16
ENVIRONMENTAL LAW

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I INTRODUCTION

UNDER THE Indian Constitution, legislative powers are shared between the Union and the States. Apart from this distribution of power, the Parliament is also empowered to legislate in 'national interest' on the matters falling in the state list.[1] The distribution of legislative powers from an environmental standpoint is an important one. Some environmental problems such as sanitation and waste disposal are best tackled at the local level. Others, like water pollution and wildlife protection, are better regulated by uniform national laws.[2] The 42nd amendment to the Constitution expressly incorporated environmental protection and preservation in the constitutional framework. The amendment appears to have considerably impacted the environmental jurisprudence of the country as is evident from the observations of Chinnappa Reddy J, in *Sachidanand Pandey* v. *State of West Bengal,* which best express what has been and continues to be broadly the outlook of the judiciary to environmental problems.[3] His observations, however, are important

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1 Art. 249.

2 Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India: Cases, Materials and Statutes* 43 (OUP) Delhi.

3 (1987) 2 SCC 295 at 304 (emphasis supplied): When ever a problem of ecology is brought before the court, the court is bound to bear in mind art. 48-A of the Constitution, the directive principle which enjoins that "the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country," and art. 51-A(g) which proclaims it to be the fundamental duty of every citizen of India "to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures." When the court is called upon to give effect to the directive principle and the fundamental duty, the court is not to shrug its shoulders and say that priorities are a matter of policy and so it is a matter for the policy-making authority. *The least that the court may do is to examine whether appropriate considerations are borne in mind and irrelevancies excluded. In appropriate cases, the court may go further, but how much further must depend on the circumstances of the case. The court may always give necessary directions. However the court will not attempt to nicely balance relevant considerations. When the question involves the nice balancing of relevant considerations, the court may feel justified in resigning itself to acceptance of the decision of the concerned authority.*

from another perspective in as much as they also bring out the perpetual dilemma that underlies the judicial adjudication of environmental issues. Most of the situations in fact do involve 'balancing of relevant considerations' and the court, either recognising the inherent limitations of the judicial process or otherwise reluctant to change the *status quo* which may involve high financial stakes, or then for fear of entering into the forbidden legislative domains, may feel 'justified in resigning to acceptance of the decision of the concerned authority' despite its avowed commitment to constitutional mandate. At the same time there is a concealed warning in his statement to the fact that 'where the court is called upon to give effect to the directive principle and the fundamental duty, the court is not to shrug its shoulders and say that priorities are a matter of policy and so it is a matter for the policy-making authority'. To some extent, although, the court has been engaged in the process of persuasive dispensation of justice, it has been willing to resort to hard options if, and when the situation demanded.

The annual survey of environmental law cases in the Supreme Court for the year 2011 clearly points to a strategy that is more accommodative thus leaving open at times spaces for adjustments and accommodations. Some of the important cases decided by the court or in which significant interim orders were issued pertained to, the construction of a park at Noida near the Okhla bird sanctuary, the mining of limestone in the state of Meghalaya, the after effects of a chemical spill in Rajasthan, ban on the manufacture, sale and uses of asbestos, and of endosulfane, reclamation and rehabilitation of Bellari mines and the rehabilitation and resettlement of canal affected families of the Indira Sagar and Omkareshwar projects. A perusal of various high courts cases decided on the subject during the year under investigation similarly reveal a variety of issues coming before the courts, for instance, those concerning with encroachment of forest land in Delhi, water pollution in Maharashtra caused by immersion of idols, disposal of bio-medical waste by hospitals in Orissa and Karnataka, eco-tourism theme park in Kerala and protection of natural forests in Andaman and Nicobar Islands, among others. Only a few of them have been dealt with in the survey as most of the cases did not involve substantial policy perspectives requiring detail analysis. The survey now proceed to have a closer look at the interplay of conflicting claims and contentious ideologies vying for recognition before the Supreme Court and the high courts and the way the appellate courts have tried to resolve these conflicts during the year 2011.

II FORESTS

The park in Noida

In *Re: Construction of Park at Noida near Okhla Bird Sanctuary*[4] two residents of Noida objected to the setting up of a very large government park by the state of Uttar Pradesh adjacent to the Okhla bird sanctuary. It was contended that no prior permission from the authorities had been taken for setting it up and that a large number of trees had been cut down for bringing about the project.

4 (2011) 1 SCC 744.

The government defended its actions claiming that the aim of setting up of the park was primarily to beautify the area. It was stated that the government had complied with all the relevant rules and regulations, and the setting up of the park did in no way harm the bird sanctuary.

One of the main objections to the setting up of the park was that over 6,000 trees had been cut down for clearing the area for setting up of the project in violation of the provisions of the Forest (Conservation) Act, 1980. The Act requires the state government to seek prior approval of the central government for utilizing a forest land for non-forest purposes. The question, therefore, was whether the site for the construction of the project was situated on a forest land or not?

It may be recalled that the Supreme Court in *T.N. Godavarman Thirumulkpad* v. *Union of India,*[5] had directed each state government to constitute an expert committee to:

(*i*) identify areas which are 'forests,' irrespective of whether they are so notified, recognised or classified under any law, and irrespective of the ownership of the land of such forest;
(*ii*) identify areas which were earlier forests but stand degraded, denuded or cleared; and
(*iii*) identify areas covered by plantation trees belonging to the Government and those belonging to private persons.

Pursuant to the directions, the state of Uttar Pradesh had constituted a state level expert committee for identifying forests and forest like areas. The committee had framed certain parameters for identification of forests in terms of which, in the plains any stretch of land over 2 hectare (ha) in area with a minimum density of 50 trees per hectare was to be considered as a forest. These parameters had been approved by the Supreme Court itself.

In terms of the above parameters the district level committee of Gautam Budh Nagar had intimated to the conservator of forests that there were no forest like areas in the district and consequently the project site was not identified as a forest or forest like area by the state level committee.

However, complaints came to be filed in March 2009 before the central empowered committee constituted by the Supreme Court, alleging that the construction of the park, which had begun in January 2008, was on a forest land. By that time, 50% of the construction of the project had already been completed.

The state government in defending the construction of the park strongly relied upon the state level expert committee's view that the project was not situated on a forest area. It was pointed out that the omission to identify the trees at the project site as forests or deemed forest was not due to a mistake. The decision had been arrived at by following the parameters adopted by the state level expert committee that the 'trees found in the area must be naturally growing trees and plantations done on public or private lands would not convert the land into a forest area'.

5 (1997) 2 SCC 267.

