said public hearing signed on 10th June, 2008, also discloses that almost all the speakers had actually supported the project.

The said writ petition further goes on to state that the muscle men were also engaged by Aqua took the law into their own hands, beat up the protestors and threw chairs on them. It is further alleged that Shri. Sanjay Chopra and several (unnamed) protestors were hurt, while Shri. Sanjay Chopra had to be hospitalized. It is also averred that the local police were mute spectators to the violent act and the designated officers supervising the proceedings did not pay any heed to it.

According to Samarth, the said violence was also video graphed by a commercial videographer arranged by the protestors themselves. It is stated that the unedited video was broadcasted by the local news channel and was also reported by the local press. It is alleged that the "official" video-recording forwarded to the EAC did not show any violence because may have been doctored or manipulated. The bone of contention, therefore, is what actually transpired in the public hearing.

In this context, it is also alleged by Samarth that the "official" videographer was commissioned or organized by Aqua and that is why a faithful record of the

313 WP (C) No.9317/2009 Page 24 of 38.
proceedings was not submitted to the EAC. However, the court held that the allegation of Samarth, that the videographer was engaged or organized by Aqua, is denied by UEPPCB in its affidavit and it is categorically stated that it had engaged the videographer and payment for his services was made by the SPCB itself. Thus, the court felt that there is no reason for it to take a contrary view to the same.

It seems that the protest was not of such a magnitude as a result of which the said proceeding was needed to be suspended. The Additional District Magistrate could have resorted to this option if the situation had gone out of control. Therefore, it is quite clear that while there may have been some disruption because of the slogan shouting, etc by the protestors led by Shri. Sanjay Chopra, it was not such as to dissuade those present at the public hearing from continuing their deliberations.

It has been alleged by Samarth and was also pointed out by the learned Amicus Curiae that there was a delay on the part of the local authorities, even though the Minutes of the meeting held on 10th June, 2008 were purportedly signed on the same day but they were dispatched much later to the MoEF. According to Samarth, the said Minutes were ante-dated and the delay in forwarding them was due to the fact that UEPPCB and others involved in the public hearing were busy doctoring the video tape.

In its defence vide the affidavit submitted, the UEPPCB has categorically stated that the Minutes of the public hearing were finalized and signed on 10th June, 2008. It is further stated that around 1056 representations were received before the public hearing and 62 were received during the said public hearing process. The delay in sending the Minutes to the MoEF was caused due to the fact that print outs of the video-recording and making out copies of the representations took a few days to
organize and consequently, the Minutes were dispatched only by 26th June, 2008. Accordingly the court accepted this explanation for a few days delay as not that fatal and quite satisfactorily explained.

The court also placed on record that it is very interesting to note the role played by said Samarth, who had organized a large number of complaints including by challenging the public hearing process was with an ulterior objective to stall the project at any cost. There were also reports of some politicians belonging to a particular political party, who may have been instrumental in forwarding these representations to the MoEF in July, 2008. Further, an NGO called Peoples Vigilance Commission also joined the agitating process and sent a complaint to the Central Vigilance Commission on 8th July, 2008, regarding the said public hearing process. Even the Kalchakra315 had also sent a complaint on 11th July, 2008, to the CPCP protesting about the said public hearing.

Under the said circumstances, after receiving all the aforesaid complaints, as a regulator the MoEF, then directed for setting up an independent Committee316 to look at the said allegations and submit a detailed report. The exact TOR of the said the Office Memorandum as mentioned hereinafter; which amply clears the intention and the stand taken by the MoEF as a regulator to fulfil its statutory obligations such as:

- To ascertain the initiation of work at the site by the project proponent on the asbestos project without EC by the Ministry.

315 News Bureau (also an NGO), WP (C) No.9317/2009 Page 30 of 38.

316 Vide a Memorandum the MoEF on 16 September, 2008 an independent committee appointed by the MoEF consisting of Dr. G.V. Subramaniam, Advisor, MoEF and Mr. P.K. Gupta, Environmental Engineer, at the Central Pollution Control Board, India.
To review the representations received regarding the project, in the backdrop of the public hearing for the project including the public hearing report submitted by the SPCB and the video recording of the public hearing itself.

Thirdly, to analyse broadly of the various representations vis-à-vis the likely impact of asbestos production.

The said independent committee held that there is a contrast in the video recording of the public hearing submitted by the SPCB and the video recording submitted by Samarth. It is also to be noted that, according to the Minutes of the proceedings of the public hearing, submitted to MOEF by the Additional District Magistrate, there is no mention of any such violent incident. Further, the said investigation report suggested that local villagers were also contacted by the said committee and they had expressed ignorance about the project or the public hearing and those who were in support to the project proposed and also shared that they were unaware of any were no adverse environmental or health impacts likely to be caused by the disputed project. At this juncture, it is very interesting to note that the said Shri. Sanjay Chopra did not even mention anything about chairs being thrown about or anybody else (other than him) being beaten up. Thus, the court satisfactorily accepted the ground investigative report. The said investigative committee also submitted on record that it failed to understand that how Samarth had access to the video recording.

Additionally in the report of the District Collector it was mentioned that sufficient police force was available at the site of the said public hearing and both the Station House Officers deployed at the site denied having any such violent incident or fight.

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317 The said investigative committee conducted on-site visit on 20 and 21 October, 2008 and also met the local, Block Pramukh and other Gram Pradhans and submitted a confidential report on 23 October, 2008 the report to the MoEF.

318 Dated 31 October, 2008.
It is also stated that there was no breach of peace and these 10 to 15 protestors were led away from the site to continue with the public hearing peacefully. The District Collector went on to say that those opposed to the project raised slogans instead of putting up their case peacefully. This was objected to by the local residents.

In its conclusion, the court held that on the basis of the material placed before them, they have no hesitation in concluding that all the reports clearly bring out that despite an attempt to disrupt the public hearing, it was conducted and concluded after giving an opportunity of hearing to all those who wanted to express their views. The only person who was not allowed to express his view (and there is serious doubt about this) was Shri. Sanjay Chopra, who led a small group of about 10-15 persons. Given the fact that the group was shouting slogans and entered the venue of the public hearing, not when it started but while it was in already in progress, thus, it is clear that their prime motive was not to meaningfully participate in the public hearing rather to disrupt it and however they failed in doing so.

At this stage, it is worth mentioning that the public hearing was attended by a very large number of people, the lowest estimate being about 1000 persons, compared to hardly 10-15 persons who chose to disrupt the meeting. It is also worth mentioning that a completely independent body like the Central Vigilance Commission (whose credentials have not been doubted by Samarth) did not find it worth it, to pursue the complaint\(^\text{319}\) made to it about the conduct of the public hearing. On the basis of these facts, the contention of Samarth that the public hearing was vitiated or that it was a sham hearing or a farce was rejected. Additionally the court also made a special

\(^{319}\) WP (C) No.9317/2009 page 37 of 38.
reference to the CVC\textsuperscript{320} report, wherein the CVC had closed the complaint with regard to the allegations of irregularities in the said public hearing proceeding of \textit{Aqua}. However, while dismissing the said petition, the court had laid that the condition precedents issued by the \textit{MoEF} must be followed without any deviation. Lastly, the High Court of Delhi also made reference to the laid down precedents and rejected contention of petitioner that the public hearing was a sham. Thus, the court dismissed the said petition with awarding the costs of Rs.25,000/- payable to the proponent \textit{Aqua}.

Hence, this landmark case portrays the various critical issues related to the implementations of the EIA laws and its alleged violations and the concoction of the political interests and interference jeopardising the smooth administrative functioning of the local regulators. Lastly, the case was a sheer misuse of the dynamic judicial tool of PIL due the filing of such frivolous complaint.

\textbf{5.3.10 \textit{India Splendor Landbase Ltd} Case}

The next case our further discussion related to the judicial interpretation of the EIA laws is the case of \textit{India Splendor Landbase Ltd.}\textsuperscript{321} which was adjudicated by the Delhi High Court on 30\textsuperscript{th} September, 2010. The cause of action the said case arose, when the said petitioner, \textit{Splendor Landbase Ltd.} and other builders of the various properties in the \textit{NCT}\textsuperscript{322} of Delhi, had filed 38 writ petitions challenging the

\begin{footnotesize}
\textsuperscript{320} Central Vigilance Commission, India.


\textsuperscript{322} National Capital Territory of Delhi.
\end{footnotesize}
respondent, *DPCC*\(^{323}\), who had issued show cause notices and also directions for alleged violation under the *Water Act, 1974*, and the *Air Act, 1981*.\(^ {324}\) The petitioners were represented by the counsel *Mr. Soli J Sorabjee*, Senior Advocate with others, while the respondent was represented by *Mr. Sudhir Chandra*, Senior Advocate and others.

The construction of the said properties, except two which were residential complexes, rest 36, were consisting of various types of non-residential commercial complexes, shopping malls, etc. The show cause notices have been issued by the respondent, *DPCC*, on the ground that these petitioners had not, prior to commencing construction, applied to the *DPCC* for obtaining the “consent to establish” under *Section 25\(^ {325}\) of the Water Act* and under *Section 21* of the *Air Act\(^ {326}\)*.

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\(^{323}\) Delhi Pollution Control Committee.


\(^{325}\) S. 25 Water Act, 1974- No person shall without the previous consent to establish - Restrictions on new outlets and new discharges. (1) Subject to the provisions of this section, no person shall, without the previous consent of the State Board, -- W.P. (C) No. 543/2008 batch Page 6 of 122 (a) establish or take any steps to establish any industry, operation or process, or any treatment and disposal system or any extension or addition thereto, which is likely to discharge sewage or trade effluent into a stream or well or sewer or on land (such discharge being hereafter in this section referred to as discharge of sewage); or

(b) bring into use any new or altered outlet for the discharge of sewage; or

(c) begin to make any new discharge of sewage:

Provided that a person in the process of taking any steps to establish any industry, operation or process immediately before the commencement of the Water (Prevention and Control of Pollution) Amendment Act, 1988, for which no consent was necessary prior to such commencement, may continue to do so for a period of three months from such commencement or, if he has made an application for such consent, within the said period of three months, till the disposal of such application.

\(^{326}\) Section 21(1) of the Air (Prevention and Control of Pollution) Act, 1981: Restrictions on use of certain industrial plants. (1) Subject to the provisions of this section, no person shall, without the previous consent of the State Board, operate any industrial plant for the purpose of any industry specified in the Schedule in an air pollution control area:
Apart from the violation under the *Water Act* and *Air Act*, shopping malls due to being consisting of a built up area of over 20,000 m$^2$ they were required to comply with the EIA notifications in terms of the *EPA, 1986*. According to the respondent, as per the existing EIA norms, the petitioners having with built up area of 23,281 m$^2$ and 10,733 m$^2$ respectively, and hence, need to comply with the same. It is not possible therefore to underestimate the impact that the discharge from such residential complexes, of large volumes of sewage, would have on water pollution in general.

The main issues raised by the petitioners were in the said case are as follows;

- Whether the notice issued by the respondents was valid under the relevant law?
- Whether the petitioner had violated the provision of the *Water Act* and *Air Act* as alleged by the respondent in their notice?
- Whether the case falls within the scope of the *Water Act* and *Air Act*?
- Whether besides violating the basic provision of the *Water Act* and *Air Act*, the petitioners were also required to comply with the EIA norms?
- Whether the scope of the relevant laws namely, the *Water Act*, *Air Act* and the *EIA Notification* can be interpreted judiciously to include the non-industrial units within their ambit?
- Whether after the independent EIA clearance obtained by such petitioners from the Government of India in the MoEF, another separate consent to establish under the *Water Act* and consent to operate under the *Air Act* would nevertheless be required to be obtained from the *DPCC*?

Provided that a person operating any industrial plant in any air pollution control area immediately before the commencement of section 9 of the *Air (Prevention and Control of Pollution) Amendment Act, 1987* (47 of 1987), for which no consent was necessary prior to such commencement, may continue to do so for a period of three months from such commencement or, if he has made an application for such consent within the said period of three months, till the disposal of such application.
The petitioners primarily maintained that the proposed project is not covered within the scope of the *Water Act* nor the *Air Act*. Therefore, there was no need for any of these petitioners to obtain either prior consents to establish, under *Section 25 of Water Act*, or prior consent to operate under *Section 21 of the Air Act* from the DPCC. Contrast to the aforesaid argument, the respondent maintained that for the said project the built up area is over 20,000 m² and just by obtaining of EIA clearances from the MoEF by such builders will not obviate the need to obtain separate prior consents from the *DPCC* under the *Water Act* and *Air Act*.

The court before interpreting the scope and applicability of the said relevant statues, tried to draw the attention towards its legislative intent and statutory objectives. With regard to the *Water Act*, the court made reference to it’s the *Statement of Objects and Reasons* [327], which was enacted way back on 23rd March, 1974, for the prevention of water pollution in India. Thereafter, it underwent further changes in the year 1978 and 1988. Thereafter, the court made a specific reference to the *Section 25 of the Water Act* which in its present form has result out of certain extensive amendments made in the year 1988. [328] The court, thus, explained that it is amply clear that the amendments

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[327] *Water Act, 1974: Statement of Objects and Reasons (SOR)*- noted that *"the problem of pollution of rivers and streams has assumed considerable importable and urgency in recent years as a result of the growth of the industries and the increasing tendency to urbanization."*

[328] Para 2 of the SOR of the Amendment Act No. 53 of 1988, which is relevant for the present purposes, reads as under: "The Water Act is implemented by the Central and State Governments and the Central and State Pollution Control Boards. Over the past few years, the implementing agencies have experienced some more administrative and practical difficulties in effectively implementing the provisions of the Act. The ways and means to remove these difficulties have been thoroughly examined in consultation with the implementing agencies. Taking into account the views expressed, it is proposed to amend certain provisions of the Act in order to remove such difficulties. The State Legislatures of Himachal Pradesh, Manipur and Tripura have passed resolutions under Article 252(2) of the Constitution authorizing the Parliament to amend the provisions of the Water Act to give effect to those amendments."

