CHAPTER 8

REMEDIES FOR THE ENFORCEMENT OF ENVIRONMENTAL RIGHTS

8.1 CONSTITUTIONAL REMEDY - WRIT JURISDICTION

The most important and innovative part of the Indian Constitution is that Right to enforce the fundamental rights by moving the Supreme Court and High Courts itself a fundamental right. The law declared by the Supreme Court shall be binding on all Courts within the territory of India. The Supreme Court in exercise of its jurisdiction may pass such decree or make such order as is necessary for 'doing complete justice' in any cause or matter pending before it and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf it so made, in such manner as the President may by order prescribe. The Supreme Court shall be a Court of Record and shall have all the powers of such a Court including power to punish for contempt of itself.

The powers of judicial review of administrative action derive from the Constitution and are available only under the provisions which also protects fundamental rights, judicial review is regarded as a matter of a constitutional jurisdiction and is closely bound up with the jurisprudence relating to fundamental rights.
Under clause (2) of Article 32 the Supreme Court is empowered to issue appropriate directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari. The language used in Article 32 (2) is very wide. The power is not confined to issuing only writs but any direction or order or writ whichever appropriate to enforce the fundamental rights, nor it is bound to follow all the procedural technicalities, attached to it in English Law. The wording of Article 32 (2) is so elastic that it permits all necessary adaptation without legislative sanction from time to time so as to enable effective enforcement of fundamental rights.

The right to move the Supreme Court is itself is a guaranteed right and the significance of this has been assessed by Justice Gajendragadkar in the following:

"The fundamental right to move this Court can therefore be appropriately described as the cornerstone of the democratic edifice raised by the Constitution. That is why it is natural that this Court should, in the words of J. Patanjali Sastri regard itself 'as the protector and guarantor of fundamental rights' and should declare that 'it cannot consistently with the responsibility laid upon it, refuse to entertain applications seeking protection against infringement of such rights'."

The underlying purposes of the Constitution in conferring the power on the Supreme Court under Article 32 and on the High Courts under Article 226 to issue writs for the enforcement of the fundamental rights is explained by the Supreme Court.

"The makers of the Constitution having decided to provide for certain basic safeguards for the people in the new set up, which they call the fundamental rights, evidently thought it necessary to provide also a guide and inexpensive
remedy for the enforcement of such rights and finding that prerogative writs which the Courts in England had developed and used whenever urgent necessity demanded immediate and decisive interposition, where peculiarly suited for the purpose...”.

Even though Environmental Jurisprudence provides more scope for statutory remedy as the system consists of several statutes, still it has a wide latitude to grant relief and prevent environmental damage by issuing direction, orders or writs. Infact in India most of the environmental cases have been developed by invoking writ jurisdiction. The writ powers of the Supreme Court and High Courts under Articles 32 and 226 are not restricted in issuing specific writ but extends to issue directions and orders to vindicate the petitioner's rights, to grant declaratory relief or issue an injunction or quash the impugned action without recourse to a specific writ. A wider writ jurisdiction is conferred on High Courts by Article 226 of the Constitution. These rights are:

- fundamental rights guaranteed by the Constitution
- constitutional rights not having the status of fundamental right
- statutory rights
- rights flowing from subordinate legislation
- rights based on case laws, customary rights and contractual rights.

Only fundamental rights falling within category (a) above can be enforced under Article 32 of the Constitution by the Supreme Court. Every High Court shall be a Court of Record and shall have all the powers of such
a Court including powers to punish for contempt of itself.\textsuperscript{7} The law declared by the High Court is binding on all subordinate Courts within its jurisdiction.\textsuperscript{8} The relief that may be granted under Article 226 may be setting aside an illegal order, declaratory, restitutionary and other consequential relief.

\section*{8.2 PREFERENCE OVER CONSTITUTIONAL REMEDY}

In India most of the time the constitutional remedy is preferred over statutory remedy or tort action or public nuisance because it is relatively speedy, cheaper and provide direct access to the higher judiciary and reduces the chances of further appeals. The presenting of oral evidence is eliminated, as facts are set forth in the affidavits of the parties. Further, approaching the highest Courts directly for a writ reduces the likelihood of prolonged litigation in subsequent appeals. The relative speed, simplicity and cheapness of the writ remedy have made it more popular with litigants. Normally the delay between the filing of a writ and granting of a writ is far less the time required to obtain a decree in a suit. In the writs there are fewer intervening proceedings between the filing and judgement.