The petitioner, on the other hand, alleged that a tract of land bearing a thick cluster of trees that should qualify as a forest land would not cease to be one simply because the parameters adopted by the expert committee in identifying a forest area were deficient. In support, the petitioner relied on google earth images which showed that the area might have had a dense cover of forest. However, the court observed: [6]

> …A satellite image may not always reveal the complete story. Let us for a moment come down from the satellite to the earth and see what picture emerges from the government records and how things appear on the ground. In the revenue records, none of the khasras (plots) falling in the project area was ever shown as jungle or forest. According to the settlement year 1359 Fasli (1952 AD) all the khasras are recorded as *agricultural land*, banjar (uncultivable) or parti (uncultivated).
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> NOIDA was set up in 1976 and the lands of the project area were acquired under the Land Acquisition Act mostly between the years 1980 to 1983 ... the possession … of the lands … was taken over in the year 1983. From the details of the acquisition proceedings … it would appear that though on most of the plots there were properties of one kind or the other, *there was not a single tree on any of the plots under acquisition*. The records of the land acquisition proceedings, thus, complement the revenue record of 1952 in which the lands were shown as *agricultural and not as jungle or forest*. There is no reason not to give due credence to these records since they pertain to a time when the impugned project was not even in anyone's imagination and its proponents were nowhere on the scene.
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> Further, in the second response of the MoEF, dated 22-8-2009/24-8-2009 there is a reference to the information furnished by the Deputy Horticulture Officer, NOIDA according to which plantations were taken up along with seed sowing of subabul during the years 1994-1995 to 2007-2008. A total of 9480 saplings were planted (including 314 saplings planted before 1994-1995). NOIDA had treated this area as an 'urban park'. It is, thus, to be seen that on a large tract of land (33.45 ha in area) that was forever agricultural in character, trees were planted with the object of creating an urban park (and not for afforestation!). The trees, thus, planted were allowed to stand and grow for about 12-14 years when they were cut down to make the area clear for the project.
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> The satellite images tell us how things stand at the time the images were taken. We are not aware whether or not the satellite images can ascertain the different species of trees, their age and the girth of their trunks, etc. But what is on record does not give us all that information. What the satellite images tell us is that in October 2006 there was thin to moderately dense tree cover over about half of the project site. But this fact is all but admitted; the State Government admits felling of over 6000 trees in 2008. How and when the trees came up there we have just seen with reference to the revenue

6 *Supra* note 4 at 758.

> and land acquisition proceedings records. Now, we find it inconceivable that trees planted with the intent to set up an urban park would turn into forest within a span of 10 to 12 years and the land that was forever agricultural, would be converted into forest land. *One may feel strongly about cutting trees in such large numbers and question the wisdom behind replacing a patch of trees by large stone columns and statues but that would not change the trees into a forest or the land over which those trees were standing into forest land.*

In the facts and circumstances of the case, the court was also required to interpret the directions of the Supreme Court in *T.N. Godavarman Thirumulkpad* v. *Union of India,*[7] as those directions were essential for determining as to what constituted a forest. Interpreting the observations therein the court said thus:[8]

> [T]he order dated 12-12-1996 indeed gives a very wide definition of "forest." But any definition howsoever wide relates to a context. There can hardly be a legal definition, in terms absolute, and totally independent of the context. The context may or may not find any articulation in the judgment or the order but it is always there and it is discernible by a careful analysis of the facts and circumstances in which the definition was rendered…
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> …To an extent Mr Bhushan is right in contending that a man-made forest may equally be a forest as a naturally grown one. He is also right in contending that non-forest land may also, with the passage of time, change its character and become forest land. But this also cannot be a rule of universal application and must be examined in the overall facts of the case otherwise it would lead to highly anomalous conclusions.
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> Like in this case, Mr Bhushan argued that the two conditions in the guidelines adopted by the State Level Expert Committee i.e. (*i*) "trees mean naturally grown perennial trees", and (*ii*) "the plantation done on public land or private land will not be identified as forest like area" were not consistent with the wide definition of forest given in the 12-12-1996 order of the Court and the project area should qualify as forest on the basis of the main parameter fixed by the Committee. If the argument of Mr Bhushan is accepted and the criterion fixed by the State Level Expert Committee that in the plains a stretch of land with an area of 2 ha or above, with the minimum density of 50 trees per hectare would be a deemed forest is applied mechanically and with no regard to the other factors a greater part of Lutyens Delhi would perhaps qualify as forest. This was obviously not the intent of the order dated 12-12-1996.

Another objection to the construction of the park was that the construction had been started by the government without obtaining the prior environmental clearance from the central government or the state level environment impact assessment authority, in terms of the notification issued by the central government on 14.09.2006

7 (1997) 2 SCC 267.

8 *Supra* note 4 at 761 - 762.

under section 3(3) of the Environment (Protection) Act, 1986. The issue here primarily was of interpretation of the 2006 notification. The question was whether the park would qualify as a 'building and construction project' or as a 'township and area development project' within the meaning of the notification'. Having regard to the nature and the purpose of the project, the court said thus: [9]

> … it is difficult to see the project in question as a 'building and construction project'. Applying the test of 'dominant purpose or dominant nature' of the project or the 'common parlance' test i.e. how a common person using it and enjoying its facilities would view it, the project can only be categorised under Item 8(*b*) of the schedule as a township and area development project'. But under that category it does not come up to the threshold marker inasmuch as the total area of the project (33.43 ha) is less than 50 ha and its built-up area even if the hard landscaped area and the covered areas are put together comes to 1,05,544.49 sq m i.e. much below the threshold marker of 1,50,000 sq m. *The inescapable conclusion, therefore, is that the project does not fall within the ambit of the EIA Notification S.O. 1533(E) dated 14-9-2006. This is not to say that this is the ideal or a very happy outcome but that is how the notification is framed and taking any other view would be doing gross violence to the scheme of the notification*.

One of the main objections to the construction of the park was that the project site was located adjoining the Okhla bird sanctuary. This close proximity it was contended raised serious concerns of destruction of the natural habitat of the bird sanctuary. The dilemma, however, before the Supreme Court was that even though the construction of the park adjoining the bird sanctuary might be hazardous to the habitat, but there was no legal restraint on the state government from doing so. In fact, in the report of the central empowered committee it had been stated that the MoEF had time and again requested states to identify eco-sensitive zones around national parks and sanctuaries. However, the state of Uttar Pradesh had not prepared any proposal. In the absence of any identification and a notification of an eco-sensitive zone, there was no legal restraint on the state government against the construction of the project on the ground that the project was adjacent to the Okhla Bird Sanctuary. Considering the peculiar facts and circumstances of the case, the Supreme Court came out with a unique solution to the problem. The court asked the MoEF to make a study of the environment impact to the project and to suggest measures for safeguarding the bird sanctuary. In pursuance to the court's direction, the MoEF asked the project proponents to have the environment impact assessment of the project done by some expert agencies. The project proponent accordingly got three studies made of the impact assessment of the project on the environment. In view of the recommendations of the three expert bodies, the court noted:[10]

> It is significant to note that none of the expert bodies has taken the view that the project is so calamitous or ruinous for the bird sanctuary that it

9 *Id*. at 774. (emphasis added).
10 *Id*. at 779.

> needs to be altogether scrapped in order to save the sanctuary. The expert bodies have given recommendations which allow the completion of the project subject to certain conditions. On behalf of the State of U.P. it is unequivocally stated that all the conditions laid in the reports of the expert bodies are acceptable to the state government/NOIDA in their entirety. In the light of the two study reports and the report submitted by the EAC, we see no justification for directing the demolition of the constructions made in the project, as prayed for on behalf of the applicants. We would rather allow the project to be completed, subject, of course to the conditions suggested by the three expert bodies…

However, it is significant to note that the court could not help conceal its discomfort when it observed that: [11]

> …we would also like to point out that the environmental impact studies in this case were not conducted either by the MoEF or any organisation under it or even by any agencies appointed by it. All the three studies that were finally placed before the Expert Appraisal Committee and which this Court has also taken into consideration, were made at the behest of the project proponents and by agencies of their choice. *This Court would have been more comfortable if the environment impact studies were made by the MoEF or by any organisation under it or at least by agencies appointed and recommended by it.*

The two paragraphs cited above from the judgment obviously point to an untenable proposition where, on the one hand, the court is questioning the very legitimacy of the reports prepared by the experts appointed by the state government and not by the MoEF, and yet, on the other hand, relies on the same reports to find enough justification to allow the project to be completed. Similarly, it is difficult to comprehend as to why and for what reasons the state government was allowed to take advantage of its own failure to identify and notify eco-sensitive zones in clear contravention of the court's earlier directions thus creating a legal lacunae which the state authorities could exploit. The only plausible answer perhaps lies in the fact that huge amount of public money had already been invested in the project by the state government and an adverse finding from the court would have created an unprecedented situation. Environmentalism appears to have been relegated to a mere concern for the habitats of the bird sanctuary who perhaps will have to learn to live in the exalted company of the stone statutes.