Thereafter in Para 3(iii) and 3(vi) of the SOR, it was explained that the Bill inter alia sought to make the following amendments to the Act, namely:
made in 1988 were with a view to making it obligatory on the part of the person taking any steps to establish "any industry, operation or process which is likely to cause pollution of water...." to obtain the prior consent of the respective State Pollu

Here, a plain reading into the text of the heading of the said Section 25, instantly clarifies that the object of the said is to put “restrictions on new outlets and new discharges.” Hence, as per the rule of literal interpretation these newly constructed premises fall very much within the scope of the provision and further the subsection\(^{329}\) of the said section provides satisfactory backing in this regard. Accordingly, Section 25\(^{330}\) authorises the concerned regulating authority to take

\(^{(iii)}\) it is proposed to make it obligatory on the part of a person to obtain the consent of the relevant Board for establishing or taking any steps to establish any industry, operation or process which is likely to cause pollution of water and also to empower the Boards to limit their consents for suitable periods so as to enable them to monitor observance of the prescribed conditions;

\(^{(vi)}\) it is proposed to empower the Boards to give directions to any person, officer or authority including the power to direct closure on regulation of offending industry, operation or process or stoppage or regulation of supply of services such as water and electricity”.

\(^{329}\) “(1) Subject to the provisions of this section, no person shall, without the previous consent of the State Board, --

(a) establish or take any steps to establish any industry, operation or process, or any treatment and disposal system or any extension or addition thereto, which is likely to discharge sewage or trade effluent into a stream or well or sewer or on land (such discharge being hereafter in this section referred to as discharge of sewage); or

(b) bring into use any new or altered outlet for the discharge of sewage; or

(c) begin to make any new discharge of sewage:

Provided that a person in the process of taking any steps to establish any industry, operation or process immediately before the commencement of the Water (Prevention and Control of Pollution) Amendment Act, 1988, for which no consent was necessary prior to such commencement, may continue to do so for a period of three months from such commencement or, if he has made an application for such consent, within the said period of three months, till the disposal of such application.

\(^{330}\) Where, without the consent of the State Board, any industry, operation or process, or any treatment and disposal system or any extension or addition thereto, is established, or any steps for such establishment have been taken or a new or altered outlet is brought into use for the discharge of sewage or a new discharge of sewage is made, the State Board may serve on the person who has established or taken steps to establish any industry, operation or process, or any treatment and disposal system or any
action wherever there is a violations with respect to the aforesaid sub-section. Here, the court also analysed the literal meaning of the expression "new or altered outlet"\(^{331}\), and held that it means any outlet which is wholly or partly constructed on or after the commencement of the said act or which (whether so constructed or not) is substantially altered after such commencement. Along with this expression the court here made reference to the various other relevant provisions which is applicable in the said case.\(^{332}\)

In response to the aforesaid argument, the advocate for the petitioners held that the said Section 25 is not at all applicable to the case as the said provision only intents to regulate the establishment of an industry, operation or process, which in turn discharges trade effluent. Hence, any residential complex cannot produce “trade effluent”. It can only produce domestic sewage which the legislature has consciously

\(^{331}\) Applicable to the section and sections 27 and 30- (a) of the Water Act, 1974.

\(^{332}\) (b) the expression "New discharge" means a discharge which is not, as respects the nature and composition, temperature, volume, and rate of discharge of the effluent substantially a continuation of a discharge made within the preceding twelve months (whether by the same or a different outlet), so however that a discharge which is in other respects a continuation of previous discharge made as aforesaid shall not be deemed to be a new discharge by reason of any reduction of the temperature or volume or rate of discharge of the effluent as compared with the previous discharge.”

8. For further understanding the scope of the expressions used in Section W.P. (C) No. 543/2008 batch Page 9 of 122 25 (1) of the Water Act, the definitions therein of the terms "outlet" occurring in Section 2(d)(d), "Sewage effluent" under Section 2(g) and "trade effluent" under Section 2(k) are relevant. They read as under: "2 (dd) "outlet" includes any conduit pipe or channel, open or closed, carrying sewage or trade effluent or any other holding arrangement which causes, or is likely to cause, pollution;

2 (g) "Sewage effluent” means effluent from any sewerage system or sewage disposal works and includes sullage from open drains;

2 (k) "Trade effluent” includes any liquid, gaseous or solid substance which is discharged from any premises used for carrying on any industry, operation or process, or treatment and disposal system, other than domestic sewage.”
excluded from the expression “trade effluent”. It is further urged that, what takes place in a commercial shopping complex or shopping mall or merely a retailing operation or sale of goods and services, etc. There is no industry, operation or process that goes on inside a commercial shopping complex or mall that discharges trade effluent. Thus, the petitioners concluded that aforesaid provision was never intended to cover shopping complexes, malls or residential complexes.

Further, on behalf of the respondent, the Senior Counsel, Mr. Sorabjee, submitted that the words "operation or process or any treatment and disposal system or any system of extension or addition thereto" following the word "industry" have to be read as per the rule of interpretation of Ejusdem generis, the word "industry" and therefore it was not meant to cover an activity which is not an industrial activity by nature. It was also contended that there is no industrial activities that takes place in a shopping complex or mall or a commercial complex. Consequently, it was argued that Section 25 (1) of the Water Act is not attracted in any of the present cases.

However, the court did not accept the aforesaid argument of the petitioners and held that the existing scope of the term “Trade Effluent” has been widened vide the amendment of 1988 keeping in mind the modern context. The above definition of “Trade Effluent” does not take a residential complex or even a commercial shopping

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333 The ejusdem generis (Latin for "of the same kind") rule applies to resolve the problem of giving meaning to groups of words where one of the words is ambiguous or inherently unclear. The rule results that where "general words follow enumerations of particular classes or persons or things, the general words shall be construed as applicable only to persons or things of the same general nature or kind as those enumerated." available at http://en.wikipedia.org/wiki/Statutory_interpretation, visited on May 2012.

334 Industries such as chemical industries, metallurgical industry and engineering industry, etc.

335 It must be noticed that the definition of “Trade Effluent” under Section 2(k) underwent a change with the Amendment Act No. 53 of 1988. The definition of “"trade effluent" in the unamended Section 2(k) contained the words - "carrying on any trade or industry" following the words "...any premises used for." This was replaced by the words "...from any premises carrying on any industry, operation or process, or treatment and disposal system." Thus, the idea was to expand the use of the premises and not limit it to an industry but also any process or treatment and disposal system.
complex or shopping mall out of the purview of Section 25(1) of the said act. A careful reading of the said Section 25(1) of the Water Act would show that it is intended to cover not just “industry which discharges trade effluent” but any, process or operation that results in a discharge of sewage not limited to trade effluent.

The expression sewage or trade effluent in Section 25(1)(a) Water Act, which follows the words “operation or process, or any treatment and disposal system or any extension or addition thereto, which is likely to discharge,” is wide enough to cover all kinds of sewage and not just trade effluent.

Similarly, the expressions “Process and Operation” is not meant to be confined to industry, but it is inclusive to all kinds of processes and operations including those that take place in kitchens and bathrooms of residential complexes and retail sales in shops and restaurants, and activities in the rest rooms of commercial shopping complexes and malls, etc. The court referred to external sources for statutory interpretation like a dictionary, which was referred for the judicial interpretation of the term "Operation" and “Process”336 and it was concluded that Section 25(1) will stand attracted. Thus, the said provisions u/s 25, underscores the mandatory nature of the requirement of even an on-going construction to obtain prior consent to establish from the SPCC, which is DPCC in the given case.

The court also explained that the said law when legislated way back in 1974, perhaps it never anticipated the present large scale commercial and residential shopping

336 As per the New Shorter Oxford English Dictionary (Leslie Brown Ed.) the term “Operation” means An action, deed; exertion of force or influence; working, activity; an act of a practical or technical nature, esp. one forming a step in a process. Whereas the term “Process” means- The action or fact of going on or being carried on; a continuous series of actions, events or changes; a systematic series of actions or operations directed at a particular end.
complexes, due to rapid increase in urbanization process. There has been an unprecedented increase in the number of residential and commercial shopping complexes in urban metropolises in the recent few decades in India. Consequently, the volume of sewage which such residential and commercial complexes and shopping malls are likely to discharge into the main urban sewage system would indeed be enormous. The court agreed, that the DPCC, as a regulatory authority, directed the project proponent for obtaining prior consent to establish under the Water Act, with an ultimate object to ensure the effective prevention and control of water pollution.

In this case the court also adopted the tool of *Doctrine of Purposive Construction* to provide the liberal and widest possible interpretation of the words "Operation" and "Process" occurring in Section 25(1) of the Water Act. On the other hand the *Principle of Purposive Construction* commends itself for application, as held in the case of *Anderton vs. Ryan* 337. The court also quoted 338 the persuasive precedent which was laid down in this regard in the case of *Pepper vs. Hart* 339, which was also followed by the Hon. Supreme Court of India in several cases 340 as it was laid down that;

"The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted."

337 *Anderton vs. Ryan*, (1985) 2 All ER 355, it was held that: "Statutes should be given what has become known as the purposive construction, that is to say the Courts should identify the mischief" that existed before passing of the statute and then if more than one construction is possible, favour that which will eliminate the mischief so identified.”


339 *Pepper vs. Hart*, (1993) 1 All ER 42.

The respondent, clarifying their stand, submitted that after applying the aforesaid interpretation, the scope of the Section 25 of the Water Act is wide enough to include both, the residential complexes as well as commercial shopping complexes and shopping malls, Thus, the contention of the said DPCC was quite logical that the any residential complex is likely to discharge large volumes of "Sewage" as distinguished from trade effluent. Thus, it is clear that the said provision envisages for including all such "Operation or Process" which is likely to discharge "Sewage". Accordingly, it can be said that the operations or processes that take place within a residential complex is likely to discharge large volumes of sewage into the municipal sewerage system. There can be many activities in a residential complex which result in the use of water, generation and discharge of sewage and the carrying of such sewage into main sewerage system for further treatment, etc. In such circumstances, it is difficult to accept the contention of the petitioners that residential complexes would not fall within the purview of Section 25(1)(a) of the Water Act.

Thus, the court very clearly stated that the impact that the discharge from such commercial cum residential complexes cannot be underestimated or excluded from the purview of the said Act. Thus, the scope of the liability under the Water Act was explained more accurately by the court stating that only because the sewage discharged from such complexes joins the main municipal sewerage system, which may or may not be treated in keeping with the water pollution norms, the petitioners cannot be not get exempted. Furthermore, it was added that it is important to understand the impact that the activity of construction of the said commercial shopping or residential complex or a shopping mall is likely to have on water pollution. Hence, we can say that irrespective of the phases, the compliance to the Water Act is *sine qua non* for any such project of this magnitude.
Additionally, in the said case the court has also addressed another very crucial aspect with regard to the clarity about the correct legal position of the regulating bodies like DPCC. Thus, we can very aptly say that these kinds of cases in a sense are like test cases for the DPCC, where for the first time Section 25 of the Water Act was invoked by the DPCC on this scale against commercial or residential complexes. It was also laid down that, the argument given by the petitioners, that there cannot be a multiplicity of authorities over the same subject matter, and that if the control and regulation of water and sewage is within the exclusive domain of the MCD, then the DPCC cannot also exercise such powers in relation to the same subject matter under the said Water Act. The Court was unable to agree with the above submission, and held that the regulating authorities, DPCC and MCD respectively, operated in separate fields and both sets of regulations and norms will have to be complied with.

Similarly, the court also applied the same approach to give a wider and purposive construction for interpreting to the scope of the applicability of the Air Act, 1981 to the proposed projects. Here, the most important provision referred by the court is

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341 As per the provision under Schedule XII read with Article 243 to the Constitution of India, 1950.

342 Municipal Corporation of Delhi.

343 Incidentally Entry 5 in Schedule XII reads: "water supply for domestic, industrial and commercial purposes”. It obviously does not cover the entire field of the use of water and treatment and discharge of sewage.

344 The relevant provisions of the Air Act, 1981 applicable to the said case are:

a) "Air pollutant” means “any solid, liquid or gaseous substance including noise present in the atmosphere in such concentration as may be or tend to be injurious to human beings or other living creatures or plants or property or environment”;

(b) "Air pollution” means “the presence in the atmosphere of any air pollutant.”

(j) "Emission” means “any solid or liquid or gaseous substance coming out of any chimney, duct or flue or any other outlet;
Section 2(k), \(^{345}\) which defines an ‘Industrial Plant’ to mean “any plant used for any industrial or trade purpose and made any area pollutant into the atmosphere”. Thus in this context the word “Trade” must be given a wider meaning keeping in mind the present world. It could include the transaction that takes places within a commercial shopping complex or a shopping mall.

Similarly, the term “Air Pollutant”\(^{346}\) defined under Section 2(a), includes air pollution from any sources which is present in the atmosphere. Therefore, a collective reading of Section 21(1) of the Air Act with Section 2(a), 2(b) and 2(k), thereof, led the Court to the conclusion that a commercial shopping complex or a shopping mall would be covered within the scope of the Air Act. The precedent T.N. Godavarman Tirumulpad vs. Union of India\(^ {347}\) decided by the Hon. Supreme Court was referred and the court held that there is a likelihood of air pollution being caused due to use of loose cement during construction activity, etc. Clearly, therefore, it is anticipated that the very activity of construction is likely to cause both air as well as water pollution.

The court only granted exemption in the case of a residential complex, while there may be no need to obtain prior consent to operate under Section 21(1) of the Air Act, the court, very rightly, laid down that;

\(^{345}\) Section 2(k) defines Industrial Plant to mean “any plant used for any industrial or trade purpose and made any area pollutant into the atmosphere”.

\(^{346}\) Section 2(a) “Air pollutant”, as defined in means the presence in the atmosphere “in such concentration as may be or tend to be injurious to the atmosphere or the other breeding creatures or plants or property or environment”.