In the recent years due to Judicial Activism and the development of the concept of Public Interest Litigation (PIL) under the writ jurisdiction, brought tremendous change in the processual jurisdiction. The constitutional remedy also provides flexibility to the Court to choose an appropriate relief by appropriate orders, directions or writs. The judiciary started awarding compensation in the writs. In environmental matters writ of Mandamus is proved to be more effective in securing the public authorities action to improve the environment especially in urban areas. Mandamus can also be issued to undo what has been done in contravention of a statute. This writ can issue against an administrative, quasi judicial or judicial authority. Writ of Certiorari may be issued against a municipal authority that permits constructions contrary to the development rules or violation of zoning or
wrongly authorizes construction of building in a reserved area for parks or any recreation facilities or against pollution control boards that sanction any industry to discharge pollutants beyond prescribed levels. The writ of certiorari and prohibition are issued where an authority (1) acts in excess of jurisdiction (2) acts in violation of the rules of natural justice (3) acts under a law which is unconstitutional (4) commits an error apparent on the face of the record and (5) reaches factual findings that are not supported by the evidence.

8.3 LIMITATIONS OF CONSTITUTIONAL REMEDY

Eventhough invoking of writ jurisdiction has several advantages, still it has some limitations. In the writ process especially in environmental disputes wherein complicated questions of fact are involved which are to be resolved after recording evidence - for instance pollution related cases involving health injuries, the High Courts exercising writ jurisdiction under Article 226 as a matter of practice (not of jurisdiction) feel reluctant to receive evidence. In a petition under Article 226 of the Constitution, the High Court has jurisdiction over issues of both fact and law; but ordinarily such a petition is based on facts established by affidavit. In that case a suit may be more appropriate. For example, if pollution injures health, a suit for damages is appropriate since medical evidence and evidence to establish causation would have to be adduced. Secondly a writ is also inappropriate in such a case because damages are not normally awarded under Articles 32 and 226 of the Constitution.
8.4 CITIZENS SUIT PROVISIONS

8.4.1 Under Environment (Protection) Act, 1986
Air (Prevention and Control of Pollution) Act, 1981 and
Water (Prevention and Control of Pollution) Act, 1974

Section 19 of the Environment (Protection) Act, 1986 states, "No Court shall take cognizance of any offence under this Act except on a complaint made by-

(a) the Central Government or any authority or officer authorized in this behalf by that Government, or

(b) any person who has given notice of not less than sixty days, in the manner prescribed, of the alleged offence and of his intention to make a complaint, to the Central Government or the authority or officer authorized aforesaid".

Under this section a citizen can initiate prosecution against an offender by way of filing a complaint to a magistrate, but prior to complaining he must give a notice of sixty days to the government and his intention to complain. The notice is intended to alert the government so that it can take appropriate action as it deems fit before it is taken to the notice of the magistrate.

8.4.2 **Under Indian Easements Act, 1882**

The Indian Easements Act, 1882\(^9\) guarantees beneficial enjoyment to the owner of the land free from air, water and noise pollution and this law enable the aggrieved individual to challenge any act of pollution.\(^{10}\) It can be done by moving the Court under the Civil Procedure Code.\(^{11}\) Section 9 of the Civil Procedure Code empowers the Court to try suits of civil nature. It reads, "The Court shall... have jurisdiction to try all suits of a civil nature excepting suits of which their cognisance is either expressly or impliedly barred".