The mining of limestone in Meghalaya

The decision in *Lafarge Umiam Mining Private Limited* v. *Union of India*[12] was perhaps the most significant case that arose, in the period under survey, bearing on the subject of environmental law. The case concerned the mining of limestone in the state of Meghalaya. The mining was to be done by Lafarge Umiam Mining Pvt

11 *Id*. at 780 (emphasis added).
12 (2011) 7 SCC 338.

Ltd, under a lease, from a limestone mine situated at Nongtrai, East Khasi hills district of the state of Meghalaya. The limestone was to be transported by a conveyor belt to the parent plant in Bangladesh for the production of cement.

The case arose as there was uncertainty as to whether the limestone mine was situated within a forest area. The clearance initially sought for by Lafarge was based on the premise that the mine was not situated in a forest area. However, after work had started it was discovered that the mine was in fact situated within a forest area. The authorities, therefore, asked Lafarge to seek the necessary environmental clearance. On Lafarge making an application, the clearance was granted by the authorities retrospectively. This retrospective clearance came to be challenged before the court by certain public spirited persons. It was contended that the initial clearance had been obtained by Lafarge being fully aware that the mine was situated within a forest area. Yet it had hidden this fact from the authorities. It was only because of this misrepresentation, that Lafarge could obtain the clearance. And, only when it was discovered that the mine was situated within a forest area, did Lafarge obtain another clearance from the authorities as mining in the area had already started and substantial investment made. In this background, it was contended that the *ex post facto* clearance could not be sustained in law. The court noted: [13]

> …Universal human dependence on the use of environmental resources for the most basic needs renders it impossible to refrain from altering the 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.* ... These concepts rule out the formulation of an 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... Since the nature and degree of environmental risk posed by different activities varies, the implementation of environmental rights and duties requires 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.

What has always been bothering the courts, is the level of judicial scrutiny that they should have in environmental decisions. Should the court sit in an appeal over every decision taken by the government clearing a project which might have an adverse impact on the environment? Answering the dilemma the court noted: [14]

> In the circumstances, barring exceptions, decisions relating to utilisation of natural resources have to be tested on the anvil of the well-recognised principles of judicial review. *Have all the relevant factors been taken into account? Have any extraneous factors influenced the decision? Is the decision strictly in accordance with the legislative policy underlying the*

13 *Id*. at 367 (emphasis added).
14 *Id*. at 379 (emphasis added).

law (if any) that governs the field? Is the decision consistent with the principles of sustainable development in the sense that has the decision-maker taken into account the said principle and, on the basis of relevant considerations, arrived at a balanced decision? Thus, the Court should review the decision-making process to ensure that the decision of MoEF is fair and fully informed, based on the correct principles, and free from any bias or restraint.

The area which was being subjected to mining activities had its own unique history. In fact the mining of limestone in Khasi hills dated back to 1793, when an agreement had been signed between the East India Company and the Nawab of Bengal. Regular trade of limestone between Khasi hills and Bengal started some time in the year 1858. Over the years substantial revenue had been earned by the British government from these mines. There were historical records about continuance of limestone trade between Khasi Hills and Bengal up to 1947. The business, however, declined after partition. As a result, the trade of limestone slipped into the hands of the unorganized sector.

The court noted that the mining site had been selected after thorough consultation with the village Durbar, which was the custodian of the lands in the area. The land had been left unused and was covered with degraded forests and this was the reason the Durbar had leased the lands for mining. The village Durbar also felt that unscientific mining by the unorganized sector in the area was on the rise and, therefore, it was felt necessary that the lease be given to Lafarge, so that at least the mining be done on a scientific basis. Accordingly under the lease agreement dated 29.03.1993, the village Durbar represented by a special committee headed by the headman as the lessor granted lease of the limestone quarry in Nongtrai to the predecessor of Lafarge. Thus an area of 100 ha stood acquired on lease for mining, whose lessor was the village Durbar of Nongtrai.

As to the question of whether the initial clearance which had been sought by Lafarge, the court wondered 'Can it be said on the above facts that a mis-declaration was willfully made by Lafarge or its predecessor (project proponent) while seeking site and environmental clearances? Was there non-application of mind by MoEF in granting such clearances? Was the decision of MoEF based solely on the declarations made by the project proponent(s)?'

As has been earlier noted in the survey, the Supreme Court had in *T.N. Godavarman Thirumulkpad* v. *Union of India*[15]directed each state government to constitute an expert committee for the identification of forest and forest like areas. In terms of the said directions, an expert committee had been formed in the state of Meghalaya with the principal chief conservator of forests as its chairman. The chairman in its report had stated that the mining lease granted by the government did not fall in a forest area. At the same time the state government had also addressed a letter to the Khasi Hills Autonomous District Council to clarify whether the area which was the subject matter of the lease was a forest as per the records of the council. The council had in its response informed the state government that the mining lease granted by the government did not fall in a forest area. As the state

15 (1997) 2 SCC 267.

had not considered the area where the mine was located as a forest area, it did not submit a proposal to the central government seeking its approval under section 2 of the 1980 Act. Accordingly, the court held that there was no reason to interfere with the decision of the MoEF granting environmental clearance retrospectively.

The court also gave guidelines to be followed by the central government, state government and the various authorities under Forest (Conservation) Act, 1980 and the Environment (Protection) Act, 1986 to be implemented in all future cases, 'so as to ensure that *fait accompli* situations do not occur'. It also directed the central government to appoint a national regulator for appraising projects, enforcing environmental conditions for approvals and to impose penalties on polluters under section 3(3) of the Environment (Protection) Act, 1986.

Lafarge Mining no doubt was a *fait accompli* situation where the court rightly or otherwise felt that it had no choice but to allow the continuation of mining operations considering the heavy financial stakes involved. The court couldn't have been averse to the obvious implications of its decision permitting large scale mining over an extended period of time in an ecologically fragile area on the ecology of the region and the people inhabiting therein. The mining by a multinational was purely a commercial venture and did not involve any public interest, developmental issues or, livelihood issues. The reasons cited by the court in upholding the retrospective environmental clearance granted by the Ministry of Environment to Lafarge do not measure up to the court's own concern for protection and preservation of environment expressed towards the concluding part of its judgment. Otherwise the *fait accompli* remarks and the direction to the government to appoint a national regulator would be totally out of context.