\(^{347}\) Supreme Court in T.N. Godavarman Tirumulpad vs. Union of India, 2006 (10) SCALE 246 (the Vasant Kunj Ridge matters) is the inevitable use of reinforced cement concrete (RCC) mix during construction.
“Once the construction activity commences, that activity has to be in consonance with the provisions of both the Air Act as well as the Water Act. Needless to mention, once the complex, whether commercial or residential or a shopping mall is functional, the norms under both the Air Act and the Water Act or for that matter the EPA or any other environmental law, will have to be complied with.”

Lastly, the most important law that was referred by the court is the *EIA Laws*[^348] which is applicable in the said case. According to the *EIA Notification, 2006* and its schedule annexed, it is applicable to all the new "Projects" and "Activities", including the projects like construction of building/development projects and townships, etc.[^349] The said notification further lays down[^350] that criteria for the application of its scope is wherever there is a scope of using of natural resources for construction or operation of the proposed project (such as land, water, materials or energy, especially any resources which are non-renewable or in short supply). Further, the said EIA law has also incorporated an in-built check list[^351] for furnishing the very

[^348]: EIA Notification dated 14th September 2006 requires the obtaining of a prior EIA clearance for "new projects or activities listed in the schedule to this notification."

[^349]: In the EIA Notification, 2006 Serial 8(A) concerns building and construction projects. In column 4 it is stated that where the extent is of equal to or more than 20,000 sq.m. and less than 50,000 sq.m. of built up area, the EIA clearance is mandatory.

[^350]: Serial No. 2.2 asks for details about "Water (expected sources & competing users)". Appendix 2 sets out the exclusive requirement for construction projects. In para 2 there is a detailed checklist concerning, Water Environment”. Para 2.1 requires the applicant to "give the total quantity of water requirement for the proposed project with the breakup of requirements for various users".

[^351]: "2.9. What the impacts of the proposal on the ground water? (Will there be tapping of ground water give the details of ground water table, recharging capacity, and approvals obtained from competent authority, if any) W.P. (C) No. 543/2008 batch Page 33 of 122.

2.10. What precaution/measures are taken to the prevent the run-off from construction activities polluting land & aquifers? (Give details of quantities and the measures taken to avoid the adverse impacts)

2.11. How is the storm water from within the site managed? (Since the provisions made to avoid flooding of the area, details of the drainage facilities provided along with a site layout indication contour levels)
vital facets related to any project or activity, which may be very relevant for the determining the applicability of the EIA laws.

Further, the court also responded to the contention of the said petitioners, who argued that obtaining EIA clearance from the MoEF for the projects, exempts them from again approaching the said DPCC for their consent to establish under the Water Act and consent to operate under the Air Act, as they felt that the same exercise will be unnecessarily repeated by the DPCC. Clarifying this issue, the court held that in most of the EIA clearances, one of the additional conditions that are imposed is that the

2.12. With the deployment of construction labourers particularly in the peak period lead to unsanitary conditions around the project site (Justify with proper explanation)

2.13. What on-site facilities are provided for the collection, treatment & safe disposal of sewage? (Give details of the quantities of wastewater generation, treatment capacities with technology & facilities for recycling and disposal)

2.14. Give details of dual plumbing system if treated waste used is used for flushing of toilets or any other use.”

44. As regards “Air Environment” para 5 of the form lists out the various questions that have to be answered by the applicant. The questions read as under:

"5.1. Will the project increase atmospheric concentration of gas & result in heat islands? (Give details of background air quality levels with........ based for dispersion models taking into account the increased traffic generation as a result of the proposed constructions)

5.2. What are the impacts on generation of dust, smoke, odours, fumes or other hazardous gases? Give details in relation to all the metrological parameters. 5.3. Will the proposal create shortage of parking space for vehicles? Furnish details of the present level of transport infrastructure and measures proposed for improvement including the traffic management at the entry & exit to the project site.

W.P. (C) No. 543/2008 batch Page 34 of 122 5.4. Provide details of the movement patterns with internal roads, bicycle tracks, pedestrian pathways, footpaths etc., with areas under each category.

5.5. Will there be significant increase in traffic noise & vibrations? Give details of the sources and the measures proposed for mitigation of the above.

5.6. What will be the impact of DG sets & other equipment on noise levels & vibration in & ambient air quality around the project site? Provide details."

Additionally, reference is made to a Circular dated 21st November 2006 issued by the MoEF clarifying that an NOC from the State Pollution Control Board (“SPCB”) and its consent to establish are “separate legal requirements, any project proponent has to fulfil.” It is clarified that ”NOCs are required under Water and Air Acts are mandatory requirement under those Acts and will have to be taken as required and do not require to be intended as environmental clearance”. 352
applicant has to obtain consent to establish under the \textit{Water Act} and consent to operate under the \textit{Air Act} respectively from the \textit{DPCC}.

Thus, the objection claimed by the petitioners on the ground that there is any scope for repugnancy between the relevant statutes namely, the \textit{Air} and \textit{Water Acts} on the one hand and the \textit{EPA, 1986} on the other hand, was rejected out rightly. Further, clearing the said doubt with regard to the matter of the overlapping of the certain aspects of the EIA clearance \textit{vis-à-vis} the consent from \textit{DPCC}, the court while referring to the precedent laid down in the case of \textit{State of Bihar vs. Kedar Sao}, held that;

\begin{quote}
\textit{“It is possible that more than one enactment applies to the same facts and circumstances and it is possible that the applicant may have to get clearances from different agencies for the same activities. The mere fact that an EIA clearance has been obtained from the MoEF cannot be a ground to seek exemption from obtaining consent to establish under the Water Act and consent to operate under the Air Act”}.\footnote{State of Bihar vs. Kedar Sao Appeal (civil) 6643-44 of 2003, available at http://www.manupatrainternational/supremecourt/2001\%20onwards/sc2003/s030610.htm, [visited last on November, 2012].}
\end{quote}

Thus, the court gave a valuable suggestion for harmonising the possible balance that can be struck with a view to avoiding duplication that, when any project proponent seeking an EIA clearance applies to the \textit{DPCC} for either consent to establish under the \textit{Water Act} or consent to operate under the \textit{Air Act}, it would be incumbent on the \textit{DPCC} to ascertain the aspects that have already been examined by the MoEF while granting the said EIA clearance. Therefore, to the extent that certain aspects have not been covered by the EIA clearance, it would certainly be open for the \textit{DPCC} to
examine those aspects and decide whether or not to grant consent to establish under the Water Act and consent to operate under the Air Act.

Further with regard to the legal issue as to who would be liable to apply for the consent from the DPCC? The court clarified that situation is a bit peculiar and complex as in this case the ownership has changed several hands and has been passed from the original owner of land to the said builder and from the builders of the said projects proponent to the existing owners.

However, in the present case where the project has been completed without obtaining prior consent to establish under the relevant said laws, it would be upon the person receiving a show cause notice, in turn to inform the DPCC, the names and the other details of the persons to whom the whole or part of the said premises has been sold or ownership or any other legal rights has been transferred. Then only the notices can then be issued to those persons as well but till such time, the person who has received the show cause notice will continue to be liable to answer the show cause notice under both the said Water as well as Air act.

The ratio laid down the court in the said case states that where a person proposes to establish a commercial shopping complex or a shopping mall or even a residential complex, it would be necessary for such person to comply with the requirements of Section 25(1) (a) of the Water Act and apply to the DPCC for prior consent to establish.

Where the built up area is more than 20,000 m², the requirement of obtaining an EIA clearance for such activity is mandatory. The mere fact that an EIA clearance has been applied for and obtained by a person seeking to establish a shopping mall,
shopping complex or residential complex will not obviate the necessity of such person to again separately apply to the DPCC for a consent to establish under the Water Act.

Where an EIA clearance has already been granted by the MoEF, and the DPCC is thereafter approached for grant of prior consent to establish or prior consent to operate, it would be incumbent on the DPCC to avoid re-examining those aspects that have been examined by the MoEF while granting EIA clearance. The DPCC will examine other aspects which have not been covered by the EIA clearance process.

Finally, the court citing reasons the above set aside the impugned orders passed earlier and left to the DPCC to now proceed in accordance with Section 25(5) of the Water Act and other relevant provisions of the Air Act following the due process of law. The court also gave the regulator the power under the existing statute that, if after making an enquiry or investigation into the matter, it finds it suitable that the use of the premises is causing either water or air pollution, then it can very well proceed to take further action in the manner as provided under the law. At the same time, the court also curtailed the power of the DPCC to impose any environmental damages or requiring the petitioner to furnish any bank guarantee in case of non-compliance with the provisions of either of the Acts. The court pragmatically issued separate directions for each of the petitioners as per level of default made by each of them respectively.

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5.3.11 Kenneth Builders and Developers Case

The next case is related to Kenneth Builders,\footnote{Kenneth Builders and Developers Limited vs. Union of India and others, 2010 Indlaw DEL 3301, available at http.supremecourtofindia.nic.in/mmlist/mm09122011.pdf. [visited on July, 2012].} which is referred hereafter to understand the legislative scope of the EIA laws vis-à-vis the role of the regulating officials like MoEF versus the local state regulating authorities. The said case was heard and decided by a division bench of the Delhi High Court on 30\textsuperscript{th} July, 2010. The local authority of DDA\footnote{DDA- as Delhi Development Authority.} had placed an advertisement on its website for the first public-private participation project to meet the new challenges of the ever evolving capital city and its growing housing needs. Following this advertisement, the said Kenneth Builder (herein after referred as the petitioner) had made the highest bid at Rs. 450.10 crores, and consequently, also paid the entire bid amount.

In turn, the DDA (hereinafter referred as the respondent) accepted its proposal and issued an official statement stating that the work was to be completed within a period of 3 years, \textit{i.e.}, by 04.09.2010. And that possession had been handed over on 04.12.2006 to the said petitioner. But when the starting of the work itself got delayed, and it appeared that petitioner would be unable to complete work on time, the DDA issued a show cause notice. According, to the said notice a penalty of 0.5 \% of the said bid amount was proposed to be imposed\footnote{As per the terms of clause 57 of agreement signed between the petitioner and the DDA.} on the petitioner.

**Issues:**

\footnote{Kenneth Builders and Developers Limited vs. Union of India and others, 2010 Indlaw DEL 3301, available at http.supremecourtofindia.nic.in/mmlist/mm09122011.pdf. [visited on July, 2012].}
Keeping in mind the above facts and circumstances, the issues raised in the said case are as follows:

- Whether the said notice was a valid?
- Whether tender issued by DDA and auction made was liable to be set aside with return of money to petitioner?
- What is the scope of the role of any regulating authority like DDA while granting “consent to establish” under the Water and Air Act?

The petitioner submitted that the said delay was caused because of the objections raised by the Forest Department, as the area in which the work of the project was initiated by the petitioner, incidentally was falling within a ridge. Thus, the petitioner was ordered by the Forest Department to suspend all activities related to the said project. Consequentially, the petitioner incurred huge losses on account of unutilized manpower and used equipment due to the said suspension of work. According to the respondent, the disputed land was earmarked for residential use and hence, the alleged land falls outside of the said ridge area. Thus, the court while referring to relevant statutes,\(^{358}\) accepted that the respondents and the respective state officials like the Department of Forests and NCT, Delhi, cannot raise any such objection on this account and direct to suspend the work, causing the huge financial loss for the said petitioner.

Responding to the most important issue and the third issue, the court interpreting the statutory provision related to the EIA process\(^{359}\) held that when the said petitioner has

\(^{358}\) Air (Prevention and Control of Pollution) Act, 1981, Water (Prevention and Control of Pollution) Act, 1974, Delhi Development Act, 1957 s. 7, s. 7(2) s. 10.

\(^{359}\) The Environment Impact Assessment Notification, 2006, had laid one of conditions that petitioner should obtain ‘consent to establish’ from DPCC under Water and Air Acts respectively.
already sought the EIA clearance from the MoEF, the extent and the scope of DDA’s power to grant the consent is merely confined within four corners of relevant acts. However, the court felt that the said respective regulating authorities like DPCC, NTC and the Forest Department has crossed their jurisdiction of power and had ventured themselves as to whether the disputed land used for the said project falls within the ridge area or not? The Hon. Supreme Court has issued clear guidelines for determining the ridge area and hence, such confusion should not arise at all.

However, the court denied the petitioner’s request, explaining that retrospectively, neither the auction can be set aside nor the project the can be abandoned. Thus, the directions were issued to the DPCC that within two months from this date of judgment, it had to examine and dispose the matter pending for granting the “Consent to establish” strictly according to the legal mandate of the Water and Air Acts. Further, the court guided that, in case the DPCC, after the aforesaid examination feels that the said project cannot not be allowed, then the respondent will be entitled to return the entire bid amount paid by the petitioner with interest due to incapable situation forcing inability to complete the said project proponent.

Lastly, the court while disposing the petition very categorically held that;

“When project itself cannot be gone ahead with, for no fault on part of petitioner, there is absolutely no reason as to why a statutory body, such as DDA, could be permitted to retain amount of money paid by petitioner.”

Thus, the said case stands as an illustrative case, explaining the scope and the jurisdiction of the EIA laws vis-à-vis the law providing the procedure for the granting

360 To return tender amount deposited to DDA along with interest at rate of 6% per annum till realization.
the consent to establish. On one hand, the court very rightly interpreted the limitation of the scope of the provisions under *Water and Air Acts*, and on the other hand, it gave a very pragmatic direction, that in a case where the project stands frustrated, the DDA has no right to keep the bid amount deposited by the petitioner rather they are liable to return the same with due interest.

### 5.3.12 Orissa Coal Washery Case

The next case reveals the issue of violation of the existing norms of the *EIA laws* by any regulating body of the state which is the SPCB in the State of *Orissa*. The said case was filled by a petitioner named *Shri. Karnakar Samal* from the *Angul* district of Orissa against the local State Pollution Control Board, alleging that the EC granted to a Coal Washery was done at the cost of violating the provisions of the existing *EIA laws*. It was alleged by the said complainant that the alleged company had started construction of a Coal Washery, which even started dry coal beneficiation plant having a production capacity 68,000 TPM, without seeking the prior EC under the existing *EIA laws*.