8.4.3 **Under Civil Procedure Code, 1908**

In cases where the environmental assaults amount to private nuisance the Court can invoke this provision and give different kinds of remedies in the form of injunction, damages, interim orders, declaration and decree. The Civil Procedure Code has the Section\(^{12}\), under which the Advocate General, or with the leave\(^{13}\) of the Court, two or more persons, can institute a suit, whether or not special damage caused to such persons. A suit may be filed in the case of public nuisance affecting or likely to affect the public. The remedy may be either a declaration or injunction or any other relief according to the circumstances of the case. It has enormous potential for class action against environmental violations.\(^{14}\)

Actually when a representative suit is filed, notice by personal service or by advertisement is to be given. The Court has discretion to allow impleading a party. The decree will be binding to all parties on whose behalf or for whose benefit the suit is instituted. It is enough that the persons who sue need have the same interest in the suit and it is not necessary to establish that such persons have the same cause of action as the persons on whose behalf or for whose benefit they sue.
8.4.4 Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985

Eventhough Section 91 of C.P.C has a reservoir for class action against environmental violations, to overcome some of the difficulties in the class actions the Indian parliament had passed Bhopal Gas Leak Disaster (Processing of Claims), Act in the year 1985.

This Act confers exclusive right to the Central Government to represent the claims of the victims in parens patriae suits. This was done in order to secure the claims arising out of or connected with the disasters were dealt with 'speedily, effectively, equitably and to the best advantage of the claimants'. The validity of the legislation was upheld by the Supreme Court.15

8.5 COMMON LAW
8.5.1 Introduction

Common law is the body of law rooted from customs and conventions recognized through the decisions of Courts of law in contrast to legislative enactments. It is derived from the word 'Lex communis'. The common law was mainly brought by British to India. Tort law or the law of civil wrongs has emerged out of the common law system providing remedies for all such individual or group acts of nuisance, negligence and trespass. Tort law is based upon the principles *sic uteve two ut alininum non lex das* means so use your property as not harm others. The basis of application of common law is 'Justice, Equity and Good conscience'. Although tort law does not deal directly with pollution control still one can spell out rules of pollution control and successfully apply them from the principles evolved out of certain aspects of the law. The common law aspects of Environmental law in India are nuisance, trespass, negligence and strict liability. Pollution cases relating to riparian rights and prior appropriation also fall under this branch of law. Even after the independence this corpus of law continues to be valid and operative as the Constitution facilitates its continuance.16
8.5.2 Nuisance

It means anything which annoys, hurts or that which is offensive. Under the common law principle the nuisance is concerned with unlawful interference with the person's right over wholesomeness of land or of some right over or in connection with it. But for an interference to be an 'actionable nuisance' the conduct of the defendant must be unreasonable.

Nuisance may be public or private in nature. Hence acts interfering with the comfort, health or safety are covered under nuisance. The interference may be due to smell, noise, fumes, gas, heat, smoke, germs, vibrations etc. In the private nuisance the basis of an action under nuisance is unreasonable and unnecessary inconvenience caused by the use of defendant's land.17

A public nuisance is an unreasonable interference with a right common to general public, otherwise an act or omission which materially affects the reasonable comfort, convenience, health, safety and quality of life of a class of persons. The activities include carrying of trades causing offensive smells, intolerable noises, dust, vibrations, collection of filth that affects the health or habitability in a locality. Reasonableness of the defendants' conduct is usually the pivotal question in nuisance. In determining reasonableness, the Courts are generally guided by ordinary standard of comfort prevailing in the neighborhood.

8.5.2.1 Remedies for public nuisance under common law

The Code of Criminal Procedure contain provisions to tackle the problems of public nuisance. The remedies available under Cr.P.C are

* An executive magistrate can interfere and remove a public nuisance of an environmental nature.18
* The magistrate can adopt immediate measures to prevent danger or injury of a serious kind to the public.\textsuperscript{19}

* For the prevention of danger to human life health or safety the magistrate can direct a person to abstain from acts.\textsuperscript{20}

* The scope of this provision as an instrument of pollution control was used in early cases like \textit{Deshi Sugar Mill vs. Tupsi Kahar}.\textsuperscript{21}

* A criminal prosecution can be initiated for the offence of causing public nuisance under Indian Penal Code.\textsuperscript{22}

* The Advocate General or two or more persons can institute a suit, whether or not special damage is caused to such persons.\textsuperscript{23}

* A suit may be filed in case of public nuisance or other wrongful acts affecting or likely to affect the public. The remedy may be a declaration or injunction.\textsuperscript{24}