Two months later, during one of the interim orders passed in *Khimjibhai Lakhabai Baraiya* v. *Union of India*[16] the Supreme Court expressed its dissatisfaction that the directions passed by it in *Lafarge Umiam Mining Private Limited*[17] had not yet been implemented. As if, making up for a lost opportunity, the court observed:[18]

> Before concluding, we seek to invite the attention of the MoEF to our judgment in the case of *Lafarge Umiam Mining Pvt. Ltd.*[19] In the said judgment, we have directed MoEF specifically to frame questions in appropriate cases wherever MoEF so deems fit and refer those questions to the Experts (Institutions) from its panel. In the past, MoEF has been obtaining such reports from Institutions (Experts nominated by the Project Proponents). Even questions were framed by the Project Proponents who managed to get answers accordingly. This approach has been criticised in our judgment in the case of *Lafarge Umiam Mining Private Limited.*

The court appeared to be in no mood this time to relent and while reprimanding the concerned authority, asked for an explanation as to why the court's order in *Lafarge* is not being followed.

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16 Decision dated 09/09/2011 in Special Leave to Appeal (Civil) No(s).14698/2010.
17 *Supra* note 12.
18 *Supra* note 16.
19 *Supra* note 12.

Suspension of mining operations in Bellari district

The Supreme Court in *Govt. of A.P.* v. *Obulapuram Mining Co. (P) Ltd.*[20] directed that 'the mining operations and transportation in an area admeasuring approximately 10,868 hectares in Bellary district be immediately suspended till further orders'. Expressing its concern, the court observed that 'on account of over exploitation, considerable damage has been done to the environment' and hence 'taking a holistic view of the matter' and 'keeping in mind the precautionary principle, which is the essence of article 21 of the Constitution,' 'we have suspended these operations'. The court also directed the Ministry of Environment and Forest to submit an interim report indicating, what is the requirement of steel industry in India as far as iron ore is concerned and, out of the total requirement of the steel industry in the country, how much is met by the Bellary mines. The court also wanted to know how much of the quantity of iron ore is domestically required and internationally exported.

These directions were given only by way of an interim measure. The final adjudication of the mining area is still pending before the Supreme Court.

Encroachers into forests areas

The Supreme Court had in *MC Mehta* v. *Union of India*[21] by its order dated 25th January, 1996 and 13th March 1996 directed that uncultivated surplus lands of gaon sabha falling in 'ridge' be excluded from vesting in the gaon sabha under section 154 of the Delhi Land Reforms Act, 1954 and be made available for the purpose of creation of reserved forests. The government of NCT in pursuance of the directions issued a notification dated 2nd April 1996 declaring the uncultivated lands of gaon sabha specified in the notification and situated in the southern ridge as surplus land and excluded the same from vesting in the gaon sabha. The lands were accordingly placed at the disposal of the forest department of the government.

Some persons who had encroached on the lands belonging to the gaon sabha and had built unauthorized constructions on the lands, challenged the notification before the Delhi High Court in *Freedom Fighters Social Welfare Association* v. *Union of India*[22] contending that both the Supreme Court order and the notification issued by the government in pursuance thereof were prospective. In effect, it was contended that if the illegal construction had been done before the order and the notification, the land stopped being a vacant land and the notification would have no application on the land.

Rejecting the contention, the court made reference to the orders of the Supreme Court in pursuance of which the notification had been issued. The Supreme Court, it noted, was there concerned with preservation of the green area, to provide a lung to the ever increasing population of the city of Delhi.

Accordingly the court held that 'when the purport of the order was preservation of environment necessary for the very survival of the city, it is irrelevant whether the encroachment …of the land … was before the said notification or thereafter'.

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20 (2011) 12 SCC 491.

21 Writ Petition (Civil) No. 4677 of 1985.

22 MANU/DE/0863/2011 (Decision dated 15.03.2011 by High Court of Delhi).

The court was of the view that even if the petitioner had encroached upon the land prior to 1996, they could not be permitted to continue with the encroachment. Being trespassers, they had no rights or equities in their favour.

Similarly, certain persons had been evicted from their lands by an order passed under the Indian Forest Act, 1927. The lands were admittedly within the Dudwa Reserve Forest. The persons had been allotted shops in the Mandi in the year 1928 on a lease. Ever since, they had been paying rent for the shops to the government and their shops also had a proper electricity connection. The persons affected challenged the eviction order before the Luckhnow bench of the Allahabad High Court in *Ishwar Chandra Gupta* v. *State of Uttar Pradesh*[23]claiming protection under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 which they contended had overriding effect over the Indian Forest Act, 1927. The said Act, it was contended recognized the rights and occupation in forest lands of forest dwelling scheduled tribes. The Act contained its own forest procedure and the petitioners were entitled to be governed by the procedure under that Act.

The court, however, rejected the contention. It noted that the 2006 Act provided protection to either a 'forest dwelling scheduled tribe' or to an 'other traditional forest dweller'. The Act defined a 'forest dwelling scheduled tribe' as the members or community of the scheduled tribes who primarily reside in and who depend on the forests or forests lands for *bona fide* livelihood needs and included scheduled tribes pastoralist communities. Similarly 'other traditional dwellers' had been defined as any member or community who has for at least three generations prior to 13th December, 2005 primarily resided and who depended on the forest lands for *bona fide* livelihood needs. In the courts opinion, the petitioner had failed to prove that he fell within either of the categories of persons who were entitled to protection. The petitioner, the court noted, were admittedly running a shop. It, therefore, could not have been their case that they were dependent on the forests for their livelihood needs.

The court accordingly held that the 2006 Act did not apply to them and upheld the eviction order passed under the Indian Forest Act, 1927.

III COASTAL AREAS

The eco-tourism theme park

In *Pappinisseri Eco Tourism Society* v. *State of Kerala*[24] the petitioner society had established and started operating a Mangrove theme park on the banks of Valapattam river. It was alleged that the theme park was situated in coastal regulation zone I (CRZ I) classified under the Coastal Regulation Zone Notification, 1991. As for establishment of the project Mangrove forests had been extensively destroyed, a public interest litigation was filed in the Kerala High Court for closing down the theme park. During the pendency of the litigation, a representation was received by the MoEF indicating alleged violations in CRZ in establishing the theme park.

23 AIR 2011 All 88.

24 ILR 2011 (1) Ker 747.

Pursuant to the representation, MoEF obtained a report from an expert. Based on the report of the expert and other relevant materials MoEF directed the society to stop all activities relating to the theme park as the theme park was being operated in violation of the CRZ Notification, 1991. The order was challenged before the high court and the high court stayed the operation of the order subject to the condition that no new construction shall be made, no commercial activities shall be carried out and no alienation of the project shall be made by the society.

Both the public interest litigation as well as the writ petition challenging the order of MoEF came to be heard together. The society contented *inter alia* that once the central government had delegated its power under section 5 of the Act in favour of the state government, it was no longer open for the MoEF to issue an order directing the society to close down the theme park. Such an order it was contended could only be issued by the state government. It was further contended that, in any event, the theme park was not situated in a CRZ I and that the area map prepared by the Kerala State Coastal Zone Management Authority (KSCZMA) was arbitrary. It did not specify the area regarding which it was prepared, and there were no measurements, resurvey or other particulars of the land given in the map to identify the site where the theme park was situated.

The government, on the other hand, contended that the Kerala State Coastal Zone Management Authority was the custodian of the coastal zone management plan of Kerala. It was further stated that the site where the theme park was situated, fell within the CRZ I and therefore attracted the provisions of the Coastal Regulation Zone Notification, 1991.