The said complainant further alleged that, without taking due precautions to mitigate the adverse impact on the local environment, the project would badly affect the local villages, nearby land meant for cultivation purpose, the water resources, forest and

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361 *Karunakar Samal and another vs Member-Secretary, State Pollution Control Board, Orissa and another Orissa*, 2009 Indlaw ORI 62.

362 Environmental Impact Assessment Notification, dated 14 September, 2006, issued by the Ministry of Environment and Forest (MoEF), Govt. of India.

363 The Coal Washery Company was with operating process of dry coal beneficiation plant of production capacity of 68,000 TPM.
Thus, the main issues for the judicial interpretation brought up in the said complaint were as follows:

- Whether the EIA Notification originally passed in 1994 is still operative even after passing of its subsequent notification in 2006?
- Whether according to the provisions of the exiting EIA norms the said coal washery was required to obtain an environmental clearance?
- Whether the respective regulator the local pollution control board of Orissa was responsible for the violation of EIA norms while granting the consent to operate to the said coal washery?

In its defence, the respondent maintained that the coal washery is supposed to operate with a dry process of coal beneficiation and thus, it is not required to obtain the EC as per the *EIA Notification, 2006*. In other words, according to the respondent, the dry process for coal beneficiation technology is excluded from the scope of the recent *EIA Notification, 2006*. Hence, the EC for the said coal washery would be legally and procedurally governed by the earlier *EIA Notification, 1994*.

In contrast to the aforesaid argument of the petitioners, the local SPCB in its record maintained that under the *EIA Notification, 1994*, coal washery units were required to obtain EC but the EIA Notification, 2006, which was issued in supersession of the original EIA Notification of 1994, required the coal washeries to obtain EC, since the same were found place at Sl. No.2 (a) of the *Schedule* appended thereto. Here, a very peculiar interpretation was adopted by the said local regulator that although technically they are in support of the *EIA Notification, 2006*, but they could not issue

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364 A type of land classified under the Local Land Revenue Records.

365 *EIA Notification, 1994* dated 27.1.1994 issued by the MoEF.
the NOCs physically, due to administrative reasons. Hence, the respondent may be exempted from the requirement of environmental clearance under the EIA Notification, 2006, subject to rigorous checking by the SPCB itself, on the fact of its the decisions.

The matter of the alleged violation of the law was also reported by the newspaper where the counsel representing the rights of the locals Mr. Bibhu Prasad Tripathy, counsel for the villagers, very rightly raised the question stating that:

“When the environment clearance application was under process, how come the local regulator namely, the OSPCB went ahead with granting the company consent to operate? It is violation of environmental law”.

He further submitted that:

“Show cause notices were mere formalities. There is no punishment for pollution caused by industries prior to closure notice and after revocations.”

Appealing against the cause of environmental degradation the said counsel Mr. Tripathy stated that;

“Policymakers never understand that pollution problems are recurring in nature. The industry keeps on polluting by furnishing bank guarantees and keeping regional officers of SPCB in their good books”.


On the complaint filed by the petitioner, the State Appellate Authority admitted the said matter and finally it was heard by the presiding the Chairman Justice B.P. Das. Thus, this case was a good example of the judicial interpretation of the scope and applicability of a law especially when the existing law has been amended.

5.3.13 Dhangadhra Prakruti Mandal’s PIL Case

Hereinafter, the next case was filed for the discussion is a case[^369] which was decided by the local Gujarat High Court and filed by an NGO Dhangadhra Prakruti Mandal, as a registered society. The said PIL[^370] was filed against the respondent no. 5, who was running a company dealing with DI & CI iron spun pipes. The objection raised was that the said respondent had not obtained the required EC under the mandate of the prevailing law.[^371] The matter was heard by the division bench presided by Justice K. M. Thaker and Justice S. J. Mukhopadhaya of the Gujarat High court. The petitioned also made the respective state officials party to the said PIL, by adding them as respondent no. 1-4, on the alleged ground that they failed in their statutory duty to prevent respondent No.5 from starting the production of the spun pipe without taking the prior EC. The said division bench had dismissed the said PIL, holding that there appeared no violation of the clearance certificate and the EIA Notification, 1994.

[^368]: As stated by Mr. Bibhu Prasad Tripathy, senior High Court advocate, The Hindu, Online edition of India's National Newspaper, as reported by the Staff Reporter, on Friday, Jun 05, 2009, available at [http://www.hindu.com/2009/06/05/stories/2009060556870300.htm](http://www.hindu.com/2009/06/05/stories/2009060556870300.htm), [retrieved on November, 2012].

[^369]: Dhangadhra Prakruti Mandal vs. Union of India, decided by the Gujarat High Court on 9th September 20120, cited in 2010 Indlaw GUJ 606.

[^370]: PIL filed under Article 266 of the Constitution of India, 1950.

so far as production of DI/CI pipes was concerned and so long any DI pipes fittings or DI Castings were not being manufactured technically.

Further, in the SLP filed before the apex court, the issues were;

- Whether manufacturing activity being carried on by respondent no. 5 was in the nature of foundry work?
- Whether the respondent no. 5 had breached *EIA Notification, 1994*, and thus, respondent nos. 1-4 ought to be directed to take steps to suspend respondent no.5’s production activity?

In response to the said first issue, the apex court made a reference to the earlier decision given by the *Gujarat* High Court, where the court had opted to seek an expert opinion on whether the manufacturing activity in the plant at the site in under question can be considered same as foundry work. After scrutinizing the factual aspects involved in the given case, the expert committee opined that so far as DI & CI spun pipes were concerned, it was held by unanimous expert opinion that the manufacturing of said pipes was not in nature of Foundry Work. Thus, considering the said opinion given by the Expert Committee and also reference made to the specific declaration and stipulation made by respondent no.5, it was held that the proponent does not manufacture ductile iron pipe fittings and ductile iron castings at its industrial unit.

Hence, it was concluded that so far as the production of DI/CI pipes was concerned, there appeared no violation of the clearance certificate or the *EIA Notification, 1994* so long the said DI pipes Fittings or DI Castings are not being manufactured. So, the court dismissed the petition stating that it feels that it has no reason to give any direction to respondent nos. 1-4, 7 and 8 to suspend all activities of the respondent.
no.5, pertaining to the production of DI spun pipes and CI spun pipes at the plant situate at *Mundra*. Thus, the said case highlights an issue of a complaint against the alleged violation of the EIA norms, where the petition was dismissed and the all respondents were not held guilty by the by both the High Court as well as the apex court by considering the opinions of technical experts for arriving at the conclusion.

### 5.3.14 Case related to FSI norms in *Maharashtra* State

In the next case,\(^ {372} \) related to the issue of non-compliance of EIA norms, discussed herein below for the state of *Maharashtra*. In the said case the state of *Maharashtra*, while passing a notification to amend the local the *Maharashtra Regional Town Planning Act, 1966* (hereinafter referred as *MRTP Act*)\(^ {373} \) the Government of *Maharashtra* proposed the raising of the FSI\(^ {374} \) on the construction of housing. The said notification had proposed to increase the FSI of the *Mumbai* suburbs, where the housing consumer could avail it at a premium price.

According to a local news report,\(^ {375} \) this plan of additional construction would be possible in suburbs of *Mumbai*. The Government will provide this facility by way of

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\(^{372}\) *Amit Maru and Others vs. State of Maharashtra and Others*, cited at 2010 Indlaw MUM 1604, 2010 (4) ALL MR 596.

\(^{373}\) *The Maharashtra Regional Town Planning (MRTP) Act, 1966*.

\(^{374}\) FSI is the floor space index. Municipalities and governments allow only a certain FSI. Otherwise very tall buildings in a narrow space would be constructed leading to parking and various other problems. In Mumbai and its suburbs it is now 1.33, FSI in Mumbai was first introduced in 1964 and the value then was 4.5. Government had drafted a policy for FSI throughout Maharashtra. It would vary from city to city and municipality to municipality depending upon the population density, available at [http://forum.skyscraperpage.com/archive/index.php/t-126768.html](http://forum.skyscraperpage.com/archive/index.php/t-126768.html), [visited last Nov, 2012].

charging a "premium" amount ranging between Rs 7,000 and Rs 23,000 per m², depending on the locality. A petition was a filed by Mr. Ami Maru and another filed by Mr. Arun Gaikwad as the co-petitioners, against the State of Maharashtra in the year 2008. The petitioners submitted that the due to the proposed increase in the FSI, it will be mandatory to make alterations in the development plan. However, the development plan could not have been amended without infrastructure assessment, considering the effect it has on the infrastructural facilities, thereby, affecting the quality of life. Thus, it may be quite detrimental in near future.

The issue raised by the petitioners in this case highlighted the followings aspects:

- Prior to even proposing the said notification, the local government has totally failed to take into consideration the impact on the environment of the city of Mumbai, and thereby, affecting the already overburdened infrastructure.
- That no EIA study has been undertaken to assess the impact of the said notification on the local environment in the city of Mumbai by the Government before proposing such modifications.
- It was ultra vires to the existing law, that the government was trying to generate funds by selling the additional 0.33 FSI, without having any power vested in them under any existing law.

The government defended the said charges against itself and stated that the state's plan was to increase revenue by sale of additional FSI at a premium would be used for the local infrastructure development. Even the state's Advocate General Ravi Kadam had argued that the said additional FSI would facilitate to bring the house prices in suburbs down, which is in favour of the consumers. The said matter was heard by the

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local High Court of Bombay on 10th June, 2010. The presiding judges, Justices F. I. Rebello and Amjed Sayed, interpreting the scope of the said MRTP Act, 1966, held that the under the said MRTP Act, 1966, the state government cannot charge any additional fee, or premium, so the said notification is not illegal. Thus, a stay was issued by the court while refusing to grant permission to the State of Maharashtra from passing the said disputed notification.

The case once again explains that the scope of EIA is wide enough to include all kinds of modern infrastructural and developmental projects to make them environmentally sound. However, it is quite interesting to note that the said decision of the court was largely based on the technical aspect and not on the basis environmental concerns, which could occur due to the said proposed notification.

5.3.15 Case related to CRZ vis-à-vis EIA norms

For our further discussion on EIA laws the next case reference is the case of M. Nizamudeen vs. Chemplast Sanmar Ltd. & Others,377 which also highlights the loopholes of the EIA as well as the CRZ law and their implementations in India. In the said case, the respondent project proponent, namely Chemplast Sanmar Ltd., had proposed for the installation of MTF.378 The said project was alleged to use VMC379 as a raw material for the manufacturing of PVC. Further, the proponent needed to develop a pipeline facility from the nearby coast to the industrial location of the said

377 M. Nizamudeen vs. Chemplast Sanmar Limited and Others, 2010 AIR (SC) 1765.

378 MTF- A Marine Terminal Facility near the seashore for receiving and transferring VCM from the ships to the PVC (Poly-Vinyl Chloride) plant through underground pipeline.

379 VCM- Vinyl Chloride Monomer, which was to be imported.
project. The respondent had obtained the EIA clearance as well as Risk Assessment and the MoEF, after scrutinizing the said proposal, granted the clearance as per the mandate of CRZ Notification, 1991 for the PVC plant, MTF and pipeline project. Thereafter, on the basis of the said clearance granted by the MoEF, the local regulator namely, the TNPCB, also granted their consent for the said proposal. However later, the Executive Engineer cancelled the said permission on the objection of the use of VCM as a material in the said project, as it is a highly hazardous substance, and its use and storage is likely to cause local environmental pollution, and is threat to the health and safety of the people.

The said cancellation by the said executive engineer, prompted the respondent to file a writ before the local High Court for seeking legal redressal against the cancellation and praying through its PIL, for the quashing of the cancellation order. The local High Court at Chennai admitted the matter and granted the relief as prayed by the respondent and quashed the said cancellation order of the executive engineer. Hence, the authorities of the state filed an appeal in the apex court against the order of the local High Court. In its appeal, the appellant before the apex court prayed, that in tune with the executives order, the permission granted by the MoEF should also be quashed. The court, while examining the matter, was also required to deal with the issue of scope and applicability of the CRZ rules in the said project clearance along with the EIA norms.


381 Tamil Nadu Pollution Control Board, Chennai, India.


As per the proposal of the respondent, the pipeline facility of the said project would be passing through the geographical area of the *Uppanar* river bank, which does not come under the CRZ III of the *CRZ Notification of 1991*. Hence, the apex court held it as negative, hence no clearance under for such laying the pipelines. The court also agreed with the rationale adopted by the MoEF for granting clearance, that for laying of pipelines under the *Uppanar* river, since it was passing through the CRZ abutting the sea, no clearance was needed as it was not required.

The next issue before the court was the matter of interpretation of the text of the *Para 2 Sub Clause (ii) of the CRZ Notification, 1991* that whether the said provision restricts the transfer of any hazardous substances like VMC through the pipeline and further in the port area where the said PVC plant is located. The court after referring the text of the said provision, held that it clearly, by and large, restricts any such

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384 CRZ Notification, 1991, Coastal Area Classification and Development Regulations, Classification of Coastal Regulation Zone: Category-III (CRZ-III): defines Coastal Regulation Zone (CRZ) III area-Areas that are relatively undisturbed and those which do not belong to either Category-I or II. These will include coastal zone in the rural areas (developed and undeveloped) and also areas within Municipal limits or in other legally designated urban areas which are not substantially built up, available at http://envfor.nic.in/legis/crz/czrnew.html, [visited last on November, 2012].

385 The CRZ abutting the sea i.e. 500 meters from the HTL and no clearance was granted as it was not required for laying of pipelines under the Uppanar river, thus no clearance was needed as per the mandate of existing CZR Rules, 1991.