\textbf{8.5.2.2 Limitations of the remedy}

The tort law of nuisance as a remedy with reference to environmental damage suffers from several limitations. First reasonableness of defendant’s conduct is a question mark or otherwise unreasonableness on the defendant’s conduct is very difficult to prove and mostly weighed against the gravity of the harm to the plaintiff. No ideal or absolute standard can be expected from the defendant such as that of 'reasonable man'. Standard of nuisance varies from place to place. Lack of 'standing' to sue another factor. "Special injury" is to be proved for successful action in private actions on public nuisance by the plaintiff. In pollution related cases it is very
difficult for the plaintiff to establish casual link between the pollutant and the injury as the subject required more of technical evidences. Again material harm attributable to the unreasonable conduct of the defendant is very difficult to prove especially in the pollution related cases.

8.5.2.3 Public nuisance under Section 133 of the Criminal Procedure Code, 1973

The scope of the provision as an instrument of pollution control came under scrutiny in several cases.

In Deshi Sugar Mill vs. Tupsi Kahar the Patna High Court held that the law of nuisance under Section 133 Cr. P.C. would be applicable to pollution related cases also. The Court also recognized that the magistrate has the power to proceed against the discharge of effluents injurious to the health of the community.

In Raghunandan vs. Emperor the Allahabad High Court upheld the magistrate's order forbidding the factory owner from operating his factory engines from 9 pm to 5 am on the ground that the noise emanated from the factory is 'injurious to the physical comfort of the community'. The Court held nuisance of such a nature would undoubtedly be injurious to the physical comfort and those living in the neighborhood of the factory and the matter attracts action under Section 133 of Cr. P.C.

In Shaukat Hussain vs. Sheodayal the Madhya Pradesh High Court limited the application of the provision of Section 133 Cr. P. C. only to actual nuisance and held that it should not be used in the case of potential nuisance.

In Govind Singh vs. Shanti Swaroop the Supreme Court upheld the magistrate's order of demolition of the bakery causing air
pollution and dismissed the special leave petition, relied on the findings of the magistrate believing him to have made a local inspection of the site. The Supreme Court captured the potentiality of the law of nuisance in the Criminal Procedure Code.

In Municipal Council, Ratlam vs. Vardhichand and others\textsuperscript{30} the Supreme Court identified the responsibilities of the municipal council towards environmental protection and developed the law of public nuisance in the Code of Criminal Procedure as a potent instrument for the enforcement of their duties.

When the case came before the Supreme Court Justice V.R.Krishna Iyer made a thorough examination of the two main issues.

\begin{itemize}
  \item the municipal legislation which casts a duty on the municipality to maintain clean roads and clean drains, and
  \item the provisions of the Section 188 of the Indian Penal Code (1860), which prescribes punishment to a person contravening the directions of the magistrate.
\end{itemize}

According to Justice Iyer, the imperative tone of these provisions demands a mandatory duty. When an order is given under Section 133 of the Cr.P.C., the municipality cannot take the plea that notwithstanding the public nuisance, its financial inability validly exonerated it from statutory liability. Further, the Court held that the processes that are envisaged under Section 133 of the Cr.P.C. have a social justice component. The remedies available, and the powers exercisable, under the provision are conducive to the demands of the rule of law necessitated by the conditions of developing countries.
In Krishna Gopal vs. State of Madhya Pradesh\textsuperscript{31} the Madhya Pradesh High Court has gone one step forward and ordered the closure of the factory eventhough the contention of the defendant was that the inconvenience to the inmates of a house is not of public nuisance but only private in nature. The High Court Observed:

"It is not the intent of the law that the community as a whole or large number of complainants should come forward to lodge their complaint or protest against the nuisance: that does not require any particular number of complainants. A mere reading of Section 133 (1) of Cr.P.C. would go to show that the jurisdiction of sub-divisional magistrate can be invoked on receiving a report of a police officer or other information and on taking such evidence if any, as he thinks fit. These words are important. Even on information received the sub-divisional magistrate is empowered to take action in his behalf for either removal or regularizing a public nuisance".\textsuperscript{32}

The Court further said that smoke and noise emanated from the glucose manufacturing factory is injurious to health and physical comfort of the community, and dismissed the revision petition filed by the defendant.