As to the preliminary question of whether the central government could issue the impugned order, the court made a detailed analysis of the provisions of the Act. Section 5 it noted conferred the power on the central government to issue directions including closure, prohibition or regulation of any industry, operation or process or stoppage or regulation of supply of the electricity or water or any other service. Section 23 of the Act, however, empowered the central government to delegate its powers, to any state government. In exercise of that power, the MoEF had on 10.02.1988 issued a notification delegating the powers of the central government under section 5 of the Act to the state governments mentioned therein including the State of Kerala, subject, however, to the condition that the central government may revoke such delegation of powers or may itself invoke the provisions of section 5 of the Act, if its opinion such a course of action is necessary in public interest.

In view of this, the Kerala High Court had no hesitation in holding that even after the delegation of powers in favour of the state government the central government did not stand denuded of its authority to initiate action under section 5. Instead by delegation, the power was conferred on the delegate as well. In fact, the court noted that the notification itself made it clear that the central government retained the authority to initiate action if in its opinion such action was necessary in public interest.

The main question for determination before the court was whether the site where the theme park was situated fell within a CRZ I and whether the map prepared for the purpose could be relied on. The court noted that the MoEF had issued CRZ notification after considering the need for protection of coastal areas and to ensure

that use and activities in the coastal area were consistent with the principles and requirements of environment conservation. CRZ's were classified into four categories. Ecologically sensitive areas were categorized as CRZ I. Mangroves area where the theme park was located had been classified as an ecologically sensitive area. In terms of the notification all construction activities in a CRZ I zone were prohibited. The theme park, if it was located in a CRZ I area, could not have been constructed.

As to the nature of activity being carried on by the society at the site the court noted that 'the society has taken up a systematic activity whether it is for amusement or study in the property in question by providing various facilities, such as, boardwalk inside the park, sheds, huts, boat landing, raised platforms, conversion of tidal flats into pools by excavation and other facilities'. These activities in the court view came within the expression 'industry, process or operation,' i.e., activities which the central government had power to regulate under the relevant statutory rules.

As to the challenge, to the map prepared by the Kerala State Coastal Zone Management Authority, the court noted that the 'central government had in terms of the provisions of the Act directed the state government and union territories to prepare coastal zone management plan with high tidal regulation, 500 meters regulation line, other boundaries and different categories of coastal area for approval of MoEF. Accordingly, the Kerala State Authority had prepared the coastal zone management plan for Kerala and got it approved by the central government.

That plan had been prepared by the project group after interaction with various authorities. According to the map, the banks in the upstream of Valapattanam river which even in the year, 1995 had mangroves were brought within the forest category of coastal Regulation Zone (CRZ I), mangrove areas being ecologically sensitive. In support the court also relied on the report of the expert which had been submitted to the MoEF and which had come to a similar finding.

Moreover, the court categorically rejected the reliance placed by the society on google earth images from December, 2003 to show that there were no mangrove forests in the property of the petitioner as far back as 2003, noting 'google earth gives only a satellite imagery and need not always having regard to the existence of clouds etc. give a clear picture of the area'. In the courts opinion, there was no reliable evidence to show that mangroves had been planted on the site only in the year 2004. There was, therefore, no reason to discard the map which had been prepared by the authority.

Accordingly, as the activities undertaken by the society were found by the court to be in violation of the CRZ notification, 1991 the court upheld the order of the MoEF ordering the society to stop all activities carried on by it at the theme park.

IV INDUSTRIAL WASTE

The chemical spill in Rajasthan

'A very unusual and extraordinary litigation' is how the Supreme Court described the case before it in *Indian Council for Enviro-Legal Action* v. *Union of India.*[25] What evoked this response from the court was the fact that even after the

25 (2011) 8 SCC 161.

pronouncement of the judgment in the original petition more than 15 years ago in February 1996, the matter had been kept alive by the defaulting party on one pretext or the other. In the courts own words: [26]

> …the said judgment of this Court has not been permitted to acquire finality till date. This is a classic example of how by abuse of the process of law even the final judgment of the Apex Court can be circumvented for more than a decade-and-a-half. This is indeed a very serious matter concerning the sanctity and credibility of the judicial system in general and of the Apex Court in particular.

The case concerned the environmental degradation of the Bichhri village in Udaipur District of Rajasthan by certain chemical industries operating in the area. The chemicals produced by these industries gave rise to enormous quantities of highly toxic effluents. Unfortunately, this untreated waste was allowed to flow freely and contaminate the environment. As a result, both the soil and the water in the area had become contaminated. As the authorities paid no heed to the degrading situation, the villagers rose in revolt leading to the imposition of section 144 CrPC. Even though the chemical industries had been closed down, but the environmental waste left behind by them remained lying untreated in the village. An environmental organization brought this situation to the notice of the court and requested for an appropriate remedial action.

After detailed arguments and counter arguments in which environmental experts had also assisted, the court directed the closing down of the chemical industries operating in the village and directed them to pay a sum of Rs. 37.385 crore as remediation to the government. The court had further directed that the units not be permitted to run until they deposit the remediation cost for restoring the environment in the area.

Both the review petition and the curative petition against the judgment were dismissed. These orders were, however, never implemented. The concerned industrial units kept filing one interlocutory application after the other with the intention of reopening the case. Through these applications the chemical industries sought direction from the court that at present no pollution existed in the area which may require remediation at the behest of the industries. To support the stand they sought to introduce new reports by experts who had visited the area almost 10 years after the original judgment. They in effect sought to discredit the original reports showing the extent of environmental damage in the area on the basis of which the court had passed the judgment.

The court, however, did not permit them to re-agitate the issue again before it. In its view the matter had been concluded by the original judgment of February 1996 itself. The interlocutory applications filed after both the review and the curative petition had been dismissed were nothing but a device to delay the enforcement of the judgment. In the facts and circumstances of the case, the court directed that: [27]

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26 *Id*. at 177.

27 *Id*. at 247 (emphasis added).

> …the applicant industry concerned must deposit the amount as directed by this Court vide order dated 4-11-1997 with compound interest. The applicant industry has deliberately not complied with the orders of this Court since 4-11-1997. Thousands of villagers have been adversely affected because no effective remedial steps have been taken so far. The applicant industry has succeeded in their design in not complying with the Court's order by keeping the litigation alive. Both these interlocutory applications being totally devoid of any merit are accordingly dismissed with costs. Consequently, the applicant industry is directed to pay Rs 37.385 crores *along with compound interest @ 12% per annum from 4-11-1997 till the amount is paid or recovered*. The applicant industry is also directed to pay costs of litigation. Even after final judgment of this Court, the litigation has been kept alive for almost 15 years. The respondents have been compelled to defend this litigation for all these years. Enormous Court's time has been wasted for all these years. On consideration of the totality of the facts and circumstances of this case, *we direct the applicant industry to pay costs of Rs 10 lakhs in both the interlocutory applications*. The amount of costs would also be utilised for carrying out remedial measures in Village Bichhri and surrounding areas in Udaipur District of Rajasthan on the direction of the authorities concerned.