386 The CZR Notification, 1991, S 2.Prohibited Activities:The following activities are declared as the prohibited within Coastal Regulation Zone, namely: (ii) Manufacture or handling or storage or disposal of hazardous substances as specified in the Notifications of the Government of India in the Ministry of Environment and Forests No. S.O. 594(E) dated 28th July 1989, S.O. 966(E) dated 27th November, 1989 and GSR 1037(E) dated 5th December, 1989; except transfer of hazardous substances from ships to ports, terminals and refineries and vice versa in the port areas: Provided that, facilities for receipt and storage of petroleum products and Liquefied Natural Gas as specified in Annexure-III appended to this notification and facilities for regasification of Liquefied Natural Gas, may be permitted within the said Zone in areas not classified as CRZ-I (i), subject to implementation of safety regulations including guidelines issued by the Oil Industry Safety Directorate in the Government of India, Ministry of Petroleum and Natural Gas and guidelines issued by the Ministry of Environment and Forests and subject to such further terms and conditions for implementation of ameliorative and restorative measures in relation to the environment as may be stipulated by the Government of India in the Ministry of Environment and Forests., available at http://envfor.nic.in/divisions/iass/notif/crz.htm, MoEF, India, visited on last November, 2012.
activities like handling or manufacturing or disposal of any kind of hazardous substances, and as an exception, only such transfers of hazardous substances are allowed when they are carried from ships to ports, terminals and refineries and vice-versa, in the port areas. The court further by applying the *Doctrine of Purposive Construction* for the interpretation of the said provision, held that the expression in the said para S 2 (ii), “in the port areas” should be read as, “in or through the port areas”. Thus, the exception contained in the said paragraph 2 (ii) would only achieve its objective and hence it should be read as “except transfer of hazardous substances from ships to ports, ships to terminals and ships to refineries and vice versa, in or through the port areas”. The court stated that this construction will be even harmonious in nature with further paragraph 3(2)(ii) which permits the activity of laying pipelines in the CRZ area. Finally, the court concluded that, it is of the opinion that there is no infirmity in the permission granted by the MoEF on 19th December, 2005. Hence, following the said rationale, the court also expressed that there cannot be any illegality in the permission granted by the executive engineer on 27th February, 2008, and so the said petition stands dismissed.

5.3.16 *Lafarge Umiam Mining Case of Meghalaya State*

Another significant case, decided in the year 2011, was the case of *Lafarge Cement*387 was related to the EIA decided by the bench headed by *S.H. Kapadia, CJI*. The case has multiple dimensions and has discussed several issues such as encroachment of the land of the local indigenous people, resulting in violation of their fundamental rights

to life\textsuperscript{388} and livelihood\textsuperscript{389} under the \textit{Constitution of India, 1950}; the developmental policy \textit{vis-à-vis} the issue of Sustainable Development; role of the regulating authorities in granting the ECs and the procedural violations with regard to the existing EIA laws in India, etc.

The cause of action in the said case arose in the geographical setting of a rich biodiversity state of State of Meghalaya in the North East India. The \textit{Lafarge Surma Cement Ltd.}, (hereinafter referred as `LSCL') is the MNC project proponent and the said company was incorporated within the national territory of the neighbouring country of Bangladesh. To supply the raw material for the said cross-border cement manufacturing plant at \textit{Chhatak} in Bangladesh, \textit{limestone} mining was proposed 100Ha located at \textit{Phlangkaruh, Nongtrai}, East Khasi Hills District in the State of Meghalaya. The said mining lease was granted in favour of \textit{Lafarge Umium Mining Pvt. Ltd.} (hereinafter referred LUMPL), which is a subsidy of the LSCL. It was decided that the mined \textit{limestone} from the aforesaid mines would to be transported to the said LSCL plant across the border through a conveyor belt system.

In April 1997, the said mining company applied for an EC under the \textit{EIA Notification, 1994}. Soon, in October, 1997, the said application was returned back by the regulators on the ground that the existing EIA law has been amended recently and according to it the public hearing is now mandatory for any EC. Hence, the said project proponent


\textsuperscript{389} Part III- Fundamental Rights - Protection of certain rights regarding freedom of speech, etc.—Article 19 (1) All citizens shall have the right— (g) to practice any profession, or to carry on any occupation, trade or business, Constitution of India, 1950, Available at http://lawmin.nic.in/olwing/coi/coi-english/Const.Pock%202Pg.Rom8Fsss(6).pdf, [visited in Jan, 2013].
was asked to revise the formalities accordingly. It was also directed to seek a Site Clearance as well as Project Clearance both. Accordingly, the project proponent in 1998 applied for Site Clearance through the respective state level agency for mining. According to the details of the said application, the project proponent submitted that the area is largely hilly with local tribal population. However, the column “Forest Land involved in the project” was duly filled as “Nil” and also that no endangered species or habitat is located in the proposed mining area.

Further, the local *Khasi Hills Autonomous District Council*, at Shillong,\(^{390}\) which issued a NOC to the said mining company, and then, on the basis of the same, MoEF issued a Site Clearance *vide* letter dated 18\(^{th}\) June, 1999, with an additional condition that it will have to seek the final EC before initiating any kind of on-site developmental work. Hence, the direction by MoEF *vide* the said clearance was merely temporary in nature and not to be considered as a final clearance. Thus, the said proponent again filed its application for EC in 2000 to MoEF for mining *limestone* worth a capacity of 2 million tons/year from a mining area consisting of 100 hectares. In this said application, once again the project proponent maintained the *status quo* of the proposed mining site as “Barren Land”. In addition to this, the proponent also stated in its application that there is not even any notified forest land within a range of 25kms from the proposed mining site.

Thereafter, the public hearing was held as mandated by the recently amended EIA norms. It was held in the details of the minutes of the public hearing that all the

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\(^{390}\) A local council is the constitutional authority under Sixth Schedule of the *Constitution of India, 1950*. 
official representatives nominated by the government given their views in favour of the said project, as they felt that limestone is abundantly available naturally in this area, but due to lack of infrastructure and technological assistance it have not been exploited at all. In the said situation, the proposed project will be handy to uplift the economic and social development of the local region. The only opposition made was by the members representing the Meghalaya Adventures Association, who were complaining of the potential destruction of local historical caves, which was later rebutted by the Headman of the local Durbar. Thus, the said hearing was concluded in favour of the proposed project. Thereafter, the said project proponent filed for the final EC application along with the NOC, Site Clearance Certificate and copy of the approval of the Mining Licences. The EIA report maintained the said area was dominated by uneven rugged topography with very insignificant vegetation and thus, was termed as a “Waste Land.”

The MoEF, on receiving the said application, raised a few basic queries and also asked the proponent to obtain an additional certificate from the DFO to seek forest clearance as mandated under the existing Forest laws. The project proponent also assured the MoEF, that for purpose of the project related infrastructure development no forest will be cleared. Lastly, after submitting the clearance certificate from the local Wildlife Division, the EIA final clearance was granted by the MoEF in 2001. In contrast to this, in 2006 the local Chief Conservator of Forests, Shri Khazan Singh, on the basis of his personal site visit sent a letter to the MoEF alleging the followings points:

391 A Mining license issued under Section 5(1), Mines and Minerals (Regulation and Development) Act, 1957.

392 District Forest Official.
That the industry is has been operating in the heart of the dense forest area with sufficient trees around.

That, as submitted by the said proponent in its EIA report and maintained in its record mining site to be a “Waste Land”, which is incorrect,

That there is ground evidence of the felling of trees and forest clearance, thus violating the norms existing under the FCA, 1980 (hereinafter referred as the FCA).

However, the proponent filed his response denying the above stated violation of any law and having proceeded only after seeking required clearances from the respective authorities, fulfilling all the necessary legal formalities. It was also denied that there is any dense forest existing in the said mining area, and thus, the FCA, 1980, is not applicable. Thereafter, in 2007, the issue again went on a reverse track, on the basis of the aforesaid allegations of the said Chief Forest Conservator and all the on-going activities related to the mining were stalled for the time being on the ground of

Section 2, Forest Conservation Act, 1980 - Restriction on the reservation of forests or use of forest land for non-forest purpose - Notwithstanding anything contained in any other law for the time being in force in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing-

(i) that any reserved forest (within the meaning of the expression “reserved forest” in any law for the time being in force in that State) or any portion thereof, shall cease to be reserved;
(ii) that any forest land or any portion thereof may be used for any non-forest purpose;
(iii) that any forest land or any portion thereof may be assigned by way of lease or otherwise to any private person or to any authority, corporation, agency or any other organisation not owned, managed or controlled by Government;
(iv) that any forest land or any portion thereof may be cleared of trees which have grown naturally in that land or portion, for the purpose of using it for reforestation.

Explanation - For the purpose of this section, “non-forest purpose” means the breaking up or clearing of any forest land or portion thereof for-

(a) the cultivation of tea, coffee, spices, rubber, palms, oil-bearing plants, horticultural crops or medicinal plants;
(b) any purpose other than reforestation;
but does not include any work relating or ancillary to conservation, development and management of forests and wildlife, namely, the establishment of check-posts, fire lines, wireless communications and construction of fencing, bridges and culverts, dams, waterholes, trench marks, boundary marks, pipelines or other like purpose. available at MoEF, http://www.moef.nic.in/legis/forest/forest2.html . [visited on Jan, 2013].
violations of the *FCA, 1980*. Further, promptly responding to the said incident, the MoEF also asked the state of *Meghalaya* to file its reply within a week and also intimated that failing which the mining operations would be banned permanently. Finally, the MoEF passed the closure order on 30th April, 2007, to stop all on-going non-forestry activities by said mining company, as per the mandate of the *FCA, 1980*, and in accordance to the directions of the Hon. Supreme Court passed in 1996 in this regard.

However, the said project proponent refused all the above stated allegations are baseless and submitted that they have sought all the necessary permissions before they had proceeded for the commencement of the said mining activity. It was also submitted that the respective Principal Chief Forest Conservator who is the local statutory authority under the existing *FCA, 1980*, had also granted permission in favour of the said project. Additionally, it must be noted that the industry also has additional responsibility to fulfil and to bear the cost of afforestation in the said area. Further, the said proponent held that they are also willing to take care of any such financial liability if mandated by the existing law. They also highlighted the importance of having such cross border socio-economic developmental project, whereby, they have spent almost a period close to ten years for seeking the necessary statutory permissions under the existing laws. Thus, it must be considered that the intention of the said proponents have been always to follow the mandate of law and not to violated law as alleged.

Lastly, the said proponent submitted that the said Chief Forest Conservator, *vide* its letter of 2007 and also suggested that the said proponent should be allowed to move the limestone already mined and simultaneously also apply for license under the *FCA, 1980*, for these area of the mining operations, which is not yet broken. Accordingly,
the proponent has promptly applied for the said license and also has filed an I.A.\textsuperscript{394} in the local court to seek the direction of the court for the speedy disposal of their said application within the stipulated time of 60 days. This stand of the said proponent was out rightly rejected by the present Chief Forest Conservator, stating that the mandate of the FCA, 1980, was a condition precedent to be fulfilled before the commencement of the said mining operations and not after the objection was raised against them. Thus, seeking an ex-facto compliance was totally unlawful.

By vide an interim order dated 5\textsuperscript{th} February, 2010, the local High Court also directed to stop all mining activities keeping in mind the alleged violations. The court also took a note of the report submitted by the respective High Level Committee\textsuperscript{395} which indicated the assessment of the impact of the mining done by the project proponent up to April, 2010, on forest, wildlife and surroundings, etc., and all the details regarding the area already broken. However, the said report very categorically stated that the total clearing involved felling of 9345 trees out of which 1200 trees have already been felled. The report, although clarified, that the said temporary destruction of the local biodiversity can be very well restored by a well-designed Bio-diversity Restoration Plan, having a time bound implementation structure. Additionally, the said report also expressed that, as per the interactions that have taken place between the said members and the local residents, there seems to be a positive response among them with regard to hope of economic development, due to the commencement of the said project. So prima facie, the said report concluded that the project seems to be have no adverse effect locally, neither on the humans nor the environment.

\textsuperscript{394} An Interlocutory Application No. 1868 of 2007 filed before the Supreme Court of India.

\textsuperscript{395} Headed by Shri. B.N. Jha on 2010.
According to the said assessment of the local forest vegetation done in 2010, it was this said vegetation, in the core area, which was classified as Tropical moist-deciduous type, whereas the vegetation in the upper zone was categorized as Tropical and Sub-tropical types. Accordingly, the learned counsel, on the basis of this aforesaid undisputed position emerging from the record related to the existence of the tropical moist forest in the said area and held that it deserves the highest degree of ecological protection, so prayed before the said court that it should set aside the environmental clearance, dated 9th August, 2001, given under Section 3 of the EPA, 1986, by MoEF.

The learned counsel also submitted that the said environmental clearance dated 9th August, 2001, was clearly granted on the basis of false representations made by the said proponent, M/s. Lafarge, where they had falsely maintained the absence of any significant forest cover, existing in the project core area, and accordingly, engineered reports projecting the site as "a near wasteland" to substantiate their position. Hence, the concealment of factual data available with M/s. Lafarge, including the 1997 NEHU Report, which showed the subject land as forest land, and accordingly, the MoEF ought to revoke the environmental clearance dated 9th August, 2001, having regard to Para 4 of the EIA Notification, 1994. Since, the MoEF as a chief regulator has failed and neglected to revoke the said clearance, it was the statutory obligation of the Court to quash the said clearance in the interest of justice, uphold the rule of law and set precedence.

Further, in this case the role of the EIA consultant\textsuperscript{396} is also very interesting to observe that the designated consultant also wrongly stated in its EIA report that the

\textsuperscript{396} Environmental Resources Management India, Pvt. Ltd.
said area geologically falls under the “Karst Topography”, supporting merely the growth of scanty shrub vegetation. In addition to this, in its defence, the Attorney General appearing on behalf of the state of Meghalaya also submitted that it is completely wrongful to suggest that the Environmental clearance, dated 9th August, 2001, was granted to the to the said project proponent by the MoEF arbitrarily, capriciously or whimsically. It must be noted that all the respective officials\(^{397}\) have submitted their reports in this regard, and the after elaborate discussion, the Expert Committee recommended granting the said EC to the project, once again subject to certain conditions.