In Madhavi vs. Thilakan\textsuperscript{33} the Kerala High Court upheld the order of the magistrate under Section 133 Criminal Procedure Code against the nuisance created by the automobile workshop in a residential area.

In Ajeet Mehta vs. State of Rajasthan\textsuperscript{34} the Section 133 Cr. P. C. was very much recognized by the Rajasthan High Court and the court upheld the orders of the magistrate in the removal of loading, unloading and stocking of fodder business near a residential locality causing serious health hazard.
In Pranab Kumar Chakraborty vs. Mohamed Akram Hussain\textsuperscript{35} the Gauhati High Court decided that with the help of an order under Section 133 Cr. P. C. a landlord could not evict a tenant. The Court further said that magistrate must satisfy himself in an objective manner in finding out whether there is nuisance or likelihood of nuisance.

In Jayakrishna Panigrahi vs. Hrisikes Panda\textsuperscript{36} the Division Bench of the Rajasthan High Court set a differing view on 'public nuisance' under Section 133 Cr. P. C. The Court held that despite the heading 'public nuisance' in the section the literal and unambiguous meaning shall be given to the expression 'nuisance' and that the provision shall apply to a case where the interest of a single individual or of a few individuals are affected.

8.5.3 Negligence

Negligence is another specific tort on which a common law action to prevent environmental pollution can be instituted. When there is a duty to take care and the same is not taken, which results in some harm to another person, it is amounted to negligence. In the action of negligence the result is some kind of a loss, inconvenience or annoyance to another. The plaintiff must show

- the defendant was under a duty to take reasonable care to avoid the damage complained
- breach of the duty
- consequential damage which must have been factually caused by breach of duty and must be reasonably foreseeable as a consequence of the breach.

The problem with cases of negligence is, the difficulty in establishing casual connection between the negligent act of one and injury to other. It is also very difficult and problematic to prove if the effect of the injury remains latent for a long period.
8.5.4 Trespass

It means an intentional invasion of the interests of the plaintiff over property in his exclusive possession. Invasion may be direct or through some tangible object. Two things are necessary to prove for constituting the tort of trespass.

♦ intentional interference
♦ such interference must be direct rather than consequential.

It differs from nuisance in that, trespass is actionable per se whereas nuisance is actionable in the proof of damage. In the environment related problems tort of trespass constitute a deliberate placement of waste in such circumstances as it will be carried to the land of plaintiff by natural forces. It may be gases or even invisible fumes.

In environment related cases the tort of trespass is very rarely invoked due to the fact.

♦ difficult to identify the source
♦ high cost of litigation
♦ unwillingness on the part of the people to resort to such remedy

all this make it less popular amongst the people.

8.5.5 Strict Liability

The rule of strict liability as enunciated in Rylands vs. Fletcher\(^{37}\) is another form of private law action in respect of environmental hazards. The rule provides that:
"... the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape".38

The rule as enunciated by Justice Blackburn has few components which must be fulfilled so as to attract its application. Upon the presence of these components only the defendant is prima facie liable for the damage caused. The principle is that when a person brings on his premises something that is likely to cause harm if it escapes, possesses it at his peril, he will be strictly liable for the damage caused as a result of the escape of the substance. There is no need either to establish any negligent conduct or malicious intention to make one liable. Liability is strict and independent of motive. All that one need to establish is that a person had brought dangerous thing on his premises for non natural use of land by him (ie. not an ordinary use) and it escaped to the area outside the occupation and injured others. It imposes 'no fault' liability as attachment of liability exists irrespective of the fact that one had taken abundant care and caution and still the object escaped from his control and caused damage to others. As the liability is strict the defendant can raise only a few defenses such as an act of God, act of default of the plaintiff, consent of the plaintiff, independent act of a third party and statutory authorization for the tort.

The rule of strict liability has been applied to a variety of circumstances where in damage has resulted either due to fire39, gas40, explosions41, electricity42, noxious fumes43, colliery spoil44, vibration45 etc.