V BAN OR NOT TO BAN

Seeking ban on asbestos

In *Kalyaneshwari* v. *Union of India*[28] a petition under article 32 of the Constitution was filed by an NGO praying that a writ of *mandamus* be issued directing the Union as well as the states to immediately ban all uses of asbestos in any manner. It was prayed that a committee of experts be constituted to frame a scheme for identification of workers suffering from asbestos related diseases. It was pointed out that whereas the international trend was moving towards completely banning asbestos but in India asbestos was continued to be used indiscriminately. The petitioner claimed to have itself identified over 500 victims from five states who were suffering from asbestos related diseases.

The Asbestos Cement Products Manufacturing Association who opposed the petition contended that the public interest litigation was an abuse of the process of law. It was stated that the petitioner had approached the court with ulterior motives.

The court felt that the petitioner did not provide any data or factual details with regard to the unauthorized activities of manufacture of asbestos carried on in any of the states. This was crucial as the states, had in the affidavits filed in reply to the petition taken the stand that wherever such activities were being carried out, they were in compliance with the rules and regulations. The petitioner, the court stated, had not put in any serious effort in rebutting the averments made by the states in their affidavits. The Supreme Court had earlier in *Consumer Education & Research Centre* v. *Union of India*[29] issued comprehensive directions governing the case of

28 (2011) 3 SCC 287.
29 (1995) 3 SCC 42.

asbestos in the country. The states had maintained that those directions were being strictly complied.

The tone and tenor of the court's observations give an impression that it was in no mood to conduct a fishing enquiry to look for the culprit. It noted that though the petitioner had prayed for complete ban on all mining and manufacturing activities but had hardly made any study or prepared statistical data in that regard. It only made reference to certain studies in foreign countries. The petitioner, claiming to be an organisation involved in the good of the common man, ought to have taken greater pains to state essential facts supported by documents in relation to Indian environment.

The court felt, that 'it was not within its domain to ban a particular activity'. Doing so was 'a policy decision exclusively within the domain of the legislature'. More so, when a bill namely the White Asbestos (Ban on Use and Import) Bill, 2009 had already been introduced in the upper house of the parliament, and was pending there.

The court also felt that the petition might have been motivated by personal interest rather than genuine public interest. It felt that 'the courts, while exercising jurisdiction and deciding a public interest litigation, have to take great care'. Such an exercise was necessary to ensure that the litigation was genuine and not motivated by extraneous considerations. The lack of *bona fides* on the part of the petitioner, are evident from the following observations of the court: [30]

> Presumably, and as contended, the direct impact of banning of activities of mining/manufacturing relating to asbestos *shall result in increase in demand of cast iron/ductile iron production as they are some of the suitable substitutes for asbestos*. It is not in dispute that ESCL is one of the largest manufacturer of iron and allied products in India and there was a professional and/or other connections between ESCL and B.K. Sharma on the one hand and B.K. Sharma and Shanti Swarup on the other who, admittedly at present, is involved with the activities of NGO for a considerable time. *Thus, it would be a reasonable conclusion to draw that the writ petition has been hardly filed in public interest but is a private interest litigation to give rise to business opportunities in a particular field*.

Even though the court did not grant the relief to the petitioner it was of the view that there was a need to reiterate the directions which had been issued more that 15 years ago in *Consumer Education and Research*.[31] This, it noted was imperative in order to strike a balance between the health hazards caused by the activity on one hand, and the ground realities that a large number of families were dependant for livelihood on this activity on the other. It however, cautioned that the directions should be read in comity with the proposed legislation and not in derogation to it: [32]

30 *Supra* note 28 at 304 (emphasis added).

31 *Consumer Education and Research Centre* v. *Union of India* (1995) 3 SCC 42.

32 *Supra* note 28 at 298.

(a) The Ministry of Labour in the Union of India and the Department of Industries and Labour in all the State Governments shall ensure that the directions contained in the judgment of this Court in Consumer Education and Research Centre[33] are strictly adhered to;
(b) In terms of the above judgment of this Court as well as reasons stated in this judgment, we hereby direct the Union of India and the States to review safeguards in relation to primary as well as secondary exposure to asbestos keeping in mind the information supplied by the respective States in furtherance of the earlier judgment as well as the fresh resolution passed by the ILO. Upon such review, further directions, consistent with law, shall be issued within a period of six months from the date of passing of this order;
(c) Further, we direct that if the Union of India considers it proper and in public interest, after consulting the States where there are large number of asbestos industries in existence, it should constitute a regulatory body to exercise proper control and supervision over manufacturing of asbestos activities while ensuring due regard to the aspect of health care of the workmen involved in such activity. It may even constitute a committee of such experts as it may deem appropriate to effectively prevent and control its hazardous effects on the health of the workmen;
(d) The authorities concerned under the provisions of the Environment (Protection) Act, 1986 should ensure that all the appropriate and protective steps to meet the specified standards are taken by the industry before or at the time of issuance of environmental clearance.

Ban on endosulfan

Quite contrary to the petition seeking ban on manufacture and use of asbestos,[34] the Supreme Court just about four months later in an ad-interim order issued on 13.05.2011 imposed an immediate ban on the production, use and sale of endosulfan all over India in *Democratic Youth Federation of India* v. *Union of India*.[35] This was a writ petition filed in public interest highlighting the harmful effects caused by the continued use of endosulfan on human beings and on the environment. Referring to the report published by the Government of Kerala and the 'disturbing photographs' appearing therein, the court observed that *Right to life, guaranteed under Article 21 of the Constitution of India, is the most fundamental of all human rights, and any decision affecting human life, or which may put an individual's life at risk, must call for the most anxious scrutiny*'.[36] A joint committee headed by the Director General of ICMR and the Commissioner (Agriculture) was set up by the court to conduct a scientific study on the question whether the use of endosulfan would cause any serious health hazard to human beings and would cause environmental pollution. The court further directed the statutory authorities to seize

33 *Supra* note 31.
34 *Supra* note 28.
35 2011 (11) SCALE 398.
36 (emphasis added).

the permit given to the manufacturers of endosulfan till further orders. However, in the case of of banning asbestos, the court saw no reason why, in the exercise of its extraordinary jurisdiction under article 32 of the Constitution, should ban 'such activity' when 'admittedly large number of families are dependent upon such processes'.[37]

The ill effects of asbestos or for that matter those of endosulfan on humans and environment would be the same no matter what the location. In the case of asbestos, the court refused to entertain the plea to ban it, on the ground that it was not within its domain to ban a particular activity, and that a large number of families were dependent for livelihood on the activity, that the petitioner had not done his home work well before coming to the court, had not cited any particular studies conducted in India supporting his contentions, had his own private vested interest in seeking the ban and that all states did not have industrial units manufacturing asbestos. The court readily accepted the affidavits filed by the state governments asserting that the rules and the guidelines were in fact being followed to ensure safety standards without any need for an independent corroboration. And yet the court felt the need to reiterate its earlier directions passed in *Consumer Education & Research Centre.*[38] The question that one might like to ask here is 'why did the court adopt two diametrically opposite stances'. In case of asbestos, despite acknowledging its harmful effects, it felt that banning the activity was not within its domain, and yet it had no difficulty in imposing a blanket ban on endosulfan through an ad-interim order. In fact, one might argue that almost all those reasons cited by the court in the case concerning the baning of asbestos, with the sole exception of one that concerned the *bona fides* of the petitioner, would be relevant in case of endosulfan as well. If one were to go by the court's logic and its observation in case concerning banning of endosulfan that 'any decision affecting human life, or which may put an individual's life at risk, must call for the most anxious scrutiny' the plea for ban on asbestos could not be put on a different pedestal, no matter how the court views the credentials of the petitioner. The court did acknowledge the harmful effects of asbestos on humans and environment and yet felt that it did not 'call for the most anxious scrutiny'.