Hence, the allegation that the granting of the EC was erroneous was not completely true. It also pertinent to note, that all the precautions were taken, even after such recommendation. Thus, the MoEF once again wrote to the Chief Conservator of Forest, Meghalaya, on 19th April, 2001, seeking his expert view\(^{398}\) before granting the EC. It was a bit peculiar that at the EC stage and as per the letter dated 9th August, 2001 the existence of the forest land was not established. If it has been so established, then the project proponent would have obtained forest clearance under the FCA, 1980 also. Thus, the allegation of violation of law is wrong. Another anomaly, explained by the learned counsel is that in the present case where the clearance process continued a duration of almost 9 years (i.e., between 1997 and 2007) and in between due to frequent changes made in the existing legal mandate by successive amendments the

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\(^{397}\) a. A report by Dr. A.K. Ghosh (Former Director ZSI) additional information was also provided in respect of a comprehensive survey and Flora and Fauna Report dated January, 2001.

b. The report of the Expert Committee on Mining dtd. 19-20.10.2000 along with clarifications on detailed survey of the plant and animals to be carried out with the help of BSI and ZSI officers situated in Shillong, India.

\(^{398}\) The Chief Conservator of Forest (Wildlife Division) vide its report dtd 1.6.2001 commented the project area is sloppy, ending 50in the nearby plains of Bangladesh and covered wholly by degraded forests and grassland vegetation and annexures which was on the basis of Field Verification Report submitted by DFO, Khasi Hills Wildlife Division, Shillong.
proponent often suffered set back in procedural matters. The view of the MoEF as a regulator changed often, as in 1997, the MoEF on the basis of the report of the Chairperson of the Expert Committee of the State of Meghalaya vide an affidavit, maintained in the court, that the said mining lease did not fall on forest land and gave a go-by. However, again between the year 2006-07, it took a completely opposite and entirely new stand, by opposing the very same clearance and rejected it.

The court further explained the legislative importance in this regard and held in Para 2 that;

“The National Forest Policy, 1988 stood enunciated pursuant to Resolution No. 13/52-F, dated 12 May, 1952, of GOI to be followed in the management of State Forests in India. The said Policy stood enunciated because over the years forests in India had suffered serious depletion due to relentless pressures arising from ever increasing demand for fuel wood, fodder and timber; inadequacy of protection measures; diversion of forest lands to non-forest uses without ensuring compensatory afforestation and essential environmental safeguards; and the tendency to look upon forests as revenue earning resource. Thus, there was a need to review the situation and to evolve, for the future, a strategy of forest conservation including preservation, maintenance, sustainable utilisation, restoration and enhancement of the natural environment.”

The court, by explaining the main objective the forest legislations held that;

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399 On the basis of the report, dated 1 June, 2006, of the Chief Conservator of Forests (C), Shri Khazan Singh who had visited the limestone mining project of M/s. Lafarge on 24.5.2006 and found that the mining lease area is surrounded by thick natural vegetation cover with sizeable number of tall trees.

“It is this need which led to the enunciation of National Forest Policy in 1988. The principal aim of the Policy was to ensure environmental stability and maintenance of ecological balance. The derivation of direct economic benefit was to be subordinate to the principal aim of the Policy (See para 2.2). Under essentials of forest management it is stipulated that existing forests and forest lands should be fully protected and their productivity improved. It is further stipulated that forest cover should be increased rapidly on hill slopes, in catchment areas and ocean shores.”

Lastly, the court added by highlighting the special need for having forest cover in the given physiographical the area, and accordingly designed the mandate of law which states that:

“The goal is to have a minimum of one-third of the total land area under forest or tree cover. In the hills and in mountains the aim is to maintain two-third of the area under forest or tree cover in order to prevent erosion and land degradation and to ensure the stability of the fragile eco-system.”

Lastly, as we are aware that to make the EIA law more effective and decentralise the process of decision making, the concept of public hearing was introduced in 1997.

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401 The National Forest Policy, 1988 states;

a. Projects which involve such diversion should at least provide in their investment budget, funds for regeneration/compensatory a forestation. Beneficiaries who are allowed mining and quarrying in forest lands and in lands covered by trees should be required to re-vegetate the area in accordance with forestry practices.

b. In para 4.4.2 it is stipulated that no mining lease shall be granted without a proper mine management plan. Under para 4.5 it is stipulated that forest management should take special care for wildlife conservation and consequently forest management plans should include prescriptions for that purpose.

c. Again under para 4.6 of the Policy it is stipulated that a primary task of all agencies responsible for forest management shall be to associate the tribals and communities living in such areas in the protection, regeneration and re-development of forests as wells as to provide gainful employment to people living in and around the forest.
In India. Keeping in mind the above factual aspects, the core issues for before the court for the deliberation are as follows:

- Whether there is a scope of applicability of the existing EIA and FAC laws to the present case?
- Whether, according to the above facts, the wrongful declaration was wilfully made by the project proponent?
- Whether there was non-application of mind by MoEF in granting such clearance?

The court, in the context of deliberation on the said issues held that;

“Universal human dependence on the use of environmental resources for the most basic needs renders it impossible to refrain from altering environment. As a result, environmental conflicts are ineradicable and environmental protection is always a matter of degree, inescapably requiring choices as to the appropriate level of environmental protection and the risks which are to be regulated. This aspect is recognized by the concept of "Sustainable Development". It is equally well-settled by the decision of this Court in the case of Narmada Bachao Andolan that environment has different facets and care of the environment is an on-going process. These concepts rule out the formulation of across-the-board principle as it would depend on the facts of each case whether diversion in a given case should be permitted or not, barring "No Go" areas (whose identification would again depend on

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402 The original EIA Notification, dated 27 January, 1994, stood slightly amended by notification, dated 10 April, 1997. By the said notification detailed procedure for public hearing has been prescribed. It also prescribes composition of public hearing panels.

undertaking of due diligence exercise). In such cases, the Margin of Appreciation Doctrine would apply.

Making these choices necessitates decisions, not only about how risks should be regulated, how much protection is enough, and whether ends served by environmental protection could be pursued more effectively by diverting resources to other uses. Since, the nature and degree of environmental risk posed by different activities varies the implementation of environmental rights and duties require proper decision making based on informed reasons about the ends which may ultimately be pursued, as much as about the means for attaining them. Setting the standards of environmental protection involves mediating conflicting visions of what is of value in human life and the nature of the land.‖

The court accepted the learned counsel’s submission that the requirement of public hearing as mandatory both under the EIA Notification 1994 and 2006. Hence, the requirement for payment of NPV\textsuperscript{406} does not automatically ensure that environmental clearance is to be granted in favour of the proponent. Further, the court held that;

“At the outset, one needs to take note of Section 2 of the Forest Act, 1980, which stipulates prior approval. This particular section refers to restriction on the de-reservation of forests or use of forest land for non-forest purpose. It begins with non-obstante clause. It states that “Notwithstanding anything contained in any other law for the time being in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing that any forest land or any portion thereof may be used for any non-forest purpose”.\textsuperscript{405}

\textsuperscript{405} Para 19 & 20 of the said judgment.

\textsuperscript{406} Net Present Value.
Finally the court passed a details order inclusive of the following guidelines:

―The User Agency will comply with all the conditions imposed on it earlier as well as further recommendations made 95 by the Committee constituted by the MoEF under the order dated 30th march, 2010, including, in particular, the following :

1. It shall prepare a detailed Catchment Area Treatment Plan.
2. It shall explore the use of surface miner technology.
3. It shall monitor ambient area quality as per New National Ambient Air Quality Standards.
4. It shall take steps to construct a Sewage Treatment Plant and Effluent Treatment Plant.
5. It shall discontinue any agreement for procuring limestone on the basis of disorganized and unscientific and ecologically unsustainable mining in the area.
6. It shall prepare a comprehensive forest rehabilitation and conservation plan covering the project as well as the surrounding area.
7. It shall prepare a comprehensive Biodiversity Management Plan to mitigate the possible impacts of mining on the surrounding forest and wildlife.
8. It shall maintain a strip of at least 100 meter of forest area on the boundary of mining area as a green belt.‖

In addition to the said guidelines, the court also directed that it will be mandatory to be implement them in all future cases and for all the regulatory authorities dealing with the process of issuing environmental clearances in India namely, the Central Government, State Government and the various authorities under the FCA, 1980, and the EPA, 1986, etc.
Lastly, the bench\textsuperscript{407} directed that the MoEF will be under statutory obligation to file the compliance report of implementation of these guidelines within six months and also directed to revise the environmental clearance for diversion of 116 hectares of forest land, taking into consideration all the conditions stipulated hereinabove, and it may impose such further conditions as it may deem proper. Thus, the objective of the court was to set these guidelines as precedent so that \textit{fait accompli} situations do not recur and re-establish the rule of law.

### 5.4 Analysis of Implementation of EIA Laws in India

The judicial decisions in all the cases discussed above, up to some extent, appears to have been mostly influenced by the technical aspects of the case or the cost factor involved in the any project and thus the ecological concerns may have become the matter of least concern. However, the overall analysis of the judicial trends on the EIA issues clearly supports the proposition that the judiciary acted as the curator by plugging the implementational gaps existing in the EIA laws. The court also suggested the various steps, such as the FONSI Model of EIA,\textsuperscript{408} where a preliminary study is conducted to determine the scope for the applicability of the EIA clearances to avoid any procedural lapses. The objective of this model is to determine whether a project/activity falls within the scope of the EIA laws or not.

\textsuperscript{407} The bench comprised of the then CJI, S. H. Kapadia, J., Aftab Alam, J., K. S. Panicker Radhakrishnan, at Supreme Court of India, 2011.

\textsuperscript{408} FONSI- finding not any significant fact, for the purpose of the EIA process, the EIA Model of USA and UK.
Since origin of the EIA process close to two decades ago, the EIA law has been amended more than a dozen times already. Such frequent and successive amendment creates more complications for any on-going projects like Lavasa, etc. Another critical aspect of the EIA regime is the issue of granting the temporary clearance for major projects, which only favours the project proponents. In such cases whether a plea of _fait accompli_ be accepted and allow any project to be continued just because it has incurred heavy cost and even if it is environmentally hazardous? In case of public hearing where the NGOs can only make representation in writing, it doubtful whether there can be any scope for revision or review or reversal of the decision after the hearings are concluded and clearance is granted. There is also need for creating monitoring system at the grassroot level especially at the post EC stage. The judiciary has already issued an ultimatum against the EIA scams and its procedural lapses in India;

“Public participation in environmental decision making is now desideratum”\[^{409}\].

Such cases are examples where courts have taken pro-environmental view and judicially reviewed the executive decision making and have sent a strong message that the scope of judicial review is wide enough to even cover the issues related to environmental governances. On the other hand, cases like Narmada dam project and Konkan railways project, etc, may have caused momentary setbacks for the environmental activists but the minority view expressed in these cases have actually paved the way for the further environmental activism, resulting in enhancing the EIA legislative enactments.

\[^{409}\] Centre for Social Justice _vs._ Union of India (UOI) and Ors., AIR 2001 Guj. 71.
After the detailed discussion on the various foreign as well as Indian cases since the enactment of the EIA Notification in 1991, in our final phase of our discussion hereinafter, we will focus on the most recent judicial trends related to National Green Tribunal in India.

5.5 Role of NGT in shaping EIA Jurisprudence in India

As we are aware that besides, the legislative enactments even the various judicial and non-judicial fora plays very significant in jurisprudential development and implementation of law. In this context, it is pertinent to add here that the recently established National Green Tribunal (hereinafter referred as NGT),\textsuperscript{410} which has also opened the new vistas for the environmental adjudication in India.\textsuperscript{411} To analyse the role and the contribution of the NGT, we hereinafter to undertake this analytical discussion in the following two phases:

- The Pre-establishment of the NGT Phase in India,
- Post Establishment of the NGT Phase and its future scope for uplifting the environmental adjudication in India,

In the pre-NGT phase, we can observe the role of the regular judicial courts in India, playing very crucial roles in granting environmental clearances in most of the developmental projects. The objective is to explore and highlight the inadequacy or

\textsuperscript{410} Hereinafter referred as the NGT.

inefficacy of existing environmental adjudication by these courts in order to strengthen the future course of environmental adjudication in India. In this phase, the roles of judicial courts in adjudicating the environmental cases have often been infected with several fallacies. Some of the said challenges to environmental adjudications in India have been often expressed by the judiciary itself in its several landmark cases.

For example in the case of *A.P. Pollution Control Board vs. M.V. Nayudu*, the Supreme Court referred to the serious differences in the constitution of appellate authorities under plenary as well as delegated legislation (appellate authorities constituted under the *Water and Air Act* and pointed out that;

“... except in one state, where the appellate authority was manned by a retired High Court Judge, in other States they were manned only by bureaucrats.”

The Hon. Supreme Court further observed in another case that;

“*Environmental Courts having civil and criminal jurisdiction must be established to deal with the environmental issues in a speedy manner...*”

The apex court also held a similar view in another landmark case;

“In order to meet the situation, to avoid delay and to ensure immediate relief to the victims, the law should provide for constitution of tribunals regulated by special procedure for determining compensation to victims of industrial disaster or accident,

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412 *A.P. Pollution Control Board vs. M.V. Nayudu*, 2001(2) SCC 62.


414 *Charan Lal Sahu vs. Union of India*, 1990 AIR 1480.
appeal against which may lie to this Court on the limited ground of questions of law only after depositing the amount determined by the Tribunal.”

Thereafter again in 2012, in the case of Vimalbhai vs. UOI, Dr. S Muralidhar, J. raised serious concerned and lamented that;

“Since 2nd July, 2000, the office of the Chairperson NEAA has remained vacant. The office of the Vice-Chairperson has remained vacant since 1st August 2005. The reason for the posts have remaining vacant has been noticed earlier. They leave this Court in no doubt that the Union of India is not at all serious about having an effective functioning NEAA. That the government has been lackadasical is obvious. This Court finds the failure of the government to appoint a Chairperson for over eight years inexcusable. A headless NEAA has, thus, been rendered ineffective by the act of omission of the Government. The intention of Parliament in requiring the Government to constitute an independent body for quick redressal of public grievances in relation to grant of environmental clearances has thus been defeated.”