In India the rule of strict liability has been applied in limited situations relating to the escape of water causing damage to landed property and chattels46, fire47 etc. In the modern industrial society with highly developed scientific and technological knowledge, where hazardous and
inherently dangerous industrial activities are necessary due to their social utility, the Supreme Court found it necessary to lay down the old rule of strict liability and evolved a new principle of Absolute Liability. The new principle of Absolute Liability affords no exceptions available under Rylands vs. Fletcher for their liability.

8.6 REMEDIES AVAILABLE UNDER COMMON LAW

The common law remedies against the environmental pollution are available under the law of torts. A plaintiff in the tort action may sue for damages or seek an injunction or both.

8.6.1 Damages

Substantive damages are the reliefs given to the affected party of a tort in terms of money for the loss suffered, injury sustained and inconvenience borne. Exemplary damages are another category of damages, awarded as punishment and by way of warning to a wrong doer. A third category of damages "nominal damages' indicating that the monetary compensation made available is only very meager and nothing more than a symbolic or token of punishment to the wrong doer. Eventhough damages are the principle relief in any tort action, it suffers from inherent weakness. In our country most of the time the damages awarded have less money value, depreciation in the value of damages awarded at the end of litigation due to high rate of inflation, prolonged litigation - all this make the relief a little successful to plaintiff. Secondly the relief does not deterrent the polluter. Thirdly it is not an effective remedy for the abatement of pollution.

8.6.2 Injunction

This is an order of the Court restraining the commission, repetition or continuation of a wrongful act of the defendant. The remedy is awarded
at the discretion of the Court. It is of two kinds, temporary and perpetual. The Court will consider the relative economic consequences which will result to the parties from grant or denial of an injunction, the good faith or intentional misconduct of the parties and the public interest. Compare to damages the injunctive reliefs are more effective in abating pollution.

8.6.3 Common Law Remedy - Not so popular

In India common law remedy is used in very few cases for the purpose of protecting the environment. The remedy is not so popular because like any other civil action, litigation is very expensive and lengthy affair. Secondly very few people perceive that environmental issues may be brought to Court under the law of torts. Thirdly the burden of proof - as the subject of environmental pollution is of highly technical in nature a common man may not be in a position to understand the technical aspects of the same and this puts him in a psychologically disadvantageous position.

8.7 STATUTORY REMEDIES

In addition to the above remedies Parliament has provided special channels to redress in certain special types of environmental cases. The Public Liability Insurance Act of 1991 and the National Environment Tribunal Act of 1995 provides a summary remedy to the victims of the hazardous industrial accident. Both the laws adopt a 'no fault' liability standard, all but abolishing the defenses available to the owner of the hazardous facility and create a speedy claims-disposal machinery.

Under the Public Liability Insurance Act, claims upto Rs.25,000/- may be filed before the district collector, with the jurisdiction for awarding larger amounts vesting in the National Tribunal constituted under the Environmental Tribunal Act, 1995.
Until the enactment of the Environment (Protection) Act of 1986, the power to prosecute belonged exclusively to the Government under the existing laws. Citizens had no direct statutory remedy against a polluter.

But after the enactment of Environment (Protection) Act, 1986 under Section 19 of the E.P. Act a citizen may prosecute an offender by a complaint to a magistrate of course prior to complaining he must give the government 60 days notice of his or her intention to complain.

Similar provisions are available allowing citizens participation in the enforcement of pollution laws, in the Section 43 of the Air Act 1981 and in Section 49 of the Water Act as amended in the year 1988.

Again the amended sections require pollution control boards to disclose relevant internal reports to a citizen seeking to prosecute a polluter. The case of the writ procedure and the willingness of judges to adjudicate complex environmental issues on the basis of affidavit-evidence in P.I.L has led to the neglect of the private prosecution machinery. More over private prosecutions entail adherence to strict rules of evidence. Under the existing pollution control laws those seeking to launch a private prosecution are discouraged by the sampling requirements which confer the power to draw the effluent samples exclusively on government officials.

Supplementing the redressal machinery in the National Environment Appellate Authority Act 1997 which creates an appellate forum to test the validity of environmental clearances for industrial projects granted under the Environment (Protection) Act, 1986. A citizen can make a criminal complaint under Section 19 of the Environment (Protection) Act, 1986 or the corresponding provisions under the Water Act and the Air Act to trigger the prosecution of polluters.