VI REHABILITATION AND RESETTLEMENT

The dam in Madhya Pradesh

The appeal in *State of M.P.* v. *Medha Patkar*[39] came against the decision of the High Court of Madhya Pradesh which had restrained the state of Madhya Pradesh from proceeding with the Indira Sagar Pariyojna and Omkareshwar project till their command area development plans had been cleared by the MoEF. The high court had further directed the state government to provide rehabilitation and resettlement benefits under the Rehabilitation and Resettlement Policy of 1989 for Narmada Valley project to the canal affected families of the Indira Sagar Pariyojna and Omkareshwar project also.

37 *Supra* note 28 at 297.
38 *Supra* note 31.
39 (2011) 8 SCC 55.

To properly understand the impact of these directions of the high court, it is essential to understand the factual background from which the case arose. The environmental clearance for the Indira Sagar Pariyojna had been granted by the MoEF in 1987. The Planning Commission had also approved the investments to be made in the project. Land acquisition proceedings for the canal construction of the Indira Sagar project started in 1991. The actual construction started in 1999 and the construction of the dams stood completed by 2005.

The environmental clearance for the Omkareshwar project was granted by the MoEF in 1993 and the approval by the Planning Commission for the project was given in 2001. The Omkareshwar dam stood completed by 2007. However, the land acquisition proceedings for setting up the canal of the project were initiated in 2009. These were still going on.

The Indira Sagar Pariyojna and Omkareshwar projects should not be confused with the Sardar Sarover Project. Whereas the Sardar Sarover is an inter-state project, which involves more than one state, the Indira Sagar Pariyojna and Omkareshwar project are confined only within the State of Madhya Pradesh.

The construction of both the Indira Sagar Pariyojna and Omkareshwar project had been challenged before the high court, which had restrained the state government from proceeding with the project till the command area development plan had been approved by the MoEF.

It had been contended by the state government before the Supreme Court that the approval of the command area development plan was an ongoing process, and though the projects would be constructed in accordance with the approval given by the MoEF, the project should not be stopped in its entirety in the meanwhile.

The Supreme Court seemed to agree with these submissions and directed that the project be allowed to continue, subject, however, to the ultimate approval of the MoEF to the command area development plans submitted for the project.

The only question that remained to be answered by the court was whether canal affected persons could be treated at the same level with oustees of the submerged area. In the courts view these two categories of persons could not be treated alike. This distinction in the courts view had categorically been recognized in *Narmada Bachao Andolan* v. *Union of India*, wherein it had been held that:[40]

> *… while people, who were oustees from the submergence zone, required resettlement and rehabilitation, on the other hand, most of the people falling under the command area were in fact beneficiaries of the projects and their remaining land would now get relocated with the construction of the canal leading to greater agricultural output*. We agree with this view and that is why, in the award of the Tribunal, the State of Gujarat was not required to give to the canal-affected people the same relief which was required to be given to the oustees of the submergence area.

The court had therein held that whereas those ousted from the submerged area required rehabilitation and resettlement, those who had been affected by the

40 (2000) 10 SCC 664 at 741 (emphasis added).

construction of the canal were in fact beneficiaries of the project as the remaining portion of their lands would yield a greater output.

Pursuant to this decision the state of Madhya Pradesh had amended its rehabilitation policy and removed canal affected persons from the benefit of the rehabilitation and resettlement package. In view of this the Supreme Court had no hesitation in holding that canal-affected persons were not on par with submergence-affected persons.

However, the court by one of its interim orders made a sub category of hardship cases, i.e., those whose more than 60% of land was being acquired for the construction of the canal. Those falling within this category were held entitled to alternate land in the vicinity of the canal. However, those not covered by this category, i.e., those whose less than 60% of the land was being acquired were held entitled only to the compensation in terms of the Land Acquisition Act, 1894. Considering the facts and circumstances of the case, the state itself came out with a suggestion that the market value of lands acquired be calculated not from the date of the initial section 4 notification but from the date of pronouncement of the court's judgment. Accepting this suggestion the court said: [41]

> …the State has come forward with the most appropriate and valuable suggestion, thus, we accept the same. In view of the above, the Land Acquisition Collector is directed to reconsider the market value of (*sic* the acquired land of) canal-affected persons as if Section 4 notification in respect of the same has been issued on date i.e. 2-8-2011 and make the supplementary awards in accordance with the provisions of the 1894 Act. Such concession extended by the State would be over and above the relief granted by this Court vide order dated 5-5-2010 as clarified/modified subsequently, as explained hereinabove and it is further clarified that further canal work would be subject to clearance/direction which may be given by MoE.

VII ENVIRONMENTAL ADJUDICATION

The green tribunal

The appeal in *Union of India* v. *Vimal Bhai*[42] arose from a decision of the division bench of the Delhi High Court directing the central government to offer the salary, allowances and other conditions of service to the Chairperson of National Environment Appellate Authority at par with sitting judge of the Supreme Court and make necessary amendment in the National Environmental Appellate Authority Rules.

During the pendency of the matter before the Supreme Court, the National Green Tribunal Act, 2010 was brought into force. Panta J., former judge of the Supreme Court was appointed as the first Chairperson of the National Green

41 *Supra* note 39 at 64.

42 SLP (Civil) No. 12065 of 2009 (Orders available at <http://courtnic.nic.in/supremecourt/casestatus_new/caseno_new_alt.asp> last accessed on 22 April, 2012.

Tribunal. Soon thereafter, the central government, in exercise of the powers under section 35(2)(e), (f) and (g) of the 2010 Act framed the National Green Tribunal (Manner of appointment of Judicial and Expert Members, Salaries, Allowances and other Terms and Conditions of Service of Chairperson and other Members and Procedure for Inquiry) Rules, 2010. However, as there had been considerable delay on the part of the central government to make the tribunal functional, the court passed comprehensive directions to iron out the creases in the functioning of the new adjudicatory body. The court *inter alia* directed that:

> … the period between 18.10.2010 i.e. the date on which National Environment Appellate Authority stood abolished by operation of Section 38(5) of the 2010 Act and the date on which Bench of the National Green Tribunal becomes functional *shall be excluded while computing the period of limitation* for filing applications/appeals etc.; till the rules are framed by the Central Government for regulating the procedure for filing of applications/appeals, *the rules which were applicable for filing such applications/appeals before the National Environmental Appellate Authority shall be treated as operative* and applicable and the aggrieved persons shall be entitled to file applications and appeals in the format prescribed under those rules and the Bench of the Tribunal shall entertain and decide such applications/appeals.

Despite these directions, the tribunal could not become functional as a petition had been filed before the Madras High Court challenging the 2010 Rules. The high court had stayed the operation of the rules pending disposal of the matter. Considering that it was already seized of the matter, the Supreme Court on an application of the central government, transferred the proceedings pending before the Madras High Court before it, and stayed the operation of the judgement of the Madras High Court.