Lastly, in M.V. Nayudu’s case the court looking into the apathy of the regular judicial courts adjudicating the environmental cases, expressed the need for a special tribunal and held that;

“The Court dealt at length on the need for establishing Environmental Courts which would have the benefit of expert advice from environmental scientists/technically qualified persons.”

415 Vimal Bhai vs. Union of India & Ors. Appeal No. 7/2012, para. 32.

416 A.P. Pollution Control Board vs. M.V. Nayudu, 1999(2) SCC 718.
Apart from this, many times the judicial approach of the courts have been that, if the process of law has been followed, the technicalities of legal mandate has been fulfilled, then the judiciary does not like to interfere in the executive decision making domain!\(^{417}\) There also lot of experts who have been alleging time and again that the MoEF has a track record of passing all proposed projects sooner or later.

Another important issue is that most of the Appellate Authority constituted under the *Air and Water Acts* were manned by non-judicial or technical or scientific persons and thus, due to lack of any fresh and regular appointments in these forums, they were manned by retired officials mostly on temporary basis. Further, the Law Commission of India recommended the need for the establishment of environmental tribunal in its 186th Report “On Proposal to Constitute Environment Courts” in 2003.\(^{418}\) The Law Commission’s Report was critical regarding the manner of functioning of existing environmental courts.

The said report the Law Commission of India made the following observations;

> “Thus, these two National Environmental Tribunals today are unfortunately non-functional. One had only jurisdiction to award compensation and never actually came into existence. The other came into existence but after the term of the first Chairman ended, none has been appointed.”

At the international level the mandate for the need for establishment of specialised tribunals, dedicated for the environmental adjudication, was expressed in the United


Nations Conference on Environment and Development\(^419\) (UNCED), held in Rio de Janeiro from 3\(^{rd}\) June to 14\(^{th}\) June, 1994. In the said declaration specifically Principle 10\(^420\) provided an important trigger for enactment of laws constituting environmental courts. There are well established and successful persuasive precedents available for the working of such specialised tribunal on environmental adjudication in the various parts of the Globe such as in countries like New Zealand Land, New South Wales, Australia, etc. Thus, finally in 2010, the NGT Act was passed vide, and the NGT became functional as an exclusive appellate authority for the environmental adjudications.

5.5.1 Merits of the National Green Tribunal

The recently established NGT has now become the prime body adjudicating the environmental cases in India, to understand its role and contribution, hereinafter we look at its merits.

1. Jurisdiction of the National Green Tribunal

Section 14 of NGT Act, 2010 states that;


“The Tribunal shall have the jurisdiction over all civil cases where a substantial question relating to environment (including enforcement of any legal right relating to environment), is involved and such question arises out of the implementation of the enactments specified in Schedule I. The Tribunal shall hear the disputes arising from the questions referred to in sub-section (1) and settle such disputes and pass order thereon.”

2. **Statutory Interpretation of the Jurisdiction of National Green Tribunal**

   It is been judicially interpreted as the widest jurisdiction ever granted under any other environmental legislation, as it allows the tribunal to have jurisdiction on all civil cases where a substantial question relating to environment is involved. It includes all such question arising out of the implementation of the enactments specified in Schedule I of the said NGT act. In this context, the expression “Only aggrieved/affected party” has been very exhaustedly and harmoniously interpreted keeping in mind the constitutional duty under *Article 51-A(g)* under “Duty to Protect Environment”.\(^{421}\)

3. **Laying Strict Judicial Precedents**

   In 2011, the NGT *vide* its order in the case of *Koradi Thermal Power Project*, laid the legal precedent on the issue of Thermal Radiation and held that for all the future cases involving the radiation issues it would be its mandatory to do an impact assessment and follow the said judicial precedent.

\(^{421}\) The Constitution of India, 1950, where *vide* 42nd Amendment Art. 51-A (g) was inserted which states, “it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures”. The above two provision impose two-fold responsibilities. On the one hand, it gives directive to the State for protection and improvement of environment, and on the other hand it casts/imposes a duty on every citizen to help in the preservation of natural environment.”
4. **Time Limit for the appeal**

The time limit for filing an appeal which has been facilitated under the NGT Act is within 90 days. This would make quite a positive impact on the process of access to justice and widening the scope for environmental adjudication.

5. **Nature of Reliefs**

The NGT has ensured that the Cumulative Impact Assessment is undertaken in order to grant adequate and sufficient relief under the *Polluter pays principle*. It has also started successfully applying all the concept of *Sustainable Development* and all its subsidiaries principles namely: *Polluter pays principle, Precautionary Principle, Principle of Inter-Generational Equity*, etc. The compensation in the areas like potential loss of crops, fisheries, damage to livelihood, etc. all are also covered extensively while granting the relief by the NGT in its recent decisions.

6. **The Composition of Tribunal**

The adjudicating body presiding over the appeals in the NGT is composed of the best of the both worlds, *i.e.*, Judicial Members and Technical Experts as well, to provide comprehensive and more judicious adjudication to matters.

7. **Access to Information**

The NGT has own official website, which is fully loaded with all relevant information, including all the orders passed by the NGT date-wise along with other relevant information, available 24/7.
8. The Output of the National Green Tribunal

On a regular basis, the NGT is now hearing 8-9 cases on average daily, exclusively related to the environmental issues. This shows a tremendous potential of speedy disposal of environmental adjudication in India. The trend existing in the pre-NGT phase shows that the environmental adjudications especially the cases related to the EIA issue have faced huge setback due to delays caused in the ordinary courts in India. Thus, creation NGT would certainly help us to overcome this issue.

9. The Judicial Approach of the National Green Tribunal

The trend shows that the NGT has maintained a very strictly professional attitude in the conducting their business of grievances redressal. It has pretty much emerged like an independent body which works completely dedicated towards dispensing environmental justice in India. It has been also been very vocal in its expression and been very proactive in issuing the strict diktats as and when needed.

5.5.2 Existing Challenges before the National Green Tribunal

Along with its above stated merits the NGT does have few drawbacks and challenges which it is facing in its day to day functioning, some of which are listed herein below;

1. Lack of power to prosecute the EIA consultants for lying on oath. It is because of this that the EIA consultants are escaping from facing any kind of legal
liability as the NGT lacks power to prosecute them as it can only be done by way of instituting separate criminal proceedings against them.
2. The problem of computation and quantification of actual damage in cases related to any environmental damages.
3. Lack of infrastructure facility across the nation has posed great functional difficulty for the tribunal.
4. Lack financial resources are also one of the most prominent hurdles on the ways of effective functioning and growth.
5. The lack of legislative and political will of the government to support the working of the tribunal.

5.5.3 Recent Judgement of National Green Tribunal - *Nirma* Cement Case

Among the most recent decisions delivered by NGT, it would be worth to mention a significant case, adjudicated by the NGT and also related to the existing EIA laws in India.

In the said on-going case at NGT 422 *Nirma Industries Ltd.* was the appellant against the MoEF. Both the sides were duly represented by their respective counsels.423 The presiding bench at NGT, which heard the said case, was comprised of Shri. A. S. Naidu, as the Acting Chairperson, and Dr. G. K. Pandey, as an Expert Member. The

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423 Counsel for the appellant were Shri Dushyant Dave, Sr. Advocate along with Shri Prashanto Chandra Sen, Advocate and Shri Ramesh Singh, Advocate and the Counsel for Respondents: Shri Raj Panjwani, Sr. Advocate along with Shri Abhimanue Shrestha for Respondent No. 4.
cause of action in the said case arose when the MoEF had revoked the environmental clearance granted to the appellant’s proposed cement industry under Section 5 of the EPA, 1986.

In its affidavit filed before the Hon. Supreme Court, the MoEF submitted that its decision on the revocation order has been taken after bearing in mind the analysis of the Expert Committee’s opinion. During the pendency of the said petition before the Supreme Court, an EAC, comprising of seven members and it was set up by MoEF to fulfil the mandate and the directions issued by the Apex Court. Thus, on 1 December, 2011, the said petitioner was duly and formally intimated regarding the decision of the revocation of EC and hence, directed to halt and not proceed with any further on-site developmental activities. It is important to note that EC was issued for the said project even after it was opposed by the several groups of locals and activists.

It allegation was that the proposed project has been allotted on a site which is ecologically a wetland and consists of few water bodies. The state government, after receiving a project proposal from the said project proponent, i.e., Nirma Industries Ltd. had allocated 268 hectares at the village of Padhiyarka of the Mahuva Taluka in Bhavnagar district, Gujarat.

The local villagers, headed by Dr. Kanu Kalsaria, started agitating against the construction of Nirma Industries’ Rs 2,500-crore proposed Cement Plant, which had a capacity to produce 1 M.T. cement annually. The villagers and local farmers also

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424 Expert Appraisal Committee.

constituted an association named *Shri Mahuva Bandhara Khetiwari Paryavaran Bachav Samittee* and got it registered as a society under the Bombay Public Trust Act. The main crux of their agitation was the fear of spreading of pollution due to the cement plant to ground water and air and eventually the loss of healthy life and economy as well. The said association raised several allegations before the competent authorities with regard to as non-fulfilment of mandatory environmental orders and impacts which may be caused by the project. However, the MoEF after considering of all the objections, granted EC for the said project by order dated 11th December, 2008.

Thereafter the said activist association filed a PIL\(^{426}\) in the *Gujarat* High Court in 2009, challenging the state government’s order of issuing land to the appellant for the proposed cement plant. On 26th April, 2010, the division bench of the said high court passed an order in favour of the industry and also laid condition that the said industry needs to give back the portion of the area measuring 100 hectares and which is mainly consisting the water bodies, out of the total allotted area of 268 hectares. After the said decree being granted in favour of the industry, the agitating association approached the Apex Court *vide* a SLP.\(^{427}\) Apart from this, other SLPs\(^{428}\) were also filed by the various interested groups, raising their objections against the proposed project. The apex court, as a matter of tradition, clubbed all the said SLPs and heard them together. During the hearing on 18th March, 2011, representing the Union of India, the Attorney General of India submitted before the Hon. Supreme Court that the MoEF now plans to revisits the EC due to all the continuation of conflicts and contradictions surfacing from various affidavits submitted in the said matter.

\(^{426}\) M/s Nirma Ltd., by filing a writ petition which was registered as Special Civil No.3477 of the 2009.  
\(^{427}\) Special Leave Petition No. 3477 of the 2009 filed at the Supreme Court.  
\(^{428}\) Special Leave Petition No. 15016 of 2010, SLP (Civil) No.14698 of 2010, SLP (Civil) No.32414 of 2010, and SLP (Civil) No.32615 of 2010 filed before the Supreme Court.
Further, the apex court, after hearing the counsels for both parties, directed the MoEF to constitute an expert body consisting of five members, who must be reputed experts and scientists from respective fields. The said expert body was directed to do a local site visit of the disputed project site and also hear the project proponents as well as the other agitators before submitting their conclusive report. The court also raised its concern as to why the MoEF has not followed the ratio laid down in the Lafarge case.\textsuperscript{429} The Apex Court on 9\textsuperscript{th} December, 2011, disposed the said SLPs and allowed the final appeal to be filed in the NGT, as desired by the project proponents and held that the case will be disposed expeditiously. The court also granted a time of four weeks, as seeked by the said appellants. Thus, \textit{vide} the said SLP, appeal was made to the NGT, making all the concerned authorities, like MoEF, Revenue Department and GPCB, etc credible respondents.

In the meantime the association, \textit{Shri Mahuva Bandhara Khetiwadi Pariyavaran Bachav Samittee}, also pleaded before the NGT to allow them to join as intermediaries. The said association also tried to draw the attention of the court that from the beginning they have dueley represented the cause of environmental pollution caused due to the proposed cement plant, yet the said proponent has deliberately not added them as a respondent in the present appeal. The said association humbly submitted before the tribunal that they have played the role as a main agitating body leading the said agitation from the ground of dispute and hence it will be crucial to assist the said tribunal in deciding both, the question of law and fact. Thus, leaving the association out of this \textit{lis} will result in unjustified and wrong. Lastly, the association submitted that since they are fighting for the protection of the fundamental rights for

healthy and pollution free life under *article 21*\(^{430}\) of the *Constitution of India, 1950*, of the locals, their representation is vital to the final disposal of the matter.

In contrast to the aforesaid argument of the association, the appellant held that it is pertinent to note that in the present appeal before the tribunal, the appellant’s main contention is to challenge the legality of the revocation of the EC by the MoEF, which was earlier granted in favour of the appellant. Therefore, the appellant feels that there is no need for the tribunal to allow the agitating association to joint as intermediaries, as they do not fit as a ‘*proper and necessary party*’ in the said case. Thus, it is sufficient to only include the MoEF as the main respondents, who have been statutorily responsible in revoking the said EC against the appellant. Moreover, the primary issue in the said appeal before NGT is the revocation process of EC. It is pertinent to note that the said association has not played any role at all in this regard and it is only Respondent No.1, namely the GPCB, which has been actively involved as local regulator. Therefore, the question of adding the association as a necessary party is a completely futile request, made by the said association to hinder the process of the present appeal.