On 06.05.2011, the court took cognizance of the three notifications dated 05.05.2011. By one the central government specified Delhi as the ordinary place of sitting of the National Green Tribunal, having jurisdiction all over India. By the other two notifications the central government appointed four expert members and three judicial members to the tribunal. Despite this the tribunal and its benches could not become functional because of lack of adequate infrastructure facilities. Therefore, with a view to ensure that the tribunal and its benches may be able to function effectively without further delay the court by its order dated 12th May, 2011 issued the following directions:

> …the Chief Secretaries of Madhya Pradesh and Maharashtra are directed to instruct the concerned officers to make available appropriate and adequate accommodation at Bhopal and Pune respectively for making Benches of the Tribunal functional. They shall also ensure that appropriate and adequate housing accommodation are made available for the Judicial and Expert Members of the Tribunal as per their status and entitlement. The needful be done within a period of two months from the date of receipt of this order.

the Chief Justices of the High Courts of Madhya Pradesh and Bombay are requested to depute one officer of the rank of Additional District Judge, who may function as Registrar of the benches of the National Green Tribunal at Bhopal and Pune respectively for a period of six months;

the chief secretaries of West Bengal and Tamil Nadu shall issue necessary instructions for making available appropriate and adequate infrastructure for establishment of the Benches of the National Green Tribunal at Kolkata and Chennai. They shall also issue Instructions for making available housing accommodation for the judicial and Expert Members of the Tribunal for operationalising the Benches of the National Green Tribunal at Kolkata and Chennai respectively. The needful should be done within a period of two months from the date of receipt of this order.

Those, who could not file petitions before the National Green Tribunal because it did not become functional, may do so within a period of 60 days from 30.5.2011. The National Green Tribunal shall give wide publicity to this direction so that aggrieved parties can file appropriate petitions etc. within 60 days from 30.5.2011. The petitions which are filed within the aforesaid period shall not be treated as barred by time and be decided on merits. The parties shall also be entitled to file applications for interim relief before the National Green Tribunal; and, till the Benches of the National Green Tribunal become functional at Bhopal, Pune, Kolkata and Chennai, the aggrieved persons may file petitions before the National Green Tribunal at Delhi. Once the benches of the tribunal become functional, the Chairperson of the National Green Tribunal may transfer the cases to the concerned benches.

VIII CONCLUSION

Environmental litigation is complex and fraught with conflicting demands, pulls and pressures, notions of right and justice and competing ideologies. Environmental laws and regulations deeply impinge upon the way people live, think and behave; the laws seek change in people's life styles, habits, perceptions and outlooks prejudicial to the environment. Fast changing technologies and their impact on life styles and work habits create impregnable zones where law and its instrumentalities are bound to hit the wall, particularly where the laws are weak and its instrumentalities lack conviction. In India, we have seen remarkable growth in environmental jurisprudence with the initiative and perseverance of the apex court alleviating the right to clean environment to the high pedestal of fundamental right as integral to right to life under article 21 of the Constitution. A strong environmental movement is in place with the Right to Information Act, 2005 facilitating access to information so vital to the success of the movement. Environmental laws have also proliferated with elaborate institutional mechanisms empowered to enforce environmental standards. And yet, the state of environment in the country is one of total chaos.

Dirt, filth and stink mock at our municipalities and municipal laws from small towns to cities to the metropolis. The soil and the waters are being polluted by

unregulated industrial and urban waste. Growing vehicular traffic and poor emission norms seriously affect the quality of air that we breathe. The land and mining mafias are playing havoc with ecology and environment, destroying the forests and endangering the flora and the fauna. To illustrate the gravity of the situation it would be pertinent to point to the recent observations of the apex court. Commenting on the excessive use of plastic bags and their unregulated disposal which has been choking lakes, ponds and sewage systems across the country, the Supreme Court warned that 'it posed a threat more serious than the atom bomb for the next generation'.[43] These observations came from a bench of G S Singhvi and S J Mukhopadhaya JJ in the course of hearing a PIL filed by two Andhra based NGOs drawing the court's attention to 30-60 kgs of plastic bags recovered from the stomachs of cows because of irresponsible disposal of plastic bags and a defunct municipal waste collection system. In other words, this warning although, issued in the particular context of danger emanating from the unregulated use of plastic bags, equally symbolises the state of desperation and is a pointer to the seriousness with which the problem concerning protection and preservation of environment in India needs to be approached.

While, the role of the higher appellate courts in India in this regard has been generally quite commendable, some of the environmental issues which confronted the Supreme Court during the year under survey evoked mixed feelings. In two important judgments delivered by the Supreme Court during this period, i.e., the *Noida Park*[44] and the *Lafarge Mining*[45] both concerning situations of *fait accompli* involving high financial stakes for the parties, the court, it appears, had almost resigned to these situations as ones of 'no return' where it seemed to have relied upon an approach that can only be described excessively legalistic in determining the meaning of the word 'forest land' even though the discomfort was writ large and clearly reflected in the concluding parts of both the judgments where an attempt was made to retrieve the lost ground by issuing directions to ensure the safety of environment. In particular, *Lafarge Mining,*[46] presents a problematic situation and establishes a disturbing precedence. It is problematic because it is difficult to locate the decision within the ambit of environmental jurisprudence which the court has been espousing for a long time in innumerable judgments which need not be recounted here wherein the most relevant consideration for the court in such cases remained the protection of the larger interest in the preservation and protection of environment rather than the protection of individual/private interest. The judgment also establishes a disturbing doctrine of *fait accompali* rather by default which can be cited in future giving precedence to the claims of profit seeking enterprises, be they national or multinationals, even at the risk of causing irreversible damage to the environment. While the Noida park admittedly posed considerable threat to the adjoining bird sanctuary, the effects of extensive mining by *Lafarge* on the ecology and the people inhabiting the area may leave them with no conceivable remedy in

43 Times of India, May 8, 2012.
44 *Supra* note 4.
45 *Supra* note 12.
46 *Ibid.*

future. The danger involved in such situations may be exemplified by another order passed by the court in a different context in which commenting upon the impunity with which a profit seeking enterprise can go on scuttling the entire judicial process by delaying and circumventing even the final judgment of the apex court for over a decade and a half, wherein the court said that, 'it is indeed a very serious matter concerning the sanctity and credibility of the judicial system in general and of the apex court in particular'.[47] On a positive note, however, the court eventually did put a stop to this kind of adventurism by disallowing the defaulting party to re-agitate the matter and directed the closing down of the chemical industries till they deposit the remediation cost for restoring the environment in the area.[48] Similarly, the Supreme Court's orders in *Bellary District Mining* case[49] directing suspension of mining operations and transportation in the area on account of considerable damage done to the environment and, one imposing immediate ban on the manufacture, sale and use of endosulfan[50] throughout the country till further orders, keeping in view the 'precautionary principle' despite a set back to the plea for a ban on the manufacture, sale and use of asbestos[51] are credible reassertions of the court's commitment to preserve and protect the environment.

In the ultimate analysis, given the delicate task that the higher appellate courts are required to perform in environmental litigation, barring a few aberrations, the Supreme Court and the high courts have continued to play pre-eminent role in the preservation and protection of environment, at the same time, ensuring that their sensitivity and concern for the environment did not unduly strain the developmental imperatives. Having said that, it is equally incumbent on the courts that they adopt a more holistic and pro-active approach, rather than viewing environmental problems in isolations within the strict confines of legalism.

47 *Supra* note 25 at 176.
48 *Ibid*.
49 *Supra* note 20.
50 *Supra* note 35.
51 *Supra* note 31.