Further, rejecting the aforesaid contention of the appellant, the senior counsel representing the association, submitted that the charges of the appellant are completely baseless, as the association has been quite actively involved in the entire issue related to the said dispute of granting EC to the said appellant industry. The association also submitted that they have made several written representations to the various competent authorities and had also appeared wherever necessary to make their

\(^{430}\)Article 21 - Protection of life and personal liberty - “*No person shall be deprived of his life or personal liberty except according to procedure established by law*” *The Constitution of India, 1950*, available at: [http://lawmin.nic.in/coi/coiason29july08.pdf](http://lawmin.nic.in/coi/coiason29july08.pdf), [visited on December, 2012].
point adequately heard, representing the cause of the locals. To make their argument more relevant for allowing the said association to join the said appeal, the said counsel further quoted the essential *Doctrine of Public Participation* as held under the *Rio Declaration 1992*.431

The said counsel further added that:

“*Relying upon the Rio declaration on Environment and Development, Mr. Panjwani submitted that environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities including information on hazardous materials and activities in their communities and the opportunity to participate in a decision making process. It is submitted that this Tribunal having been constituted with the aims and objectives of effective and expeditious disposal of cases relating to environment's protection and conservation of forests and to deal with any legal right relating to environments and is also vested with the power to handle the multi-dimensional issues involved in environmental cases, no barrier should be created to keep a group of justice seekers, away from the hearing of a dispute involving environment.*” 432

The learned senior counsel, *Mr. Dushyant Dave*, representing the appellant while rejecting the aforestated contention of the association, stated that;

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“The association, being an unregistered body, does not have any legal standing to represent themselves in the given litigation. Further, he repeating his argument relying upon the Section 16 of the NGT Act, 2010, before the tribunal and held that the said association has no legal right to be admitted as a proper and necessary party, as they have never been a party before the respective authority who has passed the said revocation order of EC against the appellant industry. Lastly, the counsel submitted that the litigating party has all the right to choose his opponent in its legal battle and according to the appellant, since they are not seeking any relief from the said association, adding them as respondent is completely out of question.”

Further, the counsel, for precedence, presented the ratio of the case of Northern Plastics Ltd. vs. Hindustan Photo Films Manufacturing Company. In the said decision, the Hon. Supreme Court held that;

“At the outset it must be kept in view that the appeal is a creature of statute. The right to appeal has to be exercised by persons permitted by the Statute to prefer appeals subject to the conditions regarding the filing of such appeals. We may in this connection usefully refer to a decision of four learned Judges of this Court in the case of Anant Mills Co. Ltd. vs. State of Gujarat. In the said case Khanna, J., speaking for the Court had to consider the question whether the provision of Statutory appeal as per Section 406(2) (e) of the Bombay Provincial Municipal Corporation Act, 1949,

433 Section 16 - The tribunal to have appellate jurisdiction - Any aggrieved person (i) an order made , on or after the commencement of the National Green Tribunal Act, 2010,refusing to grant environmental clearance for carrying out any activity or operation or process under the EPA, 1986, The National Green Tribunal Act, 2012 (Act No 19/2010), available at http://moef.nic.in/modules/recent-initiatives/NGT/, 2 June, 2010. [last visited June, 2013]

434 Northern Plastics Ltd. vs. Hindustan Photo Films Manufacturing Company Ltd. and Others, (1997) 4 SCC 452.

435 Supra, Anant Mills Co. Ltd. vs. State of Gujarat, 1966 SCR (2) 669.
which required the appellant to deposit the disputed amount of tax before the appeal could be entertained could be said to be in any way violative of Article 14 of the Constitution of India. Repelling the aforesaid challenge to the vires of the said provision the following pertinent observations were made.”

It was further held that:

“.... The right of appeal is the creature of a Statute. Without a Statutory provision creating such a right the person aggrieved is not entitled to file an appeal. We fail to understand as to why the Legislature while granting the right of appeal cannot impose conditions for the exercise of such right. In the absence of any special reason there appears to be no legal or constitutional impediment to the imposition of such conditions. It is permissible, for example, to prescribe a condition in criminal cases that unless a convicted person is released on bail, he must surrender to custody before his appeal against the sentence of imprisonment would be entertained. Likewise, it is permissible to enact a law that no appeal shall lie against an order relating to an assessment of tax unless the tax had been paid. Such a provision was on the Statute-book in Section 30 of the Indian Income Tax Act, 1922. The proviso to that section provided that ‘... no appeal shall lie against an order under Sub-section (1) of Section 46 unless the tax had been paid.’ Such conditions merely regulate the exercise of the right of appeal so that the same is not abused by a recalcitrant party and there is no difficulty in the enforcement of the order appealed against in case the appeal is ultimately dismissed. It is open to the Legislature to impose an accompanying liability upon a party upon whom legal right is conferred or to prescribe conditions for the exercise of the right. Any requirement for discharge of that liability or the fulfilment

436 *Ibid* the observations made by the Supreme Court in para 40 of the SCC pp. 202-03 para-40.
of that condition in case the party concerned seeks to avail of the said right is a valid piece of legislation, and we can discern no contravention of Article 14 of the Constitution in it.”

However, the tribunal rejected the aforesaid authority and its precedence quoted by the appellant counsel stating that the case in hand and the facts of the cited authority’s facts do not match at all. Hence, no reliance can be placed on its judicial precedent as suggested by the appellant. The tribunal then explained further, that in the aforesaid case, the issue decided by the Hon. Supreme Court was related to the issue of right to appeal, whereas in the present appeal, the agitating association does not want to refer an appeal by itself, rather it merely wants to be allowed as a respondent to be able to assist the court in arriving at its decision. Thus, both the issues are quite different in nature. Similarly, the there is no scope for application of Section 16 of the NGT Act, 2010, as argued by the appellant’s counsel, since the said provision also merely deals with the parties to an appeal and explains the appellate jurisdiction of the NGT. And this appeal also proves that the appellant have exercised their right to appeal under Section 16 of the NGT Act, 2010, rightfully.

Further, the said tribunal went on to explaining the very nature of the present case and held that all the instances enumerated in the Schedule I of the NGT Act, 2010, are basically non-adversarial in nature, which generally does not have the regular litigating parties like plaintiffs and defendants standing opposite to each other. Rather, controversies like the present case in hand are more like PILs by nature. Additionally, it is also important to mention, in this context, that the main legislations relevant in the said case are the EPA, 1986, and the EIA Notification, 2006. Both the said legislation also mandates for the resolution of any disputes within their scope by way of maximum public participation in the process related to the environmental decision.
making in India. In this regard, another significant reference can be made from the report of the expert committee, which was constituted under the direction from the apex Court, concluding that the said association had duly represented itself even before the said expert committee during its investigation on the ground. Lastly, the reference made to the order of the Hon. Supreme Court in the said matter which also proves that the said association has taken active part. Thus, the tribunal rejected the arguments of the appellant and held that the association has a deep nexus with the pending dispute. With their active representation in all the stages of the case, they are not strangers to the present *lis* which has wrongfully been alleged by the appellant.

It is important to note that the most concrete supporting factor in this regards also comes from the fact that in its order dated 18th March, 2011, the Hon. Supreme Court directed the expert committee to hear all the parties, namely *Nirma Industries Ltd.* and all the other objectors, including the said association. Finally, the said tribunal, in para 14 held that;

“We therefore, allow the application for impletion of party and direct that the applicant be added as a Respondent No. 5 to the Appeal.” Additional directions were also issue to serve a copy of the memorandum of appeal and other relevant documents to association within two weeks, in order to enable them to participate adequately, and also granted time of three weeks for them file their response. Thus, allowing the appeal the next hearing was scheduled on 30th May, 2012.

Further the updates and few orders given till recently by the NGT in the said case are discussed in brief herein below:

> On 30th May, 2012, the NGT heard *Mr. Prashanto Chandra Sen*, Learned Counsel for the Appellant and *Mr. Raj Panjwani*, Learned Senior Counsel for
Respondent No.4. A prayer was made by Ms. Neelam Rathore, Learned Counsel for MoEF, to obtain instructions and file a reply. Thus, the matter was then listed on 25th July, 2012. It was held that the reply if any shall be filed by the next date of hearing. The newly added Respondents were also granted time to file reply on the said date. It is made clear that no further time shall be granted to any of the parties.437

➢ Again on 2nd July, 2012, the NGT heard Learned Counsel for the parties. A prayer was made by the respondents to grant some time to file replies. Considering the said facts and circumstances, the NGT granted time till 30th August, 2012, for filing replies, as the last chance. The matter was then listed next for 30th August, 2012, for further hearing.438

➢ Further on 30th August, 2012, the NGT heard learned Counsel for the parties. Counsel for the Respondent No. 1 submitted that the reply is ready but it is to be vetted from Ms. Indira Jaisingh, learned Additional Solicitor General, who is unavailable due to illness of her father. In view of such reason, Learned Counsel for the Respondent No. 1 seeked a week’s time to file the reply. Considering the special reason, the request was granted to Respondent No. 1 to file the reply within one week in the office and furnish copy thereof to the Counsel for the appellant without any delay. In the meanwhile, if rejoinder is to be filed as intended by Learned Counsel for appellant, the same shall be filed prior to the next date and copy of the same be furnished to the other side. The


learned counsel for the Respondent No. 4 submitted that leave may be granted to file reply, if so required, within above period of four weeks. Leave was granted and the parties were to complete the pleadings within that time as no further time will be granted. The parties were put on notice that the final argument will be heard on next date.  

On the next date, 8th October, 2012, before the NGT, Mr. Pranab Prakash holding Mr. Abhimanyu Shrestha, appearing for Respondent No. 4, submitted that reply could not be filed due to lack of instructions. The NGT held that;

“We do not find any substance in the said submission. For, earlier Senior Counsel Mr. Panjwani had appeared and that the Respondent No. 4 is the NGO. The intervention of the Respondent No. 4 was allowed in the matter. Therefore, it will have to be assumed that the Respondent No. 4 gave instructions to the Counsel. It appears that vide order dated 30th May, 2012, a similar request was made to allow filing of the reply after obtaining instructions of the Respondent No. 4. That request was granted. So far the Respondent No. 4 has not taken any effective steps. We, therefore, hold that the Respondent No. 4 has forfeited its opportunity to file the reply. Hence, the appeal would be heard without reply of the Respondent No. 4. The Counsel for the appellant submits that he may be granted two/three days’ time to file the rejoinder. By way of last chance, time granted to file the rejoinder, till 12 October, 2012. The appeal is scheduled for

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final hearing on 17 October, 2012. No further opportunity will be granted, the Counsel may take note of this.  

Again on 17th October, 2012, Mr. Ramesh Singh, Learned Counsel for the Appellant submitted that the Appellant had engaged Mr. Dushyant Dave, Learned Senior Counsel, but due to some reasons he is unable to appear in this matter. Learned Counsel for the Appellant sought adjournment for the said purpose. The matter is accordingly adjourned to 21st November, 2012. Learned Counsel for Respondent No. 4 sought leave to file a short affidavit. Leave is granted. Further, NGT also granted leave to file Rejoinder and directed that the parties shall complete pleadings at least two weeks before the next date of hearing. The same shall be exchanged between the Parties prior to the next date of hearing. Lastly, the tribunal held that “No grievance will be entertained about non-availability of any Counsel on the next date of hearing.”

On the next date, 21st November, 2012, the NGT heard the Learned Counsel for the parties. A short affidavit was being filed by the Respondent No. 4 on that day itself. A copy thereof was given to the appellant’s counsel. The Learned Counsel for the appellant sought to go through the said affidavit and if necessary to file the reply. Hence, one weeks’ time was granted to file the reply, if any, to the short affidavit so filed by the Respondent No. 4. The NGT also decided that the appeal was not to be heard by the Bench to which Justice V.R. Kingaonkar is a party. Therefore, the appeal may be placed before the

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Chairperson for further orders in as much as the counsel for the appellant expresses urgency in the matter and also there is direction of the apex court to expedite final hearing. The appeal be placed before the Chairperson within a couple of days and stand over to 18th December, 2012.  

Further on the next date, the NGT vide its order dated 17th October, 2012, held that the parties were already directed to complete the pleadings, but then unfortunately a prayer was made on behalf of Revenue Department Secretary, State of Gujarat, for granting some more time for filing a reply. Learned Counsel for parties had no objections and the NGT also felt that the counter of the Government of Gujarat would be very necessary for effectual adjudication. Considering the facts and circumstances and taking a liberal view, the NGT held that;

“We accept the counter which is filed by the said respondent in Court today. Copies, thereof, be served on Learned Counsel for Appellant and other parties. Rejoinder, if any, shall be filed within two weeks hence.” As agreed to by parties, list this matter on 31st January, 2013.

Again on January 31st, 2013, the principle bench of the NGT took the said pending matter and decided to post the further for 7th February, 2013.

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444 The National Green Tribunal Coram comprised of Justice Swatanter Kumar, The Present Chairperson of NGT, Justice P. Jyothimani, Judicial Member, Dr. D. K. Agrawal, Expert Member, Dr. G. K. Pandey, Expert Member, and Prof. A.R. Yousaf Expert Member.

It was again very tiring to see even on 7th February, 2013, that the matter was re-scheduled for the next day 8th February, 2013. On 8th February, 2013, the NGT held that;

“The suggestions have been mooted that the site in question should be examined by the Expert of the Tribunal for the reasons, that there are 4 different expert reports in Court to the project in question. Consequently, it will be most appropriate for the Tribunal to avail expertise and talent of the Expert Member to have the first information to enable the Tribunal to decide the real issue under controversy in the present Appeal. Learned Additional Solicitor General prays for time to take instructions. This is, in any case without prejudice to the rights any of the parties, as held by the tribunal.”

Thus, the matter was once again posted for the next date on 19th February, 2013. The final order in the case is pending and the matter is still getting dragged at the NGT like any other regular judicial court in India.

Analysis:

Looking into the trend of the case until now and disposal of the matter at the various levels of the judicial courts and then before the NGT, it is interesting to note that judicial delays have now also become part and parcel of NGT’s functioning. Due to lack of effectiveness and fairness in executive decisions, often there is a need to judicially review them. Thus, the delay and fate of the project hangs in uncertainty, great amount of time, resources is lost and wasted in approaching various foras to get

the ultimate decision. In this said case, the whole issue originated way back in 2003 \textit{vide} an MOU in Vibrant Gujarat, where the proponent had presented a proposal for a cement plant in Gujarat, and then the project went into litigation, and now it’s almost been dragging for more than a decade. In this case too, the regulator only woke up and withdrew executive decisions of EC only when the locals and activists agitated. This shows that there is lack of judiciousness in executive decision making and often the policy and real legislative intent of law is ignored.